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Cooperation of Europol and Eurojust with external partners in the fight against crime: what are the challenges ahead?

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Abstract:

The paper addresses the cooperation of Europol and Eurojust with external partners in the fight against crime. Like other EU Justice and Home Affairs agencies do within their respective mandates, Europol and Eurojust take part to the EU's efforts to promote and strengthen cooperation with third countries and international organisations in criminal matters, and the tools and expertise they developed make them interesting and valuable partners with whom to cooperate. Their external activities are essential in the current criminal landscape, marked by the globalisation of crime and the necessity to conduct cross-border investigations and prosecutions involving non-EU countries. The issue also gains a new interest with the perspective of Brexit, as the question arises whether the negotiations on the future EU-UK relationship will allow the United Kingdom to continue to cooperate closely with the two agencies. The paper discusses the legal framework currently organising the modalities of Europol and Eurojust's external cooperation, which is marked by the revision of their constitutive instruments in order to modernise them, and a move towards the harmonisation of the relevant provisions. The two agencies face two challenges that may limit their external activities: 1) the importance of diversity and variable geometry in their relations with both EU Member States and external partners, and 2) the need to ensure an appropriate balance between efficient cooperation and protection of fundamental rights. Concerning the latter, mechanisms of political and judicial accountability are particularly important to monitor the agencies' external activities and ensure the absence of fundamental rights' violations.

Keywords: Europol, Eurojust, Cooperation, Third countries, International Organisations, Brexit, United Kingdom.

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1. Introduction

Security and the fight against crime has always been a topical issue in European affairs, and mechanisms to develop cooperation between national authorities in this field date back to the late 1970s. Introduced on a purely intergovernmental basis in 1993 as part of the Third Pillar, police and judicial cooperation in criminal matters (PJCCM) has become one of the fastest growing domains of EU action. EU's activities in this field have also entailed an external dimension, through which the European Union (EU) sought to establish and deepen its cooperation with third countries and international organisations.

The EU's activities in criminal matters have been given a new impetus with the entry into force of the Lisbon Treaty. The latter consecrated as one of the objectives of the European Union (EU) ensuring "a high level of security through measures to prevent and combat crime (…)" (Art. 67 (1) TFEU). It also abolished the pillar structure, thus subjecting EU criminal law instruments to the Community method (albeit with few exceptions),[1] and granted the EU new competences to develop its activities in the field of law enforcement and criminal justice. The Lisbon Treaty also singled out the two EU agencies active in the field of PJCCM, Europol and Eurojust. These two agencies, which are working alongside the other EU specialised AFSJ agencies,[2] are the only EU AFSJ agencies whose mandates are defined in EU primary law (Articles 88 and 85 TFEU).

Europol and Eurojust thus deserve further attention, and will be the focus of the present paper. Given their role of supporting and strengthening cooperation between EU Member States in criminal matters, they constitute key actors for EU's internal security and combat against crime. They possess very complementary mandates and competences. Even though this may lead to overlaps and tensions between them, it also imply that their joint participation in a case often results in a strong added-value

[1] These exceptions include for instance the shared right of initiative shared between the European Commission and a quorum of Member States (the adoption of the Regulation establishing the European Public Prosecutor's Office via a special legislative procedure (Art. 86 (1) TFEU), or the emergency brake procedure allowing Member States to refer to the European Council draft directives that "would affect fundamental aspects of its criminal justice system" (Art. 82 (3) and 83 (3) TFEU).
[2] Within the Area of Freedom, Security and Justice, the EU institutions and the Member States have established the following specialised agencies: Frontex (border management), eu-LISA (management of large-scale IT systems), EASO (asylum), EIGE (gender equality), EMCDDA (drugs), CEPOL (police college), Europol (police cooperation), FRA (fundamental rights) and Eurojust (judicial cooperation in criminal matters). The work of these agencies is complemented by the work of specialised EU bodies: OLAF (anti-fraud office) and the European Public Prosecutor's Office (also protection of the EU's financial interests).

and increase the chances of a successful outcome.[3] The two agencies are also taking part in the EU's efforts to promote cooperation in criminal matters with external partners, like other agencies, such as Frontex, do in their respective fields of competences. Europol and Eurojust have developed within their respective mandates tools and expertise that are crucial for the success of cross-border investigations and prosecutions, and which make them interesting partners from the perspective of third countries and international organisations. Both agencies have concluded agreements with external partners, forming the basis for diverse forms of cooperation.

The research objective of this paper is to assess the legal framework organising the mandate and work of Europol and Eurojust, and more particularly the provisions regulating their external activities in order to determine whether their constitutive instruments are appropriate to meet the challenges ahead. These challenges can be political, as the agencies remain relatively new actors, still in the process of gaining the trust of national (EU and non-EU) authorities, and are not necessarily perceived as potential partners by third countries. Similarly, a third country may prefer not to cooperate with the agencies, and instead to conclude bilateral cooperation agreements with individual Member States – the latter remaining the only ones possessing operational capabilities in the sense of deployable personnel and technical means.[4] These challenges will not be addressed in this paper, which focuses on the legal challenges encountered by the agencies when they develop their external activities. Even though both Europol and Eurojust are guided by their desire to ensure the efficiency and effectiveness of their cooperation with their external partners, their desire is somewhat constrained by two legal challenges:

1) They need to accommodate the diversity existing among both EU member States and third countries, while preventing a situation in which differentiation and variable geometry compromise smooth cooperation;

2) As EU agencies, they are bound by the respect for the rule of the law, the protection of fundamental rights, and data protection rules, enshrined in EU primary law and applicable in the EU's external relations (Art. 20 TEU). They need to strike a delicate balance between the effectiveness of their operational cooperation with external partners and the protection of fundamental rights.

Assessing their legal framework to determine whether it is appropriate to meet the above mentioned challenges is firstly relevant considering the importance and emphasis placed by the EU institutions and Member States on strengthening and deepening cooperation in criminal matters with external partners, for instance in counter-terrorism or in combating smuggling of migrants.[5] Such assessment is also relevant considering the future withdrawal of the United Kingdom (UK) from the EU. The UK, which is a very active Member State in the fight against crime, will become a third country to the EU, and its future cooperation in criminal matters with the EU will most likely be influenced by the current modalities of cooperation between the EU and third countries in this field. This perspective of Brexit

[3] On this point see Anne Weyembergh, Ines Armada and Chloé Brière, Research paper for the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament on '*the interagency cooperation and future architecture of the EU crim inal justice and law enforcement area'*, November 2015. See also Anne Weyembergh, Ines Armada and Chloé Brière, "The cooperation between police and justice at EU level: the representative example of Joint Investigation Teams", in Chloé Brière and Anne Weyembergh, *The Needed Balances in EU Criminal Law, Past, Present and Future,* Bloomsbury, 2017, p. 355 – 382.

[4] Jorg Monar, *The external dimension of the EU's Area of Freedom, Security and Justice, Progress, potential and limitations after the Treaty of Lisbon*, Swedish Institute for European Policy Studies, 2012, p. 59.

[5] See for instance Council, *Conclusions on EU External Action on Counter-terrorism*, 19 June 2017, council doc. 10384/17.

raises many delicate questions for the EU and UK negotiators, and the future cooperation in criminal matters between British authorities and EU agencies counts among the issues to be resolved. A highly sensitive and political question is whether the UK will be considered as an ordinary third country, or whether by virtue of its former Member State status, it may obtain *sui generis* modalities of cooperation. There is thus a clear interest in analysing the current modalities of Europol's and Eurojust's cooperation with external partners, as similar arrangements may apply to their future cooperation with the UK.

The present paper will be structured as follows. After briefly retracing the competences and role of these two agencies (I), the legal framework under which EU agencies develop their external activities will be analysed, and here the focus will be placed on the provisions contained in their respective Regulations (II.). The two main challenges faced by Europol and Eurojust will then be examined in detail, notably to determine how the EU legislator decided to address them (III.). Finally, accountability mechanisms for the external activities of the two agencies will be reviewed, as these mechanisms will be essential checks and balances to monitor the implementation of the set of rules regulating the agencies' external cooperation (IV.).

2. Europol and Eurojust as key actors in the fight against crime

Europol and Eurojust both pre-exist the Lisbon treaty, yet with this new instrument, the two agencies are for the first time mentioned in Articles 85 and 88 TFEU, and their roles and mandates are enshrined in EU primary law. The two agencies can be described as sister agencies involved in the fight against serious cross-border crime affecting two or more EU Member States.[6]

Europol's mission is to "support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy" (Art. 88 (1) TFEU). Europol was set up to gather police and law enforcement information from national authorities and to provide strategic and/or operational analyses on the basis of this information. It has been compared to a '*mega-search engine'*.[7] It also coordinates law enforcement authorities' actions, and may support operational activities with its mobile office, analysis in real-time of information gathered on actions days, forensic tools, etc.[8]

Eurojust's mission is to "support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases" (Art. 85 (1) TFEU). Eurojust is a 'facilitator' of judicial cooperation, which intervenes to smoothen the effective functioning of judicial cooperation instruments (such as the European Arrest Warrant), to resolve legal issues arising in complex cases (such as *ne bis in idem* issues or conflicts of jurisdiction) and/or to stimulate the coordination of judicial authorities.[9] It has been compared to a '*control tower'*,[10] whose members will intervene when

[6] For more details on the respective tasks of the two agencies, see A. Weyembergh, I. Armada and C. Brière, *The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area*, Study realised for the LIBE Committee of the European Parliament, Nov. 2014, p. 11 – 14.
[7] French Sénat, *Europol et Eurojust : perspectives d'avenir, Rapport d'information No. 477*, 17 April 2014, p. 10.
[8] Europol, 2013 Europol Review, p. 14.
[9] Eurojust, 2013 Annual Report, p. 14.

they notice the need to investigate in a coordinated manner cross-border and/or complex cases. It is important to stress that none of these agencies possesses operational powers. Europol has no vocation of being a European FBI its members have never been enabled to perform investigative acts on the ground. Similarly, Eurojust has no vocation of becoming a European prosecutor, and cannot directly perform investigative or prosecution acts. Nevertheless, they play a key role in assisting national authorities, especially for the coordination of investigations and prosecutions of the multilateral dimension of criminal cases.

The evolution of the two agencies' legal frameworks follows parallel paths, as the Commission proposed back in 2013 two proposals for Regulations.[11] Whereas the Regulation for Europol has been adopted in May 2016 and entered into force on May 1st 2017,[12] the negotiations on the Regulation for Eurojust are not yet finalised. A general approach had been adopted by the Council in February 2015,[13] and the negotiations had been put on hold, pending progresses in the negotiations of the regulation establishing the European Public Prosecutor's Office. The analysis of the future legal framework of Eurojust will thus be based on the text of the General Approach. However, given the recent adoption of the Regulation establishing the European Public Prosecutor's Office,[14] the negotiations on the Eurojust regulation could reach their end soon.[15]

These new legal instruments pursue several objectives. They not only "lisbonise" the functioning of the agencies, i.e. adapt it to the post-Lisbon Treaty legal framework, but they also give them new tools and competences to further support cross-border cooperation in criminal matters. Such evolution is to be welcome especially considering the globalisation of crime, and the frequency and scale of cross-border criminal activities. Indeed, if the globalisation of our economies and societies has created economic growth and wellbeing, it has also given rise to massive opportunities for criminal enterprise[16] and leads to the globalisation of crime. Criminals, working either in groups or in networks,[17] operate across continents. Those involved in traditional cross-border criminal activities, such as trafficking in drugs or arms, may produce the illicit substances or weapons in one continent, traffic them across another and market them in a third.[18] Yet these patterns are also now present in "modern" criminal activities, such as cybercrime, a field in which criminals commit crime

[10] Sénat, *Europol et Eurojust Europol et Eurojust : perspectives d'avenir*, Rapport d'information No. 477, 17 April 2014, p. 39.

[11] Commission, Proposal for a regulation of the European Parliament and of the Council on the EU Agency for Law Enforcement Cooperation and Training (Europol), 27 March 2013, COM (2013) 173 final. Commission, Proposal for a regulation of the European Parliament and of the Council on the EU Agency for Criminal Justice Cooperation (Eurojust), 17 July 2013, COM (2013) 535 final.

[12] Regulation (EU) 2016/794 of the European Parliament and the Council of 11 May 2016on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L 135/53.

[13] Council, Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) – General Approach, 27 February 2015, Council doc. n° 6643/15.

[14] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1. Contrary to Eurojust, the EPPO constitutes a major change in judicial cooperation, as this body is competent to perform investigative acts in the territory of the participating Member States. For more details, see Weyembergh and Brière, *Towards an EPPO,* Study for the LIBE Committee of the European Parliament, 2016.

[15] The Bulgarian Presidency of the Council of the EU has issued a document presenting its priorities in the area of justice, and it announced that they will work hard to finalise the trilogue in the draft Eurojust Regulation" (Ms Tsacheva, Minister for Justice, Presentation of the priorities of the Bulgarian Presidency of the Council of the EU in the area of justice before the Committee on
Civil Liberties, Justice and Home Affairs of the European Parliament, Brussels, 11 January 2018).

[16] UNODC, *Transnational Organised Crime Threat Assessment*, 2010, p. 6.

[17] Recent research have shown that criminal are more and more functioning in networks, rather than in hierarchical / structured groups, nevertheless in the following pages and for clarity reasons, reference will be made only to organised criminal groups (OCGs).

[18]UNODC, *Transnational Organised Crime Threat Assessment*, 2010, p. 6.

anonymously over the Internet, anywhere and anytime, regardless of physical location.[19] In summary, "*serious and organised crime is fundamentally affected by the process of globalisation with none of the crime areas or criminal groups insulated from the changes involved. Criminals act undeterred by geographic boundaries and can no longer be easily associated with specific regions or centres of gravity*".[20]

Criminal activities are thus very often limited neither to a single member State nor to the territory of the EU. Terrorism, cyber-crime, migrant smuggling or trafficking in human beings are often mentioned among the most severe transnational criminal threats, especially since they lead to serious violations to their victims' fundamental rights. These changes in the criminal landscape constitute new challenges for national law enforcement and judicial authorities. They increasingly have to investigate and prosecute cases with cross-border elements and links with neighbouring countries and/or more geographically distant countries. An effective cooperation in criminal matters is thus essential to ensure effective prosecution and conviction of criminals (and thus to ensure the dissuasive effect of criminal law), and to protect the fundamental rights of victims of crime. This necessity in turn impacts the EU and the EU criminal justice agencies Europol and Eurojust.

Taking into account the above mentioned evolutions of the criminal landscape, the EU developed the external dimension of its Area of Freedom, Security and Justice, which mainly aims at serving the internal EU security policy by creating a secure external environment in order to combat illegal immigration, terrorism and organised crime.[21] This has led to the emergence of a whole set of instruments, provisions and mechanisms aimed at favouring cross-border cooperation in criminal matters between the European Union, the national authorities of its Member States and its external partners (third countries as well as international organisations).[22]

Europol and Eurojust, as EU agencies, participated in this development of the external dimension of the AFSJ. The agencies have benefited from the possibility to develop their cooperation with external partners, notably on the basis of EU secondary law. Their external activities take different forms: the signature of cooperation agreements, allowing or denying the exchange of personal data, the appointment of liaison officers or contact points, or the appointment of liaison magistrates. In practice, even though they remain service providers to the national authorities, and are not automatically involved in all cross-border operations, the two agencies regularly publish press releases detailing the support they offered in cases investigated and prosecuted in cooperation with non-EU Members States.[23] The two agencies are often perceived as the EU structures which come closest to an EU operational capability, which adds to their attractiveness as interlocutor for third countries.[24]

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[19] Europol, *Massive changes in criminal landscape*, 2015, p. 9.
[20] Europol, *Serious Organised Crime Threat Assessment*, 2013, p. 8.
[21] P. De Bruycker and A. Weyembergh, "The external dimension of the European Area of Freedom, Security and Freedom", in M. Telo, *The European Union and Global Governance,* (Routledge, 2009), p. 210.
[22] See for instance the conclusion of international agreements on mutual legal assistance or exchange of information, the insertion in regional frameworks of activities and provisions on cooperation in criminal matters (pre-accession policy or ENP, or development cooperation), etc.
[23] For Europol, see for instance Press Releases "Migrant smuggling ring dismantled by Finland, the United States and Iceland" 19 October 2017 or "195 individuals detained as a result of global crackdown on airline ticket fraud", 24 October 2017. For Eurojust, see for instance Press Releases "Operation in FIFA World Cup media rights-related investigations", 12 October 2017, or "Romania, UK, Belgium and Switzerland – coordinated takedown of a Romanian THB criminal network", 21 June 2017.
[24] Jörg Monar, The EU as an International Counter-terrorism Actor: Progress and Constraints, *Intelligence and National Security* (2015) 30:2-3, p. 346.

Europol and Eurojust have thus become key players in the development and deepening of cross-border cooperation in criminal matters, not only between national authorities operating in EU Member States, but also between these authorities and those operating in third countries. Their importance has been acknowledged by the EU institutions and the Member States, which have - during the negotiations of the two Regulations - substantially amended the provisions on the agencies' cooperation with third countries and international organisations. These amendments have not only placed the agencies under the general legal framework applicable to the EU's external relations, but they have also introduced new provisions, such as those allowing the exchange of information under derogation clauses. They testify the importance given to the security and the effectiveness of international cooperation in criminal matters in a context where crime prevention sometimes requires real-time transfer of information. These changes are all the more relevant considering that the UK, a key Member State in the field of security, will soon become a third country to the EU, and will rely on the legal framework governing Europol's and Eurojust's external cooperation to continue to cooperate with them.

3. Legal framework applicable to their cooperation with external partners

From a very early stage of their existence, Europol and Eurojust sought to cooperate with external partners operating in the field of criminal justice, such as Interpol. The possibility for Europol to cooperate with third countries was already formalised in its Convention, which had the form of a traditional international treaty, making it a fully-fledged international organisation with full legal personality.[25] Europol's capacity to enter into binding agreements was established in Article 42 of the Convention, which explicitly provided for Europol's right to "*establish and maintain relations with third States and third bodies*". The treaty included rules dealing with the receipt of data[26] and the transmission of data.[27]

The adoption of the Europol Council Decision[28] in 2009 turned Europol from an international organisation to an agency of the EU,[29] and slightly changed the legal framework of Europol's external relations. Its Article 23 reiterates the capacity of Europol to establish and maintain cooperative relations with third states and international organisations. Similarly for Eurojust, which has always been an agency of the EU, the Council Decision of 2002[30] provided for the possibility to establish contacts and exchange experiences (e.g. best practices) with other bodies, in particular international

[25] Dick Heimans, "The external relations of Europol – Political, legal and operational considerations", in Bernd Martenczuck and Servaas van Thiel (eds), Justice, Liberty and Security, New challenges for EU external relations, VUB Press, 2008, p. 369.
[26] Art. 10 para. 4 Europol Convention: Europol may request that third states, international organisations, and their subordinate bodies, or Interpol forward the relevant information to it by whatever means may be appropriate. It may also under the same conditions and by the same means accept information provided by those various bodies on their own initiative.
[27] Art. 18 Europol Convention. Communication of data to third states and bodies is authorised if three conditions are met: where this is necessary in individual cases for the purposes of preventing or combating criminal offences, an adequate level of data protection is ensured in that State or that body, and this is permissible under the general rules contained in the implementing decisions.
[28] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) [2009] OJ L 121/37.
[29] Alexandra de Moor and Gert Vermeulen, "The Europol Council Decision: Transforming Europol into an agency of the European Union", *Common Market Law Review*, Vol. 47, 2010, p. 1089.
[30] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1.

organisations (Art. 26 (5)). The Council Decision of 2008[31] further strengthened its capacity to work with external partners, notably through the posting of liaison magistrates (Art. 2 (7)) or the conclusion of agreements (Art. 26a).

For both agencies, the procedure of concluding cooperation agreements was mostly left in their hands and the involvement of the EU institutions was very limited: only the Council of the EU was involved, but in a very limited capacity. The Commission and the European Parliament were not involved at all. These procedures raised concerns with regard to the coherence of the EU's external actions.[32] Yet this fear had not materialised and the list of agreements concluded by each agency revealed that they inserted their activities into the EU's efforts to develop closer cooperation with certain countries, such as the Member States of the EEA or those participating in the Stabilisation and Association Process. Concerns relating to the respect for fundamental rights were also addressed as both agencies assessed the existence of an adequate level of data protection before the conclusion of a cooperation agreement.

This situation may have led to a certain reporting fatigue for the authorities of the third countries concerned, which may have to demonstrate their compliance with data protection rules several times. Furthermore, it also leads to a duplication of work for the agencies, as they could not rely on a previous assessment. Finally, a last concern was the lack of transparency, and an absence of accountability for these external activities. Relevant information could be found in the annual reports of each agency, but it was often very limited. No EU institution, or national authority, could monitor the conduct of the agencies' external activities, and raise comments or criticism concerning their cooperation with third countries.

The entry into force of the Treaty of Lisbon introduced several changes in the field of the EU's external relations' law, and thus in the legal framework under which Europol and Eurojust develop their external activities. Article 21 TEU clarifies the values that the Union will promote in its external relations, such as the rule of law and respect for human dignity, and provided that the EU shall work for a high degree of cooperation in all fields of international relations, notably in order to safeguard its values, fundamental interests, and security (Art. 21 (2) a)). The consecration of a single legal personality for the EU brought under the same framework the different external policies carried out previously under different regimes. It further imposes on EU institutions a duty to ensure consistency and coherence between the different areas of the EU's external actions (Art. 21 (3) subparagraph 2 TEU), applicable to the external dimension of the EU's area of freedom, security and justice. Concerning the conclusion of international agreements, with the abolition of the pillar structure, the procedure foreseen in Article 218 TFEU becomes the standard procedure, and should be applied for the conclusion of all EU's international agreements, including those concluded by the EU agencies. These constitutional changes are of fundamental importance for the legal framework under which the EU agencies can develop their external activities, and they constitute some of the reasons explaining why the European Commission published proposals for Regulations, amending the instruments organising the competences and mandates of Europol and Eurojust.

In this regard, the provisions contained in the Regulations[33] constitute a move towards an approximation of the legal frameworks applicable to the two agencies. A first sign of this move is

[31] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (…) [2009] OJ L 138/14.
[32] Jorg Monar, "The EU as an International Actor in the Domain of Justice and Home Affairs", *European Foreign Affairs Review*, Vol. 4, Issue 3, 2004, p. 414.
[33] Even though the most recent version of the text of the Eurojust Regulation dated of 2 October 2017 is not publicly available, the General Approach adopted in 2015 constitutes a basis for such argument. See in this respect Council, *Proposal*

found in the provisions establishing the general framework of their cooperation with external partners. Both agencies may establish and maintain cooperative relations with the competent authorities of third countries and international organisations. They may also conclude working arrangements and exchange all information, with the exception of personal data, with these entities (Art. 23 Europol Regulation and Art. 38 Eurojust General Approach). Similarly, the conclusion of cooperation agreements with third countries and international organisations are now subject to the standard procedure defined in Article 218 TFEU. This means that the conclusion of their external agreements falls within the general legal framework applicable to the conclusion of all the EU's international agreements, granting new roles to the European Commission and the European Parliament.

A second sign of this move is found in the provisions regulating the transfer of personal data[34] to third countries and international organisations (Art. 25 Europol Regulation and Art. 45 Eurojust General Approach). The transfer of strategic data is regulated by less strict rules, and similarly the reception of data from third countries and international organisations is not subject to strict procedures, the two agencies being authorised to process such data as long as it is necessary for the performance of their missions (Art. 17 (1) b) and Art. 23 Europol Regulation and Art. 38 (3) Eurojust General Approach). The possibility to transfer personal data to third countries and international organisations is in contrast strictly organised. Both texts foresee three "normal" situations under which personal data can be transferred to external partners: 1) personal data can be transferred on the basis of cooperation agreement concluded before the entry into force of the Regulations (Art. 25 (1) c) Europol Regulation and Art. 45 (1) c) Eurojust General Approach); 2) personal data can be transferred on the basis of an international agreement concluded between the EU and the external entities pursuant to Art. 218 TFEU, which refers to future cooperation agreements; and finally 3) personal data can be transferred on the basis of the Commission adopted in accordance with Article 36 of Directive (EU) 2016/680.[35] In addition of these "normal" situations, the transfer of personal data may also occur on a case-by-case basis in "exceptional circumstances", e.g. when the transfer of personal data is essential for the prevention of an imminent and immediate terrorist attack, or necessary for protecting the vital interests of the data subject (Art. 25 (5) Europol Regulation and Art. 45 (2) Eurojust General Approach).

The process of inserting mirror provisions concerning the external relations of the agencies and the transfer of personal data to third countries and international organisations is inextricably linked to a larger process of uniformising the EU's external relations law and the rules on data protection. Concerning the EU's external relations law, as previously mentioned, the Treaty of Lisbon resulted in an improvement in the coherence of the EU's external activities,[36] especially through the removal of the pillars and the introduction of a single structure, a single legal order and a single legal

for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) – General Approach, 27 February 2015, Council doc. n° 6643/15.

[34] It is important to clarify that personal data processed, stored and transferred by the agencies may concern persons suspected or accused of committing a criminal offence under national law, but it may also refer to personal data of victims of a criminal offence, witnesses or other persons who can provide information concerning criminal offences, or in respect of persons under the age of 18. See in this regard Art. 30 Europol Regulation, and Art. 27 Eurojust General Approach.

[35] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

[36] Nevertheless, there continues to be a specific legal framework applicable to the Common Foreign and Security Policy. See for instance Lucia Serena Rossi, "From EU pillar to Area, The Impact of the Lisbon Treaty", in Catherine Flaesch-Mougin and Lucia Serena Rossi, *La dimension extérieure de l'Espace de Liberté, Sécurité et Justice de l'Union Européenne après le Traité de Lisbonne* (Bruylant, 2013), p. 8.

personality.[37] For the European Commission, it "has changed the way in which the European Union conducts its external relations and these changes also affect the agencies, (which) shall no longer be able to negotiate international agreements themselves".[38] The Council of the EU still retains an important role, as the institution authorises the opening of negotiations, addresses directives to the negotiators, and authorises the conclusion of the agreement. Nevertheless, the procedure of Article 218 grants new powers to the Commission, which can submit the recommendations to the Council, and to the European Parliament, which has to give its consent to the conclusion of Europol's and Eurojust's future agreements.[39] Furthermore, these institutional changes may also facilitate negotiations with third countries and international organisations. Taking an outsider's perspective, they will only deal with one negotiator appointed by the Council, which can be the Commission, or another entity, and one can eventually envisage situation in which a third country may discuss at once the conclusion of cooperation agreements with both Europol and Eurojust.[40]

Concerning the rules on data protection, the negotiations and the adoption of the Regulations for Europol and Eurojust are concomitant to the negotiations and adoption of the new data protection package, composed of the General Data Protection Directive (hereafter the GDPD),[41] and the Data Protection Directive (EU) 2016/680 for Police and Criminal Justice Authorities (hereafter Directive 2016/680).[42] Although the latter does not apply to the processing of personal data by the Union institutions, bodies, offices and agencies (Art. 2 (3) Directive 2016/680), some of its provisions are relevant for the external activities of Europol and Eurojust. This is for instance the case of its Article 36 organising the transfer of personal data on the basis of an adequacy decision, defining the modalities under which the Commission prepares and adopts such adequacy decisions. This indicates a search for coherence, as national competent authorities remain those feeding personal data to the two EU agencies, hence the data owners, and bound to respect certain conditions when transferring personal data to third countries and international organisations.

Yet this process towards uniformisation does not exclude the persistence of certain specificities in the external activities of Europol and Eurojust. The Europol Regulation foresees for instance that Europol may establish and maintain cooperative relation not only with the law enforcement authorities of third countries and international organisations, but also with private parties, defined as entities and bodies established under the law of a Member State or third country (Art. 23 (1), read together with Art. 2 f), Europol regulation). This possibility is justified by the fact that "companies, firms, business

[37] Marise Cremona, "EU External Action in the JHA Domain; A Legal Perspective", in Marise Cremona, Jorg Monar and Sarah Poli, *The external dimension of the European Union's Area of Freedom, Security and Justice,* Peter Lang, 2011, p. 97-98.

[38] Commission, Eurojust's Proposal, COM (2013) 535, p. 6.

[39] Art. 218 para. 6 a) v) TFEU. The consent of the European Parliament is required for agreements covering fields to which the ordinary legislative procedure applies, which is the case in the field of police and judicial cooperation in criminal matters. It can thus be deduced that the EP's consent will be required for the conclusion of Europol's and Eurojust's agreements. This means that the European Parliament could exercise a certain degree of scrutiny on the negotiation process of the agencies' external cooperation agreements, and it could eventually use its power to block the conclusion of the agreement, whenever it considers that the third party concerned does not sufficiently respect data protection rules and/or human rights. [39] As an example of the EP's new negotiating powers, see the example of the Passenger Name Record agreement with the USA, described in Christina Eckes, "How the EP's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures", Jean Monnet Working Paper 12/14, p. 12 – 18.

[40] Intervention of B. de Buck, during the ECLAN 10th Anniversary Conference, Brussels, 25 – 26 April 2016.

[41] Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/1.

[42] Directive (EU) 2016/680 of the of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89.

associations, non-governmental organisations and other private parties hold expertise and information of direct relevance to the prevention and combating of serious crime and terrorism" (Rec. 30 Europol Regulation). Europol's cooperation with private parties may even - under strict conditions - cover the receipt and procession of personal data obtained from them (Art. 26 Europol Regulation). Such possibility is in line with legislative and policy developments at national and European levels,[43] under which private parties are more and more called upon to collaborate with competent authorities and agencies in the prevention and combat of serious crime.[44]

Concerning Eurojust, most of the specificities build upon the previous legal framework, and refer to its specific judicial competences. In that regard, it would still be possible for Eurojust to post liaison magistrates to third countries (Art. 43a Eurojust General Approach). These magistrates will act for all EU Member States, which has important symbolic value and will facilitate even further judicial cooperation with third countries. [45] Eurojust may also coordinate, with the agreement of the Member States concerned, the execution of requests for judicial cooperation issued by a third country where these requests require execution in at least two Member States as part of the same investigation (Art. 43b Eurojust General Approach).

The analysis of the constitutive instruments of Europol and Eurojust, and of the evolution of the legal frameworks governing the external relations of the two agencies can be summarised as a movement from *sui generis* regimes to their integration into the EU's general external relations regime. A certain uniformisation has been highlighted, as similar provisions are provided for in both Regulations, thus reinforcing consistency and coherence in their external activities. They have both obtained new legal bases for intensifying their cooperation with third countries, and in particular for facilitating the exchange of personal data, which is essential in the investigation and prosecution of cross-border criminal activities. This change has been particularly welcomed by practitioners, since it allows for the exchange of data with a third country in the absence of an agreement and on a more flexible basis. This better suits operational needs, in particular in emergency situations, such as the prevention of terrorist attacks. Nevertheless, the cooperation of Europol and Eurojust with external partners continues to face significant challenges.

4. Challenges faced in the development of their external activities

The entry into force of the Treaty of Lisbon and the subsequent amendments of the legal framework applicable to the external relations of Europol and Eurojust reinforces the similarities in the conduct of their external activities, and thus reinforces the coherence and harmonisation in the external dimension of the EU's AFSJ. Notwithstanding this development, significant challenges remain for the agencies in the conduct of their external activities.

[43] See for instance the cooperation of the European Commission with internet platforms through the EU Internet Forum to reduce access to terrorist content and prevent radicalisation.

[44] See for instance on the cooperation of private parties in the prevention and combat of trafficking in human beings, Chloe Brière, "Combatting trafficking in human beings: moving beyond labels with the EU's multidisciplinary, integrated and holistic approach", in Francesca Galli & Anne Weyembergh (eds.), *Do labels still matter?: Blurring boundaries between administrative and criminal law. The influence of the EU*, Editions de l'Université de Bruxelles, 2014, p. 19-42.

[45] Their tasks shall include "any activity designed to encourage and accelerate all forms of judicial cooperation in criminal matters, in particular by establishing direct links with the competent authorities of the host State, and the exchange of operational personal data with the competent authorities of the State concerned in accordance with Article 45".

The following part will focus on the two issues that have been identified as the main challenges faced by the two agencies. The first challenge consists in their need to accommodate diversity and variable geometry in the provisions defining the degree of cooperation that they can develop with national (EU and non-EU) authorities. This results in a complex legal framework, affecting the efficiency and effectiveness of their cooperation with external partners. The second challenge concerns their duty to respect and protect fundamental rights, as well as data protection rules, in the conduct of their external activities, while ensuring that cooperation with external partners answers to operational needs and priorities. These two challenges will be examined successively.

a) Accommodating diversity and variable geometry

The development of EU activities in the Area of Freedom, Security and Justice, and more particularly in the field of police and judicial cooperation in criminal matters, has always been perceived as particularly sensitive with regard to the Member States' sovereignty and national authorities are sometimes reluctant to confer competences at the EU level in this field. Furthermore, the competences granted to the EU remain shared with the Member States (Art. 4 TFEU). This sensitiveness is also perceptible when looking at the two EU agencies active in this field. Europol and Eurojust are designed as service providers available to assist the competent national authorities upon request. They never received operational powers to carry out or order certain investigative measures themselves.

These considerations affect the external activities of the EU in the field of criminal justice. Complexity first arises because the Member States have discretion to develop their own external cooperation in this field with authorities of third countries or with international organisations, for instance through bilateral agreements. These national external activities will not be further discussed in this paper.

Another factor of complexity resides in the diversity and variable geometry in the two agencies' cooperation with national authorities. Such diversity is present in their cooperation with EU partners (internal cooperation) and external partners (external cooperation). The legal framework applicable to these two types of cooperation must be analysed subsequently, as they are strongly linked to each other. Our analysis starts with the diversity and variable geometry present in the agencies' internal cooperation, since it frames the work of the agencies and their position as key actors in criminal matters within the EU. This influences in turn their cooperation with external partners, which also include diversity and variable geometry.

- **Variable geometry in the relations of the EU agencies with national authorities within the EU**

The issue of variable geometry in the relations of Europol and Eurojust with national authorities is crucial, as the cooperation of competent national authorities is a key factor in the success and added-value of the two agencies.

The collection and transfer of information constitutes a representative example. Despite its large databases and technical tools, Europol relies on national authorities from the Member States, Union bodies, third countries, international organisations and private parties for receiving information. The agency can only directly retrieve and process information, including personal data, from publicly available sources, including the internet and public data (Art. 17 (1) and (2) Europol Regulation),

which would not be sufficient to accomplish its missions and tasks. These limits imply that the agency is most often not the owner of the data stored in its databases, and it must thus obtain the consent of the data owner (national authority, EU institution, etc.) before being able to transfer it to authorities located in another Member State (or to an external partner). Similarly Eurojust does not possess competences to collect information and also relies on the reception of information from competent EU national authorities, which are under an obligation to exchange with Eurojust any information necessary for the performance of its tasks, such as the setting up of a Joint Investigation Team, cases with a multilateral dimension or cases in which the assistance of Eurojust is necessary (Art. 21 Eurojust General Approach). These obligations are enshrined in the agencies' constitutive instruments, and in the past, the compliance of national authorities with their duty to provide information was variable. The new Regulations have reinforced the compulsory character of these obligations, but still the willingness of national authorities to share information is essential for the effectiveness of the two agencies. This example shows the strong connection that exists between the cooperation with EU national authorities and the cooperation with third national authorities. The more the two agencies cooperate with EU national authorities, the more they appear as key actors in criminal matters, and the more they are considered as crucial partners by third countries and international organisations. Their cooperation with EU national authorities, which constitutes the internal dimension of their activities, is thus relevant for their cooperation with external partners. Should internal cooperation be insufficient or ineffective, the agencies would fail to appear as attractive partners, and external partners would have less incentive to cooperate with them. In addition, from a legal perspective, the legal framework applicable to their internal activities impacts on the modalities of their cooperation with external partners. Specific modalities of cooperation between an EU Member State and Europol/Eurojust may for instance require the insertion of specific provisions in cooperation agreements with third countries and international organisations.

In this regard, the increasing existence of differentiated status among the EU Member States constitutes a cause for concern. In general terms, differentiated integration refers to the differentiation among Member States in the application of EU law. It results from the refusal by some Member States to take part in the development of Union law in specific fields and their preference not to participate in these developments.[46]

This has notably been the case of Denmark, which decided not to participate in the new Europol Regulation, and will also not participate in the future Eurojust regulation. This EU Member State obtained a *sui generis* status with regard to the application of the instruments adopted within the AFSJ.[47] Although it continues to participate in the Schengen acquis, it obtained the right not to be bound by the measures adopted under Title V of Part Three of the TFEU (provisions on the AFSJ),[48] including measures dealing with police and judicial cooperation in criminal matters.[49] In December 2015, the Danish electorate rejected a proposal to transform this opt-out regime, and the voters also rejected the participation of their country to the new Regulation on the police cooperation agency

[46] Steve Peers, *Trends in differentiation of EU Law and lessons for the future*, In Depth Analysis for the AFCO Committee of the European Parliament, 2015, 22 pages.
[47] Protocol No. 22 on the position of Denmark [2008] OJ C 115/299.
[48] Only one exception provided for in Art. 6 Protocol No. 22: Denmark participates in the measures determining the third countries those nationals must be in possession of a visa when crossing the EU external borders and measures on uniform format for visas.
[49] Art. 2 of Protocol No. 22 nevertheless provides that the measures adopted before the entry into force of the Lisbon treaty are still applicable.

Europol.[50] The cooperation between Denmark and Europol is thus not based on the Europol Regulation, but on an separate Agreement on Operational and Strategic Cooperation,[51] negotiated and concluded as an agreement between Europol and a third party.[52] According to this agreement, the cooperation between Europol and Danish authorities is far from reaching the same intensity as the cooperation between Europol and national authorities located in EU Member States bound by the Regulation. For instance, there is no provision concerning the duty of Danish authorities to share information with Europol, or concerning their possibility to access and search Europol's databases.[53] The text only foresees that Europol shall notify the Danish authorities without delay of any information concerning Denmark, and shall assign up to 8 Danish speaking Europol staff on a 24/7 basis to the processing Danish requests as well as inputting and retrieving data coming from the Danish authorities into the Europol processing system (Art. 10 (5) and (6) Agreement). This may for instance mean that data collected and processed by Denmark of interest for a third country may not be processed by Europol, and links between criminal cases may remain unnoticed.

The United Kingdom (for as long as it remains a member state of the EU) and Ireland also benefit from a specific regime regarding their participation in the AFSJ. By virtue of Protocol No. 21 attached to the Lisbon Treaty, both countries do not in principle take part in the adoption of measures proposed and adopted pursuant to that Title, but they may notify the Presidency of their wish to take part in the adoption and application of measures proposed in this field. They can express their wish at any moment, from the moment the measure is proposed till after its adoption. They have for instance opted in to the Europol Regulation after its adoption,[54] and they are bound by the provisions contained therein. Concerning Eurojust, the two countries decided not to opt in in the future Regulation (Recital 38 General Approach), but they are part of the previous instrument[55] and they may adopt a "wait and see" approach, reserving their decision to opt in until the final adoption of the text (as they did for Europol).[56] Considering their support to these agencies, it is likely that they will also opt in in the future Eurojust Regulation.

However, the withdrawal of the United Kingdom from the EU raises important concerns, as it will impact on police and judicial cooperation in criminal matters between the UK authorities and their counterparts, but also on the participation of the UK in Europol and Eurojust. The perspective of Brexit is particularly sensitive regarding the two agencies, as this country has been instrumental in shaping the evolution and the role of these bodies: two out of the five Presidents of Eurojust thus far come from the UK, while the current Director of Europol is British. The UK has also been mentioned among the highest contributors to Europol's databases, and is frequently involved in the activities of Eurojust.[57] However, despite its essential support to the work of the two agencies, there is yet little

[50] H. Jacobsen, "Denmark rejects further EU integration in referendum", 4 December 2015, available at <www.euractiv.com/section/justice-home-affairs/news/denmark-rejects-further-eu-integration-in-referendum/> accessed 22 June 2016.
[51] Agreement approved by a Council Implementing Decision in April 2017 (council doc. 7281/1/17 REV 1).
[52] For more details on the Agreement on Operational and Strategic Cooperation between Denmark and Europol, see Deirdre Curtin, "Brexit and the EU Area of Freedom, Security and Justice, Bespoke Bits and Pieces" in Federico Fabbrini, *The Law and Politics of Brexit*, OUP, 2017, pp. 189-192.
[53] Ibid.
[54] The UK government announced on 14 November 2016 it intended to opt into the new Regulation. See Letter from Brandon Lewis MP, Minister of State for Policing and the Fire Service to Lord Boswell of Aynho, Chairman of the European Union Select Committee, House of Lords, 14 November 2016: http://www.parliament.uk/documents/lords-committees/eu-home-affairs-subcommittee/EuropolOpt-in%20-14-nov-letter.pdf, referred to in House of Lords, Brexit: future UK-EU security and police cooperation, HL Paper 77, 2017, para. 45. Ireland opted in as well (see
[55] The UK opted back in to both Europol and Eurojust in 2014, House of Commons, In brief: the 2014 bloc opt-out and selective opt-back-ins, 2013, p. 4 – 5.
[56] Valsamis Mitsilegas, EU Criminal Law after Brexit, *Criminal Law Forum* (2017) 28, p. 222.
[57] Ibid. p. 240.

knowledge – as the negotiations have not advanced enough – concerning the future modalities of cooperation between the UK and the two agencies, and whether already existing levels and choices of cooperation will be maintained.[58] The UK government only indicated that from its point of view, existing precedents for EU cooperation with third countries are not the right starting points for a future EU-UK partnership, and it favours a strategic agreement that provides a comprehensive framework for future cooperation.[59]

Brexit constitutes a major challenge for the two agencies, as they may have to reflect upon the future of their cooperation with British authorities. One highly sensitive and political question concerns the modalities of such cooperation and whether the UK will be considered as an ordinary third country, or whether by virtue of its former Member State status, it may obtain a *sui generis* agreement.[60] The answer given to this question will have a decisive impact on the quality of the cooperation between the UK and the two EU agencies, potentially creating in turn major gaps in the possibilities of the two agencies to detect links and seek cooperation from authorities located in third countries. The joint report from the EU and the UK negotiators recording the progress made in the first phase of negotiations does not contain further detail on the issue.[61] There is undeniably a strong mutual interest in sustaining police and judicial cooperation after the UK leaves the EU, but this should not lead to a false sense of optimism.[62] It is difficult to determine the form and substance of future arrangements, and whether they can adequately substitute for the current cooperation with EU agencies and mutual recognition instruments.[63]

Differentiated integration among Member States, as well as the withdrawal of the UK, has consequences for the cooperation of the two agencies with third countries. It may firstly mean that there are "blind spots" in the EU territory preventing discovery of links between cases, including links to third countries. It may also mean that the exchange of data, and particularly personal data, between the agencies and third countries is subject to a specific regime. This is for instance foreseen in the Agreement on Strategic and Operational Cooperation between Denmark and Europol, which provides that onward transfer of the information received "must be consented to" by the other party (Art. 13 Agreement).[64] This diversity on the inside is further complemented by diversity "on the outside", as the modalities of cooperation between the agencies and their external partners may also vary from one external partner to another.

- **Variable geometry in the relations of the agencies with national authorities of third countries (and with international organisations)**

[58] Deirdre Curtin, "Brexit and the EU Area of Freedom, Security and Justice, Bespoke Bits and Pieces" in F. Fabbrini, The Law and Politics of Brexit, OUP, 2017, pp. 199.
[59] Department for Exiting the European Union and Home Office, "*Policy paper on Security, Law Enforcement and Criminal Justice, A future partnership*", 18 September 2017, p. 13, para. 36 and p. 14, para. 38.
[60] For reflections on this question, see Deirdre Curtin, "Brexit and the EU Area of Freedom, Security and Justice, Bespoke Bits and Pieces" in Federico Fabbrini, The Law and Politics of Brexit, OUP, 2017, p. 183-200; or Valsamis Mitsilegas, EU Criminal Law after Brexit, *Criminal Law Forum* (2017) 28, p. 219-250.
[61] Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017, para. 90. The report reads as follows: "On police and judicial cooperation in criminal matters there is a need to provide legal certainty and clarity. Both parties broadly agree on the principle that all structured and formalised cooperation procedures ongoing on withdrawal date that have passed a certain threshold (to be defined) should be completed under Union law."
[62] UK House of Lords, EU Committee, *Brexit: future UK-EU security and police cooperation*, HL Paper 77, December 2016, p. 42, para. 3.
[63] Ibid.
[64] This regime differs to the one applicable to the other Member States, which can grant prior authorisation to such onward transfer, either in general terms or subject to specific conditions, when transferring the date to Europol (Art. 23 para. 5).

Variable geometry, in the sense of variations in the modalities of cooperation, are also an important challenge in relations between national authorities of third countries and Europol/Eurojust.

Such variations would depend on the nature of the external partner. The modalities of cooperation with an international organisation, whose activities are determined by the mandate it receives from its State parties, will differ from those applicable to the cooperation with a third country, which possesses State powers and operational capabilities. Europol has for instance concluded agreements with international organisations, such as the United Nations Office on Drugs and Crime, or the World Custom Organisation. However these agreements do not allow the transfer of all types of data.[65] The memorandum of understanding concluded between Eurojust and Interpol also foresees strategic cooperation rather than operational cooperation.[66] Eurojust has not concluded agreements with any international organisation. As a consequence, the cooperation between the agencies and international organisations does not raise further comments. The exchange of personal data is never envisaged and their cooperation is thus far less advanced than cooperation with third countries.

Variations are also present in the modalities of cooperation of both agencies with third countries. Europol distinguishes between two types of agreements it concludes with third countries. Strategic Cooperation Agreements aim at enhancing the cooperation of the parties in preventing, detecting, suppressing and investigating serious forms of international crime.[67] In addition to the designation of a national contact point in the country, these agreements foresee the exchange of strategic and technical information, i.e. its use is limited for the investigation, prosecution and prevention of criminal offences and in proceedings relating to criminal matters.[68] However, the agreements only authorise the exchange of information of a general nature (modus operandi, threat assessments, etc.), and do not authorise the transmission of data related to an identified individual or identifiable individuals.

Agreements on Operational and Strategic Cooperation represent a more advanced form of cooperation. Whereas they pursue similar objectives and foresee methods of cooperation existing in less ambitious agreements (such as the appointment of national contact points, the deployment of liaison officers and the exchange of information), these agreements allow the transmission of personal data and classified information[69] and thus include much more detailed measures on data protection.[70] Some even provide for the association of national experts to Analysis Groups, granting them the possibility to attend analysis group meetings, to be informed of the development of the concerned Analysis Work File (AWF),[71] and to receive analysis results concerning them.[72] They also foresee mutual support between their national authorities and Europol in the facilitation of the establishment and operation of joint investigation teams.[73] These more advanced agreements are preferred by third countries as they provide for a more extensive cooperation, e.g. the exchange of personal data. However, the third

[65] Example in the Cooperation Agreement between Europol and the UNODC, the transfer of information by Europol shall not include data related to an identified individual or identifiable individuals (Art. 4(1)).
[66] The MoU refers for instance to the exchange of general information (Art.3) and the exchange of strategic and technical information (Art. 4).
[67] Articles 1 and 3 (read together) of both agreements.
[68] Article 6 Agreement with Serbia, Article 6 § 3 Agreement with Montenegro.
[69] Article 10 Agreements with Serbia and with Albania, and Article 7 Agreement with FYROM.
[70] Article 11 to 16 Agreements with Serbia and with Albania, and Articles 8 and 9 Agreement with FYROM
[71] An Analysis Working File is an information processing system on specific crime areas which is intrinsically linked to specific forms of operational support offered by Europol, see EUROPOL, New AWF Concept Guide for MS and Third Parties, EDOC#525188v14, Date: 31/05/2012.
[72] Article 17 Agreements with Serbia and with Albania
[73] Article 18 Agreements with Serbia and with Albania

countries must demonstrate that they provide an adequate level of data protection and sufficient guarantees to be allowed to receive personal data.

Similarly, Eurojust's modalities of cooperation with third countries are diverse. In practical terms, Eurojust has concluded cooperation agreements with several countries, including the USA, Iceland, Liechtenstein, Norway, Switzerland, FYROM, and Moldova.[74] Two agreements with Montenegro[75] and Ukraine have been signed but not entered into force. The content of the agreements may vary, but these variations reflect more the evolution of the state of the law, rather than the desire to tailor modalities of cooperation to one specific partner. The variations include, for instance, the insertion of provisions concerning privacy and data protection in the most recent agreements, reflecting the increasing importance of such safeguards/provisions.[76] Three liaisons prosecutors have been appointed (from the USA, Norway and Switzerland) and 41 contact points form part of Eurojust's network.[77] These contact points play an important role, as in the absence of a cooperation agreement, the agency can still cooperate with third countries and assist investigations and prosecutions when the College of Eurojust considers that there is an essential interest in providing such assistance in a specific case,[78] and the contact points can facilitate the implementation of such decisions.

Complexity is further increased by the insertion of the agencies' agreements into a multi-layered and extensive framework of legal relationships between the EU and third countries in the field of security.[79] A first additional layer is composed of the agreements concluded by the EU in judicial cooperation matters. Agreements on extradition and mutual legal assistance have been concluded with the United States (signed in 2003, entered into force in 2010),[80] Japan (signed in 2009, entered into force in 2011),[81] Iceland and Norway (signed in 2003 and 2004, entered into force in 2013).[82] The two agreements with the USA were the first international criminal justice agreements ever concluded by the EU, on the basis of the previous third pillar provision (Art. 38 TEU, no longer existing).[83] Both EU-US agreements are not intended to substitute existing bilateral arrangements, but they rather aim to add value to the Member States' existing treaty relationships with the USA, which remain free to set more detailed rules in bilateral negotiations.[84] A further additional layer is composed of agreements

[74] The list and the texts of the different agreements are available on Eurojust's website: http://www.eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx#partners.
[75] Eurojust, "Eurojust and Montenegro sign cooperation agreement", Press release, 4 May 2016.
[76] See for instance Art. 9 Cooperation Agreement with Ukraine, or Art. 11 Cooperation Agreement with Montenegro, whereas such provision on privacy is absent from the Cooperation Agreement between Eurojust and the USA.
[77] See http://www.eurojust.europa.eu/about/Partners/Documents/2016-Cooperation-with-3rd-States.pdf.
[78] Article 3 (2) Eurojust Council Decision.
[79] On such multi-layered legal framework in the EU-USA relationship, see Valsamis Mitsilegas, The External Dimension of Mutual Trust: the Coming of Age of Transatlantic Counter-terrorism Cooperation, in Chloe Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law: the Past, the Present and the Future*, Hart Publishing, Jan. 2018.
[80] Agreement on extradition between the European Union and the United States of America [2003] OJ L 181/27 and Agreement on mutual legal assistance between the European Union and the United States of America [2003] OJ L 181/34.
[81] Agreement on mutual legal assistance between the European Union and Japan [2010] OJ L 39/20.
[82] Council Decision 2004/79/EC of 17 December 2003 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto [2004] OJ L 26/1.
[83] The Agreement on extradition – is designed to modernize older treaty texts, thereby expanding and facilitating cooperation. the Agreement on Mutual Legal Assistance makes additional tools available to Member States' authorities, such as the ability to obtain information on bank accounts, form Joint Investigation Teams ('JITS'), transmit requests (and responses to requests) using faster means of communication, obtain witness evidence by video conferencing, and secure evidence for use by administrative authorities where subsequent criminal proceedings are envisaged, through a formal process, thus ensuring that the resulting evidential product is admissible. Council, Review of the 2010 EU-USA MLA Agreement, Council Doc. 7403/16, 7 April 2016, p. 3.
[84] Florian Trauner and Auke Willems, '*The internal-external nexus: Cross-border criminal justice'*, Brief Issue n° 29, European Union Institute for Security Studies (EUISS), October 2016.

characterised as 'executive' or 'operational' agreements, such as the agreements on the transfer of Passenger Name Record (PNR) data concluded with the USA,[85] Canada[86] and Australia.[87]

Variable geometry and diversity thus results in a very complex and multi-layered legal framework, in which the external activities of Europol and Eurojust are just one of many elements. For practitioners this means that when seeking cooperation from a third country or an international organisation, a careful screening exercise must be carried out at a preliminary stage in order to identify the tools available by virtue of international, European and national laws. This complexity is understandable given the diversity present in third countries. Furthermore the importance of data protection as a pre-requisite for operational cooperation itself favours diversity, as it prevents the conclusion of certain agreements with countries or organisations not guaranteeing an adequate level of protection.

b) Ensuring the respect for fundamental rights – focus on data protection rights

As agencies of the European Union, Europol and Eurojust are bound by the EU's principles and values, especially the values of respect for the rule of law and respect for human rights (Art. 2 TEU). Specific provisions on the respect for fundamental rights apply to them (Art. 6 TEU, and the EU Charter of Fundamental Rights), as well as provisions regarding data protection (Art. 16 TEU). These provisions are essential for agencies competent to intervene in the field of criminal justice.

Criminal law is - as H. Wechsler observed - the law "on which men place their ultimate reliance for the protection against all the deepest injuries that human conduct can inflict on individuals and institutions", but it is also the law that "governs the strongest force that we permit official agencies to bring to bear on individuals".[88] As a consequence, "if penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils".[89] His words illustrate the crucial necessity, or even the requirement, to find an appropriate balance between preventing and fighting crime and protecting the fundamental rights of individuals in criminal law. This crucial relationship can be described as the 'shield' and 'sword' functions of criminal law,[90] notably analysed by J.A.E. Vervaele in the field of EU criminal law.[91] According to him, the 'sword' function of criminal law refers to its objective to protect society against crime and criminals. In contrast the 'shield' function refers to the limitation/framing of the use of violence, and the protection of individuals against arbitrariness and abuses by repressive authorities.

[85] Council Decision of 13 December 2011 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security [2012] OJ L215/1; Council Decision of 26 April 2012 on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records to the United States Department of Homeland Security [2012] OJ L215/4.

[86] 2006/230/EC: Council Decision of 18 July 2005 on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of API/PNR data [2006] OJ L 82/14.

[87] Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service [2012] OJ L 186/4.

[88] Herbert Wechsler, 'The challenges of a Model Penal Code' *Harvard Law Review* 65 (1952) p. 1098.

[89] Ibid. Quoted in Chloé Brière and Anne Weyembergh, "About ECLAN and the Balances that need to be struck in EU Criminal Law", in Chloé Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law: the Past, the Present and the Future*, Hart Publishing, Jan. 2018.

[90] For an overview of some authors who have followed this perspective, see Françoise Tulkens 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* , p. 578, Fn 5.

[91] John A.E. Vervaele, 'Régulation et répression au sein de l'Etat providence. La fonction ''bouclier'' et la fonction ''épée'' du droit pénal en déséquilibre' (1997) 21 *Déviance et société* 121.

Since Europol has no operational capacity and Eurojust has no prosecutorial capacity, neither agency really has the power to violate the fundamental rights of suspects and accused persons in a direct way – e.g. depriving them of their liberty or their right to a fair trial. Nevertheless, as EU agencies cooperating with national law enforcement and criminal justice authorities from the preliminary investigation phase up to the trial stage, their activities may have an indirect impact on the fundamental rights of suspects and accused persons, e.g. coordination of arrests or analysis of information establishing the involvement of a suspect in a crime. This is true with the exception of data protection. In the framework of their activities the two agencies collect, store and process personal data, which may directly violate the rights of the data subject. The two agencies are thus, like national authorities, subject to the need of ensuring a balance between operational efficiency and protection of fundamental rights. This paper will thus focus on a specific dimension of such need: the need to ensure a balance between the efficiency of data processing and transfer, and the protection of privacy rights of individuals.

The importance to ensure such balance is further intensified by the evolution of the techniques used to combat crime. Modern techniques and technologies have changed the way competent national authorities are collecting information and gathering evidence against persons suspected of having committed a criminal offence. The scale of the collection and sharing of personal data has increased significantly and technology allows personal data to be processed on an unprecedented scale (Recital 3 Directive 2016/680). At national and European levels, large databases are established, such as the Europol Information System (EIS), or the Europol Analysis System, which contain information related to crime, such as information on suspected and convicted persons, criminal structures, offences and means used to commit them. These tools allow competent national authorities to conduct the strategic and operational analysis of information[92] to identify for instance the *modus operandi* of a criminal network, individuals potentially involved in unlawful activities, etc..[93] They also enable authorities to review current and emerging trends and to illuminate changes in the crime environment and emerging threats to public order,[94] or to identify recurring judicial cooperation issues in the prosecution of cross-border criminal networks.[95] At the judicial stage of the proceedings, technological developments also have an impact. Electronic evidence, such as evidence obtained through the interception of telecommunications, has become essential in many cases, and raises many new legal questions.[96] In this new context, whereas the collection of data, including personal data of suspects and accused persons, but also of victims and witnesses, as well as its storage, processing and analysis, are essential to combat crime, it may also entail violations of human rights and data protection rules. The challenge faced by EU and national legislators in defining the rules applicable to the collection, storage, processing and exchange of personal data, is to realise an appropriate balance between on the one hand the efficiency of the fight against crime and the operational activities of the competent authorities, and on the other hand the protection of fundamental rights of individuals and the respect for data protection rules.

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[92] For a discussion of the role of Europol and Eurojust in analysing information, see Anne Weyembergh, Ines Armada and Chloé Brière, Research paper for the Committee on Civil Liberties, Justice and Home Affairs of the European P arliament on '*the interagency cooperation and future architecture of the EU criminal justice and law enforcement area'*, Nov ember 2015.

[93] Simon Roberston, *Intelligence-Led Policing: a European Union View*, in IALEIA, Intelligence Led Policing, International perspectives on policing in the 21st century, 1997, p. 12, available here.

[94] Simon Roberston, ibid, p. 12.

[95] As an example see Eurojust, Strategic project on Eurojust's action against trafficking in human beings, Oct. 2012, 72 pages, available here.

[96] See for instance Mark Taylor and others, Digital evidence from mobile telephone applications, *Computer Law & Security Review*, Volume 28, Issue 3, 2012, pp. 335-339.

Indeed, no matter how essential data is in the fight against crime, its collection, storage and processing remains an intrusion in individuals' fundamental rights. Instruments protecting human rights, such as the EU charter of Fundamental rights, or the European Convention on Human Rights contain clear provisions on the right of privacy and respect for private life (Art. 8 ECHR and Art. 7 and 8 EU Charter). Interferences with these rights have been framed carefully, either in the instruments themselves (Art. 8 (2) EU Charter), or in the case law of courts like the Court of Justice of the European Union,[97] or the European Court of Human Rights.[98] In addition, detailed sets of data protection rules have been elaborated to define the conditions in which personal data may be collected, stored and processed, and to detail the rights granted to the data subject, as well as the supervision mechanisms available. One can stress that the collection and use of personal data for the purpose of fighting crime is subject to specific rules, given the specific nature of these fields.[99] This is evidenced by the adoption at EU level of the Police Data Protection Directive in 2016,[100] which applies only to protection of natural persons with regard to the processing of personal data by authorities competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

The importance of data protection is also reflected in the new instruments applicable to Europol and Eurojust. The Treaty of Lisbon made it clear that the EU activities in the field of police and criminal justice, including the activities of Europol and Eurojust, must be compatible with the EU Charter of Fundamental Rights, the ECHR and EU secondary law on data protection.[101] The number of provisions relating to data protection has substantially increased in the two proposals for Regulations and these provisions introduce new rules and procedures for the processing of personal data, which replicate to a certain extent those binding competent national authorities by virtue of Directive 2016/680. General principles, in line with human rights standards, provide that personal data shall be processed fairly and lawfully, collected for specified, explicit and legitimate purposes, be adequate, relevant and limited to what is necessary in relation to the purposes for which it is collected, etc. (Art. 28 Europol Regulation and Art. 26a Eurojust General Approach). Provisions concerning the time limits for the storage of personal data have been introduced (Art. 31 Europol Regulation and Art. 28 Eurojust General Approach), together with provisions regarding the rights of access, rectification, erasure and restriction of the data subjects (Art. 36 - 37 Europol Regulation and Art. 32-33 Eurojust General Approach).

The importance of data protection rules is also noticeable in the provisions organising the cooperation of the two agencies with third countries and international organisations. A specific provision in the Europol Regulation indicates that any information, received notably from a third country, shall not be processed if it has clearly been obtained in obvious violation of human rights (Art. 23 (9) Europol Regulation). Furthermore, the general provisions on the transfer of personal data to third countries and international organisations insist on the fact that such transfer and processing of the data received shall take place only to the extent necessary for the performance of the tasks of the agencies (Art. 25 (1) Europol Regulation and Art. 38 (3) draft Eurojust Regulation). This wording can be interpreted as

[97] See for instance CJEU [2014] Digital Rights Ireland Ltd, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238; CJEU, [2015] *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, ECLI:EU:C:2015:650; or CJEU [2017] Opinion 1/15, on the envisaged agreement between Canada and the EU on the transfer and processing of Passenger Name Record data, ECLI:EU:C:2017:592.
[98] See ECtHR, Guide on Article 8 of the Convention – Right to respect for private and family life, available at: http://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.
[99] See Declaration 21 on the protection of personal data in the fields of judicial cooperation in criminal matters and police cooperation [2016] OJ C 202/345.
[100] Directive (EU) 2016/680 [2016] OJ L 119/89.
[101] V. Mitsilegas, EU Criminal Law after Brexit, *Criminal Law Forum* (2017) 28, p. 238.

introducing a general proportionality requirement, in line with data protection standards. In addition, exchanges of personal data with third countries shall be based on the adoption of an EU adequacy decision confirming that the country offers an adequate level of data protection in the eyes of the EU.[102] The CJEU also detailed further in the *Schrems* case that "the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 [*now replaced by the GDPR*] read in the light of the Charter."[103] These requirements have led certain authors to discuss the extraterritorial application of EU data protection standards, as they imply that data may only be transferred to third countries if EU legal standards apply to their processing and they result in obligations based on EU law directly applying to parties outside the EU.[104]

A further indication of the importance of data protection standards can be found in the strict wording of the derogations allowing transfer of personal data in the absence of an adequacy decision are strictly framed. Such transfers are not applicable to systematic, massive or structural transfer, and they are authorised on a case-by-case basis if the transfer is necessary for certain purposes. They may be authorised for a renewable period not exceeding one year, but the European Data Protection Supervisor must agree and the existence of adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals must be taken into account (Art. 25 (6) Europol Regulation and Art. 45 (3) Eurojust General Approach). Furthermore personal data may not be transferred if it is considered (by the Director of Europol) that fundamental rights and freedoms of the data subject concerned override the public interest in certain situations (Art. 25 (5) Europol Regulation).

The modifications in the legal framework applicable to Europol and Eurojust legal frameworks demonstrate the importance granted to respect for fundamental rights, enshrined in the Treaties themselves, and these requirements have made their way into the external activities of the two EU agencies. Close attention is indeed paid to compliance with data protection standards, constituting a pre-requisite for the transfer of personal data to third countries and international organisations. The challenge to realise an appropriate balance between fundamental rights and the effectiveness of external cooperation has been resolved through the insertion of provisions preserving a certain flexibility. The possibility to exchange personal data, even without a cooperation agreement or an adequacy decision, is an improvement from a practical perspective. The conclusion of such agreement or the adoption of an adequacy decision by the Commission can be time-consuming and may not allow for prompt reactions to urgent operational needs, influenced by quick changes in the criminal landscape.[105] In addition, under the current framework, the adequacy decisions can be adapted to the content, the nature or the purpose of the exchange of information. For instance, a difference could be made between an adequacy decision obtained for an exchange of information in which the data is not stored afterwards in Europol's databases, and one concerning the transfer of information which will be subsequently stored in one of Europol's Analysis Work Files.[106] Finally the derogations allowing

[102] V. Mitsilegas, EU Criminal Law after Brexit, *Criminal Law Forum* (2017) 28, p. 244.
[103] CJEU [2015] *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, ECLI:EU:C:2015:650, para. 73.
[104] See in respect of Art. 25 and 26 GDPR, C. Kuner, Extraterritoriality and regulation of international data transfers in EU data protection law , International Data Privacy Law, 2015, Vol. 5, No. 4 , p. 241.
[105] Intervention of B. de Buck, during the ECLAN 10th Anniversary Conference, Brussels, 25 – 26 April 2016. Example: despite the current migration situation, it was under the previous legal regime impossible to exchange data with North African countries, as the countries had to be placed on the Council's list and be subject of an evaluation of their compliance with data protection standards… Such procedure was not very flexible.
[106] Ibid.

transfer of personal data in urgent cases, reinforce the flexibility in the cooperation between the EU agencies and third countries, which may be more interested in intensifying their cooperation. Nevertheless, it remains important to see how the implementation of these rules will be monitored.

5. Accountability of the agencies for their external activities

The cooperation of Europol and Eurojust with third countries is essential to combat criminal activities with a transnational dimension, but it must be carried out in compliance with their constitutive instruments. Both agencies are held accountable for the way they carry out their external activities. They have for instance to demonstrate that they are effectively fulfilling their missions, without being plagued by e.g. waste, corruption, mismanagement, etc. The present paper will focus on one specific dimension of their accountability: the protection of fundamental rights, on the basis of which the two agencies must demonstrate that they cooperate with third countries without violating of fundamental rights. Even though the cooperation of the two agencies with third countries is limited to the exchange of information, or the facilitation of mutual legal assistance requests, it may eventually infringe fundamental rights, especially the right of privacy and respect for private life (Art. 8 ECHR and Art. 7 and 8 EU Charter) and the right to a fair trial, including the presumption of innocence (Art. 6 ECHR and Art. 47 and 48 EU Charter).

In the previous section, the provisions concerning the protection of fundamental rights have been examined, but this analysis is not enough to conclude whether in practice the right balance between the effectiveness of their cooperation and the respect for fundamental rights is ensured.

Given the recent entry into force of the Europol Regulation, and the pending negotiations of the Eurojust Regulation, it is still early to assess the practical implementation of these provisions. Nevertheless the accountability mechanisms foreseen in the two instruments constitute a solid basis for such prospective assessment. They constitute a way to monitor the external activities of the two agencies and to eventually identify and correct violations of fundamental rights. In the current multi-level architecture of the EU area of police and criminal justice, it is important to stress that there is a multiplicity of mechanisms applicable to hold the competent authorities accountable for their activities, including their cooperation with third countries. A first step in holding them accountable is to identify which authority is responsible for an activity. In this regard, the insertion in both Europol and Eurojust regulations of provisions allocating responsibility and liability between the agencies and national authorities is to be welcomed.

The present section focuses on the mechanisms designed to hold the agencies accountable for their external activities, in particular their political and judicial accountability.

a) Political accountability

Political accountability refers, from a democratic perspective, to the possibility granted to democratic forums to effectively monitor the exercise of governmental power. That is to say, "public accountability is an essential precondition for the democratic process to work, since it provides citizens and their representatives with the information needed for judging the propriety and

effectiveness of government conduct. (…) the quality of accountability arrangements hinges upon their demonstrated ability to consolidate and reaffirm the democratic chain of delegation."[107]

For the EU agencies like Europol and Eurojust, the entry into force of the Lisbon Treaty required the insertion of new provisions foreseeing a stronger oversight of the agencies' activities by democratically elected representatives of the EU citizens. Their political accountability is thus before the European democratically elected representatives, the members of the European Parliament, and to a lesser extent before national democratically elected representatives, the members of national parliaments. Concerning the European Parliament, this role stems from its general mandate of exercising functions of political control and consultation as laid down in Art. 14 (1) TEU. For national parliaments, their new mission with regard to Europol and Eurojust is also explicitly provided for by Article 12 c) TEU.[108]

Both regulations indicate in their preamble the importance of ensuring that the European Parliament and national parliaments are involved in the scrutiny and evaluation of the agencies' activities, which is framed notably by the need to safeguard the confidentiality of operational information (Recital 58 Europol Regulation and Recital 31 Eurojust General Approach).

The political accountability of Europol and Eurojust before the European Parliament is organised in detail in both Regulations. Both agencies are bound to adopt an annual activity report, publicly available, on their activities, sent among others to the European Parliament and national parliaments (Art. 11 (1) c) Europol Regulation and Article 55 Eurojust General Approach). In addition, the Director of Europol and the President of the College of Eurojust may be invited to present and discuss the activities of their respective agencies. For the president of the College, this possibility is provided for in the text of the Regulation (Art. 55 Eurojust General Approach),[109] while for the Director of Europol this possibility is only mentioned in the Preamble (Recital 60 Europol Regulation), except when his/her mandate may be extended (Art. 54 (5) Europol Regulation). The European Parliament possesses another powerful competence to review *ex-post* the activities of the agencies: its budgetary role. Together with the Council, the European Parliament authorises the budgets of Europol and Eurojust (Art. 58 (6) Europol Regulation and Art. 49 (4) and (6) Eurojust General Approach), and votes on its own the budgetary discharge for their implementation (Art. 60 (8) Europol Regulation and Art. 51 (12) Eurojust General Approach).

Europol and Eurojust may also be held accountable before national parliaments, which may also invite them to present and discuss their activities. This possibility was for instance exercised by the UK House of Lords, which auditioned the Director of Europol,[110] or by the French Senate, which

[107] Madalina Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, 2010, p. 39.
[108] The provision reads as follows: National Parliaments contribute actively to the good functioning of the Union (…) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty.
[109] According to this provision, the President of the College may appear before the European Parliament or the Council, at their request, to discuss matters relating to Eurojust, and in particular to present its Annual Reports, taking into account the obligations of discretion and confidentiality. Finally, Eurojust shall transmit results of studies and strategic projects, working arrangements concluded with third parties and the annual report of the EDPS
[110] House of Lords, EU Committee, *Europol: coordinating the fight against serious and organised crime*, Nov. 2008, p. 78 – 115.

auditioned the President of Eurojust.[111] However the scrutiny of the national parliaments is not complemented with direct budgetary powers, which reduces the strength of their scrutiny.

The Europol Regulation introduces an innovation consisting in the setting up of a Joint Parliamentary Scrutiny Group, established together by the national parliaments and the competent committee of the European Parliament. This JPSG shall "politically monitor Europol's activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons" (emphasis added) (Art. 51 Europol Regulation). This group shall receive a certain number of documents, including the administrative arrangements concluded with third countries and international organisations (Art. 51 (3) b) Europol Regulation). It shall also have the possibility to request the presence of Europol's representatives for discussing matters relating to its activities, but also for discussing "general matters relating to the protection of fundamental rights and freedoms of natural persons, and in particular the protection of personal data, with regard to Europol's activities" (Art. 51 (2) b) Europol Regulation). The latter shall take place at least once a year.

These new provisions constitute an important step forward.[112] However it might still be too early to determine to what extent they will allow the European Parliament and the national parliaments to exercise an *ex post* examination of the respect of fundamental rights in Europol's cooperation with third countries. The establishment of the Joint Parliamentary Scrutiny Group for Europol is still very recent. Some authors have expressed concerns on its size, as a large inter-parliamentary forum of 128 participants may have difficulties to effectively monitor Europol's activities.[113] These concerns have been somewhat intensified as during its constituent meeting held in the European Parliament's premises in Brussels on 9 and 10 October 2017, the JPSG failed to adopt its Rules of Procedure.[114] It nevertheless agreed to recognise the right to ask questions to Europol (oral and written questions for an oral response at meetings of the JPSG (Art. 4.1a draft Rules Of Procedure – version of 10 October), or to invite non-voting observers "from the list of third countries and international organisations with which Europol has concluded agreements or from EU Member States that have concluded an Agreement on Operational and Strategic Cooperation with Europol" (Art. 2.2. draft Rules of Procedure – version of 10 October). The establishment of this JPSG responds to a debate that had been ongoing for many years. It was indeed "felt that Europol's involvement in police activities and its key role in the exchange of information among national law-enforcement services required parliamentary oversight (and) the processing of information, including personal data — Europol's core business — has the potential to impact on the fundamental rights of individuals, (… hence) a parliamentary control system was seen as the means to enhance democratic legitimacy in this area".[115]

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[111] Sénat, *Europol et Eurojust : perspectives d'avenir*, Rapport d'information No. 477, 17 April 2014, p. 45.

[112] Meijers Committee, *Note on the interparliamentary scrutiny of Europol*, CM1702, p.1: "The Meijers Committee takes the view that improving the interparliamentary scrutiny of Europol, with appropriate involvement of both the national and the European levels, will by itself enhance the attention being paid by Europol on the perspectives of democracy and the rule of law, and more in particular the fundamental rights protection. It will raise the alertness of Europol as concerns these perspectives. Moreover, the scrutiny mechanism could pay specific attention to the fundamental rights protection within Europol. This is particularly important in view of the large amounts of – often sensitive - personal data processed by Europol and exchanged with national police authorities of Member States and also with authorities of third countries."

[113] Diane Fromage, The New Joint Parliamentary Scrutiny Group for Europol: Old Wine in New Bottles? June 2017, blog post available at: http://eutarn.blogactiv.eu/2017/06/17/the-new-joint-parliamentary-scrutiny-group-for-europol-old-wine-in-new-bottles/.

[114] European Parliament and Parliamentary Dimension of the Estonian Presidency of the Council of the EU, *Summary conclusions*, 8 November 2017, p. 2.

[115] European Commission, *Communication on the procedures for the scrutiny of Europol's activities by the European Parliament, together with national Parliaments*, COM (2010) 776, p. 4.

In contrast, at the current stage of the negotiations, the draft Regulation of Eurojust does not foresee a similar mechanism. This difference may be explained by the different nature of their activities, and the fact that the information stored and processed by Eurojust consists of judicial information from national judicial authorities, mainly prosecutors, stemming from and/or relating to judicial cooperation requests, and sometimes from judgments or other judicial acts. This means that such judicial information has been collected in a framework foreseeing procedural guarantees for suspects and accused persons, and thus less likely to infringe their fundamental rights. This does not mean that there is less democratic oversight on the activities of Eurojust, especially for its external activities. The General Approach on Eurojust for instance provides that liaison magistrates posted by Eurojust to third countries, who may exchange operational personal data with the competent authorities of their host State (Art. 43a 1a) Eurojust General Approach), shall report to the College, which shall inform the European Parliament and the Council in the annual report and in an appropriate manner of their activities (Art. 43a (5) Eurojust General Approach).

It is early to conclude on the thoroughness with which the European Parliament and the national parliaments will examine the respect for fundamental rights by the agencies, or the conduct of their external activities. The establishment of a *sui generis* JPSG for Europol can raise interrogations, as it departs from the EU Institutions' Common Approach on Decentralised Agencies, which does not mention this possibility.[116] Its work shall be closely followed to determine whether it fulfils the missions assigned to it.

b) Judicial accountability

Judicial accountability is also crucial, as it refers to the extent to which acts and measures emanating from Europol and Eurojust, two EU agencies subject to EU law, can be reviewed by the Court of the Justice of the EU (CJEU). The answer to this interrogation is crucial as the notion of judicial review is at the core of the EU legal order, which prides itself in being based on the rule of law. The CJEU has interpreted this as meaning that neither its Member States, nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the treaty.[117]

The existence of a judicial review is particularly important for an individual whose data has been collected, stored and processed by national police and/or judicial authorities, and then transferred to Europol and Eurojust, or by the agencies themselves.

The data subject can first rely when applicable to the mechanism set up at national level in accordance with Directive 2016/680 (Art. 52 – 54), providing the right to lodge a complaint with a supervisory authority, the right to an effective judicial remedy against a supervisory authority and the right to an effective judicial remedy against a controller or processor. Similar mechanisms have been foreseen in the Europol and Eurojust regulations, but before European supervisor and court. Any data subject shall have the right to lodge a complaint with the European Data Protection Supervisor (EDPS), if he/she considers that the processing of personal relating to him/her does not comply with the Regulations (Art. 47 Europol Regulation and Art. 36 Eurojust General Approach). Both texts even provide an additional guarantee, where a complaint relates to the processing of data provided to Europol or to Eurojust by Union bodies, third countries or international organisations, the EDPS shall ensure that

[116] Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, July 2012, p. 11.
[117] CJEU, [1986] *Parti Ecologiste 'Les Verts' vs European Parliament*, Case 294/83, ECLI:EU:C:1986:166, para. 23, quoted in Madalina Busuioc, *The Accountability of European Agencies – Legal Provisions and Ongoing Practices*, 2010, p. 167.

Europol or Eurojust has correctly carried out the necessary checks on the lawfulness of the processing of the data (Art. 47 (4) Europol Regulation and Art. 36 (3) Eurojust General Approach). If a complaint is admissible, the EDPS carries out an inquiry and then adopts a decision, which may for instance impose a temporary or definitive ban on processing the respective data,[118] and which is then communicated to the complainant. The latter possesses a right to judicial review against the decisions of the EDPS.

Additionally, Europol and Eurojust are both liable for incorrect personal data processing. Individuals who have suffered damage as a result of such unlawful data processing can bring an action against the agencies before the CJEU (Art. 50 (1) Europol Regulation and Art. 37 Eurojust General Approach). This liability also extends to the Member States which have communicated data to Europol and Eurojust, and in that case individuals can lodge a complaint before a competent national court of that Member State (Art. 50 (1) Europol Regulation and Art. 37 (3) draft Eurojust Regulation). Even though this does not correspond to judicial review, another review mechanism applies to the activities to Europol and Eurojust: the European Ombudsman.[119] Its role shall not be forgotten, as this entity is competent to investigate complaints about maladministration in EU institutions, bodies, offices, and agencies, covering administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, and unnecessary delay.[120] In the past the European Ombudsman has received complaints from individuals requiring access to their data stored by Europol,[121] and by Eurojust.[122]

However, these mechanisms face one main difficulty: in order to exercise these rights, the data subject must know that his/her data has been collected, stored and processed, which is particularly sensitive with data collected, stored and processed for the purposes of preventing and combating crime. The Directive 2016/680, as well as the Europol and Eurojust Regulations, provide for the right of access to the data subject, who is normally entitled to obtain confirmation as to whether or personal data concerning him or her is being processed (Art. 14 Directive 2016/680, Art. 36 (6) Europol Regulation and Art. 32 Eurojust General Approach). Yet these instruments also foresee derogations to such right of access (Art. 15 Directive 2016/680, Art. 36 Europol Regulation and Art. 32 (2a) Eurojust General Approach). The exact grounds on which access of data may be refused or restricted vary from one instrument to another, but in substance they cover similar considerations: the refusal or restriction is necessary for the proper fulfilment of the tasks of the national authorities/agencies – including protecting security and public order and preventing crime, for avoiding that any national investigation or prosecution is jeopardised, or for protecting the rights and freedoms of others.

Such derogations to the right of access are understandable for pragmatic and operational reasons, as the communication that personal data of a data subject is being processed may be taken as a sign that the person is under investigation, and that person may attempt to hinder investigations or escape justice (e.g. by destroying compromising evidence or moving to a third country). They nevertheless undermine the effectiveness of the judicial accountability of national authorities and EU agencies. One

[118] For more details see https://edps.europa.eu/data-protection/our-role-supervisor/complaints_en.
[119] On the role of the European Ombudsman, see Marco Inglese, *The external projection of EU's Agencies: an emphasis on the Ombudsman's role*, Paper presented at the TARN conference on the "external dimension of the EU agencies", held in Luxembourg on 27-28 June 2017.
[120] European Ombudsman, Who can help you? Information leaflet, p. 3. See also Decision 94/262/ECSC of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L 113/15.
[121] See for instance Decision of the European Ombudsman on complaint 183/2006/MF against Europol, 21 February 2007.
[122] See for instance Decision of the European Ombudsman closing the inquiry into complaint 2057/2011/TN against the European Union's Judicial Cooperation Unit (Eurojust), 24 January 2014.

may nevertheless consider that judicial accountability may intervene at a later stage, for instance at the trial stage where the evidence against the accused person is subject to contradictory principle and where, according to national procedural rules, its admissibility may be rejected on the basis of fundamental rights' violations.

The gap in judicial accountability is more pronounced when personal data is transferred to third countries. The difficulty for the data subject to be informed that his/her personal data has been transferred outside the EU is equally present. The provisions on the right of access foresee that the data subject shall be informed on the recipients or categories of recipients to whom the data is disclosed (Art. 14 (c) Directive 2016/680, Art. 36 (2) b) Europol Regulation – no provision (yet) in Eurojust General Approach), but the restrictions and derogations mentioned earlier apply. One can always envisage the situation in which such discussion on the legality of the processing of his/her personal data may take place at the trial stage in the third country to which the data has been transferred. This possibility reinforces the necessity to carefully evaluate the respect for data protection standards, including the existence of adequate judicial review, before authorising the transfer of personal data. In addition, the data subject may eventually be informed – at a later stage - that his/her personal data has been transferred to authorities located in third countries or to international organisations.

In such cases, once the person learns that his/her personal data has been transferred to a third country or an international organisation, the question is to determine who is competent to review the legality of such transfer and the law applicable. The EU Regulations provide an answer as they foresee the allocation of responsibility in data protection matters and provide for the responsibility of Europol and Eurojust for the legality of a transfer of personal data provided by it to Member States, third countries or international organisations (Art. 38 (5) Europol Regulation and Art. 34 (3) Eurojust General Approach). In other words, these provisions can be interpreted as meaning that the responsibility of transfers of personal data to third countries and international organisations lies with the EU agencies, and hence judicial review of such transfers shall be conducted by the CJEU. The latter shall thus review the compliance of such transfers with EU law, including with the EU Charter of fundamental rights and the case law of the ECHR.

The CJEU has increased its role in judging the respect of fundamental rights in criminal matters, and more particularly in the processing of personal data. In its Opinion 1/15,[123] the Court has clearly considered that the processing of personal data constitutes an interference with the fundamental right to the protection of personal data guaranteed in Article 8 of the Charter (para. 126), which still continues to apply where personal data is transferred from the European Union to a non-member country (para. 134). When examining the proportionality and adequacy of the processing of personal data in the PNR agreement between Canada and the EU, the Court insists on the importance that the agreement contains clear and precise rules limited to what is strictly necessary, defining the degree of seriousness of the offences concerned (para. 175 – 177), the authorities responsible for receiving and processing data (para 182 f), the person concerned (para 186 f) and the retention and use of data (para. 190 f), as well as the rights of the data subjects and the oversight of data protection safeguards (para. 228 f).

[123] CJEU [2017] Opinion 1/15, on the envisaged agreement between Canada and the EU on the transfer and processing of Passenger Name Record data, ECLI:EU:C:2017:592.

It can thus be expected that cases will arise where the CJEU will conduct a thorough assessment of the provisions contained in the Europol or Eurojust Regulation, read together with those contained in the cooperation agreements of the agencies. One may however wonder whether the legal framework designed in the Europol and Eurojust Regulations will pass the test, and whether the CJEU will consider it compliant with the EU Charter. The higher degree of interference with the individuals' fundamental rights, compared for instance to the degree of interference with the transfer of passengers' name records, will probably require an even stricter assessment of its proportionality and adequacy to the objectives pursued by Europol and Eurojust.

6. Conclusion

In the current security context, the cooperation with third countries and international organisations is of crucial importance for the EU's objectives of preventing and combating crime. The issue will also be an important point of discussion during the Brexit negotiations, as once the United Kingdom will have withdrawn from the EU, new modalities of cooperation between British authorities and EU agencies will have to be identified. The current modalities of cooperation between Europol, Eurojust and their external partners, which have been analysed in this paper, may serve as a source of inspiration for the EU and UK negotiators. They also reveal the potential limits that may be faced in developing the future modalities of cooperation between the EU and the UK, and the need to reflect on developing specific modalities eventually drawing on the UK's status of former Member State. These issues are of crucial importance, since insufficient cooperation in criminal matters between the EU and the UK may reduce the safety of the people of the UK and of EU citizens.

The relevance of Europol's and Eurojust's external activities extend beyond the perspective of Brexit and the future EU-UK cooperation in criminal matters. The EU agencies are fully integrated in the EU's strategy to develop the external dimension of key AFSJ policies. Taking the example of counter-terrorism, the European Commission has recently recalled[124] that cooperation with third countries is essential in the fight against terrorism and organised crime, as underlined by the June 2017 Foreign Affairs Council Conclusions on EU External Action on Counter-Terrorism.[125] In the light of the Union's operational needs in terms of security cooperation with third countries, the Commission announced that it will put forward recommendations to the Council before the end of the year to authorise the opening of negotiations for agreements between the EU and Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey to provide a legal basis for the transfer of personal data between Europol and these third countries.[126]

This recent announcement illustrates the importance but also the challenges faced in the development of the agencies' external activities. They now operate (or will soon operate, for Eurojust) under a

[124] Commission, *Eleventh progress report towards an effective and genuine Security Union*, 18.10.2017 COM (2017) 608 final.
[125] Council, *Conclusions on EU External Action on Counter-terrorism*, 19 June 2017, council doc. 10384/17.
[126] Commission, Eleventh progress report towards an effective and genuine Security Union, 18.10.2017 COM (2017) 608 final, p. 15. It must be stressed that the Commission simultaneously "*recalls the strategic framework for 'adequacy decisions' as well as other tools for data transfers and international data protection instruments, as articulated in the Commission Communication on Exchanging and Protecting Personal Data in a Globalised World (COM(2017) 7 final of 10.1.2017) in which the Commission encourages accession by third countries to Council of Europe Convention 108 and its additional Protocol*" (fn 55).

revised legal framework in line with the changes the Treaty of Lisbon introduced in the field of EU external relations law.

The two agencies face challenges, starting with the need to accommodate diversity within and outside the European Union. However, their main challenge probably lies in the sensitivity of the exchange of data with third countries that are not bound by the EU norms on the protection of fundamental rights and data protection, and thus potentially entailing severe violations of fundamental rights. The two agencies are not the only actors faced with this challenge, which promises to test the effectiveness of crime prevention against legal considerations, prohibiting the processing of information when it has been obtained in violation of fundamental rights. In today's security reality, marked by regular terrorist attacks, some advocate for looser human rights standards, considering for instance that information preventing an attack shall be used, even though it may have been obtained through torture.[127]

In a European Union founded on the respect of the rule of law, such arguments are difficult to uphold. One can welcome in this regard the references in Europol's and Eurojust's regulations to the respect for data protection as a pre-requisite for the reception of personal data from third countries[128] and the transfer of personal data to third countries. In addition, the mechanisms set up to hold both agencies accountable before democratically elected bodies and before judges shall be essential in this regard, in order to ensure that no red lines are crossed. As the Europol Regulation entered into force just a few months ago, and the Eurojust regulation is still under negotiations, it is still too early to provide a definitive answer on whether they are effective and sufficient, and a close attention will need to be paid to their practical implementation.

[127] On this issue, see for instance Kim Lane Scheppele, "The Deep Dilemma of Evidence in the Global Anti-Terror Campaign" and Brice Dickson, "The Extra-Territorial Obligations of European States regarding Human Rights in the Context of Terrorism", in Federico Fabbrini and Vicky Jackson, Constitutionalism Across Borders in the Struggle against Terrorism, Elgar, 2016.

[128] Such reference is for the moment missing in the general Approach on a regulation for Eurojust, and such omission should be added, even though Eurojust shall receive information from judicial authorities. Judicial independence and the respect of procedural guarantees is indeed not always automatic.