

The Future of Europol's Parliamentary Oversight: A Great Leap Forward?

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Abstract

Secrecy profoundly challenges democratic oversight. Law enforcement cooperation, however, requires some space for discretion and confidentiality. This classical paradox within the context of the European Union is central in the current legislative debate on Europol's revision. The reform is initiated by the Commission's proposal in March 2013 and, for the first time in its history, the European Parliament has direct power to decide over the future of the intelligence agency.

This article argues that we should not overestimate European Parliament's post-Lisbon prerogative for oversight, and particularly its access to Europol Classified Information, due to the architecture of intelligence exchange. The foundational principle of intelligence cooperation confers absolute discretion to the originators of information and Europol's "secrets" in almost all cases originate from the member states or third parties.

The article offers a new legal and empirical perspective on the tensions of secrecy and oversight in the EU, and especially in the Area of Freedom Security and Justice. It discusses the internal information structure of Europol and suggests options for more plausible oversight arrangements.

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A. Introduction

Oversight of security agencies is traditionally a challenging task. Following the Lisbon Treaty innovations, the European Parliament for the first time since Europol's establishment has direct impact on how this crucial agency in law enforcement cooperation should function, in light of the ongoing ordinary legislative procedure for Europol Regulation.¹ Another significant novelty is the European Parliament's oversight prerogative, and hence privileged access to Europol Classified Information.² The latter is being flagged as a major achievement considering the recent fierce but lost struggle to gain access to Europol's classified inspection Report on implementation of the Terrorist Finance Tracking Programme Agreement with the US, which allows for financial messaging data to be transferred to the transatlantic partner.³

Yet, celebration is premature. This article argues that the *de facto* oversight position of the European Parliament regarding access to Europol Classified Information will not drastically change because of Europol's unique institutional and information design.

Europol's main structural characteristics are the dependency on the member states for information and lack of discretion regarding how such information should be later exchanged. Due to lack of trust, the member states keep absolute control over the information shared with Europol, mainly through the so-called principle of originator control.⁴ This principle is the core of the information architecture exchange not merely in Europol, but also in the wider system of European Union Classified Information, supported

¹ See Treaty on the Functioning of the European Union, Dec. 13, 2007, 2012 O.J. (C 326) 88(2) [hereinafter TFEU]; see also Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and Repealing Decisions 2009/371/JHA and 2005/681/JHA, Mar. 27, 2013, 2013 O.J. (COM 0173) [hereinafter Europol Regulation Proposal].

² See TFEU, *supra* note 1, art. 88(2); Europol Regulation Proposal, *supra* note 1, art. 54.

³ See Agreement Between the European Union and the United States of America on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purpose of the Terrorist Finance Tracking Program, Jan. 13, 2010, 2010 O.J. (L 195/5); see also Letter from Rob Wainwright, Europol Director, to Juan Fernando López Aguilar (May 24, 2012), <http://www.statewatch.org/news/2012/jun/eu-usa-tftp-europol-ep-letter.pdf> (denying access to the European Parliament's LIBE Committee); see generally Elaine Fahey, *Law and Governance as Checks and Balances in Transatlantic Security: Rights, Redress, and Remedies in EU-US Passenger Name Records and the Terrorist Finance Tracking Program*, YEARBOOK OF EUROPEAN LAW (2013).

⁴ See Council Decision 2009/968/JHA of 30 November 2009, Adopting the Rules on the Confidentiality of Europol Information, 2009 O.J. (L 332/17); Council Decision 2009/934/JHA of 30 November 2009, Adopting the Implementing Rules Governing Europol's Relations with Partners, Including the Exchange of Personal Data and Classified Information, 2009 O.J. (L 325/6); James I. Walsh, *Intelligence-Sharing in the European Union: Institutions Are Not Enough*, 44 J. COMMON MKT. STUD. 625 (2006).

strongly by the Council and accepted as an international standard.⁵ What is unique for Europol, however, is the high applicability of the rule because the vast majority of information is received from the member states.⁶

In the wider context of the EU, both the European Parliament and the Court of Justice of the European Union have faced the negative consequences of the originator rule, that is they have ended up empty-handed because the originator refused to allow access to their classified documents, regardless of the fact that EU executive institutions had the documents or they were significant for EU fundamental rights.⁷ Furthermore, it made no difference which route was followed to request the documents. Both the public disclosure regime under Regulation 1049/2001, otherwise known as the Transparency Regulation, as well as privileged access as part of oversight or investigative prerogatives are strictly bound by the originator's consent.⁸ Therefore, public and privileged access to classified information can be denied if the originator of the information refuses to give consent for disclosure.

The European Parliament should be aware of the implications for oversight arising from member states' information dominance in Europol and in that matrix the supremacy of the originator consent. Ignoring the internal functioning of Europol's classification system leads the European Parliament to have the impression that it could access Europol classified information when, in fact, originators of that information could block it. What remains for the European Parliament, beyond the principle of originator control, which is perhaps irrevocable, is to focus on certain feasible arrangements not merely to gain access, but also to give credibility to its new oversight tasks, the details of which should be central in the establishment of Working Arrangements with Europol in the near future.

This article will show that a neglected dimension, the classified information policy, is necessary in understanding the structure of Europol, while building upon the scholarly

⁵ See Council Decision 2013/488/EU of 23 September 2013 on the Security Rules for Protecting EU Classified Information, 2013 O.J. (L 274); see Alasdair Roberts, *OCRON Creep: Networked Governance, Information Sharing, and the Threat to Government Accountability*, 21 *GOV'T INFO. Q.* 249 (2003).

⁶ Interview with Europol Official in Charge of Classified Information, in The Hague, Netherlands (Mar. 19, 2012).

⁷ See Deirdre Curtin, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, 50 *COMMON MARKET L. REV.* 423 (2013); see also Christina Eckes, *Decision-Making in the Dark?—Autonomous EU Sanctions and National Classification*, in *LEGAL ASPECTS OF EU SANCTIONS* 177 (Iain Cameron ed., 2013).

⁸ See Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, 2001 O.J. (L 145/43); EUROPEAN PARLIAMENT, *RULES OF PROCEDURE Annex IX* (Feb. 2013); see generally PATRICK BIRKINSHAW, *FREEDOM OF INFORMATION: THE LAW, THE PRACTICE AND THE IDEAL* (2010).

discussion on the agency.⁹ Moreover, it provides some of the insider views taking into account the semi-structured interviews conducted with former and current practitioners in Europol, and also relevant institutions such as the Council.¹⁰

The article reflects on oversight challenges and prospects of the European Parliament. Significantly, suggestions are made to possibly improve oversight arrangements. The reform of Europol is a test case and could serve as an example for European Parliament's oversight functions in the Area of Freedom Security and Justice.

The article is structured as follows: Section B introduces Europol's organization and functions in view of classified information, paying special attention to its specificities. Section C discusses the significance of oversight and provides a broad view of both the background and future parliamentary oversight. In light of the above, Section D addresses the main challenges of oversight, and especially access to classified information. For sake of clarity and moderation, it also lays out possible objections that might be raised to the view presented here, followed by counterarguments. In addition, considerations for the future oversight arrangements are set forth. The very last section brings together the conclusions.

B. Europol

1. Information Broker in European Law Enforcement

European law enforcement depends on efficient cooperation. Europol, an agency of the European Union, plays a crucial role to that end, mostly through the analysis and exchange of confidential information related to various crimes. Since its creation, Europol has undergone many changes due to the shifting context of security threats and also the

⁹ See Florian Trauner, *The European Parliament and Agency Control in the Area of Freedom, Security and Justice*, 35 WEST EUR. POL. 784 (2012); see also Stephen Rozée, Christian Kaunert & Sarah Léonard, *Is Europol a Comprehensive Policing Actor?*, 14 PERSPECTIVES ON EUR. POL. & SOC'Y 372 (2013); Herwig C.H. Hofmann, *Constitutional Aspects of the Pluralisation of the EU Executive Through "Agencification,"* 37 EUR. L. REV. 419 (2012) (explaining Europol's position and significance in the broader context of EU executive power); Valsamis Mitsilegas, *The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice?*, 34 EUR. L. REV. 523, 553 (2009) (noting that Europol's "transparency and accountability leaves much to be desired").

¹⁰ In terms of methodology, the interviewees were part of semi-structured qualitative interviews with questions based on the applicable legal framework and their personal practice. For the broader European Union Classified Information system (EUCI), almost thirty high-level EU officials have been interviewed, of which five officials have direct connection with Europol, and others form part of the Council, the Commission, and the European External Action Service. The selection of the interviews is based on their professional link with the EUCI. The overall interviews are part of a broader research on the EUCI. Due to protection of privacy, the identity of the officials is not revealed publicly in the article and remains on file with the author.

development of the European Union legal order.¹¹ Most reforms have been of a reactive nature and aimed to make Europol fit for its purpose: To support and strengthen member states' efforts in preventing and combating security threats. Despite the lack of coercive powers, Europol is a significant actor in the fight against terrorism and other serious crimes, through its threat assessment and analytical reports.

Europol's establishment was a result of a political idea as opposed to a police enforcement need. Hence, national local authorities have generally been skeptical in acknowledging Europol's added value, resulting in a tendency not to share information with the agency.¹² This in turn has been particularly problematic because Europol has a specific information architecture, conditioned by member states' collaboration. On the one hand, member states are supposed to provide most of the sensitive information for Europol to analyze, while on the other, member states are supposed to receive the "end product": Reports about future crime trends. The duality creates a situation for Europol in which if the first part of the cycle is not successful it directly impacts the second part and decreases the chances of successful work.¹³ Some exchanges of information take place informally and bilaterally between liaison officers of member states without involving Europol at all in matters that fall within its competence.¹⁴ The UK House of Lords even noted that "up to 80% of bilateral engagement occurs this way" and "the main loser is Europol."¹⁵

¹¹ Europol's origin can be traced back to the so-called TREVI group of the 1970s, when the member states' interior ministries and security services aimed to co-ordinate national counter-terrorism efforts that had cross-border implications. See JOHN D. OCCHIPINTI, *THE POLITICS OF EU POLICE COOPERATION: TOWARDS A EUROPEAN FBI?* 32 (2003); Rachel Woodward, *Establishing Europol*, 1 EUR. J. ON CRIM. POL'Y & RESEARCH 7 (1994).

In the Treaties, Europol was first mentioned in Article K1 (9) of the EU Treaty as a "Union-wide system for exchanging police information." It was established in 1993 by a Ministerial Agreement in order to fight drug trafficking. This Agreement was later replaced by a Joint Action to establish the Europol Drug Unit with a mandate wider than only drug trafficking, as it also covered trafficking in radioactive and nuclear substances, clandestine immigration networks, and vehicle trafficking. The Joint Action was replaced by the 1995 Europol Convention, which entered into force in 1998. Since the Amsterdam Treaty, there were attempts to build a legal and institutional framework in order for Europol to be fully operational for fighting cross-border crime. See Council Decision 2009/371/JHA of 6 April 2009, *Establishing the European Police Office (Europol)*, May 15, 2009, 2009 O.J. (L 121/37); see also Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective*, 23 JUST. Q. 336 (2006).

¹² See HOUSE OF LORDS, *AFTER MADRID: THE EU'S RESPONSE TO TERRORISM* (2005), <http://www.publications.parliament.uk/pa/ld200405/ldselect/lddeucom/53/53.pdf>

¹³ See Madalina Busuioac & Martijn Groenleer, *Beyond Design—The Evolution of Europol and Eurojust* (Amsterdam Centre for European Law and Governance, Research Paper No. 2011-03, 2011); see also Alexandra De Moor & Gert Vermeulen, *The Europol Council Decision: Transforming Europol into an Agency of the EU*, 47 COMMON MKT. L. REV. 1089, 1099 (2010).

¹⁴ See HOUSE OF LORDS, *EUROPOL: COORDINATING THE FIGHT AGAINST SERIOUS AND ORGANIZED CRIME* (2008), <http://www.publications.parliament.uk/pa/ld200708/ldselect/lddeucom/183/183.pdf>.

¹⁵ See *id.*, para. 50.

The reluctance to share confidential information is also due to member states' fear that their information could be "leaked."¹⁶ Therefore, Europol has prioritized the protection of information and secure channels of communication in order to gain the trust of member states. Trust is central to ensuring reciprocity in sharing secrets.¹⁷ Practitioners at Europol also stress its importance:

We need to maintain high level of trust that we can actually protect their information If they just decide that [we] are *not trustworthy enough* then they can use the system of the liaison bureau to work again on a bilateral bases. We can just be out of the picture.¹⁸ [emphasis added].

More importantly, the exchange is only made possible by ensuring that member states maintain absolute control throughout the life of a classified document, through the so-called "principle of originator control." According to the originator control principle, the actor who provides information retains complete control over its dissemination by the actor who receives it. No rules oblige the originator to justify its decision to refuse a request for declassification or release of information.¹⁹ The originator rule is intertwined in the system of the EU. It is found in all rules regarding secrecy regulation since their very inception.²⁰ The current form of the originator rule in the EU was first stipulated in the Council's Decision on security of classified information in 2001.²¹ The Council insisted that the exchange of sensitive information would "work *only if* the originator of such

¹⁶ Interviews with Several Europol Officials, in The Hague, Netherlands (Mar. 29, 2012, Apr. 10, 2012 & Aug. 30, 2012). See also Björn Müller-Wille, *The Effect of International Terrorism on EU Intelligence Co-operation*, 46 J. COMMON MKT. STUD. 49, 57 (2008).

¹⁷ See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* (1982); Monica de Boer, Claudia Hillebrand & Andreas Nolkehillebrand, *Legitimacy Under Pressure: The European Web of Counter-Terrorism Networks*, 46 J. COMMON MKT. STUD. 101 (2008) (explaining intelligence cooperation).

¹⁸ See *supra* note 6.

¹⁹ See Alasdair Roberts, *OCRON Creep: Networked Governance, Information Sharing, and the Threat to Government Accountability*, 21 GOV'T INFO. Q. 249 (2003); EUROPOL MANAGEMENT BOARD, *DECISION LAYING DOWN THE RULES CONCERNING ACCESS TO EUROPOL DOCUMENTS* (2009), https://www.europol.europa.eu/sites/default/files/public_access_to_europol_documents.pdf

²⁰ Protection for classified documents in the EU has existed since 1958 in the form of Regulation No. 3, the scope of which was limited to defense information for measures exercised under the supervision of the Commission. A form of the originator rule is found in Article 6(1) where the "original security grading" of the information in question is retained. See Hans Ragnemalm, *The Community Courts and Openness within the European Union*, in *THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 19, 22 (1999).

²¹ See Council Decision 2001/264 of 19 March 2001 Adopting the Council's Security Regulations, 2001 O.J. (L 101/1).

information can be confident that no information put out by him will be disclosed against his will.”²² This reasoning was later reflected in the adoption of Regulation 1049/2001 on Public Access to Information, whereby pursuant to Article 9(3) the originator has a guaranteed discretion regarding classified information. The European Court of Justice has also interpreted originator consent regarding classified documents as an absolute condition for public disclosure.²³ The Court has been explicit that any action regarding such documents can take place “only with the consent of the originator.”²⁴

II. Europol's Specific Information Architecture

In Europol, the principle of originator control in terms of content and function is merely a reflection of the broader legal matrix of the EU. What is specific to Europol, is that the majority of information is classified at the national level. The drafting process of sensitive information or their assemblage starts at the national level.²⁵ The vast majority of Europol's secrets originate from the member states.²⁶ Europol is still merely a “clearing house for information” facilitating “different cultures of secrecy with some member states having a tendency to overclassify.”²⁷

The position of control from national authorities can be seen in two ways. First, when the member states provide already classified information to Europol, they are responsible for deciding if the information should have been classified, at which level, and for how long, and make these choices under their national regulations. The current Europol Confidentiality Decision does mention the requirement that Europol's operational

²² See Council Decision 2000/527 of 14 August 2000 Amending Decision 93/731 on Public Access to Council Documents, 2000 O.J. (L 212/9); Council Decision 2000/23 on the Improvement of Information on the Council's Legislative Activities and the Public Register of Council Documents, Dec. 6, 1999, 2000 O.J. (L 212/9) (emphasis added).

²³ See *Sweden v. Comm'n*, CJEU Case C-64/05, 2007 E.C.R. I-11389, para. 47 (explaining the difference between Art. 9 and Art. 4 Regulation 1049/01). The CJEU has had a few occasions to adjudicate upon issues of access to information regarding security and international relations and the role of the originator control. The court appears to be restrained in its review of the information not granting access to documents classified under the exception of security under Article 4(1a). See Päivi Leino-Sandberg, *Case C-64/05 P, Kingdom of Sweden v. Commission*, 45 COMMON MKT. L. REV. (2008); Dariusz Adamski, *Approximating a Workable Compromise on Access to Official Documents: The 2011 Developments in the European Courts*, 49 COMMON MKT. L. REV. 521 (2012).

²⁴ See *Jose Maria Sison v. Council*, CJEU Case C-266/05, 2007 E.C.R. I-1233, para. 95.

²⁵ See Hugo Brady, *Europol and the European Criminal Intelligence Model: A Non-State Response to Organized Crime*, 2 POLICING 103 (2008).

²⁶ See *supra* note 6. Also, interviews with Several Europol Officials, in The Hague, Netherlands (Mar. 29, 2012, Apr. 10, 2012 & Aug. 30, 2012) as well as the Council Officials, in Brussels, Belgium (9 Nov. 2012, 20 Nov. 2012).

²⁷ See Madalina Busuioc & Martijn Groenleer, *supra* note 13; Interview with Europol Official, in the Hague, Netherlands (30 Aug. 2012).

flexibility should be taken into account.²⁸ However, in practice that would mean that a national police officer must know what level of operational flexibility Europol needs for a certain investigation and take this into account before classifying information—despite the fact that recent empirical findings point out “most police officers still think and act nationally or locally.”²⁹

Second, in addition to information that originates from national authorities, when Europol uses information in the new context, that document receives a so-called “derivative classification,” that is, the newly created document is categorized at the same level of protection as the original document and the discretion for the newly created document remains at the national level because of the national information it consists. Thus, to a large extent, member states make the final decision as to whether the information should be classified and all the consequences that follow. Europol may advise a member state that a classification decision should be reconsidered, yet in practice this happens rarely due to Europol’s need for member states’ input.³⁰ The process is similar with regard to third parties. Europol has direct discretion only when information comes from open and private sources, as a result of a very recent trend of police cooperation with actors from the private sector.³¹ Practically, this category of information remains small.³²

In summary, the originator rule is a rigid principle recognized at the EU level. Most importantly, it forms the core of information architecture exchange in Europol. Due to Europol’s manner and purpose—which is to receive information from member states and third parties, assemble it, and provide a new overview in return—the scope of the originator rule encompasses the vast majority of classified information at Europol. In addition to national authorities providing Europol with information, they are also significant in that Europol’s work is carried out and implemented by assigned employees of member states and national authorities, respectively. Also, these activities are primarily regulated by national law.³³ In light of Europol’s function and information architecture, the following section looks at oversight of the agency, with the aim to discuss its future institutional design.

²⁸ See for example arts. 3, art. 10, and art. 11 of the Council Decision 2009/968/JHA of 30 November 2009, Adopting the Rules on the Confidentiality of Europol Information, 2009 O.J. (L 332/17).

²⁹ See Busuioac & Groenleer, *supra* note 13, at 16.

³⁰ See Interview with Europol Official in Charge of Classified Information, in The Hague, Netherlands (Mar. 19, 2012); Interview with Council Official, in Brussels, Belgium (Nov. 20, 2012).

³¹ See Nicholas Dorn, *The End of Organised Crime in the European Union*, 51 CRIME L. SOC. CHANGE 283, 283 (2009).

³² Interviews with Several Europol Officials, in The Hague, Netherlands (Mar. 29, 2012, Apr. 10, 2012 & Aug. 30, 2012).

³³ See Aidan Wills & Mathias Vermeulen, *Parliamentary Oversight of Security and Intelligence Agencies in the European Union*, EUROPEAN PARLIAMENT DIRECTORATE GENERAL FOR INTERNAL POLICIES 80 (2011).

C. Oversight in Europol

Scholars have mixed opinions about the present Europol oversight arrangements.³⁴ Some have pointed out that “Europol is perhaps the most controlled police agency in Europe” while others have warned that there is an underuse of the existing arrangements.³⁵ At the EU level, oversight arrangements so far have been mostly executive institution based. Institutions like the Council and the Commission are involved more directly. The Council lays down the strategic priorities for Europol whereas the Commission proposes the agency's annual budget and has voting rights within Europol's Management Board. The Europol Joint Supervisory Body, an independent body, ensures compliance with the data protection regime.

In general, parliamentary oversight at the EU level has been limited. However, in line with the Lisbon reforms, particularly Article 88(2) of the Treaty on the Functioning of the EU (TFEU), the position of Europol is set to change in two very significant regards. First, the Treaty stipulates a new legal basis for the agency pursuant to a Regulation adopted in an ordinary legislative procedure, placing for the first time the European Parliament on an equal footing with the Council, a formerly dominant actor in shaping Europol's structure and organization. Second, Article 88(2b) TFEU empowers the European Parliament, together with national Parliaments, to scrutinize Europol's activities.

I. Parliamentary Oversight

Parliamentary oversight of Europol has been fragmented between national and EU levels. Article 88 TFEU stipulates a change for this setting by laying out that future oversight must be conducted by the European Parliament in cooperation with national parliaments in order to ensure democratic legitimacy of the agency.

³⁴ Oversight generally refers to an actor scrutinizing an organization's activities with the aim of evaluating its compliance with particular criteria and on this basis, issuing recommendations or orders to the organization concerned. See *id.* at 41. Some authors define *control* in a similar manner. For example, Hood defines control as “the periodic checking and examination of the activities of public officials by external actors possessed of formal or constitutional authority to investigate, to grant quietus or to censure, and in some cases even to punish.” See Christopher Hood, *The Hidden Public Sector: The “Quangocratization” of the World*, in GUIDANCE, CONTROL AND EVALUATION IN THE PUBLIC SECTOR 766–67 (G. Majone & V. Ostrom eds., 1986). The aim and scope here is not to draw clear distinctions and discuss these terms, but it must be noted that they are not significantly different and mostly differ in terms of the level and importance of consequences as well as the rigidity of the evaluation process. One of the key differences is if they are focused retrospectively or through the decision-making process as well. See CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 10 (2002).

³⁵ See Cyrille Fijnaut, *Police Cooperation and the Area of Freedom, Security, and Justice*, in EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE 241, 255 (Neil Walker ed., 2004); EUROPEAN PARLIAMENT, THE EU INTERNAL SECURITY STRATEGY 17 (2011).

For national parliaments, the supervision has been mainly indirect and exercised through the control of their governmental representatives on Europol's Management Board.³⁶ National oversight is also narrower because the authority for scrutiny only extends within the state jurisdiction and is often limited due to lack of access to information originating from bodies other than the national contact point. This is an incomplete scrutiny considering that Europol assembles information from many different national intelligence and police agencies, which results in reports containing new and more informed perspectives of the investigations taking place.

The European Parliament's empowered position for oversight, together with national parliaments, hence has an added value because of its larger jurisdictional scope.³⁷ Moreover, as a representative of EU citizens and guarantor of their interests,³⁸ the European Parliament should be informed about one of the EU's most significant agencies and the work it does in preserving security. In addition, the increased parliamentary involvement is seen as a positive step not merely for Europol as such, but also more broadly as contributing to the democratic legitimacy of the EU.³⁹ Finally, Europol does not have coercive powers, hence there is no direct risk of infringement of human rights by investigations or arrests. However, Europol might be granted authority to participate in joint investigations teams in the future.⁴⁰ In this regard, parliamentary scrutiny is necessary to ensure compliance with and awareness of human rights as well as public debates regarding these issues.

The relationship between the European Parliament and Europol has evolved constantly. The following sub-section takes a look back at the main stages of this relationship, which gives the background of the changes to be introduced by the current legislative debate on Europol Regulation.

II. The Evolving Role of the European Parliament

Since the initial establishment of Europol by the Europol Convention, under which the European Parliament was limited to receiving an annual report, the role European Parliament has evolved, allowing it greater involvement and extending democratic oversight. The relation between the actors changed as a result of the Council's Europol

³⁶ See European Commission, *The Commission Paves the Way for Increased Transparency and Parliamentary Scrutiny of Europol* (Dec. 17, 2010), http://europa.eu/rapid/press-release_IP-10-1738_en.htm.

³⁷ See Wills & Vermeulen, *supra* note 33, at 126.

³⁸ See TFEU, *supra* note 1, art. 10(2).

³⁹ See European Commission, *supra* note 36; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON THE DEMOCRATIC OVERSIGHT OF THE SECURITY SERVICES (2007) [hereinafter Venice Commission].

⁴⁰ See Europol Regulation Proposal, *supra* note 1, art. 5.

Decision in 2009, which incorporated Europol as an EU agency within the EU legal system, and the enhanced position of the European Parliament in the broader institutional make-up of the EU. More specifically, three stages can be identified in the European Parliament's relationship with Europol.

In the early stage, between 1995 and 2009, the European Parliament was supposed to receive Special Reports about the work of Europol through the Council Presidency. The Special Report was subject to "obligations of discretion and confidentiality," which implies that the European Parliament did not receive classified information but was informed about the general work.⁴¹ During this stage, the role of national parliaments was more prominent.

The Council's Europol Decision in 2009 marks the second stage in the development of Europol's relationship with the European Parliament. Adopted only a few days before the Lisbon Treaty, which stipulates a clear role of scrutiny for the European Parliament, came into force, the Decision was controversial and highly disputed because of the limited oversight function it afforded the European Parliament.⁴² According to this legal framework, there are a few mechanisms through which the European Parliament plays an oversight role. Formal and direct oversight tools include the adoption of the budget and the obligation of the Europol Director to appear before the European Parliament at its request.⁴³ A less direct manner of communication is the European Parliament's prerogative to raise questions to the Commission regarding Europol. In practice, informal visits and exchanges also take place.⁴⁴

The third stage is marked by a legislative proposal for a Europol Regulation, submitted by the Commission in mid-March 2013, which aims to make Europol "more accountable, effective, and efficient."⁴⁵ The proposal was followed by a debate in the Council while the

⁴¹ See The Europol Convention, Jul. 26 1995, art. 34.

⁴² See EUROPEAN PARLIAMENT, DRAFT RESOLUTION ON THE DRAFT COUNCIL DECISION ADOPTING THE IMPLEMENTING RULES GOVERNING EUROPOL'S RELATIONS WITH PARTNERS, INCLUDING THE EXCHANGE OF PERSONAL DATA AND CLASSIFIED INFORMATION (2009).

⁴³ See Council Decision 2009/371/JHA of 6 April 2009, Establishing Europol, art. 48; see also TFEU, *supra* note 1, arts. 310–24 (explaining European Parliament's budgetary authority).

⁴⁴ See Interviews with Several Europol Officials, in The Hague, Netherlands (Mar. 19, 2012, Apr. 10, 2012 & Aug. 30, 2012); Interview with Commission Official in Charge of Classified Information, in Brussels, Belgium (Mar. 22, 2013).

⁴⁵ Martin Banks, *Commission Calls for More Accountability of EU Police Agency*, THE PARLIAMENT (May 8, 2013), <http://www.theparliament.com/latest-news/article/newsarticle/commission-calls-for-more-accountability-of-eu-police-agency/>.

first plenary reading for the European Parliament took place in February 2014.⁴⁶ On the basis of Article 88(2) TFEU, Europol's revision should lead to a new stage in the involvement of the European Parliament. Terminology in this regard is also revealing, because both primary law and the proposed Europol Regulation by the Commission refer to scrutiny, which implies a more direct and critical inquiry as well as possibilities for consequences.⁴⁷ The role of the European Parliament is enhanced and encompasses different stages of Europol's work, especially in comparison to the previous stages. Oversight revolves around receiving certain information, some of which will also be classified. In this respect, for the first time since the creation of Europol, it is expected that the European Parliament would have privileged access to Europol classified information.

III. Oversight and Europol's Revision

The Commission's legislative proposal regarding Europol's revision is not specific about the oversight body and leaves an open door for future concrete arrangements. The proposal to a large extent is merely a repetition of the wording of Article 88 TFEU. The European Parliament's intention is to form a so-called Parliamentary Scrutiny Unit. This Scrutiny Unit is supposed to be comprised of both European and national members of parliament.⁴⁸ The Scrutiny Unit is proposed as a small and specialized structure of parliamentary scrutiny. The text is clear that there should be one representative from each member state and comprising the full members of the competent committee of the European Parliament. Reactions from national parliaments about the joint parliamentary scrutiny thus far have shown an interest in making the arrangements in accordance with Article 9 of Protocol 2 on the role on national parliaments.⁴⁹ The aim is not to create duplication of oversight at the EU and national level but to ensure cooperation. This cooperation would only add value and would not prejudice the national oversight mechanisms as stipulated by national constitutional arrangements.

The new oversight role of the European Parliament is multifaceted and highly dependent on receiving information, either in the form of reports or through direct questions and statements. First, the European Parliament is foreseen as having consultative prerogatives. For example, Article 15(4) of the proposed regulation stipulates that the multi-annual work

⁴⁶ See European Parliament, *Procedure File 2013/0091(COD)*, [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM\(2013\)0173](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM(2013)0173).

⁴⁷ For an overview of scrutiny, terminology and background, see LUCINDA MAER & MARK SANDFORD, *THE DEVELOPMENT OF SCRUTINY IN THE UK: A REVIEW OF PROCEDURES AND PRACTICE* (2004).

⁴⁸ See *European Parliament Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and Repealing Decisions 2009/371/JHA and 2005/681/JHA*, COM (2013) 0173 (Feb. 7, 2014) [hereinafter *European Parliament Draft Report*].

⁴⁹ EUROPEAN UNION COMMITTEE, *THE UK OPT-IN TO THE EUROPOL REGULATION*, 2013-2 H.L. 16 (U.K.).

program is to be adopted after consultation with the Parliamentary Scrutiny Unit. Second, obligations are foreseen to report directly to the Scrutiny Unit and share reports produced by other supervisory actors, according to Article 19 and Article 46 respectively. Third, the European Parliament will be directly involved in the Executive Director's appointment procedure, because it foresees an obligation of the executive director to appear before the Parliamentary Scrutiny Unit in order to provide a statement and answer the questions of MEPs. In this respect, the amendments of the European Parliament differ from the Commission's proposal because the proposed Regulation initially foresees the questioning session as a possibility but not a binding obligation for the Executive Director.⁵⁰ The European Parliament has proposed the same procedure in case of an extension of term in office. As to possible removal from office, the European Parliament here too seeks to be directly involved by requesting an explanation if such action is to take place. However, the formulations of the proposal and the amendments do not clarify from whom the Scrutiny Unit should receive the explanation. Fourth, and a crucial aspect of oversight, the European Parliament is involved in the approval of Europol's budget and is supposed to receive reports regarding the estimate of Europol's revenue and expenditure. In addition to such reports being sent to the Parliamentary Scrutiny Body, the national parliaments will also receive them directly. This procedure would result in a large number of representatives being involved in the financial scrutiny. Finally, the European Parliament will take part in the overall evaluation of Europol as envisaged in Article 70. Every five years an external review by the Commission is supposed to take place and thereafter report to the European Parliament.

In other words, the role of the European Parliament, through the Parliamentary Scrutiny Unit, is structured around appointment procedures, Europol's finances, and Europol's substantive work exemplified by the European Parliament being either consulted or receiving reports.⁵¹ To fulfill its oversight role overall, the European Parliament will receive a variety of information: Threat assessments, strategic analysis, general situation reports, results of studies, and evaluations commissioned by Europol. As was mentioned, the European Parliament for the first time is seen as having privileged access to classified information. Privileged access does not, however, erode all questions regarding effective oversight. Particularly, questions arise about the practice of the new right. Although the European Parliament will have a clear mandate to access Europol classified information, the right is conditioned by "obligations of discretion and confidentiality," i.e. the principle

⁵⁰ Compare Europol Regulation Proposal, *supra* note 1, art. 56, with European Parliament Draft Report, *supra* note 48.

⁵¹ Regarding the last point, curiously, the amendments of the European Parliament exclude the possibility of Europol to draw reports on the quantity and quality of information shared by the member states on the basis that such reports would mean an imposition on the national authorities. Such reports could indeed be seen from that perspective, but the intention rather is to create a higher awareness and more cooperative culture between the national authorities and Europol, which in the past has continually been identified as an issue.

of originator control.⁵² Therefore, situations of tension, considering the originator principle discussed above, between privileged access to classified information and the need for confidentiality will be unavoidable.

D. Institutional Design for the Future

I. The Main Challenge Ahead: Points of Tension

A key provision on parliamentary oversight in the proposed Europol Regulation is Article 53, which also reveals two possible points of tension between oversight and originator control: Appearance before the Scrutiny Unit and transmission of information.

The wording of the proposed provision as used in the current legislative documents—“obligation of discretion and confidentiality”—differs from the more common and direct usage—“subject to originator consent.” The former resembles the text of the Europol Convention, while the latter is mostly referred to in European Union security rules on classified information and international confidentiality agreements concluded specifically for classified information exchange. Also, Article 53 of the proposed Europol Regulation should be read in conjunction with Article 54 and 69 of the same legislative proposal. These articles together make it clear that the access regime will take place within the context of the broader arrangements of classified information exchange in the EU. For the latter, the rules as set by the Council in Decision 2013/488/EU represent the minimum standards and common denominator, which encompass principles of originator control and other principles for security of information.⁵³

1. Obligation to Appear Before the Parliamentary Scrutiny Unit

According to the proposed Regulation and the foreseen amendments, the Executive Director will have an obligation to appear before the Parliamentary Scrutiny Unit at its request for questions regarding Europol’s work. As such, this mechanism of scrutiny is not new, current practice also includes visits of the Europol Director to the LIBE Committee. In line with the current rules, the Europol Director has the discretion or at times is under an obligation not to answer questions that would possibly reveal classified information.⁵⁴ This caveat is also included in the current legislative proposal.⁵⁵ Consequently, despite having privileged access, the Executive Director will not be obliged to provide answers revealing

⁵² Europol Regulation Proposal, *supra* note 1, arts. 53, 54.

⁵³ Council Decision 2013/488/EU on the Security Rules for Protecting EU Classified Information, Sept. 23, 2013, 2013 O.J. (L 274).

⁵⁴ See Wills & Vermeulen, *supra* note 33, at 180.

⁵⁵ See Europol Regulation Proposal, *supra* note 1, art. 53(1).

confidential information. Therefore, privileged access as such would not change the factual balance and the possibility of discussing classified information in meetings between the Parliamentary Scrutiny Unit and the Executive Director.

2. *Obligation to Transmit Information*

All scrutiny mechanisms depend on the transmission of information, be that finance reports or strategic reports about crime prevention. Particularly, it is important for the Parliamentary Scrutiny Unit to receive information that enables it to be familiar with the long-term goals and objectives of the agency in order to contribute to the priorities of the agency with a clear idea of citizens' interests in mind. The proposed regulation clarifies the significance of such an approach by affirming that, in addition to obligations of information and consultations, the agency must also submit the following: Threat assessment, strategic analysis, and general situation reports.⁵⁶ Information presented in the form of reports provides a crucial reflection of what Europol does. Thus far, these reports have been transmitted to the European Parliament in the public version. Namely, Europol formulates reports containing threat assessment or strategic analysis in two versions. The public version contains general information and provides a broad picture of security developments. As such, it is intended for familiarizing the general public with what Europol does. The classified version of the report, which is a detailed analysis, is merely shared within the executive community, i.e. the intelligence and security actors.

This situation is supposed to be improved in the future because the legislative proposal explicitly foresees such reports as part of the obligation to inform the European Parliament. The question still remains, however, to what extent this practice would differ from the current one of having public access by the European Parliament, considering that the confidentiality and discretion prerequisite is included. Should such a provision be adopted, it might be expected that a more detailed version of the reports could be shared with the European Parliament than in the past, but that information that originators would not want to be shared will remain inaccessible. If the Parliamentary Scrutiny Unit were to have more questions regarding such reports or would like to clarify the information missing, it could call the Executive Director. In this case, the Unit could also use the mechanism foreseen in Article 54 in a similar fashion. However, these two mechanisms will not supplement each other by filling the missing gaps because classified information that originators do not give consent to be revealed will remain undisclosed in both cases.

Finally, these obligations for information do not mention operational information that Europol uses. Operational information, relating specifically to investigations, is excluded from the scope of access. It remains unclear to what extent the right of the Parliamentary Scrutiny Unit will include information that relates to Europol's possible future participation

⁵⁶ Europol Regulation Proposal, *supra* note 1, art. 53(3a).

in joint investigation teams.⁵⁷ Such information could be categorized as operational, but the proposed Regulation is silent on the matter.

II. Much Ado About Nothing?

Privileged access to classified information is in tension with principles of confidentiality and discretion. The latter is very important for actors in intelligence cooperation to be assured that they retain control over highly sensitive information; the former is an essential condition for parliamentary oversight. Nevertheless, the question remains: To what extent is it a serious tension? In other words, is the issue overstated?

Some potential objections could be raised in order to show the tension is not as problematic as it is claimed to be here. The principle of confidentiality could be considered an exception rather than the rule regarding how the exchange should take place. In this respect, and drawing an analogy with the access to public information regime under Regulation 1049/2001, the application of the exception should be as narrow as possible and enable the European Parliament to exercise privileged access to Europol classified information.⁵⁸ However, some reservations persist. First, the exercise of the originator principle is predominant because, as was elaborated above, the number of documents received from member states or third parties constitute the vast majority of documents received.⁵⁹ Even if the principle of confidentiality is interpreted as narrowly as possible and regarded as an exception, the results would not differ in practice due to the high number of documents to which the originator rule applies. Second the originator principle enjoys support in the classification system practice but also in the interpretation of the Court. Despite being seen as an exception to the general access regime, the rule remains rigid in its application.

Another objection could be that, in line with the principle of sincere cooperation, the member states will be bound to show a greater willingness to cooperate.⁶⁰ Again, however, two reservations arise. First, the principle of sincere cooperation in relation to access to classified information has not been interpreted in a manner that would oblige the member states to share their classified documents. Perhaps due to the area of security, which after

⁵⁷ To clarify, despite possible participation in joint investigation teams, Europol will not apply coercive measures; see TFEU, *supra* note 1, art. 88(3).

⁵⁸ See *Svenska Journalist förbundet v. Council*, CJEU Case T-174/95, 1998 ECR II-2289.

⁵⁹ Either in direct form as an original document that is used by Europol, or the so-called derivative documents that are produced by Europol, but on the basis of member-state or third-party information. See *supra* Part B.II.

⁶⁰ Treaty on European Union, 1992 O.J. (C191) 1, art. 4(3) [hereinafter TEU]. *But see* TFEU, *supra* note 1, art. 346(1a).

all does remain a "sole responsibility of each Member State,"⁶¹ sincere cooperation has not been sufficient in the past to allow access for scrutiny purposes. This argument is illustrated in the case of *France v. OMPI*, regarding sanctions (asset freezing) as counter-terrorism measures set out in the Common Position 2001/931/CFSC.⁶² Albeit not related to Europol directly, the case does concern the confidentiality principle in the field of security exercised by a member state. Specifically, the Council was unable to produce the requested documents to the Court "since these were classified as confidential by the French Republic and could not be made available."⁶³ The Court itself was not granted access due to the lack of consent from the originator member state. The second reservation, which partly gives an insight into the reason why member states are reluctant to share their classified information, has to do with the subjective perception of the risk that parliamentarians might leak the information. Due to this fear, the member states and others partaking in the intelligence exchange would not voluntarily open their secrets to a scrutiny agent. Examples of parliamentary leaks of classified information in the EU are hard to find, and the leaks that have taken place were actually caused by members of the intelligence network.⁶⁴ Moreover, research into the functioning of parliamentary intelligence oversight committees in other countries has indicated that parliamentarians rarely leak classified information.⁶⁵ Nevertheless, fears persist that leaks would be unavoidable because "politicians get involved with their own agenda, [and] they do not always need to protect the classified information of another state."⁶⁶ Europol practitioners show concern that:

The member states [will] actually [be] asking if Europol starts releasing information to the European Parliament will it happen maybe at some stage that someone at the European Parliament will come up with classified information that we classified in the first

⁶¹ TEU, *supra* note 60, art. 4(2).

⁶² Common Position 2001/931/CFSC, Dec. 28, 2001, 2001 O.J. (L 344), 93.

⁶³ *France v. People's Mojahedin Organization of Iran*, CJEU Case C-27/09 P, 2011 ECR 00000, para. 42. For more in-depth discussion, see sources cited *supra* note 8.

⁶⁴ See Andrew Rettman, *Intelligence Chief: EU Capital is "Spy Capital,"* EUOBSERVER (Sept. 17, 2012), <http://euobserver.com/secret-ue/117553>.

⁶⁵ Hans Born & Loch K. Johnson, *Balancing Operational Efficiency and Democratic Legitimacy*, in WHO'S WATCHING THE SPIES? ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY 225–39 (Hans Born & Ian Leigh eds., 2005); see also HANS BORN & IAN LEIGH, *MAKING INTELLIGENCE ACCOUNTABLE: LEGAL STANDARDS AND BEST PRACTICE FOR OVERSIGHT OF INTELLIGENCE AGENCIES* (2005).

⁶⁶ Interviews with Europol Officials at Europol Headquarters (Mar. 19, 2012).

place and will they start showing it to the public or the internet? That can easily happen.⁶⁷

It remains to be seen if these possible objections would indeed be taken into account in practice. It might be the case that the originator principle would be interpreted very narrowly and that member states would be under the duty of sincere cooperation or willing to share classified information. Nevertheless, other concrete steps could be considered that would address the tension more directly and potentially expunge some of the current fears and the mistrust between the actors. Besides other questions they raise or issues regarding their feasibility, these steps could offer the potential to build a better working relation between the actors involved. The relation between the actors, those who have the information and those who want to know, is a critical element for the exchange of information.⁶⁸

III. Future Working Arrangements on Oversight

The clash between requirements of security and confidentiality on the one hand, and the need for democratic oversight on the other, is traditionally an issue in the area of law enforcement.⁶⁹ Although the clash itself is problematic, and structurally possibly inevitable, certain arrangements could be considered feasible. The question is whether these arrangements would result in a “quick fix” that does not address broad and long-term concerns. The answer is not straightforward, but the claim can be made that the underlying assumption of the arrangements is to create trust between an enlarged circle of secret keepers, which is essential for the sharing of classified information.⁷⁰ The aim should be to create a framework for access to classified information that enables consistency, predictability, and trust between the actors to attain constructive oversight relations. The framework might not specifically address the limitations imposed by the principle of originator control, but extends beyond such margins and, crucially, depends on steps the oversight body can take. Subsequent to an adoption of a Europol Regulation in the future, it is foreseen that the European Parliament together with Europol will establish working

⁶⁷ *Id.* Similar views were expressed in interviews with several Europol officials done at Europol Headquarters on March 19, 2012, April 10, 2012, and August 30, 2012, as well as interviews with Council officials in Brussels on October 22, 2012.

⁶⁸ Eva Horn, *Logics of Political Secrecy*, 28 *THEORY, CULTURE & SOC'Y* 103, 109 (2011).

⁶⁹ See also INTERNATIONAL INTELLIGENCE COOPERATION AND ACCOUNTABILITY (Hans Born, Ian Leigh & Aidan Wills eds., 2011); see also Anne Peters, *Transparency, Secrecy, and Security*, in *RULE OF LAW, FREEDOM AND SECURITY IN EUROPE* 183 (Julia Iliopoulos-Strangas, Oliver Diggelmann & Hartmut Bauer eds., 2010).

⁷⁰ See Marieke de Goede & Mara Wesseling, *Clashing Cultures of Secrecy: Tracking Terrorism Financing and the Paradox of Publicity*, *CULTURAL POL. (SPECIAL ISSUE)* (forthcoming 2014).

arrangements on access to classified information.⁷¹ In this respect, the following theoretical and practical issues could be considered.

1. Systematic and Timely Access

In principle, oversight relies on systematic and timely accessibility of information.⁷² Ideally, accessibility should not be fully dependent on the discretion of the scrutinized agent, if the oversight body is to be able to ensure the prior requirement of systematic and timely access.⁷³ Systematic accessibility means that information should be shared regularly and not in a selective manner.⁷⁴ Such an obligation implies not merely a responsibility on the scrutinized actor to grant access, but importantly, it requires that the oversight body engage in an active and direct manner at its own initiative. In other words, such model of oversight coined as "police-patrol" oversight, implies that an agency's activities are checked regularly "by any of a number of means."⁷⁵ The second crucial question is whether the information is shared at the time the oversight body requests it or while the action is ongoing. The temporal factor becomes difficult to fulfill for policies or decisions whose very revelation or existence might be harmful. In such situations *ex post* oversight is exercised, although oversight bodies might remain doubtful whether the level of secrecy is indeed necessary for security reasons as it is claimed. Such situations are difficult to assess externally by the oversight body considering that the choice is made by the agency under scrutiny. Consequently, mechanisms should be considered to ensure that there is some level of limited discretion and that access would not be denied or manipulated.

2. Prospects in Practice

One of the key elements of oversight, as was mentioned, is the temporal dimension—having the right information at the right time. Often the information may be accessed, but at a later point in time. Consequently, the European Parliament may consider an approach

⁷¹ Europol Regulation Proposal, *supra* note 1, art. 69.

⁷² For systematic information, see Stephen Schulhofer, *Oversight of National Security Secrecy in the United States, in* SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 22 (David Cole et al. eds., 2013); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049 (2008). For the notion of timely access, see Dennis Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181 (1999).

⁷³ When the discretionary element is not eliminated, there could be fear of possible abuse or manipulation. See Rahul Sagar, *Who Holds the Balance?: A Missing Detail in the Debate over Balancing Security and Liberty* 41(2) POLITY 166, 179 (2009).

⁷⁴ Kathleen Clark, *Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power* (Wash. U. in St. Louis Legal Stud. Res. Paper No. 12-07-02, 2012).

⁷⁵ Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28(1) AM. J. POL. SCIENCE 165 (1984).

of complementary steps. First, the Scrutiny Unit should have the option of *ex post* review of the information. In this manner, while the Unit will perhaps not be able to have a fully informed debate at the very time of the possible operations or activities of Europol, the Unit could nevertheless benefit from having seen the information after the event and form future questions to the Executive Director. In addition, *ex post* review could lead to invoking the originator rule not merely out of subjective—non-security related—issues, considering that the Scrutiny Unit would actually receive the document at a later stage. The key question here is at what point that information could be made available and to what extent should the good faith of the actors involved be assumed so as not to create a possibility for obstruction.

Moreover, *ex post* review to a large extent does not change the equilibrium of who holds the discretion—it would still be the originator that would actually decide to grant access. To possibly remedy such limitation, a complementary mechanism would be a direct exchange between the Scrutiny Unit and national parliaments. Through coordination with national parliaments, the Scrutiny Unit could be more informed. This is not to imply that the Scrutiny Unit should surpass the originator consent principle by directly addressing national parliaments, which could actually lead to mistrust and not a cooperative relation between the Scrutiny Unit and the originator, which is the main aim. However, it would make it possible for the national members of the Scrutiny Unit to consult with their colleagues at the national level and provide a more informed input at the EU level. The caveat is that not all national parliaments have the same relationship with their national executive authorities. In some EU member states, the national parliaments have prerogative to receive all information, regardless of the originator principle.⁷⁶ Such national parliaments hence have the ability to be fully informed and must receive the information they request from national authorities.

Another aspect is the organization of access. Classified information is often not shared due to the perceived lack of a secure environment whereby the owners of the information would actually feel confident sharing.⁷⁷ For example, the Council for a long time claimed to be unable to share information with the European Parliament due to the latter's lack of appropriate security arrangements as judged by the Council.⁷⁸ Without disregarding less

⁷⁶ See Wills & Vermeulen, *supra* note 33 **Error! Bookmark not defined.**

⁷⁷ It is not ignored that the different—possibly divergent—interests involved in knowing the information between actors that might have opposed interests play a significant role in what information is or is not shared. But practitioners do admit that the security arrangements for the actor with whom they would share information matters to a very large extent.

⁷⁸ See David Galloway, *Classifying Secrets in the EU* (paper presented at Transparency and Access to the Records and Archives of the EU Institutions Seminar, the European University Institute, Jan. 25, 2013); see also Guri Rosén, *Can You Keep a Secret? How the European Parliament Got Access to Sensitive Documents in the Area of Security and Defense* (RECON Online Working Paper No. 2011/22).

transparent motives for not sharing, the security arrangements of the actor who aims to gain access to classified information are indeed highly salient. For instance, in international confidentiality agreements, the parties make sure that they afford equal and similar protection to secret information and would not conclude an agreement if such protection did not exist despite the clear will to cooperate.⁷⁹ Consequently, the European Parliament could consider three issues for its future working arrangements. First, the European Parliament must ensure that sufficient and equivalent protection of information can be given to classified information. In this regard, the European Parliament can actually use the cooperation with Europol to its advantage to learn from a more established practice on issues of information security both for technological and physical security measures. It must be noted that the European Parliament has made a progress in this regard and has both the legal framework and the practical arrangements in place for receiving classified information.⁸⁰ Second, the practice of scrutiny will not merely depend on the cooperation by the scrutinized actor, but it will also be highly dependent on the level of continuous interest of the parliamentarians in familiarizing themselves with the work of Europol in order to be able to establish the necessary expertise to provide scrutiny. Hence, it is important that oversight does not become a tool utilized haphazardly or only focused on more extreme cases of abuse of power or other infringements of law.⁸¹ The continuous interest and knowledge about the work of the agency is supposed to circumvent the issue of "amateur investigator."⁸² Specifically, the possibility for the security agency to withhold or conceal information from an amateur investigator means that parliamentary questions or *ad hoc* parliamentary commissions of inquiry are usually only of limited efficacy in this field. Third, and very much connected to the previous point, is the question of resources. This is indeed one of the most challenging aspects of the role of oversight, because most parliaments committees have limited resources—such as time and staff—with which to conduct systematic and thorough oversight. However, considering the relevance of the issues in question, matters of security and citizens' liberties, the organization of oversight merits thoughtful deliberation by the European Parliament in its future working arrangements.

⁷⁹ Such agreements in regard to Europol can be seen in the case with the western Balkans, whereby Europol made sure in advance that the countries would correspond to security arrangements. Similar action took place with countries that aimed to join NATO and be part of its classified information network. For the latter, see ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006).

⁸⁰ See Decision of the Bureau of the European Parliament of 15 April 2013, 2014 O.J. (C 96) 1.

⁸¹ See McCubbins & Schwartz, *supra* note 75; see also Gareth Griffith, *Parliament and Accountability: The Role of Parliamentary Oversight Committees* (New Parliamentary Library Research Service, Briefing Paper No. 12/05, 2005).

⁸² See Venice Commission, *supra* note 39, at 6.

E. Conclusions

Europol plays an important security role in the European Union as an agency in law enforcement cooperation, supporting more than ten thousand cases per year.⁸³ Currently, it is undergoing a legal revision, and for the first time, this is being done not through executive decisions, but through European legislative process, whereby the European Parliament has direct influence over the reform of this relevant security agency. Moreover, the reform is an opportunity for the European Parliament to extend its oversight prerogative, in accordance with primary law. In respect to the latter, the European Parliament faces one of the key challenges: Arranging access to Europol classified information in a manner that ensures effective oversight.

Technical at first sight, rules on classified information actually mirror the structure of power and control within an organization. In Europol's case, this article argues that to a large extent the agency relies on information provided by national authorities. Moreover, such reliance is tied to a rigid European Union principle—the originator control. The principle of originator control is both necessary and antithetical: Necessary for ensuring information exchange in the intelligence community; antithetical to parliamentary access to classified information.⁸⁴ At the core, this principle reveals the lack of trust of member states towards Europol and their clear intention to keep utmost control of information. In this respect, this article revealed two implications: First, Europol is not autonomous in its information architecture. Second, the originator control principle significantly limits access to classified information both because of its numerical application as well as its rigid legal interpretation.

Based on the current EU legal matrix and practice, this article adopts the position that the principle is here to stay and might not be negotiable during legislative discussions on Europol's revision, as can be noticed in the current legislative documents. This article aimed to raise awareness that, despite the European Parliament's privileged access, *de facto* access to classified information could be limited, and consequently, the position set out in the legislative proposal would not be a drastic change from the current practice. In other words, the discretion of the originator could prove decisive, which in turn implies a case-by-case response to parliamentary access requests. Instead of defeatist claims on future oversight arrangements, however, the secondary purpose was to elaborate other means and considerations that the European Parliament could take into account in order to organize oversight towards more systematic and timely access. Importantly, most of the suggestions are dependent on the oversight actor itself and in this respect could make oversight more effective despite external challenges. An active and regular use of

⁸³ EUROPOL REVIEW, EUROPEAN POLICE OFFICE (2013).

⁸⁴ For issues of secrecy more generally, see Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906 (1990).

oversight, combined with appropriate security arrangements for classified information, could make the European Parliament a credible actor both toward the citizens as protector of their rights, but also towards the intelligence community. For the latter, it shows that the parliamentarians are interested in effective oversight and security of information.

Overall, in comparison to the European Parliament's past position towards Europol, the current proposal for privileged access to Europol Classified Information, albeit conditioned by the principle of originator control, gives the appearance of being a great success. Seen from the perspective of the internal functioning of Europol, however, triumph seems modest if not followed by more serious reflections on the modality of oversight.