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Eurojust: New Perspectives in Judicial Cooperation
Budapest, 15-17 May 2011
Report**

1. Introduction

The strategic seminar “Eurojust: new perspectives in judicial cooperation” organised by Eurojust and the Office of the Prosecutor General of Hungary, in cooperation with the Hungarian Presidency of the European Union, was held in Budapest from 15 to 17 May 2011. About 130 practitioners and representatives from Member States and EU institutions attended the seminar. This report aims to reflect the opinions expressed by them.

The goal of the strategic seminar was to consider the future of Eurojust in light of Article 85 of the Treaty on the Functioning of the European Union (TFEU), with a view to improving judicial coordination and cooperation in criminal matters. The aim was to identify ideas and input for consideration in future regulations for Eurojust.

A critical look at Eurojust's operational experience and its current tasks was the basis of the seminar's approach. A practical case study approach was used. A further focus of the seminar was on strengthening links between Eurojust and its EU partners, such as Europol and OLAF, with a view to ensuring a consistent and integrated approach within the common European area of Freedom, Security and Justice.

The opening plenary session was followed by six workshops devoted to specific topics arising from Article 85. These included the initiation of investigations, resolution of conflicts of jurisdiction, coordination of investigations and prosecutions, operational cooperation with Europol and OLAF, and the evaluation of Eurojust. The workshop outcomes were presented in the final plenary session, together with the general conclusions of the seminar.

The Budapest seminar built on the Eurojust strategic seminar held in Bruges in September 2010 in the framework of the Belgian Presidency of the EU¹. Common to both was an emphasis on an evidence-based approach to Eurojust's development.

2. Opening session

Chair: Ms Ilona Lévai (National Member for Hungary, Eurojust)

Mr Tibor Navracsics, Deputy Prime Minister and Minister for Public Administration and Justice of Hungary, underlined the importance of increasing the presence of the EU in international judicial cooperation and the need for national authorities to cooperate in the fight against organised crime. To this aim, Article 85 TFEU gives the possibility to Eurojust to go beyond its current role of "mediator". A common judicial and law enforcement culture, including common shared values guiding the daily application of law and common minimum standards, should be developed. Judicial training for professionals is an essential factor to improve communication skills and overcome the obstacles to effective judicial cooperation due to the diversity of the legal systems.

¹ "Eurojust and the Lisbon Treaty: towards more effective action" – Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 September 2010), doc. 17625/10 REV 1 CATS 105 EUROJUST 147.

The Hungarian Presidency thinks that existing structures of judicial training can be supplemented by regional cooperation. It was in this spirit that five countries of Central Europe signed a Memorandum of Cooperation in the area of judicial training on 5 May 2011, in Veszprém, to enhance cooperation between their judicial training bodies. Fitting into the European framework of judicial training, such regional cooperation could take into consideration existing regional specificities.

Mr Aled Williams, President of Eurojust and National Member for the United Kingdom, emphasized the operational nature of Eurojust and its increasing caseload as the way to approach Article 85 TFEU. Judicial cooperation in criminal matters could best improve through an evidence-based approach: consideration of what did, and what did not, work at EU level would assist legislators in reaching reasoned and informed decisions. In this context, lessons could be drawn from the operational experience of Eurojust, and those lessons should be actively developed through a “centre of expertise”. The full implementation of the revised Eurojust Decision and, in particular, of Article 13’s requirement for national authorities to notify Eurojust of serious cross-border cases, could provide an improved evidential basis for deciding about new perspectives under Article 85 TFEU. Equally, strategic partnerships with Europol, OLAF and the EU institutions had to be developed for a proper EU approach to fighting serious and organised crime.

Mr Péter Polt, Prosecutor General of Hungary, noted that any steps forward, including broadening tasks and powers of Eurojust, can be taken only in possession of the experience resulted from the implemented revised Eurojust Decision. Article 85 TFEU raises many questions of interpretation. It is necessary to define the exact meaning of “offences against the financial interests of the EU” that can give rise to difficulties under substantive and procedural law. The relationship between Eurojust and OLAF needs to be clarified and, even if merged in the future, the two organisations have to maintain their subsequent or parallel operations; Eurojust must receive all relevant information from OLAF. It is also necessary to strengthen the cooperation with Europol to achieve better synergy and associate Eurojust to all Analytical Work Files (AWFs). The new power of Eurojust to “initiate” investigation raises problems of interpretation and, in Member States where the prosecution is mandatory, risks not to be decisive.

The “classical” role of Eurojust to coordinate cases depends on the flow of information to Eurojust that is then of paramount importance. However, the main question is whether Eurojust has enough powers to effectively coordinate. The same question concerns the powers to prevent and solve conflicts of jurisdiction. If Eurojust is granted binding powers, its transformation from the current coordinator role into a transnational organisation would begin and issues such as legal remedies and judicial control should also be discussed. Finally, with regard to the establishment of a European Public Prosecutor’s Office from Eurojust, a careful approach should be adopted: positions taken on this issue will probably have an impact on the current development of Eurojust as well.

Ms Alexandra Jour-Schroeder, Head of the Criminal Law Unit, DG Justice of the European Commission, considered that the future of Eurojust is at the heart of the overall structure of the European criminal justice area, which the Treaty allows to foster and deepen. The 2008 reform of Eurojust has been a step in the right direction and its correct implementation by the Member States and Eurojust sets the basis for future developments. The Commission is following very closely this process as well as the implementation phase of the Organisational Structure Review launched by Eurojust with regard to internal management matters. The Commission is also assessing potential areas to further develop the functioning of Eurojust under Article 85 TFEU as, for example, Eurojust’s internal structure and procedures and the arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust’s activities. The findings of an external, currently ongoing, study on the strengthening of Eurojust will form the basis for the Commission’s Impact Assessment. Another important area the Commission is currently focusing on – a Communication will be soon adopted – is the protection of the EU financial interests. More effective action is needed, and Eurojust may well need to play an enhanced role in it. Measures to improve procedures and criminal law measures as regards definitions of offences and sanctions will be looked at. Finally, a thorough analysis of the institutional framework will have to be conducted regarding a specialised European Prosecution authority “from Eurojust”, as provided in Article 86.

Ms Kinga Gál, Vice-Chair of the LIBE Committee of the European Parliament, drew attention to the fact that traditional bilateral forms of judicial cooperation might not be appropriate to fight against transnational organised crime and that the action of Eurojust is needed. However, the relatively low number of cases referred to Eurojust shows that its potential still has to be fully exploited. This is mainly due to the lack of awareness among national competent authorities on the role of Eurojust. To enhance the effectiveness of Eurojust and spread its awareness, the EU judicial training system should be improved. The European Parliament encourages the creation of a new “EU judicial culture” to effectively fight against transnational crime. It is essential that national authorities involve Eurojust from an early stage, especially in view of preventing and solving conflicts of jurisdiction, and share information with Eurojust. Strengthening cooperation with Europol and OLAF is also important. With regard to the evaluation of Eurojust by the European Parliament and national Parliaments *ex Article 85 TFEU*, the European Parliament looks forward to the Commission’s Communication foreseen in 2011. Any kind of “political” evaluation should not focus on operational issues but rather consist in an overall assessment of Eurojust. The already existing dialogue and flow of information between the LIBE Committee and Eurojust should continue in the future.

3. Plenary session

Chair: Mr Hans G. Nilsson (Head of the Criminal Judicial Cooperation Division, General Secretariat of the Council of the EU)

The future of Eurojust in the area of Freedom, Security and Justice: challenges and perspectives?

Prof Dr John A.E. Vervaele (Utrecht University, the Netherlands)

State of the art

From the analysis of the Annual Reports of Eurojust, on the eve of its 10th anniversary, it is clear that the need for a European body dealing with judicial cooperation in criminal matters and its added value for the success of investigations and prosecutions are quite undisputed. The question today is rather which type of judicial body Eurojust should become in the future and which needs it should address. Four main reasons exist to move forward:

(i) Eurojust has to work in a complex context in which national criminal justice systems have the lead and the European dimension of criminal law enforcement is still very weak and limited to transnational enforcement; a multiplicity of instruments are available for practitioners and great uncertainty exists about their use; the process of shift from MLA to mutual recognition is unachieved and there is a lack of harmonisation in the procedural field.

(ii) Although the caseload of Eurojust is increasing, in certain fields of crime, such as corruption, money laundering, banking and security fraud, cybercrime, and serious environmental crime, the number of cases prosecuted in the Member States is still very low.

(iii) The cooperation between the European enforcement bodies should be improved and the flow of information enhanced. The EU bodies are not perceived as acting in the framework of a comprehensive criminal policy with common strategy and goals, but rather acting as single (or even competing) players.

(iv) Many Member States conceive the European enforcement bodies not as European enforcement bodies, but as horizontal networks of intergovernmental cooperation in which their national members are representing national interests.

Eurojust is not an intergovernmental body, but a body of the European Union. It is part of the area of Freedom, Security and Justice (Article 67 TFEU) which is not just a political umbrella or utopia. The national judicial systems must protect not only national interests but also the EU interest. The European Court of Justice already plays here a fundamental role in defining key concepts and giving content to the European dimension of national criminal justice systems. Eurojust must play a key role, related to the European dimension of the national judiciaries.

Strengthening of Eurojust under Article 85 TFEU

The work of Eurojust is strictly related to the work of the national investigating and prosecuting authorities in relation to serious crime (*see* Article 85(1) TFEU). Nowadays, in the information society we live in, the pro-active role of judicial authorities is vital. In fact, judicial investigation is not only about *post-factum* investigation into committed crime, but also about pro-active investigation into patterns of organised crime. For this reason, it is very important to include such aspect in Eurojust's tasks and to elaborate a pro-active intelligence-led approach, *i.e.* a strategy for a generic European crime intelligence model.

The mission of Eurojust is not limited to coordination and cooperation of transnational cases affecting at least two Member States, but extends to cases “requiring a prosecution on common bases” (Article 85(1) TFEU). It is quite obvious that in a single common judicial area there are common interests to protect what affects the core values of the European integration project. Essential is the way in which they violate the legal interest at stake; whether they are transnational or not does not make any difference.

With regard to the coordination role of Eurojust, important progress was already made. However, a stronger follow-up of national investigations and prosecutions is needed, especially in the field of PIF. Moreover, in some cases, recommendations and coordination are not sufficient and it would be necessary to launch formal requests. When Eurojust is asking to open an investigation, it does mean that Eurojust is a requesting or issuing authority and that the National Member is acting on behalf of Eurojust. Since the initiation of a criminal investigation is the launching of a criminal investigation under national criminal procedure, members of Eurojust could be seconded to that investigation. In any case, the execution of the request/order should be mandatory and cannot depend on national agendas, criminal policies, or capacity and available resources in the Member States: it is indeed a European request. Nevertheless, in accordance with Article 85(2), the operational activity would remain under the national competent authorities and Eurojust cannot investigate under its own authority. This means that, as far as the execution of investigation is concerned, the role of Eurojust would be limited to urgent situations and non-coercive acts. Further than this, Article 86 TFEU should apply.

The area of prevention and resolution of conflicts of jurisdiction is problematic because of the fragmentation (27 Member States, 29 jurisdictions), the lack of knowledge of each other’s activities, the necessity of parallel investigations and the many negative conflicts that occur in reality. The current recommendations are not enough and binding decisions of Eurojust, based as much as possible on objective criteria, are needed. Considering the legal effects of those binding decisions, there might be a necessity to foresee a remedy for the suspect to challenge the decision.

Another aspect is the judicial control of Europol. Europol will not execute operational coercive measures (as they are competences of Member States' authorities), but as Europol's intelligence activities can affect civil liberties, a judicial supervision of Europol will indeed be needed in the future, and this role could be played by Eurojust.

The structure of Eurojust should be changed: a Eurojust unit in the Member States, *i.e.* a national Eurojust antenna stronger than the current ENCS (Eurojust National Coordination System), is needed. Also, the internal structure of Eurojust should be redefined: the College could be replaced by an executive body composed of President and Vice-Presidents and specialised units dealing with investigations and prosecutions or with specific areas of crime. This is the right moment to enhance the European dimension of Eurojust in a new Regulation and to consider the conversion in an EU agency relying on the EU budget.

Furthermore, other areas of Eurojust's activities should be improved, such as the relationships with key partners as Europol, OLAF and EJM, and the relationships with third States.

In conclusion, there is a double urgency: (i) to arrive at equivalent law enforcement standards in law and practice between the Member States; (ii) to set up EU agencies with a strong European profile and, at the same time, strongly embedded at national level.

The mission of Eurojust should not be limited to mediation, but it should include binding decisions on the initiation of judicial investigations and binding decisions on jurisdiction issues. The mission should also include the steering of criminal prosecutions on common grounds, including the follow-up of PIF cases.

Eurojust experience: presentation of case studies

Mr Vincent Jamin (Assistant to the National Member for France, Eurojust)

Mr Filippo Spiezia (Deputy National Member for Italy, Eurojust)

The two case studies presented have been chosen to tackle the main issues at stake and identify the weak points of the current practice and legal framework. They formed the basis for discussion in the afternoon workshops, in particular in workshops 1, 2 and 3 (*see infra*). The purpose was to reflect on whether the effectiveness of Eurojust is impacted by the limitation of its current powers and whether it would be more effective if it had additional powers. The cases illustrated some practical and legal difficulties encountered to be kept in mind when implementing new possibilities offered by the Lisbon Treaty.

Case 1, presented by Mr Jamin, dealt particularly with issues related to the initiation of criminal investigations and coordination, and the added value – as well as the limits – of Eurojust’s support in that respect. In this case, the processing of data by the Eurojust’s Case Management System indicated a connection between information provided by Europol and information provided by a national authority. This analysis revealed the involvement of four Member States in a large-scale trafficking case of stolen luxury vehicles. However, despite its involvement through the transmission of information in accordance with Article 13 of the revised Eurojust Decision, Eurojust was not required to provide further specific assistance.

The case showed in particular the following difficulties: (i) the (possible) reluctance of national authorities to initiate investigations on the sole basis of data originated from or processed at EU level, due to the (supposed) lack of usability/reliability of the information, difficulties related to the admissibility of evidence gathered abroad or the need to comply with domestic priorities; (ii) the length of execution of international letters of request that may lead prosecution authorities to preferring to undertake proceedings rapidly, neglecting the transnational nature of the case; (iii) the lack of a strong interest at national level by all Member States involved to open an investigation that may lead to a “quasi” negative conflict of jurisdiction. The case demonstrated that only a common and coordinated action in all the Member States involved could have led to dismantling the organised crime group, and Europol’s analysis and Eurojust’s input would have allowed getting the European dimension of the case.

Case 2, presented by Mr Spiezia, dealt with the prevention of conflicts of jurisdiction and coordination of parallel investigations. The case concerned drug trafficking conducted by a huge organised criminal group operating in at least two Member States with transnational connections in EU and in third States. In this case, the cooperation between the concerned national judicial authorities through the intervention of Eurojust proved to be excellent in a first phase.

Eurojust's intervention made it possible to trigger parallel investigations in the concerned Member States and facilitated the exchange of information. However, at a later stage, despite the efforts and the recommendations made by Eurojust, the coordination aimed at clarifying the scope of the parallel investigations and preventing the possible conflict of jurisdiction failed. In fact, although the competent judicial authorities took into account the partial overlapping of the two investigations (the latter having partially in common some of the suspects and the types of crime), the national authorities eventually decided to proceed separately, carrying on their own investigation.

Important values at stake were identified: (i) the sound management of investigations and the proper administration of justice (parallel investigations can duplicate efforts for all parties involved but can be useful in some cases); (ii) the prevention of *bis in idem*; and (iii) the enhancing of the principle of mutual recognition. According to the current legal framework, Eurojust is only a mediator without any binding powers. Thus, the competent national authorities can decide not to comply with the solution proposed by Eurojust to prevent the possible *bis in idem*, as it happened in this case.

In both case studies presented, the possible solutions offered by the existing legal instruments were analysed and the perspectives under Article 85 TFEU were presented as open questions to be discussed in the workshops.

4. Outcome of the workshops

Part I: Tasks of Eurojust in light of the case studies

WORKSHOP 1: INITIATION OF CRIMINAL INVESTIGATIONS AND PROPOSAL FOR INITIATION OF PROSECUTIONS

Chair: Mr Hans G Nilsson (Head of the Criminal Judicial Cooperation Division, General Secretariat of the Council of the EU)

Discussant: Mr Vincent Jamin (Assistant to the National Member for France, Eurojust)

Purpose

The goal of the workshop was to examine whether granting Eurojust the power to initiate criminal investigations and to propose the initiation of prosecutions could help solve practical problems and bring real added value to the fight against serious crime.

Outcome

- ✓ **Eurojust's initiation of criminal investigations as a way to ensure that actions are undertaken (Article 85(1)(a) TFEU)**
 - Differing views were expressed. Providing Eurojust with the ability to initiate criminal investigations was not a panacea, but might prove useful for certain types of offences. Eurojust should be entitled to ensure that actions or common strategies agreed upon at coordination meetings are undertaken. One of Eurojust's main assets is its 'helicopter view'. It puts Eurojust in a privileged position to prompt national authorities to enlarge the dimension of complex cases with a cross-border dimension, and move from a system of judicial cooperation based only on mutual legal assistance, *i.e.* exchange of rogatory letters, to a new approach based on 'coordination of parallel investigations'.

- The extent to which Eurojust’s recommendations under Articles 6 and 7 of the Eurojust Decision are accepted may vary between Member States: in some Member States, it appears that Eurojust recommendations are always followed; in some others, this is not always the case; in others again, cases are progressed without the need for formal recommendations at all. A variety of factors may play their part, such as availability of resources, legal problems, procedural issues, differing crime priorities and approaches to discretionary or mandatory prosecution.
- ✓ **Eurojust’s initiation of criminal investigations, particularly those relating to offences against the financial interests of the Union (Article 85(1)(a) TFEU)**
 - National authorities may not always regard offences affecting the financial interests of the Union in the same way as domestic offences, and may not give them the same priority, and consequently a common approach and common procedures could prove necessary to ensure that the financial interests of the Union were adequately protected.
 - This could be achieved in two different ways:
 - by a mandatory system ensuring that Eurojust’s requests are executed by national authorities, and for the latter to mandatorily inform Eurojust about the outcome of criminal investigations when they are completed; or
 - by a ‘*pouvoir d’évocation*’ given to Eurojust’s National Members to take over the case; the complexity of this option was, however, underlined.
- ✓ **Eurojust’s initiation of criminal investigations to deal with negative conflicts of jurisdiction**
 - Negative conflicts of jurisdiction occur, particularly in VAT and ‘boiler room’ fraud cases, when Member States may be competent and also involved but unwilling to prosecute. An initiation role for Eurojust could help to resolve this problem.
 - This would be complementary to the work Eurojust currently undertook to resolve conflicts of jurisdiction without mandatory powers.

- ✓ **Eurojust's initiation of criminal investigations in practice**
 - Differences in the legal systems within the EU would need to be reflected in the definition of the terms 'initiation of criminal investigations' and 'proposal to initiate prosecutions'.
 - The different options regarding who would take the decision to initiate were considered, e.g. National Members acting as national authorities, or acting on behalf of Eurojust, or Eurojust acting as a College. Ultimately, the College of Eurojust should be the last resort when deciding to initiate criminal investigations.
- ✓ **Eurojust's initiation of criminal investigations to ensure European interests are taken into account**
 - The case law of the Court of Justice of the European Union may suggest that EU law does not require mandatory prosecution but that national authorities can use the opportunity principle, provided that European interests are taken into account (*see* 'Spanish Strawberries' case , *Commission v France C-265/95*).
 - Eurojust's initiation role could help ensure that European interests are taken into account when deciding how to proceed in a national case.
- ✓ **Final considerations**
 - Different views were expressed on whether Article 85 TFEU contains a possibility for granting mandatory powers to Eurojust to initiate criminal investigations, in particular given that formal acts of judicial procedure were to be carried out by national officials under Article 85(2), which allows for different interpretations.
 - A mandatory power to initiate investigations raised complex questions. As discussed in the Bruges seminar, an EU procedural code with appeal to the Court of Justice of the European Union may be necessary to permit proper review of decisions to investigate.
 - The discussion on whether Eurojust should be granted mandatory powers to initiate criminal investigations should be evidence-based: e.g. how many cases against the financial interests of the EU have, and indeed have not, been pursued? In this respect, the importance of collecting cases for that purpose was considered necessary, also in light of future policymaking discussions.

WORKSHOP 2: PREVENTION AND RESOLUTION OF CONFLICTS OF JURISDICTION

Chair: Mr Raoul Ueberecken (JHA Counsellor, Permanent Representation of Luxembourg to the EU)

Discussant: Mr Filippo Spiezia (Deputy National Member for Italy, Eurojust)

Purpose

The goal of the workshop was to discuss granting binding powers to Eurojust under Article 85 TFEU in order to prevent and resolve possible conflicts of jurisdiction, and to discuss the legal implications of granting of such powers.

Outcome

✓ Eurojust's current competencies in the prevention and resolution of conflicts of jurisdiction

- Solving conflicts of jurisdiction is closely aligned to Eurojust's tasks of coordination and possibly future initiation of investigations. In case of transnational crime, conflicts exist 'by nature' and the focus should be on preventing them.
- Eurojust's practical experience suggests that the case studies presented in the seminar illustrate a recurrent issue.
- The existing legal instruments can help to solve conflicts of jurisdiction, and their proper implementation is therefore of utmost importance, *i.e.* Articles 6 and 7 of the revised Eurojust Decision and the Framework Decision on prevention and settlement of conflicts of jurisdiction (Article 12). The effectiveness of these instruments depends on the quality and quantity of information exchanged between Member States and Eurojust.

✓ Possibility of granting binding powers to Eurojust

- The current legislative position was considered realistic, although capable of improvement. Different views were expressed regarding the possibility to go beyond the Framework Decision on prevention and settlement of conflicts of jurisdiction and make use of the new possibilities offered by the Lisbon Treaty, which entered into force after the adoption of the Framework Decision. The difficulties stemming from different legal traditions and, in particular, the opportunity *versus* the legality principle should be taken into account.

- In a single judicial area, the tools for preventing and solving conflicts of jurisdiction require both acceptance at national level and integration of the EU perspective.
 - The concept of conflict of jurisdiction must be clarified and a distinction made between investigation and trial phases. In view of the prosecutorial nature of Eurojust, the focus should be on preventing conflicts of jurisdiction during the investigation phase, at the earliest opportunity.
 - The ‘psychological effect’ of a provision granting binding powers to Eurojust must not be underestimated. Examples from the Belgian and Italian systems suggest the mere existence of binding powers might be useful, even when they are not actually used.
 - Granting Eurojust binding powers to resolve conflicts of jurisdiction could entail involving the Court of Justice of the European Union in appeals against a binding decision.
- ✓ **Adoption of binding criteria for deciding which authority is best placed to prosecute**
- The adoption of binding criteria for deciding which authority is best placed to prosecute was considered a difficult exercise, although feasible. The negotiation of the Framework Decision on prevention and settlement of conflicts of jurisdiction has illustrated the challenge that this exercise represents. The results achieved in the field of civil and commercial law (by Regulation 44/2001, *Brussels I*) show that difficulties can be overcome.
 - Identification of factors such as those designated in the European Arrest Warrant for resolving conflicts, are useful. The criteria ensure legal certainty, predictability and the possibility of judicial review. However, during the investigation phase, a certain flexibility provides room for discussion and negotiation.
 - As an immediate action, a suggestion was made to review the Guidelines for Deciding Which Jurisdiction Should Prosecute, as published in the Eurojust Annual Report 2003. Eurojust has planned to proceed with such review on the basis of the experience gained with the guidelines on competing EAWs (currently under discussion).
- ✓ **Judicial review of Eurojust’s decisions**
- All participants agreed that the granting of binding powers to Eurojust must be accompanied by a judicial review of its decisions.

- Several issues were discussed, such as the roles of the Court of Justice of the European Union and of the national courts; the opportunity for a judicial review in the investigation phase and/or in the trial phase; the sufficiency of the existing provision (Article 263 TFEU) or the need for a specific procedure; and the need for considering the role of the defendant.

✓ **Final considerations**

- The different priorities set at national level – and the way in which such priorities are dealt with by the Member States – can lead to negative conflicts of jurisdiction. The setting of priorities at EU level (*e.g.* through the EU policy cycle based on the (S)OCTA) can help to alleviate this problem.
- Information received from non-State actors (OLAF, Europol) is essential to enhance Eurojust’s role as initiator of criminal investigations in the resolution of negative conflicts of jurisdiction.

WORKSHOP 3: COORDINATION OF INVESTIGATIONS AND PROSECUTIONS.

POWERS OF NATIONAL MEMBERS AND COLLEGE UNDER THE REVISED

EUROJUST DECISION

Chair: Mr Björn Blomqvist (Director of Public Prosecution, Office of the Prosecutor General of Sweden)

*Discussants: Ms Ilona Lévai (National Member for Hungary, Eurojust)
Mr Robert Sheehan (National Member for Ireland, Eurojust)*

Purpose

The goals of the workshop were to analyse the limitations and difficulties currently encountered by Eurojust in exercising its task of coordination of investigations and prosecutions between the competent authorities, and to explore the possibilities offered by Article 85 TFEU in this regard.

Outcome

✓ Improving the coordination role currently carried out by Eurojust

- Coordination, which is at the core of Eurojust's work, has proved to be a successful, efficient and effective tool in the fight against serious cross-border crime. However, it is agreed that it can be improved. The following suggestions were made:
 - systematic and structured written record by Eurojust of the results achieved, agreements reached (or the reasons why no agreement was reached) and decisions made, as well as details of the follow-up expected (who will report to whom, when, about what);
 - regular discussions at College level of the outcome of coordination meetings, particularly in cases where no agreement was reached or where the agreement or decision made was not respected, with the aim of harmonising the approach of the National Desks; and
 - establishment by Eurojust of guidelines to the national authorities as to the follow-up expected from coordination meetings.
- These suggestions would improve the monitoring of the follow-up to coordination meetings. They would also offer a better understanding of the impact of the coordination role performed by Eurojust and help assess the need for additional tasks/powers; it is a prerequisite to the 'evidence-based approach'.

✓ Improving Eurojust's coordination role in cooperation with Europol

- The regular 'by default' presence and involvement of Europol in coordination meetings would enhance the effectiveness of Eurojust's role.

- The possibility for the Europol representative to access the Europol information database during a coordination meeting and provide information and data related to the Eurojust case could be of great assistance.
 - The direct contacts between police and prosecution services at domestic level should be paralleled at EU level and therefore be encouraged with a view to reducing costs and speeding up procedures.
- ✓ **Improving Eurojust’s coordination role in cooperation with OLAF**
- Eurojust’s National Members should be informed of any investigations conducted by OLAF in relation to their Member States. The possibility for National Members to liaise directly with the national authorities involved in that investigation could be a practical way to move forward.
 - At a minimum, OLAF should regularly inform Eurojust of all cases that could possibly lead to criminal proceedings.
 - The irregularities and serious misconduct investigated by OLAF often do not amount to criminal offences. Exchange of information with Eurojust in relation to such cases could be beneficial, but the risk is to overwhelm Eurojust with information that is not of crucial importance for Eurojust.
- ✓ **Persuasion or decision?**
- Article 85 TFEU in relation to the coordination role of Eurojust should not necessarily be interpreted as providing for the possibility of granting Eurojust ‘supranational’ or coercive powers towards national authorities, even if it gives Eurojust a new role in monitoring the follow-up given to a coordination meeting.
 - In addition and in line with the above, if new powers are to be granted, they should be clearly defined and should be counterbalanced with an equivalent level of responsibility.
 - Concerning the question of whether ‘new powers’ should be granted to Eurojust to enhance the effectiveness of its coordination role, *i.e.* whether its current powers to assist should be accompanied by powers to decide, to order and to give instructions to national authorities, most participants considered it unnecessary or inappropriate.

- The ‘power to motivate and persuade’, was mentioned. If case decisions and agreements reached with the assistance of Eurojust during coordination meetings had binding force, the real question would be how to motivate national authorities to agree and to respect and implement their decisions. The key issue is, therefore, the need to increase the power of persuasion of Eurojust: in this sense, reporting and evaluation exercises were recognised as powerful tools.
- This approach respects the need for maintaining the right balance between the complementary roles of Eurojust and national authorities.

✓ **Final considerations**

- Whether either a more persuasive or a more directive approach is appropriate to foster the coordination role of Eurojust, there is a clear need to measure the impact of the coordination activities performed by Eurojust, identify the problems, if any, and provide the Commission with an evidence-based opinion concerning the need, or not, for new specific powers.
- The ‘psychological effect’ of granting Eurojust powers should also be considered: the very existence of such powers would be a strong incentive even if not actually used.

Part II: A developing architecture: strengthening links with essential partners

WORKSHOP 4: DEFINING FUTURE OPERATIONAL COOPERATION BETWEEN EUROJUST AND EUROPOL

Chair: Mr Dietrich Neumann (Head of Legal Affairs, Europol)

Discussant: Mr Arend Vast (National Member for the Netherlands, Eurojust)

Purpose

The goal of the workshop was to discuss how the opportunities afforded by the existing cooperation instruments, and, in particular, by Article 85 TFEU, with regard to Eurojust and Europol’s role in fighting against organised crime, could be further developed, given that direct cooperation between Eurojust and Europol is essential for developing a European dimension to law enforcement and judicial cooperation.

Outcome

✓ **Strengthening operational cooperation between Eurojust and Europol under Article 85(1)**

TFEU

- The phrase ‘*or requiring a prosecution on common bases*’ (Article 85(1) TFEU) could be applied and interpreted in concrete cases, or in the alternative be defined in a future Regulation on Eurojust. Concrete illustrations of *prosecutions on common bases* should be identified at an early stage.
- Eurojust and Europol have different mandates: Eurojust’s mandate is wider than Europol’s (see Article 88 TFEU). Some participants advocated the alignment of their mandates to facilitate cooperation.
- Strong support was demonstrated for establishing a more comprehensive overview and analysis of ongoing cross-border casework to achieve more effective investigations and subsequent prosecutions.
- Eurojust and Europol act from two sides, or two different perspectives, to ‘squeeze’ the criminals (the ‘sandwich approach’): strengthening their operational cooperation is crucial. The exchange of information from Member States to both Eurojust and Europol is essential in achieving that goal and Member States must be made aware of it.

✓ **Coordination roles of Eurojust and Europol (Articles 85(1)(b) and 88(2)(b) TFEU)**

- Article 85(1)(b) TFEU does not limit Eurojust’s coordination of cases to those that have been *initiated* in accordance with Article 85(1)(a). Eurojust's coordination competence therefore covers all investigations for which it is competent according to its mandate.
- Eurojust’s precise remit would need to be politically and legally determined. The additional competences – including Article 13 of the revised Eurojust Decision – might require enlargement of the National Desks to cope with the additional workload. The financial limitations of the Member States might also lead to the need for increased EU funding and consequently also to an increase in EU staff members.
- The overlapping of the coordination roles of Eurojust and Europol should be avoided, with Eurojust coordinating judicial investigations and prosecutions according to Article 85(1) TFEU, and Europol coordinating investigative and operational actions carried out jointly with the Member States’ competent authorities in accordance with Article 88(2) TFEU.

✓ **Enhancing cooperation under the current legal framework**

- Recent cooperation has shown that timely interaction between Eurojust and Europol is crucial for the success of operations.
- Information gaps must thus be closed to encourage involvement on both sides, particularly by ensuring Eurojust's association with the remaining five Europol AWFs and Europol's involvement in a more structured and regular way in Eurojust's coordination meetings.
- Europol will continue to support the association of Eurojust with all AWFs. Personal contacts between Eurojust National Members and representatives of Member States in the AWFs are encouraged.
- Practical and user-friendly arrangements for information exchange must be enhanced. The technical infrastructure for the current and future interaction between the two organisations must be further developed (*e.g.* SIENA system to be improved).
- Analysts from Europol and Eurojust should have more regular and intensified contacts to achieve a more coherent and comprehensive analysis of operational information. The current ongoing exchange programme was mentioned as a useful example.

✓ **Final considerations**

- Use of EU bodies such as Eurojust and Europol is vital to achieving successful results in investigation and prosecutions of cross-border cases.
- The current situation may be compared to a puzzle, with Eurojust and Europol acting as the glue that holds together the different pieces.
- The needs of practitioners must be addressed in order to improve the current situation.

WORKSHOP 5: DEFINING FUTURE OPERATIONAL COOPERATION BETWEEN EUROJUST AND OLAF

Chair: Mr Lothar Kuhl (Head of the Corporate Planning and Policy Unit, OLAF)

Mr Martin Wasmeier (Head of Internal Investigations Unit, OLAF)

Discussant: Mr Juan Antonio García Jabaloy (National Member for Spain, Eurojust)

Purpose

The goals of the workshop were to discuss whether the possible increase in Eurojust's powers of investigation envisaged by the Treaty of Lisbon may have significant implications for the relationship between Eurojust and OLAF, and to explore the modalities for an efficient cooperation in the future between the two EU actors, bearing in mind their distinctive roles and current interaction in the fight against offences adversely affecting EU financial interests.

Outcome

✓ Improving cooperation between Eurojust and OLAF: need for improvement

- Despite the increase in the number of cases that are exchanged, the interaction between Eurojust and OLAF remains modest: the potential for cooperation between the two bodies is far from being fully exploited.
- Operational cooperation, as well as judicial follow-up to the cases investigated by OLAF, should be improved: 40 per cent of the cases transmitted to the judiciary by OLAF are dropped by the national authorities before reaching trial stage.
- The tasks of OLAF and Eurojust are different in nature, but the organisations have a common mission concerning OLAF cases to be presented to the judiciary.
- The intensification of personal contacts (directly between National Members and representatives of OLAF) is essential to enhance information flow.
- A formal exchange of liaison officers to Eurojust, as well as regular mutual visits, would enhance cooperation.
- An exploration of the possibilities to enhance the involvement of OLAF in the establishment of JITs was suggested: a less restrictive approach to the use of this tool would improve the sharing of information and best practices during investigations.

✓ **Increasing the exchange of information from OLAF to Eurojust**

- Different views were expressed as to the extent to which the transmission of information from OLAF to Eurojust should be obligatory. The possibility to allow Eurojust to have direct access to all OLAF cases and assess in cooperation with OLAF the cases which could potentially require judicial follow-up with a view to encourage the initiation of a criminal investigation, was strongly opposed. This was because:
 - OLAF investigates irregularities and serious misconduct, which may not amount to criminal offences. Exchange of information concerning these cases could overwhelm Eurojust with cases for which it is not competent.
 - Informing Eurojust at an early stage of all OLAF investigations is not feasible: at the beginning of an investigation, it may be unknown whether the follow-up is to be administrative or criminal.
- Eurojust must be informed as soon as it is clear that the case will have a criminal follow-up, and where its involvement would have an added value, *i.e.*:
 - when at least two Member States are involved,
 - when instruments of judicial cooperation are needed, and
 - when the investigation is related to a serious crime.
- Eurojust's added value also includes a potential role as mediator between OLAF and the national authorities, whenever judicial authorities are unwilling to proceed. In the considerable number of cases where investigations conducted by OLAF are not followed up because of their low priority from a national point of view, Eurojust's European perspective could help ensure the appropriate treatment of cases that are currently dropped by the national authorities before reaching trial stage.
- The obligation imposed on OLAF by the new Article 10(a) of the Commission- amended proposal for the reform for OLAF is a good approach: the transmission of relevant information to Eurojust should at least take place whenever OLAF notifies the competent authorities of the Member States that there are grounds for suspecting the existence of an offence against the EU's financial interests committed in the form of serious crime.

✓ **Final consideration**

- If Eurojust initiates investigations under Article 85, the added value of involving Eurojust in OLAF cases will naturally increase.

WORKSHOP 6: EVALUATION OF EUROJUST

Chair: Ms Eszter Mária Köpf (Prosecutor, Head of Department for International and European Affairs, Office of the Prosecutor General of Hungary)

Discussant: Mr Raivo Sepp (Vice-President and National Member for Estonia, Eurojust)

Purpose

The goals of the workshop were to analyse the mechanisms of the evaluation of Eurojust under Article 85 TFEU and the revised Eurojust Decision, and to discuss the possible ways to make these mechanisms operate in coherent and effective ways.

Outcome

✓ **Current existing evaluation and control mechanisms**

- The Eurojust Annual Report was considered one of the tools for evaluating Eurojust. The Council Conclusions on the Annual Report bring an opportunity to assess Eurojust's developments and set priorities. The presentation of the Annual Report to the European Parliament was also considered a control mechanism currently in place.
- In accordance with Article 36(10) of the Eurojust Decision, the European Parliament, on a recommendation from the Council acting by qualified majority, shall give a discharge to the Eurojust Administrative Director in respect of the implementation of the budget. Final accounts and information given for the discharge procedure were considered another control mechanism.
- In addition, regular reports of National Members to their national authorities, and reports by the President of Eurojust to national Parliaments, were discussed.

✓ **Other forms of evaluation**

- The future evaluation of Eurojust's activities by the European Parliament and national Parliaments was considered in light of Article 85(1) TFEU. In this respect, the question raised was whether this evaluation should take place jointly or separately. The potential role of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) was considered as was the need for national Parliaments to define the scope of the evaluation.
- A need to coordinate additional forms of evaluation was also identified. These included:
 - The report from the European Commission on the implementation of the revised Eurojust Decision in the Member States under Article 42(2) of the Eurojust Decision.
 - The independent external evaluation of Eurojust before 4 June 2014 and every five years thereafter, under Article 41a of the Eurojust Decision
 - The proposal from the Hungarian Presidency to devote the 6th round of mutual evaluations to the practical implementation and operation of the Eurojust and EJM Decisions in the Member States.

✓ **Final considerations**

- Different views were expressed on the scope of evaluation. While some considered that it should be solely parliamentary, others preferred involvement of other stakeholders such as Member States and EU institutions.
- The parliamentary evaluation of Eurojust should focus on compliance with its objectives and general priorities, but not on casework decisions. With respect to the setting of priorities, the possibility of taking into consideration the Internal Security Strategy was mentioned.
- The evaluation of Eurojust could be based on its Annual Report. The possibilities of developing the Annual Report by setting priorities not only for Eurojust but also for the Member States, should be discussed.
- The need to avoid duplication between the different evaluation and reporting mechanisms was stressed.

5. General conclusions

Mr Péter József Csonka (JHA Coordinator, Permanent Representation of Hungary to the EU)

Mr Csonka firstly presented his views on the state of play of the steps that were identified by Mr Daniel Flore in his general conclusions to the Eurojust strategic seminar held in Bruges in September 2010¹. In this context, Mr Csonka remarked that the discussions about Articles 85 and 86 TFEU have continued under the Belgian and Hungarian Presidencies and that the fixed deadline (June 2011) to fully implement the revised Eurojust Decision will soon expire. Moreover, he considered that a parallel approach (reinforcing Eurojust under Article 85 and in parallel looking at Article 86 on the European Public Prosecutor's Office), rather than a step-by-step approach, seems to prevail in the current discussions and that the partnership with crucial actors, at least with OLAF and Europol, has been strengthened.

After ten years of existence, Eurojust is still a coordination body but also has demonstrated tremendous progress. The revision of the Eurojust Decision in 2008 – that, *inter alia*, sought to enhance and harmonise the powers of National Members – cannot be considered a ‘qualitative leap’. However, Article 85 TFEU now offers ‘concrete possibilities to transform Eurojust from a simple mediator and player at horizontal cooperation level to a player with binding operational powers at vertical integration level’.

The outcome of the six workshops should be taken into account for the future reform of Eurojust under Article 85 TFEU.

The following remarks could be made regarding the way forward:

- The common objective, *i.e.* the fight against serious cross-border crime, should never be forgotten. Eurojust is about protecting the European Union, and not only national interests, from serious crime.
- The Commission proposal on Article 85 TFEU is expected in 2012. The level of ambition of the proposal will depend on political determination and decision. The proposal should be evidence-based and inspired by a European vision.

¹ “Eurojust and the Lisbon Treaty: towards more effective action” – Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 September 2010), doc. 17625/10 REV 1 CATS 105 EUROJUST 147.

- Eurojust should support the preparatory process and provide evidence for the impact assessment of the Commission. The case studies presented during the seminar are a good example of the support needed in the preparatory process.
- In general, increasing Eurojust's powers also means increasing its responsibilities and accountability. The psychological impact of the mere existence of these powers should not be neglected.
- However, 'less is more': partnership with the national authorities should not be prejudiced by an increase in Eurojust's powers.

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