



Council of the
European Union

Brussels, 5 October 2021
(OR. en)

12516/21

JAI 1062
COPEN 367

COVER NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Eurojust Written Recommendations on Jurisdiction - Follow-up at the national level

Delegations will find attached the above-mentioned document, which is also available on Eurojust's website, see [here](#).



Eurojust Written Recommendations on Jurisdiction

Follow-up at the National Level

September 2021

Criminal justice across borders

In loving memory of María Poza Cisneros

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Executive summary

Eurojust written requests (or recommendations) are issued by National Members to assist national authorities when jurisdictional issues arise between two or more Member States. They are based on Article 4(2)(b) of the Eurojust Regulation and fall within the autonomous initiative powers of Eurojust. They usually take the form of 'joint requests', i.e. requests issued jointly by two or more National Members involved in a case (and, sometimes, by Liaison Prosecutors). With a joint request, the National Members ask their respective competent authorities to accept that one of them is in a better position to undertake an investigation or prosecute specific acts. The conclusion included in the joint request is based on an in-depth assessment of the legal and factual circumstances of the case and is developed in accordance with the [Eurojust Guidelines for deciding 'which jurisdiction should prosecute?'](#)

National authorities can therefore rely upon a commonly held opinion of Eurojust supported by a reasoned legal assessment. They may refuse to comply with such requests only if doing so would harm essential national security interests, jeopardise the success of an ongoing investigation or jeopardise the safety of an individual.

Eurojust written requests may concern cases where:

- there are parallel proceedings ongoing in different Member States concerning the same facts and the same suspects, so that their continuation could lead to an infringement of the *ne bis in idem* principle (conflict of jurisdiction in a strict sense);
- or the offences and suspects investigated in two or more countries are not identical but closely connected and mutually dependent, and a possible concentration of the proceedings in one country would be more effective in the interest of justice.

They are either issued at the request of national authorities or upon autonomous initiative of the National Members involved, in particular when:

- a document setting out the reasons supporting the decision on which country is best placed to prosecute is considered helpful or even needed at the national level;
- the national authorities request the opinion of Eurojust;
- the national authorities cannot come to an agreement on jurisdictional issues.

The analysis of Eurojust written requests, issued between 2016 and 2019, on which State is best placed to prosecute shows that they are an effective tool to address jurisdictional issues in transnational criminal proceedings, especially to:

- prevent duplication of efforts or risks of infringing the *ne bis in idem* principle;
- ensure a more effective prosecutorial strategy.

In all cases, except one, the national authorities transferred / accepted the transfer of the case fully in line with the solution suggested by Eurojust. In most cases, the Eurojust request was mentioned in the national decision to transfer the case that, later, was rarely challenged by the parties. When this happened, the challenge was often dismissed as unfounded by the competent national courts, who were able to rely on the arguments and legal assessment included in the Eurojust request.

Following the issuing of a written request, Eurojust continues to assist national authorities in facilitating the execution of the transfer of proceedings in line with its recommendations, e.g. by addressing issues regarding the translation of the case file or delays in its concrete transmission, or by receiving a formal reply of acceptance of the transfer.

1. Background

The project 'Follow-up on Eurojust written recommendations on which State is best placed to prosecute' intends to examine the follow-up given at the national level of those Eurojust cases where a jurisdictional issue was detected and dealt with, in particular where a written recommendation (or request) was issued pursuant to Article 6(1)(a)(ii) of the Eurojust Decision (now Article 4(2)(b) of the Eurojust Regulation). The aim is to assess the impact and effectiveness of Eurojust written recommendations, focusing on whether:

- the Eurojust written recommendations were accepted by the competent national authorities;
- the decision on jurisdiction was challenged at any stage of the national proceedings and what the outcome of the challenge was;
- any subsequent judicial cooperation issues followed the adoption of the Eurojust written recommendation.

This report first presents what a Eurojust written recommendation on jurisdiction is, in light of the relevant legal framework and the practice developed so far (Section 2). After a description of the scope of the project and the methodology followed (Section 3), and some statistics (Section 4.1), this report provides an overview of the main results of the analysis in relation to the national authorities' compliance with the Eurojust written recommendations (Section 4.2), the challenges brought at national level against the decision on jurisdiction (Section 4.3) and the role played by Eurojust after the issuing of the written recommendation (Section 4.4). The report concludes with some considerations on the effectiveness of this tool in light of the analysis carried out (Section 5).

2. Eurojust written recommendations on jurisdiction

2.1. Terminology, legal framework and practice

Eurojust cases often concern jurisdictional issues between two or more Member States or third countries ⁽¹⁾. In Eurojust practice, this term refers not only to conflicts of jurisdiction in the strict sense, where parallel proceedings are conducted in two or more countries against the same person for the same facts ⁽²⁾. It also refers, more broadly, to situations in which the offences investigated in two or more countries are not identical but so closely connected that developments in linked proceedings are mutually dependent, and to cases where several countries might have jurisdiction in principle to investigate the same facts.

In all such situations, Eurojust can play a major advisory and coordinating role in assisting national authorities in determining whether to continue dealing with the prosecutions separately or to concentrate the proceedings in one jurisdiction to prevent any risk of *bis in idem* ⁽³⁾, and in assessing

⁽¹⁾ See Article 3(5) Eurojust Regulation.

⁽²⁾ In accordance with Framework Decision 2009/948/JHA of 20 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

⁽³⁾ On the principle of *ne bis in idem*, see Eurojust, *Case law by the Court of Justice of the European Union on the Principle of ne bis in idem in Criminal Matters*, last updated in 2020.

which jurisdiction would be best placed to prosecute for the totality or for only some of the facts. To this end, Eurojust (written) recommendations/requests on jurisdiction are a useful tool.

Pursuant to Article 6(a)(ii) of the Eurojust Decision (now Article 4(2)(b) of the Eurojust Regulation), National Members may issue motivated requests (also called 'recommendations' in practice) to the competent authorities of the Member States concerned in a concrete case to prevent and/or solve a conflict of jurisdiction, by asking them to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts. It should be underlined that Eurojust may issue such recommendations on its own initiative (and not only upon request of the national authorities), as clarified and underlined by the new Eurojust Regulation.

While the legal framework, including under the previous regime of the Eurojust Decision, refers to them as Eurojust 'requests', such measures had, until recently, been called 'Eurojust recommendations' in practice in order to highlight the nature of the advice they provide to national authorities. Since 2020, however, they have been called 'requests' in order to reflect the changes brought about by the Eurojust Regulation, which strengthens their legal effects on national authorities. Indeed, pursuant to the new Article 4(6) of the Eurojust Regulation, 'competent authorities of the Member States concerned shall respond to requests from Eurojust under paragraph 2 ... without undue delay' and they 'may refuse to comply with such requests ... if doing so would harm essential national security interests, would jeopardise the success of an ongoing investigation or would jeopardise the safety of an individual.' Nevertheless, for the sake of facilitating the readability of this report, only the term 'Eurojust recommendation' will be used.

In most situations, jurisdictional issues are addressed at Eurojust during level II meetings (i.e. discussions between the National Members involved in the case), during coordination meetings (in which, in addition to the Eurojust representatives, the competent judicial and law enforcement authorities from the countries involved in the case participate), or in the framework of a joint investigation team. Usually, the solutions reached are then reflected in the conclusions of the meeting. Yet, there are cases where the issuing of a reasoned Eurojust written recommendation is needed, for instance where:

- a document setting out the reasons supporting the decision on which country is best placed to prosecute is considered helpful (e.g. to persuade the hierarchical superior or the court of such a decision) or even needed at the national level;
- the national authorities have not taken any position yet and request the expert opinion of Eurojust;
- the national authorities cannot come to an agreement on jurisdictional issues.

In any case, it is up to the National Members concerned to suggest or decide to issue a reasoned written recommendation, as the national authorities may not be aware of this possibility.

Considering the above, unsurprisingly, the number of written recommendations issued by Eurojust is altogether quite limited and much smaller than the number of Eurojust cases in which jurisdictional issues arise and are dealt with.

2.2. Individual or joint recommendations

While Eurojust written recommendations on jurisdiction initially took the form of individual requests issued by a National Member to their national authorities, a new practice of issuing **joint**

recommendations (or joint requests) was introduced at Eurojust in 2016. With a joint recommendation, the National Members involved in the case **jointly** ask their respective competent authorities to take certain courses of action, as a conclusion to a reasoned opinion on the matter (usually based on an analysis and legal assessment). National authorities can therefore rely upon a commonly held opinion of Eurojust, which is not only supported by a reasoned legal assessment, but also more solid because it is shared among two or more National Members. When considering the issuing of a joint recommendation, National Members can rely upon the support of the Casework Unit. Based on a template and on the [Eurojust Guidelines for deciding 'which jurisdiction should prosecute?'](#), the Casework Unit prepares a first draft of the joint request in English, usually without personal data. Once the National Members have agreed on the common text, the request can be translated into the relevant languages, if needed.

Pursuant to Article 3(5) of the Eurojust Regulation, Eurojust can also issue similar recommendations in cases concerning a Member State and a third country, where the cooperation agreement concluded with said country allows it and a Liaison Prosecutor is seconded to Eurojust. The joint recommendation will thus be issued by the concerned National Member(s) and the Liaison Prosecutor, who is granted prosecutorial powers in order to accomplish its tasks in accordance with the purpose of the cooperation agreement concluded by Eurojust and the third country.

3. Scope and methodology of the project

This project covers a **period of 4 years, from 2016 to 2019**. The Eurojust written recommendations on jurisdiction issued in 2020 (three in total) are not included since it is still too early to obtain any meaningful information on their follow-up at national level. This report, therefore, does not analyse any recommendations issued by Eurojust on the basis of the new legal framework, but only those issued on the basis of old provisions of the Eurojust Decision.

All cases registered at Eurojust between 2016 and 2019 in which Eurojust issued a written recommendation on jurisdiction on the basis of Article 6(a)(ii) of the Eurojust Decision have been identified. In this period, a total of **19 Eurojust written recommendations on which State is best placed to prosecute** were issued (as communicated to the Governance Secretariat according to the Eurojust (former) Rules of Procedure). It is also worth noticing that Article 7(2) of the Eurojust Decision (now Article 4(4) of the Eurojust Regulation), on the possibility for the College to issue an opinion on a case of conflict of jurisdiction where there is disagreement between the National Members involved, was never used.

The National Members who issued the 19 Eurojust written recommendations identified were requested to provide feedback on the cases by completing a questionnaire and by asking their national authorities for relevant information. The questions posed were the following:

- 1) *What is the current status of the proceedings?*
- 2) *Did the national authorities comply with the recommendation issued by Eurojust?*
 - *If yes, was Eurojust informed?*
 - *If not, was Eurojust informed of their decision and of the reasons for it?*
- 3) *Was the jurisdiction challenged at any stage of the proceedings?*
 - *If yes, on what grounds? By whom (e.g. defendant)? Please elaborate briefly.*
 - *If a final decision was not reached yet, can the jurisdiction still be challenged?*

- Please attach the relevant national decision/judgment/motion, especially in case the jurisdiction was challenged.
- 4) Was the Eurojust recommendation ever referred to (e.g. in the decision/judgment)?
 - If yes, please attach the relevant national decision/judgment.
- 5) Were any practical or legal problems encountered with the transfer of proceedings?
- 6) How did the cooperation with the other involved country develop following the issuance of the Eurojust recommendation?
- 7) After the issuance of the recommendation, was Eurojust's support asked again at a later stage for jurisdictional or transfer of proceedings issues? And for any other issues?

Not all 19 cases could be analysed in depth because some were already closed at Eurojust; therefore, the available information was very limited, and the national authorities were not able to provide additional relevant information because, in some cases, the criminal proceedings were still ongoing at the national level. In certain cases, where needed and possible, searches in the Case Management System allowed some further information to be retrieved.

4. The results of the analysis

4.1. Statistics on Eurojust written recommendations on jurisdiction

The graphic below shows that, soon after the introduction of joint recommendations in 2016, National Members issued several on which State is best placed to prosecute (*). Yet, this tool was used less frequently in the following years, based also on the reasons mentioned in Section 2.1. However, the entry into force of the Eurojust Regulation, granting new powers of initiative to Eurojust, as discussed in Section 2.1, could trigger a change in this trend in the coming years.



The majority of the 19 Eurojust recommendations analysed were issued by the Spanish, Italian and Romanian National Members. Other National Members having issued at least one of the identified recommendations are those of Belgium, France, Germany, Ireland, Poland, Portugal and Slovakia.

(*). The 2016 figures also include two individual recommendations issued before the new practice of joint recommendations was introduced.

Furthermore, one Eurojust joint recommendation concerned a case involving a third country and was jointly issued by a National Member and a Liaison Prosecutor (Norway).

Except for two Eurojust recommendations that were issued individually in 2016 by the National Members involved in the case before the practice of issuing joint recommendations took hold, all other recommendations identified were issued jointly by the National Members involved in the case.

4.2. Compliance by national authorities with Eurojust written recommendations on jurisdiction

The analysis shows that Eurojust written recommendations on which State is best placed to prosecute are an effective instrument. **In all cases analysed but one, the national authorities followed Eurojust recommendations** and transferred / accepted the transfer of the case fully in line with the solution suggested by Eurojust. Very often, Eurojust was informed of the actions taken at national level to comply with its recommendation, most frequently by the national authorities of the Member State transferring the proceedings. There are cases, however, in which Eurojust was not informed of the outcome of the case at national level.

In most cases, the **Eurojust recommendation is mentioned explicitly in the national authorities' decision to transfer the case to another Member State**. By contrast, the Member State retaining jurisdiction on the case usually does not refer to the Eurojust recommendation but simply pursues its investigations, if necessary by accepting the transfer of proceedings.

There is only one case among those analysed where the solution to the conflict of jurisdiction between two Member States put forward in the two Eurojust individual recommendations issued by the respective National Member concerned was not fully implemented at national level. More specifically, the first Member State requested the transfer of the proceedings to the second Member State according to the Eurojust recommendation issued in 2016. However, a two-step procedure was required under the national law of that Member State for the transfer of proceedings to be accepted. While the public prosecutor complied with the Eurojust recommendation by requesting that the transfer of proceedings as a whole be accepted, the investigative judge granted the request only partially and decided to accept the transfer of proceedings only in relation to some suspects and not others (for further details on the reasons for this decision, see Section 3.3, Case 1).

4.3. Challenges to jurisdiction at the national level

Another circumstance showing the effectiveness of Eurojust recommendations in solving jurisdictional issues is that, **in the vast majority of the cases analysed, the decision on jurisdiction was not challenged at national level**. Yet it should be noted that, depending on the state of play of national proceedings, in certain cases, it cannot be excluded that jurisdiction might still be challenged in the future. Indeed, only a few of the cases analysed are now closed with the adoption of final convictions, while most are currently at the trial stage and some are still in the investigation phase. Nevertheless, in many other cases, the decision on jurisdiction is already final, either because the case has been concluded or because the deadline for challenging jurisdiction has expired.

Of the 19 cases analysed, **the decision on jurisdiction was challenged during the national proceedings only in four cases, mostly in the framework of the transfer of proceedings**, and so far the appeals brought have been **successful in only one case**. In two other cases, the competent judge

dismissed the challenge and upheld the solution suggested by Eurojust in its joint recommendations, while in another case the court's decision is still pending. It is also worth noting that, in all said cases, **Eurojust joint recommendations are largely and explicitly referred to by the national courts when assessing the issue of jurisdiction.**

In all four cases, jurisdiction was challenged by the defence but the arguments and scenarios differ from case to case. **Jurisdiction appears to be challenged more frequently in the Member State transferring the proceedings** or relinquishing its jurisdiction, whereas only in one case was the challenge filed in the Member State accepting the transfer of proceedings. Below is a short summary of these four cases that had the decision on jurisdiction challenged during the national proceedings.

Case 1 – Successful challenge on jurisdiction brought in the Member State accepting the transfer of proceedings

In 2016, the National Members of two Member States issued two individual written recommendations to their respective national authorities to accept that Member State A was better placed to prosecute an organised criminal group committing tax fraud, composed of nationals of both Member State A and Member State B. The arguments supporting the Eurojust conclusions were the following:

- the concentration of proceedings in one jurisdiction would favour the administration of justice;
- the investigation in Member State A had a broader scope and was at a more advanced stage;
- the evidence collected in Member State B could be transferred to Member State A.

Having received the request for transfer of proceedings by Member State B in line with the Eurojust recommendation, the public prosecutor of Member State A asked the competent investigative judge to accept said transfer in order to concentrate the entirety of the proceedings in its Member State. However, before the investigative judge, the suspects who were nationals of Member State B argued that such a transfer would infringe their defence rights, since they were resident in Member State B and they had no relationship whatsoever with Member State A. Upholding these arguments, the investigative judge decided to accept the transfer of proceedings only in relation to the nationals of Member State A. The Court of Appeal, dismissing the appeal brought by the public prosecutor, subsequently confirmed the decision. The court noted that a condition under national law to accept the transfer of proceedings was not met (i.e. that the suspect is a national or resident) and there is no international obligation binding Member State A to exercise its jurisdiction over facts committed abroad over foreign nationals. Furthermore, the prosecution of the foreign nationals in this case would infringe their rights of defence and would not serve the purpose of their rehabilitation. Finally, there is no specific interest of justice requiring the prosecution of the foreign nationals in Member State A, since the autonomous nature of the facts under investigation allows for the facts committed in each Member State to be judged separately. No information is available as to whether the suspects were then prosecuted separately in Member State B.

Case 2 – Challenge brought in the context of European Arrest Warrant proceedings in the Member State relinquishing its jurisdiction

In line with a Eurojust joint recommendation holding that Member State A was best placed to prosecute a case involving several offences in its entirety, Member State B suspended their investigations pending the prosecution by Member State A. Member State A subsequently issued a European Arrest Warrant for the surrender of a suspect. During the proceedings for the execution of the warrant in Member State B, the defence challenged the decision to suspend the investigation and not prosecute him in Member State B. The arguments raised were mainly based on national law. In their response to the suspect's application for judicial review, the respondent authorities outlined the terms of the Eurojust joint recommendation. The hearing of the judicial review application and the decision by the competent court are pending.

Cases 3 and 4 – Dismissal of the challenge on jurisdiction brought in the Member State transferring the proceedings in line with the Eurojust recommendation

In two other cases, the transfer of proceedings in line with Eurojust joint recommendations was challenged in the Member State seeking the transfer of proceedings, but the challenge was finally dismissed in both cases. The proceedings were therefore successfully transferred, as suggested in the Eurojust joint recommendations.

More specifically, in one case, the transfer of proceedings was challenged by one of the suspects affected on the main grounds that:

- despite being a national of Member State A, he resided in Member State B and the transfer of proceedings would, therefore, not serve his rehabilitation;
- the investigations in Member State B were at a more advanced stage;
- the penalties provided in Member State A were more severe and his defence rights would, therefore, be infringed;
- he was also subject to another investigation in Member State B.

However, the competent court, referring also to the Eurojust joint recommendation, dismissed the challenge holding *inter alia* that:

- the suspect was already in pre-trial detention in Member State A in a linked criminal proceeding;
- the transfer of proceedings would be in the interest of justice, since most of the evidence was located in Member State A;
- the hearings for the other criminal investigation could take place via videoconference;
- a formal comparison between the penalties is not an admissible ground to contest the transfer.

It is interesting to note that many of these arguments stem from the Eurojust joint recommendation.

No details are available as to the grounds for the challenge against the transfer of proceedings in the second case, yet it was highlighted that the challenge entailed a significant delay to its execution.

4.4. Subsequent judicial cooperation needs

The analysis showed that, following the issuing of a Eurojust recommendation on jurisdiction, the cooperation between the national authorities involved sometimes continued very smoothly **without any need for further involvement of Eurojust**. A **best practice** that contributed to ensuring such smooth cooperation was identified in one case: following the issuing of the Eurojust recommendation, a coordination meeting was organised to discuss the details and practicalities related to the transfer of proceedings and related case files.

In many other cases, however, **national authorities still requested the assistance and support of Eurojust for subsequent issues** arising in the same case.

In the vast majority of cases, Eurojust was requested to **facilitate the execution of the transfer of proceedings in line with its recommendation**. Sometimes, Eurojust was involved because there were delays by the requested Member State in providing a formal reply of acceptance of the transfer of proceedings. Yet, the most frequent issue was the **delay in the transmission of the case file** and its documents to the requested Member State (up to one year in one case). In some cases, Eurojust was also requested to facilitate the transmission of the objects seized or of the money frozen in bank accounts in the Member State that transferred the proceedings. Another recurring issue that Eurojust was often asked to assist with is the **translation of the documents of the case file** to be transmitted with the proceedings. In some cases, the issue was the costs of the translation and whether they could be covered by the joint investigation team's budget; in others, the time needed to translate the documents significantly delayed the proceedings. In one case in particular, this led to a stall since, according to national law, a decision to prosecute cannot be taken until the translation of the whole file is received. In another case, the delays were exacerbated by a misunderstanding as to the language into which the documents were to be translated, which entailed a second translation to remedy the mistake. A **best practice** used in some cases to reduce the delays related to the translation of the documents was to receive a digital copy of the translated case file via email, while waiting for the originals to arrive via ordinary mail.

In a few cases, Eurojust was instead requested to assist on **other subsequent issues that were not directly related to the transfer of proceedings**. In two cases, for instance, Eurojust facilitated the execution of freezing orders issued by the Member State to which the proceedings were transferred on assets retrieved in the Member State that relinquished its jurisdiction. In another case, Eurojust facilitated the execution of a mutual legal assistance request issued by the Member State to which the proceedings were transferred for the summoning and hearing of suspects located in the other Member State.

5. Conclusions

The analysis shows that **Eurojust written (joint) recommendations on which State is best placed to prosecute are an effective tool** to solve jurisdictional issues in transnational proceedings and prevent risks of infringing the principle of *ne bis in idem*. Since 2016, when a Eurojust joint recommendation was issued for the first time, national authorities have always complied with the solution proposed by Eurojust, except in one case. Furthermore, casework shows that the decision on jurisdiction adopted at national level in line with the Eurojust recommendation is very rarely challenged

by the parties and, even where that happens, challenges are often dismissed as unfounded by the competent national courts – who are also able to rely on the arguments and legal assessment included in the Eurojust written recommendation.

At the same time, the analysis shows that Eurojust's role does not end with the issuing of the recommendation. Its assistance is frequently crucial and also required in relation to follow-up issues, **particularly concerning the practical and timely execution of the transfer of proceedings** as indicated in the recommendation. Indeed, the lack of a specific EU instrument on transfer of proceedings often creates difficulties that trigger the national authorities to call upon Eurojust ⁽⁵⁾.

Nevertheless, this report shows that **National Members do not use this tool very often**. Yet, the new Eurojust Regulation (applicable since December 2019), which in its Article 2(3) confirms and reinforces the **National Members' powers of autonomous initiative** regardless of a request formulated by the national authorities, might offer new opportunities for a wider recourse to this tool that has proven to be effective in practice. National Members (and Liaison Prosecutors where relevant) should therefore consider the issuing of a joint recommendation each time jurisdictional issues (in the broad sense used in this report) arise, even where their national authorities do not specifically ask for a Eurojust opinion on the issue.

⁽⁵⁾ See also Eurojust, [Report on Eurojust Casework in the Field of Prevention and Resolution of Conflicts of Jurisdiction](#), last updated in 2018.



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PDF: Catalogue number: QP-09-21-254-EN-N • ISBN: 978-92-9490-637-3 • DOI: 10.2812/667025