The future of Eurojust

STUDY for the LIBE committee

EN 2012
Abstract

This study focuses on the key issues related to the future of Eurojust in the light of the new framework established by the Treaty of Lisbon. The study evaluates the current structure and functions of Eurojust and on that basis describes the three main paths that Eurojust’s future can take: (1) gradually building on the current legislative framework; (2) invoking the new treaty base; and (3) co-existing with the European Public Prosecutor’s Office.
2. FUNCTIONING OF EUROJUST

2.1. General objectives, competences and tasks assigned to Eurojust

2.1.1. The objectives and competences of Eurojust

2.1.2. Tasks of Eurojust

2.2. General tasks of Eurojust

2.2.1. Winning by numbers – coordination meetings

2.2.2. Priority crime areas

2.3. Specific tasks of Eurojust

2.3.1. The 2000 MLA Convention

2.3.2. European Arrest Warrant

2.3.3. Joint Investigation Teams

2.3.4. Conflicts of jurisdiction

2.3.5. Evidence gathering – the European Evidence Warrant and the European Investigation Order

2.3.6. Role in policy development and strategy making

2.3.7. Professional network

2.4. Eurojust and its partners

2.4.1. Eurojust and Europol

2.4.2. Eurojust and the European Anti-Fraud Office

2.4.3. Eurojust and the European Judicial Network

2.4.4. Eurojust and other EU agencies, third states and international organisations

2.5. Main conclusions on the functioning of Eurojust

2.5.1. From a reactive to a proactive style

2.5.2. Underpowered by legislation

2.5.3. Informal working style

2.5.4. Direction

2.5.5. Strategy making

3. FUTURE DEVELOPMENTS AND STATUS OF EUROJUST WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE

3.1. The future of Eurojust based on its current legislative framework

3.1.1. Reluctance to change

3.1.2. Proposals to improve Eurojust without changing the 2008 Decision

3.1.3. Proposals to improve Eurojust through other legislative instruments

3.2. Changes stemming from the new legal base in the Treaty on the Functioning of the European Union

3.2.1. General changes affecting the area of freedom, security and justice
3.2.2. Specific changes concerning Eurojust’s legal base – general discussion of Article 85 TFEU 106
3.2.3. Structure 109
3.2.4. Operation 112
3.2.5. Power to initiate investigations 112
3.2.6. Resolving conflicts of jurisdiction 115
3.2.7. Accountability and control 116
3.2.8. Representation of the interests of the defence 120
3.2.9. Data protection 124

3.3. Establishment of the European Public Prosecutor’s Office? 125
3.3.1. Common past, common future? 125
3.3.2. Article 86 of the TFEU – an analysis 127
3.3.3. Establishment of the EPPO – effect on Eurojust’s structure 129
3.3.4. Establishment of the EPPO – effect on Eurojust’s competencies 131
3.3.5. Establishment of the EPPO – Methodology 132

4. CONCLUSIONS 134
4.1. Gradually building on the 2008 Decision 134
4.1.1. How to improve the structure of Eurojust 134
4.1.2. How to improve the functioning of Eurojust 135
4.1.3. How to improve the accountability of Eurojust 136

4.2. Evaluation and perspectives of Article 85 TFEU 137
4.2.1. Perspectives for the structure of Eurojust 138
4.2.2. Perspectives for the functions of Eurojust 139
4.2.3. Perspectives for the accountability of Eurojust 140

4.3. Evaluation of the intertwined future of Eurojust and the European Prosecutor’s Office 141
4.3.1. Methodology 141
4.3.2. Complex legal framework 141

REFERENCES 142

ANNEXES 153


RECORD ON TERM OF OFFICE, THE JUDICIAL POWERS AND THE PREROGATIVES OF THE NATIONAL MEMBERS 220

LIST OF INTERVIEWS 221
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
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<td>AWF</td>
<td>Analytical Work File</td>
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<td>BUDG</td>
<td>EP’s Committee on Budgets</td>
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<td>CIS</td>
<td>Customs Information System</td>
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<td>CATS</td>
<td>Coordinating Committee in the area of police and judicial cooperation in criminal matters</td>
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<td>COPEN</td>
<td>Working Party on Cooperation in Criminal Matters</td>
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<td>COSAC</td>
<td>Conference of national parliaments’ European Affairs Committees</td>
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<td>COSI</td>
<td>Standing Committee on Operational Cooperation on Internal Security</td>
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<td>CMS</td>
<td>Case Management System</td>
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<td>CT Team</td>
<td>Counter-terrorism Team</td>
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<td>DPO</td>
<td>Data Protection Officer</td>
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<td>EAW</td>
<td>European Arrest Warrant</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EDPS</td>
<td>European Data Protection Supervisor</td>
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<td>EJN</td>
<td>European Judicial Network</td>
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<td>EJTN</td>
<td>European Judicial Training Network</td>
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<td>ENCS</td>
<td>Eurojust National Coordination System</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EPPO</td>
<td>European Public Prosecutor’s Office</td>
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<td>EU</td>
<td>European Union</td>
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<td>Eurojust</td>
<td>Judicial Cooperation Unit of the European Union</td>
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<td>Europol</td>
<td>European Police Office</td>
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<tr>
<td>Frontex</td>
<td>European agency for the coordination of operational cooperation at the external borders of the European Union</td>
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<td>GENVAL</td>
<td>Working Party on General Matters including Evaluation</td>
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<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>IWG</td>
<td>Informal Working Group on the implementation of the new Eurojust Decision in the Member States</td>
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<tr>
<td>JAIEX</td>
<td>Working Party for JHA-External Relations</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
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<td>JIT</td>
<td>Joint Investigation Team</td>
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<td>JSB</td>
<td>Joint Supervisory Body</td>
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<td>LIBE</td>
<td>Committee on Civil Liberties, Justice and Home Affairs</td>
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<td>MLA</td>
<td>Mutual Legal Assistance</td>
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<td>MS</td>
<td>Member State</td>
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<td>OCC</td>
<td>On-call Coordination</td>
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<td>OCTA</td>
<td>Organised Crime Threat Assessment</td>
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<td>OLAF</td>
<td>European Anti-Fraud Office</td>
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<td>OSR</td>
<td>Organisational Structure Review</td>
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<td>SIS</td>
<td>Schengen Information System</td>
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<tr>
<td>SIS II</td>
<td>Second generation Schengen Information System</td>
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<tr>
<td>SOCTA</td>
<td>Serious and Organised Crime Threat Assessment</td>
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<td>Sitcen</td>
<td>Situation Centre</td>
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<tr>
<td>ROCTA</td>
<td>Russian Organised Crime Threat Assessment</td>
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<td>RoP</td>
<td>Rules of Procedure</td>
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<td>TE-SAT</td>
<td>EU Terrorism Situation and Trend Report</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
</tr>
</tbody>
</table>
LIST OF TABLES

Table 1: Crimes falling under Eurojust’s competence 55
Table 2: Tasks of Eurojust acting through its national members and acting as a College 57
Table 3: Number of Coordination meetings 61
Table 4: Priority crime types in Eurojust cases 64
Table 5: College registered cases involving Europol 83
Table 6: Eurojust coordination meetings requested by Europol 83
Table 7: Main crime types where Europol is involved between 2005 and March 2011 84
Table 8: College registered cases involving OLAF 86
Table 9: Eurojust coordination meetings requested by OLAF 86
Table 10: Main crime types where OLAF is involved between 2005 and March 2011 87
EXECUTIVE SUMMARY

Marking its tenth year anniversary in 2012, Eurojust is the judicial cooperation unit of the European Union. In the fight against cross-border criminal activity, Eurojust is entrusted to facilitate the work of national authorities by improving the coordination of transnational investigations and prosecution and by improving cooperation among these authorities, especially with regard to mutual legal assistance, extradition requests, and strengthening national investigations and prosecutions by supporting information exchange and coordination. Eurojust has become institutionally embedded in criminal justice cooperation among Member States and has proved its worth in the everyday work of national criminal justice. Eurojust is an indispensable institution of the area of freedom, security and justice.

Since its founding in 2002, Eurojust has undergone some important changes. With the amendment of the body’s founding act in 2008, a number of previously identified shortcomings were addressed and Eurojust entered a new phase of its development. However, while the implementation of the 2008 amendment remains incomplete to this day, possibilities for even more significant change to the body have appeared on the horizon.

In this vein, this study will examine the potential future development of Eurojust in three different but related frameworks. Firstly, the immediate future of Eurojust is the course set out by the 2008 revision of Eurojust’s founding decision, within which Eurojust is meant to operate. Upon the full implementation of the amendments introduced by the 2008 revision, Eurojust will be in a position to adopt a proactive working method where the exercise of formal powers should be increasingly sought. However, the proper national transposition of the 2008 revision is a “sine qua non” condition to this end. Furthermore, there can not be any serious consideration of further changes to Eurojust until these amendments are fully implemented. Beyond the current legal framework, the new legal base provided by the Treaty of Lisbon opens up a number of possibilities not only to strengthen but to reorient the unit. Invoking the new treaty base would be a clear departure towards a more intensified model of judicial cooperation in criminal matters. The granting of new powers, such as the power to initiate investigations and to resolve conflicts of jurisdiction, would result in a Eurojust that embodies a more Europeanized approach to judicial cooperation and clearly shifts powers from the national authorities to Eurojust. At the moment, this course of development seems to be more of a medium-term possibility. The third framework, lying in the more distant future, is the possibility opened up by the Treaty of Lisbon to establish the European Public Prosecutor’s Office. Should such an office see the light of day, its organisation and powers will evidently affect Eurojust. There will be a risk of bringing too much complexity into the current administration of judicial cooperation in criminal matters. For this reason as well, the potential structure and competences of the European Public Prosecutor’s Office will require a very careful design in order to ensure that it complements rather than competes with Eurojust. In any case both the structure and the functions of Eurojust will be seriously affected by the establishment of the European Public Prosecutor’s Office, the degree of change and the efficiency gain will to a great extent depend on the caution with which this undertaking is made.

The three main issues that any reconsideration of Eurojust’s current regulatory framework has to address are the unit’s structure, function and accountability. Following the examination of the above frameworks, the study will consider what impact the various paths of development could have on these areas. In this regard, the crucial question for the policymaker is to clearly identify what Eurojust’s main objective is and whom the body serves. While answering the first question may seem to be straightforward, as the overarching mission is to combat serious crime and organised crime, the second question
calls for a more nuanced answer. However, as Eurojust is a truly operational body, this answer is not at all self-evident. Is Eurojust ultimately there to serve the national authorities or by becoming a standard agency and taking action based on EU interests, to serve a European agenda? The two conceptions are not fully antagonistic, yet when choices are made from among the possibilities provided by the various regulatory frameworks, this underlying policy consideration has to be kept in mind. This report suggests that serving the specific requests of national authorities is precisely what embodies the strength of Eurojust, defining it as a truly operational unit in the fight against serious crime. Should the further empowerment and consolidation of Eurojust be based on the consideration that the body is meant to serve a concrete EU agenda, this will need to be defined in concrete terms. However, it is not at all clear that the requisite political will to take this step is in place, nor it is clear what impact the implementation of such a reform would have on Eurojust’s operational capacity. This study offers various considerations that should be borne in mind as policy-makers consider the future of the body.

Regardless of which framework ultimately ends up shaping its future, it is clear that Eurojust will eventually become a body that is different from the current one. From a policy-makers perspective, the question of whether to pursue the paths opened up by these frameworks in sequence or in parallel is as important as having an exact idea of what objective Eurojust is meant to serve by following these paths of development. This study suggests that a gradual approach should be taken. A prerequisite for moving ahead is the full implementation of the 2008 revision and an evaluation of the impacts on Eurojust that this has brought.

Finally, the myriad issues raised by an examination of the future of Eurojust can not be understood without a thorough understanding of both its history and its current operations. Indeed the legal, structural, organisational and functional context within which Eurojust has evolved and continues to operate have direct bearing on its future development, regardless of the modalities that this development will entail. For this reason, the first two chapters of the study are dedicated to a detailed examination of Eurojust’s structure and organisation as well as its current functioning.
GENERAL INFORMATION

Mandate

The European Parliament’s Directorate General for Internal Policies - Policy Department C mandated the European Centre for Judges and Lawyers, European Institute of Public Administration (EIPA) - Luxembourg to carry out a study on the key issues related to the future of Eurojust in the light of the new framework established by the Treaty of Lisbon and the Stockholm Programme.

On the basis of practical experiences of Eurojust, the study addresses the need for better coordination and cooperation among the Member States’ judicial authorities in their fight against serious crime and terrorism.

The purpose of this study is to review the achievements and shortcomings of Eurojust, an EU body established by a Council decision from 2002, which was later amended in December 2008. The study looks at Eurojust’s relation with other EU institutions and bodies and reviews Eurojust’s involvement in the European Arrest Warrant and the Joint Investigation Teams, as well as other relevant EU criminal law instruments.

The study considers the ways in which the interests of the defence can be better integrated in the (future) structures of Eurojust.

Last but not least the study looks at possible ways to enhance the parliamentary control of Eurojust and at potential future developments related to Eurojust’s structure and competences, including the possible establishment of a European Public Prosecutor’s Office from Eurojust.

Aim

In the light of the above, the present study will to a large extent devote its attention to the possibilities lying in the existing regulatory framework and will draw on how the changes brought in 2008 could set Eurojust on a different course. The structure of the unit will be analysed in depth, paying special attention to:

- the standing and powers of Eurojust national members;
- powers of the College;
- organisational structure of Eurojust.

Eurojust’s inter-institutional placement and the various control mechanisms to which it is subjected will be discussed with reference to:

- relations with the Council of Ministers, and Council working parties;
- relations with the European Commission;
- relations with the European Parliament;
- relations with national parliaments;
- budgetary procedure;
- data protection rules;
- evaluation mechanisms.
This account will be closed with an evaluation of Eurojust’s structure and inter-institutional placement (Chapter 1).

This will be followed by an in-depth analysis of the general objectives, competences and tasks assigned to Eurojust, based on the current legislative environment involving in-depth discussion of those EU criminal law instruments to which Eurojust makes recourse in its operational work. In this respect special attention will be paid to:

- The competences under the 2008 Decision;
- 2000 Mutual Legal Assistance Convention;
- Framework Decision on the European Arrest Warrant;
- Framework Decision on Joint Investigation Teams;
- Framework Decision on Conflicts of Jurisdiction;

This will be complemented by an examination of the relationships Eurojust have established with fellow JHA agencies in the course of its operational work, namely:

- Europol;
- European Anti-Fraud Office;
- European Judicial Network.

An evaluation of the functioning of Eurojust will close this part of the study (Chapter 2.).

On the basis of these findings the last part of the study will strictly focus on the possible directions that Eurojust’s future could take firstly by fully implementing and applying the current legislative framework, secondly by invoking the new legal base for Eurojust introduced by the Treaty of Lisbon and finally elaborating on the impact the European Public Prosecutor’s Office may have on Eurojust, if established (third chapter). The conclusions of the study will be drawn from the findings made in relation to Eurojust’s current regulatory framework synthesised with possible scenarios for change.

**Methodology**

The present study is based on a combination of desk research and interviews. Research work encompassed legislative instruments, legal scholarship and publicly available documents. Desk research was complemented by interviews conducted with officials from the European Commission, the General Secretariat of the Council of the European Union, Eurojust, Europol and OLAF. A list of interviews is attached to the annex, yet in the study interviewees are only referred by numbers.
1. ESTABLISHMENT OF EUROJUST – STRUCTURE AND ORGANISATION

KEY FINDINGS

- Eurojust’s institutional framework represents an intergovernmental-style, hybrid structure.
- The underlying consideration of strengthening Eurojust was that better equipped Eurojust national members would promote Eurojust itself.
- Eurojust to date is rather controlled by national laws and national authorities although an implicit shift towards a more integrationist style can be detected.
- Given the limited objectives of the 2008 amendments there was no need to accommodate further rules on accountability and to consider defendants’ rights.
- Full implementation of the 2008 Decision will represent the stage from where the horizontal cooperation model cannot be taken further.
- Eurojust’s inter-institutional placement and related control mechanisms largely reflect the intergovernmental origins.
- The present EU legal framework ensures a high degree of formal autonomy for Eurojust.
- There is a vacuum in Eurojust’s performance review and priority setting.
- National laws and hierarchies to which Eurojust national members are bound create a second layer of control.

1.1. The Establishment of Eurojust

1.1.1. Forerunners of judicial cooperation

While the idea of setting up a judicial cooperation unit within the European Union goes back to the early nineties when a prosecutorial counterpart to Europol was being sought, it was only at the end of the decade that concrete proposals to this effect were put on paper. In the Action Plan to Combat Organised Crime adopted by the Council on 28 April 1997 there is already a recommendation to establish a network for judicial cooperation, which “should be given a special mandate and consist of practitioners having an extensive practical experience in fighting organised crime”. In order to make this recommendation the European Judicial Network was created by the Joint Action 98/428 JHA of 29 June 1998 and the network was formally launched on 25 September 1998. Since its inception the European Judicial Network (EJN) has functioned as a network for legal practitioners who are designated by the respective Member States as national contact points. These national...
contact points are assisted by an EJN secretariat and a designated contact point from the European Commission. In parallel to this the posting of liaison magistrates in other Member State (MS) was also made possible to improve bilateral judicial cooperation by enhancing the flow of information and to promote mutual understanding of national legal systems. While both the EJN and the liaison magistrates proved useful in enhancing bilateral judicial cooperation among MSs, both are loose structures not well designed for dealing with transnational criminal procedures where more Member States are involved.

1.1.2. Why Eurojust was needed

As the police and criminal law agenda of the European Union become more ambitious, respective calls were made to complement this work by enhancing judicial cooperation in criminal matters. Repeated emphasis was put on the fact that a platform was needed to provide assistance in the judicial follow-up of cross border criminal cases in order to effectively fight serious crime within the European Union. At the same time the argument for the need to put Europol under judicial or prosecutorial control also gained momentum. The combined outcome of these ‘visions’ took shape when political support was given for the creation of a judicial cooperation arm of the area of freedom security and justice. It will be seen below that while the judicial cooperation mandate was carried out and has been carried out by Eurojust ever since its creation, the role of scrutinising Europol was soon abandoned and has since been largely forgotten.

1.1.3. Negotiating Eurojust

More advanced ideas for creating an EU judicial cooperation unit took shape during the course of 1999. Having tested the waters in the informal meeting of the justice ministers earlier that year the Finnish Presidency, with the active brokering of the Council General Secretariat, was able to put the creation of an EU body for judicial cooperation, now called Eurojust, into the five year multi-annual programme on justice and home affairs. The so-called Tampere Programme concluded that:

„46. To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol’s analysis, as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001."

Having received a clear mandate and a deadline from the European Council, preparatory work on the creation of Eurojust quickly ensued. Four subsequent presidencies, namely Portugal, France, Sweden and Belgium, prepared a draft decision on the establishment of

Eurojust, which was submitted for Council discussion in the second half of 2000.\textsuperscript{11} Somewhat surprisingly, Germany submitted a separate proposal on Eurojust as well.\textsuperscript{12} The main difference between the two was that while the Portuguese-French-Swedish-Belgian proposal aimed to create an autonomous organisational entity with Member States appointing a single delegate each, the German proposal had lower ambitions which consisted only of convening, in a less formal manner, national liaison officers aided by the Council General Secretariat.\textsuperscript{13} The German proposal did not intend to recognise Eurojust as an entity, the operational capacity of which was very loosely defined, whereas the Portuguese-French-Swedish-Belgian proposal attributed Eurojust a legal personality, with more concrete tasks. The German initiative can also be characterised as embodying a truly intergovernmental approach as compared to the Portuguese-French-Swedish-Belgian proposal, which deliberately opted for more than a loose network of liaison officers and consciously wanted to go beyond Europol’s structure.\textsuperscript{14} Finally, the course set by the Portuguese-French-Swedish-Belgian proposal was adopted, and Eurojust was established as a separate entity.

Eurojust was made responsible for improving criminal justice cooperation among Member States in relation to the prosecution and investigation of serious cross border crimes involving two or more Member States\textsuperscript{15} in order to fight these crimes more effectively throughout the EU. It has to be emphasised from the outset that Eurojust was set up without itself having the power to initiate an investigation or to request national authorities, in a binding manner, to take procedural steps.

In the meantime the treaty base of Eurojust was also created by the adoption and entry into force of the Treaty of Nice, amending the provisions on judicial cooperation in criminal matters set forth by the Treaty on the European Union (TEU).

\begin{quote}
Article 31 TEU as amended by the Treaty of Nice
1. Common action on judicial cooperation in criminal matters shall include:
   (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;
   [...]
2. The Council shall encourage cooperation through Eurojust by:
   (a) enabling Eurojust to facilitate proper coordination between Member States’ national prosecuting authorities;
   (b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol;
   (c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests.
\end{quote}

\textsuperscript{11} Initiative of the Portuguese Republic, the French Republic, the Kingdom of Sweden and the Kingdom of Belgium with a view to adopting a Council Decision setting up Eurojust with a view to reinforcing the fight against serious organised crime OJ 2000/C 243/05.
\textsuperscript{12} Initiative of the Federal Republic of Germany with a view to the adoption of a Council Decision on setting up a Eurojust team OJ 2000/C 206/01
\textsuperscript{14} Mangenot M. (2006), p7.
\textsuperscript{15} Suominen, A. (2008), p221.
1.1.4. The parallel story of the European Public Prosecutor

The tension that arose at the time between whether to create a more intergovernmental or a more supranational-style body can also be detected beyond merely the two concurring proposals being negotiated in the Council. The same issue was at stake at the 2000 Intergovernmental Conference (2000 IGC) negotiating the modification of the founding treaties, where special attention was paid to the long established need for institutional reform. It was in the context of the 2000 IGC that the European Commission put forward its own initiative to create a supranational-style European Public Prosecutor in order to establish an institution having sufficient powers to fight crimes committed against the EC’s financial interests, including the power to prosecute such crimes before the national courts of Member States. The 2000 IGC chose not to take up the Commission’s initiative and decided upon the establishment of Eurojust, giving the institution a legal base in the modified Treaty of the European Union. With this decision the Member States opted for a more horizontal, intergovernmental-style coordinating body rather than transferring more substantive powers to an independent institution with the power to prosecute.

Consequently, Member States clearly decided in favour of a model of criminal law cooperation which focuses on the principle of mutual recognition and maintains Member States’ criminal law competence, instead of harmonising substantive criminal law. In the same vein, Member States sought to build up horizontal cooperation structures over the kind of vertical integration that would have been manifested by a supranational prosecutorial structure. Eurojust is an institution which, to date, embodies this choice. It facilitates cooperation among national authorities in relation to cross border crimes without having the genuine power to initiate investigations/prosecutions with binding effect on these authorities.

At the same time it also needs to be observed that while Eurojust was established with such so-called soft powers, since its inception a wide range of crimes have been placed under its ambit. While prosecution remains outside Eurojust’s competence, the scope of the crimes it deals with clearly exceeds the crimes committed against the EC’s financial interests, which was the only crime in relation of which the European Prosecutor was to be made competent according to the Commission’s 2000 proposal.

While Member States opted for the more horizontal type of cooperation and established Eurojust, from the moment of its creation the fate of Eurojust has been intertwined with that of the European Public Prosecutor. Leaving the Treaty of Nice behind, the treaty for establishing a constitution for Europe and later the Treaty of Lisbon put the issue of the establishment of the European Public Prosecutor’s Office back on the agenda, linking the issue once again to Eurojust’s future. The repercussion of these developments are discussed in Section 3.3. As a result the idea of introducing a more integrated prosecutorial structure has been coupled with the institutional development of Eurojust from the outset. The consequences of the eventual establishment of the EPPO will be elaborated below.

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17 Article 31(2) TEU.
18 Ligeti (2011) p139.
19 Ibid.
1.1.5. Pro-Eurojust

With its legal basis confirmed in the Treaty of Nice\(^\text{20}\) and foreseeing the lengthy discussions that would come in drafting its founding document, the Council decided to set up a ‘Provisional Judicial Cooperation Unit’, which came to be known as “Pro-Eurojust”, in order to fulfil certain tasks of the future body until it was up and running.\(^\text{21}\) The objectives set out for Pro-Eurojust were:

- To improve cooperation between the competent national authorities with regard to investigations and prosecutions in relation to serious crime, particularly when it is organised, involving two or more Member States.
- In the same framework, to stimulate and improve the coordination of investigations and prosecutions in the Member States, taking into account any request emanating from a competent national authority and any information provided by any body competent by virtue of provisions adopted within the framework of the treaties.
- To provide expertise to the Member States and to the Council, where necessary, with a view to the negotiation and the adoption by the Council of the instrument establishing Eurojust.\(^\text{22}\)

The provisional Pro-Eurojust structure was composed of one delegate per Member State, with headquarters located in Brussels, supported by the Council General Secretariat. Pro-Eurojust became operational on 1 March 2001. While the Commission was to be fully associated with the workings of the body, its own delegate was not allocated with membership status.\(^\text{23}\) Pro-Eurojust got off to an energetic start, immediately establishing relations with its EU counterparts and law enforcement agencies, i.e. OLAF, Europol, Interpol and the World Customs Organisation. It also made efforts to focus its operations on:

- Operational casework;
- Developing an operational strategy;
- Contributing to the Working Group negotiations on the definitive Eurojust;
- Developing a wider awareness of and “marketing” Eurojust;
- Consolidating internal organisational issues.\(^\text{24}\)

It is worth mentioning that even the short and provisional period during which Pro-Eurojust existed illustrated one of the most recurring shortcomings of the proposed and then agreed structure of Eurojust; namely the differences in both the standing and the powers to act of the national delegates, who are each governed by their respective national laws.\(^\text{25}\) This issue was already reflected upon, albeit in a cautiously diplomatic manner, as early as the report on the Pro-Eurojust, which was submitted in December 2001. The report stated that “(t)he unit’s strength is directly related to its members’ network of contacts, their personal

\(^{22}\) Pro-Eurojust Decision Article 1-2.
\(^{23}\) Pro-Eurojust Decision Article 3.
abilities and their powers. It was soon apparent that the extent of a member’s powers had an immediate and practical impact on the work of facilitating and stimulating investigations.” The report explains how the variations in the powers of the different national delegates hinder daily work, giving concrete examples, such as, certain delegates were authorised to transmit or receive letters of request whereas others not; only a very small number of delegates retained prosecutorial or investigative powers; a few delegates had powers under national law to receive and exchange information on criminal proceedings where some delegates had no authorisation even to request information directly from their national police authorities. Having mapped out these crucial differences in standing and how they might impede the meeting of the objectives set out, the report went on to modestly conclude that “(i)t is an interesting fact that in the process of appointing their national representatives Member States have created a mosaic of powers in Pro-Eurojust.” The asymmetry in the roles and powers of Pro-Eurojust delegates foreshadowed the phenomenon that played a defining role in first period of Eurojust’s institutional history and was only remedied when the founding decision was revised in 2008.

At the time of the report’s submission negotiations in Council on the creation of Eurojust were in their final stage, and the report’s findings and warnings were ultimately not taken into account.26 The Council finally adopted its decision on establishing Eurojust on 28 February 2002,27 which Member States had to implement by 6 March 2003. In the meantime, it was also decided that the seat of Eurojust would be in The Hague, where Eurojust started its work on 10 December 2002.28

Regardless of the fact that the Member States in Council felt that a compromise solution had been found, the Commission continued to insist on the establishment the European Public Prosecutor for the protection of the financial interest of the EC.29

1.2. The 2002 Decision

1.2.1. The structure of Eurojust

The 2002/187/JHA decision setting up Eurojust, with a view to reinforcing the fight against serious crime (2002 Decision),30 established the institution on the basis of Articles 31 and 34(2)(c) TEU, under the then third pillar of the European Union. The 2002 Decision is the founding document of Eurojust, which has been amended twice since its adoption. In 2003 the provisions on Eurojust’s budget were amended.31 In 2008, however, a major amendment to the 2002 Decision was adopted (2008 Decision).32


28 Decision taken by common agreement between the representatives of Member States, meeting at head of state or government level 2004/97/EC, Euratom, of 13 December 2003 on the location of the seats of certain offices and agencies of the European Union OJ L 29/15.


30 Ibid fn27.


Eurojust became a body with legal personality, funded by the EU and falling under the EU staff regulations. The distinctive feature of Eurojust was that each Member State could delegate to it one national member in “accordance with its legal system”, who was either a “prosecutor, judge or police officer of equivalent competence”. If this provision by itself had not been clear enough a later provision explicitly stated that “(n)ational members shall be subject to the national law of their Member State as regards their status”. It is, therefore, the Member State’s national laws that governed the judicial powers of the national member acting in the territory of the given Member States. In this vein, national law regulated the national members’ competence with regard to foreign judicial authorities and access to national criminal records. In short the standing, the length of term and the range of powers to be exercised by the national member were all governed by the law of the delegating Member State. The salary of the Eurojust national member is also paid by the Member State. There is only one provision which represented a modest exception, requiring Member States to govern the term of their member in a manner that allows ‘Eurojust to operate properly’.

National members were to be assisted by one assistant or, if the College – the central organ of Eurojust - permitted, by several assistants, one of which may replace the Member State’s national member. Besides the assistants, Member States could also appoint national correspondents responsible for matters of high priority. The 2002 Decision explicitly mentioned matters related to terrorism as an example of the latter. National correspondents were, however, based in the Member States themselves, being entirely subjected to their respective national law, provided that the relation between the competent authorities of the Member State and its Eurojust national member remains undisturbed.

The national members together form the College, and it is this forum which practically embodies Eurojust. Each national member has one vote in the College with voting rules largely determined in the Rules of Procedure (RoP). There are a few exceptional cases where the 2002 Decision itself stipulated the voting rules. It has to be noted at this stage that it was, and still is, a distinct feature of Eurojust that it can act either through its national members or through the College. However the competences of the College and the national members in facilitating judicial cooperation matters vary. The College may be called upon to act in relation to a case that is being dealt with by Eurojust and a national member so requests, or when the case at hand has repercussions at the Union level, or when a given case has an effect on those Member States who were not directly concerned with it. Eurojust also acts through the College when the issue at stake involves the attainment of its objectives generally and in other matters specifically referred to the College by the 2002 Decision. According to the 2002 Decision the bulk of the operational

referred as Eurojust Decision. 5347/3/09 REV 3 COPEN_ 9 EUROJUST 3 EJ_ 2 Brussels, 15 July 2009. Text of the Eurojust Decision is attached to this study as Annex I.

33 Article 2(1) 2002 Decision.
34 Article 9(1) 2002 Decision.
35 Article 9(3)-(4) 2002 Decision.
36 Article 9(1) 2002 Decision.
37 Article 2(2) 2002 Decision.
38 Article 12(1)-(3) 2002 Decision.
39 Article 10(1) 2002 Decision.
40 According to Article 10(2) of the 2002 Decision the Rules of Procedure is adopted by the Council on the basis of the proposal of the College.
41 I.e. Article 10(3) 2002 Decision stating that when the College requests a Member State to initiate investigation it has to vote by a two-thirds majority.
42 Whenever Eurojust acts it has to clearly state whether it acts in the capacity of its members or as a College Article 5(2) 2002 Decision.
43 Article 5(1) 2002 Decision.
work was to be carried out by the national members operating in their national capacity, with the College itself primarily used as a forum of information exchange and for taking up operational tasks in high profile cases.

Following the path set out by Pro-Eurojust, the 2002 Decision did not allocate membership in the College for the Commission. The Commission’s role, in accordance with the general provision of the TEU,44 is confined to one of being associated with the work of Eurojust, with the proviso that it may be specifically invited to provide expertise regarding work carried out on the coordination of investigations.45 The 2002 Decision also contained an open-ended possibility for Eurojust to map out a “necessary practical arrangement” in order to enhance cooperation with the Commission.46

The institutional framework drawn up by the 2002 Decision stands out as a genuine embodiment of the concept of the third pillar; one representing an intergovernmental-style structure where there is no attempt to approximate the standing of the national members or even to lay a common set of minimum powers so that national members could enjoy equal footing when exercising their competencies. Whereas the appointment, powers and competences of Eurojust national members clearly fall under the remit of national law, this is coupled with the standing of the College, which may also act as an entity, however with no mandatory powers. This double or hybrid nature characterises Eurojust to the present day. The 2008 Decision has not changed this underlying feature of Eurojust’s structure. While it is true that the 2008 Decision institutionally strengthened Eurojust in many respects, the dual nature of the organisational structure was not altered. Eurojust, therefore, has been described as having a mixed character, demonstrating both national and European/integrational features at the same time.47

It will be seen below that an implicit shift can be detected towards a more integrationist approach, yet to date the control and influence of national laws and national authorities remain very significant with regards to Eurojust’s structure and work.

1.2.2. Competences

The overarching objectives set out for Eurojust in the 2002 Decision were to facilitate general cooperation in the context of investigations and prosecutions concerning two or more Member States. The scope of this cooperation related to certain types of serious crimes listed in the 1995 Europol Convention and its annex48 and also in the 2002 Decision itself. These included crimes in relation to which Europol has competence49 and five specific types of crimes50, as well as other offences committed in conduction with these.51

44 Article 36(2) TEU.
45 Article 11(2) 2002 Decision.
46 Article 11(3) 2002 Decision.
49 Drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime, terrorism.
50 Computer crime, fraud and corruption and any criminal offence affecting the European Community’s financial interests, the laundering of the proceeds of crime, environmental crime, participation in a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.
51 Article 4(1) 2002 Decision.
The scope of crimes with regard to which Eurojust was made competent to act was deliberately broadly drawn, with the linkage to Europol’s field of competence illustrating how Eurojust was meant to complement the work of Europol in combating cross-border crime. Besides the enumeration of the crimes coming under the auspices of Eurojust action found in the Europol Convention, its annex and in the 2002 Decision, national authorities could also request Eurojust to assist with investigations and prosecutions relating to other crimes, provided that the crime in question was serious and involved two or more Member States. Moreover, a Member State's authority or the Commission could request Eurojust to assist in investigations and prosecutions concerning crimes involving only the given Member State and the Community.

When the 2002 Decision was revised in 2008 the competences of Eurojust were amended in a technical sense only, adjusting the types of crimes in relation to which Eurojust was made competent to the new Europol Decision that had been adopted in the meantime. For a full discussion of Eurojust's competences see Sections 2.1. and 2.2.

1.2.3. Tasks of the national member and of the College

Eurojust, whether through its national members or as a College, could only ask the competent authorities of the Member States concerned to do the following: consider undertaking an investigation or prosecution of specific acts; accept that the competent authority of another Member State may be in a better position to undertake an investigation or to prosecute specific acts; coordinate with the competent authorities of another concerned Member State; set up a joint investigation team in keeping with the relevant cooperation instruments; or to provide Eurojust with any information necessary for it to carry out its tasks. Eurojust was to ensure that the competent authorities of the Member States concerned informed each other on investigations and prosecutions of which Eurojust itself has been informed. At their own request, Eurojust was also to assist the competent authorities of the Member States in ensuring the best possible coordination of investigations and prosecutions and to provide assistance with an aim to improve cooperation between the competent national authorities. Eurojust was to cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database. The tasks exercised by the national members were slightly extended and strengthened by the 2008 Decision to include the power of asking national authorities to take special investigative measures or any other justified measures.

In addition to the above, the national members of Eurojust could forward requests for judicial assistance and with the agreement of the College they shall assist investigations and prosecutions concerning the competent authorities of only one Member State in those cases where Eurojust has competence.

Acting as a College, Eurojust could also assist Europol, in particular by providing it with opinions based on analyses carried out by Europol. Eurojust also supplies logistical support to Europol in the cases where the coordination and cooperation of Member States is required.

52 Article 4(2) 2002 Decision.
53 Article 3(3) 2002 Decision.
54 Article 6(a) and Article 7(a) 2002 Decision.
55 Article 6(b) and 7(b) 2002 Decision.
56 Article 7(c) and Article 7(c) Article 6(d) and Article 7(d) 2002 Decision.
57 Article 6(e) and Article 7(e) 2002 Decision.
58 Article 6(f) and (g) 2002 Decision.
The 2008 Decision, however, went further with respect to empowering the College. In listing Eurojust’s modus operandi it has to be underlined that both the College and its national members only had the power to request national authorities to carry out a specific act. In other words, Eurojust has no power – neither at the time of the 2002 Decision nor presently – to oblige Member States and their authorities to undertake specific actions. The only obligation Member States face when a request from Eurojust through the College goes unfulfilled is that reasons need to be provided for the refusal. Yet this obligation is lifted if carrying it out is deemed to harm the national security interests of the concerned Member State or if it jeopardises the success of the investigation or the safety of individuals.\(^{59}\) The 2008 Decision, although in a different tone, retains this status quo.

A general rule in Eurojust’s everyday work was that all information exchange between Eurojust and the Member States is made through the national member, with the national member being in a position to contact the competent authorities of his/her Member State directly.\(^{60}\) To this end national members were to be empowered by Member States to exchange any information necessary for the performance of their tasks both with the other national members or with other Member States’ competent authorities, without prior authorisation.\(^{61}\) The relation between the national authorities and Eurojust has been significantly reshaped by the 2008 Decision, the details of which are mapped out below.

The 2002 Decision provided for data protection as well in regulating the processing of personal data in the course of Eurojust’s daily work. Separate legislative acts complement this by allowing Eurojust to have access to specific databases.\(^{62}\) The 2002 Decision established a Joint Supervisory Body (JSB) to ensure that data protection rules are being enforced.\(^{63}\) Such an arrangement was necessary as the European Data Protection Supervisor had no competence regarding judicial and police cooperation in criminal matters at the time the 2002 Decision was adopted, thus a parallel structure was needed.

1.2.4. Evaluation of Eurojust under the 2002 Decision

A constant increase in Eurojust’s caseload could be observed almost immediately after it began operations. The period between 2002 and 2007, which marks the first period of Eurojust’s institutional history, saw a five-fold increase in the number of cases dealt with.\(^{64}\) Accompanying this growth in the number of cases in which Member States’ authorities sought out Eurojust’s supporting role, the institution itself underwent sizeable expansion, with a doubling of its budget and a ten-fold increase in staff over the same five-year period.\(^{65}\)

While the professionalism with which Eurojust carried out its tasks was never called into question and the general political and professional commitment to the institution remained firm, by 2007 it was a commonplace opinion that with the powers conferred upon it by the 2002 Decision, Eurojust would not be able to effectively achieve the objectives set out for it by the Member States. Both commentators\(^{66}\) following the evolution of Eurojust, as well as the Commission itself, reporting on the first five years of the institution, were univocal in

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59 Article 8 2002 Decision.
60 Article 9 (2) and (5) 2002 Decision.
61 Article 13(2) 2002 Decision.
63 Article 23 2002 Decision.
64 Figure 1 Eurojust Annual Report 2007. p13.
observing that national implementation of the 2002 Decision had been unsatisfactory and Eurojust generally needed to be strengthened.  

While national implementation of the 2002 Decision was set forth by the decision itself, this was not phrased as an obligation but rather as a ‘task’, which the Member States were to carry out if they deemed necessary. As the legislative act establishing Eurojust was adopted in the form of a decision, a stronger national implementation provision could not have been included. Ultimately, therefore, it was entirely up to the Member States to decide if, and how to bring their national laws into conformity with the 2002 Decision. By 2007, this broad scope for national implementation had produced the following results: 10 Member States had actually transposed the 2002 Decision into national law, 14 took no decision at all on implementation, while three had fulfilled this task through an administrative decision. Four of the Member States that had not carried out any form of implementation reported that they were in the process of implementation. By any account this implementation scorecard illustrated a relatively high degree of indifference from the side of the Member States with regards to the empowerment of Eurojust rather than a firm identification with the new institution. The gap between the rhetoric on the need to improve judicial cooperation on criminal matters and the lack of complementary national measures directed to achieving this objective was quite striking. Eurojust was clearly feeling the shortcomings of this haphazard national implementation and voiced the concern that certain provisions of the 2002 Decision left a too wide margin of discretion to Member States.

The variations in national implementation of the 2002 Decision were particularly manifested with respect to the standing of the national members. One practical result was that the term of office of the national members ranged from one year to unlimited periods, with the majority of national members being posted for between three to five years. While all national members were given the power to request their Member States to undertake an investigation or a prosecution in a specific case, as well as to manage coordination and provide all useful information, beyond these basic tasks the powers exercised by the national members differed significantly. The difference was the most striking with respect to the request to intervene in the setting up of a Joint Investigation Team (JIT), the power to consult criminal records directly and the power to establish direct contact with the competent authorities. A majority of the national members were not empowered to exercise these powers. Only three out of the 27 national members were authorised to accept a Eurojust decision on a conflict of jurisdiction or prosecution. Furthermore, only a few national members were given competences in addition to those listed in the 2002 Decision to make a request for mutual assistance, to order an investigation and prosecution, to authorise the setting up of a joint investigation team and to retain law enforcement or operational powers in their home country.

This was further burdened by the fact that Member States seconded their national members “in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence”. There are, however, significant variations in national criminal justice systems, with investigative and prosecutorial tasks allocated in differing ways among the police, the prosecution services and the judiciary. This meant that the varying nature of the powers of

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68 Article 42 2002 Decision.
the national members stemmed not only from the significant divergence in the specific powers that the Member States conferred upon their Europol delegate, but also from the diverging manner by which national laws – at times constitutional in nature – regulated the powers of the agencies from which the delegate was drawn.

These differences in the range of powers enjoyed by Eurojust national members presented a problem far beyond the formally unequal standing of delegates. A greater concern was the threat this posed to the adequate flow of information between Eurojust and Member States. In this regard, the particular concern was that relevant information could be lost due to the lack of power of the national member, who in principle was supposed to be the broker of all exchanges of information between his or her competent authority and Eurojust. The Commission signalled this problem as early as 2004, while also drawing attention to the fact that national members’ access to information on investigations and prosecutions was indispensable for Eurojust to operate successfully. Indeed, the divergences in the standing of national members was to such a degree that it hindered rather than facilitated cooperation, yielding a new mosaic of competences instead of levelling the playing field with respect cooperation and coordination. Nonetheless, Xanthaki has observed that irrespective of the vague provisions of the 2002 Decision and problematic national implementation, with some Member States effectively failing to take any measures at all towards national implementation, national authorities did genuinely seek out Eurojust’s support in handling cross-border cases. Xanthaki’s empirical study demonstrated that this fact was true even for the national authorities of non-implementing Member States. In short, Xanthaki’s important conclusion was that with respect to the usefulness of Eurojust, there was no direct correlation between operational level needs and government level inaction.

As noted above, the modus operandi of Eurojust was established in such a way that the institution, acting either through its national members or through the College, could only ask Member States to carry out certain measures. Eurojust was never meant to oblige Member States to initiate proceedings, to set up joint investigation teams or to issue binding decisions on Member States. Even those national members who were mandated to do so were acting within the context of their national law. Although it was reported by the first President of Eurojust that the soft power to name and shame non cooperating Member States was enough to nudge the state concerned to act, the lack of power to initiate national proceeding in its own right - either through the College or by the national members - coupled with the ill-equipped national members, together risked that core tasks would not be carried out properly. Without the ability to initiate national proceedings in its own right, the College had to wait for cases to be referred to it by national authorities, which was often done only at a very late stage of the national proceedings.


74 House of Lords, European Union Committee (2004), p21 Para 44.

1.3. The general context of revising the 2002 Decision

Before discussing the specificities of the 2008 Decision it is worth considering the wider context in which the revision of the 2002 Decision was made.

The ways and means through which Eurojust could be further empowered in order to meet its tasks more efficiently were openly discussed with the body throughout 2006 and 2007 in the seminars organised by the Austrian and Portuguese Presidencies.76

The Commission, in responding to the shortcomings explained above, offered a number of solutions in its 2007 communication, to be achieved through a “clarification and reinforcement of the powers of the national members and by greater authority for the College.”77 To this end, the Commission proposed that national members be appointed for a fixed term of at least three years. Furthermore, national members were to be entrusted with a minimum set of powers.78

The common feature of the powers recommended in the 2007 Commission Communication was that all of them were, in some form, already found in the 2002 Decision, either defined in a less precise manner or provided for with a limited scope only. The overall objective of the communication was to enhance the effectiveness of Eurojust through a more detailed enumeration of national members’ powers. The Commission also made it clear that Member States were to ensure that requests made by national members were not left unanswered. This was the point up to which the Commission could go under legal basis provided by the Treaty of the European Union (TEU) at the time and without re-shaping Eurojust entirely.

The Commission, however, made no secret of its view that in the long term the power of both national members and the College to initiate proceedings, especially with respect to offences prejudicial to the financial interests of the Union, and also to take specific investigative measures, were the best way to properly empower Eurojust. With respect to the powers exercised by the College, the Commission was of the view that in the medium term the College needed to be strengthened to effectively resolve jurisdictional conflicts and conflicts regarding the working of the mutual recognition instruments. The 2007 Commission communication also recommended that national members be able to set up joint investigation teams.

78 • to accept and forward requests from national authorities;
• to ask the law enforcement authority concerned to take further follow-up measures and to suggest additional investigations or inquiries;
• to suggest that the prosecutor, judge or court dealing with a case take special investigation measures relating to specific facts;
• to be informed before a decision is taken to set up a joint investigation team;
• to be informed to the extent necessary, where two other Member States are involved, of the organisation of a controlled delivery, an infiltration or an undercover investigation and to have responsibility for monitoring it;
• to receive automatic, early, complete and continuous information on all criminal cases involving three Member States or more, or two Member States or more where the offence is particularly serious (terrorism or human trafficking) in so far as necessary for the performance of Eurojust’s functions;
• to forward this information to the national member of a Member State which has not been informed but which is involved de facto;
• to receive from national law enforcement authorities all judgments in transnational cases of money laundering, organised crime, human trafficking and terrorism in so far as necessary for the performance of Eurojust’s tasks. Commission Communication (2007), p 4-5.
Besides the changes envisaged by the communication, one can not overlook the fact that at the time the communication was issued the treaty base of Eurojust was to be changed. Those ideas for empowering Eurojust detailed in the communication which truly went going beyond the old treaty base offered by the TEU had more reality than ever before, as they resonated with the new legal basis provided for Eurojust by the Treaty establishing a Constitution for Europe and subsequently the Treaty of Lisbon.

The new treaty provisions on Eurojust set forth in the Treaty of Lisbon provided the appropriate legal base for the powers which the Commission sought to confer upon Eurojust, including the power to initiate investigations. The new legal base also contained rules on implementing a heightened degree of accountability for Eurojust. Moreover the Treaty of Lisbon also provided for the establishment of the European Public Prosecutor’s Office (EPPO), giving a further twist to the ideas regarding the direction in which Eurojust was to evolve.

The relevant provisions of the Treaty of Lisbon on both Eurojust and the European Public Prosecutor Office will be analysed in chapter 3, with respect to how they might affect the future of Eurojust once they are invoked. At this stage what needs to be strongly underlined is that the revision of the 2002 Decision took place irrespective of the changes to the regulatory environment to be brought about by the new treaty. When the revision of the 2002 Decision began in 2008, the Treaty of Lisbon was still awaiting entry into force and the ratification process was predicted to be very slow. It was in this context, on the eve of the entry into force of the new treaty, a treaty which was to open up a number of uncharted avenues to empower Eurojust, that Member States decided not to wait and instead initiated their own proposal based on the previous, less ambitious, TEU. This also explains why Member States made a proposal on their own rather than waiting for the Commission proposal, which would have been tabled after the new legal base was in force and would have proposed enacting all the powers for Eurojust that were recommended in the 2007 Communication.

On the one hand it could be argued that enacting the necessary modifications to put Eurojust on the right course could not have waited for the ratification process to end. On the other hand it could also be argued that Member States deliberately ran ahead of events, and instead of waiting for the Commission’s proposal, opted for a less revolutionary revision of the exiting instrument. In this way the original ‘third pillar’ nature of Eurojust could be kept, dominated by Member States’ and controlled to a lesser degree by other EU institutions.

Thus the amendment of the 2002 decision took place regardless of the parallel developments concerning the very legal basis of Eurojust and from the outset was not intended to fundamentally change the nature of the judicial cooperation body.

In line with the above, in 2008 a group of 15 Member States proposed a legislative instrument amending the 2002 Decision. The objective of the revision was to ‘reinforce the

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79 Furthermore, the Hague Programme also suggested to revise the 2002 Decision with a view of the new treaty base – the Treaty establishing a Constitution for Europe at that time – and encouraged Member States to wait for the Commission’s proposal on the matter. THE HAGUE PROGRAMME: STRENGTHENING FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION (2005/C 53/01).

80 Confirmed in interview 1.

81 COUNCIL Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to adopting a Council Decision of ... on the strengthening of Eurojust and amending Decision 2002/187/JHA OJ 2008 C 54/4.
role and capacities’ of Eurojust, while remaining on the basis of the 2002 Decision. Negotiations continued throughout 2008 and by the end of that year Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA on setting up Eurojust with a view to reinforcing the fight against serious crime was adopted. The 2008 Decision prescribed that Member States shall bring their national laws into conformity with the revised instrument as early as possible, but not later than 4 July 2011. The European Parliament also contributed to the legislative process through the submission of a number of suggestions. However, as the European Parliament only had to be consulted and its consent was not needed, the recommendations of the European Parliament were overlooked during the course of the Council deliberations.

The consolidated text version of the 2002 and 2008 Decisions was prepared by the Council General Secretariat, which is referred as the Eurojust Decision in the present study.

1.4. 2008 Decision

The two areas where the amendments of the 2008 Decision bring significant changes are related to the status and powers of the national members and the relationship between Eurojust and national competent authorities. Further changes encompass the establishment of an on-call information centre, refining the data protection rules and mapping out relations with other JHA agencies and external partners.

It needs to be emphasised from the outset that the primary objective of the revision was to fine-tune the working of Eurojust without genuinely changing it.

1.4.1. Standing and powers of national members

As illustrated above a number of significant operational deficiencies arose from the difference in standing of the delegated national members. Indeed the primary objective of the 2008 Decision was to settle this issue in a manner that benefited Eurojust. Building on the 2007 Communication, the 2008 Decision states that national members are to be appointed for at least four-year terms, that their workplace must be located at the seat of Eurojust and that each shall have a deputy and an assistant. Besides offering a solution to the concerns arising from the wide variances in appointment terms, these amendments also tackled the issue that due to various other obligations, national members were often not present at The Hague, which was a problem with regard to achieving a quorum in the College. It is clear that in terms of efficiency, retaining institutional memory and continuity these are all welcome changes.

Although the governing principle that it is for national laws to regulate the standing and powers of the national members is retained, a list of detailed and specific rules in the 2008

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84 Article 42.
87 For a general discussion on the current data protection rules see Section 1.6.3.
88 Article 2(2) and 9(1).
89 Yet this principle is also regulated in a detailed manner by Article 9a limiting Member States in governing the standing of their national members by requiring them to ensure the powers set forth in the 2008 Decision are granted to them.
Decision map out the powers they must be able to exercise in their capacity as Eurojust national members. These powers encompass four categories:

- ordinary powers (Article 9b);
- powers in agreement with the competent national authority (Article 9c);
- powers exercised in urgent cases (Article 9d);
- powers granted at the national level (Article 9a).

This enumeration is complemented with the general requirement that the national delegates have a level of access to information that is at least equal to those of their national competent agencies, including to the criminal registry, the registry of arrested persons, the on-going investigation registers, DNA registries and other national registries to which access is deemed necessary. At present most Eurojust national members have direct access to these databases, six Eurojust national members have only indirect access, one national desk has access to criminal records only and one national member has no access to databases. The 2008 Decision also states that national members of Eurojust may also participate in joint investigation teams.

**Ordinary powers**

Ordinary powers include the capacity of the national member to ‘receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition’. National members are encouraged to ask for supplementary measures should an initial request for judicial cooperation be inadequate. With this description of core minimum powers the 2008 Decision aimed to equip national members with the ability to genuinely support cross border criminal proceedings and to act as efficient and effective outposts for their competent authorities. Indeed the 2008 Decision explicitly states that Member States have to provide their respective national member at least with these powers. At present the overwhelming majority of the national members are empowered to exercise ordinary powers in the fullest sense.

**Powers exercised in agreement with the competent national authority**

Beyond the ordinary powers, the range of powers to be exercised by a national member in agreement with, or at the request of, the competent national authority, on a case–by-case basis, encompass the following:

- issuing, completing and executing judicial cooperation requests,
- ordering investigative measures,
- authorising and coordinating controlled deliveries.

As for the moment only a few Eurojust national members are entrusted with such powers.
Powers in urgent cases
In urgent cases national members are entitled to authorise controlled deliveries and request judicial cooperation without the authorisation of their competent national authorities, informing them at the earliest time possible. This is certainly an improvement compared to the 2002 Decision, which did not provide for urgent cases at all. Few national members are entrusted to exercise urgent powers.

Powers at the national level
Finally, national members may be granted powers at the national level, where such powers on judicial coordination can be exercised with respect to the delegating Member State.

Despite this well-defined enumeration, it has to be made clear that the core power that all national members of Eurojust must be able to exercise are the ordinary powers. With regard to powers exercised in agreement with the national authorities and those invoked in urgent cases, the 2008 Decision allows Member States to provide their delegates with merely the right to propose a measure to their competent authorities in those cases where going beyond a mere proposal would be contrary to constitutional rules or ‘fundamental aspects of the criminal judicial system’ of a Member State. This latter is understood with regard to the division of powers between the police, prosecutors and judges, and the functional division of tasks between prosecution authorities in the federal structure of some of the Member State.

This provision aims to resolve the problem of Member States sending a delegate from an agency within its own criminal justice system who, because of the nature of the home agency, cannot exercise certain powers that are foreseen to be exercised by the Eurojust national member. Experience showed, indeed, that national laws governing the criminal justice system prescribe some of these powers to other agencies within the system than the one from which the national member was drawn. It goes without saying that altering the division of powers within a Member State’s criminal justice system was not the aim of either the 2008 Decision or, for that matter, any other EU instrument. To overcome this difficulty, a balance was thought to have been found firstly by recognising this problem and then guaranteeing that the national member shall have at least the right to propose that a measure be taken by the national competent authority, even if it is not the one from which the delegate was drawn. The right to propose could therefore be exercised even if constitutional or other limitations set forth by national law would otherwise prevent the national delegate from taking any action at all. Recognising also the bureaucratic difficulties that such requests have the potential to cause, the 2008 Decision also states that the processing of the request issued by the national member should not cause delay.

In effect this provision, however, gives an exemption to the Member States from granting powers to the national members other than the ordinary powers, and confines members to the right to propose a certain action to be taken strictly by the national authorities. This exemption practically reduces the range of powers of national members to the ones described as ordinary powers, which are seen to be the lowest common denominator.

It is worth highlighting that all actions of national members in some way or another remain controlled by the competent authorities, either through actual consent or by prompt acceptance.
information\textsuperscript{102}. Indeed the wording of the various provisions also suggests that the aim was to bring the national member on to an equal footing vis-à-vis his/her national authority rather than with the other Member States’ national members.\textsuperscript{103}

1.4.2. Relationship between Eurojust and national authorities

Generally speaking the provisions governing the relationship between the national authorities of the Member States and Eurojust have been refined and explained in a more precise manner in the 2008 Decision. There are three directions in which genuine changes are palpable in the 2008 Decision. Firstly, Eurojust’s position has been strengthened vis-à-vis the national authorities. Secondly, national authorities are better linked to Eurojust in the form of the Eurojust National Coordination System. The third item, however, is the most important, and its significance will prove to be long lasting; namely the obligation of national authorities to transmit information to Eurojust.

**Eurojust’s strengthened position**

According to the 2008 Decision Eurojust, when acting through its national members, does not merely ask national authorities \textit{to consider} taking action, as the 2002 Decision stated, but by giving reasons for its request \textit{asks} national authorities to act.\textsuperscript{104} The scope of requests made by national members to national authorities was widened and now includes “special investigative measures” and “any other measures necessary to the investigation or prosecution”. The requests of national members need to be carried out “without undue delay” by the national authorities, a clear obligation on the side of the Member States, one which was not stated so explicitly previously.

The task of national members to forward requests for mutual assistance used to be enumerated among the tasks that Eurojust carries out through its national members. The 2008 Decision changes that arrangement and lists this power among the ordinary powers of national members.

In addition to its existing powers, a new power granted to the College is to make written non-binding opinions to resolve cases of conflict of jurisdictions regarding the undertaking of investigations or prosecution or “recurrent refusals or difficulties” concerning requests made to a competent authority. In both cases the College issues such opinions when the relevant parties could not resolve the issues by themselves. For a further discussion for this specific competence of Eurojust see Section 2.3.4.

The obligation of Member States to give reasons as to why their competent authorities are not fulfilling requests is worded in a more imperative manner in the 2008 revised Decision.\textsuperscript{105} According to the 2002 Decision, a Member State simply had to inform Eurojust regarding its decision not to comply with a request. Now, under the 2008 Decision, the Member State must give reasons without undue delay when requests are refused. The

\textsuperscript{102} Article 9b and 9d.

\textsuperscript{103} Article 9(3) “In order to meet Eurojust's objectives, the national member shall have at least equivalent access to, […] the following types of registers of his Member State as would be available to him in his role as a prosecutor, judge or police officer, whichever is applicable, at national level” and Article 9a(2) “However, each Member State shall grant its national member at least the powers described in Article 9b and, subject to Article 9e, the powers described in Articles 9c and 9d, which would be available to him as a judge, prosecutor or police officer, whichever is applicable, at national level”.

\textsuperscript{104} Article 6(1) (a).

\textsuperscript{105} Article 8.
grounds of refusal were also trimmed, citing that “success of investigation” is no longer grounds for justifying a refusal, although operational reasons could be still invoked.\textsuperscript{106}

**Eurojust National Coordination System**

One of the most visible ways for strengthening the relationship between Eurojust and national authorities is that Member States are required by the 2008 Decision to establish a national coordination system for Eurojust (ENCS). This national coordination system is meant to be the national interface vis-à-vis Eurojust. Member States are required to designate one or more national correspondents for Eurojust (including a designated correspondent for terrorism matters); the national correspondent for the European Judicial Network (EJN);\textsuperscript{107} and the relevant national members or contact points on genocide,\textsuperscript{108} asset recovery\textsuperscript{109} and corruption.\textsuperscript{110} Member States also need to set up a national coordination system to fine-tune the work of the national correspondents, especially if several such correspondents have been designated. The objective of setting up such national coordination systems is to ensure that Eurojust's Case Management System is provided with all information needed to assist the Eurojust national member in identifying the relevant national authorities to execute request on judicial cooperation, to distinguish matters to be referred to the EJN and to maintain close relations with the Europol national unit. The correspondents and contact points may be connected to Eurojust's Case Management System, but neither that nor the national coordination system as such shall prejudice direct contacts between judicial authorities in the context of judicial cooperation among Member States. The improvement made here is that the revised text obliges Member States to designate national correspondents and efficiently organise their work in the national context, whereas the 2002 Decision only provided the possibility for appointing such persons. Also, the 2008 Decision takes into account other existing contact points who may come into play in the course of the work of the national correspondents and oblige Member States to structure their internal work, which is clearly a way to facilitate the flow of information. Eurojust has issued a note in which possible ways of setting up the national coordination system are suggested.\textsuperscript{111} As ENCSs are currently being established in the course of implementing the 2008 Decision, their respective effect and added value to the efficiency of information flow cannot be evaluated at the moment.

**Obligation to transmit information to Eurojust**

The 2008 Decision makes an explicit obligation for the national authorities to transmit information to Eurojust, which is one, and perhaps the most important improvement that has been made. Whereas the 2002 Decision merely stated that national authorities may send information to Eurojust if it was necessary for the performance of Eurojust's own task, the 2008 Decision hits a completely different tone. The now revised Article 13 obliges Member States to exchange all information with Eurojust that is necessary for the performance of its tasks and gives a long list of what is seen as the minimum requirement for meeting this obligation.

\textsuperscript{106} Harm to essential national security interests and jeopardy to the safety of individuals remained a ground of refusal.


\textsuperscript{108} Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes OJ L 167.

\textsuperscript{109} Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime OJ L 332.


Member States shall inform their national member in Eurojust, without undue delay, about any case in which at least three Member States are directly involved, where judicial cooperation requests involve at least two Member States, and

- regarding ten specific offences\(^{112}\) which are punishable by at least five or six years, or;
- “there are factual indications that a criminal organisation is involved” or;
- the case may have a serious cross border dimension or repercussions at the EU level, or might affect other Member States.

The obligation to transmit information is a clear and very welcome improvement made by the 2008 Decision, turning the tide to the benefit of Eurojust. Previously, national authorities informed Eurojust when its assistance was needed, now national authorities are expressly required to transmit all information specified irrespectively of whether assistance is sought from Eurojust. Being systematically supplied by relevant information, Eurojust has now moved away from the position of being at the mercy of cooperating national authorities. In Weyembergh’s account, this should help Eurojust “to develop its initiative powers, its proactive work, to identify any links between cases and to forward requests to the national authorities”\(^{113}\) in sum to establish its own agenda.

Member States shall ensure that their national members are informed about the setting up of joint investigation teams, conflicts of jurisdiction matters, controlled deliveries “affecting at least three States, at least two of which are Member States”, and repeated difficulties concerning judicial cooperation requests. Member States need to provide information in a structured way. Regardless of the fact that the obligation to provide information to Eurojust is carefully tailored, Member States may still refrain from doing so if this is deemed to harm national security interests or jeopardise the safety of individuals. Furthermore, the obligation to transmit information to Eurojust shall not prejudice agreements between Member States and third countries. The 2008 Decision also provides an annex as to the minimum type of information to be transmitted to Eurojust. The practical application of this obligation is also facilitated by a note drafted by Eurojust\(^{114}\).

The 2008 Decision requires, in turn, that Eurojust also provides national authorities with information with regard to the requests made by these authorities on the one hand, and feedback of the results of processing information on the other. This is meant to complement the obligation of Member States to provide information and to ensure that their requests are dealt with in a timely fashion. It also ensures that the information provided by national authorities is crosschecked in Eurojust’s Case Management System and the results of this check are communicated in due course.

1.4.3. Relations with EU bodies and external actors

Although the 2008 Decision makes certain improvements with regard to Eurojust’s relations with other EU bodies and third states, it has to be emphasised that the institutional embedding of Eurojust within the Union, and therefore its core relations with the European

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\(^{112}\) (i) trafficking in human beings; (ii) sexual exploitation of children and child pornography; (iii) drug trafficking; (iv) trafficking in firearms, their parts and components and ammunition; (v) corruption; (vi) fraud affecting the financial interests of the European Communities; (vii) counterfeiting of the euro; (viii) money laundering; (ix) attacks against information systems.


Institutions (the Council of Ministers, the European Commission, and the European Parliament) has not been altered in any sense.

With respect to Eurojust and its operational partners the 2008 Decision primarily restructures former provisions and treats other EU bodies, third states and international organisations separately. Rules defining relations with the European Judicial Network (EJN) are found in a separate provision, which adds one important new element; namely that Eurojust national members may inform the EJN about cases that the EJN is better positioned to deal with. Furthermore, the 2008 Decision opens up the possibility for Eurojust to house the secretariats of the Joint Investigation Teams and the Genocide Network. With respect to EU bodies, the list of EU agencies with which Eurojust is encouraged to cooperate are now complemented with FRONTEX, the Joint Situation Centre and the European Judicial Training Network (EJTN). Eurojust is encouraged to establish agreements or working arrangements with these EU bodies. With respect to third states and other organisations the 2008 Decision specifically mentions Interpol. The 2008 Decision also makes all exchange of information subject to stricter provisions, as any agreement to this end shall be consulted with the Joint Supervisory Body and approved by the Council. Eurojust is also empowered to post liaison officers in third states. The operational relations of Eurojust and other EU bodies are fully discussed in the context of the functioning of Eurojust in section 2.4.

With regard to external relations the 2008 Decision introduces an entirely new provision concerning Eurojust’s power to handle the execution of judicial cooperation requests to and from third states. In principle the agreement of the concerned Member States is needed for Eurojust to get involved, however, in those urgent cases where Eurojust has a cooperation agreement with the third state in question, Member States’ consent is not a prerequisite for Eurojust to act. To date there has not been any significant practice in this field and it is not regarded as a priority area for Eurojust.

1.4.4. On call coordination

Article 5a of the 2008 Decision sets up On Call Coordination (OCC) in order to enable Eurojust to receive and process requests and to fulfil its tasks in “urgent cases” on a 24/7 basis. The OCC is organised through single contact points, one per Member State (OCC representative), who shall be able to act on a 24/7 basis in the same manner. In urgent cases, national authorities can forward their requests for judicial cooperation to their respective OCC contact point, who in turn shall immediately forward it to the OCC contact point of the requested (issuing) state. The OCC representative shall execute the request without delay by invoking the powers provided for national members under the 2008 Decision. The On Call Coordination started to function as of 4 June 2011.

1.4.5. Evaluation of Eurojust under the 2008 Decision

As it was suggested earlier the revision of the 2002 Decision was never intended to genuinely reorganise or rebalance Eurojust. Its primary aim was rather to make the body more effective and to consolidate and clarify its powers. In this sense the 2008 Decision has attained its objective. It has brought about a number of practical changes which

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115 See fn 107 and 108.
116 Article 26.
117 Article 26a.
118 Article 27a. No such posting was made so far and is not regarded as a priority for Eurojust. Interview 4.
119 Interview 4.
120 http://eurojust.europa.eu/Practitioners/objectives-tools/Pages/on-call-coordination.aspx
undoubtedly make Eurojust more effective both with respect to its internal workings and its cooperation with the Member States.

Any evaluation of the 2008 Decision, however, needs to begin with the disclaimer that although the implementation period for transposing the Decision into national legislation has expired, this exercise is still uncompleted by nine Member States. The serious issues arising from the fact that one third of the Member States have not implemented the 2008 Decision within two years of its adoption will be considered below in section 3.1.2. It needs to be emphasised at this point that a full assessment of the genuine long term effects of the 2008 Decision will be only possible once all Member States have fulfilled their obligation to implement it. Up until then the improvements brought about by the 2008 Decision can be highlighted, but their genuine effects can only be predicted.

With the standing of national members identified as the core concern to be addressed, the 2008 Decision employs a carefully crafted fix without altering the basic model set up by the 2002 Decision. Thus the structure – Member States sending national members to the College - is kept, yet the core powers, access to information, terms of office and the standing of members are fine-tuned. While the 2008 Decision alleviated those differences in the standing of national members which undermined Eurojust’s ability to fulfil its tasks, it also gave due respect to the varying national laws which remain applicable to appointed national members. The expectation at the time was that levelling the standing of national members with respect to taking appropriate actions once a case is referred to Eurojust would also eliminate barriers posed by their national legislation.

The obligation of the national members to have their workplace in The Hague and the requirement to appoint deputies and assistants supporting their work has significantly raised the efficiency of Eurojust. Problems of quorum in the College meetings have ceased, and institutional continuity is guaranteed. Furthermore, the OCC and the national coordination system as well as the accommodation and the EJN secretariat have made cooperation smoother and ensure that information instantly gets to the right place. Making national databases available to national members ensures that Eurojust receives all information needed hence makes it work more efficiently. Attributing the College with powers to issue opinions in case of conflicting jurisdictions and refusal of enforcing a request are means for Eurojust to mediate in situations which seem to be deadlocked.

The 2008 Decision subjected the relationship between national authorities and Eurojust to more detailed and elaborate rules, with little room for doubt as to what information should be exchanged. It has to be highlighted again that the obligation of national authorities to systematically transmit information to Eurojust is of vital importance not only for the body to be able to better position itself vis-à-vis the national authorities, but as a vehicle for Eurojust to act more proactively. It is exactly the flow of information coming from the national authorities which will enable Eurojust to function more efficiently and to truly live up to its mandate. Here it is only submitted, the details are to be mapped out in the preceding sections of 2.2. and 2.3. Indeed it is precisely the raw information transmitted by national authorities that will put Eurojust into a position to actively use its powers. This enables Eurojust to act in a proactive manner, taking the initiative with regard to events and problems instead of merely following them. The immediate implications of the obligation to transmit information could possibly, though not exclusively, explain the rise in the number of coordination requests made to Eurojust in 2011. This is discussed in section 2.2.1. Generally speaking, these refinements will clearly facilitate Eurojust’s ability to better fulfil its tasks. The body’s efforts can now more
effectively concentrate on substantive work, rather than on identifying the competent authority or tracking down the information required. On the other hand, we will have to wait and see what the precise long term effects of the obligation to transmit information to Eurojust will be.

As previously stated, irrespective of all the changes brought about to facilitate Eurojust’s work, the nature, style and structure of Eurojust were left untouched by the 2008 revision. Eurojust retained its dual facet; a national one through the presence of national members and a European one embodied by the College. The increased empowerment of Eurojust was carried out by the levelling of powers of national members, and not through granting stronger powers to the College. The belief was that once national members were better equipped to act, that would promote Eurojust itself as well.121

Besides the many important changes brought about by the 2008 Decision, it is important to keep in mind that this was carried out to meet a moderate agenda and without regard to the Treaty of Lisbon, which was not yet in force at that time. The Treaty of Lisbon has not only opened up new directions to empower and build Eurojust further, but it also provided for the establishment of the EPPO, to be established ‘from Eurojust’. The 2008 revision made no attempt – even within the limits of the former legal base - to accommodate any of these new ideas, and carefully stuck to the existing structure. Therefore, the result is a body that is institutionally strengthened with respect to the competent national authorities in their everyday exchanges. Ignoring the Treaty of Lisbon also explains the limited objectives of the 2008 Decision and the issues which were simply not dealt with. As any genuine departure from the 2002 model was out of question, the 2008 Decision merely offers a shift in language. As the key feature of Eurojust’s competence was left unchanged, there was no need to accommodate further rules on making Eurojust accountable vis-à-vis other EU Institutions and to consider accommodating the interests of individual suspects of those criminal cases in which Eurojust is involved.122 The same applies to the structure of Eurojust, which could not have been left untouched had any major change regarding Eurojust’s powers been made. The one area which can be singled out as bringing a genuine change with significant potential for the future is the obligation to transmit information to Eurojust which if used proactively may truly change the functioning of Eurojust.

1.5. Organisational structure

1.5.1. The hybrid structure of Eurojust

Eurojust’s structural design stands out as a genuine embodiment of the concept of horizontal cooperation in criminal matters, and it still echoes the intergovernmental origins of the unit. While the 2002 Decision clearly made no attempt to approximate the standing of the national members or even to lay a common set of minimum powers so that national members could enjoy equal footing when exercising their competencies, the 2008 Decision partially levelled the standing and powers of national members. The 2008 Decision requires Member States to empower their national member with a bare minimum set of powers, however, at the same time it provides wide exemptions for Members States not to grant any further power to their delegate.

Regardless of the fact that the powers of national members now appear in a structured and detailed manner, this still only provides a limited range of action for the national members of Eurojust. The 2008 Decision still draws on the original arrangement, namely that the powers of national members stem from their national laws. Furthermore it only prescribes a minimum set of competences, leaving it for the Member States to decide whether or not to allocate additional power to their national member.

Practically this means that granting the so-called ordinary powers to the Eurojust national member is the bare minimum. Beyond this point, it is entirely up to the Member States to confer further powers on the delegate. Any additional power – including powers exercised in urgent cases - fall under the general exemption provided for Member States to limit the action of the national member based on constitutional rules and fundamental aspects of its criminal justice system. Thus the 2008 Decision seeks to close the gap between the various degrees of powers exercised by national members by laying down a core set of powers - the ordinary powers - while at the same time allowing a broad scope for exemptions with regard to all other powers possibly exercised by the member. This solution levels the standing of national members en face, however, though under a different name, still allows a degree of divergence.

It needs to be remarked that all actions of national members in some way or another remain under the control of the competent authorities. Should the national member take action either the actual consent of the national authorities is required or the national authorities are required to be informed promptly. The wording of the various provisions also suggests that the aim was to bring the national member onto an equal footing vis-à-vis his/her national authority rather than with the other Member States’ national members.

With respect to standing and powers, the 2008 Decision labels and defines these powers better and lays down the bare minimum set of powers to be granted for the national member and provides wide exemptions that Members States can avail not to grant any further power to their delegate. The 2008 Decision essentially keeps the underlying consideration that national laws are to govern powers exercised by Eurojust national members, and recourse is made to national laws in order to avoid any conflict between the respective powers of the national member and the competent authority.

To date, Eurojust national members are fully embedded within their national authorities and are positioned within their respective hierarchies. It is this cord between the national authorities and the Eurojust national member which forms the vehicle through which Eurojust carries out its mandate and which ensures mutual trust and fulfilment of requests. The importance of these national ties within Eurojust cannot be underestimated.

Just as often as Eurojust is labelled an intergovernmental body, mention is always made of its hybrid character, which is described as showing both national and European/integrational

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124 Article 9(3) „In order to meet Eurojust’s objectives, the national member shall have at least equivalent access to, […] the following types of registers of his Member State as would be available to him in his role as a prosecutor, judge or police officer, whichever is applicable, at national level“ and Article 9a(2) „However, each Member State shall grant its national member at least the powers described in Article 9b and, subject to Article 9e, the powers described in Articles 9c and 9d, which would be available to him as a judge, prosecutor or police officer, whichever is applicable, at national level.“
features.\textsuperscript{125} It has to be stressed that although the national limb of this hybrid character is dominant, the 2008 Decision took a step forward to strengthen the European part as well, which is embodied by the College. The College does have an array of formal powers, including issuing non-binding opinions and making formal requests to national authorities where it has to be given reasons if requests go unfulfilled. Still, the extent of the powers of the College certainly do not outweigh the dominance of Eurojust’s national facet.

The cumulative effect of these factors yields a structure which for the most part is oriented towards the particular interests of the Member States and, as a corollary, one which concentrates on the preservation of national criminal justice systems and ties Eurojust to national authorities which through their requests actually make Eurojust work. The College, in its current form (being composed of national members) can be hardly seen as representing any specific European level interest, besides the general mandate to fight serious cross border crime.

Eurojust’s present structure is also a reflection of its tasks, which not by accident are drawn from the horizontal cooperation model. Accordingly, Eurojust is tasked to coordinate national authorities without being directly involved in national investigations and prosecutions. It is submitted here, and mapped out in greater detail in section 3.2.3, that the structure and powers of Eurojust are by definition of an interlocutory nature, where the current structure truly mirrors Eurojust’s tasks. It is argued here and throughout this study that any genuine change with regard to the powers of Eurojust will necessarily entail a change of its current hybrid structure, a change which would essentially mean a shift towards a model of vertical integration, involving supranational structures.

To a degree it can be stated that should the 2008 Decision be fully implemented, Eurojust would reach a stage in development from which the horizontal cooperation model could not be taken further. Indeed the logic of the horizontal model appears to reach its limit with the 2008 Decision, as any change of the hybrid character of Eurojust, making it more European or more agency-like, or any increase in its substantive powers, would inherently mean a departure from the horizontal model.

1.5.2. Administration

The College, as the central body of Eurojust, holds the primary responsibility for the organisation and operation of the body. The College, by two-thirds majority, elects one of its members for President, a post that is held for three years. The President acts on behalf of Eurojust, represents it and directs the College’s work. Two Vice Presidents may be elected if this is considered necessary. The management of Eurojust is entrusted to an Administrative Director, who is responsible for the day-to-day administration and staff management. The Administrative Director is also elected by a two-thirds majority of the College.\textsuperscript{126}

The wording of article 28 of the Eurojust Decision, which governs the organisation and operation of Eurojust, is quite unfortunate in many ways. Firstly, in paragraph 1, it is stated that ‘the College shall be responsible for the organisation and operation of Eurojust’. This is supplemented by paragraph 3 of the same article stating that it is the President who, under the authority of the College, directs the work of the Administrative Director and monitors daily management.

\textsuperscript{125} Vlastnik, J. (2008).
\textsuperscript{126} Articles 28 and 29.
The current arrangement of the Eurojust Decision sets up a triangle formed by the College, the President and the Administrative Director who are each, although to different degrees, responsible for organisational tasks. As a consequence, the administrative and executive functions are not separated since the President, and to a lesser extent the College, are both clearly entrusted with management functions as they direct and supervise the Administrative Director. It is not clear what the underlying principle was when this structure was established; most likely this is the result of a compromise solution. Accordingly, it was preferred to involve the College instead of giving clear administrative powers to the President. The latter would have changed his primus inter pares position and would have allowed for a single-handed management style. At the same time the emergence of a too powerful Administrative Director was prevented by subjecting the director to the President, who directs and monitors, yet neither appoints nor sanctions him.

The present division of administrative tasks, at least in the way as it is set out in the 2008 Decision, risks duplication of functions, blurred responsibilities and inefficient functioning. The currently overlapping functions in the 2008 Decision open up the possibility of administrative tasks being managed based on the ambition and skills of personalities instead of upon a clear allocation of respective functions. There is a further imbalance introduced by the fact that those national members of the College who have fewer cases can devote more time to their management functions.

Although the College purportedly exercises a great degree of self-restraint by not involving itself in purely administrative matters and by delegating non-operational functions to the extent possible, it has been suggested by many that the portfolio of the College could still be further streamlined. Although there have been and currently are efforts underway to put budgetary, administrative and staff matters entirely under the responsibility of the Administrative Director, such issues need to be settled at a minimum through the Rules of Procedure, but at best in the applicable legislative framework.

The internal administration of Eurojust has also been subject to an Organisational Structure Review (OSR) in order to ‘enhance the efficiency and effectiveness of Eurojust by reviewing the management structure, roles and responsibilities of internal stakeholders, co-ordination mechanisms, human resources management and control systems’. The review was carried out by an independent consultancy firm, although the final outcome has not been made public, even though the work and certain conclusions have been reported in the respective Annual Reports of Eurojust. The work was started in February 2009 with an assessment phase, which involved the analysis of the ‘management structure, overall corporate governance system and on realignment of administrative workflows with Eurojust’s operational work’. The assessment phase was followed by an implementation phase of the OSR, which has been underway since the second part of 2010. Seven projects were initiated under the auspices of the OSR, all of which aim to enhance the efficiency of Eurojust’s internal administration. The projects are: (1) delegation of some management decisions from the Eurojust College to an executive board; (2) grouping of work areas currently undertaken by College teams into a structure of portfolio management; (3) performance and risk management; (4) ensuring Eurojust administrative structures are

127 For two years there were acting Administrative Directors only, the vacant position has been filled 2011. This eventually created situation where the College had to deal with administrative matters to a greater degree.
128 Ibid.
129 Ibid.
131 Ibid.
133 Ibid.
aligned with its core business; (5) restructuring and re-grading of the administration; (6) culture; and (7) training.

Although such self-review is always to the benefit of an institution, it is submitted that the proper division of administrative and operational work calls for much clearer rules. The Administrative Director should be made solely responsible for budgetary, staff and administrative matters and the College should be confined exclusively to operational work. This division of labour should be formulated in an explicit manner so that it is not the voluntary self-restraint or good will upon which the improved running of the institution depends but rather on an unambiguous separation of functions.

1.6. Inter-institutional placement, controls and feedbacks

1.6.1. Inter-institutional placement – the road towards accountability

Article 31(2) of TEU did not contain any reference to how Eurojust’s work should be monitored, followed or controlled. Rules establishing reporting and other control mechanisms were largely left to EU secondary legislation. In this vein, the 2002 and 2008 Decisions, with little deviation, both required Eurojust to report to the Council. They both placed Eurojust within the EU’s general budgetary and discharge procedure and drew up loose rules as to how to keep the Commission and the European Parliament informed about Eurojust’s substantive work. It should be pointed out that the lack of designing any specific powers and procedures with respect to having Eurojust supervised and/or evaluated by any other EU Institutions other than the Council is a clear illustration of its intergovernmental origin. The notion of accountability, if it was raised at all, was considered to be fully met by the above mechanism. In practice, this has meant that Eurojust was made to report solely to the Council, with the Commission and the European Parliament receiving no specific formal powers whatsoever to exercise any control over Eurojust. Furthermore, the Commission’s formal involvement in Eurojust’s work is also very limited.

The Council of Ministers

Eurojust reports directly to the Council, which in practice means that the President, on behalf of the College, reports annually to the Justice and Home Affairs Council on the body’s activities and management, including budgetary management, of Eurojust. The written report submitted to the Council includes an overview of Eurojust’s activities during the year and, where necessary, elaborates on current criminal policy problems as well as containing proposals on how to improve judicial cooperation in criminal matters. In addition to the regular annual report the Council may ask Eurojust to submit a report on any other aspect of its operation. The Presidency of the Council forwards the annual report to the European Parliament, accompanied by the report on the activities of the Joint Supervisory Body.134 The Council has no appointment or removal powers with respect to the President or the Administrative Director of Eurojust.

The Council conclusions reflect on the annual reports submitted by Eurojust. The process by which these conclusions are drafted and negotiated has become very technical. The Council General Secretariat prepares a draft, which is then negotiated by the respective Council working parties (COPEN and CATS, involving ministerial officials). Next it goes to through to COREPER II, where it is normally adopted as an A item, meaning it is approved without deliberation. The draft is finally adopted by the Council of Ministers, also without deliberation as an A item. Although Council conclusions need the unanimous approval of Member States, it seldom happens that agreement on the wording cannot be reached before the level of the Council of Ministers. In practice, this means that the workings of

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134 Article 32.
Eurojust are not discussed at all by the ministers themselves, and it is up to the domestic coordination of EU matters in a given Member State as to whether the draft conclusions on Eurojust’s annual report garner the political interest of the ministerial cabinet or of the national criminal justice system which actually works with Eurojust. In short, this means that the work and performance of Eurojust only formally reaches the political levels of the Council and substantive evaluation or political debate on this topic is not held. The first exception to this was the informal Justice Council held on 28 February 2012 in The Hague, where an informal discussion on Eurojust took place.\textsuperscript{135}

On the other hand these Council conclusions correspond to the annual report submitted by Eurojust, which thus means that they essentially reflect on the previous calendar year without any reflection on the way forward. Council conclusions are worded in a very general manner (recall, encourage, acknowledges, etc.) yet at the same time give piecemeal hints with respect to what to improve and what is considered as satisfactory. Since 2008, at the specific request of the Council, Eurojust structures its annual reports in a way that corresponds to the previous years’ Council conclusions. In this new format, Eurojust gives an item-by-item account of how it has implemented the specific recommendations of the Council. Nonetheless this does not help the fact that no overall policy instructions can be deduced from the Council conclusions on the annual reports. For these Eurojust has to look elsewhere, mainly to the horizontal JHA strategies, such as the Stockholm Programme or the Internal Security Strategy, none of which thematically discuss Eurojust specifically, but horizontally address the work of JHA agencies and their respective role in fighting serious cross border crime.

According to the Eurojust Decision, there is a possibility for the Council to ask Eurojust to prepare a thematic report, yet to the present day this option has not been invoked. The Council is not involved in discussing the annual work programme of Eurojust or any other strategic document.

There are six Council working parties that Eurojust is regularly invited to attend the meetings of and which have a portfolio that encompasses the following of Eurojust’s work.

\textbf{COPEN, the Working Party on Cooperation in Criminal Matters, and CATS, the Coordinating Committee in the area of police and judicial cooperation in criminal matters, are the working parties in the area of police and judicial cooperation in criminal matters where legislative proposals regarding cooperation in criminal matters are discussed. COPEN is the working party that oversees all legislative proposals and also discusses matters relevant to Eurojust, such as the Council conclusions on Eurojust’s annual report and the Mutual Evaluation Rounds. CATS, the former Article 36 Committee, is the more senior formation, discussing items which COPEN is not able to close. Both formations involve Ministry of Justice officials, who probably have the clearest idea of Eurojust within the structure of the Council. There are a number of close personal and working relationships between the CATS delegates and Eurojust national members, some of whom have occupied respective posts since Eurojust was established. It is clear that CATS continues to be an important forum for Eurojust both for in terms of networking and for providing an informal avenue of access to ministerial cabinets.\

The Standing Committee on Operational Cooperation on Internal Security (COSI) was set up by 71 TFEU and is responsible for ensuring operational cooperation in the area of freedom security and justice. While Eurojust does participate in COSI meetings, the overwhelming majority of Member States are represented in the committee through their police forces, seldom sending representatives of the judicial authorities to these meetings. COSI itself is a

\textsuperscript{135} \url{http://eu2012.dk/en/Meetings/Other-Meetings/Feb/eurojust}.
new body, seeking a well-defined role and trying to identify its place among the Council working parties. However COSI does serve as a useful forum for JHA agencies to report on their cooperation and through this create synergies and streamline their activity. The practice established by the Swedish Presidency, to have all four JHA agencies – CEOPOL, Eurojust, Europol and Frontex - prepare a joint report on their cooperation and then follow the implementation, should be continued. Despite the largely ‘police driven’ nature of COSI, Eurojust makes a particular effort to articulate the ‘criminal justice’ aspect of its work, through which it expects that the body will receive more attention and recognition among JHA agencies.

GENVAL, the Working Party on General Matters including Evaluation, is the successor of the former Multidisciplinary Working Group on Organised Crime, with a specific focus on strategies and policies aimed at coordinating measures to prevent and counter-organised crime. In addition to this, GENVAL discusses the evaluations of the Member States’ compliance with JHA instruments. The evaluation of the national implementation of the 2008 Decision is the subject of the Sixth Round of Mutual Evaluations conducted under the auspices of GENVAL. This exercise evaluates the implementation of the recent 2008 Decision in the Member States and not Eurojust directly.

JAIEX, the Council working party responsible for the external dimension of justice and home affairs, is largely an information hub with no mandate to discuss legislative proposals or operational work. It is largely composed of foreign ministry officials of the Member States. While Eurojust is invited to JAIEX meetings to give information about its external relation activities, JAIEX is in no way in a position to approve, advise or mandate Eurojust with respect to its cooperation with third states and other international organisations.

Generally speaking, the manner in which Eurojust reports to the Council represents a very loose form of monitoring the performance of the unit, a process which has largely turned out to be mostly a technical one, only formally reaching the level of the ministers. It should be noted that besides the reporting mechanism described above, the Council has no other powers in relation to Eurojust.

The European Commission

As described above the Commission is not a member of Eurojust’s College and its role is confined to one of being associated with the work of Eurojust. The former Article 36(2) TEU explicitly mentioned the Commission in this latter respect. The Commission may be specifically invited to provide expertise regarding work carried out on the coordination of investigations. The 2008 Decision, leaving the 2002 Decision basically unchanged, also contains an open-ended possibility for Eurojust to map out a “necessary practical arrangement” in order to enhance cooperation with the Commission. Moreover, the Commission may request Eurojust to assist in investigations and prosecutions concerning crimes involving only one Member State and the Community.

The Commission also takes part in the selection of the Administrative Director, however, it is confined to participating in the selection process and to sitting on the selection board.

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137 Interview 5.
138 Despite of efforts made during the negotiations of the 2008 Decision. Interview 1.
139 Article 11(2).
140 Article 11(3).
141 Article 3(3).
142 Article 29 (1).
The final decision on the selection of the Administrative Director is made solely by the College. Furthermore, the Commission is not in the position to formally reflect on the annual report of Eurojust. The only forum in which the Commission may react, orally, to the annual report is the Council working party meetings, yet it seldom happens in practice that the Commission makes a comment.

From the above it is evident that to date the Commission has not been in a position to be formally involved with the work of Eurojust. Moreover, until recently there has not been a formal arrangement between the two bodies to map out other avenues of cooperation besides that found in the wording of the 2008 Decision. There was an informal routine at periods during mutual visits when the Commission visited Eurojust and there were informal exchanges. Yet this practice was informal, and there was no consistency with respect to its intensity. Changes in this respect are under way, as there are plans for the Commission and Eurojust to sign a Memorandum of Understanding in this area which would fill in the gaps left by the 2008 Decision. If signed, this Memorandum of Understanding will oblige Eurojust and Commission officials – including high level officials as well - to meet regularly and will allow the Commission to participate in College meetings where non-operation strategic issues are discussed. Furthermore, both parties will designate contact points. Alongside the articles on information and consultation the Commission may invite Eurojust to discuss legislative proposals relating to cooperation on criminal matters, a possibility which exists already under Article 32(3) of the 2008 Decision. In turn, Eurojust will consult the Commission on strategic documents, its draft budget, its draft annual report, the staff policy plan, its Multi-Annual Strategic Programme and on the priorities of external relations. The Commission will be invited to make recommendations on the annual report. Furthermore, upon request Eurojust will supply the Commission with anonymous statistical data and analyses of its own activities. The parties will inform each other about studies and evaluations made on Eurojust’s activities and will ensure that their external communication activities are aligned. Eurojust will be required to send a series of explicitly enumerated documents to the Commission, as well to inform the Commission of any documents sent to other EU Institutions and of meetings of other EU bodies. With regard to external relations Eurojust will regularly inform the Commission, consult the Commission on external relations policy issues and inform the Commission of formal meetings held with third states and international organisations. Further provisions deal with consultation on staff matters, joint training and the participation of the delegate of the Director General for Justice in the appraisal of the Administrative Director.

The Memorandum of Understanding is clearly asymmetric in the sense of providing a significant amount of commitments for Eurojust, yet few for the Commission. The language used with respect to Eurojust’s duties is ‘will’; since it is a Memorandum of Understanding the term ‘shall’ could not have been used. The Commission enjoys discretion regarding most of the items where it is to cooperate with Eurojust, which is reflected in the weaker conditional style wording ‘may’. The degree to which Eurojust will have to inform the Commission in a preliminary manner regarding a range of items results in an asymmetric relationship, whereby the Commission will be in a position to know everything that Eurojust is about to do already at a nascent phase. According to the Memorandum of Understanding Eurojust is essentially required to inform the Commission about everything it does, except for its operational work, the latter being entirely excluded from the scope of the document.

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143 Interviews 2 and 5.
144 Memorandum of Understanding between the European Commission and Eurojust (Commission and Eurojust MoU).
145 Commission and Eurojust MoU Articles 1 and 2.
146 Commission and Eurojust MoU Article 3.
147 Commission and Eurojust MoU Article 4.
148 Commission and Eurojust MoU Article 5.
149 Commission and Eurojust MoU Articles 7-9.
The Memorandum obviously stays within the confines of the Eurojust Decision and does not allocate any further formal powers to the Commission. Regardless of the fact that the form of the agreement is a memorandum, and thus formally speaking it is non-binding and does not qualify as a legislative act, it entails serious consequences. The Memorandum has the capacity to reshape Eurojust’s autonomy and the high level of independence which it has enjoyed so far. The Memorandum signals that the ethos of the treaty changes is beginning to encroach upon Eurojust in the sense of gradually turning it into a standard EU agency and distancing it from Member States. For a further discussion of this trend see Section 3.2.9.

The European Parliament
Before the Treaty of Lisbon the European Parliament had only a minimal influence on Eurojust through legislation, as the consultation procedure only permitted the European Parliament to form an opinion on legislative proposals regarding Eurojust. The other way through which the European Parliament has been involved in the control of Eurojust is the budgetary procedure discussed in section 1.6.2. The Presidency of the Council also sends the annual report of Eurojust to the European Parliament. Besides these formal avenues of control there has been regular contact between the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and Eurojust, with the President of Eurojust participating in the LIBE meetings and answering questions from the floor. Yet there is no formal obligation prescribed to invite Eurojust and make it report. The European Parliament is also a key actor in the budgetary procedure to which Eurojust is a subjected.

The Court of Justice of the European Union
So far the Court of Justice of the European Union is restrained from exercising judicial control over Eurojust. However as the transitory period provided in the protocol attached to the Treaty of Lisbon elapses, the court will be able to exercise its review powers over Eurojust’s acts. This is further discussed in relation to individual complaints in section 3.2.8. As Eurojust national members are not officials of the European Union and do not fall under EU staff regulations the court has no power to hear cases involving their liability in carrying out acts in their official capacity.

Other EU bodies and agencies
Other EU bodies which add to the control mechanism largely exercised by the EU Institutions are the European Ombudsman, the European Data Protection Supervisor and the Court of Auditors.

The European Ombudsman has the power to investigate cases where the ‘right to good administration’ provided in the Charter of Fundamental Rights has been allegedly violated. So far Eurojust has been subject to such an inquiry four times. Three out of four the cases are related to complaints regarding staff recruitment, and there is one ongoing case on allowing public access to documents. The issue of granting public access to documents is expected to receive heightened attention with the growing number of cases dealt by Eurojust. In this respect the European Ombudsman has a definite role in providing a control mechanism over Eurojust in the field of ensuring good governance.

Although the European Data Protection Supervisor (EDPS) is very active in the field of the area of freedom security and justice, with respect to Eurojust this is largely confined to issuing opinions on legislatives proposals. The EDPS did deliver an opinion of the 2008 Decision when it was negotiated in Council, and criticised many of its proposed

150 Interview 3 and 5.
151 Protocol (No 36) Title VII attached to the Treaty of Lisbon.
152 Article 41 of the Charter of Fundamental Rights of the European Union.
153 Cases No0325/2010/OV; 0991/2006/WP and 1237/2004/MHZ.
155 Opinion of the European Data Protection Supervisor on the Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the
arrangements on data processing and supervision. Besides this consultative function the EDPS plays no role in formally supervising data protection practices of Eurojust, as Eurojust being a third pillar body is placed under a distinct data protection regime, and is not subject to the EDPS.

**Court of Auditors**
In the context of the budgetary and discharge procedure the Court of Auditors makes observations to the provisional accounts of Eurojust, and then receives its final accounts.

**National parliaments**
Before the entering into force of the Treaty of Lisbon there was no specific arrangement provided for national parliaments to follow the work of Eurojust in any sense. It was an entirely domestic issue as to whether the minister of justice attending Council meetings, gave any information about Eurojust to his/her respective national assembly. National parliaments however in their capacity to scrutinise EU law on the basis of the principles of subsidiarity and proportionality could in the form of COSAC address legislative activities in related to the AFSJ, a much weaker power then the scrutiny exercised over ‘Community law instruments’.156

### 1.6.2. Financial control

Financial accountability over Eurojust is exercised in the context of the budgetary procedure on the one hand and by internal and external audits on the other hand.

In Eurojust’s case as well, the budgetary procedure represents an interplay of a number of actors. The budgetary and discharge rules are carefully elaborated in the Financial Regulation and the Framework Financial Regulation157 to which the 2008 Decision is aligned, embedding Eurojust into the EU’s annual budgetary cycle.

The budgetary procedure offers only an indirect way for the Commission to potentially be involved in Eurojust’s activities, and so far there are no reports of it being used for that end.158 For the European Parliament too, the budgetary procedure is an indirect way of responding to the performance of the unit. The Budgetary Control Committee of the European Parliament positively recognised Eurojust’s own initiative to include Key Performance Indicators in its 2010 plans, and recommended this to the other EU agencies to follow as a best practice.159

The College adopts a draft budget for the following financial year based on the Administrative Director’s proposal, which is then submitted to the Commission. The Commission, within the framework of the budget procedure, proposes an annual subsidy for Eurojust, which is then determined by the budget authority competent for the general budget of the EU. Once this has occurred, the College adopts its finalised budget at the

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158 Interview 2 and 4.

beginning of the financial year.\textsuperscript{160} The implementation of the budget is reported to the European Parliament, the Court of Auditors and the Commission, where political control is exercised by the European Parliament and financial control is carried out by the Court of Auditors.

The internal audit of Eurojust is also put in line with standard EU procedures as of Article 38 of the 2008 Decision made Regulation (EC) No 1073/1999 applicable to Eurojust and the College adopted the corresponding implementing measures in 2004.

The budgetary procedure to which Eurojust is subjected is fully in line with the procedure applicable to other EU agencies. It has to be noted as well that the budgetary powers of the Commission and the European Parliament over Eurojust clearly outweigh their involvement in the actual workings of the body.

1.6.3. Data protection

Although the 2002 Decision already contained a set of data protection rules, the 2008 Decision significantly refined the existing provisions. The 2008 Decision brings a number of important changes on how personal data is protected in the course of Eurojust’s work. Firstly, the definition of persons in relation to whom Eurojust may process the personal data has been extended. Secondly the categories of personal data that Eurojust may process is widened, now including phone numbers and other data retained under the data retention directive,\textsuperscript{161} vehicle registration data and DNA profile. Processing personal sensitive data will only be possible where this is strictly necessary, which tightens the scope for the use of such data as compared to the previous provisions, which simply required that the use of sensitive data be necessary.\textsuperscript{162}

The 2008 Decision also updates the provisions on databases to include the Case Management System.\textsuperscript{163} The 2008 Decision gives detailed rules on the access and functioning of the Case Management System, where there is a possibility for access for the Eurojust national coordination systems. There is also a new provision which leaves no room for doubt that Eurojust is strictly prohibited from establishing any other automated database for processing case-related personal data.\textsuperscript{164} Limits to the right to access to personal data by individuals\textsuperscript{165} and rules on the storage of personal data are made more elaborate and detailed\textsuperscript{166}.

The mechanism through which compliance with data protection rules is ensured has remained mostly unchanged. The supervision of data protection is carried out on two levels: the Data Protection Officer (DPO) and the Eurojust Joint Supervisory Body (JSB). The DPO belongs to the Eurojust staff, yet it acts independently and reports to the College. The main task of the DPO is to ensure compliance with data protecting rules in Eurojust’s everyday work.\textsuperscript{167} As opposed to the DPO, the JSB is an elected and an external body composed of three members.\textsuperscript{168} The JSB hears and decides upon complaints regarding the College’s decision made pursuant to Article 19(8) concerning the right to access to personal data and pursuant to Article 20(2) concerning the correction or deletion of personal data. The JSB

\begin{footnotesize}
\textsuperscript{160} Article 35.
\textsuperscript{161} Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks OJ L 105.
\textsuperscript{162} Article 15 (4).
\textsuperscript{163} Article 16.
\textsuperscript{164} Article 16(6).
\textsuperscript{165} Individual requests to access data are now refused if that may jeopardize national investigation, whereas previously that restriction applied only to investigation in which Eurojust was assisting. Article 19(4)(b) Eurojust Decision.
\textsuperscript{166} Detailed rules on the length of storage providing for defined exceptions, and Article 21 Eurojust Decision.
\textsuperscript{167} Article 17.
\textsuperscript{168} Article 23.
\end{footnotesize}
also acts as a higher instance body for non-compliance issues raised by the DPO but not resolved by the College under Article 17(4). The JSB submits its report to the Council annually.

Besides the detailed and tailor-made regulatory framework ensuring data protection standards and compliance with those in Eurojust’s daily work, this is an area that should be carefully followed in the future. Upon the full implementation of the 2008 Decision, Eurojust will be in a position to receive mass volumes of information involving personal data from the Member States. It is exactly for this reason that the 2008 Decision itself prescribes procedures to review how the increased inflow of data is being handled and whether the existing safeguards are sufficient to ensure a high degree of protection of personal data in the course of Eurojust’s operations. This issue discussed in the below section 1.6.4.

1.6.4. Evaluation mechanisms

There are various evaluation mechanisms related to the 2008 Decision which contribute to the general notion of institutional accountability and transparency. The 2008 Decision is the subject of the sixth round of mutual evaluations conducted under the auspices of the GENVAL. According to this exercise, Member States need to fill out a detailed questionnaire giving precise information on how the revised decision was implemented in their domestic law. The replies will be summarised by the General Secretariat of the Council and will likely give a general overview on whether and how the 2008 Decision has been implemented.

Apart from this the 2008 Decision itself provides for a number of evaluations or review mechanisms.

Firstly, five years after the entry into force of the 2008 Decision and from then on in every five years the College has to commission ‘an independent external evaluation of the implementation of the 2008 Decision as well as of the activities carried out by Eurojust’. The evaluation will assess the impact of the 2008 Decision, Eurojust's performance in terms of achieving the objectives of the Decision as well as the effectiveness and efficiency of Eurojust. The evaluation shall contain recommendations and has to be sent to the European Parliament, the Council and the Commission as well as being made public.170

Besides this the Commission shall, at regular intervals, examine the implementation of the 2008 Decision by the Member States and submit a report to the European Parliament and to the Council. This report can be accompanied if necessary with proposals to improve judicial cooperation and the functioning of Eurojust.171

There are two specific review mechanisms dedicated to data protection. Firstly the Commission shall by 4 June 2014 make a report on how Article 13 on the exchange of information between Eurojust and Member States has been implemented. This report may also propose amendments to the same article if deemed necessary.172 This reporting mechanism is complemented with another, according to which by 04 June 2013, Eurojust shall report to the Council and the Commission on the implementation of the access to the Case Management System at the national level. This report shall also include the opportunity for the Member States to review the extent of access provided to the CMS nationally.173

170 Article 41a.
171 Article 42.
172 Article 13 (12).
173 Article 16b(4).
1.6.5. Evaluation of inter-institutional placement and accountability

The current rules subjecting Eurojust to various reporting, review and control mechanisms largely reflect the intergovernmental origins of the body. There are, however, a number of premises which needs to be taken into account before entering into a discussion of the inter-institutional placement and accountability of Eurojust.

Firstly, the legislative framework in which Eurojust operates was designed in the course of Council negotiations. Thus, the key premises of its inter-institutional relations were designed for Eurojust and not by Eurojust. The body had to fulfil its obligations as set by law and it could fill these relations with substance.

Secondly, Eurojust is an operational body, which means that it is addressed with requests coming from Member States’ national authorities arising in the course of investigating and prosecuting cross border crime. For this reason, Eurojust’s operational activities by their nature are directed towards the Member States and this puts Eurojust at the service of these authorities. It was argued above that Eurojust’s structure is to a large extent directed towards the Member States. In the same vein its responsibilities in carrying out its functions are connected to the national authorities.

Thirdly, as noted above, the notion of accountability, if occurred at all, was considered to be fully met by the set mechanism. In practice this has meant that Eurojust was made to report solely to the Council, with the Commission and the European Parliament receiving no specific formal power to exercise any control over the body. The Commission’s formal involvement in Eurojust’s work, as has been stated, is also very limited.

On the basis of the above tenets the mechanisms through which Eurojust’s performance is controlled can be evaluated as follows.

The mechanism whereby Eurojust produces its annual report and the Council replies to it in the form of Council Conclusions has not only become a rather technical exercise but entails two serious shortcomings. Firstly, the Council Conclusions are adopted on the basis of the annual report submitted by Eurojust, thus they essentially reflect on the previous calendar year in without any reflection on the way forward in an ex post manner. Council conclusions are also worded in a very general manner and no overall policy instructions can be deduced from them. And secondly the Council conclusions only formally reached the ministerial level of the Council. This means that Eurojust is evaluated in an ex post manner, is not given adequate strategic guidance, and remains discussed at the technical levels of the Council.

As mentioned above, the Commission has thus far not been in a position to be involved with the work of Eurojust. For most of Eurojust’s existence, cooperation was limited to that found in wording of the 2008 Decision. As discussed previously, changes in this respect are under way, as the Commission and Eurojust are to sign a Memorandum of Understanding. The Memorandum represents an important change by signalling that the spirit of the treaty changes is now reaching Eurojust as well in the sense of gradually turning it into a standard EU agency and distancing it from Member States.

Besides that, what can be seen is that the European Parliament lacks any formal powers to be informed, to monitor or to reflect on the performance of Eurojust. Other EU bodies, such as the European Ombudsman and the European Data Protection Supervisor can exercise their powers only in relation to very specific areas. It is submitted, however, that the budgetary and data protection mechanisms in which Eurojust is placed are elaborate and allow independent oversight in these respective areas.
Based on the above it can be concluded that the way Eurojust reports to the Council represents a very loose form of monitoring the performance of the body, one that has largely turned into a technical process not reaching the level of the ministers. At the moment there is no other EU Institution, formally speaking, that exercises any control over Eurojust.

The hybrid nature of Eurojust’s structure, where national members wear an EU and a national hat, coupled with Eurojust being directed towards national authorities by its very nature, and combined with a loose control system provided by the legislative framework has resulted in a setting where Eurojust acts with a high degree of formal autonomy. This formal autonomy may be a blessing with respect to operational work, but with regard to strategic choices it clearly creates problems. Lacking periodical pro futuro strategic guidance stemming from the political institutions of the Union has made Eurojust learn how to work in a self-agenda setting manner. The details of Eurojust’s functioning will be discussed in sections 2.1.-2.3., yet it is submitted here already that there were a number of instances where the body developed a priority or strategy on its own initiative which was later confirmed by the Council. This, however, does not change the fact that a genuine ex ante review of Eurojust’s activities would be more welcome. In this context it is not only the control element that is loose, but the political and strategic input that Eurojust could receive through such a review is clearly missing. An ex ante priority setting would allow a substantive dialogue about what direction the strategic work of the body should take, avoiding all subsequent criticism about arbitrary or partisan choices. The current legislative environment and the reporting mechanism conducted by the Council are clearly insufficient to provide an informed control, review and feedback of Eurojust’s performance. The Memorandum of Understanding between the European Commission and Eurojust arguably has the capacity to reshape Eurojust’s autonomy, yet only to the extent that the Memorandum will put the Commission into an informed position and by this influence Eurojust in strategic issues. In the current legislative environment this influence can only be exercised through informal channels.

The low intensity review of Eurojust’s performance is also at odds with the budgetary scrutiny to which Eurojust is subjected. As mentioned, regarding its budget Eurojust goes through the standard procedure applicable for all EU agencies. There is a clear discrepancy between the strict budgetary scrutiny and the loose performance review applied to Eurojust.

No discussion of the mechanisms through which Eurojust’s performance is reviewed can be complete without making an explicit reference to the specificities stemming from Eurojust’s hybrid structure. Whereas the high degree of autonomy of Eurojust might be true in the European arena, it may not be so in the national one. And it is this national aspect that is often forgotten. The national members of Eurojust, who remained embedded within their respective national criminal justice systems, continue to retain all their responsibilities towards their own hierarchies. This yields a rather complicated setting. In the EU context it is true that there is only one EU Institution that Eurojust has to report to, and this is done in a fairly loose manner. This mechanism is complemented, however, with the national responsibility attached to each and every Eurojust national member. This second layer of control is less visible from the outside and by its nature is as diverse as the various criminal justice systems to which national members are attached.

While the current formal autonomy of Eurojust can be regarded as being problematic in many ways, one has to keep in mind that this shortcoming is a result of the legislative context which has governed Eurojust and not due to Eurojust itself, which is merely subject to this framework. The high degree of independence of Eurojust is currently labelled as an

accountability deficit. The notion of accountability with regard to the future perspectives of Eurojust will be revisited in section 3.2.8. It is submitted here that with respect to the political institutions of the EU there is a vacuum in performance review and priority setting for Eurojust. The most distorting result of this is that Eurojust is questioned for setting its own priorities, its operational work is undervalued and it still does not receive strategic guidance. Possible ways of enhancing the performance review, priority setting and the administration of Eurojust are discussed in sections 3.1.2. and 3.2.8.

1.7. Main conclusions regarding the structure and accountability of Eurojust

The institutional framework drawn up by the 2002 Decision stands out as a genuine embodiment of the concept of the third pillar; one representing an intergovernmental-style structure with no attempt to approximate the standing of the national members. Whereas the appointment, powers and competences of Eurojust national members clearly fall under the remit of national law, this is coupled with the College, which may also act as an entity, however, with no mandatory powers. The 2008 Decision has not changed this underlying feature of Eurojust’s structure and this hybrid nature characterises Eurojust to the present day.

An implicit shift can be detected towards a more integrationist style, yet to date control and influence of national laws and national authorities are still very strong in Eurojust’s structure and work.

Eurojust’s strengthening through the 2008 Decision was carried out through the vehicle of levelling the powers of national members, on the basis of bringing national laws closer and not through granting stronger powers to the College. It was believed that once national members are better equipped to act, this would promote Eurojust itself as well.

Besides the many important changes brought about by the 2008 Decision, it is important to keep in mind that this was carried out to meet a moderate agenda and without regard to the Treaty of Lisbon, which was not yet in force at that time. As any genuine departure from the 2002 model was out of question; hence the initial idea that Eurojust requests national authorities in a non-mandatory manner remains unchanged. As the key feature of Eurojust’s competence was left unchanged, there was no need to accommodate further rules on making Eurojust accountable vis-à-vis other EU Institutions and to consider accommodating the interests of individual suspects of those criminal cases in which Eurojust is involved. The same applies to the structure of Eurojust, which could not have been left untouched had any major change regarding Eurojust’s powers been made. The one area of significant potential is the obligation to transmit information to Eurojust which if used proactively may truly change the functioning of Eurojust.

Regardless of the fact that in the light of the 2008 Decision the powers of national members now appear in a structured and detailed manner, it needs to be recalled that this provides only a limited range of action for the national members of Eurojust. The 2008 Decision still draws on the original arrangement that the powers of national members stem from their national laws, and only prescribes a minimum set of competence, leaving it for the Member States to decide whether or not to allocate additional powers.
With respect to standing and powers the 2008 Decision labels and defines the powers of national members more effectively as well as laying down the bare minimum set of powers to be granted. It also provides a wide range of reasons for Members States to deny granting any further power to their delegate. The 2008 Decision essentially keeps the underlying consideration that national laws are to govern powers exercised by Eurojust national members, and recourse is made to national laws in order to avoid any conflict between the respective powers of the national member and the competent authority.

To date, Eurojust national members are fully embedded within their national authorities and are positioned within their respective hierarchies. It is this cord between the national authorities and the Eurojust national member which forms the vehicle through which Eurojust carries out its mandate and which ensures respective trust and fulfilment of requests. The importance of these national ties within Eurojust cannot be underestimated.

Eurojust’s present structure is also a reflection of its tasks, which not by accident are drawn from the horizontal cooperation model and allow Eurojust to coordinate national authorities without being directly involved in national investigations and prosecutions. The structure and powers of Eurojust are by definition of an interlocutory nature, where the current structure truly mirrors Eurojust’s tasks. Any genuine change with regard to the powers of Eurojust will necessarily entail a change of its current hybrid structure, a change which would essentially mean a shift towards a model of vertical integration, involving supranational structures.

Should the 2008 Decision be fully implemented, it will represent the stage when the horizontal cooperation model cannot be taken further. Any change of the hybrid character of Eurojust by making it more European or more agency-like, or by any increase in its substantive powers would inherently mean a departure from the horizontal model.

The current arrangement of the 2008 Decision sets up a triangle formed by the College, the President and the Administrative Director, who are each, although to different degrees, responsible for organisational tasks. The present division of administrative tasks, at least in the way as it is set out in the 2008 Decision, risks duplication of functions, blurred responsibilities and inefficient functioning.

Any proper division of administrative and operational work calls for much clearer rules. The Administrative Director should be made solely responsible for budgetary, staff and administrative matters and the College should be confined to operational work exclusively. This has to be formulated in an explicit manner.

With respect to inter-institutional relations the intergovernmental origins of Eurojust are still largely visible. It has to be underlined that the current legislative framework is the one which makes Eurojust and despite the various mechanisms on making the unit report and give account about its performance there is still a lack of explicit strategic guidance provided.

The current rules subjecting Eurojust to various reporting, review and control mechanisms largely reflect the intergovernmental origins of Eurojust.

The mechanism whereby the Eurojust produces its annual report and the Council replies to it in the form of Council Conclusions has become a rather technical exercise. Council conclusions are also worded in a very general manner; no overall
policy instructions can be deduced from them. Council conclusions do not reach the ministerial level of the Council.

The Commission so far has not been in a position to be involved with the work of Eurojust. Moreover, until recently there has not been a formal arrangement between the two bodies to map out other avenues of cooperation besides that found in the wording of the 2008 Decision. Changes in this respect are under way, as the Commission and Eurojust are to sign a Memorandum of Understanding which signals that the ethos of the treaty changes is beginning to encroach upon Eurojust in the sense of gradually turning it into a standard EU agency and distancing it from Member States.

The European Parliament lacks any formal powers to be informed, to monitor or to reflect on the performance of Eurojust. Other EU bodies, such as the European Ombudsman and the European Data Protection Supervisor can exercise their powers only in relation to very specific areas.

The current legislative environment and the reporting mechanism conducted by the Council is clearly insufficient for providing informed control, review and feedback of Eurojust’s performance. The Memorandum of Understanding between the European Commission and Eurojust arguably has the capacity to reshape Eurojust’s autonomy, yet only to the extent that the Memorandum will put the Commission in an informed position and by this influence Eurojust regarding strategic issues. In the current legislative environment this influence can only be exercised through informal channels.

The hybrid nature of Eurojust’s structure, where national members wear an EU and a national hat, coupled with Eurojust being directed towards national authorities by its very nature, and combined with a loose control system provided by the legislative framework has resulted in a setting where Eurojust acts with a high degree of formal autonomy.

The low intensity review of Eurojust’s performance is also at odds with the budgetary scrutiny to which Eurojust is subjected. Regarding its budget Eurojust goes through the standard procedure applicable for all EU agencies. There is a clear discrepancy between the strict budgetary scrutiny and the loose performance review applied to Eurojust.

Whilst it is true that in the EU context Eurojust works with a high degree of autonomy, this is complemented with the national responsibility attached to each and every Eurojust national member, which creates a second layer of control. This second layer of control is less visible from outside and is as diverse as the various criminal justice systems of the Member States.

The present legal framework ensures a high degree of formal autonomy for Eurojust, which results in a vacuum with respect to performance review and priority setting. These issues have to be resolved to the satisfaction of other EU political institutions and to the benefit of Eurojust. In practice this means that better mechanisms of control need to be established to ensure that Eurojust is not only more thoroughly reviewed but that its work is better recognised and that it is given strategic direction.
2. FUNCTIONING OF EUROJUST

KEY FINDINGS

- The one area of significant potential is the obligation of national authorities to transmit information on serious crime to Eurojust
- Proactive use of the information transmitted to Eurojust may truly change the functioning of Eurojust
- The legislative environment in which Eurojust currently operates is designed to confine Eurojust to horizontal cooperation
- The European Investigation Order will have a significant bearing on Eurojust’s work
- Eurojust generally follows an informal operational style, and kept this modus operandi even when it has been prescribed with formal powers
- Recourse to formal powers should be made more often
- The current objectives and tasks of Eurojust inherently direct the body towards the Member States as there is no specific European mandate given to Eurojust
- Eurojust has acquired an intelligence-led rational and a more articulated accusatorial role

As opposed to its structure, the objectives and tasks of Eurojust have never been seriously questioned. Ever since the idea of creating a judicial cooperation counterpart to police cooperation among the EU Member States was floated, the need to enhance the investigation/prosecution phase of combating serious cross-border crime and organised crime has been evident. It was also clear that any qualitative improvement in the cooperation of national authorities would begin with setting up vehicles and mechanisms through which such cooperation could be made more efficient. With regard to EU criminal legislation, this meant adopting instruments facilitating cross border criminal procedures. The principle of mutual recognition, which serves the theoretical underpinning of judicial cooperation instruments adopted in the field of EU criminal law, also follows the logic of horizontal cooperation among national authorities. In terms of institutionalisation it is Eurojust which guarantees that national authorities cooperate with each other to the fullest extent possible with respect to criminal procedures having a cross border nature. The main mechanisms through which Eurojust realises these objectives were set by the 2002 Decision, based on former Article 31(2) of the TEU, and were largely left untouched by the 2008 Decision. The fact that the 2008 Decision only refined the tasks of the national members and the College, and for the most part concentrated on Eurojust’s relations with the national authorities, can also be interpreted in the sense that the core objectives and competences of Eurojust were seen as requiring change.

The present chapter focuses on the operational work of Eurojust in implementing its general and specific tasks. To this end, firstly the general tasks emanating from the 2008 Decision will be analysed through the work of the body. This will be followed by an analysis of

specific tasks regarding the stimulation of coordination and cooperation among national authorities in those criminal judicial matters which are assigned to Eurojust by other EU legislation. An account will also be given of how relations with other EU agencies complement Eurojust’s work. The chapter will conclude with an evaluation of Eurojust’s operational work.

2.1. General objectives, competences and tasks assigned to Eurojust

2.1.1. The objectives and competences of Eurojust

The language in which the objectives and tasks of Eurojust are formulated reflect the idea that Eurojust’s primary purpose is to facilitate national investigations and prosecutions. As discussed above, in order to attain its objectives, the ‘tasks’ of Eurojust are carried out on its behalf either by the national members or by the College. In addition, one may add that national members, if empowered by their national laws, may also act in their national capacity. The underlying consideration is that whether it is acting through its national members or in the capacity of the College, Eurojust has no real investigative or prosecutorial powers. It is essentially there to broker cooperation among national authorities, which are empowered by their respective national law to investigate and prosecute.

This allocation of powers, whereby Eurojust coordinates and supports national authorities which remain solely competent for any concrete procedural action in the course of the criminal procedure, be it in the stage of investigation or prosecution, has been strictly observed ever since Eurojust’s creation. Indeed, this division of powers was clearly set out in the 2002 Decision and was left untouched by the 2008 Decision and also all subsequent EU legislation assigning specific tasks to Eurojust. Preventing Eurojust from taking any concrete procedural action in national criminal procedures was the fundamental choice that was made when the body was established, reflecting the envisaged horizontal cooperation model. According to this model, criminal cooperation is enhanced among Member States regarding a broad spectrum of criminal offences through a platform where all relevant information is shared. However there is no shift of powers from the national authorities.

The general objectives of Eurojust were enumerated in Article 3 of the 2002 Decision, which has been slightly amended by the 2008 Decision.\textsuperscript{176} With respect to a serious crime, and in particular when it is organised crime, that concerns two or more Member States, Eurojust;

- shall \textbf{stimulate and improve the coordination}, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the treaties;
- shall \textbf{improve cooperation} between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on,

\textsuperscript{176} According to the 2002 Decision Eurojust was to improve cooperation between the competent authorities of the Member States, in particular by facilitating „the execution of international mutual legal assistance and the implementation of extradition requests”, the 2008 Decision replaced this latter quoted part of the provision with the following „the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition”.

53
judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition;

- shall **support otherwise** the competent authorities of the Member States in order to render their investigations and prosecutions more effective;

- may at the request of a Member State also **assist investigations and prosecutions** concerning only that Member State and a non-Member State where an agreement establishing cooperation has been concluded with the said state or where in a specific case there is an essential interest in providing such assistance;

- may at the request of either a Member State's competent authority or of the Commission **assist investigations and prosecutions** concerning only that Member State and the Community.

From the above definition of Eurojust's objectives it is fairly straightforward that Eurojust is confined to coordinating and improving cooperation in relation to investigations and prosecutions referred to it, with procedural actions taken solely by the competent national authorities. Any further role in actually providing assistance with respect to cases where a non-Member State or only one Member State is involved is regarded as exceptional. Figures illustrating the above breakdown of objectives are available only from 2007. In that year 263 cases involved stimulating and improving coordination, there were 688 cases of improving cooperation, 815 cases involved other support. There were only 89 instances where Eurojust’s assistance was sought in cases involving a third country and only four cases concerned one Member State only. Although the caseload of Eurojust has been reported in a different breakdown since 2007, it can be stated that the requests predominantly seek Eurojust’s assistance in stimulating coordination and cooperation among national authorities. Requests concerning one Member State only or a third country are made less frequently. It will be seen below that Eurojust’s role in garnering requests to facilitate judicial cooperation cannot be underestimated and cannot be properly appreciated if looked at from the inability of Eurojust to take action in its own right.

The objectives set out in article 3 are to be carried out with respect of Eurojust’s general competence defined in article 4, which was only technically modified in 2008. This article specifies that the general competence of Eurojust encompasses all crimes with respect to which Europol is competent to act.

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177 Article 4 originally referred to the Europol Convention, see fn 49-50. The 2008 Decision amended this only to the extent that it now refers to the new Europol Decision Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol) OJ L 121. Article 4 of the Europol Decision states that “1. Europol’s competence shall cover organised crime, terrorism and other forms of serious crime as listed in the Annex affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.”
The Future of Eurojust

Table 1: Crimes falling under Eurojust’s competence

<table>
<thead>
<tr>
<th>Crimes falling under Eurojust’s competence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unlawful drug trafficking</td>
</tr>
<tr>
<td>Illegal money-laundering activities</td>
</tr>
<tr>
<td>Crime connected with nuclear and radioactive substances</td>
</tr>
<tr>
<td>Illegal immigrant smuggling</td>
</tr>
<tr>
<td>Trafficking in human beings</td>
</tr>
<tr>
<td>Motor vehicle crime</td>
</tr>
<tr>
<td>Swindling and fraud</td>
</tr>
<tr>
<td>Computer crime</td>
</tr>
<tr>
<td>Corruption</td>
</tr>
<tr>
<td>Illicit trafficking in arms, ammunition and explosives</td>
</tr>
<tr>
<td>Illicit trafficking in endangered animal species,</td>
</tr>
<tr>
<td>Illicit trafficking in endangered plant species and varieties</td>
</tr>
<tr>
<td>Illicit trafficking in hormonal substances and other growth promoters</td>
</tr>
</tbody>
</table>


In addition to its general competence, at the request of a competent authority of a Member State, Eurojust may also assist in investigations and prosecutions concerning other crimes. This is referred to as Article 4(2) competence. Eurojust may also be requested by a Member State to provide assistance on matters or topics of a more general nature that are not necessarily directly linked to an ongoing operational case, for example concerning, inter alia, national legislation or procedures (legal issues cases).

**Generally speaking the number of cases dealt with by Eurojust has been constantly increasing ever since the unit began operations.** There were 202 registered cases in 2002, whereas 2011 saw 1441 cases being referred to Eurojust. The biggest annual increase in requests, of 41%, was observed in 2008. Figures making the general competence/other cases distinction have been available since 2008. In the period between 2008-2010, the bulk of Eurojust’s cases clearly fell under its general competence and approximately 10% of the total number represented requests by national authorities concerning crimes falling outside of Eurojust’s general competence.

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178 Figures are extracted from the respective Annual Reports of Eurojust except for the 2011 figures which were provided directly by Eurojust.
179 Since 2008 a new approach to classification of casework has been applied.
Another important trend is also evident from the figures reported by Eurojust; namely that ever since its establishment the caseload of the unit has been dominated by bilateral cases. Between 2002 and 2010 the percentage of cases involving only two Member States fell to between 70 and 80% of the overall caseload. Or putting this in another way, only one fifth of Eurojust’s caseload relates to multilateral cases, involving three or more Member States.

2.1.2. Tasks of Eurojust

Concerning the crimes falling into its competence, Eurojust carries out its ‘tasks’, either through one or more of the national members or acting as a College, if one of the below criteria stands:

- it is requested by one or more of the national members,
- the case involves investigations or prosecutions which have repercussions at the Union level or which might affect Member States other than those directly concerned,
- when a general question relating to the achievement of its objectives is involved,
- when otherwise provided for.\textsuperscript{181}

In carrying out its tasks Eurojust shall indicate whether it is acting through one or more of the national members or as a College, within the meaning of the respective articles of the Decision.

\textsuperscript{181} Article 5 Eurojust Decision.
### Table 2: Tasks of Eurojust acting through its national members and acting as a College

<table>
<thead>
<tr>
<th>Task</th>
<th>National Member</th>
<th>Article 6</th>
<th>College- Article 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undertake an investigation or prosecution of specific acts</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Coordinate between the competent authorities</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Set up a joint investigation team</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Provide information</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Take special investigative measures</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Take any other measure justified for the investigation or prosecution</td>
<td>May ask the competent authorities</td>
<td>May ask the competent authorities in cases subject to eurojust’s general competence</td>
<td></td>
</tr>
<tr>
<td>Shall ensure that the competent authorities inform each other on investigations and prosecutions of which it has been informed</td>
<td>All cases</td>
<td>Cases which have repercussions at union level or which might affect member states other than those directly concerned</td>
<td></td>
</tr>
<tr>
<td>Shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions</td>
<td>May assist investigations and prosecutions concerning the competent authorities of only one Member State</td>
<td>May assist Europol</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Supply logistical support - organisation of coordination meetings, interpretation</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Issue non-binding opinion to resolve conflicts of jurisdiction</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Issue non-binding opinion to resolve recurrent refusals or difficulties concerning the execution of requests</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Article 6 and 7 of the Eurojust Decision.
Tasks carried out under Article 6 and Article 7 of the 2008 Decision represent the mechanisms through which Eurojust may get involved in cases conducted by national authorities. Requests made either by the national desk or the College, are of a non-binding nature, with Member States merely required to give reasons for their non-compliance.

Figures available from 2006 show that there has been a steady increase in formal requests made under Article 6, (Eurojust acting through a national member): 6 (2006) 3 (2007) 12 (2008) 9 (2009) 29 (2010). Formal requests made under Article 7, on behalf of the College, are still exceptional and hardly exceed one such request made per year. As noted by observers and reported by Eurojust itself, despite the now strengthened powers, requests and exchanges are still made informally rather than formally. That is to say that Eurojust’s tasks are pre-dominantly carried out through informal exchanges rather than administered formal requests.

There is, however, a deliberate reluctance on the side of the College to call upon Member States’ authorities in a formal way. This semi-authoritative style has been pursued by Eurojust from the very beginning, which often opts for soft powers and uses its weight as a network hub rather than use its formal authority to make national authorities to comply. This informality, in the sense that it translates into close day to day working relations often referred to as ‘a dialogue with the competent authorities’, is a working style that is highly valued by practitioners. It has also be suggested that the non-use of Eurojust’s powers under Article 7, where the College would formally request national authorities to take action, “does not mean that it is devoid of meaning; just the mere possibility suggests that national authorities follow informal advice given by the national members”. One needs to be reminded, however, that what is at stake here is the reduced use of a power to formally request national authorities in a non-binding manner. Eurojust national members use their power to formally request national authorities, who are their own counterparts, whereas the College as such, embodying Eurojust in the fullest sense, is not.

It has also been suggested that reluctant and non-cooperating Member States could be named in the annual reports prepared by Eurojust and submitted to the Council of Ministers and that by this political pressure could be brought to bear to get such a Member State on board. There are strong arguments, however, that such a move would mostly be counterproductive. On the one hand it would largely upset the trust Eurojust has successfully built between its national counterparts, as national authorities would feel betrayed and become even less reluctant to cooperate. Furthermore, since formal powers are less often used, such political sanction would simply be disproportionate.

Eurojust has been strengthened by the 2008 Decision exactly for the reason to ensure its tasks are better fulfilled, where it is expected that powers will be actually used. Without formal requests non-compliance is untraceable. Council Conclusions repeatedly take notice of the limited use of Article 7 powers of the College. It will be seen that, despite such messages emanating from the Council how long can Eurojust maintain its reserved attitude to show its own vigour. It is true that the arguments emphasising that the network style that Eurojust wishes to maintain has proved to be useful.
are indeed valid. On the other hand, with a constantly growing caseload the formalisation of requests will become unavoidable. The manner in which the Eurojust National Coordination Systems (ENCS) are set up in the Member States will be vital in seeing whether the informal working style can be kept. ENCSs are to be the stretch of the national desks’ arm, penetrating into the competent national authorities, ensuring that information is properly channelled and does not get lost. Should ENCSs start working effectively and begin supporting the national desks’ work, then the current degree of informality can probably be kept. Otherwise, more formalisation can be envisaged as formal records will be needed to trace Eurojust’s involvement. The Council, despite its commitment to strengthening Eurojust, will not seek to politically highlight the fact that Eurojust should make more formal requests to Member States’ own authorities and will conveniently live with the situation that Eurojust’s formal powers are underused. Should Eurojust continue to report only to the Council, not engendering significant interest and with the burden of proof remaining on Eurojust as to why has it not used its strength?

2.2. General tasks of Eurojust

From the outset, it was both the raison d’être and a key objective of Eurojust to concentrate on operational work and through this enhance cooperation among Member States’ authorities. Thus from the beginning Eurojust sought to respond to any request coming from the national authorities in an efficient and professional manner, leaving no doubt that it could support and complement the work of competent authorities. This working style was based on the firm understanding that it is the national authorities that ultimately reach out to Eurojust and not the other way around. Therefore getting cases, especially before 2008, when there was no obligation for national authorities to systematically transmit information to Eurojust, was vital for making Eurojust work in the proper sense.

The goal set for Eurojust to stimulate coordination between national authorities is defined in very general, often criticised as vague, terms. There are, however, a number of EU legislative acts on the basis of which operational work is supported with concrete tools. The main pillars of this legislative framework are the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (200 MLA Convention) and the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Framework Decision on the European Arrest Warrant or EAW). The framework also includes, to a lesser extent, the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (Framework Decision on conflicts of jurisdiction), the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (Framework Decision on orders freezing property or evidence) and the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (Framework Decision on confiscation of crime).

Eurojust’s work on stimulating coordination will be assessed in two steps. First a look will be had at Eurojust’s approach to handling cases referred to it which seek its support in coordination. This will provide an overview of Eurojust’s functions based on the Eurojust Decision, followed by an evaluation. Secondly, EU criminal law will be examined to see what specific roles it confers upon Eurojust, and whether there are legislative obstacles that hinder Eurojust from maximising its involvement in judicial coordination in criminal matters.

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189 Interview 5.
2.2.1. Winning by numbers – coordination meetings

Since beginning its mission Eurojust was eager to receive referrals from national authorities and was proactively campaigning for recourse to be made to it. To that end it has made various efforts in reaching out to national authorities, which to date have resulted in a solid caseload to be handled. **Pointing to an ever-increasing caseload is a very convincing way of providing evidence on how coordination among national authorities has been stimulated and the fact that Eurojust has an added value role to play in this.**

When requested to coordinate, Eurojust deals with the matter in the so-called coordination meetings organised at different levels. The so-called Level I meetings\(^{191}\) are held twice a week when the College normally holds its operational meeting. In a tour de table form national members report on new cases and information is shared. The College decides on a case-by-case basis whether to accept a case or not.\(^{192}\) Since the only criteria set is that the case shall concern two or more Member States and be serious, the latter referring to a wide range of crimes, there is ample room for discretion to make a decision on the merits rather than adhering to formal prerequisites. This is further enhanced by voting rules that require a two-thirds majority of the College members to dismiss a case, which means that getting the green light of the College requires only one-third plus one vote.

Level II meetings are scheduled subsequently to level I meetings and attended by the national members of the Member States which are directly concerned with a given case.\(^{193}\) Level II meetings are either called by the national desk(s) or by the College so deciding. After making contact with their own national authorities Eurojust national members are to put the matter on track so that coordinated action can be taken. Level II meeting are rather informal and there is a general atmosphere of flexibility as all national members are at the premises of Eurojust generally being available.

Level III meetings are conveyed by the national member(s), with the College’s approval, when the complexity of the matter requires the presence of the national investigation/prosecution bodies directly involved in the case so that information is adequately shared and coordinated actions can be agreed.\(^{194}\) It has become standard practice that representatives of Europol, the European Anti-Fraud Office (OLAF) and European Judicial Network are invited to these meetings, as well as the liaison officers of third countries. These meetings are attended by those who actually enforce subsequent procedural actions (i.e. search, seizure, arrest) at the national level. As such, operational matters can be discussed in a detailed manner, with all participants getting the same level of information. The symmetry of information is invaluable in building trust among authorities who need to work hand in hand in a given case. Level three meetings are either held at Eurojust premises or in one of the Member States involved. Translation is provided throughout the meetings in order to overcome linguistic difficulties and travel and accommodation expenses are also covered for the participants. Such arrangements seek to overcome any lack of human and budgetary resources.

The true success of coordination meetings hinges on whether they are well prepared in the sense that all available information is gathered and all issues to be discussed are identified before the meeting is convened. In addition, the success of a coordination meeting also

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\(^{191}\) Eurojust Rules of Procedure Article 15.  
\(^{192}\) Eurojust Rules of Procedure Article 15(3).  
\(^{193}\) Eurojust Rules of Procedure Article 16.  
\(^{194}\) Eurojust Rules of Procedure Article 17.
means that an agreement was reached that will be subsequently enforced by the concerned authorities.¹⁹⁵

The statistics available from Eurojust cover the so-called level III meetings, which are specifically requested by one or more national desks. **Figures show that in 2011 there were ten times more meetings than in 2002,** with meetings mostly being organised at Eurojust’s own premises at The Hague. France, the United Kingdom, Italy, Belgium, the Netherlands, Sweden and Germany have been requesting most of the meetings. There are a few instances where the liaison officer of the United States or Norway requested a meeting, although the figures remain low.

### Table 3: Number of Coordination meetings

<table>
<thead>
<tr>
<th>Year</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of coordination meetings</td>
<td>20</td>
<td>26</td>
<td>52</td>
<td>73</td>
<td>91</td>
<td>91</td>
<td>132</td>
<td>131</td>
<td>140</td>
<td>204</td>
</tr>
<tr>
<td>Inside Eurojust</td>
<td>N/A</td>
<td>15</td>
<td>N/A</td>
<td>55</td>
<td>70</td>
<td>74</td>
<td>110</td>
<td>115</td>
<td>127</td>
<td></td>
</tr>
<tr>
<td>Outside Eurojust</td>
<td>N/A</td>
<td>11</td>
<td>N/A</td>
<td>18</td>
<td>21</td>
<td>17</td>
<td>17</td>
<td>22</td>
<td>16</td>
<td>14</td>
</tr>
</tbody>
</table>

Source: Eurojust Annual Reports 2002-2010.

**Coordination meetings are found to be equally vital both by Eurojust national members and their competent authorities. Indeed it is these meetings that provide the forum for Eurojust to carry out its mission to bring together interlocutors and ensure the consorted work of national authorities.** Through facilitating these meetings Eurojust has really become a ‘multiplication of shortcuts.’¹⁹⁶ These meetings simply replace the myriad and often very slow and bureaucratic ways of finding the person in charge, exchanging – at times sensitive – information and asking foreign authorities to execute requests. The mere fact that Eurojust brings together national members and national authorities is a strength that alone drives cooperation. The number of cases dealt with and the number of meetings organised to this end are duly reported in the annual reports made by Eurojust, in which concrete cases are also discussed demonstrating how a coordination meeting facilitated the work of the competent authorities.

What is often reported, however, is that Eurojust often becomes involved only at a later stage of the proceedings, a phenomenon which is largely the result of the institutional design of the body.¹⁹⁷ Firstly, Eurojust pre-dominantly deals with matters referred to it by national authorities and so far has not been in the position to influence the timing of a request. On the other hand the national desks of Member States have varying backgrounds, coming from different parts of the criminal justice system in the broader sense, i.e. judiciary, prosecutorial service or the police, and remain within the structure of the criminal justice system of their own countries. If, for example, an investigation is made by the police and the national member happens to be a prosecutor, where prosecutorial services do not receive information about the investigation before a formal charge is made, the national

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member will simply not have the information about the investigation, which could have been facilitated by the involvement of Eurojust. In criminal justice systems where the police and prosecutorial services are separated, it is for the police to actively reach out to Eurojust and vice versa it is for Eurojust national desks to establish working relations with national police forces even if that would not be the case on the home front. The difficulties of working with the various national police forces and the reluctance of the local police to find recourse to Eurojust, instead of using their bilateral relations, was reported especially in the early years of Eurojust.198

Also Eurojust is still at the receiving end of cases. National authorities refer cases to it and seek its assistance, with Eurojust hardly generating any cases by itself. Up until recently this was explained by the fact that Eurojust’s access to databases – such as the Schengen Information System (SIS) - was limited and it was entirely up to the national authorities as to when and about what they informed Eurojust. Eurojust thus was entirely reliant on the information it received from national authorities. As a result, Eurojust was simply not in a position to initiate cases. Up until the 2008 Decision there was no specific obligation imposed on national authorities to transmit information to Eurojust. It is recalled that according to the 2002 Decision, national authorities were merely granted the possibility to send information if that was necessary to the performance of Eurojust’s own tasks. Thus Eurojust was essentially at the mercy of the national authorities to share information and cooperate. In this regard the 2008 Decision is truly a milestone by not only imposing a clear obligation on national authorities to systematically transmit information along defined criteria to Eurojust, but specifically describing exactly what information is to be transmitted.

Furthermore, the 2008 Decision, when fully implemented, will ensure that national members of Eurojust enjoy equal access to the national databases that their national counterparts have access to. Eurojust is also gradually receiving access to the various databases; SIS in December 2007 and the Customs Information System (CIS) in May 2011.199 Probably the most important tool for Eurojust is its association of the Analytical Work Files (AWF) of Europol. By 2010 Eurojust have been associated with 15 AWFs.

The gradual improvement and technical upgrading of the Case Management System (CMS) since 2006 also significantly contributes to a structured handling of cases. The CMS encompasses information on all investigations and prosecutions reported to Eurojust, allowing in-depth case-by-case cross-referencing analysis. The analytical capability of Eurojust has also been improved through the recruiting of analysts.200 In 2010, an evaluation of the CMS began, with a view to implementing the 2008 Decision, to enable the semi-automatic processing of the information received from the national authorities and to make it more user-friendly.201 There are different security levels at which the CMS can be accessed and in the context of Eurojust National Coordination System national authorities will be provided with access as well.202

In the light of all these changes it is submitted that the 2008 Decision brought about a qualitative change with regards to transmitting information to Eurojust, the result of which is that Eurojust is now much better equipped with information then previously. It is now in Eurojust’s court as to how proactively it uses this

information. With respect to its broader objective to stimulate coordination, this means that the ‘quantitative approach’ of getting as many cases as possible and coordinating them properly may change. Emphasis may shift to Eurojust’s qualitative input as to generate its own cases through analytical work made on the basis of the information it is now receiving. This was signalled by the Commission already in its 2007 Communication and now the conditions for making this shift are present.\textsuperscript{203} For reasons that will be elaborated later, this leap has to be taken by Eurojust.

\subsection*{2.2.2. Priority crime areas}

In parallel to setting up the coordination meetings and generating cases to be referred by the national authorities, Eurojust has also made a number of efforts to identify certain topics which it considers as strategic. The basic idea was to single out a certain type of crime and to discuss the specificities of investigating and prosecuting issues, relevant best practices and to create informal contacts among responsible officials. Such strategic meetings were held on terrorism, trafficking in human beings and the European Arrest Warrant\textsuperscript{204}. Beside the objective that insights received and networks created in the course of these meetings could be further used should real cases need to be referred to Eurojust, strategic meetings were also seen as a way to make Eurojust more visible, and thus attract more case referrals. In 2006, however, it was decided that the number of strategic meetings should be reduced and preference should be given to operational work, as the Council started to question the effectiveness of such meetings.\textsuperscript{205} However a new type of meeting, the tactical meeting, took shape, where best practices were discussed through real cases, yet not all Member States need to be present. Thus the strategic ambition has given way to operational work.

The most frequently recurring request of the Council towards Eurojust is that it should concentrate on complex cases and serious crimes.\textsuperscript{206} Further and more concrete guidance is to be found in the Council Conclusions on the Organised Crime Threat Assessment (OCTA), the Russian Organised Crime Threat Assessment (ROCTA) and the EU Terrorism Situation and Trend Report (TE-SAT) documents, all of which address crime trends in the European Union, and last but not least the Stockholm Programme, which is the current multi-annual programme for area of freedom security and justice. From these the College sets its operational priorities, which in both 2010 and 2011 were the following\textsuperscript{207}

- Terrorism (financing of terrorism, cyber-terrorism, terrorism related to materials Chemical, Biological, Radiological and Nuclear),
- Drug Trafficking (especially using the West and Central African route),
- Trafficking in Human Beings (especially for the purpose of sexual exploitation of children and child pornography),
- Fraud,
- Corruption,
- Cybercrime,

\textsuperscript{204} Eurojust Annual Report 2006 p35.
\textsuperscript{205} Eurojust Annual Report 2006, p68.
\textsuperscript{207} Eurojust Annual Work Programme 2010 and 2011.
- Money laundering,
- Other activities related to the presence of Organised Crime Groups in the economy.

As a general estimate priority crime types occur twice as much in the overall caseload of Eurojust than non-priority crimes.\(^{208}\) As indicated in the table below, within the priority crimes drug trafficking, money laundering, fraud and other organised crime occur the most often. This was true for the period between 2002 and 2008 as well, when a different breakdown was used for the caseload of Eurojust.

### Table 4: Priority crime types in Eurojust cases

<table>
<thead>
<tr>
<th>Title</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Terrorism</td>
<td>33</td>
<td>25</td>
<td>44</td>
<td>34</td>
<td>39</td>
<td>21</td>
<td>28</td>
<td>27</td>
</tr>
<tr>
<td>Drug Trafficking</td>
<td>82</td>
<td>132</td>
<td>167</td>
<td>207</td>
<td>223</td>
<td>230</td>
<td>254</td>
<td>242</td>
</tr>
<tr>
<td>Trafficking in Human Beings</td>
<td>14</td>
<td>33</td>
<td>29</td>
<td>71</td>
<td>83</td>
<td>74</td>
<td>84</td>
<td>79</td>
</tr>
<tr>
<td>Fraud*</td>
<td>37</td>
<td>79</td>
<td>124</td>
<td>178</td>
<td>212</td>
<td>221</td>
<td>204</td>
<td>218</td>
</tr>
<tr>
<td>Corruption**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>20</td>
<td>31</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>Cybercrime</td>
<td>0</td>
<td>5</td>
<td>5</td>
<td>11</td>
<td>31</td>
<td>31</td>
<td>32</td>
<td>24</td>
</tr>
<tr>
<td>Money laundering</td>
<td>20</td>
<td>46</td>
<td>72</td>
<td>104</td>
<td>103</td>
<td>125</td>
<td>146</td>
<td>122</td>
</tr>
<tr>
<td>Other activities related to the presence of Organised Crime Groups in the economy*</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>254</td>
<td>233</td>
<td>197</td>
</tr>
</tbody>
</table>

* Before 2008 Fraud was classified to encompass a larger group of crimes types including: Organised robbery, Illicit trafficking in cultural goods, including antiques and work of art, Swindling and fraud, Racketeering and extortion, Counterfeiting and product piracy, Forgery of administrative documents and trafficking therein, Forgery of money and means of payment, Corruption, and the residual category of Other types of crime against property or public goods including fraud.

** Before 2008 Corruption was classified a sub category of Fraud and Swindling.

**Source:** Annual Report 2008, 2009, 2010 (The figure shows the number of times that these crime types were involved in the cases registered at Eurojust in 2008 and 2009. One case may involve more than one crime type).

While it is true that Eurojust should focus on complex cases, one needs to be reminded again that cases are still generated by national authorities which refer matters to Eurojust. It is still the exception for Eurojust to ask that cases to be brought before it. Upon the full implementation of the 2008 Decision national authorities will be obliged to refer serious cross border cases to Eurojust, hence the unit will be in a position to find relevant connections and be able to act based on its own initiative regarding priority crime types.

Besides putting an emphasis on the priority crimes in the course of its operational work, Eurojust has made efforts to single out certain crime types and undertake further analysis or awareness-raising work in relation to these.\(^{209}\) Examples of these are the Counter-
Terrorism TEAM, the Children Contact Point and the Strategic Project on Drug Trafficking Cases. The **Counter-terrorism Team (CT Team)** was set up in 2004 after the Madrid terrorist attacks, although there have been anti-terrorist coordination meetings since the time of Pro-Eurojust back in 2001. The CT Team builds databases, such as the Terrorism Conviction Monitor, supports tactical meetings and generally supports other national members and national authorities in relation to terrorism issues. It also processes information received under the Council Decision 2005/671/JHA. The **Children Contact Point** is one Eurojust national member who serves as a contact point for child protection matters such as missing children, sexual abuse of children, trafficking in children and child pornography. The contact point represents Eurojust, follows the work of national authorities, advises other national members, maintains a statistical overview of cases and provides support on the classification of the different types of criminality concerning child protection matters. The **Strategic Project on Drug Trafficking Cases** is a recent undertaking of Eurojust, in the context of which the main challenges and solutions concerning drug-trafficking cases were identified in Eurojust’s work between 2008 and 2010.

### 2.3. Specific tasks of Eurojust

#### 2.3.1. The 2000 MLA Convention

As stated above, Eurojust’s mission to stimulate coordination is practically carried out in the context of a legal regime in the area of criminal cooperation that has been continually developed, ever since the Treaty on the European Union established EU competence in this field. The 2000 MLA Convention is a key cornerstone of this regime. The **2000 MLA Convention is the main mechanism in the EU for requests for judicial assistance, as it contains detailed rules on sending and servicing documents, transmitting requests of mutual legal assistance, exchanging information, transferring persons held in custody for the purposes of investigations, covert operations and intercepting telecommunications.** The concept of joint investigation teams also appeared in the 2000 MLA Convention. The protocol later attached to the 2000 MLA Convention covers fiscal offences and requests related to bank accounts and transactions.

**Eurojust’s role**

The 2000 MLA Convention predates Eurojust, and therefore Eurojust is obviously not referred to in it. Yet this is the instrument that sets out the main avenues for requesting and providing legal assistance in cross border criminal cases within the EU. Article 10(2) of the Protocol to the MLA Convention however prescribes an optional mediating role for Eurojust in cases where competent authorities encounter problems in executing requests. It has to be recalled how slow the ratification process of the 2000 MLA Convention was. Indeed in the course of the process Eurojust itself called many times for its ratification in order to be able to apply the instrument.

**Assessment**

The 2000 MLA Convention is one of the most frequently used instruments in cross border criminal cases, the application of which is reported positively by Eurojust national desks, with no major legal obstacle is encountered. Having said that, to date, after more than 10 years since its adoption, not all Member States have ratified the 2000 MLA Convention in its entirety, which does give rise to problems in its application. Problems have been reported by Eurojust concerning the use of interception of telecommunications, restitution

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211 Eurojust News Issue No. 5 – December 2011.

212 Enhancing the work of Eurojust in Drug Trafficking Cases Final Results, Strategic Project January, 2012.


of stolen items, setting up Joint Investigation Teams and the absence of videoconferencing facilities.\textsuperscript{216} It seems to be a recurring problem that procedures and formalities required by the requesting state are not met by it.\textsuperscript{217} Obtaining evidence is one area, however, where legal provisions do need clarification as there are palpable legal obstacles concerning the admissibility and gathering of evidence.\textsuperscript{218} It is also reported that the multiplicity of available instruments, beside the 2000 MLA Convention, such as the Schengen Agreement of 14 June 1985, the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959 and secondary EU law, also creates a degree of uncertainty, as practitioners are faced with a choice of which instruments should utilised.\textsuperscript{219}

In its annual reports Eurojust regularly gives an account of how it sought to provide assistance with regard to the various difficulties national authorities faced in applying the 2000 MLA Convention. In this regard the 2009 and 2010 annual reports offer an especially detailed analysis of what kinds of problems arise where the involvement of Eurojust can foster cooperation, facilitating the exchange of information or the issuing of rogatory letters in urgent cases. Eurojust also assisted national authorities in clarifying the interrelations between EU and national legal provisions. There remain, however, a number of instances where the legal lacuna needs to be filled and where Eurojust may help to bridge the gap, but it is entirely up to the legislator to finally settle the matter. This is the case for example with respect to cross border interception under the Article 20(2) of the 2000 MLA Convention, requiring a Member State to inform the other Member State on the territory on which the subject will be intercepted. This requirement no longer corresponds to the current practice followed by most of the Member States, as interception is made through automatic recording and then only later analysed. The gravity of this problem lies in the fact that the given interception could be made inadmissible as evidence. This problem has reached such a level that Eurojust sent out a questionnaire to Member States and on the basis of the answers made recommendations as to how this issue could be resolved. This is a fine example of how Eurojust can provide first hand evaluation and strategic advice based on its operational work.

2.3.2. European Arrest Warrant

The European Arrest Warrant (EAW) is one of the most frequently applied EU criminal law instruments. Its principal objective was to replace the previously existing multilateral extradition system and thus accelerate extradition procedures among EU Member States.\textsuperscript{220} The implementation of the Framework Decision was completed by the end of 2004 by 24 of 25 the then Member States.\textsuperscript{221} It has to be stated that from the very beginning Eurojust followed the way of the Framework Decision on the European Arrest Warrant with particular attention. It has organised a number of strategic meetings on the application of the EAW, contributed to the handbook on the EAW, which was compiled in 2008,\textsuperscript{222} and participated in the Fourth Mutual Evaluation Round\textsuperscript{223} organised to assess practical application of the instrument.

\begin{footnotes}
\item[221] Italy being the last non-implementing Member State.
\item[222] European Handbook on how to issue a European Arrest Warrant, Council doc. 8216/2/08.
\item[223] Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States Council doc. 8302/4/09.
\end{footnotes}
Eurojust’s role
Eurojust also deals with a great number of cases in which a European Arrest Warrant has been issued. Exact figures are available from 2008, demonstrating that roughly one fifth of the total number of cases dealt with by Eurojust involves the EAW. There are three main avenues by which Eurojust is linked with EAWs, two of them prescribed in the Framework Decision on the EAW and one stemming from the general tasks of Eurojust. These are the following:

- Eurojust facilitates the execution of the EAWs,
- Eurojust gives advice in cases where multiple EAW requests were issued,
- Breach of time limits shall be reported to Eurojust.

Facilitating the execution of the EAWs
Eurojust’s involvement in EAWs stems from Article 3(1)(b) of the Eurojust Decision stating that Eurojust is “to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition”. Eurojust’s general role in facilitating mutual recognition instruments - the EAW being one of these – is further specified in detailed provisions concerning the ordinary powers of national members to transmit EAWs, to issue EAWs with the consent of national authorities, to execute EAWs in urgent cases, to be informed when EAWs are issued, the power of the OCC to forward EAWs and ENCS to assist the execution of EAWs.

Most of the Eurojust’s EAW cases fall into this category, with Member States’ authorities seeking Eurojust’s assistance in executing EAWs. The majority of these cases are reported to be of an operational nature with only one or two cases per year involving issues of a general nature. Eurojust is considered to be very useful in this field of activity, sorting out issues in cases where there are parallel investigations or prosecutions for the same act and national arrest warrants have been issued. The coordinating role of Eurojust is perceived as essential in these cases.

The following examples from the recent years illustrate Eurojust’s involvement in facilitating the execution of EAWs:

- In 2006 a number of meetings took place between Dutch and Italian authorities with the participation of Europol regarding criminals responsible for more than 200 armed robberies at upmarket jewellery shops. Based on these meetings in 2007, under “operation Baltico,” an Italian judge alone issued 35 European Arrest Warrants to 6 Member States: Estonia (25), Finland (4), France (2), Spain (2), Lithuania (1) and Germany (1). The warrants were co-ordinated by Eurojust and Europol and were executed simultaneously, involving police and judicial forces in Italy, Estonia, Lithuania, Finland, Spain, France and Germany.

- In 2008 an EAW was issued by a Swedish prosecutor against a Bulgarian suspect who was arrested in Bulgaria for murder. The suspect appealed the surrender order, but later withdrew it. Eurojust and Sweden were only informed about this a mere 24 hours before the end of the 10-day time limit for the execution of the warrant. With the assistance of Eurojust, Sweden was able to obtain all the necessary decisions.

224 Article 9b(1), 9c1a), b), 9d (b), Eurojust Decision.
225 Article 13(6), Eurojust Decision.
226 Article 12(5)c) and 5a Eurojust Decision respectively.
from the competent authorities in various countries (Bulgaria, Czech Republic, Germany and Sweden) and to bring the suspect to Sweden before the expiration of the time limit. 229

- In 2008 a joint operation was initiated in Paris for the repression of illegal immigration and employment of foreigners without residence permits (OCRIEST). Eurojust was responsible for the coordinated implementation of EAWs which were issued after several coordination meetings at Europol and Eurojust.230

- In 2009 Eurojust assisted Italian, Spanish and Romanian authorities in planning coordinated action for simultaneous arrests against a criminal group suspected of skimming at least 15,000 payment cards. Coordination meetings were held at Eurojust to identify targets and organise a joint operation. It was Eurojust that facilitated the execution of EAWs with Belgian, Irish, Italian, Dutch, and Romanian magistrates and coordinated requests for interception.231

- In 2010 an investigation was carried out into an organised criminal group active in Afghanistan, Pakistan, Romania, Albania and Italy. The Rome-based group trafficked Afghani and Pakistani persons with counterfeit documentation to Italy. Eurojust facilitated the investigation, "avoiding overlapping among national investigations and potential ne bis in idem, synchronised the execution of EAWs, was actively involved in the coordination of the final and very difficult synchronised police operations in three Member States and also facilitated the cooperation of the judicial authorities throughout the operation."232

Eurojust also created a team dedicated to the European Arrest Warrant in order to “to make the best use of their time, skills and resources, to expedite decision making and to better suit the changing shape and size of the organisation”.233

**This degree of involvement of Eurojust in overseeing the operation of the European Arrest Warrant goes well beyond what was initially expected.** Back in 2004 it was predicted that the issuing and executing of EAWs would be an essentially bilateral process, with the role of Eurojust a useful, but not a leading one. Practice shows that the opposite has proven to be true. The involvement of Eurojust is sought by national authorities more than expected and assistance in cases involving three or more Member States is essential with respect to the EAW as well. In the course of facilitating EAWs, Eurojust’s role is twofold; firstly it supports national authorities in administering and executing the EAWs, which is largely done through the national desk coordinating with his/her competent authorities. The second and more strategic role of Eurojust is to synchronise and coordinate the issuing and execution of EAWs in high profile criminal cases involving more than two Member States. This key role of Eurojust is expected to increase as its association with the Europol’s AWFs and the scope of information received from national authorities is generally broadened. This latter role of Eurojust should be further encouraged. The establishment of ENCSs, linking national authorities closer to Eurojust, will further facilitate this role of Eurojust.

**Providing advice in cases where multiple EAW requests have been issued**

Under Article 16(2) of the Framework Decision on the EAW the “executing judicial authority may seek the advice of Eurojust” when deciding which of the EAWs issued for the same person by two or more Member States shall be executed. Eurojust systematically prepared

229 Eurojust Annual Report 2008 p34
230 Eurojust Annual Report 2008 p33
for this task to be properly carried out. In its 2004 annual report, at a time national implementation of the instrument was almost complete and its application was about to commence, Eurojust openly articulated that it would be ready to give assistance to all parties concerned, that is to say to the authorities other than the one requesting Eurojust to give advice in the conflict.234 On the one hand this is a good example of how Eurojust sought to provide a forum to discuss operational issues and involve all stakeholders, as opposed to one-sided solutions emanating from an ivory tower. On the other hand, with respect to the EAWs, it also demonstrates how much Eurojust is willing to decide such matters on the merits in a transparent manner. In such cases, Eurojust plays the role of a mediator rather than the ultimate source of wisdom.235 Eurojust has also published guidelines suggesting criteria to be taken into consideration in multi-jurisdictional cases.236

Despite this promising start what we see is that not many cases on conflicting EAWs are referred to Eurojust. The 2010 annual report simply states that a “number of cases were registered where Eurojust dealt with conflicting EAWs and gave advice”,237 whereas exact figures are available only for 2009 and 2008, when Eurojust received four such requests in each year. Eurojust’s recommendations in such cases were always followed by the concerned national authorities.238

Contrasting these figures with the numbers of European Arrest Warrants issued by the national authorities – 6894 EAWs issued in 2005 and 15827 issued in 2009239 - suggests that: issued EAWs are so straightforward that only very few conflicting EAWs are issued; or that the issuing of EAWs conflicts rather with national arrest warrants; or that Eurojust is underused by national authorities; or that in general there is a lack of reporting and recourse to Eurojust.240 It has to be mentioned as well that most of the Member States implemented the Framework Decision on EAW by explicitly referring to the possibility of seeking out Eurojust’s advice in cases of conflicting EAWs.241

Without having precise empirical data for support, a positive reading of the way in which Eurojust is helping national authorities in its capacity of facilitating cooperation is that it prevents situations where multiple EAWs could be issued. Yet one cannot exclude that the advisory role of Eurojust is just simply being underused by national authorities. This proposal is burdened with the fact that between 2005 and 2009 only one fifth of issued EAWs have been executed,242 which can lead one to the conclusion that some EAWs might have been issued redundantly.

Breach of time limits reported
Under Article 17 of the Framework Decision on the EAW when a Member State, in exceptional circumstances, cannot observe the time limits for executing an EAW provided for in the same article, it shall inform Eurojust and give the reasons for the delay.

In 2007 9, in 2008 28, in 2009 30 and 2010 85 breaches of time limits were reported to Eurojust. Both Eurojust and the European Commission considered that these figures and the relatively low number of countries which report them suggests that there are disparities in the reporting practice. One striking example is that in 2010 Ireland’s notifications represented 70 of the total 85 breaches reported. The remaining cases were reported from 234 Eurojust Annual Report 2004 p86.
236 Eurojust Annual Report 2004 Annex II.
238 Interview 4 and 5.
Such provision is found in the AT, BE, BG, CY, DE, EE, ELL, ES, FR, HU, IT, IRL, LT, PT, RO, SK, SI national implementing legislation.
8 other Member States, whereas no figures came from rest of the 18 Member States. This discrepancy may suggest that either the remaining 18 Member States had fully complied with the time limits or there is serious underreporting. The Commission urged Member States to comply with their obligation and report breaches of time limits. It links this problem to the general lack of availability of full statistical data.\textsuperscript{243} Replies to questionnaires issued annually on quantitative information on the practical operation of the European arrest warrant clearly support the proposal that Member States do not consistently report delays, particularly not reporting them to Eurojust.\textsuperscript{244}

**Schengen Information System**

It was submitted earlier that once the second generation of the Schengen Information System (SIS II) is put to work Eurojust’s role concerning EAWs will decrease as this system will become the major mechanism for exchanging extradition data.\textsuperscript{245} No matter that the SIS II has been under construction for more than a decade and that the launch date is still not set, the new generation system will allow the entry of data concerning the EAW that goes beyond merely the alert itself that an EAW has been issued.\textsuperscript{246} Should SIS II go live, it will be possible to place a range of additional information concerning the EAW directly into SIS II, instead of waiting to be approached by the state executing the EAW for further information. Having said that, the core of Eurojust’s involvement concerning EAWs, however, is not about pressing the issuing national authorities to send additional information to the executing authorities. Eurojust’s role revolves around the coordinated issuing and synchronised execution of EAWs. Once SIS II is up and running its improved technological capacity will ease the work of Eurojust national members regarding the administration of EAWs, yet this will not replace Eurojust’s role in coordinating EAWs.

**Assessment**

Assessing Eurojust’s role in relation to the European Arrest Warrant, it is said that the two explicit tasks assigned to Eurojust in the Framework Decision on the EAW appear to be the lesser vehicles where Eurojust’s assistance is sought. As opposed to these, Eurojust encounters a great deal of cases, actually one fifth of its total caseload, where in some form or another its assistance is sought in the context of a case where one or more EAW has been issued. In all these cases Eurojust facilitates the work of the national authorities under its general task to facilitate coordination among Member States. In this way Eurojust clearly goes beyond the specific tasks assigned to it by the Framework Decision on the EAW,\textsuperscript{247} however this is provided for under its general mission. The number and nature of reported cases suggest that Eurojust’s assistance is particularly needed and its coordinative role is especially useful in complex investigations involving more than two Member States. Eurojust’s involvement regularly leads to successfully coordinated operations, where persons

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244 Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2010 p14-15; 9120/1/11 REV 1 COPEN 83 EJN 46 EUROJUST 58; Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009 7551/6/10 REV 6 COPEN 64 EJN 5 EUROJUST 34 p13-14. COPE_87 EJ_28 EUROJUST 28; Replies to questionnaire on quantitative information on the practical operation of the EAW – Year 2008 9734/09 COPEN 87 EJN 28 EUROJUST 28 Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2007 10330/08 COPEN 116 EJN 44 EUROJUST 58.
against whom European Arrest Warrants are issued face charges. Consequently it is submitted that this supportive role of Eurojust with respect of EAWs is both needed and used by national authorities and the current legislative environment is sufficient for Eurojust to carry this role out effectively.

Another question is why Eurojust’s advice on multiple EAWs is less sought after. One explanation is that national authorities have too much discretion in deciding which EAW to execute and the criteria offered by the EAW Framework Decision to make this decision are “not satisfactory and do not offer a comprehensive solution”. Moreover national authorities have no obligation to turn to Eurojust to step in and decide in cases where multiple EAWs have been issued. Besides the few cases where national authorities seek out Eurojust’s advice and then adhere to it, it is submitted that a greater degree of certainty could have been achieved had it been compulsory for national authorities to refer multiple requests to Eurojust and to accept Eurojust’s recommendation.

It was proposed by Fichera that Eurojust could have a greater role not only in multiple requests made within the EU, but also in cases where the extradition requests made by a third state competes with an EAW issue by an EU Member State. It was also reported that in the course of negotiating the EU-USA agreement on extradition – along with the agreement on mutual legal assistance - the issues of whether EAWs take precedence over USA extradition requests was discussed. The final wording of Article 10(2) of the agreement dealing with concurrent requests does not provide for such a priority, although the French Government vehemently argued for giving priority to EAWs. It is also true, however, that Article 21 of the agreement allows that should the EU wish to give precedence to the EAWs over US requests, the agreement will not prohibit this. This issue will recur when the agreement is reviewed five years after its entry into force, which took place on 1 February 2009. If the case would be made for the priority of EAWs over US requests, it is submitted that a role for Eurojust should be considered. To date the EU-US extradition agreement is the only agreement on extradition made on behalf of the EU, yet future negotiations should also consider a role for Eurojust where conflicting requests are made. In this vein any EU JHA external policy objective could be better streamlined as well.

The reason for insufficient reporting of delays in the execution of EAWs is that despite the obligation set out by the Framework Decision, most national legislation implementing the EAW does not make it compulsory for national authorities to report delays. This could be remedied by proper national implementation clearly making it compulsory to report delays and stating the reasons for the delay. Eurojust explains the practice of non-reporting by saying that delays in EAW execution are mostly due to requests for additional information (clarification of the legal classification of the facts or lack of receipt of original documents) and the nature of appeal hearings. Yet the reason why compulsory reporting was made in the Framework Decision was to enable Eurojust to act in EAW cases that have become problematic.

In can be stated in general, however, that through the cases referred to it Eurojust is in a solid position to have first hand information about the legal and practical obstacles that can arise in the application of the Framework Decision on the EAW.
Now that national authorities will need to systematically transmit information to Eurojust, Eurojust will be in an even better position to evaluate and proactively assist Member States in the areas of EAWs as well, at times being able to act before specifically requested. Such a proactive approach should be accepted and welcomed by Member States, especially considering that in the current legislative context Eurojust will carry this out in its advisory and mediating role.

**Eurojust is very well placed to make policy recommendations on how to improve the application of EAW. This unique knowledge of Eurojust has to be better exploited.** The question remains, in what form should this experience and insight be shared so as to have an impact? It is submitted that Eurojust’s overall assessment of the EAW, annexed to its 2004 annual report, could be updated in the light of the fact that the instrument has been in application for almost a decade now.

### 2.3.3. Joint Investigation Teams

The Joint Investigation Team (JIT) is a tool for facilitating investigations into criminal offences which either “require difficult and demanding investigations having links with other Member States” or “necessitate coordinated, concerted action”. The establishment of JITs was first envisaged by the 2000 MLA Convention, yet due to the slow ratification process a Framework Decision was also adopted in order to compel Member States to implement and eventually use this tool. However statistics showed an extremely low degree of establishing JITs. By 2005 only one such team had been set up and Member State implementation again seemed to be inadequate.

**Eurojust’s role**

The joint efforts of Europol and Eurojust made a real comeback for JITs. Under the auspices of the Hague Programme a number of measures were taken in order to breathe life into this instrument, which was generally thought to be completely underused. The JITs’ Experts Network was established to raise awareness of the instrument and to facilitate the setting up of JITs in practice, and Eurojust and Europol were given a specific mandate to encourage and support JITs, with both bodies being provided with powers in regards to the Joint Investigation Teams.

The 2002 Eurojust Decision already allocated the power to Eurojust to ask national authorities to set up a JIT, however the 2008 Decision extended these powers to now include:

- Eurojust national members may request the competent authorities in EU Member States to set up a JIT (Article 6 1.a);
- in the capacity of the College by way of giving reasons may ask the competent authorities in EU Member States to set up a JIT (Article 7 1.a);
- national members of Eurojust are entitled to set up and participate in JITs, national law may subject this to the agreement of the competent national authorities (Article 9);
- national contact points of the JIT Network are part of the ENCS (Article 13);

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256 Article 13 of the MLA Convention.
258 15227/05 LIMITE CRIMORG 151 ENFOPOL 176 EUROJUST 81 COPEN 193 Conclusions of the first meeting of the national experts on Joint Investigation Teams Brussels, 2 December 2005 15227/05.
national members shall be informed about setting up JITs by their competent authorities (Article 13);

the Secretariat of the network of Joint Investigation is located at Eurojust (Article 25a).

Besides these powers there are a number of ways in which Eurojust facilitates the establishment of JITs including; advice to set up a JIT, drafting the agreement on the establishment of a JIT, applying for financial support and supporting the JIT’s operation.

Eurojust and Europol jointly run a JIT project, which consists of the following:

- Guide on EU Member States’ legislation on JITs,
- Manual on JITs,
- JITs’ webpage,
- Annual meeting of the Network of National Experts on JITs.

Besides these Eurojust also runs a JIT funding project allocated by the European Commission’s ‘Prevention of and Fight against Crime’ Programme, which provides financial assistance with respect to the expenditure on JITs.

Assessment

The strengthened involvement of Eurojust in facilitating the establishment and operation of JITs is generally considered a success and its good cooperation with Europol in this regard is often referred as being a model.\(^{259}\) Statistics seem to positively reflect all the efforts taken in 2009. Eurojust received 10 notifications of the establishment of a JIT and Eurojust national members participated in 7 JITs. In 2010 11 notifications were received and national desks participated in 20 JITs.\(^{260}\)

Besides being mandated\(^ {261}\) to support JITs, it is clear that for Eurojust this was a strategic area in which it could position itself, eventually to become ‘the key player and centre of expertise with regard to JITs’.\(^{262}\) Eurojust has not only actively promoted the setting up of JITs among national authorities but clearly understood the underlying difficulties and the reasons for the general reluctance in making recourse to this tool. Eurojust tackled these through a number of actions, including awareness raising regarding financial support and subsequently administering such support, sharing experience and generally becoming a focal point for JITs. On the one hand this can be evaluated as a proactive use of existing powers provided for by the 2008 Decision. Eurojust follows the entire cycle of JITs, from their establishment to their closure, and acts as a collective memory for lessons learned and best practices. It is notified of each JIT set up, has powers to participate in their work, has the secretariat to liaise with the National JIT experts and the funding to support. It can be concluded, that Eurojust has made the most out of its role of being a facilitator, a conclusion that has been endorsed by the Council.\(^ {263}\)

Despite all these efforts, the setting up of a JIT is still considered to be hindered by a number of difficulties stemming from the legal differences between the Member States regarding covert investigative techniques and divergent disclosure regimes, just to mention the prime examples, to the willingness to engage in intensified cooperation at all.\(^ {264}\) Without

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\(^{259}\) Interview 5 and 6.


\(^{263}\) Council conclusions on the eight Eurojust Annual Report (calendar year 2009) para. 12 and 15.

disputing Eurojust’s positive role in revitalising the concept of JITs, there is still work to be done.

It is another question, however, whether Eurojust can support JITs through analysis, and participate in the substantive work of JITs. Based on the information transmitted by the national authorities, Eurojust will be in the position to analyse incoming data and make connections between cases. This point leads to one very important issue, which has to do with the general profile of Eurojust. The strengthened position of Eurojust with respect to JITs and its degree of involvement in JITs certainly articulates an orientation towards investigations and policing meant to be carried out primarily by Europol. This not only reshapes Eurojust’s profile in the sense of emphasising its accusatory role, but also leads to a different relationship with Europol, where the two agencies rather work in tandem, creating synergies on the one hand and yet risking duplication on the other.

2.3.4. Conflicts of jurisdiction

Eurojust’s role

Resolving conflicts of jurisdictions, thus giving way to the ne bis in idem principle and avoiding forum shopping in cross border criminal prosecutions was initially seen as a cornerstone to complement the area of freedom security and justice, where judicial cooperation is largely based on the principle of mutual recognition. Coordination rules were initially thought to be avoided through mutual consultation and dispute resolution complemented with a binding decision by an EU body. It has to be mentioned that this work was greatly supported by Eurojust’s Guidelines for Deciding which Jurisdiction Should Prosecute, set out in its 2003 annual report. Despite many ambitious attempts it was only in 2009 when the Framework Decision on Conflicts of Jurisdiction was adopted. The adopted instrument in many respects is a far cry from the proposal as it was originally tabled under the Czech Presidency, not to mention the preceding policy papers. The adopted instrument was criticised from the outset for its limited scope, especially with regard to the fact that it aims to avoid “parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States”. It was submitted that the double jeopardy principle does not only come into play when final disposal of proceedings are at stake but also when the second prosecution is commenced. Also, situations in which different offences are committed by one or more perpetrators have been excluded from the scope of the instrument. The central idea, to establish an information and consultation process once it is believed that parallel proceedings are being undertaken, was kept, yet the final version of the text omitted the purpose and criteria which would guide the entire venture. The result is a process with no parameters and which is not designed in a way that the outcome is accepted or waived by the authorities concerned. It may be argued that referring to Eurojust’s guidelines in the ninth recital of the preamble gives some support on what basis should conflicts be resolved, yet the preamble and the guidelines are both of a non-binding manner. The effects of the lack of a provision that would regulate what happens if no consensus is reached on a conflict of jurisdiction has the potential to be grave as from then on Member States may reset or drop proceedings as they wish.

266 Interviews 6 and 7.
272 Ibid.
Eurojust’s role in resolving jurisdictional conflicts is limited. The Framework Decision on Conflicts of Jurisdiction in principle follows Article 7 (2) of the 2008 Decision, yet in practice creates a different procedure. In the 2008 Decision it is stated that “where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution […], the College shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned”. Article 12 of the Framework Decision on Conflicts of Jurisdiction states “Where it has not been possible to reach consensus in accordance with Article 10, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision”.

A closer reading of the Framework Decision on Conflicts of Jurisdiction reveals that whereas in the 2008 Decision it is for the Eurojust national members to refer the conflict of jurisdiction case to the College in a mandatory way, in the Framework Decision this is an option for the national authorities (“shall as appropriate”). The language of the Framework Decision on Conflicts of Jurisdiction does not make it compulsory to refer a conflict to Eurojust and furthermore it limits Eurojust’s role to its general competence.

Assessment
The Framework Decision on Conflicts of Jurisdiction has already been labelled as being disappointing for not precluding multiple prosecutions through centralising prosecutions based on an objective set of criteria on the choice of jurisdiction.274 In its current form the Framework Decision on Conflicts of Jurisdiction does not resonate with the depth of the problem caused by the interplay of the lack of jurisdictional rules and the principle of ne bis in idem in EU criminal law. The result is that parallel criminal proceedings may still be entertained. The concern of creating more forum shopping instead of precluding multiple proceedings has been also voiced.275 The concern is that the overall effect of the open-ended nature of the consultation process and the limited role of Eurojust will be that unsuccessful consultations will not be revealed and referred to Eurojust.276

The message of the negotiations on the Framework Decision on Conflicts of Jurisdiction is that Member States are clearly not in favour of mandatory jurisdictional rules, or any criteria for ranking basis of jurisdiction and vehicles for mandatory coordination. Concerns related to the loss of sovereignty still outweigh the degree of certainty that would be achieved had objective criteria for deciding concurrent jurisdictions cases been adopted.277 To be sure the Framework Decision is a missed opportunity, both regarding the subject matter itself and regarding Eurojust as well. Now that the Framework Decision has been adopted, there are no signs that the issue will be tackled in the near future. The Action Plan Implementing the Stockholm Programme does not envisage any proposal on this topic.278 It has also been argued that the principle of mutual recognition has in general lost its appeal and a degree of caution in the application of this principle can be discerned in recent legislative instruments.279 It appears, therefore, that the regulatory environment in this area will not change in the near future. It is a lost battle for Eurojust as well, as the deficiencies of the emerging legislative environment seem to prevent it from playing a pivotal role in the coordination of jurisdiction and resolving conflicts of jurisdiction.

It has been suggested that for Eurojust, the issue of laying down criteria and acquiring a role in deciding the best place for prosecutions to proceed was related to its own preparation to become the institution from which the European Public Prosecutor will be created.\footnote{Groenler, M. (2009) p 316.} The issue of determining jurisdiction in cross-border EU criminal cases is a step on the path to becoming a quasi-prosecutorial authority and is therefore interlinked with the establishment of the future European Public Prosecutor. However, as mentioned above, Eurojust could not secure a decisive role for itself. On the other hand it has been emphasised many times that should Eurojust be granted with the power to take a final decision on the best place to prosecute, this would need to be balanced with the rights of the defendant. Such a transfer of prosecutorial power to Eurojust would need to be checked by heightened defence rights, including at least the possibility to challenge the decision on the venue of prosecution. For further discussion of this see Section 3.2.7.

The Framework Decision on Conflicts of Jurisdiction needs to be implemented by June 15 2012 by the Member States. So far very few cases have been brought under the 2008 Decision, where Eurojust mediation was sought and its recommendation was then followed by the parties.\footnote{Interview 4 and 5.} Eurojust has stated that it is too early to make any assessment of the use of its Article 7(2) power.\footnote{Eurojust Annual Report 2010 p69.} Practice will tell whether the coordination rules set by the Framework Decision on Conflicts of Jurisdiction have added value or are clearly insufficient. It will also become apparent whether and to what extent the lack of formal powers will be offset through the adoption of a proactive attitude and informal support from Eurojust’s side. Given that Eurojust, due to the obligation of national authorities to transmit information on serious cross border crime cases, is now in an informed position, it may step in informally in cases burdened with a jurisdictional conflict. There are hints that Eurojust is more willing to play this kind of informal role instead of issuing formal opinions,\footnote{Ibid.} and indeed it appears that this is precisely the expectation of the national authorities.\footnote{Vernimmen-Van Tiggelen, G. and Surano, L. (2007), p17-18.} Also, there is nothing to prevent Eurojust from doing so in case of negative conflict which is not covered by the Framework Decision on Conflicts of Jurisdiction, yet do occur. In the 2010 annual report Eurojust makes reference to cybercrime cases where national authorities only sought to combat crime within their territory irrespective of the EU cross-border aspect. Eurojust stepped in to ensure that prosecutions take place in other Member States as well.\footnote{Eurojust Annual Report 2010 p45.}

Despite the fact that the informal support provided by Eurojust in cases of conflicts of jurisdiction would be in line with its operational style, and the fact of its already praised virtue of networking with national authorities based on persuasive authority rather than formal power, there is a limit to this kind of operational approach. When it comes to resolving an issue on the venue of a prosecution one may ask on what grounds was the decision taken and how. From then on informal corridor discussions at Eurojust may be very effective in bridging the gap between the lack of rules and practical needs, but has to meet rule of law requirements as well.\footnote{Mitsilegas, V. (2009) p555.}
2.3.5. Evidence gathering – the European Evidence Warrant and the European Investigation Order

EU criminal law related to the gathering of criminal evidence can, at present, be described as overlapping and fragmented. Currently EU national judicial authorities seeking evidence from another EU Member State can make recourse to two different regimes, one based on mutual legal assistance and another based on mutual recognition. The first regime consists of international mutual legal assistance agreements, the most well known of which are the 2000 MLA Convention and the 1959 Council of Europe Convention on mutual legal assistance. These international treaties are applicable irrespective of the type of investigative measure or the type of evidence concerned. The mutual recognition instruments adopted under the auspices of the EU have a much more limited scope. There are two mutual recognition instruments in force with regard to obtaining evidence: the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (Framework Decision on freezing orders) and the Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (Framework Decision on the EEW, or EEW), which applies only to pre-existing evidence.

There is now work ongoing to replace this legal regime by one single instrument: the European Investigation Order (EIO), which is currently in the first reading of the European Parliament in the context of the ordinary legislative procedure. The main reason underlying the push for a new instrument is to replace the existing regime, which mixes two different approaches to judicial cooperation in criminal law, namely mutual assistance and mutual recognition. The aim of the new instrument is to place the obtaining of evidence in EU cross border criminal cases under the auspices of the principle of mutual recognition, which is seen to be a heightened level of cooperation whereby national judicial authorities – based on mutual trust - recognise and enforce decisions rendered by other EU Member States' authorities. In practice, the introduction of mutual recognition into evidence gathering would mean that the issuing Member State could order the executing Member State to carry out an investigative measure. Such requests to carry out an investigative measure have so far only been possible under mutual legal assistance. The leap under mutual recognition would be that the executing Member State is obliged to recognise and execute the investigation order, and treat it as if it were issued by its own authorities. It has to be emphasised also that the currently existing mutual recognition instruments in the field of evidence gathering, namely the Framework Decision on Freezing Orders and the EEW, have a much more limited scope, as they provide only for the collection of already existing evidence. It is expected that the new instrument will generally simplify the obtaining evidence firstly by replacing the currently fragmented legislative regime with one single instrument and by generally accelerating evidence-gathering by the setting of time limits and further limiting the possibilities to refuse the execution of an EIO. It needs to be emphasised as well that the Framework Decision on Freezing Orders has been reported to be inadequately implemented by Member States, whereas the EEW was implemented by

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287 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters OJ C165/53 24.6.2010.


289 Such investigative measure may include the temporary transfer of persons held in custody for the purpose of conducting an investigative measure, hearing by videoconference or other audio-visual transmission or by telephone, monitoring banking or other financial operations, controlled deliveries, covert operations, interception of telecommunications.

Denmark only\textsuperscript{291}. Thus the adoption of the EIO, now in the form of a directive as a post-
Lisbon instrument, would certainly result in a more vigorous measure.

The discussions at the Council on the EIO were lengthy and difficult and the general
approach was finally adopted at the end of 2011. The proposal now proceeds to the first
reading conducted with the European Parliament, where the draft report on the proposal
was prepared and the amendments tabled. The debate largely revolves around the grounds
for non recognition and non-execution, how to ensure the principle of proportionality,
whether the executing state is to be granted with the right to examine the EIO on this basis,
how the principle of \textit{ne bis in idem} is to be respected and finances. Both the tabled proposal
itself and the work undertaken by the Council were vehemently criticised for undermining
the suspect’s position in cross border criminal proceedings. This criticism results from
allowing investigative measures to be carried out which are otherwise not available in a set
of domestic criminal proceedings and the underlying rationale that the guarantees of the
issuing Member States need to be met only\textsuperscript{292}.

\textbf{Eurojust’s role}

Leaving aside the shortcomings that the instrument may contain if adopted, the EIO will
have a significant bearing on Eurojust in two respects. One concerns its overall role and
the other relates to its operational work with respect to evidence gathering in cross border
criminal cases.

Regarding its role while in the Framework Decision on the EEW provides a consultative role
for Eurojust, albeit in a limited field, the EIO does not prescribe any articulated role for
Eurojust. Article 13(4) of the Framework Decision on the EEW provides that Eurojust shall
be consulted by the competent authority when it is considering refusing an EEW on the
basis of the territoriality principle. If the competent authority is not in agreement with
Eurojust’s opinion, it needs to give reasons and inform the Council. The rationale behind this
provision is that when the executing state considers that the EEW concerns a criminal
offence which was committed in its territory, it is refusing the execution of the EEW in order
to retain the power to prosecute the crime. As a consequence, parallel proceedings may be
considered, and therefore Eurojust is asked to step in and avoid this situation. No such role
is allocated for Eurojust in the EIO, at least in its currently discussed form. One needs to
bear in mind that should the EIO be adopted the EEW will be repealed, and with it the
consultative role now assigned to Eurojust. In the course of negotiating the instrument in
the Council the issue of assigning any specific role to Eurojust was largely disregarded.
Eurojust was invited to issue an opinion on the proposal by the Hungarian Presidency, in
which besides commenting the proposal, the unit also sought that its assistance and
consultative role should be explicitly referred in cases where an investigative measure is
sought that is different from the one requested. These ideas gained no support in the
Council. Academic writing on the EIO does not discuss any role for Eurojust. A series of
amendments tabled to the proposal in the course of the first reading held in the European
Parliament, however, seems to systematically bring Eurojust back. These amendments
relate to having the possibility to transmit the EIO via Eurojust as well, to inquire via
Eurojust about the executing authority if it was unknown, assistance provided by Eurojust in
transmitting the EIO, and a mediating role for Eurojust if the executing Member State is
about to refuse an EIO, as the measure requested does not exist or would not be available

\textsuperscript{291} There is a tacit agreement in the Council that the EEW is a failure because its limited scope, hence it is now
sought to be replaced by EIO, which was proposed one year before the end of the transposition period for EEW.
Denmark’s position is very delicate in the sense that it is not only the one Member State that did implement the
EEW, but it is not participating in the adoption of the EIO due to its opt-out rules. This will yield a fairly
complicated situation where Member States adopting the EIO will still need to implement the EEW.

Initiative to a European Member States’ Legislative Initiative on a Directive for a European Investigation Order
under its own law. It remains to be seen whether these proposed amendments find attraction in the course of the triilogue conducted with the Council.

The other way in which the EIO will affect Eurojust is through its operational work. When the EIO replaces the current, mostly legal assistance based system of evidence gathering, the involvement of central authorities administrating mutual legal assistance requests will also cease. The EIO will be issued by one competent authority of one Member State and directly addressed to the national authority of another Member State in order to execute the order i.e. carry out the investigation. In this way the EIO essentially decentralises the currently centralised systems, in which central authorities, usually ministries, receive all requests and distribute them to the competent national authorities, which is seen to be a rather time consuming process. Despite the fact that the intermediary role by central authorities prolonged the fulfilment of requests, relying on their experience in handling cross border matters was very convenient for national authorities. This will also be gone once the EIO takes over, with the result that national authorities for sure will need assistance. It also needs to be underlined that all investigative measures fall under the EIO except for the joint investigation teams. That is to say Member States’ authorities will always make recourse to the EIO when cross border evidence is needed, and EIOs will be issued when more intrusive measures are required. Ultimately, the result of the EIO will be that authorities will issue requests in the knowledge that that the receiving competent authority is obliged to recognise and enforce it, which means that coordination and support in linking the concerned authorities will be vital. This will fall to Eurojust, carrying out this task within the context of its general competence, normally by the national desks through phone calls and emails. Eurojust’s support will be vital in administering EIOs, but this will be done without being given a specific role in the directive.

Assessment

The current stage of negotiations demonstrate that assigning a specific role for Eurojust was not a consideration for the Member States tabling the proposal nor for the Council. This argument may be mitigated, however, if one considers the fact that the Eurojust Decision itself already gives a number of ways for Eurojust to become active. Through the general provisions of the Eurojust Decision, and specifically through its provisions explicitly mentioning "instruments giving effect to mutual recognition instruments", there is a role for Eurojust. Indeed this role may be considerable, including national desks administrating EIOs, where national law allows the issuing an EIO in agreement with the competent national authority, the execution of an EIO in urgent cases and being informed if an EIO is issued with respect to more than two Member States or where repeated difficulties or refusals regarding the execution of EIO occurs. The OCC and the ENCS will have a role in coordinating EIOs and ultimately the College may issue non-binding opinions should matters concerning “recurrent refusals or difficulties concerning the execution of requests” be referred to it.

Regardless of the fact that the Eurojust Decision is broad enough to encompass all requests made in the form of the future EIO, the problem concerns the fact that the EIO, being a directive, will be implemented into national laws and in the course of national implementation the connection between issuing and executing an EIO and Eurojust may not be made. This could be simply due to the fact that different parts of the national legislation will have to be put in line with the EIO Directive (i.e. different sections of the criminal
procedural code). The result may easily be that national laws will not provide that Eurojust’s assistance can be sought when evidence is gathered by issuing an EIO. It is a question of whether the general provisions of the Eurojust Decision and the provisions related to mutual recognition in particular will be implemented in such a manner that national authorities will know that they can reach out to Eurojust. The concern is that there will be a repeat of the situation whereby Eurojust’s supporting role will need to be advertised among national authorities.

With regard to the consultative role of Eurojust granted by the EEW to advise the executing Member States should it wish to refuse a request based on the territoriality principle, no such power can be deducted from the 2008 Decision. Thus under the EIO, Member States will not be obliged to refer such matters to Eurojust and Eurojust will not be required to issue an opinion. With this, an important mechanism for filtering out concurrent proceedings is lost in which Eurojust could have played a mediating role. Obviously such matters can be tackled informally, through coordination done by the national desks. Again it is informal networking through which business will likely be run.

As compared with the EAW, the other flagship instrument of the principle of mutual recognition, there are certain similarities between the EIO and EAW. The EIO, if adopted, will be at least as frequently used as the EAW since it will replace all mutual legal assistance requests among Member States. A more substantive similarity will be that the EIO will bring to the surface all the shortcomings of the principle of mutual recognition, just as the EAW will do with respect to dual criminality, double jeopardy and safeguarding the rights of the defendant. Thus both in terms of the volume of cases and generating problems the EIO will surely provide work for national and EU authorities as well. For Eurojust, this will mean a further increase in its caseload. The proactive or more strategic use of EIOs will be more difficult than in the case of EAWs, where the coordination between Europol and national desks often leads to successful synchronised issuing of EAWs. In the case of EIOs, a lot more analytical work will be required to find connections and to be able to proactively suggest to national authorities which partner national authority they should issue an EIO to. Not only is the visibility of this kind of support lower, again it will be done informally.

In summary, what can be witnessed through the proposal of the EIO is not only that formal powers are being withheld from Eurojust, but explicit reference to its work to facilitate judicial cooperation is not voiced in an initiative which is meant to be used daily by the competent national authorities.

2.3.6. Role in policy development and strategy making

According to Article 32 of the Eurojust Decision, the Commission and the Council may seek Eurojust’s opinion on all draft instruments prepared under Title VI of the treaty, which after the Treaty of Lisbon translates to chapter 4 on Judicial cooperation in criminal matters and chapter 5 on Police cooperation of Title V of the Treaty on the Functioning of the European Union. Such requests, however, are rarely referred to Eurojust. Eurojust is seldom invited to the meetings of Council Working Parties discussing legislative proposals, with its participation confined to agenda points directly related to Eurojust. One of the few exceptions was an invitation to issue a written opinion on the European Investigation Order. Given that Eurojust has a good ten years of expertise in judicial cooperation and increasingly oversees a high volume of cases, its insight could certainly be better exploited. The legislative loopholes, problematic practices and inconsistent national laws that Eurojust regularly flags in its annual reports are largely left unanswered by EU policy-makers following their own agenda. Examples include its account of problems concerning the application of the

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Mutual Legal Assistance Convention, the European Arrest Warrant, freezing orders, confiscation and asset recovery, controlled deliveries and the Framework Decision on Freezing orders. Experience which draws attention to both the specific and systematic problems of these instruments would be of direct relevance to policy-makers. One other suggestion is that this expertise should be used at the phase of policy formation and drafting legislative proposals rather than at the stage of Council discussions, when the proposal is already tabled and room for negotiation is more confined.

Eurojust’s strategy development is unfortunately problematic due to the lacunae of the reporting mechanism to which it is subjected. This in essence means that the Council only _ex post_ confirms Eurojust’s actions, strategy choices and priority settings. Despite the horizontal overarching strategies made regarding the area of freedom security and justice, such as the Stockholm Programme, the Internal Security Strategy, the OCTA, ROCTA and TE-SAT reports, so far no _pro futuro_ strategy direction has been issued by the Council specifically for Eurojust. Given its institutional placement, as discussed in section 1.6.1., there is no other EU Institution which could provide such a direction or be formally consulted regarding Eurojust strategies before they are formed. Since its establishment, Eurojust has been in a position to make strategy choices on its own initiative. It must be added, however, that these were later confirmed by the Council. Eurojust’s Counter-terrorism Team, taking on work concerning JITs, the Children Protection Contact point and the Strategic Project on Drug Trafficking Cases, are examples of setting priorities and taking strategy decisions in the context of orienting Eurojust’s work. Such choices can certainly be underpinned with sound arguments: terrorism is a top priority for the EU in the in the area of freedom security and justice; drug trafficking cases are the crime type referred to Eurojust in the highest number; JITs are underused and need to be better exploited. This, however, does not change the fact that the Council only approved these choices _ex post_. The problem is that instead of having its strategy choices discussed on their merits and then implementing them, Eurojust is put into the situation that first it has to make a choice and later have it confirmed. It has been said that this policy cycle is not to the benefit of either Eurojust or the EU political institutions. Eurojust is in a situation whereby it has to assume all responsibility for its strategy planning and can later be easily criticised _post factum_ for actually taking concrete decisions.

With regard to strategy setting, however, it can be also argued that the national authorities’ requests made to Eurojust are the primary and most important vehicle from which Eurojust should draw its orientation. It could be argued that requests come from the ground up and reflect genuine queries, thus Eurojust should only follow such requests as these can be very well regarded as evidence of the real needs of Member States. This proposal also invokes the ultimate question; whose agenda is Eurojust meant to carry out? That of the requesting national authorities, or is there a European agenda that Eurojust is meant to implement?

Institution-building, however, needs more than this and Eurojust has begun to move in the direction of organising and communicating around priorities set for longer terms. The Multiannual Strategic Plan 2012-2014 and the Annual Work Plan made public since 2009 are examples of this. Both were adopted by Eurojust’s College after prior consultation with the Commission.

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2.3.7. Professional network

No discussion of Eurojust’s functions can be complete without explicitly mentioning its mission to become a centre of expertise and the fact that the coordination work of the body results in the pulling together of a large number of professionals, who build professional networks and share experiences and practices.

2.4. Eurojust and its partners

2.4.1. Eurojust and Europol

Despite the intertwining origins of Europol and Eurojust and indispensable cooperation between the two agencies, the Eurojust Decision provides only a few ideas on how Europol and Eurojust are to work in tandem. Firstly, it needs to be emphasised again that Eurojust’s scope of competence is completely adjusted to that of Europol. Secondly, the Eurojust Decision expressly states that Eurojust shall establish a cooperative relationship with Europol, which may involve a formal agreement between the two agencies, and that at the national level the Eurojust National Coordination System shall maintain close relations with the Europol National Unit. Apart from this the Eurojust Decision generally states that the College may assist Europol’s work. However its provisions are not particularly detailed when it comes to mapping out the depth and content of the relationship. Yet the vagueness of the Eurojust Decision is counterbalanced by the agreement between Eurojust and Europol signed in 2009 and which entered into force on the 1 January 2010.301 This agreement on the one hand replaces the previous 2004 agreement and provides detailed rules on consultation and cooperation between the two bodies (including the JITs), the exchange of information, processing of information, and the issue of confidentiality.

Probably the most important part of the agreement is the chapter on information exchange. According to this Europol is obliged to give both general and specific analysis findings to Eurojust. Europol shall share analysis data and analysis results with Eurojust either of its own motion or at the request of Eurojust. Interim analysis results shall in particular be transmitted should judicial follow-up be required (i.e. support of the execution of EAWs, mutual legal assistance). In turn, Eurojust is also required to communicate information to Europol, including analyses and strategic findings. Eurojust will transmit data on its own initiative where information sent by Europol matches with information stored by Eurojust.303

Information exchange between Europol and Eurojust also involves Eurojust’s association with Europol’s Analysis Work Files (AWF). Europol not only informs Eurojust about the opening of a work file but Eurojust itself may initiate the opening of an AWF. Eurojust experts associated with an AWF attend the analysis group meetings, the development of the AWF concerned and receive data and analysis results. It needs to be recalled, however, that the decision regarding which AWF Eurojust can be associated with is taken by the Member States. Europol advocates Eurojust’s cause when its association with an AWF is discussed, yet ultimately it is not Europol who actually decides. While it is true that the current regulatory environment treats Eurojust as a third state, AWFs contain sensitive information and it requires a great degree of trust from the Member States to have a partner associated with the AWF. It was also suggested that legally enforced automatic association of any of Europol’s partners – including Eurojust - with the AWF would diminish this trust and would lead to an emptying out of the AWF as Member States would not supply

302 Article 7 Eurojust - Europol Agreement.
303 Article 8 Eurojust - Europol Agreement.
304 Articles 9-11. Eurojust - Europol Agreement.
it with information. Currently Eurojust is associated with 17 of the 21 AWFs, however, it is also telling to which AWS Eurojust is not allowed to be associated with, including the AWF on terrorism. Eurojust’s work in providing for the judicial follow up to the investigated cases is regarded very positively in Europol circles, especially Eurojust’s ability to broker cooperation where there is a reluctance from one Member State to take the lead and to engage prosecutors.

According to the Eurojust-Europol Agreement, Europol shall have the right to request Eurojust to provide assistance in judicial cooperation in concrete cases and the right to request to be invited to strategic and coordination meetings held at Eurojust. The agreement also covers issues concerning the transmission of data and provides the “right to access to any individual to personal data concerning himself under this agreement, to have his data corrected and deleted, or to have such data checked in accordance with the applicable provisions of the party to which the request is addressed”. There are further rules on assessment of sources and reliability of information and on the correction and deletion of information.

On the basis of the agreement the two agencies shall report annually to the Council and the Commission about their cooperation. This is done both in their respective annual reports and through a report jointly produced by the JHA agencies. In the annual reports of Europol and Eurojust there are number of cases illustrating the coordination between the two agencies and the ways in which they support each other’s work. Eurojust regularly reports how many times has Europol requested and participated in coordination or strategic meetings (See Table 5 below). Eurojust also reports on how many AWFs Eurojust is associated with (in 2010 it was 15, since then it has increased to 17). Since 2008 information exchange has been supported by secured communication channels and complemented with a new Memorandum of Understanding on the respective confidentiality and security standards to enable the exchange of information up to the level of “EU Top Secret”.

Exchange of information in 2010 has been reported to have increased by 27% compared to the previous year, with 675 messages (2009 529, 2008 140). Information exchange is generally seen as increasing and yields excellent results in operational cases.

Table 5: College registered cases involving Europol

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Table 6: Eurojust coordination meetings requested by Europol

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</tbody>
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306 Interview 7.
307 Articles 10 and 12. Eurojust - Europol Agreement.
308 Article 15 Eurojust - Europol Agreement.
309 Joint Eurojust-Europol paper on judicial - police co-operation in operational cases Council doc. 9387/1/11.
311 Interview 6.
For Europol it is policy to work closely with Eurojust and to maintain good working relations at every level. Inter-institutional relations are further strengthened through training and the joint improvement of organisational relations. Both in 2009 and 2010 Europol was invited to discuss the involvement of Europol National Units in the ENCS under Article 12.5(d) of the Eurojust Decision. In turn, Eurojust attended meetings of the Heads of Europol National Units (HENUs) at Europol, including the discussions on how to increase awareness of Eurojust’s association with AWFs. Eurojust also contributes to the Organised Crime Threat Assessment (OCTA) and Terrorism Situation and Trend Report (TE-SAT) reports prepared by Europol on the basis of its own casework in the main crime priority areas.

Table 7: Main crime types where Europol is involved between 2005 and March 2011

<table>
<thead>
<tr>
<th>Title</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug trafficking</td>
<td>67</td>
</tr>
<tr>
<td>Crime against property or public goods including fraud</td>
<td>65</td>
</tr>
<tr>
<td>Participation in a criminal organisation</td>
<td>50</td>
</tr>
<tr>
<td>Money-laundering</td>
<td>24</td>
</tr>
<tr>
<td>Swindling and fraud</td>
<td>22</td>
</tr>
<tr>
<td>Illegal immigrant smuggling</td>
<td>19</td>
</tr>
<tr>
<td>Forgery of money and means of payment</td>
<td>19</td>
</tr>
<tr>
<td>Trafficking of human beings</td>
<td>17</td>
</tr>
</tbody>
</table>

Source: Strategic Seminar Eurojust: New Perspectives in Judicial Cooperation, Budapest, 15-17 May 2011

Statistics on Eurojust’s cooperation With Europol and OLAF, Case Management Unit, Eurojust May 2011.

It has been expressed, however, that there is no need to make JHA agencies compete with each other as there are clear roles for both Europol and Eurojust. With regard to unnecessary competition, the specific example mentioned was the allocation of the JIT fund to Eurojust, regarded as surprising by Europol and creating unnecessary competition. Also, should Eurojust aim to be more active in analytical work, this should be done very carefully in order not to duplicate Europol’s work in this field and to avoid generating competition between the two agencies. The analytical work of Europol and Eurojust should complement and not compete with each other.

From the above it can be seen that significant efforts have been made by Europol and Eurojust to work in tandem. However one must not lose sight of the fact that the nature of this relationship is nothing like the original idea, which envisaged Eurojust as the judicial counterpart to Europol and which validates Europol’s activities. Eurojust has not evolved in the direction of monitoring police operations and securing the observance of procedural guarantees, as some originally envisaged. Indeed there was no specific supervising role ever prescribed to Eurojust in either the 2002 or 2008 Decisions or elsewhere. Over time, the accusatory role of Eurojust has been strengthened. Therefore, the relationship between Europol and Eurojust is not only of a truly operational nature but is directed towards the same end; namely investigating crime, where Eurojust’s role is mainly to help prosecute and ensure the judicial follow to of police results. In this work Eurojust moved towards intelligence-led policing and gradually established its analysis capacities

312 Interview 7.
314 Interview 6.
315 Interview 7.
as well, now fed by a sufficient amount of information from the national authorities. This move is mainly reinforced by the fact that with the exception of one national desk, all Eurojust national members come from the prosecutorial services or from the police and not from the judiciary. The predominance of prosecutors in the College further underlines the intelligence-led rationale of the body, which is to assist police investigations by collecting evidence upon the basis of which charges can be laid. The question remains whether the idea of Eurojust’s role of providing judicial supervision of Europol should be fully abandoned, despite the fact the Europol does not and will not enforce coercive measures, yet its intelligence activities can affect liberties.

2.4.2. Eurojust and the European Anti-Fraud Office

Despite the fact that the legal provisions providing for it are in place, the relationship between Eurojust and the European Anti-Fraud Office (OLAF) is difficult due to the competition generated by the insufficient definition of roles and overlapping tasks. While legislative provisions taken at face value appear to allow for well-balanced inter-institutional relations, the reality is more complicated.

As with Europol, Article 26 of the Eurojust Decision merely states that a cooperative relationship shall be established between Eurojust and OLAF, and states that OLAF may contribute to Eurojust’s work ‘regarding the protection of the financial interests of the European Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation’. Since 2004 this has been complemented with Joint Liaison Working Groups, which is a forum for cooperating on common cases, and since 2008 the Practical Agreement on arrangements of cooperation, a document which replaced the previous Memorandum of Understanding, and which regulates the relations between the two agencies. The agreement primarily states that Eurojust and OLAF shall maintain close and regular contact. This takes place in the form of teams consisting of Eurojust national members and OLAF officials who shall meet four times a year. These meetings are ‘intended to

- reinforce common strategies on cases and to resolve practical problems in cooperation [...],
- to consult on matters of common interest [...],
- to support the development of priorities and strategies which are complementary to each other [...],
- to identify individual or joint activities [...],
- to help coordinating the parties’ support and assistance of the national authorities [...].

Besides this the cooperation between Eurojust and OLAF may include the exchange of case summaries and operational information, participation in operational meetings, and the exchange of strategic information. Probably the most important provision is the one formulating an explicit obligation to inform the other agency without delay if a case falling under the competence of that agency is dealt with. In such cases the transmission of information itself is to be regarded as a request to ‘examine the necessity for close cooperation on a specific case’. There are ample regulations on the transmission of data,
and provisions allowing the exchange of personal data.\textsuperscript{321} OLAF and Eurojust may participate in strategic or operational meetings held by the other agency and may consider informing the other agency if they participate in a JIT.\textsuperscript{322} The joint seminars on fraud and corruption organised by Eurojust and OLAF, an already exiting practice, have also found their way to being incorporated into the agreement.\textsuperscript{323}

In practice, however, the administrative investigation and judicial follow-up of crimes committed against the EU’s financial interests are not easy to separate. Tensions were readily apparent at the time when Eurojust was being set up, including the time when OLAF established a unit of 15 magistrates exactly when Pro-Eurojust was just to starting work at the General Secretariat.\textsuperscript{324} Some of the difficulties have arisen form OLAF’s interpretation that only crimes against EU’s financial interests including a ‘broader criminal conduct’\textsuperscript{325} would come under Eurojust’s ambit. It was also suggested that the prosecution phase of these cases necessitates cross border cooperation not only of judicial authorities but also of financial authorities and that Eurojust initially lacked experience in this realm.\textsuperscript{326} The Eurojust-OLAF relationship was initially characterised as being ‘hampered by suspicion and antagonism’,\textsuperscript{327} and despite genuine efforts to ease these strains, cooperation between the two agencies is still regarded as insufficient and calling for improvement.\textsuperscript{328} Besides practical ways of improving this (better personal contacts, exchange of liaison officers, involvement of OLAF in JITs) the core issues of at what stage of an OLAF investigation Eurojust should be informed and whether there should be an obligation or criteria according to which Eurojust is informed \textit{ex officio} about OLAF cases, remain to be addressed.

### Table 8: College registered cases involving OLAF

<table>
<thead>
<tr>
<th>Title</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>7</td>
</tr>
</tbody>
</table>


Table 7 indicates that the number of cases involving OLAF is a fragment of the total number of cases Eurojust deals with. It is also a fragment of OLAF investigations. It is suggested that most OLAF investigations concern one Member State\textsuperscript{329} and may not lead to criminal charges. Yet the low number of referrals and coordination calls for attention.

### Table 9: Eurojust coordination meetings requested by OLAF

<table>
<thead>
<tr>
<th>Title</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>1</td>
</tr>
</tbody>
</table>


It is also striking that up to now there is no protocol as to when to refer cases to Eurojust and this is largely left for OLAF to decide on a case-by-case basis. If OLAF

\begin{itemize}
\item \textsuperscript{321} Point 6. (11)-(16) of the Eurojust-OLAF Practical Agreement.
\item \textsuperscript{322} Points 8 and 9 of the Eurojust-OLAF Practical Agreement.
\item \textsuperscript{323} Point 10 of the Eurojust-OLAF Practical Agreement.
\item \textsuperscript{324} House of Lords, European Union Committee (2004), p27 section 64 in particular.
\item \textsuperscript{325} Ibid.
\item \textsuperscript{326} House of Lords, European Union Committee (2004), p27 section 66.
\item \textsuperscript{327} Ibid 68.
\item \textsuperscript{329} No statistics are available on the breakdown of OLAF investigation concerning one Member State only and cases involving or two or more Member States.
\end{itemize}
The Future of Eurojust

considers that the involvement of Eurojust would have ‘added value’ then a reference is made, otherwise OLAF makes recourse to national authorities to start criminal proceedings. The involvement of Eurojust is mainly considered to be useful when there is a mutual legal assistance request or a reluctant national prosecutor unwilling to attend to the cross border aspect of a case. This narrow understanding of what type of cases should be sent to Eurojust means that both the Case Management System of Eurojust and its analytical capacity in making connections remain underused in combating crimes against the EU’s financial interests. It has also been suggested that had Eurojust used its formal powers more extensively, it would have triggered better cooperation from OLAF.

Given that approximately 44% of OLAF cases are dropped by national authorities any support from Eurojust would come in handy. OLAF could especially use assistance with regard to national criminal procedural laws, in particular to address problems concerning the demonstration of evidence and generally the ability to follow national proceedings. Information about these aspects is only provided by the judge at the closure of the national procedure, if at all. National prosecutors do not inform OLAF regularly about the status of proceedings nor do they seek advice on EU legislation underpinning OLAF’s investigation. There is an overall sense that the EU is not a party to the proceedings, particularly in cases where there is a civil action as well, and the EU’s interests are not a priority at the national level, are not articulated or protected well.

Table 10: Main crime types where OLAF is involved between 2005 and March 2011

<table>
<thead>
<tr>
<th>Title</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax fraud</td>
<td>4</td>
</tr>
<tr>
<td>Grievous bodily harm</td>
<td>4</td>
</tr>
<tr>
<td>Other types of crime against property or public goods including fraud</td>
<td>4</td>
</tr>
<tr>
<td>VAT fraud</td>
<td>4</td>
</tr>
<tr>
<td>Swindling and fraud</td>
<td>5</td>
</tr>
<tr>
<td>Participation in a criminal organisation</td>
<td>11</td>
</tr>
<tr>
<td>Other offences committed together or in relation to the types of crime mentioned above</td>
<td>13</td>
</tr>
<tr>
<td>Crime against property or public goods including fraud</td>
<td>14</td>
</tr>
</tbody>
</table>


There would be ample room for Eurojust national members to step in and liaise with their competent authorities on an informal basis to feed more information to OLAF, however no such practice is reported. Some of the Eurojust national members are not even considered to be a judicial authority for the purposes of receiving and transmitting OLAF information, as required by Article 26(5) of the Eurojust Decision. This could be done within the current regulatory environment. Any further role for Eurojust, to be involved in cases concerning only one Member State, to formally provide help regarding national criminal procedural issues and to closely follow national criminal procedures and report about them would certainly require changes in the current legislative environment. It is particularly unfortunate that the amendment of the OLAF regulation, which was to prescribe the

330 Interview 8. and 9.
331 Interview 8.
transmission of information to Eurojust, was halted in the co-decision procedure and has now been pending for five years.\textsuperscript{334}

Nonetheless this seems to be an issue that receives too great a degree of attention to be left for the two agencies to solve. The whole issue of protecting the EU’s financial interests has been intertwined with the establishment of the European Public Prosecutor’s Office and has come to the forefront with the Commission’s 2011 Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers’ money.\textsuperscript{335} With this overture the Commission is committed to tackle the investigation and prosecution of crimes committed against EU public money through the use of far-reaching measures, something which will have a direct bearing on Eurojust and OLAF. For a discussion of the possible outcomes see sections 3.1.3., 3.2.5. and 3.3.).

2.4.3. Eurojust and the European Judicial Network

The European Judicial Network (EJN) in a way can be considered as the forerunner of Eurojust, having been established in 1998 and reinforced with a new legal basis in 2008.\textsuperscript{336} The EJN is composed of national contact points, designated by the Member States from their central authorities of international judicial cooperation, judicial authorities or other authorities being responsible for international judicial cooperation. The EJN is to provide a simple, informal mechanism to establish direct contact between judicial and competent authorities, to provide practical information to enable such authorities to prepare an effective request and for information exchange between national authorities for facilitating judicial cooperation, especially in cases of combating serious forms of crime. The initial separation of tasks between EJN and Eurojust appeared to be rational, EJN being a more loose form of cooperation and being mostly concerned with bilateral cases, with Eurojust concentrating on multilateral complex cases and having a permanent organisation. It was thought that for practicalities in bilateral cross border cases practitioners will reach out to the EJN and in cases where operational support in the form of coordination is needed Eurojust would be the place to seek assistance. In practice, however, the demarcation of tasks has been blurred and the 2008 Decision reshaping both Eurojust and EJN also reflects on this by creating rules in both directions for ensuring that information is shared and cases are referred to the forum better placed to deal with it.

In principle, Eurojust and the European Judicial Network shall ‘maintain privileged relations with each other, based on consultation and complementarity’.\textsuperscript{337} To that end, the following provisions govern their joint work:

- Eurojust national members and the contact points of the EJN, on a case-by-case basis, inform the other of whether the other organisation is in a better position to deal with a case;\textsuperscript{338}
- the Secretariat of the European Judicial Network shall form part of the staff of Eurojust[...] and function as a separate unit and may draw on the administrative resources of Eurojust which are necessary for the performance of the European Judicial Network’s tasks,\textsuperscript{339}

\textsuperscript{337} Article 25a Eurojust Decision.
\textsuperscript{338} Article 25a (1) a) Eurojust Decision and Article 10 b) of the EJN Decision.
\textsuperscript{339} Article 25a (1) b). Eurojust Decision.
The Future of Eurojust

- EJN contact points may be invited on a case-by-case basis to attend Eurojust meetings and vice versa Eurojust may attend EJN meetings;\textsuperscript{340}
- national desks and the College of Eurojust shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database,\textsuperscript{341}
- EJN national contact points’ meetings are held on the premises of Eurojust,\textsuperscript{342}
- ENCS shall include the contact points of the European Judicial Network,\textsuperscript{343}
- ENCS shall assist in identifying which is better placed to coordinate the case, Eurojust or EJN,\textsuperscript{344}
- Eurojust may use the secure telecommunications connection of the European Judicial Network, and the Case Management System of Eurojust may be linked to this.\textsuperscript{345}

The above provisions of the respective founding documents not only reflect the tandem work of the two forums but suggest a degree of merging which poses of the question whether and to what extent the EJN is independent from Eurojust?

Besides this rhetorical question, it is often argued that the functions of Eurojust and the EJN still overlap, as there are no clear cut rules regarding when to seek assistance from the EJN and when to turn to Eurojust. Despite the repeated calls from the Council to establish some criteria on which forum is to be charged with a specific matter, this remains an unresolved issue.\textsuperscript{346} It is certainly not easy to set up a clear division, yet the current practice of sending bilateral cases to the EJN and multilateral ones to Eurojust is not sufficient as it is rather formal and does not take into consideration the merits of a case which may require the attention of the other forum. It must be added that currently the case management of Eurojust and EJN are completely separate, thus in principle they do not know what the other entity deals with and only mutually keep each other informed if it seems appropriate. At a different level, it is reported by Eurojust itself that confusion is also caused by the fact that the EJN adds to the multiplication of avenues that can be used for channelling requests and correspondence.\textsuperscript{347}

With regard to the future the question is whether the ENCSs will be fully set up, and what exactly will be the difference between the 27 ENCSs and the EJN, with both providing a network for competent national authorities involved in judicial cooperation in criminal matters.

2.4.4. Eurojust and other EU agencies, third states and international organisations

Besides Europol, OLAF and the EJN - which due to their respective mandate are closely intertwined with Eurojust - Eurojust reaches out to other EU agencies as well. First and foremost we need to mention Frontex, with which a cooperation agreement is currently being drafted.\textsuperscript{348} It is expected that such a cooperation agreement will mutually improve the work of the two agencies in the context of organised crime such as drug trafficking and human trafficking. Relations between Eurojust and Cepol, the police training body of the EU, are also structured and shaped by a cooperation agreement.\textsuperscript{349}

\textsuperscript{340} Article 25a (1) c). Eurojust Decision and Article 10 c) of the EJN Decision.
\textsuperscript{341} Article 6 (1) e) and 7 (1) e) Eurojust Decision.
\textsuperscript{342} Article 5(3) EJN Decision.
\textsuperscript{343} Article 12 (2) c) Eurojust Decision.
\textsuperscript{344} Article 12 (5) b) Eurojust Decision.
\textsuperscript{345} Article 16 (3) Eurojust Decision. Article 9(3) and 10 a. EJN Decision.
\textsuperscript{347} Eurojust Annual Report 2010 p19.
\textsuperscript{348} Eurojust Annual Report 2010 p55.
\textsuperscript{349} MoU between Eurojust and CEPOL 2009.
Eurojust also houses the secretariats of a number of networks. The EJN secretariat and the JIT secretariat have already been discussed. In addition to these the European network of contact points with respect to persons responsible for genocide, crimes against humanity and war crimes is also located at Eurojust’s premises, and the network against corruption will also be located there. According to the Commission, it is a clear strategy to place the secretariats of all operational networks in the law enforcement sphere under the auspices of Eurojust. Eurojust also takes part in the work of the European Judicial Training Network and the network of liaison magistrates.

Eurojust has entertained a number of cooperation agreements with third countries and international organisations. The United States, Norway and Croatia have liaison magistrates seconded to Eurojust, who regularly participate in coordination meetings. The essence of these agreements is information exchange, with data protection receiving special attention, as transmitting personal data is involved as well. When negotiated, such agreements need the approval of the Joint Supervisory Body and the Council. There are ongoing negotiations with Ukraine, the Russian Federation and Liechtenstein. Contacts have been established with a view to start negotiations with Moldova, Israel, Serbia, Montenegro, Bosnia-Herzegovina, Albania and Turkey.

Two general issues can be discussed with respect to Eurojust’s relations with third states. One is that Eurojust must stay in line with the general guidelines accepted for any action related to the external dimension of the area of freedom, security and justice. These guidelines stem from two main sources: A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice and from the Stockholm Programme. It is the JAIEX working group that specifically monitors Eurojust’s external activity, as discussed in section 1.5.2.

With respect to Eurojust’s external relations, secondly, it needs to be noted that these relations are strictly about information exchange, and Eurojust in no way plays a role of being a central authority or a judicial cooperation unit in administering legal assistance requests with regard to the third states in question. Currently this seems not be a priority for Eurojust.

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350 Council Decision 2002/494/JHA.
351 Decision 2008/852/JHA on a contact-point network against corruption.
357 Interview 4.
2.5. Main conclusions on the functioning of Eurojust

2.5.1. From a reactive to a proactive style

The legislative environment in which Eurojust carries out its functions is based on the fundamental policy choice of horizontal cooperation of Member States’ authorities in judicial cooperation on criminal matters. This is reflected in both Eurojust’s structure and composition - national members and College - and in its functions as well. With regard to Eurojust’s function the horizontal nature of the body is captured in the fact that Eurojust is essentially about coordination among competent authorities and is mostly withheld from being involved in national criminal proceedings. In that sense both the 2002 and 2008 Decisions translate the mandate given by Article 31(2) TEU.

With regard to its functions, Eurojust was meant to assist national authorities, respond to requests and help those seeking out its assistance. Presently Eurojust is still mostly on the receiving end, where national authorities refer cases to it and seek its assistance, while Eurojust hardly generates cases by itself.

It is put forward that upon the full implementation of the 2008 Decision, there will be a qualitative change regarding the transmission of information to Eurojust. In this regard the 2008 Decision is truly a milestone, not only imposing a clear obligation on national authorities to systematically transmit information along defined criteria to Eurojust, but specifically describing exactly what information is to be transmitted. The 2008 Decision, when fully implemented, will move Eurojust into a position whereby it will possess a sufficient amount of information to be able to filter incoming data and find connections, and thus to take the initiative with regard to cases. In the light of these developments it is now in Eurojust’s court to determine how proactively this information is used. With respect to its broader objective to stimulate coordination this means that the ‘quantitative approach’ of receiving as many cases as possible and coordinating them properly may well call for a change. Emphasis could shift to Eurojust’s qualitative input by generating its own cases through analytical work conducted on the basis of the information it is now receiving. This leap has to be taken by Eurojust.

Now that national authorities will need to systematically transmit information to Eurojust, as explained above, Eurojust will be in an even better position to evaluate and proactively assist Member States, at times pre-empting specific requests. This proactive attitude should be accepted and welcomed by Member States, especially with a view to the fact that Eurojust, in the current legislative context, will carry this out in its advisory and mediating role.

The inflow of significant amounts of information will enable Eurojust to better concentrate on complex cases, to use EAWs in a strategic and synchronised manner, to assist in and prevent conflicts of jurisdictions, to suggest where to set up of a JIT and whom to issue an EIO. All this will entail a major shift from a reactive to proactive style of working.
2.5.2. Underpowered by legislation

Legislation subsequent to the establishment of Eurojust continues to adhere to the choice of creating a horizontal body, and clearly further confines Eurojust to the role of facilitator rather than being a player in its own right. EU legislation adopted under the auspices of the principle of mutual recognition is based on the exact same consideration of horizontal cooperation; namely leaving national procedural laws untouched. The most important mutual recognition instruments – the European Arrest Warrant and instruments on evidence-gathering – fully adhere to this principle and mostly refrain from allowing Eurojust to formally be involved in the interplay of national authorities. This is done in a way that such rules not only omit Eurojust from any ‘vertical role’, through which it could penetrate into national procedures, but are also very reluctant to give any formal power to Eurojust, where formal power does not encompasses a power of a binding nature. Among the few mutual recognition instruments two make explicit reference to Eurojust – the EAW and the EEW. The remaining eight framework decisions do not give any specific power to Eurojust whatsoever. The EIO, if adopted in its current form, will be a further example of how Eurojust is downplayed, by clearly avoiding to give specific tasks to it. Even the limited powers that are given to Eurojust seem to be difficult to exercise.

The non-binding power to advise Member States in cases of multiple EAWs is a clear example of this, whereby there is no obligation on the part of Member States to refer multiple EAW cases to Eurojust, which only has an advisory power and provides a recommendation. Also the reporting of delays in the execution of EAWs was meant to allow Eurojust to step in and facilitate the execution of EAWs. Despite the fact that most Member States did implement the Framework Decision on the EAW in a way that national legislation expressly allows for asking for Eurojust’s advice, that avenue is not used to a great degree. Reporting is clearly unsatisfactory despite the fact that there is an obligation in the Framework Decision. Improper transposition of this obligation into the respective national laws has yielded a situation whereby Eurojust cannot play its proper role in enhancing the execution of delayed EAWs.

If Eurojust is expected to play a greater role in relation to mutual recognition instruments, then recourse to Eurojust’s general powers will not be sufficient. The Eurojust Decision provides a number of powers for Eurojust with respect to instruments facilitating the principle of mutual recognition; national desks to administer, execute, or even issue such instruments, be informed of difficulties and ultimately the College to issue non-binding opinions in cases of recurrent refusals or difficulties concerning the execution of these instruments. It is feared, however, that all this may be in vain since the mutual recognition instruments themselves do not refer to Eurojust.

If Eurojust is not mentioned specifically in the mutual recognition instrument, national authorities will simply not consider reaching out to Eurojust, except for its administrative help. Eurojust’s advisory role concerning multiple EAWs demonstrates this. It is suggested that regardless of the fact that the Eurojust Decision is broad enough to encompass all requests made under mutual recognition without explicit mention of Eurojust in these instruments, national authorities will simply not know that Eurojust could be involved. The national implementation of the Eurojust Decision and other mutual recognition instruments may not be enough to provide this connection, and as such national competent authorities applying their respective national laws would not make the association that Eurojust could be involved.
The Future of Eurojust

What has been witnessed on the other hand, quite unexpectedly, is that Eurojust does play a crucial role in the everyday administration of mutual recognition instruments, the EAW being a clear example of this. Nonetheless, such assistance is provided under the general competence of Eurojust, and in most cases involves informal support. If the EIO is adopted, evidence-gathering in cross border criminal cases will undergo a revolutionary change and Eurojust will probably be flooded with questions on issuing and executing EIOs in a now decentralised system. Eurojust will again provide its informal support, but will not be able to formally take part in the application of the instrument. The result of this will be that Eurojust will be predominantly preoccupied with taking care of the proper application and administration of mutual legal instruments in bilateral cases, which is done informally and with no trace in the procedural file.

Underplaying Eurojust’s capacity to mediate and broker consensus among national authorities is also curtailed in the field of conflicts of jurisdiction. Despite the significant efforts Eurojust devoted to this issue, the outcome has been a power only to issue non-binding opinions, burdened by the fact that Member States are not obliged to refer conflicts of jurisdiction to Eurojust. On the eve of the closure of the period in which the Framework Decision on Conflicts of Jurisdiction should be transposed into national laws there is a general anticipation that the instrument will not have a great impact on resolving jurisdictional conflicts. Eurojust seems to acquire a role of a persuasive authority instead of exercising its limited yet formal power. In general it is expected that with no explicit obligation to refer conflicts, Member States will only reluctantly make recourse to Eurojust. Should Eurojust identify a conflict by analysing information transmitted by national authorities – which is quite time-consuming – then it is again left to consult with Member States’ authorities informally as, to exercise its formal power in the case of conflicts of jurisdiction, the College needs to be requested by these authorities.

There is tendentiousness in the current legislative environment to under power the unit, where powers are not exercised with binding effect, and of course Eurojust has no right to initiate proceedings. By ‘underpowered’ it is meant that Member States are still not in a position to have to seek out Eurojust when cross border criminal proceedings would require it: namely in conflicts of jurisdiction, problems regarding the EAW, evidence-gathering and mutual legal assistance requests. This has resulted in a situation whereby Eurojust still has to have cases referred to it and still has to attract national authorities to seek its assistance, while constantly being criticised for being underused. Yet one needs to be reminded that the legislative environment is such that it keeps Eurojust in the position of being a facilitator and supporter, withholding any real power from the body. The legislative environment in which Eurojust currently operates is designed to have a limited institution based on the fundamental choice to opt for horizontal rules and horizontal cooperation in EU criminal laws, in which national criminal justice systems and national procedures are largely left intact. For Eurojust this means a limited capacity by design, where upgrades are possible yet the fundamental choice is left untouched.

A recurring problem in the area of freedom, security and justice is the non-implementation of EU instruments, where the Commission at least for a transitory period still lacks the power to bring infringement procedures against non-complying Member States. Eurojust is heavily affected by this, firstly with regard to its very own founding act, and secondly with regard to the legislative acts it is meant to work within. Prime examples of this include the still not fully ratified 2000 MLA convention, the Framework Decision on orders freezing property or
evidence and the Framework Decision on confiscation of crime. The European Evidence Warrant is implemented only by Denmark and there is a tacit agreement in the Council to proceed with the EIO instead. It is suggested that the mere implementation of existing legislation would by itself improve the functioning of Eurojust.

2.5.3. Informal working style

In the course of carrying out its functions Eurojust has adopted an informal-style approach. This deliberate choice has been consistently upheld since the establishment of the institution and can be largely explained using the preceding analysis. When Eurojust sought to carry out its tasks, it was largely left to the mercy of cooperating national authorities, which Eurojust could not compel in any way. Thus informal networking seemed to bridge this gap effectively. Eurojust was eager not to alienate national authorities and any hint of requesting them in a binding manner seemed to risk their willingness to cooperate. The different standing of national members was also a reason to opt for informality, as it was not taken for granted that a request could actually be made by a certain national desk.

The result of this is a generally informal operational style, which is praised for its efficiency and for not being intrusive into national prosecutorial services. It has to be emphasised that both Eurojust members and practitioners in national administrations continuously express that this way of informal networking is more effective in getting results than any exercise of formal power. The persuasive authority upon which Eurojust continues to rely is often reported as being enough to get national authorities on board. Eurojust largely kept this modus operandi even after the Eurojust Decision, which does prescribe formal powers for the body. Eurojust in the form of the College makes limited use of its newly gained formal powers, however modest those powers may be.

One must not lose sight of the fact, however, that Eurojust is now mandated to use these powers, which were granted in order to strengthen the unit. It was easier to explain this working style when Eurojust had to win over the Member States’ authorities, yet after a decade of existence it is increasingly difficult to explain why informality is still sought at the expense of formal powers. The formal powers were quite difficult to negotiate in the Council, thus not making recourse to them may make one question why Eurojust should be further empowered with the right to initiate an investigation, or to resolve jurisdictional conflicts and so on, if even lesser powers are not used. In addition, with a constantly increasing caseload, formalisation is inevitable and a track record will be needed to highlight the fact that reluctant national authorities were formally requested to cooperate.

It was also previously suggested that although Eurojust makes rare use of its formal powers, the mere existence of these powers, and the possibility of their use in an *ultima ratio* manner, itself makes more reluctant national authorities cooperate. In this vein Eurojust needs a scale of powers with varying intensity so as to be able to gradually push the non-cooperating authority.

It is often argued that the informal network style won the trust of national authorities and this would be lost should national authorities be addressed formally. However given that the formal powers at stake are non-binding in
nature, it is difficult to see how the use of such powers would be an intrusion into their work. Should such informal business be regarded as essential for getting national authorities to cooperate, then the necessary conclusion seems to be that the current structure itself hinders any serious empowerment of Eurojust. It is questionable how long the reluctance to use formal powers can be maintained. Any further role that may be allocated to Eurojust that directly involves it in national procedures will also mean that the informal style will need to be abandoned and formal working methods will need to be applied. Through such an approach, it will be possible to trace Eurojust’s activities and identify responsibilities.

2.5.4. Direction

The above discussion of Eurojust’s functions also reveals another important feature that has already been articulated but that still needs again to be emphasised. Eurojust was initially thought to be the judicial counterpart of Europol and, in this capacity, to provide overall judicial control of Europol. Neither the 2002 or 2008 Decisions nor any subsequent legislation assigned such a role to Eurojust. It could also be argued that the very fact that national members of Eurojust can either come from the judiciary or the prosecutorial services and the police as well made such a role impossible from the outset. Now on top of this there is the fact that most national desks are actually prosecutors. Certain tasks performed by Eurojust translate to the different realms of the criminal justice systems in Member States. It is, however, not only the composition of Eurojust that reflects the fact that the unit has acquired a more accusatory profile. Eurojust’s devotion to the topic of Joint Investigation Teams, its activity in operational cases resulting in charges laid and warrants issued, the development of its own analysis capacity and its tandem work with Europol all suggest that the body is clearly opting to have a more articulated investigatory role.

There are several possible explanations for this shift in direction. One is that with regard to judicial cooperation the legislative environment has simply hindered Eurojust from acquiring any visible and well-defined role. Its role of being a letter-box for requests and providing practical assistance to mutual recognition instruments, which was especially the case between 2002 and 2008, as inevitable as it may have be for national authorities, clearly did not resonate with a strategic role in combating serious cross border crime. The 2008 Eurojust Decision did strengthen the judicial aspect of Eurojust in the form of giving it the power to issue non-binding opinions in conflicts of jurisdiction cases, recurrent refusals or difficulties concerning the execution of requests, yet this does not outweigh the predominance of prosecutorial tasks undertaken. On the other hand, the intelligence-led rationale to which Member States clearly subscribed to in the post 9-11 security environment redirected prosecutors towards the police, and to being more involved in police investigations.359 This proactive role of authorities involved in prosecuting crime, involving investigation into patterns of organised crime, is a trend which affects Eurojust’s work and to which it seems to be aligning itself.

This shift took place with the tacit approval of the Council and can be illustrated by the calling up of Eurojust to support the establishment of JITs, affirming Eurojust’s operational work, providing Eurojust with access to databases and mostly by not giving Eurojust the powers necessary for having a more defined role in judicial cooperation. Any serious discussion on Eurojust’s functions needs to revisit this issue and clearly define whether Eurojust’s main profile is a prosecutorial or a judicial one.

2.5.5. Strategy making

Eurojust’s strategy development is unfortunately problematic due to the lacunae in the reporting mechanism to which it is subjected, which in essence means that the Council only confirms Eurojust’s actions, strategy choices and priority settings *ex post*. Despite the overarching horizontal strategies made regarding the area of freedom, security and justice, so far no *pro futuro* strategy direction has been given by the Council specifically to Eurojust. Given its institutional placement, there is no other EU Institution that could provide such direction or be formally consulted on Eurojust strategies beforehand. As has been stated previously, since its establishment, Eurojust has been in a position to make its strategy choices at its own initiative, which were later confirmed by the Council. The problem is that instead of having its strategy choices discussed on their merits and then implementing them, Eurojust is put into the situation that first it has to make the decision and then have it confirmed. It is suggested that this policy cycle does not benefit either Eurojust or the EU political institutions.

The more general, yet ultimate question that has to be addressed at some point is the one regarding whose agenda Eurojust is to carry out; that of the requesting national authorities or is there a European agenda that Eurojust is meant to implement? The current objectives and tasks of Eurojust inherently direct the body towards the national authorities and the Member States. There is no specific European mandate given to Eurojust apart from the 2008 Decision to facilitate judicial cooperation among Member States, to coordinate and to assist them. The political institutions of the EU so far have not provided Eurojust with any specific strategy. Any discussion on the strategies and priorities set for Eurojust should start with answering the question of whose service the body is in; the requesting national authorities or the European Union, as it seems that the two are not the same.
3. FUTURE DEVELOPMENTS AND STATUS OF EUROJUST WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE

**KEY FINDINGS**

- The implementation of the 2008 Decision is the *sine qua non* condition for any discussion about the future of Eurojust
- The current legislative environment still allows, without major reform, to further improve Eurojust's structure, functioning and accountability
- Article 85 of the TFEU clearly sets out a new path for Eurojust as it opens up a number of possibilities to strengthen and hence redirect the unit
- Article 85 of the TFEU has to be invoked with a clear vision of who Eurojust is ultimately meant to serve
- A reorganisation of Eurojust will be inevitable in order to bring it in line with the spirit of the new treaty base
- The power to initiate investigations can be regarded as genuinely shifting Eurojust towards a more intelligence-led rationale, where it is moved into a position of shaping and not only witnessing events
- Should Eurojust be granted the power to initiate investigations and resolve conflicts of jurisdiction, a judicial instance needs be created in order to meet the basic rule of law requirements of criminal justice
- Accountability rules should ensure performance review and clear policy direction and not result in overburdening Eurojust with parallel or overlapping procedures
- The subsequence in which Eurojust and the EPPO are dealt with is of great relevance
- From the moment of its potential establishment EPPO will add a degree of complexity to the current way judicial cooperation in criminal matters is administered
- The way in which EPPO will be organised will have significant bearing on Eurojust

### 3.1. The future of Eurojust based on its current legislative framework

#### 3.1.1. Reluctance to change

The starting point of any discussion on the future of Eurojust needs to be an examination of how Eurojust could be improved, and in what direction Eurojust could evolve if no change is made to its legal basis, namely the 2008 Decision. It must be emphasised that the implementation period for the 2008 Decision, which was meant to strengthen Eurojust, only ended on 4 June 2011. Even if we assumed that all Member States had completed their obligation to transpose the 2008 Decision in a timely fashion – which is unfortunately not the case - not even one year has elapsed at the time of writing since the 2008 Decision was...
meant to be being applied in a fully fledged manner. The instrument is, thus, fairly new and it is therefore legitimate to ask why the 2008 Decision should be changed at all. Why should a legal instrument be subject to change if insufficient time has elapsed to properly observe its effects and its possible advantages or shortcomings? Should any legislative proposal be tabled amending the 2008 Eurojust Decision, a number of justice ministers in the JHA Council would surely raise the issue of the untimely nature of such a proposal. The argument for waiting for and observing the outcomes 2008 Eurojust Decision is not only about caution or reluctance. Justice ministers need to face their respective national parliaments, and in this case their judiciary, prosecutorial services and police, and explain to them why this instrument needs to be changed even as its current application has just started.

The new avenues offered by the new legal base in Article 85 of the TFEU is not a compelling argument for the Member States to amend the Eurojust Decision. It is recalled that the 2008 Decision was adopted on the eve of the entry into force of the Treaty of Lisbon in order to circumvent the Commission’s proposal and to maintain Eurojust on its old, third pillar bases provided by Article 31(2) TEU. It was in this manner, by referring to the old legal base - which obviously provided for a judicial cooperation unit with a limited agenda - that any serious discussion about reshaping Eurojust could be avoided in the Council. As discussed in chapter 1, the 2008 Decision entered into force right before the Treaty of Lisbon, and in this way it can also be interpreted as a strong political message to inherently maintain Eurojust’s hybrid nature.

This is also captured in the Stockholm Programme, which explicitly states that the assessment of the 2008 Decision shall be carried out first, and on the basis of that assessment ‘new possibilities could be considered’.

The Internal Security Strategy, endorsed by the European Council in March 2010, is a recent reminder of keeping Eurojust within its existing legal framework. It states that ‘[c]loser cooperation between Member States' judicial authorities is essential, as is the need for EUROJUST to achieve its full potential within the framework of applicable law.’

A position favouring the status quo can be further supported by the Eurojust Decision itself, which states that by 4 June 2014 the Commission is to make a report on the application of the most crucial provision of the Eurojust Decision concerning the obligation to transmit information to Eurojust. Since enhanced information exchange is vital for the strengthening of Eurojust it can be argued that no amendment of the Eurojust Decision is timely before a reflection on the implementation and results emanating from this new arrangement.

For the sake of completeness, it has to be stated that despite the arguments above, the Commission has voiced in various forms that it will indeed propose a legislative initiative to strengthen Eurojust by 2012. It is now saying the year 2013.

Given the fact that it will take time for any proposal in this regard to come forward, and that even if a proposal is tabled the legislative process takes significant time, and indeed the

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360 Stockholm Programme Paragraph 3.1.1.
363 Announced in the informal Justice Council held on 28 February 2012, in The Hague.
question of whether a proposal would, in the end, be adopted at all, it seems worthwhile to consider what future awaits Eurojust if its legislative framework, namely the Eurojust Decision, remains unchanged.

3.1.2. Proposals to improve Eurojust without changing the 2008 Decision

Full implementation of the 2008 Decision
As a point of departure, the primary proposal with regard to how to improve Eurojust without changing the 2008 Decision is to fully implement the 2008 Decision. It is beyond question that no discussion of Eurojust's future is sensible without first seeing the genuine effects brought about by the 2008 Decision, if implemented properly. Member States are notorious in this regard. As has been witnessed with regard to the 2002 Decision, even years after the adoption of the Decision there were a few Member States which claimed that they did not need legislative steps to accommodate and work with the Decision or simply had done nothing.

It is alarming that nine out of the 27 Member States have not made the necessary arrangements for transposing the 2008 Decision. This means that one third of the Member States have still not implemented the decision even after almost a full year has elapsed since the transposition period came to a close. The gravity of this cannot be underestimated. Non-implementation is the most problematic aspect with regard to the establishment of the ENCSs (Article 12) and the obligation of the Member States to transmit information to Eurojust (Article 13). Without full implementation, the full benefits of these very important improvements brought by the 2008 Decision are simply not palpable.

Even if the reminder to implement the existing instrument is not an overly sophisticated argument, full implementation of the current instrument is the baseline obligation that Member States have to meet.

As argued in sections 1.7. and 2.5., the 2008 Decision does not fundamentally change Eurojust's structure. It does, however, strengthen Eurojust in a way which has the possibility to make the body a more vigorous actor in the field of judicial cooperation in criminal matters. Based on this, it is submitted that the immediate and short-term future of Eurojust is to be found in the full transposition of the 2008 Decision and in putting in place the new arrangements that it introduces.

Accountability
In their current form, the Council conclusions as discussed in section 1.6. are insufficient to proactively provide guidance with regard to priorities. A clearer setting of priorities is needed from the Council. It is suggested that more specific political guidance should be given to Eurojust, providing a clear message with regard to what mission is set for the body. While the ex post evaluation of Eurojust's annual reports can be kept in the current form of Council conclusions, an ex ante direction also seems to be necessary, which should take the form of the approval of Eurojust's annual work programmes. Article 32 (1) of the Eurojust Decision allows this where it states that 'The President shall also submit any report or any other information on the operation of Eurojust which may be required of him by the Council'. The corresponding Council conclusions could be negotiated either through the current work stream, and possibly may involve COSI and the Public Prosecutors Forum.

Should the Memorandum of Understanding be signed between the European Commission and Eurojust, the Commission will be in a position to have a full overview of the work of Eurojust, apart from its operational casework. The Commission will thus be able to closely follow the body. Should the Commission take up the option for informally influencing the strategy choices of Eurojust, then this has to be done in a manner that is clearly in line with the messages emanating from the Council.
With the lapse of the transitory period, the **Court of Justice of the European Union** will be able to fully exercise its jurisdiction over Eurojust, the most important part of which will be the judicial review of Eurojust acts under Article 263 of the TFEU. According to this article, Eurojust acts could be challenged on various grounds - lack of competence, infringement of an essential procedural requirement, infringement of the treaties or of any rule of law relating to their application, or misuse of powers - by the Member States, the Commission, the Council and the European Parliament. The standing of Member States and EU Institutions and bodies in such proceedings is not subjected to any further condition and their respective action is only limited by a deadline. While the court interprets the term ‘acts’ widely for the purposes of Article 263 of the TFEU, even such a broad interpretation does not capture informal working methods. Judicial control over Eurojust via the vehicle of judicial review will only be possible if Eurojust adopts formal acts as the standard mode in the course of its work, which is one further reason to encourage the body to work through formal acts. To a much more limited extent natural and legal persons may also challenge the acts of EU institutions and bodies. For a discussion of using this procedure for the purposes of seeking remedy by natural and legal persons see section 3.2.8.

### Functions

The principal finding of section 2.5 was that if the 2008 Decision is fully implemented by the Member States, then in relation to the functioning of Eurojust the most important change this will entail is the clear obligation on national authorities to systematically transmit information along defined criteria to Eurojust. As stated, this will put Eurojust in a position whereby it will possess a sufficient amount of information to be able to filter incoming data and find connections, and thus to make its own cases. **In the future, it will be up to Eurojust to make the most out of this strengthened position.** As has been previously stated, the ‘quantitative approach’ policy of getting as many cases as possible and coordinating them properly will have to be altered. Emphasis could shift to Eurojust’s qualitative input with a view to generating its own cases through analytical work made on the basis of the information it will be receiving. Eurojust will be in an even better position to evaluate and proactively assist Member States, at times pre-empting specific requests. This proactive attitude should be accepted and welcomed by Member States, especially in the light of the fact that in the current legislative context Eurojust will carry this out in its advisory and mediating role.

This significant influx of information will enable Eurojust to better concentrate on complex cases, to use EAWs in a strategic and synchronised manner, to step in and prevent conflicts of jurisdictions and to recommend the setting up of a JIT. All of this will entail a major shift from a reactive to a proactive style of working. As has been emphasised, this leap has to be taken by Eurojust.

The other main finding of section 2.5. related to the functioning of Eurojust was that Eurojust still relies on informal working methods, particularly exercising persuasive authority and flexible networking, to the detriment of its formal powers. It is suggested that this policy needs to be rebalanced. Formal powers granted by the Eurojust Decision should be used to their fullest potential and the informal working style in cases where Eurojust could exercise formal authority could be abandoned. To rebut the argument that national members of Eurojust would find it rather difficult to formally address their own national authorities, it is proposed that as a first step it should be for the College to systematically use powers under Article 7 (1) of the Eurojust Decision and that national members should gradually increase the use of their formal powers under Article 6 (1) of the same.

**With regard to Article 7(2) powers of the College to issue a non-binding opinion at the request of Eurojust national members who are unable to resolve a conflict of**
jurisdiction, it is put forward that Eurojust should facilitate the identification of jurisdictional conflicts through the filtering of information transmitted by national authorities and proactively combine its 7(1) powers to receive concrete information from national authorities. There is an inbuilt tension in these areas, in that whereas under the Eurojust Decision it is for the national members to bring such cases before the College, according to the Framework Decision on Conflicts of Jurisdiction it is the national authorities that may do so. Obviously no national member will want to take any such issue before the College without the approval of his/her competent authorities. It is suggested, however, that both national authorities and national desks need to accept the added value that Eurojust’s mediation may entail. Although recourse to Eurojust is in no way obligatory in this field, and powers that can be exercised are rather limited, the neutrality of the College, and its previous work in the field of conflicts of jurisdiction, could mitigate the limitations of its powers and may encourage national authorities to reach out for Eurojust. Again, this capacity of Eurojust needs to be made known and advertised among national authorities which are a responsibility of Member States as well. Given that Eurojust’s Guidelines for Deciding Which Jurisdiction Should Prosecute was issued in the annual report of 2003, it is suggested that a review with a view to updating and aligning the guidelines on the Framework Decision could also be considered.

On the basis of Article 7(3) the College, at the request of national authorities, may issue a non-binding opinion when ‘recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation’ are experienced. A stated above, Eurojust should filter the information it receives from national authorities with a particular view to this article, and it should not refrain from using this power. Accordingly, national authorities should make use of this power of the College. Regardless of the fact that Article 7(3) is an ultima ratio power, this should not prevent recourse to this power in order to make authorities cooperate.

Direction
As discussed in Section 2.5.4, Eurojust’s work has taken the direction of an intelligence-led policy rationale with a pro-active investigative style. It is suggested that explicit guidance and support should be given to Eurojust with regard to this profile. It has been called for many times. Nonetheless it is worth repeating that Eurojust’s role within the European internal security environment, especially with respect to the intelligence-led rationale, needs to be thematically discussed. Its tasks should be aligned to the intelligence-led rationale and the body should be given clear orientation with respect to this profile.

One way of better orienting Eurojust towards the security field could be through COSI. There are visible signs that COSI devotes attention to operational issues as well. In 2011 Europol and Eurojust prepared a joint paper on judicial-police cooperation in operational cases, in which examples were given as to what role the two agencies played in winding up organised crime cases, and what additional value this had. It is quite telling, however, that one of the aims of this paper was to invite Member States to raise awareness “among practitioners of operational added value the two agencies may bring and to ensure that the relevant national authorities, both on the judicial and the law enforcement side, involve Europol and Eurojust at an early stage in their investigations where appropriate” and “to promote more effective use of services and assistance offered by Europol and Eurojust”. The

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366 Council doc. 9387/1/11 REV 1 LIMITE JAI 264 COSI 29 E_FOPOL 125 EUROJUST 61.
need to be advertised ten years after its establishment (in the case of Europol almost twenty) is quite astonishing, yet COSI does offer the possibility of creating the so far missing link between prosecutors and police. COSI should be further encouraged to devote attention to the operational work of Eurojust.

**Relations with partners**

Among the relations of Eurojust with its strategic partners it is the relation with OLAF which needs to be further improved without delay. Steps can be taken even before the Commission tables all of its proposals with regard to how better protect the EU’s financial interests, discussed in section 2.4.2. As a baseline this should involve a much better flow of information between the two agencies. Automatically signalling cases to Eurojust seems to be largely unfeasible, as OLAF conducts investigations which may not necessarily involve criminal offences but only official misconduct or misdemeanour. In this respect the involvement of Eurojust seems unnecessary. However, Eurojust should be informed if it becomes apparent that there will be a judicial follow-up in the given case. The argument that OLAF is mainly concerned with cases involving one Member State is misleading in the sense that OLAF may not trace links to other Member States, whereas Eurojust, through its analytical work and Case Management System, may be able to make such a connection.

Furthermore, within the limits of its current powers Eurojust may readily act as a mediator between OLAF and Member States’ national authorities unwilling to take up OLAF’s cases and prosecute. There would be ample room for Eurojust national members, albeit on an informal basis, to step in and liaise with their competent authorities to feed more information to OLAF. No such practice has, however, been reported. Indeed some of the Eurojust national members are not even considered, by their respective national laws to be a judicial authority for the purposes of receiving and transmitting OLAF information as required by Article 26(5) of the Eurojust Decision. These shortcomings could be remedied within the current regulatory environment. However any further role for Eurojust, such as being involved in cases concerning only one Member State, formally providing assistance regarding national criminal procedural issues and closely following national criminal procedures and reporting about them – let alone stepping in – would certainly require changes in the current legislative environment.

**Internal distribution of tasks**

Without changing the structure of Eurojust, there are few measures which, if taken, could eventually make the internal administration more effective. Separating administrative tasks from operational ones could be mapped out in the Rules of Procedure, which have not been changed since 2002, when the unit was established. The College should exercise voluntary self-restraint in the fullest sense and not deal with non-operational issues. The Administrative Director has to be positioned in a way so as to be entirely responsible for budgetary, staff and administrative issues. It is also proposed that the College could delegate its role of monitoring the Administrative Director to a group of College members. This group would oversee the work of the Administrative Director in a rotating manner, and in this way the College as such would be relieved from closely following everyday business.

**3.1.3. Proposals to improve Eurojust through other legislative instruments**

There are two legislative instruments which, if adopted, could make Eurojust stronger and more effective in the future. The European Investigation Order (EIO) and the Amendment of Regulation 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF).

The EIO, if adopted, will put in place the last missing element in cross-border criminal justice cooperation. As discussed in 2.3.5., Eurojust’s possible role is disapprovingly underplayed in the proposal under discussion. At this stage the proposal does not
provide any specific task for Eurojust. However through the general provisions of the Eurojust Decision and specifically through its provisions explicitly mentioning “instruments giving effect to mutual recognition instruments”, there remains a considerable role for Eurojust. Thus the EIO, being a mutual recognition instrument, if adopted, will provide a number of duties for national desks to administer EIOs. National laws could go further than this and allow national members to issue an EIO in agreement with the competent national authority, in urgent cases to execute an EIO and be informed if an EIO is issued with respect to more than two Member States or where repeated difficulties or refusals regarding the execution of EIO occurs. Eurojust could also use its formal powers in Article 7(3) with respect to non-cooperating Member States.

The current proposal could be improved to the benefit of Eurojust in two ways. Firstly, explicitly mentioning Eurojust throughout the text as a vehicle that assists in issuing, executing and transmitting EIOs. The other is to provide a consultative role to Eurojust – in the same way as the EEW does - to advise the executing Member States should it wish to refuse a request based on the territoriality principle no such power can be deducted from the Eurojust Decision. This would be an important filter regarding concurrent proceedings.

The EIO if adopted will certainly increase the operational work of Eurojust, as its assistance will likely be sought out by national authorities, which so far have relied on the central authorities which currently administer most of the mutual legal assistance requests regarding evidence-gathering. The EIO, by decentralising the system for evidence-gathering in cross border cases, will not provide for a role of the central authorities. This will be a window of opportunity for Eurojust.

In 2006, the Commission tabled a proposal for amending Regulation 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF).\(^{367}\) The proposal aimed to achieve better operational efficiency and improved governance at OLAF. Although the proposal set out enhanced information exchange between OLAF and Eurojust as an objective, the concrete legislative amendments proposed themselves do not clearly provide for this.

The European Parliament held the first reading of the proposal and itself proposed a substantial number of amendments. In response, the Commission presented a reflection paper in July 2010. In this paper the Commission elaborates further on the reform of OLAF and outlines possible ways on how to take the legislative procedure further. In response to this the European Parliament asked the Commission to continue the legislative process. With a view to that the Commission has prepared an amended proposal.\(^{368}\)

For Eurojust the most important parts of the amended proposal are the articles devoted to ‘Cooperation of the Office with Eurojust, Europol and international organisations’ (Article 10a) and to the ‘Exchange of views with the institutions’ (Article 11a).

According to Article 10a, OLAF transmits relevant information to Eurojust when this ‘may support and strengthen coordination and cooperation between national investigating and prosecuting authorities’, or ‘when the office has forwarded to the competent authorities in the Member States information giving grounds for suspecting the existence of fraud, corruption and any other illegal activity.’ Article 11a provides that Eurojust may be invited, on an ad-hoc basis, to attend the ‘exchange of views at political level discussing the office’s policy of investigations’.


These two articles, if adopted, would certainly improve Eurojust-OLAF relations. Firstly by prescribing for OLAF the transmission of information to Eurojust in all cases where national competent authorities have been contacted on the grounds of suspecting the existence of a crime against the EU’s financial interests. This would essentially solve the issue of when and to what extent OLAF should inform and reach out to Eurojust, a problem that currently strains relations between the two bodies. Secondly, it will put Eurojust in the position of at least being eligible to participate in making investigation policies.

3.2. Changes stemming from the new legal base in the Treaty on the Functioning of the European Union

3.2.1. General changes affecting the area of freedom, security and justice

Before turning to the specific changes stemming from the new legal base of Eurojust, one cannot lose sight of the most important change brought about by the Treaty of Lisbon concerning the area of freedom, security and justice, which generally effects Eurojust as well. The Treaty of Lisbon abolished the former third pillar of the European Union, which in effect means that judicial and police cooperation in criminal matters has lost its distinct intergovernmental framework and is now regulated under the “Community method” as any other EU policy. The relevant treaty provision can be found under title V. of the Treaty on the Functioning of the European Union (TFEU). Rules on decision-making, the form of the adopted legal acts, the powers of the Commission and the jurisdiction of the Court of Justice of the European Union are now adjusted in line with the general rules applicable to any other policy field of the EU.

This shift in the regulatory framework is the most visible feature in the loss of national veto power, as decision-making in the Council is now subjected to the qualified majority rule; although there are still a few exceptions to this rule. Also, the separate forms in which legal acts which were issued under the third pillar, mostly framework decisions, are now replaced by the general forms of acts enumerated in the treaty. Legislation on criminal matters is made via the ordinary legislative procedure, formerly known as the co-decision procedure, fully involving the European Parliament in the legislative process. This is again a striking difference to pre-Lisbon times when the European Parliament was merely consulted concerning the legislative drafts negotiated in Council, but was never in the position to actually influence the content of the legislative instrument being discussed. Also, after a transitional period, the Court of Justice of the European Union will enjoy full jurisdiction over the field of police and judicial cooperation in criminal matters, including infringement procedures against Member States, judicial review of the adopted legal acts and full preliminary reference procedures for the interpretation of primary and secondary law. In order to mitigate the effects of all these changes a new instrument, the so-called ‘emergency break’ was created for Member States to have recourse to. According to this, Member States may refer legislative proposals, albeit in a limited field, to the European Council should that they be deemed to effect fundamental aspects of their criminal justice system. Through this Member States can suspend the ordinary legislative procedure.

These changes have been discussed and analysed in detail elsewhere. Here it is only underlined that while subjecting cooperation in criminal matters under the ‘Community method’ represents a hugely significant development, such a shift did not come as a

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369 Acts adopted before the entering into force of the Treaty of Lisbon are subject to a transition period until 1 December 2014 see Protocol (No 36) Title VII attached to the Treaty of Lisbon.
surprise. Ever since the Treaty establishing a Constitution for Europe, it has been predictable that the distinct intergovernmental approach to police and criminal matters will fade away, and that this field will eventually be subjected to the general rules applicable to any other EU policy area.

Besides the new treaty base, the general changes brought about by the Treaty of Lisbon in the field of the area of freedom, security and justice affect Eurojust, from a policy and a procedural standpoint as well. From a policy angle the base line is that the entire field of police and judicial cooperation in criminal matters is now accommodated in a regulatory environment characterised by being under the control of the EU Institutions rather than the Member States. From the perspective of Eurojust this means that its current model, which still retains the original concept of establishing a horizontal, third pillar body working in an intergovernmental fashion, is not in line with the very policy change the new Treaty opted to take. As EU criminal law will gradually lose its former third pillar features, in the long run Eurojust can hardly avoid taking the direction generally set out by the new treaty.

From a procedural perspective, whatever legislative instrument is proposed, Eurojust under the new treaty base will have to go through the ordinary legislative procedure, which is a markedly different process than the one followed when the 2002 and 2008 Decisions were adopted. Firstly, any legislative proposal will need only qualified majority support in Council, a rather different negotiating environment to the times when unanimous decisions were taken. The national veto is gone, and there is no ‘emergency brake’ provided under the treaty for legislative proposals related to Eurojust. Therefore no Member States can invoke the argument that ‘fundamental aspects of criminal justice system’ are affected, should any proposal on Eurojust be tabled. The other major change in the course of the ordinary legislative procedure is obvious: the full involvement of the European Parliament in the process, where legislative acts are adopted by the Council and the Parliament together.

A third aspect, particular though it may be, is the standing of the opt-out Member States, namely the United Kingdom, Ireland and Denmark. Opt-in and opt-out rules have also been markedly changed by the Treaty of Lisbon. This issue has also been discussed extensively elsewhere. Here it is only stated that should a new legislative proposal emerge on Eurojust, only the UK and Ireland have the possibility to actually opt-in to that instrument. Under the current opt-out rules Denmark will not participate in the adoption of the legislative act, which hence will have no effect on Denmark. Denmark will remain bound only by the legislative acts related to Eurojust which were adopted before the entry into force of the Lisbon Treaty, insofar as this prior legislation is not repealed. Any proposal on Eurojust will need to consider this and settle Denmark’s position. In EU criminal law post-Lisbon legislative acts, which regulate subject matters that pre-Lisbon instruments have tackled, have been adopted in a way that the new legislation replaces but does not repeal the prior legislative act. In this way Denmark is kept bound by the pre-Lisbon legislative act with regard to the other Member States, yet it is not bound by the post-Lisbon instrument. In the context of Eurojust this would mean that Denmark remains bound

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372 Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.
by the Eurojust Decision but for it the new instrument would not be applicable, with the obvious result of fragmentation. In this way, however, Demark is not entirely excluded from Eurojust by losing the legislative base to take part in Eurojust’s work. The other option is to conclude an international agreement with Denmark regarding its participation in Eurojust, in a similar way as has been done in the field of judicial cooperation in civil matters.

3.2.2. Specific changes concerning Eurojust’s legal base – general discussion of Article 85 TFEU

The new treaty articles related to Eurojust, however innovative they may be, are not complete novelties, as they stem from the work of the Convention on the Future of Europe, and can be found in the relevant articles in text of the Treaty establishing a Constitution for Europe. After the ratification process of the Treaty establishing a Constitution for Europe was halted and the Reform Treaty – later to become the Treaty of Lisbon - was negotiated, the articles on Eurojust and European Public Prosecutor’s Office were kept.

The Treaty of Lisbon, reworking and renaming the previous treaty framework, has resulted in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which both address Eurojust. The Treaty on the Functioning of the European Union deals with Eurojust in three articles. Article 85 TFEU, which is the new legal base of Eurojust, allows for the further strengthening of Eurojust and paves the way for conferring binding powers on the body. Article 86 TFEU is devoted to the possibility of creating the European Public Prosecutor’s Office ‘from Eurojust’, as it is phrased in the provision. Finally Article 88 (2) b) TFEU refers to Eurojust in the context of Europol’s role in coordinating investigations. Article 12 (c) of the Treaty on the European Union complements Article 85 TFEU regarding the role of national parliaments in evaluating Eurojust’s work.

This section is devoted to the discussion of Article 85 of the TFEU, making reference to Article 88 (2) of the TFEU as well. Article 86 of the TFEU will be dealt with in section 3.3.2. and Article 12 (c) of the TEU will be discussed in section 3.2.9. in the context of accountability.

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375 Article III-174 and III-175 Brussels, 18 July 2003 CONV 850/03, in the version adopted by the European Council on 17 and 18 June 2004 and signed on 29 October 2004 see Article III-273 and III-274 respectively.
376 A meticulously precise analysis of Article 85 is offered by Weyembergh A, (2011). This Section is greatly influenced by her account, yet specific references will also be made respectively.
Article 85
(ex Article 31 TEU)
1. Eurojust’s mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust’s structure, operation, field of action and tasks. These tasks may include:
(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
(b) the coordination of investigations and prosecutions referred to in point (a);
(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust’s activities.

2. In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials.

Article 85 (1) - mission
The way Article 85 (1) captures Eurojust’s mission to a large extent resembles the text of the Eurojust Decision. There are changes in the wording, however, that may have palpable consequences. Firstly, Eurojust is responsible for ‘serious crime’, which is no longer qualified by the adjective of ‘cross border’, hence broadening Eurojust’s ambit of action. Secondly, the phrase ‘requiring a prosecution on common bases’ is new language, which raises a number of questions: who decides that common action is required and whether this involves any shaping of a European criminal policy?377 Given that the conjunction between this phrase and the preceding one is ‘or’, Eurojust may seem to be able to act when only one Member State is concerned. It is also submitted that in such cases prosecution seems to be of a strategic nature. Thirdly, reference is made to the fact that Eurojust carries out its tasks ‘on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol’, which Weyembergh considers as a reaffirmation of the requirement to send information to Eurojust, with the only shortcoming that there is no reference made to OLAF.378

Article 85 (1) – ‘by means of regulations’
According to Article 85 Eurojust’s structure, operation, field of action and tasks shall be determined by means of regulations in accordance with the ordinary legislative procedure. The specificities of the ordinary legislative procedure have been discussed above in section 3.2.1. The identification of the legislative form in which Eurojust is to be regulated has significant consequences. First one can dwell on the plural form in which future Eurojust instruments are referred. This suggests that the placing Eurojust under Article 85 TFEU may be done by separate regulations, which indicates that instruments could be adopted consecutively, allowing it to gradually live up to the possibilities offered by the new treaty base rather than adopting parallel regulations.

It has to be emphasised that by their very nature regulations do not need national implementation and become binding and directly applicable once entering into force. **This characteristic of EU regulations circumvents the entire problem of national implementation.** Member States have no duty to transpose regulations, thus there is no risk of inadequate implantation or of non-implementation. Member States are to facilitate the application of a regulation, if necessary by changing those national laws that contradict or hinder the application of the said regulation. Regulations are generally regarded as more intrusive into national laws by not allowing the possibility for Member States to accommodate the legislative act into the part of their national laws where it best fits.

Though it may be only a legal technicality, consideration has to be given to the fact that the current legislative act on Eurojust was adopted in the form of a decision. In EU legal typology the nature of such a former third pillar decision is labelled as a *sui generis* decision, having a general scope and not encompassing specific addressees, as administrative decisions normally do. Once Article 85 is invoked, the new legislation has to be made in the form of a regulation. Regulations have a general scope and a general circle of addressees as well, yet due to the different legislative typology the cross amendment of the former decision by a regulation will probably not be possible. Therefore, it has to be closely examined whether a future regulation only partially amending the Eurojust Decision can co-exist with it, or whether the entire Eurojust Decision shall be transferred into a regulation to acquire the same legal form, even if the substantive provisions of the Eurojust Decision are only partially amended. Should the latter solution be opted for, there is a danger of opening up the entire Eurojust Decision in that the arrangements already agreed upon are open for re-negotiation and may not emerge in the same way as they are now. To a certain extent this can be mitigated by the recast technique.

**Article 85 (1) (a) – (c) – tasks**

Article 85 (1) enumerates three major tasks that may be attributed to Eurojust. The conditional formulation of the phrase should be emphasised as there is no obligation on the EU legislator to actually grant such tasks to Eurojust. On the other hand, the wording used, namely ‘These tasks may include’, suggests that this is *not an exhaustive list of tasks*. It can be argued that in order to fulfil the mission of Eurojust as described in the same article, other tasks could be granted to Eurojust as well.

As opposed to the current situation where Eurojust ‘may ask’ the competent national authorities to undertake an investigation or prosecution of specific acts, Article 85 TFEU articulates the *power to initiate criminal investigations and to propose the initiation of prosecutions*. The wording of the subparagraph suggests that in the case of initiating investigations, this would be binding on national authorities. The consequences of attributing the power to initiate an investigation or to propose prosecution to Eurojust is discussed in full detail in section 3.2.5.

The provision on Eurojust’s function concerning the *coordination of investigations* and prosecutions reaffirms what Eurojust has been doing ever since its establishment. If, however, this is read together with the broader of scope in which Eurojust is made competent, discussed above, then it is evident that this traditional function is now to be exercised on a larger scale.

The phrase on the *resolution of conflicts of jurisdiction* found in Article 85 (1) (c) TFEU goes beyond Eurojust’s current role in this sphere. Firstly, Eurojust’s role in resolving conflicts of jurisdictions is now articulated at treaty level, whereas previously it was the Eurojust Decision and the Framework Decision on Conflict of Jurisdictions, i.e. secondary EU
The Future of Eurojust

law, which provided this power for Eurojust. Secondly, the wording of the phrase stipulating ‘resolution’ indicates that Eurojust would decide such situations in a binding manner, thus finally resolving the conflict. Should this power be actually granted to Eurojust by way of a new regulation, it would clearly represent an upgrade of its rather limited current advisory function in jurisdictional conflicts. The consequences of attributing Eurojust with the power resolve jurisdictional conflicts are elaborated upon at length in section 3.2.6.

Article 85 (1) - evaluation of Eurojust’s activities
The last provision of Article 85 (1) of the TFEU relates to the evaluation of Eurojust’s activities by the European Parliament and national parliaments, with the arrangements to be laid down in regulations to be adopted under the new treaty base. The role of the European Parliament and national parliaments in evaluating Eurojust is considered 3.2.8.

Article 85 (2) - role of competent national officials
Paragraph (2) of Article 85 TFEU on the role of competent national officials poses a number of questions. Firstly, why are only prosecutors mentioned when paragraph (1) talks about investigations and prosecutions? Secondly, what does ‘formal acts of judicial procedure’ mean? And thirdly, who actually comprises ‘competent national officials’? The recurring answer to the first question is that the mentioning of only prosecutors is an oversight of legislative drafting. Previous versions of the text also only contained prosecutions, but when ‘investigation’ was later added to paragraph (1), the corresponding clarification was not made in paragraph (2).379 As to the second and third questions, Weyembergh entertains one possible answer rooted in the preparatory work of the Convention on the Future of Europe. The Final Report of Group X stated that, ‘Finally, it could be specified that formal acts of judicial procedure in the Member States would in any event be taken by the competent national officials (including the national members of Eurojust to the extent that they have received such competence).’380 It was suggested that although the last part of the sentence in brackets was dropped, what is essentially meant here is that proceedings should be directed by officials of the competent national authorities. Probably one may interpret this term so as to include Eurojust national members and that it would encompass the functions of Eurojust both with respect to investigations and prosecutions described in paragraph (1) of Article 85.

According to Varvelde, the explicit reference to the fact that even if Eurojust initiates an investigation or prosecution it is for national officials to carry out the ‘formal acts of Judicial procedure’ means that it was not intended for Eurojust receive such powers in its own right, and hence this is solely to be left to the European Public Prosecutor381.

3.2.3. Structure

Article 85(1) TFEU only states that Eurojust’s structure shall be determined through regulations but gives no further hint as to what structure should be pursued. With regard to Eurojust’s institutional design and composition the following needs to be taken into account.

Reasons to change Eurojust’s structure
The current structure of Eurojust as described previously still reflects the pre-Lisbon era. Eurojust is now, however, operating under a new treaty regime, which enshrines the deliberate policy choice to put an end to the distinguished status of judicial cooperation in criminal matters and subject it to the mainstream institutional and decision-making rules. Eurojust’s unique structure was described in sections 1.5., here it is only reiterated that that it does not follow the EU agency model, is still rather controlled by the Member States and enjoys a great degree of institutional

independence with regard to other EU Institutions.\textsuperscript{382} If further empowerment of Eurojust is considered under the new treaty base, the issue of changing its structure so as to reflect the new era ushered in by the Treaty of Lisbon seems difficult to avoid.

There are further reasons for supporting the need to change Eurojust’s internal structure. As discussed in section 1.6.5., the accountability of Eurojust is not a fully resolved issue at the moment and calls for change. The enhancement of Eurojust’s accountability may also involve a change in its internal structure, where a board (management or executive) could be created to which Eurojust would report and from which Eurojust could receive strategic instructions. In this way Eurojust would be brought closer to the model of other EU agencies, including JHA agencies as well.

Clarifying the respective roles of the College and the Administrative Director may also call for an internal reorganisation of Eurojust that may have implications on its structure. As proposed in section 1.5.2., the College should deal solely with operational matters and not, as it currently does, be concerned with administrative matters. Administrative matters should be left to the Administrative Director, who should report to and be guided by a specific panel that is separate from the College (i.e. a management board or executive board).

As it is discussed below in sections 3.2.5. and 3.2.6., the new tasks identified in Article 85 (1) (a) and (c) concerning the initiation of investigations and resolving the conflicts of jurisdictions also imply a need for change, as the current structure would not properly serve the requirements of carrying out such tasks. This in turn leads to the most difficult question that requires serious consideration: whether to keep or to change Eurojust’s composition of national members.

**Eurojust national members – catch 22**

At the time Eurojust was established the agreement whereby there is a College and there are national members, who at the same time are the members of the College, was seen as the great compromise between those desiring to trim and those striving to empower the body. This halfway compromise not only allowed Member States to remain in control but to retain most of their powers in terms of administering Eurojust’s tasks. For this reason most of Eurojust’s powers are eventually carried out by the national members. On the other hand, the compromise did allow for the College to emerge as a collective body, albeit in a limited way. This dual facet of Eurojust essentially means that national members, their deputies and their assistants keep their national status and remain within the structure of their respective hierarchies; be it the prosecutorial service, the magistrates or the judiciary. As such, Eurojust national members are in no way independent from their national authorities and are thus in not a position whatsoever to instruct or impose, let alone to go against, their seconding authorities. It is often admitted informally that this is precisely the reason why formal requests are rarely made, why the College seldom addresses Member States directly and why national members opt to liaise with their national authorities informally. Drawing from these experiences it has been voiced that the autonomy of national members should be enhanced in the form of stretching out their term of appointment, tightening the rules on removal, imposing common selection criteria and further aligning the respective powers of national members.\textsuperscript{383} In this way Eurojust could be made more effective in carrying out an agenda that does not necessarily coincide with that of the national authorities.

The other side of the story is that it is indeed the national embedment of Eurojust national members which provides the crucial link between Eurojust, as an EU entity, and national authorities. It is exactly the placement of national members within their respective national hierarchies that allows national authorities to cooperate with Eurojust and for them to

\textsuperscript{382} Groenling, M. (2009).

\textsuperscript{383} Weyembergh A, (2011), p 89. citing others.
actually accept Eurojust’s authority. National members of Eurojust are actually the guarantee for achieving smooth work with national authorities. It is vehemently argued by many that this close cooperation would be lost if the existing structure is changed.384

In the light of the above, there seems to be a catch 22 situation regarding national members. The strengthening of Eurojust with further powers, making it more autonomous from national authorities, could have the counter effect of loosening the willingness of national authorities to cooperate.

What degree of change?
The interrelated relationship between the structure of Eurojust and its powers is a characteristic of the body which requires a careful approach. It may be argued that the current level of powers enshrined in the 2008 Decision is the maximum that Member States are willing to grant, despite the fact that it is actually their own delegate who is empowered. Indeed the powers that Eurojust exercises have been granted precisely with the knowledge they will be exercised either by the College, where the national members are present, or by the national members themselves, and in any case still subject to the implementation into national legislation. Any change in Eurojust’s structure may affect this status quo. It is also feared that a more autonomous body would not be granted with powers of the current standard, should that matter be opened for negotiation.

It seems that the logic on which Eurojust was built cannot be stretched further without fundamentally changing the body’s structure and powers. Any further empowerment of Eurojust will immediately pose structural issues implying fundamental change.

The number of specific issues that could make Eurojust more effective and accountable, such as the better implementation of the 2008 Decision, the increased provision of information, the alignment of national members’ powers, attaching an executive or management board to Eurojust, would be welcome should they be implemented. Yet these all are small steps, merely refining the current model and having no serious consequences with respect to the structure of the body. It is suggested that if and when Eurojust is made more autonomous from national authorities, or eventually even independent from them and once Eurojust is attributed with the powers offered in Article 85 (1) (a) and (c), then a fundamental change to its current structure and powers is inevitable. Such a change may come about from the full independence of Eurojust national members to their entire replacement with EU officials. Through such a vertical integration Eurojust would become a truly EU agency. The question is whether this would yield a more effective body. The decision regarding the degree of change is a political one, though a gradual approach would be advisable.

Less is more
Given that any fundamental change to Eurojust would need to take the form of a regulation, no radical change as to the composition of Eurojust can be predicted at this point. However a reorganisation of the body is inevitable in order to meet the spirit of the treaty, to ease criticisms as to accountability and transparency, and last but not least to better focus Eurojust on its substantive work, namely its operational casework. Such a reorganisation, carried out without uprooting the body, could entail adding a management or executive board to the current structure.

Clearly there are a number of possible options regarding the composition of a possible management or executive board. It could be composed of the President and Vice Presidents of the College, Member States’ delegates and the Commission, or of only a few Member

384 Interview 1.
States i.e. the trio presidencies, the Commission and of the President and Vice Presidents of the College.

As to their respective functions it has to be decided whether the management board should approve Eurojust’s annual work programme, accept its annual report and give strategic guidance to Eurojust. The Administrative Director would report to the executive board and be accountable to it. Such changes, however, would not fundamentally change the present composition of Eurojust, yet has the benefit of clearing the portfolio of the College, allowing national members to devote more time to operational cases and truly distinguishing administrative and operational work. It is submitted that should Member States’ delegates on the management board be drawn from competent national authorities that would also increase Eurojust’s domestic perception in the Member States.

3.2.4. Operation

While Article 85 (1) TFEU provides a general reference to the fact that the operation of Eurojust shall be determined through regulations, no specific limitation, qualification or requirement either as to the internal or to the external operation of the body is foreseen in the treaty provision. Should political will for re-regulating the operation of Eurojust under the new treaty base be formed, a proper evaluation of Eurojust’s operations on the basis of the Eurojust Decision seems inevitable.

Indeed there are a number of issues with regard to the operation of the body which do need to be addressed. Concerning the internal operation of the body it is proposed that the College agenda needs to be cleared to allow it to deal solely with operational casework. It will be a policy choice to decide whether to shift all administrative tasks to the Administrative Director, who then is accountable to a management board, or to establish an executive board as well, which would split administrative duties with the Administrative Director. These models are discussed above, here it is submitted that the College shall entirely be devoted to substantive work, and not to discussing administrative issues. Decision-making rules should reflect the general trend of moving from the cooperationist to the integrationist model, forming the sense that the instances where the College takes decision by a two-thirds majority could be reviewed and eventually reduced.385

There is a lot of room for manoeuvre regarding regulating the external operations of Eurojust. Firstly, in exchanges with national authorities, the formal working method should be fully followed and specifically prescribed as a condition. Secondly inter-institutional relations should be strengthened by way of explicitly regulating such relations in the form of a legislative act. As useful as inter-institutional agreements may be, they are of a self-imposed nature, not being legally binding, yet articulating duties which is the prerequisite to the proper functioning of the other institution. Eurojust’s relations with OLAF, Europol and the EJN should be specifically addressed and regulated in detail in secondary EU legislation. The current trend of leaving agencies to design their own respective relations should be abandoned.

3.2.5. Power to initiate investigations

Analyses of Article 85 (1) (a) and (b)

As noted above Article 85 (1) (a) TFEU provides for the possibility to attribute Eurojust with the power to initiate criminal investigations. It has to be stressed that this is a possibility under the TFEU and not an obligation (‘tasks may include’).

It is also worth noting that the wording of Article 85 (1) (a) is very careful as it talks about ‘the initiation of criminal investigations, as well as proposing the initiation of prosecutions

conducted by competent national authorities’. It should be observed that among the crimes for which Eurojust is made competent, ‘offences against the financial interests of the Union’ are highlighted as being among those where Eurojust in particular should be made competent to initiate and propose action. Another structural observation is that Eurojust’s main role in coordinating investigations covered in Article 85 (1) (b) is also connected to the power to initiate investigations.

As Weyembergh notes, this is a clear departure from the wording of Article 31 (2) TEU and Article 3 (1) of the Eurojust Decision, which both use the language of ‘facilitating proper coordination’ and ‘stimulating and improving coordination’. Article 85 (1) (a) surely encompasses a wider power to initiate actions and to coordinate such actions. The question is whether and to what extent this would involve binding powers. It is at this stage that a hidden intricacy in the wording of Article 85 (1) (a) spotted by Weyembergh appears. While the phrase refers to the ‘initiation of criminal investigations,’ this is complemented with the following, ‘as well as proposing the initiation of prosecutions conducted by competent national authorities’. Thus it seems that there is a clear demarcation between the powers concerning investigation and powers concerning prosecution; whereas Eurojust seems to have a power to mandate national authorities to investigate, it may only propose that national authorities start prosecuting a crime.

With regard to the word ‘initiate’ used in Article 85 (1) (a), if it is read together with Article 85 (2) it appears fair to say that Eurojust can ask for commencement of an investigation that is carried out by the national authorities in the Member States. The oversight of Article 85 (2), omitting the term investigations, should not be misleading in the sense of allowing Eurojust to carry out investigations instead of the national authorities. This was surely not intended. What is maintained is that with regard to investigations, should Eurojust ask national authorities to initiate an investigation, this would be done in binding manner, yet practically speaking it would be launched by national authorities. With regard to prosecutions, Eurojust could propose this to national authorities, yet it would not be binding upon them.

Despite all the limitations, Article 85 (1) (a) is a clear move towards a vertical cooperation model and as such foresees Eurojust stepping out from the horizontal cooperation model that it has embodied since its creation. This is true even if it is evident that it would not ever be for Eurojust to carry out concrete procedural steps either in the course of an investigation or a prosecution. These will remain for the national authorities.

A further particularity of Article 85 (1) (a) is that it makes specific reference to ‘offences against the financial interests of the Union’. Given Eurojust’s general competence, it is not easy to understand why these crimes are singled out. One possible explanation is the desire to place an emphasis on making investigations and prosecution of these crimes a priority, as it is reported that the prosecution of these crimes is simply not a priority at the national level. Thus, by making a specific reference to offences against the EU’s financial interests, a certain priority is established by instructing Eurojust to step in. Weyembergh suggests that the specific reference to crimes against the EU’s financial interests may imply a sectoral approach, in which Eurojust is only gradually given the power to initiate investigations with respect to certain crime areas only, the first and foremost of which is the protection of the EU financial interest. But then the question arises as to how such a sectoral approach in relation to powers to investigate can be reconciled with Article 85 (1) (b), according to which Eurojust is to coordinate investigations and prosecutions. It can also argued that the reference of Article 85 (1) (a) to crimes against the EU’s financial interests can be linked to Article 86, articulating the minimum project to be attained in combating crimes against the EU’s financial interests.

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Article 85 (1) (b) refers to the core function Eurojust currently undertakes. As mentioned above Article 85 (1) (b) is phrased in such a way so as to connect these coordinative functions to the tasks in Article 85 (1) (a). At this stage the question arises of whether Eurojust’s coordinative role mentioned in Article 85 (1) (b) is limited to the investigations and prosecutions Eurojust itself has initiated or proposed. Such a limitation would clearly be a step backwards from the coordination work in which Eurojust is now involved. It has been suggested by many that this was not the aim of the text, which should not be strictly interpreted. The proposal on whether Eurojust could actually take decisions when coordinative functions are carried out was clearly rejected and the method of mediating with persuasive authority between national authorities was maintained.

Article 85 (1) (a) and (b) powers in practice

With a view to carrying out the tasks of Article 85 (1) (a) a number of further issues arise, which any future legislation granting such powers needs to consider and, in the best-case scenario, solve. Firstly, the language concerning investigation and prosecution may not at all translate into the same actions in the respective national criminal laws. Very careful consideration needs to be devoted to this issue, especially considering that the legislative form of granting such powers will be a regulation. As mentioned, Member States will not have the possibility to refine and more precisely define these EU legislative provisions in the course of transposition. An EU criminal procedural code, unattainable as it may be, would surely be welcome in this sense.

Secondly, the issue arises of whether the College or national members would be the vehicle for initiating investigations in a binding manner. As authoritative as the College may be, for those Member States where the responsible national authorities are not under the ambit of the executive but belong to the judiciary, it might be constitutionally difficult to accommodate College decisions as being binding on their competent authorities. The other option is that a binding decision to order national authorities to investigate be made by Eurojust national members. This would at least require that national laws attribute their national member with the sufficient power to do so. The other complication that may occur here is that the Eurojust national member may come from a different area of the national criminal justice system than the one responsible for carrying out the requested investigation. Last but not least there is the often raised psychological element, which will be probably be the most difficult to overcome. National members prefer not to formally address their competent national authorities in any sense. The scarce use of the currently available formal, yet non-binding powers, can be explained through the fact that national members are simply not in a position, domestically speaking, to even hint at the suggestion that they instruct their authorities. If this is the situation now, the question arises as to how this may improve so as to make national members the avenue of ordering national authorities to act. Here the interrelated relation between Eurojust’s structure and its power to initiate investigations can be very well captured. Indeed it has to be seriously considered whether the current structure of Eurojust is capable of carrying out this function. It is submitted that the current structure of Eurojust, whereby national members carry out tasks on behalf of Eurojust with respect to their own national authorities, is inherently designed for horizontal cooperation and not to the vertical type of cooperation that may take shape under Article 85 (1) (a).

It has been suggested that the power to initiate investigations would add an extra layer to the currently existing array of powers at Eurojust’s disposal for making non-cooperating Member States comply. This power would be employed as an ultima ratio tool, after all soft powers have been exhausted.
The added value of the binding nature of Eurojust’s power to initiate an investigation is that
the required measure would not depend on the discretion of national authorities, their
respective agendas, priorities, and distribution of work or their resources. As Vervaele puts
it, they would now be European requests, mandatory to execute.\footnote{Report on the Strategic Seminar Eurojust: New Perspectives in Judicial Cooperation Budapest, 15-17 May 2011 Report 14428/11 COPEN 227 CATS 78 p7.} In relation to OLAF cases, the prosecution of which is consistently reported as not being a priority for Member States’ national authorities, the power of Eurojust to initiate investigations would clearly be of added value.\footnote{Ibid.}

It has to be emphasised that the power to initiate investigations is not a ‘panacea’ in the
context of strengthening Eurojust or obliging reluctant national authorities to cooperate.
Instead, the power would be best used to proactively initiate proceedings based on analysis,
to carry out coordinated actions in complex cases, and work strategically. In this vein the
power to initiate an investigation can be regarded as genuinely shifting Eurojust
towards a more intelligence-led rationale, whereby it is put in a position of
shaping and not only witnessing events. The power of initiating investigations
allows the EU itself to develop a criminal justice agenda, which Eurojust has the
mandate to carry out.

Any binding power of Eurojust to order national authorities to commence investigations
should be carried out under effective judicial control. There will have to be an independent
instance of a judicial nature which ensures that this power is exercised within the limits of
the law and where such orders can be challenges by those affected i.e. the suspect. A
special procedure will have to be drawn up and a specialised forum needs to be designed for
this purpose. The ‘urgent preliminary ruling procedure’ entertained by the Court of Justice of
the European Union shows that it is possible to deal with specific matters in an accelerated
way. The issue of the representation of defence interests is further discussed in section
3.2.7.

3.2.6. Resolving conflicts of jurisdiction

Analyses of Article 85 (1) (c)

A further novelty of the tasks envisaged in Article 85 (1) is related to the conflict of
jurisdictions, an issue that has preoccupied the attention of many. As observed above, one
major change from the current situation is that Article 85 (1) (c) stipulates that
strengthening the judicial cooperation may include the ‘resolution of conflicts of jurisdiction’.
Given the limited powers that Eurojust currently enjoys in this field, discussed at length in
section 2.3.4., the clarification that Eurojust would now be able resolve jurisdictional
conflicts is a major leap.

Article 85 (1) (c) powers in practice

The baseline for exercising the power to decide jurisdictional conflicts would be a clear set of
criteria on the basis of which any decision could be taken. Without such criteria no decision
based on the rule of law can be expected. The absence of such criteria is a compelling
problem even in the current situation, where Eurojust is not able to resolve jurisdictional
conflicts. As discussed in section 2.3.4., the lack of criteria allows for forum shopping by the
prosecution, who tend to seek out the best place to prosecute, to the obvious detriment of
the accused. The issue of negative conflict also comes into play, which can cause deadlock
situations calling for resolution. The gravity of this matter should not be underestimated, as
all efforts to agree on a set of criteria for resolving jurisdictional conflicts have so far failed,
as discussed above.

One of the most compelling difficulties in carrying out the task of taking a final decision with
respect to which Member State’s court shall have jurisdiction - and therefore obviously
including the venue of prosecution – has to do with Eurojust’s structure. At the moment the College is mostly composed of prosecutors, a trend which is not foreseen to undergo any change, as Eurojust’s accusatory profile has been significantly strengthened, as discussed in section 2.5.4. The question therefore becomes how to explain that it would ultimately be prosecutors who decide, whether collectively in the capacity of the College or individually in the capacity of national members, on jurisdictional matters. What we see again is that the current hybrid structure of Eurojust would essentially hinder the practical realisation of a task – resolving conflicts of jurisdiction - which Eurojust could possibly be attributed with.

One possible way of mitigating the above problem is to refine what is meant by a conflict of jurisdiction to apply to either the investigation or the trial phase. Should the notion be limited to the investigation phase only, it would be easier for Eurojust to step in as the concern of the body being an improper venue for deciding on a court’s jurisdiction would be evaded. It has also been suggested that sorting out potential positive and negative conflicts at the earliest possible stage, namely during the investigation, would be an effective way of preventing conflicts at the trial phase, which are more difficult to resolve.\(^{394}\) It should be added further that in this way one of the major shortcomings of the Framework Decision on Conflicts of Jurisdiction could also be circumvented, aiming to avoid the final disposition of parallel proceedings based on the same facts instead of avoiding the initiation of a proceeding parallel to one already commenced on the same facts.

**Should Eurojust be empowered to decide on matters related to where to prosecute or to hear a case, avenues to challenge such decisions before a judicial instance need to be created in order to meet the basic rule of law requirements of criminal justice. The specificities of this requirement are considered in section 3.2.8.**

3.2.7. Accountability and control

The last sentence of Article 85 (1) of the TFEU states that the regulations related to Eurojust ‘shall also determine arrangements for involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities’. Through this provision the parliamentary control of Eurojust is now a treaty requirement, as compared with the previous treaty regime which contained no corresponding provision. This imperative is a welcome development as it will allow Eurojust to receive wider recognition and to attach greater transparency and democratic legitimacy to its work. Apart from the number of questions arising from Eurojust’s parliamentary control as enshrined in the above treaty provision, it needs to be stated that parliamentary control is only one way of enhancing the accountability of the body. The accountability of Eurojust will be discussed below from the viewpoint of the respective EU Institutions that may exercise control over the body. However there are four considerations which have to be taken into account before the overarching issue of accountability is addressed with respect to Eurojust.

Firstly the term accountability in a general manner encompasses various institutions and procedures in the context of which the different institutions, within their respective powers, exercise specific control along clearly described procedures. It is the interplay of these procedures that yields the result which accountability is meant to achieve: namely the transparent, legal and efficient functioning of an institution in line with set policy directions. Consequently accountability rules encompass a number of processes related to parliamentary oversight, budgetary control, procedures for removal and reporting mechanisms as well. In the case of Eurojust, parliamentary oversight and reporting mechanisms are the ones which, due to the express treaty provision, need to be specifically addressed.

Secondly, regardless of the fact that the improvement of Eurojust’s accountability attracts heightened political attention, this should not result in overburdening the agency with parallel or overlapping procedures and reporting mechanisms that end up being counterproductive in relation to the operational work which Eurojust is actually designed to carry out.\textsuperscript{395} To date, Eurojust is subject to formal control mechanisms, through which it reports to the Council, is subject to the procedures of the European Ombudsman, has data protection supervision exercised over its operational work and is subject to budgetary control. It should be emphasised that besides these formal proceedings, Eurojust is subject to a number of informal reporting and review mechanisms, such as the LIBE committee meetings, the various requests of Council working parties and consultations with the Commission.

Thirdly, Eurojust, being a unit largely relying on information fed to it by Member States’ law enforcement agencies, encompassing the police, prosecutors, magistrates and the judiciary - as the case may be in the respective national criminal justice system – the EU level scrutiny of Eurojust should not result in reducing Member States’ incentive to actually supply information to Eurojust.

Fourthly, it should be kept in mind here as well that Eurojust, due to its hybrid structure, is partially embedded within the respective national criminal justice systems, with national members retaining all of their responsibilities towards their own hierarchies. Thus the European arena in which Eurojust is placed and works in is complemented by a national arena, which actually is the real operational playing field for Eurojust. This second layer of control encompasses the responsibility attached to each and every Eurojust national member. It may be less visible from outside, and its mechanisms may be as diverse as the various criminal justice systems, yet this national context cannot be disregarded when Eurojust’s accountability is discussed. It is suggested that no discussion and design of the mechanisms through which Eurojust’s performance is reviewed can be complete without considering this hybrid structure, which means that Eurojust actually serves two masters; one European and one encompassing all 27 Member States individually.

Taking these considerations into account, the respective roles of the EU Institutions in the context of improving Eurojust’s accountability will now be discussed.

\textbf{European Parliament and national parliaments}\textsuperscript{396}

As stated above the parliamentary oversight of Eurojust is now an explicit treaty requirement. However the realisation of this requirement can take shape in various forms.

To begin with, the following observations can be made on the actual wording of the provision, which reads as follows, ‘involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities’. The first point which has to be made is that the wording clearly shows that the European Parliament and the national parliaments are not solely responsible for ensuring Eurojust’s accountability, but are ‘involved’ in this venture, in which other institutions of the EU also take part.

Secondly the treaty provision talks about the ‘European Parliament and national parliaments’ as compared to Article 88 (2), which in the case of Europol uses a different language suggesting that the European Parliament controls Europol together with the national parliaments. Reading these two treaty provisions together leads to the conclusion that in the case of Eurojust, the European Parliament and the national parliaments are to exercise this function separately.


\textsuperscript{396} Specific attention is drawn to the study prepared for the European Parliament on Parliamentary oversight of security and intelligence agencies in European Union (2011) systematically addressing this issue.
Thirdly, use of the word ‘evaluation’ means that both the European Parliament and the national parliaments are called upon to actively reflect upon Eurojust activities, and not merely to hear it and take note of what has been reported to them.

Fourthly, the treaty provision uses the term ‘Eurojust’s activities’, which opens the question of whether or not the operational activities of Eurojust should be also subjected to evaluation. An initial observation regarding this issue is that the European Parliament and the national parliaments should confine themselves to monitoring Eurojust’s overall performance, the priorities and strategies it pursues and the service it has provided to ‘European citizens’. Operational activities should, however, remain excluded from this evaluation, as this would not only risk the success of these operations, but would immediately pose confidentiality and security issues, not to mention the risk related to the continued supply of information on operations cases from the Member State.397

There are various forms in which the European Parliament could have recourse to in carrying out the ‘evaluation’ of Eurojust. Clearly the primary form of parliamentary oversight is committee hearings, where a representative of the unit gives an account of the unit’s work and answers the questions of the parliamentary deputies. As it was submitted in section 1.6.1., despite the absence of explicit legal provisions to this effect, the President of Eurojust regularly attends the meetings of the LIBE Committee398 of the European Parliament and Members of the European Parliament do address questions to Eurojust. Given the treaty requirement, there is ample room to provide a legal basis for this practice.

The core question regarding the evaluation of Eurojust is how vigorous such an exercise should be, an issue which the treaty itself leaves open. Here the possibilities range from Eurojust appearing before the LIBE and answering questions orally, to more stringent types of control such as the formal acceptance of reports or the answers provided to questions, the adoption of a committee report,399 which Eurojust must then accommodate in its work programme, to a refusal of an insufficient annual report. Regardless of what the decision is, the choice of the evaluation has to be harmonised with Eurojust’s current obligation to present its annual report before the Council. Specific attention needs to be devoted to avoid overlapping scrutiny procedures resulting in incoherent policy guidance.

Further tools available to the European Parliament include the setting up of a committee of inquiry400 in case of investigating a specific serious matter, or to draw up its own report401 on a particular issue.

Secondary issues related to the parliamentary oversight of Eurojust are the European Parliament’s role in budgetary control and a possible power concerning the appointment and removal of Eurojust’s President. The budgetary control of Eurojust through the Council, Commission, the European Parliament and the Court of Auditors is a standard fully-fledged mechanism and there do not seem to be any arguments to the effect that this should be amended.402 Furthermore, any appointment powers granted to the European Parliament would be both at odds with standard practice, whereby the executive directors of EU agencies are appointed by the Council, and would be difficult to reconcile with the current composition of Eurojust, where national members are appointed solely by the Member States. In light of the above, no such power of appointment seems feasible with respect to the European Parliament.

397 Such risks were vehemently voiced by the President of Eurojust in the democratic accountability in the Area of Freedom, Security and Justice Evaluation of Europol, Eurojust, FRONTEX and Schengen, Interparliamentary Committee Meeting. 4-5 October 2010.
398 RoP Annex XVII makes LIBE the responsible committee for Eurojust.
A general objective of the Treaty of Lisbon was to enhance the involvement of national parliaments in EU matters. Their participation in evaluating Eurojust is one concrete articulation of this objective, which is expressed both in Article 12 (c) of the Treaty on the European Union and in Article 85 (1) of the TFEU. In addition to this, scrutiny powers of national parliaments on proportionality and subsidiarity also come into play when EU legislation is proposed. Thus any legislative proposal with regard to Eurojust will be cross-checked by national parliaments beforehand.

With regard to the involvement of national parliaments in evaluating Eurojust, the most recurring issue is the manner in which 27 national assemblies – some of them with two chambers – could streamline their efforts in a way that the outcome produces a coherent message. While in the case of Europol there have been forerunners of this idea, with respect to Eurojust no preliminary thought has been given to the matter. The major policy consideration here is whether the evaluation of national parliaments should in some form be aligned to that of the European Parliament or whether it should be kept separate and exercised in the framework of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC).

The Council of Ministers
As discussed in Section 1.6.1., a number of options are available for the Council to improve its control over Eurojust and with this enhance the accountability of the body. One possible way for doing so is to reform the current practice of adopting Council conclusions on Eurojust’s annual reports and to give more specific political guidance to Eurojust. An ex ante direction given to Eurojust by approving its annual work programmes could also be envisaged. The involvement of COSI or the Public Prosecutors Forum in this work could also be explored.

The European Commission
Article 85 of the TFEU does not mention the Commission with respect to Eurojust, and the provision in the former Article 36(2) of the TEU, referring to the Commission’s close association with the work carried out in judicial cooperation in criminal matters, is also dropped. Yet this silence is not an indicator of the fact that the position of the Commission with respect to Eurojust continues to be unchanged. To the contrary the main message is that the distinct intergovernmental style is lost and the ‘Community model’ takes its place. Thus the Commission plays its leading role in policy formation and takes part in setting the priorities for EU agencies to implement these policy choices.

As discussed in section 1.6.1, the Memorandum of Understanding that is about to be signed by the European Commission and Eurojust is the first step in rebalancing Eurojust’s position in the institutional landscape of the EU. The Memorandum – staying within the limits of the current 2008 Decision - obliges Eurojust to inform the Commission about everything it does except for its operational casework. The Memorandum clearly reflects the direction in which the Commission would want to move when the question of the structure of Eurojust is revisited. It is evident that the Commission desires a structure in which it can directly influence the non-operational strategic decisions made by Eurojust and that it is very keen on having a say in the control of administering Eurojust.

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Adding a management or executive board to the current structure of Eurojust, as discussed in section 3.2.3, would allow the Commission to take part in the strategic guidance of the body, to exercise a degree of control over its everyday administration, and to become more closely associated with the non-operational activities of Eurojust. The benefits of such an arrangement would not only be that the operational and administrative tasks are finally separated, but it would shift the current informal consultation style to a formal relationship, thereby enhancing the perception of Eurojust’s accountability.

**Accountability of Eurojust national members**

Despite the fact that Eurojust as an institution will be placed within a framework of accountability rules and will be subjected to the various control procedures exercised by the respective EU Institutions, the accountability of Eurojust national members is an issue which also needs to be addressed. As Peers underlines, as long as Eurojust national members are embedded in their own national hierarchies and their actions are governed by their respective national laws, it is national accountability rules which will apply to them, even if Eurojust tasks have been carried out in the capacity of being a Eurojust national member. The Eurojust Decision does not address this issue and makes no attempt to level national accountability rules or even to require a minimum standard of accountability. The underlying rationale of the Eurojust Decision was to leave this matter entirety to the respective national legislations and avoid entering the difficult domain of public law, to which this issue belongs. **It is suggested, however, that as long as the dual facet of Eurojust is retained, with Eurojust national members carrying out Eurojust tasks, the accountability Eurojust national members has to be revisited at least in the form of requiring a minimum standard to be provided by national legislation. This becomes especially true if Eurojust is entrusted with the task to initiate investigations and resolve conflicts of jurisdiction.**

3.2.8. **Representation of the interests of the defence**

The weakened position of suspects and accused persons as a result of mutual recognition instruments and the inequality of arms in the course of the cross border criminal investigations and prosecutions has been voiced on numerous occasions in academic circles and by non-governmental organisations.

Without fully analysing each specific EU criminal law instrument from the perspective of whether or not the interests of the defence has been fully taken into account, this section confines itself to giving an account of how this issue is related to Eurojust’s work. It should be pointed out at the outset that the new treaty base of Article 85 is silent on that matter.

There are two levels on which the rights of suspected and accused persons (defendants’ rights) can be captured. One is the availability of procedural guarantees in the course of criminal investigations and prosecutions, and the other is the institutional setting which can actually put such guarantees into effect.

From the standpoint of legislation the most compelling, if not the major criticism of EU criminal law was its focus on the repressive side of criminal law – defining common elements of criminal offences, levelling of sanctioning, the exchange of criminal records, judicial cooperation - at the expense of procedural guarantees, defence rights and victim protection. This is topped by the inherent effect of the principle of mutual recognition by which executing authorities have very limited grounds to refuse decisions taken by the issuing authorities. Mutual recognition instruments have been designed precisely to allow recognition and enforcement of decisions without allowing the executing authorities to thoroughly cross-check the decision taken by the issuing authority on the basis of non-compliance with the European standards of defence rights.

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408 See E.g. Peers, S. (2011) and Statewatch, Fair Trials International Justice papers related to various EU criminal law proposals.
procedural rights. The European Arrest Warrant, due to the volume in which it is issued and the gravity of the surrender procedure itself, was heavily criticised for not allowing the executing state to check the proportionality of the decision of the issuing authority or whether other procedural guarantees have been observed by that authority. Mutual recognition instruments, on the other hand, tend to gravitate towards the lower level of the system of guarantees, as in all cases it will be the executing state's criminal justice system that will prevail. Should the executing state's procedural guarantee system be of a lower level, this level of guarantee will prevail regardless of the level of guarantee that the defendant would have benefited from the issuing state. This systematic shortcoming could only be remedied through a levelling of Member States’ procedural laws so as to ensure a minimum level of guarantee.\(^{409}\)

There are two bodies of law which provide the corresponding remedies in relation to procedural guarantees. Firstly, the Charter of Fundamental Rights of the European Union has been adopted and through this the EU Institutions and Member States are subjected to a specific fundamental rights catalogue. Besides the general rights and freedoms contained under title I on dignity and title II on freedoms - enumerating among others the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security - the Charter devotes a separate title to due process. Title VI of the Charter on Justice specifically lists the right to an effective remedy and to a fair trial, the principles of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice in criminal proceedings for the same criminal offence. The level of protection guaranteed by the Charter is aligned to that of European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECHR). The accession of the European Union to the ECHR is currently underway, which will complete the circle in aligning the proceedings taken before the ECHR and the Court of Justice of the European Union (CJEU).

Secondly, both the European Commission and the Council have dedicated themselves\(^{410}\) to taking up the issue of procedural guarantees and adopting a series of legislation to that end. This work, guided by the ‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal matters’, has already begun and its first results are the adoption of the directive on the right to translation and interpretation and the directive on the right to information (Letter of Rights). The proposal on the right to have access to a lawyer is being negotiated at the moment.

It is expected that these two pieces of legislation will provide a sufficient minimum guarantee for suspected and accused persons in the course of EU cross border criminal investigations and prosecutions, bridging the gap opened up by mutual recognition instruments.

The above legislative developments have the following bearing on Eurojust. Eurojust, being an EU body, fully falls under the remit of the Charter.\(^{411}\) This means that whenever Eurojust implements EU law, which translates into applying EU law or carrying out a measure based on EU law, it is acting under the Charter. This also means that the application of EU law or measures carried out in implementing EU law can be challenged on the basis of violating the Charter. The then question arises as to how to qualify the conduct of Eurojust national members. When national members act in Eurojust’s capacity, their actions are

\(^{409}\) There were previous failed efforts to legislate.


\(^{411}\) Article 51 (1) of the Charter.
fully governed by the Charter. Also, when national members act in their own capacity, under their respective national law, yet that specific national law actually ‘implements EU’, the Charter is also fully applicable. Where national members of Eurojust act solely on the basis of national law in an area where the EU has no powers at all, then the Charter is not applicable.412

The next question is what types of Eurojust actions can be considered as such that they could actually give rise to an individual complaint under the Charter. Certainly facilitating judicial cooperation by transmitting assistance requests, exchanging information and coordinating national authorities does not involve Eurojust directly in criminal procedures in a way that its actions would have a direct bearing on individuals. On the contrary, the underlying principle ever since the unit has been established is that procedural steps, whether in the investigation or prosecution phase, are taken by the national authorities. Should there be any doubt in this regard under the possible new powers to be granted to Eurojust, Article 85 (2) of the TFEU reinforces the fact that it is still solely for the competent national authorities to take procedural action.

If, however, Eurojust is to be granted with the power to initiate an investigation or decide conflicts of jurisdiction matters, whether restricted to the investigation phase or encompassing the trial phase as well, the above clear division of competences becomes blurred. Although formally speaking it would still not become a party to the national proceedings, when Eurojust directs national authorities to commence an investigation or finally decides which authorities are best placed to prosecute. Eurojust, however, does become involved in the national procedures, where its decision directly affects individuals subject to the proceedings. Therefore, should Eurojust’s tasks be designed so as to involve the body in national proceedings, all of its actions would readily become reviewable under the Charter. Any binding power of Eurojust to order national authorities to commence investigations or to decide the venue of prosecution should be carried out under effective judicial control. There needs to be an independent instance of a judicial nature which ensures that such powers are exercised within the limits of law and where such orders can be challenged by those affected i.e. the suspect. This is a fundamental due process requirement stemming from the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and national constitutions as well.

Apart from this, there is one additional aspect of Eurojust’s work that may affect individuals, even without Eurojust getting involved in national proceedings, namely data protection. For a discussion on this see section 3.2.9.

The other level at which defendants’ rights should be examined is the institutional setting in which the violation of rights receive remedy. It is generally accepted that whenever Eurojust is involved in a criminal investigation or prosecution in a way that its actions effect individuals, an avenue for effective remedy needs to be made available. As was already proposed, with respect to the power to initiate criminal investigations and taking decisions when there is a conflict between criminal jurisdictions, there has to be an instance where such decisions can be challenged.

The following issues arise from the above proposal. Firstly, any decision that Eurojust takes which affects individuals has to be rendered in the form of a formal act. This is both a requirement of legality and a pre-condition of the reviewable nature of the act. Secondly, there have to be procedures and a judicial forum in place where a remedy can be sought.

It is the annulment procedure of the Court of Justice of the European Union under Article 263 of the TFEU that comes the closest to the requirements of a procedure in the framework of which Eurojust’s act can be challenged under a review of legality.

412 Article 51 (2) of the Charter.
The Future of Eurojust

Article 263 of the TFEU
(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

A closer look at Article 263 of the TFEU reveals the following. Firstly, Eurojust falls within the scope of the article as an EU agency producing legal acts that have an effect vis-à-vis third parties under Article 263 (1). According to the CJEU jurisprudence, for an act to be reviewable it has to be existing and legally binding. It is exactly for this reason that Eurojust decisions affecting individuals have to be taken in the form of a legally binding act. Secondly, the grounds on the basis of which the review of an act is carried out are enumerated in Article 263 (2) and comprise: lack of competence, infringement of an essential procedural requirement, infringement of the treaties or of any rule of law relating to their application, or misuse of powers. It is suggested that the review of an act of Eurojust on the basis of the Charter is captured by the phrase ‘infringement of the Treaty or any rule relating to their application’. It is Article 263 (4) that serves as the basis to challenge acts of EU bodies by individuals, the wording of the provision imposes an important qualification. Individuals may seek the review of acts which are ‘addressed to that person or which is of direct and individual concern to them’.

The acts of Eurojust in relation to which review is sought would not, in the majority of cases, be addressed directly to the applicant, as Eurojust would not itself institute the investigations or prosecution. Eurojust would address such acts to the national authorities of the Member State concerned. Hence the individual has to establish direct and individual concern, which according to the jurisprudence of the CJEU is not particularly easy. Moreover, it could disputed why the same test of direct and individual concern should apply to a person challenging an act addressed to a national authority to conduct investigation against that person as for example to person whose clementine export quota is being established by a national authority based on an EU act. This limitation in locus standi may be justifiable in

commercial cases, yet would not fulfil the effective remedy requirement dictated by fundamental rights and the requirement for the legality of the administration of criminal justice. It is submitted that the test of direct and individual concern, as applied by the CFEU, would rather pose a procedural obstacle for suspected and accused persons seeking effective remedy. Therefore, a procedure that is unconditionally available would be required. Consequently it is suggested that the legal base offered in Article 263(5) should be utilised and ‘specific conditions and arrangements concerning actions brought by natural or legal persons against acts’ of the given EU agency should be established. Currently neither the 2008 Decision nor any other legislative instrument makes use of this.

The question of utilising the jurisdiction of the CJEU or whether to make a special forum to hear such cases remains to be addressed. The experience with the ‘urgent preliminary ruling procedure’ entertained by the Court of Justice of the European Union shows that the CJEU can deal with specific matters in an accelerated way. Should any other judicial forum be sought, there is a possibility under Article 257 of the TFEU to establish specialised courts ‘to hear at first instance certain classes of action or proceeding brought in specific areas’.

Apart from the legislative and procedural prerequisites for securing procedural guarantees and effective remedies designed to protect the rights of suspected and accused persons, other supporting mechanisms are also needed. Legal aid should also be readily available to individuals throughout such a proceeding, in order to ensure that limited financial means do not hinder the realisation of the defendants’ rights. At the moment there is no legal aid available at the EU level, only nationally administered aid schemes are available.

One further element also needs to be considered, and that is the equality of arms in cross border criminal cases. It is very apparent that whereas Member States’ national authorities are surrounded with institutions, platforms and tools designed for assistance, support and cooperation, this is not at all the case when it comes to representing the interests of suspected and accused persons. Competent national authorities have Eurojust and EJN waiting to provide support. There are a number of tools on the EJN website which facilitate the application and administration of criminal law instruments. Officials of national authorities have ample opportunity to receive training and have the possibility to reach out to counterparts in other Member States. Defence counsels are not so well equipped. Networks, training and information flow among defence counsels need to be strengthened in order for them to gain a better familiarisation with cross border criminal law instruments and procedures, and hence provide a higher level of representation. These issues obviously call for a solution outside the institutional framework of Eurojust, yet it is precisely in the context of realising the equality of arms that defence counsels must be supported in order to live up to their obligations even when challenging an EU agency.

There is one final element that needs to be added to the above discussion. Protecting defendants’ rights and providing the corresponding judicial avenues in which Eurojust’s act can be challenged are not equal to judicial control exercised over Eurojust, an issue that is discussed in the section 3.1.2. and 3.2.7. on accountability.

3.2.9. Data protection

With the entry into force of the Treaty of Lisbon, the special data protection regime overseeing Eurojust data processing has also become obsolete. This special regime was tailor made to the police and judicial cooperation under the third pillar, as the data protection rules and institutions, namely the European Data Protection Supervisor, under the first pillar could not have been used. With the abolishment of the third pillar this raison d’être for a special data protection regime has vanished and Eurojust is now placed under
the general data protection regime of the EU. Article 16 of the TFEU is the new legal basis for a comprehensive approach to data protection, which encompasses police and judicial cooperation in criminal matters as well. Therefore the data protection regime applicable to Eurojust is to be changed as well.

It is on the basis of Article 16 of the TFEU that the Commission has tabled its package on a comprehensive reform of data protection rules in January 2012.\textsuperscript{415} For Eurojust this will mean that the Framework Decision 2008/977/JHA,\textsuperscript{416} which covered its information exchange with the national authorities, will be replaced by a directive. According to the Commission the objective of the directive is to:

\begin{quote}
- apply general data protection principles to police cooperation and judicial cooperation in criminal matters, while respecting the specific nature of these fields;
- provide for minimum harmonised criteria and conditions on possible limitations to the general rules. This concerns, in particular, the rights of individuals to be informed when police and judicial authorities handle or access their data. Such limitations are necessary for the effective prevention, investigation, detection or prosecution of criminal offences;
- establish specific rules to cover the specific nature of law enforcement activities, including a distinction between different categories of data subjects whose rights may vary (such as witnesses and suspects)\textsuperscript{417}
\end{quote}

The directive will remedy one of the most criticised shortcomings of the Framework Decision as it will not be restricted to covering cross-border processing activities only. The Commission will also have heightened powers to enforce the directive.

With this change of the legislative framework the special institutions, especially the Joint Supervisory Body, supervising Eurojust’s compliance with data protection rules will have to be re-examined. It is proposed that once the comprehensive data protection package is adopted, Eurojust’s own data protection rules will have to be revisited as well.

\section*{3.3. Establishment of the European Public Prosecutor’s Office?}

\subsection*{3.3.1. Common past, common future?}

As indicated in section 1.1.4., which recapitulated the history of Eurojust, the parallel story of the European Public Prosecutor has been as closely intertwined with the establishment and development of Eurojust. A significant amount of intellectual and institutional effort has been put into making the case for a European Public Prosecutor, the major instances of which were the Corpus Juris project,\textsuperscript{418} the Commission’s 2001 green paper,\textsuperscript{419} the following public debate\textsuperscript{420} and the follow-up report on the green paper,\textsuperscript{421} as well as the European


\textsuperscript{416} Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.


Convention and the Constitutional Treaty for Europe. Now that the Treaty of Lisbon has finally provided the legal foundation in the form of Article 86 TFEU, on the basis of which the European Public Prosecutor’s Office (EPPO) can be brought to life, one may presume that there is now a political will to eventually establish this body. As a result, arguments for and against the EPPO seem to be of secondary relevance here. It is definitely out of the scope of this paper to discuss the necessity of the EPPO and the different ways in which it could be established. Thus the present section will confine itself to the sole question of how Eurojust would be affected if the EPPO were to be established? In the same vein, the various models related to the structure, competence, relation to national authorities, accountability, and the applicable substantive law issues that arise in the context of the EPPO are only covered to the extent that Eurojust is concerned.

First, Article 86 of the TFEU will be discussed with a view to Article 85 of the TFEU on Eurojust, followed by an examination of how Eurojust would be affected by the structure in which the EPPO may take shape and the competences that the EPPO may be granted with. The section will close with an evaluation of the intertwined futures of Eurojust and the EPPO.
3.3.2. Article 86 of the TFEU – an analysis

Article 86 of the TFEU

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor’s Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor’s Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Special legislative procedure

It must be pinpointed that regardless of the fact that the EPPO has received a legal base in the treaty, its establishment is not at all seen as a standard procedure. Firstly, while the establishment of the EPPO is a possibility under the treaty, there is no obligation to create such a body. Secondly, it is not the ordinary legislative procedure that the treaty provides recourse to in the case of the establishment of the EPPO, but the special legislative procedure. With a view to Article 289(2) of the TFEU, this means that the legislative act is not adopted by the tandem work of the Council and the European Parliament, but one institution adopts the instrument with the consent of the other. Thus the inter-institutional negotiations are omitted, the co-decision element is gone and the institution whose consent is needed is in a take it or leave it position. With regard to the European Parliament this means that once Article 86 is invoked, it will not be able to directly influence the draft. It will be presented with a proposal that it has to accept or reject, without being able to amend it.
Emergency break and enhanced cooperation

Before assuming that the EPPO will be eventually set up, it also has to be observed that the treaty itself considers it to be a realistic option that not all Member States are willing to take this leap in the field of EU criminal cooperation. The treaty not only provides an emergency break for non-consenting Member States but also provides the possibility of enhanced cooperation for the more enthusiastic Member States. The emergency break in Article 86 (1) is, however, distinct from the one reflected in Article 82 (3) and Article 83 (3) as it has to be initiated by nine, and not merely one Member State. The other clear difference is that invoking the emergency break under Article 86 (1) does not have to be made on the basis of the argument that the proposal affects fundamental aspects of the criminal justice system. Indeed no reason is needed to take the proposal on the EPPO to the European Council.

If after the deliberation of the European Council there is still disagreement, nine Member States may proceed with the proposal in the framework of enhanced cooperation, the general rules of which are laid down in Article 329 (1) TFEU.

Not much foresight is needed to observe that since the establishment of the EPPO requires unanimity in Council and there are Member States which are clearly against the idea of such an institution, any proposal on the EPPO will eventually take the route of an enhanced form of cooperation.422

‘From Eurojust’

Article 86 states that the EPPO is created ‘from Eurojust’. With the deliberate vagueness of this term, it is left to the creativity of the drafters and the consensus they are able to broker to establish in what form EPPO emerges at the end. What is certain is that the EPPO is not meant to replace Eurojust.424 Yet from this point on it is an open question of whether EPPO is created from Eurojust in a physical sense and will benefit from Eurojust’s infrastructure, or if the two bodies will be structurally merged. For a detailed account of how the EPPO’s structure might influence Eurojust see section 3.3.3.

Jurisdiction

The underlying principle for setting up EPPO is to more effectively combat offences against the EU’s financial interests.425 Article 86 obviously refers to this priority crime and makes clear that such crimes themselves would be defined in the EPPO regulation. Yet it leaves it open whether the prerequisite jurisdictional issues are to be governed by European or by national law.426 It has to be noted that Article 86 provides that crimes against the EU’s financial interests be regulated in the form of a regulation, as opposed to Article 82 and 83 on cooperation in criminal matters, which provide for directives.

The picture, however, is still not complete as Article 86 (4) provides the possibility to extend the EPPO’s jurisdiction so as to encompass ‘serious crime having a cross-border dimension’. The wording of Article 86 (4) also states that such an extension of the EPPO’s jurisdiction, which is initially limited to combating crimes against the EU’s financial interests, may take place at the same time or subsequently to the establishment of the EPPO. Such an extension has to be made through the unanimous decision of the European Council, involving all Member States, including those who do not participate in the enhanced cooperation regarding the EPPO. After reaching an agreement in the European Council, the consent of the European Parliament is also needed to extend the powers of the EPPO.

423 Interview 1.
425 See fn 415 and 417.
Should EPPO’s jurisdiction be broadened, the immediate question is how that would affect Eurojust.

**Competences**

Article 86 (2) sets out the competences of the EPPO, namely ‘investigating, prosecuting and bringing to judgment’ crimes against EU’s financial interests. The EPPO ‘shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences’. This again opens up an array of questions. How can the EPPO investigate if not with the national police forces? Does ‘prosecuting and bringing to judgment’ actually mean deciding to take the case to court or not and does it also involve demanding specific sanctions in a sentence and filing appeals? In entertaining the actual proceedings further issues arise related to how evidence is to be collected and evaluated, how the defendant’s rights are to be protected and whether an EU sentencing policy is needed. Last but not least the judicial control of the EPPO has to be provided, and again it is a question of whether recourse would be made to national structures or there would be a designated judicial forum.

It has to be recalled as well that Article 85(1) explicitly refers to offences against the EU’s financial interests with respect to empowering Eurojust with the initiation of criminal investigations. The apparent question is how would that relate to the EPPO’s competence? Should Article 85 (1) (a) and Article 86 be read as complementing or excluding one another? If Eurojust is granted the power to investigate crimes against the EU’s financial interests and if this proves to be efficient, then would the EPPO still be created or is Eurojust a kind of fall-back position, only being granted the power to investigate EU financial crimes, if the proposal on EPPO fails?

### 3.3.3. Establishment of the EPPO – effect on Eurojust’s structure

As argued above the notion that EPPO is to be created ‘from Eurojust’ leaves a broad scope regarding how to actually realise the EPPO. The only further certainly worth pointing out is that since the treaty refers to the European Public Prosecutor’s Office, it is clear that it is not one person - a prosecutor – who embodies the institution but that it is an organisation. Thus when respective structures of the EPPO and Eurojust are considered, then it is the relationship between two organisational entities that is captured.

There have been various scenarios envisaged as to how the EPPO would be established ‘from Eurojust’, each of them entailing a different effect on Eurojust’s structure. The mainstream models that have been suggested to date will be explored below. In addition to the various models on how EPPO would relate to Eurojust there is another issue which gives a further twist to this discussion; namely whether the EPPO itself will have a centralised or decentralised structure. As there is no number of variables as to what the EPPO could look like, one can only speculate as to how Eurojust would relate to a yet unknown entity.

**Model 1 Eurojust becomes the EPPO**

At face value the model whereby Eurojust itself is transferred to the EPPO seems to be the easiest to digest in terms of organisational transformation. Eurojust could continue with its horizontal role, and alongside this it could act in the capacity of the EPPO with respect to crimes against the EU’s financial interests. The advantage of this model is that it would immediately exclude any inter-institutional turf war between the EPPO and Eurojust. The concern with regard to this approach is the question of how to accommodate the vertical

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integration model that EPPO requires to the current structure of Eurojust, which is based on horizontal cooperation. Questions regarding how to design the role of the College and Eurojust national members in relation to EPPO functions would need immediate attention. Thus the implementation of this model would likely require the reorganisation of Eurojust on a smaller scale, involving a possible designation of a European Public Prosecutor as the 28th member of the College, to embody and exercise EPPO functions. The Eurojust national members of those Member States that participate in the EPPO could wear a Eurojust and an EPPO hat. Thus they could act both in the capacity of Eurojust national members and in the capacity of the EPPO. When wearing the EPPO hat, they could hold separate coordination meetings under the direction of the European Public Prosecutor. It has to be kept in mind that the establishment of the EPPO would in any case require staff to build an analytical and investigative capacity to administer its own cases. Such a model would give a lower level of visibility to EPPO, yet it would definitely strengthen Eurojust’s standing.

Model 2 EPPO is part of Eurojust
As opposed to model 1, EPPO could also be established as a separate entity located on Eurojust’s premises in order to be able to use Eurojust’s facilities, but functioning independently from Eurojust. In this way although EPPO would organisationally be a part of Eurojust, the horizontal and vertical functions would not merge. However if EPPO were only a unit within Eurojust, it would not be clear who exercises EPPO functions and who is accountable for them towards Eurojust. The advantage of this model is that infrastructure and supporting facilities of Eurojust could be utilised by EPPO. National and professional networks of Eurojust would also be availed by EPPO. The risk for Eurojust is becoming overshadowed by the supposedly smaller entity, nascent it may be, but with the potential to outgrow its host.

Model 3 Separate entities
If the EPPO is set up as a separate, organically independent entity, while at the same time benefiting from Eurojust’s expertise, then this would create the clearest solution in terms of accountability and internal organisation, as the two entities would be kept completely separate. While the overall structure would be clearer that there is one unit for judicial cooperation in general and another for investigating and prosecuting EU fraud, tasks would immediately overlap, and as a result Eurojust’s tasks would have to be curtailed with a view to the EPPO’s tasks. If Eurojust were made to share all its expertise with EPPO, this in practice would mean connecting EPPO to Eurojust’s Case Management System and using Eurojust’s analysis. The risk that the two bodies would compete rather than cooperate with each other would, however, be very considerable, and would immediately take its toll on information exchange. For Eurojust, there would be a public relations disadvantage as well of being the old and implicitly less capable unit, as opposed to the new and enhanced EPPO, even if the EPPO would probably be backed by only a few Member States and would have a narrow scope of action, at least in the beginning.

Model 4 EPPO and Eurojust is merged
If Eurojust and EPPO are merged to become one single entity capable of doing both current Eurojust tasks – cooperation and coordination – and new EPPO tasks – investigation and prosecution – that would require the creation of a genuinely new body. This new body would have an internal structure and internal decision-making mechanisms that are markedly different from what Eurojust currently has. Such a transformation of Eurojust would involve not only the complete internal reorganisation of Eurojust, but the redefinition of the ‘College and Eurojust national members’ setting as well. In effect, merging EPPO and Eurojust would simply bring Eurojust as it is presently known to an end, and an essentially new body would emerge from it.

In all four scenarios, the creation of the EPPO described above would have a bearing on the internal organisation of Eurojust, the only question being the...
extent of the effects on the current structure of Eurojust. The model in which Eurojust becomes the EPPO would entail the least amount of changes made to Eurojust’s present structure, whereas at the other end of the continuum a radically new body emerges from the merging of today’s Eurojust and the future EPPO. Realistically speaking should sufficient political momentum develop around the creation of EPPO, such that it is enough to overcome the hurdles of decision-making and actually emerge at all, then the models in which EPPO is more distinct from Eurojust are the ones most likely to be preferred. This, in turn, means that Eurojust’s internal structure would be affected to a greater extent. Although it will be a prerequisite for both bodies to cooperate and co-exist, the ease with which this will be put into practice will largely depend on how compatible their respective structures are. In drawing up EPPO’s structure, a very detailed assessment has to be made on how that would affect Eurojust’s structure. This is absolutely essential in order to avoid two competing institutions.

3.3.4. Establishment of the EPPO – effect on Eurojust’s competencies

With regard to the effects that the eventual establishment of the EPPO might have on Eurojust’s competencies, the following needs to be considered.

Firstly, the EPPO is fundamentally designed to attain a supranational character and embody a vertical type of integration in its field of competence with respect to Member States. Should Eurojust move in the same direction through the use of Article 85 (1) (a) and (c) and be granted the power to initiate investigations and resolve conflicts of jurisdiction, there would be an inherent competition with respect to which body is more supranational and has the more vigorous powers. That would trigger Eurojust to opt more frequently for its formal or ultima ratio powers. This would eventually move Eurojust towards the direction of the vertical model. For the EPPO this would mean being constantly challenged by Eurojust, pushing it to use its powers to the maximum degree possible. For the national authorities, this would mean not knowing exactly who is in charge while at the same time being ‘ordered’ to take action.

Secondly, once EPPO is established and made competent to combat crimes against the EU’s financial interests, Eurojust’s powers in the same field have to be aligned accordingly. Since there is a high chance that not all Member States would participate in creating the EPPO, this will probably mean that this priority crime area will not be entirely stripped from Eurojust’s competences. Hence in relation to the non-EPPO Member States, Eurojust would retain its competence in the field of crimes against the EU’s financial interests. Although this seems to be a clear dividing line, the story does not end here, as further complications arise. For example, which entity would deal with those cases that involve Members States participating in the EPPO and those that do not? Would this be the EPPO or Eurojust, or both? Other very important issues that would need to be dealt with involve how to resolve the different degrees of powers the two bodies have, insofar as the EPPO would probably have the power to initiate and prosecute, yet Eurojust may not. Furthermore, should Eurojust be given the power to investigate what the essential difference between the incompetencies of the two would be in this regard?

Should the EPPO’s competence be extended to go beyond EU fraud, the aforementioned problem of concurrent powers and complexity would only increase. It is exactly for this reason that EPPO is mostly discussed as being confined to combating crimes against the EU’s financial interests. However Zwiers argues that combating crimes against the EU’s financial interests is merely the political ‘selling idea’ for the EPPO, and other competences would come to it through the back door.

For Eurojust the establishment of the EPPO would instantly entail working with another body which has parallel competences, yet enjoys more vigorous powers. While sorting out parallel competences in a limited crime type area – crimes against the EU’s financial interests – appears to be a complex challenge, it is surely possible to deal with. The same could not be said if EPPO is made competent in relation to other crime types. A development along these lines would probably lead to such a degree of overlapping functions and parallel competencies that it would to a large extent make the two institutions incapable of carrying out their respective tasks. Indeed in such a scenario, sorting out who does what and in relation to whom would require such a high degree of coordination that it would necessarily come at the expense of operational functions.

3.3.5. Establishment of the EPPO – Methodology

There is a methodological issue relevant to the intertwined future of Eurojust and EPPO, which has to do with the sequence of steps in which the two bodies are dealt with. As discussed above, the Stockholm Programme clearly suggests that the impact of the 2008 Decision first needs to be evaluated before invoking Article 85 of the TFEU and entering into the discussion of how to further empower Eurojust. The Stockholm Programme also refers to the establishment of the EPPO and in careful wording states that after the assessment of the implementation of the 2008 Decision that ‘new possibilities could be considered in accordance with the relevant provisions of the treaty, including giving further powers to the Eurojust national members, reinforcement of the powers of the College of Eurojust or the setting-up of a European Public Prosecutor’.434

With this language, the Stockholm Programme is very explicit in making the evaluation of the 2008 Decision the first priority, before considering any other options of improvement. It therefore clearly sets out the sequence of actions as evaluate first and consider new options second. From then on, however, the Stockholm Programme puts the empowerment of Eurojust and the creation of EPPO on the same plane, as being two equally possible options offered by the treaty, and treats the two options in an either or manner. One may wonder, whether those responsible for drafting the Stockholm Programme literally thought that the strengthening of Eurojust and the EPPO were indeed mutually exclusive. It has to be kept in mind, of course, that the Stockholm Programme is adopted by the European Council and is the multi-annual programme of the area of freedom, security and justice.

The Commission’s Action Plan to Implement the Stockholm Programme envisages a communication on the arrangements for involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities, to be tabled in 2011. It also envisages a proposal for a regulation submitted in 2012 providing Eurojust with powers to initiate investigations, making Eurojust’s internal structure more efficient and involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities. A communication on the establishment of a European Public Prosecutor’s Office from Eurojust is foreseen in 2013.435 From this sequence it is evident that first a communication would be drawn up on involving the European Parliament’s and the national parliaments’ role in evaluating Eurojust, then Article 85 of the TFEU would be invoked to strengthen Eurojust, before evaluating the impacts of the 2008 Decision. In parallel with this a communication on EPPO would be issued, which is practically the forerunner of a concrete proposal.

It has to be underlined that whereas for the Council the evaluation of the 2008 Decision is the baseline before considering any further move, this is not so for the Commission. At best what can be observed is that while the Council seems to opt

434 Para 31.1.
for a step-by step approach - evaluate first and then see what other options there are for strengthening Eurojust or creating the EPPO -, the Commission seems to follow the logic of a parallel approach - strengthening Eurojust and establishing the EPPO.436

There are advantages and disadvantages to both options. If evaluation of the 2008 Decision precedes the invocation of Article 85 or 86 of the TFEU, one can have a better picture of how far the current model of Eurojust can been taken and whether to keep Eurojust on this track, to change it, or to create the EPPO. This advantage, however, is burdened by the fact that implementation can be delayed, incomplete or inappropriate, thus prolonging the whole evaluation process, during which time it can be always argued that complete implementation still needs to be awaited. The parallel approach to Eurojust and EPPO preferred by the Commission clearly does away with waiting for the Member States to finally implement the 2008 Decision. This is advantageous in terms of time efficiency, as it invokes the existing legal basis regardless of how far could Member States get with the 2008 Decision based on the former TEU legal basis. This, however, can be rebutted by arguing that moving along these lines is too early, and full of risks if one cannot see the real impact of the 2008 Decision.

Surely the fact that at the time of writing one third of the Member States have still not implemented the 2008 Decision, the deadline for that being mid-2011, provides an extra argument for the parallel approach, skipping the exercise of evaluation.

For Eurojust, the methodology has some important consequences. If the evaluation is made first then the whole issue of invoking the new treaty basis is prolonged, and even when it does come to the fore, Eurojust will have more ammunition to make its own case further strengthened. If the evaluation phase is skipped the chances for departing from the current structure and functions of Eurojust are higher and the creation of the EPPO becomes an imminent reality.

Also if Eurojust is strengthened under Article 85 of the TFEU firstly, it will have more time to ‘prove itself’, which would inevitably lessen the necessity of creating the EPPO. This paradox has been pointed out, coupling this with the fact, that for those Member States for whom the EPPO is clearly not an option, the empowerment of Eurojust will always be a fallback position437.

The parallel discussion of strengthening Eurojust and creating the EPPO bears the risk of adopting arrangements that are not fully complementing each other.

4. CONCLUSIONS

Three different paths can be mapped out with regard to Eurojust’s future. The course set by the 2008 Decision is the first such path and is most relevant to the immediate future of the unit. Upon the full implementation of the 2008 Decision, there is ample opportunity to attain a more enhanced degree of cooperation in serious cross border criminal cases. The second path is the new legal basis provided by the Treaty of Lisbon, which offers the possibility to depart from the current model on which Eurojust is constructed. At present, this appears to be more of a medium-term possibility. A third path is set by the establishment of the European Public Prosecutor’s Office, which will have a very significant bearing on Eurojust’s future. These paths are not mutually exclusive, yet great care needs to be taken in what sequence each path is taken.

Regardless of which path is taken, Eurojust will eventually become a body different from the one it is now, the only question is the extent of the changes it will undergo. From a policy-maker’s perspective, the question of whether to pursue these paths in sequence or in parallel is as important as having an exact idea of what objective Eurojust is meant to serve by following these paths of development.

The three main issues that any reconsideration of Eurojust’s current regulatory framework has to address are the unit’s structure, function and accountability. In order to find answers to these issues in the context of the potential paths of development, one has to clearly identify what Eurojust’s main objective is and whom the body serves? While answering the first question may seem to be straightforward, as the overarching mission is to combat serious crime and organised crime, the second question calls for a definite answer. Who is Eurojust ultimately meant to serve? As Eurojust is a truly operational body, this question is not at all self-evident. Is the answer the national authorities? Has Eurojust the vocation to assist them, coordinate them, and enhance their cooperation? Or is Eurojust to serve a European agenda, become a standard agency and take action based on EU interests? The two proposals are not fully antagonistic, yet when choices are made from among the possibilities provided by the various regulatory frameworks, this underlying consideration has to be kept in mind.

4.1. Gradually building on the 2008 Decision

4.1.1. How to improve the structure of Eurojust

The path set by the 2008 Decision still draws upon the institutional framework representing an intergovernmental-style hybrid structure, where to date the control and influence of national laws and national authorities remains very strong in Eurojust’s structure and work. Should the 2008 Decision be fully implemented, Eurojust will reach the stage when the horizontal cooperation model cannot be taken further. That would be the end of the logic of horizontal cooperation and any further step would necessarily mean entering a different model. Neither the Member States nor Eurojust are prepared to take this step. The implementation of the 2008 Decision is not at all complete, although this should be the *sine qua non* condition for any discussion about the future of Eurojust.
Even without changing the structure of Eurojust, there are a number of steps which, if taken, could make its internal administration more effective. Separating administrative tasks from operational ones could be mapped out in the Rules of Procedure, which have not been changed since 2002, when the unit was established. The College should exercise voluntary self-restraint in the fullest sense and not deal with non-operational issues. The Administrative Director must be positioned in such a way as to be entirely responsible for budgetary, staff and administrative issues. It is also suggested that the College could delegate its role of monitoring the Administrative Director to a group of College members, who through a system of rotation would oversee the work of the Administrative Director. In this way the College as such would be exempted from closely following everyday business.

4.1.2. How to improve the functioning of Eurojust

Upon the full implementation of the 2008 Decision the most important change to the functioning of Eurojust is the clear obligation of national authorities to systematically transmit information on serious crime to Eurojust. In this way, the 2008 Decision puts Eurojust in a position whereby it will possess a sufficient amount of information to be able to filter incoming data and find connections, and thus to make its own cases. In the future it will be up to Eurojust to make the most of this strengthened position. It is suggested that the policy of ‘quantitative approach’ of receiving as many cases as possible and coordinating them properly will have to be altered. Emphasis could shift to Eurojust’s qualitative input in generating its own cases through analytical work conducted on the basis of the information it will be receiving. Indeed Eurojust will be in an even better position to evaluate and proactively assist Member States, at times pre-empting the specific requests. This proactive attitude should be accepted and welcomed by Member States, especially with a view to the fact that Eurojust, in the current legislative context, will carry this out in its advisory and mediating role.

This significant inflow of information will enable Eurojust to better concentrate on complex cases, to use European Arrest Warrants in a strategic and synchronised manner, to step in and prevent conflicts of jurisdictions and to propose the setting up of a Joint Investigation Team. All of this will entail the possibility of undertaking a major shift from a reactive to proactive style of working.

From among the relations of Eurojust with its strategic partners, it is the relationship with OLAF that needs to be further improved without delay. At a minimum, this needs to involve a much better flow of information between the two agencies. OLAF should not confine itself to referring only those cases to Eurojust where it sees Eurojust offering added value or where there is a need for legal assistance. Eurojust, furthermore, within the limits of its current powers, may readily act as a mediator between OLAF and Member States’ national authorities unwilling to take up OLAF’s cases and prosecute. There would be ample room for Eurojust national members, although on an informal basis, to step in and liaise with their competent authorities to feed more information to OLAF.

In relation to Eurojust's functioning, it is proposed that the manner in which Eurojust continues to rely on informal working methods, characterised by exercising persuasive authority and flexible networking, is to the detriment of its formal powers. It is suggested that this policy needs to be rebalanced. Formal powers granted by the 2008 Decision should be used to their fullest potential and the use of the informal working style in cases where Eurojust could exercise formal authority should be abandoned.

With regard to the direction that Eurojust’s functioning should take and its role within the European internal security environment, especially with respect to the
intelligence-led rationale which is currently predominant, a thematic discussion by EU political institutions is required. Its tasks should be aligned to the outcome of such a discussion and the unit should be given clear orientation with regard to this profile.

The wider legislative environment in which Eurojust currently operates is designed to create a limited institution based on the fundamental choice of opting for horizontal rules and horizontal cooperation in EU criminal laws, in which national criminal justice systems and national procedures are largely left intact. For Eurojust, this means a limited capacity by design, within which upgrades are possible, yet the fundamental choice is left untouched.

A recurring problem in the area of freedom, security and justice is the non-implementation of EU instruments, where the Commission, at least for a transitory period, still lacks the power to bring infringement procedures against non-complying Member States. Eurojust is heavily affected by this, firstly with regard to its very own founding act, and secondly with regard to the legislative acts it is meant to work within. The mere implementation of existing legislation would by itself improve the functioning of Eurojust.

4.1.3. How to improve the accountability of Eurojust

The present legal framework ensures a high degree of formal autonomy for Eurojust, which results in a vacuum with respect to performance review and priority-setting. These issues have to be resolved to the satisfaction of the political institutions of the EU and to the benefit of Eurojust. In practice, this means that better mechanisms of control need to be established to ensure that Eurojust is not only more thoroughly reviewed, but that its work is better recognised and that it is given strategic direction.

While it is true that in the EU context Eurojust works with a high degree of autonomy, thus can be regarded as loosely controlled, this is complemented with the national responsibility attached to each and every Eurojust national member, which creates a second layer of control. This second layer of control is less visible from the outside and is as diverse as the various criminal justice systems of the Member States.

Council conclusions in their current form are insufficient to proactively provide strategic guidance to Eurojust. A clearer setting of priorities is needed form the Council. It is suggested that more specific political guidance should be given to Eurojust, providing a clear message on what mission is set for the unit. While the ex post evaluation of Eurojust annual reports can be kept in the current form of Council conclusions, an ex ante direction also seems to be necessary, which should take form of the approval of Eurojust’s annual work programmes.

Should the Memorandum of Understanding between the European Commission and Eurojust be signed, the Commission will be in the position to have a full overview of the work of Eurojust, apart from its operational casework. The Commission will thus be able to closely follow the unit. Should the Commission make use of the possibility provided by the MoU to informally influence the strategy choices of Eurojust, this will have to be done in a way that is clearly in line with the directions set by the Council.
The European Parliament, besides exercising budgetary control over Eurojust, could make the current practice of informal exchanges between its LIBE committee and Eurojust more regular.

A further definite change in relation to the control mechanisms over the unit will be the lapse of the transitory period after which the Court of Justice of the European Union will be able to fully exercise its jurisdiction over Eurojust, and Eurojust acts will become subject to judicial review.

4.2. Evaluation and perspectives of Article 85 TFEU

Article 85 of the TFEU clearly sets a new path for Eurojust as it opens up a number of possibilities to strengthen and hence redirect the unit. The significant new features provided for by the text are the following:

- Eurojust is made responsible for ‘serious crime’, which is not qualified anymore with the adjective of cross border, hence Eurojust’s ambit of action is broadened;
- the phrase ‘requiring a prosecution on common bases’ involves cases of a European dimension and or strategic value and may involve one Member State only, thus Eurojust scope of action is further broadened;
- recourse is made to regulations, which circumvent the entire problem of national implementation;
- ordinary legislative procedure shall be used in adopting the regulations based on Article 85, involving a qualified majority vote in the Council and co-decision with the European Parliament;
- tasks are extended, making it possible to empower Eurojust with the power to initiate criminal investigations and to propose the initiation of prosecutions and resolve jurisdictional conflicts;
- crimes against the EU’s financial interests are singled out as a crime type where Eurojust may initiate criminal investigations and propose the initiation of prosecutions;
- the European Parliament and national parliaments will evaluate Eurojust.

From the above it is clear that Article 85 offers a number of avenues to depart from the way Eurojust works at present. There are, however, two important considerations which have to be borne in mind before invoking the new treaty base.

Firstly, the fairly recent entry into force and implementation of the 2008 Decision has to be respected. It would be a senseless exercise to amend the current legislative framework without knowing how it has evolved. As was argued in section 3.1., there are number of reasons to stick with the 2008 Decision, at least to see how the major improvements it enacted work in practice. It is recalled that the 2008 Decision was adopted exactly on the eve of the entry into force of the Treaty of Lisbon in order to avoid the Commission’s proposal and to maintain Eurojust on its old, third pillar bases provided by Article 31(2) of the TEU. In any case it is suggested that there should be a sequence of steps: first evaluating the fully implemented 2008 Decision and on that basis making recourse to Article 85.

Secondly, despite the new avenues explicitly opened up by Article 85, this treaty provision remains silent on a number crucial issues related to Eurojust. Article 85 does not give any
specific guidance on what Eurojust’s structure, operation, field of action and tasks - apart from the tasks explicitly mentioned - should look like. It was suggested that this vagueness or silence is deliberate, in order ‘not to close doors’, and thus leaving it mostly to the EU Institutions to get out from the text whatever it is they can actually agree on. As a consequence, it is proposed that one has to have a fairly clear idea of what type of body Eurojust is meant to be transformed into once the treaty base is invoked as a path of development. Deciding certain fundamental questions is essential in order to ensure that the outcome of the legislative process yields a coherent solution, regardless of whether that involves a more constrained or a more intrusive reform of Eurojust.

The current model of Eurojust retains the original concept of establishing a horizontal, third pillar body, working in an intergovernmental fashion, and this is not in line with the policy change the new treaty opted to take. The question from this point is whether to retain some of the specificities of the current model or to completely turn Eurojust into an EU agency, which is the direction the treaty moves towards.

If and when the issue of reform is put on the table, it has to be decided from the outset what is expected from Eurojust, whom it serves and in which arena it should play. In essence, the issue of whether Eurojust serves national authorities by way of coordinating them or it is meant to implement a European agenda has to be decided.

From a procedural perspective, whatever legislative instrument is proposed regarding Eurojust under the new treaty base, it will have to go through the ordinary legislative procedure, which is a markedly different process than the one followed when the 2002 and 2008 Decisions were adopted.

4.2.1. Perspectives for the structure of Eurojust

Article 85 of the TFEU opens up a number of possibilities for Eurojust, while at the same time remaining silent on a number crucial issues related to the body. The structure of Eurojust is one of the issues where the wording of the treaty does not give any guidance, hence leaving numerous options open. It is at this juncture where the degree to which Eurojust is to serve a European interest should be discussed.

The current structure of Eurojust, as described previously, still reflects the pre-Lisbon era. Eurojust is now, however, operating under a new treaty regime, which enshrines the deliberate policy choice to put an end to the distinguished status of judicial cooperation on criminal matters and subject it to the mainstream institutional and decision-making rules. Eurojust’s unique structure does not follow the EU agency model, but is still rather controlled by the Member States and enjoys a great degree of institutional independence with regard to other EU Institutions. If further empowerment of Eurojust is considered under the new treaty base, the issue of changing its structure so as to reflect the new era ushered in by the Treaty of Lisbon seems to be difficult to avoid.

There are a number of reasons to change the structure of Eurojust, yet the degree of this reform depends on its precise objective. If Eurojust is to be made more efficient by separating administrative and operational tasks, then a more cautious internal reform is sufficient. This would include the strengthening of the

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438 Interview 1.
Administrative Director and attaching a management board to the body. As discussed previously, this would also remedy the problem of Eurojust not getting sufficient policy direction.

Should plans be more ambitious and seek to transform Eurojust so that it resembles an EU agency, putting it at an increased distance from national authorities or eventually even making it independent of them, then a fundamental change of its current structure and powers is inevitable. Such change could stem from distancing Eurojust national members, or making them fully independent from their respective national authorities to their entire replacement with EU officials. With this vertical integration Eurojust would truly become an EU agency. The question is whether this would yield a more effective body. It is submitted that if and when Eurojust is made more autonomous from national authorities, or eventually even independent from them and once Eurojust is attributed with the powers offered in Article 85 (1) (a) and (c), then a fundamental change to its current structure and powers is inevitable.

There seems to be however, a paradoxical situation regarding national members. The strengthening of Eurojust with further powers, making it more autonomous from national authorities, distancing national members from national authorities could have the counter effect of loosening the willingness of national authorities to cooperate.

The decision of the degree of change is a political one, although a gradual approach would be advisable. A radical change to the composition of Eurojust would entail more risk than benefit. However, a reorganisation of the body will be inevitable in order to bring it in line with the spirit of the treaty, to ease criticism regarding accountability and transparency, and last but not least to better focus Eurojust on its substantive work, namely its operational casework.

Despite all its limitations, Article 85 is a clear departure towards a vertical cooperation model and therefore envisages Eurojust stepping out of the horizontal cooperation model that has defined it since its inception. There is an interrelated relationship between Eurojust’s structure and the power to initiate investigations and resolve conflicts of jurisdiction. Should plans entail entrusting Eurojust with these powers, it has to be seriously considered whether the current structure is capable of accommodating the execution of these functions. It is said that the current structure of Eurojust, whereby national members carry out tasks on behalf of Eurojust with respect to their own national authorities, is inherently designed for horizontal cooperation and not to the vertical type of cooperation that may take shape should such powers be granted to Eurojust.

4.2.2. Perspectives for the functions of Eurojust

Article 85 clearly offers a number of avenues to depart from the way Eurojust works at present. Most importantly, if the power to initiate criminal investigations and to propose the initiation of prosecutions and resolve jurisdictional conflicts is granted to Eurojust, that will shift Eurojust away from a model of horizontal to a vertical integration in cooperation in criminal matters. Furthermore, the broadening of Eurojust’s scope to encompass ‘prosecution on common bases’ in cases involving one Member State paves the way towards a European criminal justice agenda, which is to be implemented by Eurojust. If these paths of development are taken, Eurojust’s work will be fundamentally changed. The corresponding structure will have to be found to accommodate these new functions.
In this vein, the power to initiate investigations can be regarded as genuinely shifting Eurojust towards a more intelligence-led rationale, where it is put into a position of shaping and not only witnessing events. Moreover the power of initiating investigations allows the EU itself to develop a criminal justice agenda, which Eurojust has the mandate to carry out.

Should Eurojust be granted the power to initiate investigations and resolve conflicts of jurisdiction, a judicial instance needs be created in order to meet the basic rule of law requirements of criminal justice.

4.2.3. Perspectives for the accountability of Eurojust

The issue of accountability has to be tackled by considering that the notion itself captures various institutions and procedures where Eurojust is already subject to a number of mechanisms. Accountability rules should not result in overburdening the unit with parallel or overlapping procedures and reporting systems which end up being counter effective with regards to Eurojust’s operational work. The EU-level scrutiny of Eurojust should not result in reducing Member States’ incentive to actually supply information to Eurojust.

With regard to how the European Parliament and national parliaments should evaluate Eurojust, it is suggested that the current informal practice whereby Eurojust presents its activities before the LIBE Committee could be maintained, but formalised. The question is how vigorous the evaluation of Eurojust should be, whether it suffices for the European Parliament to hold only hearings or it should make recommendations as well or vote on accepting Eurojust’s reports. Furthermore, the national parliaments’ evaluation has to be streamlined so as to form a single, coherent message.

Should a management or executive board be attached to the current structure of Eurojust, the Commission should take part in the strategic guidance of the unit, to control its everyday administration, and become closely associated with non-operational activities of Eurojust. Approving Eurojust’s annual work programmes could alternatively be adopted by such a board.

If Eurojust is entrusted with the tasks of initiating investigations and resolving conflicts of jurisdiction as long as the Eurojust national members carry out these Eurojust tasks, the accountability of Eurojust national members has to be revisited at least in the form of requiring a minimum standard to be provided by national legislations.

Furthermore, should Eurojust be granted the power to initiate investigations and resolve conflicts of jurisdiction, the rights of suspected and accused persons have to be ensured through procedural guarantees, encompassing appropriate legislation and effective remedies designed to protect these rights. Other supporting mechanisms are also needed, involving legal aid and enhancing the equality of arms in cross border criminal cases.
4.3. Evaluation of the intertwined future of Eurojust and the European Prosecutor’s Office

4.3.1. Methodology

The sequence in which Eurojust and the EPPO are dealt with is of great relevance. For the Council, the evaluation of the 2008 Decision is considered to be the baseline before considering any further move. However this is not the case for the Commission. The Council seems to prefer opting for a step-by-step approach: evaluate first and then see which option is more feasible, the strengthening of Eurojust or the creation of the EPPO. The Commission appears to prefer the logic of a parallel approach: strengthening Eurojust and establishing the EPPO as a parallel exercise.

For Eurojust, the choice of methodology mentioned above has serious consequences. If an evaluation is first conducted, then the whole issue of invoking the new treaty basis is prolonged, and even once that is discussed, Eurojust will have more ammunition to make its own case to be further strengthened. Should the strengthening of Eurojust follow such an evaluation the ‘necessity’ of EPPO could easily fade. If a decision is made to skip the evaluation phase, the chances for departing from the current structure and functions of Eurojust are higher and the creation of the EPPO becomes an imminent reality. The parallel discussion of strengthening Eurojust and creating the EPPO however bears the risk of adopting arrangements that do not fully complement each other.

4.3.2. Complex legal framework

From the moment of its potential establishment, the EPPO will add a degree of complexity to the current way judicial cooperation in criminal matters is administered. This complexity is due to several factors. Firstly, the EPPO will probably be created through enhanced cooperation, thus from the outset it will not involve all the Member States. Secondly, the special position of the opt-out Member States provides a further twist, especially if creating the EPPO also entails the modification of the 2008 Decision. Thirdly, the necessarily concurrent responsibilities of the EPPO and Eurojust in the field of crimes against the EU’s financial interests will immediately create problems of sorting out who does what. This appears to be a complex challenge, yet still possible to deal with. Fourthly, should EPPO’s competence be extended beyond crimes against the EU’s financial interests, that would lead to a myriad overlapping competences and concurrent tasks between Eurojust and the EPPO. Such a development could entail the risk of making the two institutions incapable of carrying out their respective tasks. Sorting out who does what and in relation to whom would require such a high degree of coordination that it would necessarily come at the expense of operational functions.

The way in which the EPPO will be organised will also have significant bearing on Eurojust. From among the models in which the EPPO could be established "from Eurojust", the most probable are the ones which create a separate entity that needs to co-exist and cooperate with Eurojust. Although it will be a prerequisite for both bodies to cooperate and cohabitate, the ease with which this will be put into practice will largely depend on how compatible their respective structures are. In drawing up the EPPO’s structure, a very careful assessment has to be made in order to ensure that it complements, and does not compete with, Eurojust.
REFERENCES

- Agreement on extradition between the European Union and the United States of America, OJ L 181/27, 19/07/2003
- Agreement Eurojust-Norway
- Agreement Eurojust-Iceland
- Agreement Eurojust-Romania
- Agreement Eurojust-USA
- Agreement between Eurojust and Switzerland
- Agreement on cooperation between Eurojust and the former Yugoslav Republic of Macedonia (FYROM)
- Agreement between Eurojust and the Republic of Croatia
- Conclusions of the first meeting of the national experts on Joint Investigation Teams Brussels, 2 December 2005 15227/05


• Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers' money COM(2011) 293 final Brussels, 26.5.2011


• Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol OJ C 312, 16.12.2002


• Council Conclusions on the ninth Eurojust Annual Report (calendar year 2010) Council doc. 9361/11

• Council Conclusions on the eighth Eurojust Annual Report (calendar year 2009) Council doc. 9959/10

• Council Conclusions on the seventh Eurojust Annual Report (calendar year 2008) Council doc. 10115/09

• Council Conclusions on the sixth Eurojust Annual Report (calendar year 2007) Council doc. 8062/08

• Council Conclusions on the fifth Eurojust Annual Report (calendar year 2006) Council doc. 9920/07

• Council Conclusions on the fourth Eurojust Annual Report (calendar year 2005) Council doc. 10334/06

• Council Conclusions on the third Eurojust Annual Report (calendar year 2004) Council doc. 12527/05

• Council Conclusions on the second Eurojust Annual Report (calendar year 2003) Council doc. 8560/04

• Council Conclusions on the first Eurojust Annual Report (calendar year 2002) Council doc. 9771/03


• Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes OJ L 167


• Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L 205,

• Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime OJ L 332


• Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters OJ L 350 , 30/12/2008

• Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings OJ L 328/42


• Decision taken by common agreement between the representatives of Member States, meeting at head of state or government level 2004/97/EC, Euratom, of 13 December 2003 on the location of the seats of certain offices and agencies of the European Union L 29/15.


• Democratic accountability in the Area of Freedom, Security and Justice Evaluation of Europol, Eurojust, FRONTEX and Schengen, Interparliamentary Committee Meeting. 4-5 October 2010.


• Developing an EU Internal Security Strategy, fighting terrorism and organised crime Study for the European Parliament (2011)

• Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks OJ L 105, 13.4.2006, p. 54


• Draft Memorandum of Understanding between the European Commission and Eurojust


• Draft Scorecard – Implementation of the JHA Agencies report Council doc 5676/11

• Report on the cooperation between JHA Agencies in 2010 Council doc 5675/11

• Eleventh Operational Report of the European Anti-fraud Office, 2010

• Enhancing the work of Eurojust in Drug Trafficking Cases Final Results, Strategic Project January, 2012

• European Council the Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens 2010/C 115/01

• European Handbook on How to Issue a European Arrest Warrant Council doc. 8216/2/08

The Future of Eurojust


- Eurojust Annual Report 2010
- Eurojust Annual Report 2009
- Eurojust Annual Report 2008
- Eurojust Annual Report 2007
- Eurojust Annual Report 2006
- Eurojust Annual Report 2005
- Eurojust Annual Report 2004
- Eurojust Annual Report 2003
- Eurojust Annual Report 2002
- Eurojust Annual Work Programme 2010
- Eurojust Annual Work Programme 2011
- Eurojust News Issue No. 6 – February 2012.
- Eurojust News Issue No. 5 – December 2011
- Eurojust News Issue No. 4 - July 2011
- Eurojust News Issue No. 3 - December 2010
- Eurojust News Issue No. 2 – April 2010
- Eurojust News Issue No. 1 – October 2009
- 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) Council doc. 17625/1/10

- Eurojust Multi-annual Strategic Plan 2012-2014
- Explanatory Memorandum to the Council Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to adopting a Council Decision of ... on the strengthening of Eurojust and amending Decision 2002/187/JHACouncil doc.5038/08 (Brussels, January 30, 2008),

• Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States Council doc. 8302/4/09


• Fair Trials International response to the Initiative to a European Member States Legislative Initiative on a Directive for a European Investigation Order 29 June 2010


• Joint Eurojust-Europol paper on judicial - police co-operation in operational cases Council doc. 9387/1/11

• Implementation of the European Arrest Warrant and the Joint Investigation Team at EU and National Level, Study for the European Parliament (2009)
The Future of Eurojust

- Initiative of the Portuguese Republic, the French Republic, the Kingdom of Sweden and the Kingdom of Belgium with a view to adopting a Council Decision setting up Eurojust with a view to reinforcing the fight against serious organised crime OJ 2000/C 243/05 24.8.2000
- Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘ne bis in idem’ principle, OJ C 100, 26.4.2003, p. 24. 28
- Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters OJ C165/53 24.6.2010.
- Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters Council doc. 18225/1/11 Brussels, 9 December 2011.
- Memorandum of Understanding between Eurojust and the European Judicial Training Network
- Memorandum of Understanding between Eurojust and CEPOL
- Memorandum of Understanding between Eurojust and the Iberoamerican Network of International Legal Cooperation (Iber-RED)
- Memorandum of Understanding between Eurojust and the United Nations Office on Drugs and Crime

• Opinion of the European Data Protection Supervisor on the Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to adopting a Council Decision concerning the strengthening of Eurojust and amending Decision 2002/187/JHA, 2008/C 310/01

• Outcome of the Police Chiefs’ Task Force meeting on 12 May 2005, Council doc. 9494/05, 30 May 2005


• Proposal for a Regulation of the European parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) {SEC(2012) 72 final} {SEC(2012) 73 final Brussels, 25.1.2012 COM(2012) 11 final 2012/0011 (COD) and

• Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data COM(2012)010 final - 2012/0010 (COD)


• Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2010 p14-15; 9120/1/11 REV 1 COPEN 83 EJN 46 EUROJUST 58

• Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009 7551/6/10 REV 6 COPEN 64 EJN 5 EUROJUST 34 p13-14. COPEN_ 87 EJ_ 28 EUROJUST 28
The Future of Eurojust

- Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2008 p12 10330/08 9734/09 COPEN 87 EJN 28 EUROJUST 28
- Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2007 p12 10330/08 COPEN 116 EJN 44 EUROJUST 58
- Report to the European Parliament and national Parliaments on the proceedings of the Standing Committee on operational cooperation on internal security for the period January 2010 - June 2011 Council doc. 14614/11
- Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance) (2009/C 295/01)
- Schengen Convention, The Schengen acquis - Agreement on the Accession of the Italian Republic to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders signed at Schengen on 19 June 1990
- Sixth round of mutual evaluations Council doc. 12384/11 Brussels, 6 July 2011

151


ANNEXES


It is noted that the Recitals which are incorporated in the document are reproduced from the Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

The consolidated text of the Council decision does not replace the Council decisions 2002/187/JHA, 2003/659/JHA or 2009/426/JHA. It is prepared for information purposes only at the request of a number of delegations.

Council Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 31(2) and 34(2)(c) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament\(^1\),

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\(^1\) Opinion delivered on 2 September 2008 (not yet published in the Official Journal).
Whereas:

(1) Eurojust was set up by Decision 2002/187/JHA\(^1\) as a body of the European Union with legal personality to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States.

(2) On the basis of an assessment of the experience gained by Eurojust, a further enhancement of its operational effectiveness is needed by taking account of that experience.

(3) The time has come to ensure that Eurojust becomes more operational and that the status of national members is approximated.

(4) In order to ensure continuous and effective contribution from the Member States to the achievement by Eurojust of its objectives, the national member should be required to have his regular place of work at the seat of Eurojust.

(5) It is necessary to define a common basis of powers which every national member should have in his capacity as a competent national authority acting in accordance with national law. Some of these powers should be granted to the national member for urgent cases where it is not possible for him to identify or to contact the competent national authority in a timely manner. It is understood that these powers will not have to be exercised in so far as it is possible to identify and to contact the competent authority.

(6) This Decision does not affect the manner in which the Member States organise their internal judicial system or administrative procedures for the designation of the national member and the setting up of the internal working of the national desks at Eurojust.

The setting up of an On-Call Coordination (OCC) within Eurojust is necessary to make Eurojust available around the clock and to enable it to intervene in urgent cases. It should be the responsibility of each Member State to ensure that their representatives in the OCC are able to act on a 24 hour/7 day basis.

Member States should ensure that competent national authorities respond without undue delay to requests made under this Decision, even if competent national authorities refuse to comply with requests made by the national member.

The role of the College should be enhanced in cases of conflict of jurisdiction and in cases of recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition.

Eurojust national coordination systems should be set up in the Member States to coordinate the work carried out by the national correspondents for Eurojust, the national correspondent for Eurojust for terrorism matters, the national correspondent for the European Judicial Network and up to three other contact points of the European Judicial Network, as well as representatives in the Networks for Joint Investigation Teams, War Crimes, Asset Recovery and Corruption.
The Eurojust national coordination system should ensure that the Case Management System receives information related to the Member State concerned in an efficient and reliable manner. However, the Eurojust national coordination system should not have to be responsible for actually transmitting information to Eurojust. Member States should decide on the best channel to be used for the transmission of information to Eurojust.

In order to enable the Eurojust national coordination system to fulfil its tasks, a connection to the Case Management System should be ensured. The connection to the Case Management System should be made taking due account of national information technology systems. Access to the Case Management System at national level should be based on the central role played by the national member who is responsible for the opening and management of temporary work files.

Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters is applicable to the processing by the Member States of the personal data transferred between the Member States and Eurojust. The relevant set of data protection provisions of Decision 2002/187/JHA will not be affected by Framework Decision 2008/977/JHA and contains specific provisions on the protection of personal data regulating these matters in more detail because of the particular nature, functions and competences of Eurojust.

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(14) Eurojust should be authorised to process certain personal data on persons who, under the national legislation of the Member States concerned, are suspected of having committed or having taken part in a criminal offence in respect of which Eurojust is competent, or who have been convicted of such an offence. The list of such personal data should include telephone numbers, e-mail addresses, vehicle registration data, DNA profiles established from the non-coding part of DNA, photographs and fingerprints. The list should also include traffic data and location data and the related data necessary to identify the subscriber or user of a publicly available electronic communications service; this should not include data revealing the content of the communication. It is not intended that Eurojust carry out an automated comparison of DNA profiles or fingerprints.

(15) Eurojust should be given the opportunity to extend the deadlines for storage of personal data in order to achieve its objectives. Such decisions should be taken following careful consideration of particular needs. Any extension of deadlines for processing personal data, where prosecution is statute barred in all Member States concerned, should be decided only where there is a specific need to provide assistance under this Decision.

(16) The Rules on the Joint Supervisory Body should facilitate its functioning.

(17) With a view to increasing the operational effectiveness of Eurojust, transmission of information to Eurojust should be improved by providing clear and limited obligations for national authorities.

(18) Eurojust should implement priorities set by the Council, in particular those set on the basis of the Organised Crime Threat Assessment (OCTA), as referred to in the Hague Programme\(^1\).

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\(^1\) OJ C 53, 3.3.2005, p. 1.
Eurojust is to maintain privileged relations with the European Judicial Network based on consultation and complementarity. This Decision should help clarify the respective roles of Eurojust and the European Judicial Network and their mutual relations, while maintaining the specificity of the European Judicial Network.

Nothing in this Decision should be construed to affect the autonomy of the secretariats of the networks mentioned in this Decision when they discharge their function as Eurojust staff in accordance with the Staff Regulations of Officials of the European Communities laid down by Regulation (EEC, Euratom, ECSC) No 259/68.

It is also necessary to strengthen Eurojust's capacity to work with external partners, such as third States, the European Police Office (Europol), the European Anti-Fraud Office (OLAF), the Council's Joint Situation Centre and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

Provision should be made for Eurojust to post liaison magistrates to third States in order to achieve objectives similar to those assigned to liaison magistrates seconded by the Member States on the basis of Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union.

This Decision allows the principle of public access to official documents to be taken into account,

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HAS DECIDED AS FOLLOWS:

Article 1

Establishment and legal personality

This Decision establishes a unit, referred to as “Eurojust”, as a body of the Union. Eurojust shall have legal personality.

Article 2

Composition of Eurojust

1. Eurojust shall have one national member seconded by each Member State in accordance with its legal system, who is a prosecutor, judge or police officer of equivalent competence.

2. Member States shall ensure continuous and effective contribution to the achievement by Eurojust of its objectives under Article 3. To fulfil those objectives:

   (a) the national member shall be required to have his regular place of work at the seat of Eurojust;

   (b) each national member shall be assisted by one deputy and by another person as an assistant. The deputy and the assistant may have their regular place of work at Eurojust. More deputies or assistants may assist the national member and may, if necessary and with the agreement of the College, have their regular place of work at Eurojust.

3. The national member shall have a position which grants him the powers referred to in this Decision in order to be able to fulfil his tasks.

4. National members, deputies and assistants shall be subject to the national law of their Member State as regards their status.
5. The deputy shall fulfil the criteria provided for in paragraph 1 and be able to act on behalf of or to substitute the national member. An assistant may also act on behalf of or substitute the national member if he fulfils the criteria provided for in paragraph 1.

6. Eurojust shall be linked to a Eurojust national coordination system in accordance with Article 12.

7. Eurojust shall have the possibility of posting liaison magistrates in third States in accordance with this Decision.

8. Eurojust shall, in accordance with this Decision, have a Secretariat headed by an Administrative Director.

*Article 3*

*Objectives*

1. In the context of investigations and prosecutions, concerning two or more Member States, of criminal behaviour referred to in Article 4 in relation to serious crime, particularly when it is organised, the objectives of Eurojust shall be:

   (a) to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States, taking into account any request emanating from a competent authority of a Member State and any information provided by any body competent by virtue of provisions adopted within the framework of the Treaties;

   (b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effects to the principle of mutual recognition;

   (c) to support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective.
2. In accordance with the rules laid down by this Decision and at the request of a Member State's competent authority, Eurojust may also assist investigations and prosecutions concerning only that Member State and a non-Member State where an agreement establishing cooperation pursuant to Article 26a(2) has been concluded with the said State or where in a specific case there is an essential interest in providing such assistance.

3. In accordance with the rules laid down by this Decision and at the request either of a Member State's competent authority or of the Commission, Eurojust may also assist investigations and prosecutions concerning only that Member State and the Community.

Article 4

Competences

1. The general competence of Eurojust shall cover:

(a) the types of crime and the offences in respect of which Europol is at all times competent to act; ¹

(b) other offences committed together with the types of crime and the offences referred to in point (a).

2. For types of offences other than those referred to in §1, Eurojust may in addition, in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State.

¹ At the time of adoption of this Decision, the competence of Europol is set out in Article 2(1) of the Convention of 26 July 1995 on the establishment of a European Police Office (Europol Convention) (OJ C 316, 27.11.1995, p. 2), as amended by the 2003 Protocol (OJ C 2, 6.1.2004, p. 1), and in the Annex thereto. However, once the Council Decision establishing the European Police Office (Europol) enters into force, the competence of Eurojust will be as set out in Article 4(1) of that Decision and in the Annex thereto.
Article 5

Tasks of Eurojust

1. In order to accomplish its objectives, Eurojust shall fulfil its tasks:

   (a) through one or more of the national members concerned in accordance with Art.6, or

   (b) as a College in accordance with Art. 7:

      (i) when so requested by one or more of the national members concerned by a case
dealt with by Eurojust, or

      (ii) when the case involves investigations or prosecutions which have repercussions at
Union level or which might affect Member States other than those directly
concerned, or

      (iii) when a general question relating to the achievement of its objectives is involved,
or

      (iv) when otherwise provided for in this Decision.

2. When it fulfils its tasks, Eurojust shall indicate whether it is acting through one or more of the
national members within the meaning of Art. 6 or as a College within the meaning of Art.7.
Article 5a

On-call coordination (OCC)

1. In order to fulfil its tasks in urgent cases, Eurojust shall put in place an On-Call Coordination (OCC) able to receive and process at all times requests referred to it. The OCC shall be contactable, through a single OCC contact point at Eurojust, on a 24 hour/7 day basis.

2. The OCC shall rely on one representative (OCC representative) per Member State who may be either the national member, his deputy, or an assistant entitled to replace the national member. The OCC representative shall be able to act on a 24 hour/7 day basis.

3. When in urgent cases a request for, or a decision on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition, needs to be executed in one or more Member States, the requesting or issuing competent authority may forward it to the OCC. The OCC contact point shall immediately forward it to the OCC representative of the Member State from which the request originates and, if explicitly requested by the transmitting or issuing authority, to the OCC representatives of the Member States on the territory of which the request should be executed. These OCC representatives shall act without delay, in relation to the execution of the request in their Member State, through the exercise of tasks or powers available to them and referred to in Article 6 and Articles 9a to 9f.
Article 6

Tasks of Eurojust acting through its national members

1. When Eurojust acts through its national members concerned, it:

   (a) may ask the competent authorities of the Member States concerned, giving its reasons, to:

      (i) undertake an investigation or prosecution of specific acts;

      (ii) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

      (iii) coordinate between the competent authorities of the Member States concerned;

      (iv) set up a joint investigation team in keeping with the relevant cooperation instruments;

      (v) provide it with any information that is necessary for it to carry out its tasks;

      (vi) take special investigative measures;

      (vii) take any other measure justified for the investigation or prosecution;

   (b) shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed;

   (c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

   (d) shall give assistance in order to improve cooperation between the competent national authorities;

   (e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;
(f) shall, in the cases referred to in Article 3(2) and (3) and with the agreement of the College, assist investigations and prosecutions concerning the competent authorities of only one Member State;

2. The Member States shall ensure that competent national authorities respond without undue delay to requests made under this Article.

Article 7

Tasks of Eurojust acting as a College

1. When Eurojust acts as a College, it:

(a) may in relation to the types of crime and the offences referred to in Article 4(1) ask the competent authorities of the Member States concerned, giving its reasons:

(i) to undertake an investigation or prosecution of specific acts;

(ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;

(iii) to coordinate between the competent authorities of the Member States concerned;

(iv) to set up a joint investigation team in keeping with the relevant cooperation instruments;

(v) to provide it with any information that is necessary for it to carry out its tasks;

(b) shall ensure that the competent authorities of the Member States inform each other of investigations and prosecutions of which it has been informed and which have repercussions at Union level or which might affect Member States other than those directly concerned;
(c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions;

(d) shall give assistance in order to improve cooperation between the competent authorities of the Member States, in particular on the basis of Europol's analysis;

(e) shall cooperate and consult with the European Judicial Network, including making use of and contributing to the improvement of its documentary database;

(f) may assist Europol, in particular by providing it with opinions based on analyses carried out by Europol;

(g) may supply logistical support in the cases referred to in points (a), (c) and (d). Such logistical support may include assistance for translation, interpretation and the organisation of coordination meetings.

2. Where two or more national members can not agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution pursuant to Article 6 and in particular Article 6(1)(c), the College shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned. The opinion of the College shall be promptly forwarded to the Member States concerned. This paragraph is without prejudice to paragraph 1(a)(ii).

3. Notwithstanding the provisions contained in any instruments adopted by the European Union regarding judicial cooperation, a competent authority may report to Eurojust recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition, and request the College to issue a written non-binding opinion on the matter, provided it could not be resolved through mutual agreement between the competent national authorities or through the involvement of the national members concerned. The opinion of the College shall be promptly forwarded to the Member States concerned.
Article 8

Follow up to requests and opinions of Eurojust

If the competent authorities of the Member States concerned decide not to comply with a request referred to in Article 6(1)(a) or Article 7(1)(a) or decide not to follow a written opinion referred to in Article 7(2) and (3), they shall inform Eurojust without undue delay of their decision and of the reasons for it. Where it is not possible to give the reasons for refusing to comply with a request because to do so would harm essential national security interests or would jeopardise the safety of individuals, the competent authorities of the Member States may cite operational reasons.

Article 9

National members

1. The length of a national member's term of office shall be at least four years. The Member State of origin may renew the term of office. The national member shall not be removed before the end of a term without informing the Council before the removal and indicating to it the reason therefore. Where a national member is President or Vice-President of Eurojust, his term of office as a member shall at least be such that he can fulfil his function as President or Vice-President for the full elected term.

2. All information exchanged between Eurojust and Member States shall be directed through the national member.

3. In order to meet Eurojust's objectives, the national member shall have at least equivalent access to, or at least be able to obtain the information contained in, the following types of registers of his Member State as would be available to him in his role as a prosecutor, judge or police officer, whichever is applicable, at national level:

(a) criminal records;

(b) registers of arrested persons;
(c) investigation registers;

(d) DNA registers;

(e) other registers of his Member State where he deems this information necessary for him to be able to fulfil his tasks.

4. A national member may contact the competent authorities of his Member State directly.

Article 9a
Powers of the national member granted to him at national level

1. When a national member exercises the powers referred to in Articles 9b, 9c and 9d, he does so in his capacity as a competent national authority acting in accordance with national law and subject to the conditions laid down in this Article and Articles 9b to 9e. In the performance of his tasks the national member shall, where appropriate, make it known whenever he is acting in accordance with the powers granted to national members under this Article and Articles 9b, 9c and 9d.

2. Each Member State shall define the nature and extent of the powers it grants its national member as regards judicial cooperation in respect of that Member State. However, each Member State shall grant its national member at least the powers described in Article 9b and, subject to Article 9e, the powers described in Articles 9c and 9d, which would be available to him as a judge, prosecutor or police officer, whichever is applicable, at national level.

3. When appointing its national member and at any other time if appropriate, the Member State shall notify Eurojust and the General Secretariat of the Council of its decision regarding the implementation of paragraph 2 so that the latter can inform the other Member States. The Member States shall undertake to accept and recognise the prerogatives thus granted in so far as they are in conformity with international commitments.

4. Each Member State shall define the right for a national member to act in relation to foreign judicial authorities, in accordance with its international commitments.
**Article 9b**

*Ordinary powers*

1. National members, in their capacity as competent national authorities, shall be entitled to receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition. When powers referred to in this paragraph are exercised, the competent national authority shall be informed promptly.

2. In case of partial or inadequate execution of a request for judicial cooperation, national members, in their capacity as competent national authorities, shall be entitled to ask the competent national authority of their Member State for supplementary measures in order for the request to be fully executed.

**Article 9c**

*Powers exercised in agreement with a competent national authority*

1. National members may, in their capacity as competent national authorities, in agreement with a competent national authority, or at its request and on a case-by-case basis, exercise the following powers:

   (a) issuing and completing requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition;

   (b) executing in their Member State requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition;

   (c) ordering in their Member State investigative measures considered necessary at a coordination meeting organised by Eurojust to provide assistance to competent national authorities concerned by a concrete investigation and to which competent national authorities concerned with the investigation are invited to participate;
(d) authorising and coordinating controlled deliveries in their Member State.

2. Powers referred to in this Article shall, in principle, be exercised by a competent national authority.

Article 9d
Powers exercised in urgent cases

In their capacity as competent national authorities, national members shall, in urgent cases and in so far as it is not possible for them to identify or to contact the competent national authority in a timely manner, be entitled:

(a) to authorise and to coordinate controlled deliveries in their Member State;

(b) to execute, in relation to their Member State a request for, or a decision on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition.

As soon as the competent national authority is identified or contacted, it shall be informed of the exercise of powers referred to in this Article.

Article 9e
Requests from national members where powers cannot be exercised

1. The national member, in his capacity as a competent national authority, shall be at least competent to submit a proposal to the authority competent for the carrying out of powers referred to in Articles 9c and 9d when granting such powers to the national member is contrary to:

(a) constitutional rules,

or

(b) fundamental aspects of the criminal justice system:

(i) regarding the division of powers between the police, prosecutors and judges,
(ii) regarding the functional division of tasks between prosecution authorities,

or

(iii) related to the federal structure of the Member State concerned.

2. Member States shall ensure that, in cases referred to in paragraph 1, the request issued by the national member be handled without undue delay by the competent national authority.

Article 9f

Participation of national members in joint investigation teams

National members shall be entitled to participate in joint investigation teams, including in their setting up, in accordance with Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union or Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams¹, concerning their own Member State. However, Member States may make the participation of the national member subject to the agreement of the competent national authority. National members, their deputies or their assistants, shall be invited to participate in any joint investigation team involving their Member State and for which Community funding is provided under the applicable financial instruments. Each Member State shall define whether the national member participates in the joint investigation team as a national competent authority or on behalf of Eurojust.

Article 10

College

1. The College shall consist of all the national members. Each national member shall have one vote.

2. The Council shall, acting by a qualified majority, approve Eurojust's rules of procedure on a proposal from the College. The College shall adopt its proposal by a two-thirds majority after consulting the Joint Supervisory Board provided for in Article 23 as regards the provisions on the processing of personal data. The provisions of the rules of procedure which concern the processing of personal data may be made the subject of separate approval by the Council.

3. When acting in accordance with Art. 7(1)(a), (2) and (3), the College shall take its decisions by a two-thirds majority. Other decisions of the College shall be taken in accordance with the rules of procedure.

\textit{Article 11}
\textit{Role of the Commission}

1. The Commission shall be fully associated with the work of Eurojust, in accordance with Art. 36(2) of the Treaty. It shall participate in that work in the areas within its competence.

2. As regards work carried out by Eurojust on the coordination of investigations and prosecutions, the Commission may be invited to provide its expertise.

3. For the purpose of enhancing cooperation between Eurojust and the Commission, Eurojust may agree on necessary practical arrangements with the Commission.

\textit{Article 12}
\textit{Eurojust national coordination system}

1. Each Member State shall designate one or more national correspondents for Eurojust.

2. Each Member State shall, before 04 June 2011, set up a Eurojust national coordination system to ensure coordination of the work carried out by:
(a) the national correspondents for Eurojust;

(b) the national correspondent for Eurojust for terrorism matters;

(c) the national correspondent for the European Judicial Network and up to three other contact points of the European Judicial Network;

(d) national members or contact points of the Network for Joint Investigation Teams and of the networks set up by Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes\(^1\), Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime\(^2\) and by Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption\(^3\).

3. The persons referred to in paragraphs 1 and 2 shall maintain their position and status under national law.

4. The national correspondents for Eurojust shall be responsible for the functioning of the Eurojust national coordination system. When several correspondents for Eurojust are designated, one of them shall be responsible for the functioning of the Eurojust national coordination system.

5. The Eurojust national coordination system shall facilitate, within the Member State, the carrying out of the tasks of Eurojust, in particular by:

(a) ensuring that the Case Management System referred to in Article 16 receives information related to the Member State concerned in an efficient and reliable manner;

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\(^1\) OJ L 167, 26.6.2002, p. 1
\(^3\) OJ L301 of 12.11.2008, p. 38
(b) assisting in determining whether a case should be dealt with with the assistance of Eurojust or of the European Judicial Network;

(c) assisting the national member to identify relevant authorities for the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition;

(d) maintaining close relations with the Europol National Unit.

6. In order to meet the objectives referred to in paragraph 5, persons referred to in paragraph 1 and paragraph 2(a), (b) and (c) shall, and persons referred to in paragraph 2(d) may, be connected to the Case Management System in accordance with this Article and Articles 16, 16a, 16b and 18 as well as with the Rules of Procedure of Eurojust. The connection to the Case Management System shall be at the charge of the general budget of the European Union.

7. Nothing in this Article shall be construed to affect direct contacts between competent judicial authorities as provided for in instruments on judicial cooperation, such as Article 6 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. Relations between the national member and national correspondents shall not preclude direct contacts between the national member and his competent authorities.

Article 13

Exchanges of information with the Member States and between national members

1. The competent authorities of the Member States shall exchange with Eurojust any information necessary for the performance of its tasks in accordance with Articles 4 and 5 as well as with the rules on data protection set out in this Decision. This shall at least include the information referred to in paragraphs 5, 6 and 7.

2. The transmission of information to Eurojust shall be interpreted as a request for the assistance of Eurojust in the case concerned only if so specified by a competent authority.
3. The national members of Eurojust shall be empowered to exchange any information necessary for the performance of the tasks of Eurojust, without prior authorisation, among themselves or with their Member State's competent authorities. In particular national members shall be promptly informed of a case which concerns them.

4. This Article shall be without prejudice to other obligations regarding the transmission of information to Eurojust, including Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences\(^1\)

5. Member States shall ensure that national members are informed of the setting up of a joint investigation team, whether it is set up under Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union or under Framework Decision 2002/465/JHA\(^2\), and of the results of the work of such teams.

6. Member States shall ensure that their national member is informed without undue delay of any case in which at least three Member States are directly involved and for which requests for or decisions on judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition, have been transmitted to at least two Member States and

(a) the offence involved is punishable in the requesting or issuing Member State by a custodial sentence or a detention order for a maximum period of at least five or six years, to be decided by the Member State concerned, and is included in the following list:

(i) trafficking in human beings;

(ii) sexual exploitation of children and child pornography;

(iii) drug trafficking;

\(^1\) OJ L 167, 26.6.2002, p. 1
\(^2\) OJ L 253, 29.9.2005, p. 22
(iv) trafficking in firearms, their parts and components and ammunition;

(v) corruption;

(vi) fraud affecting the financial interests of the European Communities;

(vii) counterfeiting of the euro;

(viii) money laundering;

(ix) attacks against information systems;

or

(b) there are factual indications that a criminal organisation is involved;

or

(c) there are indications that the case may have a serious cross-border dimension or repercussions at European Union level or that it might affect Member States other than those directly involved.

7. Member States shall ensure that their national member is informed of:

(a) cases where conflicts of jurisdiction have arisen or are likely to arise;

(b) controlled deliveries affecting at least three States, at least two of which are Member States;

(c) repeated difficulties or refusals regarding the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition.

8. National authorities shall not be obliged in a particular case to supply information if this would mean:

(a) harming essential national security interests; or

(b) jeopardising the safety of individuals.
9. This Article shall be without prejudice to conditions set in bilateral or multilateral agreements or arrangements between Member States and third countries including any conditions set by third countries concerning the use of information once supplied.

10. Information transmitted to Eurojust pursuant to paragraphs 5, 6 and 7 shall at least include, where available, the types of information contained in the list provided for in the Annex.

11. Information referred to in this Article shall be transmitted to Eurojust in a structured way.

12. By 04 June 2014\(^1\), the Commission shall establish, on the basis of information transmitted by Eurojust, a report on the implementation of this Article, accompanied by any proposal it may deem appropriate, including with a view to considering an amendment of paragraphs 5, 6 and 7 and the Annex.

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**Article 13a**

*Information provided by Eurojust to competent national authorities*

1. Eurojust shall provide competent national authorities with information and feedback on the results of the processing of information, including the existence of links with cases already stored in the Case Management System.

2. Furthermore, where a competent national authority requests Eurojust to provide it with information, Eurojust shall transmit it in the timeframe requested by that authority.

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\(^1\) OJ L 253 of 29.09.2009, p. 22
Article 14

Processing of personal data

1. Insofar as it is necessary to achieve its objectives, Eurojust may, within the framework of its competence and in order to carry out its tasks, process personal data, by automated means or in structured manual files.

2. Eurojust shall take the necessary measures to guarantee a level of protection for personal data at least equivalent to that resulting from the application of the principles of the Council of Europe Convention of 28 January 1981 and subsequent amendments thereto where they are in force in the Member States.

3. Personal data processed by Eurojust shall be adequate, relevant and not excessive in relation to the purpose of the processing, and, taking into account the information provided by the competent authorities of the Member States or other partners in accordance with Art. 13, 26 and 26a accurate and up-to-date. Personal data processed by Eurojust shall be processed fairly and lawfully.

Article 15

Restrictions on the processing of personal data

1. When processing data in accordance with Article 14(1), Eurojust may process only the following personal data on persons who, under the national legislation of the Member States concerned are suspected of having committed or having taken part in a criminal offence in respect of which Eurojust is competent or who have been convicted of such an offence:

(a) surname, maiden name, given names and any alias or assumed names;

(b) date and place of birth;

(c) nationality;

(d) sex;
(e) place of residence, profession and whereabouts of the person concerned;

(f) social security numbers, driving licences, identification documents and passport data;

(g) information concerning legal persons if it includes information relating to identified or identifiable individuals who are the subject of a judicial investigation or prosecution;

(h) bank accounts and accounts with other financial institutions;

(i) description and nature of the alleged offences, the date on which they were committed, the criminal category of the offences and the progress of the investigations;

(j) the facts pointing to an international extension of the case;

(k) details relating to alleged membership of a criminal organisation;

(l) telephone numbers, e-mail addresses and data referred to in Article 2(2)(a) of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks;

(m) vehicle registration data;

(n) DNA profiles established from the non-coding part of DNA, photographs and fingerprints.

2. When processing data in accordance with Art. 14(1), Eurojust may process only the following personal data on persons who, under the national legislation of the Member States concerned, are regarded as witnesses or victims in a criminal investigation or prosecution regarding one or more of the types of crime and the offences defined in Art. 4:

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1 OJ L 105, 13.4.2006, p. 54
(a) surname, maiden name, given names and any alias or assumed names;

(b) date and place of birth;

(c) nationality;

(d) sex;

(e) place of residence, profession and whereabouts of the person concerned;

(f) the description and nature of the offences involving them, the date on which they were committed, the criminal category of the offences and the progress of the investigations.

3. However, in exceptional cases, Eurojust may also, for a limited period of time, process other personal data relating to the circumstances of an offence where they are immediately relevant to and included in ongoing investigations which Eurojust is helping to coordinate, provided that the processing of such specific data is in accordance with Articles 14 and 21. The Data Protection Officer referred to in Article 17 shall be informed immediately of recourse to this paragraph. Where such other data refer to witnesses or victims within the meaning of paragraph 2, the decision to process them shall be taken jointly by at least two national members.

4. Personal data, processed by automated or other means, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning health or sex life may be processed by Eurojust only when such data are necessary for the national investigations concerned as well as for coordination within Eurojust. The Data Protection Officer shall be informed immediately of recourse to this paragraph. Such data may not be processed in the Index referred to in Art. 16(1). Where such other data refer to witnesses or victims within the meaning of paragraph 2, the decision to process them shall be taken by the College.
Article 16  
Case Management System, index and temporary work files

1. In accordance with this Decision, Eurojust shall establish a Case Management System composed of temporary work files and of an index which contain personal and non-personal data.

2. The Case Management System shall be intended to:

   (a) support the management and coordination of investigations and prosecutions for which Eurojust is providing assistance, in particular by the cross-referencing of information;

   (b) facilitate access to information on ongoing investigations and prosecutions;

   (c) facilitate the monitoring of lawfulness and compliance with the provisions of this Decision concerning the processing of personal data.

3. The Case Management System, in so far as this is in conformity with rules on data protection contained in this Decision, may be linked to the secure telecommunications connection referred to in Article 9 of Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.

4. The index shall contain references to temporary work files processed within the framework of Eurojust and may contain no personal data other than those referred to in Article 15(1)(a) to (i), (k) and (m) and in Article 15(2).

5. In the performance of their duties in accordance with this Decision, the national members of Eurojust may process data on the individual cases on which they are working in a temporary work file. They shall allow the Data Protection Officer to have access to the work file. The Data Protection Officer shall be informed by the national member concerned of the opening of each new temporary work file that contains personal data.

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6. For the processing of case related personal data, Eurojust may not establish any automated data file other than the Case Management System.

Article 16a
Functioning of temporary work files and the index

1. A temporary work file shall be opened by the national member concerned for every case with respect to which information is transmitted to him in so far as this transmission is in accordance with this Decision or with instruments referred to in Article 13(4). The national member shall be responsible for the management of the temporary work files which he has opened.

2. The national member who has opened a temporary work file shall decide, on a case-by-case basis, whether to keep the temporary work file restricted or to give access to it or to parts of it, where necessary to enable Eurojust to carry out its tasks, to other national members or to authorised Eurojust staff.

3. The national member who has opened a temporary work file shall decide which information related to this temporary work file shall be introduced in the index.

Article 16b
Access to the Case Management System at national level

1. Persons referred to in Article 12(2) in so far as they are connected to the Case Management System in accordance with Article 12(6) may only have access to:

   (a) the index, unless the national member who has decided to introduce the data in the index expressly denied such access;

   (b) temporary work files opened or managed by the national member of their Member State;
2. The national member shall, within the limitations provided for in paragraph 1, decide on the extent of access to the temporary work files which is granted in his Member State to persons referred to in Article 12(2) in so far as they are connected to the Case Management System in accordance with Article 12(6).

3. Each Member State shall decide, after consultation with its national member, on the extent of access to the index which is granted in that Member State to persons referred to in Article 12(2) in so far as they are connected to the Case Management System in accordance with Article 12(6). Member States shall notify Eurojust and the General Secretariat of the Council of their decision regarding the implementation of this paragraph so that the latter can inform the other Member States.

However, persons referred to in Article 12(2), in so far as they are connected to the Case Management System in accordance with Article 12(6), shall at least have access to the index to the extent necessary to access the temporary work files to which they have been granted access in accordance with paragraph 2 of this Article.

4. By 04 June 2013, Eurojust shall report to the Council and the Commission on the implementation of paragraph 3. Each Member State shall consider, on the basis of that report, the opportunity to review the extent of access provided in accordance with paragraph 3.
Article 17

Data Protection Officer

1. Eurojust shall have a specially appointed Data Protection Officer, who shall be a member of the staff. Within that framework, he or she shall be under the direct authority of the College. In the performance of the duties referred to in this article, he shall act independently.

2. The Data Protection Officer shall in particular have the following tasks:

   (a) ensuring, in an independent manner, lawfulness and compliance with the provisions of this Decision concerning the processing of personal data;

   (b) ensuring that a written record of the transmission and receipt, for the purposes of Art.19(3) in particular, of personal data is kept in accordance with the provisions to be laid down in the rules of procedure, under the security conditions laid down in Art. 22;

   (c) ensuring that data subjects are informed of their rights under this Decision at their request.

3. In the performance of his tasks, the Data Protection Officer shall have access to all the data processed by Eurojust and to all Eurojust premises.

4. When he finds that in his view processing has not complied with this Decision, the Data Protection Officer shall:

   (a) inform the College, which shall acknowledge receipt of the information;

   (b) refer the matter to the JSB if the College has not resolved the non-compliance of the processing within a reasonable time.
Article 18

Authorised access to personal data

Only national members, their deputies and their assistants referred to in Article 2(2), persons referred to in Article 12(2) in so far as they are connected to the Case Management System in accordance with Article 12(6) and authorised Eurojust staff may, for the purpose of achieving Eurojust's objectives and within the limits provided for in Articles 16, 16a and 16b, have access to personal data processed by Eurojust.

Article 19

Right of access to personal data

1. Every individual shall be entitled to have access to personal data concerning him processed by Eurojust under the conditions laid down in this article.

2. Any individual wishing to exercise his right to have access to data concerning him which are stored at Eurojust, or to have them checked in accordance with Art. 20, may make a request to that effect free of charge in the Member State of his choice, to the authority appointed for that purpose in that Member State, and that authority shall refer it to Eurojust without delay.

3. The right of any individual to have access to personal data concerning him or to have them checked shall be exercised in accordance with the laws and procedures of the Member State in which the individual has made his request. If, however, Eurojust can ascertain which authority in a State transmitted the data in question, that authority may require that the right of access be exercised in accordance with the rules of the law of that Member State.
4. Access to personal data shall be denied if:

(a) such access may jeopardise one of Eurojust's activities;

(b) such access may jeopardise any national investigation;

(c) such access may jeopardise the rights and freedoms of third parties.

5. The decision to grant this right of access shall take due account of the status, with regard to the data stored by Eurojust, of those individuals submitting the request.

6. The national members concerned by the request shall deal with it and reach a decision on Eurojust's behalf. The request shall be dealt with in full within three months of receipt. Where the members are not in agreement, they shall refer the matter to the College, which shall take its decision on the request by a two-thirds majority.

7. If access is denied or if no personal data concerning the applicant are processed by Eurojust, the latter shall notify the applicant that it has carried out checks, without giving any information which could reveal whether or not the applicant is known.

8. If the applicant is not satisfied with the reply given to his request, he may appeal against that decision before the JSB. The JSB shall examine whether or not the decision taken by Eurojust is in conformity with this Decision.

9. The competent law enforcement authorities of the Member States shall be consulted by Eurojust before a decision is taken. They shall subsequently be notified of its contents through the national members concerned.
Article 20

Correction and deletion of personal data

1. In accordance with Art. 19(3), every individual shall be entitled to ask Eurojust to correct, block or delete data concerning him if they are incorrect or incomplete or if their input or storage contravenes this Decision.

2. Eurojust shall notify the applicant if it corrects, blocks or deletes the data concerning him. If the applicant is not satisfied with Eurojust's reply, he may refer the matter to the JSB within thirty days of receiving Eurojust's decision.

3. At the request of a MS's competent authorities, national member or national correspondent, if any, and under their responsibility, Eurojust shall, in accordance with its rules of procedure, correct or delete personal data being processed by Eurojust which were transmitted or entered by that Member State, its national member or its national correspondent. The Member States' competent authorities and Eurojust, including the national member or national correspondent, if any, shall in this context ensure that the principles laid down in Art. 14(2) and (3) and in Art.15(4) are complied with.

4. If it emerges that personal data processed by Eurojust are incorrect or incomplete or that their input or storage contravenes the provisions of this Decision, Eurojust shall block, correct or delete such data.

5. In the cases referred to in §3 and 4, all the suppliers and addressees of such data shall be notified immediately. In accordance with the rules applicable to them, the addressees, shall then correct, block or delete those data in their own systems.
Article 21

Time limits for the storage of personal data

1. Personal data processed by Eurojust shall be stored by Eurojust for only as long as is necessary for the achievement of its objectives.

2. The personal data referred to in Art. 14(1) which have been processed by Eurojust may not be stored beyond the first applicable among the following dates:

(a) the date on which prosecution is barred under the statute of limitations of all the Member States concerned by the investigation and prosecutions;

(aa) the date on which the person has been acquitted and the decision became final;

(b) three years after the date on which the judicial decision of the last of the Member States concerned by the investigation or prosecutions became final;

(c) the date on which Eurojust and the Member States concerned mutually established or agreed that it was no longer necessary for Eurojust to coordinate the investigation and prosecutions, unless there is an obligation to provide Eurojust with this information in accordance with Article 13(6) and (7) or according to instruments referred to in Article 13(4);

(d) three years after the date on which data were transmitted according to Article 13(6) and (7) or according to instruments referred to in Article 13(4).

3. (a) Observance of the storage periods referred to in paragraph 2(a),(b),(c) and (d) shall be reviewed constantly by appropriate automated processing. Nevertheless, a review of the need to store the data shall be carried out every three years after they were entered.
(b) When one of the storage deadlines referred to in paragraph 2(a), (b), (c) and (d) has expired, Eurojust shall review the need to store the data longer in order to enable it to achieve its objectives and it may decide by way of derogation to store those data until the following review. However, once prosecution is statute barred in all Member States concerned as referred to in paragraph 2(a), data may only be stored if they are necessary in order for Eurojust to provide assistance in accordance with this Decision.

(c) Where data has been stored by way of derogation pursuant to point (b) a review of the need to store those data shall take place every three years.

4. Where a file exists containing non-automated and unstructured data, once the deadline for storage of the last item of automated data from the file has elapsed all the documents in the file shall be returned to the authority which supplied them and any copies shall be destroyed.

5. Where Eurojust has coordinated an investigation or prosecutions, the national members concerned shall inform Eurojust and the other Member States concerned of all the judicial decisions relating to the case which have become final in order, inter alia, that § 2(b) may be applied.
Article 22

Data security

1. Eurojust and, insofar as it is concerned by data transmitted from Eurojust, each Member State, shall, as regards the processing of personal data within the framework of this Decision, protect personal data against accidental or unlawful destruction, accidental loss or unauthorised disclosure, alteration and access or any other unauthorised form of processing.

2. The rules of procedure shall contain the technical measures and the organisational arrangements needed to implement this Decision with regard to data security and in particular measures designed to:

   (a) deny unauthorised persons access to data processing equipment used for processing personal data;

   (b) prevent the unauthorised reading, copying, modification or removal of data media;

   (c) prevent the unauthorised input of data and the unauthorised inspection, modification or deletion of stored personal data;

   (d) prevent the use of automated data processing systems by unauthorised persons using data communication equipment;

   (e) ensure that persons authorised to use an automated data processing system only have access to the data covered by their access authorisation;

   (f) ensure that it is possible to verify and establish to which bodies personal data are transmitted when data are communicated;

   (g) ensure that it is subsequently possible to verify and establish which personal data have been input into automated data processing systems and when and by whom the data were input;

   (h) prevent unauthorised reading, copying, modification or deletion of personal data during transfers of personal data or during transportation of data media.
Article 23

Joint Supervisory Body (JSB)

1. An independent JSB shall be established to monitor collectively the Eurojust activities referred to in Art.14 to 22, 26, 26a and 27 in order to ensure that the processing of personal data is carried out in accordance with this Decision. In order to fulfil these tasks, the JSB shall be entitled to have full access to all files where such personal data are processed. Eurojust shall provide the JSB with all information from such files that it requests and shall assist that body in its tasks by every other means. The Joint Supervisory Body shall meet at least once in each half year. It shall also meet within the three months following the lodging of an appeal referred to in Article 19(8) or within three months following the date when a case was referred to it in accordance with Article 20(2). The Joint Supervisory Body may also be convened by its chairman when at least two Member States so request. In order to set up the JSB, each Member State, acting in accordance with its legal system, shall appoint a judge who is not a member of Eurojust, or, if its constitutional or national system so requires a person holding an office giving him sufficient independence, for inclusion on the list of judges who may sit on the JSB as members or ad hoc judges. No such appointment shall be for less than three years. Revocation of the appointment shall be governed by the principles for removal applicable under the national law of the Member State of origin. Appointment and removal shall be communicated to both the Council General Secretariat and Eurojust.

2. The JSB shall be composed of 3 permanent members and, as provided for in §4, ad hoc judges.

3. A judge appointed by a Member State shall become a permanent member after being elected by the plenary meeting of the persons appointed by the Member States in accordance with paragraph 1, and shall remain a permanent member for three years. Elections shall be held yearly for one permanent member of the Joint Supervisory Body by means of secret ballot. The Joint Supervisory Body shall be chaired by the member who is in his third year of mandate after elections. Permanent members may be re-elected. Appointees wishing to be elected shall present their candidacy in writing to the Secretariat of the Joint Supervisory Body ten days before the meeting in which the election is to take place.
4. One or more ad hoc judges shall also have seats, but only for the duration of the examination of an appeal concerning personal data from the Member State which has appointed them.

4a. The JSB shall adopt in its rules of procedure measures necessary to implement paragraphs 3 and 4.

5. The composition of the JSB shall remain the same for the duration of an appeals procedure even if the permanent members have reached the end of their term of office pursuant to § 3.

6. Each member and ad hoc judge shall be entitled to one vote. In the event of a tied vote, the chairman shall have the casting vote.

7. The JSB shall examine appeals submitted to it in accordance with Art. 19(8) and Art.20(2) and carry out controls in accordance with §1, first sub§, of this article. If the JSB considers that a decision taken by Eurojust or the processing of data by it is not compatible with this Decision, the matter shall be referred to Eurojust, which shall accept the decision of the JSB.

8. Decisions of the JSB shall be final and binding on Eurojust.

9. The persons appointed by the Member States in accordance with §1, third sub§, presided over by the chairman of the JSB, shall adopt internal rules of procedure which, for the purpose of the examination of appeals, lay down objective criteria for the appointment of the Body's members.

10. Secretariat costs shall be borne by the Eurojust budget. The secretariat of the JSB shall enjoy independence in the discharge of its function within the Eurojust secretariat. The Secretariat of the Joint Supervisory Body may rely upon the expertise of the secretariat established by Decision 2000/641/JHA¹.

11. The members of the JSB shall be subject to the obligation of confidentiality laid down in Art. 25.

12. The JSB shall submit an annual report to the Council.

*Article 24*

*Liability for unauthorised or incorrect processing of data*

1. Eurojust shall be liable, in accordance with the national law of the Member State where its headquarters are situated, for any damage caused to an individual which results from unauthorised or incorrect processing of data carried out by it.

2. Complaints against Eurojust pursuant to the liability referred to in §1 shall be heard by the courts of the Member State where its headquarters are situated.

3. Each Member State shall be liable, in accordance with its national law, for any damage caused to an individual, which results from unauthorised or incorrect processing carried out by it of data which were communicated to Eurojust.

*Article 25*

*Confidentiality*

1. 1. The national members, their deputies and their assistants referred to in Article 2(2), Eurojust staff, national correspondents and the Data Protection Officer shall be bound by an obligation of confidentiality, without prejudice to Article 2(4).

2. The obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust.

3. The obligation of confidentiality shall also apply after leaving office or employment or after the termination of the activities of the persons referred to in § 1 and 2.

4. Without prejudice to Article 2(4), the obligation of confidentiality shall apply to all information received by Eurojust.
Article 25a

Cooperation with the European Judicial Network

and other networks of the European Union involved in cooperation in criminal matters

1. Eurojust and the European Judicial Network shall maintain privileged relations with each other, based on consultation and complementarity, especially between the national member, the European Judicial Network contact points of the same Member State and the national correspondents for Eurojust and the European Judicial Network. In order to ensure efficient cooperation, the following measures shall be taken:

(a) national members shall, on a case-by-case basis, inform the European Judicial Network contact points of all cases which they consider the Network to be in a better position to deal with;

(b) the Secretariat of the European Judicial Network shall form part of the staff of Eurojust. It shall function as a separate unit. It may draw on the administrative resources of Eurojust which are necessary for the performance of the European Judicial Network's tasks, including for covering the costs of the plenary meetings of the Network. Where plenary meetings are held at the premises of the Council in Brussels, the costs may only cover travel expenses and costs for interpretation. Where plenary meetings are held in the Member State holding the Presidency of the Council, the costs may only cover part of the overall costs of the meeting;

(c) European Judicial Network contact points may be invited on a case-by-case basis to attend Eurojust meetings.
2. Without prejudice to Article 4(1), the Secretariat of the Network for Joint Investigation Teams and of the network set up by Decision 2002/494/JHA shall form part of the staff of Eurojust. These secretariats shall function as separate units. They may draw on the administrative resources of Eurojust which are necessary for the performance of their tasks. Coordination between the secretariats shall be ensured by Eurojust.

This paragraph shall apply to the secretariat of any new network set up by a decision of the Council where that decision provides that the secretariat shall be provided by Eurojust.

3. The network set up by Decision 2008/852/JHA may request that Eurojust provide a secretariat to the network. If such request is made, paragraph 2 shall apply.

Article 26

Relations with Community or Union related institutions, bodies and agencies

1. Insofar as is relevant for the performance of its tasks, Eurojust may establish and maintain cooperative relations with the institutions, bodies and agencies set up by, or on the basis of, the Treaties establishing the European Communities or the Treaty on European Union. Eurojust shall establish and maintain cooperative relations with at least:

(a) Europol;

(b) OLAF;

(c) the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex);

(d) the Council, in particular its Joint Situation Centre.
Eurojust shall also establish and maintain cooperative relations with the European Judicial Training Network.

2. Eurojust may conclude agreements or working arrangements with the entities referred to in paragraph 1. Such agreements or working arrangements may, in particular, concern the exchange of information, including personal data, and the secondment of liaison officers to Eurojust. Such agreements or working arrangements may only be concluded after consultation by Eurojust with the Joint Supervisory Body concerning the provisions on data protection and after the approval by the Council, acting by qualified majority. Eurojust shall inform the Council of any plans it has for entering into any such negotiations and the Council may draw any conclusions it deems appropriate.

3. Prior to the entry into force of an agreement or arrangement as referred to in paragraph 2, Eurojust may directly receive and use information, including personal data, from the entities referred to in paragraph 1, in so far as this is necessary for the legitimate performance of its tasks, and it may directly transmit information, including personal data, to such entities, in so far as this is necessary for the legitimate performance of the recipient's tasks and in accordance with the rules on data protection provided in this Decision.

4. OLAF may contribute to Eurojust's work to coordinate investigations and prosecution procedures regarding the protection of the financial interests of the European Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation.

5. For purposes of the receipt and transmission of information between Eurojust and OLAF, and without prejudice to Article 9, Member States shall ensure that the national members of Eurojust shall be regarded as competent authorities of the Member States solely for the purposes of Regulation (EC) No 1073/1999 and
Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)¹. The exchange of information between OLAF and national members shall be without prejudice to the information which must be given to other competent authorities under those Regulations.

**Article 26a**

*Relations with third States and organisations*

1. In so far as is required for the performance of its tasks, Eurojust may establish and maintain cooperative relations with the following entities:

   (a) third States;

   (b) organisations such as:

      (i) international organisations and their subordinate bodies governed by public law;

      (ii) other bodies governed by public law which are based on an agreement between two or more States; and

      (iii) the International Criminal Police Organisation (Interpol).

2. Eurojust may conclude agreements with the entities referred to in paragraph 1. Such agreements may, in particular, concern the exchange of information, including personal data, and the secondment of liaison officers or liaison magistrates to Eurojust. Such agreements may only be concluded after consultation by Eurojust with the Joint Supervisory Body concerning the provisions on data protection and after the approval by the Council, acting by qualified majority. Eurojust shall inform the Council of any plans it has for entering into any such negotiations and the Council may draw any conclusions it deems appropriate.

3. Agreements referred to in paragraph 2 containing provisions on the exchange of personal data may only be concluded if the entity concerned is subject to the Council of Europe Convention of 28 January 1981 or after an assessment confirming the existence of an adequate level of data protection ensured by that entity.

4. Agreements referred to in paragraph 2 shall include provisions on the monitoring of their implementation, including implementation of the rules on data protection.

5. Prior to the entry into force of the agreements referred to in paragraph 2, Eurojust may directly receive information, including personal data in so far as this is necessary for the legitimate performance of its tasks.

6. Prior to the entry into force of the agreements referred to in paragraph 2, Eurojust may under the conditions laid down in Article 27(1), directly transmit information, except for personal data, to these entities, in so far as this is necessary for the legitimate performance of the recipient's tasks.

7. Eurojust may, under the conditions laid down in Article 27(1), transmit personal data to the entities referred to in paragraph 1, where:

(a) this is necessary in individual cases for the purposes of preventing or combating criminal offences for which Eurojust is competent, and

(b) Eurojust has concluded an agreement as referred to in paragraph 2 with the entity concerned which has entered into force and which permits the transmission of such data.

8. Any subsequent failure, or substantial likelihood of failure, on the part of the entities referred to in paragraph 1 to meet the conditions referred to in paragraph 3, shall immediately be communicated by Eurojust to the Joint Supervisory Body and the Member States concerned. The Joint Supervisory Body may prevent the further exchange of personal data with the relevant entities until it is satisfied that adequate remedies have been provided.
9. However, even if the conditions referred to in paragraph 7 are not fulfilled, a national member may, acting in his capacity as a competent national authority and in conformity with the provisions of his own national law, by way of exception and with the sole aim of taking urgent measures to counter imminent serious danger threatening a person or public security, carry out an exchange of information involving personal data. The national member shall be responsible for the legality of authorising the communication. The national member shall keep a record of communications of data and of the grounds for such communications. The communication of data shall be authorised only if the recipient gives an undertaking that the data will be used only for the purpose for which they were communicated.

Article 27

Transmission of data

1. Before Eurojust exchanges any information with the entities referred to in Article 26a, the national member of the Member State which submitted the information shall give his consent to the transfer of that information. In appropriate cases the national member shall consult the competent authorities of the Member States.

2. Eurojust shall be responsible for the legality of the transmission of data. Eurojust shall keep a record of all transmissions of data under Articles 26 and 26a and of the grounds for such transmissions. Data shall only be transmitted if the recipient gives an undertaking that the data will be used only for the purpose for which they were transmitted.
Article 27a

Liaison magistrates posted to third States

1. For the purpose of facilitating judicial cooperation with third States in cases in which Eurojust is providing assistance in accordance with this Decision, the College may post liaison magistrates to a third State, subject to an agreement as referred to in Article 26a with that third State. Before negotiations are entered into with a third State, the Council, acting by qualified majority, shall give its approval. Eurojust shall inform the Council of any plans it has for entering into any such negotiations and the Council may draw any conclusions it deems appropriate.

2. The liaison magistrate referred to in paragraph 1 is required to have experience of working with Eurojust and adequate knowledge of judicial cooperation and how Eurojust operates. The posting of a liaison magistrate on behalf of Eurojust shall be subject to the prior consent of the magistrate and of his Member State.

3. Where the liaison magistrate posted by Eurojust is selected among national members, deputies or assistants:

   (i) he shall be replaced in his function as a national member, deputy or assistant, by the Member State;

   (ii) he ceases to be entitled to exercise the powers granted to him in accordance with Articles 9a to 9e.
4. Without prejudice to Article 110 of the Staff Regulations of Officials of the European Communities laid down by Regulation (EEC, Euratom, ECSC) No 259/68\(^1\), the College shall draw up rules on the posting of liaison magistrates and adopt the necessary implementing arrangements in this respect in consultation with the Commission.

5. The activities of liaison magistrates posted by Eurojust shall be the subject of supervision by the Joint Supervisory Body. The liaison magistrates shall report to the College, which shall inform the European Parliament and the Council in the annual report and in an appropriate manner of their activities. The liaison magistrates shall inform national members and national competent authorities of all cases concerning their Member State.

6. Competent authorities of the Member States and liaison magistrates referred to in paragraph 1 may contact each other directly. In such cases, the liaison magistrate shall inform the national member concerned of such contacts.

7. The liaison magistrates referred to in paragraph 1 shall be connected to the Case Management System.

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Article 27b

Requests for judicial cooperation to and from third States

1. Eurojust may, with the agreement of the Member States concerned, coordinate the execution of requests for judicial cooperation issued by a third State where these requests are part of the same investigation and require execution in at least two Member States. Requests referred to in this paragraph may also be transmitted to Eurojust by a competent national authority.

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\(^1\) OJ L 56, 4.3.1968, p. 1
2. In case of urgency and in accordance with Article 5a, the OCC may receive and process requests referred to in paragraph 1 of this Article and issued by a third State which has concluded a cooperation agreement with Eurojust.

3. Without prejudice to Article 3(2), where requests for judicial cooperation, which relate to the same investigation and require execution in a third State, are made, Eurojust may also, with the agreement of the Member States concerned, facilitate judicial cooperation with that third State.

4. Requests referred to in paragraphs 1, 2 and 3 may be transmitted through Eurojust if it is in conformity with the instruments applicable to the relationship between that third State and the European Union or the Member States concerned.

Article 27c

Liability other than liability for unauthorised or incorrect processing of data

1. Eurojust's contractual liability shall be governed by the law applicable to the contract in question.

2. In the case of non-contractual liability, Eurojust shall, independently of any liability under Article 24, make good any damage caused through the fault of the College or the staff of Eurojust in the performance of their duties in so far as it may be imputed to them and regardless of the different procedures for claiming damages which exist under the law of the Member States.

3. Paragraph 2 shall also apply to damage caused through the fault of a national member, a deputy or an assistant in the performance of his duties. However, when he is acting on the basis of the powers granted to him pursuant to Articles 9a to 9e, his Member State of origin shall reimburse Eurojust the sums which Eurojust has paid to make good such damage.

4. The injured party shall have the right to demand that Eurojust refrain from taking, or cease, any action.
5. The national courts of the Member States competent to deal with disputes involving Eurojust's liability as referred to in this Article shall be determined by reference to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters\(^1\).

\textit{Article 28}

\textit{Organisation and operation}

1. The College shall be responsible for the organisation and operation of Eurojust.

2. The College shall elect a President from among the national members and may, if it considers it necessary, elect at most two Vice-Presidents. The result of the election shall be submitted to the Council acting by qualified majority, for its approval.

3. The President shall exercise his duties on behalf of the College and under its authority, direct its work and monitor the daily management ensured by the Administrative Director. The rules of procedure shall specify the cases in which his decisions or actions shall require prior authorisation or a report to the College.

4. The term of office of the President shall be three years. He may be re-elected once. The term of office of any Vice-President(s) shall be governed by the rules of procedure.

5. Eurojust shall be assisted by a secretariat headed by an Administrative Director.

6. Eurojust shall exercise over its staff the powers devolved to the Appointing Authority. The College shall adopt appropriate rules for the implementation of this § in accordance with the rules of procedure.

\(^1\) OJ L 12, 16.1.2001, p. 1
Article 29

Administrative Director

1. The Administrative Director of Eurojust shall be appointed by two-thirds majority by the College. The College shall set up a selection board which, following a call for applications, shall establish a list of candidates from among whom the College shall choose the Administrative Director. The Commission shall be entitled to participate in the selection process and to sit on the selection board.

2. The term of office of the Administrative Director shall be five years. It may be extended once without a need for a call for applications, provided that the College so decides by a three-fourths majority and appoints the Administrative Director with the same majority.

3. The Administrative Director shall be subject to the rules and regulations applicable to officials and other servants of the European Communities.

4. The Administrative Director shall work under the authority of the College and its President, acting in accordance with Article 28(3). He may be removed from office by the College by a two-thirds majority.

5. The Administrative Director shall be responsible, under the supervision of the President, for the day-to-day administration of Eurojust and for staff management. To that end, he shall be responsible for establishing and implementing, in cooperation with the College, an effective monitoring and evaluation procedure relating to the performance of Eurojust's administration in terms of achieving its objectives. The Administrative Director shall report regularly to the College on the results of this monitoring.
Article 30

Staff

1. Eurojust staff shall be subject to the rules and regulations applicable to the officials and other servants of the European Communities, particularly as regards their recruitment and status.

2. Eurojust staff shall consist of staff recruited according to the rules and regulations referred to in §1, taking into account all the criteria referred to in Article 27 of the Staff Regulations of Officials of the European Communities laid down by Regulation (EEC, Euratom, ECSC) No 259/68, including their geographical distribution. They shall have the status of permanent staff, temporary staff or local staff. At the request of the Administrative Director, and in agreement with the President on behalf of the College, Community officials may be seconded to Eurojust by the Community institutions as temporary staff. Member States may second national experts to Eurojust who may also assist the national member. The College shall adopt the necessary implementing arrangements for seconded national experts.

3. Under the authority of the College the staff shall carry out its tasks bearing in mind the objectives and mandate of Eurojust, without seeking or accepting instructions from any government, authority, organisation or person extraneous to Eurojust without prejudice to Articles 25a(1)(c) and 25a(2).

Article 31

Assistance with interpreting and translation

1. The official linguistic arrangements of the Union shall apply to Eurojust proceedings.

2. The annual report to the Council, referred to in the second sub§ of Art. 32(1), shall be drawn up in the official languages of the Union institutions.
Article 32

Informing the European Parliament, the Council and the Commission

1. The President, on behalf of the College, shall report to the Council in writing every year on the activities and management, including budgetary management, of Eurojust.

To that end, the College shall prepare an annual report on the activities of Eurojust and on any criminal policy problems within the Union highlighted as a result of Eurojust's activities. In that report, Eurojust may also make proposals for the improvement of judicial cooperation in criminal matters.

The President shall also submit any report or any other information on the operation of Eurojust which may be required of him by the Council.

2. Each year the Presidency of the Council shall forward a report to the European Parliament on the work carried out by Eurojust and on the activities of the JSB.

3. The Commission or the Council may seek Eurojust's opinion on all draft instruments prepared under Title VI of the Treaty.

Article 33

Finance

1. The salaries and emoluments of the national members, deputies and assistants referred to in Article 2(2) shall be borne by their Member State of origin.

2. Where national members, deputies and assistants act within the framework of Eurojust's tasks, the relevant expenditure related to these activities shall be regarded as operational expenditure within the meaning of Article 41(3) of the Treaty.
Article 34

Budget

1. Forecasts shall be made of all Eurojust revenue and expenditure for each financial year, which shall be the same as the calendar year. Revenue and expenditure shall be entered in the budget, which shall include the establishment plan which shall be submitted to the budget authority competent for the general budget of the EU. The establishment plan shall consist of posts of a permanent or temporary nature and a reference to national experts seconded, and shall state the number, grade and category of the staff employed by Eurojust for the financial year in question.

2. Revenue and expenditure shall be balanced in the Eurojust budget.

3. Without prejudice to other resources, Eurojust revenue may include a subsidy entered in the general budget of the EU.

4. Eurojust expenditure shall include inter alia expenditure relating to interpreters and translators, expenditure on security, administrative and infrastructure expenditure, operational and rental costs, travel expenses of members of Eurojust and its staff and costs arising from contracts with third parties.
Article 35

Drawing up of the budget

1. Each year the College, on the basis of a draft drawn up by the Administrative Director, shall produce an estimate of revenue and expenditure for Eurojust for the following financial year. This estimate, which shall include a draft establishment plan, shall be forwarded by the College to the Commission by 10 February at the latest. The European Judicial Network and networks referred to in Article 25a(2) shall be informed on the parts related to the activities of their secretariats in due time before the forwarding of the estimate to the Commission.

2. On the basis of the estimate, the Commission shall propose in the preliminary draft general budget of the European Union the amount of the annual subsidy as well as the posts of a permanent or temporary nature and submit this proposal to the budgetary authority in accordance with Article 272 of the Treaty.

3. The budgetary authority shall authorise the appropriations for the subsidy to Eurojust and determine the posts of a permanent or temporary nature within the framework of the Staff Regulations of officials and other Servants of the European Communities.

4. Before the beginning of the financial year, the College of Eurojust shall adopt the budget, including the establishment plan referred to in Article 34(1), third sentence, on the basis of the annual subsidy and posts authorised by the budgetary authority in accordance with paragraph 3 of this Article, adjusting it to the various contributions granted to Eurojust and the funds from other sources.
Article 36

Implementation of the budget and discharge

1. The Administrative Director shall, as authorising officer, implement the Eurojust budget. He shall report to the College on the implementation of the budget.

2. By 1 March at the latest following each financial year, the accounting officer of Eurojust shall communicate the provisional accounts to the Commission's accounting officer and the Court of Auditors together with a report on the budgetary and financial management for that financial year. The Commission's accounting officer shall consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of the general Financial Regulation.

3. Eurojust shall send the report on the budgetary and financial management for the financial year to the European Parliament and the Council by 31 March of the following year.

4. On receipt of the Court of Auditors' observations on Eurojust's provisional accounts, pursuant to Article 129 of the general Financial Regulation, the Administrative Director shall draw up Eurojust's final accounts under his own responsibility and submit them to the College of Eurojust for an opinion.

5. The College of Eurojust shall deliver an opinion on Eurojust's final accounts.

6. The Administrative Director shall, by 1 July at the latest following each financial year, forward the final accounts to the European Parliament, the Council, the Commission and the Court of Auditors, together with the College of Eurojust's opinion.

7. The final accounts shall be published.

8. The Administrative Director shall send the Court of Auditors a reply to its observations by 30 September at the latest. He shall also send this reply to the College of Eurojust.
9. The Administrative Director, acting under the authority of the College of Eurojust and its President, shall submit to the European Parliament at the latter's request any information required for the smooth application of the discharge procedure for the financial year in question, as laid down in Article 146(3) of the general Financial Regulation.

10. The European Parliament, on a recommendation from the Council acting by a qualified majority, shall, before 15 May of year \(N+2\), give a discharge to the Administrative Director in respect of the implementation of the budget for year \(N\).

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**Article 37**

*Financial regulation applicable to the budget*

The financial rules applicable to Eurojust's budget shall be adopted unanimously by the College after the Commission has been consulted. They may not depart from Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities unless specifically required for Eurojust's operation and with the Commission's prior consent.

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**Article 38**

*Audit*

1. The responsibility for putting in place internal control systems and procedures suitable for carrying out his tasks shall lie with the authorising officer.

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2. The College shall appoint an internal auditor who shall be responsible in particular for providing, in accordance with the relevant international standards, an assurance regarding the proper functioning of the systems and procedures for implementing the budget. The internal auditor may not be either the authorising officer or the accountant. The College may ask the Commission's internal auditor to carry out these duties.

3. The auditor shall report his findings and recommendations to Eurojust and submit a copy of the report to the Commission. Eurojust shall, in the light of the auditor's reports, take the necessary measures in response to these recommendations.

4. The rules laid down by Regulation (EC) No 1073/1999 shall apply to Eurojust. The College shall adopt the necessary implementing measures.

**Article 39**

**Access to documents**

On the basis of a proposal by the Administrative Director, the College shall adopt rules for access to Eurojust documents, taking account of the principles and limits stated in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

**Article 39a**

**EU classified information**


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Article 40

Territorial application

This Decision shall apply to Gibraltar, which shall be represented by the national member for the United Kingdom.

Article 41

Reporting

1. Member States shall notify Eurojust and the General Secretariat of the Council of the designation of national members, deputies, assistants as well as persons referred to in Article 12(1) and (2) and of any change to this designation. The General Secretariat of the Council shall keep an updated list of these persons and shall make their names and contact details available to all Member States and to the Commission.

2. The definitive appointment of a national member can not take effect before the day on which the General Secretariat of the Council receives the official notifications referred to in paragraph 1 and Article 9a(3).
Article 41a

Evaluation

1. Before 04 June 2014 and every five years thereafter, the College shall commission an independent external evaluation of the implementation of this Decision as well as of the activities carried out by Eurojust.

2. Each evaluation shall assess the impact of this Decision, Eurojust's performance in terms of achieving the objectives referred to in this Decision as well as the effectiveness and efficiency of Eurojust. The College shall issue specific terms of reference in consultation with the Commission.

3. The evaluation report shall include the evaluation findings and recommendations. This report shall be forwarded to the European Parliament, the Council and the Commission and shall be made public.

Article 42

Transposition

1. If necessary the Member States shall bring their national law into conformity with this Decision at the earliest opportunity and in any case no later than 04 June 2011.

2. The Commission shall at regular intervals examine the implementation by the Member States of Decision 2002/187/JHA as amended and shall submit a report thereon to the European Parliament and to the Council together with, if appropriate, necessary proposals to improve judicial cooperation and the functioning of Eurojust. This shall in particular apply to Eurojust's capacities to support Member States in fighting terrorism.
Article 43

Taking of effect

This Decision shall take effect on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels

For the Council

*The President*
"ANNEX

List referred to in Article 13(10) setting out
the minimum types of information to be transmitted, where available,
to Eurojust pursuant to Article 13(5), (6) and (7)

1. For situations referred to in Article 13(5):
   (a) participating Member States,
   (b) type of offences concerned,
   (c) date of the agreement setting up the team,
   (d) planned duration of the team, including modification of this duration,
   (e) details of the leader of the team for each participating Member State,
   (f) short summary of the results of the joint investigation teams.

2. For situations referred to in Article 13(6):
   (a) data which identify the person, group or entity that is the object of a criminal investigation or prosecution,
(b) Member States concerned,

c) the offence concerned and its circumstances,

d) data related to the requests for, or decisions on, judicial cooperation including regarding instruments giving effect to the principle of mutual recognition, which are issued, including:

(i) date of the request,

(ii) requesting or issuing authority,

(iii) requested or executing authority,

(iv) type of request (measures requested),

(v) whether or not the request has been executed, and if not on what grounds.

3. For situations referred to in Article 13(7)(a):

(a) Member States and competent authorities concerned,

(b) data which identify the person, group or entity that is the object of a criminal investigation or prosecution,

(c) the offence concerned and its circumstances.
4. For situations referred to in Article 13(7)(b):
   (a) Member States and competent authorities concerned,
   (b) data which identify the person, group or entity that is the object of a criminal investigation or prosecution,
   (c) type of delivery,
   (d) type of offence in connection with which the controlled delivery is carried out.

5. For situations referred to in Article 13(7)(c):
   (a) requesting or issuing State,
   (b) requested or executing State,
   (c) description of the difficulties."
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LIST OF INTERVIEWS

Interviews were held with the following persons:

**Eurojust**
Mr. Aled Williams, President of Eurojust, UK national member
Ms. Michele Coninsx, Vice-President of Eurojust, Belgian national member
Mr. Klaus Rackwitz, Administrative Director of Eurojust

**General Secretariat of the Council of the European Union**
Mr. Hans G. Nilsson, Head of Division, Fundamental Rights and Criminal Justice

**European Commission**
Mr. Péter Csonka, Special Advisor DG JUSTICE

**Europol**
Mr. Brian Donald, Head of Unit, Office of the Director
Mr. Dietrich Neumann, Head of Unit, Legal Affairs Unit
Ms. Christa Bauer, Senior Specialist, Operations Department Management Office

**OLAF**
Ms. Ute Stiegel, Office of the Director
Mr. Andrea Venegona
Ms. Simone White
POLICY DEPARTMENT
CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS

Role
Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas
- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents