

Developing Eurojust and Europol
with a view to strengthening the fight against organised crime

Contribution to the joint CRIM/LIBE Committee Hearing on “Adapting European structures and institutions in view of fighting organised crime and money laundering”

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(1) The CRIM and LIBE Committees can only be congratulated on the choice of the subject as organised crime must be regarded as the primary cross-border internal security threat in the EU in terms of the number of victims and the costs to the economy. The terrorist threat – which often attracts more political and media attention – is more intermittent in nature, less evenly distributed across the EU and has (fortunately) affected far fewer EU citizens directly.

(2) Both Eurojust and Europol provide already substantial added value in the fight against organised crime not only by providing support to national authorities through the provision of technical and networking support to cross-border cooperation and information exchange between national authorities but also, and more importantly, by providing EU-wide assessments of threats and law enforcement and prosecution challenges which are of policy relevance as well increasingly assuming coordination and even initiative tasks with regard to national authorities.

(3) Europol, the older and larger of the two agencies, makes already a significant contribution to the fight against organised crime through its well established central networking function for national authorities (Europol Liaison Officers/Europol National Units) and by providing a framework for the free flow of secured information between national authorities (Europol Secure Network/SIENA). Yet four other dimensions of its activities can be regarded as being of particular importance to EU policy and action on organised crime challenges:

- a) The **strategic analysis** of EU-wide organised crime threats through the (S)OCTA reports. These provide the strategic intelligence basis for the definition – by the Council – of the priorities in the fight against organised crime as part of the EU policy cycle for organised and international serious crime the first of which started in January 2012. The importance of this strategic intelligence function is underlined by the fact that on the basis of Europol’s threat assessment report the Council defined a

list of eight priorities for implementation into action by the European Multidisciplinary Platform Against Criminal Threats (EMPACT) which regroups all major actors at the European level.

- b) The **operational analysis** of specific cross-border organised crime links to identify missing links in ongoing investigations. Europol can use for this purpose its own Europol Analysis System (EAS) which is equipped with a wide range of tools. The EAS contains Analysis Work Files (AWFs) which focus on major crime fields and can be used for both identifying missing links and provide other informational support to national authorities.
- c) The **provision of operational support** to national police authorities by helping with the establishment of Joint Investigation Teams (JITs) and deploying Europol agents – often in the form of its “mobile offices” – for intelligence and technical support to joint operation carried out by national police forces (such as in the case of “Operation Tropo 68” in 2012 against an Albanian organised crime group involved in illegal immigration and heroin trafficking in several Member States).
- d) The **provision of expertise on major forms of organised crime and law enforcement techniques**, not only the Europol Platform of Experts (EPE) for the sharing of knowledge and best practices (including investigative techniques and special issues such as witness protection) but also through a variety of specialised databases (such as the Europol Cocaine Logo System, ECLS) and information hubs (such as the European Cybercrime Centre, EC3, established in January 2013).

(4) Although both smaller and younger Eurojust plays a equally crucial role in the fight against organised crime as it finds itself in the frontline position of EU criminal justice cooperation where the legal, organisational and procedural differences between the Member States’ criminal justice systems still account for major obstacles to the effective prosecution of organised crime. Its main current functions in the fight against organised crime can be summarised as follows:

- a) The **initiation of action by national prosecution authorities**. Eurojust can in fact ask national authorities to undertake an investigation or prosecution of specific acts, accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts, coordinate between the competent authorities of the Member States concerned, to set up a joint investigation team and to take special investigative measures. In most cases informal suggestions by Eurojust are sufficient to trigger action by the competent national authorities, but during 2012 18 formal requests were issued as well.

- b) The **provision of guidance to national authorities on complex cross-border organised crime cases**. Eurojust can issue formal opinions on conflicts of jurisdiction or reported difficulties with the execution of judicial assistance requests which puts it in a quite powerful arbitration role vis-à-vis national authorities. In practice, however, it exercises this arbitration role mainly through the organisation of coordination meetings between the authorities concerned by a case, of which 194 were held during 2012. Eurojust's guidance function also extends on the use of major EU instruments in the field, such as the setting up of JITs and the issuing of European Arrest Warrants (EAWs) and freezing and confiscation orders.

- c) The **monitoring of the application and effectiveness of EU judicial instruments**. Formally mandated to monitor the application of EAWs and JITs Eurojust regularly assesses the effectiveness and practical problems of the use of these and also other judicial instruments, such as controlled deliveries, in different organised crime fields – assessments which frequently generate recommendation on how to improve both the instruments and cooperation between national authorities.

- d) The **provision of expertise on judicial challenges of major forms of organised crime**. Its frontline position in cross-border criminal justice cooperation enables Eurojust to accumulate and provide expertise on the field specific judicial challenges of the fight against organised crime, and it contributes on this basis to the work of a range of other European structures such as the Financial Action Task Force (FATF) and the new Europol Cybercrime Centre (see above).

(5) It should be added that both Eurojust and Europol have also developed into important international interlocutors with third-countries on questions of law enforcement and judicial cooperation in the fight against organised crime. Both agencies have concluded a range of cooperation agreements and both agencies host several liaison officers/magistrates from third-country authorities at their seats, with Europol also having second two officers to Washington and one to Interpol.

(6) Any consideration of a further strengthening of the role of both agencies in the fight against organised crime has to take into consideration the tight limitations imposed by the Treaties and the Member States. The provision of internal security remains an “essential state function” (Art. 4(2) TEU) and as such a primary (and jealously guarded) competence of the Member States. “Coercive measures” remain as a result the exclusive competence of national authorities (Art. 88(3) TFEU). The EU's treaty defined role remains essentially of a purely

subsidiary nature with EU action only being legally possible if certain objectives in the fight against organised crime cannot be achieved by the Member States acting on their own (principle of subsidiarity, Art. 5(3) TEU) – and politically possible only if the Member States see indeed enough of a necessity for common action, which is often enough not the case.

(7) This session of the hearing has as its subtitle “perspectives for a European FBI”. Given the aforementioned legal and political constraints there seems to be little prospect, at least in the short-term, for a treaty change (because it would take no less than a treaty change) to transform Europol into a central law enforcement agency with cross-border executive powers as this is the case with the US FBI. Even if such a treaty change would be politically feasible there would still be three caveats to consider. The first is of a constitutional nature and concerns the current absence of a democratically fully legitimised, elected and controlled EU government. In the US case the FBI exercises its powers in such a legitimising constitutional context – in the EU’s case this context would first need to be created, and it seems at the moment that this would take several EU treaty Conventions. The second caveat is the current absence of anything similar to the US system of “federal crimes” for which a potential EU FBI equivalent would be responsible. This would require both a treaty defined division of powers between the national and the EU level as regards different forms of crime and the development of a real EU criminal law corpus (of which we currently only see a first few timid shoots). The third caveat is one of cultures and mentalities. The current EU policing landscape remains marked by a huge diversity of cultures, structures and legal frameworks with mentalities at the national level which have often shown significant degrees of reluctance with regard to both “high-level” European structures and frequently enough even as regards trustful cooperation with police authorities from other Member States. While this is slowly changing any sudden “imposition” of an EU executive police authority with full powers in all Member States might be met with considerable problems of non-effective cooperation as well as a partial disruption of existing cooperation frameworks.

(8) The **establishment of a European Public Prosecutor’s Office** (EPPO, Art. 86(1) TFEU) – which is the subject of the next session – needs to be mentioned here as it **could potentially open a pathway towards a future executive empowerment of Europol**. The establishment of the EPPO would require a fully harmonised definition of the constitutive elements of all criminal acts within the EPPO’s competence – and hence mark a move towards a system of “federal crimes” as it exists in the US. Once empowered to prosecute directly in all Member States – which is not the only but a possible option for the EPPO – the Office would need to be in a position to give instructions to police authorities, which in turn would create a forceful rationale to have police officers at the EPPO’s disposal with cross-border policing powers, although all the caveats mentioned above would remain valid.

(9) Yet the role of both Eurojust and Europol could be strengthened without a direct emulation of the US federal law enforcement system for which the EU is clearly constitutionally not yet ready. Ambitious political projects often carry the risk that they

absorb much political capital and require protracted political battles whose benefits will – if at all – only become available after quite some time while at the same more practical and immediate progress on less “visible” issues is relatively neglected. The as such very sensible EPPO perspective is a case in point as **any political prioritisation of the use of Art. 86 TFEU at this moment** – when it is already clear that the mandate of the EPPO will initially be restricted to the protection of the EU’s financial interests, that it will not involve all Member States and that it require several years of negotiations – **might result in a relative neglect of the realisation of the full potential of Eurojust** – for which Art. 85 TFEU offers quite a few options. The British have the saying “a bird in the hand is worth two in the bush”. With **fraud against the EU budget representing only a small fraction of the overall organised crime challenge within the EU** and a significant number of Member States still unlikely to support the EPPO appears currently, notwithstanding its longer-term importance as a step towards a federal-type criminal justice and law enforcement system, as a rather small “bird in the bush” which should not absorb most of the political capital which can be invested in the strengthening of the EU’s capabilities in the fight against organised crime.

(10) In the case of Eurojust Art. 85(1) TFEU opens up the possibility to vest the institution with the power to initiate prosecution itself (rather than only – as currently – to only ask national authorities to do so), to assume an active coordinating (rather than the current mediating) role with regard to investigations and prosecutions carried out by national authorities and to exercise a real decision-making power in cases of conflicts of jurisdiction rather than the current non-binding opinion only). To **grant Eurojust binding powers with regard to the initiation of investigations and prosecutions as well as** – as part of its coordination role - **the prevention and resolution of conflicts of jurisdiction** raises surely complex and sensitive questions. Yet the granting of such powers should be seriously considered as the currently most promising way to ensure that the “European interest” in cross-border organised crime investigations and prosecution will be given its due weight and that effectiveness risks caused by different national approaches, interests and procedures are reduced. A **better use of Eurojust’s expertise in terms of specific investigation and prosecution challenges as regards major forms of organised crime**, such as drug trafficking and trafficking in human beings, cybercrime and money laundering, should also be on the agenda. This could be achieved by giving Eurojust a formal role to contribute to the EU policy cycle for organised and international serious crime, the definition of priorities in the fight against organised crime and the potential revision of existing criminal law legislation. The **synergy potential with Europol could also be further enhanced**, for instance via Europol accepting a full involvement of Eurojust in all current and future Europol AWFs.

(11) In the case of Europol its assessment functions could be further developed by a **half-yearly assessment of EU action** in response to the threats identified by Europol. An “organised crime scoreboard” should list identified challenges against planned EU action and

EU action actually taken. It could include a “naming and shaming” of Member States being sluggish with the implementation of agreed counter-organised crime measures (as the Counter-terrorism coordinator has done this with regard to the implementation of legislative counter-terrorism measures). With the EU also being in need of more of a prioritisation of its action and dedication of resources to organised crime challenges Europol should also be tasked with the **assessment of both the “human” and the “economic and financial” costs of the main forms of organised crime** to allow for a more effective prioritisation and programming. Europol’s potential role under Art. 5(4) of the Europol Decision as regards **action on the prevention of organised crime** also appears currently underexploited, although Europol would be in an excellent position to identify best practices across the whole EU in reducing opportunities for organised crime structures emerging and spreading. Finally it should be envisaged to **strengthen Europol’s role in the initiation, planning and coordination of joint police operations**, and one could also think **about creating national pools of police officers specialised in the fight against certain forms of organised crime which could be deployed under a Europol coordinated procedure for joint operations** as this is already the case with the European Border Guard Teams in the case of Frontex and the Asylum Support Teams in the case of the European Asylum Support Office.

(12) Any look at a potential “further strengthening” of the roles of Eurojust and Europol in the fight against organised crime cannot escape the financial dimension. The adopted budget for 2013 has reduced the budget of Eurojust to € 30.05 million (down from € 31.67 million in 2012) and – much more severely – that of Europol to € 75.18 million (down from € 82.50 in 2012). Needless to say that because of inflation the cut in real terms is even bigger. “Doing more with less” is surely a nice and much loved slogan in times of austerity – but one should not have any illusions about such cuts having their own costs in terms of reduced operational capabilities and development potentials. I think that those holding the purse strings – and I can only welcome that the European Parliament has reminded the Heads of State or Government forcefully last week that they are not alone in charge – should also remember this other, less lofty but from my perspective more stringent saying, which is “you get what you pay for”. There is something almost schizophrenic in Council and Commission on the one hand all the time adding to the agencies’ tasks – the establishment of the European Cybercrime Centre within Europol in January of this year is a case in point – and pursuing a systematic policy of budgetary cuts on the other. **Less financial means for both Europol and Eurojust will necessarily mean less added value in the Europe-wide fight against organised crime and hence less security for European citizens.** One should also not forget that both Eurojust and Europol are institutions which provide a real dimension of solidarity within the EU in the fight against organised crime as they provide analytical, operational and technical support to those national authorities which are most in need of it at any given time. **Less financial means for both therefore also means less solidarity in response to the real common threats posed by organised crime.**