



**20 years of Eurojust:
EU judicial cooperation in the making**

A collection of anniversary essays

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EU judicial cooperation in the making**

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Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000
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Contents

PREFACE	3
Introduction – <i>Didier Reynders, European Commissioner for Justice</i>	7
A short history of the creation of Eurojust – <i>Gilles de Kerchove, former European Union Counter-Terrorism Coordinator (2007-2021)</i>	13
INSTITUTIONAL PARTNERS	
A brief look at 20 years of Eurojust and EU policies in the field of justice and law enforcement, and a glimpse into the future – <i>Christine Roger, Director-General for Justice and Home Affairs, General Secretariat of the Council of the European Union</i>	23
The evolution of the European Parliament’s role in shaping the Area of Freedom, Security and Justice – <i>Juan Fernando López Aguilar, Chair of the Committee on Civil Liberties, Justice and Home Affairs, European Parliament</i>	35
Future perspectives and challenges in the Area of Freedom, Security and Justice <i>Ana Gallego, Director-General of DG Justice and Consumers</i>	41
Partners against crime: 20 years of judicial and law enforcement cooperation <i>Catherine De Bolle, Executive Director of Europol</i>	47
COUNTRY PERSPECTIVES	
Eurojust, protector of EU values: A perspective from the host state <i>Dilan Yeşilgöz, Minister of Justice and Security, the Netherlands</i>	57
Eurojust at 20: the story of an ambition to achieve European judicial cooperation <i>Eric Dupond-Moretti, Keeper of the Seals, Minister of Justice, France</i>	63
Eurojust from the perspective of a Member State of the European Union <i>JUDr. Igor Stríž, Supreme Public Prosecutor, Czech Republic</i>	75
Present at the Creation: Eurojust and the United States Department of Justice <i>Bruce Swartz, U.S. Deputy Assistant Attorney General and U.S. Department of Justice Counselor for International Affairs, and Kenneth Harris, U.S. Department of Justice Senior Counsel for EU and International Criminal Matters at the U.S. Mission to the EU</i>	83

JUDICIAL COOPERATION

Recent jurisprudence of the CJEU on judicial independence and the Framework Decision on the European Arrest Warrant – *Lars Bay Larsen, Vice President of the Court of Justice of the European Union* 87

About the *Gavanazov II* and *HP* judgments of the CJEU on the European Investigation Order Directive: strengthening the judicial protection in the issuing Member State – *Anne Weyembergh, Professor, Université Libre de Bruxelles* 95

Eurojust’s contribution to the fight against terrorism – *Ilkka Salmi, EU Counter-Terrorism Coordinator* 105

AI and data protection in judicial cooperation in criminal matters
Wojciech Wiewiórowski, European Data Protection Supervisor, and Michał Fila, Legal Officer at the European Data Protection Supervisor 115

The protection of fundamental rights in cross-border cooperation: trends and future perspectives – *Michael O’Flaherty, Director of the European Union Agency for Fundamental Rights* 125

EPILOGUE: A forward look through the rear-view mirror
Ladislav Hamran, President of Eurojust 133

PREFACE

In 2022, Eurojust, the European Union Agency for Criminal Justice Cooperation, celebrates its 20th anniversary. To honour this milestone, the Agency presents this commemorative book, gathering the perspectives of policymakers, academics, and judicial practitioners who work daily in the joint effort to fight serious cross-border crime.

Eurojust is very grateful to all authors for their valuable contributions, which highlight the multifaceted nature of our collective work. It is the sincere wish of all authors that this book serves as a useful reflection tool for the judicial and wider community, to learn from the past and build a better future, where criminal justice cooperation continues to be the bedrock for a safer world.

The book begins with an introduction by Didier Reynders, European Commissioner for Justice, who reflects on the Agency's significant evolution as an integral justice actor in the EU family. Our journey then continues by reflecting on the organisation's genesis, before moving to section 1 of the book featuring contributions from our institutional partners. In this section we learn about Eurojust's strong cooperation with the Council of the European Union, the European Parliament, the European Commission and Europol – all united in bolstering the Union's area of freedom, security and justice.

In section 2, a series of perspectives from different countries on judicial cooperation through the Agency are provided, including Member States and the United States, an example of one of the many third countries with whom Eurojust collaborates closely. The book's final section offers insights from authors with direct experience of specific judicial instruments and crime areas in which Eurojust has and continues to play a critical role.

Our commemorative journey ends with some closing words from Eurojust's President, Ladislav Hamran, who casts a look back over the last 20 years, while keenly focusing on the road ahead. He highlights Eurojust's important role in contributing to tomorrow's digital criminal justice cooperation, and the Agency's commitment to growing its network of partner countries outside of the European Union.

The Eurojust story is a rich one, involving many important players and events. While this account is not exhaustive, it offers a glimpse at what and who have made Eurojust what it is today. We invite you to enjoy reading all contributions, which together represent not only what the Agency has achieved over the last two decades, but the many future challenges it is now equipped to face, thanks to its solid foundations and valued network of partners.

All opinions expressed in each of the contributions solely represent those of the authors. Where a contribution was not originally written in English, the original text has been included after the English translation.

We wish you an engaging read, and look forward to continuing working with you in strengthening judicial cooperation for a safer Europe.



Introduction

Didier Reynders

European Commissioner for Justice



Didier Reynders © European Union

Over the past 20 years, Eurojust has been on a steady upward trajectory. The following pages tell the story of an ugly duckling and its growth into a white swan. It is a story that begins with a meeting of prosecutors around a table in the Council premises in Brussels and ends as a fully fledged European agency, nestled among the great institutions of law and justice in The Hague.

The Tampere European Council of October 1999 set Eurojust along its current path. It was here that EU leaders, determined to reinforce the fight against serious crime, agreed to create a new ‘unit’ composed of ‘national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State’. It was to be tasked with facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases. Eurojust has more than lived up to this mission and quickly outgrew the unit.

As is the case for any organisation, establishing Eurojust was not without teething problems. It took six years to build up a staff, offices and the necessary equipment and computers. It took another year before its meeting rooms could properly function with interpretation facilities. But Eurojust was already proving its worth. The coordination following the attempted bombings of the US Embassy in Paris and the Kleine-Brogel military base in Belgium underlined this point very early on. This was followed by more intensive coordination, for example between Belgium, Germany, Greece, Italy, Spain, the Netherlands and the United Kingdom in the case concerning letter bombs sent to EU institutions in 2004. Any logistical kinks were soon ironed out and, in the years since, it has frequently been heard that national prosecution services can no longer do their job effectively without Eurojust’s support.

In the first 10 years, Eurojust successfully met many more challenges – an enlarging EU and the establishment of numerous cooperation agreements with third countries, international organisations and EU bodies and agencies. In parallel, its operational capabilities were strengthened, in response to the increase in cross-border crime across Europe. The next decade saw an unprecedented development in the fight against crime at the EU level, with the European Public Prosecutor’s Office established to specifically tackle crime against the EU budget, today worth over EUR 460 million each year. Eurojust has been key in this partnership, from its inception to the cooperation today. No matter the trials and tribulations it has faced over the past 20 years, today Eurojust remains the number one hub for judicial cooperation in the European Union.

Its growth reflects the increasing demand in the European Union and beyond for the support this organisation can provide. In 2021 alone, Eurojust coordinated the take-down of a migrant smuggling network, shut down an international malware network and helped secure the conviction of a Syrian official sentenced for prison torture, in addition to handling over 10 000 other cases, thereby contributing to EUR 2.8 billion in criminal assets being seized or frozen and EUR 7 billion worth of drugs being seized.

The case, which led to the imprisonment of a former member of the Syrian intelligence service, is also a landmark case because it demonstrated Eurojust's capacity to fight impunity and why Eurojust's home in The Hague is more than purely symbolic. Here, I want to pay tribute to the Genocide Network Secretariat at Eurojust, which started monitoring the situation in Syria in 2012 and is the most valuable resource in Europe's efforts to ensure that core international crimes – genocide, war crimes and crimes against humanity – do not go unpunished.

Some of Eurojust's recent cases have also kept Europeans safe in the midst of a major pandemic. One online scam had been duping unwitting customers all over Europe out of personal protective equipment, such as face masks, which they paid for but never received. The scammers defrauded companies in at least 20 countries. It is thanks to Eurojust that the operation was dismantled, that the evidence was collected and the culprits were caught.

This is a job that does not come in a flashy uniform with wailing sirens, (although it still features frequently in the work of international crime novelists). Eurojust's work takes place behind the scenes, ensuring that the solid evidence needed to put criminals behind bars is not lost in the cracks between borders. It is a job that is undertaken in Eurojust's coordination centres by judicial authorities from multiple countries ensuring their operations take place at exactly the same time. To effectively fight cross-border crime today, you need far more than police work. You need judicial coordination so that the medusa's head of a criminal network can be sliced off at once to ensure the snakes cannot emerge elsewhere.

With a workload that is only increasing – the number of cases has almost doubled during the past four years alone – this is also a story of an organisation that has, from the very beginning, been over-delivering. I want to thank Eurojust and its staff for their dedication over the past two decades. I know how heavily the European Commission relies on Eurojust today and how intense our cooperation is. Moreover, the Commission has recently adopted two initiatives to enhance the efficiency of the work led by Eurojust: the new Counter-Terrorism Register and the establishment of an online platform to improve cooperation between joint investigation teams. Eurojust's future is digital and so must be judicial cooperation. We must all embrace this change. Eurojust has still managed to mature in the meantime as the reality of cross-border crime has increased. Following the 2015 terrorist attacks in Paris and Saint-Denis, the cross-border dimension of terrorism became crystal

clear, and France, Germany, Spain, Belgium, Italy, Luxembourg and the Netherlands responded by setting up a register at Eurojust to keep all the judicial information on terrorist activities and networks in one place to determine where coordination was needed. This is now permanent with the Counter-Terrorism Register and absolutely vital given the international and multilateral dimension of the fight against terrorism and the importance of information sharing.

Eurojust not only ensures that cases involving multiple jurisdictions are prosecuted, but it also ensures that they are prosecuted in the right place. Since the very beginning of its existence, national authorities have been operating on its advice. The case following the sinking of the Prestige oil tanker in 2002 which caused a huge amount of environmental damage is a good example of this. Eurojust was heavily involved in the deliberations over where it was best to prosecute. There is still a gap that Eurojust can fill when it comes to fighting cross-border environmental crime. Today, the number of cross-border environmental crime cases referred to Eurojust constitutes less than 1% of the Agency's total casework, which seems insufficient given that Interpol and the UN Environment Programme estimate environmental crime to be the fourth-largest criminal activity in the world and growing at a rate of between 5% and 7% per year. With a new proposal for a Directive on EU-wide environmental crimes by the Commission in 2021, I can see a major role developing for Eurojust in ensuring environmental protection in Europe.

Online as much as offline, the skills at Eurojust know no boundaries. This has been clear in the support Eurojust provided in cases that have stopped the most heinous online crimes, ranging from online child sex abuse in Operation Koala to cyberattacks that paralysed entire countries, including Ukraine. In turn, the need for Eurojust's skills has clearly expanded beyond the European Union's borders. The number of joint investigation teams with third countries is growing rapidly, and it has become a very successful tool to speed up criminal investigations by facilitating the issuance of more than 500 European Arrest Warrants and more than 4,300 European Investigation Orders in 2021 alone. The European Commission has now been given a mandate to improve Eurojust's international outreach even further and in the coming year, bilateral cooperation agreements between Eurojust and 13 third countries will be negotiated.

What does a day in the life of Eurojust look like? For many years now, Eurojust has been opening its doors to the public, giving citizens a glimpse into how judicial co-operation works in practice to address the radically different challenges presented by cross-border crime, from terrorism and trafficking in human beings to economic and cybercrime. As President of Eurojust, Ladislav Hamran, recently explained to visitors, organised crime tries to spread its activities to different jurisdictions, and that is when Eurojust steps in. The Agency always has to focus on the bigger picture to connect the dots between jurisdictions and facilitate communication, the sharing of evidence, and the coordination of investigations.

There are so many different legal systems and different laws in every European country. As one national prosecutor said, *'It is impossible to learn everything about everyone, let alone about your own system!'* Having Eurojust saves so much time because the staff are able to connect national prosecutors and judges with all the people they need to do their investigation in other countries and every coordination meeting ensures that national authorities avoid duplication or treading on each other's toes. Eurojust has done this time and again – sometimes only days after an event such as the crash of Flight MH17 over Ukraine in 2014, and sometimes only hours after, such as the case with the discovery of the bodies of 71 migrants in an abandoned truck in Austria in 2015.

At the end of the day, and regardless of the national particularities of each country, everyone is working towards the same goal: to fight crime in Europe. This was perfectly put by one Eurojust staffer who said: *'This is the first working place in my whole career where I feel not only accepted or tolerated but very welcomed. When I came into the building and met my colleagues from all over Europe, they gave me the impression that I belong to them – I am part of the Eurojust family.'* This confirms my own impression. Since I took up my job as a Commissioner for Justice, I have seen just how valuable this organisation is and how it fits in the EU family.

As Eurojust celebrates 20 years on the job, I am delighted the European Commission was able to negotiate the biggest budget in its history – EUR 350 million until 2027. We have come a long way from an organisation that began as a small meeting of prosecutors around a table in Brussels to what we see in practice today. There will always be a need for the outstanding service Eurojust does for the safety of Europe, and I look forward to seeing what will be achieved in the years to come.



Building formerly occupied by Eurojust (2002-2017) in it's host city of The Hague.

A short history of the creation of Eurojust

Gilles de Kerchove

Former European Union Counter-Terrorism Coordinator (2007-2021)



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Ladislav Hamran kindly asked me to compile memories about the stages which led to the creation of Eurojust. As several authors have already approached this task from an academic perspective, I decided to focus my input on a number of episodes which, thus far, have remained quite confidential. As 20 years have now passed, I considered the period of limitation to have expired.

Eurojust came into being in response to two needs:

- ▶ First, there was the need to provide mutual assistance in criminal matters and to establish a more effective instrument than those developed previously within the Council of Europe and, since the entry into force of the Maastricht Treaty in November 1993, within the European Union. The Geneva Appeal, a desperate call made by seven European judges in October 1996, highlighted the distress of those who were having to fight organised crime with outdated instruments. I can remember the frustration of one of the signatories to that appeal, who described the sense of solitude he felt when he issued international letters rogatory: ‘When I send an international letter rogatory, I feel what Robinson Crusoe must have felt whenever he threw a bottle into the sea: I do not know if it will ever be picked up, if the message that it contains will be read or, much less, if anyone will ever reply.’
- ▶ Second, there was the need to balance the interaction between the police and the courts. The Maastricht Treaty (on the initiative of Chancellor Kohl) established Europol (Article K.1(9) TEU). In most Member States, with police work under the authority and control of the prosecution service, it seemed necessary to establish a ‘sister’ agency to balance the creation of Europol. I also find it very telling that in French, Europol is male and Eurojust is female!

The origins of Eurojust, like all good ideas, are multifarious. I played my part alongside many partners in crime, as it were, who are now my friends: Hans Nilsson, Clemens Ladenburger, Charles Elsen, Emmanuel Barbe, Lorenzo Salazar, Claude Debrulle, Daniel Flore, Gisèle Vernimmen, and many more.

It took several attempts to convince the Member States that it was necessary. Of

course, tragic events such as the 9/11 attacks consolidated the political will, but it called for a little amount of guile, as the short history that follows shows.

As far as I recall, the first attempt to create a European judicial cooperation unit dates back to the Belgian proposal presented at the informal meeting of Ministers for Justice in Limelette in September 1993. The Belgian Minister for Justice at the time, Melchior Wathelet, for whom I served as head of Cabinet, made a proposal to his colleagues about setting up a centre for information, discussion and exchange ('CIREJUD'), which was inspired by the asylum and immigration centres (CIREA and CIREFI). Unfortunately, this proposal did not receive the approval of all the Member States and remained on the shelf.

The second attempt came three years later. After an Irish journalist, Veronica Guerin, was murdered in June 1996 while reporting on organised crime, the President of the European Council suggested to colleagues to set up a high-level group with a view to establishing a European strategy to fight organised crime. As the director in charge of these matters in the General Secretariat of the Council, I was tasked with proposing ideas for reform to the Presidency. My assistant, Hans Nilsson, resurrected the idea of creating a judicial cooperation agency as part of this process. Unfortunately, once again, the proposal did not receive enough support within the Council.

Three years later, the third attempt did succeed. For the first time, the European Council had decided to devote an entire meeting to justice and home affairs in view of the entry into force of the Treaty of Amsterdam. This facilitated taking a broad community approach on the issues of asylum, immigration and external border control, and it substantially overhauled the functioning of intergovernmental cooperation in internal security. A wonderful surprise came when the Finnish Prime Minister, Paavo Lipponen, and his Permanent Representative, the late Antti Satuli, gave me the task of drafting – in the utmost secrecy – the draft conclusions of the European Council. I had complete freedom to add all the good ideas I could gather from the Member States and the Commission. Under the authority of my Director-General, Charles Else, and with the help of Clemens Ladenburger and Hans Nilsson, I was able to promote, in addition to the creation of Eurojust, many reforms such as enshrining the principle of mutual recognition, eliminating extradition and replacing it with what eventually became the European Arrest Warrant, as well as the harmonisation of a series of crimes, including terrorism, just to mention a few issues related to the criminal field.

With respect to the creation of Eurojust, I had to overcome three obstacles:

- ▶ The first obstacle was to convince Commissioner Antonio Vitorino, who was in charge of justice and home affairs. The main difficulty was that Antonio Vitorino's colleague, Michaële Schreyer, responsible for protecting the Community's financial interests, was promoting the *Corpus Juris* project, led by the late Mireille Delmas-

Marty, to create a European Public Prosecutor to protect the financial interests of the Community. I went to see Antonio Vitorino to make sure that he would not block my intention to include the creation of Eurojust in the Tampere conclusions. He told me that he shared my belief that it was too soon to introduce a European Public Prosecutor (it required the mechanism of enhanced cooperation to create it some 10 years later!), and that it was preferable not to limit the competences of this new agency to only protecting financial interests but to expand it to include all forms of serious crime. Out of courtesy for his colleague Schreyer, Antonio Vitorino told me that he would not officially support the creation of Eurojust, as certain people in the Commission regarded this proposal as a way of blocking the plan to set up a European Public Prosecutor's Office, but that he would not object to it either. On the contrary, Antonio Vitorino shared my belief that it was important to proceed in stages and that the creation of Eurojust, if the Agency demonstrated its added value, would naturally lead to the creation of a European Public Prosecutor. The events that followed proved us right...

- ▶ The second obstacle was to convince the Finnish Presidency. As I mentioned above, I had considerable freedom to make proposals. However, the Finnish Presidency did not regard the idea of establishing a judicial cooperation agency as being necessary. The reason for this was that, under the Finnish system, neither a public prosecution service nor an investigating judge is involved in carrying out investigations and prosecutions – a bit like the British model, whereby the investigation is conducted exclusively by the police, and the Crown Prosecution Service only intervenes at the end to check that the case is strong enough to go to court.
- ▶ The final obstacle was to convince the Member States. Some were sceptical about whether such an agency would be useful as they were satisfied with the recently created European Judicial Network. Others feared that this Agency was just the first step towards creating the European Public Prosecutor's Office.

I, therefore, had to be a little crafty. The Finnish Presidency had naturally decided to devote the informal meeting of Ministers for Justice and Home Affairs, held in Turku one month before Tampere, to gathering ideas from the ministers about what should be submitted to the Tampere European Council. I had prepared a questionnaire for the discussion on the first morning, with questions intended to prompt the Ministers for Justice to support the idea of setting up Eurojust. To my great surprise, even though I had spent the evening before the ministerial meeting asking those I knew best to promote the idea, none of them brought it up.

During the break, I went to see the German Minister for Justice, Herta Däubler-Gmelin, who had heard talk about Eurojust from a German judge, Wolfgang Schomburg. She promised to speak in the afternoon, which she did, based on a speech prepared by her staff with the assistance of Clemens Ladenburger. At the start of the afternoon, thanks to the friendly relationship I had with the late Daniel

Lecrubier, the then Head of International Cooperation at the French Ministry of Justice, and with Michel Debacq, then an adviser in his cabinet, I succeeded in convincing the Minister for Justice, Elisabeth Guigou, to support her German colleague. All the other ministers then spoke in support of setting up Eurojust, and this helped me to convince the Presidency to add the proposal to the Tampere draft conclusions.

As the establishment of Eurojust had been agreed upon in principle by the Tampere European Council on 15 and 16 October 1999, the four successive presidencies of the Council (Portugal, France, Sweden and Belgium) submitted a draft decision drafted mainly by Hans Nilsson. Negotiations on this draft decision started in early 2000, under the Portuguese presidency. They were long and arduous. The issues were certainly complex, but I despaired at the pace at which the work was progressing.

An idea struck me one evening after a day of unproductive discussions. Why not suggest proceeding, just as the Ministers for Home Affairs had done in 1995 when setting up Europol? While waiting for the adoption of the Convention on the establishment of Europol, the Council had decided to create a provisional unit – the Europol Drugs Unit (EDU) – to make the technical preparations for the launch of the Agency. As the French Presidency approached, I drafted a note on the idea to Minister Elisabeth Guigou, and I sent it to her via the Jacques Delors ‘Notre Europe’ Foundation. Elisabeth Guigou very cleverly proposed the idea during the informal meeting of Ministers for Justice in Marseille in July 2000. The ministers agreed to send one judge each to Brussels, from the following September. I took it upon myself to welcome them to the Council buildings, which proved to be a very good idea. First, because the appointed judges started to work together and reflect on how the Agency would operate once established; and, second, because they were even more enthusiastic about taking part in negotiating an instrument to establish Eurojust since they were eager to become the first members of its College. This helped to speed up negotiations considerably.

The 9/11 terrorist attacks gave significant impetus to the negotiations. A political agreement was reached in the Council on 14 December 2001 and the decision was formally adopted on 28 February 2002.

The final step was to set up the legal framework for the creation of Eurojust. This was achieved, also on the initiative of Elisabeth Guigou, during the adoption of the Treaty of Nice with the insertion of Article 29(2) into the TEU.

Hans Nilsson and I then met with the members of Pro-Eurojust for strategic discussions in a beautiful setting, in La Converserie, in the Belgian Ardennes. The participants’ enthusiasm and creativity were remarkable.

This short history illustrates the power of networks. It shows once again that Europe was not built all at once, but it is built in stages.

I had the privilege and good fortune to work very closely with the successive presidents of Eurojust. The Agency met the expectations that its many creators had placed on it. In fact, since 2015, no terrorism investigations or prosecutions have gone ahead without the involvement of Eurojust. In such a sensitive area, this just proves how much the Member States trust Eurojust.

For my part, I am eager to follow the successes of Eurojust over the next 20 years!

La petite histoire de la création d'Eurojust

Gilles de Kerchove

Ancien coordinateur européen de la lutte contre le terrorisme (2007-2021)

Ladislav Hamran m'a fait l'amitié de m'inviter à rassembler quelques souvenirs sur les étapes qui ont conduit à la création d'Eurojust. Plusieurs auteurs ayant procédé à cet exercice avant moi sur un plan académique, je me suis décidé à centrer mon propos sur certains épisodes restés jusqu'ici assez confidentiels. Après vingt années, j'ai estimé qu'il y avait prescription.

Eurojust est né de la perception d'un double besoin :

► *d'une part, la nécessité de doter l'entraide pénale et l'extradition d'un instrument plus performant que ceux développés jusqu'alors dans le cadre du Conseil de l'Europe et, depuis l'entrée en vigueur du Traité de Maastricht en novembre 1993, dans le cadre de l'Union européenne. L'Appel de Genève, cri de désespoir lancé en octobre 1996 par 7 magistrats européens, témoigne du désarroi de ceux qui devaient alors combattre le crime organisé avec des instruments dépassés.*

J'ai en mémoire la frustration exprimée par l'un des signataires de cet Appel qui exprimait le sentiment de solitude ressenti lorsqu'il émettait des commissions rogatoires internationales : "lorsque j'envoie une commission rogatoire internationale, j'éprouve ce que devait ressentir Robinson Crusoe lorsqu'il jetait une bouteille à la mer : je ne sais si elle va jamais être recueillie, si le message qu'elle contient va être lu et encore moins si elle fera l'objet d'une réponse".

► *d'autre part, la nécessité d'équilibrer les relations entre police et justice. Le Traité de Maastricht avait institué (à l'initiative du Chancelier Kohl) Europol (article K.1.9 du TUE). Dans la plupart des États membres, la police travaillant sous l'autorité et le contrôle du parquet, il paraissait nécessaire d'instituer une Agence "sœur" pour équilibrer la création d'Europol. Je trouve du reste très révélateur qu'en français Europol soit masculin et Eurojust féminin !*

La paternité d'Eurojust, comme toutes les bonnes idées, est multiple. J'y ai pris ma part avec de multiples complices, qui sont devenus des amis : Hans Nilsson, Clemens Ladenburger, Charles Elsen, Emmanuel Barbe, Lorenzo Salazar, Claude Debrulle, Daniel Flore, Gisèle Vernimmen ...

Il a fallu s'y prendre à plusieurs reprises pour convaincre les États membres de sa nécessité. Certes des événements tragiques comme les attentats du 11 septembre 2001 ont cristallisé la volonté politique. Mais il a fallu un peu ruser, comme l'illustre la petite histoire qui suit.

Le premier essai de créer une unité européenne de coopération judiciaire remonte, dans mon souvenir, à l'initiative belge lancée lors de la réunion informelle des Ministres de la Justice à Limelette en septembre 1993. Le Ministre belge de la Justice de l'époque, Melchior Wathelet, dont j'étais le chef de cabinet, a proposé à ses collègues la création d'un centre d'information, de réflexion et d'échange ("CIREJUD") inspiré des centres créés en matière d'asile ou d'immigration (CIREA et CIREFI). Malheureusement cette proposition n'a pu recueillir l'accord de tous les États membres et tomba en sommeil.

Le deuxième essai intervint trois ans plus tard. Une journaliste irlandaise enquêtant sur le crime organisé, Véronica Guérin, ayant été assassinée en juin 1996, le Président du Conseil européen proposa à ses collègues de mettre sur pied un groupe à haut niveau pour établir une stratégie européenne de lutte contre la criminalité organisée. Directeur en charge de ces questions au sein du Secrétariat général du Conseil, je fus chargé de proposer des idées de réforme à la Présidence. Mon adjoint, Hans Nilsson, ressuscita dans ce cadre l'idée d'instituer une Agence de coopération judiciaire. Malheureusement, à nouveau, la proposition ne recueillit pas suffisamment de soutiens au sein du Conseil.

Le troisième essai, réussi cette fois, eut lieu trois ans plus tard. Le Conseil européen avait décidé de consacrer, pour la première fois, une réunion entière aux questions de justice et d'affaires intérieures compte tenu de l'entrée en vigueur du traité d'Amsterdam. Celui-ci opérait une large communautarisation des questions d'asile, d'immigration et de contrôle des frontières extérieures et rénovait en profondeur le fonctionnement de la coopération intergouvernementale en matière de sécurité intérieure. La divine surprise fut que le Premier Ministre finlandais (Pavo Lipponen) et son Représentant permanent (le regretté Antti Satuli) me confièrent la mission de rédiger, dans le plus grand secret, le projet de conclusions du Conseil européen. Je disposais d'une liberté totale d'y insérer toutes les bonnes idées que je pouvais recueillir auprès des États membres et de la Commission. Sous l'autorité de mon Directeur général, Charles Elsen, et avec l'aide de Clemens Ladenburger et de Hans Nilsson, j'ai pu promouvoir, outre la création d'Eurojust, de multiples réformes telles que la consécration du principe de reconnaissance mutuelle, la suppression de l'extradition et son remplacement par ce qui est devenu le mandat d'arrêt européen, l'harmonisation d'une série de crimes, dont celui de terrorisme, pour ne citer que certains aspects liés au domaine pénal.

S'agissant de la création d'Eurojust, il me fallut surmonter trois obstacles :

- ▶ *convaincre le Commissaire Antonio Vitorino, en charge des questions de justice et d'affaires intérieures, tout d'abord. La difficulté tenait au fait que la collègue d'Antonio Vitorino en charge de la protection des intérêts financiers de la Communauté, Michaële Schreyer, poussait le projet du Corpus Juris, porté par la regrettée Mireille Delmas-Marty, de créer un procureur européen pour la protection des intérêts financiers de la Communauté. Je suis allé voir Antonio Vitorino pour m'assurer qu'il ne bloquerait pas mon souhait d'insérer la création d'Eurojust dans les conclusions de Tampere. Il m'avoua qu'il partageait ma conviction que l'instauration d'un procureur européen était prématurée (il a fallu le mécanisme des coopérations renforcées pour l'instituer dix ans plus tard !) et qu'il était souhaitable de ne pas limiter les compétences de cette nouvelle agence à la seule protection des intérêts financiers mais de l'élargir à toutes formes graves de criminalité. Par correction pour sa collègue Schreyer, Antonio Vitorino m'indiqua qu'il ne soutiendrait pas officiellement la création d'Eurojust, certains au sein de la Commission voyant en cette proposition une manière de bloquer le projet d'instituer un parquet européen, mais qu'il ne s'y opposerait pas non plus. Bien au contraire, Antonio Vitorino partageait ma conviction qu'il fallait procéder par étapes et que la création d'Eurojust, si l'Agence faisait la démonstration de sa valeur ajoutée, conduirait tout naturellement à la création du procureur européen. La suite a montré que nous avons raison ...*
- ▶ *convaincre la Présidence finlandaise. Comme je l'ai indiqué ci-dessus, je disposais d'une très large liberté de propositions. Sauf que l'idée de créer une Agence de coopération judiciaire ne paraissait pas nécessaire à la présidence finlandaise. La raison tenant au système finlandais qui ne connaît ni la figure du parquet, ni celle du juge d'instruction dans la conduite des enquêtes et des poursuites, un peu sur le modèle britannique où l'enquête est conduite exclusivement par la police, le Crown Prosecution Service n'intervenant qu'à la fin pour vérifier si le dossier est suffisamment solide pour être soumis au tribunal.*
- ▶ *convaincre les États membres. Certains d'entre eux doutaient de l'utilité d'une telle agence, se satisfaisant du réseau judiciaire européen récemment créé. D'autres craignaient que cette Agence ne soit que la première étape vers la création du Parquet européen.*

Il me fallut dès lors un peu ruser. La Présidence finlandaise avait décidé de consacrer, bien naturellement, la réunion informelle des ministres de la Justice et de l'Intérieur, qui avait lieu à Turku un mois avant Tampere, à recueillir les idées des Ministres sur ce qu'il fallait soumettre au Conseil européen de Tampere. J'avais préparé un questionnaire pour la discussion de la première matinée dont les questions devaient conduire les Ministres de la Justice à soutenir l'idée de créer Eurojust. À mon grand étonnement, alors que j'avais passé la soirée précédant la réunion ministérielle à demander à ceux que je connaissais le mieux de pousser l'idée, aucun d'entre eux n'évoqua l'idée.

À l'interruption, j'allai voir la ministre allemande de la Justice, Herta Däubler-Gmelin, qui avait entendu parler d'Eurojust par un magistrat allemand, Wolfgang Schomburg. Elle promit d'intervenir l'après-midi, ce qu'elle fit sur la base d'une intervention préparée par ses collaborateurs aidés de Clemens Ladenburger. En début d'après-midi, grâce à mes relations amicales avec le regretté Daniel Lecrubier, à l'époque, chef de la coopération internationale au ministre français de la justice et avec Michel Debacq, à l'époque conseiller à son cabinet, je pus convaincre la Ministre de la Justice Elisabeth Guigou de soutenir sa collègue allemande. Tous les autres ministres prirent ensuite la parole en soutien de la création d'Eurojust, ce qui me permit de convaincre la Présidence d'en insérer la proposition dans le projet de conclusions de Tampere.

Le principe de la création d'Eurojust étant décidé par le Conseil européen de Tampere les 15 et 16 octobre 1999, les quatre présidences successives du Conseil (Portugal, France, Suède et Belgique) déposèrent un projet de décision largement rédigé par Hans Nilsson. La négociation de ce projet débuta début 2000, sous présidence portugaise. Elle se révéla longue et fastidieuse. Certes, les questions étaient complexes mais je me désespérais du rythme excessivement lent des travaux.

Une idée me vint au soir d'une journée de discussion peu fructueuse. Pourquoi ne pas lancer l'idée de procéder comme les ministres de l'intérieur l'avaient fait en 1995 lors de la création d'Europol ? En attendant la conclusion de la convention portant création d'Europol, le Conseil avait en effet décidé de créer une unité provisoire – l'Unité de Droque Europol (EDU) – afin de préparer techniquement le lancement de l'Agence. La Présidence française se rapprochant, je rédigeai une note décrivant l'idée à l'attention de la Ministre Elisabeth Guigou, que je lui transmis par le canal de la Fondation Notre Europe de Jacques Delors. De manière très astucieuse, Elisabeth Guigou lança l'idée lors de la réunion informelle des ministres de la Justice à Marseille en juillet 2000. Les Ministres s'engagèrent à envoyer à Bruxelles, dès septembre, chacun un magistrat. J'avais pris sur moi de les accueillir dans les bâtiments du Conseil. Cela se révéla une très bonne idée. Non seulement parce que les magistrats désignés commencèrent à travailler ensemble et à réfléchir au mode de fonctionnement de l'Agence lorsqu'elle serait créée. Mais aussi parce qu'ils participèrent avec d'autant plus d'enthousiasme à la négociation de l'instrument portant création d'Eurojust dont ils étaient impatients de devenir les premiers membres de son Collège. Ce qui permit d'accélérer considérablement la négociation.

Les attentats terroristes du 11 septembre donnèrent un coup d'accélérateur puissant à cette négociation : un accord politique fut atteint au Conseil le 14 décembre 2001 et la décision fut adoptée formellement le 28 février 2002.

Restait à consacrer constitutionnellement la naissance d'Eurojust. Ce fut fait, ici aussi à l'initiative d'Elisabeth Guigou, lors de l'adoption du traité de Nice par l'insertion d'un article 29.2 dans le TUE.

Hans Nilsson et moi avons ensuite réuni les membres de « pro-Eurojust » dans un très

bel endroit des Ardennes belges, la Converserie, pour y mener une réflexion stratégique. L'enthousiasme et la créativité des participants furent remarquables.

Cette petite histoire illustre la force des réseaux. Elle montre une fois encore que l'Europe ne procède pas d'une construction d'ensemble mais se construit par étapes.

J'ai eu le privilège et la chance de travailler très étroitement avec les présidents successifs d'Eurojust. L'Agence a répondu aux attentes que ses multiples géniteurs avaient placé en elle. Au point qu'il n'est plus, depuis 2015, une enquête ou une poursuite dans le domaine du terrorisme qui n'associe Eurojust. C'est la preuve, s'agissant d'un domaine très sensible, de la confiance que les États lui portent désormais.

Je suis impatient de suivre les succès d'Eurojust au cours des 20 prochaines années !



INSTITUTIONAL PARTNERS

A brief look at 20 years of Eurojust and EU policies in the field of justice and law enforcement, and a glimpse into the future

Christine Roger

Director-General for Justice and Home Affairs, General Secretariat of the Council of the European Union¹



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This anniversary of the legal basis of Eurojust provides an interesting opportunity to look back at the last two or three decades of EU cooperation in the field of justice and law enforcement and, on that basis, to envisage the future of our common efforts. To do this, this article will begin with considerations of the judicial nature of Eurojust and its implications. It will then look at the relation between Eurojust and police cooperation, the evolution of judicial cooperation and the challenges brought by digital investigation. It will end with a few thoughts on Eurojust in the EU judicial cooperation architecture.

The judicial nature of Eurojust and its relationship with the Member States

While the European Judicial Network was set up in a standard way in terms of the type of organisation (a network of Contact Points), Eurojust was conceived from the start as an atypical body. It is a permanent body, but it is not led by an executive director appointed by the Council or a management board, nor does it have a management board where Member States are represented (like Europol or Frontex, for example). Instead, Eurojust is led by a College composed of one National Member designated by each Member State, and the College elects its President. Eurojust's National Desks are fundamentally different from those at Europol, since they are attached to the National Member who is part of the College, while Europol's National Desks are more of an extension of the police of the Member State concerned. Eurojust's collegial nature makes it closer, with regard to its organisation, to the Court of Auditors or the Court of Justice, while its role is very different, since it focuses on coordination.

The atypical structure of Eurojust has never really been questioned². This structure is not so much the result of Eurojust being the product of an initiative by the Member States (so is Europol) but has more to do with its (mostly) judicial nature or composition. The independence of the judiciary does not, in itself, require this collegial nature, but it does contribute to the fact that the judiciary has a less hierarchical structure compared to the police or other administrative bodies. This pushed Member States, more than 20 years ago, to apply a solution where

prosecutors in each Member State would have a peer at Eurojust to work with in order to foster trust in the new body.

This has worked really well, and the collegial nature is undoubtedly a key part of the success of Eurojust in concrete cases. Eurojust has gained the trust of national judicial authorities, which was not a given when it was first created. The collegial nature of Eurojust also compensates for the lack of a management board in terms of relations with the Member States themselves.

It is interesting to see that the collegial structure was also favoured by the Member States for the European Public Prosecutor's Office (EPPO), departing in that crucial aspect from the Commission's proposal. The EPPO's structure is not, of course, exactly the same. In particular, EPPO has a Chief Prosecutor, and the EPPO Regulation puts more emphasis on the independence of the European Prosecutors. But the general idea is similar: to make the EPPO and Eurojust work, the diversity of legal systems needs to be reflected, and the national judicial authorities need national peers to embody the action taken by this European body in or with their Member State.

Eurojust and police cooperation

The pre-existence³ of Europol is one of the main factors that triggered the idea of setting up what would become Eurojust. The growing maturity of the information-sharing component of police cooperation increasingly highlighted the limitations of judicial cooperation. As Europol is based on the necessity to tackle complex organised crime structures operating in several Member States, it became evident that another level of coordination than the European Judicial Network⁴ was needed for the criminal proceedings themselves. Coordinated action needed to include, for example, resolving conflicts of jurisdiction or taking simultaneous judicial measures, such as house searches or arrests, in different Member States⁵.

The relationship between Eurojust and Europol, and more generally between police cooperation and judicial cooperation, has been important ever since. It would be a mistake to reduce this dynamic to the natural interaction between two bodies operating in the same field but with different roles, where there is the usual combination of a positive drive to cooperate and, from time to time, unavoidable tensions about each other's role. The interaction between Eurojust and Europol is much more complex and richer.

Almost 15 years ago, the 'Swedish framework decision'⁶ clarified the fact that police cooperation concerns information while judicial cooperation is about evidence⁷. This legal framework is necessary, and its consequences are clear regarding the exchange of specific pieces of information. But when it comes to complex investigations that involve monitoring criminal organisations over the course of several years, police and judicial cooperation becomes very much intertwined. Information

analysis, on the one hand, and the collection of evidence and coordination of criminal proceedings, on the other, necessarily overlap in cases that form the 'raison d'être' of Europol and Eurojust. In practice, Europol and Eurojust have set up various mechanisms to facilitate their essential cooperation.

All relevant actors are aware of the importance of ensuring smooth and efficient cooperation between Europol and Eurojust and, in general, interaction between police and judicial cooperation. But maintaining a clear vision is challenging. Both police and judicial cooperation have seen their legal and operational frameworks ramify and become more complex. It has become difficult to find experts working in law enforcement, the judiciary or policymaking at national or EU level, who have a global view of at least one of the two worlds, let alone experts who understand both of them.

Most academics, practitioners or policymakers who have developed expertise in judicial cooperation have a simplistic or limited view of police cooperation and vice versa. I myself cover both sectors, and I am convinced that the development of our law enforcement policies will require increasing efforts to maintain a horizontal understanding and strategy, beyond the division of competences between national ministries of justice and home affairs or administrative divisions in the EU institutions.

The cooperation between Eurojust and Europol will not only be an interesting barometer of the success of these efforts. Its evolution will also be crucial concerning the possible transformations discussed in this contribution.

The evolution of judicial cooperation

This anniversary is also an opportunity to reflect on Eurojust's work and evolution in parallel with the evolution of the EU rules on judicial cooperation in criminal matters.

The creation of the European Judicial Network can easily be linked with the negotiation of what would lead to the 2000 MLA Convention, which formalises the principle of direct contact between local judicial authorities (rather than channelling cooperation via central authorities, usually ministries of justice).

Looking at the timing, it may seem straightforward to link Eurojust with the next step and therefore with the principle of mutual recognition. After all, the political endorsement of the creation of Eurojust coincided with the endorsement of the principle of mutual recognition. Both were explicitly formulated in the Tampere conclusions (1999). And the first Eurojust Decision was finalised together with the Framework Decision on the European Arrest Warrant (December 2001). However, Eurojust's activities are at least as important in the early stages of criminal proceedings, where it is important to coordinate the launch of criminal proceedings and the gathering of evidence. It was not until the application of the European Investigation

Order (EIO), in 2017, that mutual recognition was applicable to the main areas of evidence collection (such as searching a house, seizing a computer or hearing a witness).

Of course, the creation and the work of Eurojust cannot be dissociated from the spirit, if not the actual implementation, of mutual recognition. The general trend was mutual trust and ‘judicialisation’. Even if the 2000 MLA Convention does not explicitly prevent Member States from subjecting the execution of a letter rogatory to a governmental decision, such a requirement will progressively disappear, and judicial cooperation will fall exclusively to judicial authorities.

However, judicialisation and decentralisation do not themselves justify setting up a permanent body at EU level. The need to tackle complex and long investigations, particularly with regard to organised crime, is the most important factor. In that sense, more than the European Arrest Warrant or the definition of terrorism, which were adopted together with the Eurojust Decision as part of the post-9/11 package, the legal framework for joint investigation teams (JITs) is maybe the closest to Eurojust in terms of objective. Although JITs can operate without Eurojust’s support, and although Eurojust’s involvement in cases that give rise to a JIT represents just a small fraction of the cases where Eurojust intervenes, there is a close link between the two tools. Knowing that it took some time for the first JITs to be used and to increase in number, it is interesting to see that Eurojust has now been involved in as many as 254 JITs.

The innovative aspects of the legal framework of the JITs are often underestimated. Setting up a JIT creates a legal space in which evidence can be shared and later used in court proceedings in each participating state, irrespective of where the evidence has been collected. The initial phase is cumbersome, precisely because the consequences are far-reaching from a legal point of view. It is an appropriate tool for the types of investigations that form the core of what motivated the setting up of Eurojust.

Twenty years after Eurojust was set up, along with the launch of mutual recognition and the JITs, what lies ahead of us?

We first need to take into account the evolution of the legal framework of the cornerstone of judicial cooperation that is mutual recognition. The legislative pace has slowed down significantly. During the first 10 years of implementation of the mutual recognition principle in EU legal instruments, there was one instrument adopted every year (between 2001 and 2011). The last decade has seen only two new instruments adopted. Since the EIO was proposed in 2010 and adopted in 2014, mutual recognition has mostly evolved through CJEU case law⁸.

There are several reasons why we have not had new mutual recognition instruments. First, mutual recognition brought so many important changes that the adoption of legal instruments was naturally followed by a long phase of adjustment. Second, with

the EIO, all the main types of judicial decisions are now covered⁹. But it is also true that the evolutions around the rule of law do not provide any incentives to make further steps towards a purer translation of the principle of mutual recognition in the legal framework. It is striking to compare the complexity of the rules contained in the EIO Regulation of 2014 with the pure application of mutual recognition, before that was its name, in the cross-border application of the *ne bis in idem* principle adopted more than 25 years earlier (Art. 54 of the 1990 Convention Implementing the Schengen Agreement).

With mutual recognition as we know it – with a radical improvement compared to classical judicial cooperation but, nevertheless, with relatively important checks allowed in the executing state – the role of Eurojust remains essential. We need a forum and an actor for coordination, a place where mutual trust between the authorities can be fostered, where differences between the legal systems can be discussed and where prosecutors and investigative judges building cases can hold discussions to avoid difficulties down the road which could lead to obstacles in the mutual recognition phase, because those obstacles will continue to exist.

While we might not be able to reduce grounds for refusal or checks needed in the executing state, a lot of progress can be made in the digitalisation of procedures, with possible ways of reducing the workload and the length of judicial cooperation. Eurojust has been a driving force in this regard.

Major legislative work is ongoing, based on Commission proposals. As always in digitalisation efforts, integrating the different strands will pose a challenge. It is essential to bring together what could be called the ‘e-justice’ community and the ‘criminal law cooperation’ community. There are, for example, links between the development of e-Codex (being applied to the transmission of EIOs), the Atlas developed by the European Judicial Network (EJN) to identify the judicial authority that is locally competent to receive an EIO, the JIT platforms where evidence can be stored and shared, and Eurojust’s Case Management System. There are, of course, experts already working on those links, but we need the awareness and knowledge to spread further. The digitalisation of justice may have been slower than in other sectors, but that can be transformed into an opportunity if we manage to fit the different pieces of the puzzle together from the start. Eurojust’s role in these efforts is already and will remain crucial.

Digital investigations

If we need more digitalisation of criminal justice, we also need more criminal justice in the digital world. This includes the collection of digital evidence (including evidence of crimes committed in the physical sphere), prosecuting crimes committed via the digital world (such as hate crimes committed via internet-based social networks) and prosecuting crimes against computer systems (such as ransomware cyberattacks).

Efforts are ongoing and have been for a long time. Eurojust is already playing an important role, including by hosting the Secretariat of the European Judicial Cybercrime Network. Efforts include applying existing tools to digital investigations, helping national authorities in this regard and accompanying legislative efforts at EU level.

This digital world is evolving quickly, and we are having trouble keeping up at a legislative level. Three issues are by now well-known and reflect the hesitations and obstacles: (1) data retention, (2) the e-evidence legal framework and (3) the issue of access to encrypted communications. These issues have highlighted the tensions.

But national authorities and EU agencies are confronted with many other complex and sensitive legal issues, such as searching in a computer system located in another state but accessible from the state where the prosecution is taking place, targeted access to smartphones to circumvent the obstacle of encrypted communications, or the use of fake identities by investigators to enter a closed digital group (such as a closed Facebook group) composed of people from all around the world.

These issues are not only delicate in terms of finding a balance between fundamental rights and the requirements of criminal investigations. They also raise difficult questions in terms of territoriality and conflicts of law, both within the European Union and with non-EU countries. There is no solution to these questions on the horizon.

The timeline for the e-evidence package is not reassuring on the possibility of bringing rapid EU answers: the Ministers of Justice started discussing the need for a common framework in 2015. Despite the enormous efforts put into the negotiations, it seems unlikely that the EU instruments will be applicable in practice before 2024. Furthermore, conflicts of law will only be resolved once an EU-US agreement has entered into force, and that will only concern situations where the provider is based in the United States, and not in another third country.

Europol is providing essential support on all these issues. The EC3 (European Cybercrime Centre) and the innovation lab are essential tools for thinking ahead, mutualising resources and finding creative solutions. The judicial aspect is, of course, also crucial. Eurojust will need to continue playing an essential role in helping prosecutors keep up, collectively, with all the evolutions, while making sure that the solutions found hold up in court and that digital investigations are well coordinated.

Two issues illustrate the challenges ahead. The first, online child sexual abuse material, is already currently plaguing the digital world. The other, the metaverse, is an issue for the future, but it raises questions that need to be explored now.

The staggering figures regarding child sexual abuse material detected by private companies (for example by Meta/Facebook) may lead us to adapt our model of law

enforcement cooperation. The Commission is expected to table a legislative proposal soon, which might include an obligation for internet platforms to report child sexual abuse material and the setting up of a European Centre to fight and prevent child sexual abuse¹⁰. The future solutions will have to deal with a situation where it is not possible or efficient for the platforms to dispatch every detected image or video to the Member State concerned to enable criminal proceedings. Some sort of centralisation, as an intermediary step before national authorities launch their proceedings, may be needed¹¹. What exactly will be the role of the new European Centre and what will Europol do in this framework remains to be seen. Again, it is also important to reflect on the judicial aspect. Issues such as prioritisation of cases, given the sheer volume of material involved, can be dealt with once cases arrive at national level but could also be prepared at a more European level.

The metaverse opens up further considerations on the future European law enforcement and judicial architecture with regard to the digital world. Whether or not it will actually materialise (in the sense of combining both a massive number of users and a fundamental transformation of the user's experience compared to the current web 2.0), is open for debate. At any rate, it is an opportunity to look at what we are currently doing and to check whether the framework we are developing will resist one of the possible evolutions that could – but might not – happen within the next 10 to 20 years.

From a legal point of view, the metaverse will not necessarily raise questions that are significantly different from those we are looking at now. It will still involve investigations covering data managed by private companies often located outside the EU, with uncertainty about where they are stored, concerning unknown and non-located users that are of interest for criminal investigations in an EU Member State, in situations where it becomes increasingly difficult to determine where the offence was committed or, for that matter, where it was not committed (for example, hate crime visible on the internet throughout the world). It is also possible that the metaverse will push all of these difficult issues to a breaking point where we will need to change our approach, for example, concerning territoriality and conflicts of law.

If the digital world becomes an alternate reality, avatars will develop a growing range of behaviours. Issues such as whether sexual violence as a criminal offence can be committed in virtual worlds are already being discussed. They will become more and more significant. The metaverse will not only raise questions of substantive criminal law but also questions about whether and how to 'patrol' and police these spaces, how to investigate and where to prosecute. This will also raise questions about the current law enforcement and judicial architecture.

There is always the possibility of a centralisation model at EU level, but, even if that option is chosen at some point, it is unlikely to be the next step. It is more likely that we will see, at least in an initial stage, Europol and Eurojust diversifying their roles while retaining their supportive function towards national authorities.

Eurojust in the EU judicial cooperation architecture

Looking at the existing models – liaison magistrates, the European Judicial Network, Eurojust and the EPPO – we can see that the emergence of one player does not mean the gradual replacement of others. They simply pursue different objectives in different ways, are intended to tackle different types of cases and are all building blocks in a common judicial area.

The remit of the EPPO might evolve at some point. Proposals have already been made to extend its remit to cases of terrorism and environmental crime¹². What seems clear is that, at least for some time, the EPPO's field of activity will remain extremely limited compared to the much wider scope of competence of Eurojust.

Even with the EPPO's limited scope of competence, there will be frequent overlap, because not all Member States participate in the EPPO and because the world of fraud against the EU's financial interests is not separate in practice from other criminal activities, in particular when organised crime is involved. The coming years will be very interesting as we will gradually be able to assess, based on the EPPO's first years of operational activities, how the EPPO, Eurojust and Europol cooperate and what can be improved. It is difficult to anticipate all aspects of their future cooperation. A JIT has already been set up involving both the EPPO and a non-participating Member State, with the support of Eurojust. More complex situations will arise. It is not far-fetched to imagine a JIT supported by Eurojust involving non-EU States, EPPO participating and non-participating Member States and, within the EPPO participating Member States, both national authorities and the EPPO playing a role because a case has different dimensions.

The legislator will need to step in at some point. Despite the amount of time and effort put into the preparation and negotiation of the EPPO Regulation, it is impossible to anticipate all of the challenges this new structure will be faced with. And most of the solutions will come from practical cooperation. The human factor will be important. A lot will depend on good cooperation, for each participating Member State, between the relevant actors, including the European Prosecutor, the European Delegated Prosecutors and the National Member of Eurojust, as well as with the key prosecutors in the Member State concerned. There already is and there will continue to be a lot of sitting around in physical or virtual meetings to discuss how to overcome unexpected obstacles.

Solving this sort of problem by bringing people together and finding creative solutions is what Eurojust has been doing for 20 years. It is part of its DNA and the culture of cooperation will (have to) prevail.

When Eurojust emerged, the system that was being developed to implement the criminal law aspects in the Area of Freedom, Security and Justice was relatively

simple. Quite a few people could claim to have a horizontal view of all of the important dimensions. Twenty years later, the picture is considerably more complex. Legislative instruments, tools, players and important case law have multiplied. New approaches have been launched that were not anticipated in 2002, such as the approximation of procedural safeguards, mutual direct access to national databases (the 'Prüm' framework), access to electronic evidence and, of course, the setting up of the EPPO.

These changes have made Eurojust more necessary. The College of Eurojust and its successive National Members have developed the anticipated hands-on approach and they have earned the trust of national authorities. Eurojust's building has become an essential forum for prosecutors to come together, discuss and take decisions. Prefigured by a group of 15 individuals working from the building in Brussels where the present article is written, Eurojust has become a robust agency composed of more than 300 people.

Reflecting on these 20 years of Eurojust's development in the context of the wider evolutions that are affecting law enforcement and judicial cooperation is a good starting point for looking into the future. Eurojust is ideally placed to support not only national judicial authorities in specific cases, but also EU policymakers in developing a vision and a strategy for this increasingly complex law enforcement and judicial architecture. Eurojust is indeed a regular guest in Council working parties, Committees and ministerial meetings. There is also excellent cooperation at a more informal level. I look forward to continuing these discussions and reflections, which will help all of us, collectively, to design EU policies capable of tackling the numerous challenges ahead of us in this constant endeavour to create an Area of Freedom, Security and Justice.

¹ The views expressed are those of the author and in no way reflect the views of the Council or the European Council.

² With the exception of the 'lighter' version of Eurojust proposed at the very beginning of the negotiations (OJ C 206, 19.07.2000, pp. 1-2).

³ Europol's legal basis, the Europol Convention, was adopted more than 10 years before the Eurojust Decision of 2002. Although the entry into force of the Europol Convention took some time, Europol was up and running by the end of the 1990s. In 1999, Europol staff already totalled more than 200. The main objective of Europol, which is to allow Member States to share and jointly analyse information, had already been implemented for a few years.

⁴ The European Judicial Network, formally established in 1998, focuses primarily on facilitating bilateral contacts between judicial authorities located in the Member States.

⁵ There was also concern in some circles that the focus on police cooperation reflected the bigger role given to the police in criminal proceedings in common law countries, which formed a minority of the then 15 Member States.

- ⁶ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386, 29.12.2006, pp. 89–100.
- ⁷ If you exchange information via police cooperation, typically at a stage where you need to focus the investigation and ‘close some doors’, and the information later needs to be used as evidence, that will require going through the formal channels of judicial cooperation, now known as the European Investigation Order framework.
- ⁸ With the exception of Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018, p. 1.
- ⁹ The main area that is missing concerns the transfer of proceedings and the issue of conflicts of jurisdiction, but, while this is intrinsically linked to mutual recognition, it might not be resolved by a mutual recognition instrument. The European Commission has announced a legislative initiative on transfer of proceedings in its work programme for 2022.
- ¹⁰ See [Commissioner Ylva Johansson’s speech](#) at the We Protect Global Alliance Webinar “Prioritising Children in Online Safety Laws” (available on the *European Commission’s* website).
- ¹¹ The main internet platforms are already cooperating in the United States with the National Center for Missing and Exploited Children.
- ¹² These two proposals are interesting in that they raise the question of the criteria, beyond the requirement of the Treaty, to task the EPPO with a new field of criminal activities. Does this concern the seriousness of the impact on the European Union as a whole, even if that seriousness actually translates into the highest level of priority in the Member States and efficient judicial cooperation between them? Or, on the contrary, is it the need to make sure that a specific form of crime is given the necessary priority because of its impact on the EU as a whole?



The evolution of the European Parliament's role in shaping the Area of Freedom, Security and Justice

Juan Fernando López Aguilar

Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), European Parliament



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The law embodies the story of a nation's development through many centuries, and cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

~ O.W. Holmes, *The Common Law* ~

This year, we celebrate the 20th anniversary of Eurojust as a success story of an EU agency in the field of judicial cooperation. It is also a celebration of the strength of the Area of Freedom Security and Justice (AFSJ) as well as of the democratisation of the mentioned area in view of the role of the European Parliament (EP) and national parliaments. In that regard, democratisation also means more legitimisation of EU prerogatives in the field of judicial cross-border cooperation. Especially in the area of adoption of criminal law, parliamentary decision-making, as well as parliamentary oversight of law enforcement agencies, is essential to guarantee a functioning system of checks and balances and gain the trust of citizens in such a system.

From Maastricht to Lisbon

Initially, the Maastricht Treaty¹ and the amendments in the subsequent Treaty of Amsterdam² viewed the Justice and Home Affairs (JHA) area as a purely intergovernmental system with a purely consultative function of the European Parliament³. It could state its opinion during a specific time frame. However, during this period, the EP's voice was like 'a distant echo', not necessarily heard by Member States. They only had to wait for the deadline for the EP opinion to pass, and not necessarily take the opinion into account. In the sensitive area of criminal law, such an intergovernmental approach, which limited the adoption of acts to representatives of national executives (governments) only in the framework of the EU Council, led to a certain imbalance between efficiency on the one hand, and fundamental rights protection on the other, as acknowledged in the framework of the five-year Stockholm programme. Nevertheless, several decisions and framework decisions were

adopted after Amsterdam covering mutual recognition in all phases of the criminal procedure (for example, the European Arrest Warrant), substantial harmonisation of criminal material law (for example, on trafficking, abuse against children and terrorism), and certain criminal cooperation frameworks were established as well, such as the European Judicial Network and Eurojust.

However, criminal law is not only an effective tool for combating crime (protective role), but it is also a safeguard mechanism for the individual (guarantee role). In that regard, the role of parliaments is essential whereby pros and cons for a certain legislative solution are discussed and assessed in a transparent way in an open debate. As a result, citizens can become aware of what is happening and try to shape criminal law legislation, such as legislation with a significant impact on fundamental rights, through its elected representatives. Only after Lisbon did the European Parliament and its Committee on Civil Liberties, Justice and Home Affairs (LIBE) become fully involved in criminal law legislation based on the new provisions of Chapter 4 of Title V of the Treaty of the Functioning of the European Union (TFEU, Area of Freedom, Security and Justice). The Lisbon Treaty introduced a ‘Copernican’ shift and provided national parliaments with a special procedure on subsidiarity issues⁴, and the role of an equal co-legislator in the criminal justice area for the European Parliament⁵. And the Parliament, as well as the LIBE Committee responsible for approximately one-third of the legislative work at the EP committee stage, has used its role wisely and effectively since then.

The added value of the European Parliament as a co-legislator

Over the past 12 years, the European Parliament has co-shaped EU criminal law and judicial cooperation in a substantive way, including the new structure and prerogatives of Eurojust. It has significantly contributed to a high level of protection of victims in criminal proceedings by enhancing the level of protection (see Directive 2012/29/EU), thereby shifting the focus onto victims as well. As regards harmonising the rights of suspects under Article 82(2) TFEU, it has helped to substantially increase the level of protection – for example, regarding the right to information, by insisting that the right to remain silent must be included in the system of warnings given⁶. The Parliament also limited exceptions to the right to a lawyer to a minimum due to the Council’s objection that such an exception exists at all⁷. In the framework of presumption of innocence, it has opposed any reversal of the burden of proof and argued in favour of the right to remain silent and the privilege against self-incrimination to be an absolute category⁸. It has also significantly improved the directive on legal aid, changing it from a provisional system to a proper system of free legal aid⁹. As regards harmonising offences under Article 83 TFEU, it has championed appropriate deterrent sanctions, if necessary, for example regarding human trafficking¹⁰ or combating sexual abuse against children¹¹. It has championed the protection of the European Union’s financial interests through the PIF Directive based on Article 83 TFEU (and not 325 TFEU) and including certain VAT offences¹².

It has significantly added to the definition of terrorist offences¹³ and the fight against money laundering, for example as regards the issue of predicate offences¹⁴. As regards mutual recognition in criminal law under Article 82(1) TFEU, it has established a balanced system of mutual recognition, including, *inter alia*, a fundamental rights non-recognition ground, a reference to proportionality, and stronger provisions on legal remedies regarding the European Investigation¹⁵ Order and freezing and confiscation orders¹⁶, and continues to use this balanced approach with e-evidence¹⁷. The EP has provided an efficient system of confiscations, including extended confiscations¹⁸. It has also championed the Lisbonisation of the Eurojust legal framework¹⁹. It is a strong supporter of the newly established European Public Prosecutor's Office²⁰. In addition, regarding certain broader issues, the foresight of the EP was almost 'prophetic'. Indeed, the EP already warned in 2012 that rule of law issues in the Member States might have a negative impact on mutual recognition in criminal law, much before the CJEU decision in the LM case (C-216/18)²¹. These are just some examples of the EP's involvement and its role as a co-legislator in matters of criminal justice since Lisbon.

Eurojust – a success story

Eurojust as an agency in the field of criminal justice is one of the great European Union success stories. For example, the last annual report showed an impressive number of practical support in more than 10 000 cases covering more than 85 000 suspects and 15.3 billion in damages, 517 cases involving European Arrest Warrants, 4 319 cases involving European Investigation Orders, 254 joint investigation teams (JITs) and 3 312 mutual legal assistance (MLA) cases²². The trend through the years shows a continued increase in workload. Furthermore, Eurojust has established contact with a variety of third countries in view of the fact that crime does not stop at the European Union's borders. Ten Liaison Prosecutors from third countries are stationed at Eurojust, and Eurojust concluded 12 cooperation agreements with third countries such as Ukraine, Serbia and Montenegro. This has all been accomplished on a relatively modest budget of around EUR 44 million.

The European Parliament had a certain share in that success by supporting the above-mentioned Lisbonisation of Eurojust, fighting for Eurojust's prerogatives, conducting swift procedures to conclude cooperation agreements between Eurojust and third countries, providing appropriate budgetary means for Eurojust, as well as showing a continued interest in Eurojust's activities by maintaining permanent contact with Eurojust, for example in the framework of annual inter-parliamentary conferences on Eurojust. Regarding the current Eurojust Regulation (EU) 2018/1727, the EP aimed, during the legislative procedure, *inter alia*, to achieve the following: a clearer division of competencies between Eurojust and the EPPO; cooperation provisions between Eurojust and other JHA bodies and agencies; the option of writing one's opinions on refusals or difficulties concerning the execution of requests for judicial cooperation; enhanced powers of National Members; clear provisions on Eurojust's governing structure, such as the role of

the College or the Executive Board; stronger provisions on the national coordination system; strong provisions on informing national members of cross-border cases affecting a certain number of Member States; clear provisions on the response obligations of national authorities; clear provisions on the Case Management System and its access; clear rules on data sharing and close cooperation with Europol and the EPPO, including a 'hit/no hit' system; strong rules on international cooperation; and a strong data protection framework based on Regulation (EU) 2018/1725 and certain specific data protection provisions in the Eurojust Regulation as a *lex specialis*.

The EP conducted its legislative procedure with the utmost diligence in view of the circumstances and close connection with the EPPO proposal. In that regard, the Eurojust regulation had to be closely coordinated with the negotiations and closure on the EPPO file and EU data protection rules. The EP LIBE report on Eurojust was confirmed by the EP plenary in October 2017, and the final agreement between the two co-legislators was confirmed by the EP in October 2018 after intensive negotiations in 2017-2018.

There are also additional legislative procedures pending involving Eurojust related to JITs²³ and to the digital exchange of information in terrorism cases²⁴. Currently, Eurojust is providing practical and logistical support to the JITs Network and hosting the JITs Secretariat. New provisions will provide an IT platform where JIT participants can share information. In addition, the issue of the European Judicial Counter-Terrorism Register (CTR) and the Eurojust Case Management System (CMS) will be clarified. These developments mean that judicial authorities and Eurojust are being equipped with the latest technology, which is welcome, provided that fundamental rights, especially data protection rights, are fully respected, no prohibited general indiscriminate data retention system is established during the process, and cooperation with third countries is based on the same data protection and fundamental rights values. It should be added that not everything that is technologically possible in a democracy is also legally possible.

However, the EP interest in Eurojust with regard to legislative work is far from over, and there is a constant, regular exchange to understand the work and needs of Eurojust. In that regard, it is necessary to highlight specifically the application of Article 67(3) of the Eurojust Regulation whereby '[t]he President of Eurojust shall appear once a year for the joint evaluation of the activities of Eurojust by the European Parliament and national parliaments within the framework of an interparliamentary committee meeting, to discuss Eurojust's current activities and to present its annual report or other key documents of Eurojust'. So far, two such meetings have been conducted, in 2020 and early 2022 respectively, under the German and French presidencies, and despite logistical difficulties due to the COVID-19 pandemic. In addition, there is also a continuous presentation of the Eurojust Annual Report and certain sectorial reports in the LIBE Committee by Eurojust.

Conclusion

Eurojust has proved that it is possible to be an efficient judicial body, while fully respecting fundamental rights, safeguarding data protection and demonstrating full transparency regarding the democratic process through the European Parliament. Indeed, the establishment of the EPPO in no way makes Eurojust redundant or superfluous, as some feared. On the contrary, Eurojust and the EPPO serve the same goal (to fight crime and end impunity for criminals), but at the same time using two different but complementary paths. The EPPO is a fully fledged prosecutorial agency, a kind of federal prosecutor for certain EU offences, while Eurojust focuses more on providing support and coordination, such as JITs, for a broader set of cross-border offences. Both are needed, now and in the future. In addition, the horrific violations of human rights taking place in Putin's war against Ukraine clearly show that such a coordination role is necessary not only for EU Member States but also for third countries, especially crimes against peace, war crimes and crimes against humanity. In view of that, Eurojust has a fully functioning system of third country Liaison Prosecutors and Contact Points, whose work also covers crimes against peace, war crimes and crimes against humanity committed in third countries but which fall under universal jurisdiction. Consequently, the European Parliament and the LIBE Committee will continue to provide its full support to Eurojust in its noble fight against crime.

¹ Articles K.1 to K.9 TEU.

² Article 29 to 40 TEU.

³ Article 39 TEU.

⁴ Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality.

⁵ See Articles 82 till 85 TFEU.

⁶ See Article 3 of Directive 2012/13/EU.

⁷ See Article 3(6) of Directive 2013/48/EU.

⁸ See Articles 6 and 7 of Directive (EU) 2016/343.

⁹ Directive (EU) 2016/1919.

¹⁰ Directive 2011/36/EU.

¹¹ Directive 2011/93/EU.

¹² See Article 2(2) of Directive (EU) 2017/1371.

¹³ Directive (EU) 2016/681.

¹⁴ Article 3 of Directive (EU) 2018/1673.

¹⁵ Directive 2014/41/EU.

¹⁶ Regulation (EU) 2018/1805.

¹⁷ Proposed system of European Production and Preservation Orders (COM/2018/225).

¹⁸ Directive 2014/42/EU.

¹⁹ Regulation (EU) 2018/1727.

²⁰ Regulation (EU) 2017/1939.

²¹ See, for example, the EP report on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)).

²² See Eurojust's 2021 Annual Report.

²³ Proposed Regulation on establishing a collaboration platform to support the functioning of Joint Investigation Teams (COM(2021) 756).

²⁴ Proposed Regulation regarding the digital information exchange in terrorism cases (COM(2021) 757).



Future perspectives and challenges in the Area of Freedom, Security and Justice

Ana Gallego

Director-General of DG Justice and Consumers



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As Commissioner Didier Reynders concludes in his introduction to this book, ‘...there will always be a need for the outstanding service Eurojust does for the safety of Europe’. I could not agree more. As I write this chapter, war is raging on Europe’s borders, and we are all confronted with one of the greatest and saddest challenges that we have had to face in our recent history, and one that impacts directly in the title of this chapter: freedom, security, justice.

I wish I did not have to start off with these words, but how could I not? My most sincere and deepest solidarity and sympathy go to the people of Ukraine: to the women, men and children that are suffering terrible losses and unspeakable fear from a brutal and unjustified act of aggression. We stand by you. Justice will be served.

And, of course, these reflections around the future perspectives and challenges of Eurojust in the midst of its 20th anniversary, would have been very different had it not been for this major challenge, in which Eurojust has courageously assumed its responsibility as the hub for international cooperation in cross-border investigations, including war crimes.

In the past few weeks, the International Court of Justice has issued an order for Russia to immediately suspend military operations in the territory of Ukraine; the International Criminal Court (ICC) has opened an investigation on the crimes committed in the territory of Ukraine and is working closely with Eurojust and the national prosecution services to support domestic investigations. Eurojust is leading a united and coordinated response by supporting the joint investigation team (JIT) with Ukraine, Lithuania and Poland, and by fostering close cooperation and exchange of information among national authorities. This is a necessary response to the illegality of Russia’s actions and a reminder that a united response from Europe, grounded in law, is vital.

In this context, the European Commission has shown courage and vision by taking up a coordination role to bring together the different actors involved in the response to the war in Ukraine. In the area of justice, this has been done mainly through two work strands.

In order to coordinate actions taken at a national level to freeze the assets of individuals and companies subject to Union sanctions, the Commission set up, under the leadership of Commissioner Reynders, the Freeze and Seize Task Force. Eurojust is a key player in the task force and has supported its work from the outset, showing a strong commitment to providing national authorities with the best support possible in tackling crimes committed in the course of the Russian aggression. Eurojust's work is a testament to the unquestionable importance of Union level cooperation when facing cross-border and international threats: only through cooperation can breaches of the European Union's sanctions legislation be thoroughly investigated and flows of money to the Russian war machine stopped. This is why cooperation needs to go beyond Union borders and is being established with the European Union's international partners.

Very early in the war, the world had to witness hideous crimes being committed in Ukraine that could amount to serious war crimes. Here, the Commission has also reacted by providing the necessary support for the competent authorities to do their work effectively, and the role of Eurojust in the investigations into war crimes in Ukraine has been crucial. Only a few weeks after the war began, a JIT was set up between Lithuania, Poland and Ukraine with the indispensable legal and technical support of Eurojust. As we have seen with past atrocities, such as those carried out in Syria, bringing justice to victims requires the strongest effort and maximum coordination. Evidence and testimonies from witnesses on the ground have to be securely stored, chains of custody must be established and maintained and, at the appropriate moment in time, decisions will have to be made about where prosecutions should take place. The Genocide Network, hosted by Eurojust, is also a very valuable source of expertise that could be incorporated further into the work of Eurojust in the future, including in decisions on where best to prosecute cases.

These are all areas where Eurojust is called to provide invaluable support, as it proved capable of doing in the past, and the Commission will stand ready to provide the means to do it effectively, including by proposing new legislation to accommodate its mandate to new circumstances and needs.

We must ensure that these important tasks, together with the daily work that Eurojust carries out, continue with the same efficiency and even more in the future. To do this, the Agency needs to be equipped with the right digital infrastructure; we need nothing short of a digital revolution in the European justice sector. This has been on the European Union's radar for the past couple of years, largely because of an evolving security threat landscape coupled with the accelerating pace of technological developments. The need to digitalise justice has become even clearer during a global pandemic that kept courtrooms closed and justice only flowing in countries that had the right digital infrastructure already in place. As is the case for judicial institutions all over the world, Eurojust must modernise, and the Commission will do everything it can to make this happen.

Digitalisation in Eurojust means a better digital system for managing cases. Gone are the days of logging details in an Excel spreadsheet; not with 10 000 cases per year, growing by 17% on average! In December 2021, the European Commission made a proposal to create the legal and technical conditions for a state-of-the-art system with features such as secure digital communication channels, the means to share large files securely, and access for representatives from third countries that have cooperation agreements with Eurojust. The system must allow Eurojust staff to quickly join the dots between related cases, evidence and suspects, especially in terrorism cases, where missed connections cost lives. Eurojust's Counter-Terrorism Register will greatly benefit from these improvements.

Digitalisation will also help with the management of joint investigation teams. These are already one of the most successful tools for cross-border investigations and prosecutions in the EU. JITs can be better managed digitally with an instant messaging tool, a system to exchange large files and temporarily store them, and a mechanism to trace who is sharing what evidence during an investigation to ensure its admissibility in court. The Commission is working to make a digital platform for JITs legally possible.

As internal work will continue on the digital overhaul of Eurojust over the next few years, there are ways in which the current working methods can be strengthened. Member States must continue to provide information on national judicial proceedings when they concern criminal offences with a cross-border dimension, including on terrorism, as is their legal obligation. In turn, Eurojust must provide feedback to the Member States wherever connections between cases could be established. Information must freely and safely flow in both directions. A permanent arrangement should soon be agreed with the ICC so data can flow more easily in the future, in particular for investigations of war crimes where multiple European countries are involved. Eurojust is already an important bridge between EU Member States' investigations and the ICC, and there is a way to strengthen the ties further.

Beyond becoming digital, Eurojust's horizons are also international; to fight crime effectively, prosecutors must be able to share information and discuss cases. The European Commission will be negotiating even more partnership agreements for Eurojust, with countries such as Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey. And the list could certainly grow, including with regional organisations that share the same goals and working methods, such as IberRED and others.

Once the infrastructural creases are ironed out, working methods strengthened, and new partners on board, Eurojust can take on a more proactive role, beyond its role as a one-stop shop for judicial cooperation in Europe. Eurojust is ideally placed to determine where the prosecution of a cross-border case should take place, or even to initiate investigations on behalf of national authorities in some cases.

I have had the opportunity to cooperate with Eurojust ever since its first steps back in 2002, from my position as a central authority in the Ministry of Justice of Spain, and I was already fully aware of the immense added value of Eurojust in cross border investigations. I am now able to see its functioning at European level, and it is not only a privilege to be part of Eurojust's management structure as the 28th Member of Eurojust's Management Board, but also a unique opportunity to have a comprehensive overview of the truly European dimension of its activities and to experience first-hand the unrelenting dynamism and exemplary professionalism of its staff.

Eurojust is always there to tell us about how judicial cooperation is working on the ground, how the European Arrest Warrant is being used, whether there is a need to do more on the transfer of proceedings, what the latest information on trafficking is... Eurojust is our eyes and ears on the ground in the landscape of cross-border judicial cooperation. Through our excellent cooperation, we can better fulfil the Commission's task to improve the Area of Freedom, Security and Justice.

The European Union can be proud to have an agency as valuable as Eurojust; this is really European cooperation at its best. It is why, as far as the future challenges go, I have no doubt in Eurojust's capabilities to grow further and ensure that no cross-border criminal case is lost.

Happy birthday to Eurojust. I look forward to seeing what the next 20 years will bring!



Partners against crime: 20 years of judicial and law enforcement cooperation

Catherine De Bolle

Executive Director of Europol

From the Luxembourg Council in 1991 to the Tampere Conclusions of 1999, eight years separate the genesis of the ideas of Europol and Eurojust. Far from constituting a generational gap, this age difference was rapidly bridged by the Treaty of Lisbon, which in a way reset the evolution of both Agencies, establishing a convergence of the two key European Union instruments in the area of police and judicial cooperation. Indeed, Eurojust and Europol are singled out in the Lisbon Treaty as the only two Justice and Home Affairs Agencies whose core functions are defined in EU primary law. The Treaty also aligned the legal and institutional development of Europol and Eurojust, foreseeing the organisation of the two Agencies by means of Regulations.



Catherine De Bolle © Europol

Much has been written about the differences between Europol and Eurojust in terms of their evolution, their nature and functional logic, their organisational structure, and their size and resources. However, in my view, the history of both agencies over the last 20 years is much more about operational convergence than institutional difference. What may have started as a tale of two cities, has now become a tale in a single city, The Hague, where both organisations are located across the street from each other.

Europol and Eurojust have a common mission to support law enforcement and the judiciary in their respective constituencies – to support, but not to substitute, let alone exercise executive powers. In fact, though both are fully fledged EU Agencies, Europol and Eurojust are still imbued with a strong intergovernmental spirit, not least because of the highly delicate subject matter they deal with, involving national sovereignty. In the case of Europol, this is related to its evolution and history. In matters of law enforcement, Europol stood alone, since 1995, as an institutional player within the EU and was the only organisation, within the framework of the third pillar, created on the basis of an intergovernmental convention. For its part, Eurojust was established in 2002 by a Council Decision directly as an EU body.

In their functioning and activities, Europol and Eurojust were and remain equally dependent on Member States' competent authorities. Both are service providers,

which are voluntarily approached by Member States' judicial or law enforcement authorities. Both Agencies offer competitive products and services, which substantially contribute to Member States' judicial actions and criminal investigations. However, Member States remain the initiators and owners of such investigations and judicial actions. Competent authorities provide the criminal- or terrorist-related information, which allows Europol to act as the EU criminal information hub. Likewise, national judges or prosecutors opt to use Eurojust as an instrument to enhance international judicial cooperation. Therefore, both agencies need to create a positive dynamic of permanent engagement with national authorities, and they must continuously nurture an environment of trust that makes them relevant and valuable.

From complementarity to collaboration

Europol and Eurojust are key actors in the EU internal security framework and play an instrumental role in supporting and strengthening cooperation between EU Member States in criminal matters. They both have complementary functions and competences facilitated by their corresponding mandates. This complementarity should not be understood as an exclusive exercise of competences in different and separate jurisdictions or constituencies. On the contrary, over the last 20 years, complementarity between Europol and Eurojust has been about achieving and maintaining a dynamic engagement strategy. Close cooperation between both Agencies is essential to effectively assist national authorities in fighting serious and organised crime and terrorism, from the preliminary police investigation phase up to the judicial stage. There is a continuum between Europol's police cooperation function and the judicial coordination work carried out by Eurojust. Judicial authorities build on the investigations of law enforcement authorities, transforming the collection and analysis of criminal information into judicial evidence, thus facilitating the formulation of criminal charges.

The Maastricht Treaty confirmed that Eurojust's task was to support criminal investigations in cases of serious cross-border crime, particularly organised crime, taking account of analyses carried out by Europol. For Europol, the necessity and value of engaging with Eurojust essentially originate from an operational responsibility, rather than from a statutory obligation. This became evident soon after the Europol Convention entered into force on 1 October 1998, in Europol's start-up phase following the Europol Drugs Unit period (1994-1998). In 1999, the newly created Europol Management Board launched an early debate about Europol's perspectives and strategic outlook with a view to facilitating its mission of providing assistance to national law enforcement agencies. This led to a 'Europol vision paper' adopted in Paris on 4-5 December 2000, which among other recommendations, concluded that a working relationship between Europol and Eurojust should be developed following the establishment of the latter. In the meantime, on 14 December 2000, on the initiative of Belgium, France, Portugal and Sweden, a provisional judicial cooperation unit was formed under the name Pro-Eurojust, operating from the Council building.

Following the 9/11 terrorist attacks in the United States, the EU further intensified its initiatives in justice and home affairs, giving additional impetus to the development of relations between Europol and Eurojust. On 20 September 2001, an extraordinary Council meeting entrusted the Article 36 Committee, which handled police and judicial cooperation in criminal matters, with the task of ensuring the closest possible coordination between Europol, Pro-Eurojust and the EU Police Chiefs Task Force.

The 20th anniversary of the foundation of Eurojust also marks the coming of age of the formalisation of the relationship between Europol and Eurojust. Despite the operational necessity and political priorities, reaching a formal agreement between both agencies took some time. The Council Decision 2002/187/JHA, which created Eurojust as a judicial coordination unit, required both agencies to establish and maintain close cooperation avoiding duplication of efforts and to do so through an agreement to be negotiated by the two parties and approved by the Council. A similar requirement was included in a third amending protocol to the Europol Convention on 27 November 2003. Eventually, Europol and Eurojust would sign their first cooperation agreement in 2004. However, it soon became evident that the arrangement was insufficient to ensure an effective exchange of information. Indeed, the Justice and Home Affairs Council Statement of 5-6 June 2008 called for a new agreement between Europol and Eurojust to enhance cooperation in order to make the investigation and prosecution of crimes as efficient as possible through a proper exchange of personal data.

Since then, the mandates of both Agencies have regulated their bilateral cooperation, underlining its relevance for the fulfilment of their respective missions and for achieving the overall goals of EU action in the area of justice and home affairs. Europol and Eurojust negotiated and concluded a new cooperation agreement, which entered into force in January 2010, to increase both Agencies' effectiveness in combating serious forms of international crime.

The cooperation agreement solidified efforts to foster closer cooperation between the Agencies, in particular by increasing information exchange and improving strategic and operational cooperation. It also facilitated mutual participation in strategic and operational coordination meetings and the possibility of temporarily posting representatives of one or both agencies on the other's premises, as well as the obligation to inform each other about participation in joint investigation teams (JITs).

Eurojust and Europol also concluded agreements for the temporary placement of Eurojust representatives in Europol's operational centres, namely the European Cybercrime Centre (EC3) and the European Counter Terrorism Centre (ECTC). Eurojust's seconded national expert posted at EC3 promotes the early involvement of judicial authorities in cross-border cyber investigations and facilitating the exchange of information. This ensures Eurojust's contribution to relevant cyber-related investigations in the context of Europol's Analysis Projects (APs), as well

as its regular and active participation in the EC3 Programme Board, the EU Cyber-crime Task Force, the Europol Joint Cybercrime Action Task Force or the European Cybercrime Training and Education Group. For its part, the Eurojust prosecutor posted at ECTC has decisively contributed to the enhancement of cooperation with Eurojust in counter-terrorism matters.

Eurojust is associated with almost 30 Europol APs. Meetings between AP managers and Eurojust Contact Points provide a useful platform for discussing practical issues related to the further strengthening of operational cooperation. Eurojust Contact Points act as facilitators between Europol APs and Eurojust National Desks. Both Agencies have intensified expert-level contact in dedicated crime areas, for example between financial intelligence experts at Europol and Eurojust's Economic Crimes Team to discuss asset recovery or in the area of intellectual property rights. The requirements for closer cooperation have led to a multitude of operational meetings between both Agencies on an almost daily basis. In addition to this intense and smooth interaction, Eurojust and Europol have established a Steering Committee, which normally meets four times a year in two different formats – covering strategic and operational matters – as a dedicated forum to address issues of common interest or concern for their mutual cooperation.

From exchanging to accessing information

Since its establishment, Europol's core task has been to conduct operational analysis of criminal information and intelligence. Europol's function is to collect, store, process, analyse and exchange information and intelligence and to notify the competent authorities of the Member States of information concerning them and of any connections identified between criminal offences. Over the years, Europol has established extensive and recognised analytical capabilities and continuously improves and reinforces its analytical tools.

Europol's analytical function requires the processing of data that is obviously relevant to law enforcement agencies during the criminal investigative stage, but which can also be relevant to judicial authorities during the prosecution and trial phases. The new Europol and Eurojust Regulations have mirroring provisions to grant each other indirect access to data, which will require a number of technical enablers for their implementation. While Eurojust already has a SIENA connection – Europol's secure information-exchange network application – both Agencies are working to make the indirect access to information possible, including by developing new technical solutions, such as web-based functionalities facilitating reciprocal access. The exchange of information has been a regular practice between both Agencies since the signing of the Cooperation Agreement in 2010. In fact, both parties had already agreed to use their contacts with national authorities to ensure the early and complete acquisition by both Agencies of information necessary to fulfil their tasks. In this regard, the Europol and Eurojust Regulations of 2016 and 2018

respectively codify previous business practices in terms of information exchange. One common practice now enshrined in the Eurojust Regulation is that if, while information is being processed regarding an individual investigation, Eurojust or a Member State identifies the need for coordination, cooperation or support in accordance with Europol's mandate, Eurojust shall notify Europol and initiate the procedure for sharing the information. It will be important to take advantage of the new possibilities offered by the respective Regulations, while preserving the good practices already consolidated through regular engagement, mutual trust-building and operational cooperation.

A crucial nexus for judicial and law enforcement cooperation

Europol and Eurojust share an essential responsibility in facilitating police and judicial cooperation in criminal matters. This requires close cooperation and a continued commitment to engage in matters of joint concern, in particular to respond quickly to any request for operational support. JITs have become a well-established, efficient and effective international cooperation tool among national investigative agencies to facilitate the coordination of criminal investigations and prosecutions conducted in parallel across several states.

In many ways, JITs are the central nexus of the Europol-Eurojust cooperation for a number of reasons. JITs can bring together the respective competent authorities from both the judicial (judges, prosecutors and investigative judges) and law enforcement domains. They facilitate cooperation between two or more Member States. They are established for the specific purpose of carrying out criminal investigations in one or more of the involved states. JITs have clear added value compared to traditional forms of police and judicial cooperation, in that they enable the direct gathering and exchange of information and evidence without the need, for example, of using complex channels of mutual legal assistance. Information and evidence are collected in accordance with the legislation of the state in which the team operates and can be shared on the basis of the JIT agreement. JITs facilitate the engagement of team members as they become entitled to be present and take part in investigative measures conducted outside their state of origin, within the limits foreseen by national legislation or specified in the JIT agreement.

Eurojust and Europol have played an instrumental role in the development of JITs as one of the most advanced tools used in international cooperation in criminal matters. To further strengthen the supportive role played by Eurojust and Europol in financially supporting JITs, in June 2018, both Agencies signed a Memorandum of Understanding (MoU) on the joint establishment of rules and conditions for financial support to JIT activities. Among other points, the MoU underlines the need for the Agencies to efficiently exchange information, including on applications for JIT funding, in order to prevent duplication of efforts, including double funding for JITs. More generally, the MoU emphasised the Agencies' commitment to close

cooperation and continued cooperation in matters of joint concern, which is also a requirement of the Eurojust and Europol Regulations.

Europol supports the JITs Network Secretariat established at Eurojust. Both agencies work towards improving the communication of the conclusions of JIT meetings to the Commission and Council. They also review the JIT training programme to better reflect the needs of various target groups. Stronger links have been established between the Liaison Bureaux at Europol and the JIT national experts to continuously improve this crucial tool for judicial and law enforcement cooperation, which has underpinned some of the most decisive international criminal investigations in recent years.

A common platform for mutual engagement

The European Multidisciplinary Platform Against Criminal Threats offers an integrated approach to EU internal security and an operational platform for inter-agency cooperation, with measures ranging from police, customs and judicial cooperation to information management, innovation, training, prevention and the external dimension of internal security. This facilitates cooperation between various national law enforcement and judicial authorities, bringing together Europol and Eurojust in a dedicated operational environment.

Throughout the different policy cycles, Eurojust and Europol have jointly participated in most if not all Operational Action Plans, and Eurojust has co-led Operational Actions for example in the areas of cyberattacks against information systems, cyber-non-cash payment fraud or migrant smuggling. Europol and Eurojust have also cooperated in joint action days by being available 24/7 to ensure, upon request, transmission of information, guidance and coordination on legal and practical aspects of international judicial cooperation. The judicial dimension of joint action days is a key aspect of the multi-disciplinary approach and multi-agency cooperation. The early involvement of judicial authorities in the support and coordination of joint action days is beneficial in situations where legal or practical problems in international cooperation need to be addressed at the judicial level. Furthermore, cross-border criminal cases initiated in the context of activities carried out during joint action days often require judicial follow-up. Therefore, the cooperation between Europol and Eurojust during joint action days is another clear example of value added to national law enforcement and judicial authorities.

Addressing the root causes and challenges of organised crime

Beyond their casework, Eurojust and Europol cooperate closely to raise awareness about serious and organised crime and to develop common responses to new developments in cross-border crime, including in the fields of terrorism and cybercrime. As part of these joint efforts, the Agencies regularly co-author and disseminate joint

publications on topics such as encryption or cybercrime. Both agencies closely collaborate on strategic topics of common interest, such as data retention, e-evidence and asset recovery. Eurojust is regularly involved in the preparation of Europol's key strategic products, the EU Serious and Organised Crime Threat Assessment (EU SOCTA), the Terrorism Situation and Trend Report (TE-SAT) and the Internet Organised Crime Threat Assessment (IOCTA). In particular, Eurojust is a permanent member of the SOCTA Advisory Group to develop the methodology and review the draft report. Eurojust participates in the TE-SAT Advisory Board and contributes data on convictions and penalties for terrorist offences to be included in the TE-SAT. Eurojust also provides feedback and comments on the draft IOCTA every year.

A partnership for the next 20 years

Over the last decade, the European security ecosystem has been profoundly reshaped by an ongoing series of crises – economic and social, migration and health-related. In particular, the COVID-19 pandemic has changed our notion of safety and security and challenged policies and response measures in the law enforcement and judicial spheres. The war in Ukraine is likely to have significant implications for organised crime and terrorism in the EU in much the same way as the Balkan wars of the 1990s had a deep impact on organised crime in Europe for many years after the conflicts in the region ended. This builds on an already complex and entrenched pre-existing organised crime landscape. Criminal groups and networks continue to take advantage of the possibilities offered by cross-border movement and interconnectivity; they exploit the blurring of the boundaries between the physical and digital world; and they abuse vulnerable groups as well as social and economic divergences.

There are many challenges and risks ahead, including unknown ones, but also many opportunities and gateways to explore new avenues to further increase cooperation between both Agencies. First, Europol and Eurojust will need to make the most of the information exchange provisions in their new Regulations with all the necessary safeguards in terms of data protection and fundamental rights. Timely and relevant information is key to the fight against organised crime and terrorism. Second, it will be important to systematically seek complementarity and interoperability of information-exchange tools, systems and collaboration platforms, not just to avoid data gaps and operational fragmentation, but to facilitate the work of law enforcement and judicial authorities. Third, Europol and Eurojust must continue to work together in innovation and research, identifying new technologies and tools to help law enforcement and judicial actors. Europol and Eurojust have already established an observatory function to engage in a forward-looking analysis with respect to encryption, which should facilitate informed decision-making on this complex matter from a law enforcement and judicial perspective. Both agencies should continue to engage on strategic topics of common interest, building on work already done regarding data retention, e-evidence or asset recovery. Fourth, both agencies can further intensify their operational coordination and cooperation techniques and approaches,

in particular with respect to JITs, improving the common intelligence picture and operational analysis. The pooling of operational efforts is essential to multiply the effectiveness of law enforcement and judicial actions, but also to overcome resource shortcomings. One obvious area for operational collaboration is war crimes, where the coordination role of a JIT can effectively combine with the investigative activities of Europol's Analysis Project on Core International Crimes.

In a particularly complicated and fragmented environment, Europol and Eurojust will need to maximise their engagement and reinforce the interaction between law enforcement cooperation and judicial cooperation. Not only to advance the fight against organised crime and terrorism but also to enhance the overall strategic coherence of the justice and home affairs area in the EU. The proximity of Eurojust and Europol's headquarters in The Hague (literally across the street from each other), the existing complementarity between respective actions, tested and well-established forms of structured cooperation, effective operational coordination practices and techniques, and new legal provisions constitute a solid basis to build the partnership between Europol and Eurojust for the next 20 years. As Executive Director of Europol, I remain fully committed to this goal.



COUNTRY PERSPECTIVES

Eurojust building in the heart of the International Zone in The Hague.

Eurojust, protector of EU values: A perspective from the host state

Dilan Yeşilgöz

Minister of Justice and Security, the Netherlands



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Introduction

French painter Claude Monet had already visited the Netherlands many times before, but it was not until the spring of 1886 that he first saw the tulip fields in their full glory. Impressed, he wrote to a friend: 'Vast fields of flowers, incredibly beautiful, but maddening to a poor painter. It's impossible to convey with our poor colours'. One hundred and sixteen years later, on 28 February 2002, the Dutch daily newspaper *NRC Handelsblad* quoted these words in an article announcing a major Monet exhibition in The Hague.

In that issue, however, there was not a word to be found about the decision adopted that day to set up Eurojust. Even for a quality daily like the *NRC*, a new European legal institution was apparently not newsworthy. By contrast, Claude Monet was an icon, and his paintings had touched the hearts of art lovers the world over. That was stiff competition for Eurojust, which had yet to prove itself.

I realise that I am comparing apples and oranges. You may be raising an eyebrow and thinking: clearly, the Dutch Minister of Justice and Security is not a lawyer. That is true. I am not. But I have spent my political career fighting for freedom and justice. As a child I learned that people can only live up to their potential in a world that upholds these values. Only in a compassionate and just world can the art of Claude Monet move us as individuals and build bridges between countries. Right now that world is under pressure from increasingly ruthless criminals and from Russian aggression towards Ukraine. In these uncertain times, Eurojust gives me hope, because now more than ever it embodies and protects European values.

Illustrious pioneers

On 15 October 1999, the Tampere European Council laid the foundations for Eurojust. At that time, nobody – neither the EU heads of government nor the ministers who ultimately approved the Eurojust decision – could have imagined that Eurojust would quickly become the cornerstone of EU criminal justice cooperation that it is today. That achievement is in itself reason to congratulate everyone who contributed at that stage, not least the illustrious pioneers who – in a cramped room at the Council

Secretariat in Brussels – paved the way for Eurojust’s impressive evolution. Praise is also due to all those who carried on the task in the makeshift temporary location at the Arc and those who are continuing this work, with the help of new staff, at the new location on Johan de Wittlaan in The Hague, across from the Europol building.

The 2021 Annual Report speaks volumes about the way Eurojust has evolved. At the start, in 2002, it supported 217 cross-border criminal investigations. Last year, it handled over 10 000 cases for the first time, 10 105 to be exact. In addition, 3 329 suspects were arrested or surrendered, and in 1 401 cases agreements were made about where a suspect would be prosecuted. In total, EUR 2.8 billion in criminal assets were frozen or seized, and drugs worth EUR 7 billion were confiscated. In 2021, Eurojust supported 254 joint investigation teams. The fact that Eurojust was able to achieve all of this with a modest budget of EUR 43.8 million, across a broad terrain covering fraud, human trafficking, environmental crime and international crime, is worthy of respect. Especially in a year that was heavily impacted by the pandemic.

Cross-border crime and terrorism

As a representative of Eurojust’s host country, I would like to express my great appreciation for the prominent place that the organisation occupies in the area of criminal justice cooperation within the European Union. I appreciate the role that Eurojust plays in the unremitting battle against cross-border crime and terrorism. The new premises in the Netherlands, which were established in close consultation with the Dutch government, demonstrate that Eurojust is an organisation that must be taken seriously.

In my view, it is beyond dispute that 20 years on we still need Eurojust. All of us are used to the openness of our own countries and our borders, which have all but disappeared within the European Union. We often take that freedom for granted. Yet, the bitter reality is that criminals within and outside the European Union try to use it to maximum advantage. Their far-reaching criminal business model threatens to undermine the very foundations of our open society and the rule of law.

If criminals are allowed to act with impunity, investing their ill-gotten gains in the legitimate economy, corrupting institutions and using violence against journalists, witnesses, lawyers and other professionals, this will have a disastrous impact on the core values of our society and the values that we, as EU citizens, hold dear. As in other countries, in the Netherlands innocent people have been murdered because they got in the way of hardened criminals. It is more important than ever to push back against ruthless organised crime.

A united front

We can make real progress only if we work together and form a united front against

those who believe personal gain is more important than freedom and justice for all. Strong international cooperation is essential, because criminals and terrorists can operate across borders and online with relative ease and flexibility. By contrast, the police and the Public Prosecution Service are limited in their scope of operation, not only by physical territorial boundaries but also by fundamental differences in law, culture, language and organisation. The EU Member States have many gaps to bridge before they can work together effectively, and criminals are not going to sit on their hands until we are ready to take them on.

Due to its organisational structure and years of experience providing practical support, Eurojust is better suited than any other organisation to help Member States meet these challenges. Of course, Eurojust cannot achieve this goal in isolation. It must work closely with national institutions in the Member States, which in turn must provide Eurojust with information. In addition, Eurojust needs to be able to determine when cross-border cooperation is necessary or could be improved. To do that, Eurojust must have sufficient resources. I am therefore pleased that Eurojust will have more funding at its disposal in the years to come. The Netherlands fought hard for that during the negotiations on the new Multiannual Financial Framework, and will do the same again if necessary.

Eurojust must also be able to operate in a rapidly digitalising environment. This is crucial if it is to continue fulfilling its role effectively in the long term. On 1 December 2021, the European Commission presented several proposals, one of which creates the legal conditions for modernising Eurojust's technically outdated Case Management System. The Commission also proposed to develop IT infrastructure to help Member States exchange information with Eurojust in terrorism cases faster and more securely. A third proposal is the initiative to establish a joint investigation teams collaboration platform. The Netherlands welcomes these proposals because they will all help Eurojust fulfil its role even more effectively.

Related agencies

It is important that Eurojust works closely with related agencies, not only its close partners Europol, eu-LISA and Frontex, but also the European Anti-Fraud Office and the European Public Prosecutor's Office (EPPO). As a rule, each of these organisations operates within its own mandate to avoid overlap and make the most of scarce resources. In my view, we are also making progress with the development of 'hit/no-hit' mechanisms, which enable organisations to compare the information they hold and determine whether there are connections.

I just mentioned the EPPO, which has existed on paper for a long time but has only been operational since 1 June 2021. The Netherlands joined relatively late – in 2018 – but has great confidence in the added value of the organisation as a leader in the fight against fraud involving EU funds in the participating Member States and as a

driver of cross-border cooperation in such cases. In the long run-up to the Netherlands' decision to participate, the dividing line between the role of the EPPO and Eurojust was an important issue of political debate. It is now clear that Eurojust will keep its independent, complementary position alongside the EPPO. This principle is explicitly laid down in the legal instruments regulating the status of the two institutions. As a result, Eurojust has an independent and meaningful role in cases where the EPPO has no powers or chooses not to exercise them.

I believe that in practice the two organisations will develop close institutional, organisational and operational ties. The fact that the EPPO and Eurojust adopted a working arrangement in February 2021 underlines their intention to establish a mature collaborative partnership. On the 20th anniversary of its founding, Eurojust was able to provide support on a VAT fraud case at the start of a joint investigation team involving the EPPO and Sweden, which is not even a participant in the EPPO.

Bright spot

That is a bright spot at a time when it is difficult to remain optimistic about European ideals. Unfortunately, I cannot avoid reflecting on the disturbing developments in Ukraine that we have witnessed in real time since the Russian invasion on 24 February. After the MH17 air disaster, which was a major shock to Dutch society, once again we are seeing incidents of serious violence that must be investigated to determine whether criminal offences have taken place. If so, we have a duty to prosecute the people behind these offences, which could include war crimes and crimes against humanity.

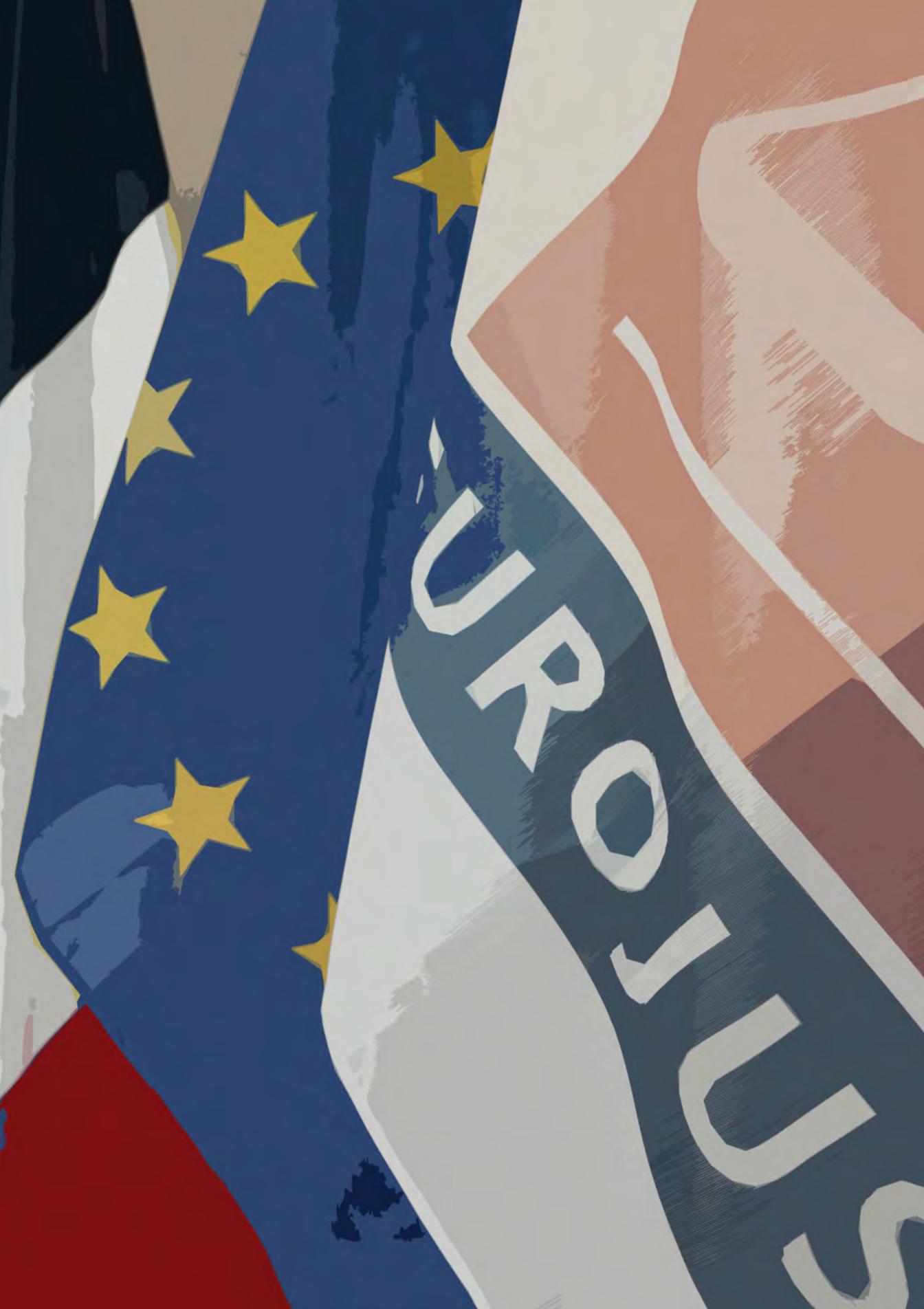
In its last annual report, Eurojust explained that it has been working with the Genocide Network and receiving assistance from the United States to build experience and knowledge in this area, including on the use of battlefield evidence in criminal proceedings. I am therefore grateful that my French counterpart Éric Dupond-Moretti and European Commissioner Didier Reynders – after the Justice and Home Affairs Council of 4 March – underlined the importance of Eurojust playing a role in supporting the International Criminal Court's investigation of such crimes and support the various steps taken since then. I also appreciate the idea of giving Eurojust a role in the 'Freeze and Seize' Task Force, which will help coordinate the implementation of sanctions aimed at freezing and confiscating the assets of listed oligarchs and preventing money laundering.

Conclusion

At the beginning of this article, I mentioned an anecdote about the French painter Claude Monet. It is hard to imagine, but throughout his career Monet was tormented by doubts about the quality of his work, unsure about whether he had adequately rendered the light, colours and brilliance of what he saw. However, his doubts

never stopped him from trying. That is fortunate for us because he left a magnificent oeuvre to the world.

I think we all recognise that self-doubt, the uncertainty about whether we will succeed and whether we are doing enough. Perhaps everyone who pursues ambitious goals has these feelings. I would like to convey a message of support to everyone who is committed to the European justice system, with Eurojust as a cornerstone. I applaud your dedication and wish you success in your mission to rein in cross-border crime and terrorism and counteract their undermining effects on society. In the same vein, I wholeheartedly support your active role in fighting impunity in relation to international core crimes. Your work is helping to advance the cause of freedom and justice for all.



Eurojust at 20: the story of an ambition to achieve European judicial cooperation

Eric Dupond-Moretti

Keeper of the Seals, Minister of Justice, France



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On 24 February 2022, the war in Ukraine began. Very quickly, questions surfaced about potential war crimes being committed in this conflict. The Attorney General of Ukraine and several Member States of the European Union opened investigations. Thirty-nine states, including all of the Member States of the European Union, decided to refer the matter to the International Criminal Court (ICC).

In this highly charged context, the Justice and Home Affairs Council of the European Union met on 4 March under the French Presidency. Immediately, in the face of unambiguous evidence, the idea materialised to request Eurojust to play a central role in coordinating the investigations. In turning automatically to Eurojust in this way, the Ministers for Justice and Home Affairs were paying it the highest tribute. As we celebrate Eurojust's first 20 years this year, it is now firmly established as a key player in European and international judicial cooperation. Eurojust has managed, in just 20 years of its existence, to win the trust of all stakeholders, to the point of becoming the figurehead of the European judicial area; and this is because it was set up in response to a crying need.

In 20 years, the European judicial area has progressed so much that we have forgotten the extent to which the traditional forms of judicial cooperation, still prevailing in the 1990s, were obsolete. While the geopolitical upheavals in Eastern Europe and the entry into force of the Schengen Agreement in 1995 had opened up the European area by allowing people to move more freely across borders, justice remained constrained within its national borders. The judicial cooperation, unchanged for decades, was not between judicial authorities, but between states, and this gave rise to proceedings that were often long and ineffective. This was criticised by some, and the Geneva Appeal launched in 1996 by seven European judges to denounce the hampering of their investigations – in particular in the areas of organised crime and combatting corruption – set alarm bells ringing.

The Treaty of Amsterdam's entry into force in 1999 gave the European Union the new objective of creating a European Area of Freedom, Security and Justice and was a response to the Geneva Appeal, as it opened the door to completely new mechanisms for cooperation. One of the jewels of this cooperation is Eurojust.

After creating a network of liaison magistrates and the European Judicial Network, which were the first tools developed to strengthen direct contact between practitioners to facilitate judicial cooperation, one further step was needed. At the Tampere European Council meeting, the rationale for creating Eurojust was set out. Let me pay tribute to the visionary actions taken by some of my predecessors, and in particular Elisabeth Guigou, Minister of Justice at the time of the French Presidency in 2000, who succeeded in having the regulation adopted to create the provisional Eurojust unit. That unit began its work in March 2001 in Brussels.

The regulation that definitively created Eurojust was eventually negotiated at the same time as the European Arrest Warrant, after the shocking attacks of 9/11. At the turn of the century, with the terrorist threat looming large, the European judiciary had to equip itself with the tools that it needed to protect Europeans and to combat crime. On 28 February 2002, Eurojust was born.

However, in the specific context of the early 2000s, Eurojust still had to assert itself, earn its place among the European institutions and create the conditions for trust among the judicial authorities of the Member States.

In the light of these first 20 years of Eurojust, I think it can be said that its success stems from the ongoing concern of its members to respond to the operational needs of European justice and their capacity to adapt.

The very essence of Eurojust and the ongoing concern of its members is operational and aims to help judges carry out their investigations so that differences between legal systems no longer pose obstacles. And Eurojust has proven itself in case after case.

Operational successes made possible by Eurojust have nurtured among practitioners the trust that is vital for judicial cooperation within the Union. Today, everywhere in Europe, practitioners have acquired the 'Eurojust reflex'. Its expertise and effectiveness of its methods are universally acknowledged by professionals on the ground with responsibility for undertaking cross-border investigations on a daily basis. The figures speak for themselves: 10 000 cases handled in 2021, 254 joint investigation teams (JITs), 3 329 suspects arrested or brought before the courts, 1 928 rapid responses to judicial cooperation requests, the coordination of 1 419 large-scale operations, criminal assets worth EUR 2.8 billion seized or frozen, and drug seizures worth EUR 7 billion. Eurojust is now a major player in judicial cooperation and in the fight against crime in Europe. The methods that Eurojust uses, in particular the digital tools, have allowed it to continue to work during the pandemic without affecting its results.

If I just take the case of France, I see that, in 2021, France opened 258 cases at Eurojust, it was a requested Member State in 766 cases, and it signed up to 13

joint investigation teams (JITs). This is all the more significant given that these are major investigations. I would like to commend the French desk in particular for its successful results.

In the area of terrorism, in which France is a particular target, the role of Eurojust has been decisive in bringing about effective investigations. In the aftermath of the Bataclan attacks, a JIT was created at Eurojust and coordination meetings were organised. In instances where states acting alone or in a fragmentary way would be ineffectual, Eurojust now provides a common framework that enables proceedings to go ahead.

In the same vein, some momentous victories against transnational organised crime can be directly attributed to the coordinating role played by Eurojust. For example, in the ‘EncroChat’ case, highly complex organised crime networks were uncovered following the lawful interception of encrypted communications. In this case, the coordination within Eurojust led to the dismantling of criminal networks in more than 13 countries, hundreds of arrests and the confiscation of criminal assets worth several million euros.

Of course, Eurojust’s successes stem from its favourable position, arising from its close judicial cooperation in criminal matters and the use of new instruments. It would be remiss of me not to refer to significant advances such as the European Arrest Warrant (also turning 20 in 2022), the European Investigation Order and the Freezing and Confiscation Directive; and more generally, all the texts adopted in the last 20 years that give substance to the principle of mutual recognition of judicial decisions, align criminal legislation more closely, enable mutual trust and equip the European Union with tools for enhancing the quality of judicial exchanges.

The partnership with Europol is also a key factor in increasing the effectiveness of the fight against crime in Europe. As early as 2005, the two agencies signed a first Cooperation Agreement. Since then, they have developed extensive experience in joint interventions, on the same cases, to support national authorities, in particular in the context of coordination centres.

Regardless of the area of crime, Eurojust, therefore, is a leading partner for judicial practitioners.

Allow me, on behalf of the French Presidency of the Council of the European Union, to commend the work and commitment of the women and men who have made it happen at Eurojust on a daily basis over the past 20 years.

With those in mind, I wanted the French Presidency of the Council of the European Union to celebrate Eurojust’s anniversary in a fitting way, by holding a conference on 18 February 2022. Due to the public health constraints, we met by video conference. Nonetheless, I wanted to use the opportunity of this anniversary to take stock of the

past 20 years in order to contemplate future prospects, three of which seem to me to be of crucial importance.

First, the ongoing modernisation of Eurojust's legal and technological tools.

Over the years, Eurojust has evolved. In July 2008, a decision of the Council increased its operational capacities, facilitating procedures for cooperation with the judicial authorities of Member States, and strengthening its relationships with third countries. The adoption of the regulation of November 2018 then granted it the status of a European Union agency. It also enabled Eurojust to adopt a new system of governance and a new data protection regime, thereby firmly establishing it on the landscape of European institutions.

The French Presidency of the Council of the European Union is fully committed to working towards implementing the proposal to provide Eurojust with the legal framework to exchange digital information in cases of terrorism. This modernisation of the case management system will increase the effectiveness and proactive nature of Eurojust. Going beyond that text, it will be important for Eurojust to be able to benefit at all times from the latest technological advances to pursue its work in all areas of combatting crime, including cybercrime, the threat of which is constantly increasing.

Moreover, the extensive involvement of Eurojust in the ongoing investigations into possible war crimes in Ukraine will further strengthen its legal framework, so that it can fully guarantee that all forms of collected evidence are preserved properly and can be examined and sent to the jurisdictions concerned, in particular the ICC. The French Presidency hopes that these enhancements will be adopted swiftly.

Second, Eurojust must strengthen its relationships with third countries. Organised crime and terrorism are global phenomena that largely ignore borders. To increase its effectiveness, Eurojust has extended its activity outside the European Union, and signed numerous cooperation agreements with third countries. In 2021, the Council authorised Eurojust to negotiate agreements with 13 new partners. These agreements will further increase Eurojust's capacity and allow it to use its most advanced cooperation tools outside the European Union. These tools include coordination meetings, coordination centres and assistance to JITs. Some third countries have seconded Liaison Prosecutors to Eurojust, who constitute valuable links.

Eurojust's potential in the international sphere is recognised to such a degree that, a few days after the outbreak of the war in Ukraine, the Attorney General of Ukraine asked Eurojust to create a JIT to look into potential war crimes committed on Ukrainian territory.

The wish of the Prosecutor of the ICC to strengthen its partnership with the Agency, in particular with regard to the conflict in Ukraine, shows that the methods

employed by Eurojust are becoming international benchmarks. Eurojust's international activity is one of the keys to its future and to its influence.

Finally, and more generally, the main challenge for Eurojust will continue to involve adapting its work to the evolving needs of judicial cooperation.

Recently, to intensify the fight against the smuggling of migrants, Eurojust, in tandem with Europol, launched a focus group. The group brings together stakeholders concerned about security and criminal justice systems and has led to the opening of 170 new cases, the creation of 11 JITs and the convening of 22 coordination meetings.

In addition, Eurojust on several occasions has played a vital role in coordinating assistance to victims of catastrophes, whether they be terrorist acts such as the attacks in Nice and Barcelona, or transport incidents such as the Germanwings aeroplane crash. This represents a new field of expertise in which the Agency can develop its activities in the future.

It would be remiss of me to conclude without mentioning the European Public Prosecutor's Office (EPPO). As the direct successor of Eurojust in its area of competences under the Treaty, the EPPO benefits from the accumulated experience of Eurojust in the area of criminal justice cooperation. The EPPO has the power to undertake direct investigations all over Europe whenever the financial interests of the Union are at stake. It embodies the evolution of European judicial cooperation towards deeper integration, and reflection on this must continue. There is already operational cooperation between the two institutions, and this will inevitably develop in the coming years.

The European Union is never as strong and as useful as when it can reconcile ambition and effectiveness. Eurojust is a remarkable example of that: the Agency carries the ambition of shared values. These values – justice, freedoms, combatting impunity, respect for the rule of law and protecting victims – influenced its very foundation. Over the years, Eurojust has proven its worth, gained in experience and professionalism, and demonstrated its expertise and its added value. Eurojust represents a Europe that protects, sometimes far away from the cameras and out of the spotlight. It represents a Europe that acts, works and builds, a Europe that links operational effectiveness and respect for fundamental freedoms, a Europe that is pragmatic and devoted to its values.

On behalf of the French Presidency of the Council of the European Union: happy anniversary, Eurojust! And thank you to those who make it happen on a daily basis.

Eurojust a 20 ans : l'histoire d'une ambition pour la coopération judiciaire européenne

Eric Dupond-Moretti

Garde des Sceaux, ministre de la justice

Le 24 février 2022 débutait la guerre en Ukraine. Très vite, la question de possibles crimes de guerre perpétrés dans le cadre de ce conflit se posait. La Procureure générale d'Ukraine et plusieurs Etats membres de l'Union européenne ouvraient des enquêtes. 39 Etats, et en particulier tous les Etats de l'Union européenne décidaient de saisir la Cour pénale internationale.

Dans ce contexte chargé d'émotion, le Conseil des ministres de la Justice de l'Union se réunissait le 4 mars sous présidence française. Immédiatement, avec la simplicité de l'évidence, s'imposait l'idée de demander à Eurojust de jouer un rôle central dans la coordination des enquêtes. En se tournant ainsi spontanément vers Eurojust, les ministres de la justice lui ont rendu le plus bel hommage. Alors que nous célébrons cette année ses 20 ans d'existence, Eurojust s'impose aujourd'hui comme un acteur-clé de la coopération judiciaire européenne et internationale.

Si aujourd'hui, en seulement vingt années d'existence, Eurojust a réussi à gagner la confiance de l'ensemble des acteurs, au point de devenir la figure de proue de l'espace judiciaire européen, c'est parce que sa création répondait à un besoin profond.

En 20 ans, les progrès de l'espace judiciaire européen ont été tels que nous avons oublié à quel point les formes traditionnelles de la coopération judiciaire qui prévalaient encore dans les années 90 étaient obsolètes. Alors que les bouleversements géopolitiques à l'Est de l'Europe et l'entrée en vigueur des accords de Schengen en 1995 avaient ouvert l'espace européen en permettant aux hommes de circuler plus librement de part et d'autres des frontières, la justice restait enfermée à l'intérieur des frontières nationales. La coopération judiciaire, inchangée depuis des décennies, se faisait non entre autorités judiciaires mais d'Etat à Etat, donnant lieu à des procédures le plus souvent longues et inefficaces. Certains le dénonçaient, et l'appel de Genève lancé en 1996 par 7 magistrats européens déplorant les entraves à leurs enquêtes, notamment en matière de criminalité organisée et de lutte contre la corruption, constitua à cette époque un cri d'alarme retentissant.

En donnant à l'Union européenne le nouvel objectif de créer un espace européen de liberté, de sécurité et de justice, le traité d'Amsterdam entré en vigueur en 1999 était une réponse à cet appel et ouvrait la porte à des mécanismes de coopération résolument nouveaux. Eurojust en est l'un des fleurons.

Après la création du réseau des magistrats de liaison et du Réseau judiciaire européen, premiers outils permettant de renforcer les contacts directs entre professionnels pour

faciliter la coopération judiciaire, une étape supplémentaire était nécessaire. Le Conseil européen de Tampere posa le principe de la création d'Eurojust. Qu'il me soit ici permis de rendre hommage à l'action visionnaire de certains de mes prédécesseurs, et en particulier à Elisabeth Guigou, ministre de la Justice lors de la présidence française de 2000, qui fit adopter le règlement créant l'unité provisoire Eurojust. Celle-ci commencera à fonctionner à Bruxelles, dès mars 2001.

Le règlement créant définitivement Eurojust sera négocié en même temps que le mandat d'arrêt européen, après le choc des attentats du 11 septembre. Au tournant du siècle, la menace terroriste devenant majeure, l'Europe judiciaire devait enfin se doter des outils nécessaires pour protéger les européens et faire face à la criminalité. Le 28 février 2002, Eurojust était née.

Mais dans le contexte particulier du début des années 2000, Eurojust devait encore s'affirmer, conquérir sa place parmi les institutions européennes, créer les conditions de la confiance auprès des autorités judiciaires des Etats membres.

A la lumière de ces vingt premières années, je crois possible d'affirmer que le succès d'Eurojust est lié au souci permanent de ses membres de répondre aux besoins opérationnels de la justice européenne et à ses capacités d'adaptation.

Etre opérationnel et aider les magistrats sur le terrain à mener leurs enquêtes pour que les différences entre les systèmes juridiques ne soient plus un obstacle, c'est l'essence même d'Eurojust et le souci permanent de ses membres. Affaire après affaire, Eurojust a fait ses preuves.

Les succès opérationnels rendus possibles par Eurojust, ont nourri chez les professionnels la confiance indispensable à la coopération judiciaire au sein de l'Union. Aujourd'hui, partout en Europe, les praticiens ont acquis le « réflexe Eurojust ». Son expertise et l'efficacité des méthodes déployées sont unanimement reconnues par les acteurs de terrain chargés au quotidien de mener les enquêtes transnationales. Les chiffres parlent d'eux même : 10 000 dossiers en cours en 2021, 254 équipes communes d'enquêtes, 3329 suspects arrêtés ou remis à la justice, 1928 réponses rapides à des demandes de coopération judiciaire, 1419 opérations de grande ampleur coordonnées, 2,8 milliards d'Euros d'avoirs criminels saisis ou gelés, et 7 milliards d'Euros de drogues saisies... Eurojust se révèle aujourd'hui un acteur majeur de la coopération judiciaire et de la lutte contre la criminalité en Europe. Les méthodes mises en œuvre, en particulier les outils numériques, lui ont permis de continuer à travailler pendant la pandémie qui n'a pas affecté ses résultats.

Si je me limite à la France, je relèverai ainsi qu'en 2021 la France a ouvert 258 dossiers en 2021 auprès d'Eurojust, a été requise dans 766 dossiers et a signé 13 équipes communes d'enquête. C'est d'autant plus considérable qu'il s'agit d'enquêtes très importantes. Je tiens à saluer en particulier le bureau français pour ces réussites.

Dans le domaine du terrorisme, qui a particulièrement visé la France, le rôle d'Eurojust a été déterminant pour l'efficacité des enquêtes. Dès le lendemain des attentats du Bataclan, une équipe commune d'enquête était mise en place à Eurojust et des réunions de coordination organisées. Là où les Etats agissant seuls ou en ordre dispersé seraient condamnés à l'impuissance, Eurojust a fourni un cadre commun permettant aujourd'hui aux procès de se tenir.

De même, certains succès retentissants en matière de criminalité organisée transnationales sont à attribuer directement au rôle de coordination d'Eurojust. Ainsi, dans l'affaire « Encrochat » qui a permis de mettre au jour des réseaux particulièrement complexes de criminalité organisée grâce à la captation judiciaire de communications cryptées, la coordination au sein d'Eurojust a permis le démantèlement de réseaux de criminels dans plus de 13 pays, des centaines d'arrestations, la confiscation de plusieurs millions d'euros d'avoirs criminels.

Naturellement, les réussites d'Eurojust se sont inscrites dans un contexte favorable, né de l'intensification de la coopération judiciaire en matière pénale au moyen d'instruments nouveaux. Il est impossible de passer sous silence les avancées considérables qu'ont été le mandat d'arrêt européen (dont nous célébrons en 2022 également les 20 ans), la décision d'enquête européenne, la directive gel et confiscation, et plus largement, l'ensemble des textes adoptés depuis 20 ans pour donner corps au principe de reconnaissance mutuelle des décisions judiciaires, rapprocher les législations pénales, permettre la confiance mutuelle et doter l'Union des outils qui permettent la fluidité des échanges judiciaires.

Le partenariat avec Europol est également un facteur majeur de renforcement de l'efficacité de la lutte contre la criminalité en Europe. Dès 2005, les deux agences ont conclu un premier accord de coopération et ont développé une large expérience d'interventions conjointes, dans des dossiers identiques, au soutien des autorités nationales, notamment dans le cadre de centres de coordination.

Quel que soit le domaine de criminalité, Eurojust constitue donc pour les professionnels de la justice un partenaire de premier plan.

Qu'il me soit permis, au nom de la présidence française du Conseil de l'Union européenne, de saluer le travail et l'engagement des femmes et des hommes qui au quotidien font vivre Eurojust depuis 20 ans.

C'est en pensant à eux que j'ai souhaité que la présidence française du Conseil de l'Union européenne célèbre dignement l'anniversaire d'Eurojust, en organisant une conférence le 18 février 2022. Les contraintes sanitaires nous ont contraint à une visio-conférence, mais j'ai voulu que cet anniversaire nous donne l'occasion de dresser le bilan des années écoulées pour nous projeter sur les perspectives d'avenir, dont trois me paraissent particulièrement déterminantes.

Premièrement, la modernisation constante des outils tant juridiques que technologiques d'Eurojust.

Au cours des années, Eurojust a évolué. En juillet 2008, une décision du Conseil a accru ses capacités opérationnelles, facilité les modalités de coopération avec les autorités judiciaires des Etats membres, et renforcé ses relations avec les États tiers. L'adoption du règlement de novembre 2018 lui a permis ensuite d'acquérir le statut d'agence de l'Union, de mettre en place un nouveau système de gouvernance et un nouveau régime de protection des données, l'installant avec force dans le paysage institutionnel européen.

Aujourd'hui, la présidence française du Conseil de l'Union européenne est pleinement mobilisée pour aboutir sur la proposition visant à doter Eurojust du cadre juridique permettant l'échange d'informations numériques dans les affaires de terrorisme. Cette modernisation du système de gestion des dossiers lui permettra de gagner en efficacité et proactivité. Au-delà de ce texte, il sera important qu'Eurojust puisse en permanence bénéficier des dernières avancées technologiques disponibles pour poursuivre son action dans tous les domaines de la lutte contre la criminalité, y compris la cybercriminalité, où la menace est sans cesse grandissante.

Par ailleurs, l'implication forte d'Eurojust dans les enquêtes en cours sur de possibles crimes de guerre en Ukraine vont conduire à renforcer de nouveau son cadre juridique afin de lui permettre d'assurer en toute sécurité la conservation de tous les types de preuves recueillies, de faciliter leur analyse et de permettre leur transmission aux juridictions concernées, notamment la Cour pénale internationale (CPI). La présidence française espère que ces avancées seront adoptées avec la plus grande rapidité.

Deuxièmement, Eurojust doit renforcer ses relations avec les Etats tiers. La criminalité organisée et le terrorisme sont des phénomènes globaux qui ignorent largement les frontières. Pour être efficace, Eurojust a étendu son action au-delà de l'Union européenne, et a signé de nombreux accords de coopération avec des Etats tiers. En 2021, le Conseil a autorisé Eurojust à négocier des accords avec 13 nouveaux partenaires. Ceux-ci renforceront encore ses capacités en permettant d'étendre au-delà de l'Union européenne les outils de coopération les plus avancés proposés par Eurojust, tels que les réunions de coordination, les centres de coordination ou l'assistance aux équipes communes d'enquête. Certains Etats tiers à l'Union européenne ont ainsi détaché des procureurs de liaison auprès d'Eurojust qui constituent des relais précieux.

Le potentiel international d'Eurojust est tellement reconnu que quelques jours après le début de la guerre en Ukraine, la Procureure générale d'Ukraine s'adressait à Eurojust pour constituer une équipe commune d'enquête sur les éventuels crimes de guerre commis sur le territoire ukrainien.

Le souhait du procureur de la Cour pénale internationale de renforcer son partenariat avec l'agence, notamment à l'occasion du conflit en Ukraine illustre le fait

que les méthodes d'Eurojust deviennent des références internationales. L'activité internationale d'Eurojust est l'une des clés de son avenir et de son rayonnement.

Enfin, plus généralement, le principal défi pour Eurojust continuera à être, l'adaptation de ses missions aux besoins, évolutifs, de la coopération judiciaire.

Récemment, pour renforcer la lutte contre le trafic de migrants, Eurojust en lien avec Europol a lancé un groupe de réflexion réunissant les acteurs concernés des systèmes de sécurité et de justice pénale qui a conduit à l'ouverture de 170 nouveaux dossiers, la mise en place de 11 équipes communes d'enquêtes et la tenue de 22 réunions de coordination.

Eurojust a également à plusieurs reprises joué un rôle essentiel dans la coordination de l'aide aux victimes dans des catastrophes de grande ampleur, qu'il s'agisse d'actes terroristes comme les attentats de Nice ou de Barcelone, ou d'accidents collectifs comme le crash de l'avion de la Germanwings. Il s'agit là d'un nouveau champ d'expertise dans lequel l'activité de l'agence pourrait se développer dans l'avenir.

On ne saurait conclure sans parler du Parquet européen. Direct héritier d'Eurojust aux termes du Traité, le parquet européen bénéficie de l'expérience accumulée par Eurojust dans la coopération judiciaire pénale. Capable d'enquêter directement partout en Europe en vertu de ses pouvoirs propres à chaque fois que les intérêts financiers de l'Union sont en jeu, le Parquet européen incarne l'évolution de la coopération judiciaire européenne vers une intégration plus poussée sur laquelle la réflexion devra se poursuivre. D'ores et déjà, une coopération opérationnelle s'amorce entre les deux institutions et elle a vocation à se développer dans les prochaines années.

L'Union européenne n'est jamais si forte et utile que lorsqu'elle sait concilier ambition et efficacité. Eurojust en est une illustration magistrale: l'agence porte l'ambition de valeurs partagées, qui ont présidé à sa genèse – la justice, les libertés, la lutte contre l'impunité, le respect de l'Etat de droit, la protection des victimes ; elle a pu au cours des années faire ses preuves, acquérir expérience et professionnalisme, démontrer son savoir-faire et sa valeur ajoutée. Eurojust porte l'image d'une Europe qui protège, parfois loin des caméras et du feu des projecteurs ; celle d'une Europe qui agit, travaille et construit ; celle d'une Europe qui articule efficacité opérationnelle et respect des libertés fondamentales, d'une Europe pragmatique et attachée à ses valeurs.

Au nom de la présidence française du Conseil de l'Union, bel anniversaire à Eurojust et merci à celles et ceux qui l'animent au quotidien.



Eurojust from the perspective of a Member State of the European Union

JUDr. Igor Stríž

Supreme Public Prosecutor, Czech Republic



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The 20th ‘birthday’ of Eurojust offers a great opportunity to reflect on the role Eurojust plays or could play in the field of international judicial cooperation in criminal matters.

I would like to attempt at such reflection from the perspective closest to me, being a national judicial authority of a Member State of the European Union, which is a partner of Eurojust and in a sense also a ‘user of its services’.

Although Eurojust is an agency of the European Union, which can sometimes be seen by the Member States as something distant and at times not overly friendly, as something taking away their competences, I dare say that Eurojust has never been perceived in this way, and for the judicial authorities of the Member States of the European Union, Eurojust is, on the contrary, a close friend to whom they can turn with confidence.

Eurojust was established within the legal framework of the former third pillar of the European Union as a structural measure at the European Union level to facilitate the optimal coordination of action for investigations and prosecutions covering the territory of more than one Member State¹. The coordinating and cooperative nature of the powers of Eurojust as such, whether acting as the College² or through its National Members³, corresponded to the intergovernmental nature of the former third pillar of the European Union, and in addition the Member States of the European Union were given the option to endow the National Member with certain operative powers⁴.

Neither the amending Decision 2009/426/SVV of 16 December 2008, nor the Regulation (EU) 2018/1727 of 14 November 2018 have changed much about the coordinating and cooperative nature of the Eurojust’s powers, meaning that Eurojust as such continues to have, in particular, the power to assist, to cooperate, to support, to request certain measures and to issue written opinions⁵, although it should be acknowledged that the ability of the Member States of the European Union not to comply with Eurojust’s requests or to refuse to comply with its written opinions has been substantially limited⁶. While the possibilities to grant operative powers to the National Members of Eurojust have been extended⁷, these possibilities have been left to the individual Member States of the European Union, when setting the minimum mandatory standard, and under their responsibility⁸.

This brief excursus on the origin of Eurojust and its powers may lead to the conclusion that Eurojust is a mere relic of a former intergovernmental era of judicial cooperation in criminal matters between Member States of the European Union, whose concept and powers do not correspond to the present-day reality, where international judicial cooperation in criminal matters between Member States of the European Union is regulated by the community method and with much greater dynamics.

However, this conclusion would be profoundly wrong. Coordinating action for investigations and prosecutions between the Member States of the European Union, which is in the DNA of Eurojust, is necessary regardless of whether international judicial cooperation in criminal matters between the Member States of the European Union takes the form of traditional request-based institutions (e.g. transfer/take-over of criminal proceedings or joint investigation teams) or in the form of mutual recognition-based institutions (e.g. European Arrest Warrant or European Investigation Order). As long as the multiplicity of criminal jurisdictions persists within the European Union, or as long as the individual Member States of the European Union exercise their own criminal jurisdictions, the necessity for such coordination will remain as well. So far, though not all of them yet, the Member States of the European Union have allowed the institutions of the European Union to participate in the exercise of their criminal jurisdiction only to a limited extent, both in terms of the type of authority involved in criminal proceedings and the type of criminal activity⁹. Even the creation of this specific body of the European Union – the European Public Prosecutor’s Office (EPPO) – has not diminished the importance and purpose of Eurojust. Whereas the EPPO replaces the operation of national authorities¹⁰ in the (relatively narrow) scope of its competence¹¹, Eurojust exists primarily to assist national authorities in the exercise of their powers¹² in a wide range of cases¹³, and it can also provide assistance to the EPPO¹⁴.

The powers of Eurojust as such, with respect to the Member States of the European Union, are indeed not very strong, and the extent of the operational powers of individual National Members depends mainly on the ‘generosity’ of their home Member States. However, it can hardly be otherwise as long as the Member States of the European Union remain responsible for exercising their criminal jurisdiction (except in cases dealt with by the EPPO), and when Eurojust is not subject to judicial control at the European Union level. The requirement of judicial control has been strongly emphasised, in particular recently, by the Court of Justice of the European Union in relation to the European Arrest Warrant¹⁵ and European Investigation Order¹⁶.

The less Eurojust can rely on strong powers, the more it needs an informal authority based on the quality of work and trust of national judicial authorities, stemming from its proven ability to help where needed. I have no doubt that Eurojust has such informal authority and that it has succeeded in making itself indispensable to national judicial authorities in a number of respects. The key to this is the day-to-day casework, in particular dealing with requests from various judicial authorities

of the Member States of the European Union, which is the real focus of Eurojust's work. From the perspective of national judicial authorities, Eurojust's professional, logistical and financial support in organising coordination meetings and setting up and operating joint investigation teams should be particularly appreciated. It is safe to say that while Eurojust did not invent coordination meetings or joint investigations teams, it certainly has facilitated their use, significantly contributed to their widespread use and elevated them to a much higher level. Informative materials such as overviews of case law on *ne bis in idem* or on European Arrest Warrants¹⁷ or analytical materials containing recommendations¹⁸ are especially useful for practice. Particularly important is the contribution of Eurojust in connection with the European Judicial Network to resolve practical issues raised by the not-always-perfect legislation of the European Union¹⁹ or the surprising and suddenly emerging case law of the Court of Justice of the European Union²⁰. This makes Eurojust and the European Judicial Network an important voice of practice that is much needed at the European Union level. Last but not least, as a representative of the supreme body of the prosecution system, I must also acknowledge the work of Eurojust in organising the Consultative Forum for Prosecutors General of Member States of the European Union. As such, if Eurojust appears to have a brilliant present, one needs to ask the question: what will its future hold (beyond maintaining and developing its strengths, as described in this paragraph)?

Part of the answer is provided by the current proposal to amend the Regulation (EU) 2018/1727²¹. Above all, this proposal makes it clear that the European Commission wants to make Eurojust a focal point for the coordination of the fight against terrorism at the judicial level and, to this end, to optimise the functioning of the European Judicial Counter-Terrorism Register, so Eurojust can identify potential links between criminal proceedings and possible coordination needs on the basis of continuously updated information from the Member States of the European Union. So, if anyone is called upon to coordinate international judicial cooperation in criminal matters (in particular) between the Member States of the European Union, it is Eurojust and a functioning counter-terrorism register that can facilitate the necessary coordination. However, the Area of Freedom, Security and Justice, in which *inter alia* the principle of *ne bis in idem* also applies in relation to the decisions of other Member States of the European Union and States associated with the implementation of the Schengen *acquis*, would long ago have been served well by a single register of prosecuted persons (which is not to say that it should be Eurojust who maintains such a register).

Another issue addressed by the current proposal to amend the Regulation (EU) 2018/1727 is improving the cooperation with liaison prosecutors from third countries. This brings me to a more general reflection on the role of Eurojust in relation to third countries. In its 2020 Annual Report, Eurojust presented the results of its work on the expansion of its interconnected international network built mainly on cooperation agreements, Liaison Prosecutors from third countries seconded to

Eurojust and Eurojust Contact Points in third countries, which it proudly described as ‘a gateway to 55 jurisdictions worldwide’²². I believe that from the perspective of national authorities, this supportive network of informal communication with third countries is decidedly welcome, as it can make an important contribution to finding the will to cooperate on the part of third countries, which is at least as important a prerequisite for good cooperation, as a sound legal basis. This, however, does not mean that Eurojust should replace the operation of national central authorities for international judicial cooperation in criminal matters and play the role of the European Union’s central authority for international judicial cooperation in criminal matters, since the official communication of the individual Member States of the European Union with third countries takes place on different legal bases and the interests of the individual Member States of the European Union in relation to third countries can vary greatly, as can the level of cooperation.

When reflecting on the future functioning of Eurojust, it is also impossible not to assess whether the COVID-19 pandemic, which has put the whole of society to a severe test, has also provided any lessons or inspiration for the future. According to the 2020 Annual Report, Eurojust maintained full continuity of operations during the pandemic, which is certainly admirable, especially considering that most contact during the pandemic was conducted ‘remotely’, i.e. electronically (so much so that 232 out of 286 coordination meetings were held via videoconference)²³. This extent of the digitalisation of communication within Eurojust at the time of the COVID-19 pandemic raises the question: to what extent can Eurojust’s activities be transferred to a virtual environment? This question is made more pressing by the unmistakable trend of moving our daily lives to a virtual environment, which also applies to criminal activity. I may be accused of basing my assessment of this issue on the fact that I do not come from a generation that grew up surrounded by virtual environments and to whom these environments come naturally, but I believe that even though Eurojust was able to function to a significant extent in a virtual environment during the COVID-19 pandemic, its ‘physical’ existence continues to be indispensable.

It is my understanding that Eurojust’s main mission is to coordinate action for investigations and prosecutions between two or more States. One certainly can exchange information via videoconferencing or agree on solutions to minor problems. However, in my view, videoconferencing, where people talk *at* each other rather than *with* each other, is not sufficient for real coordination, which involves discussion, finding consensus on solutions to larger problems or reconciling various conflicting interests. True coordination still requires personal contact, which the Eurojust model, based on the permanent presence of national representations in The Hague, coordination meetings, etcetera, provides excellently. The COVID-19 pandemic can therefore be seen as a temporary exception which, while it may have shown that some things can be solved by videoconferencing, does not lead to a change in the proven model of Eurojust’s functioning. I am afraid that a remotely connected

Eurojust, or a *home office*-based Eurojust, would quite quickly turn into something strikingly reminiscent of the European Judicial Network. The latter is also undeniably very useful, but its working methods are somewhat different.

In conclusion, what started out as a group of enthusiasts has evolved into a strong and respected institution. For this institution to remain viable in the future, it needs above all to maintain the spark of the initial enthusiasm, the connection to everyday practice, and an open and humane approach to national judicial authorities and other partners and to problem solving. It is said that at one of the first conferences devoted to Eurojust, held at the Academy of European Law in Trier on 21 and 22 March 2002, the contemporary Belgian National Member (and later President) of Eurojust, Michèle Coninx, captured the ‘spirit’ of Eurojust with a statement that can be paraphrased as follows: We need to be not only experts in international judicial cooperation, but also good people, so that we are able to agree and always find the best solution²⁴. I am certain that Eurojust is succeeding in pursuing this goal, and I wish that it continues to do so.

¹ See recital 2 of the preamble of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

² See article 7 of the Decision 2002/187/JHA.

³ See article 6 of the Decision 2002/187/JHA.

⁴ See article 9 (3) of the Decision 2002/187/JHA.

⁵ See article 4 of the Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

⁶ Compare article 8 of the Decision 2002/187/JHA, as amended by the Decision 2009/426/JHA of 16 December 2008, on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust) and article 4 (6) of the Regulation (EU) 2018/1727.

⁷ See first the articles 9a through 9f of the Decision 2002/187/JHA, as amended by the Decision 2009/426/JHA, and then article 8 (2) through (6) of the Regulation (EU) 2018/1727.

⁸ See first article 27c (2) and (3) of the Decision 2002/187/JHA, as amended by the Decision 2009/426/JHA, and then article 78 (2) through 6 of the Regulation (EU) 2018/1727.

⁹ See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office.

¹⁰ See article 4 of the Regulation (EU) 2017/1939.

¹¹ See article 22 of the Regulation (EU) 2017/1939.

- ¹² See article 2 (1) of the Regulation (EU) 2018/1727. With regard to article 8 (3) through (6) of the Regulation (EU) 2018/1727 it may appear at first sight that Eurojust has also partly taken the route of replacing the activities of national authorities, however, as mentioned above, this is not about the powers of Eurojust as such, but rather about the powers of National Members, the scope of which is determined by the national law of the relevant Member State of the European Union. In this respect, see also article 85 (2) of the Treaty on the Functioning of the European Union.
- ¹³ See the general subject matter competence of Eurojust according to article 3 (1) and Annex no. I of the Regulation (EU) 2018/1727 and subject matter competence of Eurojust based on a request of a Member State of the European Union according to article 3 (3) of the Regulation (EU) 2018/1727.
- ¹⁴ See article 3 (1) and (2) of the Regulation (EU) 2018/1727, as well as the Working Arrangement between the European Public Prosecutor's Office (EPPO) and the European Union Agency for Criminal Justice Cooperation (Eurojust), available on Eurojust's website.
- ¹⁵ See in particular the judgment of 27 May 2019 in joint cases C-508/18 OG and C-82/19 PPU PI and the follow-up case law.
- ¹⁶ See the judgment of 11 November 2021 in the case C-852/19 Ivan Gavanzov and the judgment of 16 December 2021 in the case C-724/19 HP.
- ¹⁷ See Case-law by the Court of Justice of the European Union on the Principle of *ne bis in idem* in Criminal Matters, December 2021, and Case-law by the Court of Justice of the European Union on the European Arrest Warrant, December 2021, both available on Eurojust's website.
- ¹⁸ See, for example, Guidelines for deciding 'Which jurisdiction should prosecute?' Revised 2016, or Guidelines for deciding competing requests for surrender and extradition, Revised 2019, both available on Eurojust's website.
- ¹⁹ See Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, June 2019, available on Eurojust's website.
- ²⁰ See Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries, November 2020, available on Eurojust's website.
- ²¹ See Proposal for a Regulation of the European Parliament and of the Council, amending the Regulation (EU) 2018/1727 of the European Parliament and of the Council and the Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases, document of 1.12.2021 COM(2021) 757 final.
- ²² See the Eurojust Annual Report 2020, available on Eurojust's website, chapter 5.
- ²³ See the Eurojust Annual Report 2020, available on Eurojust's website, chapter 3.
- ²⁴ See Polák, P.: Regulation of international legal assistance in criminal matters within the frame of the European Union with regard to the protection of its financial interests, Masaryk University, Brno, 2003, p. 152.



Present at the Creation: Eurojust and the United States Department of Justice

Bruce Swartz

U.S. Deputy Assistant Attorney General and U.S. Department of Justice Counselor for International Affairs

Kenneth Harris

U.S. Department of Justice Senior Counsel for EU and International Criminal Matters at the U.S. Mission to the EU



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It is an honour to be able to contribute to the Eurojust 20th anniversary commemorative book. Indeed, over the past 20 years, we have had the privilege, so to speak, of seeing Eurojust grow up: in our positions at the U.S. Department of Justice, we looked on from the moment of Eurojust’s birth, have watched it as it took its first steps and have seen it move through its growing pains to reach maturity. And we are very proud to have played our own small role in Eurojust’s history – as, one might say, Eurojust’s American cousin.



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Our informal relations with Eurojust began from its inception but were formalised in 2006, as part of the broader knitting together of the European Union and the United States through agreements to fight terrorism and transnational crime following 9/11. In 2006, with the key assistance of Thomas Burrows of our Office of International Affairs, the U.S. Department of Justice-Eurojust Agreement was concluded and laid the groundwork for the US presence at, and future cooperation with, Eurojust.

To be sure, in the early years of this relationship, the United States and Eurojust needed time to identify how each could help the other and deepen the relationship. Initially, the post of US liaison prosecutor was filled by the U.S. Department of Justice Counselor at the US Mission to the EU in Brussels, who worked with Eurojust in addition to his other duties and often spent long hours commuting between Brussels and The Hague. As time passed, however, it became increasingly clear that Eurojust possessed unique structures that combined well with US investigative and prosecutorial capabilities, and which could facilitate increased and more effective cooperation between the United States and the European Union in investigating and prosecuting crime. As these synergies were identified, US-Eurojust cooperation intensified significantly, and, as a result, the US commitment to Eurojust has increased, with recent years seeing the US presence at Eurojust shift from a part-time presence to a full-time presence of first one, and then two, Liaison Prosecutors posted in The Hague – as well as the U.S. Department of Justice Counselor in Brussels, who still logs significant train time.

Of course, Eurojust is first and foremost an institution dedicated to enhancing cooperation between the prosecutors of EU Member States. But it has had the vision to do much more than that, reaching out to become a bridge between prosecutors in Europe and the rest of the world. To be a Liaison Prosecutor at Eurojust for a third country like the United States is thus an experience for a prosecutor like none other. Eurojust provides a unique ability for our Liaison Prosecutors to discuss cases with the national members of every EU Member State, as well as with Liaison Prosecutors from a diverse group of other partner countries, which in itself is an important contribution to international prosecutorial cooperation.

At Eurojust, all of these prosecutors are located down the hall from one another, making it easier than ever to seek – or give – advice about whom best to contact for a particular purpose or how best to meet national legal requirements in a particular situation. But there is much more beyond this: there is a sophisticated infrastructure provided to investigators and prosecutors in the field, facilitating their abilities to cooperate closely and rapidly, whether it be case-specific, or at a broader criminal justice practice and policy level. This is critical to the ability to prosecute wrongdoers effectively in today’s world, in which the criminals and the evidence of their crimes are often scattered widely in different countries.

By providing this permanent infrastructure, Eurojust makes it much easier for practitioners to plan and carry out real-time meetings to enhance case cooperation and deconflict problems, in which authorities from many different countries can work together in real time. This includes the first-class conference facilities and interpretation services Eurojust brings to prosecutors, which enhance the ability to bring together, either in person or virtually, prosecutors in many different countries who may be working on the same or different aspects of a particular criminal scheme, or who may be investigating different activities of the same criminal group.

This capability is of great value for the United States, whose people, companies and government are often victimised by the same criminal actors, including cyber-criminals, corrupt officials and terrorists, that affect the Member States of the European Union. Our ability through Eurojust structures to coordinate easily with the countries that so closely share objectives and concerns we have in combatting transnational crime cannot be understated. US prosecutors have participated in hundreds of case coordination meetings at Eurojust, and the United States has opened an increasing number of cases itself, as the demand for such coordination has markedly increased.

But Eurojust does still more than this. It has also established and continues to augment networks for combatting crime that bring together the most experienced and knowledgeable practitioners and policymakers in their respective fields, in order to find solutions for challenges in combating various types of crime or to provide guidance to prosecutors in the field to streamline cooperation and enhance their

effectiveness. For example, over a more than 10-year period, the U.S. Department of Justice has worked with Eurojust to improve structures for identifying, investigating and prosecuting terrorists who have travelled to Europe from zones of conflict in the Near East. This work, which is continuing to this day, has enabled the US government to share evidence coalition forces have gathered on the field of battle to be shared with our European colleagues more quickly and effectively for investigation and prosecution.

We have also worked with Eurojust continuously to improve international judicial cooperation, starting with a series of meetings held shortly after the entry into force of the US-EU extradition and Mutual Legal Assistance agreements in 2011. These meetings have brought together international cooperation experts from the United States and EU Member States to work together to facilitate the effective implementation of those agreements, particularly in the digital age. In this regard, we are currently working together to facilitate the ability of EU practitioners to access electronic evidence held by providers based in the United States, such as by providing guidance on how to prepare mutual legal assistance requests to the United States and work with its central authority in a manner that will enhance the ability to rapidly and successfully obtain the electronic evidence that is increasingly needed to prosecute virtually all forms of crime.

And Eurojust has shown the ability to pivot quickly to address evolving forms of crime. Most recently, the emergence of ransomware has created new challenges in identifying and building criminal cases against malicious actors and retrieving ransoms that have been paid. The U.S. Department of Justice is partnering with Eurojust for the purpose of providing best practices for responding to ransomware, in order to assist investigators and prosecutors on both sides of the Atlantic. This work, currently at its inception, builds on other successful initiatives we have undertaken with Eurojust and will facilitate our criminal law enforcement authorities' ability to combat this form of criminality successfully.

These are but a few examples that illustrate the depth of cooperation between the United States and Eurojust. In short, in Eurojust, the U.S. Department of Justice has found a true partner in combating serious transnational crime, where we are able to meet with our friends and counterparts, build meaningful structures to bridge the differences in legal systems and make the public safer from criminals. Of course, none of this would have been possible without the strong support of the European Union institutions, and Eurojust leadership, in particular that of Eurojust President Ladislav Hamran over the past five years.

On behalf, then, of the United States, we would like to convey our best wishes on Eurojust's 20th anniversary. We wish it continued and yet greater success in the future. It can count on the United States as a friend, as a partner – indeed, as a transatlantic cousin – in that effort.



JUDICIAL COOPERATION

Recent jurisprudence of the CJEU on judicial independence and the Framework Decision on the European Arrest Warrant

Lars Bay Larsen¹

Vice President of the Court of Justice of the European Union



Lars Bay Larsen © Jesper Bay

First general remarks

I have been given the opportunity not only to congratulate Eurojust on the occasion of its 20th anniversary but equally to share a few thoughts on the recent jurisprudence of my Court – the Court of Justice of the European Union (CJEU) – on judicial independence and the Framework Decision on the European Arrest Warrant (FD EAW)².

Just as Eurojust remains a rather young institution, the Area of Freedom, Security and Justice still constitutes a relatively new – and since Lisbon an enlarged and reinforced – field of jurisdiction of the CJEU.

Following the Tampere meeting of the European Council in 1999, *inter alia* calling for the setting up of Eurojust and endorsing the principle of mutual recognition as the way forward for judicial cooperation in criminal matters³, a number of new legislative initiatives were taken and eventually completed.

In the aftermath of 11 September 2001, the difficult negotiations on the FD EAW – the first EU legal instrument based on the principle of mutual recognition – were accelerated, and arguably to such a degree that the legal quality of the new instrument was affected.

Whether the resulting ambiguity stemmed from political difficulties or simple haste, the consequences have been more work for the CJEU. This comes notably, but not exclusively, in the form of requests for preliminary rulings submitted by national courts asking for binding interpretations of EU law.

It is perhaps unsurprising, then, that the CJEU has been asked many times to interpret the FD EAW and has delivered about 70 judgments on this instrument, nearly 30 of which were in its composition as a Grand Chamber.

Recently, several issues of interpretation and application of the principle of judicial independence have been raised before the CJEU. The court has had to examine

whether some Member States have failed to fulfil their obligations to preserve the rule of law flowing from, in particular, Articles 2 and 19(2) TEU⁴.

Such issues may arise in different fields, which may call for a more ‘tailored’ interpretation and application of the principle of judicial independence.

Recent jurisprudence of the Court demonstrates that the issue of judicial independence within the context of the European Arrest Warrant can be examined from at least two different angles.

First, the Court has, in some cases, been tasked with examining the level of independence required in order to be considered a ‘judicial authority’ within the meaning of Article 6(1) of the FD EAW. This notion, which is primarily based on the wording of the provision, concerns in principle all Member States but remains of particular importance to Member States where European Arrest Warrants are issued by public prosecutors.

Second, the issue of the possible general consequences for the application of the European Arrest Warrant, when judicial independence in the issuing Member State is threatened due to ‘systemic or generalised deficiencies’ in its judicial system, has on several occasions been raised before the Court. Albeit concerning only a very limited number of Member States, the key question in these cases has been whether the level of such systemic or generalised deficiencies in the issuing Member State may trigger a general exception to the obligation set out in Article 1(2) of FD EAW to give effect to a European Arrest Warrant⁵.

Independence required in order to be considered a ‘judicial authority’ within the meaning of Article 6(1) of FD EAW

The CJEU has observed, on several occasions, that the principle of mutual recognition is, as reflected in recital 6 of FD EAW, the ‘cornerstone’ of judicial cooperation⁶. Article 1(2) of the FD EAW likewise sets as its starting point that Member States are required to execute any European Arrest Warrant based on the principle of mutual recognition and in accordance with the provisions of that framework decision.

When asked by a Dutch court whether a European Arrest Warrant issued by the Lithuanian Ministry of Justice or by the National Commissioner of the Swedish Police with a view to executing a custodial sentence can be regarded as a ‘valid’ European Arrest Warrant, the CJEU found that the obligation to execute a European Arrest Warrant on the basis of Article 1(2) of the FD EAW presupposes that the executing Member State is confronted with a European Arrest Warrant, within the meaning of Article 1(1) of the FD EAW. The CJEU further specified that it follows from that article that such an arrest warrant is a ‘judicial decision’, which, in turn, requires that it is issued by a ‘judicial authority’ within the meaning of Article 6(1) of the FD EAW⁷.

The CJEU held that the term ‘judicial authority’, within the meaning of that provision, refers to the judiciary which must be distinguished, in accordance with the principle of separation of powers, from the executive. Thus, the term ‘judicial authority’ within the meaning of Article 6(1) of FD EAW cannot be interpreted as covering an organ of the executive of a Member State, such as a ministry or police service⁸.

A similar question subsequently came back to the CJEU on references from Irish courts, in relation to European Arrest Warrants issued by the Public Prosecutor’s Offices in Lübeck and in Zwickau (Germany) for the prosecution of criminal offences.

In its judgment OG and PI, the CJEU noted that the FD EAW entails a dual level of protection of procedural rights and fundamental rights from which the requested person may benefit. Thus, in addition to the judicial control, when a national decision such as a national arrest warrant is adopted, further protection must be afforded at the second level at which a European Arrest Warrant is issued⁹.

Given that it is the responsibility of the ‘issuing judicial authority’ referred to in Article 6(1) of FD EAW to ensure that second level of protection, it must be capable of exercising its responsibilities objectively and without risking its decision-making power being made subject to external directions or instructions, in particular from the executive. That independence requires that the statutory rules and the institutional framework at hand guarantee that the issuing judicial authority is not exposed to such a risk¹⁰.

In light of those considerations, the CJEU concluded that German prosecutors in some Länder could not be regarded as sufficiently independent in order to act as a ‘judicial authority’ in the sense of the FD EAW, since they – exceptionally – might receive instructions in individual cases from the Minister for Justice¹¹.

Although such rare potential instructions were circumscribed by particular safeguards such as, for example, immediate written information from the Minister to the Parliament, the outcome was not changed¹².

The immediate effect of this judgment was that all European Arrest Warrants – including the pending ones – issued by prosecutors of Member States whose legal order did not provide for statutory rules and an institutional framework meeting these institutional standards, in principle became invalid given that they were issued by an authority that could not be regarded as sufficiently independent.

Consequences of a ‘systemic or generalised deficiency’ in the judicial system of the issuing Member State

By contrast, the possible general consequences when judicial independence in a specific Member State is threatened due to ‘systemic or generalised deficiencies’,

potentially relate to the judicial system of a Member State as a whole, rather than to the specific legal framework governing the issuing of a European Arrest Warrant. Regardless, the issue has still been raised before the CJEU on several occasions.

This occurred when an Irish court confronted with European Arrest Warrants issued by Polish courts was concerned with possible general deficiencies in the Polish judicial system. The Irish court in this respect made reference to, *inter alia*, reports from the Venice Commission and asked the CJEU whether the general violations of the principle of judicial independence in Poland described in such reports implied that there was no longer a sufficient basis for the necessary mutual trust required to execute the European Arrest Warrants at hand.

In the *Minister for Justice and Equality* judgment, referring to the *Aranyosi and Căldăraru* judgment¹³, the CJEU stated that the principles of mutual recognition and mutual trust between Member States might be subject to limitations ‘in exceptional circumstances’¹⁴. The CJEU also stressed that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial which is of cardinal importance as a guarantee that all of the rights individuals derive from EU law are protected. Moreover, it ensures that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded¹⁵.

The CJEU continued to follow the reasoning and methodology of the judgment in *Aranyosi and Căldăraru* by reminding the executing judicial authority to first assess whether there is a real risk, connected with the lack of independence of the courts of the issuing Member State, that such systemic or generalised deficiencies may result in the fundamental right to a fair trial being breached. Furthermore, this assessment should be made on the basis of material that is objective, reliable, specific and properly updated¹⁶. Should the executing judicial authority find that there is generally such a real risk in the issuing Member State, it must, as a second step, assess specifically and precisely whether in the particular circumstances of the case at hand there are substantial grounds for believing that the requested person, if surrendered to the issuing Member State, would be exposed to that risk¹⁷. In this latter assessment, the judicial authority of the requested Member State must take into account the personal situation of the requested person, as well as the nature of the offence for which he or she is being prosecuted and the factual context that forms the basis of the European Arrest Warrant¹⁸.

Essentially, the same question has come back to the CJEU on references from a Dutch court confronted with several European Arrest Warrants issued by Polish courts. The Dutch court had serious doubts as to the independence of the judiciary in Poland due to recent developments in relation to the ‘judicial reform’ in Poland. This Dutch court referred in this respect, notably, to the jurisprudence of the CJEU on the new appointment conditions and procedures for the members of the Disciplinary Chamber of the Polish Supreme Court and in the area of disciplinary and control procedures¹⁹.

The CJEU first addressed this issue in the *L and P* judgment where it found that an executing judicial authority confronted with evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, still cannot deny solely on that basis, the status of ‘judicial authority’ to all judges or all courts of that Member State²⁰.

The CJEU further explained why, in the *OG and PI* judgment²¹, the CJEU had held that the public prosecutors’ offices in these cases did not satisfy the requirement of independence inherent in the concept of ‘issuing judicial authority’ within the meaning of the FD EAW. It was not due to material evidencing the existence of a systemic or generalised deficiency in the judiciary’s independence but rather was attributed to the statutory rules and institutional framework adopted by that Member State. This implied that the public prosecutors’ offices were placed in a legally subordinate position to the executive, and thus were exposed to the risk of instructions in a specific case concerning the adoption of a decision to issue a European Arrest Warrant²².

Referring to the *Minister for Justice and Equality* judgment²³, the CJEU then recalled that, where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, that authority cannot presume that there are substantial grounds for believing that the requested person would, if he or she was surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification. Even when such deficiencies are widespread and serious, the possibility of refusing to execute a European Arrest Warrant based on Article 1(3) of the FD EAW thus presupposes a two-step examination, where the general and individual steps cannot overlap with one another²⁴.

In the more recent *Openbaar Ministerie* judgment, the CJEU provided further indications on the assessment that the executing judicial authority is required to carry out with regards, in particular, to the second part of this two-step examination. This judgment confirms that the object of this second part of the assessment is to determine whether the person concerned, if surrendered, would run a real risk of a breach of his or her fundamental right to a fair trial before a tribunal previously established by law, as enshrined in the second paragraph of Article 47 of the EU Charter. The judgment also makes it clear that this test applies both in the context of a European Arrest Warrant issued for the purposes of executing a custodial sentence or detention order and of a European Arrest Warrant issued for the purposes of conducting a criminal prosecution²⁵.

Final remarks

The recent jurisprudence of the CJEU on judicial independence and the FD EAW confirms that the issue of the independence requirement to be considered a ‘judicial

authority' within the meaning of Article 6(1) of the FD EAW and the issue of the possible general consequences on the operation of the mechanism of the European Arrest Warrant established by the FD EAW, when judicial independence in an issuing Member State is threatened due to 'systemic or generalised deficiencies', are conceptually distinct. However, these aspects may occasionally both be of relevance in a specific case, as was the case in the judgment in *L and P*²⁶.

It is worth noting that the standards of judicial independence to be met in this context, so as to fall within the (outer) limits of the notion of 'judicial authority' within the meaning of Article 6(1) of the FD EAW, were deduced rather strictly by the Court from the wording of the provision.

The case law on the possible general consequences of a 'systemic or generalised deficiency' in the judicial system of the issuing Member State illustrates the limitations placed by the Charter on the operation of the mechanism of the European Arrest Warrant designed by the EU legislator. This case law also reflects, perhaps, the importance attached to preserving an Area of Freedom, Security and Justice, in which judicial cooperation is based on the principle of mutual recognition.

¹ All opinions expressed herein are personal to the author.

² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

³ Presidency Conclusions, Tampere European Council, 15-16 October 1999, paras. 33 and 46.

⁴ See, notably, judgments of 24 June 2019, *Commission v Poland* (Independence of the Supreme Court), C-619/18, EU:C:2019:531; of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982; of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'* and *Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, and of 15 July 2021, *Commission v Poland* (Disciplinary regime for judges), C-791/19, EU:C:2021:596.

⁵ As is stated in Article 1(3) of the EAW FD, this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

⁶ Judgment of 29 April 2021, *X* (European Arrest Warrant – *Ne bis in idem*), C-665/20 PPU, EU:C:2021:339, para. 38.

⁷ Judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, para. 28, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, para. 29.

⁸ Judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paras. 34-35, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paras. 35-36.

⁹ Judgment of 27 May 2019, *OG and PI* (Public Prosecutor's Offices, Lübeck and Zwickau), C-508/18 and C 82/19 PPU, EU:C:2019:456, para. 67.

- ¹⁰ Judgment of 27 May 2019, OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau), C-508/18 and C 82/19 PPU, EU:C:2019:456, paras. 71-74.
- ¹¹ Judgment of 27 May 2019, OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau), C-508/18 and C 82/19 PPU, EU:C:2019:456, paras. 88 and 90.
- ¹² Judgment of 27 May 2019, OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau), C-508/18 and C 82/19 PPU, EU:C:2019:456, paras. 78-87.
- ¹³ Judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198.
- ¹⁴ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, para. 43.
- ¹⁵ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, para. 48.
- ¹⁶ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, para. 61.
- ¹⁷ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, para. 68.
- ¹⁸ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paras. 75 and 79.
- ¹⁹ Notably judgments of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 15 July 2021, Commission v Poland (Disciplinary regime for judges), C-791/19, EU:C:2021:596.
- ²⁰ Judgment of 17 December 2020, *Openbaar Ministerie* (Independence of the issuing judicial authority), C 354/20 PPU and C-412/20 PPU, EU:C:2020:1033, para. 41.
- ²¹ Judgment of 27 May 2019, OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau), C-508/18 and C 82/19 PPU, EU:C:2019:456.
- ²² Judgment of 17 December 2020, *Openbaar Ministerie* (Independence of the issuing judicial authority), C 354/20 PPU and C 412/20 PPU, EU:C:2020:1033, paras. 45-50.
- ²³ Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586.
- ²⁴ Judgment of 17 December 2020, *Openbaar Ministerie* (Independence of the issuing judicial authority), C 354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paras. 51-60 and 69.
- ²⁵ Judgment of 22 February 2022, *Openbaar Ministerie* (Tribunal established by law in the issuing Member State), C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, paras. 66-102.
- ²⁶ Judgment of 17 December 2020, *Openbaar Ministerie* (Independence of the issuing judicial authority), C 354/20 PPU and C 412/20 PPU, EU:C:2020:1033.



About the *Gavanazov II* and *HP* judgments of the CJEU on the European Investigation Order Directive: strengthening the judicial protection in the issuing Member State

Anne Weyembergh

Professor, Université Libre de Bruxelles



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Introduction

Like Eurojust, initially set up by the Council Decision of 28 February 2002¹, the framework decision on the European Arrest Warrant and surrender procedure² celebrates its 20th anniversary this year. The latter has been the subject of many judgments of the Court of Justice of the European Union (hereafter CJEU). Some of these are very striking ones, such as those relating to the extent of mutual trust and the control to be exercised by the executing authorities, to the possibility of refusing execution on the basis of the risks of infringement of fundamental rights³, or to the notions of issuing and executing judicial authorities. Some of these judgments have had a significant impact on the functioning of judicial cooperation in criminal matters and on national laws. This is for instance the case of the CJEU judgment in the OG-PI case⁴.

Although adopted later, Directive 2014/41/EU of 3 April 2014 on the European Investigation Order⁵ is one of the main instruments of mutual recognition in criminal matters in the European Union. Despite its more recent entry into force, this directive has given rise to an increasing number of judgments by the CJEU. Some of them are striking as well. This is particularly the case for the two judgments which will be at the heart of this contribution in honour of the 20th anniversary of Eurojust. These are, on the one hand, the judgment of 11 November 2021, in case C-852/19, *Gavanozov II*⁶ and, on the other hand, the judgment of 16 December 2021, in case C-724/19, *HP*⁷.

The provisions of the Directive which these two judgments interpret are different. The first is essentially linked to Article 14 related to legal remedies, while the second mainly relates to its Article 2 c) i) concerning the designation of the issuing authority. However, both preliminary rulings present common features. Besides the fact that they have both been issued on a referral by the Specialised Criminal Court of Bulgaria (*Spetsializiran nakazatelen sad*), they have also in common the importance of their impact on the functioning of judicial cooperation and on the national

laws of the Member States. Both should result in a strengthening of the judicial protection in the issuing state.

I will start with the *Gavanozov II* case (1) and continue with the *HP* one (2).

The *Gavanozov II* judgment or the consecration of the right to an effective remedy and of the principle of effective judicial protection

The *Ivan Gavanazov* case concerned criminal investigations into large-scale VAT fraud. The Bulgarian authorities wished to request searches and seizures and a witness hearing by videoconference in the Czech Republic on the basis of a European Investigation Order (EIO). However, under Bulgarian law, there is neither a legal remedy against the lawfulness of searches and seizures and witness hearings nor against the issuance of an EIO dealing with such investigative measures. In such context, the Specialised Criminal Court of Bulgaria referred preliminary questions to the CJEU, the main one seeking to find out whether the national laws of Member States must provide for the possibility of an appeal against the issuance of an EIO to carry out searches and seizures and to organise the hearing of a witness by videoconference. This gave the Court the opportunity to rule on the scope of Article 14 of the Directive on the EIO read in conjunction with the Charter of Fundamental Rights of the EU.

As a reminder, Article 14 § 1 of the Directive especially provides that Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

In a first judgment dated 24 October 2019 (*Gavanozov I*)⁸ – contrary to Advocate General Yves Bot, who answered all referred questions⁹ – the Court reformulated these, considering that the Bulgarian referring Court was simply seeking to know how to complete section J of the form annexed to the Directive. It specified that Article 5, § 1 of the Directive, read in conjunction with the aforementioned section J, must be interpreted as meaning that the judicial authority issuing an EIO must not include in this section a description of the legal remedies available in its national law against the issuance of such an order. That authority needs only to indicate whether a legal remedy has been exercised against the EIO and provide the name and contact details of the competent authorities able to provide further information in this regard.

The ‘Guidelines on how to complete the forms’ were then amended accordingly¹⁰.

Being unsatisfied with that first decision by the Court of Justice, the Bulgarian referring court came back with two preliminary questions: a first one intended to know whether national legislation, which does not provide for any legal remedy against the issuing of an EIO for the search of residential and business premises, the seizure

of certain items and the hearing of a witness, is compatible with Article 14 of the Directive read in conjunction with Article 47 of the EU Charter of Human Rights, and a second question seeking to discover whether an EIO can be issued under such circumstances. This time, by a judgment of 11 November 2021, the CJEU responded to both questions, generally speaking along similar lines as the former conclusions of Advocate General Yves Bot in *Gavanazov I* and of Advocate General Michal Bobek in *Gavanozov II*¹¹.

In its response to the first question, the Court considered that Article 14 of Directive 2014/41, read in conjunction with its Article 24 (7) and with Article 47 of the Charter, must be interpreted as meaning that it opposes the rules of a Member State issuing an EIO which does not provide for any remedy against the issuance of an EIO having as its object the carrying out of searches and seizures as well as the organisation of a witness hearing by videoconference. In this respect, the judgment highlights the divergences that exist in terms of the level of judicial protection in the various Member States and the lack of harmonisation at the investigative stage. Article 14 of the EIO Directive does not approximate national laws in the field since it limits itself to imposing ‘equivalence’ between legal remedies in domestic cases and investigative measures indicated in EIOs. As the Court stresses: Article 14 ‘does not require Member States to provide additional legal remedies to those that exist in a similar domestic case’ (see point 26). In other words, Bulgarian legislation does not infringe Article 14 of the Directive as such as it does not allow for any remedies against the national investigative measures either.

That said, as the Court underlines it, ‘it should be borne in mind that when the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter, a provision which constitutes a reaffirmation of the principle of effective judicial protection’ (see point 28). Thus, in a way, such a transposition gives the opportunity to the CJEU to transplant by analogy in the context of an EIO the reasoning of the European Court of Human Rights which found repeatedly the absence in Bulgarian law of a legal remedy to domestic investigative measures in breach of the minimum standards under Article 13 of the European Convention on Human Rights¹². The CJEU refers to these decisions of the Court of Human Rights explicitly (see point 34).

In its answer to the second question, the Court considered that Article 6 of Directive 2014/41, read in conjunction with Article 47 of the Charter and Article 4, § 3 TEU, must be interpreted in the sense that it *opposes* the issuance, by the competent authority of a Member State, of an EIO having as its object the carrying out of searches and seizures as well as the organisation of a witness hearing by videoconference, where the regulations of that Member State do not provide for any remedy against the issuance of such EIO. The Court bases its reasoning on the concept of mutual recognition and mutual trust. As a rule, the executing authority is required to recognise an EIO transmitted in accordance with Directive 2014/41, without any

further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing Member State (see points 38 and 39). The mechanism is based on mutual trust and on the rebuttable presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. Observance of those rights falls, primarily, within the responsibility of the issuing Member State, which must be presumed to be complying with Union law and, in particular, with the fundamental rights conferred by that law (see points 54 and 55). Since the absence of legal remedies in the issuing State against the issuance of an EIO infringes Article 47(1) of the Charter, it rules out the possibility of mutual recognition being implemented and benefiting that Member State (see point 56). If an EIO is issued, it would result in the automatic application of Article 11(1)(f) of the Directive which provides for a ground for refusal when there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter (see point 59).

In this judgment, the Court thus pays particular attention to the right to an effective remedy and to the principle of effective judicial protection in the issuing state. It strengthens the position of individual rights, which is to be welcomed. The limited control by the executing authorities that results from the mutual recognition principle is to be legitimised by the extent of judicial control on the issuance of the order in the issuing state. As with its case-law on the EAW, faced with sensitive questions¹³, the Court paused by initially reformulating the questions put to it but then embarked on a more daring, impacting case-law in terms of the protection of fundamental rights. Among the other important lessons to be learned from this decision is the complementarity between mutual recognition and trust, on the one hand, and the respect for minimum standards and approximation, on the other. This has been underlined by many in the case of the EAW, but it is true also in the field of cooperation at the investigation level, where approximation has remained much neglected by the EU legislator so far. Nothing comparable to the provisions related to the EAW in the Directives on procedural guarantees for suspects and accused persons¹⁴ exists for the moment in the field. Indeed to overcome the divergent approaches of the Member States in the field, the latter has attempted to circumvent differences by leaving a wide margin of discretion to the Member States and extensively referring to national law, including in a number of (nevertheless crucial) aspects of defence rights in transnational investigations such as legal remedies¹⁵.

As was expected by several actors in the field, this judgment is likely to have important consequences. For Bulgaria, of course, it means that as long as Bulgarian law is not made compatible with the Charter and the European Convention of human rights, it will no longer be able to issue EIOs anymore. If Bulgarian EIOs are issued in the same legal context, the executing authorities should apply Article 11(1)(f) of the Directive which provides for an optional ground for refusal based on fundamental

rights. The other Member States which do not have such legal remedies in their national law should be impacted as well. It should lead them to revise and correct their national laws accordingly. Logically, the impact should not only concern the legal remedies against the issuance of EIOs but the investigative measures in domestic cases as well. Hence this case-law could have, progressively and indirectly, a positive approximating impact on the level of judicial protection at the investigative stage in the Member States.

The decision by the Court leaves many questions unanswered. I will tentatively and without claiming to be exhaustive mention four of them. A first question is to know when the legal remedy should be available, namely before or after the execution of the requested acts and measures (*ex ante* or *ex post*). If it is before, the surprise effect will obviously be lost¹⁶. In other words, if a legal remedy should be available *ex ante* this would most probably render the issuing of an EIO useless, since the person against whom the investigative measure will be applied will be able to anticipate it. A second question is to know for which other investigative measures such a legal remedy is required. The main criterion for the Court seems to be ‘when a person can be adversely affected’ (see point 47). Of course, this could be interpreted more or less extensively. The Court seems to interpret it rather broadly as it considers that a request to hear a witness by videoconference is also covered by these terms. A third question relates to the precise outlines of the requested reaction and degree of control by the executing authority. It would be particularly detrimental to mutual trust if the executing authority were expected to raise the issue of legal remedy systematically and *ex officio* and arguably slow down the cooperation in the process, thus making it less effective. The circumstances in which the executing authority should check whether there is any effective remedy available in the issuing State against an EIO should therefore be clarified. A fourth question concerns the exact meaning of the aforementioned statement by the Court according to which the issuance of an EIO in the absence of a legal remedy being available would result in the automatic application of Article 11(1)(f) of the Directive (see *supra* point 59). The latter only provides for an optional ground for refusal. Does ‘automaticity’, in the view of the Court, imply an obligation to refuse the recognition and execution? At first glance, these two notions (automaticity and optional ground for refusal) would seem to be incompatible.

The *HP* Judgment or the importance of the equivalence principle, the simplification

In the case at hand, the Bulgarian public prosecutor’s office had issued four EIOs with a view to collecting traffic and location data associated with telecommunications. Those EIOs were addressed to the Belgian, German, Austrian and Swedish authorities. All orders stated that HP was suspected of financing terrorist activities and that, in the context of that activity, he had had phone conversations with persons residing in the territory of these four Member States. The competent German, Austrian and Swedish authorities did not transmit a decision recognising the EIOs,

but the Belgian investigating judge did. On the basis of the evidence gathered, HP was charged, together with other persons, with illegally financing terrorist activities and participating in a criminal organisation seeking to finance those activities. The referring court, once again the Specialised Criminal Court of Bulgaria, before which HP's indictment was brought, wanted to determine whether that accusation was well founded. Indeed, according to Bulgarian law, these EIOs had been issued by the Public Prosecutor's Office whereas, in a similar domestic case, the authority with competence to order that traffic and location data associated with telecommunications is a judge of the Court of First Instance, having jurisdiction in the case concerned, whereas the public prosecutor only has the power to make a reasoned request to that judge in such a situation. Hence, it referred two questions to the CJEU.

The first question was to find out whether Article 2 (c) (i), of the Directive precludes a public prosecutor from being competent to issue, during the preliminary phase of criminal proceedings, an EIO aimed at obtaining traffic data and location data relating to telecommunications, where, in the context of a similar national procedure, the adoption of an investigative measure aimed at accessing such data falls within the exclusive competence of the judge. The Court answered in the *affirmative*. It started by analysing the letter of that provision but concluded that it does not allow the Court to respond to the question. The Court thus examined the context and objectives of the said provision (see points 30 and 31). In terms of context, it considers that, in order to assess the necessity and proportionality of an investigative measure – which is a requirement according to Article 6(1) a) of the Directive – and to provide the additional explanations referred to in Articles 26(5), 27(4) and 28(3) of the Directive, the issuing authority must be the investigating authority in the criminal proceedings concerned, which is thus competent to order the gathering of evidence in accordance with national law (see points 32 to 34). Article 6(1)(b) of the Directive which provides that the issuing authority may only issue an EIO where the investigative measure(s) referred to therein could have been ordered under the same conditions in a similar domestic case, leads the Court to consider that only an authority which is competent to order such an investigative measure under the national law of the issuing State may be competent to issue an EIO (see point 35). Turning to the objectives of the Directive, the Court of Justice particularly insisted on its simplification purpose and concluded that a distinction between the authority which issues the EIO and the authority which is competent to order investigative measures in the context of those criminal proceedings would risk complicating the system of cooperation, thereby jeopardising the establishment of a simplified and effective system (see points 36 to 38).

The Court then replied *negatively* to the second question, which was to discover whether the recognition of such an EIO by the competent authority of the executing state (public prosecutor or an investigating judge) replaces the court order required under the law of the issuing state. In other words, it considers that the executing authority cannot, by its decision of recognition, remedy the non-compliance

with the conditions for issuing an EIO (see point 50). The opposite solution would indeed affect the distribution of competences between the issuing authority and the executing authority, and thereby the balance of the EIO mechanism based on mutual trust, since this would amount to recognising the executing authority with the power to control the substantive conditions for issuing such a decision (see points 51 to 53).

In this decision, besides putting the emphasis on the equivalence principle requiring the application of the same rules as in a similar domestic case, the Court insisted on the simplification purpose that lies at the heart of the EIO directive as well as on the balance of roles between issuing and executing authorities and the restricted control only that can be performed by the latter. In this case, the result is in a way favourable to judicial protection since it indeed results in a judge issuing EIOs. As highlighted by the Court itself, it is also in line with another judgment by the Court dated 2 March 2021, in case *Prokuratuur C 746/18*, related to Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. In this decision, the Court considered indeed that Article 15(1) of that Directive read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as precluding national legislation that confers upon the public prosecutor's office, whose task is to direct the criminal pretrial procedure and to bring, where appropriate, the public prosecution in subsequent proceedings, the power to authorise access of a public authority to traffic and location data for the purposes of a criminal investigation. In its HP judgment, the CJEU repeats the part of Advocate General's conclusions where he noted that an EIO seeking to obtain traffic and location data associated with telecommunications cannot be issued by a public prosecutor where that public prosecutor not only directs the criminal pretrial procedure but also is in charge of the public prosecution in subsequent criminal proceedings (see points 42 and 43).

Conclusion

These two cases show the major added value that CJEU case-law can bring in interpreting aspects of EU legislation in this field and especially in terms of the need to find a balance between security and efficacy, on the one hand, and protection of human rights and judicial protection, on the other. The added value of the functioning of the EAW was already clear. This is now true of the EIO Directive as well. These two judgments show replies to some important questions, but they are far from exhaustive. Others will surely follow, which will allow the Court to bring further necessary clarifications.

In a way, this case-law is also representative of Eurojust's added value. Its impact on operational cooperation is of course well known. As stated in Eurojust's 2021 Annual Report, the Agency dealt with 4 262 cases involving an EIO in 2021, and helped to resolve issues concerning challenges with the execution of EIOs for the hearing of suspects or accused persons via videoconference, or the interception of

telecommunication¹⁷. Its role in terms of informing and disseminating important decisions of the CJEU and analysing them, and the impact these decisions have on the functioning of judicial cooperation and on national legislations, is perhaps less known. Yet the same Annual Report mentions that ‘Eurojust also monitors relevant CJEU case-law developments in the field of the EIO directive and their possible impact on judicial cooperation’. This is crucial in the EIO context but also with respect to the other mechanisms of judicial cooperation in criminal matters¹⁸.

Together with the European Judicial Network, Eurojust has indeed a key function to fulfil. Not only do they facilitate the implementation of EU legislation in the field of judicial cooperation in criminal matters as such, but equally they assist national authorities by monitoring CJEU judgments, drawing attention to them, helping authorities to understand these judgments and adjust their practice to the implications of these judgments, and identifying best solutions and practices. This is essential for practitioners – including defence lawyers – and academics involved and interested in the implementation of EU legislation in this field.

¹ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002, pp. 1-13.

² Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1–20.

³ CJEU, 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Caldaru*, ECLI:EU:C:2016:198 ; CJEU, 25 July 2018, C-220/18 PPU, ML; CJEU, 25 July 2018, C-216/18 PPU, LM, ECLI:EU:C:2018:586; CJEU, 15 October 2019, C-128/18, *Dumitru-Tudor Dorobantu*, ECLI:EU:C:2019:857 and CJEU, 17 December 2020, C-354/20 PPU and C-412/20 PPU, L&P, ECLI:EU:C:2020:1033.

⁴ CJEU, 27 May 2019, OG - PI, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.

⁵ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, pp. 1–36.

⁶ ECLI:EU:C:2021:902.

⁷ ECLI:EU:C:2021:1020.

⁸ C-324/17, ECLI:EU:C:2019:892.

⁹ See Opinion of Advocate General Y. Bot, 11 April 2019 (ECLI:EU:C:2019:312).

¹⁰ See Council of the EU, doc. 5291, 23 January 2020.

¹¹ See Opinion of Advocate General Y. Bot, points 51-90 and Opinion of Advocate General, 29 April 2021 (ECLI:EU:C:2021:346).

¹² ECtHR, 22 May 2008, *Iliya Stefanov v. Bulgaria*, CE:ECHR:2008:0522JUD006575501, § 59; ECtHR, 31 March 2016, *Stoyanov and Others v. Bulgaria*, CE:ECHR:2016:0331JUD005538810, §§ 152 to 154; and ECtHR, 19 January 2017, *Posevini v. Bulgaria*, CE:ECHR:2017:0119JUD006363814, §§ 84 to 86).

- ¹³ See CJEU, 29 January 2013, C-396/11, ECLI:EU:C:2013:39, where the Court also reformulated the questions to then embark in more daring judgments (see its *Aranyosi* and *Caldararu* case-law as referred to in fn 3).
- ¹⁴ See Directive of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive of 22 May 2012 on the right to information in criminal proceedings (letter of rights); Directive of 22 Oct. 2013 on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest ('Salduz Directive'); Directive of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.
- ¹⁵ In this regard, see E. Sellier and A. Weyembergh (eds), *Criminal Procedures and Cross-border Cooperation in the EU Area of Criminal Justice. Together but Apart?* Ed. De l'Université de Bruxelles, 2020, p. 312 and fn.
- ¹⁶ In this respect, see especially Opinion of Advocate General Michal Bobek, points 56 and 57.
- ¹⁷ Eurojust 2021 Annual Report, p. 24. See also Report on Eurojust's casework in the field of the European Investigation Order.
- ¹⁸ See especially Eurojust, [Case-law by the Court of Justice of the European Union on the European Arrest Warrant](#) (available on Eurojust's website).



I'M CHARLIE

Je suis CHARLIE

Eurojust's contribution to the fight against terrorism

Ilkka Salmi

EU Counter-Terrorism Coordinator¹



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Introduction

The judicial dimension plays a key role in countering terrorism, and Eurojust is instrumental in facilitating cooperation in this context. My first meeting in office on 1 October 2021 was with the President of Eurojust, Ladislav Hamran. Since then I have visited Eurojust and participated in its annual counter-terrorism meeting. This has reinforced my belief in the added value of Eurojust. I commend the Eurojust's solid response to evolving terrorist phenomena based on the rule of law and its commitment to protecting citizens in the European Union and beyond.

As the EU Counter-Terrorism Coordinator, I look ahead most of the time. Today I am looking back at how Eurojust has improved the judicial dimension of the fight against terrorism over the years. In paying tribute to those who have striven to achieve significant progress, one can only feel optimistic about future endeavours.

My legal and judicial background make me well aware of the impact of the criminal chain on both the repression and prevention of serious forms of criminality. I know how important it is for practitioners to be well-equipped for investigations, prosecutions, convictions, the enforcement of sentences and the reintegration of former convicts.

Given the international nature of terrorism and the opportunities provided by the internet and terrorist travel, there is a clear need for international judicial cooperation. Terrorist networks operate transnationally. Incitement to terror, preparatory acts and attacks often take place on the territory of more than one state. Perpetrators and victims often have different nationalities. As a result, many, if not most, terrorism cases require the competent authorities of different states to collaborate.

Tackling terrorist phenomena in an effective way would not have been possible without a radical departure from traditional mutual legal assistance. The system of judicial cooperation in criminal matters established within the European Union over the past 25 years is unique in the world. At its heart lies the principle of mutual recognition of judicial decisions. Eurojust, which celebrates its 20th anniversary this year, is one of its most effective tools; it offers Member States and partner countries a modern platform for judicial cooperation.

I will first outline the development of Eurojust and the contribution it has made in terrorism cases. I will then turn to the future by highlighting priorities for Eurojust related to counter-terrorism. I will conclude by stressing Eurojust's role in implementing the priorities I set out at the beginning of my current mandate.

The development of Eurojust and its contribution to countering terrorism

The Tampere European Council of October 1999 set out the vision of a judicial cooperation instrument that could provide operational support in cases of serious cross-border organised crime. The shock of the attacks on 11 September 2001 contributed to the creation of Eurojust on 28 February 2002², followed four months later by the Framework Decision on the European arrest warrant³ (allowing the surrender of Salah Abdeslam⁴ from Belgium to France in two months whereas it had taken ten years for Rachid Ramda⁵ to be surrendered from the United Kingdom to France).

Over the years, the cooperation of national judicial authorities via Eurojust has contributed to building mutual trust, and the EU judicial cooperation toolbox has expanded to include other mutual recognition instruments, including the Directive on the European Investigation Order⁶, which was due to be transposed in 2017.

Eurojust's legal framework has been strengthened⁷, and so have its capacities. The Agency has become a key player in facilitating cooperation between the national judicial authorities of the Member States, but also with third countries and other partners. It has supported bilateral and multilateral cooperation.

With regard to counter-terrorism, Eurojust's role has undergone a sea change since 2015. The assistance Eurojust provided to the investigation of the Paris terrorist attacks of 13 November 2015 was pivotal, with 15 Member States involved, as well as the United States; 17 coordination meetings were held in multiple formats and a joint investigation team (JIT) set up including France, Belgium, Eurojust, Europol and later the Netherlands. The experience reinforced the credibility of the Agency as a unique platform for facilitating operational cooperation when many States are involved.

While Eurojust's assistance was requested for a total of only 51 terrorism cases in 2014, this number has progressively increased over the years: Eurojust supported a total of 74 terrorism cases in 2015, 124 in 2016, 178 in 2017, 191 in 2018, 223 in 2019, 217 in 2020 and 221 in 2021⁸.

These figures include investigations into major terrorist attacks in EU Member States (such as the Charlie Hebdo and Paris attacks, the attacks in Brussels in March 2016, and the attack on the Christmas Market in Berlin in December 2016) or in third countries (such as the attacks against the Bardo Museum in Tunis in March 2015, and in Ouagadougou in January 2016), but also cases of financing of terrorism,

recruitment and training with a view to committing terrorist acts, participation in or support for terrorist groups, production and dissemination of terrorist propaganda, as well as travel to or return from a conflict zone. The cases involved both networks and individuals including high-profile targets.

The transmission of requests for mutual legal assistance and for mutual recognition instruments and their execution through Eurojust has proven to be beneficial, particularly in urgent cases. The Agency has supported national judicial authorities facing various challenges relating to, *inter alia*, the gathering and admissibility of evidence, e-evidence and financial investigations. Eurojust's assistance and coordination mechanisms have played an essential role, allowing for seizures, confiscations, arrests and convictions in complex cross-border investigations and prosecutions. They have also facilitated the protection and support of victims of terrorism, requests for assistance to third countries as well as the settlement of jurisdictional issues.

In 2014, only four coordination meetings were organised in terrorism-related investigations. This number has expanded since then with 15 coordination meetings being held in 2015, 18 in 2016, 14 in 2017, 20 in 2018, 24 in 2019, 12 in 2020 and 9 in 2021. These coordination meetings have provided incomparable added value. In adapting their formats to operational needs, they have brought together magistrates and investigators, allowing them to share in real time and in their own language all useful information with their colleagues, and to define investigation strategies collectively while avoiding duplication or jeopardising parallel initiatives. Additionally, the creation of two operational coordination centres has made it possible to hold successful joint action days: one in 2015 and one in 2017. Eurojust also gave organisational and financial support to a total of 2 JITs in terrorism cases in 2014, 5 in 2015, 6 in 2016, 13 in 2017, 12 in 2018, 8 in 2019, 7 in 2020 and 9 in 2021⁹. JITs, such as the one set up in January 2022 by Sweden and France with the support of Eurojust for proceedings involving core international crimes committed by foreign terrorist fighters against the Yezidi population in Syria and Iraq, are key tools for Member States, but also increasingly for third countries, allowing them to share information and exchange evidence in an efficient manner without the need for a European Investigation Order or mutual legal assistance request, as well as to coordinate investigative measures and prosecution strategies.

Information exchange is crucial in terrorism cases, and has been stepped up considerably in recent years regarding both ongoing criminal investigations and prosecutions and proceedings that have already been concluded. The Counter-Terrorism Register, launched in September 2019 on the initiative of the Ministers of Justice of France, Germany, Spain, Belgium, Italy, Luxembourg and the Netherlands, and based on Council Decision 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences¹⁰, has contributed to this in a significant manner. The Register has allowed for the identification of links between prosecutions, and for the detection of the need for multilateral coordination in a num-

ber of cases, even when operational cooperation was not facilitated by Eurojust. Eurojust's efforts aimed at consolidating the uniform and consistent transmission of information, the timely processing thereof, efficient follow-up and regular updates are to be commended.

Eurojust has also fostered its collaboration with Europol, in particular with the European Counter Terrorism Centre created in January 2016.

The feedback provided by Eurojust to national authorities through, *inter alia*, the Terrorism Convictions Monitor and ad hoc analyses of landmark court decisions in terrorism cases has also facilitated prosecutions by putting forward comparative legislation, comparative case law and lessons learnt. Additionally, Eurojust has provided strategic input to the Council and its preparatory bodies, on topics such as foreign terrorist fighters, e-evidence and encryption. With contributions to Europol's TE-SAT report, for example, Eurojust has made it possible to map and analyse trends.

Challenges in the gathering of, timely access to and admissibility of battlefield evidence have limited the number of convictions for terrorist offences and international crimes. These challenges have oriented prosecution strategies towards indictments for participation in terrorist organisations, even in cases where this qualification does not guarantee the full accountability of perpetrators and adequate justice for victims. The work of the Eurojust Genocide Network has been crucial in enhancing the use of battlefield information in prosecutions and in encouraging cumulative prosecutions for international crimes and terrorism offences. The cooperation among Member States' and Eurojust's affiliated prosecutors on war crimes, as well as the close relations with international partners and NGOs, is internationally referenced as exemplary, *inter alia* in the context of the Global Counter-Terrorism Forum or within the United Nations. The 2020 Eurojust Memorandum on Battlefield Evidence showed a recent increase in the number of cases based on battlefield evidence and cumulative charges. This is a positive development in the fight against impunity. The Eurojust Memorandum was highly successful in flagging difficulties and disseminating best practices.

An additional contribution by Eurojust to strengthening investigations into and prosecutions of terrorism cases is its cooperation with third countries, such as the United States, Norway, Switzerland, Western Balkan states, Turkey and Ukraine. International cooperation has been reinforced through international agreements, Liaison Prosecutors and Contact Points. Around one quarter of the terrorism investigations and prosecutions assisted by Eurojust in 2019 involved non-Member States.

Way ahead: counter-terrorism priorities for Eurojust

Information sharing is key in countering terrorism. I very much welcome the progress Eurojust has achieved in that area with the Counter-Terrorism Register. It is

crucial that Member States share in a systematic and timely manner information on all terrorism-related investigations and convictions, with regular updates to facilitate the establishment of links in proceedings with potential cross-border implications. The Counter-Terrorism Register has already demonstrated in practice that it can strengthen coordination and speed up actions against suspects. Optimising its efficiency depends on the systematic entry and updating of information by the national judicial authorities of all Member States. Further progress is needed. I therefore fully support the proposal made by the Commission in its ‘Security and justice in the digital world’ package¹¹, published in December 2021, to strengthen digital information exchange on cross-border terrorism cases. It would be beneficial to modernise the Eurojust Case Management System while integrating the Counter-Terrorism Register and its functionalities (especially the link identification), and to set up secure digital communication channels between the competent authorities and Eurojust.

Eurojust’s contribution to the digitalisation of justice, in a more general sense, is to be commended. I believe for instance that the creation of a Joint Investigation Teams Collaboration Platform, as proposed by the Commission in the same digital package of December 2021, would bring added value in terrorism cases, by *inter alia* facilitating the daily management of teams, as well as the collaboration with third countries and other partners. It would also ensure the secure exchange of information and evidence, the traceability of which would be reinforced.

New technologies are key for investigations and prosecutions. I hope that Eurojust will actively participate in the EU innovation hub for internal security at Europol to identify security threats related to new technologies, assess the impact of new technologies on prosecutions and develop innovative tools in joint projects to maximise the use of new technologies in the judicial dimension. The input from magistrates on legal and practical challenges is very important in guiding policymakers.

It is also important that Eurojust continues to develop its collaboration with partners such as the European Counter Terrorism Centre at Europol and third countries. The fact that the Council authorised the Commission to negotiate cooperation agreements with 13 more states is also an encouraging sign. Furthermore, Eurojust’s participation in the EuroMed Justice Programme on promoting criminal justice cooperation between the EU Member States and Southern Mediterranean countries is very positive.

The full implementation of Directive (EU) 2017/541 on combating terrorism is fundamental. In that context, enhancing judicial authorities’ timely access to information from conflict zones is critical. Eurojust and the Genocide Network should continue their excellent and unique work with the national correspondents for terrorism and international crimes on battlefield evidence and cumulative prosecutions. We are on the right track and I encourage the national competent authorities to build on this to make further progress.

Eurojust's role in implementing the EU Counter-Terrorism Coordinator's priorities

On taking up my duties in October 2021, I set out four priorities for my office, which will evolve over time depending on developments.

My first priority is the implementation of the Afghanistan CT Action Plan¹², designed with the Member States, the European Commission, the European External Action Service, the relevant Justice and Home Affairs agencies and international partners, and welcomed by the Council in October 2021. The terrorist threat to the EU is not likely to increase immediately but may grow in the medium term. We need to be prepared and mobilise the existing instruments. There is a role for Eurojust to play as far as the prosecution of foreign terrorist fighters, battlefield evidence and tackling organised crime are concerned, including in cooperation with partner countries such as those in the Western Balkans.

My second priority is enhanced assistance to camps and prisons in north-east Syria, where former Da'esh fighters and their families are held. The EU does not intervene in repatriation, to which the Member States take different approaches. Aid and the prevention of further radicalisation in the camps and prisons must be ensured for international and EU security, with a particular focus on minors. The work on battlefield information is important in this context too: building the capacities of national authorities to fight against impunity by obtaining and using battlefield information in court would expand Member States' options for tackling the challenging legacy of Da'esh. Since the EU is also working towards decongesting the camps by supporting reintegration in local communities in Syria and Iraq, capacity building of national authorities in the region is also critical. The comparative experiences, lessons learnt and best practices issued by Eurojust provide valuable material in this context.

Prevention of radicalisation is my third priority. Our work includes projects with a special focus on young people. Investing in education, culture, sports and international exchanges as elements of social cohesion is extremely important. Addressing the ideologies behind violent movements is also necessary: we must look into the roots of Islamist, right-wing and left-wing terrorism and violent extremism from all angles. Terrorism motivated by Islamist extremism remains the main threat we are facing in the EU, but the threat of right-wing violent extremism and terrorism is on the rise. Violent right-wing extremists are increasingly interconnected in the international online space, which exacerbates the threat they pose. I therefore attach great value to the work carried out by Eurojust on this phenomenon.

The online spread of terrorist speech, hate speech and disinformation is particularly concerning. The Regulation on addressing the dissemination of terrorist content online¹³ and the proposed Digital Services Act¹⁴ are major steps towards addressing this. Major digital companies can and should do much more to curb this phenomenon. Not only should they invest more resources in removing illegal content and

moderating harmful content, but they should also refrain from increasing the visibility of divisive and polarising content. I am particularly concerned about the algorithms used by companies such as Facebook and Google to amplify extreme or sensationalist content at the expense of moderate, nuanced and mainstream voices. Commercial gain should not come at the price of creating societal vulnerability and jeopardising security. The EU has the opportunity to set an ambitious standard to protect its citizens and I hope that it will build up the necessary means to achieve its ambitions.

In the fight against radicalisation online, cooperation between Eurojust and Europol in the framework of the Scientific Information Retrieval Integrated Utilisation System (SIRIUS) project is very important. The SIRIUS project guides prosecutors to the relevant point of contact for online platforms in the course of their investigations, and sensitises online platforms to the need to build up resources and streamline processes to better respond to judicial requests. Sharing information and best practices on mutual legal assistance procedures and internet-based investigations is beneficial for the national judicial authorities' capacity building and for online service providers' outreach.

My fourth priority relates to new and disruptive technologies. It is twofold. On the one hand, we should restrict the malicious use of such technologies. While recent terrorist attacks in Europe have so far been low-tech, there is a risk that terrorists will attempt to use new technologies, such as drones, 3D printing and large-scale cyber operations, in future attacks. On the other hand, we should make sure that our law enforcement and security services are equipped with advanced technologies to fight terrorism in full respect of our fundamental freedoms. Eurojust's contribution in mapping the evolution of criminal practices and the impact of technological changes on prosecution, for instance through its collaboration with Europol in the Observatory Function on Encryption, is important. It makes it possible to have foresight. Further initiatives of this nature should be undertaken.

Like my predecessor Gilles de Kerchove, I believe that security and judicial practitioners in Brussels do not have a strong enough voice. There is a risk that technical and legal capabilities to collect information and use evidence in terrorism cases will be severely affected by restrictions on data retention and the use of artificial intelligence, by the increase in end-to-end encryption of electronic communications, further expanded by the roll-out of 5G, and by challenges related to e-evidence. I am keen to contribute to the debate to make sure that we strike the right balance between privacy and security. Here again, Eurojust's engagement is important, as it echoes legal and practical challenges related to the judicial dimension of the fight against terrorism.

Conclusion

Eurojust plays a crucial role in supporting the major prosecutions of terrorism in the EU. It provides a strong and modern platform for bilateral and multilateral

judicial cooperation, and for information-sharing in counter-terrorism. Like my predecessor, I look forward to working closely with Eurojust. I will strongly support the Agency and I am committed to ensuring that it has the necessary legal framework and adequate resources to provide optimal support to national judicial authorities.

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- ¹ The opinions expressed in this article are those of the author alone and do not necessarily reflect the positions of the Council of the European Union or the European Council.
 - ² Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.
 - ³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
 - ⁴ Facing trial in France for his alleged participation in the terrorist attacks in Paris on 13 November 2015.
 - ⁵ Convicted in France for the terrorist attacks on public transport in Paris in the summer of 1995.
 - ⁶ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.
 - ⁷ The Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation, replacing and repealing Council Decision 2002/187/JHA was adopted on 6 November 2018 and became applicable on 12 December 2019.
 - ⁸ Number of new terrorism cases supported by Eurojust per year: 14 in 2014, 41 in 2015, 71 in 2016, 92 in 2017, 84 in 2018, 95 in 2019, 69 in 2020 and 80 in 2021.
 - ⁹ Number of *new* JITs supported by Eurojust in terrorism cases per year: 1 in 2014, 3 in 2015, 2 in 2016, 9 in 2017, 2 in 2019, 2 in 2020 and 4 in 2021.
 - ¹⁰ Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.
 - ¹¹ [Modernising judicial cooperation](#) (09/03/2022) (available on the *European Commission's* website).
 - ¹² ST 11556/1/21 REV 1, 29 September 2021.
 - ¹³ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.
 - ¹⁴ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

AI and data protection in judicial cooperation in criminal matters

Wojciech Wiewiórowski

European Data Protection Supervisor

Michał Fila

Legal Officer at the European Data Protection Supervisor



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Introduction

As we celebrate the 20th Anniversary of Eurojust, the European body for judicial cooperation in criminal matters, we should also review the historical and technological contexts in which the agency began its existence.

The year is 2002: the European Union consists of 14 Member States; new Euro banknotes and coins are in our pockets; the future of the Nice Treaty in the period between Irish referendums is uncertain; the role of the year-old Charter of Fundamental Rights is uncertain as well; and expectations are high for the newly established European Convention led by Valéry Giscard d'Estaing, who was in charge of writing the Constitution for Europe. We were also just four months on from 9/11. Internet Explorer was occupying more than 90% of the market; Safari and Firefox did not yet exist. Using your European mobile phone (smartphones were not yet known) in the United States or Japan was difficult and barely affordable. The IT market was recovering after the dot.com bubble collapse.

What were we, the authors, doing 20 years ago? In 2002, Wojciech was teaching constitutional and European law as a young PhD student, exploring the interplay between IT and law, both academically and professionally. Michał was defending his Master of Laws (LL.M) thesis on police cooperation in Europe at the Christian Albrecht University in Kiel, Germany. Our interest in the newly created Eurojust was limited. Although some specific and focused solutions, developed by artificial intelligence (AI) researchers, were being widely used at that time, they were still only rarely described as 'artificial intelligence'. The only remote association made between the judiciary and AI in popular culture was probably through the figure of Judge Dredd!

Fast forward to 2022 and here we are, with national strategies, policies and regulations on AI adopted by almost all major economies in the world. Non-binding guidelines or principles for the use of AI, focusing on ethical considerations, are

common. Proposals for legal changes to address issues raised by AI (for example, transparency) are tabled in the European Union, the United Kingdom, the United States and around the globe. At the same time, Wojciech is at the helm of the EU's supervisory authority responsible for monitoring compliance with data protection rules by all EU institutions, offices, bodies and agencies (EUIs), including, since December 2019, Eurojust. Since September 2020, Michał has been the legal officer at the European Data Protection Supervisor (EDPS) responsible for relations with Eurojust.

The EDPS took over the supervision of Eurojust at a crucial time – in 2020, the European Commission (EC) presented its Communication on the Digitalisation of Justice in the European Union¹. One of the objectives set out in the EC's document is to further improve cross-border judicial cooperation between competent authorities at the European level. To this end, the EC announced that it is exploring ways to increase the availability of relevant machine-readable data produced by the judiciary, in order to establish trustworthy machine-learning AI solutions for interested stakeholders to use. Shortly after, in April 2021, the EC presented a proposal for an AI Regulation laying down harmonised rules for the EU, otherwise known as the Artificial Intelligence Act (AI Act)². In both of these contexts, the EC stressed that any actions put in place must be in full compliance with the EU's fundamental rights, including the right to the protection of personal data. The AI Act would also designate the EDPS as the competent authority for the supervision of EUIs as they develop and use AI systems³.

The use of AI tools in the area of justice may represent a high risk to the fundamental rights of individuals⁴. This is especially true with regard to AI systems that may be used to assist judicial authorities in factual and legal research, as well as in interpreting and applying the results of such research in a specific case. Such high risk is largely absent in cases where AI systems are used for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation/pseudonymisation of judicial decisions/documents or purely administrative tasks and allocation of resources. The formal views of the EDPS and of the European Data Protection Board (EDPB) on the new regulatory framework are expressed in their joint opinion issued in June 2021⁵.

With this written contribution for Eurojust's 20th anniversary, we take this opportunity to reflect on some of the data protection issues stemming from the proposed AI rules on one hand, and the ongoing reform of Eurojust on the other.

Relationship between the data protection framework and AI rules

When speaking about AI, we usually start by reminding readers that a comprehensive European data protection framework, adopted on the basis of Article 16 TFEU, already exists. The data protection framework of Eurojust consists of the Data Protection Regulation for the EUIs (EUDPR)⁶ and the specifying data protection provisions of the Eurojust Regulation.⁷ While the Law Enforcement Directive (LED)⁸

is not directly applicable to Eurojust, it determines the way in which national judicial authorities of Member States protect personal data for the purposes of prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties.

Contrary to the European Public Prosecutor's Office and Europol, to which the EUDPR does not apply for the processing of operational personal data⁹, the Eurojust data protection framework can be regarded as both clearer and more comprehensive. The EUDPR governs the processing of administrative personal data, and, together, its Chapter IX and the provisions of the Eurojust Regulation, constituting a *lex specialis* to the general rules, apply to the processing of operational personal data. We must stress the need for consistent interpretation and application of these rules – something that the text itself underlines¹⁰. It should be clearly stated that the existing data protection rules apply to the processing of personal data by Eurojust, whenever carried out wholly or partly by automated means, including possible processing by AI systems. There should be no doubt that the essential data protection requirements, derived from Article 8 of the EU Charter of Fundamental Rights, such as the principles of necessity, proportionality, accuracy, purpose limitation, data minimisation, integrity and confidentiality, continue to apply. Other obligations of the controller, such as data protection by design and by default, are also relevant. Whenever personal data is processed, data protection provisions apply. It should be clear that, when it comes to the processing of personal data, the new AI regulation would be without prejudice to the existing rules¹¹.

Human involvement

One of these rules deserves a special mention here. Article 77 of the EUDPR prohibits a 'decision based solely on automated processing', unless authorised by EU law as providing adequate safeguards – which should include at least the right to obtain human intervention from the controller. Such decisions (if authorised by law) shall not be based on sensitive data 'unless suitable measures to safeguard the data subjects' rights, freedom and legitimate interests are in place'. There is a clear requirement for specific safeguards to tackle the risks linked to the processing of sensitive data in automated processing used for decision-making.

To that end, controllers need to provide for human involvement in the processes where AI operates. The use of AI systems should involve systematic human intervention, evaluation and validation by expert staff. Human validation should be employed as an inherent step to ensure that the output of the systems is faultless. In the case that the automated results are assessed as faulty, the human intervention should provide feedback to be recorded and used for retraining the AI. How to best implement meaningful human involvement is certainly a topic for another article; here, we want only to stress the importance of such a safeguard, while being mindful that it is not the only factor to consider.

AI training and data minimisation

AI regulation discourse often seems to avoid the problem of potential conflict between AI development and the data minimisation principle. According to the conventional understanding of AI, data is an essential strategic resource and any meaningful progress in cutting-edge AI techniques requires large volumes of data, including personal data. Training of AI models relies on the data ‘feeding’ them. The more and better-quality data used, the better the AI tool is trained. AI developers are constantly seeking datasets that could improve the functioning of their creations. However, such an approach is in opposition to the principle of data minimisation. This fundamental principle is rarely considered when discussing AI regulation. However, it remains applicable to any processing of personal data. Designers and developers should therefore ask themselves whether it is really necessary to train a particular model on personal data. The data minimisation principle, combined with the principles of data protection by design and by default, are general requirements when using anonymous data if possible¹². If the AI tool can be trained on anonymised datasets, collecting or injecting personal data in the training process should not take place. Current research demonstrates that AI is not synonymous with big data, and there are several other approaches that can be used in different small data settings¹³.

Is AI a silver bullet?

We all know that digital transformation has profoundly changed people’s lives in recent decades and will continue to do so. The use of AI in the public sector, including in the area of criminal justice and cross-border cooperation, is increasingly being explored. We understand there are high expectations regarding the possible benefits of these solutions; for instance, to help make judicial decisions machine readable, to simplify the reuse of case-law or simply to improve legal practitioners’ advice to clients. Although AI can be used in process automation, it should not be seen as a universal solution to all problems and shortcomings. Even when the development of AI is delegated to a third party, the process of correctly developing an AI system demands the work and attention of people who know how the organisation works. It is a fallacy to believe that AI will, by itself, magically correct procedures that were already problematic.

While digital tools often contribute to the greater efficiency and effectiveness of today’s judicial systems, it is crucial that their deployment should take into account the requirements to guarantee higher standards for the public justice service as well as the expectations and needs of the justice system’s professionals and users. The use of digital technologies in the justice sector is highly sensitive and must therefore meet state-of-the-art standards with regard to information security and cyber security, and must fully comply with privacy and data protection legislation and with the standards upheld by the rule of law.

When discussing the use cases of AI models with representatives of law enforcement and of the judiciary, we are often given the impression that the principles of necessity and proportionality in particular are not sufficiently addressed. We believe that the development of machine-learning models needs to be driven by the proven ability of the model to fulfil a specific and legitimate purpose and not by the availability of the technology. In assessing necessity, EU entities should demonstrate that their purposes could not be accomplished in another reasonable way¹⁴. They should demonstrate a real need for AI to process personal data, how the processing effectively addresses this need and that the same purpose cannot be reasonably achieved with other, less invasive means. The main argument made in this context is that the growing volume of processed datasets can indeed be considered a starting point for the necessity assessment. This argument may provide a general reason for the use of AI to effectively carry out specific tasks entrusted to EUJs. Nevertheless, there are still elements that need to be added in order to complete the necessity assessment. Such assessment should explain and document why some AI models are preferred to others, to justify the selection of the least intrusive solution from a personal data perspective.

Possible use cases of AI systems for Eurojust

Given Eurojust's role as the EU hub for supporting and strengthening judicial cooperation between national authorities in charge of investigating and prosecuting serious crime, it seems that certain types of AI applications would fit this role better than others. For example, if we consider Eurojust as an agency that does not conduct its own investigations, tools for forensic analysis or visual biometric identification would not be at the top of the list, especially given the strong reservations around the intrusiveness of such means and the potential overlap with other actors, such as Europol.

However, there are other AI categories that seem highly relevant for cross-border judicial cooperation, such as various natural language processing (NLP) tools. These technologies are particularly useful for the processing of large-scale sets of unstructured data, commonly handled by judicial authorities. NLP technologies can support and facilitate Eurojust's main tasks by improving its internal processes; for example, these tools can be used for automated document processing, machine translation in cross-border cases, text summarisation or named-entity recognition.

Automated document processing

Considering that Eurojust is starting the process of designing and developing its new case management system, automated document processing (ADP) seems an obvious candidate for a use case¹⁵. ADP proves to be particularly valuable for processing high volumes of documents, especially for the classification, conversion and archiving of these documents in searchable formats. These types of AI systems can not only significantly reduce the need for manual document processing, but can also contribute to improving data accuracy and completeness. The conversion of

paper-based formats into searchable documents is also the first step in exploring further deployment of other AI-driven tools, such as machine translation.

Automated translation

Overcoming language and communication difficulties between judicial authorities of the EU Member States was one of the driving forces behind the creation of Eurojust. It is also a strong argument for the application of AI in the context of cross-border cooperation in criminal justice. The need to communicate and analyse evidence in multiple languages is self-explanatory, particularly for joint investigative teams (JITs) supported by Eurojust¹⁶. Integrating automated translation tools into JITs' operations could significantly reduce the time spent on translation and make the evidence directly accessible to all team members; not to mention the reduction in costs for sworn translation, which would still be necessary for evidence to be admissible in court.

However, the specificity of cross-border judicial cooperation seems to be a problem when it comes to machine translation. Domain-specific legal language can pose a challenge to generic automated translation systems available on the market, as they are not reliable when distinguishing specific legal terminology from the generic language. To produce a high-quality translation, domain-specific terminology needs to be 'learned' and integrated into the AI tool. The research in this area is advanced and has generated promising results¹⁷. Nevertheless, domain-specific customisation would still require time and significant resources.

Automated summarisation systems

Another type of NLP tool to support cross-border criminal justice cooperation is text summarisation (summarisation systems). These tools prove to be particularly useful in applications where large amounts of information need to be processed in a limited amount of time. Summarisation systems facilitate the extracting of the most relevant information, significantly reducing the time needed to analyse large volumes of text, such as documentation seized in criminal investigations. Summarisation systems can also improve data classification and accessibility, especially in cases where processing by humans would take too long and where precision is not decisive.

Legal research

We turn now to another use case for NLP technologies: their use in legal research to facilitate the identification of case-relevant statutes, provisions and case-law. While this might be dispensable for research on the law of the EU Member States or non-EU countries posting Liaison Prosecutors to Eurojust (with Eurojust here fulfilling its role as a knowledge hub), there are instances where knowledge of foreign law is necessary for Eurojust to make informed decisions concerning data protection. We refer to the assessments of appropriate safeguards, provided for in Article 56 of the Eurojust Regulation. Knowledge about foreign data protection regulations applicable in the transfer of operational personal data to non-EU countries is an important element of Eurojust's assessment of existing data protection safeguards. This is a

potential use case where AI technology could directly support the application of data protection provisions. Moreover, legal research supported by AI would not require the AI tool to process individuals' personal data. However, linguistic barriers might be a particular challenge in these situations, making this another case where automated translation could come in handy.

The AI Act and Eurojust's cooperation with third countries

Since we have already mentioned Eurojust transfers to third countries, allow us another digression on this point. Some of the solutions proposed by the AI Act might appear complicated when it comes to Eurojust's relations with external partners. The EC proposes to limit the scope of the AI Act with regard to international law enforcement and judicial cooperation. This would mean that the provisions of the draft AI Act, according to its Article 2(4), would not apply to public authorities in a third country or to international organisations, if these authorities or organisations use AI systems in the framework of international agreements for law enforcement and judicial cooperation with the EU, or with one or more EU Member State. In our view, Article 2(4) would not, in any way, limit the application of the AI Act to EUJs; only public authorities in third countries and relevant international organisations could 'benefit' from this proposed exception.

The practical application of such an exception in the Eurojust environment raises some questions. While the AI Act would be applicable to Eurojust as it develops or uses AI systems, does this exemption mean that it would not (formally) be applicable to third countries' Liaison Prosecutors operating at Eurojust? We feel this issue merits some further reflection in advance of the negotiations between legislators.

Prior assessment and data protection by design and by default

While the EDPS takes note of new and emerging ideas, it is not our intention, nor our role, to plead for these ideas to be put in place. Prior to the set-up of these technologies, authorities considering such applications should perform a legal and ethical assessment to take into account the impact and any possible risk to the fundamental rights and freedoms of individuals, as well as their ethical and legal implications. It is also important to conduct the testing and evaluation of these technologies to ensure that their performance meet the relevant standards, especially regarding data accuracy and bias.

The processing of personal data is often at the heart of AI technologies. At the same time, the data collected, processed and stored in judicial systems may be highly sensitive, revealing intimate details about individuals or even causing a threat to their lives. Giving access to this data for the purpose of training algorithms has to be considered with extreme caution and under very strict conditions. Training, testing and validation of machine-learning models with operational personal data and for their

further use in the context of a specific Eurojust activity should not be carried out before a data protection impact assessment is done, according to Article 89 of the EUDPR. In addition, we stress that the responsibility of the controller goes beyond that: it starts with adequate project governance, which should take into account the principle of data protection by design throughout the conception and development of the AI tool and system in question. A data-protection compliant AI tool or system can be achieved once the following are in place: clear commitments to this principle in the key documents of the project; policies, processes and methodologies that consider data protection at each stage of the project; by identifying privacy and data protection stakeholders; by assigning roles and responsibilities regarding data protection; by working with competent individuals; and by properly documenting all of these steps. Furthermore, sets of business-level requirements on data protection and mechanisms to assess compliance of the outcome are needed. The controller also needs to put in place procedures for the identification and elimination of any bias in the data used to further train AI models, and to verify that the training data used does not cause discrimination. Processes to check the training or validation of data sets must be built and documented, and procedures allowing for regular monitoring of the models regarding biases and their readjustment or retraining must exist. These processes should include statistical checks on the input and output data.

Final remarks

From an EDPS perspective, we can clearly see the added value of AI. AI solutions can help complete tasks in a much faster and more cost-effective way, and can also be more accurate and precise than humans, if deployed correctly. At a time when nearly all judicial systems are facing a backlog of cases to process, the promises of efficiency that AI brings cannot be ignored. AI can also detect duplicated information in a reliable way, which contributes to data minimisation and helps to reduce personal data processing by effective anonymisation. If correctly put in place, AI may help to reach true equality and improve access to impartial and objective justice.

Nevertheless, we also see the associated risks. Algorithms are only as good as their programmers and the data they have been trained on. This leaves AI systems vulnerable to human error or historical bias. Gains in speed and efficiency can easily turn into disadvantages, if personal data is collected and processed in an immanently biased way. Lack of human oversight and monitoring mechanisms may have dire consequences for the fundamental rights of individuals, as well as their trust in judicial systems and in the EU mechanisms supporting them.

Finally, we see many actors in the field trying to be the first to seize the potential benefits of AI. There is a need for a coordinated approach at EU level when it comes to EUJs' development and use of AI systems to support law enforcement and judicial cooperation. You can count on the EDPS to play its part in the EU's coordinated approach to AI.

- 1 COM(2020) 710 final; Communication of 2 December 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Digitalisation of justice in the European Union – a toolbox of opportunities’
- 2 COM(2021) 206 final; Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts..
- 3 Article 2 and 3 of the draft AI Act.
- 4 The proposed AI Act would explicitly qualify ‘AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts’ as a high-risk system subject to a particular legal regime (see Annex III, point 8 (a)).
- 5 [EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence \(Artificial Intelligence Act\)](#), 18 June 2021 (available on the EDPS’s website).
- 6 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, pp. 39–98.
- 7 In particular, Chapter IV of the Eurojust Regulation.
- 8 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, pp. 89–131.
- 9 Article 2(2) and 2(3) of the Regulation 2018/1725.
- 10 Recital 29 of the Eurojust Regulation.
- 11 With some notable exceptions, such as the list of prohibited AI practices in Article 5 of the AI Act.
- 12 For more details on data protection by design as an enforceable legal obligation, see the [EDPS Preliminary Opinion no. 5/2018 on Privacy by Design](#) (available on the EDPS’s website).
- 13 [Small Data’s Big AI Potential](#) (available on the *Center for Security and Emerging Technology’s* website).
- 14 See also the [EDPS Toolkit on Assessing the necessity of measures that limit the fundamental right to the protection of personal data](#), as well as the [EDPS quick guide to necessity and proportionality](#) (available on the EDPS’s website)
- 15 [Cross-border Digital Criminal Justice, Final Report](#) (pp. 160-162) (available on the *Publications Office of the European Union’s* website).
- 16 COM(2021) 756 final; [Analytical supporting document accompanying the proposal for the Regulation on the JIT collaboration platform](#) (available on the *European Commission’s* website)
- 17 See for instance the [Connecting Europe Facility Digital programme \(CEF Digital\) with the eTranslation tool](#) (available on the *European Commission’s* website).



The protection of fundamental rights in cross-border cooperation: trends and future perspectives

Michael O'Flaherty

Director of the European Union Agency for Fundamental Rights



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First general remarks

Cross-border cooperation in criminal matters is an important component of European integration and serves to promote respect for fundamental rights. Its importance became evident with the progressive elimination of border controls within the European Union, which facilitated free movement within the European Union, but also – at the same time – cross-border crime.

The European Union has regulated the main elements of cross-border cooperation in criminal matters. For instance, the European Arrest Warrant (EAW) entering into force in 2004 facilitated the surrender of suspects or convicted persons, without the need to apply long and cumbersome extradition proceedings. The EAW was followed by other framework decisions aiming to facilitate transfer of prisoners, transfer of probation and alternative sanctions, and transfer of pre-trial non-custodial measures.

At the same time, the operation of the EAW, which hinges on the principles of mutual trust and mutual recognition, made it clear that the procedural rights guaranteed in national proceedings should be comparable; so courts can easily recognise decisions adopted by other jurisdictions without the need to examine the respect of fundamental rights during the proceedings in another Member State.

With the operation of the EAW, it also became clear that conditions of detention (pre- and post-trial) differ in the EU Member States. The Court of Justice of the European Union (CJEU) ruled that Member States executing the EAW should ensure that a requested person would not risk being held in inhumane conditions after the transfer to the issuing Member State.

In 2009, the Council of the European Union issued a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Since then, the EU has put in place six directives on the right to interpretation and translation, information, access to a lawyer, legal aid, the presumption of innocence and the procedural safeguards for children suspected or accused in criminal proceedings. The directives apply to a certain extent also to the cross-border proceedings triggered by the issuing of the EAW.

In turn, cross-border collection and sharing of evidence have become increasingly important with the ongoing EU harmonisation in certain fields of criminal law, leading to challenges both in terms of effectiveness as well as safeguarding fundamental rights.

This article reflects the work of the European Union Agency for Fundamental Human Rights' (FRA), which to date has covered three main areas: procedural rights¹, detention conditions, and cross-border collection and exchange of evidence. These areas are particularly pertinent to fundamental rights and important for ensuring the efficiency of cross-border cooperation in criminal matters.

Criminal detention and alternatives

The EAW framework decision regulating transfer of detained persons between Member States is the most important legal instrument for effective cross-border cooperation in the area of criminal law. The CJEU clarified² that Member States executing such transfers must ensure that persons transferred will not run a real risk of inhumane conditions of detention in the requesting Member State. More specifically, in the *Dorobantu* judgement, the CJEU pointed out that 'as regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms'.³

FRA research showed that the conditions of detention still vary considerably across Member States. Detainees remain vulnerable, as data presented in FRA's Criminal Detention Database⁴ show, with some Member States lacking standards that would meet the minimum requirements set by the European courts. Establishing that such differences exist in the treatment of detainees opens an opportunity for discussing common minimum standards in the EU with respect to pre-trial detention which could improve mutual trust between Member States, increase the effectiveness of mutual recognition instruments, and demonstrate commitment to upholding the EU's fundamental rights and other values.

The work of the Agency identified three areas for prioritising action to improve the current situation: first, physical conditions, such as living space, access to sanitary facilities and access to meaningful activities, which should reflect respect for human dignity and other fundamental rights, including privacy and respect for family life. Second, adequate access to healthcare; this requires the presence of a sufficient number of medical staff in detention facilities, which proved to be a particularly important issue during the COVID-19 pandemic. Third, protection from violence. Authorities need to acknowledge that violence is endemic in prison environments and should apply effective measures to protect detainees from violence, both from prison staff and from other inmates. Particular attention should be given to those

considered most vulnerable, such as LGBTI prisoners for whom only a few Member States provide special protection measures.

One of the underlying reasons for the shortcomings in detention conditions is overcrowding in detention facilities, which is in turn closely related to the overuse of detention measures and underuse of non-custodial measures. In 2016, FRA published a report on fundamental rights aspects of criminal detention and alternatives in EU cross-border transfers⁵. It examined a range of fundamental rights issues related specifically to three EU instruments concerning transfers of prison sentences between EU Member States, probation measures and alternative sanctions, as well as pre-trial supervision measures: the Framework Decision on transfer of prisoners, the Framework Decision on probation and alternative sanctions, and the Framework Decision on the European supervision order.

FRA research showed that the EU instruments providing for the cross-border transfer of such alternatives to detention in pre- and post-trial phases remain under-utilised, arguably because alternative measures to detention are still not perceived as an effective deterrent to crime.

In the light of these findings, FRA continues to encourage Member States to make full use of the framework decisions related to cross-border proceedings, on probation and alternative sanctions and on the European supervision order, but also to use alternative measures more often in domestic proceedings to help reduce prison populations. The use of alternatives is even more important at the pre-trial stage, where individuals remain innocent until proven guilty in a court of law. Promoting and establishing widely alternative measures to detention needs to go hand in hand with a shift in public opinion coupled with a better understanding of their effectiveness and added value to society. At the same time, it would have a clear positive impact both for fundamental rights as well as for further stimulating cross-border cooperation.

Criminal procedural rights

Over the past years, the FRA has conducted research and published reports concerning the respect of fundamental rights in a number of core areas of criminal procedural rights, covering five directives adopted under the Criminal Procedural Roadmap⁶. The Agency's research examines the legal provisions in place, as well as the practical implementation of the law to identify shortcomings, as well as promising practices, and suggest improvements.

Our research shows, as a general trend, a positive influence of the EU directives on criminal procedural rights. Member States appear to be gradually harmonising the application of EU standards. Nevertheless, challenges persist – for example, information in criminal proceedings is not always conveyed in an understandable manner; access to a lawyer is delayed; and the right to remain silent is not always

respected in practice. Moreover, our research shows that these issues continue to affect children too when they are involved in criminal proceedings.

Recognising linguistic diversity in the EU, the legislator guaranteed every suspect, accused and requested person the right to interpretation and translation to enable them to participate in proceedings at the same level as persons speaking the language of the proceedings. Our survey of national associations of legal interpreters and translators identified problems particularly with less common languages. For example, respondents in our interviews complained about the inadequate interpretation services and even mentioned using other inmates or family members and friends as interpreters, although poor or inaccurate interpretation could have serious legal consequences. National requirements and practices on interpretation and translation services for criminal proceedings vary, for example as regards the qualifications and certification of official legal interpreters and translators, resulting in varying quality of these services within the EU.

The right to **information** is another important right in criminal proceedings enabling full and engaged participation. The EU has introduced an obligation to provide a written 'letter of rights' to those deprived of liberty. However, in practice, as our research indicates, often defendants felt inadequately informed – either because the provision of information is delayed or conveyed as incomprehensible legal jargon.

Access to a lawyer is the most important right in the course of criminal proceedings but also EAW proceedings. Our research found instances where access to a lawyer was delayed and suspects were questioned without the presence of a lawyer. FRA recommended that Member States take appropriate measures to avoid such practices. Additionally, our findings show that authorities do not always inform persons arrested on an EAW about their right to be assisted by lawyers in both states – issuing and executing. Even more so, the authorities do not facilitate this access. Moreover, given the difficulties some defendants deprived of their liberty had in accessing their lawyers, FRA recommended that national authorities should issue specific guidance to law enforcement authorities for prompt, direct and confidential access to a lawyer before the first questioning of defendants deprived of their liberty.

FRA provided a range of recommendations for improvement concerning the different criminal procedural rights, some of which have a transnational dimension. For instance, with regard to translation and interpretation, which can be a critical factor for ensuring fair proceedings, we recommend considering cooperation between Member States on interpretation, for example by sharing a pool of interpreters. Moreover, FRA recommends enabling criminal justice authorities to monitor and assess the quality of national interpretation or translation services.

The Agency recommended that national authorities put in place robust safeguards to ensure that individuals are effectively informed about their criminal procedural

rights as soon as they become suspects. Particular attention should be paid to language barriers, lack of education or any physical or intellectual disability that individuals may have. We also suggested that information should be provided both orally and in writing using non-technical and accessible language.

In particular, FRA pointed out that law enforcement should inform any suspect or a potential suspect (sometimes called ‘a person of interest’) about their rights as suspects, in particular the right to remain silent and not to incriminate themselves. With regard to the recurrent practice of questioning as witnesses persons who are likely to become suspects, we call for abandoning this practice to ensure that questioning is immediately stopped once it becomes clear that the person might be charged with a crime, to inform this person fully about their procedural rights, and to enable their consultation with a defence lawyer.

Concerning the letter of rights, we recommend introducing a uniform template for all criminal justice authorities in the EU to improve legal certainty and clarity. In addition, as national laws rarely include detailed rules and measures to cater for the needs of persons with disabilities, practical measures, such as transcribing written text into braille for individuals with visual impairments or providing audio files and easy-to-read versions, would improve fundamental rights protection.

Specifically concerning **children**, our ongoing research indicates that when they are involved in criminal proceedings, national authorities do not always follow the safeguards provided by EU law, nor are children treated in the way recommended by the Council of Europe Guidelines on child-friendly justice⁷. We find, for example, that authorities inform children in the same way as adult defendants by handing out a letter of rights or a leaflet; and that their parents are not always involved as required by EU law. On the other hand, we find that children involved in criminal proceedings are rarely detained and, in general, authorities apply non-custodial measures to children.

Cross-border collection and sharing of evidence

Cross-border collection and sharing of evidence is often necessary for the successful investigation of serious crime, including terrorism. The Agency’s research into the fundamental rights impact of EU counter-terrorism legislation shows that EU level action has helped foster cooperation between Member States when detecting, investigating and prosecuting these offences⁸.

Moreover, counter-terrorism practitioners interviewed for this research underlined the added value of Eurojust in setting up and supporting joint investigation teams, in supporting investigations and by exchanging information. The prosecutors and judges interviewed across the EU consider Eurojust as an important facilitator of their work to keep Europe safe.

Nevertheless, the research also identified persistent challenges, such as the vague definitions of certain offences which affect legal clarity and foreseeability. Different interpretations of what conduct constitutes an offence such as travelling for the purpose of terrorism, receiving training to terrorism or public provocation to commit a terrorist offence, can have an adverse impact on fundamental rights and discourage lawful conduct but also can hinder cross-border cooperation. Rules for the use of evidence from intelligence work or collected in conflict zones are also not always clear and would benefit from explicit fundamental rights safeguards. Practitioners we interviewed for our research also claimed that information provided by non-EU countries for criminal proceedings in terrorism cases was not systematically verified. It was therefore not clear if it had been obtained legally or not, for example through torture. Such factors can have a real impact on the rights of individuals involved in criminal proceedings and also hinder effective cross-border cooperation in terrorism cases.

In closing, I would reiterate the importance of fundamental rights for cross-border cooperation in criminal matters. FRA research clearly shows that respect for fundamental rights and a clear legislative framework with robust safeguards are prerequisites of Member States' mutual trust in each other's justice systems, and therefore for effective cross-border cooperation and the prevention of impunity in the European Union. EU Agencies can assist Member States and EU institutions with capacity building, operational support and data in this important field, and can help promote these shared objectives of criminal justice.

1 FRA has undertaken research in this area largely as a result of direct requests from the European Commission.

2 Court of Justice of the European Union, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], 5 April 2016 (available on the CJEU's website).

3 Court of Justice of the European Union, C-128/18, *Dorobantu* [GC], 15 October 2019 (available on the CJEU's website).

4 FRA developed the [Criminal Detention Database](#) (2015-2019) upon a request by the European Commission as a practical tool to assist members of the judiciary and other legal professionals involved in cross-border criminal proceedings. The database (available on FRA's website) is a hub for information on detention conditions in all EU Member States.

5 FRA (2016), [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#) (available on FRA's website).

6 [Right to information](#), [Right to interpretation](#), [Right to access to a lawyer](#), [Right to be presumed innocent and to be present of a trial](#), [Safeguards for children in criminal proceedings](#) (available on FRA's website).

7 Council of Europe (2020), [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#) (available on the CoE's website).

8 FRA (2021), [Directive \(EU\) 2017/541 on combating terrorism - Impact on fundamental rights and freedoms](#) (available on FRA's website).



Sculpture entitled '*Reflection*', by Spanish sculptor Fernando Sanchez Castillo, which stands in front of the Eurojust building

EPILOGUE:

A forward look through the rear-view mirror

Ladislav Hamran

President of Eurojust

Thinking in 2021 of how best to mark Eurojust's 20th anniversary, I remember there was no shortage of ideas among colleagues. One of the suggestions we immediately grew fond of was to bring together written contributions from policymakers, academics and a rich assortment of colleagues to lay out how the story – not just of Eurojust, but of judicial cooperation in the European Union in general – has unfolded so far. Compiling this anniversary book has been an enriching exercise, as it sheds light on our work from many different angles at once. But even more than the different perspectives as such, it is the quality – without exception – of the contributions that sets this work apart. I could therefore not be more grateful to all authors for the time and effort they agreed to invest. And I could not be more pleased that the result of this collective effort has found its way to the publisher, and to you.



Ladislav Hamran © Eurojust

Ultimately, the story of Eurojust is the result of the need for closer cooperation that was felt among judicial practitioners as the previous century was drawing to a close. In those days, prosecutors were often unsure where to send their letters rogatory but felt safe in their suspicions that a reply would not come soon – if at all. A watershed moment arrived when, in October 1999, the European Council in Tampere (Finland) concluded that *‘To reinforce the fight against serious organised crime, the European Council has agreed that a unit (Eurojust) should be set up (...). Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases (...).’* As demonstrated by Gilles de Kerchove’s insightful contribution on the genesis of Eurojust earlier in this book, it was an idea that had been pushed previously. History, however, confirms that European cooperation develops in stages rather than following a straight line, and Eurojust seeing the light of day was no exception. It only amplifies the gratitude we feel towards all those colleagues – to Gilles himself, for instance, but in equal measure to Hans Nilsson and many others – for the foresight and perseverance they have shown.

Looking at the year-on-year development of the caseload Eurojust has been entrusted with by Member States, I am proud to say their vision quickly became reality. In its very first year and in a European Union of 15 Member States, Eurojust covered 202

files. The following years saw a steep increase – aided also by consecutive EU enlargements – up to a point when Eurojust serviced 5 608 cases in 2017 and a further rise to 10 105 cases in 2021. This has meant an 80% increase in just four years (2017-2021), and we look forward to sustaining and supporting the growth curve that lies ahead.

However, numbers alone do not fully explain the development of Eurojust and of cross-border judicial cooperation. The countless coordination meetings, coordination centres, conferences and seminars that are conducted at Eurojust not only serve to assist judicial practitioners in their duties, but they also instil a stronger kinship among the community of prosecutors and investigative judges throughout the European Union. This is a qualitative bond that gives us a faster and better understanding of each other's legal frameworks and requirements. In his article, Judge Bay Larsen, Vice President of the European Court of Justice, offered an excellent summary of the increasing legal complexity that surrounds the principle of mutual recognition in criminal matters and, more specifically, in the execution of European Arrest Warrants. With its in-house legal knowledge and the permanent presence of EU countries' National Members, Eurojust is much like a hub that gathers Member States' judicial authorities to support and facilitate work among them.

Beyond the numbers and caseload, another qualitative development I would like to highlight is the new Eurojust Regulation of November 2018, which entered into force in December 2019. It updated our governance structure, it transformed us from the *EU's Judicial Cooperation Unit* into the *EU Agency for Criminal Justice Cooperation*, but above all, it offered recognition of the continued need for Eurojust and our role in the European Union's security architecture. As I write these words, the EU Council and European Parliament have just further extended Eurojust's mandate with a view to preserving, analysing and storing evidence of core international crimes. While this is largely uncharted territory for Eurojust, we will move fast to live up to these new responsibilities. With armed conflicts continuing in various parts of the world, with the war in Ukraine the latest example, this new strand of work will require our urgent focus.

The road ahead promises a number of other developments that will further shape Eurojust as an organisation in years to come. What comes to mind first is the digital shape and form of tomorrow's criminal justice cooperation, and second, the external dimension of Eurojust's work. On the first topic, it seems clear that, as our lives increasingly move online, so will criminal justice cooperation. Back in 2018, Eurojust presented to the Council of the European Union the need for a standardised set of digital tools to support cross-border judicial cooperation. In the meantime, the legislative process has been set in motion, and we look forward to a future in which Member States and Eurojust will have equal access to secure e-applications that will define the face of tomorrow's criminal justice cooperation.

The second topic is linked to our work with partner countries outside the European Union. With the advent of Eurojust (2002), the European Arrest Warrant (2002),

the European Investigation Order (2014) and the Freezing and Confiscation Order (2018), European judicial cooperation has taken an important turn during the past 20 years. It has also been a time in which Eurojust concluded 13 operational cooperation agreements with a geographically diverse range of countries, from the United States of America to Georgia. In the period that lies ahead, it is our ambition to substantially widen our network with third countries and to welcome additional Liaison Prosecutors to Eurojust to join the 10 colleagues we already host at our premises in The Hague.

If the past is any predictor of the future, I imagine Eurojust's next 20 years will look very different from our experiences so far. With the invaluable support and expertise of policymakers, academics, data protection professionals and, most importantly, the judicial practitioners who decide to place their trust in us, I believe there is important room left to strengthen Eurojust's role. Our ambition will always be to provide the best possible operational support to prosecutors in the field while remaining at the forefront of major new developments in the field of cross-border judicial cooperation.

If we collectively agree to continue on this course, I have no doubt that the words of EU Commissioner Reynders will hold true in the future as much as they do now, when he wrote in his introduction *'(...) this is also a story of an organisation that has, from the very beginning, been over-delivering.'*

In gratitude to all Eurojust colleagues, past and present,

Ladislav Hamran

President of Eurojust



Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000

@Eurojust    YouTube