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Subject:	Eurojust and the Lisbon Treaty: Towards more effective action Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 September) - Information by the Presidency

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The strategic seminar “Eurojust and the Lisbon Treaty: towards more effective action”, organised by Eurojust in cooperation with the Belgian Presidency of the Council of the European Union, was held in Bruges, Belgium, from 20-22 September 2010.

More than 120 experts, including practitioners, among which representatives from the Member States, the Council, the European Commission, the secretariat of the LIBE Committee of the European Parliament, the European Court of Justice, the secretariat of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), OLAF, Europol, academics and members of the College of Eurojust took part in the seminar.

The goals were to reflect on the development of Eurojust in light of the Lisbon Treaty and in particular on the possibility provided for in Article 85 of the Treaty on the Functioning of the European Union (TFEU) to adopt a new regulation for Eurojust, and the possible establishment of a European Public Prosecutor's Office from Eurojust under Article 86 TFEU. These subjects have among others equally been discussed during the Informal meeting of Ministers for Justice and Home Affairs on 15-16 July 2010 in Brussels where the subject of “Coordination of judicial investigations and prosecutions at European level: the role of Eurojust” was debated.

On the first day of the seminar, the plenary session began with presentations from various speakers. Aled Williams, President of Eurojust and National Member for the United Kingdom stated that the Lisbon Treaty envisages a new phase of development for Eurojust where cooperation will continue and coordination will play a greater role. The Belgian Minister of Justice Stefaan De Clerck underlined the importance of the improvement of judicial cooperation in criminal matters between Member States and declared that this is one of the priorities for the Belgian Presidency. He noted that the creation of a European Public Prosecutor's Office is an ambitious project on which reflection is needed before making any concrete steps.

The starting points for the debates in the workshops were two discussion papers prepared by Eurojust and the Belgian Presidency. Participants exchanged views on both topics. In the four workshops dealing with the topic of more effective action of Eurojust under Article 85 TFEU the following subjects were discussed: Structure and institutional development of Eurojust, The improved legal basis of Article 85: towards full operational powers of Eurojust, Resolution of conflicts of jurisdiction and relations between Eurojust and national authorities and perational cooperation. In the four workshops concerning the establishment of a European Public Prosecutor's Office under Article 86 TFEU the following subjects were discussed: Preliminary questions and institutional aspects, Organisation of the EPPO and relationship with Eurojust, Competence and rules of procedure and Admissibility of evidence and judicial review.

During the seminar it became clear that participants are open to reflect on the various aspects of these provisions. Interesting discussions were held on the different subjects, but many questions still remain unanswered. The questions which have been raised need to be further examined and discussed.

The seminar closed with general conclusions on future perspectives, presented by Daniel Flore, General Counsellor at the Belgian Ministry of Justice. He noted that the new Treaty creates possibilities but entails a certain degree of complexity. Although the Treaty provides for a new legal basis, the two provisions are open to different interpretations. The significant number of questions resulting from the discussion during the course of the seminar should encourage and be a source of inspiration for academics, experts and the European Commission to reflect and elaborate further on these issues.

Delegations will find attached a more detailed report on the outcome of this seminar.

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**STRATEGIC SEMINAR****“EUROJUST AND THE LISBON TREATY:  
TOWARDS MORE EFFECTIVE ACTION”  
*BRUGES, 20-22 SEPTEMBER 2010*  
REPORT**

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**1. Introduction**

The strategic seminar “Eurojust and the Lisbon Treaty: towards more effective action”, organised by Eurojust in close co-operation with the Belgian Presidency of the Council of the European Union, was held in Bruges, Belgium, from 20-22 September 2010.

The goal of the seminar was to reflect on the future development of Eurojust in light of the new provisions introduced by the Lisbon Treaty and, in particular, the regulation for Eurojust according to Article 85 of the Treaty on the Functioning of the European Union (TFEU) and the possible establishment of a European Public Prosecutor’s Office (EPPO) from Eurojust under Article 86 TFEU.

On the first day of the seminar, the opening plenary session, including presentations by academics, was followed by eight workshops devoted to specific topics. On the second day, the results of the workshops’ discussions were presented in the final plenary session. The seminar closed with general conclusions on future perspectives.

The starting point for debates in the workshops was two discussion papers prepared by Eurojust and the Belgian Presidency.

More than 120 experts, including practitioners, representatives from the Member States, EU institutions and bodies, academics and members of the College of Eurojust, took part in the seminar. The seminar was hosted by the College of Europe.

## **2. Opening of the seminar**

The morning plenary session was opened by Professor *Paul Demaret*, Rector of the College of Europe, who thanked Eurojust and the Belgian Presidency for the choice of the College as the location of the seminar and talked about the European spirit of the College of Europe.

Mr *Aled Williams*, President of Eurojust and National Member for the United Kingdom, noted that the Lisbon Treaty envisages both change and continuity for Eurojust. The recognition of the continuing value of Eurojust and the proposals for change through redefinition of its powers and tasks are not controversial; they form an important starting point. The language in the Lisbon Treaty already shows how Eurojust is moving towards a new phase of development where co-operation will continue and co-ordination will play a greater role. Further, “more effective action” under the Lisbon Treaty means building and developing partnerships with national authorities and EU bodies. The implementation of the revised Eurojust Decision by the Member States may have important lessons for Articles 85 and 86 TFEU, particularly in two priority areas: information flow between Eurojust and competent national authorities, which is a pre-condition for the reinforcement of the tasks and powers of Eurojust under Article 85(1) TFEU, and operational relationships – notably with the European Judicial Network (EJN), Europol and OLAF – that should be fostered both within and outside the EU.

Mr *Stefaan De Clerck*, Minister of Justice of Belgium, underlined the importance of the improvement of judicial co-operation in criminal matters between Member States, especially after the entry into force of the Lisbon Treaty. The Belgian Presidency considers these issues as priorities and will continue to focus on proposals such as the European Investigation Order, which is currently under discussion in the Council. Minister De Clerck referred to the achievements of Eurojust since the establishment of Pro-Eurojust in 2001 during the previous Belgian Presidency. He said that Eurojust should receive all the possible support to continue working in the future as a key player in judicial co-operation. Several questions related to Article 85 (e.g. definition of terms and meaning) and Article 86 TFEU (e.g. structure, relations with other agencies, national authorities, rules of procedure, the meaning of the term “from Eurojust”) still need to be discussed and solved. As early as the informal JHA Council meeting in July, the ministers of justice exchanged preliminary views on these matters. At present, a step-by-step approach seems to be preferable. The Minister concluded that he is convinced that, even if in the long term, a consensus will be found between the Member States leading to establishment of the EPPO from Eurojust, as indicated in the Lisbon Treaty.

Mr *Johan Delmulle*, Federal Prosecutor of Belgium, noted that the correct interpretation of the tasks of Eurojust under Article 85 TFEU (especially the meaning of “initiation of criminal investigations”) should be clarified. He raised some concerns about the possibility to grant Eurojust more operational powers that, *in concreto*, could compete with the powers of the local public prosecutors offices in Belgium. Though the revised Eurojust Decision has not yet been transposed in Belgium, at the time this transposition occurs, a number of important powers of the Belgian National Member of Eurojust, exercised under the direction and supervision of the Federal Prosecutor, will be implied. Thus, the application of Article 85, which would constitute another step forward, raises many questions related to the new powers of Eurojust and its relationship with national judicial authorities. With regard to Article 86 TFEU, Mr Delmulle expressed the opinion that Eurojust could evolve into an EPPO as was the case in Belgium when the National Magistrates evolved into the Federal Prosecutor’s Office. Such an evolution should nevertheless happen along gradual lines and the EPPO should in any case keep close relations with the public prosecution offices in the Member States.

Ms *Françoise Le Bail*, Director General of the Directorate-General for Justice, European Commission, highlighted that the future of Eurojust and the establishment of an EPPO are at the heart of the overall structure of the future European criminal justice area. Under the new Lisbon Treaty and the Stockholm Programme, a number of steps – such as the strengthening of Eurojust, the establishment of an EPPO, the reform of OLAF and the establishment of common minimum standards in the justice process – need to be taken. The political aim is the protection of the citizens and the protection of the Union’s financial interests. The Vice-President and Commissioner, Ms Viviane Reding, has announced her intention to put forward a proposal for the establishment of an EPPO during her mandate. The work of other actors in the area of criminal justice, and in particular of OLAF (whose reform is well underway), should be also fully taken into account. Ms Le Bail noted that the strengthening of Eurojust and the gradual setting up of an EPPO should go hand in hand. Article 85 TFEU gives other tools to reinforce Eurojust’s operational capacities. In particular, the following two priority options must be mentioned: the strengthening of the efficiency of Eurojust’s internal structure and the possibility of giving Eurojust powers to initiate investigations in the field of Union’s financial interests. For this reason, the Commission intends to publish in 2011 a Communication on the strengthening of the Union’s financial interests using the criminal justice system.

In her general introduction, Ms *Michèle Coninx*, Vice-President of Eurojust and National Member for Belgium, presented the topics of the seminar and noted that the new provisions of the Lisbon Treaty make clear that Eurojust will be a key player in the area of judicial co-operation in criminal matters. Ms Coninx referred to the several internal and external activities already carried out by Eurojust and its Task Force on the Future of Eurojust – established by the College in December 2009 – to reflect and continuously discuss the future developments of Eurojust and the establishment of the EPPO “from Eurojust”.

With regard to Article 85 TFEU, Ms Coninx highlighted that the real added value of Eurojust is the co-ordination among national competent authorities conducting investigations and/or prosecutions against a criminal organisation. However, Eurojust can only play a relevant role if it receives sufficient and significant information from the national authorities and if it is able to process this information, detect links between the cases and provide proper feedback to the national authorities. Several provisions of Article 85 TFEU deserve to be further discussed and interpreted: for instance, the opportunity to confer on the National Members mandatory powers to initiate investigations and prosecutions; the possibility to make mandatory the decisions of Eurojust on resolution of conflicts of jurisdiction; the way to strengthen judicial co-operation by closer co-operation with the EJP; the definition of scope and appropriate mechanism to ensure the evaluation by the European Parliament and the national Parliaments.

Regarding Article 86 TFEU, different options and scenarios are possible for the setting up of the EPPO “from Eurojust”, which might mean from the experience and expertise developed by Eurojust since 2002, in collaboration with Europol and in partnership with OLAF. Moreover, Eurojust is committed to improving its expertise in the protection of the financial interests of the EU, also thanks to the establishment of the Eurojust National Coordination System (ENCS), which will allow Eurojust to receive the relevant information from the national authorities in a more structured format and on a regular basis.

Ms Coninx concluded that other issues will then need to be discussed further, such as the structure and scope of competences of the EPPO, the need for a prior harmonisation of criminal offences and criminal procedural laws and the definition of judicial control.

### **3. Presentations on Articles 85 and 86 TFEU**

#### **3.1. Article 85 TFEU: Professor Anne Weyembergh (Université Libre de Bruxelles)**

Professor Weyembergh presented her analysis on the potential and limitations of Article 85 TFEU and the future development of Eurojust. The origins of Article 85 were first recounted. The preparatory work on the draft Treaty establishing a Constitution for Europe put forward by the European Convention in 2003 (Article III-174) and the Treaty establishing a Constitution for Europe of 2004 (Article III-273) are of particular interest, because they make clear that the “rationality” of Article 85 should not be overestimated.



Professor Weyembergh referred to the contributions and limitations of two recent instruments covering Eurojust either directly or indirectly: the revised Eurojust Decision of 16 December 2008 and the Framework Decision of 30 November 2009 on prevention and settlement of conflicts of jurisdiction. With regard to the revised Eurojust Decision, the amendments introduced, though essentially designed to strengthen the effectiveness of Eurojust, remain relatively modest. Clearly, the powers of the National Members as national authorities, and not the powers of the College of Eurojust or of the National Members as members of the College, have been strengthened. Even in this regard, the strengthening has remained rather limited. Neither the revised Eurojust Decision nor the 2009 Framework Decision grants any binding powers to Eurojust. At the present time, Eurojust is still a simple “mediator”, without any decision-making or binding powers with regard to national authorities.

Professor Weyembergh presented a detailed analysis, paragraph by paragraph, of the meaning and implementation of Article 85. She drew attention to several ambiguous passages in the article, clearly resulting from difficult compromises and causing numerous questions to be raised. She underlined, among others, two significant changes in formulation regarding the mission of Eurojust under Article 85(1): the phrase “*or requiring a prosecution on common bases*”, which leads one to believe that Eurojust could initiate co-ordination in areas where a common criminal policy strategy is needed; and the phrase “*on the basis of operations conducted and information supplied by the Member States’ authorities and by Europol*”, which serves to stress the importance of providing Eurojust with the relevant information.

Article 85(1) refers to the adoption of “*regulations*”. One must then discuss how (in accordance with the ordinary legislative procedure and, for instance, adopting a step-by-step approach) and when (following the Stockholm Programme and first evaluating the implementation of the revised Eurojust Decision) these regulations should be adopted. And, most important, what will be the content of such regulations regarding Eurojust’s structure (changes could be directed towards strengthening the autonomy of the National Members vis-à-vis their State of origin to bring forward a European interest), operation (a revision of the way in which Eurojust operates with regard to its external and internal relations could be envisaged), field of action (*status quo* could be maintained) and tasks.

Concerning tasks, Article 85 *a)* to *c)* clearly goes further than the existing framework, allowing for granting Eurojust certain binding powers with regard to the national authorities. Nevertheless, this provision contains important limitations (e.g. the tasks only “*may include*”).

Subsections *a)* and *b)*, which are linked together, would grant Eurojust binding power with regard to the initiation of investigations, but also with regard to the co-ordination of investigations and prosecutions referred to in *a)*. However, the binding power is limited to the initiation of investigations, not prosecutions. These first two subsections raise many questions, including the meaning of *initiate* (at the very least, “ordering the commencement of an investigation by the national authorities in the Member States”), the way Eurojust would initiate investigations (via the competent National Member?), the notion of *investigations* and *prosecutions* (a European vision would be indeed advisable), and the interpretation of the phrase “*particularly, those relating to offences against the financial interests of the Union*” (first stage towards the implementation of Article 86?).

Regarding the resolution of conflicts of jurisdiction (subsection *c)*), both negative and positive, the term “*resolution*” implies decision-making powers. Eurojust would be able to solve such conflicts via binding decisions. However, to frame Eurojust’s actions, a list of binding criteria for the division of jurisdictions as well as a jurisdictional control by the European Court of Justice should be foreseen.

As for co-operation with the EJM, expressly mentioned in Article 85, the problem of the lack of rules defining precise criteria to establish a clear line of demarcation between the types of cases to be covered by Eurojust and by the EJM still requires examination. Moreover, even if not mentioned in the article, the strengthening of judicial co-operation requires the strengthening of links with two other essential players, namely Europol and OLAF.

Furthermore, the implementation of the subsection referring to the involvement of the European Parliament and national Parliaments in the evaluation of Eurojust’s activities is important and should lead to a greater transparency and democratic legitimacy for Eurojust. But the form of this control (joint European Parliament/national Parliaments’ control?), as well as the objective and subject of the evaluation, will need to be specified, taking into account the special nature of Eurojust and the need to guarantee its autonomy (operational activities should therefore be excluded).

Professor Weyembergh concluded that Article 85 offers concrete possibilities to transform Eurojust from a simple mediator and player at horizontal co-operation level to a player with binding operational powers at vertical integration level. Nevertheless, the changes announced remain limited because, unlike Article 86 TFEU, the centre of gravity for investigations and prosecutions would not be transferred at EU level. However, the implementation of Article 85 remains a very sensitive matter in terms of national sovereignty and given the discrepancies between national systems. When setting up Eurojust, and during the 2008 revision, the granting of binding powers was perceived to be premature. Thus, the question is whether Member States are now ready to accept this development and exploit the potential of Article 85.

### **3.2. Article 86 TFEU : Professor André Klip (Maastricht University)**

Professor Klip presented the main issues related to the implementation of Article 86 TFEU and the creation of the European Public Prosecutor's Office. He identified and analysed several questions and stressed that most of them would need to be examined and discussed further.

According to Professor Klip, the starting point is the establishment of the EPPO. Predicting when this event will happen and how many Member States will take part, assuming that not all of them would be willing to participate from the beginning, is difficult. However, in the meanwhile, we should await the necessary political momentum and also be prepared.

The preliminary question to be thoroughly addressed regards the need for the creation of an EPPO. In fact, all the topics related to the EPPO mutually influence each other: for instance, the meaning of the establishment of an EPPO "*from Eurojust*" depends very much on what the EPPO will be and mean.

The crimes under the competence of the EPPO, as well as the crimes resulting from the possible extension of its powers to include serious crime having a cross-border dimension (Article 86(4)), should be exactly defined. But on the basis of which definitions should the EPPO act: the definitions of the national criminal law systems or those of the EPPO's regulations? Though the first solution would, in principle, be preferable as a national judge would then conduct the trial, the difficulties caused by possible diverging crime definitions and solutions suggest defining at least the crimes for which the EPPO is competent.

The adoption of clear rules regarding criminal procedure and collection, admissibility and evaluation of evidence is essential. In fact, the EPPO cannot act in a vacuum and the conditions set should be applicable to both the EPPO and the national authorities. Further, conditions should also be established with the Member States that do not participate in the EPPO. In addition, the rights of defendants need to be strictly regulated so that a counterbalanced mechanism is guaranteed. It is true that a general regulation would barely regulate and cover everything. However, consistency and compatibility of national and European rules must be ensured.

Prosecutorial policies should not be neglected. These policies involve, among the others, the choice between the legality and the opportunity principles (although eventually they differ only slightly in practice). In addition, drafting a common European Union sentencing policy and a clear policy on execution of sentences would also be logical. Finally, the independence of the EPPO and its democratic accountability constitute crucial topics that deserve in-depth discussion, as has been the case at the level of international tribunals.

Professor Klip underlined that several questions about jurisdiction of the EPPO are raised since by definition there will be concurrent jurisdiction between the EPPO and the Member States' national authorities. For instance, which principle should apply in general (territoriality or otherwise) and which principle should apply to solve possible conflicts (complementarity, primacy or a mixed system based on the fair administration of justice): *quid iuris* for crimes committed in Member States to which the EPPO regulations do not apply, and *quid* for crimes committed outside the EU?

The competition law model (e.g. Regulation No 1/2003) and the civil co-operation model (e.g. driving licences) constitute two good examples that, *mutatis mutandis*, could also be followed for the allocation of jurisdiction in criminal law.

Another important topic that needs to be carefully addressed regards the relationships of the EPPO with other relevant actors, such as Eurojust, Europol, OLAF, the European Commission, the Member States to which the EPPO regulations apply and those to which they do not apply, third States and entities. New channels and ways of communication must be created once the EPPO is established.

Professor Klip concluded that further development of a common criminal policy is needed to establish the EPPO and make the EU criminal justice system work. In addition, a balance between the internal market and the area of freedom, security and justice should be ensured. The subsequent logical step following the setting up of the EPPO should be the establishment of what today seems to be a utopia: a European Criminal Court.

#### **4. Outcome of the workshops**

##### **4.1. More effective action of Eurojust under Article 85 TFEU**

###### ***Workshop 1: Structure and institutional development of Eurojust***

***Chair:*** Mr Fritz Zeder, Head of Unit, Federal Ministry of Justice, Austria

***Rapporteur:*** Ms Claudia Gualtieri, Secretariat of the Committee on Civil Liberties, Justice and Home Affairs - LIBE, European Parliament

The first issue discussed was how to make Eurojust's internal structure and operation more efficient. In this respect, participants were informed about the results of Eurojust's Organisational Structure Review (OSR) and, in particular, about the different options envisaged to develop a governance structure based on the principles of supervision and delegation. The possibility of creating an Executive Board composed of the President, the Vice-Presidents and possibly the Administrative Director, and the replacement of Eurojust's current College team structure by project-oriented portfolios, were some of the options contemplated. Eurojust is in the process of preparing the implementation plan of the OSR.

Most participants agreed that the structure of Eurojust could be improved and expressed concern about its complex organisational structure and methods of operation. In addition, it was considered that the College of Eurojust should devote less time to administrative tasks and focus more on operational work. Further discussion of how Eurojust should take strategic decisions, and whether the College would be the most appropriate body for doing so, was deemed necessary. Despite the shortcomings of Eurojust's current structure and operation, the core business of Eurojust, its operational work, was considered to be done effectively.

The second issue discussed was the involvement of the European Parliament and national Parliaments in the evaluation of Eurojust's activities. Concern about the possibility that Eurojust could be subject to multiple assessments by the national Parliaments, the Conference of Community and European Affairs Committees of Parliaments of the EU (COSAC) (which also includes the European Parliament), the European Parliament and the Council, was expressed. In this respect, a conclusion was reached that the evaluation of Eurojust's activities, possibly by different actors, should be co-ordinated and implemented in such a way as not to be too cumbersome and time-consuming for Eurojust.

With respect to the content of the parliamentary evaluation, participants agreed that the independence of Eurojust should be safeguarded and that the evaluation should be limited to an overall or political assessment of the functioning of Eurojust and not its operational activities. Further, the necessity for EU political masters to clearly identify the purpose, criteria and scope of such evaluation was stressed.

The third issue discussed was Eurojust's involvement in the Strategy on Internal Security of the European Union. Participants generally agreed that Eurojust's substantial contributions should be channelled through its participation in COSI meetings. Further, participants considered that Eurojust could act as the Secretariat of the Consultative Forum of the General Prosecutors and Directors of Public Prosecutions and that Eurojust could further be entrusted with the task of communicating the position of the Consultative Forum to COSI. Finally, the participants acknowledged that Eurojust should further develop its contributions to reports in the field of internal security, such as the OCTA and TE-SAT reports. The increased involvement of Eurojust in the EU Strategy on Internal Security would be beneficial to achieve the objective of better balancing the law enforcement and judicial approaches.

**Workshop 2: The improved legal basis of Article 85: towards full operational powers of Eurojust**

**Chair:** Mr Peter Csonka, Adviser and Head of Unit, Direction B – Criminal Justice, Directorate General for Justice, European Commission

**Rapporteur:** Ms Katariina Jahkola, Counsellor of Legislation, Ministry of Justice, Finland

To enable Eurojust to play a more pro-active role in investigating and prosecuting serious trans-border crimes, an increased transmission of relevant and structured information from the national competent authorities, Europol, OLAF, and third States must take place. The information transmitted to Eurojust (either with a request for assistance or spontaneously) will allow the identification of links between cases and the provision of appropriate feedback to the national competent authorities.

In that respect, concerns were expressed as to the actual impact to be expected from the implementation of the new Eurojust Decision in terms of increased transmission of information, taking into account the relative lack of clarity of legal provisions imposing new obligations on national authorities (i.e. Article 13 of the new Eurojust Decision) and the predictable diversity of systems that will be set up at national level for the transmission of information to Eurojust. Reinforcement of the responsibilities of the National Members and the College will be subject to appropriate implementation at national level of Articles 12 and 13 of the new Eurojust Decision, the improvement and strengthening of Eurojust's capacity for processing information, identifying links between the cases and providing appropriate feedback, and would require enhanced mutual trust and good co-operation between Eurojust and the national competent authorities.

Three possible scenarios exist as to the empowerment of Eurojust to initiate criminal investigations: a *minimum level*: Eurojust can request national authorities to act; a *medium level*: Eurojust can order the national authorities to undertake a national investigation and the case is immediately transferred to the national authorities; and a *maximum level*: Eurojust can initiate *ex officio* an investigation and undertake certain judicial measures: the case is transferred afterwards to the national authorities.

All scenarios require close co-operation and mutual trust between Eurojust and the national authorities.

In relation to the capacity under which Eurojust could exercise its competence to initiate a criminal investigation, three levels were also identified: a *minimum level*: the National Member initiates a criminal investigation in his capacity as national authority; a *medium level*: the National Member initiates a criminal investigation “acting on behalf of Eurojust”; and a *maximum level*: the College of Eurojust, acting as College, can initiate an investigation.

The “initiation” of a criminal investigation must be understood as “the launch” of a criminal investigation in accordance with national criminal procedural rules, taking into account the criminal policy adopted at national level and the available resources in the concerned Member State.

The protection of the EU’s financial interests was considered an example of an area where a need exists to confer upon Eurojust a pro-active role in the initiation of criminal investigations. Eurojust’s power to initiate a criminal investigation would ensure appropriate follow-up to OLAF’s administrative enquiries, particularly in cases where the investigation conducted at national level has not been initiated on the basis of information provided by OLAF.

Reference was made to the possibility for some Member States to make use of opt-out clauses (the United Kingdom and Ireland in accordance with Protocol No 21 TFEU, and Denmark in accordance with Protocol No 22 TFEU). The use of opt-out clauses could result in a “variable geometry” legal framework, whereby some Member States would participate in Eurojust under the current legal framework while other Member States would participate in a “post-Lisbon Eurojust” resulting from the adoption of a new regulation. Ideally, this solution should be avoided and the participation of all Member States in future developments of Eurojust under Article 85 TFEU would be desirable. If not, the conclusion of specific "ad hoc" agreements with the Member State(s) who would opt out can be envisaged.



**Workshop 3: Resolution of conflicts of jurisdiction and relations between Eurojust and national authorities**

**Chair:** Mr Jorge Espina, Prosecutor, International Cooperation Department, Prosecutor's General Office, Spain

**Rapporteur:** Mr Jakub Pastuszek, Acting Director, Ministry of Justice, Czech Republic

Workshop participants considered the need to strengthen Eurojust's role in the resolution of conflicts of jurisdiction through enhancing the current legal basis for such role (the Eurojust Decision (Article 7(3)) and the Framework Decision on prevention and settlement of conflicts of jurisdiction<sup>1</sup>).

Once again, an increased transmission of information to Eurojust would facilitate both the prevention and the resolution of positive and negative conflicts of jurisdiction, as it would enable Eurojust to identify criminal offences/suspects being simultaneously investigated/prosecuted in different Member States.

The essential purpose of Eurojust's role in that context should be to foster agreement of the national authorities involved in the conflict of jurisdiction, rather than to solve them by use of mandatory powers.

Article 85(2) TFEU states that "*formal acts of judicial procedure* shall be carried out by the *competent national officials*", i.e. even when Eurojust makes use of its power to initiate a criminal investigation under Article 85(1)(a) TFEU, acts of judicial procedure should still be carried out by the national authorities. Indeed, Eurojust was established to facilitate judicial co-operation and support national authorities, not to take part as such in national criminal proceedings conducted before the national courts. This interpretation does not, however, exclude the possible involvement of the National Members in national investigations and prosecutions in their capacity as national authorities.

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<sup>1</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15.12.2009.

#### **Workshop 4: Operational co-operation**

**Chair:** Mr Gilles de Kerchove, Counterterrorism Coordinator, Council of the European Union

**Rapporteur:** Mr Ola Löfgren, Head of the International Unit, Office of the Prosecutor General, Sweden

Participants discussed, first of all, the relationship and co-operation of Eurojust with Europol, and considered respect for the principle of complementarity essential. The participants were reminded of the different tasks allocated to Eurojust and Europol and the fact that they have separate roles and character. The need for both organisations to increase their mutual participation and involvement in operational meetings was also considered important.

Another issue discussed was the need to further facilitate Eurojust's association with Europol's Analysis Work Files, particularly in terrorism cases. Participants acknowledged the difficulties in giving that access to Eurojust and the need to raise this issue at a higher political level.

The importance of an increased exchange of information between Eurojust and Europol was also discussed. In this context, the participants noted that bilateral meetings between Eurojust National Desks and Europol Liaison Bureaux could further facilitate and enhance co-operation between both organisations. Further, the participants agreed that future relations between the Eurojust National Coordination System (ENCS) and the Europol National Units should be established or be further elaborated in accordance with Article 12(5) of the revised Eurojust Decision. From a technical point of view, the need for development of compatible software to facilitate the exchange of information between Eurojust and Europol was acknowledged.

Finally, participants agreed that the participation of Eurojust and Europol in Joint Investigation Teams should be further promoted.

The second major issue discussed concerned co-operation between Eurojust and OLAF. The participants agreed that Eurojust and OLAF should complement each other and co-ordinate common efforts in the fight against corruption, fraud and any other offence affecting the financial interests of the EU. The need to ensure good co-ordination in time was considered fundamental; a pre-condition in that respect would be the transmission of information at an early stage of investigations.

In addition, participants agreed that the practical agreement on arrangements of cooperation between Eurojust and OLAF of 24 September 2008 should be further implemented and that the possibilities for negotiating a new formalised co-operation agreement, based on the revised Eurojust Decision, should be further explored.

The third issue discussed was the interaction between Eurojust and the EJM. The application of the complementarity principle between both organisations was again considered essential. The importance of exchanging information in both directions and maintaining regular contacts between Eurojust and EJM Contact Points to decide which party should act, on a case-by-case basis, was acknowledged. Participants welcomed, in this context, the elaboration of best practices on interaction between Eurojust and the EJM and acknowledged that, in certain bilateral cases, Eurojust could be in a better position to act.

The setting up of the ENCS, which will assist in determining whether a case should be handled with the assistance of Eurojust or EJM Contact Points, was considered a solution in itself. Eurojust National Correspondents, EJM National Correspondents and EJM Contact Points should actively assist, within the ENCS - once established – in that important task.

Finally, the possibility of merging Eurojust and the EJM was considered by some participants. The fourth and final issue discussed was related to Eurojust's external relations. In this context, the participants acknowledged that Eurojust has an important role to play in the external relations of the EU. Both the setting up of Working Groups with third States for discussing legal obstacles in judicial co-operation and the preparation of regular reports on the state of judicial co-operation with third States, based on Eurojust's operational work, were welcomed by participants and considered important contributions.

## 4.2. The establishment of a European Public Prosecutor's Office under Article 86 TFEU

### ***Workshop 5: Preliminary questions and institutional aspects***

**Chair:** Mr Lorenzo Salazar, Director for International Criminal Affairs, Ministry of Justice, Italy

**Rapporteur:** Mr Nicholas Franssen, Coordinator of International Affairs, Ministry of Justice, The Netherlands

The first issue discussed was the prior assessment of the need to establish an EPPO and its development within and in compliance with the Area of Freedom, Security and Justice.

Discussions focused in particular on the major aspects that should be taken into account in the impact assessment on the need to create an EPPO. Most participants highlighted that before setting up a new body, its added value must be demonstrated. To achieve this aim, any available data as well as a thorough assessment of the functioning of the current instruments and the role of all the existing actors involved in JHA matters should be considered. Whether and how the existing difficulties could be solved by an EPPO should be evaluated.

Participants generally agreed that particular attention should be given to the problems concerning the protection of the financial interests of the Union: the mechanisms currently in place are very complex and, moreover, the Member States often consider the matter as a low national priority. Therefore, the creation of an EPPO with a central and overriding jurisdiction would respond to this need for specialisation. Participants also discussed the possibility to extend the powers of the EPPO to include under its sphere of competence other “serious crime having a cross-border dimension”. In particular, the added value of the creation of a centralised body such as the EPPO in the fight against terrorism was stressed.

The second issue discussed was the approach to the possible implementation of Article 86 TFEU. With reference to the Stockholm Programme and the Commission's Action Plan, two main options were identified: i) a parallel approach (carrying out in parallel the further development of Eurojust and the creation of an EPPO); and ii) a step-by-step approach (first evaluating the implementation of the revised Eurojust Decision, then exploring further developments under Article 85 TFEU, and finally discussing the establishment of an EPPO from Eurojust according to Article 86).

Participants highlighted the pros and cons of both options. Those in favour of the parallel approach noted that since the two processes are complementary and different functions are at stake, there is no need to wait; the opportunity to create something new should be seized and the step-by-step approach would take too long to achieve a result. In addition, the further development of Eurojust and the evaluation of the implementation of its revised Decision would not prejudice the assessment of the need for an EPPO. Conversely, by definition, evaluation means waiting for the outcome of the process and the time needed for a thorough impact assessment will be presumably long. Moreover, the revised Eurojust Decision first (by June 2011) needs to be implemented.

The third issue discussed was the effects of a possible enhanced co-operation and of the use of *opt-out* and, consequently, the relationships with the Member States not involved. In fact, the EPPO, if created by enhanced co-operation and/or in case of use of *opt-out* by the Member States entitled to do so, will act in a complex context. Three different groups of Member States could exist and be required to interact: 1) Member States participating in Eurojust under its current legal framework; 2) Member States participating in Eurojust under the new regulation post-Lisbon Treaty; and 3) Member States participating in the EPPO.

Participants noted that the wording related to the voting in Article 86 is very complex. They generally acknowledged that a co-operation *à 27* Member States would be the best option, although rather unlikely at present. In case of enhanced co-operation, a limited mandate might make the functioning easier, especially in the beginning, and encourage other Member States to join. In fact, starting with a smaller group could attract other Member States as was the case for Schengen and Prüm. Participants stressed that, in any event, no Member State should be excluded from the discussions (especially those related to rules of procedure) conducted within a smaller group of Member States. In this regard, the participation of the USA in the negotiations for the Rome Statute of the International Criminal Court was mentioned as a good example.

**Workshop 6: Organisation of the EPPO and relationship with Eurojust**

**Chair:** Mr Hans G. Nilsson, Head of Division of Judicial Cooperation, General Secretariat of the Council of the European Union

**Rapporteur:** Mr Joachim Ettenhofer, Senior Prosecutor, Prosecutor's General Office, Munich, Germany

This workshop mainly dealt with the interpretation of Article 86(1) TFEU, stating that the European Public Prosecutor's Office (EPPO) may be established "from Eurojust". The following scenarios were considered:

1. Eurojust gradually becomes the EPPO by a progressive increase in the powers of the College and the National Members;
2. The EPPO is established as a separate entity, next to Eurojust and outside its structure but using the expertise of Eurojust;
3. A specialised unit (Office of the EPP) is created within the structure of Eurojust; or
4. The Office of the EPP merges with Eurojust so as to form one body, but with different decision-making structures.

Additional combinations of the above-mentioned scenarios were also envisaged. One possible option: the EPPO could become a future member of Eurojust, having a seat in the College only when the protection of the financial interests of the Union is discussed. Another possible option: the EPPO works as a college and is represented at national level by deputies who could possibly be the National Members of the Member States participating in the setting up of the EPPO.

A general assumption was expressed that the EPPO will be initially set up through enhanced co-operation and that its scope of competence will be initially restricted to the protection of the financial interests of the Union. Most participants who expressed an opinion suggested that Eurojust and the EPPO could develop as different bodies with different functions: co-operation and co-ordination for Eurojust; investigation, prosecution, direction and decision-making for the EPPO, with a kind of supra-national competence. The question of the respective seats of the bodies was also mentioned in that context. All, however, agreed on the importance of maintaining a close link between the two bodies, particularly in cases where suspects of crimes affecting the Union's financial interests are involved in other serious transnational crimes falling outside the sphere of competence of the EPPO.

Participants discussed the future role of OLAF after the setting up of the EPPO, particularly the possible transfer of its "external" investigation functions to the EPPO, OLAF in such scenario becoming a police force working under the supervision of the EPPO. This possibility would probably facilitate and hasten (in terms of staff and budget) the setting up of the EPPO. Some participants saw in the creation of the EPPO an opportunity to streamline the role of EU decentralised entities, while others questioned the effectiveness of such process. In particular, participants underlined that the EPPO would still need the support of national police and investigation forces, raising the question of the procedural rules to be applied by the "external investigations unit" of the EPPO. Furthermore, participants pointed out that Article 86 TFEU does not refer to OLAF, but to Europol, whose investigative powers could perhaps better assist the EPPO.

The independence of the EPPO was also discussed. All participants agreed that the EPPO should be independent in investigating and prosecuting criminal offences, pointing out, however, the need for judicial control of its activities. The independence of the EPPO should be carefully considered in relation to its interaction with the national authorities, particularly in cases where the operational support of the national police forces is needed, as these forces operating in such cases under the sole supervision of national authorities would not be acceptable. Relations between the EPPO and the national authorities also need further reflection in respect of the authority and procedure involved in the decisions to bring cases to court or to terminate investigations at a pre-trial stage.

## **Workshop 7: Competence and rules of procedure**

**Chair:** *Mr Cédric Visart de Bocarmé, Prosecutor General Liège, Board of Prosecutors General, Belgium*

**Rapporteur:** *Ms Carla Deveille – Fontinha, Judge, Ministry of Justice, France*

The participants first acknowledged the necessity of discussing the scope of competence of the EPPO. Article 86(1) TFEU indicates a first and main competence of the EPPO in “*crimes affecting the financial interests of the Union*”, while explicitly providing for an enlargement of scope. Does the creation of an EPPO with restricted competence make sense, and is there justification for this? Should the EPPO be competent also for offences other than those covered by the Convention for the Protection of the Financial Interests of the EU and its additional protocols (PIF Convention)?

In respect of offences covered by the PIF Convention, most participants, while recognising the need for an impact assessment, highlighted that the quantitative importance of the EU budget, the impact of the financial crisis and the accession of new Member States were indicators of the potentially huge risk of offences affecting the financial interests of the EU, calling for a EU response. The creation of the EPPO could ensure that these offences are prosecuted in a more consistent and effective way throughout the EU. The creation of the EPPO is therefore justified, even with restricted competence.

The participants agreed in general that the initial scope of competences of the EPPO should be restricted to crimes covered by the PIF Convention, thus allowing the development of an EPPO with a high degree of specialisation. Such approach would also ensure the participation of more Member States from the beginning. The competence of the EPPO for other offences could be envisaged only at a second stage of development. Participants suggested considering any offences that might destabilise society, including trafficking in human beings and cybercrime, as criteria having a cross-border dimension and falling under the enlarged sphere of competence of the EPPO.



The workshop participants discussed the powers of investigation that could/should be granted to the EPPO and the rules of procedure that would/should be applicable to its activities. In that respect, a flexible approach was considered desirable, taking into account the diversity of national legal traditions and systems. Such approach would allow cases related to investigations carried out at national level in accordance with national procedural rules to be prosecuted by the EPPO, and for national authorities to conduct prosecutions on behalf of the EPPO (in accordance with their national legislation). Problems encountered due to the variety of systems, rules and languages could be overcome thanks to the co-ordination and facilitation roles played by Eurojust. As to the applicable rules, priority must be given to the application of the principle of mutual recognition and to instruments based on this principle. In addition, and in accordance with the provisions of the TFEU, a basic set of rules applicable to the activities of the EPPO must be adopted. The extension of the scope of new instruments to harmonise procedural rights in cases dealt with by the EPPO (e.g. rights to interpretation and translation) was also suggested.

Should the EPPO enjoy exclusive competence? Here again, a flexible approach was favoured by most participants, who rejected this solution in the hopes of preventing conflicts of jurisdiction between the EPPO and national authorities and dividing up connected cases. The principle of priority should apply, according to which the EPPO would have the possibility to not exercise its competence to proceed in cases where, in view of their relative importance or impact, it would leave it to the national authorities to carry on the investigation and the prosecution.

Finally, the discussion focused on the capacity for investigation of the EPPO and the role to be played by Europol and OLAF. The EPPO should maintain an active relationship with both bodies. Although no reference is made in Article 86 TFEU to OLAF, a definite benefit could be achieved if the EPPO could avail itself of the experience of OLAF. Furthermore, the EPPO should receive from Europol the information that is necessary to enable it to carry out investigations and prosecutions.

**Workshop 8: Admissibility of evidence and judicial review**

**Chair:** Mr Lars Bay Larsen, Judge, Court of Justice of the European Union

**Rapporteur:** Ms Marie-Hélène Descamps, Legal Advisor, Ministry of Justice, Belgium

Workshop participants first discussed the subject of evidence gathered by the EPPO during its investigation and, in particular, the rules governing the admissibility of evidence as referred to in Article 86(3) TFEU.

Participants generally agreed that the need and consent for introducing minimum common standards for gathering evidence will depend on the structure of the EPPO and its relationships with the national authorities. Two possibilities were considered: (i) in case of prosecution carried out before an EU court, the need for a single set of standards, such as, at least, a “mini” EU criminal procedural code, was deemed necessary; (ii) in case of prosecution held before national courts, the national judge should apply EU law, including minimum EU standards, and/or national standards. In any event, most participants insisted on the need for a prior regulation of common standards for gathering evidence.

The consequences of possible enhanced co-operation or of the use of *opt-out* by the Member States entitled to do so were considered. Participants highlighted the rather complex situation that would be encountered at times when the EPPO, especially during the gathering of evidence, deals with Member States not participating in the EPPO. This scenario also deserves to be carefully regulated.

Further, participants noted that the execution by national authorities of an order given by the EPPO should be made according to the applicable national law of the Member State concerned. However, the obligation of the national authority to execute the EPPO's order should be underlined.

The second main issue discussed was how the jurisdictional control of the measures adopted by the EPPO should be ensured in the pre-trial stage while guaranteeing the protection of fundamental rights of individuals. Participants acknowledged that, in this situation, the solution will depend very much on the structure chosen for the EPPO. In principle, actions taken under the authority of the EPPO should be subject to review by an auditor designated as the "judge of freedoms". In this respect, three possibilities were considered: the assignment of this auditing task to (i) a national judge; or (ii) a national judge providing the possibility to appeal before the European Court of Justice (ECJ); or (iii) directly to a special ECJ Chamber devoted to this task. The participants concluded that, in any case, a judicial review as well as the EPPO's accountability should be addressed and ensured.

Lastly, participants acknowledged that the *ne bis in idem* principle must apply and cited the relevant existing legal framework (notably, Article 4 of Protocol No 7 to the European Convention on Human Rights, Article 54 of the Schengen Convention and the relevant ECJ case law, and Article 50 of the EU Charter of Fundamental Rights). However, a question was raised regarding how the *ne bis in idem* principle is to be applied during the pre-trial stage in the relations between the EPPO and national authorities. In fact, on the one hand, the application of the principle should not prevent the carrying out of an investigation but, on the other hand, a balance should be found taking fully into account the consequences for the person concerned.

Two options for the jurisdiction that should carry out the control in this regard were mentioned: the ECJ or a national judge (who is also a "European judge" and might, in any event, refer the case to the ECJ for a preliminary ruling).

Finally, the need was emphasized for a proper exchange of information to avoid conflicts of jurisdiction and infringements of the *ne bis in idem* principle.

## **5. General conclusions – Future perspectives**

Mr *Daniel Flore*, General Counsellor at the Belgian Ministry of Justice, presented his general conclusions on the seminar at the final plenary session.

He noted that the main task at this stage is to identify what is and what is not clear. The new Treaty – Articles 85 and 86 TFEU – creates possibilities but entails a certain degree of complexity. However, the significant number of questions resulting from the discussions during the course of the seminar should not daunt but, on the contrary, should encourage and enable academics, experts and the European Commission to reflect further and elaborate on these issues.

Mr Flore first considered that the Treaty provides a new legal basis which, nonetheless, includes two provisions open to different interpretations. This inconsistency clearly reflects the lack of consensus during the negotiation of the Treaty and results from a compromise between the Member States.

Mr Flore then presented the three following remarks:

First, Articles 85 and 86 TFEU are linked. In principle, Eurojust should be competent for co-ordination, while the EPPO should be competent for investigation and prosecution. However, Article 85 provides the possibility for Eurojust to initiate criminal investigations, particularly those relating to offences against the financial interests of the Union. Moreover, Eurojust is expressly mentioned in Article 86 (the Council may establish a European Public Prosecutor’s Office “from Eurojust”). Nevertheless, these cross-references between both provisions do not clarify the relations between them: if the power to “initiate” according to Article 85 is made use of, are the services of the EPPO rendered dispensable? And is the continued development of Eurojust necessary if the EPPO is established?

Second, the exact meaning of “initiation of criminal investigations” under Article 85 may be subject to different interpretations: could this provision mean a request or an order made by Eurojust, or could it mean allowing Eurojust to decide and take action? The interpretation of this provision is then open and crucial, as well, for the future prospects of the EPPO.

Third, with regard to Article 86, the EPPO is an unknown entity. Many aspects should be clarified and for the time being many questions remain open. First of all, several questions concern the structure of the EPPO, e.g. would it be a centralised or a decentralised body? Would the authorities work only within the EPPO and/or also for the Member States? What about the role of the National Members of Eurojust? Will OLAF be competent for investigations? Once the structure of the EPPO is better defined, answers to other questions should be found as well, such as those concerning the gathering of evidence, defence, appeals, possible harmonisation, and recognition of other Member States' standards. Even though the Treaty does not specify whether prosecution and judgement should be carried out at European or at national level, the best possible solution would be for the EPPO to appear before a European court, ensuring complementarity. From this point of view, a step-by-step approach to establish the EPPO would not be a good option; the creation of the International Criminal Court shows that another approach is feasible and realistic.

Regarding the way forward, Mr Flore underlined that thanks to *new momentum* of the Lisbon Treaty, action is required by Europe. The establishment of the COSI and the new concept of internal security strategy require taking into account their judicial dimension.

Mr Flore ended his concluding remarks by explaining the next three necessary steps: (i) continuing discussion about these issues under the Belgian and successive Presidencies, deciding first whether a parallel/complementary approach or a step-by-step approach should apply; (ii) fully implementing the revised Eurojust Decision respecting the fixed deadline, i.e. by June 2011; and (iii) strengthening Eurojust's partnerships with crucial actors such as the EJM, OLAF and Europol.

In short, the debate must continue.

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