

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **D**
BUDGETARY AFFAIRS

Budgets

Budgetary Control



Improving Coordination between the EU Bodies Competent in the Area of Police and Judicial Cooperation: Moving Towards a European Prosecutor

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT D: BUDGETARY AFFAIRS

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STUDY

Abstract:

This study examines the activities of the various bodies currently active in the field of criminal-law protection of the financial interests of the Union in the light of the Lisbon Treaty, considering how they are currently organised and how they might be reorganised in the event of the creation of a European Public Prosecutor.

This document was requested by the European Parliament's Committee on Budgetary Control. It designated Luigi DE MAGISTRIS, MEP, to follow the study.

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Executive summary

The Lisbon Treaty – a new agenda

The Lisbon Treaty (hereafter “TFEU”) launched a new era for the European Union.

The TFEU, which came into force in December 2009, amended the EU treaties – without replacing them – in order to provide the Union with the legal framework and tools to meet future challenges and to respond to citizens’ demands.

The TFEU foresees the possibility to strengthen Eurojust further (Art. 85) and to establish a European Public Prosecutor’s Office (hereafter “EPPO”) “from Eurojust” (Art. 86)¹.

Article 325 TFEU also stipulates that the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union and that Member States should take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. Paragraph 4 of article 325 TFEU foresees that the European Parliament and the Council shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies.

Current situation

The debate on the need to establish the EPPO is active and different European Institutions, Member States and other stakeholders have varied opinions about its potential added value, its roles and responsibilities – and about its structure and institutional positioning vis à vis existing national and European actors.

Within this context, this study seeks to support the debate, identify key issues which need to be resolved, and provide insights into the current standpoints regarding the EPPO of three significant actors - Eurojust, Europol and OLAF.

The report confirms that there is room for improvement in the cooperation between Eurojust, OLAF and Europol. Although the framework for cooperation has been created, the agreed upon exchange of case summaries, case-related information and strategic information does not seem to be fully implemented in practice.

The three bodies stated that further impact assessment and/or clarifications with regard to the mandate and scope of the EPPO are needed in order to provide proper answers to detailed questions related to ways to improve the current situation and the future role(s) and responsibilities of the EPPO.

There is a wide range of opinions on the optimal way forward, and a lack of clarity and agreement on many of the major issues. However all three bodies recognize the added value the EPPO could have with regard to the cooperation between Member States and to reach an equivalent level of

¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008/c 115/01, 9 May 2008, Official Journal of the European Union.

protection in all the Member States. All three bodies confirmed the value of having an independent criminal investigative function under supervision of a criminal judicial prosecution body.

Based on the input received from OLAF there seems to be an opportunity to reach a consensus on the positioning of Eurojust as the highest European independent prosecutorial body, with hierarchical and supplementary competencies to the Member States, whereas EUROPOL and OLAF could carry out forensic and analytical services for the benefit of the European investigators.

OLAF believes the creation of an efficient European Procedural Code in criminal matters, compatible with the existing traditionally proven criminal procedures of all Member States will be a long term project. The currently difficult and lengthy negotiations regarding the admissibility of evidence, which are in sharp contrast with the initial rapidity of mutual recognition as principle of judicial cooperation in criminal matters between the EU Member States, appear to confirm this. OLAF suggests, as a first step, that it would be more realistic to set up the EPPO only as an EU judicial supervisory body with the hierarchical competencies to give instructions to EU investigators (from OLAF) and national prosecution offices, whereby the EPPO would act itself only as a complementary judicial body if the Member States authorities fail or do not follow consistently their role (principle of proportionality). Europol believes that if such a body of EPPO investigators were to be established they should be housed within the Europol environment to avoid duplication of criminal investigation support, e.g. analysis and operational support.

During 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 in September 2010, the following possible alternative scenarios for the organization of the EPPO and its relationship with Eurojust were listed: Eurojust becomes the EPPO by progressive increase in powers of College and National Members; the EPPO is established as a separate entity, next to Eurojust and outside its structure; a specialised Unit is created within Eurojust; the EPPO merges with Eurojust to form one body, but with different decision making structure; other combinations such as: EPPO sits in the College when matters related to the protection of the financial interests of the Union are discussed, 9 National Members from the participating States become deputy European Public Prosecutors and the EPPO works as a “mini College”. Although the participants agreed that a close link between EPPO and Eurojust must always be maintained they referred to both functional and organizational differences. Some participants also mentioned that the added value of the EPPO as a supranational body still needs to be proven through an impact assessment.

During the Annual Forum on mutual recognition of Judicial Decisions in Criminal Matters organized by the Academy of European Law in October 2010 the current status regarding EPPO was discussed between national judges and prosecutors. The basic assumptions were that the EPPO should not be “Eurojust II”, because their nature, scope, objectives and means are different; the EPPO should not be another macro-structure and there is a need to cooperate (at different levels) with Eurojust, OLAF, the National Prosecution Services and Europol. The shared views included the need for an impact and needs assessment; specialization is seen as an important value added of the EPPO; preference is given to a parallel approach involving both strengthening of Eurojust and development of EPPO, and the preferred option is cooperation with 27 Member States, where no Member States

should be excluded from discussions and with the assumption that starting with a small group of Member States could attract others.

The debate on the desired future situation is very lively. There is a wide range of opinions on the optimal way forward, and a lack of clarity and agreement on many of the major issues. This makes it impossible for the study to provide detailed recommendations on issues such as the future institutional architecture for judicial cooperation in Europe, enhancing the protection of the financial interests of the Union through the extension or reorganization of tasks within or between the existing bodies, and creating an EPPO.

It appears to be premature to recommend how best to reorganize the responsibilities of the various bodies currently active in the field, if a European Public Prosecutor's Office was to be created. Given the situation as described above, a thorough impact and needs assessment is the appropriate way to prepare for future decisions. This would cover the functioning of all relevant actors (Eurojust, EJM, Europol, OLAF, etc.) and EU judicial co-operation in criminal matters in general. Such an approach is in line with the European Commission's responsibility to propose further steps in this area. The Commission intends to make a recommendation on the future strengthening of Eurojust and to reflect on how to propose the creation of the EPPO. The impact assessment and in-depth consultations among the stakeholders will help to inform its thinking.

Recommendation

We recommend that structured in-depth discussions take place between the different bodies and Member State authorities, in the framework of the Commission's work programme, in order to:

- perform an in-depth analysis on the effectiveness and the efficiency of the current cooperation and come to a more detailed definition of the cooperation in practice within the area of freedom, security and justice is desirable.;
- decide how the current overall efforts can be improved through the extension or reorganization of tasks within or between the existing bodies;
- assess the optimal manner of launching the EPPO; and
- explore how best to reorganise the responsibilities of the various bodies currently active in the field if the EPPO were to be created.

In an indication of the attention which these matters are currently receiving, the Presidency of Eurojust informed us that they intend to invite Europol and OLAF in the near future to exchange views and reflect together with Eurojust on the future of their organisations in the light of the provisions introduced by the Lisbon Treaty.

RÉSUMÉ

Le traité de Lisbonne: une nouvelle ère

Le traité de Lisbonne (ci-après le «TFUE») a marqué l'avènement d'une nouvelle ère pour l'Union européenne.

Le TFUE, qui est entré en vigueur en décembre 2009, a modifié les traités de l'UE – sans les remplacer – afin de donner à l'Union le cadre et les instruments juridiques nécessaires pour relever les futurs défis qui se poseraient à elle et pour répondre aux demandes de ses citoyens.

Le TFUE prévoit la possibilité de renforcer davantage Eurojust (article 85) et d'instituer un Parquet européen «à partir d'Eurojust» (article 86)².

L'article 325 du TFUE précise par ailleurs que l'Union et les États membres combattent la fraude et toute autre activité illégale portant atteinte aux intérêts financiers de l'Union, et que les États membres prennent les mêmes mesures pour combattre la fraude portant atteinte aux intérêts financiers de l'Union que celles qu'ils prennent pour combattre la fraude portant atteinte à leurs propres intérêts financiers. Le paragraphe 4 de l'article 325 du TFUE indique que le Parlement européen et le Conseil arrêtent les mesures nécessaires dans les domaines de la prévention de la fraude portant atteinte aux intérêts financiers de l'Union et de la lutte contre cette fraude, en vue d'offrir une protection effective et équivalente dans les États membres ainsi que dans les institutions, organes et organismes de l'Union.

Situation actuelle

Le débat sur la nécessité d'instituer un Parquet européen est lancé et les avis divergent entre les institutions, États membres et autres parties prenantes de l'UE en ce qui concerne la valeur ajoutée potentielle, le rôle et les compétences d'un tel Parquet européen – ainsi qu'en ce qui concerne sa structure et son positionnement institutionnel vis-à-vis des acteurs nationaux et européens existants.

Dans ce contexte, l'étude tente de faciliter le débat en répertoriant les principaux problèmes à résoudre, et de permettre de mieux connaître les points de vue actuels de trois acteurs majeurs (Eurojust, Europol et l'OLAF) sur le Parquet européen.

² Versions consolidées du traité sur l'Union européenne et du traité sur le fonctionnement de l'Union européenne, 2008/C 115/01, 9 mai 2008, Journal officiel de l'Union européenne.

Le rapport confirme qu'il est possible d'améliorer la coopération entre Eurojust, l'OLAF et Europol. En dépit de la mise en place d'un cadre de coopération, les échanges convenus de résumés des cas traités, d'informations sur les cas traités et d'informations stratégiques ne semblent pas être pleinement appliqués dans la pratique.

Ces trois organes ont fait savoir que des analyses d'impact approfondies et des précisions supplémentaires quant au mandat et au champ d'action du Parquet européen étaient nécessaires, avant qu'ils puissent répondre correctement à des questions détaillées portant sur la façon d'améliorer la situation actuelle ainsi que sur les futurs rôle(s) et compétences du Parquet européen.

Les avis sur la meilleure voie à suivre sont divers et variés; quant à nombre d'autres points importants, signalons l'absence de consensus et de clarté. Toutefois, ces trois organes reconnaissent la valeur ajoutée que le Parquet européen pourrait apporter à la coopération entre les États membres, et à l'instauration d'un niveau équivalent de protection dans tous les États membres. Ils confirment tous trois l'atout que constituerait la création d'une fonction d'enquête indépendante en matière pénale, agissant sous la supervision d'un organe chargé des poursuites en matière pénale.

À la lumière des contributions de l'OLAF, il semble possible d'arriver à un accord sur le positionnement d'Eurojust en tant qu'organe indépendant suprême de l'Union européenne pour les poursuites – qui aurait des compétences hiérarchiques et complémentaires sur les États membres –, tandis qu'Europol et l'OLAF pourraient mettre leurs analyses et leurs compétences médico-légales au service des enquêteurs européens.

Pour l'OLAF, la création d'un code de procédure pénale européen efficace, qui soit compatible avec les procédures pénales actuelles, depuis longtemps éprouvées, de tous les États membres, sera un projet à long terme. La longueur et la difficulté des négociations actuelles sur la recevabilité des preuves – qui tranchent fortement avec la rapidité initiale avec laquelle la reconnaissance mutuelle a été adoptée comme un principe de la coopération judiciaire en matière pénale entre les États membres de l'UE – semblent le confirmer. L'OLAF suggère dans un premier temps qu'il serait plus réaliste de faire du Parquet européen uniquement un organe de supervision judiciaire à l'échelon européen, qui aurait des compétences hiérarchiques pour donner des ordres aux enquêteurs européens (de l'OLAF) et aux organismes nationaux chargés des poursuites, le Parquet européen faisant fonction uniquement d'organe judiciaire complémentaire lorsque les autorités des États membres ne remplissent pas leur mission, ou s'en acquittent de façon inconstante (principe de proportionnalité). Pour Europol, si un tel organe d'enquêteurs du Parquet européen était institué, il conviendrait de l'héberger dans les locaux d'Europol afin d'éviter le doublonnage des services d'appui aux enquêtes pénales, par exemple les analyses et l'appui opérationnel.

Lors du séminaire stratégique intitulé «Eurojust et le traité de Lisbonne: vers une action plus efficace», organisé par Eurojust en coopération avec la présidence belge du Conseil de l'Union européenne en septembre 2010, les cas de figure suivants pour l'organisation du Parquet européen et de sa relation avec Eurojust ont été recensés: Eurojust deviendrait le Parquet européen, moyennant une augmentation progressive des compétences de son collège et des membres nationaux; le Parquet européen serait institué en tant qu'entité distincte, proche d'Eurojust et hors de la structure de ce dernier; une unité spécialisée serait créée au sein d'Eurojust; le Parquet européen fusionnerait avec Eurojust pour constituer un seul organe, mais doté d'une structure décisionnaire différente; d'autres combinaisons telles que le Parquet européen siégerait au collège lorsque celui-ci aborde des questions portant sur la protection des intérêts financiers de l'Union, 9 membres nationaux des États participants deviendraient des vice-procureurs européens, et le Parquet européen fonctionnerait comme un «mini-collège». Bien que les participants aient convenu qu'il y a lieu de conserver des rapports étroits entre le Parquet européen et Eurojust, ils ont mentionné des différences d'ordre opérationnel et organisationnel. Certains ont également indiqué que la valeur ajoutée du Parquet européen en tant qu'organe supranational doit encore être démontrée via une analyse d'impact.

Lors du forum annuel sur la reconnaissance mutuelle des décisions de justice en matière pénale organisé par l'Académie de droit européen en octobre 2010, l'état actuel du Parquet européen a été examiné par les juges et procureurs nationaux. Parmi les postulats de base, citons le fait que le Parquet européen ne doit pas être un Eurojust *bis*, parce que leurs nature, champ d'action, objectifs et moyens sont différents; que le Parquet européen ne devrait pas être une nouvelle macrostructure et qu'une coopération s'impose (à différents niveaux) avec Eurojust, l'OLAF, les services nationaux chargés des poursuites et Europol. Les avis partagés par les participants comprenaient la nécessité de réaliser une analyse d'impact et des besoins; la spécialisation en tant que forte valeur ajoutée du Parquet européen; la nécessité de privilégier une démarche parallèle favorisant le renforcement d'Eurojust en même temps que le développement du Parquet européen; et la piste privilégiée consiste en une coopération avec les 27 États membres, au sein de laquelle aucun État membre ne devrait être exclu des débats et partant de l'idée selon laquelle l'association dans un premier temps d'un petit groupe d'États membres pourraient en attirer d'autres.

Le débat sur la situation future à privilégier est très animé. Les avis sur la meilleure voie à suivre sont divers et variés; quant à nombre d'autres points importants, signalons l'absence de consensus et de clarté. Il est donc trop tôt pour que l'étude formule des recommandations détaillées sur des questions telles que la future architecture institutionnelle de la coopération judiciaire en Europe, le renforcement de la protection des intérêts financiers de l'Union par l'extension ou la réorganisation des missions au sein des organes existants ou entre eux, et l'institution du Parquet européen.

Compte tenu de la situation décrite ci-dessus, une analyse d'impact et des besoins approfondie est la voie à suivre pour préparer les décisions futures. Une telle analyse couvrirait le fonctionnement de tous les acteurs concernés (Eurojust, Réseau judiciaire européen, Europol, OLAF, etc.) et de la coopération judiciaire en matière pénale au niveau de l'UE en général. Une telle solution serait compatible avec la compétence de la Commission européenne de proposer de nouvelles étapes dans ce domaine. Cette dernière entend présenter une recommandation sur le renforcement futur d'Eurojust et examiner la voie à suivre pour proposer l'institution du Parquet européen. L'analyse d'impact et les consultations détaillées des parties prenantes permettront d'orienter la Commission sur cette voie à suivre.

Recommandations

Nous recommandons d'organiser des discussions approfondies entre les différents organes et les autorités des États membres, dans le contexte du programme de travail de la Commission, afin:

- de mener une analyse détaillée de l'efficacité et de l'efficience de la coopération actuelle et de formuler une définition plus détaillée de la coopération pratique dans l'espace de liberté, de sécurité et de justice;
- de convenir d'une approche pour améliorer les efforts généraux actuels par l'extension ou la réorganisation des missions au sein des organes existants ou entre eux;
- d'évaluer la meilleure façon d'instituer le Parquet européen; et
- d'étudier la façon de réorganiser au mieux les compétences des divers organes actuellement actifs dans ce domaine en cas d'institution du Parquet européen.

Signe de l'attention portée actuellement à ces questions, la présidence d'Eurojust nous a informés qu'elle entend inviter Europol et l'OLAF dans un proche avenir à des échanges de vues et à des réflexions communes sur l'avenir de ces organisations à la lumière des dispositions du traité de Lisbonne.

ZUSAMMENFASSUNG

Der Vertrag von Lissabon - eine neue Agenda

Der Vertrag von Lissabon (im Weiteren „AEUV“) markierte für die Europäische Union den Beginn eines neuen Zeitalters.

Mit dem AEUV, der im Dezember 2009 in Kraft trat, wurden die EU-Verträge geändert - jedoch nicht ersetzt -, um die Union mit dem Rechtsrahmen und dem Instrumentarium auszustatten, die sie benötigt, um für künftige Herausforderungen gewappnet zu sein und um den Forderungen der Bürger gerecht zu werden.

Im AEUV ist die Möglichkeit vorgesehen, Eurojust weiter zu stärken (Artikel 85) sowie „ausgehend von Eurojust“ eine Europäische Staatsanwaltschaft (im Weiteren „EStA“) einzusetzen (Artikel 86)³.

Ferner ist in Artikel 325 AEUV festgelegt, dass die Union und die Mitgliedstaaten Betrügereien und sonstige gegen die finanziellen Interessen der Union gerichtete rechtswidrige Handlungen bekämpfen und dass die Mitgliedstaaten zur Bekämpfung von Betrügereien, die sich gegen die finanziellen Interessen der Union richten, die gleichen Maßnahmen ergreifen, die sie auch zur Bekämpfung von Betrügereien ergreifen, die sich gegen ihre eigenen finanziellen Interessen richten. Absatz 4 von Artikel 325 AEUV bestimmt, dass das Europäische Parlament und der Rat zur Gewährleistung eines effektiven und gleichwertigen Schutzes in den Mitgliedstaaten sowie in den Organen, Einrichtungen und sonstigen Stellen der Union die erforderlichen Maßnahmen zur Verhütung und Bekämpfung von Betrügereien, die sich gegen die finanziellen Interessen der Union richten, beschließen.

Aktuelle Lage

Die Debatte über die Notwendigkeit der Einsetzung der EStA ist in vollem Gange, doch sind sich die verschiedenen Organe und Einrichtungen der EU, die Mitgliedstaaten und die sonstigen Interessengruppen über den Nutzen der EStA, ihre Aufgaben und ihre Zuständigkeiten nicht einig - auch nicht in der Frage der Struktur und Stellung der EStA als Institution im Verhältnis zu den bestehenden Akteuren auf nationaler und europäischer Ebene.

³ Konsolidierte Fassungen des Vertrags über die Europäische Union und des Vertrags über die Arbeitsweise der Europäischen Union, ABl. C 115 vom 9. Mai 2008, S. 1.

Vor diesem Hintergrund ist es das Ziel dieser Studie, die Debatte voranzubringen, zentrale Probleme zu ermitteln, die gelöst werden müssen, und Einblicke in die Standpunkte zu vermitteln, die drei wichtige Akteure - Eurojust, Europol und das OLAF - zur EStA einnehmen.

Im Bericht wird bestätigt, dass in der Zusammenarbeit zwischen Eurojust, dem OLAF und Europol noch Raum für Verbesserungen besteht. Zwar wurden die Rahmenbedingungen für eine Zusammenarbeit geschaffen, doch funktioniert der vereinbarte Austausch von Zusammenfassungen von Fällen, fallbezogenen Informationen und strategischen Informationen in der Praxis offenbar nicht uneingeschränkt.

Die drei Einrichtungen haben erklärt, dass weitere Folgenabschätzungen und/oder Klarstellungen zum Mandat und zum Arbeitsbereich der EStA notwendig seien, um sachgerechte Antworten auf detaillierte Fragen, die die Verbesserung der aktuellen Lage und die künftigen Aufgaben und Zuständigkeiten der EStA betreffen, zu finden.

Es bestehen die unterschiedlichsten Meinungen darüber, wie am besten weiter zu verfahren ist, und bei vielen wichtigen Fragen mangelt es noch an Klarheit und Einigkeit. Allerdings sehen alle drei Einrichtungen den zusätzlichen Nutzen, den die EStA für die Zusammenarbeit zwischen den Mitgliedstaaten und für das Erreichen eines einheitlichen Schutzniveaus in allen Mitgliedstaaten haben könnte. Alle drei Einrichtungen haben den Wert einer unabhängigen Stelle für strafrechtliche Ermittlungen unter Aufsicht eines justiziellen Strafverfolgungsorgans bestätigt.

Nach von den vom OLAF übermittelten Informationen scheint die Möglichkeit zu bestehen, hinsichtlich der Positionierung von Eurojust als höchste unabhängige staatsanwaltschaftliche Stelle der EU mit hierarchischen und ergänzenden Zuständigkeiten für die Mitgliedstaaten zu einer Einigung zu gelangen; Europol und das OLAF würden dann kriminaltechnische und analytische Dienste für die europäischen Ermittler übernehmen.

Das OLAF ist der Ansicht, dass die Schaffung eines effizienten europäischen Kodex für Strafverfahren, vergleichbar den bestehenden und bewährten strafrechtlichen Verfahren in allen Mitgliedstaaten, ein langfristiges Vorhaben sein wird. Die schwierigen und langwierigen Verhandlungen, die derzeit über die Zulässigkeit von Beweismitteln geführt werden und die in scharfem Gegensatz zur anfänglichen schnellen Durchsetzung der gegenseitigen Anerkennung als Grundsatz der justiziellen Zusammenarbeit in Strafsachen zwischen den EU-Mitgliedstaaten stehen, bestätigen dies. Nach Ansicht des OLAF wäre es als ein erster Schritt zunächst realistischer, die EStA lediglich als justizielles Aufsichtsorgan der EU einzurichten, das den nachgeordneten EU-Ermittlern (des OLAF) und den nationalen Staatsanwaltschaften gegenüber weisungsberechtigt wäre, während die EStA selbst nur als ergänzendes Justizorgan handeln würde, wenn die Behörden der Mitgliedstaaten ihrer Aufgabe

nicht oder nicht durchgängig nachkommen (Grundsatz der Verhältnismäßigkeit). Europol meint, wenn eine solche Gruppe von EStA-Ermittlern eingerichtet werden solle, müsse sie bei Europol angesiedelt sein, um eine Doppelung von Strafverfolgungsaktivitäten, beispielsweise bei Analysen und operativer Unterstützung, zu vermeiden.

Auf dem Strategiefragen gewidmeten Seminar „Eurojust und der Vertrag von Lissabon: Für ein effektiveres Handeln“, das Eurojust in Zusammenarbeit mit der belgischen Ratspräsidentschaft der Europäischen Union im September 2010 veranstaltete, wurden folgende möglichen alternativen Szenarien für die Organisation der EStA und deren Beziehung zu Eurojust genannt: Eurojust wird zur EStA durch eine schrittweise Erweiterung der Befugnisse von Kollegiums- und nationalen Mitgliedern; die EStA wird als gesonderte Einheit neben Eurojust und außerhalb von dessen Struktur errichtet; innerhalb von Eurojust wird ein Sonderreferat gebildet; die EStA schließt sich mit Eurojust zu einer Stelle, aber mit einer anderen Entscheidungsstruktur zusammen; weitere Kombinationen sind beispielsweise die Anwesenheit der EStA im Kollegium, wenn Angelegenheiten im Zusammenhang mit dem Schutz der finanziellen Interessen der Union erörtert werden, oder die Ernennung von neun nationalen Mitglieder aus den teilnehmenden Staaten zu stellvertretenden Europäischen Staatsanwälten mit der EStA als „Mini-Kollegium“. Die Seminarteilnehmer waren sich darin einig, dass stets eine enge Verbindung zwischen der EStA und Eurojust gewahrt werden müsse, doch sie verwiesen auch auf Unterschiede in der Arbeitsweise und Organisation. Einige Teilnehmer äußerten auch, dass der Zusatznutzen der EStA als länderübergreifende Institution noch mit einer Folgenabschätzung nachgewiesen werden müsse.

Auf dem Jährlichen Forum zur gegenseitigen Anerkennung gerichtlicher Entscheidungen in Strafsachen, das die Europäische Rechtsakademie im Oktober 2010 veranstaltete, sprachen Richter und Staatsanwälte aus den Mitgliedstaaten über den aktuellen Stand bezüglich der EStA. Man ging grundlegend von folgenden Prämissen aus: die EStA sollte kein „Eurojust II“ sein, weil ihr Charakter, ihr Arbeitsbereich, ihre Zielsetzungen und ihr Instrumentarium anders sein würden; die EStA sollte keine weitere Makrostruktur sein, und sie müsste (auf verschiedenen Ebenen) mit Eurojust, dem OLAF, den einzelstaatlichen Strafverfolgungsbehörden und Europol zusammenarbeiten. Einig war man sich über die Notwendigkeit einer Folgen- und Bedarfsabschätzung; Spezialisierung gilt als wichtiger Zusatznutzen der EStA; bevorzugt wird ein paralleles Vorgehen mit der Stärkung von Eurojust auf der einen und dem Aufbau der EStA auf der anderen Seite, wobei sich die Zusammenarbeit auf alle 27 Mitgliedstaaten erstrecken und kein Mitgliedstaat von den Gesprächen ausgeschlossen sein sollte; der Anfang könnte mit einer kleinen Gruppe von Mitgliedstaaten gemacht werden, dann würden sich weitere bald anschließen.

Die Diskussion um die angestrebten künftigen Gegebenheiten wird sehr lebhaft geführt. Es bestehen die unterschiedlichsten Meinungen darüber, wie am besten weiter zu verfahren ist, und bei vielen wichtigen Punkten mangelt es noch an Klarheit und Einigkeit. Deshalb wäre es voreilig, in der Studie ausführliche Empfehlungen zu Fragen wie dem künftigen institutionellen Aufbau der justiziellen

Zusammenarbeit in Europa abzugeben, wenn es um einen besseren Schutz der finanziellen Interessen der Union durch die Erweiterung oder Neuordnung der Aufgaben innerhalb oder zwischen den bestehenden Institutionen und die Einrichtung einer EStA geht.

In Anbetracht der vorstehend geschilderten Sachlage ist eine gründliche Folgen- und Bedarfsabschätzung der geeignete Weg, um künftige Entscheidungen vorzubereiten. Dies würde die Arbeitsweise aller relevanten Akteure (Eurojust, das Europäische Justizielle Netz, Europol, das OLAF usw.) und die justizielle Zusammenarbeit in Strafsachen in der EU im Allgemeinen betreffen. Eine solche Vorgehensweise entspricht der Aufgabe der Europäischen Kommission, weitere diesbezügliche Schritte vorzuschlagen. Die Kommission beabsichtigt, eine Empfehlung über die künftige Stärkung von Eurojust abzugeben und zu prüfen, wie die Schaffung der EStA vor sich gehen soll. Eine Folgenabschätzung und umfassende Konsultationen der Interessengruppen werden als wichtige Informationen in diese Betrachtungen einfließen.

Empfehlung

Wir empfehlen, ausführliche Beratungen zwischen den verschiedenen Gremien und einzelstaatlichen Behörden im Rahmen des Arbeitsprogramms der Kommission durchzuführen, um

- eine eingehende Analyse der Wirksamkeit und Effizienz der derzeitigen Zusammenarbeit vorzunehmen und eine umfassendere Definition der praktischen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts zu formulieren;
- zu entscheiden, wie die derzeitigen allgemeinen Anstrengungen durch die Erweiterung und Neuordnung der Aufgaben innerhalb oder zwischen den bestehenden Institutionen optimiert werden können;
- zu prüfen, wie bei der Gründung der EStA am besten zu verfahren ist; und
- zu erkunden, wie die Zuständigkeiten der einzelnen Institutionen, die gegenwärtig in dem Bereich tätig sind, für den eine künftige EStA zuständig wäre, am besten neu zu ordnen wären.

Ein Hinweis darauf, welche Beachtung diese Angelegenheiten momentan genießen, ist die Mitteilung des Präsidenten von Eurojust an die Verfasser, man werde Europol und das OLAF in naher Zukunft zu einem Meinungsaustausch und Beratungen über die Zukunft ihrer Organisationen vor dem Hintergrund der neuen Bestimmungen im Vertrag von Lissabon einladen.

1. Introduction

“The goal of the TFEU was to bring Europe to the next level by striving for:

- A more democratic and transparent Europe;
- A more efficient Europe;
- A Europe of rights and values, freedom, solidarity and security; and
- Europe as an actor on the global stage”⁴.

Within this context, The Treaty foresees the possibility to establish a European Public Prosecutor’s Office (hereafter “EPPO”) from Eurojust (Art. 86 of the Lisbon Treaty)⁵ along with the intention to strengthen Eurojust even further (Art. 85 of the Lisbon Treaty)⁶. Article 325 of the Lisbon Treaty mentions that the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union and that Member States should take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. In paragraph 4 it foresees that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies. (Annex 1).

This report is structured as follows:

Chapter 2 gives an insight in the methodological approach of our study. The study was based on a combination of thorough desk research and direct input through questionnaires and interviews from Eurojust, Europol and OLAF.

Chapter 3 gives an overview of the current roles and responsibilities of the different existing bodies.

Chapter 4 describes the level of interaction and cooperation between the different bodies, including the agreements between Eurojust, Europol and OLAF.

Finally chapter 5 summarises the debate on the creation of a European Public Prosecutors Office (hereafter “EPPO”), including the assessment of the existing bodies regarding the effectiveness and efficiency of the current system, the ways to improve the current situation and the future roles and responsibilities of the EPPO.

⁴ http://europa.eu/lisbon_treaty/glance/index_en.htm .

⁵ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2008/c 115/01, 9 May 2008, Official Journal of the European Union.

⁶ Art. 85, art.86 and art.325 can be found in annex.

2. Methodology

The report is based on a combination of thorough desk research of public reference sources and direct input through questionnaires and interviews from Eurojust, Europol and OLAF.

Desk research of public reference sources

A thorough desk research of public reference sources has been carried out in order to analyse (1) the current situation regarding the roles and responsibilities of the existing bodies, (2) the level of interaction and cooperation between the existing bodies and (3) the differences in opinion regarding the potential role(s) and responsibilities of the EPPO.

The key documents reviewed are listed in Annex 2.

A complete bibliography of consulted documents can be found in Annex 8.

Input from existing bodies

The report also includes the input from questionnaires sent to and interviews organized with representatives of existing bodies.

A detailed questionnaire was sent to representatives from Eurojust, Europol and OLAF in order to prepare for interviews (see Annex 3). A distinction was made between primary and secondary questions. When sending the questionnaires we indicated that although we are also interested in the answers to the secondary questions they were not essential for this study.

The following persons were contacted as representatives of their respective organization:

- Ms. Michele Coninx, Vice President, Eurojust;
- Mr. Lothar Kuhl, Head of Unit Legislation and Legal Affairs, OLAF;
- Mr. Brian Donald, Head of Unit, Europol.

All bodies were requested to react upon the answers received from the other bodies.

We received preliminary remarks regarding the primary questions from Eurojust (see Annex 4).

Furthermore we received case examples illustrating the role played by the three bodies in the protection of the financial interests of the EU, and these are attached (see Annex 5, 6 & 7).

The existing bodies' assessment regarding the effectiveness and efficiency of the current organization, the ways to improve the current situation and the future role(s) and responsibilities of EPPO is provided in Chapter 5.

3. Current roles and responsibilities of the existing bodies

In 2010, the key existing bodies which are active in the field of criminal law protection of the financial interests of the Union are Eurojust, Europol and OLAF. The responsibilities of these bodies have changed over the years.

In the following chapter we will provide a short introduction on these existing bodies, including their origin and their current roles and responsibilities.

3.1 Eurojust

Origin and history

The European Council of Tampere decided on 15 and 16 October 1999 to establish the first permanent network of judicial authorities in Europe with the goal to reinforce the fight against crime.

Moreover it was decided that Eurojust should have the task of facilitating the coordination of national prosecutions, investigations of organized crime and the cooperation with the European Judicial Network.

On 14 December 2000, a provisional judicial cooperation unit, named Pro-Eurojust, was set up as a proof of concept.

On 28 February 2002 the Council of the European Union decided to set up Eurojust with the goal to reinforce the fight against serious crime.

On 29 April 2003, Eurojust moved to its final seat in The Hague and started its operations.

Current roles and responsibilities

The Council Decision setting up Eurojust stated the following mission: *‘enhance the development of Europe-wide cooperation on criminal justice cases by enhancing the effectiveness of the competent authorities in the European Union Member States in investigating and prosecuting the perpetrators of serious cross-border and organized crime’*.

Serious cross-border and organized crime was defined as follows: “Fraud, corruption, criminal offences affecting the European Community’s Financial interests, environmental crime etc.”.

The following competencies were provided to Eurojust in order to fulfill its mission:

- Request from Member States to provide the information necessary for Eurojust to carry out its tasks;
- Facilitate the exchange of information between competent authorities;
- Assist with the coordination of investigations and prosecutions between Member States and non-Member States or between a Member State and the Commission;

- Send reasoned requests to the competent authorities of Member States to:
 - Undertake an investigation or prosecute specific acts;
 - Consider that one country may be better placed to undertake an investigation or to prosecute specific acts;
 - Coordinate and cooperate with other Member States;
 - Set up joint investigation teams;
 - Take special investigative measures;
 - Take any other justified measure for the investigation or prosecution of serious cross-border and organized crime.

The mandate of Eurojust was expanded to all types of crime and offences for which Europol is competent with the implementation of Council Decision 2009/426/JHA on the strengthening of Eurojust. The objectives mentioned for the strengthening of Eurojust were the following:

- Enhance the operational capabilities of Eurojust;
- Increase the exchange of information between the interested parties;
- Facilitate and strengthen cooperation between national authorities; and
- Strengthen and establish relationships with partners and third states.

With the implementation of the Lisbon Treaty (Art. 85) the possibility has been created for Eurojust to initiate criminal investigations, as well as propose the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union.

It is to the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, to further determine Eurojust's structure, operation, field of action and tasks (Art. 85 Lisbon Treaty). In December 2009, the College of Eurojust already approved the setting up of a task force on the Future of Eurojust, in order to reflect on the future development of Eurojust and a European Public Prosecutors' Office. The main objective of the Task Force is to promote an internal discussion on the basis of Eurojust's experience about the strengthening of the powers of Eurojust under article 85 and the setting up of the EPPO "from Eurojust", in order to be ready and able to contribute, where required, to the discussion expected on both legal provisions in the different fora and institutions.

In the action plan implementing the Stockholm programme dated April 2010 the Commission stated its intention to propose giving Eurojust powers to directly initiate investigations. At the same time, the proposals would make Eurojust's internal structure more efficient and involve the European Parliament and national parliaments in evaluating Eurojust's activities. Within the action plan it has also been foreseen to further reflect on the cooperation with all the actors involved, including the European Anti-Fraud Office (OLAF), to enter a legislative proposal in 2012 and to publish a communication on the establishment of a European Prosecutor's Office (EPPO) from Eurojust by 2013.

3.2 Europol

Origin and history

In 1992 the Maastricht Treaty foresaw police cooperation between Member States to combat terrorism, drug trafficking and other international crime. Within this document, an explicit reference to a European Police Office (Europol) was made.

With the installation of the Europol Drugs Unit (EDU) in 1993 the mandate expanded to include other areas of transnational crime, including terrorism, motor vehicle crime and organized crime. This paved the way for the creation of a full-fledged European Police Office.

In 1995, the Europol Convention was agreed on and by 26 July 1996 all Member States had signed it. By mid 1998, the Europol Convention was ratified by all 15 Member States and on the first of October 1998, Europol came into force. Almost one year later, on the first of July 1999, Europol started its activities in its headquarters in The Hague.

Since then, its mandate has expanded another time and now also includes child abuse, terrorism and forgery of money. It was also decided that Europol could enter into cooperation agreements with non-Member States and international organizations.

In October 1999, at the Tampere Council, it was decided to further strengthen the role of Europol in order, for the European Union, to move closer to an institutional approach regarding international security matters. This strengthening of the role of Europol was followed by an internal reorganization in 2001.

With the introduction of the euro in 2002, the introduction of The Hague programme and the accession of 12 new Member States in 2004 and 2007, the European Union – and Europol – entered a new era and in the following years three protocols amending the Europol Convention were established:

- ‘Money Laundering Protocol’: extended Europol’s mandate to tackling money laundering in general, regardless of the type of offence for which the laundered proceeds originate⁷;
- ‘JIT protocol’: allowed the participation of Europol Officials in a support capacity in Joint Investigation Teams⁸;
- ‘Danish protocol’: made a number of changes to the Europol Convention concerning the objective of Europol; the information processing by Europol, information to the European Parliament, Right of Access to Europol documents etc⁹.

⁷ Council of the European Union, 2000, Council Act of 30 November 2000 drawing up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) of a Protocol amending Article 2 and the Annex to that Convention, Official Journal of the European Communities.

⁸ Council of the European Union, 2002, Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, Official Journal of the European Communities.

On 24 June 2008, there was a political agreement to change the Europol Convention into a Council Decision. This agreement came into force on 1 January 2010 and further expanded the mandate of Europol to all kinds of serious international crime, not only necessarily those perpetrated by organized crime groups.

According to article 5.1 of the Europol Council Decision Europol shall have the following principal tasks:

- (a) to collect, store, process, analyse and exchange information and intelligence;
- (b) to notify the competent authorities of the Member States without delay via the national unit referred to in Article 8 of information concerning them and of any connections identified between criminal offences;
- (c) to aid investigations in the Member States, in particular by forwarding all relevant information to the national units; EN 15.5.2009 Official Journal of the European Union L 121/39
- (d) to ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and to suggest the setting up of joint investigation teams in specific cases;
- (e) to provide intelligence and analytical support to Member States in connection with major international events;
- (f) to prepare threat assessments, strategic analyses and general situation reports relating to its objective, including organised crime threat assessments.

Europol also became the Central Office for combating euro counterfeiting (in terms of Article 12 of the 1929 Geneva Convention, CD JHA11/2005 and article 5 of the Europol Council Decision). This entitled Europol to exchange strategic and technical information worldwide and to provide financial support upon request. The European Commission in its communication in 2004 (COM(2004)376), already called for the possible attribution of certain investigative powers to Europol in order to combat counterfeiting of the euro.

With the implementation of the Lisbon Treaty (Art 88 TFEU) the following has been foreseen on the future of Europol's regulations:

- Europol's mission is to support and strengthen action by, and cooperation between, Member States' law enforcement authorities to prevent and combat serious crime affecting two or more Member States and "forms of crime which affect a common interest covered by a Union policy;
- Requires the Council and the EP to make regulations to determine Europol's structure, operation, "field of action" and tasks; and
- Requires the regulations to "lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the national parliaments.

⁹ Council of the European Union, 2003, Council Act of 27 November 2003 drawing up, on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, Official Journal of the European Union.

Current roles and responsibilities

The Europol Convention from 1995 stipulated the following mission for Europol: *'make a significant contribution to the European Union's law enforcement action in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime within the competencies, with a particular emphasis on the criminal organizations involved'*¹⁰.

The following competencies were provided to Europol in order to fulfill its mission:

- Facilitate the exchange of information between the Member States;
- Obtain, collate and analyze information and intelligence;
- Notify the competent authorities of the Member States without delay of information concerning them and/or any connection identified between criminal offences;
- Aid investigations in Member States by forwarding all relevant information to the national units;
- Maintain a computerized system of collected information allowing data input, access and analysis.

In its Europol Strategy 2010 – 2014¹¹, Europol elaborated on its vision i.e. *'to contribute to a safer Europe by providing the best possible support to law enforcement authorities in Member States through the establishment of a unique set of operational services for the European Union'*, e.g.:

- Support centre for law enforcement operations;
- Criminal information hub; and
- Centre of law enforcement expertise.

There are currently around 510 staff members and 129 Europol Liaison Officers (ELO's) based at the Europol headquarters. These ELO's are seconded to Europol by the EU Member States and the non-EU partners of Europol. They guarantee fast and effective cooperation based on personal contact and mutual trust. In concrete, these ELO's provide operational analysis and support to Member State operations, they provide expertise and technical support for investigations and operations carried out within the European Union and they draft strategic reports and crime analysis on the basis of information and intelligence supplied by Member States or gathered from other sources.

3.3 OLAF

Origin and history

On 28 April 1999, the European Anti-Fraud Office (OLAF) was created and the European Anti-Fraud Unit (UCLAF) was dissolved¹². On the first of June 1999, OLAF became operational. Together with the installation of OLAF, a Supervisory Committee of the European Anti-Fraud Office was established to

¹⁰ Council of the European Union, 1995, Convention on the establishment of a European Police Office (Europol Convention), Official Journal of the European Union

¹¹ Council of the European Union, 22 February 2010, Europol Strategy 2010 – 2014.

¹² European Communities, 1999, Commission decision of 28 April 1999 establishing the European Anti-Fraud Office (OLAF).

reinforce and guarantee OLAF's independence through the regular monitoring of its investigative function¹³.

Based on evaluations performed by the European Court of Auditors in 2003 and 2005, proposals were made in 2006 to amend the regulation of OLAF regarding the following:

- Governance, cooperation between the institutions and the Supervisory Committee;
- Guarantee of the rights of implicated persons;
- Improved monitoring of investigations;
- Improving the information flow;
- Strengthening OLAF's operational efficiency;
- Improving the effectiveness of OLAF's investigations;
- Term of office of the Director-General¹⁴.

Current roles and responsibilities

The protection of the financial interests of the Community is a major priority for the European Institutions. OLAF was established in order to intensify this action.

OLAF is part of the European Commission, with a special independent status for conducting anti-fraud investigations.

OLAF carries out all the powers of investigation conferred on the Commission by Community legislation and the agreements in force with non-Member States.

The following tasks were allocated to OLAF in order to fulfil its mission:

- Carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests as well as any other act or activity by operators in breach of Community provisions;
- Carry out internal administrative investigations intended:
 - To combat fraud, corruption and any other illegal activity adversely affecting the Community's financial interests;
 - To investigate serious facts linked to the performance of professional activities which may constitute a breach of obligations by officials and servants of the Communities.
- Provide the Commission with support in cooperating with the Member States in the area of the fight against fraud;
- Develop a concept for the fight against fraud;
- Prepare legislative and regulatory initiatives of the Commission with the objective of fraud prevention;
- Any other operational activity of the Commission in relation to the fight against fraud, in particular:

¹³ OLAF, 2009, OLAF: The first 10 years in the fight against fraud.

¹⁴ Commission of the European Communities, 2006, Proposal for a European Parliament and Council Regulation amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office.

- Develop the necessary infrastructure;
- Ensure the collection and analysis of information;
- Give technical support, in particular in the area of training, to the other institutions and bodies as well as to the competent national authorities.
- Represent the Commission, at service level, in the forums concerned¹⁵.

OLAF is, in executing its tasks, subject to different regulations. In 1995, the Council adopted the Council regulation on the protection of the European Communities financial interests. This regulation foresaw general rules relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law. Later, with the creation of OLAF in 1999, two regulations specifying the procedures to be followed for all investigations were adopted. Procedures concerning administrative, internal and external investigations, opening investigations, duties to inform OLAF, investigation reports and actions taken following investigations, confidentiality and data protection, forwarding of information by OLAF, etc were agreed upon. Moreover, OLAF is also affected by sector regulations e.g. concerning Mutual Administrative Assistance, Traditional Own Resources, Common Agricultural Policy, Structural Funds and Direct Expenditures. Additionally, OLAF is influenced by legislation on the notification or irregularities and recovery of sums wrongly paid, the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by OLAF and Conventional instruments such as the EU Convention.

On 12 July 2010 the European Commission presented a reflection paper on the reform of OLAF to the European Parliament's budgetary control committee. We were informed by OLAF that the reform of their organization is in the Commission 2011 work programme and a revised proposal should be adopted by the Commission soon to amend the OLAF Regulations (1073/1999 and 1074/1999),

¹⁵ The European Commission, 31/5/1999, Commission decision of 28 April 1999, Establishing the European anti-fraud office (OLAF), 1999/352/EC, ECSC, Euratom.

4. Coordination between the various existing bodies

4.1 Cooperation agreements between Eurojust and Europol

On 9 June 2004, Europol and Eurojust signed their first operational agreement. Another operational agreement was signed in October 2009 and came into force in 2010. Both agreements aimed at establishing and maintaining close cooperation between Eurojust and Europol in order to increase their effectiveness in combating serious forms of international crime. Moreover, the agreements were signed with the clear goal to avoid duplication of work¹⁶.

In order to achieve these objectives, Eurojust and Europol agreed on a range of activities, such as:

- Exchange of operational strategic and technical information including regular consultations, temporary posting of representatives, exchange of information, association with each other's work files and right of initiative;
- Coordinated activities including general cooperation and joint investigation teams¹⁷.

4.2 Cooperation agreements between Eurojust and OLAF

On 14 April 2003 Eurojust and OLAF signed a practical agreement, which was replaced in 2008 by the Practical Agreement on arrangements of cooperation between Eurojust and OLAF¹⁸. The purpose of this agreement is to enhance the fight against fraud, corruption and any other criminal offence or illegal activities affecting the European Communities' financial interests. It constitutes a further enhancement of the cooperation and collaboration between Eurojust and OLAF. Some general rules on operational cooperation were agreed upon. Both organizations also agreed to have regular contacts to exchange case summaries, case-related information and strategic information. Furthermore there was a clear intention to cooperate in the field of professional training, seminars and workshops.

4.3 Cooperation agreements between Europol and OLAF

The first agreement on Co-operation between the European Commission and the European Police Office was signed on 18 February 2003. On 8 April 2004, OLAF and Europol signed arrangements to further enhance practical cooperation, based on mutual confidence and respective competencies with the aim to fight against international organized crime in the context of fraud, corruption and any other criminal offence or illegal activities affecting the Community's financial interests. In order

¹⁶ Eurojust and Europol, 2009, Agreement between Eurojust and Europol.

¹⁷ <http://www.eurojust.europa.eu/about.htm> .

¹⁸ Eurojust and OLAF, 2008, Practical Agreement on arrangements of cooperation between Eurojust and OLAF.

to do so, a range of instruments have been agreed upon such as the exchange of strategic and technical information, cooperation in the field of intelligence and technical support, common reports and mutual consultation, joint investigation teams and cooperation in the field of professional training and working groups¹⁹

4.4 Cooperation between the different bodies in practice

The answers received on the cooperation between the different bodies in practice confirm that there is room for improvement in the cooperation between Eurojust, OLAF and Europol. Although the framework for cooperation has been created, the agreed-upon exchange of case summaries, case-related information and strategic information does not seem to be fully implemented in practice.

In response to our question to explain the current position on the level of coordination between Eurojust, Europol and OLAF and/or any other European organizations involved with crime investigations/prosecution, the following answers were received from the three bodies.

Eurojust

- Despite the existence of a co-operation agreement with Europol and a practical arrangement with OLAF, the co-ordination between Eurojust, Europol and OLAF could be substantially improved, mainly in the area of exchange of information about ongoing investigations and prosecutions.
- Eurojust's statistics on cases related to VAT fraud and fraud against the financial interests of the EU show that casework co-operation with OLAF could be developed. From 2004 to 2009, OLAF officially submitted only 5 cases to Eurojust, three of which were registered in the Case Management System (one dealing with a mobile telephone VAT fraud case and two with other frauds against the European Union). In 2010, three more cases were communicated to Eurojust, which may suggest an improving trend. The low numbers may reflect both legal complexities and the resource-intensive nature of such investigations in Member States. Eurojust provides OLAF with updates on potential cases of interest, but only in a few cases has this sharing of information led to a real follow-up.
- Co-operation with Europol should be extended, in particular, to develop further mutual involvement in operational cases, to foster common participation in Joint Investigation Teams (JITs), and to share analysis of organised crime phenomena and trends, and ways to fight organised crime. Eurojust is already associated with 15 Analysis Work Files (AWFs) covering a wide variety of serious cross-border crimes. However, a more systematic association with all Europol's AWFs is required to improve co-operation and co-ordination.
- The foundations for good co-operation with Europol have been established. Europol now attends one-third of Eurojust's casework co-ordination meetings, including those meetings

¹⁹ Europol and OLAF, 2004, Administrative arrangement between the European Police Office (Europol) and the European anti-fraud Office (OLAF)

related to VAT fraud. The creation of Europol's AWF on Missing Trader Intra-Community frauds (a development influenced by Eurojust casework as the Annex example shows) (Annex 5), and the subsequent association of Eurojust with this AWF illustrate solid co-operation between the two bodies. Europol has also been party to JIT agreements signed at Eurojust. Eurojust also provides extensive and detailed contributions based on its casework and analysis of judicial co-operation to Europol's Organised Crime Threat Assessment (OCTA). Eurojust has begun an important strategic project on VAT fraud and will jointly host a seminar with Europol in March 2011 on this topic.

- Co-operation with the European Judicial Network (EJN) should also be strengthened and improved. Joint initiatives are already under consideration to further this goal, including the involvement of the EJN in Eurojust's National Co-ordination System under the revised Eurojust Decision. This will provide the basis for improved casework synergies between the two organisations.

OLAF

The 'Judicial & Legal Advice' Unit is OLAF's contact point for operational cooperation with EUROJUST. The OLAF/EUROJUST operational liaison team meets 4 times per year and the core of its work consists of exchange of information on common/overlapping cases. Then, OLAF's investigators and magistrates participate in the Level II and Level III coordination meetings organised by EUROJUST, together with the investigators and judicial authorities of the respective Member States and with EUROPOL, if needed. This cooperation concerns complex cases where more than 2 Member States are involved and where the mutual judicial cooperation between the Member States' authorities is difficult. The main areas of these common cases concern the VAT/customs fraud, smuggling and counterfeit of cigarettes, external aid and fraud in agriculture. In the first two categories mentioned, EUROPOL was also involved as it opened for OLAF the analytical work files (AWF).

EUROPOL

- Europol and Eurojust have a strong but still developing relationship. In many areas they can and do work together closely, in particular through the exercise of complementary roles in major investigations, i.e. Europol coordination of analytical and investigation activities followed by Eurojust coordination of the subsequent prosecution.
- In the case of OLAF the relationship is also strong. However, there is room for improvement when it comes to sharing intelligence in fields of common interest. Legal constraints have also prevented the agencies from exchanging personal data. It was not until this year that this problem was solved with the implementation of the Europol Council Decision and the agreed working arrangements between Europol and OLAF. In addition, some duplication of responsibilities exist, for example in the field of counterfeiting of the euro currency.
- With other agencies, e.g. SITCEN and FRONTEX, Europol have regular and important contacts particularly around intelligence exchange and joint assessments. We have many examples in

our work with other agencies where coordination and support provided by our respective agencies have given good results.

In response to the question to explain their current position on the level of coordination between Member States, including how it has evolved since the creation of their organization and how it can be further improved, the following answers were received from the three bodies.

EUROJUST

- Eurojust was established in 2002 as a body of the European Union with legal personality to stimulate and improve co-ordination and co-operation between competent judicial authorities of the Member States conducting investigations and prosecutions in relation to serious crime.
- The Council Decision of 16 December 2008 on the strengthening of Eurojust has enhanced its operational effectiveness, by taking account of the experience gained by Eurojust since its establishment. In terms of caseload, Eurojust's work of co-operation and co-ordination has steadily grown. In 2002, Eurojust registered about 200 cases; in 2009, Member States referred almost 1400 cases to Eurojust, a seven-fold increase.
- The Treaty of Lisbon makes mutual recognition the central principle for judicial co-operation in criminal matters, in a development from traditional mutual legal assistance. Eurojust has played an important role in this process. It has helped ensure the success of the European Arrest Warrant (the most important mutual recognition instrument), by facilitating execution of EAWs and resolving conflicts of jurisdiction.
- To improve co-ordination of investigations and prosecutions in the European Union, priority should be given to a timely and full implementation of the revised Eurojust Decision. In addition, timely submission of relevant information from the competent national authorities would enable Eurojust to effectively co-ordinate investigations and prosecutions.
- The provisions of the Lisbon Treaty show that Eurojust is moving towards a new phase of development, where new tasks, such as the initiation of criminal investigations, the proposal of the initiation of prosecutions and the co-ordination of criminal investigations and prosecutions initiated by Eurojust, together with the establishment of an EPPO could be conferred upon it.

OLAF

OLAF's specialized unit 'Judicial & Legal Advice', consisting of professionals with exclusively judicial or magistrates' background, has 10 years experience in coordinating investigations and /or exchange of information with the Member States in criminal matters. In comparison with EUROJUST, whose competence is only to coordinate and facilitate exchange of information (mainly MLAs), OLAF takes the initiative to conduct concrete administrative

investigations which often overlap with judicial criminal procedures at the national level and must be coordinated. OLAF's cooperation contains synergies with two aspects: practice in conducting the investigation with overlapping of EU and national, administrative and criminal law and in application of EU and national law at the same time. Thus the experience is both investigative and legal.

EUROPOL

The current level of judicial cooperation between Member States is strong and increasingly so. Initiatives such as the EAW and the proposed EIO, allied to a raft of cooperative measures in the EU such as Europol, Schengen, Prüm etc., means that there has never been an easier or more structured way for the Member States to cooperate in criminal matters, both at the investigation stage and at the prosecution stage. Implementation is patchy in some areas but overall the position is strong. However, there is certainly room for improvement. Since the inception of Europol, some 15 years ago, and over the last 10 years since Europol was established, there have been great advances. On the other hand this is an area of law where many Member States are traditionally reluctant to give up too much power over their own affairs. This is likely to remain so for the foreseeable future.

5. The European Public Prosecutor Office

5.1 Origin and History

The European Public Prosecutor is an idea that goes back some decades. In the mid-1990s, the European Commission asked a group of experts to work out a Corpus Juris aimed at establishing some basic principles for the criminal law protection of the financial interests of the European Union. The Corpus Juris was published in 1997 and included the proposal to introduce a European Public Prosecutor (EPP) (Art. 18.5). In the beginning of the 21st century the debate on the European Prosecutor advanced. On 11 December 2001, a Green paper on “Criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor” was drafted by the European Commission²⁰. The Commission elaborated on the different possibilities to install a European Prosecutor and tackled different questions. The aim of the Green Paper was to clarify the Commission’s ideas on the installation of the European Prosecutor and to widen the debate. Next to the detailed opinion of the European Commission and possibilities regarding the establishment of the EPPO, the Green Paper also presented different questions to the Member States and stakeholders concerning the need for a European Prosecutor, the general organization of a European Public Prosecutor and the Deputy European Public Prosecutors, the coordination with existing bodies, the legal powers, harmonization or rules, coordination with national authorities, etc.

The European Parliament also expressed its belief in the establishment of a European Prosecutor’s office. The European Parliament emphasized that the protection of the Communities’ financial interests is not a matter for the institutions alone; instead, those institutions must be seen as part of a comprehensive system. In that connection, the European Parliament welcomed the submission of the Commission’s Green paper²¹.

Two years later, in 2003, a follow-up report was published with a summary of the answers to the questions from the different Member States²². At that time, the opinions between the different Member States were divided. Some countries such as Belgium, Greece, the Netherlands, Portugal and Spain were in favour of a European Prosecutor, while other Member States such as Austria, Denmark, Finland, France, Ireland and the United Kingdom were opposed. The remaining Member States such as Germany, Italy, Luxemburg and Sweden had their doubts. Besides the differences in opinion on the need for a European Public Prosecutor, there were a range of differing opinions on its mandate and organizational structure. Topics where Member States differed included: coordination with other bodies, the legal powers of the EPP, the status of the Deputy European Public Prosecutors,

²⁰ Commission of the European Communities, 11 December 2001, Green Paper on criminal law protection of the Financial interests of the Community and the establishment of a European Prosecutor.

²¹ European Parliament, 2001, European Parliament resolution on the protection of the Communities’ financial interests and the fight against fraud – annual report 2001 (2002/2211(INI)).

²² Commission of the European Communities, 19 March 2003, Follow-up report on the Green Paper on the criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor.

the harmonization of national legislation, the coordination with national authorities, the mandate to investigate, admissibility of evidence and judicial review, fundamental human rights,.... Despite these differences, most countries agreed as a basic point that a European Public Prosecutor should be independent from both the Member States and the other European Institutions.

Since 2003 the proposition to create a European Prosecutor has re-emerged on a regular basis. In 2005, the Constitutional Treaty enabled the Council to set up the office of the European Public Prosecutor by means of a unanimous decision. The remit of the Prosecutor would initially be limited to “combating crimes affecting the financial interests of the Union.”²³ However the Constitutional Treaty never came into force and the wording was amended in the finally-adopted Lisbon Treaty.

In January 2008, the Spanish Ministry of Justice together with the OLAF supervisory committee, organised a conference on the Future European Public Prosecutor’s Office. During this Conference, the different parties elaborated on the model of an EPPO and its relations with OLAF, Eurojust and Europol. Speakers from OLAF, The Committee on Budgetary Control of the European Parliament, Eurojust, etc. were present. There were no general conclusions of this seminar but the presented document, with the speeches of the different speakers elaborated on the need and value added of the European Public Prosecutor’s Office and the organization of the EPPO, which should draw on existing resources and structures.

The Lisbon Treaty, which came into force in December 2009, created a legal basis for the installation of a European Prosecutor’s Office (EPPO) from Eurojust (art. 86).

The Lisbon Treaty clearly stated the tasks of the EPPO i.e. *‘the EPPO shall be responsible for investigation, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in offences against the Union’s financial interests. It shall exercise the function of prosecutor in the competent courts of the Member States in relation to such offences’.*

The Lisbon Treaty also referred to the possibility to extend the power of the European Prosecutor’s Office to include serious crime having a cross-border dimension²⁴.

In December 2009, the Stockholm programme for the period 2010 – 2014 was agreed²⁵. The key attention points within this programme were the following:

- Promoting citizenship and fundamental rights;
- A Europe of Law and Justice;
- A Europe that protects;
- Access to Europe in a globalised world;
- A Europe of responsibility, solidarity and partnership in migration and asylum matters;
- The role of Europe in a globalised world.

²³ <http://www.euractiv.com/en/future-eu/constitutional-treaty-key-elements-archived/article-128513> .

²⁴ Council of the European Union, 09 May 2008, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, Official Journal of the European Union.

²⁵ Council of the European Union, 2 December 2009, The Stockholm programme – An open and secure Europe serving and protecting the citizens.

The Stockholm programme referred to the EPPO as one of the possibilities to strengthen the internal security. A recommendation was also made to Europol and Eurojust to further strengthen their cooperation and expand their agreements and activities with non-Member States.

5.2 Latest developments

On 11 and 12 February 2010, the French Court of Cassation, thanks to the support of the European Commission and the European Anti-Fraud Office (OLAF), brought together key French and European practitioners in charge of the fight against cross-border crime. The conference aimed at increasing the participants' awareness of the reality of cross-border crime by reflecting on the practical means that enable reinforcement of the legal mechanisms currently in place. Three subjects were dealt with: the reasons and rationale for the creation of a European Public Prosecutor, the reinforcement of the current legal instruments and the 'format' for a future European Prosecutor²⁶.

An action plan (European Commission plan to deliver justice, freedom and security to citizens) implementing the Stockholm programme was proposed by the Commission in April 2010²⁷. This action plan clearly stated that the Commission will prepare for the establishment of a European Public Prosecutor's Office from Eurojust, with the responsibility to investigate, prosecute and bring to judgment offences against the Union's financial interests. Within the action plan it has also been foreseen to further reflect on the cooperation with all the actors involved, including the European Anti-Fraud Office (OLAF), to enter a legislative proposal in 2012 and to publish a communication on the establishment of a European Prosecutor's Office (EPPO) from Eurojust by 2013.

In its resolution of 6 May 2010, the European Parliament called on the Commission to begin early discussions and consultations with interested stakeholders, including civil society, on all aspects related to the creation of the European Prosecutor's Office for combating crimes affecting the financial interests of the Union, as provided for in Article 86 of the TFEU, and to step up the adoption of all necessary measures for establishing this office²⁸.

On 12 July 2010 the European Commission presented a reflection paper on the reform of OLAF to the European Parliament's budgetary control committee. With reference to article 86 TFEU the Commission states that the role and function of OLAF in relation to the EPPO will require further discussions in the perspective of identifying the best options for the EPPO and that the EPPO and the consolidation of the existing anti-fraud legislation need a thorough impact assessment and they should be handled at a later stage. Furthermore the Commission believes that because the reform of Regulation (EC) No 1073/1999 aims at improving OLAF's efficiency and effectiveness, by reviewing its governance and procedural rules, it should be taken up immediately and not postponed until it is known whether and when an EPPO will be created and the existing anti-fraud legislation might be consolidated.

²⁶ EUCRIM, 2010/1,

²⁷ European Commission, 20 April 2010, Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm programme.

²⁸ European Parliament, 2010n European Parliament resolution of 6 May 2010 on the protection of the Communities' financial interests and the fight against fraud – Annual Report 2008 (2009/2167(INI)).

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 2010²⁹.

Eight workshops were organized during this seminar. The first four workshops concentrated on Eurojust, while four other workshops concentrated on the EPPO:

- Workshop 1: Structure and institutional development of Eurojust;
- Workshop 2: The improved legal basis of Article 85: towards full operational powers of Eurojust;
- Workshop 3: Resolution of conflicts of jurisdiction and relations between Eurojust and national authorities;
- Workshop 4: Operational cooperation;
- Workshop 5: Preliminary questions and institutional aspects;
- Workshop 6: Organisation of the EPPO and relationship with Eurojust;
- Workshop 7: Competences and rules of procedure;
- Workshop 8: Admissibility of evidence and judicial review.
- 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 were also 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 Bruges 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

²⁹ Presidency of the Council of the European Union, 8/12/2010, ‘Eurojust and the Lisbon Treaty: Towards more effective action. Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency (Brugge, 20 – 22 September) – Information by the Presidency.’

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 operational 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 ambiguity and complexity. Although the Treaty provides for a new legal basis, the two Articles 85 and 86 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.

A non-exhaustive list of issues discussed during this seminar concerned:

- The prior assessment of the need to establish an EPPO and its development within and compliance with the Area of Freedom, Security and Justice. Most participants highlighted that before setting up a new body, its future value added must be clearly demonstrated;
- The approach to the possible implementation of art. 86 TFEU: (1) a parallel approach³⁰ or (2) a step-by-step approach³¹;
- The effects of a possible enhanced cooperation and of the use of opt-out: participants generally acknowledged that a cooperation with 27 Member States would be the best option, although rather unlikely at present;
- The organisation of the EPPO and the relationship with Eurojust;
- The future role of OLAF and Europol after setting up of the EPPO;

³⁰ The parallel approach: carrying out in parallel the future development of Eurojust and the creation of an EPPO.

³¹ The step-by-step approach: first evaluating the implementation of the revised Eurojust Decision, then exploring further the developments under Article 85 TFEU, and finally discussing the establishment of an EPPO from Eurojust according to Article 86.

- The competences of the EPPO: the participants acknowledged the necessity of discussing the scope of competence of the EPPO and in general agreed that the initial scope of competences should be restricted to crimes covered by the PIF Convention;
- The powers of investigation and the rules of procedure: a flexible approach was considered desirable, taking into account the diversity of national legal traditions and systems;
- Admissibility of evidence and judicial review.

During workshop 6 several possible scenarios for the organization of the EPPO and its relationship with Eurojust were listed:

- A. Eurojust becomes the EPPO by progressive increase in powers of College and National Members.
- B. The EPPO is established as a separate entity, next to Eurojust and outside its structure.
- C. A specialised Unit is created within Eurojust.
- D. EPPO merges with Eurojust to form one body, but with different decision making structures.
- E. Combinations possible – examples:
 - EPPO sits in College when matters related to the protection of the financial interests of the Union are discussed;
 - 9 National Members from the participating States become deputy European Public Prosecutors;
 - EPPO works as a “mini College”.

Although the participants agreed that a close link between EPPO and Eurojust must always be maintained they referred to the following differences:

- Functional differences
 - Eurojust: co-operation, co-ordination
 - EPPO: investigation, prosecution, direction, decision-making
- Organizational differences
 - Eurojust: College
 - EPPO: hierarchical structure

Some participants also mentioned that the added value of the EPPO as a supranational body still needs to be proven through an impact assessment.

The seminar closed by referring to three steps to follow up on the above issues: (1) continue discussions about these issues, deciding first whether a parallel/complementary approach or a step-by-step approach should apply, (2) fully implementing the revised Eurojust decision while respecting the fixed deadline and (3) strengthening Eurojust’s partnerships with crucial actors such as the EJM, OLAF and Europol.

We were informed by Eurojust that a comprehensive report of the whole seminar, including the conclusions of the 8 workshops, has been prepared and will be soon presented at CATS level (Council of the EU).

From 20 – 22 October 2010, the Annual Forum on mutual recognition of Judicial Decisions in Criminal Matters organized by the Academy of European Law took place, with as one of the main topics ‘the European Public Prosecutor’s Office (EPPO): state of play and initiatives taken so far’³².

During this Forum, the current status regarding EPPO was discussed between national judges and prosecutors, featuring some basic assumptions and commonly shared views.

The basic assumptions were that the EPPO should not be Eurojust II, because their nature, scope, objectives and means are different; the EPPO should not be another macro-structure and there is a need to cooperate (at different levels) with Eurojust, OLAF, the National Prosecution Services and Europol.

The shared views included the need for an impact and needs assessment; specialization is seen as an important value added of the EPPO; preference is given to a parallel approach Eurojust/EPPO and the preferred option is cooperation with 27 Member States, where no Member States should be excluded from discussions and with the assumption that starting with a small group of Member States could attract others.

5.3 Current position of Eurojust, Europol and OLAF on the creation of the EPPO

There is a wide range of opinions on the optimal way forward, and a lack of clarity and agreement on many of the major issues. However all three bodies recognize the added value the EPPO could have with regard to the cooperation between Member States.

In the following paragraphs, the detailed answers to the questions sent to Eurojust, OLAF and Europol are presented.

In response to the question to explain their current position on the need for the creation of the EPPO, if their position has changed over time and which role they see for their organization in this respect, the following answers were received from the three bodies.

Eurojust

- First, a thorough impact assessment of the need for the creation of the EPPO is essential. The functioning of all relevant JHA actors (Eurojust, EJM, Europol, OLAF, etc.), and EU judicial co-operation in criminal matters in general, needs to be carefully considered.

³² EUCRIM, 2010, The Lisbon Treaty.

- Particular attention should be given to the protection of the financial interests of the EU. A systematic impact assessment of the irregularities affecting the EU financial interests would need to be carried out. In fact, one of the main reasons for the setting up of an EPPO would be the need to protect the financial interests of the EU effectively at European judicial level in a more comprehensive manner and simplify the mechanisms currently in place, and this would clearly benefit from being evidence-based.
- Eurojust's experience in the protection of the financial interests of the EU is based on its competence in this field, which covers several economic crime types, namely VAT fraud, Euro counterfeiting and other criminal offences affecting the financial interests of the EU.
- More than 250 cases falling into one of the relevant crime categories have been registered in Eurojust's Case Management System (CMS) in the period between January 2004 and October 2010³³. The annual rate of VAT case referrals to Eurojust is now between 35-40 a year (approximately a two-fold increase since 2005).
- During the period 2004 – 2009, Eurojust held a total of 13 casework co-ordination meetings involving these crimes. In 2010, a total of 7 co-ordination meetings have been held to date (five co-ordination meetings related to VAT fraud, one related to Euro counterfeiting, and one related to the protection of the financial interests of the EU). The involvement of Eurojust in addition to OLAF in these cases has consistently provided added value. The Annex to this document provides examples of such cases (see annex 5).
- Article 86(1) TFEU states that the Council may establish an EPPO from Eurojust. Eurojust would thus play an important role in the creation of the EPPO. However, this brief provision allows for different interpretations and several scenarios can be identified. Three in particular have been discussed by the College:
 - Scenario 1 - The EPPO would be established as a separate entity, outside the Eurojust structure, but taking advantage of the experience acquired by Eurojust and maintaining very close links and co-operation between the two bodies.
 - Scenario 2 - A specialised unit (Office of the EPP) would be created within the structure of Eurojust, making use of Eurojust's administrative resources but without using the "College model".
 - Scenario 3 - The Office of the EPP would merge with Eurojust to form one body, possibly with competence extended to serious crime having a cross-border dimension.
- The debate over these scenarios and the possible creation of an EPPO from Eurojust in relation to both the implementation of the revised Eurojust Decision and possible regulations under Article 85 continues.

OLAF

³³ 197 VAT fraud cases, 16 Euro counterfeiting cases and 42 other cases (criminal offences affecting the European Community's financial interests). The figures for Euro counterfeiting cover the period January 2004 – August 2009.

- The need for the creation of an EPPO has been recognized very early. In 1997, the Corpus juris, even before OLAF was created, and the further 2000 law study already contained this idea. The Commission adopted in 2001 a Green Paper on criminal law protection of the financial interests (PFI) and the establishment of a European Prosecutor and a follow-up report in 2003 and the idea was finally materialized in the Lisbon treaty (Article 86 TFEU) even if the initial Commission proposal was to have the EPPO established directly by the Treaty.
- OLAF has constantly supported the creation of an EPPO. The fact that OLAF's recent operational results show that cooperation with the national criminal prosecution authorities within the Member States has improved (OLAF annual reports 2008 and 2009), but is not equivalent and is still lacking speed and efficiency on the one hand, and that the 2008 Eurojust reform and the current OLAF reform are limited in scope on the other hand, clearly show the need for a future independent criminal investigative function that would need to be supervised by a criminal judicial prosecution body at EU level. This is also recognized by the European Parliament (see the conclusion of the working document of 4/2/2009 on judicial follow-up to OLAF investigations: "it is imperative that the fight against fraud and corruption which harms the Community's financial interests gain in credibility"). The last editorial of the European criminal law associations' forum (Euclid 2010/2) co-signed by V.P. Reding and Commissioner Šemeta and focusing on the implementation of the 2009 Stockholm programme, fully reflects OLAF's position.

Europol

- The possible establishment of the EPPO is still at an early stage and it is a complex matter. Therefore, it is not possible for Europol to have a final position at the moment. Europol, in principle, supports the establishment of the EPPO. However, its mandate and scope needs to reflect a holistic and balanced solution. This would mean that it needs to go hand in hand with Europol's developments and, at the same time, take into account the current arrangements and developments at the institutional/agency level. Otherwise, an institutional imbalance may be created in the Justice and Home Affairs field between judicial and police cooperation arrangements.
- Europol is explicitly mentioned in article 86 TFEU, in which it is stated that the EPPO shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests. Accordingly, the legislator has foreseen a role for Europol with regard to the EPPO. That being the case we see Europol as continuing in its primary role post the EPPO as a supporting and coordinating agency at the EU level and foresee that opportunities will exist for the EPPO to make use of those characteristics of Europol. We believe that the future EPPO will, by necessity, have a close relationship with Europol.

- In assessing Europol’s role with regard to the EPPO the word “responsible” in article 86 TFEU is essential (the EPPO shall be responsible for investigating, prosecuting and bringing to judgment). The terminology used tends to indicate that the EPPO should be responsible for the process of investigation, prosecution and bringing to judgment. However, in accordance with most of the criminal procedural systems of the Member States, criminal investigations are carried out by police authorities under the guidance and responsibility of the Prosecutor’s office. Therefore, this strongly indicates that the legislator has foreseen this role for Europol to carry out the investigations. We would strongly make the case for this.

Regarding the questions to explain if the EPPO can create added value with respect to the current and expected future roles and responsibilities of their organizations, the cooperation between Member States, the protection of the financial interests of the European Communities and the fight against organized crime, the following answers were received from the three bodies.

Eurojust

- According to Article 86(2) TFEU, the EPPO “shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests”, and “shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences”.

So far, the role of Eurojust is to stimulate and improve co-ordination and co-operation between the competent authorities of the Member States. Except for some National Members who are already entitled to initiate investigations in urgent cases acting in their capacity as competent national authorities, generally neither National Members nor the College have the power to investigate, prosecute or bring to judgment the suspects of criminal offences with transnational dimension.

- The answers to this question depend very much on the solutions adopted regarding the structure and the status of the EPPO. Given that “expected changes” have not been specified, it is not possible to give an informed opinion at this stage.
- The setting up of a body based on “vertical co-operation” would have significant effects on judicial co-operation between Member States. In principle, if an EPPO is established, it will deal with cases previously dealt with by Member States using the existing applicable tools for judicial co-operation.

OLAF

- Yes indeed the EPPO can create value, in particular as, as a first step, the EPPO would be responsible in the area of the protection of the Union’s financial interests (PFI). The role of OLAF will have to be redefined. However, as already stated, the future independent criminal investigative function would need to be supervised by a criminal judicial

prosecution body at EU level. It would bring clear added value compared with the current situation where OLAF only carries out administrative investigations.

- OLAF's experience in conducting investigations in the EU and outside, as well as concerning the misconduct of European officials (Staff Regulations), should be still developed in a more structured and procedurally better organised manner. The OLAF reform (amended proposals amending OLAF Regulations) is under way (Commission work programme for 2011). This reform concerns in particular OLAF's governance. But as stated above, there is room for future changes. OLAF could possibly serve under the authority of the EPPO and the scope of its investigations could to that end be reviewed to cover also criminal investigations. OLAF investigators could conduct 'European investigations' under the supervision of the EPP as an independent European judicial/prosecutorial body which could consequently bring the evidence to the national courts.
- Yes, indeed the EPPO can create value for the cooperation between Member States. One important thing is to build mutual trust, which is an ongoing process promoted today mainly by EUROJUST, the EJM and OLAF, but only clear procedural rules exercised by a competent judicial body at European level can ensure a transparent, legal and coherent judicial follow up in particular in the field of fraud and other criminal offences to the detriment of the Union financial interests. The EU criminal law area remains fragmented, mutual judicial assistance has proven to be rather inadequate and we still have problems with mutual recognition, in particular as regards the admissibility of evidence. We need to avoid maintaining a situation characterized by lack of action, partial or competing proceedings as well as by delays, dilatory actions and unpunished offences.
- Yes, indeed the EPPO can also add value to protect the financial interests of the European Communities. As stated above, PFI is under the terms of the TFEU the first matter within the EPPO competence. Most of OLAF's responsibilities are therefore covered (external and internal investigations, corruption of the EU officials) and this is clearly a matter where prosecution is not always considered as a priority at national level.
- Yes, indeed the EPPO can also add value in the fight against organized crime, as organised crime is also active in the area of the Union's financial interests (customs, cigarettes, agriculture and VAT fraud, but also direct expenditure)
- Further reflection is needed as regards the protection of other Union interests, such as the euro.

Europol

- In terms of current roles and responsibilities there appears to be little that the EPPO could add. The EPPO may be in a position to add value where Europol identify serious criminality that would benefit from a coordinated multinational approach to prosecution as well as

investigation. However, Eurojust could also perform this role. Europol has also considered whether the EPPO could potentially fulfill the “judicial oversight” role that may be envisaged in a future EU TFTP programme, in which Europol assumes the function of the recipient agency for financing data.

- If the EPPO would be established this could improve the judicial cooperation between Member States. To what extent would depend on the mandate and the scope that the EPPO would be entrusted with.
- In the area of the financial interest of the European Communities there appears to be scope for added value. Particularly where the criminality extends across multiple jurisdictions and involves multiple criminal and civil law codes.
- There might be scope for a wider mandate in the fight against organized crime and there are a few known cases where the EPPO type of prosecution could have assisted, e.g. Chinese illegal immigrant deaths at Dover, mass marketing frauds affecting EU citizens across the Union and MTIC fraud. Additionally, serious organized criminality which extends across multiple jurisdictions and involves multiple criminal and civil law codes has traditionally been found to be the most challenging investigations to bring to court. However, it seems more realistic and feasible to initially start out with the limited scope, i.e. to combat crimes affecting the financial interests of the Union.

Regarding the questions what the roles and responsibilities of the EPPO should be, if the authority of the EPPO should be limited to the protection of the financial interest or should be extended, if the EPPO should have investigation powers for serious crimes (e.g. corruption) committed by officials from all European institutions and if the EPPO function should be limited to coordination and/or include investigation powers (in accordance with the Lisbon Treaty), the following answers were received from the three bodies.

Eurojust

- The arguments about a narrower or broader remit for the EPPO are well-known and have been extensively rehearsed in the literature. Both options have been discussed by the College of Eurojust, but the choice between them will ultimately be a matter for political argument and decision. It is not yet clear how operational casework analysis from Eurojust could help determine this question.
- The creation of the EPPO would not bring added value should its function be limited to the co-ordination of criminal investigations and prosecutions, i.e. the function currently exercised by Eurojust.

OLAF

- As indicated by the Commission at the EP public hearing on 28 September 2010 on the Commission 2002 revised proposal for a directive on the criminal law protection of financial

interests, Commissioner Šemeta has asked his services, together with the services of V.P. Reding, to explore whether it is appropriate to revise this proposal, taking into account the new possibilities offered by Article 225(4) TFEU. The reflection is ongoing: it should help to make progress with regard to the establishment of the EPPO. The EPPO will be based from a procedural point of view under the provisions of Article 86 TFEU, but from a substantial point of view, there is a need to specify its material competences (which do not fall under the scope of Article 86) and an updated directive might specify that. For the 'Judicial & Legal Advice' Unit of OLAF, the experience shows (Assessments of the implementation of the European arrest warrant, EIO etc...) that the creation of an efficient European Procedural Code in criminal matters, compatible with the existing traditionally proven criminal procedures of all Member States is a long term project. Therefore, as a first step, it would be more realistic to set up the EPPO only as an EU judicial supervisory body with the hierarchical competencies to give instructions to:

- EU investigators (from OLAF) and
- national prosecution offices.

The EPPO would act itself only as a complementary judicial body if the Member States authorities fail or do not follow consistently their role (principle of proportionality).

- It is more realistic to start with a limited scope of authorities for the EPPO where the practical experience (OLAF investigations, OLAF/EUROJUST/EUROPOL pilot projects, JITs) already exists. In addition, starting with the protection of the financial interests should be more easily accepted by the Member States in the negotiating process. This is of course without prejudice to further developments.
- Yes, indeed the EPPO should have investigation powers for serious crimes committed by officials from all European institutions, as already stated above. This is one area where the efforts at national level until now are more than limited in particular because national authorities do not have the means to take all the necessary actions. A supranational independent judicial body free from any political influences would be better placed and this can only be guaranteed by a transparent and fair selection procedure.
- The function of the EPPO should go beyond coordination between Member States to also include investigations powers, as clearly mentioned in Article 86 TFEU.

Europol

- Initially the EPPO should limit itself to crimes affecting the financial interests of the Union but with the powers to direct investigators from wherever they are drawn and leading prosecutions, with the necessary power and right of audience before the courts to do so. It should begin with crimes affecting the financial interests of the Union but conceivably could extend as experience/practice/infrastructure grows.

- Serious crimes committed by officials from European Institutions could be another area of responsibility of the EPPO. However, it should be supported by (criminal) investigators drawn from the Member States either on a case by case basis or from a pool of such investigators based at Europol. The EPPO should be able to investigate serious offences by officials from the European institutions where such offences are of a criminal rather than administrative nature. It could even include for the EPPO to decide which route the investigation should take, administrative or criminal.
- There is no need for another coordinating body at the EU level. The EPPO should do something new which brings an added value, i.e. also investigate as described above or not be developed further.

Regarding the question what roles and responsibilities they see for the other bodies, the following answers were received from the three bodies.

Eurojust

The answer to this question depends very much on the solutions adopted regarding the structure and the status of the EPPO. As a preliminary step, it is clear that Eurojust and OLAF should work more closely together, with OLAF's administrative investigations being referred to Eurojust for judicial follow-up on a more systematic basis.

OLAF

- We have to bear in mind that under the provisions of Article 86 TFEU:
 - the EPPO may be established from Eurojust. The Commission will prepare in 2012 a report to the EP and the Council on the strengthening of Eurojust. A Further initiative is included in the action plan implementing the 2009 Stockholm programme.
 - investigations, prosecutions, bringing into judgments should, where appropriate be carried out in liaison with Europol.
- As mentioned in the last Eucrim editorial referred to above, further reflection involving all stakeholders has to be undertaken. Interesting studies, consultations or reports have already been produced or are currently under way and the Commission will not launch specific initiatives as regards the bodies involved at institutional level without thorough impacts assessments.
- For the 'Judicial & Legal Advice' Unit of OLAF, EUROJUST could be seen as the highest European independent prosecutorial body, with hierarchical and supplementary competencies to the Member States (analogous to the office for general prosecution in a Member State towards the regional and district prosecution offices and police) whereas EUROPOL could, together with OLAF, carry out forensic and analytical services for the benefit of the investigators.

Europol

The possible establishment of the EPPO must take into account the current arrangements and developments at the institutional/agency level. Duplications and overlaps should be avoided. Therefore, it is essential that this is considered thoroughly before any EPPO is created.

Regarding the question if OLAF and Europol investigators should be empowered to perform direct judicial actions in the Member States under the instruction of the EPPO or if their role should be limited to supporting national investigators, the following answers were received from the three bodies.

Eurojust

A constructive answer to this question again depends on the solutions adopted regarding the structure and the status of the EPPO.

OLAF

What does matter in the end is to reach an equivalent level of protection in all the Member States. A future independent criminal investigative function, supervised by a criminal judicial prosecution body at EU level, would definitely help to achieve such equivalence and therefore have a positive impact on dissuasion.

Europol

Clarifications with regard to the mandate and scope are needed in order to properly answer this question. However, if such a body of EPPO investigators were to be established they should be housed within the Europol environment to ensure no duplication of criminal investigation support, e.g. analysis and operational support.

Furthermore, investigative competences could be allocated to Europol officials, e.g. similar to the competences awarded currently to OLAF.

6. Annex 1: Art.85, Art.86 and Art.325 Lisbon Treaty

Article 85

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

- a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- b) the coordination of investigations and prosecutions referred to in point (a);
- c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

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

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

Article 86

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

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

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

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

Article 325

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.

7. Annex 2: Key documents consulted

- The Lisbon Treaty;
- The Corpus Juris;
- The Tampere European Council reports;
- The Eurojust Decisions (2002 / 2008);
- The European Parliament Annual INI Reports;
- The Europol Council Decision;
- The OLAF Decision;
- The Green Paper on criminal law protection of the financial interests of the community and the Establishment of a European Prosecutor;
- The Follow-up report on the Green paper on the criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor;
- The Stockholm programme;
- The Action Plan implementing the Stockholm programme.

8. Annex 3: Questionnaires

Primary questions

- Explain your current position on the need for the creation of the EPPO. Has this position changed over time and which role do you see for your organization in this respect?
- Explain your current position on the level of judicial cooperation between Member States. How has it evolved since the creation of your organization and how can it be approved?
- Explain your current position on the level of coordination between EUROPOL/EUROJUST/OLAF and/or any other European organizations involved with crime investigations/prosecution.
- Can the EPPO create value added with respect to:
 - Current roles and responsibilities of your organization;
 - Future roles and responsibilities of your organization (based on expected changes);
 - Judicial cooperation between Member States;
 - Protection of the financial interests of the European Communities;
 - Fight against organized crime (which forms ? e.g. illegal drug trafficking, money laundering, organized fiscal fraud, ...);
 - Any others you would like to elaborate on.
- How should the EPPO be organized to create value added?
 - What should the roles and responsibilities be of the EPPO?
 - Should the powers of the EPPO be limited to the protection of the financial interests of the European Communities or extended to the fight against organized crime e.g. money laundering, terrorism, drug trafficking, organized financial crime & any others you would like to elaborate on?
 - Should the EPPO have investigation powers for serious crimes (e.g. corruption) committed by officials from European institutions (e.g. European Commission, European Parliament, European Court of Auditors) or not?
 - Should the EPPO function be limited to coordination and/or include investigation powers (in accordance with the Lisbon Treaty)?
- Which are the roles and responsibilities that you see for OLAF/EUROJUST/EUROPOL, please also elaborate on any other organization you believe should be involved.
- Should OLAF, Europol investigators and/or investigators from organizations be empowered to perform direct judicial actions in the Member States under the instruction of the EPPO or should the role of investigators of European organizations be limited to supporting national investigators?

Secondary questions

- Which criteria can/should be used for the acceptance of cases by the EPPO (e.g. number of Member States involved, materiality, complexity ...), if any?
- By which organizations can cases be introduced or transferred to the EPPO?

- Which principle can/should be used for the prosecution of cases by the EPPO, mandatory for all criminal offences or discretionary?
- Should the EPPO have the ability to use force (e.g. house searches, seizures, detention) or does the EPPO need to go through national investigation judges?
- Is there a need to gather all evidence “for and against” or not?
- Based on what criteria should a national court be chosen to prosecute?
- Should there be the possibility to also create a European court in time or should the EPPO continue to go through national courts?
- At which stage should cases be referred to the EPPO by national authorities?
- Which information obligations should European and national organizations have towards the EPPO? When should the authority of the EPPO handle a case prevail over the rights of the national authorities?
- Should the EPPO have the authority to launch an appeal with national courts for cases instructed by national prosecutors if the EPPO believes the financial interests of the European Communities have not been best served?
- Which investigators should the EPPO be able to instruct (DEPP, OLAF, EUROPOL, other European and/or national organizations)?
- Should there be common standards on investigation procedures for all Member States, with limited adaption to national legislation or with full adaption to national legislation
- Is there a need for more harmonization of national legislation or not (e.g. regarding investigation procedures, rights of defense, privacy laws, evidence standards and rules for mutual admissibility of evidence, ...)?
- Is there a need to implement a “comply or explain principle” for Member States regarding requests for judicial assistance or not?
- Should the deputy prosecutors be exclusively European or can/should it be combined with national prosecutor functions?
- How can we best ensure the independence from Members States?
- How can we best ensure the independence from European institutions?
- By whom should the EPPO be elected and to whom should the EPPO report?

9. Annex 4: Preliminary remarks by Eurojust

“Discussions within Eurojust currently focus on the revised Eurojust Decision to be implemented in Member States by June 2011 and on future developments under Article 85 of the Treaty on the Functioning of the European Union.

In addition, Eurojust has launched a series of reflections on Article 86 TFEU, and the establishment of a European Public Prosecutor’s Office. In December 2009, a Task Force on the Future of Eurojust began work within Eurojust to promote internal discussion about the strengthening of Eurojust and the setting up of the EPPO “from Eurojust”. The Eurojust College has discussed these issues on several occasions. The Information Session with external experts in April 2010, the Brainstorming Session on the Future of Eurojust in July 2010 and the Strategic Seminar held in Bruges on 20-22 September 2010 were specifically devoted to these matters.

In its examination of the possible establishment of the EPPO, Eurojust has worked in close co-operation with the 27 Member States, with relevant EU institutions and agencies, in particular Europol and OLAF, and with academia. Eurojust is committed to make effective and informed contributions in this process, based on its practical experience as a judicial unit. The cases Eurojust has handled thus far show a positive trend in combating offences against the financial interests of the EU (further details are provided in the answers to the questions below). However, it is premature to provide definitive answers derived from Eurojust’s core business. Models need further development before casework material can be usefully examined, and the number of relevant cases does not yet allow for definitive conclusions to be drawn. Both within the framework of its Task Force and its casework, Eurojust is committed to expanding its contribution to the debate, and especially to build on co-operation with Europol and OLAF.

With regard to the creation of the EPPO, the discussions have mainly focused on the possible scenarios for the setting up of the EPPO *from Eurojust*, the timing if new regulations are to be adopted as mentioned in Article 86 TFEU, and the competence, status and guarantees of the EPPO. Several difficult issues requiring further discussion have been identified and many ideas, views and concerns have been expressed by College members (see *infra*). Discussions on the matter with all involved parties will continue in the coming months. In brief, as the judicial co-operation unit of the European Union, Eurojust can only provide responses about the EPPO based on evidence and lessons from its operational work. As indicated, Eurojust’s casework in protecting the financial interests of the EU is developing but does not yet provide a sufficient basis for definitive conclusions. It follows that the responses to the questions below cannot be exhaustive and comprehensive. They rather constitute some *pistes de réflexion*, on the basis of Eurojust’s practical experience. “

Regarding the secondary questions we received the following message from Eurojust: “This note began by stating that Eurojust, as the judicial co-operation unit of the European Union, could provide responses based on evidence and lessons learned from operational work. The success of its operational casework shows Eurojust’s added value in fighting fraud against the EU. However, models of judicial co-operation need further development before Eurojust material can be usefully examined for appropriate guidance, and the expansion of the casework base needs to continue

before general conclusions can be safely drawn. Accordingly, Eurojust considers that providing specific responses to the secondary questions raised to be premature”.

10. Annex 5: Eurojust case illustrations

Case examples might help illustrate the role played by Eurojust in the protection of the financial interests of the EU.

MTIC fraud case

This complex case involved 18 EU MS and 3 non-EU MS for revenue fraud across the EU estimated at €7.5 billion. The fraud operated via a chain of transactions involving several countries, with UK and Dubai playing important roles as missing trader/buffer/exporter and money launderer, respectively. At stake were jurisdictional questions within the EU, including primacy of prosecution and future asset recovery from a non-EU country (in particular, how to link evidence of the fraud to money laundering activities).

One Member State (the Netherlands) appeared to be very advanced in the investigation process, having already closed a suspect bank and mounted a prosecution. Therefore, there was a need to co-operate and ensure that the actions of any other involved Member States did not adversely affect the ongoing prosecution in the Netherlands. Another requirement was to ensure that the freezing of assets in the repository Dubai bank would be supported by Mutual Legal Assistance (MLA) requests from the EU Member States affected by the fraud.

Given the complexity of the case and the involvement of two-thirds of the EU Member States, the College of Eurojust decided to use its special (more incisive) powers under Article 7(a)(i) and (ii) to ensure the follow-up of a decision on the jurisdictional issues and co-ordination of the prosecutions. This decision was also necessitated by the involvement of third States with which Eurojust had no co-operation agreements. Finally, the College's powers under Article 7(c) were used to ensure the most effective co-operation in sharing information and executing MLA requests fully and quickly.

The complexity of this type of investigation led to a side effect, i.e. the sponsoring of the creation of a dedicated Europol AWF, whose investigative added value is now available to complement the work of Eurojust, investigators and prosecutors in the Member States (Article 7(d)).

The possibility of forming a JIT was also mentioned in view of the nature of the case (due to the number of countries involved and the complexities in negotiating and drafting a JIT, the College was deemed to be best placed to deal with this question (Article 7(a)(iv)).

In addition to the decision to handle this case as a College case to allow for the use of Article 7 powers, Eurojust's role was to identify links between cases in the different Member States. These links were successfully identified during a co-ordination meeting, which provided the platform for informed and co-ordinated operational decisions.

Euro counterfeiting case

This case involved the disruption of a major criminal organization which had been active in counterfeiting and distributing Euros with a face value of more than €16 million throughout the European Union.

Operational analysis identified links to distribution in Belgium, France, Germany, Greece, the Netherlands and Spain, but affecting the entire European Union.

Building on this analysis, Eurojust assisted with a Joint Investigation Team which was composed of Bulgarian and Spanish authorities, Europol and Eurojust. Eurojust further assisted with the co-ordination of the operation which involved 20 house searches, the seizure of more than 82, 000 counterfeit euro notes of high denominations (€100, €200 and €500), and the devices for the production of the counterfeit notes.

The use of the JIT tool with Eurojust and Europol participation illustrated how prosecutors and investigators from different Member States and different backgrounds could work together and exchange information to develop police and judicial cooperation in Europe. The added value from Eurojust and Europol generated excellent operational results

Carousel fraud case

The case was opened in July 2007 based upon a referral from the European Judicial Network. A Spanish citizen was using the Portuguese financial system to commit serious VAT carousel fraud involving mobile telephone transactions with several companies in six other EU Member States. In particular, there was a need to co-ordinate several letters rogatory (LoRs) addressed to Belgium, Denmark, Hungary, Italy, Luxembourg and Spain.

As a first action, Eurojust organised a Level II meeting (only Eurojust's National Members were involved) to identify judicial co-operation issues in the case, to facilitate execution of LoRs and explain the need for urgent co-ordination. The National Members then provided assistance in identifying and co-ordinating the appropriate actors in the countries where simultaneous execution was required. Legal advice ensured that LoRs were drafted to ensure ease of execution and avoid difficulties due to the different legal systems, different languages, and even different time zones involved. As a consequence, serious delay was avoided and results were obtained speedily in the countries involved.

11. Annex 6: Europol case illustrations

The following case examples illustrate the role played by Europol in the protection of the financial interests of the EU.

Tobacco fraud:

Cigarettes are the world's most widely smuggled legal consumer products. The illicit tobacco trade cost governments worldwide huge amounts in lost revenue. Europol's Analysis Work File (AWF) Smoke focuses on specific phenomenon including:

- Illegal cigarette factories (during the past two years alone about 20 illegal factories have been dismantled in the EU Member States).
- Chinese organised crime groups (aims to focus on Chinese OCGs manufacturing counterfeit cigarettes and their involvement in the transportation and distribution of tobacco).
- Cheap whites (Cheap whites is the tobacco industry term for cigarettes produced entirely independently of the multinational tobacco manufacturers that, crucially, have no true, or a very limited, legitimate market. In fact cheap whites are brands manufactured specifically for smuggling).
- Previous subprojects include water pipe tobacco and asset tracing related to tobacco smugglers.

In Operation Beehive, AWF Smoke identified the vessel which was transporting a container from China loaded with smuggled cigarettes into the EU, thus supplying vital details such as the place and time of arrival to the operation. AWF SMOKE then assisted the lead MS HU to organise a complicated controlled delivery involving 7 other countries to further the intelligence and investigation. Although eventually the controlled delivery did not take place, the investigation resulted in the seizure of 8.5 million counterfeit Marlboro cigarettes, thus the minimum tax damage was estimated at €592,000. This was the first of 16 containers the OCG had planned to order and smuggle. Without intervention the estimated tax damage would have been €462,000,000. Europol's involvement in the operation started in October 2009 and ended in January 2010.

Operation Dukhan, initiated by Germany, was an operational sub-project of AWF SMOKE related to an OC group of Arabic origin, which was involved in the European wide wholesale business with Arabic food products. They used their legal structures and logistics to smuggle and distribute predominantly cigarettes and water pipe tobacco within closed ethnic communities. AWF Smoke has provided support by analysing intelligence and facilitating the international information exchange. During the crack down 14 suspects were arrested in different European countries and approx. 74 tons of water pipe tobacco, 40 million cigarettes moreover €380.000 in cash and a significant

amount of jewellery, a high-value car, two handguns and ammunition were seized. At a later stage the first ever illegal water pipe tobacco factory in the EU could be dismantled in Poland.

Operation Forecourt (UK) Intelligence indicated that an OCG was using drivers working for a legitimate transport company to smuggle hand rolling tobacco (HRT) products into the UK. The drivers were using their company vehicles and frequent trips to the UK to facilitate the importations. AWF Smoke identified additional intelligence relevant to the case and coordinated the collation and dissemination of the relevant information. This led to a better understanding of the people and vehicles involved, and of the smuggling method being used. The legitimate tobacco supplier and his business were also identified. Telephone analysis showed a driver had contact with the supplier before continuing his journey to the UK. The targeting of drivers and vehicles from the intelligence gathered by AWF Smoke led to 2 separate tobacco seizures. On 1 February 2010 a driver was arrested attempting to enter the UK at Dover with 30 kilos of HRT. On 19 March 2010 at Dover, UK authorities arrested another driver found with 1,940 kilos of HRT in a custom made concealment. This intervention prevented a duty and tax damage of about €277,000.

Intellectual Property Rights Infringements:

Intellectual Property Rights Crime (IPR Crime) is by nature a black market phenomenon and it causes enormous losses to tax revenue for the Member States. The selling of counterfeited or pirated products generates a huge circuit of “black money” on which no taxes or VAT is paid. Furthermore it flourishes on black labour and imposes a genuine threat on public health and safety. It siphons profit out of legitimate business and adversely affects investment in research and development and thus industrial innovation. As such it causes irreparable damage to the economic fabric of the EU market.

Moreover the huge benefits, earned by the criminal organisations, are very often used to be invested in legal projects, for example real estate projects. This phenomenon implies that criminal organisations become more and more powerful and financially independent of their illegal practices. In many countries IPR crimes are not considered as a priority, the police capacity spent on IPR crimes is very low and finally the punishment if you get caught for IPR crimes is lower than drug related crimes.

Recent cases dealt within Europol’s Analysis Work File COPY taught us that trading fake goods generates huge benefits:

- In a joint operation in June 2010, in relation to fake power tools lead by Eurojust and Europol and spread over 20 member states and three other countries, 800 tons were seized representing a value of approximately €12 million. On one day assets for a value of €11 million were seized (including €4 million from bank accounts). In the same case, investigations done in Belgium, pointed out that for more than €3 million were transferred to foreign bank accounts.

- In another recent operation in September 2010 in relation to online piracy and with implications in several member states, the total illegal turnover exceeded the €30 million.

MTIC fraud:

Europol's Analysis Work File MTIC is currently supporting numerous EU Member States in their joint efforts to identify and charge the criminal networks behind the multi-billion VAT-fraud in carbon credits experienced over the past two years. At the moment Europol is involved in several ongoing cases. As most of the networks have attacked several Member States either simultaneously or successively the need for a coordinated approach by the affected MS and a centralised analysis has led to a special project at Europol. As one of the results a Joint Investigation Team will be created supported both by Eurojust and Europol early next year.

A JIT covering MTIC fraud using a different commodity (precious metals) has been signed just recently. Another example has been the Europol and Eurojust support to Member States' investigations in customs and VAT-fraud caused by fraudulent imports of commodities from East Asia. The investigations run in Austria, Hungary and France had identified a Chinese criminal network which had imported goods mainly originating from China to Europe using falsified customs declarations on the origin of the goods, their type and actual value. This had led to a loss in customs duties and VAT for the EU of at least €75 million. Several coordination meetings had been arranged at Europol and Eurojust to coordinate investigative measures and execution of MLAs.

Payment card fraud:

Payment card fraud has become a global problem. Criminals with access to compromised payment card data distributed via the internet, affect not only EU Member States but also non-EU countries. In such cases, cross-border cooperation and coordination of international investigations is crucial to effectively tackling this problem.

- French and Romanian law enforcement authorities supported by Europol successfully disrupted the activities of an international organised crime group active in France, Italy, Romania and Spain at the end of October 2010. The criminals were responsible for an international payment card scam, producing counterfeit payment cards and making illegal purchases via the internet.

Following the execution of arrest warrants, Europol supported French and Romanian law enforcement authorities to carry out 17 house searches in both countries, resulting in the arrest of 11 suspects in France and 5 in Romania. During the operation, police also seized counterfeit payment cards, equipment used to illegally copy card data and €15,000 in cash. The criminals had been buying and exchanging compromised credit card data via the internet and then

using the counterfeit payment cards worldwide. The estimated losses caused by their purchases exceeded €400,000.

Europol was involved in this investigation for more than a year and, during the raids carried out in Romania, the Europol mobile office was deployed to coordinate the international operation and provide access to databases containing criminal intelligence. Investigators from the Member States involved made use of Europol's analytical, tactical and technical support capabilities.

Currency counterfeiting:

Europol, the European Union's Central Office for Combating Euro Counterfeiting, facilitates the exchange of information, and provides expertise, criminal and forensic analysis, training, financial and technical support to law enforcement agencies inside and outside the European Union.

- On 1 October 2010, the Bulgarian police supported by Europol and the US Secret Service, dismantled a counterfeit currency print shop in Bulgaria and arrested three suspects. In total 130,000 counterfeit euro notes, and 37,500 counterfeit US dollars were seized. Using special mobile equipment, Europol experts could prove on the spot that this print shop was responsible for the production of high quality counterfeit 100 euro banknotes.

The arrests were the culmination of an extensive operation that had been ongoing for a number of months and has involved information-sharing across a number of international law enforcement agencies including Europol. In addition, Europol coordinated and supported the whole investigation, and organised several meetings to share intelligence and to coordinate joint activities.

- In April 2010, 13 people suspected of distributing counterfeit euro banknotes in the European Union were arrested in Poland, with the support of Europol. The raid on several addresses in the area of Lublin, involved around 120 Polish police officers. The operation was part of a 3-year investigation which focused on tracking down the criminals behind one of the largest distribution networks of counterfeit 20, 50 and 100 euro banknotes. In framework of the operation, two other police operations had previously been carried out – one in April 2009 and the other in September 2009.

In total more than 80 members of the criminal group, with branches in several countries, were arrested. The investigation and raid was conducted by an inter-regional team composed of the Criminal Bureau of Investigation and the Prosecution Office from Lublin in Poland, with the support of the Polish National Central Office for combating currency counterfeiting. In addition, at the request of the Polish authorities, two Europol officials provided technical and analytical support on the spot and employed a mobile office allowing direct access to Europol databases. Europol had coordinated and supported the whole

investigation since 2007, and several meetings had been organised to share intelligence amongst Member States and to coordinate joint activities.

- End of January 2010 an illegal print shop responsible for the production of counterfeit euro bank notes was dismantled in the capital of Colombia, Bogota. Counterfeit 50 euro notes to the value of more than 1,200,000 Euros were seized, along with 312,000,000 counterfeit Colombian pesos, an offset machine, printing plates, a computer and other materials to be used for the production of counterfeit currency. The banknotes were intended for distribution in Europe. The police operation was carried out by the Colombian National Police and jointly supported by the Spanish Brigada de Investigacion del Banco de Espana (BIBE) and Europol. The investigation started in 2009 and was concluded with the arrest of a person responsible for the production and logistical distribution of the forged notes. The smuggling of counterfeit euro banknotes by airmail was also disrupted. A Europol specialist provided technical support and expertise on the spot.

12. Annex 7: OLAF's case illustrations

The following case examples listed in the annual report 2010 illustrate the role played by OLAF in the protection of the financial interests of the EU.

- **Misuse of Parliamentary expenses by an ex-MEP.** A Member of the European Parliament (MEP) defrauded the EU budget by falsely claiming expenses in excess of €40000 a year. Following press coverage of the allegations, the MEP repaid the expenses falsely claimed. The OLAF investigation concluded, however, that there was sufficient evidence that the MEP was aware that his acts were illegal. OLAF therefore referred the case to the relevant national authorities. At his trial the now ex-MEP, who had not contested his seat in the 2009 European elections, pleaded guilty to false accounting and was sentenced to two years' imprisonment.
- **Embezzlement by the Director of an NGO.** The Director of a non-governmental organisation funded by the EU to provide training services has been charged with forgery and embezzlement. Acting in close cooperation with the national police forces, OLAF established that a substantial proportion of the activities declared had not taken place at all. Those that had were found to have failed to comply with the terms of the grant agreement. The activity reports also contained false information and forged signatures. Sufficient evidence was gathered to demonstrate a criminal offence and judicial proceedings before the national authorities are in progress. In the course of the investigation, the Commission rejected the final payment claimed by the NGO, terminated the grant agreement and issued an order for recovery of the full advance payment.
- **Widespread fraud and corruption in an international programme.** In 2005, the Global Fund suspended its operations in Uganda after allegations of widespread corruption and fraud and started to work closely with the new independent commission set up by the Ugandan government to investigate the allegations. It soon became clear, however, that neither the Global Fund nor the Ugandan government had the expertise or resources to investigate such a complex set of cases fully and so they asked OLAF for assistance, as the EU is one of the biggest contributors to the Global Fund. OLAF focused on enabling local law enforcement bodies to manage, investigate and prosecute such a large number of complex economic crimes effectively. Besides focusing on the cases under investigation, this assistance also served to build up the capacity of the Ugandan authorities to tackle such crimes in the future. In the first half of 2009, the first-ever convictions were secured before the newly created Anti-Corruption Division of the Ugandan High Court, resulting in prison sentences ranging from five to ten years in addition to criminal restitution. A further 45 cases are at different stages of investigation or currently before the Court.

- **Factory fraud.** The European Regional Development Fund (ERDF) provided aid for a factory which was supposed to provide more than a hundred jobs in a socially deprived area. OLAF found that factory equipment, bought at inflated prices in Austria and sourced from Luxembourg, was delivered by means of a complex chain of financial transactions designed to create the impression that the promoters of the factory had put up investment financing when, in fact, they had invested nothing. Only a few of the jobs promised ever materialised and the Austrian trader concerned promptly went into liquidation. Also, a large part of the financing has disappeared into an off-shore account. OLAF recommended that the €2 million of ERDF funding should be recovered and judicial proceedings have started in Italy and Austria. This case is a good example of how OLAF can move quickly and effectively to defend the EU budget by conducting a series of coordinated checks on operators in different Member States involved in a transnational organised fraud.
- **OLAF coordinates investigation into possible systemic fraud in the SAPARD programme** SAPARD (the Special Accession Programme for Agriculture and Rural Development) was designed to prepare the Central and Eastern European applicant countries to participate in the common agricultural policy and the single market. OLAF is currently investigating allegations of widespread fraud in the funding of meatprocessing plants in Bulgaria. In another ongoing investigation, OLAF requested the customs authorities in a number of Member States to verify the authenticity of invoices for purchases made. The German customs authorities informed OLAF that they have evidence of systematic overpricing of purchases funded from SAPARD for plants in Bulgaria. OLAF is working closely with the authorities in five Member States and has conducted on the-spot checks in another seven to determine the full extent of this fraud.
- **Kaliningrad Agricultural Trade.** Export refunds enable the EU to sell surplus agricultural products at prices which are competitive on the world market. After examining shipping records, the customs authorities spotted regular large shipments of sugar from the EU to Croatia, all via the Russian port of Kaliningrad. The exporters declared that Russia was the final destination of the sugar, which was therefore eligible for export refunds totaling several million Euros. At the request of OLAF, the Russian authorities carried out investigations into the company in Kaliningrad and were able to confirm that the sugar did not remain in Russia, but was re-exported to Croatia and was therefore not eligible for export refunds. OLAF carried out a control visit in cooperation with the Croatian customs authorities and found that over 3400 tonnes of sugar had been imported into Croatia under this scheme. Based on OLAF's findings, the Belgian paying agency proceeded to recover unduly paid export refunds totalling €1.2 million. A further €1.5 million was blocked by the paying agency and not released.
- **Chinese textiles.** In 2004 the EU lifted quotas on textile imports from China. By mid-2005, however, the EU market was flooded with cheap Chinese imports and quotas were re-introduced. Exporters began circumventing them by falsely claiming that their textiles originated from Bangladesh. OLAF focused on checking with the Bangladesh authorities the authenticity of hundreds of thousands of certificates

provided to customs authorities in the EU. It soon became clear that not only were most of the certificates not genuine, but also the scale of the problem was much larger than thought, involving hundreds of importers across most EU Member States. Following OLAF's investigations, the customs authorities in almost every EU Member State were able to start proceedings to recover around €30 million in customs duties.

- **Miami case.** In 2003, the Irish Customs and Revenue Service requested OLAF's support following the seizure of 30 million cigarettes about to enter Ireland from the port of Miami. OLAF's coordination investigation soon uncovered fraud on a scale far greater than the six containers originally identified in Ireland. Over the next six years OLAF coordinated a complex investigation stretching across nine EU Member States and several countries in Central and South America. OLAF's role was essential for ensuring a coordinated approach by the various customs authorities across the EU, in particular by providing a central contact point for cooperation with the US authorities. OLAF's investigation is still under way, but has already led to the seizure of over 43 million cigarettes and 11 arrests. The prime suspect, responsible for coordinating the operation in Miami, was sentenced to two years in jail and ordered to pay €1.2 million in compensation to the EU.

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