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COMMUNICATION FROM THE COMMISSION

On the Establishment of Eurojust

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1. BACKGROUND

The reinforcement of judicial co-operation in criminal matters is a crucial part of the area of freedom, security and justice. To take on the challenge of cross-border crime in an area of free movement, the traditional ways and means of mutual judicial assistance are no longer sufficient. In order to simplify and intensify the still lengthy and onerous procedures, the European Union has adopted some initial steps. For example, a framework for an exchange of liaison magistrates, a list of best practices and a European Judicial Network were established. While continuing with this work, the necessary co-ordination of national prosecuting authorities must be ensured through a certain central structure.

To achieve this central co-ordination, the European Council of Tampere has agreed that, by the end of 2001, a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. To reinforce the fight against serious organised crime, this unit shall have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases in particular on the basis of analyses conducted by Europol. Furthermore, it shall co-operate closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory.

Several Member States made use of their right to put forward an initiative according to Article 34 (2) of the Treaty on European Union concerning this issue. Germany has proposed a draft Council framework decision. The former, present and future Presidencies of the Council (Portugal, France, Sweden and Belgium) proposed to take a two-step approach with two subsequent Council decisions. The Commission thinks that these initiatives could be brought together. At the present stage, the Commission prefers to take a position through a Communication on the basis of the existing initiatives, rather than adding a formal proposal. It should, however, not be excluded that the Commission might launch such a proposal later on, if necessary.

2. SPHERE OF COMPETENCE

The Commission supports the general line of both initiatives, according to which Eurojust would have a rather broad sphere of competence, going beyond “serious organised crime”, as formulated in the conclusions of Tampere. This is reasonable and also compatible with the principle of subsidiarity, because the need for co-ordination of prosecution under the regime of 15 national legal systems is a general one and not confined to specific forms of crime.

The Commission supports an approach that would allow Eurojust to deal with all “major criminal offences” in respect of which judicial legal assistance may be required¹. Given the

¹ See Article 2 of the initiative of Germany, OJ C 206 of 19.7.2000. A more clear-cut definition of the term “major” (or serious) offences would, however, be desirable in order to avoid unfruitful debates on the right of Eurojust to deal with certain cases.

horizontal mandate of Tampere, it seems neither necessary nor appropriate to list expressly, in the act of foundation, all forms of crime Eurojust should deal with. Otherwise, the inclusion of any additional offence into the sphere of competence would require a new Council decision. However, if Member States consider it necessary to have such a list, this should comprise at least all forms of crime dealt with by Europol currently and all offences set out in the Annex to the Europol Convention (e.g. computer crime, counterfeiting and product piracy, illegal trading and harm to the environment, racism and xenophobia etc.).

Nevertheless, Eurojust should put particular emphasis on cross-border crime, where there are factual indications that an organised criminal structure is involved, as defined in Article 2 (1) of the Europol Convention. Notwithstanding the need for a wider mandate, the capacity and resources of Eurojust will be needed most in the area of organised crime, as pointed out by the European Council. Eurojust should identify, at least in the initial stages, areas where particular emphasis is needed. One of those areas should be the combat against counterfeiting of the Euro.

Regarding offences affecting the financial interests of the Communities, the Commission announced in its Communication of 28 June 2000 on its global anti-fraud strategy that a service platform would be put in place at the level of OLAF. This service platform shall give support and assistance to the judicial authorities of the Member States. This will include the setting up at OLAF of a judicial support unit composed of experts with experience as magistrates or prosecutors. The corresponding responsibilities of the Commission have already been mentioned in article 7 of the second protocol to the Convention on the protection of the European Communities' financial interests².

Against this background, and taking into account the complementarity of their respective roles, close co-operation between OLAF and Eurojust will be required in this field, thus ensuring that both can contribute their added value.

However, the Commission would also like to recall its opinion to the Intergovernmental Conference to create a *European Public Prosecutor* in the specific area of the protection of the European Community's financial interests³. This would definitely represent a decisive qualitative step in combating fraud.

3. TASKS AND POWERS

3.1. The Consensus Reached so far

Up to now, the notions and concepts on what tasks and powers Eurojust should have varied rather widely. It seems that the common denominator of Member States' opinions comprises as a minimum activities such as providing information on national law, building up a documentary basis, arranging contacts among investigating national bodies, transfer of information on the stage of proceedings or on judgments, exchange of experience and, to a certain degree, legal advice. However, to a large extent, the European Judicial Network⁴ could also carry out these activities.

² OJ C 221/11 of 19.7.1997. See also the relevant explanatory report, OJ C 91 of 31.3.1999.

³ Additional Commission contribution to the Intergovernmental Conference on institutional reforms: The criminal protection of the Community's financial interests: a European Prosecutor, 29 September 2000, COM (2000) 608 final.

⁴ Established by Joint Action of 29 June 1998, OJ L 191/4.

It is clear from the conclusions of the European Council of Tampere that Eurojust should mark a further qualitative step in closer judicial co-operation and go beyond the current and potential work of the European Judicial Network. Not only for this reason, we should strive to create an institution with tangible added value to the existing instruments and institutions.

Establishing a central round-table of liaison officers or magistrates will probably have a certain added value compared to the European Judicial Network in its current state. It will be easier to communicate within a team working in a joint office than among decentralised contact points in Member States, even in the light of improved technical means of communication. A central office can also increase cost-efficiency, facilitate the building up of a collation of relevant documents and guarantee that specialists with expertise in judicial co-operation are available at any time. These are considerable advantages. Nevertheless, their added value still appears to be rather limited and might not be sufficient to combat international organised crime effectively.

3.2. Tasks and Powers of Eurojust as a Collective Body

Eurojust could provide advice on practical implementation of applicable EU instruments, for example, the application of the Convention on Mutual Legal Assistance of May 29, 2000. Insofar it has to be underlined that Eurojust shall in no way anticipate an interpretation of such a Convention through Courts, in particular through the Court of Justice of the European Communities. Eurojust could also provide information on international Conventions⁵.

In the Commission's opinion, Eurojust should however be more than a documentation and information centre providing advice on an abstract level. This unit should be involved in individual criminal investigations. The new unit should be able to contribute actively to proper co-ordination of individual cases, in particular when urgent cross-border action is needed and/or when such action must be backed up legally, for example with a view to the probative value of the investigative results for formal accusation and judicial proceedings. This does not necessarily mean that Eurojust itself, as a collegial body, should have the power to initiate and carry out investigations or to create joint investigation teams.

Significant added value can be achieved if Eurojust is involved in individual proceedings, not only contributing with its expertise but, if need be, tracking down and revealing a possible hidden correlation between cases and investigations, which often cannot be easily identified at the national level. To this end and to be able to contribute effectively to co-ordination of national activities, Eurojust should be in a position to mediate actively among national prosecuting authorities, either on the request of a national authority or on its own initiative⁶.

Eurojust should become a pool of expertise with direct personal contacts to the contact points of the European Judicial Network, and if need be to competent national prosecuting authorities. Eurojust officials should also be able to communicate ideas, pieces of advice and clues on their own initiative. Eurojust as a unit should also be empowered to address common opinions and formal *recommendations* to national authorities. Such recommendations could cover, in particular, the setting up of joint investigation teams, questions of jurisdiction,

⁵ For instance, Eurojust could provide information on national legislation implementing Conventions, protocols, reservations and relevant case law, perhaps by establishing a database.

⁶ See the Italian position paper, Council document n° 6412/00 CATS 15: "A preliminary to the exercise of the co-ordination function is the collection of signs of relationships or connections between the various national investigations." In this paper, it is also explained that national investigating authorities will be required to communicate information and data on offences "regularly and promptly" to Eurojust.

exchange of information among national authorities including access to records, the contents of letters rogatory or their treatment by the requested Member State, as well as the taking of evidence or the protection of witnesses. Any national authority not following a recommendation by Eurojust should be obliged to provide a reasoned justification for this within a reasonable time. Furthermore, Member States should ensure that Eurojust as a unit can denounce a case or lay an information to any national prosecuting authority within their territory and that a reasoned reply will be provided to Eurojust, if a prosecuting authority does not initiate criminal investigations in such case.

Eurojust will only be able to contribute effectively to co-ordination of prosecution activities, if it is sufficiently informed. It must therefore be able to issue binding *information requests* to national prosecution authorities, possibly through the European Judicial Network. Eurojust should have access to national registers of convictions and proceedings. Member States should guarantee this access on request as long as there is no register at European level or national registers are not made immediately accessible, and should provide that national prosecuting authorities inform Eurojust, respectively their Eurojust delegate, on the state of important individual cross-border proceedings, even without being requested explicitly. Furthermore, Eurojust should, where necessary, have access to records (dossiers) of criminal cases, which are related to two or more Member States.

Those principles should also be applied in relation to Europol⁷. Eurojust could provide legal advice to this body and also pass, if need be, common opinions and formal recommendations. Furthermore, the expertise of Eurojust could be used to advise the Union institutions on the practical usefulness of possible further initiatives in judicial co-operation if so requested. To avoid possible conflicts of interest and to assure that its manpower and resources are focussed on co-ordinating tasks, Eurojust should, however, remain a judicial unit, not being directly involved in administrative, political or legislative work of the Parliament, the Council and the Commission.

Finally, Eurojust could also develop relations with prosecuting authorities in candidate countries for accession to the European Union. It would be very useful if Eurojust could, in conjunction with the European Judicial Network and its contact points, initiate an exchange of views, of information on important investigations and proceedings and of legal documents (e.g. specimen of letters rogatory, regulations, instructions etc.) with those countries and perhaps with other third countries and relevant international organisations. It is conceivable that such an information exchange could, to a certain degree, be established through common meetings, permanent communication channels or an exchange of experts.

3.3. Individual Tasks and Powers of National Delegates

The existing initiatives provide that Eurojust should be composed of national members, delegates or liaison officers, being subject to the national law of their Member State of origin. Member States should also pay their salaries and exercise supervisory power on their individual delegates. An essential and considerable advantage of this concept is that national officials or magistrates could continue to exercise their power under national criminal law. This would be completely in line with the conclusions of Tampere, according to which Eurojust should be composed of magistrates or officials delegated by Member States.

⁷ See infra 4.6.

In their position paper on Eurojust⁸, the former, present and future Presidencies of the Council suggested that Member States could confer such individual powers to their national Eurojust delegates under national law. Each Member State would be free to decide whether, and to what extent, it confers individual powers to its delegate regarding its own territory. For example, Eurojust delegates would be predestined to act as a “team-leader” of a joint investigation team⁹. They could also be entitled to issue a letter rogatory or, where this is not possible under national law, to provide additional information in support of a letter rogatory in order to accelerate the procedure. Moreover, like other national prosecutors or magistrates, national Eurojust delegates could exercise the power, within their national territory, to take evidence or other steps within preliminary proceedings. This could be particularly useful in urgent, unpostponable matters.

Those individual powers under national law should be distinguished clearly from the responsibilities of Eurojust as a collective body. The Commission supports this approach, which would render Eurojust strong and effective while Member States would not have to change the particularities of their national criminal law and their allocation of responsibilities and tasks. It is essential however that Member States make full use of this possibility in order to derive maximum value from Eurojust. It is also desirable that Member States agree at least on a minimum common denominator of equivalent individual powers of their national delegates with a view to their possible operational conjunction. In case that urgent action was needed, for example, for a freezing of assets, it would be very useful if all Eurojust delegates would at least be entitled by their Member State to order the measure or to file an application to the responsible national judge, in order to cover all relevant national territories. Moreover, if the powers of the individual national delegates were to diverge significantly, it might in some cases adversely affect or artificially influence the way the co-ordination is operated.

4. STRUCTURE AND STATUS

4.1. Status of Eurojust as a Union Body

The organisational and legal structure of Eurojust must be designed in accordance with its responsibilities, tasks and powers. On one hand, the structure and decision-making process should be as clear-cut and simple as possible, as Eurojust needs to provide rapid and effective support to prosecuting authorities. On the other hand, it cannot be denied that there is a need for a certain administrative structure.

According to the “common denominator” reached in discussions so far, Eurojust should at least provide legal advice and issue opinions with regard to co-ordination tasks. Even if legal advice concerning the national law of one single Member State might be provided by a national delegate in its own national responsibility, for questions regarding the law of more than one Member State and/or international law the collegial principle has to be applied. For opinions and statements based on the collegial principle, a common representative and an administrative structure will be needed in order to establish effective and clear communication channels to the “outside world”.

In order to guarantee a certain degree of independence and autonomy, and to have clear rules on representation, relations with other bodies and liability, it is preferable to create a body at the level of the Union. It seems appropriate to confer legal personality to this body, as is

⁸ Council document n° 7384/00 CATS 21 EUROJUST 1.

⁹ See Article 13 of the Convention on Mutual Assistance in Criminal Matters of May 29, 2000, OJ C 197/1.

already the case for Europol and many Community agencies. Alternative solutions, like a simple round-table, or a body of the Council or the Commission, might neither meet the practical requirements, nor be able to sufficiently guarantee a minimum degree of independence of Eurojust, as well as legal certainty concerning acts of Eurojust directed to external addressees. For the same reasons Eurojust should have a certain financial scope of action, i.e. it should have a budget, based on the principles laid down in Article 41 (3) TEU¹⁰. It will be necessary to examine the impact of the setting up of Eurojust on the Community budget, according to the tasks finally attributed to the unit.

The appropriate legal basis for creating such a legal person would be a Council decision according to article 34(2) c of the Treaty on European Union. It should, however, be kept in mind that such a decision would not entail direct effect. Therefore, Member States might have to take certain steps to adapt their national law to implement the provisions of the decision.

4.2. The National Delegates and the Steering Committee

As proposed by the existing initiatives, each Member State should delegate one magistrate, prosecutor or officer to Eurojust and define its individual powers under national criminal law (national delegates or members of Eurojust). Given the fact that several Member States have a rather large number of contact points within the European Judicial Network, and with a view to the link to be established with those contact points (see below 4.5.), it seems justified to limit the number of delegates. The Commission is aware of the fact that judicial tasks are decentralised in several Member States, in particular in those with a federal constitution. Nevertheless, it seems necessary to streamline activities on the Union level as much as possible.

The national delegates¹¹ of all Member States must be able to be reached during all working days, i.e. in case of absence of a delegate, it must be guaranteed that a deputy replaces him. The national delegates should be located permanently at the central office of Eurojust, have access to its databases and infrastructure, and be bound by the internal rules of procedure of Eurojust. They should also be able to exercise powers under the national law of the delegating Member State and could insofar be subject to this national law, which could provide supervision by a national authority or court. As it is essential that they can concentrate on their work on the judicial level, they should be relieved as much as possible from administrative tasks¹².

As concerns information requests by national authorities or contact points, those could basically be dealt with on two levels. First, as concerns advice on national law, the national delegates should be authorised to provide advice on national criminal law directly to the delegates of other Member States, who could transfer this information to their national prosecuting authorities. Information requests on the national law of a certain Member State can be dealt with on a “bilateral” basis and it would usually neither be necessary to involve

¹⁰ See also Article 21 of the initiative of Portugal, France, Sweden and Belgium, OJ C 243 of 24.8.2000.

¹¹ To a certain degree, their status would, on one hand be comparable to the liaison officers according to Article 5 of the Europol Convention (OJ C 316/5 of 27.11.1995), on the other hand, they would also fulfil tasks comparable to those of the members of the Europol management board (Article 28 of the Europol Convention).

¹² See infra 4.3.

the totality of the delegates¹³. Even in cases where more than two Member States are involved, their delegates might decide to exchange information on national law without seeking a vote of all delegates or organising a formal meeting. Thus it would be guaranteed that information requests could be answered as quickly as possible. Second, for advice on international law and third pillar instruments, it seems necessary to involve all delegates and to bring about a collective decision.

A collective decision would also be required for any co-ordination activity of cross-border prosecution, at least in cases where a larger number of Member States is involved or where it cannot be said from the beginning, which Member States will have to be involved¹⁴. Any formal recommendation (e.g. to initiate an investigation) should also be based on the collegial principle. Therefore, insofar as the collegial principle has to be applied, the delegates should form a *Steering Committee* (or Strategy Board) as the central organ or Eurojust. This Committee should include a delegate of the Commission as a full member, represented, if need be by a deputy, in accordance with Article 36(2) TEU¹⁵. The Commission delegate will be able to offer particularly legal and technical advice. The Commission, on the basis of its technical, statistical, legal or operational experience and know-how, and in particular its Anti-fraud Office (OLAF) within its sphere of competence¹⁶, could give valuable input to Eurojust in the area of economic crime, as criminal structures do not distinguish between financial interests of the Community and other interests.

4.3. The Executive Director, Deputy Directors and Staff

Eurojust will need certain infrastructure for documentation, data processing and translation. A management structure will have to be established to implement internal rules and to decide on questions of administration, resources, budget and staff-policy. All administrative tasks, such as the setting up of a secretariat preparing meetings and decisions of the Steering Committee, the supervision of staff and the administration of financial and other resources, i.e. the implementation of the budget¹⁷ should be carried out by a managing or *executive director*. It might be useful to have two deputies for the executive director.

It seems inappropriate to confer those administrative tasks to one of the national delegates. This is also true for the legal representation of Eurojust and for the editing and formal issuing of all collective Eurojust statements (recommendation, legal advice or expert opinion). Those tasks should also fall to the executive director. Collective acts of Eurojust should clearly be distinguished from any individual act of a national delegate in the execution of his duties and powers according to national law. It must be clear in each case, whether a statement is given on behalf of Eurojust as a collective body or on the basis of the national authority of an individual delegate. There should be no ambiguity within the sensitive area of criminal affairs, i.e. national and Union level should not be mixed. This could not be guaranteed, if

¹³ Nevertheless, delegates could make use of Eurojust's administrative structure for such tasks. It will have to be examined whether delegates should be equipped with personal assistants, and what status those assistants should have (Eurojust staff, national detached officials and/or national experts).

¹⁴ For example, in cases of drug trafficking, routes of transport or communication channels can quickly be changed from one State to another.

¹⁵ At its meeting on 28 September 2000, the JHA Council agreed to fully associate the Commission with the work of the Provisional Judicial Co-operation Unit (see Article 1(5) of Council document n° 11344/2/00 EUROJUST 12).

¹⁶ See Commission decision of 28.4.1999, OJ L 136/20 of 31.5.1999.

¹⁷ The financial provisions could be parallel to those of the European Monitoring Centre for Drugs and Drug Addiction, see Article 11 of Council Regulation (EEC) No 302/93, OJ L 36 of 12/02/1993.

representatives of a Union institution were to exercise sovereign power under national law, or if, vice versa, national officials were to represent a legal person on Union level.

For those reasons, the executive or managing director should only be subject to specific rules on Union level. He should be bound by the staff regulations of the European Communities. This should also apply to the deputies of the executive director and to Eurojust staff. These persons should neither exercise powers of national sovereignty, nor be subject or accountable to a national supervising authority.

4.4. Rules of Procedure

The *Steering Committee* would have to agree any common position, opinion or recommendation, which shall be considered as an act of Eurojust as a body (in distinction to individual acts by Eurojust delegates in their own responsibility under national law). The executive director should then issue such an act and send it to the addressee, which would usually be the responsible national prosecuting authority or, in certain cases, a national contact point of the European Judicial Network.

As for the voting within the Committee, basically the majority rule should be applied. This is justified in so far as Eurojust would only pass recommendations, but would not have operational powers or the power to issue orders to national prosecuting authorities. On request of a delegate, a dissenting vote could be attached to an opinion or recommendation. Abstentions should be possible, in particular to avoid unnecessary work or delay through involving delegates of Member States, which are not concerned directly by a case or legal question. Details should be set out in *internal rules of procedure* to be adopted jointly by the executive director and the Committee. In order to relieve the delegates from organisational tasks, it could also be discussed whether those internal rules could confer the setting up of the agenda, the determination of rapporteurs and/or the chairing of formal Committee meetings to the executive director, or whether such tasks should be conferred to a presiding delegate.

Furthermore, a set of clear rules and regulations on external representation, on treatment of personal data and confidentiality¹⁸, as well as on liability respectively immunity will have to be drawn up. To a large extent, such rules can be adopted from the existing rules on other Union agencies. Further details could also be set up in internal rules. Moreover, the internal rules could determine the general procedure for the treatment of incoming questions and requests for action. As Eurojust should be as accessible as possible for national prosecuting authorities, the latter should be allowed to address questions directly to the delegates, but in order to avoid duplication of work or an overload of work for Eurojust, questions should preferably be sent via the national contact points of the European Judicial Network.

Finally, the internal rules could cover questions such as the allocation of staff and the use of resources. If, for instance, a Eurojust delegate is authorised to exercise national powers, e.g. as a member of a joint investigation team, it will have to be decided whether and to what extent, within the limit of the Eurojust budget, he could make use of the human and financial resources of Eurojust for this purpose, or whether Member States would have to provide additional infrastructure for such activity. Basically, the first solution seems more appropriate.

¹⁸ The data protection aspects arising from the proposed activities of Eurojust (such as data processing, data exchange, co-operation with Europol and access to its database) will have to be properly addressed.

4.5. Integration of the European Judicial Network

It is important for the efficiency of judicial co-operation that there will be a direct link of the team of delegates to the European Judicial Network. The Judicial Network and Eurojust have different tasks, characteristics and competence¹⁹. They are however complementary and should function harmoniously together. Any possible “competition” or conflicts of responsibility or wasteful duplication of work should be avoided as far as possible. It should be ensured that both institutions streamline their resources and activities and use them to the best effect. It is important to avoid too much red tape by setting up several institutions with overlapping tasks.

Both the contact points of the judicial network and Eurojust as a central unit must be as accessible and transparent as possible for national judges, prosecutors and/or police and customs officers as well as for Europol and the relevant Union institutions. The contact points of the European Judicial Network within Member States should continue to be the main addressee for national judges and prosecutors, whereas those contact points and the relevant bodies and institutions on Union level (in particular, Europol, or the Commission, e.g. through OLAF) would have a direct relationship with Eurojust. However, in certain cases, as said above, it should also be possible for national judges or judicial officials to contact Eurojust directly, in particular in cases where more than two Member States are concerned.

For all those reasons, it seems appropriate to combine and connect both institutions for judicial co-operation. Eurojust, and in particular the Steering Committee, should also function as a kind of central headquarters of the European Judicial Network. The word “headquarters” is not meant here as an authority supervising the national contact points, but as a focal point or central unit working in conjunction with the existing contact points of this Network within Member States. Eurojust should be included into the telecommunications network established by the existing European Judicial Network so that national contact points can keep close contact with their national Eurojust delegate.

It seems appropriate that the decision establishing Eurojust include corresponding provisions for the European Judicial Network or that the instrument creating the European Judicial Network be reformatted into a Council decision, and that adequate secretarial and budgetary means should be provided to the Judicial Network on a more permanent basis. It has to be examined how Eurojust staff could support the European Judicial Network's activities and whether the Eurojust budget could cover the European Judicial Network's needs.

4.6. Relation to Europol

Last, but not least, it should also be assured that Eurojust co-operates closely and effectively with Europol. To a certain degree, Eurojust can be seen as a judicial counterpart of Europol. At this stage, the word “counterpart” would not refer to judicial supervision on Europol but to the fact that Europol's activities need to be backed up and complemented by co-ordination of prosecutions²⁰. Europol might not only need legal advice on certain judicial questions, its activities will also have to be supported by co-ordination of the relevant activity of national prosecuting authorities. On the other hand, in order to fulfil its co-ordination tasks, Eurojust will have to make use of the data collected and provided by Europol.

¹⁹ See the document presented by the Belgian delegation on this issue (Council document n° 11209/00 EUROJUST 11).

²⁰ However, as has been explained above, Eurojust's scope of activity should not be limited to the types of crime, which are currently conferred to Europol.

Both institutions will, therefore, have to co-operate closely and to develop continuous and direct contacts. Eurojust should have full access to Europol's databases, within the framework of proper data protection and confidentiality rules. Accordingly, in certain cases Eurojust might decide to provide certain data to Europol. Compilations and views of both bodies concerning national, international and supra-national law could be exchanged mutually. It might also be useful for Europol and Eurojust to exchange liaison officers and/or to lay down principles for a mutual day to day co-operation. Europol representatives should, where appropriate, be invited to participate in meetings of the Eurojust Steering Committee. This should also apply, vice-versa, to the presence of Eurojust representatives at meetings of the Europol Management Board.