11.9. Eurojust

The interim step between a purely national system of prosecution of crimes and prosecution of crimes by an EU prosecutor is Eurojust, a body intended to coordinate and support national investigations, to facilitate judicial cooperation and mutual recognition, and to assist resolving conflicts of jurisdiction. Following the mandate of the Tampere European Council, the Council adopted a Decision establishing a provisional Eurojust late in 2000.[279] Shortly after the Tampere deadline of end-2001, the Council adopted a Decision in February 2002, which established Eurojust definitively.[280] This Decision was subsequently amended as regard the financial rules governing Europol,[281] and then again more substantially in 2008, inter alia in order to strengthen Member States' support for Eurojust (in particular as regards the powers of national members), to give Eurojust a greater role settling conflicts of jurisdiction, to increase the flow of information to Eurojust, and to overhaul the external relations rules.[282] For the future, the Stockholm programme and the action plan on implementing the Stockholm programme call for a proposal on Eurojust in 2012.[283]

The JHA Council has approved Eurojust's rules of procedure,[284] and its joint supervisory body adopted its own rules of procedure.[285] According to the Court of Justice, a Member State cannot challenge Eurojust's staffing decisions before the Court pursuant to Article 230 EC (as it then was), but disappointed applicants can challenge Eurojust's decisions.[286]

Eurojust is a 'body' of the EU with legal personality,[287] with its seat in the Hague.[288] It is made up of one member seconded by each Member State, who may be a prosecutor, judge, or police officer depending on the national legal system, whose place of work must be at Eurojust. Each member must be assisted by one deputy and one assistant, and may be assisted by more people. The deputy must be able to replace the national member.[289] The Decision specifies that national members must have: a term of office of at least four years; access to the national registers on criminal records, arrested persons, investigations, and DNA; and powers to follow up mutual recognition requests, to issue such requests (in con-

'limitations [on rights] may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

[279] [2000] OJ L 324/2.

[280] [2002] OJ L 63/1. See the Eurojust website: <http://www.eurojust.europa.eu>.

[281] [2003] OJ L 245/44.

[282] [2009] OJ L 138/14, which took effect on 4 June 2009 (Art 3). See the earlier Commission communication (COM (2007) 844, 23 Oct 2007). Member States have until 4 June 2011, if necessary, to amend their national law to comply with these amendments (Art 2). The Decision has not been consolidated. All further references in this section are to the Eurojust Decision as amended, unless otherwise indicated.

[283] [2010] OJ C 115 and COM (2010) 171, 20 Apr 2010.

[284] [2002] OJ C 286/1 and [2005] OJ C 68/1.

[285] [2004] OJ C 86/1.

[286] Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.

[287] Art 1.

[288] [2004] OJ L 29/15.

[289] Art 2, as amended.

junction with a national authority), to execute mutual recognition requests, and authorize controlled deliveries in urgent cases, and to participate in joint investigative teams.[290]

The activities of Eurojust are threefold: to coordinate national investigations and prosecutions; to improve cooperation between national authorities, in particular by facilitating judicial cooperation and mutual recognition; and to support in other ways the effectiveness of national investigations and prosecutions.[291] Eurojust may also become involved in assisting investigations and prosecutions involving only one Member State and a non-Member State once Eurojust has concluded an agreement with the relevant non-Member State (see below) or where there is an 'essential interest' in specific cases.[292] It may also become involved in investigations involving only one Member State and the Community.[293]

Eurojust's competence encompasses the crimes which Europol is competent to address, plus other offences committed in conjunction with any of the crimes over which it is competent.[294] Eurojust may also assist in other investigations at the request of a Member State's authorities.[295] It has established an 'on-call coordination centre' to deal with urgent requests.[296] When it acts through its individual members, it can inter alia request Member States' authorities to begin investigations or prosecutions, to accept that one of them is in a better position to undertake a prosecution, to coordinate between authorities, to set up a joint investigation team, or to take special investigative measures.[297] When acting as a college, it can do many of the same things, plus it also has a distinct role suggesting resolutions of conflicts of jurisdiction or recommending the settlement of disputes regarding the application of mutual recognition measures.[298] On the issue of conflicts of jurisdiction, several EU substantive criminal law measures also specify a role for Eurojust in advising which Member State should exercise jurisdiction over cross-border offences, and the Framework Decision on conflicts of jurisdiction requires Member States to send a dispute over jurisdiction to Eurojust, 'where appropriate', if it cannot be agreed by means of consultation.[299] Member States have to motivate 'without undue delay' any refusals to comply with a request from a national member or the college, as well as any decision not to comply with an opinion by the college in the context of dispute settlement.[300]

In order to support Eurojust's activities, Member States must appoint national correspondents and establish a national coordination system for Eurojust.[301] Also,

[290] Arts 9–9f, as amended. On controlled deliveries and joint investigation teams, see 12.7 and 12.9 below. [291] Art 3(1), as amended.

[292] Art 3(2). [293] Art 3(3).

[294] Art 4(1), as amended. On the competence of Europol, see 12.8 below. [295] Art 4(2).

[296] Art 5a, as inserted. [297] Art 6(1)(a), as amended. [298] Art 7, as amended.

[299] See 11.6 above, and also the Eurojust guidelines on jurisdiction in the Annex to the 2003 annual report.

[300] Art 8, as amended. Member States may decline to give reasons for refusing to accede to requests on grounds of national security or protecting individual safety. [301] Art 12, as amended.

Member States must exchange extensive information with Eurojust,[302] and there are detailed rules on data protection.[303]

The provisions on the status and operation of Eurojust apply EU rules to Eurojust's staff and budget and provide for annual reports to the EP and the Council.[304] As for external relations, the Eurojust Decision has specific provisions on relations with the European Judicial Network, other EU bodies (Europol, OLAF, Frontex, and the Council as regards foreign policy), and third States and bodies, including provisions on sending and receiving liaison officers and executing requests for judicial cooperation from third States.[305]

In practice, Eurojust suffered from its limited competence as a provisional unit until 2002, a delay until it could take up permanent offices in the Hague in 2003, a shortage of support staff until 2003, and Member States' tardiness in appointing data protection officers and amending national law to conform to the initial Eurojust decision.[306] Nevertheless, Eurojust has been used increasingly in practice, with the number of cases referred to Eurojust by national authorities rising from 180 in 2001 to 202 in 2002; 300 in 2003 (a 50% increase); 381 in 2004 (a 27% increase); 588 in 2005 (a 54% increase); 771 in 2006 (a 31% increase); 1,085 in 2007 (a 41% increase); 1,193 in 2008 (a 10% increase); and 1,372 in 2009 (a 15% increase). Eurojust has in particular made a number of recommendations to Member States' authorities pursuant to the Decision, including on the issue of conflicts of jurisdiction.

As for Eurojust's external relations, an agreement with Europol came into force in 2004 and was revised in 2009,[307] and a memorandum with OLAF was agreed in 2003, although the relationship with OLAF was considered unsatisfactory until a formal agreement was negotiated in 2008. Treaties with Norway, Iceland, Romania, the US, Croatia, Switzerland, and several international bodies are in force,[308] a treaty with the Former Yugoslav Republic of Macedonia has been agreed, and further treaties are planned with Russia, Ukraine, Moldova, other Western Balkan States, Liechtenstein, Cape Verde, and Israel.

Eurojust also has a role in other Council measures, in particular as regards the EAW, where it can be asked to address the issue of competing warrants and must be informed of delays in the execution of warrants.[309] In practice, Eurojust has adopted guidelines on competing warrants, and receives reports of dozens of delayed executions of EAWs every year. Furthermore, Council Decisions on the exchange of information on terrorism provide for a role for Eurojust,[310] and another Council Decision gives Eurojust access to the Schengen Information

[302] Art 13, as amended. [303] Arts 14–24, as amended. [304] Arts 28–39, as amended.

[305] Arts 25a–27b, as amended; on the judicial network and the liaison magistrates, see 9.9 above.

[306] See the annual reports for 2001–09, available on the Eurojust website, as well as the report in COM (2004) 457, 6 July 2004. [307] See 12.8 below.

[308] For the texts, see: <http://www.eurojust.europa.eu/official_documents/eju_agreements.htm>. [309] Arts 16 and 17 of the EAW Framework Decision ([2002] OJ L 190/1).

[310] [2003] OJ L 16/68, replaced by later Decision ([2005] OJ L 252/23).

System; this took effect in December 2007.[311] Eurojust will in future have access to the Customs Information System (CIS).[312]

11.10. European Public Prosecutor

The Commission initially suggested during negotiation of the Treaty of Nice in 2000 that provisions on a European Public Prosecutor should be inserted into the EC Treaty (as it then was), but the suggestion was not taken up.[313] Subsequently in 2001, it attempted to lay the groundwork for further consideration of the idea by releasing a Green Paper,[314] arguing that the existing and contemplated arrangements for judicial cooperation and investigation related to the EU's financial interests were (and would be) ineffective. The Commission argued in particular that the legal framework was inadequate as regards lack of ratification of the PIF Convention and its Protocols, traditional judicial cooperation was 'cumbersome and inappropriate' (without citing details), judges often did not follow up OLAF investigations, and evidence was often inadmissible or (in the case of tax and banking information) inaccessible. Furthermore, the Public Prosecutor would increase the effectiveness of internal investigations within the EU institutions, and would enhance protection of fundamental rights, by speeding up proceedings and reducing the need for pre-trial detention.

As to the details, the Commission proposed that the Public Prosecutor would centralize the investigation and prosecution of the crimes within his or her remit, but that trials would subsequently take place within the criminal courts of a Member State. The existing substantive criminal law in this area could perhaps be supplemented, and rules on penalties for such crimes could be adopted. So could rules on limitation periods. There would have to be agreement on whether prosecution would be mandatory or discretionary, and on the division of competence between the Public Prosecutor and national prosecuting authorities. The Public Prosecutor would enjoy extensive investigatory powers and would choose in which Member State's courts a trial would take place, subject to established criteria for making this choice. Evidence gathered lawfully in one Member State would have to be admitted before the courts of any other Member State, and there would have to be detailed rules on judicial review of the Public Prosecutor.

According to the Commission's communication on the follow-up to the Green Paper,[315] the majority of those responding to the Green Paper were supportive of the idea of a European Public Prosecutor, although most had reservations

[311] [2005] OJ L 68/44. On the SIS, see 12.6.1.1 below.

[312] Art 12 of the CIS Decision ([2009] OJ L 323/20), which applies from 27 May 2011 (Art 36(2) of the Decision). On the CIS, see 12.6.1.2 below.

[313] See Annex I to the subsequent Commission Green Paper on the Public Prosecutor (COM (2001) 715, 11 Dec 2001).

[314] Ibid.

[315] COM (2003) 128, 19 Mar 2003.

about the details. In particular, many called for an enlarged competence for the Prosecutor, a greater degree of approximation of relevant substantive criminal law, more limited investigatory powers for the Prosecutor, and further harmonization of the law of evidence and defence rights.

Article 86 TFEU, as inserted by the Treaty of Lisbon, gives the Council the power (not the obligation) to establish the Public Prosecutor, with the option to extend his or her competence to areas other than the EU's financial interests, and accepts the model of the Prosecutor bringing prosecutions in national courts.[316] As mentioned above, the Stockholm programme refers to consideration of the creation of the Public Prosecutor, and the Commission intends to issue a communication on this issue in 2013.[317]

But in any case, is a European Public Prosecutor desirable? Certainly the objective of ensuring more effective prosecutions in defence of the EU's financial interests, and potentially other serious crimes, while still securing the fundamental rights of criminal defendants, can only be supported. But with great respect to the supporters of the idea, the notion of creating the post of the Public Prosecutor as a means to this end is fundamentally flawed.

The first basic problem with the idea is that the Commission did not properly consider the effectiveness of more limited measures to achieve the same objective. Examining in turn the specific arguments made by the Commission (summarized above), the PIF Convention and both of its Protocols have now been ratified; judicial cooperation has been speeded up by adopted EU measures (the mutual assistance Convention and its Protocol, the Framework Decisions on the arrest warrant, freezing orders, evidence warrant, financial penalties, custodial penalties, probation, and pre-trial supervision) and would be further speeded up by proposed measures (the European investigation order) and further plans set out in the Stockholm programme (for example, as regards mutual admissibility of evidence);[318] the Commission has made proposals relating to OLAF powers and on cooperation on EU financial interests,[319] and further measures strengthening the relationship between OLAF and national prosecutors and/or Eurojust could be adopted; the Protocol to the Mutual Assistance and the Framework Decisions on freezing orders and the EAW have or will make tax or banking information more accessible; and the effectiveness of internal investigations could be enhanced by amending the rules applicable to OLAF. Finally, as regards individual rights, as noted already, the speed of proceedings has been increased already by the application of the EAW and the Framework Decision on pre-trial supervision should reduce detention in cross-border cases. It should be reiterated that in all mutual recognition measures adopted or agreed to date, the dual criminality principle has been dropped as regards crimes against the EU's financial interests, except for a few cases where Member States could insist on retaining the principle.

[316] See further 11.2.3 and 11.2.4 above.

[317] [2010] OJ C 115, point 3.1.1; COM (2010) 171, 20 Apr 2010.

[318] See generally ch 9.

[319] See 12.4.6 below.

Moving on to the detailed aspects of Public Prosecutor's role as proposed by the Commission, it would be possible to harmonize the substantive criminal law as regards the EU's financial interests further, including the adoption of harmonized rules on penalties and limitation periods, without creating a Public Prosecutor. Furthermore, a case could be made that the EU should regulate national prosecutions in this area, for example as to whether prosecutions should be mandatory, the extent of investigatory powers, and the decision on where to prosecute (going further to allocate jurisdiction than the 2009 Framework Decision on conflicts of jurisdiction).[320]

The second basic problem is that the model of centralized prosecution and decentralized trials proposed by the Commission—and now enshrined in Article 86 TFEU, following the entry into force of the Treaty of Lisbon—is half-baked. This model was notably *not* followed by the Rome Statute creating the International Criminal Court, and its defects are obvious: the rules relating to investigations and prosecutions on the one hand and trials on the other cannot be separated any more than eggs can be extracted from omelettes. In particular, this model risks lowering the protection of the rights of criminal defendants, since that protection is provided at different stages in the criminal procedure in different Member States.

11.11. External relations

The Framework Decision on conflicts of jurisdiction contains a general provision permitting Member States to sign agreements which facilitate the objectives of that Framework Decision.[321] Unlike the EU's mutual recognition measures,[322] that Framework Decision does *not* require Member States to disapply the corresponding provisions of the relevant Council of Europe Convention (on the transfer of proceedings) or any other treaties,[323] which is significant because the provisions in the transfer of proceedings Convention are, on the whole, better than those of the Framework Decision.[324] On the other hand, as noted above, the Schengen Convention does not expressly clarify the relationship of the double jeopardy provisions with any other international measures.[325] There are very specific rules governing the external relations of Eurojust.[326]

It should be kept in mind that although the Court of Justice has taken an assertive approach as regards the EU's exclusive competence over issues of civil jurisdiction,[327] the case in question concerned a fully harmonized set of

[320] See 11.6 above. [321] [2009] OJ L 328/42, Art 15. [322] See 9.10 above.
[323] See explicitly para 15 in the preamble to the Framework Decision. [324] See 11.6 above.
[325] See 11.7 above. Compare Art 58 of the Convention with Arts 48, 59, and 67 ([2000] OJ L 239).
[326] See 11.9 above.
[327] *Opinion 1/2003* [2006] ECR I-1145. See further 8.9 above.