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MODULE VI

UNIT 18

Support Institutions for Cooperation: the European Judicial Network, Eurojust, Europol, Interpol, Liaison Magistrates, IberRed

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AUTHOR

Julieta Carmona Bermejo

Counsel, Legal Department of EUROJUST

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INTRODUCTION

This topic is devoted to the institutions that provide support for international judicial cooperation. As crime knows no bounds, in recent years we have witnessed the rapid emergence of new institutional structures of cooperation against transnational crime, while at the same time the existing ones have been strengthened.

On a regional scale, the European Union has witnessed the greatest progress in the promotion of police cooperation (with the creation of Europol) and judicial cooperation (firstly with the creation of liaison magistrates, the European Judicial Network and the creation of Eurojust). Regardless of the ratification and ultimate entry into force of the Treaty of Lisbon (which will present great future prospects, as it envisages the creation of the European Prosecutor's Office), in late 2008 the responsibilities of the European Judicial Network, Eurojust and Europol were enhanced, the latter changing the nature of its constitutional text to be regulated by a Council Decision and not by an International Convention between the Member States of the EU as had been the case until then [1]. With the coming into force of the Treaty of Lisbon of 1 December 2009 (the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007[2]) there were great expectations for the future, as judicial cooperation in criminal matters no longer constitutes an intergovernmental pillar, Europol and Eurojust's functions were further strengthened with this leading to the creation of the European Public Prosecutor's Office.

Nonetheless, we should not forget the cooperation institutions on an international level, with which the mechanisms of European judicial cooperation collaborate closely: Interpol, the international police organisation, and Iber-RED, the Ibero-American network for judicial cooperation in criminal and civil matters. We should also remember other forms of international judicial cooperation, including the cooperation of the national judge with international courts: the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the obligation to cooperate with the International Criminal Court and the

[1] Whilst political agreement regarding Europol came in 2008, the Council Decision did not come about until 6 April 2010. It was published in the Official Journal of the European Union on 15 May 2009 (DOUE L121/37-66).

[2] The Treaty of Lisbon amended the Treaty on European Union and the Treaty establishing the European Community, replacing the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The following link takes you to the consolidated version of these texts: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML

governing principle of complementarity.

Ultimately, the aim of this topic is to give you a broad overview of the institutional tools at your disposal in order to help you in your day-to-day work when dealing with a letter rogatory or a request for international judicial assistance, both within the context of the EU and on an international level.

1. INSTITUTIONS FOR COOPERATION IN THE EUROPEAN SPHERE

As we already said in Topics 1 and 2, the creation of a space of security, freedom and justice has been forged since the Treaty of Maastricht and it received its greatest boost with the adoption of the Convention for the Application of the Schengen Agreement (see Topic 7), the Treaty of Amsterdam and the Tampere European Council (see Topic 8). With the Treaty of Lisbon coming into force on 1 December 2009, judicial and police cooperation will advance even further, becoming one of the specific objectives of the EU (Article 3 TEU). Once the new Treaty is ratified, it will remove the traditional pillars of the EU and "communitarise[3]", the areas of justice and home affairs (see Topic 2). Throughout this process, institutional instruments for cooperation at a Union level have been creating, perfecting, adapting to the latest enlargements of the EU and to the new challenges presented by cross-border crime, creating a space of judicial cooperation that is a point of reference for other regions in the world.

We will now analyse these European cooperation institutions in chronological order: the liaison magistrates, the European Judicial Network, Europol and Eurojust.

1.1. Liaison Magistrates

1.1.1. Creation

This was the first institutional instrument created under the European Union to facilitate judicial cooperation in both civil and criminal matters. Initially conceived in the context of the fight against drugs and organised crime[4], the body came into being with a far broader scope of action in order to be able to effectively combat all forms of transnational crime, not only those already mentioned but also terrorism and the fight against fraud, particularly when it affects the financial interests of the European Community.

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[3] One of the most important consequences of this "comunitarisation" is the extension of the sphere of competence of the Court of Justice (now "The Court of Justice of the European Union", ex Article 13 TEU) which has full competence with regard to criminal judicial cooperation instruments; in other words, that a national judge may put forward questions which are also prejudicial in this regard (Article 267 TFEU).

[4] See the Recommendations adopted by the Ministers of Justice and Home Affairs at their meeting in Luxembourg on 13 June 1991 and the provisions for liaison officers contained in the global plan for combating drugs adopted by the Madrid European Council of 15 and 16 December 1995.

Regulated by Joint Action 96/277/JHA of 22 April 1996[5], subsequently extended by Joint Action 96/602/JHA of 14 October 1996[6], in order to overcome the obstacles that working with the different legal systems in the Union represents, the Council thus regulated a practice that had already been put forward in initiatives from some Member States[7].

1.1.2. Objectives

With a view to obtaining greater reciprocal comprehension between the legal systems of the Member States in order to increase the rapidity and effectiveness of judicial cooperation, the Member States, via bilateral or multilateral agreements[8], will send liaison magistrates to other Member States or to third countries (the latter taking into account the particular requirements of certain strategic European Union border zones or those of other regions of increasing strategic interest, with special attention for the most sensitive regions due to the higher incidence of the most serious forms of transnational crime, as indicated in Article 4 of Joint Action 96/602/JHA).

1.1.3. Responsibilities and functions

In general, as set out in Article 2 of the Joint Action 96/277/JHA of 22 April 1996, the functions of liaison magistrates will normally include any activity designed to encourage and accelerate all forms of judicial cooperation in criminal and, where appropriate, civil matters, in particular by establishing direct links with the competent departments and judicial authorities of the host State.

Specifically, the functions of these liaison officers can be summarised as follows:

1 **Intermediation** in processing requests for judicial assistance

2 **Information**: exchange of information or statistical data in order to promote mutual familiarity with the different systems and legal databases of the interested states

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[5] Joint Action of 22 April 1996 (96/277/JAI) adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union. OJ L 105/1 of 27.04.1996.

[6] Joint Action of 14 October 1996 (96/602/JHA) adopted by the Council on the basis of Article K.3 of the Treaty on European Union providing for a common framework for the initiatives of the Member States concerning liaison officers. OJ L 268/2 of 19/10/1996.

[7] For example, in March 1993 France already had a liaison magistrate posted in Rome (see: http://www.legalconnexion.com/contact/contact/magistliaison.pdf)

[8] The expenses regarding the training, seconding and activities of liaison officers will be borne by their Member States, pursuant to Article 9 of Joint Action 96/602/JHA.

and relations between the professionals in the legal field in both states (information on the national legal system, judicial flowchart or future legislative reforms of interest for promoting international judicial cooperation, etc.) By means of this gathering and exchange of information, particularly that of a strategic nature, the liaison magistrates participate in the improvement of bilateral and multilateral cooperation instruments, which has been shown to be of special relevance in judicial cooperation with third countries.

All of this, notwithstanding the procedural rules already existing in relation to judicial cooperation and the exchanges of information between Member States and the European Commission or between them and third countries based on other instruments. Nevertheless, it is worth highlighting that in the case of liaison magistrates sent to third countries, subject to specific agreements, each Member State may keep in mind the possibility of using its liaison officials sent to third countries for the benefit of other Member States, particularly in geographic areas that are not sufficiently covered (pursuant to Article 4(4) of Joint Action 96/602/JHA of 14 October 1996). Thus, a liaison magistrate may send relevant information on criminal activities concerning other Member States or even a Member State that does not have a liaison officer in a third country may send requests for information to the other Member State that has posted a liaison officer in that third country. The state receiving the request will examine it with full independence and, if it accedes to the same, will transfer it to its officer in the third country in question (ex Article 5 of Joint Action 96/602/JHA of 14 October 1996).

1.1.4. Future prospect of the liaison magistrates

The figure of the liaison magistrate, far from being absorbed by the European Judicial Network or Eurojust, has been enhanced by the creation and recent modification of said agencies. The new Decision to strengthen Eurojust[9] establishes the possibility of sending liaison magistrates from third-party Member States on secondment to their premises[10] as well as the option for Eurojust to send

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[9] Hereinafter, in order to facilitate its reading, all references to the "Eurojust Decision" -"EJD"- a consolidated version will be prepared of the Council Decision 2002/187/JHA, of 28 February 2002, through which Eurojust was created and amended by the Council Decision 2009/426/JHA, of 16 December 2008, strengthening Eurojust.

[10] See Article 26 bis (2) of the EJD.

liaison magistrates on secondment to other countries[11]. Meanwhile, the new European Judicial Network Decision (EJND) also envisages the perpetuity of the figure: it maintains their association with the EJN and connects them to the secure telecommunications network in those cases where the liaison magistrates in one Member State have similar functions to those entrusted to the contact points of the EJN[12].

Level Four: Spanish regulations concerning liaison magistrates

1.2. The European Judicial Network in Criminal Matters (EJN)

1.2.1. Creation and objectives

In 1997 the Council adopted an Action Plan to combat organised crime, drafted by the Council's High Level Group comprising experts from the Member States of the European Union. The majority of the recommendations of said Action Plan were aimed at improving judicial cooperation between Member States. In accordance with Recommendation No. 21, the Council of the European Union adopted Joint Action 98/428/JHA of 29 June 1998 ("JA EJN"), on the basis of Article K.3 of the Treaty on European Union, creating a European Judicial Network ("EJN").

The EJN was officially inaugurated on 25 September 1998, thus constituting the first eminently practical structural measure of judicial cooperation in the European Union. Ten years later, essentially with the aim of clarifying the relationship and improving communication between the EJN and Eurojust[13], the Council adopted a new Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, which repeals and replaces the earlier Joint Action. The new text entered into force on 24 December 2008.

The **objective** of the European Judicial Network is to improve judicial cooperation between the Member States of the Union, in particular in the fight

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[11] See Article 27 bis of the EJD.

[12] See Article 2(6) of the EJND, Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, OJEU L348/130, of 24.12.2008.

[13] As decided in the Tampere European Council in 1999, Eurojust is to cooperate closely with the EJN, in order to simplify the execution of letters rogatory in particular (see point 46 of the Presidency Conclusions).

against the forms of serious crime[14]. In order to do so, a network of experts was created to ensure optimum execution of letters rogatory and requests for judicial assistance between Member States.

The EJN acts by means of direct contact on a network of judicial contact points in each of the Member States. Its Secretariat is situated within the Secretariat of Eurojust as a functionally separate and autonomous unit, although Eurojust's budget includes a part to cover the activities of the EJN Secretariat[15].

1.2.2. Composition

The EJN is characterised by its flexible and dynamic structure, based on the principle of direct communication between the contact points, on a completely horizontal basis.

The **contact points** of the Network are appointed by the national authorities, according to their internal rules, in view of the tripartite composition of: central authorities responsible for judicial cooperation, judicial authorities and other competent authorities with specific responsibilities in the context of international cooperation[16].

The contact points must also cover all their national territory, as well as the different forms of serious crime, and speak at least one other official language of another EU Member State.

The EJND has created the figures of **national correspondent** and **tool correspondent**. The former coordinates the functioning of the Network on a national level (Article 2 (3) and 4(4) EJND) whilst the latter guarantees that the information regarding a Member State is available and up to date (Article 2(4) and 4(5) EJND). The national authorities may ask for the national correspondent's opinion before creating a new contact point.

As mentioned earlier, the **liaison magistrates** are associated with the EJN by each issuing Member State, according to the internal methods of each Member

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[14] See Article 4(1) EJND.

[15] See Article 11 EJND.

[16] By way of example, via the http://www.poderjudicial.es/, website "Consejo General del Poder Judicial", "relaciones internacionales", "Auxilio judicial internacional", "redes judiciales", "otras redes judiciales", "Red Judicial Europea Penal", we find the list of the **contact points in Spain**, which are: for the Ministry of Justice: the Deputy Director General of International Legal Cooperation; for the CGPJ: the Member of the Commission on International Relations and a Lawyer at the International Relations Department; for the Public Prosecutor's Office, four contact points in: the state Public Prosecutor's Office, the Special Anti-Drug Prosecutor's Office, the National Public Prosecutor's Office responsible for matters such as terrorism and extradition and the Anti-Corruption Public Prosecutor's Office. The website of the EJN (http://www.ejn-crimjust.europa.eu/) provides access to much information as well to the use of the instruments that will be studied in topic 19 in the sphere of international legal cooperation in criminal matters, as well as a full list of the contact points in all the Member States of the EU.

State[17]. It should be highlighted that the **European Commission** can also appoint contact points in the Network, for the spheres for which it is responsible (particularly cases of fraud against the economic interests of the European Community[18]).

1.2.3. Responsibilities and functions of the contact points

The purpose of the contact points is to facilitate the execution of requests for judicial assistance, both activating them, if applicable, and informing the judicial authorities of the other Member States of the application legislation in the Member State to which they belong.

The contact points are therefore active intermediaries[19], albeit on a horizontal level, without creating a hierarchical structure, and their main work is:

a) exchange of **information**:

- to provide the legal and practical information necessary for the judicial authorities of his/her country, as well as the contact points and judicial authorities of the other Member States, so that they can effectively prepare a request for judicial cooperation or improve judicial cooperation in general. In order to do so, the contact points must:
  - have access to four types of information: complete data on the other contact points (now possible thanks to the Atlas IT tool), a simplified list and repertoire of judicial authorities, legal information and concise practice on the different legal and procedural systems of the Member States ("fiches belges[20]") and of the texts of the pertinent legal instruments in order to put judicial cooperation in practice. With the entry into force of the new EJND, the Secretariat will also place this information at the disposal of the corresponding judicial authorities (Article 7 EJND).
  - Establish and maintain **contacts** of an informative nature (at least three times a year), in order to favour coordination of judicial cooperation and broaden their knowledge of the different legislative systems of the Member States of the Union,

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[17] See Article 2(6) EJND.

[18] See Article 2(7) EJND.

[19] As classified by Article 4(1) DRJE.

[20] As we have see in the matter of technical cooperation tools in the introduction module, these are technical files that refer to different research methods and procedures in each Member State.

examine the problems that hinder judicial cooperation and make proposals for the solution of the same.

b) **Coordinate** actions in the event that several requests must be sent to another Member State. The contact point may also intervene as **mediator** in the event of difficulties or delays in the execution of a letter rogatory or request for assistance.

c) Participate and promote **training** sessions on a national level in cooperation with the European Judicial Training Network[21].

The new EJND, finally, enhances the IT tools at the service of cooperation. While a detailed study of the IT tools developed by the EJN will be dealt with in topic 19, it is worth highlighting that since the entry into force of the new EJND, the contact points enjoy a secure telecommunications connection, which allows the flow of data and requests for judicial cooperation between Member States.

The question of relations between the European Judicial Network and Eurojust will be covered in the following section.

To learn more: other EU networks for judicial cooperation in criminal matters

1.3. Eurojust

1.3.1. Creation

Judicial cooperation in the European Union received a boost in 1999, with the Conclusions of the Tampere European Council, in which a special session set the foundations for the materialisation of the space of freedom, security and justice announced in the Treaty of Amsterdam, as a logical reply to a Union virtually without internal boundaries with the communitisation of the Convention on the Application of the Schengen Agreement. In Tampere a genuine European space of justice is created whose cornerstone is the mutual recognition of judicial decisions (see point 33 of the Conclusions). Firmly determined to step up the fight against organised crime and serious transnational crime, the European Council decided to adopt structural measures aimed at facilitating the coordination of investigations and judicial activities carried out in the territory of the different Member States, such

[21] This last function has been included in the new EJND (new paragraph 3 of Article 4).

as the suppression of the formal extradition procedure between Member States (point 35) or facilitating the securing of evidence and seizure of assets (point 36), and promoted the joint investigation teams (point 43), envisaged in the Treaty of Amsterdam, and the harmonisation of national criminal law (points 48 and 55).

In this context, acting on the initiative of Germany, Belgium, France, Portugal and Sweden, the European Council resolved in point 46 to create a unit (to be called Eurojust) consisting of prosecutors, magistrates or police officers with similar responsibilities, temporarily assigned by each Member State in accordance with its legal system, to strengthen the fight against serious organised crime. The mission of the new unit was to facilitate due coordination of national prosecutors' offices and support criminal investigations in cases of organised crime, in particular on the basis of analysis from Europol, as well as cooperating closely with the European Judicial Network, particularly in order to simplify the execution of letters rogatory.

In accordance with these guidelines and by implementing Articles 29 and 31 of the Treaty on European Union in force at the time, in a Decision dated 14 December 2000[22] the Council of the EU created a Provisional Judicial Cooperation Unit, situated in Brussels and based on Council infrastructures, as a temporary measure on the road to the creation of Eurojust (see Article 5). The experience acquired by the Provisional Unit would serve as a basis for drafting Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (the "Eurojust Decision").

Six years down the line and based on the principle of mutual recognition as a pillar of judicial cooperation, on 16 December 2008 the Council adopted the Decision strengthening Eurojust[23] ("DSE"), thus making its operational capacity more effective. This new Decision came into force on 4 June 2009, although

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[22] Council Decision of 14 December 2000 setting up a Provisional Judicial Cooperation Unit (2000/799/JHA). D.O. L324/2 of 21.12.2000.

[23] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, published in the OJEU on 4 June 2009, L138/14. As this Decision substantially amends the articles of the 2002 Decision by means of only three articles, in order to simplify reading this topic, a reference to the "Eurojust Decision" (or EJD) will be understood as a reference to the article as amended or created by Council Decision 2009/426/JHA of 16 December 2008, as set out in the consolidated text drawn up by the Council Secretariat on 15 July 2009. See Footnote 10.

Member States had until 4 June 2011 in order to adopt any applicable amendments within national law[24].

Finally, the Treaty of Lisbon coming into force on 1 December 2009 paved the way for the creation, through Eurojust, of the European Public Prosecutor's Office (Article 86(1) TFEU.

1.3.2. Objectives and responsibilities

Eurojust is a unit which is classed as a body of the European Union and staffed by its own legal personnel (see Article 1 of the EJD), meaning it has its own budgetary initiative (it is financed by the European Union's general budget) and is based in The Hague.

The main role of Eurojust is to remove the obstacles to the actions of judicial cooperation in criminal matters. Eurojust is also called to play an essential role in the fight against terrorism.

This general objective is outlined in Article 3 of the EJD:

- to stimulate and improve the **coordination**, between the competent authorities of the Member States, of investigations and prosecutions (provided they affect two or more Member States and conditional on both the request and the information presented);
- to improve **cooperation** between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;

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[24] As we shall see, this is fundamentally relevant to national regulations regarding national membership of Eurojust adopted by the majority of Member States as a result of the 2002 Decision. The Decision to strengthen Eurojust, as we shall also see, introduces new, crucial tools to strengthen cooperation, as well as new questions as to how to apply them. As a result, in 2009 Eurojust, together with the trio of Presidencies and the General Secretariat of the Council and the Commission launched the idea of creating an informal Working Group comprising two national representatives: one national head of the general application process and another specialising in specific technical questions. The objective of this informal Working Group, which met throughout 2009 and 2010, is to set up a forum offering structured debate in which the participants exchange common experiences and good practices. Thanks to the work of this Group, Eurojust has been able to draw up an Action Plan for the application of a new Eurojust Decision which, whilst not binding, may serve Member States as a guide when monitoring the start up of the planned new tools (the creation of an emergency cell, of a national coordination system, the new powers of national members or the creation of a whole legal framework for Eurojust liaison magistrates in other countries, to give just a few examples). With the application of the new Eurojust Decision there has also been a significant internal adaptation of the organisation, the Action Plan may also undergo substantial amendment with regard to the organisation of Eurojust and its Internal Regulations.

- to **support** otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective (i.e., provide translation and interpretation services and organise coordination meetings between the representatives of the Member States involved) and
- to provide support to investigations and acts that affect only one Member State and a third country, or a Member State and the Community, when a cooperation agreement has been signed with said country or when there is an essential interest in said support.

The **competences** of Eurojust are contained in Article 4 and the appendix to the EJD, with its general responsibility being for the kinds of crime and offences in relation to which Europol is authorised to act[25] and related crimes. With other kinds of offences Eurojust can, on a supplementary level, collaborate in judicial investigations and activities at the request of the competent authority of a Member State.

1.3.3. Composition

Article 2 of the Eurojust Decision establishes that: "*Eurojust shall have one national member seconded by each Member State, who is a prosecutor, judge or police officer of equivalent competence [...]*." However, in this section we will also refer to the national offices and to the College, as in performing its duties Eurojust can act either through its national members or in a collegiate manner.

1.3.3.1. The national offices

Eurojust consists of one national member seconded by each Member State. As such there are as many national offices as there are Member States of the European Union. Comprised of one national member and one or more assistants, one of which may act as a substitute for the national member, its size varies depending on the decision taken by each Member State. The DSE has strengthened them, making it obligatory for the national members to be assisted by at least one deputy and one assistant (Article 2 (2) (b) EJD).

The **national member** - whose statute is regulated by Articles 9 to 9 septies of the EJD and by Article 12 of its Internal Regulation- is appointed by the Member

[25] Article 4(1) and appendix of the Europol Decision.

State of origin, in accordance with their legal system and subject to national law[26]. The member must be a prosecutor, judge or police official with equivalent responsibilities.

As well as national members, there is also the figure of **national correspondents** (Article 12 of the Eurojust Decision), which, whist not forming part of the national offices of Eurojust, do work in close collaboration with them. Each Member State may establish or designate one or more national correspondents who are responsible for maintaining the **national coordination system**[27]. Like the national member, its status is regulated by the national law of each Member State[28], even though in this case his/her place of work is in the Member State to which he/she was appointed. The national correspondent may at the same time be the contact point of the European Judicial Network.

The relations between the national member and the national correspondent do not exclude direct relations between the national member and his/her competent authorities and the creation of the national coordination system does not exclude

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[26]By way of example, in the case of Spain, both the status of the national member and the relations between Eurojust and the Spanish authorities and regulated by Law 16/2006 dated 26 May. Currently, as established by Article 42 of the EJD:" *If necessary the Member States shall bring their national law into conformity with this Decision at the earliest opportunity and in any case not later than 4 June 2011."* Spain is currently studying reforming its law which regulates the statute of national membership of Eurojust.

[27]This system will be responsible for coordinating the actions of: the national correspondents of Eurojust, the national correspondent of Eurojust for matters of terrorism, the national correspondent for the European Judicial Network and up to three EJN contact points, the asset recovery agents and the national members of the following European networks: the Network for joint investigation teams, the Network for persons responsible for genocide, crimes against humanity and war crimes and the Network against corruption (see Article 12 (2) EJD).

[28] In the case of Spain, see Articles 8 and 9 of Law 16/2006 of 26 May. For an overview of the other Member states, see the **Report from the Commission on the Legal Transposition of the Council Decision of 28 February 2002 setting up Eurojust with a View to Reinforcing the Fight Against Serious Crime [COM (2004) 457 final - not published in the Official Journal].** With data for up to April 2004, the Commission concludes, that although the term for transposition was September 2003, in April 2004, only 4 Member States had transposed the Eurojust Decision into their national legal systems (Portugal, Germany, Austria and France, another 6 had to adapt it (Belgium, Spain, Finland, Greece, Italy, Luxembourg) and the other Member States (of the EU15) considered that there was no need to modify their domestic legislation. Also in this report, the Commission recommended that the Member States grant their national member in Eurojust the judicial and investigative powers necessary. With the Decision to Strengthen Eurojust coming into force, Member States have until 4 June 2011 in order to adapt national law, if necessary, to the new functions of national members.

direct contact between judicial authorities.

Finally, it is worth highlighting the presence of **liaison officials** or liaison magistrates from **third countries or international entities** with whom a cooperation agreement has been signed (Article 26 bis (2) EJD). To date, two states have seconded liaison officials to Eurojust: Norway and the United States of America.

1.3.3.2. The College and its committees

The College is responsible for the organisation and functioning of Eurojust. Regulated in Articles 10 and 28 of the Eurojust Decision and in Articles 1 to 11 of the Internal Regulation, the College is made up of all national members, with each member having a vote. The College elects a President and two Vice-Presidents from among its number. Both the election of the President and that of each of the Vice-Presidents must be approved by the Council. The three comprise the Presidency, for a mandate of three years each and may be re-elected once. The representation of Eurojust falls on the President, who will be responsible for directing the work of the College and supervising the day-to-day management performed by the Administrative Director.

Since late 2004, the non-operational work of the College has been organised on the basis of committees (a possibility granted under Article 6 of the Rules of Procedure). The committees consist of a reduced number of national members or assistants (chosen by the College after the national member has expressed an interest), who are given technical support by the members of the corresponding Administration depending on the subject matter in question. Each committee will be headed by a Spokesperson chosen by the members, who will present the conclusions of the work in the form of recommendations to be adopted by the College. Currently, there are 13 committees[29], although the number varies depending on the needs of the College.

[29] The current committees can be divided into three categories: (1) subject-based: External Relations, "Brussels" (monitoring the legislative proposals debated in the Council and the Commission that are of interest to Eurojust, as well as other activities of interest at the level of the EU), Trafficking in human beings and related crimes, European Arrest Warrant and European Evidence Warrant, Fraud and economic crimes, terrorism; (2) on relations with other bodies: Europol, OLAF and EJN and liaison magistrates and (3) internal Eurojust ones: Presidency, Administration, Data Protection and the E-POC project and casework strategy.

1.3.4. Operation

In order to fulfil its functions, Eurojust functions either through its national members (Article 6 of the Eurojust Decision), or in a collegiate manner (Article 7 of the Eurojust Decision).

1.3.4.1. Eurojust's collegiate operation

In operational questions, Eurojust functions in a collegiate manner in the following cases:

- when so requested by one or more national members affected by a matter dealt with by Eurojust,
- when referring to judicial investigations or actions that have repercussions on an EU level or may affect Member States other than those directly involved,
- when a general question regarding the achievement of its objectives is raised, or
- when so established by other provisions of the Eurojust Decision.

The College's working approach is regulated in Article 7 of the Eurojust Decision, with special mention to be made of the resolution of conflicts of competence[30] and assistance in the event of rejection or repeated difficulties with a request for mutual judicial assistance. In these cases, the College may adopt a **non-binding opinion**, although in the event the competent national authority decides not to follow the indications contained therein, it must provide reasons for its decision, except in cases of national security or if it could endanger an investigation already underway or the safety of individuals (see Article 8 of the Eurojust Decision).

1.3.4.2. Eurojust's operation via its national members

All communications and transmissions of information between Eurojust and the competent authorities of the Member States are made via the corresponding national member (Article 9 (2) of the EJD). This means:

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[30] Eurojust's work - acting both in a collegiate manner and through its permanent members - has been strengthened in this regard by the Council's Framework Decision 2009/948/JHA on 30 November 2009 regarding the prevention and resolution of conflict when exercising jurisdiction in criminal processes (OJEU L 328/42, from 15.12.2009). The conflict of jurisdiction and the *ne bis in idem* principle have been studied in Topic 19 [CREATE HYPERLINK TO POINT 3.3.2 IN TOPIC 19] in this course, those interested should look there.

- on the one hand, that each Member State will define the nature and scope of the judicial responsibilities it grants to its national member in its own territory, giving him/her both access to the information contained in the national criminal record or in others, as well as the power to contact the competent authorities of its Member State directly.
- on the other, that the other Member States undertake to accept and recognise the prerogatives granted to national members in this way, provided that they are in line with international undertakings.

The Member States also undertake to ensure that their national members are informed of: cases of conflict of jurisdiction, controlled deliveries, repeated rejections or difficulties in the enforcement of a letter rogatory, the creation of a joint investigation team as well as of the cases that directly affect more than three Member States and that involve an offence that entails a sentence of at least five or six years or in which a criminal organisation is involved or where the case has a cross-border dimension or repercussions at an EU level (Article 13 of the Eurojust Decision).

On an operational level, Eurojust functions through one or more national members involved in a case, entitled to perform the functions envisaged in Article 6 of the Eurojust Decision. The new DSE strengthens this task, because by extending the scope of operation of Article 8 to requests from the national members, the requested national authorities are obliged to provide reasons for their decision in the event they decide not to accede to requests from the national member.

The new DSE, moreover, is called to alleviate the distortions created in practice by the uneven attribution of responsibilities by the Member States to their national members. The powers of the national members are conferred either due to their capacity as a competent national authority or because the Member State has decided that it should be that way. The national member will inform whether he/she is acting as competent national authority or as a member of Eurojust to whom his/her state has conferred said power (Article 9 bis of the Eurojust Decision). However, all the national members must have <u>at least</u> been conferred the **powers** of:

d) receipt, transmission, monitoring and provision of information related to the execution of requests for judicial assistance (Article 9 ter of the Eurojust Decision) and
e) participation in joint research teams (Article 9 septies of the Eurojust Decision).

If permitted by constitutional rules and the national legal system, the margin for action of the national member may be extended with the following powers:

f) powers exercised pursuant to or at the request of a competent national authority (Article 9 quater of the Eurojust Decision): prepare and send a letter rogatory, execute requests for judicial assistance and decide on them, order that investigative measures be adopted or authorise and coordinate controlled deliveries. These actions will, in theory, be exercised by the competent national authority.
g) powers exercised by the national member in a case of urgency (Article 9 quinquies of theEurojust Decision): when it is not possible to identify or contact the competent national authority, the Eurojust national member can authorise and coordinate controlled deliveries and execute requests for judicial assistance and decide on them. As soon as the competent national authority has been identified, it will be informed of the action taken.

The new DSE also gives Eurojust greater operational capacity by creating an **On-Call Coordination** (Article 5 bis of the Eurojust Decision): a unit that is permanently on-call - 24/7 - comprised of one Eurojust contact point and one representative for each Member State (the national member, his/her deputy or an assistant). In cases of urgency, the competent national authority will send the request for judicial assistance to the contact point of the on-call coordination, who will immediately send it to the representative of the requesting Member State and, if explicitly requested, to the representative of the Member State in whose territory the request is to be executed.

1.3.4.3. Functional relations

Eurojust cooperates and maintains functional relations both with other EU bodies and international organisations and with third countries[31]. There are, nonetheless, different degrees of cooperation.

[31] See Article 26 and 27 of the EJD.

1.3.4.3.1. Relations with other EU bodies[32]

Eurojust maintains close *cooperation* with **Europol**, aimed above all at avoiding duplication. The relations between Eurojust and Europol are governed by the provisions of the Agreement between Europol and Eurojust dated 9 June 2004[33]. The cooperation between these two bodies has also developed in the participation of Eurojust in the Europol analysis work files[34]. In June 2007, Eurojust appointed national members and analysts as associate experts (Article 26 (1) (a) of the Eurojust Decision). On a national office level, the functions of the national members include that of maintaining close relations with the Europol national unit (Article 9 sexies (5) (d) of the Eurojust Decision).

Relations with the **European Judicial Network** (EJN) are *privileged*. Both the new Decision on the EJN and the Decision strengthening Eurojust clarify, and at the same time develop, the relationship between the two. These relations are based on consultation and complementarity (Article 10 of the EJND and Article 25 bis of the Eurojust Decision), specifically between the national member, the points of contact with the Member State and the national Eurojust correspondent. As set out above, the Secretariat of the EJN forms part of the Administration of Eurojust, albeit as a separate and autonomous unit.

This *excellent* cooperation takes the form of the following measures:

- Eurojust has access to the centralised information gathered by the EJN and its secure telecommunications network
- the national member of Eurojust will inform the contact points of the EJN of those cases where it considers that the EJN is better situated to hear the case and vice versa
- the national members of Eurojust may attend the EJN meetings at the invitation of the latter In turn, EJN contact points may be invited to Eurojust meetings[35].

Eurojust maintains close cooperation with the European Anti-Fraud Office

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[32] The new Article 26 of the of the EJD also envisages cooperation between Eurojust and the European Judicial Training Network and with FRONTEX. Since 7 February 2008 there has been a memorandum of understanding with the European Judicial Training Network which sets out the secondments of judges and prosecutors to Eurojust for training purposes.

[33] Drawn up on the basis of that stipulated in Article 23 of the Eurojust Internal Regulations.

[34] Since 2003, the Danish Protocol offers the possibility for Europol to invite experts from third countries and bodies to join the work of the analysis groups.

[35] See Article 26 (2) (c) of the Eurojust Decision.

(**OLAF**). To that end, OLAF may contribute to the work of Eurojust where it is aimed at coordinating the judicial investigations and actions on the protection of the financial interests of the Communities, either at the initiative of Eurojust, or at the request of OLAF, provided that the competent authorities of the Member States do not object (Article 26 (4) of the Eurojust Decision). This cooperation led on 24 September 2008 to a Practical Agreement on cooperation arrangements (the peculiar name is due to the lack of legal status of OLAF, held by the European Commission). The two bodies hold regular meetings and invite each other to activities they consider to be of interest[36].

As far as training organisations are concerned, Eurojust cooperates with the European Judicial Training Network and the European Police Academy, CEPOL.

Finally, as a new development introduced by the DSE, insofar as it is useful for the exercise of its functions, Eurojust may establish and maintain relations of cooperation with FRONTEX, the European agency for the management of operational cooperation on the external borders of the Member States of the European Union (Article 26 (1) (c) of the Eurojust Decision).

For specific cases, Eurojust may cooperate with **liaison magistrates** from the Member States with a view to creating a framework for exchange that makes it possible to improve judicial cooperation between the Member States of the Union. In order to avoid overlaps and duplication between Eurojust, the EJN and the liaison magistrates, in October 2007 Eurojust organised a meeting with them in order to discuss how to improve actions in cases affecting two or more states. In recent years, Eurojust has been developing its network of contact points and currently has 31 in 23 states, both in the rest of Europe and in other continents[37].

1.3.4.3.2. Relations with third countries

Eurojust can enter into cooperation agreements, approved by the Council, with third countries. Said agreements may contain, in particular, provisions on the methods for sending liaison officials or liaison magistrates to Eurojust. As

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[36] See Article 22 of the Eurojust Internal Regulation.

[37] The states with which Eurojust maintains contact points are: Albania, Argentina, Bosnia and Herzegovina, Canada, Croatia, Egypt, the Former Yugoslav Republic of Macedonia, Iceland, Israel, Japan, Liechtenstein, Moldova, Mongolia, Montenegro, Norway, the Russian Federation, Serbia, Singapore, Switzerland, Thailand, Turkey, Ukraine and the United States of America. Source: Eurojust 2007 Annual Report.

mentioned earlier, Eurojust currently has two liaison magistrates from third countries. Moreover, they may include provisions regarding the exchange of personal data; in said case, Eurojust will consult the Joint Supervisory Body.

Eurojust may exchange all the information necessary for the performance of its functions with the competent authorities of third countries for judicial investigations and actions. That is, provided two requirements are fulfilled[38]:

- that the national member of the Member State that provided the information gives his/her consent to transfer, and
- that there be a cooperation agreement in force or that the case be an urgent one.

In urgent cases, Eurojust can also cooperate with a third country without the need for a cooperation agreement in force, provided that this cooperation does not represent the transfer of personal data from Eurojust to said entities. The transfer of personal data from Eurojust to third countries to which the Council of Europe Convention of 28 January 1981 does not apply may only take place when there is a sufficient comparable level of data protection. Nevertheless, even when such conditions are not fulfilled, a national member may, acting as such, exchange information that includes personal data on an exceptional basis aimed solely at adopting urgent measures in order to prevent imminent danger for a person or for public security reasons. It will be for the national member to determine whether it is legal to authorise the communication and the communication of data will only be authorised if the addressee undertakes to ensure that the data is used exclusively for the purpose for which it was communicated.

At present, Eurojust has signed cooperation agreements with the following states (in chronological order): Norway, Iceland, the United States of America, Croatia, Switzerland and the Former Yugoslav Republic of Macedonia.

1.3.4.3.3. Relations with similar institutions or international bodies: Iber-RED, UNODC and the International Criminal Court.

In order to fulfil its objectives, Eurojust may establish contacts, share experiences of a non-operational nature and exchange all kinds of information necessary for the performance of its functions with international bodies and organisations. These include:

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[38] See Article 27 of the EJD.

- the signing in April 2007 of a letter of intent with the Prosecutor of the **International Criminal Court**, as a first step towards exploring areas of cooperation and a possible agreement between the two bodies, and

- the signing in Lisbon on 4 May 2009 of the Memorandum of Understanding between Eurojust and Iber-RED (this document was drafted in three language versions, all of which are official: Spanish, Portuguese and English) and

- the signing on 26 February 2010 of the Memorandum of Understanding with the United Nations Office on Drugs and Crime (UNODC).

1.3.6. Challenges

Articles 85 and 86 of the TFEU represent the great challenges that Eurojust must face. On the one hand, it must prepare to make advances within and strengthen judicial cooperation in criminal matters, once the new Eurojust Regulations have been adopted (article 85 of the TFEU), whilst on the other hand, it must prepare for the creation, "from Eurojust" of the European Public Prosecutor's Office (article 86 of the TFEU).

Each of these themes were the subject of discussion during the ERA-Eurojust Conference: *"10 Years of Eurojust: Operational Achievements and Future Challenges"*, held in the Hague on the 12th and 13th of November 2012[39]. In this forum, the European Commission announced its intention to propose a first draft of the Eurojust Regulations by the end of the first half of 2013. These Regulations would repeal the current Eurojust Decision.

To learn more: The Future European Public Prosecutor's Office.

Level Four: Relationships between Eurojust and the Spanish authorities.

[39] Refer to: http://www.eurojust.europa.eu/press/News/News/Pages/EJ-ERA-Conference-2012-11-21.aspx
The minutes of the conference are in the process of being published.

1.4. Europol

1.4.1. Creation

The idea of creating a European police department first began to take shape during the Luxembourg European Council of 1991. With the adoption of the Treaty of Maastricht, Article K.1 of the Treaty on European Union established this possibility by envisaging police cooperation between Member States to prevent and combat terrorism, the illicit trafficking of narcotic drugs and other serious forms of organised crime by means of the creation of a system for the exchange of information on an EU level in the context of a "European police office" that the Treaty itself termed "Europol". This precept was developed and the unit took its first steps in January 1994, under the title of the "Europol Drugs Unit" (EDU), with the adoption by the Council of Joint Action 95/73/JHA, dated 10 March 1995[40]. Based on Article K.3 of the Treaty on European Union, the Member States adopted Council Act of 26 July 1995, with an appendix containing what is commonly termed the "Europol Convention"[41] officially creating said police cooperation body. The Europol Convention entered into force on 1 October 1998 and on 1 July 1999 the EDU was definitively replaced by Europol.

The organisation was strengthened by the Tampere European Council of 1999, whose Conclusions called on the Member States to provide it with the necessary support and resources while at the same time envisaging an enhancement of the role of Europol, increasing its prerogatives and its scope of action[42].

In recent years, the Europol Convention has been revised several times over, as the list of offences which it includes was extended. In December 2006 the European Commission presented a proposal[43] to replace the current Europol Convention with an EU Council Decision. After almost two years of negotiations in

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[40] This Joint Action was amended subsequently by Joint Action 96/747/JHA, dated 29 November 1996 (OJ L342 dated 31.12.1996).

[41] It is worth highlighting that, as we will see in the final epigraph of this section, Europol is not strictly speaking a body or agency of the European Union, as it was not adopted by a Decision of the Council but by an "international" Convention between the Member States. In fact, Europol's budget does not come from the EU budget, but from contributions from Member States. The practical repercussion of this is that the inter-governmental aspect is even stronger than in the other Third Pillar bodies studied up to now. Nevertheless, there is currently a proposal to convert Europol into an agency of the Union and convert the Europol Convention into a Council Decision.

[42] See Conclusions of the Tampere European Council, Points 43 and 56.

[43] Said proposal, COM (2006)817 final, although it is not published in the Official Journal, is available on the EU website.

the Council, in April 2008 a political agreement was reached that made it possible for the Council to formally adopt, on 6 April 2009 the Decision creating the European Police Office (the "Europol Decision"). Although the Europol Decision entered into force on 4 June 2009, it did not come into force until 1 January 2010, as was envisaged in Article 64.

Since its creation, Europol has had its own legal personality[44] with head offices in The Hague. Although under the Europol Decision the field of action of the Office is extended, as it is no longer necessary for there to be an element of criminal organisation in all cases, the nature of its functions has not changed at all. Nevertheless, as we will see in this section, the change from Convention to Council Decision has clear advantages, above all regarding the closer link with the institutions of the Union and therefore, greater celerity in Europol's adaptation to the changing needs of the fight against transnational crime.

1.4.2. Objectives

Europol seeks to improve police cooperation between European Union Member States in the prevention of and fight against organised crime, terrorism and other forms of serious crime that affect two or more Member States (Article 3 of the Europol Decision) and other related offences (Article 4 and appendix of the Europol Decision). The list of the other forms of serious crimes was increased progressively over time by means of successive amendments of the Europol Convention, and the appendix to the new Europol Decision is particularly useful as it contains an updated list of the same. By way of example it is worth highlighting: offences against the life, bodily integrity, freedom and the property of persons which have been or are committed as part of terrorist activities[45], crimes connected to nuclear and radioactive substances, illegal immigration and trafficking of human beings[46], trafficking in stolen vehicles, forgery of money and means of payment, money laundering and related offences[47], crimes

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[44] See Article 26 (1) of the Europol Convention and Article 2 (1) of the Europol Decision.

[45] Included following the amendment of the Europol Convention by the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, bodily integrity, personal freedom or property (1999/C 26/06).

[46] Included following the amendment of the Europol Convention by the Council Decision of 3 December 1998 which completes the definition of the offence termed "trafficking in human beings" included in the appendix to the Europol Convention (1999/C 26/05).

[47] In compliance with the Conclusions of the Tampere European Council (Point 56), the Member states adopted the "Money-laundering Protocol" ("*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)*

against property, public assets and crimes of fraud, crimes against the environment[48], and protection of the euro[49]. With the Europol Decision, the Office's role as the European central office against the forgery of the euro has been enhanced (Article 5 (5) of the Europol Decision).

1.4.3. Composition

The Member States cooperate with each other in Europol via their **national units** (**ENU**)[50]. The ENUs act as a link between Europol and the competent national services and are comprised of **liaison officials**[51] appointed by the Member States from among the officials of the national authorities responsible for preventing and combating the crimes within the remit of Europol. The liaison officials remain the responsibility of the national authorities that sent them, are subject to national rules and are responsible for protecting the interests of the national unit in Europol.

With the entry into force of the Europol Decision, the bodies of the Office are simplified and the weight of the European Commission (formerly a mere observer on the Management Board) and the European Parliament (currently a body that authorises and verifies the budget) are increased. Thus, its bodies are reduced to the Management Board[52] and the Director[53].

The **Management Board** of Europol consists of one representative for each Member State plus one from the European Commission[54], with each member having one vote. It meets regularly (at least twice a year) and it is responsible for monitoring the correct operation of Europol; in particular: the adoption of a strategy that includes indices of reference aimed at determining whether the objectives set have been reached and the supervision of the Director's work. The full members or their replacements may be accompanied and advised by experts from their Member States during the deliberations of the Management Board and the presidency

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of a Protocol amending Article 2 and the Appendix to that Convention (2000/C 358/01)"), thus amending Article 2 of the Europol Convention.

48 Contained in the Decision of 6 December 2001.

49 Council Decision of 12 July 2005.

50 See Article 8 of the Eurojust Decision).

51 See Article 9 of the Eurojust Decision).

52 See Article 37 of the Eurojust Decision).

53 See Article 38 of the Eurojust Decision).

54 Prior to the entry into force of the Europol Decision the Commission's role was that of a mere observer and it was even barred attending in relation to some matters.

rotates, corresponding to the representative of the Member State that presides over the Council of the Union at any given time.

1.4.4. Responsibilities and function

Europol plays a vital role in providing support to the prevention, analysis and investigation of crime on an EU scale (i.e. two or more Member States must be affected before Europol can act).

It is worth highlighting that Europol **has no executive or investigative powers**. As such, its actions consist of[55]:

- facilitating the transmission, management and exchange of information between the national services, and
- providing analysis of crime ("files") to these services.

The Europol Decision has specified these functions to:

- providing support to the Member States in the shape of analysis and information in relation to an important international event, and
- preparing risk assessments, strategic analyses and general reports on the state of the work in relation to its aims, including risk assessments regarding organised crime.

On joint investigation teams, it is worth highlighting that, even before the entry into force of the Europol Decision, the possibility existed to suggest the creation of a joint investigation team in specific cases[56]. The Eurojust Decision now expressly envisages this in Article 5. In this field, Europol can also participate in the joint investigation teams[57] formed by the services of the different Member States, providing them with the information they need on the ground[58].

Finally, Europol assists in the training of the members of the competent national authorities and also supplies technical support.

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55 See Article 5 of the Eurojust Decision

56 The Member States gave Europol this possibility at the Tampere European Council in 1999 (see Conclusions of the Tampere European Council, Point 43), although this power was granted with a moratorium of five years as of the entry into force of the Treaty of Amsterdam (Article 30 (2) of the Europol Convention).

57. By way of example, the Spanish regulations governing joint investigation teams, Law 11/2003 dated 21 May, includes the regulation of the teams that may be created under Europol, as well as in Eurojust and OLAF (see the Second Additional Provision).

58 While the Council Act of 28 November 2002 establishes the privileges and immunities of Europol and its agents, the criminal liability of the members of the joint investigation teams is regulated by the national legal systems. See, for example, the Spanish law on the criminal liability of the members of joint investigation teams when acting in Spain (Organic Law 3/2003 dated 21 May).

In order to perform these functions, Europol has a computerised information gathering system. Thanks to the new Article 10 of the Europol Decision, other systems for processing personal data may be created and maintained and the current system may be enriched with new types of information (such as fingerprint data, DNA profiles or information regarding the place of residence or the profession of the person in question; see Article 12 of the Europol Decision). At present, the Europol information system ("**EIS**") consists of three elements: the computerised information system itself, the analysis work files (*"AWF"*) and the index function. It is worth highlighting that the data regarding the connected offences cannot appear in the **computerised system**. The data recorded in the system refers both to persons that have committed a crime or offence within the remit of Europol, who have been sentenced in relation to the same pursuant to the national law of a Member State or even those suspected of having committed a crime or offence or, in cases of exceptional seriousness, persons who are liable to have committed it.

Both the ENUs and the liaison officials have full access to this computerised information system, and the competent national systems designated by the Member States have restricted access.

As for the **work files**[59], they can store data on connected offences and are used to record data on suspects, presumed offenders, possible witnesses, victims and other potential contact persons.

The **index function** can only be consulted by authorised Europol agents, the Director and the liaison officials.

As the basic mission of Europol is to gather and analyse information, the right to the private life of citizens becomes particularly relevant in this organisation. Although the Europol Convention regulates the area of the processing and protection of personal data in Chapter V, envisaging the appointment by each Member State of a national monitoring authority and the creation of a common, independent control authority, the Council of the Union has been gradually adopting supplementary rules[60] that regulate the transfer of data from third parties or destined for third-party bodies. With the abrogation of the Europol Convention and in

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[59] In application of the Europol Decision of 30 November 2009, the Council adopted the Decision /936/JHA through which the development regulations applicable to the Europol analysis work files were adopted (OJEUE L325/14 of 11.12.2009).

[60] Council Act 99/C 26/01, of 3 November 1998, which adopts the rules applicable to Europol analysis files (OJ C26 of 30.1.1999); 99/C 26/2 Council Act, of 3 November 1998, which adopts rules on the confidentiality of Europol information. (OJ of 30.1.1999), amended by the Council Act of 5 June 2003 (OJ C 152 of 28.6.2003) and Council Act 99/C 26/03, of 3 November 1998, laying down rules concerning the receipt of information by Europol from third parties (OJ C26 of 30.1.1999).

application of the Europol Decision (Articles 22, 23 and 25), the Council adopted[61] two key Decisions on 11 December 2009 that replaced the previous legislation concerning the treatment and protection of classified personal information: the 2009/936/JHA Council Decision of 30 November 2009, adopting the development regulations applicable to the Europol analysis work files and the 2009/934/JHA Council Decision of 30 November 2009, which adopted development regulations governing relationships between Europol and its partners, including the exchange of personal data and classified information. Both decisions came into effect on 1 January 2010.

It should be stressed that the 2009/935/JHA Council Decision of 30 November establishes Europol external relationship priorities when determining the list of third States and organisations with which Europol may enter into cooperation agreements[62].

1.4.5. Challenges

In application of article 88 of the TFEU, the European Parliament and the Council must adopt Regulations to determine the structure, operation, field of action and tasks of Europol.

In view of the adoption of the "Europol Regulation" and on the basis of article 37(11) of the Europol Decision, the Management Board commissioned an external,

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[61] See OJEU L325, of 11 December 2009.

[62] Based on the Europol Convention and the Council Act of 3 November 1998, establishing the regulations governing Europol's exterior relationships with third States and organisations not related to the European Union (1999/C 26/04), Europol enters into strategic or "operational" cooperation agreements (only the latter allow for the transmission of personal information) with the following countries and international organisations: (a) operational cooperation agreements with: Australia, Canada, Croatia, Iceland, Norway, Switzerland, the USA and Interpol, and (b) strategic agreements with: Albania, Bosnia-Herzegovina, Colombia, the Former Yugoslav Republic of Macedonia, the Republic of Moldova, Montenegro, the Russian Federation, Serbia, Turkey, Ukraine, the World Customs Organisation and the UN Office on Drugs and Crime (UNODC). "Third parties" is also understood to refer to other bodies of the European Union with which Europol's work may be related. Based on Act of the Management Board of Europol dated 15 October 1998, Europol currently has strategic agreements with the following Union bodies: the European Commission, the European Central Bank, OLAF and the European Monitoring Centre for Drugs and Drug Addiction and an operational agreement with Eurojust. Since the new Europol regulations concerning the protection of personal information and the priorities in its external relations came into force on 1 January 2010, Europol has not adopted any operational or strategic cooperation agreement with a third-party State or institution.

independent assessment of the application of the Europol Decision and its activities. This report, published on the 21st of June 2012[63], was forwarded to the European Parliament, the Council and the European Commission as part of the impact study to be undertaken by the Commission prior to the presentation of its proposal for Regulations. The Commission presented its proposal on the 27th of March 2013[64] and it is envisaged that the Regulations will be adopted during the current parliamentary term. These Regulations would repeal the current Eurojust Decision.

2. INSTITUTIONS FOR COOPERATION ON AN INTERNATIONAL LEVEL

2.1 The Ibero-American Network for Judicial Cooperation (Iber-RED)

2.1.1 Creation and aims

Like the European Judicial Space, Latin America has set up its own Ibero-American Judicial Space[65]. In order to achieve this, in 2004 the **Ibero-American Network for Judicial Cooperation**, Iber-RED[66] was set up. Created by the Meeting of Ibero-American heads of Justice Administration (Conference of Justice Ministers[67], the Ibero-American Judicial Summit[68] and the Ibero-American

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[63] Evaluation of the implementation of the Europol Council Decision and of Europol's Activities: htpps://www.europol.europa.eu/sites/default/files/publications/rand_evaluation_report.pdf

[64] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA. COM (2013) 173 final 2013/0091 (COD), of the 27th of March 2013 (currently only available in English): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0173:FIN:EN:PDF

[65] "Ibero-America" or the "Ibero-American Community of Nations" refers to the territory covered by the "historical community of countries that form part of a common culture within the Portuguese-American and Hispano-American world". At present, 22 States comprise the Ibero-American Community of Nations: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela (see Point VII of the Preamble to the Iber-RED Regulations). Puerto Rico also participated in the Iber-Red through its involvement in the Ibero-American Judicial Summit.

[66] The Iber-RED Regulations date from 27-29 October 2004 and are available in the official languages of the organisation (Spanish, Portuguese and English) at: http://www.iberred.org/index.php?option=com_content&task=view&id=12&Itemid=45 For obvious reasons, during this presentation reference will be made to the Spanish version.

[67] www.xvconferenciaiberoamericanamjusticia.es

[68] www.cumbrejudicial.org

Association of Public Prosecutors [AIAMP][69]), held in Cartagena de Indias (Colombia) in October 2004, Iber-RED was also conceived under the auspices of the Ibero-American Conference of Justice Ministers of June 2004[70] and with the support of the Ibero-American Summit of Heads of State and Government[71].

Its aim is the creation of a network of contact points[72] which contains all the legal operators involved in the sending and execution of letters rogatory and requests for international judicial cooperation, and is conceived as an instrument for improving, simplifying and accelerating effective judicial cooperation between the states in criminal and civil matters.

More specifically, we can talk of a **double aim**:

- on an **internal** level (Provision 3 of the Iber-RED Regulations), Iber-RED's aims are:
  - to optimise judicial cooperation in criminal and civil matters between participant countries, and
  - progressively establish and maintain up-to-date an information system on the different legal systems of the Ibero-American Community of Nations.
- on an **external level** (Title IV of the Iber-RED Regulations), Iber-RED's aim is to maintain contacts and exchange experiences with other judicial cooperation networks and international bodies that promote international judicial cooperation. On this point, special interest is attributed to the task of assisting in the execution of requests for cooperation sent by the **International Criminal Court** (see Provision 14 (1) of the Iber-RED Regulations and section 2.3 of this topic) and above all the promotion, through its contact points, of operational relations with **Eurojust** (see Provision 14 (2) of the Iber-RED Regulations and section 1.3.5.3.3 of this topic).

2.1.2 Composition

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[69] http://www.aiamp.net/

[70] See the Declaration of the XIV Conference of Justice Ministers in Fortaleza (Brazil), from 31 May to 2 June 2004: http://www.xvconferenciaiberoamericanamjusticia.es/

[71] See the **Special Communiqué on the creation of the Ibero-American Network for Judicial cooperation** adopted by the Ibero-American Heads of State and Government at the XIV Ibero-American Summit, held in 2004 at San José de Costa Rica: http://www.oei.es/xivcumbredec2.htm#3

[72] The updated list can be found on the website of Iber-RED (www.iberred.org). At the date of writing, the list is updated to 5 November 2007.

Iber-RED consists of two divisions: criminal and civil. As set out in Provision 4 of the Iber-RED Regulations, there are three categories of **members** of Iber-RED:

- the contact points designated by the Justice Ministries, the Public Prosecutors' Offices and the Government legal advisory services (*Fiscalías Generales*), and by the judicial bodies of the Ibero-American Community of Nations;

- the central bodies and authorities established in instruments of international law to which the countries of the Ibero-American Community of Nations are party, or in rules of internal law regarding judicial cooperation in criminal and civil matters and, if applicable,

- any other judicial or administrative authority responsible for judicial cooperation in civil and criminal matters that the members of Iber-RED consider should belong to the network.

The contact points[73] are those who, acting as national correspondents of each state, perform the operational tasks of judicial assistance in the Ibero-American sphere. Each competent institution (Justice Ministries, the Public Prosecutors' Offices and the Government legal advisory services (*Fiscalías Generales*), and the judicial bodies of the Ibero-American Community of Nations) can designate at least three contact points, in line with the organic descriptor provided by the Secretariat General and ensuring that they are appropriately qualified in the field of international judicial cooperation (Provision 8 of the Iber-RED Regulations), meaning that Iber-RED currently has a broad, specialised network of contact points.

Iber-RED also has a **Secretariat General** (Provisions 7 and 12 of the Iber-RED Regulations) conceived as a rotating administrative unit, which will be developed and put into practice by the Justice Ministry holding the Secretariat General at the Conference of Justice Ministries of the Ibero-American Countries at the time[74]. Thus, the Secretariat General does not have operational powers, and is responsible merely for the coordination, spread, representation and maintenance of the Network.

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[73] The updated list can be found on the website of Iber-RED (www.iberred.org). At the date of writing, the list is updated to 5 November 2007.

[74] At present, the Secretary General of Iber-RED is Dr. Victor MORENO CATENA, appointed during the XV Conference of Justice Ministers of Ibero-American Countries in September 2006.

As far as representation functions are concerned, it should be stressed that it has the authority to maintain contacts and exchange experiences with other networks and international organisations that promote judicial cooperation (Provision 8 (2) *in fine* of the Iber-RED Regulation). This is the basis for the signing of the aforementioned Memorandum of Understanding with Eurojust and the European Judicial Network.

2.1.3 **Responsibilities and Functions**

In order to achieve its aims, Iber-RED acts strictly within the bounds of the principle of **complementarity**; that is, fully respecting the jurisdiction of the executives and central authorities of the Ibero-American Community of Nations in relation to international judicial cooperation.

The contact points perform two kinds of functions which are very similar to those we studied in relation to the contact points of the European Judicial Network, with express respect for the principle of complementarity and to the extent established in the respective domestic laws[75]:

- **Operational**[76]:
  - Implementation of the procedures for cross-border activities (active intermediation, enhancement, simplification and facilitation of the traditional mechanisms of international judicial cooperation) and speeding-up the requests for judicial cooperation sent;
  - effective and practical application of the conventions on judicial cooperation in force in the Ibero-American states;
  - coordination of the examination of requests for international judicial cooperation;
  - on an external level, the contact points may perform operational functions in relation to contact points or correspondents from other bodies, with special emphasis, as mentioned earlier, on the promotion of operational relations with Eurojust (see Provision 14 (2) of the Iber-RED Regulations and section 1.3.5.3.3 of this topic).
- **Non-operational**[77]:

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[75] See Provisions 5 (1), 13 (2) and 14 (2) of the Iber-RED Regulations.

[76] See Provisions 5, 6, 10 and 11 of the Iber-RED Regulations.

[77] See Provisions 13 (2) and 14 (2) of the Iber-RED Regulations.

- supply and update the information necessary for proper judicial cooperation;
- participation and collaboration in the organisation of meetings[78] of the contact points (meetings at least once a year).

2.2. The international criminal police organisation (Interpol)

2.2.1 Creation and aims[79]

This is the oldest international police cooperation organisation in the world. Created in 1923, today it has 188 member states and its basic aim is to facilitate cross-border police cooperation not only between its members, but also in support of international organisations, authorities and services whose purpose is fighting crime. Interpol contributes to international police cooperation, even in those cases in which there are no diplomatic relations between the states in question. Thus, as we will see, Interpol constitutes a valuable element for the capture of fugitives sought by the international courts and the International Criminal Court.

2.2.2. Composition

Under Article 5 of its Statute, Interpol consists of the following bodies:

- **The General Assembly**: the supreme authority of the organisation in which delegates from the Member States participate on an equal footing (each country has one vote; Article 13 Statute);
- **The Executive Committee**: responsible for checking the execution of the decisions of the General Assembly and supervising the work of the Secretary General. It is headed by the President of the organisation;
- **The General Secretariat:** headed by the Secretary General, responsible for the day-to-day work of the organisation;
- The **national central bureaus** (**NCBs**): staffed by highly qualified police officials. The NCBs act as contact points with the National Secretary of the organisation, the regional offices and the other Member States.

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[78] It is worth highlighting that at the last meeting of Iber-RED contact points, held at Punta del Este (Uruguay) in November 2007, one of the points debated was the Project for a Inter-jurisdictional Code of Cooperation for Ibero-America (see http://www.iberred.org/documentos/ConclusionesIIIReunionppccUruguayBIS.pdf). The 4th contact points meeting was planned for June 2008 in Argentina.

[79] For further information on Interpol, see: http://www.interpol.int/Public/ICPO/LegalMaterials/DefaultEs.asp

- The **advisors**: appointed by the Executive Committee and approved by the General Assembly. The organisation takes recourse to these actors in cases where it is necessary to study scientific matters. Their role is a purely consultative one.

The seat of the organisation is in Lyon (France) and it has seven regional offices[80]. The organisation works in four official languages: English, French, Spanish and Arabic.

It is also worth mentioning that Interpol has its own legal status(Article 41 of the Statute) with its budget provided by contributions Member States (Article 38 of the Statute).

2.2.3. Responsibilities

The Interpol Statute expressly prohibits "*any intervention or activities of a political, military, religious or racial character"* (Article 3 of the Statute).[81].

This restriction aside, unlike Europol, Interpol does have the power of operational action. More specifically, Interpol has four core functions:

- Secure global **police communications services**: this system is known as **I-24/7.** It enables police in all of the member countries to request, submit and access vital police data instantly in a secure environment.
- Operational **data services and databases for police**: Interpol administers a series of databases in which information is stored concerning: names and photographs of criminals and wanted persons, fingerprints, DNA profiles, stolen or lost travel documents (since 2002, having established a clear relationship between terrorist activities and the unlawful use of travel documents), stolen vehicles, images of child sexual abuse[82] and stolen works of art. Through the technical solutions developed by Interpol (known as **MIND** and **FIND**; databases on mobile and land-line networks) the police staffing airports and border posts can access these databases through their national computer terminals.

  Interpol also publishes and distributes international notices, which will be explained in greater detail in the next section.

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[80] The regional offices are in: Argentina, Cameroon, El Salvador, Ivory Coast, Kenya, Thailand and Zimbabwe.

[81] See also the publication: "***Legal framework governing action by Interpol in cases of a political, military, religious or racial character":*** http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS07.asp

[82] Database known as ICAID. Its computerised image recognition system makes it possible to establish links between images related to the same series of abuses or images taken in the same place although the victims are different.

- Operational **police support services**: this service centres on the following priority crime areas: corruption[83], drugs and organised crime[84], economic and financial crime and high-tech crime, fugitives, public security and terrorism (for which a specific unit in the General Secretariat has been created) and trafficking in human beings.

  Moreover, while they may not be considered priority areas by the organisation, Interpol's scope of operations also contains matters related to: genocide, war crimes, crimes against humanity[85] and crimes against the environment.

- **Police training and development**: Interpol performs specific police training activities for the national police forces as well as advisory and assistance tasks.

2.2.4. Functions

In order to provide **operational support**, Interpol has a **Command and Co-ordination Centre**, at its General Secretariat (Lyon) available 24 hours a day. The CCC coordinates the exchange of information and assumes the role of crisis manager in cases of serious incidents, connected to the General Secretariat, the NCBs and the regional offices. The services of the CCC include sending crisis management units or teams for identifying the victims of catastrophes (in the case of a terrorist attack or natural disaster); it can also send support units for major sporting events or world summits with a view to helping the organiser Member States ensure a larger-scale and more effective deployment of security forces.

The essential element of Interpol's operational function is the system of international notices. They are organised in seven categories, according to the type

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[83] By way of supplementary information, in 2009 the Interpol Anti-Corruption Academy (situated in Austria) opened its doors. Its aim is to foster investigation and academic instruction in the search and recovery of assets, money laundering, surveillance and research with a view to development, forensic accounting and ethics. Through this initiative the multi-disciplinary Group of Experts has been set up within Interpol to deal with corruption (IGEC).

[84] In this area, the MILLENNIUM project provides analytical support and information to the member states on the Eurasian international criminal organisations and their members, hierarchies, spheres of activity and *modus operandi*.

[85] Since 1994, Interpol has been providing support to both the Member States and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda in the location and capture of persons accused of genocide, war crimes and crimes against humanity. On 7 October 2004 the General Assembly of Interpol adopted Resolution AG-2004-PRES-17, which urged Member States to cooperate with each other and with the other international organisations. It also authorises the signing of an agreement between the organisation and the Prosecutor of the International Criminal Court, which opens access to the latter for the secure global police communications service and Interpol's police databases.

of information they communicate to the national authorities:

- **Red**: To seek the provisional arrest of a wanted person with a view to extradition based on an arrest warrant or court decision. The legal basis for red notices is the arrest warrant or judicial judgment issued or rendered by the judicial authorities in the interested country.
- **Blue**: To collect additional information about a person's identity, location, or illegal activities in relation to a criminal matter.
- **Green:** To provide warnings or criminal intelligence about persons who have committed criminal offences and are likely to repeat these crimes in other countries.
- **Yellow:** To help locate missing persons, especially minors, or to help identify persons who are not able to identify themselves.
- **Black:** To seek information about unidentified bodies.
- **INTERPOL - United Nations Security Council Special Notices:** To alert police of groups and individuals who are the targets of UN sanctions against Al Qaeda and the Taliban.
- **Orange:** To warn police, public entities and other international organisations of dangerous materials, criminal acts or events that pose a potential threat to public safety.

The international notices are also used by the International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and for Rwanda to search for persons who have committed serious violations of international humanitarian law or crimes against humanity or genocide.

2.3. Cooperation with international courts: ICTY, ICTR, ICC

Up to now we have analysed the international authorities at the disposal of the national judge or public prosecutor to facilitate judicial assistance. However, in this section we are going to look, albeit briefly, at how the national judge or prosecutor also have their own international obligations in relation to judicial cooperation, above all vis-à-vis the international tribunals and the International Criminal Court.

2.3.1. Cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and with the International Criminal Tribunal for Rwanda (ICTR).

Article 29 of the ICTY Statute and Article 28 of the ICTR Statute established the obligation on the States parties to cooperate with the investigation and trial of

those accused of having committed serious violations of International Humanitarian Law.

In the development of these provisions, on a national level, the States parties have adopted regulatory guidelines on how to put these obligations[86] into practice, with the most important consequence being the legation of competence to the *ad hoc* tribunals in the event of a positive conflict of competences (Article 9 of the ICTY Statute and Article 8 of the ICTR Statute). Moreover, the national judicial bodies can be called upon to perform specific tasks at the request of the *ad hoc* tribunals, such as:

- the identification and location of persons,
- taking statements,
- presenting evidence,
- arresting persons, or even
- the surrender or transfer of an accused person in order to bring him/her before the *ad hoc Tribunals.*

The collaboration of Interpol has proven to be particularly important in the performance of these operational actions (see the foregoing section).

2.3.2. Cooperation with the International Criminal Court (ICC).

On 17 July 1998 the Conference of Plenipotentiaries adopted the Rome Statute, creating the first international criminal court of a permanent nature for prosecuting individuals and, in principle, without any *ratione temporis* or *ratioe loci*[87]

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[86] By way of example, see the Spanish laws on cooperation with the *ad hoc* Tribunals: Organic Law 15/1994, of 1 June, on cooperation with the International Tribunal for the prosecution of those considered responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia and Organic Law 4/1998, of 1 July, on Cooperation with the International Tribunal for Rwanda.

[87] It is worth clarifying that the jurisdiction of the ICC is limited in time to the moment of its entry into force, after having been ratified by 60 States parties (which occurred on 1 July 2002) or on the date a new Party State joins if it has not made a Declaration granting jurisdiction to the Court prior to that date (Article 11 of the Rome Statute). As for its territorial jurisdiction, this is limited to the territory of a State party in which (including ships or aircraft flying its flag) the conduct in question took place, the territory of which the person accused of the crime is a citizen, when a state that is not a party to the Rome Statute makes a declaration consenting to the jurisdiction of the Court in its territory in relation to specific crimes or, in any event, when the United Nations Security Council sends the prosecutor of the Court a situation in which one or more crimes included in the Rome Statute seem to have been committed (the latter is the case of the intervention of the ICC in Darfur, Sudan; see Articles 12 and 13 of the Rome Statute). The

restrictions, as in the case of the *ad hoc*Tribunals.

Contrary to the case of the *ad hoc* Tribunals, the obligation for the States parties to cooperate with the ICC is based on the **principle of complementarity**. This implies that the competent national jurisdictional bodies for prosecuting the crimes set out in the Rome Statute (i.e.: genocide, war crimes, crimes against humanity and, in the future, aggression) are not called on to declare their jurisdiction vis-à-vis that of the Court; that is, the latter does not have primacy with respect to the national jurisdictions but acts as a complement to them, in the event the competent state does not wish to or cannot prosecute (See Articles 17 and 18 of the Rome Statute[88]).

Moreover, there is a **full and general obligation for the States parties to cooperate** in the investigation and prosecution of the crimes over which the Court has jurisdiction. Conscious of the fact that this obligation to cooperate is the **keystone** of the entire structure of the Court, the Conference of Plenipotentiaries dedicated all of Part IX of the Rome Statute to it: International cooperation and judicial assistance (Articles 86 to 102 of the Statute of Rome). In fulfilment of this obligation[89], the States parties adopted laws on cooperation with the ICC. By way of example, the Spanish instrument in this regard is Organic Law 18/2003, of 10 December, on Cooperation with the International Criminal Court, Articles 2 and 3 of which regulate active and passive cooperation respectively. In order to activate the latter, the judicial bodies and the Public Prosecutor's Office may send, via the Ministry of Justice, requests for cooperation to the Court as they see necessary in the context of a trial underway in Spain and in the cases and with the conditions established in Article 93.10 of the Rome Statute. The competent authorities for applying the law on cooperation with the ICC are, among others, the ordinary

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Court's universal vocation and the rate at which its statute is being ratified would seem to indicate that it will soon have *ratione loci* jurisdiction virtually the whole world over.

[88] In the development of these provisions of the Statute of Rome, Spanish law, in cooperation with the ICC, Organic Law 18/2003, of 10 December stipulates in Article 10 the suppression of Spanish jurisdiction in favour of the Court; whilst Article 8 of the same law foresees the possibility of the ICC prosecutor requiring the aforementioned suppression in those cases in which from the information supplied by the Chief Public Prosecutor it appears that jurisdiction has been or is currently being exercised in Spain, or, as a consequence of the notification received, an investigation has been instigated by the Spanish authorities.

[89] Article 88 of the Statute of Rome declares that "*Party States shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*."

jurisdiction judicial bodies and, in particular, the National Criminal Court (*Audiencia Nacional*) and the Public Prosecutor's Office (Article 4 of Organic Law 18/2003).

LEVEL TWO: TO LEARN MORE

Other European Union networks for judicial cooperation in criminal matters

Clearly inspired by the European Judicial Network, there are also the following networks that deal with specific crimes: The new Decision to Strengthen Eurojust (2009/426/JHA of the Council) foresees that Secretariats have a presence within the Eurojust Administration, maintaining their independent structure through the articulation created between Eurojust and the Secretariat of the European Judicial Network:

- **European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes** (Council Decision 2002/494/JHA of 13 June 2002). With a view to strengthening cooperation with the International Criminal Court and fighting against impunity in relation to the most serious crimes, each Member State designates a contact point for the exchange of information on the investigation of cases of genocide, crimes against humanity and war crimes (such as those referred to in Articles 6, 7 and 8 of the Statute of Rome of the International Criminal Court). Also based on the principle of direct communication between contact points, their function is to supply, when requested and pursuant to the corresponding arrangements between Member States and the national legislation in force, all the information they have that may be relevant in the context of investigations on cases of genocide, crimes against humanity and war crimes, and to cooperate with the competent national authorities. The contact points meet once a year at the offices of Eurojust, which also means that they are close to the seat of the International Criminal Court (also in The Hague).

- **European network of cooperation between asset recovery offices** of the Member States in the sphere of monitoring and identifying the proceeds of crime and other crime-related assets (Council Decision 2007/845/JHA, of 6 December 2007). Based on Council Framework Decisions 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence, and 2005/212/JHA, of 24 February 2005, on confiscation of crime-related proceeds, instrumentalities and property, which deal with certain aspects

of judicial cooperation in criminal matters in the sphere of the preventative seizure and confiscation of proceeds, instrumentalities and other crime-related property, and in order to complete the CARIN[90] network, each Member State creates/designates one (or two, depending on their national structure) asset recovery office in order to facilitate the monitoring and identification of the proceeds of criminal activities and other crime-related property that may be the object of a warrant for preventative seizure, confiscation or embargo issued by a competent judicial body in the course of criminal proceedings, or, insofar as it is allowed under the national law of the Member State in question, in civil proceedings. Its main function is the exchange of information and good practice among analogous Union bodies.

- **European anti-corruption network.** Special mention should be made of the German initiative to create a network of points of contact against corruption which, on 24 October 2008 emerged as the Council Decision (2008/852/JAI). With the adoption of this Decision, the Council put into practice the conclusions adopted by the member States in November 2004 during the AGIS conference on the enhancement of operational cooperation in fighting corruption in the European Union. In article 1, the Network is fully associated to the European Commission, Europol and Eurojust, with the former able to appoint representatives to the Network. Europol and Eurojust can participate in Network activities, if these fall within the scope of their respective competences. The main functions of the Network are to create a forum for the exchange of information among its members and thus favouring cooperation. The creation of a website is planned.

The Future European Public Prosecutor's Office.

The origins of the idea of creating a European Public Prosecutor's Office date back to the European Commission's concern regarding fraud in the EU's coffers, both from a point of view of income – once the European Community began to generate its own income - and expenditure, particularly focusing on subsidy fraud.

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[90] "Camden Assets Recovery Inter-Agency Network". The CARIN Network was established in The Hague in 2004 by Austria, Belgium, Germany, Ireland, the Netherlands and the United Kingdom and constitutes a global network of professionals and experts aimed at enhancing shared knowledge of methods and techniques in the sphere of the identification, preventative seizure, embargo and cross-border capture of the proceeds of crime and other crime-related assets.

This concern passed into the legislation in Article 280 of the Treaty establishing the European Community, as outlined in the Treaty of Amsterdam. However, this precept already showed the limitations which were to emerge. The fight against fraud and corruption is presented as a task for the Community and the Member States, however it is these who have to undertake it, coordinating their actions. Within this line of inter-governmental cooperation the Council was given responsibility for adopting the necessary preventative steps and for fighting fraud, yet without affecting the application of national criminal law nor the national administration of justice.

However, this inter-governmental cooperation soon showed its insufficiencies, as could be seen in the difficulties of advancing within the so-called "third pillar". The convention established on the basis of Article K.3 of the European Union Treaty, relating to the protection of EC financial interests and signed on 26 July 1995[91] - the so-called "PFI convention" - continued without coming into force due to the Member States failure to ratify[92], which lead the Commission of the European Communities to adopt a series of initiatives which was formalised in the Decision of 28 April 1999 creating the European Anti-Fraud Office, OLAF[93], with exclusively administrative competences, and in the presentation of proposed directives for the criminal protection of European Union financial interests[94], which practically covered the whole content of the Convention and which finally never came to anything.

This context provided the framework for the idea to create a European Public Prosecutor's Office. In 1995 the European Commission brought together a group of experts, under the leadership of Professor Mireille Delmas-Marty[95], to draw up a series of basic principles governing how to formalise this protection of financial interests through criminal justice measures. This group of academics did not, however, limit themselves to presenting basic principles, but also undertook important procedural work focusing on the drawing up of a *Corpus iuris,* published in 1997[96], on criminal provisions aimed at protecting financial interests in the European Union, formalised not

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[91] OJEU *C 316 of 27.11.1995, p.49/57*

[92] The PFI convention did not come into force until seven years later, in October 2002, together with the first protocol and the November 1996 protocol granting the Court of Justice competence to give preliminary rulings for interpretation, when ratification from the last of the 15 Member States that had signed it was obtained.

[93] OJEU L136/20, of 31.5.1999. The creation of OLAF was preceded by the Unit for the Coordination of Fraud Prevention (UCLAF) and the Task Force for Coordination of Fraud Prevention, which OLAF replaced.

[94] COM (2001) 272 final, of 23.5.2001

[95] As well as Professor Delmas-Marty, the Group of Experts was made up of Professors Bacigalupo, Grasso, Spencer, Spinellis, Tiedemann, Vervaele and Van den Wyngaert.

[96] ***Corpus Juris*** **portant dispositions pénales pour la protection des intérêts financiers de l'Union Européenne, sous la direction de M. DELMAS-MARTY**, Economica, Paris, 1997.

only in proposed criminal law both general and special, but also procedural law, including the creation of a European Public Prosecutor's Office whose specific remit would be the investigation of such crimes and exercising criminal proceedings before competent national criminal jurisdictions. This procedural work was completed in 1999 with a further study into the viability of the proposal, under the leadership of Professor Delmas-Marty and Professor J. Vevaele [97].

The proposed European Public Prosecutor's Office as set out in *Corpus Iuris* contemplated the creation of a general European, assisted by Deputy Prosecutors in Member States. The organisation of this office would be based on the principle of European territoriality, in other words, that regarding offences of this type, "*the territorial unity of the European Union's Member States constitutes a single space known as the European judicial area*".

These proposals met with a positive response in European institutions. In the ruling presented by the Commission to the Intergovernmental Conference on Institutional Reform ("*Adapt institutions to make a success of enlargement"* [98]), there is extensive analysis of the possibility of creating the role of Public Prosecutor, the added value it would offer, what would be the framework for his or her sphere of action and its formalisation within existing public prosecutor's offices and national criminal jurisdictions, as the creation of European criminal jurisdiction had never been contemplated for the judgment of such conduct. This ruling specifically outlined the

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[97] M. DELMAS-MARTY / J.A.E. VERVAELE: *The Implementation of the Corpus Juris in the Member States*, Intersentia, Utrecht, 2000. The Spanish translation of the text by Professor. María Luis SILVA CASTAÑO is available online. http://ec.europa.eu/anti_fraud/green_paper/corpus/es-revise.pdf

[98] COM (2000) 34 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0034:FIN:EN:PDF *Adapting the Institutions to make a success of enlargement . Opinion of the Commission under Article 48 of the Treaty on European Union on the calling of a conference of representatives of the Governments of the Member States to amend the Treaties*. In Section 5 b) of this Opinion, the European Commission recognises the inability of EU institutions, limited to OLAF, to fight efficiently against fraud and corruption, suggesting "supplementing the current provisions by a legal basis allowing the establishment of a system of rules related to:

- the offences involved and the penalties they carry
- the provisions of necessary procedures for prosecuting such cases
- the provisions governing the tasks and the role of a European Public Prosecutor

responsible for the investigation on the whole of the European territory for fraud and its prosecution before national courts.

preparatory work required for the Treaty of Nice[99], in No. 34 (b) of section 5, referring to the need *"...to supplement the current Treaty provisions on the protection of the Community's financial interests by a legal basis providing for a European prosecutor and facilitating the adoption of rules on criminal proceedings in cases of cross-border fraud."*

A subsequent document, which takes the form of a European Commission Complementary Contribution to the Inter-Governmental Conference on Institutional Reform – "*Criminal-law protection of the Community's financial interests: the European Public Prosecutor*",[100] was more explicit. This document, which expressly cites the procedural contribution of *Corpus Iuris*, recommends that the European Commission Treaty sets out the basic regulations regarding the role of the European Public Prosecutor (appointment, dismissal, mission, independence) leaving further development of these points to secondary legislation, which would also define criminal offences and common procedural regulations[101]. The proposal, however, was not

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[99] The opinion of the Commission was presented in virtue of Article 48 of the Treaty on European Union on the calling of a conference of representatives of the Governments of the Member States to amend the Treaties.

[100] Document COM(2000) 608, of 29 September 2000:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0608:FIN:EN:PDF

[101] The specific text of Article 280 bis of the EC Treaty was as follows:
Article 280 bis

1. To contribute to the attainment of the objectives of Article 280 (1) of
the Council, acting on a proposal from the Commission by a qualified majority with the assent of the European Parliament, shall appoint a European Public Prosecutor for a non-renewable term of six years. The European Public Prosecutor shall be responsible for detecting, prosecuting and bringing to judgment the perpetrators of offences prejudicial to the Community's financial interests and their accomplices and for exercising the functions of prosecutor in the national courts of the Member States in relation to such offences in accordance with the rules provided for by paragraph 3.

2. The European Public Prosecutor shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries. In the performance of his duties, he shall neither seek nor take any instructions. The Court of Justice may, on application by the European Parliament, the Council or the Commission, remove him from office if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the regulations applicable to the European Public Prosecutor.

3. The Council, acting in accordance with the procedure laid down by Article 251, shall lay down the general conditions governing the performance of the functions of the European Public Prosecutor and shall adopt, in particular:

(a) rules defining the facts constituting criminal offences relating to fraud and any other illegal activity prejudicial to the Community's financial interests and the penalties incurred for each of them;

accepted by member States at the European Council of Nice.

The following step was the European Commission's December 2001 presentation of the “Green Paper on the criminal law protection of the financial interests of the Community and the establishment of a European Public Prosecutor.”[102]. The public consultancy period resulting from this Green Paper resulted in a large number of contributions, both official institutions and those from civil society. The monitoring report drawn up by the Commission in 2003[103] states that a vast majority of opinions favoured the creation of such an office, although governments were more reticent[104], due to what they felt was the sufficiency of existing institutions, among which they mentioned OLAF, Europol and the recently created Eurojust and the European Judicial Network. However, other opinions stressed the insufficiency of these institutions, pointing out that Eurojust was not designed to obtain evidence nor to present that evidence in court, whilst OLAF was only set up to launch administrative investigations, although the need for a European Public Prosecutor to work in coordination with these institutions was also highlighted.

It was in fact during this consultation phase that the idea of linking the role of European Public Prosecutor to Eurojust arose as a possible alternative, thus becoming a“*collective prosecution body tasked with conducting and centralising investigations and prosecutions and launching prosecutions in the national courts to protect the Community interests for which it is responsible and with coordinating national operations in relation to transnational crime in general”*. In this alternative proposal, the European Public Prosecutor would be “based” in Eurojust.

Therefore, with the new reform of the European Union's founding treaties, Article 86 of the Treaty on the Functioning of the European Union[105] (in force since 1 December 2009) establishes:

“ 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,

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(b) rules of procedure applicable to the activities of the European Public Prosecutor and rules governing the admissibility of evidence;

(c) rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor in the exercise of his functions.

[102] http://ec.europa.eu/anti_fraud/green_paper/document/green_paper_en.pdf

[103] COM (2003) 128 final. http://ec.europa.eu/anti_fraud/green_paper/suivi/suivi_en.pdf

[104] In the document quoted in the previous point, the Commission resumed the positions of Member States into three groups: those which supported the Commission's position as being favourable to the creation of a European Public Prosecutor (Belgium, Spain, Greece, the Netherlands, Portugal and, to a certain extent, Italy), those that expressed doubts which were either useful or practical (Germany, Luxembourg and Sweden), and those which were openly opposed to the creation of such a position (Austria, Denmark, France, Finland, Ireland and the United Kingdom).

[105] See the text in its consolidated version in EJEU C 83/82, of 30.3.2010

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."

In applying this precept, Eurojust has been driven by and participates actively in debate and reflexion forums regarding how a public prosecutor's office may put that set out in the Treaty on the Functioning of the European Union into practice.

In June 2009, the Spanish State Prosecutor's Office and the Centre for Legal Studies organised a working meeting of the Group of Experts on the European Public Prosecutor's Office[106]. The aim was to reach conclusions that would serve as a starting point for debates which may take place during the Presidency of the Union in the first six months of 2010.

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[106] **Conclusions of the Group of Experts on the European Public Prosecutor's Office.** Madrid, 29 June to 1 July 2009. GCJ and Ministry of Justice, 2009.

The following are the most relevant conclusions, grouped together into the five main subject areas considered by the Group of Experts:

1. **Structure and statutes of the European Public Prosecutor's Office and relations with Eurojust**:
    - The European Public Prosecutor's Office should be an European body, organised in a decentralised manner. It should consist of a European Public Prosecutor, a limited number of Assistant Public Prosecutor and a sufficient number of Deputy Prosecutors for each jurisdiction.
    - The European Public Prosecutor should be appointed by the Council by qualified majority, based on a proposal from the Commission and with the assent of the European Parliament .
    - As well as forming part of the structure of the European Public Prosecutor's Office, the Deputy Prosecutors should equally benefit from their integration within the investigative and prosecution systems in their respective Member States as national prosecutors (“double function”). Deputy Prosecutors may at the same time as being National Members of Eurojust.
    - Eurojust should cooperate closely in its mandate with the European Public Prosecutor's Office, with both sharing Secretariat, human and financial resources. Nonetheless, the existence of separate purviews for each organisation has been highlighted, with Eurojust entrusted with judicial cooperation, whilst the European Public Prosecutor's Office should represent the focus of direct action.
    - Under the authority of the European Public Prosecutor's Office, the national services of criminal investigation (at the service of justice) should contribute to the EPPO's investigation and prosecution work and execute all related instructions. Within the limits of their competences, the European Public Prosecutor's Office will effect the obligatory prosecution. It should prioritise the systematic investigation with regard to national prosecution. Nevertheless, there is also the possibility of transfer to national Public Prosecutor's Offices.
    - The national Judge entrusted with ensuring the respect of liberties should exercise prior and, if required, subsequent control of the enforcement measures adopted by the EPPO.
    - The European Public Prosecutor's Office should appoint a Judge with extensive knowledge of the matter, complying with guidelines covering

national jurisdiction, as well as respecting the effectiveness of procedures and the principle of natural justice in accordance with objectively established criteria (thus avoiding forum shopping and conflicts of jurisdiction).

- The European Public Prosecutor's Office shall put as much trust as possible in the assistance offered by Eurojust and the European Judicial Network. This support should include the necessary coordination with the relevant authorities within the Member States and third-party countries, as well as the pertinent training. It shall also receive assistance from OLAF and Europol. To the extent that it is necessary in order to complement the assistance required by national criminal investigation services, as well as the current administrative investigation functions and limited to the protection of financial interests, OLAF may be assigned responsibilities involving the execution of specific duties as an arm of the judiciary acting under the strict authority and control of the European Public Prosecutor's Office.

2. Competences.

- The Group considered two hypotheses:
  - Competences limited to EU financial interests (first scenario as set out in the TFEU). The “EU's financial interests” should be defined here, opening up the debate on the harmonisation of the crimes that affect these interests.
  - Competences extended to other serious crimes with a cross-border element. Here we must wait to see if the 27 Member States can achieve this in unison or through strengthened cooperation.

3. Procedures

- The principles of primacy and subsidiarity, applied to the relevant investigating national authorities.
- During the procedural phase of the investigation, the principle of proportionality shall prevail.

4. **Jurisdictional control over the European Public Prosecutor's actions.**

   Two scenarios have also been outlined here:

   - Control exercised by the national Supervisory Judge in the place where the Public Prosecutor is operating. To this end, the European Public Prosecutor's powers within each national territory should be harmonised, to some extent at least.
   - Centralised control over the European Union Court of Justice

5. **Determination of the competent jurisdiction and exercising of criminal proceedings. Control over the intermediate phase. The holding of the trial; admissibility of evidence. Situation of the parties and other interested institutions and individuals**.

   - Control over the European Public Prosecutor's decision to close cases: the Group studied the possible approaches to competence and appeal against case closure and the effects it might have.
   - Determination of competent jurisdiction: starting from the basis that the actions of the European Public Prosecutor will be undertaken before the competent national authorities; nonetheless, the following question need to be clarified: concentration or fragmentation of prosecutions and criteria regarding the choice of competent jurisdiction.
   - Undertaking criminal proceedings: The situation regarding victims or others affected by the crime in question. The holding of the oral proceedings; admissibility of evidence. the Group took their starting point as the European Commission Green Paper which concluded that the undertaking criminal proceedings should comply with all the competent jurisdictional body's procedural guidelines (*principio locus regit actum*). Having said that, the objective is to ensure the greatest harmonisation possible. For this reason, Decisions such as the Framework Decision on the standing of the victims in criminal proceedings of 15 March 2001 are essential.

In conclusion, everybody seems to coincide that in order to be able to implement a genuine European Public Prosecutor's Office it is first necessary to go further with the

process of harmonising crime types and procedural principles and guarantees. At the current moment, the debate is far from finished.

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