# Eurojust: Fulfilled or Empty Promises in EU Criminal Law?

Helen Xanthaki*

## A. Introduction

Eurojust completed five full years of activity as an EU agency in the area of EU criminal law. During this time its regulatory framework has been strengthened to allow the new agency to flourish. Much has been written on Eurojust's structure and relationship with relevant agencies such as Europol, the European Judicial Network and OLAF.[1] However, despite the reserved,[2] diverse,[3] and at times hostile,[4] comments at the time of its establishment, an assessment of Eurojust's regulatory and operational framework as a means of achieving effectiveness has not been attempted as yet,[5] despite the significance of its success on judicial, and

* Dr. Helen Xanthaki, LL.B. (Athens), M.Jur., Ph.D. (Dunelm) is a Senior Lecturer and Academic Director of the Sir William Centre for Legislative Studies, Institute of Advanced Legal Studies, School of Advanced Study, University of London. The author expresses gratitude to Prof. Panos Koutrakos, University of Bristol, and Dr. Valsamis Mitsilegas, Queen Mary College, University of London, for their comments on drafts of this paper. Of course all inaccuracies and errors must be attributed solely to the author.

1 *See* P. Berthelet & C. Chevallier-Govers, *Quelle relation entre Europol et Eurojust? Rapport d'égalité ou rapport d'authorité?*, 444 Revue du Marché Commun et de l'Union Européenne 468-474 (2001); *see also* S. Brammertz & P. Berthelet, *Eurojust et le réseau judiciare européen: concurrence ou complémentarité?*, 82 Revue de droit pénal et de Criminologie 389-410 (2002); *also* A. Herz, *The Role of Europol and Eurojust in Joint Investigation Teams*, *in* C. Rijken & G. Vermeulen (Eds.), Joint Investigation Teams in the European Union: from Theory to Practice 159-199, at 161 (2006); T. Milke, Europol and Eurojust 289 (2003); W. Schomburg, *Justizielle Zusammenarbeit im Bereich des Strafrechts in Europa: Eurojust neben Europol*, 6 Zeitschrift für Rechtspolitik 237-240 (1999); Assemblé Nationale de France, Rapport d'Information déposé par la Dèlégation de l'Assemblée Nationale pour l'Union Européenne sur les relations entre Europol et Eurojust, N° 3609, 13 February 2002.

2 The Council recently stated that the flow of information to EUROPOL and EUROJUST, while improving, is still limited. *See* Council of the EU, *Implementation of the Action Plan to Combat Terrorism*, Justice and Home Affairs Council Meeting, Brussels 1 December 2005, at 2.

3 *See* G. Conheady, *Corpus Juris, the Presumption of Innocence and the Euro Sceptic*, 7 Trinity Law Review, 163-183, at 165-166 (2004).

4 Hanson described Eurojust as "a major step toward a European criminal justice system and a threat to common law", *see* A. Hanson, The Telegraph, 19 March 2001.

5 A detailed, yet more general, analysis of Eurojust was undertaken in the House of Lords European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust,* Report with Evidence, HL Paper 138 (2004).

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even on police,[6] cooperation in the EU. This is probably due, at least partly, to the limited resources available to researchers on Eurojust's operational activity.[7] The aim of this article is to utilise the scarce resources available in the field with the purpose of evaluating the effectiveness of Eurojust's regulatory and operational environment.

In order to achieve its aim, both aspects of analysis will be addressed by reference to EU instruments directly or indirectly related to the agency. In other words this evaluation will not be limited to Eurojust's establishing instruments. It will extend to supplementary instruments in EU criminal law, that award the agency additional operational tools, such as the Mutual Legal Assistance Convention 2000. The hypothesis put forward is that, despite efforts from the EU legislator to strengthen Eurojust, its effectiveness is still impeded at the EU level by its incomplete regulatory and operational framework and at the national level by the diverse and fragmented implementation of the relevant EU instruments.

## B. The Regulatory Framework: a First Approach

Eurojust was established with Council Decision 2002/187/JHA.[8] The preamble of the Council Decision introduces the main objectives of this legislative instrument, thus shedding ample light to the role envisaged for Eurojust and to the gap which the new agency was being set up to address. Judicial cooperation in criminal matters has often been reported as inadequate,[9] especially for the purposes of the EU where increased movement of persons fertilises transnational crime.[10] Mechanisms of cooperation in investigations and prosecutions of such crimes and methods of prioritising territorial competence as a means of identifying a

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6 *See* J. Sheptycki, *Patrolling the New European (in) security Field; Organizational Dilemmas and Operational Solutions for Policing the Internal Borders of Europe*, 9 European Journal of Crime, Criminal Law and Criminal Justice 144-158, at 154 (2001).

7 A call for improved evaluation of the effectiveness of Eurojust was also made in Council of the EU, *A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network Vienna, 25-26 September 2006*, Doc. No. 14123/06, Brussels, 19 October 2006, at 5.

8 *See* Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002, at 1; *see also* Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ 2003 L 245/44.

9 *See* C. Stefanou & H. Xanthaki, *Oral Evidence*, House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004, at 97; also *see* Mar Jimeno-Bulnes, *European Judicial Cooperation in Criminal Matters,* 9:5 European Law Journal 628 (2003).

10 *See* C. Stefanou & H. Xanthaki, *Memorandum by Dr Constantin Stefanou and Dr Helen Xanthaki*, House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004, at 94-95; also *see* W. Schomburg, *Are We on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice?'* 8 European Journal of Crime, Criminal Law and Criminal Justice 51-60 (2000).

successful prosecution forum[11] could be significantly strengthened and facilitated through Eurojust,[12] a unit of national investigators and prosecutors envisaged by the Tampere European Council.[13] Moreover, effectiveness and synergy in judicial cooperation via Eurojust could also further enhance police cooperation.[14] In view of the assessment of the role of the new unit as important even at the time of its establishment, the format of the new unit was not decided lightly[15] and therefore final consensus on its establishment was wide.[16]

However, a number of EU member states have failed or omitted to implement the Eurojust Decision.[17] Article 42 of the Decision set the transposition date to 6 September 2003. Greece and Luxembourg have not declared transposition of the Decision to have taken place as yet, whereas in Cyprus and Spain transposition took place in late 2006. At this point it is worth noting that in its last Annual Report Eurojust identifies Cyprus, Greece and Spain as member states where transposition has not taken place. Interestingly, in a very recent implementation report, the Council reports Greece and Latvia as non compliant member states.[18] The exclusion of Cyprus and Spain from the list of member states that have not transposed the Eurojust Decision in the later Council document may be explained on the basis that transposition in these two countries took place after the 2005 Eurojust Annual Report was published. What is difficult to explain is the position in Latvia: Latvia has informed the General Secretariat of the Council that the Decision has been implemented but the relevant national legislation has not been sent to the Council Secretariat. Thus, for the purposes of the Council compliance has not been achieved, whereas for Eurojust it has taken place. This demonstrates the relative value of data and tables of implementation analyses, an element which inhibits the absolute validity of effectiveness studies like the one attempted in this paper.

Irrespective of the identification of countries that do not comply, ignoring the Eurojust decision could be detrimental to judicial cooperation in criminal matters,

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11 *See* M. den Boer & P. Doelle, Controlling Organised Crime: Organisational Changes in the Law Enforcement and Prosecution Services of the EU Member States (2000), at 17.

12 *See* Berthelet a& Chevallier-Govers, *supra* note 1, at 469.

13 *See* point 46, conclusions of the Tampere European Council of 15 and 16 October 1999.

14 *See* Council of the EU, Action Plan to Combat Organized Crime of 28 April 1997, OJ 1997 C 251.

15 *See* Assemblé Nationale de France, *Rapport d'Information déposé par la Dèlégation de l'Assemblée Nationale pour l'Union Européenne sur les relations entre Europol et Eurojust*, N° 3609, 13 February 2002, at 9-10.

16 *See* V. Nilsson, *Eurojust: the Beginning or the End of the European Public Prosecutor?*, Eurojustice Conference, Santander, 24-27 October 2000, at 1-6; also *see* N. Thwaites, *Eurojust: autre brique dans l' édifice de la coopération judiciaire en matière pénale ou solide mortier?*, Revue de Science Criminelle et de Droit Comparé, 45-61, at 46 (2003).

17 In her oral evidence to the House of Lords Enquiry Haberl-Schwarz considers this an example of taking political decisions without the willingness to give effect to them; *see* Questions 132 and 143 in House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust,* Report with Evidence, HL Paper 138, (2004), at 49.

18 *See* 2005 Eurojust Annual Report, at 15; also *see* Council of the EU, *Adendum to the I item note – Implementation of the Strategy and Action Plan to Combat Terrorism*, Document No. 15266/06 ADD1 REV1, Brussels, 24 November 2006, at 5.

at least in the direct form afforded through Eurojust. In fact, non transposition by these member states could endanger the objectives of Eurojust not only within the member state themselves, but also in the EU as a whole. When a crucial link in judicial cooperation is broken, adverse effects spread to investigations and prosecutions initiated by the incompliant member states as well as to investigations and prosecutions initiated by other member states but involving incompliant states on a bilateral or multilateral basis.

Despite the *prima facie* dangers of non transposition of the Eurojust decision in some member states at least in principle, the true extent of the problem can only be revealed by reference to practice. The text of the Decision itself allows member states to assess whether express transposition of the Decision is indeed required in order to allow the national legal order to place Eurojust in its system. In fact, member states themselves conducted an initial analysis of the method in which the Eurojust Decision would be best incorporated in their national law. Although this analysis excludes the new member states, nonetheless it is worth noting that the method of national implementation is not unique. Moreover, one of the declared as accepted methods of implementation of the Decision is non legislative (see Table 1).

**Table 1: Mode of implementation of Eurojust Decision**[*]

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|---|---|
| Legislation not required | DK, IE, NL, SE, UK |
| Legislation required, but not yet adopted | BE, EL, ES, IT, LU |
| Legislation adopted within the time limit (6.9.2003) | PT |
| Legislation partly adopted within the time limit | FI |
| Legislation adopted after expiry of the time limit | AT, DE, FR |

[*] *See* Commission of the EC, *Staff Working Paper – Annex to the Report 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}, SEC(2004) 884, Brussels, 6 July 2004, at 6.

Thus, although transposition should be encouraged[19] for reasons of clarity and security in the law, its necessity in the non compliant or recently compliant legal systems requires further analysis of national practices. Assessment of the necessity of an express intervention to the national criminal laws of non compliant member states may be undertaken by reference to the past and current use of Eurojust's mechanisms from and towards these member states. It would be interesting to see whether the lack of express transposition of the Eurojust Decision until recently

[19] *See* A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network, Vienna, 25-26 September 2006, *supra* note 7, at 3.

has led to decreased use of its legal assistance mechanisms by these member states. Similarly, it is worth discovering whether the lack of express transposition in these countries until recently has deterred other member states from addressing requests of assistance to them via Eurojust.

Indeed, in its last Annual Report Eurojust expresses concern for the restriction of these member states' capacity 'to be fully effective and work to maximum effect with their national authorities.'[20] The sole source of comparative statistics on requests made and received through Eurojust per EU member state can be traced in Eurojust's Annual Reports.

With exclusive reference to cases referred to Eurojust, in 2005 Greece made 17 requests for assistance and received 26; Latvia made 14 requests and received 10; Cyprus made 3 requests for assistance and received 11 and Spain made 12 requests and received 136.[21] In 2004 Greece made 16 requests and received 28; Latvia received 8 requests for assistance; Cyprus received 12 requests for assistance; and Spain made 20 requests and received 98.[22] In 2003 Cyprus received 12 requests; Greece made 6 and received 18 requests; Spain made 18 requests and received 63.[23] In 2002 Greece made 4 requests and received 10 in 2002; Spain made 12 and received 39.[24] In 2001 Greece made 2 requests and received 8, whereas Spain made 12 and received 39 requests.[25]

The number of requests made and received by the three member states demonstrates that Eurojust is not ignored by the national authorities of the member states. Despite the lack of an express national implementing measure for the Eurojust Decision, Cyprus, Greece and Spain have made continuous and gradually increased use of the direct mechanisms for judicial assistance in criminal matters afforded by Eurojust. Similarly, other member states seem to be undeterred by the lack of express transposition of the Eurojust decision on the profound basis that a request for legal assistance in criminal matters under Eurojust can be effectively awarded to them by the national authorities of these member states. The case is more pronounced for Spain that in 2005 and 2004 received by far the most requests amongst EU member states: in 2005 Spain received 136 requests with Germany being second with 92 requests; similarly in 2004 Spain received 98 requests with the UK in second place at 65.

It can therefore be argued with some conviction that the lack of express transposition of the Eurojust Decision by Cyprus, Greece and Spain has not prima facie proved detrimental to the use of Eurojust's mechanisms for judicial assistance in criminal matters towards these member states. Nevertheless, the quality of assistance afforded can not be assessed using numbers of cases as a sole tool for analysis. For this purpose it is necessary to evaluate the extent and level

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20 *See* 2005 Eurojust Annual Report, at 15.
21 *See* 2005 Eurojust Annual Report, at 31.
22 *Id*.
23 *Id.*
24 *See* 2003 Eurojust Annual Report, at 32.
25 *See* 2002 Eurojust Annual Report, at 14.

of transposition of relevant supplementary instruments passed subsequent to the Eurojust Decision that have direct consequences on the operational framework of the agency.

## C. The Operational Framework

In its constituting Decision, Eurojust is burdened with three heavy objectives: improvement of co-ordination of transnational investigations and prosecutions, improvement of cooperation amongst national authorities mainly in legal assistance and extradition requests, and strengthening of national investigations and prosecutions.[26] The tools with which Eurojust can act towards the attainment of its objectives are introduced in Articles 6, 7, 13 and 27 of the Eurojust Decision. Under Articles 6 and 7 Eurojust acts towards its objectives by asking national authorities to consider undertaking an investigation or bowing down in favour of another member state, by facilitating the exchange of data amongst national authorities, by utilising and promoting the database of the European Judicial Network (EJN) and, under conditions, by assisting national investigations and prosecutions even when only one member state is involved. Under Articles 13 and 27 Eurojust proceeds with exchange of data with national authorities of the member states, with third states, international organisations and bodies deemed competent for such an exchange.

The vagueness and ambiguity related to the legal framework to be utilised and the exact actions that Eurojust can undertake in order to legitimately proceed with the coordination of national authorities, the exchange of data and the use of the EJN database, was not foreseen in its constituting Decision. An approach based on legislation in stages is not novel in EU criminal law: OLAF suffers under the burden of criticism for operational methods devised, perhaps inevitably, unilaterally for the achievements of its objectives within what some would describe as a criminally vague regulatory and operational environment.[27]

Thankfully, Eurojust has been blessed with additional legislative instruments that have, to a large extent, provided for effective and legitimate operational tools.[28]

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[26] *See* Article 3.1 of Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *supra* note 8, at 2; also *see* Thwaites, *supra* note 16, at 50.

[27] *See* H. Xanthaki & C. Stefanou, *Strengthening OLAF Towards Greater Effectiveness in the Protection of the Communities' Financial Interests: the Revision of the OLAF Regulation 1073/99*, Interim Presentation on 'The Revision of the Regulation on the European Anti-Fraud Office', European Parliament's Committee on Budgetary Control (COCOBU), European Parliament, April 2005, Brussels; also *see* H. Xanthaki & C. Stefanou, '*Strengthening OLAF' Towards Greater Effectiveness in the Protection of the Communities' Financial Interests: the Revision of the OLAF Regulation 1073/99*, Hearing on 'The Revision of the Regulation on the European Anti-Fraud Office', European Parliament's Committee on Budgetary Control (COCOBU), European Parliament, Room ASP 3G2 ('Salle d'écoute' ASP 5G3) 12-13 July 2005, Brussels; H. Xanthaki, *Fraud in the EU: Review of OLAF's Regulatory Framework*, *in* I. Bantekas & G. Keramidas (Eds.), International and European Financial Criminal Law (2006), at 120-153.

[28] *See* G. Persson, Gamla och nya lagstiftare – om EU och straffrätt (2005), at 88.

The Rules of Procedure of Eurojust[29] refer exclusively to the internal administration of the agency rather than the organisation and conduct of operations undertaken within the framework of its tasks. Even title III, misleadingly entitled 'Operational Rules', relate exclusively to the administrative procedures to be followed once a task is received or decided upon: recording requests and actions by national members, deciding to act on a particular request, calling coordination meetings and other relevant internal administrative rules on the conduct of business. The legal value of the Rules of Procedure is not clear. As a document agreed by the College unanimously and approved by the Council, it can not be viewed as an arbitrary source of self-regulation. Nonetheless, this is not a document with the level of legal value equivalent to that of Framework Decisions or Conventions. This may explain the choice of the EU legislator to introduce internal procedures only, thus bowing down to documents of higher, undoubtedly binding legal value for operational rules and regulations.

Is the lack of express operational rules in the constituting instruments of Eurojust intentional? Or is it possible that, in their eagerness to achieve agreement on the establishment of the new agency, EU legislators forgot or omitted to provide the new agency with operational regulations? Such an error could be detrimental to the new agency and the tasks that it was set out to achieve. A Eurojust without an operational framework would be a toothless gathering of competent national investigations and prosecutors who, in the course of their presence in The Hague, would simply serve as post boxes for their colleagues. Despite qualms about the quality of EU legislation,[30] it must be admitted that the lack of substantive and procedural operational rules in the constituting instruments of Eurojust, and indeed Europol, can not be attributed to a drafting error.[31]

The previously passed MLA Convention is expressly mentioned in point 8 of the preamble of the Eurojust Decision. For the identification of the operational parameters of Eurojust, the legislator directs expressly to the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, the 2000 MLA Convention and its Protocol.[32] Thus, for intra-EU needs, the main mechanism for the request and provision of judicial assistance in criminal matters by use of Eurojust can be traced in the 2000 MLA Convention.[33] The Convention introduces precise procedures and guidelines to be followed by member states when sending and servicing of procedural documents, transmitting requests of mutual legal assistance, exchanging information spontaneously, transferring persons held in custody for the purposes of investigations, organising joint investigations

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[29] Rules of Procedure of Eurojust, OJ 2002 C 286/1.

[30] *See* H. Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 Common Market Law Review 651-676 (2001).

[31] *See* C. J. C. E. Fijnaut, *Europol and Eurojust*, 2 Justitiële Verkenningen 11-24, at 13 (2001).

[32] *See* C. Stefanou & H. Xanthaki, *Memorandum by Dr Constantin Stefanou and Dr Helen Xanthaki*, House of Lords, European Union Committee, 23rd Report of Session 2003-04, *Judicial Cooperation in the EU: the Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004, 92-96, at 96.

[33] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters Between the Member States, OJ 2000 C 197/1.

teams, conducting covert investigations and intercepting communications. The Convention is supplemented by its Protocol of 16 October 2001[34] which introduces mechanisms for dealing with fiscal offences, political offences, requests related to bank accounts and transactions. The two instruments provide not only a legal basis for operations in most fields of criminal activity, but also a detailed guide for legitimacy in operations instigated, coordinated or supervised by Eurojust. Thus, from a theoretical point of view the combination of these provisions with the criminal procedural rules of the member states where operations take place serve as a detailed set of operational rules applicable on requests for mutual legal assistance and on investigations and prosecutions for transnational crimes within the competence of Eurojust and, under set requirements,[35] even beyond.

However, practice is not as rosy as theory mainly because of the national legislator's alleged 'removal from European reality'[36] which prevents the prompt and complete implementation of EU law.[37] The 2000 MLA has not been ratified by seven EU member states: Greece, Ireland, Italy, Latvia and Luxembourg. The Protocol to the Convention has not been ratified by Estonia, Greece, Ireland, Italy, Luxembourg, Malta and Portugal.[38] For 20% of the member states, the Convention and the Protocol are not binding upon them, their national authorities and their investigations and prosecutors. As a result, seven member states – an alarming 20% – have failed to incorporate the main operational rules for Eurojust in their national legal orders. It is disquieting to know that, only in 2005, 155 requests for mutual legal assistance were not addressed by the directness, speed and relative effectiveness provided for in the 2000 MLA and its Protocol, simply because the requesting member states have refused or omitted to ratify and implement these two instruments. In other words, in the 155 cases of requests reported in 2005 as originating from these member states, the latter have not managed to utilise Eurojust to its full potential. Perhaps it is even more upsetting to know that in the 205 cases of requests reported to have been made to these member states via Eurojust, the MLA and its Protocol have not been utilised due to the failure of omission of these countries to ratify them. The effect that non ratification has on the member states themselves, but also on the rest of the EU, is pronounced and easily evident.[39] A further, albeit murkier, debilitating effect of this situation lies with the inevitable fragmentation in the mechanisms for the award of mutual legal assistance even within Eurojust. This leads to a de facto

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34 OJ 2001 C 326/2.

35 Eurojust may extend its role to crimes outside those expressly subjected under its competence upon request of a member state.

36 *See* Mar Jimeno-Bulnes, *supra* note 9, at 629.

37 *See* H. Xanthaki, *Transposition of EC Law for EU Approximation and Accession: The Task of National Authorities*, 7 European Journal of Law Reform 89-110 (2005).

38 Council of the EU, *Adendum to the I item note – Implementation of the Strategy and Action Plan to Combat Terrorism*, Document No.15266/06 ADD1 REV1, Brussels, 24 November 2006.

39 *See* H. Xanthaki, *Drafting for Transposition of EU Criminal Laws: the EU Perspective*, European Current Law Review xi-15 (2003); also *see* H. Xanthaki, *Assessment of the Existing Legislation and Practice for the Promotion of Judicial Cooperation and the Fight Against Criminality*, *in* Public Prosecutor's Office of the Court of First Instance of Athens (Ed.), Euro-Joint: the Role of Eurojust against Crime 68-79 and 209-218 (2003).

introduction of two speeds or variable geometry within an agency designed to eradicate fragmentation in mutual legal assistance with the EU as a means of enhancing and facilitating cooperation of national authorities. The oxymoron in this case is that these concentric cycles or two speeds have not been imposed from above, the EU, but have been created by the member states themselves.

The achievement of Eurojust's goals is further impaired by the lack of ratification of further EU instruments related to its work.[40] Greece and Italy have failed to implement the Framework Decision of 13 June 2002 on Joint Investigations Teams.[41] The Czech Republic, Cyprus and Slovakia have not implemented the Framework Decision of 13 June 2002 on Combating Terrorism.[42] The Czech Republic, Latvia and Luxembourg have failed to implement the Framework Decision of 26 June 2001 on Money Laundering.[43] Germany and Cyprus had initially declared inability to execute the European Arrest Warrant against their own nationals, although steps towards at least partial compliance have now been taken.[44] Belgium, the Czech Republic, Estonia, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta and Portugal have not implemented the Framework Decision on the Execution of Orders Freezing Property or Evidence,[45] whereas Cyprus and the UK report only partial implementation.[46]

The extent to which member states are affected by their lack of implementation of some EU instruments relevant to Eurojust is not easy to assess. However, it is accepted that effectiveness of Eurojust is directly linked to its powers of cooperation and coordination.[47] To take the argument further, it is worth comparing the level of requests received and sent via Eurojust per country with the compliance record of each member state. Admittedly, this method of assessment is far from full proof. Other factors may steer a member state towards Eurojust or, equally, away from it. Such factors relate to the size of the jurisdiction, the level of criminality, the level of transnational criminality in the member state, language facilitation, experience in mutual legal assistance and existence of other networks of communication as could be the case with the new Franco-German-Spanish network of data exchange or the traditional facilitation of mutual legal assistance in the neighbouring Ireland and the UK that share the same language and similar legal traditions. However, it is worth noting that, even within the framework of

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[40] *See* Council of the EU, The Hague Programme: Strengthening Freedom, Security and Justice in the EU, 16054/04 JAI 559, Brussels, 13 December 2004, at 22.

[41] Framework Decision 2002/465/JHA/ of 13.6.2002 on Joint Investigation Teams, OJ 2002 L 162/1.

[42] Framework Decision 2002/475/JHA of 13.6.2002 on Combating Terrorism, OJ 2002 L 164/3.

[43] Framework Decision 2001/500/JHA of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, OJ 2001 L 182/1.

[44] Framework Decision 2002/584/JHA of 13.6.2002 on the EAW and the Surrender Procedures between Member States, OJ 2002 L 190/1.

[45] Framework Decision 2003/577/JHA of 22.7.2003 on the Execution in the EU of Orders Freezing Property or Evidence, OJ 2003 L 196/45.

[46] Council of the EU, A*dendum to the I item note – Implementation of the Strategy and Action Plan to Combat Terrorism*, Doc No. 15266/06 ADD1 REV1, Brussels, 24 November 2006.

[47] *See* O. de Baynast, *Eurojust, une avancée décisive*, (2002) Europ Magazine, at 91.

relativity of the chosen method, countries with a stronger record of compliance with EU instruments in this field are clearly amongst the heavier users of Eurojust for sending mutual legal assistance requests. Germany, France, Spain, Sweden and the UK are clear examples of the combination of high compliance with high use, although the example of Italy as a low level compliant yet a heavy Eurojust user is also notable. Luxembourg and Greece are examples where low level of compliance goes hand in hand with a low record of requests for mutual legal assistance via Eurojust. It would therefore be accurate to state that the level of compliance with EU instruments related to operational tools for Eurojust seems to be directly related to the level of use of Eurojust as a mechanism for requesting mutual legal assistance.

The effect of low level of compliance with Eurojust related instruments to the use of Eurojust as a mechanism of requesting assistance by member states may also be evaluated by use of the same method. Countries where operational tools provided by EU Framework Decisions and Conventions are received in the national legal order are more likely to receive requests for mutual legal assistance via Eurojust. Germany, Spain, the Netherlands and the UK are examples of this tendency. Italy shines again as the exception proving the rule (see Table 2).

Table 2: Non transposition of operational instruments at Eurojust's disposal

| | *Eurojust Decision* | *MLA 2000* | *Protocol to MLA* | *FD on JIT* | *FD on Terrorism* | *FD on Mon. Laun.* | *FD on EAW** | *FD on execution of orders* | *2005 request received* | *2005 requests sent* |
|---|---|---|---|---|---|---|---|---|---|---|
| BE | | | | | | | | • | 57 | 12 |
| CZ | | • | | | • | • | | • | 8 | 18 |
| DK | | | | | | | | | 17 | 17 |
| DE | | | | | | | • | • | 59 | 50 |
| EE | | | • | | | | | • | 8 | |
| EL | • | • | • | • | | | | • | 28 | 16 |
| ES | | | | | | | | | 98 | 20 |
| FR | | | | | | | | | 46 | 35 |
| IE | | • | • | | | | | • | 7 | 5 |
| IT | | • | • | • | | | | • | 64 | 41 |
| CY | | | | | • | | • | • | 12 | |
| LV | | | | | | • | | • | 8 | |
| LT | | | | | | | | • | 13 | 1 |
| LU | • | • | • | | | • | | • | 15 | 9 |
| HU | | | | | | | | | 12 | 2 |
| MT | | • | • | | | | | • | 5 | |
| NL | | | | | | | | | 80 | 3 |
| AT | | | | | | | | | 15 | 8 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| PL | | | | | | | | | 12 | 22 |
| PT | | | • | | | | | • | 24 | 26 |
| SI | | | | | | | | | 8 | 5 |
| SK | | • | • | | • | | | | 6 | 3 |
| FI | | | | | | | | | 6 | 11 |
| SE | | | | | | | | | 11 | 34 |
| UK | | | | | | | | • | 65 | 42 |

* *Entries in this column relate to non implementation of the EAW against own nationals.*

Thus, the non ratification of EU instruments related to Eurojust seems to deter member states from using the agency both to send and to receive mutual legal assistance requests.[48] As non compliant member states strip Eurojust from the flexible and speedy operational tools afforded to it by relevant Framework Decisions and Conventions,[49] the agency is often reduced to the narrow vision of some at the time of its creation, namely to 'a legal documentation and clearing agency'[50] or a forum of exchange of letters rogatory and informal requests. The effect that this series of events has on the agency's effectiveness, and indeed on EU law in general, should not be underestimated. The Council recently stated that a number of instruments which have been adopted have still to be implemented by all Member States, in some cases preventing their entry into force in the Union.[51] However, in view of the comprehensiveness of the many measures adopted in the area of criminal law and the speed of their adoption, maintaining and safeguarding overall consistency and effective implementation is not an easy task.[52]

## D. The Regulatory Framework Revisited

Nonetheless, the implementation of all relevant EU instruments could not profess to be a complete solution to the problems faced by the agency. A detailed analysis of the regulatory framework of the agency reveals problems related to diversities in the powers and role of national Eurojust members, to the operational tools provided to the agency for the completion of its ambitious goals and to the current national legal framework for the implementation of this already incomplete legal regulatory framework.

The powers of national members are introduced in Article 9 (1) and (3) of the Eurojust Decision. Under this provision the nature and status of each national

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[48] *See* Commission of the EU, Communication from the Commission to the Council and the European Parliament, *Developing a Strategic Concept on Tackling Organised Crime*, COM (2005) 232 final, {SEC (2005) 724}, Brussels, 2.6.2005, at 8.

[49] *See* Thwaites, *supra* note 16, at 56.

[50] *See* Schomburg, *supra* note 10, at 59.

[51] *See* Council of the EU, *Implementation of the Action Plan to Combat Terrorism,* Justice and Home Affairs Council meeting, Brussels 1 December 2005, at 2.

[52] *See* J. Wouters & F. Naert, *The European Union and September 11,* 13 International and Comparative Law Review 765 (2002-2003).

member is defined by the competent national laws. Moreover, upon appointment of the national member, member states declare the judicial powers of the national member and their ability to act in relation to foreign authorities. Although the need to reassure member states that they would maintain a large degree of control over the competences of their national members at the time of passing of the Eurojust Decision is understandable,[53] it must be accepted that the diversity of status of national members is not an ideal solution.[54] Discrepancies in the status of national members are inevitable in circumstances of non standardisation in substantive and procedural criminal laws in the member states. However, a degree of harmonisation, if not standardisation, in the powers awarded to national members would allow the agency to function coherently[55] and without discrimination based on nationality,[56] often leading to a variable geometry between member states.[57] In other words, the method of investigations and prosecutions proposed and assisted by Eurojust would no longer vary on the basis of competent national laws.[58] A seed of common powers is introduced in Article 9 (2), (4) and (5) of the Eurojust Decision. National members receive and forward requests for mutual legal assistance. National members have access to national criminal records and any additional databases in their member states. National members have the power to contact national authorities of their member state of origin directly.

The question is whether these minimal powers are adequate for the achievement of the tasks assigned to Eurojust under Articles 6 and 7 of the Eurojust Decision. It is questionable that a national member, or indeed Eurojust as a college, can be successful in persuading member states to initiate or, perhaps even worse, to drop an investigation or prosecution without awarding to them powers beyond receiving and sending off mutual legal assistance requests.[59] The improbability of effect of an action under Article 7 of the Eurojust Decision can be deduced by the reluctance of the agency to alert national authorities to a clash of jurisdictions: the only such case so far in the history of Eurojust is the Prestige case in 2005 where the college informed the French and Spanish national authorities that it would

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53 *See* Commission of the EU, Communication from the Commission on the Establishment of Eurojust, COM (2000) 746 final, Brussels, 22.11.2000, at 4; also *see* Council Document n° 7384/00 CATS 21 EUROJUST 1.

54 *See* Eurojust, Survey and Comparison of Powers Granted to all Eurojust National Members to the European Council, 11943/05 (Presse 247).

55 *See Memorandum by the Home Office* (Letter from Caroline Flint, MP, Parliamentary Under Secretary of State, Home Office, to Baroness Harris of Richmond, Chairman, EU Sub-Committee F (Home Affairs)), 22.4.2004, House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004.

56 *See* Commission of the EU, Communication from the Commission to the Council and the European Parliament, *Developing a Strategic Concept on Tackling Organised Crime*, COM (2005) 232 final, {SEC (2005) 724}, Brussels, 2.6.2005, at 8.

57 *See Oral evidence of JUSTICE*, House of Lords European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust,* Report with Evidence, HL Paper 138 (2004), at 123.

58 *See* 2001 Eurojust Annual Report, at 10-11.

59 *See* Editorial, *Transnational Crime and the EU: Investigation and Prosecution*, (2004) Criminal Law Review 765.

be the latter that were in a better position to succeed prosecution in the case of the Prestige shipwreck. Similarly, the only case in the history of Eurojust where parallel competence led the college to try to persuade a member state to initiate prosecution was a case of fraud where the UK could not establish jurisdiction and the Spanish authorities were urged to prosecute.[60]

In order to be effective in this task, the national member must be awarded the right to initiate or drop investigations and prosecutions on behalf of Eurojust,[61] perhaps with Eurojust acting as a college upon the recommendation of national members concerned.[62] If this scenario were to be followed, coordination meetings would produce immediate results with coordinated investigations, supplementary to each other, taking place in a number of member states. Weaker prosecutions would be dropped by member states only to be immediately initiated by the member state whose jurisdiction is agreed by the college to be the best forum for the achievement of a successful prosecution. Awarding national members the power to decide upon the initiation and end of transnational prosecutions would facilitate investigations and prosecutions of transnational crime with specific reference to multinational cases.[63] After all, Eurojust is most useful in complex multilateral cases,[64] where the competent national authorities are not 'in a good position to engage in direct close cooperation without the need for a facilitator or advisor'.[65] The increased[66] effectiveness of Eurojust's assistance and coordination of transnational multilateral investigations and prosecutions could address the problem of the current low level of the agency's involvement in multilateral cases[67] and the decreasing percentage of multilateral cases in 2005 in a year where cases brought before Eurojust rose by more than 54% over the figure for 2004.[68] It is worth noting that in 2004 the number of multilateral cases

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60 *See* 2005 Eurojust Annual Report, at 32 and 33.

61 *See* Commission of the EU, 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 {SEC(2004)884}, Brussels, 06.07.2004, at 5.

62 The concept of 'concentrated prosecutions' can be traced in Council of the EU, *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, 16054/04 JAI 559, Brussels, 13 December 2004, at 29.

63 After all the core task of Eurojust relates to the effective prosecution of crime; *see* R. Esser & A. Lina Herbold, *Neue Wege für die justizielle Zusammenarbeit in Strafsachen – Das Eurojust Gesetz*, 57 Neue Juristische Wochenschrift 2421-2424, at 2424 (2004).

64 *See* Council of the EU, *Draft Council Conclusions on the Fourth Eurojust Annual Report (calendar year 2005)*, Doc. No. 10334/06, Brussels 14 June 2006, at 3.

65 *See* Herz, *supra* note 1, at 194.

66 At the moment Eurojust's facilitative function on legal assistance is more significant than its coordination function: *see* Editorial, *supra* note 59, at 765.

67 *See* Council of the EU, Press Release 2683rd Council Meeting Justice and Home Affairs, Luxembourg, 12.1.0.2005, 12645/05 (Presse 247), at 26.

68 *See* 2005 Eurojust Annual Report, at 4.

brought before Eurojust was 109 against 272 bilateral cases.[69] In 2003 the number of multilateral cases brought before Eurojust was 78 against 222 bilateral cases. In 2002 the number of multilateral cases was 70 against 144 bilateral cases.[70]

Thus, finally, Eurojust would be awarded with the teeth to achieve its main task,[71] namely coordination and facilitation of investigations and prosecutions where bilateral agreements and other channels of mutual legal assistance seem to be the least successful: cases involving more than two jurisdictions.[72] In an environment of direct approach to mutual legal assistance finally being promoted by MLA 2000 and subsequent EU instruments in the area of criminal law, Eurojust remains immobilised in the role of an intermediary amongst national authorities acting to prevent delays and difficulties in the provision of mutual legal assistance whilst at the same time adding an inevitable (under the current regulatory framework) extra layer of bureaucracy to mutual legal assistance requests. Even as far back as the time of passing of the Eurojust Decision the European Parliament foresaw the problems that the lack of harmonisation in the powers of national members would lead to and set harmonisation of powers as a future ideal.[73] In fact, it seems that this time has now come: upon request of the Council, Eurojust surveyed the current powers of national Eurojust members and recommended a baseline of common consistency. Powers considered to form this baseline were the powers to issue requests for mutual legal assistance; execute requests for mutual legal assistance; act as central authorities in relation to foreign judicial authorities; decide upon rather than only recommend steps of mutual assistance, investigations and prosecutions; decide upon and authorise controlled deliveries in urgent cases; decide upon other investigative steps (e.g. interception of telecommunications and undercover operations) in urgent cases.[74]

It seems therefore that, even if the recent reserved attempts for standardisation of powers amongst national Eurojust members do not prove fruitful in the

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[69] *See* Report on the Annual Accounts of Eurojust for the Financial Year 2004 Together With Eurojust's Replies, 2005/C 332/10, OJ 2005 C332/70.

[70] *See* European Court of Auditors, Report on the Annual Accounts of Eurojust for the Financial Year 2003 Together with Eurojust's Replies, http://eca.europa.eu/audit_reports/specific_reports/docs/2003/eurojust_en.pdf, Table 1, at 6.

[71] *See* Council of the EU, *Draft Council Conclusions on the Third Eurojust Annual Report* (calendar year 2004), 12527/05, Brussels, 22 September 2005, at 4; also *see* E. Krivel Q.C., *The Evolution of Eurojust*, International Association of Prosecutors, http://www.iap.nl.com/eurojust.htm.

[72] *See Conclusions and Recommendation of the Select Committee of the House of Lords*, House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Minutes of Evidence taken before the European Union Committee (Sub-Committee F) 16 June 2004.

[73] *See* European Parliament, Report on the Draft Council Decision setting up Eurojust with a view to Reinforcing the Fight Against Serious Organised Crime (12727/1/2000; C5-0514/2000; 2000/0817(CNS)), A5-0398/2001 final, 14.11.2001, at 13.

[74] Council of the EU, *Eurojust Report on Judicial Powers of the National Members of Eurojust*, Doc. 11943/05, EUROJUST 58, Brussels, 6 September 2005; however, *see contra* House of Lords European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Report with Evidence, HL Paper 138 (2004), point 50, at 23.

immediate future, award of judicial powers[75] equivalent to those enjoyed by national prosecutors should be offered to all national Eurojust members.[76] At this point the distinction must be made between the status of national members as persecutors in their own jurisdiction and their powers to proceed with prosecutorial or investigate actions on behalf of or for the purposes of Eurojust.[77] The harmonisation of the powers of Eurojust national members to at least the level of judicial and operational authority awarded to each member by their competent national laws could contribute to the intensification of the exchange of police and judicial information envisaged by the Council of the EU in July 2005.[78]

The relationship between the 2000 EU MLA Convention and its Protocol with the subsequently passed Eurojust Decision is worthy of further analysis. The Eurojust Decision makes a single reference to the MLA in point 8 of its Preamble. There the Decision clarifies that Eurojust's jurisdiction is without prejudice to the Community's competence to protect its own financial interests, in particular the MLA. Thus, the Eurojust Decision confirms that the MLA Convention is to be read in parallel with the provisions of the Decision thus supplementing the provisions of the Decision in the operational front, where the Decision presents an obvious gap. The question is whether it is the MLA that must be seen as the main operational tool for Eurojust, or whether the MLA is merely one of the mechanisms of mutual legal assistance that are placed in Eurojust's disposal. The answer to this can be traced in point 1 of the Preamble of the MLA Convention which expressly states that the MLA Convention is deemed to be supplemental, albeit hierarchically superior to prior Conventions which maintain their applicability where the 2000 Convention either fails to regulate an issue altogether, or fails to so in the most favourable manner.[79] As a result, the MLA Convention must be viewed as the main operational tool for Eurojust members and its college.

But, can the aims of Eurojust be achieved by use of the MLA or could further advancement of the agency's operational tools contribute to increased effectiveness? It must be accepted that the MLA presents advantages and innovations, mainly related to its wide field of application to extended offences; to the precedence of the procedural rules applicable in the requesting rather than the receiving state; the application of the principle of synergy as a means of diminishing delays; the direct servicing of documents; the abolition, to an extent, of translation; the direct exchange of information between judicial authorities; the spontaneous exchange of information the rather progressive tools of hearings

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75 *See* De Baynast, *supra* note 47, at 91.

76 *See* Answer given by Mr. Vitorino on behalf of the Commission, (12 November 2003), OJ 2004 C70 E/181, 20.3.2004; also *see* House of Lords, European Union Committee, 23rd Report of Session 2003-2004, *Judicial Cooperation in the EU: the Role of Eurojust*, Report with Evidence, HL Paper 138 (2004), point 39, at 19.

77 *See* Answer given by Mr. Vitorino on behalf of the Commission, (12 November 2003), OJ 2004 C70 E/181, 20.3.2004.

78 *See* Council of the EU, Press Release Extraordinary Council Meeting Justice and Home Affairs 13 July 2005, 11116/05 (Presse 187), at 7.

79 H. Xanthaki, *The Present Legal Framework of Mutual Legal Assistance within the EU,* 56(1) Revue Hellenique de Droit International 88 (2003).

by videoconference or telephone interview and the joint investigations teams.[80] Thus, Eurojust members have been offered an ideal framework within which they can operate toward facilitation and coordination of mutual legal assistance amongst member states. Nevertheless, it is questionable whether the intervention of Eurojust, either through national members of through the college, could produce significant results if their role is reduced to the provision of a speedy and efficient box office for the provision of mutual legal assistance under the MLA.

In order to assess if this is the case, it is necessary to determine how the MLA can assist Eurojust to realise the three main objectives of the agency as introduced by Article 3 of the Eurojust Decision. First, Eurojust aims to improve cooperation between the competent authorities of the member states, in particular by facilitating the execution of mutual legal assistance and the execution of extradition requests. This is the area where the utility of the MLA is most pronounced. Improvement of cooperation of national authorities can be achieved if Eurojust members and, where necessary the college, alleviates the hurdles present in mutual legal assistance requests. The latter could entail the handling over of objects that constitute evidence in criminal proceedings; the transfer of persons held in another Member State; hearings via videoconferencing and telephone conferencing; the interception of telecommunication. Second, Eurojust aims to stimulate and improve the coordination of investigations and prosecutions between member states. This would relate to the organisation of controlled deliveries in the framework of criminal investigations, of joint investigation teams and of covert investigations. Third, further facilitation of investigations and prosecutions is requested by Eurojust in any other legal means that can lead to increased effectiveness in this area. There is no doubt that the objectives of Eurojust as introduced in its constituting instruments are rather wide and certainly ambitious. However, these objectives constitute the factors against which the performance of the agency and its effectiveness is evaluated.

It is unfortunate that Eurojust has been burdened with such ambitious goals, including of course the objectives of investigations conducted by OLAF,[81] without the tools to crack on with them. How can the agency and its members contribute/ to the effectiveness of national prosecutions and investigations in the cases where its members can not contribute actively to the procedural actions undertaken within them? If active contribution towards effectiveness is required,[82] then active contribution to the process must also be afforded to national members. On this basis there is plenty of support to the request of Eurojust for additional powers to issue, receive and execute requests for mutual legal assistance, to decide on

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[80] *Id.*, at 89.

[81] *See* point 5 of the Preamble of Council Decision of 28 February 2002 setting up Eurojust with a View to Reinforcing the Fight against Serious Crime, 2002/187/JHA, OJ 2002 L 63/1; also *see* Regulations (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF, OJ 1999 L 136/1.

[82] *See* European Commission, Communication from the Commission on the establishment of Eurojust, COM (2000) 746 final, Brussels, 22.11.2000, at 4; also *see* T. Schalken & M. Pronk, *On Joint Investigation Teams, Europol and Supervision of their Joint Actions*, 10 European Journal of Crime, Criminal Law and Criminal Justice 70-82, at 71 (2002).

investigations and prosecutions and act as central mutual legal assistance centre for foreign judicial authorities.[83] After all, such powers would offer Eurojust undoubted additional added value.[84]

Recognition of the need to introduce an active role to proceedings for Eurojust is demonstrated by subsequent EU instruments, such as the Framework Decision on the European Arrest Warrant and the Framework Decision on Joint Investigations Teams. It should be noted that according to recent statistics relating to the functioning of the EAW from 17 Member States in 2005 from 1526 people arrested, 1295 were effectively surrendered to the requesting Member State (85% surrender rate). The surrender procedures took approximately 30-40 days; the 90-day limit requested by the EAW was respected in most cases; a total of 309 nationals were surrendered.[85] Under Articles 17 (7) and 16 (2) of the Framework Decision of the European Arrest Warrant Eurojust is notified of any delay to the execution of the warrant. This allows Eurojust to intervene and facilitate the process, where possible. On the basis of the statistics quoted here, Eurojust does not seem to have a crucial role to play in practice, as most deadlines are quoted to have been respected. However, a closer comparison between cases where deadlines were not respected and cases where deadlines were not respected and Eurojust was not notified reveals that many cases of delay never reach Eurojust. In view of the small number of occurrences of delay, the number of omissions to notify Eurojust tends to look insignificant (see Table 3). However, their relatively large percentage in relation to the total number of delays demonstrates that Eurojust is not allowed the opportunity to serve its purpose under Article 17(7), at least not to the full extent of its abilities.

Moreover, under the Framework Decision Eurojust must be consulted before a competent authority uses territoriality as a ground for refusal of a warrant. The value of Eurojust's recommendation on the use of territoriality is not clear from the relevant Framework Decision. A literal interpretation of its text does not seem to support the view that the role of Eurojust in this case is anything other than advisory. Nonetheless, the Council has accentuated the role of Eurojust in such circumstances by encouraging member states to view Eurojust's considerations as a motivation to comply with the recommendations of the agency.[86]

From the point of view of national implementation of this instrument, it can be stated that most member states have complied with the Framework Decision on the European Arrest Warrant.[87] Even Germany and Cyprus, the last two member states to declare difficulties with national implementation, have moved towards

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[83] *See* The Secretariat of the European Convention, Final Report of the Working Group X Freedom, Security and Justice, CONV/426/02, Brussels, 2.12.2002, at 19.

[84] Already the nature of Eurojust's cases offer added value; *see* Brammertz and Berthelet, *supra* note 1, at 407.

[85] *See* Council of the EU, Press Release, 2732nd Council Meeting JHA, 9409/06 (Presse 144), Luxembourg, 1-2 June 2006, at 24.

[86] *Id.*, at 11.

[87] *See* Commission of the EC, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, COM (2005) 63 final, Brussels, 23.2.2005 and SEC (2005) 267; and the next annual report COM (2006) 8 final, Brussels, 24.1.2006, SEC 92006) 79.

compliance. Very recently Cyprus amended Article 11 of the Cypriot Constitution thus expressly permitting the use of a European Arrest Warrant against own nationals.[88] Germany has already taken additional legislative steps to comply with the Framework Decision,[89] although the assessment of the new legislation is premature and is currently presented as partial only.[90]

**Table 3: Implementation of Article 17 of the FD on the EAW in 2005***

| Country | Delay | Eurojust notified |
|---|---|---|
| Belgium | | |
| Czech Republic | 0 | 0 |
| Danmark | 0 | |
| Germany | | |
| Estonia | 0 | 0 |
| Greece | | |
| Spain | 0 | 0 |
| France | 3 | 2 |
| Ireland | 9 | 4 |
| Italy | | |
| Cyprus | 0 | 0 |
| Latvia | 0 | 0 |
| Lithuania | 0 | 1 |
| Luxembourg | 0 | 0 |
| Hungary | 0 | 0 |
| Malta | 4 | 4 |
| Netherlands | 0 | 0 |
| Austria | 1 | 0 |
| Poland | 2 | 0 |
| Portugal | 2 | 2 |
| Slovenia | 1 | 0 |
| Slovakia | 1 | 1 |
| Finland | 0 | 0 |
| Sweden | 1 | 1 |
| UK | 57 | 57 |

* Council of the EU, *Replies to Questionnaire on Quantitative Information on the Practical Operation of the European Arrest Warrant - Year 2005*, Doc. No. 9005/4/06 - REV 4, Brussels, 30 June 2006, at 9.

[88] *See* 5th Amendment of Constitution, Law N.127(I)/2006 which entered into force on 26 July 2006.

[89] *See* Council of the EU, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of the European Union (2002/584/JI) specifically: Notification under Article 34(2) of the Framework Decision concerning incorporation into domestic law12509/06, LIMITE COPEN 94, EJN 22, EUROJUST 43, Brussels, 7 September 2006.

[90] Council of the EU, *Adendum to the I item note – Implementation of the Strategy and Action Plan to Combat Terrorism*, Doc No. 15266/06 ADD1 REV1, Brussels, 24 November 2006.

Another instance where Eurojust has been awarded an active role concerns joint investigation teams. The relevant Framework Decision 2002/465/JHA made no reference to Eurojust in its preamble or text. However, items 7, 7a and 9 (3) of the Council Recommendation on a model agreement for setting up a joint investigation team rectified the gap of the previous EU instrument and expressly mentions Eurojust as a possible participator to a joint investigation team.[91] This is based on the express reference to Eurojust in JIT initiated under the 2000 MLA as emphasised in the MLA's Explanatory Report.[92] Moreover, the Council has since added its voice to that of the EU legislator and has urged member states to involve Eurojust to joint investigation teams as a matter of routine.[93] The strengthening of the role of Eurojust in JIT was also recognised by the Commission that echoed the European Council's encouragement to member states to implement the relevant Framework Decision in a manner that would involve Europol and Eurojust participation in JIT 'as far as possible'[94] with Eurojust being the first point of establishment of such operations.[95] Furthermore, JIT experts recognised the central role of Eurojust in these teams and "estimate it appropriate" to include the agency in the setting up and facilitation of their work.[96]

However, it is worth noting that from the point of view of implementation, national legislation is not always open – at least not expressly – to an active involvement of Eurojust. In the Netherlands the Framework Decision has been implemented under the enacting legislation concerning the 2000 Convention on Mutual Assistance in Criminal Matters, namely Law of 26 April 2002 amending certain provisions of the Criminal Procedure Code and the Law on police registers and extending the Criminal Procedure Code with a view to implementing the MLA 2000 Convention, which entered into force on 1 July 2004. Under the interpretation of the Public Prosecutor Office, the law may only apply when the other countries participating in the team have ratified the 2000 MLA Convention, the Naples II Convention and the UN Convention on transnational crime of 15 November 2000, and the Second Supplementary Protocol to the European Convention on Mutual Assistance. As a result the Dutch national implementing law applies only

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91 *See* Council Recommendation of 8 May 2003 on a model agreement for setting up a joint investigation team, OJ 2003 C 121/1.

92 *See* Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ 2000 C 379/19.

93 Council of the EU, Press Release Extraordinary Council Meeting Justice and Home Affairs 13 July 2005, 11116/05 (Presse 187), at 7; also *see* Council of the EU, *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, 16054/04 JAI 559, Brussels, 13 December 2004, at 22 and 23.

94 *See* Commission of the EC, Commission Staff Working Paper Annex to the Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams, SEC(2004) 1725, COM (2004) 858 final, Brussels, 7.1.2005, at 3 and 6.

95 Assemblé Nationale de France, *Rapport d'Information déposé par la Dèlégation de l'Assemblée Nationale pour l'Union Européenne sur les relations entre Europol et Eurojust*, N° 3609, 13 February 2002, at 23.

96 *See* Council of the EU, *Conclusions of the first meeting of the national experts on Joint Investigation Teams*, Doc. 15227/05, Brussels, 2 December 2005, at 2.

to a handful of EU member states. Moreover, even within this narrow field of application, the Dutch implementing measures make reference to the possibility of participation to JIT by Eurojust but no relevant provisions are annexed or mentioned,[97] thus rendering implementation of JIT inadequate especially with reference to Eurojust. Austria implemented the Framework Decision by means of paragraphs 60,61,62 and 76 of the law concerning extradition and mutual assistance between the Member States of the EU (Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union [EU-JZG] which entered into force on 1 of May 2004. Although Austrian law mentions Eurojust expressly as an actor that must be notified of any JIT organization or request for formation, Austrian law seems to add one more layer of approval to the participation of Eurojust in JIT as it requires the consent of every team member instead of the consent of involved Member States.[98] The UK has implemented the Framework Decision on JIT via Sections 103 and 104 of the Police Reform Act 2002, as supplemented by the Home Office Circular 53/2002, and via the Crime (International Co-operation) Act 2003 that came into force on 26 April 2004. Although the Home Office Circular mentions expressly the role of Europol and Eurojust officers in JIT, implementation of the Framework Decision with reference to Eurojust is not adequate as the chosen instrument is one of doubtful binding legal nature.[99]

The case for additional powers for Eurojust members as a means of increasing effectiveness of the agency is more marked in emergency cases, where the extra layer of bureaucracy in the provision of mutual legal assistance could either resolve or accentuate problems of time, language, legal terminology and diversity in substantive and procedural criminal laws. The need for additional powers in such cases is already recognised in the current regulatory framework of Eurojust. An example of this tendency refers to the exchange of data with third country authorities permitted by an Agreement between the third country and the Council of the EU. In order to guarantee protection of sensitive data of citizens, such agreements are undertaken when the third country has adequate data protection standards.[100] For the same purpose, these agreements are placed under the supervision of the Joint Supervision Body of Eurojust.[101] In recognition of the speedy response required in emergency situations, Article 27(6) of the Eurojust Decision allows an exception to these two safeguards and allows national members of Eurojust acting in their national capacity to authorise, unilaterally, the transmission of data to third countries.

This fresh visit to the details of the current regulatory framework of Eurojust reveals a strong case for the award of further authority to Eurojust members and the college as a means of increasing effectiveness of the agency. The EU

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97 *See id.*, at 34.
98 *See id.*, at 20.
99 *See id.*, at 24-25.
100 *See* Article 28 of the Rules of Procedure on the Processing and Protection of Personal Data at Eurojust, 2005/C 68/01, OJ 2005 C 68/1.
101 *See* Article 23 of Eurojust Decision; also *see* Article 6 of the Act of the Joint Supervisory Body of Eurojust of 2 March 2004 laying down the rules of procedure, 2004/C 86/01, OJ 2004 C 86/1.

legislator seems to have recognised already that Eurojust can be very useful as an active instigator and participant to actions forming part of investigations and prosecutions. This is clearly the case with European Arrest Warrants and Joint Investigation Teams. Moreover, national legislators seem to share this assessment and in their national implementing measures have provided the agency with further powers, albeit exclusively in emergency cases.

## E. Conclusions

There is little doubt that Eurojust enjoys shared enthusiasm for results produced.[102] The usefulness and possibilities of effectiveness open to the new agency have been appreciated both at the EU and the national level. Thus, demands for expansion in the agency's field of competences are increasing. The question is whether demands for further powers are justified by the current indicators of effectiveness.

Lack of express transposition of the Eurojust Decision seems prima facie to impede the use of the agency by the incompliant member states, namely by Greece and Luxemburg. However, records of requests made and received via Eurojust from and to these member states demonstrate that the usage of the agency is not hindered by the choice of the three member states to proceed with legislation on Eurojust, a choice which after all is offered to them by the text of the Eurojust Decision itself.

Having passed the initial stumbling block of transposition of the Eurojust Decision in member states, an assessment of effectiveness of the agency must look at the operation framework. The question is whether the operational tools and mechanisms provided for in EU and national implementing laws are adequate for the achievement of the three ambitious goals placed upon Eurojust's shoulders by its constituting instrument, namely improvement of co-ordination of transnational investigations and prosecutions, improvement of cooperation amongst national authorities, and strengthening of national investigations and prosecutions. This analysis identified two areas of concern with reference to the agency's operational framework. First, the constituting instruments refrain from the introduction of operational tools for the new agency. This could be a potential duplication of the ambiguity policy applicable to OLAF, which, instead of promoting an informed two stage approach to legislating in a manner acceptable by EU institutions and member states, led to the unilateral satiation of the gaps by the body itself in a manner that proved distasteful and unsatisfactory to member states and EU institutions. However, thankfully, Eurojust was not left in its own devises for the completion of its tasks. The preamble of the Eurojust Decision directs to the MLA Convention which is envisaged in the operational framework, and indeed has been used in practice, as the main operational tool for Eurojust.

[102] *See* A. Vitorino, Commissioner for Justice and Home Affairs, *Improving Cross-Border Cooperation between Investigating and Prosecuting Authorities*, SPEECH/03/219, The Hague, 29 April 2003, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/219&format=HTML&aged=1&language=EN&guiLanguage=en.

Unfortunately, a deeper analysis of the record of implementation of the MLA by member states demonstrates clearly that its provisions, and consequently the main operational tools of Eurojust, are not yet into force in a large number of member states. The problem is accentuated by similar low records of implementation of EU instruments that supplement the MLA and introduce new operational tools for the agency: this observation is applicable to EU instruments related to Framework Decisions on combating terrorism, on JITs, on money laundering, on the EAW and on the execution of order freezing property or evidence.

Moreover, a deeper look at the regulatory framework of Eurojust unearths further problems directly related to the effectiveness of the agency. These relate to two main issues: the discrepancies in the powers of national Eurojust members; and the inadequacy of operational tools offered to Eurojust members due to timid EU regulation accentuated by lack of national implementation. First, as things stand, member states are given the discretion of awarding whatever powers are suitable and appropriate to their national member. As a result, there is considerable discrepancy in the powers and status of national members: thus, instead of facilitating mutual legal assistance through a unified regime, free of the fragmentation and confusion prevalent in other mechanisms of mutual legal assistance, Eurojust is de facto plagued by an artificially and indirectly imposed multitude of intertwined possibilities open to other national members with varying ambiguous degrees of application. Second, even if harmonisation of powers for national members is introduced, the extent of authority awarded to national members by the Eurojust constituting instruments should be reviewed. A comparative review of its ambitious goals with the merely facilitative nature of the powers of national members shows with clarity and persuasion that the former can not possibly be achieved effectively bys use of the latter. Thus, Eurojust members must be awarded with judicial powers entailing an active and decisive role in the initiation of end of investigations and persecutions, in the choice of prosecution forum and in the representation of the jurisdiction of origin before foreign authorities. Examples of an increasing trend towards more powers for Eurojust members are found in the MLA 2000, the EAW, JIT and emergency powers. However, even in these instances lack of national implementation of the relevant instruments deprive Eurojust of stronger operational tools.

Having identified problems related to the operational and regulatory framework of Eurojust one returns to the initial statement of enthusiasm over the agency and its potential. The future of Eurojust is drawn as a very promising one. First, additional powers to host pan-European databases facilitating investigations and prosecutions and ensuring awareness of prior convictions as a means of taking them into account for sentencing have been offered to Eurojust slowly but surely. The framework for data protection for this purpose is already designed effectively and legitimately.[103] Second, the role of Eurojust as envisaged by the EU is strengthened even further, certainly in the relevant provisions of the Constitutional

[103] *See* European Parliament, Report on the Draft Council Decision setting up Eurojust with a view to Reinforcing the Fight Against Serious Organised Crime (12727/1/2000; C5-0514/2000; 2000/0817(CNS)), A5-0398/2001 final, at 11.

Treaty.[104] As envisaged in the Corpus Juris project a few years ago,[105] under the Constitutional Treaty Eurojust will develop into a European Public Prosecutor. The future work of the Prosecutor is estimated as so significant and sensitive that it will be regularly evaluated from, amongst others, national parliaments.[106] Perhaps even more interestingly, the proposals for Eurojust's development to a European Public Prosecutor are no longer necessarily linked to the ratification off the Treaty by all member states.[107]

The future for Eurojust seems increasingly rosier. But the dream is often placed in a future of harmonisation of national criminal laws[108] and complete mutual recognition.[109] This analysis has revealed that grand intentions for radical changes under the Constitutional Treaty and an environment of harmonisation and mutual recognition must be preceded by the completion of the current regulatory and operational framework of Eurojust as a means of addressing urgent requirements for unified and adequate tools of effectiveness.

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[104] *See* Persson, *supra*, note 28, at 43.

[105] *See* H. Xanthaki, *The Settlement Process in the Corpus Juris and in the Acquis Communautaire*', *in* P. Cullen (Ed.), Enlarging the Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistle Blowing and Corpus Juris in the Candidate Countries 171-188 (2004); also *see* H. Xanthaki, *Recovery: Procedures, Rules and European Union Law*, *in* P. Cullen (Ed.), Enlarging the Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistle Blowing and Corpus Juris in the Candidate Countries 237-254 (2004).

[106] *See* A. McMahon, *The Proposed Constitution for Europe – Towards an Effective Union or a Federal Super State? A Sceptical Perspective,* 8 Trinity Law Review 136 (2005).

[107] Council of the EU, *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, 16054/04 JAI 559, Brussels, 13 December 2004, at 30-32.

[108] *See* J. Rowbotham & K. Stevenson, *Societal Dystopias and Legal Utopias? Reflections on Visions Past and the Enduring Ideal of Criminal Codification,* 9 Nottingham Law Journal 37 (2000).

[109] *See* Commission of the EU, Communication from the Commission to the Council and the European Parliament, *Developing a Strategic Concept on Tackling Organised Crime*, COM (2005) 232 final, {SEC (2005) 724}, Brussels, 2.6.2005, at 8; for an analysis on the future of mutual recognition, *see* V. Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 Common Market Law Review 1310 (2006).