

Eurojust and External Dimension of EU Judicial Cooperation

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Article

ABSTRACT

Eurojust – the European Union Agency for Criminal Justice Cooperation – was first established by Council Decision 2002/187/JHA (Eurojust Decision). It is tasked primarily with the facilitation and coordination of criminal investigations and prosecutions of transnational crime in the countries that are members of the EU (Member States). However, effective criminal prosecution of most serious forms of trans-border crime may not depend only on judicial cooperation within the EU. Due to nature of this type of crime, third countries also have to be included if it is to be investigated and prosecuted in its entirety. This article describes how Eurojust, as an EU agency, can contribute to more effective judicial cooperation with non-Member States, what types of support it can provide, and on which legal bases the support can be provided. It describes the stage that development cooperation with third countries has reached since Eurojust became operational. This development now has to be continued under a new legal framework – the new Eurojust Regulation – bringing into play a new set of rules for Eurojust's external relations with a much stronger role of the European Commission.

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I. Introduction

Eurojust – the European Union Agency for Criminal Justice Cooperation – was first established by Council Decision 2002/187/JHA (hereinafter: the Eurojust Decision).¹ Initially, it was defined as a “body of the Union” with legal personality, tasked primarily with the facilitation and coordination of criminal investigations and prosecutions of transnational crime in the countries that are members of the EU (Member States). However, it was clear from the beginning that effective criminal prosecution of the most serious forms of transnational crime may not depend only on judicial cooperation within the EU but also has to include third countries. Therefore, provisions enabling Eurojust to establish relations with such countries were included in Eurojust’s legal framework from the outset and were enhanced during its development. The final stage of this development was reached in the Eurojust Regulation 2018/1727 (hereinafter: the Regulation),² adopted on 6 November 2018, which will be applied from 12 December 2019. The Regulation has a new set of rules for Eurojust’s external relations with a much stronger role of the European Commission.

This article presents a short description of the stage of development that cooperation with third countries has reached in the years of Eurojust’s existence. This development will now have to be continued under a new legal framework, as set by the Regulation.

II. Third Countries and Partners of Eurojust

As an EU agency, Eurojust is primarily competent to exercise its powers within the territory of the Member States. To interact with third countries, additional legal arrangements are necessary to establish the legal basis for interaction and to define the scope of such interaction. In general, legal arrangements between Eurojust and third countries and partners can be divided into two main categories, based on the scope and nature of the cooperation, namely:

- Memoranda of Understanding, Letters of Understanding, and Letters of Intent
- Cooperation Agreements.³

The main factor of differentiation between the two categories is the ability to exchange personal data or the lack thereof.

Eurojust has concluded and signed a number of Memoranda of Understanding (MoU) as well as Letters of Understanding and one Letter of Intent.⁴ Such arrangements were concluded between Eurojust and its partners (including the European Commission, Frontex, FRA, and the EJTN), arranging institutional cooperation and the exchange of strategic and technical information. As it is not possible to exchange any personal data under such arrangements, they may only have very limited operational impact, if any at all.

In order to achieve effective operational cooperation, a clear legal basis for the exchange of personal data needs to be put in place. Under the present legal framework, Eurojust has a mandate to conclude such agreements. In order to allow for the exchange of personal data with third countries (or EU-related institutions, bodies, and agencies), Eurojust has to conclude a **cooperation agreement** following a specific procedure that includes the participation of the Council of the EU and the Joint Supervisory Body.⁵ Once such a cooperation agreement has been concluded and after its entry into force, the country party to it is entitled to cooperate with Eurojust much like Member States are. Subject to the agreement and provided that the case includes at least one Member State and is referred to Eurojust, national authorities of third states are able to benefit from all operational activities of Eurojust described in the chapter on Eurojust’s powers

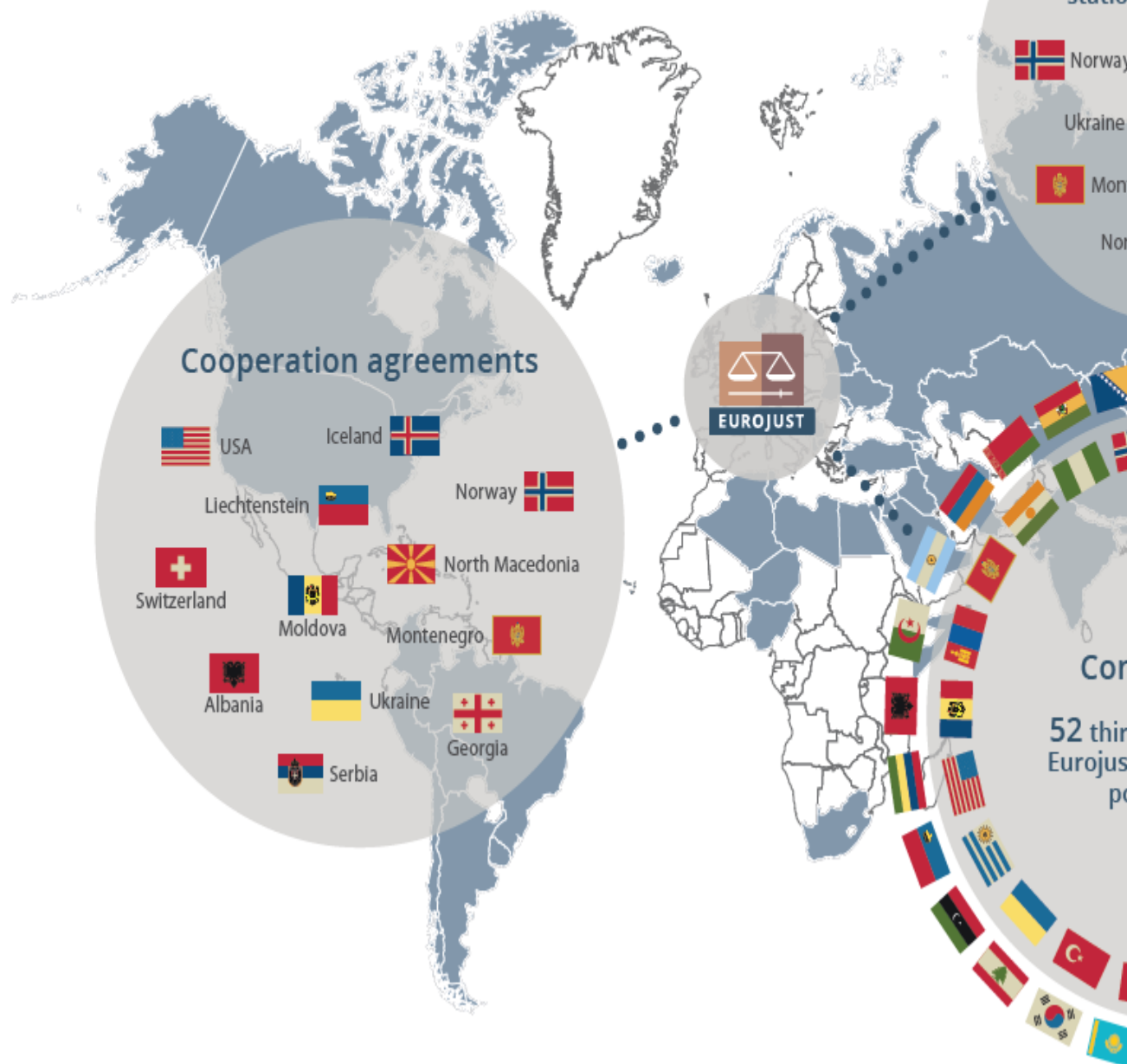
below. Operational cooperation with third states can be enhanced even further by the secondment of **liaison prosecutors**⁶ of such countries to Eurojust. This advanced form of cooperation, which is specifically foreseen in the Eurojust Decision, enables those countries to have their own prosecutors permanently present at Eurojust headquarters in The Hague, thus interacting directly with national members of Eurojust and making use of all Eurojust's operational support. The benefits of such cooperation are mutual. The same advantages of direct operational cooperation are also available to all national members of Eurojust, as well as their competent national authorities, with regard to cooperation with such a third state, represented by a liaison magistrate at Eurojust.

At present, Eurojust has signed cooperation agreements with 12 third countries, including the United States, Switzerland, and Norway. Eurojust is hosting liaison prosecutors from the United States, Switzerland, Norway, Ukraine, and North Macedonia.⁷

There is one more form of cooperation with third countries that often proves to be very useful to national authorities of Member States, although less formal in nature. This cooperation is based on **contact points**.⁸ As a result of close contacts with third countries, Eurojust has established a worldwide network of dedicated contact points, currently covering a total of fiftytwo third countries. This network consists of persons appointed by the respective countries as contact points for Eurojust. Despite the lack of possibilities to exchange personal data,⁹ these contact points often prove to be invaluable. Through them, national members of Eurojust are able to reach out to competent authorities of third countries and expedite mutual cooperation requests (sent by their own domestic authorities), as well as clarify any issues regarding the particularities of specific legal systems.¹⁰ The chart gives an overview of Eurojust's network with third countries.



Eurojust cooperation with Third States



last updated 11/12/2019

III. Powers of Eurojust

According to the Regulation, Eurojust is defined as the “European Agency for Criminal Justice Cooperation”.¹¹ In order to achieve its goal, Eurojust has been given a unique composition, combined with specific

powers for its national members. To better understand the potential and importance of Eurojust's external relations, the composition and powers of national members will be described in more detail below.

Eurojust is a collegial body. It is composed of national members representing their respective domestic judicial authorities. As such, they are formally part of their respective national judicial systems (the specific modalities are subject to relevant national legislation), and their salaries and emoluments are the responsibility of their respective Member States. The powers of national members, as well as Eurojust's operational tasks, are defined by the Regulation.¹² To exercise its operational powers, Eurojust acts either through one or more of its national members or through the College of Eurojust. All case-related information exchange between Eurojust and the Member States takes place through the national members.¹³ This is important, because national members are, in turn, incorporated within their respective domestic (judicial) authorities, meaning that any information exchange between Eurojust and Member States is considered to be intra-national.

Describing Eurojust's operational tasks in detail exceeds the scope of this article. In relation to external relations, it is sufficient to say that the operational powers and functions of Eurojust are generally divided into two main clusters:¹⁴

- Facilitation;
- Coordination.

It is important to note that Eurojust can exercise its powers only in cases that are referred to Eurojust by competent national authorities.¹⁵ Criminal investigations and prosecutions are always conducted by national authorities, the competence for which is granted and defined by domestic criminal law. In addition to operational powers and functions, Eurojust also represents a centre of expertise in the field of international cooperation in criminal matters.

1. Facilitation

For any request for mutual legal assistance or mutual recognition to be executed successfully and to the fullest extent possible, a high level of mutual understanding is essential between respective national authorities on what is requested and how it is to be provided. Due to differences in national legal systems and legal traditions, such a level of understanding is not always easy to achieve. In such situations, Eurojust is in a position to offer high-level expert support at very short notice. National members of respective countries are able to meet in person and, in direct contact with domestic authorities, to swiftly and effectively clarify any possible issues or uncertainties, be they of a legal or factual nature (level II meetings). Any language barriers, which might hinder the process and cause delays due to translation requirements, can be effectively overcome at the same time.

Within the EU, many of these issues were resolved, or at least mitigated, with the development and application of mutual recognition instruments. Nevertheless, despite the widespread use and advanced development of instruments such as the European Arrest Warrant and European Investigative Order, the need for direct contact and quick resolution of open questions occurs time and again. This is particularly so in complex cases involving the most serious cross-border crime such as terrorism, cybercrime, and migrant smuggling, when the unique means of communication of national authorities through their national members of Eurojust is invaluable¹⁶.

With respect to third countries, where no instruments of mutual recognition exist and the diversity of legal systems and legal traditions is much greater, the need for facilitation is even more pronounced. As described above, Eurojust offers the facilitation required within the limits of such arrangements, depending on the type

of agreement with a particular third country. While it is evident that the highest level of support may be provided in cases in which a concluded cooperation agreement is in place with a seconded liaison magistrate of that third country at Eurojust, a significant level of facilitation can nonetheless still be achieved in cases in which (only) Eurojust's contact points are in place.

2. Coordination

Coordination is a pivotal role for Eurojust in cases of mutual cooperation in criminal matters. Given the increasing complexity of cross-border crime and given the multilateralism of such cases, the need for coordination is on the rise. Important questions need to be addressed and resolved quickly, questions like:

- Which national authority should undertake the investigation of specific criminal acts?;
- Which authority is best placed to conduct special investigative measures?;
- Which measures are viable against which individuals and regarding which specific criminal act?;
- Which evidence collected in one country is relevant for investigations in other country?;
- What is the best way to exchange such evidence?;
- When is the best time to undertake certain investigative activities in order to not interfere with or jeopardize the investigations in other countries?.

Solutions can only be found if they are based on the agreement of all relevant parties. Direct communication between representatives of all relevant national authorities, enabling open discussion and the effective exchange of information, is instrumental to reaching such agreement. Eurojust is perfectly suited to providing all the support necessary for reaching such agreements and putting them into practice.

Eurojust provides coordination in several different ways. One of them is level II meetings, already described above. Most coordination, however, is provided by a special form of dedicated operational tool called **coordination meetings**. These meetings are attended by the competent judicial and law enforcement authorities of the Member States that conduct investigations and prosecutions at the national level. Simultaneous translation assists in enabling direct communication between the participants on challenging legal and practical issues. Coordination meetings are organised and financed by Eurojust (including travel expenses for participants). It is important to point out that representatives from third countries may be invited to participate, and they are regularly invited in all relevant cases.¹⁷ As participants at coordination meetings, they are entitled to Eurojust's full operational support, including simultaneous translation during the meeting.

Representatives of cooperation partners, such as Europol and OLAF and international organisations like INTERPOL, may also be invited to attend coordination meetings. Europol representatives regularly participate and contribute valuably, mostly with their analytical capacities. OLAF representatives are invited to coordination meetings when their specific expertise on EU financial regulations and procedures is required. Their participation is particularly welcome if parallel administrative investigations are being conducted by OLAF. Open discussion at the expert level, involving representatives from relevant national authorities and representatives from OLAF at an early stage, is the best way to address questions relating to possible risks to respective investigations as well as questions related to the admissibility of evidence obtained.

Eurojust provides an additional form of support with **coordination centres** when real-time coordination is needed. A dedicated operational room at Eurojust ensures that participating authorities can maintain direct contact (via Eurojust) to exchange information during large-scale multilateral joint actions. Depending on the specific requirements of a case, participants from third countries may also attend coordination centres at

Eurojust. Due to the specific requirements of real-time coordination, however, representatives of countries with an established, advanced form of cooperation with Eurojust¹⁸ will primarily be able to benefit from this type of support.

Joint Investigation Teams (JITs) are another important instrument in the context of Eurojust's coordination role. JITs enable continuous and direct cooperation between the investigative authorities (both judicial and law enforcement) of participating countries. This tool is based on an agreement between competent authorities of participating countries, but Eurojust can play a vital role in the process of setting up and carrying out JITs. A model agreement has been developed with Eurojust's support to facilitate the setting-up of JITs and to help competent authorities conclude formal agreements. Together with national members facilitating the drafting process, this represents important support to national competent authorities (judges, prosecutors, and the police), which are specialized in criminal investigation and prosecution and not usually experienced in setting up international agreements. Another supporting tool for practitioners is the JITs Practical Guide¹⁹ developed by the JITs Network – in cooperation with Eurojust, Europol, and OLAF – to provide information, guidance, and advice to practitioners on the formation and operation of JITs.

Eurojust also supports the operational activities of JITs by providing financial and logistical support. The objective of such funding programmes is to promote the setting up of JITs by reducing the impact on national budgets of costs incurred due to the transnational dimension of these cases. The effectiveness of such support is sometimes wrongly judged by comparing the amount of funds awarded to competent national authorities to the amount of funds actually spent. Such comparisons are unjustified and, in principle, misleading. Due to strict EU financial regulations, rules on awarding such financial support by Eurojust require a considerable amount of anticipation and planning of investigative activities by competent domestic authorities. This is often very difficult in real-life situations of complex investigations, to say the least. As a result, fewer funds are sometimes spent as originally awarded. Regardless of such challenges, domestic authorities are usually happy to receive this type of support, and the number of JITs supported by Eurojust in this manner is growing.²⁰

The value of Eurojust's support in the form of coordination has proven invaluable in numerous cases conducted by competent national authorities of virtually every Member State.²¹ But this support is not only limited to the Member States of the EU. All the benefits of Eurojust's coordination facilities are also available to competent authorities of third countries – subject to the cooperation arrangements described above (especially in cases of concluded cooperation agreements and, even more so, in cases of seconded liaison prosecutors).

3. Expertise

Besides performing functions of a purely operational nature, Eurojust is also the centre of expertise in the field of judicial cooperation in criminal matters. Due to its composition, Eurojust is in a unique and privileged position to obtain firsthand information on the use of such instruments horizontally across the EU. The same is also true, to a large extent, for cooperation with third countries. Through its national members, who are representatives of their respective national authorities, Eurojust receives direct input regarding the effectiveness of and challenges to the application of these instruments by practitioners in all Member States. Through interaction with liaison prosecutors and contact points from third countries, Eurojust also receives valuable feedback on the application of other instruments on judicial cooperation.

By assessing this feed-back, and by hosting regular meetings for practitioners where specific topics and challenges of judicial cooperation are discussed and experiences exchanged, Eurojust shapes the knowledge bases for practitioners and issues guidelines for the benefit of national authorities.²² With the similar objective, Eurojust is also regularly assessing how the European Court of Justice (ECJ) interprets the use of

mutual cooperation instruments.²³ Although issued in relation to EU mutual recognition instruments, standards regarding fundamental human rights and liberties as set by the ECJ are most valuable for judicial cooperation with third countries.

In order to maintain a high level of expertise in relation to Eurojust's operational priorities, specialized and dedicated substructures are formed, tasked with identifying challenges and best practices from Eurojust's casework in order to support the Member States. Due to specific types of crime, some of these substructures are particularly linked to cooperation with third countries, the Counter-Terrorism Team, the Anti-Trafficking and the Cyber Team being the best examples.

IV. The Future of Eurojust's External Dimension

Everything that has been discussed so far in this article regarding Eurojust's activities with regard to third countries relates to the present legal framework defining the functioning of Eurojust and its powers – the 2002 Eurojust Decision (as amended in 2009). Under this legal act, Eurojust was granted a high level of autonomy regarding relations with third countries (as well as with EU entities and international organisations). This legal framework foresaw the important role of the Council (and also the Joint Supervisory Body) in the process of concluding cooperation agreements, but the decision on entering into negotiations was in the hands of Eurojust and subject to its operational needs. However, the new Eurojust Regulation that applies as of 12 December 2019 entails several changes in this regard.

The Regulation not only strengthens the Eurojust's operational capabilities – strongly reaffirming it as the EU agency for criminal justice cooperation – but also changes the framework for cooperation with third countries. While existing cooperation agreements stay in force,²⁴ the new regime will apply to future forms of cooperation, particularly those entailing the exchange of operational personal data with third states. As explained above, the exchange of personal data is instrumental for advanced forms of cooperation, e.g., real time coordination and the use of liaison prosecutors. Under the Regulation, forms of cooperation entailing the exchange of such data will only be possible if an international agreement has been concluded between the EU and the third country (or international organisation), providing sufficient safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals.²⁵ This represents an important change compared to the present system, particularly with regard to the question which entities will decide on the entry into such negotiations and which entities will actually conduct them. According to a clear provision in the Regulation,²⁶ such international agreements will have to be concluded pursuant to Art. 218 TFEU, meaning that negotiations for such agreements will be conducted by the European Commission on behalf of the Council of the EU.

Eurojust's role has changed, but it has not been excluded from the decision-making process. In consultation with the Commission, Eurojust will prepare a four-year strategy, specifying the countries (and international organisations) for which there is an operational need for cooperation.²⁷ How this new mechanism will work in practice remains to be seen. If the operational needs of Eurojust are taken in consideration fully and negotiations with third countries are conducted effectively, such a synergy of expert know-how, provided by a dedicated EU agency and the political capacity of a pivotal EU institution, could contribute to a more coherent and streamlined EU external dimension approach.

Finally, the establishment of the European Public Prosecutor's Office (EPPO) needs to be mentioned, albeit briefly. The introduction of this important new partner with its new set of exclusive competences into the EU legal landscape would merit a separate article altogether. However, as regards Eurojust, cooperation with the EPPO does not, in principle, fall within its external dimension *strictu sensu*. This could be different in relation to questions of future cooperation between the EPPO and third countries as well as non-participating

Member States. Keeping in mind that the EPPO will retain the residual competence of domestic judicial authorities (double-hatted European Delegated Prosecutor and domestic courts), judicial cooperation with these countries will not be unlike the cooperation with third countries that Eurojust is supporting already today. Therefore, considering the lack of clarity in many areas and open questions regarding the modalities and the legal basis of international judicial cooperation of the EPPO, the vast experience of Eurojust, collected through its extensive case work and valuable lessons learned should not be overlooked.

1. Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J. L 63*, 6.3.2002, 1., amended by 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, *O.J. L 138*, 4.6.2009, 14.↵
2. Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *O.J. L 295*, 21.11.2018, 138.↵
3. Under the present Eurojust Decision, Eurojust is entitled to also conclude Strategic Agreements (not entailing the exchange of personal data), but no such agreements have been concluded up to this moment.↵
4. Besides the arrangements already mentioned, Eurojust has also concluded Memoranda of Understanding with EJTN, IberRed, CEPOL, UNODC, Interpol, EMCDDA, EUIPO, and eu-LISA.↵
5. Art.s 26 and 26a of the Eurojust Decision.↵
6. The Eurojust Decision refers to them as “liaison officers” (see Art. 26a), while in practice they are in fact prosecutors.↵
7. Due to very recent entry into force of cooperation agreements with Albania and Serbia, liaison prosecutors from these two countries are expected to be appointed in the coming months.↵
8. Here, I am referring to contact points for countries having no cooperation agreement with Eurojust, meaning that no personal data can be exchanged with such contact points.↵
9. Unless no cooperation agreement has been concluded.↵
10. Despite certain similarities, this form of cooperation is not to be confused with cooperation based on MoU and similar arrangements. The activities of contact points are related to existing requests for judicial cooperation, while cooperation based on MoUs do not entail any such requests.↵
11. Art. 1 of the Regulation, op. cit. (n. 2).↵
12. Art. 4, 5 and 8 of the Regulation.↵
13. Art. 7 para. 8 of the Regulation.↵
14. Definitions of operational functions of Eurojust – Art. 4 of the Regulation; definitions of powers of national members – Art. 8 of the Regulation.↵
15. National members do have some powers regarding the ordering and execution of investigative measures in addition to certain powers in urgent matters (Art. 8 of the Regulation), and the ability of Eurojust to act on its own initiative is expanded (Art. 2 para 3 of the Regulation), but this is less relevant for the purpose of this article.↵
16. Similar support could also be provided by the European Judicial Network, but it differs from Eurojust’s support, which is institutionalized, structured, and therefore more feasible, particularly in cases of complex crime.↵
17. In 2018, representatives of third countries attended 86 coordination meetings out of a total of 359 coordination meetings organised by Eurojust that year.↵
18. In practice, due to data-protection requirements, representatives of countries that have concluded Cooperation Agreements with Eurojust will be best suited to participate.↵
19. The model agreement and the JIJs Practical Guide are available in all official EU languages at: www.eurojust.europa.eu/doclibrary/JIJs/joint-investigation-teams/Pages/jits-framework.aspx.↵
20. A total of 200 JIJs in 2017 and a total of 227 JIJs in 2018 were supported by Eurojust.↵
21. For instance, the *Pollino* case: [www.eurojust.europa.eu/doclibrary/corporate/Infographics/Coordinated crackdown on Ndrangheta mafia in Europe, 5 December 2018/2018-12-05_Infographic-Crackdown-on-Ndrangheta.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/Coordinated%20crackdown%20on%20Ndrangheta%20mafia%20in%20Europe%205%20December%202018/2018-12-05_Infographic-Crackdown-on-Ndrangheta.pdf) and the *Santa Lucia* case: [www.eurojust.europa.eu/doclibrary/corporate/Infographics/Operation Santa Lucia, 2017/2017-Operation-SantaLucia.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/Operation%20Santa%20Lucia%202017/2017-Operation-SantaLucia.pdf) Video: www.eurojust.europa.eu/press/Pages/video.aspx.↵
22. Eurojust has issued numerous reports and guidelines for practitioners regarding the use of instruments for judicial cooperation (guidelines on jurisdiction, asset recovery, European Investigation Order, to mention but a few). Some of them are particularly related to cooperation with third countries, such as the Guidelines for deciding on competing requests for surrender and extradition (www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20on%20competing%20requests%20for%20surrender%20and%20extradition%20%28October%202019%29/2019-10_Guidelines-competing-extradition-surrender-EAW_EN.pdf).↵
23. For instance, lessons learned regarding the use of EAW have been published in the 2018 edition of Eurojust’s Overview on Case Law of the Court of Justice of the European Union (CJEU) on the EAW (www.eurojust.europa.eu/press/News/News/Pages/2018/2018-11-29_EAW-Case-Law-Report.aspx).↵
24. Art. 56, para. 2b of the Regulation↵
25. Art. 56, para. 2c of the Regulation↵
26. Art. 56, para. 2c of the Regulation↵
27. See also recital 50 of the Regulation, under which the College should be able to suggest that the Council draw the attention of the Commission to the need for an adequacy decision or for a recommendation for the opening of negotiations on an international agreement pursuant to Article 218 TFEU.↵

* Author statement

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