

Institutional Framework for EU Criminal Justice Cooperation

Refining Relations between the EJM, Eurojust and the EPPO

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ABSTRACT

The article deals with the relations between the European Judicial Network (EJM), Eurojust, and the European Public Prosecutor's Office (EPPO), in particular the question of how to shape their relationship.

Direct communication between Member States' judicial authorities is the underlying principle of international cooperation in criminal matters in the EU. This needs to be reflected in the legal instruments covering international cooperation. Technical platforms for secure electronic communication between judicial authorities must be designed in such a way as to facilitate direct communication and should not lead to an enhanced role for central authorities.

The EJM and Eurojust are both important facilitators of international cooperation. Their tasks overlap and a lot of typical EJM cases are handled by Eurojust. Therefore, the delimitation between cases to be dealt with by the EJM and Eurojust should be more clearly defined by improving existing guidelines on the distribution of roles. At Eurojust, rules of procedure should reflect these guidelines, and a consultation process should be introduced if the requested National Desks wish to challenge the choice made by the Desk opening a case.

Though knowledge and expertise concerning specific Member States within the EPPO will certainly be provided by the European Delegated Prosecutors, transnational investigations of the EPPO outside the territory of participating Member States requires international cooperation; therefore, this is still an area requiring support from Eurojust and the EJM. For Eurojust, "close cooperation" is already foreseen in Art. 100 of the EPPO Regulation. Possibilities to contact the EJM should be included in the rules of procedure of the EPPO, and a specific EJM contact point should be appointed at EPPO headquarters.



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I. General Framework of Cooperation

The basic assumption on which we have based our discussion is that this topic does not relate to “substantive judicial cooperation” (which is to be carried out among judicial authorities through direct contacts) but to the synergies and cooperation that must exist between EU structures/agencies/offices devoted to judicial criminal cooperation. This is important because it implies *the principle of direct communication* between competent authorities that must be respected as an underlying principle, not only as regards the types of institutional cooperation that could be set up but also as regards the technical solutions that might be offered to practitioners (see below).

We are concerned about how direct contacts and communication tend to be blurred and sometimes even forgotten when things are viewed from the institutional perspective of the supranational actors (EJN / Eurojust / EPPO). It might be good if the EU were to establish this principle in a clear way. So far, it has always been floating around, but it is hard to say it is a clearly defined principle that is applicable for all existing instruments.

Additionally, we believe this principle must be enhanced and not diminished by the development of new technical platforms and protocols designed to strengthen cooperation. This is the case both in the area of judicial cooperation and in the area of cooperation with/through law enforcement authorities. Among the former, initiatives like the e-EDES, a secure online portal for transmission of European Investigation Orders (and possibly other instruments) must be developed in a way that does not hamper the role of EU agencies (EJN and Eurojust are to be taken into account as actors) and, at the same time, avoids reverting to an enhanced role for central authorities. This portal is offered by the Commission as a way to connect Member States, not judicial authorities, and it remains to be seen how Member States will, in turn, connect it to individual authorities (budgetary and organisational difficulties may well result in central authorities being preferred as connections to this platform). As regards areas where the role of law enforcement authorities is defined, it would be good to keep in mind the existing legal framework for judicial cooperation so that both areas are compatible and coherent. Platforms like the EU-sponsored SIRIUS¹ project or the E-MLA initiative led by Interpol² show a certain degree of overlapping and confusion, and tend to attribute extended powers to law enforcement authorities, including transmission of MLA requests, even though this should remain within the judicial area.

Suggestions:

- Establish the principle of direct communication between Member States’ judicial authorities as the default situation (not exclusively, as certain circumstances might require a different approach) in the field of judicial cooperation in criminal matters; this should be done by means of a binding legal instrument (perhaps in the context of the legislative development of the e-EDES or the Digital Criminal Justice project).
- Reinforce the validity of electronic communications (including the development of electronic signatures) between judicial authorities; in particular, the COVID-19 situation has proven that outdated paper-based communication can be replaced by electronic means.

II. Relations EJM / Eurojust

This is an area in which overlap is very common and where greater clarity is desirable; in particular, the delimitation between cases to be dealt with by the EJM and Eurojust should be more clearly defined. Flexibility is the only practical and feasible approach to the issue.

As can be seen from the statistics provided by Eurojust, the majority of cases dealt with by Eurojust tend to be bilateral and do not always have the degree of complexity or require coordination that would justify the body's involvement. Additionally, the workflow and the attribution of resources within Eurojust is very much driven by sheer numbers, and this does not encourage the passing on of cases from Eurojust to the EJM as it should be. There is no internal mechanism in place to assess when cases need to be opened or not, and this results in clearly inflated figures for some Member States, without any possibility to control this approach (as neither Eurojust or the requested National Desk has the possibility to contest the opening of a case). Unfortunately, the new Eurojust Regulation³ has been a lost opportunity to introduce some rationality in this respect, and rules in domestic legislation that foresee a mechanism for channelling cases from one actor to the other are not used very much in practice.

The only determining factor when choosing between Eurojust and the EJM currently seems to be the degree of familiarity on the part of the individual judicial authority with one or the other. The 2018 version of the EJM - Eurojust Joint Paper "Assistance in International Cooperation in Criminal Matters for Practitioners"⁴ contains a very generic approach and has no binding force whatsoever. It is even misleading, as it ends with a sentence that is not very accurate, to say the least: "Should you need assistance, the EJM and Eurojust can provide support. As both bodies are in close contact, your request will be dealt with by the most suitable actor."

The fact that some National Desks at Eurojust have double-hatted members (who are also EJM contact points) might be a good policy, but it is not enough to prevent unnecessary cases from being opened at Eurojust and certainly does not add any possibilities of reaction against this practice.

From the EJM perspective, it is less clear how cases are internally distributed, as the mere list of contact points does not always provide a clear idea of specialisation, territorial or material competence, etc. It is also worth noting that placing contact points at ministries of justice interferes with the direct communication principle and might deter some judicial authorities from using this cooperation mechanism. Last but not least, another shortcoming is that the data protection standard for EJM operational work is less clear than that for Eurojust cases.

Against this background, another consideration could be whether the relationship between the EJM and Eurojust can obtain guidance from the EU. In the affirmative – given the flexibility that is required – it might be better to think about guidelines rather than legislation. The latter might not be able to grasp the details of every possible case.

Suggestions:

- Improving existing guidelines on the distribution of roles and cases between Eurojust and the EJM, in order to better reflect the current reality and enable proper selection of the most adequate channel.
- Creation or amendment of the Rules of Procedure at Eurojust that reflect the above-mentioned guidelines as well as introduction of a consultation process (with the possible participation of the EJM), so that requested National Desks can challenge the choice made by the Desk opening the case.

III. Relations Eurojust / EJN / EPPO

Several levels of relationship between Eurojust and the EPPO particularly exist:

Institutional: The reference in Art. 86 TFEU, “from Eurojust,” has proven to be little more than an empty declaration. No versions of the Commission’s proposal or of the various texts amended by the Council on the establishment of the EPPO contained any meaningful provision giving weight to that reference. Having established the seat of the EPPO in Luxembourg does not help either. In any case, the need for cooperation is obvious, despite the overly vague scenario depicted in Art. 100 of the EPPO Regulation⁵ as “close cooperation.”

Operational: The operational field offers room for further cooperation and development of the mechanism to ensure that cooperation takes place. The assumption that Eurojust “loses” some of its competence with the establishment of the EPPO (see Art. 3(1) of the Eurojust Regulation) is misleading, because Eurojust never dealt with investigations the way the EPPO will. Further points of discussion should be the mechanisms for sharing information, compatibility between the Case Management Systems of both bodies, and other similar topics.

Suggestions:

The role of Eurojust should be enhanced by the following:

- Coordination and cooperation with Member States that do not participate in the EPPO and third countries;
- A possible role in deciding on ancillary competence, if there is a disagreement between the EPPO and the national prosecution authorities;
- Consultations from EPPO to Eurojust for the exercise of its competence (in cases of EU repercussions);
- Provision of a supporting role to the EPPO in Joint Investigation Teams and conflicts of jurisdiction.

Administrative management: It is important to establish mechanisms to ensure that general and mutual support can be offered (although it will be more necessary for the EPPO to receive support from Eurojust than the other way around, at least during the first several years). It must be kept in mind, however, that establishing the EPPO should not necessarily mean weakening Eurojust; the fact, mentioned above, that the EPPO has not really been established “from Eurojust” should not mean it must be established “at the expense of Eurojust.” When regulating the administrative links, it is equally important to keep in mind that the EPPO is a judicial investigating authority whose independence and autonomy must be preserved.

Additionally, the definition of the role of the EJN in relation to the EPPO seems to have been forgotten. Even though knowledge and expertise concerning specific Member States will certainly be provided by the European Delegated Prosecutors, that does not mean a role for EJN contact points can be excluded, as the transnational dimension of EPPO investigations will require support from them as well. The right approach would be to see the EPPO as another judicial authority, in which case the same service that EJN contact points provide to national authorities should be offered to this new authority. The presence of a permanent contact point at the central seat of the EPPO in Luxembourg (in order to streamline the support that the EJN could offer) might also be worth exploring. These aspects will not need specific legislation but could be included in the internal rules of procedure of the EPPO.

Lastly, the relationship between EJN/Eurojust/EPPO will require the establishment of an appropriate framework for the necessary “close cooperation,” based on clear guidelines and regular mechanisms of contact and evaluation. The capacity of these actors to react efficiently in a fast way, if necessary (for example, regarding VAT carousel frauds and ancillary competences involving non-participating Member States or third states), should be taken into account. Enhanced links fostering operational cooperation with Europol and OLAF should also be considered.

Suggestions:

- To include in the Rules of Procedure of the EPPO possibilities to contact the EJN in an efficient manner. One option would be to establish a permanent EJN contact point at the EPPO headquarters (this could be implemented by appointing a specific contact point, by using a contact point who already works at the EPPO, or by using a Luxembourg contact point for this specific purpose).

IV. Conclusion:

There is a necessity for a clear definition of the relations between the EJN, Eurojust and the EPPO to achieve the best results for international cooperation. For this definition legislation is not necessary, guidelines and internal rules of procedure suffice.

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1. The SIRIUS project was created by Europol in October 2017 as a response to the increasing need of the EU law enforcement community to access electronic evidence for internet-based investigations. The SIRIUS project, spearheaded by Europol's European Counter-Terrorism Centre and European Cybercrime Centre, in close partnership with Eurojust and the European Judicial Network, aims to help investigators cope with the complexity and the volume of information in a rapidly changing online environment, by providing guidelines on specific Online Service Providers (OSPs) and investigative tools; and sharing experiences with peers, both online and in person.↵
 2. Platform for exchanging judicial mutual legal assistance requests in electronic form.↵
 3. 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.↵
 4. <https://www.ejn-crimjust.europa.eu/ejnupload/StaticPages/EJN-EJ-paper-on-judicial-cooperation-in-criminal-matters_2018-01_EN.pdf> accessed 4 December 2020.↵
 5. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31.10.2017, 1.↵
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Authors statement

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