An Overall Analysis of the Proposal for a Regulation on Eurojust

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Article

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As explicitly mentioned in the Treaty of Nice,[1] and preceded by a provisional unit ("pro-Eurojust"),[2] Eurojust was established through a Decision of 28 February 2002.[3] The latter was amended by the Decision of 16 December 2008 on the strengthening of Eurojust.[4] Shortly after the celebration of its 10th birthday in 2012, Eurojust became the subject of a new reform. On the 17th of July 2013, the Commission presented a proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), based on Art. 85 of the Treaty on the Functioning of the EU (TFEU).[5] This initiative was introduced at the same time as the proposal for a Regulation establishing the European Public Prosecutor's Office (EPPO).[6]

As stated in the title of this article, this analysis aims to give an overall review of the proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust). It will be divided into two parts. The first part will be devoted to the main innovative features of the initiative and to the main improvements it brings (I). The second part will highlight some disappointing features or sources of concern (II).

I. Main innovative features and improvements

The proposal certainly contains some interesting innovative features. Among them, six important improvements are worth underlining. But all of them raise questions, doubts, or suffer from limits.

A.

A first major improvement results from the entry into force of the Lisbon Treaty and from the communitarization it realizes: the new instrument – namely a regulation directly applicable in the EU Member States – has a much stronger legal impact than the current Eurojust decision, and it will be subject to the full range of the ECJ's competences. This is essential in order to ensure the effectiveness of the future regulation, its uniform interpretation, and the judicial control of Eurojust's acts.

There is a price to pay, however, namely the rise of variable geometry – what about the UK, Ireland, and Denmark? – and the numerous questions concerning especially the scope of the ECJ's control of Eurojust's acts.

B.

A second major improvement consists in the intensification of the development launched by the Decision of 16 December 2008 on the strengthening of Eurojust. It introduced important amendments, mainly aimed at reinforcing the effectiveness of Eurojust and its capacity to deal with its task.[7] As it is well known, however, these amendments remained limited[8] and disappointed many observers. The draft Eurojust regulation constitutes an intensification of the development launched by the 2008 decision in three main respects:

- It further reduces the characteristic asymmetry of Eurojust (1);

- It further strengthens the provisions on the exchange of information between national authorities and national members of Eurojust (2)

- It further clarifies Eurojust's relations with some partners (3).

1) The existing differences between national members of Eurojust have considerably impeded its work.[9] This is why the 2008 decision aimed to approximate the national members' powers, their place of work, their staff, and their term of office. The draft Eurojust regulation goes further in this direction. This is particularly

clear[10] regarding the national members' powers when one compares, on the one hand, the current Art. 9b to 9e) of the Eurojust decision and, on the other hand, Art. 8 of the draft Eurojust regulation. The same difference is made between three categories of powers: ordinary powers, powers exercised in agreement with a competent national authority, and powers exercised in urgent cases. However, new ordinary powers have been added, mainly the power to issue and execute requests.[11] Such power is provided for in the current Eurojust decision, but it can only be exercised in agreement with the competent national authority.[12] New powers in urgent cases have been added as well, namely the power to order investigative measures.[13] In addition, the national safeguard clause, which is currently provided for in Art. 9e), has been abolished. This is a widescale and vague exemption allowing the powers exercised in agreement with a competent national authority or the powers exercised in urgent cases not to be granted, in cases in which granting any such powers to the national member is contrary to constitutional rules or fundamental aspects of the criminal justice system.

These changes should allow for more consistency in the powers conferred to national members and should also, generally speaking, lead to a strengthening of the national members' powers.

However, they raise three questions:

The first question is whether these changes would lead to a strengthening for all national members? Does a risk of reduction of powers for some national members exist, [14]and, consequently, a risk of regress? How can it be ensured that the Member States are free to go beyond these minimum powers? A solution could be to add a sentence making clear that these are minimum standards but that the Member States are free to grant their national members additional powers. The question is then, of course, whether such a provision would be in line with the legal nature of a regulation. In answering such question, one should not be too formalistic considering the existence of similar provisions in regulations adopted in other EU policies, e.g., common agricultural policies. One should, however, be aware of the fact that the insertion of such a sentence, according to which the Member States are free to grant their national members additional powers, would restrict the approximation impact of the text accordingly.

The second question concerns the term "in accordance with national legislation," which are used in Art. 8 of the proposal. What is the exact meaning of these words and why are they used only once, namely concerning controlled deliveries?

The third question results from the abolition of the current exemption clause of Art. 9 e) and the loss of flexibility it entails: wouldn't this create difficulties in some Member States as to the division of competences and the balance of powers between judges, prosecutors, and the police? When assessing such difficulties, however, one should not forget the impact of the new proposed text, which is the instrument of a new generation for cooperation in criminal matters, i.e., a regulation.

A missed opportunity needs to be highlighted as well: further steps could have been taken down the road towards more approximation between national members and especially towards the definition of a common profile. The silence of the proposal concerning the appointment criteria of the national members is quite surprising. It is neither consistent nor understandable to approximate the national members' powers but not their appointment conditions. It would, for example, be necessary to require a high level of and longstanding practical experience in the field of criminal justice.[15]

2) The 2008 Eurojust decision enhanced the national authorities' duties in terms of the transmission of information to Eurojust.[16] The draft Eurojust regulation pursues such a shift.[17] The need for Eurojust to receive proper information is, of course, essential.

From the first national reports of the 6th round of peer evaluation, however, it appears that the implementation of Art. 13 of the Eurojust decision raises difficulties and that Eurojust's feedback on the basis of Art. 13a) could be improved.[18] Consequently, the question arises as to whether it is a good idea to aim for a strengthening of the duties of national authorities in this respect without first analyzing these difficulties.

3) The 2008 decision already brought specifications regarding Eurojust's relations with some partners[19] but they were limited. The draft Eurojust regulation offers more clarifications. Art. 40 about the Eurojust-Europol relations is one example: it foresees the access for Europol to Eurojust information. In fact, it ensures reciprocity, since it more or less mirrors Art. 27 of the draft Europol regulation.[20] But the precisions are still too limited. For instance, Art. 42, para 2 of the draft Eurojust regulation regarding its relations with OLAF is even more restricted than the current Art. 26 of the Eurojust decision.

The articulation and complementarity between the existing actors need to be further reflected upon. Two examples can be mentioned. The first example concerns the relations between Eurojust and Europol. Eurojust's role in the joint investigative teams (JITs) is strengthened,[21] which is positive. These provisions are quite similar, however, to the provisions on Europol's role in the JITs as proposed in the draft Europol regulation.[22] This creates a risk of overlap of mandates and tasks between the two agencies. The second example is related to the relations between Eurojust and the EPPO: both draft regulations[23] show a lack of vision as to the implementation of the expression in Art. 86 TFEU "from Eurojust." One can even wonder whether such expression is implemented by the proposal, Eurojust and the EPPO clearly being conceived as two different bodies. If the growing idea is to "nationalize" the EPPO as much as possible, then I plead for much more integration between the two bodies.

There is also a lack of consistency between the respective instruments. Two examples can be mentioned here as well. First, there are discrepancies between the lists of types of offences, which Eurojust and Europol are competent for, in spite of the Commission's will to ensure that they are identical.[24] Second, the articulation of competences between Eurojust and the EPPO regarding PIF crimes is unclear. Art. 3, para 1 of the draft Eurojust regulation excludes Eurojust's competence in the field of protection of the EU's financial interests (PIF), which is problematic, since it should support the EPPO in the PIF field anyway. Besides, there is a contradiction between Art. 3, para 1 excluding Eurojust's competence in the PIF field and in Annex 1 of the proposal on Eurojust, which mentions PIF among its fields of competence.

A missed opportunity should also be emphasized: the draft regulation does not organize a clear distribution of tasks and of cases between Eurojust and the European Judicial Network (EJN).[25] Consequently, the problematic and usual issue of the complementarity between both actors remains. This is regrettable, all the more so as this issue was explicitly mentioned in nearly every national report published within the framework of the 6th round of evaluation.

C.

A third major improvement is the strengthening of the European nature of Eurojust, which is particularly represented by the abolition of the distinction between the national members' powers exercised as competent national authorities and as Eurojust national members. According to the proposal, national members should always be acting as "Eurojust" when exercising their operational functions[26] and no longer as national authorities. This is, of course, an important novelty if it favors the emergence of European interests and if it allows the national members to better serve the EU criminal justice area.

Two remarks are permitted in this context. First, such a change does not result in the end of Eurojust's hybridity.[27] The national members would still wear "two hats:" they would only act as members of the college of Eurojust in their operational functions but continue to be national representatives in their management

functions. Second, the abolition of the distinction between the national members' powers exercised as competent national authorities and as Eurojust national members could be "une arme à double tranchant," i.e., entail a "perverse effect," namely the loss of their embedment in the national judicial landscape. It is essential to have national members with a double anchorage, both at the national and European levels.

D.

A fourth major improvement is the better "readability" of numerous provisions. One example is the draft Art. 8 concerning national members' powers. It is much easier to read and understand than Art. 9 b) and f. of the current Eurojust decision. Of course, however, as previously stressed, such changes raise numerous questions. A second example concerns the types of offences for which Eurojust is competent, which are listed in Annex 1 to the draft regulation and are no longer defined by reference to Europol's scope of competences. As seen previously, however, the proposed text is not exempt from criticism either.

E. A fifth major improvement is the taking into consideration of the specific and judicial nature of Eurojust. In this respect, an important change concerns the rules on transparency and access to documents. According to the current applicable regime, all Eurojust documents are submitted to the general EU regime for access to documents, namely Regulation 1049/2001 of 30 May 2001.[28] Such a regime creates major trouble as to the case-related documents. Hence, the proposal improves the situation: its Art. 60 maintains the application of the general EU regime but only to Eurojust documents that relate to Eurojust administrative tasks and no longer to the case-related documents.

Such a specific judicial nature should be taken into consideration in other respects as well. One should, for example, avoid granting the Commission a potential influence on the nature and focus of the operational work of Eurojust.

F.

A sixth and last major improvement is the strengthening of the democratic control of Eurojust. But is Art. 85, para 1, subpara 3 TFEU correctly implemented? In spite of its title,[29] Art. 55 of the draft Eurojust regulation mainly organizes the involvement of the European Parliament in the evaluation of Eurojust activities, whereas the treaty mentions the involvement of both the European Parliament and the national Parliaments.

II. Main sources of disappointment or worry

Five disappointing features or sources of worry will be addressed in the following.

A.

A first source of disappointment is the circumvention of the "good governance timeline." The simultaneous introduction of the two proposals for the Eurojust regulation and for the EPPO regulation is not easily understandable. Many academics, including the author of this article, are quite impatient to see the EPPO be established: it is one of the most interesting prospects in the EU criminal law field to date. A more logical and reasonable timeline would have been the following: (i) assessment of the changes introduced by the 2008 Decision on Eurojust and final report of the sixth round of peer evaluation; (ii) if justified on the basis of such assessment, use of the possibilities to strengthen Eurojust's powers, as provided for by Art. 85 TFEU, including competences in the PIF field; (iii) assessment of the added value of such a reform; (iv) if the latter is not sufficient, then recourse to Art. 86 TFEU and establishment of an EPPO.

Such circumvention of the "good governance timeline" unfortunately deeply impacts the Commission's proposal for an EPPO regulation. It also impacts the proposal for a Eurojust regulation. The latter could not be grounded on the conclusions of the 6th round of evaluation, as this round is still ongoing,[30] and will only be concluded in 2014. The negotiators should take this evaluation exercise into consideration as much as possible. Consistency between both negotiations and between the two resulting final regulations must be ensured. Coherence should of course also be guaranteed with the final version of the Europol regulation.

B.

A second source of concern consists in the risks of regress or regresses resulting from the draft Eurojust regulation.

Besides the above-mentioned risk of decreasing the powers of some national members, two regresses are worth mentioning.

First, Eurojust's scope of intervention is reduced as a result of the abolition of the possibility to extend Eurojust's competence to types of offences not explicitly foreseen, at the request of a competent authority. Such an option is currently provided for in Art. 4, para 2 of the Eurojust decision. This means that the frequent cases in which Eurojust's support is requested by national authorities – such as requests to facilitate the execution of mutual legal assistance requests or mutual recognition instruments irrespective of the type of crime included in the list – would be excluded from Eurojust's competence.

Second, whereas Eurojust administration is mentioned several times in the current Eurojust decision,[31] it is not mentioned anymore in the draft proposal. This is most likely an omission, which should soon be corrected.

C.

Besides those issues previously mentioned, some other missed opportunities should be highlighted.

The proposal is considered too ambitious by some observers and too modest by others. I belong to the second category. The political choice made by the Commission was not to implement Art. 85, para 1, third sentence of the TFEU and to keep Eurojust as a mediator/facilitator, without any decision-making powers vis-à-vis national authorities. I tried to show elsewhere why such move towards vertical cooperation is necessary.[32] I will not come back to this, but I see the Commission's choice as a missed opportunity to improve Eurojust's efficiency. This political choice is understandable on the basis of the "it is not the right time argument." It is even less justified then to use the possibility provided for by Art. 86 TFEU, which implies a higher level of verticalisation.

Second, one of the main purposes of the draft Eurojust regulation is to reform Eurojust's structure and governance. The need for such reform - as the necessity to keep the administrative burden on national members to the minimum - is unanimously accepted. This is indeed one of the explicit objectives of the proposal.[33] Whether the proposal will enable such an objective to be reached is rather unlikely, because national members still have a dual role entailing both management and operational functions and because the college is still heavily involved in administrative matters.[34]

D.

Besides the lack of vision related to the relations between Eurojust and the EPPO, which has already been highlighted, the proposal also suffers from a lack of vision concerning Eurojust's tasks. The draft Art. 2

remains similar to the current provision. But it inserts the interesting concept of “serious crime requiring a prosecution on common bases” of Art. 85, para 1 TFEU. It does not, however, define this new notion. Recital 9 gives further clarifications but it remains quite traditional, since it refers to situations for which Eurojust is already competent, namely cases where investigations and prosecutions affect only one Member State and a third State and cases affecting only one Member State and the EU. To strengthen the European nature of Eurojust, would it not be possible to cover cases where the need for a common strategy is felt, which refers to an EU approach to crime, i.e., to an EU criminal policy?[35]

E.

Last but not least, according to the explanatory memorandum accompanying the draft regulation, Eurojust should support the EPPO on a “zero cost” basis.[36] Such a formula is understandable considering the need not to frighten the Member States concerning the costs of the proposed system. How it will be realized in practice, however, remains a mystery to me, unless there is a possibility of charging the EPPO for the support services supplied by Eurojust.[37] Such a “zero cost rule” should neither be detrimental to the efficiency of Eurojust itself nor mortgage the EPPO functioning.

III. Conclusion

These were some observations about the draft Eurojust regulation. Negotiations have been underway since the end of the summer and do not seem to be easy. It remains to be seen what their outcome will be. Let us hope that the final result will allow us to improve the consistency and efficiency of the Area of Freedom, Security and Justice.

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1. See Arts. 29, para 2, and 31, para 1 (a) and para 2 of the TEU.↩
2. Council Decision of 14 Dec. 2000 setting up a Provisional Judicial Cooperation Unit, O.J. L 324, 21.12. 2000, p. 2 *et seq.*↩
3. Council Decision of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. L 63, 6.03.2002, p. 1 *et seq*.↩
4. O.J. L 138, 4.06.2009, p. 14.↩
5. COM(2013) 535 final, 17.07.2013.↩
6. COM(2013)534final, 17.07.2013.↩
7. *G. De Amicis and L. Surano*, Il rafforzamento dei poteri di Eurojust a seguito della nuova Decisione 2009/426/GAI, in Cassazione Penale, November 2009, n. 11, Giuffrè Editore.↩
8. On these limits, see, for instance, *A. Weyembergh*, The development of Eurojust: potential and limitations of Art. 85 TFEU in New J. Eur. Crim. Law 2011 - 2(1), p. 75 et seq.↩
9. In this respect, see, among others, *N. Thwaites*, Eurojust autre brique dans l’édifice de la coopération judiciaire en matière pénale ou solide mortier?, in Revue de science criminelle et de droit pénal comparé, 2003, pp. 51-52; *A. Suominen*, The Past, Present and the Future of Eurojust, in Maastricht Journal of European and Comparative Law, 2008, p. 226.↩
10. See also the new obligation for the deputy and for the assistant to have their regular place of work at Eurojust (Art. 7, para 2 of the proposal) and the restricting precision added (“renewable once”) concerning the terms of office (see Art. 10, para 2 of the proposal).↩
11. See Art. 8, para 1, a) *in fine* of the proposal.↩
12. See Art. 9c, para 1, a) and b) of the Eurojust decision as revised in 2008.↩
13. See Art. 8, para 3 and para 2, a) combined of the proposal.↩
14. See, for instance, the case of the Swedish and Estonian national members who are among the national members that currently have the most extensive powers.↩
15. In this respect, a source of inspiration could be Art. 8, para 2 and Art. 9, para 2 of the draft EPPO regulation.↩
16. See Art. 13 of the Eurojust decision as revised in 2008.↩
17. Compare, especially, Art. 21, para 5 of the proposal with the current Art. 13, para 6 of the Eurojust decision as revised in 2008.↩
18. See, especially, the reports on Sweden, Lithuania, Belgium, Denmark, Finland, Hungary, etc.↩
19. See, especially, Art. 25a of the Eurojust Decision as revised in 2008 about the Eurojust-EJN relations.↩
20. See the proposal for a Regulation on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing decisions 2009/371/JHA and 2005/681/JHA, COM(2013)173 final, 27 March 2013.↩
21. See, especially, Art. 8, para 1 d) but also Art. 4, para 1 e).↩
22. See Art. 4, para 1 e) of the draft Eurojust regulation and Art. 4, para 1 h) of the draft Europol regulation.↩
23. See Art. 41 of the draft Eurojust regulation and Art. 57 of the draft EPPO regulation.↩

24. Compare Annex 1 to the draft Eurojust regulation with Annex 1 to the draft Europol regulation.↩
25. The wording of Art. 39, para 1 of the proposal is nearly identical to Art. 25a of the current Eurojust decision.↩
26. Art. 5 of the draft Eurojust regulation.↩
27. Regarding this hybrid nature, see *D. Flore and S. de Biolley*, Jurisdictional bodies in criminal matters for the EU, in Cahiers de droit européen, 2003, p. 623; D. Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne,* Brussels: Larcier, 2009, p. 567; Vlastnik, "Eurojust - A Cornerstone of the Federal Criminal Justice System in the EU?", in *E. Guild and F. Geyer* (eds.), *Security versus Justice? Police and judicial Cooperation in the EU*, Ashgate Publishing, 2008, p. 37.↩
28. See Art. 39 of the Eurojust decision.↩
29. « Involvement of the European Parliament and national Parliaments ».↩
30. On 15 Oct., 2013, only 10 reports had been published (i.e., Austria, Belgium, Denmark, Estonia, Finland, France, Hungary, Lithuania, Slovakia, Sweden).↩
31. See, especially, Art. 2, para 8 and Art. 28, para 5.↩
32. *A. Weyembergh*, Coordination and initiation of investigations and prosecutions through Eurojust, in ERA Forum, Volume 14, Issue 2 (2013), p. 177 and seq. ↩
33. See recital 13.↩
34. See the list of functions in Art. 14 of the draft regulation.↩
35. See *A. Weyembergh*, The development of Eurojust: potential and limitations of Art. 85 TFEU, *op. cit*.↩
36. See COM(2013) 535 final, p. 6.↩
37. See Art. 48, para 3, c) of the draft Eurojust regulation.↩

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