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Judicial Cooperation in the EU: the role of Eurojust

Report with Evidence

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CONTENTS

Oral Evidence

Written Evidence

NOTE: Pages of the Report are numbered in bold type; pages of evidence are numbered in ordinary type. References in the text of the Report are as follows:
(Q) refers to a question in oral evidence
(p) refers to a page of written evidence

ABSTRACT

Eurojust was set up in 2002 to facilitate judicial cooperation in criminal matters in the EU.

In a remarkably short time it has established itself as a highly effective means of facilitating cooperation between investigating and prosecuting authorities in Member States in serious criminal cases.

To further enhance its effectiveness:

- all Member States which have not already done so should implement the Eurojust Decision without further delay
- national members should retain the powers they held in their own jurisdictions
- Eurojust should concentrate on complex and multilateral cases
- data protection rules should be put in place as soon as possible
- closer co-operation with OLAF and Europol must be established.

Part of Eurojust's success is due to the co-operative, collegiate approach of its national members. If in due course the office of European Public Prosecutor is established—"from Eurojust" as the Constitutional Treaty prescribes—it should build on this approach.

Judicial Co-operation in the EU: the role of Eurojust

CHAPTER 1: INTRODUCTION

Background to the inquiry

1. In recent years few areas of activity have been unaffected by globalisation. Unfortunately the growth in legitimate trade and multinational business has been mirrored by a major increase in international crime. Criminals have not only found it very profitable to operate across national frontiers; they have found it much easier than national authorities to do so. They are not handicapped by the cumbersome procedures that are required to enable governments to co-operate effectively in investigating trans-national crimes and bringing offenders to justice. International conventions, subject to lengthy negotiation and ratification procedures, have been necessary to provide the framework to enable suspected offenders to be extradited and to facilitate the collection of evidence ("mutual legal assistance") in other jurisdictions. Even when the framework has been established, obtaining evidence from another jurisdiction is often beset with difficulties because of the need to satisfy a host of detailed procedural requirements in the requested State.

2. In response to the problems caused by international crime and the shortcomings of the procedures available to gather evidence and mount prosecutions in cross-border cases, the European Union (EU) has adopted a twin-track approach. One element has been new arrangements based on the principle of mutual recognition of Member States' national criminal laws and procedures. The other has been the establishment of new institutions. A notable example of the approach based on mutual recognition has been the European Arrest Warrant, which enables an arrest warrant issued in one Member State to be executed in another Member State with the minimum of formality. The new institutions have included, most significantly, Europol, an organisation responsible for collecting and analysing intelligence at the EU level and, more recently, Eurojust, the EU Judicial Co-operation Unit, which is the subject of this report.

Origins of Eurojust

3. The idea of an EU Judicial Co-operation Unit was first endorsed by the European Council at Tampere in 1999, which concluded that:

   "to reinforce the fight against serious organised crime, the European Council has agreed that a unit (Eurojust) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of cooperating closely with the European judicial network, in particular in order to simplify

the execution of letters rogatory.[1] The European Council requested the Council to adopt the necessary legal instrument by the end of 2001." [2]

4. Negotiations on the proposal to establish Eurojust were lengthy and difficult. Successive drafts of the Decision were subject to detailed scrutiny by Sub-Committee E of the Select Committee on the European Union, which led to an extended correspondence with the Government over a period of more than a year starting in November 2000.[3] Areas of particular concern to the Sub-Committee included the accountability of Eurojust, data protection, access to the Schengen Information System, the boundaries of Eurojust's competence, the liabilities and/or immunities of Eurojust members, and judicial supervision of Eurojust as a collective body and of its individual members.

5. The negotiations were, however, given increased impetus by the terrorist attacks on the Twin Towers and the Pentagon on 11 September 2001, and Eurojust was finally established by a Council Decision of 28 February 2002.[4] (It had been operating for the previous 12 months on a provisional basis as "Pro-Eurojust".) The "College" of Eurojust consists of one member for each Member State "in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence".[5] It is, like Europol, based in The Hague. It is directly accountable to the Council of Ministers. The College of Members is self-governing and selects its own President, currently Mr Mike Kennedy, the United Kingdom Member. There is a fuller description of Eurojust's role and how it operates in Chapter 2.

6. Eurojust was established under the "Third (non-Community) Pillar" of the EU Treaty, which calls for common action among the Member States in the field of judicial co-operation in criminal matters. As Mr Hans Nilsson, the Head of Judicial Co-operation in the Council Secretariat,[6] who was closely involved in the negotiations setting it up, told us, Eurojust is at the crossroads between two conflicting models: one seeking increased harmonisation of criminal law and procedures and centralised EU structures and the other based on mutual recognition of Member States' laws and procedures and enhanced co-operation between them. Although a fully fledged EU agency, Eurojust is a Third Pillar body whose remit is to improve co-operation between the different legal systems of Member States rather than seek to harmonise them. According to Mr Nilsson, "it is highly likely that Eurojust would never have seen the day if it had not been for the fact that its very idea had something that could satisfy both 'camps'—for one it is the beginning, for the other it is the end".[7]

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1 Also known as "letters of request", the standard means of seeking legal assistance from another jurisdiction in criminal cases.

2 The idea of an EU Judicial Co-operation Unit had been put forward some years earlier by a Committee of senior officials, but was not taken up by the Council at the time. Instead its 1997 Action Plan on organised crime recommended the establishment of a European Judicial Network (EJN), a network of contact points designed primarily to facilitate bilateral judicial co-operation.

3 *Correspondence with Ministers,* 18th Report, 2001-02, HL Paper 99, pages 48-62.

4 *Official Journal,* L 63, 6.3.02, page 1.

5 Eurojust Decision, Article 2 (1).

6 Mr Nilsson gave evidence in a personal capacity.

7 "Eurojust the beginning or the end of the European Public Prosecutor?", paper presented to the Third Eurojust Conference in Santander, Spain—24–27 October 2000.

The Committee's approach to the inquiry

7. As the experience of Eurojust is central to developments in the area of judicial cooperation, we thought that it would be useful to review its first year or so of full operation. Its work is also directly relevant to the topical and controversial issue of whether a European Public Prosecutor (EPP) should be established. Indeed the proposed Constitutional Treaty[8] agreed by Heads of State and Government at the Intergovernmental Conference in Brussels on 17/18 June 2004 provides that the Member States may establish a European Public Prosecutor's Office "from Eurojust".[9] In preparing this report Sub-Committee F has kept in close touch with the parallel inquiry into OLAF, the EU's Anti-Fraud Unit, which Sub-Committee E has been conducting,[10] in view of the importance of the relationship between the two bodies.

8. To inform ourselves in depth of the subject of our inquiry, we visited the headquarters of Eurojust in The Hague and held a lengthy and very informative session of evidence with the President and many of the other national members. We took the opportunity while we were in The Hague of visiting Europol as well. And we also visited the Headquarters of the Crown Prosecution Service in order to hear at first hand details of cross-border cases in which it was involved and the contribution that Eurojust could make to them.

9. The inquiry was undertaken by Sub-Committee F of the Select Committee, whose membership is shown in Appendix 1. We issued a *Call for evidence* in March 2004 (a copy is at Appendix 2) and we received much useful evidence from a wide range of witnesses, whose names are listed in Appendix 3. We are extremely grateful to all our witnesses for the assistance they gave us, and in particular to the members of Eurojust themselves who discussed their work very openly. We are also again indebted to our Specialist Adviser, Professor Jörg Monar, Co-Director of the European Institute, University of Sussex, whose extensive knowledge of EU institutions and wise advice on all aspects of our inquiry have been invaluable.

10. **In view of Eurojust's central role in facilitating mutual legal assistance within the EU we recommend this report to the House for debate.**

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8 Draft Treaty establishing a Constitution for Europe (Council document CIG 86 of 25.6.04).

9 Article III-175 (1).

10 *Strengthening OLAF: the European Anti-Fraud Office*, 24th Report, 2003-04, HL Paper 139.

CHAPTER 2: EUROJUST'S ROLE AND METHOD OF OPERATION

What is Eurojust?

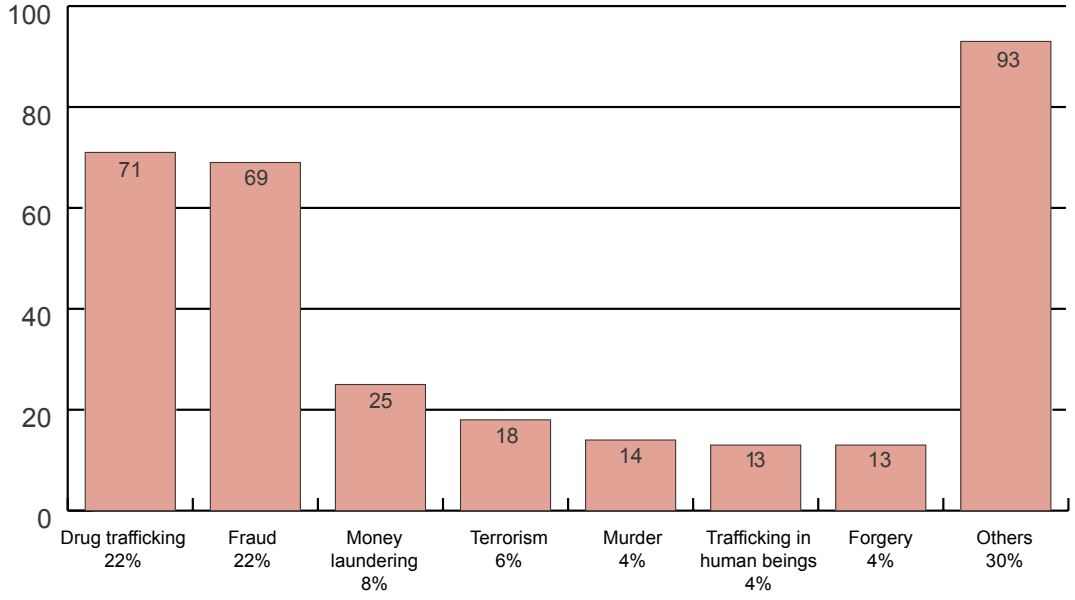
11. Eurojust is a group of full-time judges and prosecutors, one from each of the 25 Member States, who assist national authorities in investigating and prosecuting serious cross-border criminal cases. It does so by co-ordinating the activities of the national authorities responsible for a particular case and facilitating the collection of evidence under EU and other international mutual legal assistance arrangements.

What does it do?

12. Three hundred cases were referred to Eurojust in 2003, a 50 per cent increase on 2002. Nearly half involved drug traffickng and fraud; other categories of cases involving significant numbers included money laundering, terrorism and trafficking in human beings. The full breakdown was as follows:

FIGURE 1[11]

Category of offences



13. Eurojust's remit extends primarily to serious crime concerning two or more Member States, "particularly when it is organised".[12] It covers the offences which Europol has competence to deal with under Article 2(2) of the Europol Convention, and in addition:

- computer crime
- fraud and corruption and any criminal offence affecting the European Community's financial interests
- money laundering

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11 Extracted from *Eurojust Annual Report 2003* (page 33).

12 Eurojust Decision, Article 3(1).

- environmental crime
- participation in a criminal organisation.13

Two examples of cases handled by Eurojust—drawn from the Annual Report—are described in the boxes below:[14]

BOX 1

Serious Fraud

In February 2003 more than twenty competent judicial and police authorities from Finland, France, Germany, Italy, Portugal and the United Kingdom participated in a co-ordination meeting in Finland organised by Eurojust in close collaboration with the Finnish authorities. The case was a very complex global economic crime and the proceeds of crime were estimated to be several dozens of millions of euros. Criminal activity had also taken place in countries outside the European Union. The Finnish authorities had taken their domestic investigation forward as far as possible and wanted to stimulate authorities in other member states to start and to co-ordinate action in order to collect evidence and to receive a comprehensive picture of these complicated criminal activities.
The meeting led to better and co-ordinated execution of several letters of request for mutual legal assistance in member states and some of the problems relating to the execution of the requests were removed. Judicial and police co-operation in this case has been continuing through direct contacts established and strengthened at the meeting in Finland. During the year the main suspect was also arrested in a country outside the EU.

BOX 2

Terrorism

This case has been referred to the Italian national member in Eurojust by prosecutors dealing with an investigation concerning Islamic fundamentalist terrorism. It related to a subversive organisation acting with similar groups linked to Al-Quaeda, mainly in a role to support terrorist action. The Italian investigations highlighted some links with Spain, United Kingdom, France and Germany. In June 2003 as a first step the prosecutor sent letters of request to the competent judicial authorities of theses countries to gather information about specific issues under investigation. The seriousness of the alleged crimes and of the suspects meant the letters of request had to be executed urgently. The Italian prosecutor was aware of Eurojust and its responsibilities and so consulted Eurojust in order to obtain support to facilitate the execution of the letters of request and to hold a co-ordination meeting with the national investigating and prosecuting authorities in those countries involved in the case.
The meeting was held at Eurojust in November 2003 when prosecutors from the five countries attended and the immediate advantage of the

13 Eurojust Decision, Article 4(1).

14 Pages 24-25.

exchange information on current investigations was very beneficial. Relevant information about the *modus operandi* of those terrorist groups was exchanged and the meeting also provided a forum for those attending to better understand the mutual legal assistance procedures in the different judicial systems and to find technical solutions to overcome obstacles and delays in the execution of the requests. As a follow up of the co-ordination meeting, a further meeting will take place between Italian and Spanish prosecutors with the competent authorities from Algeria.

Organisation

14. Eurojust is directly accountable to the Council of Ministers, to which it is required to provide regular reports. It is not subject to direct parliamentary control, although the Presidency of the Council is required to provide an annual report on its activities to the European Parliament.[15] The European Commission is associated with Eurojust's work and is responsible for proposing its budget in the context of the EU's annual budgetary procedure, but has no say on Eurojust's operation and decisions (see paragraphs 59-60).

Composition

15. Eurojust is a "Third Pillar" body and its intergovernmental nature is reflected in its composition, which, as explained above, consists of one national member seconded from each of the Member States. The choice of the national members is up to the individual Member States. As national constitutional and legal systems vary, a national member may be a judge, a prosecutor or a police officer of similar competence (As yet no police officers have been appointed.) Member States can also appoint deputy national members, to substitute or deputise for their national members, as well as assistants to help them with their tasks, either at Eurojust itself or in their home countries.

United Kingdom representation

16. The United Kingdom's current national member is Mike Kennedy, who was seconded to Eurojust following an open competition. He had previously been the Chief Crown Prosecutor for Sussex. In June 2002 Mr Kennedy was elected by the College of Eurojust as its first President. The United Kingdom's current deputy national member is Rajka Vlahovic, who before joining Eurojust had responsibility in HM Customs and Excise Solicitor's Office for international mutual legal assistance and extradition cases. A Scottish procurator fiscal from the Crown Office and Procurator Fiscal Service in Scotland, Ann Den Bieman has also been appointed as an additional United Kingdom representative.[16] It is particularly helpful to have a Scottish member of the team in view of the differences between the criminal justice systems of England and Wales and Scotland, although the Scottish member does not work exclusively on Scottish cases.

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15 Eurojust Decision, Article 32(2).

16 At present the post is being filled on a temporary basis by another procurator fiscal, Natalie Barclay-Stewart.

The "College"

17. The national members together form the "College" of Eurojust, which is chaired by the President. While Eurojust acts in most cases through one or more of its individual national members, it can also act as a College, with enhanced powers and greater authority, especially as regards asking national authorities to undertake an investigation or prosecution of specific acts (see below—paragraph 43).

Method of operation

18. Eurojust is a self-governing body operating under rules of procedure approved by the Council of the European Union after having been unanimously adopted by the College. It is directly responsible to the Council: it has no body corresponding to Europol's management board, which is composed of representatives of national governments. The College elects its President for a three year period. He or she is responsible for directing its work, monitoring its day to day management and reporting to the Council.

19. In 2002 the College established four committees—responsible for casework, strategy, communications, and marketing and evaluation respectively—to enable certain tasks to be handled more efficiently by smaller groups of national members.[17] The committee structure is currently under review because of the expansion of Eurojust as a result of EU enlargement. As Eurojust was only fully established during 2003, some of the services are still in the process of being built up. There was, for instance, no Legal Service until a legal officer started work in April 2004.[18]

Data protection

20. In handling personal and other data Eurojust is subject to the data protection provisions of the Eurojust Decision. A full-time Data Protection Officer started work in November 2003. Her first task has been to draw up detailed data protection rules. Although working under the authority of the College, the Data Protection Officer has an independent role in ensuring the lawfulness and compliance of Eurojust's processing of personal data with the requirements of the Decision. External supervision is provided by an independent Joint Supervisory Body, which is described in more detail in Chapter 4 (paragraphs 52-54).

Budget

21. Unlike Europol, which is funded through national contributions, Eurojust is funded mainly through the EU budget, although the salaries of the national members are paid by their own Member States. As mentioned above, it is for the Commission to propose the annual budget for Eurojust, which is then subject to approval by the two arms of the EU's budgetary authority, the Council and the Parliament. In its proposals the Commission has to take into account the limitations imposed by the EU's financial perspective and the financial needs of other EU measures in the field of justice and home affairs.

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[17] *Eurojust Annual Report 2003*, page 8.

[18] p. 30.

22. In the first full year of Eurojust's operation (2003) the Commission proposed an annual budget of €m 8.1 (£m 5.4). Taking account of the expansion necessary as a result of EU enlargement and of the need to further build up services (such as the Legal Service), Eurojust requested an increase to €m 11.5 (£m 7.7) for 2004. This draft budget proposal was, however, reduced by the Commission by nearly 20 per cent to €m 9.3 (£m 6.2), which caused some dissatisfaction on the part of Eurojust as the original estimates were regarded as realistic and fully justifiable.[19] The Commission explained to us that it had to work within the financial perspective, which had been set at a time when expenditure in the Justice and Home Affairs area had not been completely foreseen. It had also taken into account that Eurojust had underspent its 2003 budget by 30 per cent. However, a procedure was available whereby Eurojust could apply for supplementary funds within the budgetary year if they were seriously under-resourced.[20]

Location

23. Members of "Pro-Eurojust" started work in Brussels in 2001, but it was decided in December 2001 that The Hague should be Eurojust's permanent seat. One of the main reasons for this decision was to collocate Eurojust with Europol in order to facilitate co-operation between the two leading EU law enforcement agencies. After the Dutch authorities had offered a building in The Hague—though not adjacent to Europol—Eurojust moved to the new premises in December 2002. Since then the premises have been increasingly adapted to its needs, most recently through the addition in February 2004 of a major new conference room with impressive state-of-the-art facilities for case conferences.

Enlargement

24. The enlargement of the EU on 1 May 2004 has brought a major challenge for Eurojust as for other EU institutions, with the number of national members increasing from 15 to 25, and a further ten different national legal systems to accommodate. Eurojust started early with preparations for this change. It encouraged the accession countries to establish specialist prosecutors as contact points and in December 2003 invited the ministries of justice of the accession countries to nominate their national members early so that they could participate in Eurojust's work before 1 May as observers. All the new Member States had made their nominations by the time of accession and almost all of the new national members were able to start work immediately, even if initially on a part-time basis in some cases. The expanded membership of the College requires meetings in a larger room, but overall the premises are considered adequate for the new national members and their supporting staff, including interpreters.

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19 p 36, QQ168, 170.

20 Q 206.

CHAPTER 3: THE CONTEXT IN WHICH EUROJUST OPERATES

Trends in international crime

25. Eurojust is operating against the background of a rapid increase in international crime. Indeed, that is why it was set up. In his evidence to us the Attorney-General, Lord Goldsmith, noted that an increasing percentage of criminal activity has an international dimension. He referred to estimates that the sums involved in money–laundering alone amount to as much as two to five per cent of global GDP.[21] The Crown Prosecution Service told us that since 9/11 there had been a significant increase in cross-border cases.[22] Besides the major threat posed by international terrorism, as recently demonstrated again by the terrorist attacks in Madrid on 11 March 2004, there is also evidence of increasing challenges posed by organised crime in Europe. Europol's latest annual organised crime report records a significant growth in the EU of the cross-border activities of organised crime groups in the areas of drug-trafficking, illegal immigration, trafficking in human beings, financial crime and smuggling. Opportunities have been opened up for organised crime, as for legitimate business, by the freedoms of the internal market and the opening of borders between EU States and their eastern neighbours.[23] These developments call for much more effective co-operation between national law enforcement authorities, and Eurojust provides the main institutional focus in the EU for co-operation between national prosecution services.

Mutual legal assistance

26. Mutual legal assistance between prosecution authorities long predates the establishment of Eurojust. The foundations for mutual legal assistance in Europe were laid by the Council of Europe starting with the 1959 Convention on Mutual Assistance in Criminal Matters. They have been further developed in the European Union during the last ten years, most notably through the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.[24]

27. There are three main elements of mutual legal assistance: extradition, to secure the attendance of an accused person for trial or sentence; letters of request, to obtain evidence in connection with a criminal investigation; and the service of process, such as judgments and witness orders. For the United Kingdom the bulk of the work involves other Member States. Simon Regis, the Head of the United Kingdom Central Authority (UKCA), which is responsible for the transmission of requests for mutual legal assistance between England and Wales and other countries,[25] told us that 60 per cent of

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21 Q 1.

22 One indicator of this increase was a 14 fold increase in cases in which application had to be made for an extension of time-limits on detention—from nine in June 2002 to 126 in December 2003—many of which were cross-border terrorist cases.

23 Europol: 2003 European Union Organised Crime Report, pages 5-9.

24 OJ C 197, 12.7.00. The Convention has, however, so far been ratified by only three Member States, an example of the very slow progress in this area, where instruments are subject to national ratification procedures.

25 Separate arrangements have recently been set up for handling requests relating to Scotland and Northern Ireland, which were previously handled by the UKCA.

letters of request and 84 per cent of requests for service of process handled by the UKCA were from other Member States.[26]

European Judicial Network

28. Another development that predates Eurojust is the European Judicial Network (EJN), which was set up by a Council Decision of 29 June 1998 with the aim of enhancing mutual legal assistance in criminal matters.[27] This network consists of representatives of national judicial and prosecution authorities, working on international judicial cooperation. They are designated by their governments as contact points for the exchange of information with the aim of dealing with certain serious forms of crime, mainly organised crime, in a fast and effective way.

29. Unlike Eurojust, however, the EJN is not a full-time body. It has no powers as such and is intended to help primarily with bilateral rather than multilateral, cross-border prosecution cases. Because of its importance as a network of numerous national contact points for the facilitation of bilateral co-operation, the EJN has not been made obsolete by the establishment of Eurojust. In order to ensure close interaction between Eurojust and the EJN the EJN Secretariat has been integrated with the Eurojust administration. Eurojust is also providing support for several EJN projects, such as the development of a "Judicial Atlas".[28]

Differences in criminal justice systems

30. Eurojust has to operate in a context of major differences between the now 25 national criminal justice systems within the European Union. These differences apply both to criminal procedure (evidential requirements, investigating authorities and procedures, and the role of the judges, for example) and substantive criminal law (such as the definition of crimes and the level of penalties). These differences can lead to serious difficulties in the form of delays in cross-border legal assistance and the failure of prosecutions, which criminals exploit to their benefit.

31. For the United Kingdom (and Ireland) these difficulties are accentuated by the differences between the common law system and the civil law systems of most Continental countries. In the criminal justice field significant differences are found less in the substantive criminal law than in rules of evidence, criminal procedure and modes of investigation and trial. In England and Wales criminal investigations are the responsibility of the police, whereas in Continental jurisdictions they are frequently carried out under judicial supervision (of the *juge d'instruction* in France for example).[29] (Scotland, where criminal investigations are supervised by a procurator fiscal (prosecutor), lies somewhere between the two.) Even within the United Kingdom there are differences between the jurisdictions (England and

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26 Q 232.

27 OJ L 191, 7.7.1998, page 4.

28 *Eurojust Annual Report 2003*, page 46.

29 The Crown Prosecution Service told us, however, that one of the most significant changes in the work of the Service was the introduction of the "charging initiative" recommended by Lord Justice Auld in his 2001 *Review of the Criminal courts of England and Wales*, which would transfer responsibility for deciding whether to charge a person with an offence and what the charge should be from the police to prosecutors. This would require a much closer involvement of prosecutors in the case at the pre-charge stage.

Wales, Scotland, and Northern Ireland), although this has given the authorities in different parts of the United Kingdom long experience in co-operating effectively in spite of them.[30]

32. All these factors underline the need for structures that can help prosecuting and judicial authorities to co-operate effectively. It is unrealistic to expect individual prosecutors to be familiar with the procedural requirements of a large number of different jurisdictions, let alone to co-ordinate unaided complex cases involving a number of different Member States. **By having senior prosecutors from each Member State available full-time to facilitate communication between prosecutors, to provide a high level of expertise in mutual legal assistance procedures, and to co-ordinate complex cases, Eurojust meets an undoubted and growing need. Its work and potential were highly valued by all the practitioners from whom we received evidence.** The Association of Chief Police Officers in Scotland, for example, said that the Scottish Police Forces and the Scottish Drugs Enforcement Agency had "benefited greatly" from Eurojust assuming a central co-ordinating role.[31] The National Crime Squad echoed this view and gave specific examples of two cases where Eurojust had played a crucial role in facilitating the investigation, one concerned with firearms smuggling and the other with people smuggling.[32]

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[30] Mrs Munro, Head of the Scottish Crown Office's Financial and International Crime Unit, gave as a very early example of what is now called mutual recognition the Summary Jurisdiction (Process) Act 1881, which enables a search warrant granted in one part of the United Kingdom to be executed in another part without undue formality, which is very similar to what is envisaged in the proposed European Evidence Warrant (Q 239).

[31] p 110.

[32] p 126.

CHAPTER 4: POWERS AND TASKS

Implementation of the Eurojust Decision: powers of national members

33. Eurojust is, like Europol, a body with legal personality, which means that it is able, for example, to conclude formal agreements with third parties.[33] As explained above, it consists of one member from each Member State "in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence".[34] National members are subject to the national law of their Member State as regards their status. It is for each Member State to set the duration of its member's terms of office, and to define the nature and extent of the judicial powers it grants its national member within its territory.[35] The Decision thus leaves Member States considerable discretion on how to determine the role of their national members. Their powers may range from merely asking a national competent authority to act to initiating criminal proceedings themselves in their own Member States.

34. There are still a number of Member States that have not implemented the Eurojust Decision—an example, according to Mrs Haberl-Schwarz, one of the Vice-Presidents of Eurojust, of taking political decisions without the willingness to give effect to them.[36] According to the Commission six Member States still need to bring their law into conformity with the Decision—Belgium, Finland, Greece, Italy, Luxembourg and Spain.[37] Mrs Vernimmen for the Commission pointed out that a significant weakness is that, as the Eurojust Decision is a Third Pillar measure, there is no mechanism for bringing infringement proceedings before the European Court of Justice against Member States which have not implemented it, as there would be in the First Pillar.[38]

35. In those Member States which have implemented the Decision, there are considerable differences in the powers given to their national members. JUSTICE expressed concern about these disparities, arguing that they would have an impact on the efficiency and accountability of Eurojust.[39] Mr Nilsson described the differences between the two extremes as follows: "one could be described as an expensive letter box, that is at least how one of the national members described himself, whereas the opposite is a person, a national member who has full powers as a national prosecutor. He can arrest someone, he can order search and seizure etc."[40] Referring to the Eurojust Report, Mrs Vernimmen said that "the strength of the network of the College in fact is depending on the weakest point" and that there should be a minimum of powers granted to national members.[41] In its written evidence,

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33 Q 7.

34 Eurojust Decision, Article 2(1).

35 Articles 9(1) and (3).

36 QQ 132,143.

37 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, 6.07.04).

38 Q214.

39 p 123

40 Q 48.

41 Q 215.

the Commission argued that, if a Member State merely conferred the formal title of prosecutor on its national member, "the question arises whether this is entirely in line with the spirit of the Eurojust Decision".[42]

36. In the United Kingdom the Government has not thought it necessary to pass implementing legislation bestowing specific powers on its national member, but the present United Kingdom national member has the full powers of a Crown Prosecutor (and his deputies retain their powers as a Customs and Excise prosecutor and procurator fiscal respectively). Mrs Munro (Head of the International and Financial Crime Unit, Crown Office and Procurator Fiscal Service, Scotland) drew our attention to the fact that the powers possessed by the United Kingdom national members derive from their previous domestic roles. She pointed out that, if new United Kingdom representatives came from another agency, they would not necessarily have the same powers.[43]

37. A country where implementation of the Eurojust Decision has proved to be particularly complicated is Germany. This stems from the German federal system, where most of the competence for criminal law prosecutions lies at the State (Land) and not at the federal level. As the Eurojust national member for Germany, Mr von Langsdorff, told us, the federal system is a huge problem as "the Länder try to retain sovereignty as much as possible and do not want to share it with someone in The Hague". He also noted that the draft legislation implementing the Eurojust Decision in Germany said that the German Eurojust member "should have some power, but the Länder said no".[44]

38. The German Eurojust Act was passed very recently, on 12 May 2004. According to Professor Vogel, the Act gives the German national member the powers to communicate with the authorities involved in a case without the consent of the German Federal Ministry of Justice, to pass information to everybody involved and to request information from German public prosecutors at least on a federal level (however it was not clear whether this would extend to the Länder). On the other hand, the German national member has neither a right to issue binding instructions to federal or Länder prosecutors nor can he prosecute or investigate cases himself. He is an "information gate" and nothing more.[45]

39. One of the main strengths of Eurojust lies in the fact that most of the national members are senior judges or prosecutors and highly respected in their own countries, which enables them to cut through a lot of procedural difficulties by virtue of their personal authority. They may not, while seconded to Eurojust, often have occasion to exercise their powers as national prosecutors, but it is desirable that they should have them in reserve. **It is particularly important that national members should be able, acting in compliance with national law, to obtain information about individual cases and communicate effectively with their national authorities in order to fulfil their duties under the Eurojust Decision. They should also retain at least the powers they held in their own jurisdictions.**

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42 p 70.

43 Q 240.

44 Q 137.

45 QQ 291-293.

Tasks

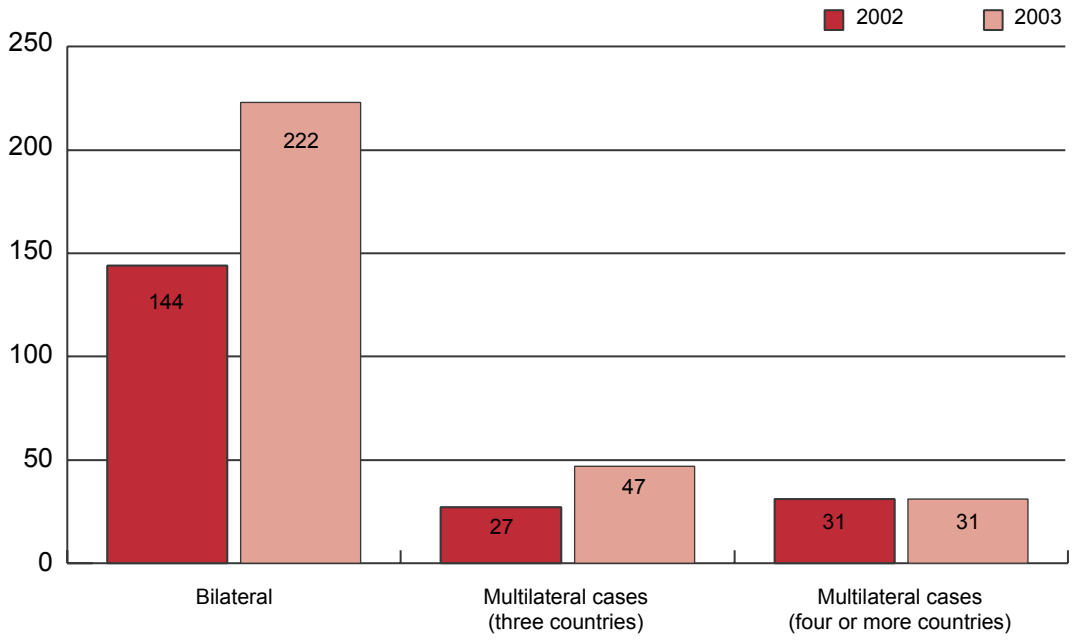
40. Eurojust's objectives are to:

- stimulate and improve the co-ordination of investigations and prosecutions in the Member States
- improve co-operation between the competent authorities of Member States, in particular in the fields of surrender of persons (formerly extradition) and mutual legal assistance
- support otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective
- assist investigations and prosecutions concerning only one Member State and a third State or one Member State and the Community.[46]

41. According to the first Annual Report on the work of Eurojust considerably more bilateral cases were referred to Eurojust in 2002 (70 per cent of the total) than multilateral cases. In 2003, despite an increase in multilateral cases, the proportion increased slightly because, as can be seen from the chart below, the number of bilateral cases also increased significantly.

FIGURE 2

Bilateral-Multilateral cases[47]



Moreover, Eurojust received more requests for assistance by way of co-operation than for help to co-ordinate investigations and prosecutions. This seems to run counter to Eurojust's ambitions to deal mostly with multilateral cases and to develop its co-ordination function (which is a high priority for the organisation). The Annual Report—and Eurojust in its oral evidence—accepted that it would take some time to gain the confidence of national

46 Eurojust Decision, Article 3.

47 Extracted from *Eurojust Annual Report 2003* (page 31).

authorities. It also noted that experience thus far showed that support from a Member State to its Eurojust national member could have a significant impact on the numbers of cases referred to the unit. The German national member gave the example of a case where the Berlin prosecutor asked for co-ordination in a drugs trafficking case, which as a result grew to the point where there were 70 known and 140 unknown suspected persons involved. Unfortunately the investigation was a victim of its own success when the prosecutor stopped it due to lack of resources.[48]

42. Eurojust can act either through its national members or, when cases have Union-wide repercussions, as a College. In addition to co-ordinating action between national authorities its main tasks are requesting them to undertake an investigation or prosecution and advising in cases where two or more Member States have jurisdiction. (It may also ask them to set up a joint investigation team and to provide information.)

Requests to Member States

43. When Eurojust acts through its national members, it may ask national authorities to consider undertaking an investigation or prosecution. When it acts as a College, the wording is stronger: Eurojust may ask national authorities to act and they must give reasons if they decline to co-operate. This makes Eurojust according to its President an "empowered" network,[49] although it was felt that it was not currently being used to its full potential.

44. Few of our witnesses advocated giving Eurojust additional powers at present. Mr Nilsson pointed out that Eurojust was still a very new institution that was finding its feet[50] and Mrs Munro called for a rationalisation rather than an increase of Eurojust's powers.[51] Moreover, although Eurojust does not have powers to insist on an investigation being undertaken, it was generally felt, not least by Eurojust itself, that the authority of the College was such that it would rarely be necessary to resort to using formal powers. Mike Kennedy pointed out that the sanction of "naming and shaming" a recalcitrant Member State in its annual report would usually be enough to discourage it from refusing to co-operate. Mrs Vernimmen also accepted that Eurojust has currently some influence over national authorities.[52] We were inclined to accept these arguments and recommend against conferring additional powers on Eurojust. However, the proposed Constitutional Treaty now provides for Eurojust to initiate investigations (but not prosecutions). We discuss the relevant provisions of the Treaty in Chapter 6.

Concurrent jurisdiction

45. An area where Eurojust's work can add significant value to existing arrangements is the determination of which jurisdiction should prosecute a criminal offence where there is a possibility of a prosecution being launched in two or more different jurisdictions. Eurojust does not have the power to take binding decisions on where a prosecution should take place, but is playing a role in facilitating meetings between national prosecutors to discuss

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48 Q 122.

49 Q 97.

50 Q 46.

51 Q 252

52 Q 209.

the issue and give advice: according to its 2003 Annual Report, "Eurojust would actively encourage all competent authorities to consider referring this type of case to it for assistance".[53]

46. In November 2003, Eurojust organised a seminar to discuss the question of which jurisdiction should prosecute cross-border offences. The seminar identified a number of criteria that should be considered by prosecutors when reaching a decision. The initial presumption is that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained. Prosecutors should consider dealing with all the prosecutions in one jurisdiction, and every effort should be made to guard against one prosecution undermining another. Other factors to be taken into account include the attendance and protection of witnesses, the availability and admissibility of evidence and the interests of victims.[54] This last factor was also emphasised by Eurojust members in their oral evidence, particularly in relation to the *Prestige* oil tanker case, where a decision on the venue for the trial would have significant implications for those affected by the spillage.[55]

47. There is some concern that a decision on the venue for a prosecution taken on Eurojust's advice might jeopardise the rights of the defendant. This could happen if the decision on where to prosecute were taken on the basis of which jurisdiction was better placed to secure a conviction (for example by having lower standards of admissibility of evidence or stricter criminal laws) or where it was more likely to secure a higher penalty.[56] The Eurojust guidelines address this issue by providing that prosecutors "must not decide to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another", and that the sentencing powers of courts in different jurisdictions must not be a primary deciding factor. However, at the same time the guidelines stress that matters that should be considered include "the liability of potential defendants and the availability of appropriate offences and penalties" and that prosecutors should ensure that the penalties available should reflect the seriousness of the offence.[57]

48. In his evidence to the Committee, Professor Vogel stressed the problem of "forum shopping" in criminal prosecutions in the EU. He gave the example of drug offences committed at the Dutch/German border, where a decision could be taken to prosecute a person for possession of a significant quantity of soft drugs in Germany (where this would be punished by a tough sentence) rather than in the Netherlands (where the offence might not even be prosecuted). Professor Vogel also felt that in taking such decisions Eurojust would look for severe sentencing: "They are public prosecutors. It is natural".[58]

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53 Page 62.

54 *Id,* pages 64-65.

55 QQ 100,109.

56 According to Mrs Vernimmen, if proceedings were transferred from one Member State to another, it would be desirable that the evidence already collected in one country was admissible and useable in other Member States. She added that the Commission was currently conducting a study on the question of admissibility of evidence (Q 216).

57 *Id,* page 65.

58 Q 301.

49. Professor Vogel was nevertheless in favour of increasing the powers of Eurojust to decide in a binding way on which national jurisdiction should investigate and prosecute and which should withdraw from the investigation.[59] He recognised that this might signify the development of Eurojust into a prosecutorial authority and believed that, if Eurojust were granted binding powers in this context, it would be useful to consider introducing some form of control of Eurojust's decisions. This would have to be exercised by a court decision, either the Court of Justice in Luxembourg or a specialised EU court of first instance in criminal matters.[60]

50. **We believe that Eurojust has a pivotal role to play in facilitating decisions on where to prosecute cross-border offences. But it would be premature to give Eurojust the power to take binding decisions on which jurisdiction should prosecute.** This would transform Eurojust into a quasi-prosecutorial authority and bring it very close to the European Public Prosecutor. **In advising national authorities on where to prosecute, it is essential that a balance is struck between the rights of the victims and the rights of defendants.**

European Arrest Warrant

51. Eurojust is also entrusted with a number of tasks regarding the operation of the European Arrest Warrant.[61] Its advice may be sought if there are competing warrants issued by more than one Member State;[62] and it must also be informed if there are delays in the execution of warrants.[63] Most of our witnesses thought that Eurojust would play a useful role in overseeing the operation of the Arrest Warrant, while acknowledging that it would not be involved in individual cases as a matter of course, since surrender of persons is essentially a bilateral process. Mr Nilsson suggested that Eurojust would not play a major role in the practical operation of the Warrant, if the Schengen Information System (SIS)[64] became the primary means of exchanging extradition data by entering details of warrants directly into the system.[65] However, this prospect is some way off. Member States have been discussing for some time the replacement of the SIS by a new system, SIS II. The new system would be an investigation as well as a reporting system, and access to it would be extended to a wider range of authorities. In a Communication in 2001 the Commission noted that access for judicial authorities to the SIS II could be considered in connection with the execution of European Arrest Warrants. It suggested that alerts under the SIS for temporary detention with a view to extradition could be extended so

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59 QQ 286, 301.

60 p 107, Q 301. According to Article 225a (1) TEC the Council may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific cases.

61 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

62 Article 16 (2).

63 Article 17 (7).

64 The Schengen Information System (SIS) is a computerised database that supports the arrangements introduced to compensate for the removal of controls at the borders of the Schengen Member States. It contains data relating both to the entry and movement of third country nationals and to policing and cross-border co-operation in criminal matters (such as data on wanted persons and stolen vehicles).

65 Q 52.

as to contain "all the additional information of the European Arrest Warrant, providing a basis on which to arrest and surrender wanted persons".[66]

Data protection

52. The Eurojust Decision provides for Eurojust to exchange information (including personal data) with Member States' authorities, and also with EU bodies, international organisations and third country authorities. It may also store and process data, including personal data. Articles 14 to 27 of the Decision contain a series of provisions establishing detailed data protection rules. These include the appointment of an independent Data Protection Officer within Eurojust[67] and the establishment of an independent Joint Supervisory Body (JSB) to monitor compliance with data protection safeguards.[68]

53. There has been considerable delay in putting in place data protection rules of procedure and appointing a Data Protection Officer and the JSB.[69] These arrangements are now in place, and will enable the processing of personal data by Eurojust and co-operation with third bodies (such as Europol and OLAF) and third countries.

54. The JSB has a crucial role to play in this context: it must be consulted on any Council decision authorising such exchange and can block the transmission of personal data by Eurojust if the other party fails to provide "adequate" data protection standards.[70]

55. It is a requirement that members of the Eurojust JSB are members of the judiciary. This was criticised by the United Kingdom Information Commissioner, who argued that a judge might not have the data protection expertise of a member of a national data protection authority and that this could lead to a divergence of approach to data protection compliance between Eurojust and other third pillar systems.[71] However, many Member States, including the United Kingdom, have nominated members of their national data protection authorities for the JSB, having designated them as judges. Mr Nilsson, a former judge himself, expressed his confidence on the ability of judges to grapple with data protection issues.[72] **It is important that there should be strong data protection expertise on the JSB, but we are satisfied that its composition enables it to provide effective supervision of Eurojust's exercise of its responsibilities in relation to data protection**.

Relations with national authorities

56. Eurojust's relationship with national investigation and prosecution authorities is crucial to its effectiveness. If national authorities do not refer cases to Eurojust, Eurojust's co-ordinating and advisory role cannot come into play. Eurojust told us that "marketing" its services had had a high

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66 COM (2001) 720 final, 18.12.2001, page 8.

67 Article 17.

68 Article 23.

69 Q 153 and *Annual Report,* pages 15-17.

70 Articles 17(4) and (5).

71 p 120.

72 Q 55.

priority.[73] The national members had done a lot of work in their own countries explaining Eurojust's role and encouraging prosecutors to refer suitable cases and this was gradually bearing fruit. The number of cases referred to Eurojust increased by 50 per cent in 2003 (from 200 to 300) but the Eurojust members themselves believe that they are still not being used to their fullest potential. Several witnesses pointed out that it requires a major change for some prosecutors, who are naturally conservative, to adapt to a culture of openly sharing information and working jointly with prosecutors from other jurisdictions.[74]

57. The authorities in the United Kingdom from which we received evidence spoke very highly of their contacts with Eurojust (see paragraph 32). The United Kingdom is one of the main users of Eurojust. In 2003 it issued requests to Eurojust in 35 cases, compared with 20 in 2002, making it the fourth highest "requesting country" (after Denmark, Germany and Italy).[75] (It was sixth in the table of "requested countries".)

58. **We welcome the very positive reaction to Eurojust's work from United Kingdom prosecutors, which is a tribute to the perceived value it can add to the handling of cases and to the efforts of the United Kingdom Member in promoting its services.**

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[73] Q 118.

[74] Mr Nilsson, Q 61, Professor Vogel Q 287.

[75] Eurojust *Annual Report 2003*, Figure II, page 32.

CHAPTER 5: RELATIONS WITH OTHER BODIES

The Commission

59. The Eurojust Decision provides that the Commission should be "fully associated" with the work of Eurojust, while the Eurojust Rules of Procedure call for the establishment of regular relations between the two.[76] Mrs Vernimmen explained that there are regular meetings, approximately every six weeks, at which general trends in Eurojust's work are discussed and consultations on Commission projects (such as the European Criminal Record) take place. Eurojust also participates in experts' meetings organised by the Commission in Brussels and submits comments on consultations launched by the Commission.[77]

60. The Eurojust Decision also states that the Commission may be invited to provide its expertise on the co-ordination of investigations and prosecutions.[78] In this context Mrs Vernimmen stressed the Commission's expertise in administrative matters, and on the interpretation of Community law. [79] There is also the possibility of the Commission providing expertise in the investigation of fraud against the Community budget, which is where Eurojust's work intersects that of the European Anti-Fraud Office (OLAF). [80]

OLAF

61. OLAF was established in 1999.[81] It is a Commission service but has operational independence. It is responsible for investigating allegations of fraud against the Community budget and related irregularities. It has power to conduct both external investigations (in Member States, for example into misuse of Common Agricultural Policy funds) and internal investigations (into EU bodies and their staff). External investigations account for 90 per cent of its work. OLAF has no prosecution powers. Its powers are limited to conducting preparatory (or, as OLAF describes them, "administrative") investigations. At the end of an investigation OLAF passes the file to the appropriate prosecuting authority, which may then initiate a criminal prosecution. There is concern on the part of OLAF that some national authorities do not give sufficient priority to following up their investigations.[82]

62. Although the powers of OLAF and Eurojust differ (as OLAF conducts "administrative" investigations while Eurojust operates in the area of criminal investigations and prosecutions) there is a considerable potential overlap in their mandates, in that both bodies are competent to deal with fraud against the Community's financial interests. In order to facilitate co-operation, OLAF and Eurojust signed a Memorandum of Understanding

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76 Articles 11(1) and 21(1).

77 Q 203.

78 Article 11(2).

79 Q 205.

80 Office Européen de Lutte Anti-Fraude.

81 It succeeded an earlier organisation, UCLAF *(Unité de Coordination de la Lutte Anti-Fraude)*.

82 For further information about OLAF, see the Committee's Report, *Strengthening OLAF, the European Anti-Fraud Office,* published simultaneously with this Report.

(MoU) in April 2003. This covered a range of issues, including exchange of information about cases of concern and inviting representatives from the other organisation to conferences and meetings of mutual interest.

63. However, the picture on the relationship between OLAF and Eurojust is far from rosy. In its written evidence, Eurojust said that there was "room for improvement in the relations between Eurojust and OLAF.[83] During our visit to The Hague, Mr de Baynast, one of the Vice-Presidents of Eurojust, told us that there is "a kind of competition" between the agencies. Eurojust was not informed at an early stage when OLAF was referring cases of fraud to judicial authorities and only sent to Eurojust what Mr de Baynast described as "old camels". Mr de Baynast attributed this to the fact that OLAF considered Eurojust responsible "for there not being a European prosecutor on fraud".[84]

64. Mr Kennedy, the President of Eurojust, added that initially Eurojust had been faced with "quite a hostile situation".[85] When Eurojust was established as a provisional unit in Brussels on 1 March 2001, OLAF suddenly decided to appoint a magistrates' unit of 15 magistrates, effectively mirroring what Eurojust was doing. Mr Kennedy told us that Eurojust had developed very good relations with those magistrates and there had been some co-operation with them, but nowhere near the sort of co-operation for which Eurojust would have hoped. Mr Kennedy accepted that lack of progress in the establishment of Eurojust's data protection rules and implementation of the Eurojust Decision by Member States may have hindered co-operation with OLAF. But he pointed out that Eurojust would be the ideal unit to co-operate with OLAF in addressing the latter's concerns that its investigations are not followed up by prosecutions in Member States—but this had not happened at a practical level.[86]

65. OLAF itself acknowledged that there was a certain overlap between the two bodies in that both had a co-ordination function in the area of the protection of the Community financial interests. In his oral evidence, Dr Kuhl for OLAF attributed Eurojust's criticisms to the fact that Eurojust "is still in a start up phase and is still…looking actually after their role". There were, however, regular contacts on an informal basis.[87] OLAF appears to envisage a role for Eurojust in cases where an OLAF investigation reveals that a fraud case in fact concerns broader criminal conduct which falls within Eurojust's mandate.[88]

66. In the area of fraud against the Community's financial interests, OLAF believes that there is potential for co-operation with Eurojust in relation to Customs and VAT fraud. But it argued that Eurojust was not sufficiently skilled to deal with this type of case because it went beyond co-operation between judicial authorities, involving co-operation between judicial authorities on the one side, fiscal authorities on the other side and perhaps in a third country Customs authorities—there are situations where in one Member State the relevant aspects of a case may be in the hands of a

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83 p 34.

84 Q 137.

85 Q 139.

86 Q 139.

87 Q 78.

88 Q 81.

Customs authority and in another Member State they may be in the hands of a prosecutor.[89]

67. On the issue of the legal framework of co-operation between Eurojust and OLAF, Dr Kuhl recognised that the MoU "is an arrangement and only an arrangement" and not a legal basis for co-operation. He also noted the limits to the co-operation between the two bodies, in terms of judicial secrecy and data protection rules He also noted that recital 5 of the Eurojust Decision limits the scope of information exchange.[90] Mr Kennedy expressed the hope that, once the Eurojust data protection arrangements had been put in place, the parties could start negotiations towards a formal, legally binding agreement.[91] However, as Mrs Vernimmen noted, such an agreement would have to be concluded not between Eurojust and OLAF but between Eurojust and the Commission.[92]

68. **The current state of affairs in the relationship between OLAF and Eurojust is regrettable. Co-operation is hampered by suspicion and antagonism, to the detriment of effective action against fraud against the resources of the Union and consequently of the European taxpayer.**[93] Matters are complicated by the overlap in the competences of the two bodies in the area of fraud against the Community budget and the fragmentation in their respective mandates and powers.[94] **Eurojust has a role to play in prompting national authorities to prosecute cases investigated by OLAF, and better co-operation between the two bodies is essential to achieving this. A formal framework encouraging co-operation between the two bodies, setting out clearly their respective roles and responsibilities, would be desirable as a first step towards that goal.**

Europol

Co-operation between Eurojust and Europol

69. Relations between Eurojust and Europol (the European Police Office, which has an intelligence gathering but not an operational function) are regulated by a recently signed agreement between the two bodies which enables personal data to be exchanged. According to Mr Kennedy, the agreement is not as ambitious as Eurojust would have hoped. Mr Kennedy said, "We would have thought that there could have been a much stronger capacity for joint working and co-operation; a stronger sense of sharing their strategic analysis; our being able to initiate that strategic analysis, then feeding off it

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89 Q 86.

90 Q 81. Recital 5 of the Eurojust Decision states that the Eurojust College should adopt implementing measures to achieve the objectives of the Regulation setting up OLAF. The College "should take full account of the sensitive work carried out by Eurojust in the context of investigations and prosecutions. In this connection, OLAF should be denied access to documents, evidence, reports, notes or information, in whatever form, which are held or created in the course of these activities, and the transmission of such documents, evidence, reports, notes and information to OLAF should be prohibited".

91 Q 139.

92 Q 218.

93 Professor Vogel, an outside observer, said, "They really fight each other and they cannot co-operate". He ascribed this in part to a battle for future resources (Q 309).

94 Dr Xanthaki and Dr Stefanou argued that European criminal law as a whole suffered from fragmentation and an ad hoc approach (Q 271).

and working it; and initiating our own files". However, this was an important first step.[95]

70. Mr de Baynast argued that it was essential for Eurojust to develop contact with the national desks at Europol and to establish direct contacts in terms of speciality—at the moment there is no bridge between judicial concerns and the work of Europol. In his view there needed to be a stronger bridge between the two, because, if not, the two organisations would grow and grow and, as in the case of OLAF, try to compete with each other.[96] Mr de Baynast added that the negotiations of the Eurojust-Europol Agreement were difficult as some of the representatives of the Europol Management Board were reluctant to agree to any kind of wording which would imply a sort of supremacy for Eurojust over Europol. He used the example of cases where Eurojust can ask Europol to open an Analysis Work File,[97] which is now subject to many conditions. According to Mr de Baynast, it was overall "a very long procedure for a very petty result".[98]

71. Europol on the other hand told us that the negotiations with Eurojust on the text of the Agreement had not been difficult. Mr Felgenhauer stressed that Europol was bound by a number of legal conditions on data protection, data security, the onward transmission of data to third parties etc, which Europol has to take into account in negotiating agreements with third parties. He attributed delays in negotiations not to Europol themselves, but to Council procedures and said that Eurojust needed some time to learn what possibilities Europol had to exchange information and that sometimes it was not legally permitted for Europol to forward information.[99]

72. As regards opening Analysis Work Files at the request of Eurojust, Mr Felgenhauer noted that Europol has to take into account the opinion of different "stakeholders" such as Member States and the Management Board: "If that decision-making process allows Europol to start a new work file at the request of Eurojust, or if Eurojust wants to participate in one of the existing work files, clearly Europol will say yes".[100] Mr Felgenhauer expressed the opinion that most of the confusions regarding the exchange of data between the two bodies can be resolved[101] and stressed the advantage for Europol of being able to bring easily to the attention of the competent judicial authorities via Eurojust what they feel should be taken into consideration in any decision on whether to start a prosecution.[102]

73. There have apparently been some difficulties in the negotiation of the Europol-Eurojust Agreement, but it has now been signed. There is potential for a fruitful co-operation, and we are pleased that both bodies recognise this. **It remains to be seen how the Agreement will operate in practice, but we urge both bodies to co-operate to the maximum extent possible. They should take advantage of being collocated in The**

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95 Q 147.

96 Q 147.

97 These are files which contain information for analysis purposes. Their opening and handling are regulated by Article 10 of the Europol Convention.

98 Q 148.

99 Q 180.

100 Q 185.

101 Q 180.

102 Q 184.

Hague to hold regular joint meetings (as Eurojust does with the Commission); and members of both bodies should also have the opportunity to attend relevant meetings of the other. In this context, it is imperative that the Eurojust data protection arrangements are fully in place prior to any exchange of personal data.

Eurojust and the supervision of Europol

74. According to Professor Vogel, one of the basic "visions" for Eurojust involves granting Eurojust the role of Europol's supervisor. This view stressed that the rule of law requires police to be subject to judicial supervision and control, and that in most Member States police investigations in criminal matters are, in some form, under judicial or prosecutorial supervision and control and the same should apply at EU level.[103] A similar view was put forward by JUSTICE, which would support Eurojust taking on a greater monitoring role in respect of Europol's work. According to JUSTICE, such a move would be comparable to the role of the judiciary in many civil law jurisdictions. It would secure greater legitimacy of Europol activities and would be likely to improve the efficiency of police and judicial co-operation in the EU.[104]

75. Eurojust currently does not have such a role, reflecting the fact that the situation in the EU is not equivalent to the relations between the police and the judiciary in Member States. Europol is an intelligence agency, but does not have the power to conduct criminal investigations. Eurojust on the other hand consists mostly of prosecutors who are members of the judiciary in their Member States, but is not a court. However, the relationship between Europol and Eurojust (and also OLAF) in this context may change fundamentally in the future if a European Public Prosecutor is established. **Depending on the place of the various European criminal justice agencies in the future institutional architecture of the EU, the issue of supervision of Europol may have to be re-visited.**

The European Judicial Network and liaison magistrates

76. The European Judicial Network (EJN) was set up by a Council Decision in 1998. It is a network of contact points in EU Member States, whose aim is to facilitate and speed up judicial co-operation between Member States, provide judicial and practical information to national authorities and give help with requests for legal assistance. It is a network of practitioners and not a central EU agency with a headquarters and full time members like Eurojust. Post-enlargement, there are about 260 contact points across the EU, who meet regularly three times a year. Professor Vogel cited the number of these contact points as a significant advantage that the EJN had over Eurojust.[105] Mrs Munro, on the other, hand noted that the United Kingdom had deliberately kept the number of contact points small to ensure that they established close relationships with their colleagues from other Member States. In Scotland, for example, she was the only contact point. Mrs Munro was clear that there were great gains from EJN contacts.[106]

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[103] pp 105-106.

[104] p 122.

[105] Q 314.

[106] Q 244.

77. According to Article 26(2) of the Eurojust Decision, Eurojust will maintain "privileged relations" with the European Judicial Network; and Eurojust will have access to centralised information from the EJN, whose secretariat will form part of the Eurojust Secretariat. Members of Eurojust may attend EJN meetings and vice-versa.

78. We were initially concerned about the potential overlap between the EJN and Eurojust—after all, both organisations aim to facilitate judicial co-operation in criminal matters in the EU—and what seemed on the face of it to be a risk of duplication of work. This suggestion was rejected by Eurojust. Mr Kennedy stressed that the EJN are "our eyes and ears on the ground, in home jurisdictions, dealing with cases". Eurojust envisages a division of labour between the two bodies, with the EJN dealing with bilateral cases, and Eurojust dealing with complex, multilateral cases.[107]

79. This division of labour may be facilitated by the different structure of the two bodies. Eurojust is a centralised EU agency and may be better placed to deal with complex requests or requests involving more than one Member State. The EJN on the other hand is about bilateral personal contacts.

80. Mrs Munro was also "evangelical" about the role of the United Kingdom liaison magistrates based in other Member States. The possibility of posting a national liaison magistrate to another Member State was established by a 1996 Joint Action.[108] The liaison magistrates "translate" the legal principles of their Member State to the judicial authorities of the host Member State in order to facilitate judicial co-operation in criminal matters and the execution of "rogatory letters" (letters of request for mutual legal assistance).[109] The United Kingdom currently has liaison magistrates in Italy, France and Spain. Many other Member States have none.

81. **There is a clear potential to establish a sound division of labour between Eurojust and the EJN. The EJN is better placed to deal with straightforward bilateral cases. It can refer more complex cases to Eurojust. It is clear from our evidence that Eurojust should deal mainly with complex cases and cases which involve more than two Member States (multilateral cases). The role of national liaison magistrates in this scheme needs to be kept under review, but they also make a valuable contribution to mutual legal assistance, and at the moment there is no real danger of duplication of work**.

Relations with third countries

82. Mr Nilsson was of the view that Eurojust could become a "one-stop shop" for judicial co-operation between the EU and third countries, although he thought that this was not a short-term prospect because of the innate conservatism of national judicial authorities.[110] This would mean that Eurojust would become the central contact point for all requests for mutual legal assistance from third countries, at least in cases involving more than one Member State, and would forward them to the competent national authorities. Eurojust also sees its future role very much along these lines, but

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[107] Q 152 .

[108] OJ L 105, 27.4.1996.

[109] Q 247.

[110] Q 61.

stresses that agreements between Eurojust and third countries are essential to achieve this.[111] **We endorse the suggestion that over time Eurojust could perform a valuable role as a "one-stop shop" for third countries needing to gather evidence from, or co-ordinate investigations with, more than one Member State.**

83. Eurojust can exchange data with third country authorities following the conclusion of an Agreement by the Council. Such agreements are subject to the third countries having adequate data protection standards and to the supervision of the Eurojust JSB. However, Article 27(6) of the Eurojust Decision provides for an exception in emergency cases, where national members acting in their national capacity may authorise the transmission of data to third countries. This was a last-minute addition to the Decision following the events of 9/11 and underlines the importance of detailed scrutiny by the Eurojust JSB.

84. At the moment Eurojust is negotiating a third country agreement with Norway, which may serve as a blueprint for future agreements with other countries. There are, however, also regular informal contacts with third countries, such as the United States, and a number of contact points have been appointed. Mr Kennedy told us that Eurojust has currently two contact points dealing with the US (one of whom is based in Washington) and has regular contacts with the legal *chargé d'affaires* in the US mission in Brussels. He also noted that Eurojust has had contacts with the US authorities, because when Eurojust was first established the US were very interested in what Eurojust had to offer (but that the US would be concerned if the information they provided was divulged to certain Member States).[112] We also heard evidence from Eurojust that the United States were not always forthcoming with evidence needed in terrorist prosecutions: the German national member told us bluntly, "Whenever Germany needed information from the US they did not get it".[113] He cited a case in Hamburg directly related to the events if 9/11, which had to be discontinued because of lack of provision of evidence by the US authorities and refusal of access to a witness in the camp at Guantanamo Bay. **It is essential that the exchange of information with third countries is not one-sided.**

85. **If Eurojust's contacts with third countries involve the transmission of information or other forms of assistance to third country authorities in individual cases they should be based on formal agreements. As Eurojust is handling sensitive data on EU citizens and is funded by the taxpayer, these agreements should be subject to effective parliamentary scrutiny. The extremely late and inadequate involvement of Parliament in the agreements between Europol and the United States in 2001 and 2002 should not be repeated.**[114]

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111 Q 150.

112 Q 124.

113 Q 127.

114 See our Report *Europol's role in fighting crime* for discussion of the Europol/USA Agreement (5th Report, 2002-03, HL Paper 43, pages 16-17).

CHAPTER 6: FUTURE DEVELOPMENTS

Eurojust in the proposed Constitutional Treaty

86. The proposed Constitutional Treaty increases the powers of Eurojust. Article III-174(2)(a) provides that Eurojust's tasks (which will be determined by future EU legislation) may include "the initiation of criminal investigations". This goes further than Eurojust's current powers, which are limited to proposing to national authorities the initiation of investigations and does not accord with the view of most of our witnesses (including Eurojust itself) that no further powers are needed at this stage.

87. In its written evidence, Eurojust noted that the use of the word "initiate" prompted much discussion when the Eurojust Decision was being negotiated as it is interpreted as meaning the commencing of an investigation or proceedings. "Request" was preferred as it offered a capacity to influence rather than to take charge or responsibility for starting investigations or prosecutions, which many felt would bring Eurojust too close to being a European Public Prosecutor.[115]

88. Professor Vogel agreed that the power to initiate criminal investigations is a major step towards a European Public Prosecutor. It would signify a change in the nature of Eurojust from a body of "horizontal" co-operation between national members to a "vertical" centralised model of investigations.[116] When asked about this issue in May (before the text of the Treaty was agreed), Mr Kennedy said that if the wording of Eurojust powers changed from "requesting" to "directing", many would say that "there you have a European Public Prosecutor directing investigations".[117] It is significant in this context that the Constitution also enables the establishment of a European Public Prosecutor's Office "from Eurojust" (see paragraphs 90 ff below).

89. The increase in powers of investigation may have significant implications for the relationship of Eurojust with OLAF. The Treaty gives Eurojust powers regarding "criminal investigations", whereas the work of OLAF finishes before this stage, as OLAF conducts preparatory investigations which may lead to a criminal investigation and prosecution. In practice, however, it is difficult to see how the investigations of the two bodies in fraud cases differ. There is certainly an overlap, especially in view of the fact that the proposed Constitutional Treaty stresses the role of Eurojust in combating offences against the EU's financial interests. It remains to be seen how the two bodies will interact in practice after the increase of Eurojust's powers. One possibility is that OLAF would become the investigative branch of Eurojust, at least in cases affecting the Community's financial interests.

European Public Prosecutor

90. The proposed Constitutional Treaty provides for the establishment, subject to the unanimous agreement of the Council and the consent of the European

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[115] p 31.

[116] Q 312, pp 106-107.

[117] Q 174.

Parliament, of a European Public Prosecutor's Office "from Eurojust".[118] The purpose of establishing this body would in the first instance be to combat crimes affecting the financial interests of the European Union. It would be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in offences against the Union's financial interests.[119] The Treaty provides for its remit to be extended to cover "serious crime having a cross-border dimension", subject again to the unanimous agreement of the Council and the consent of the European Parliament, after consulting the Commission.[120]

91. The idea of a European Public Prosecutor has a long history. It has its origins in an academic study *Corpus Juris*, which was sponsored by the Commission and published in April 1997. The aim of the *Corpus Juris* was to provide a uniform code of criminal offences to deal with fraud on the Community's finances. To achieve this, it first specified acts of fraud and corruption which should be made criminal offences throughout the European Union and also the penalties for them; and, secondly, proposed the creation of a European Public Prosecutor with a Director and Deputies in each Member State. Under these proposals the European Public Prosecutor would have investigative powers and be responsible for bringing cases before national courts.

92. Our Sub-Committee E undertook an inquiry into the *Corpus Juris* in 1999.[121] The Report concluded:

"We recognise the work that has gone into this imaginative project so far, and we believe that it would be worthwhile for it to continue. It would be rash at this stage to rule out the possibility of its future value. But we are not persuaded that the *Corpus Juris* offers, at the present time, a practically feasible or politically acceptable way forward having regard to the state of the Union and public opinion. Part II (Criminal Procedure) of the *Corpus Juris* would undoubtedly present greater difficulties for the United Kingdom than Part I (Criminal Law). In particular the creation of a separate prosecution authority with no accountability to Parliament would raise very difficult issues".[122]

93. The idea of a European Public Prosecutor (but not of the uniform criminal code for offences against the financial interests of the Community) resurfaced in the Draft Constitutional Treaty prepared by the Convention on the Future of Europe. This proposal was examined by the Committee along

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[118] Article III-175 (1).

[119] Article III-175 (2).

[120] Article III-175 (4). In the consolidated text of the proposed Constitutional Treaty (CIG 86/04), Article III–175(2) includes within the proposed jurisdiction of the EPP "serious crimes affecting more than one Member State". These words were included in the version of the draft Treaty (CIG 50/03) dated 25 November 2003. They were deleted in the text of Article III–175, which was included in the amendments proposed by the Irish Presidency (CIG 81/04). We understand these amendments, together with those in CIG 85/04, were agreed by Member States in Brussels on 18 June. The consolidated text (CIG 86/04) takes in the amendments to Article III–175 paragraphs 1 and 4 but not the deletion from paragraph 2 of the words "serious crimes etc". We have assumed that this is accidental but the Committee has written to the Government in order to clarify the position.

[121] *Prosecuting Fraud on the Community's finances—the* Corpus Juris, 9th Report,1998–99, HL Paper 62.

[122] Paragraph 143.

with other provisions relating to the area of *Freedom, Security and Justice* last year.[123] The Committee concluded:

"There is no doubt that more could be done to ensure that effective action is taken against fraud within the Union. But **the European Public Prosecutor (EPP) is not a realistic and practical way forward …** the benefits of creating another body and in particular an EPP, whose existence and processes cut across national criminal laws and procedure and which might not be accountable to democratically elected representatives, have yet to be clearly and convincingly demonstrated. **We recommend the deletion of Article 20.**"

94. We have received a number of comments regarding the relationship between Eurojust and the European Public Prosecutor. According to NCIS, "from a United Kingdom perspective, effective use of Eurojust could help to deflect calls for the establishment of a European Public Prosecutor".[124] This view was to some extent reflected in the evidence of the Attorney-General, Lord Goldsmith, who told us:

"I personally am against the idea of a European Public Prosecutor. I do not think it is desirable and I do not think it is necessary. One of the reasons I do not think it is necessary is precisely because I believe that, with the sort of cross-border crime that we are talking about, the most effective way of dealing with that is going to be through properly directed national law enforcement agencies, operating in co-operation with their international counterparts and their European counterparts, and that Eurojust, amongst other things, is a very good way of enabling that co-operation and co-ordination to take place".[125].

In his statement on the outcome of the Intergovernmental Conference on 21 June the Prime Minister was more positive in explaining why the Government had accepted the inclusion of a reference in the Treaty to a European Public Prosecutor. He said:

"Let me explain to the right hon. Gentleman why we agreed with the notion that there could be a European public prosecutor, provided that is done with unanimity, so we have to give our consent. It is precisely for the reasons that the right hon. Gentleman suggested. There is a need to deal with issues to do with fraud and accountancy problems in the European Union, so how on earth does it help for us to disappear off into the sidelines of Europe?"[126]

95. We asked most of our witnesses what they thought that establishing a European Public Prosecutor "from Eurojust" meant. No one was sure. Three different models were suggested: that the EPP should oversee Eurojust; that Eurojust itself would take on the role of the European Public Prosecutor, or that the European Public Prosecutor, while a separate body, would join the Eurojust College, as the "26th member" as a number of witnesses put it.[127]

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[123] *The future of Europe: Constitutional Treaty—draft Article 31 and draft Articles from Part 2 (Freedom, Security and Justice)*, 16th Report, 2002-03, HL Paper 81.

[124] p 126.

[125] Q 36.

[126] *Official Report,* 21 June 2004, Col 1090.

[127] Hans Nilsson, Q 67; Eurojust, Q174; the Commission, Q220.

96. We remain doubtful of the need or desirability for a European Public Prosecutor. As we have pointed out, there is already overlap between Eurojust and OLAF and to introduce another player would be likely to cause further overlap and confusion. **But if, despite the reservations we have expressed, an EPP is eventually created, we agree that, as the proposed Constitutional Treaty implies, it should build on Eurojust. Eurojust is an institution which in our view is already showing its effectiveness: it works with the grain of different national legal systems and different criminal codes (as opposed to an approach which would seek to harmonise them) and it is highly desirable that an EPP should follow a similar approach.**

97. The establishment of a European Public Prosecutor would also have significant implications for OLAF, whose primary function is action to protect the Community's financial interests. Some of the witnesses who gave evidence to Sub-Committee E's inquiry into OLAF saw OLAF's investigative role in relation to criminal cases as supporting an EPP.[128]

Eurojust and the fight against terrorism

98. Shortly after the Madrid attacks, the European Council adopted a Declaration on combating terrorism (25 March 2004). In it the Council called on Member States to ensure that the optimum and most effective use was made of Eurojust to promote co-operation against terrorism. The European Council called for *inter alia* the designation by all Member States of Eurojust national correspondents in terrorist matters. We endorse this proposal. During our inquiry, we were told that national prosecutors may be reluctant to co-operate with Eurojust in sensitive investigations, especially in the area of terrorist offences, which are deemed to require top secrecy. Professor Vogel questioned whether Eurojust could be trusted with top secret information.[129] **The establishment of Eurojust national correspondents dealing exclusively/specifically with terrorism and the adoption of high data protection standards by Eurojust would serve to address these concerns. Eurojust can play a crucial part in fighting terrorism.**

A European Criminal Record?

99. In its Communication on "measures to be taken to combat terrorism and other forms of serious crime" published last March in the aftermath of the Madrid terrorist attacks,[130] the Commission floated the idea of the establishment of a "European Criminal Record" (ECR) of convictions and disqualifications. The Commission has funded a number of studies in the field and, having taken account of their conclusions, will launch a consultation with Member States with the aim of producing a proposal for legislation before the end of 2004. Issues to be examined in the consultation involve the data to be included in such a database, data protection, access, financing and organisation. A central issue is where the European Criminal Record will be based: it has been suggested that the database could be hosted by Europol or by Eurojust.

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128 *Op cit*, paragraph 97.

129 Q 287.

130 COM (2004) 221 final.

100. The Committee had the opportunity to receive written and oral evidence from two academic experts who have conducted extensive Commission-funded studies on the ECR, Dr Helen Xanthaki and Dr Constantin Stefanou of the Institute of Advanced Legal Studies, University of London. Dr Xanthaki and Dr Stefanou argued that a European Criminal Record is necessary in view of the huge discrepancies between the Member States' laws on national criminal records, most notably regarding who has access to a record and when data can be erased.[131] They explained that a number of new Member States do not have criminal records as such and that there are gaps in the information provided, as national criminal records often do not contain entries for crimes of their own nationals committed abroad or of foreign nationals committed within their jurisdiction.[132] In view of these gaps, Dr Xanthaki and Dr Stefanou were in favour of establishing a European Criminal Record, provided that three safeguards were in place:

- the ECR contained data only on convictions
- it contained data only on transnational offences
- only judicial authorities were allowed access to and use of it.[133]

101. A further safeguard according to our witnesses would be the location of the European Criminal Record in Eurojust. They believe that, as a judicial authority, Eurojust is better placed to host such a database than Europol (which they had at first considered the appropriate body). This would address the limitation of access to the European Criminal Record to judicial authorities only.[134] However, Dr Xanthaki and Dr Stefanou believe that if Eurojust is to be awarded a new role as a host of any database, the adoption of express data protection legislation would be necessary.[135] Moreover, the role of the Eurojust Joint Supervisory Body (JSB) should be strengthened, with the JSB serving as an appeal body against actions or omissions of Eurojust in relation to databases—at the moment the role of the JSB "is more or less cosmetic".[136] This additional role would also signify a change in the role of the JSB to become a judicial or semi-judicial appeal body, consisting of national judges or judges from the European courts—according to our witnesses, their studies suggest that the latter option would be preferable.[137]

102. **We are not convinced that the establishment of a European Criminal Record is necessary.** In our scrutiny of the Commission Communication, we expressed concerns regarding the proliferation of databases at EU level, noting that "the feasibility and added value of these databases are questionable and their impact on privacy and the protection of personal data may be considerable".[138] Before a database was established it would be necessary to establish whether links between national databases could not achieve the same objective. We have particular concerns regarding proposals

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131 Q 261.

132 Q 262.

133 QQ 265, 267.

134 QQ 259, 260.

135 Q 268.

136 Q 269.

137 Q 270.

138 Letter of 10 June 2004 from Lord Grenfell to Caroline Flint MP, Parliamentary Under-Secretary of State, Home Office.

to create databases which would extend beyond convictions, including data on investigations. Dr Xanthaki and Dr Stefanou stressed the fact that this would be unconstitutional in a number of EU Member States.[139] It would certainly challenge the fundamental principle of the presumption of innocence. However, if a European Criminal Record were eventually established, we would endorse safeguards on the lines of those proposed by Dr Xanthaki and Dr Stefanou. It is essential that the content, access and use of any such database are clearly defined. If Eurojust were to play an important part in these developments, it could require fundamental changes in its internal rules and structure.

Parliamentary scrutiny of Eurojust

103. As mentioned above (paragraph 4) the Committee conducted detailed scrutiny of the draft Decision establishing Eurojust and has had the opportunity in this inquiry to examine the work of Eurojust. In spite of the fact that Eurojust is a Third Pillar body, there is no formal mechanism for regular parliamentary scrutiny of the work of Eurojust by national parliaments. The European Parliament has only a limited say—the Eurojust Decision requires the Presidency of the Council to forward to it the Eurojust Annual Report and the Report on the activities of the Joint Supervisory Body.[140]

104. In view of the current limits on parliamentary scrutiny, **we welcome the fact that the proposed Constitutional Treaty calls for the adoption of legislation to determine arrangements for involving the European Parliament and Member States' national parliaments in the evaluation of Eurojust's activities.**[141] In its report on Europol the Committee supported the idea of a joint committee of Members of national parliaments and the European Parliament.[142] This could also be the way forward in developing parliamentary scrutiny of the activities of Eurojust.

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[139] Q 265.

[140] Eurojust Decision, Article 32 (1).

[141] Article III-174(2))—a similar provision has been included regarding Europol, Article III-177(2).

[142] *Op cit*, paragraph 40.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

105. We are in no doubt that Eurojust meets a real and increasing need for assistance in facilitating the investigation and prosecution of complex cross-border criminal cases. It is unrealistic to expect individual national prosecutors to be familiar with the evidential and other requirements of a large number of different jurisdictions and to be able to co-ordinate unaided a complex investigation involving several different Member States. There is still a lot more work to do in gaining the confidence of national prosecutors to refer suitable cases to it, in focusing on complex multilateral cases ("refocusing themselves towards the more serious end of the market", as the Attorney-General put it),[143] and developing closer and more productive relationships with other bodies, particularly OLAF and Europol. But it has made an excellent start.

106. It is important that Eurojust should be adequately resourced to fulfil its remit, and in particular to provide effective support for the national members: current needs are a secure IT system and a substantial legal service/research function to develop expertise on differences between national systems. Its primary focus must remain on complex case work, but there would also be benefit in its developing a more strategic function: establishing best practice, producing guidance and holding high level seminars. There is also an important role to be undertaken in training members of national judiciaries in the increasingly important issues arising from cross-border crime. As several of our witnesses pointed out,[144] this is not a role that Eurojust can fulfil itself in terms of organising training courses but it can give advice on a limited basis and on occasion make an input itself. Given the increase in cross-border crime and the growth in the need for judicial co-operation, consideration may need to be given to the development of more structured judicial training across the EU in mutual legal assistance work.

107. All the evidence we have received reflects a very positive view of what Eurojust has achieved in the relatively short time since it has been fully operational. Much credit must go to the national members and particularly to the President of the College, Mike Kennedy for setting the organisation up effectively and demonstrating to national authorities the added value that it can contribute to complex investigations. The Government has been rightly supportive of Eurojust from the outset, albeit partly because it sees it as an alternative to a European Public Prosecutor. Be that as it may, in our view Eurojust is a model of how to make progress in an area where the differences between national jurisdictions are so great that it would be unrealistic to aim for harmonisation. It is also an example of the sort of effective practical co-operation that an EU agency can provide, which is sometimes lost sight of in more ideological debates, for example in the context of the Constitutional Treaty, about the future development of the EU.

108. The specific conclusions and recommendations we have made in the body of the report are reproduced in the following paragraphs.

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[143] Q 13.

[144] Dr Xanthaki and Dr Stefanou, Q 278; Professor Vogel, Q 306.

109. By having senior prosecutors from each Member State available full-time to facilitate communication between prosecutors, to provide a high level of expertise in mutual legal assistance procedures, and to co-ordinate complex cases, Eurojust meets an undoubted and growing need. Its work and potential were highly valued by all the practitioners from whom we received evidence *(paragraph 32)*.

110. It is particularly important that national members should be able, acting in compliance with national law, to obtain information about individual cases and communicate effectively with their national authorities in order to fulfil their duties under the Eurojust Decision. They should also retain at least the powers they held in their own jurisdictions *(paragraph 39)*.

111. We believe that Eurojust has a pivotal role to play in facilitating decisions on where to prosecute cross-border offences. But it would be premature to give Eurojust the power to take binding decisions on which jurisdiction should prosecute. This would transform Eurojust into a quasi-prosecutorial authority and bring it very close to a European Public Prosecutor. In advising national authorities on where to prosecute, it is essential that a balance is struck between the rights of the victims and the rights of defendants *(paragraph 50)*.

112. It is important that there should be strong data protection expertise on the Joint Supervisory Body but we are satisfied that its composition enables it to provide effective supervision of Eurojust's exercise of its responsibilities in relating to data protection *(paragraph 55)*.

113. We welcome the very positive reaction to Eurojust's work from United Kingdom prosecutors, which is a tribute to the perceived value it can add to the handling of cases and to the efforts of the United Kingdom Member in promoting its services *(paragraph 58)*.

114. The current state of affairs in the relationship between OLAF and Eurojust is regrettable. Co-operation is hampered by suspicion and antagonism, to the detriment of effective action against fraud against the resources of the Union and consequently of the European taxpayer *(paragraph 68)*.

115. Eurojust has a role to play in prompting national authorities to prosecute cases investigated by OLAF, and better co-operation between the two bodies is essential to achieving this. A formal framework encouraging co-operation between the two bodies, setting out clearly their respective roles and responsibilities, would be desirable as a first step towards that goal *(paragraph 68)*.

116. It remains to be seen how the Europol–Eurojust Agreement will operate in practice, but we urge both bodies to co-operate to the maximum extent possible. They should take advantage of being collocated in The Hague to hold regular joint meetings (as Eurojust does with the Commission); and members of both bodies should also have the opportunity to attend relevant meetings of the other. In this context, it is imperative that the Eurojust data protection arrangements are fully in place prior to any exchange of personal data (*paragraph 73)*.

117. Depending on the place of the various European criminal justice agencies in the future institutional architecture of the EU, the issue of supervision of Europol may have to be re-visited *(paragraph 75)*.

118. There is clear potential to establish a sound division of labour between Eurojust) and the European Judicial Network (EJN). The EJN is better placed to deal with straightforward bilateral cases. It can refer more complex cases to Eurojust. Eurojust should deal mainly with complex cases and cases which involve more than two Member States. (The role of national liaison magistrates in this scheme needs to be kept under review, but they also make a valuable contribution to mutual legal assistance, and at the moment there is no real danger of duplication of work *(paragraph 81)*.

119. We endorse the suggestion that over time Eurojust could perform a valuable role as a "one stop shop" for third countries needing to gather evidence from, or co-ordinate investigations with, more than one Member State *(paragraph 82)*.

120. It is essential that the exchange of information with third countries is not one-sided *(paragraph 84)*.

121. If Eurojust's contacts with third countries involve the transmission of information or other forms of assistance to third country authorities in individual cases they should be based on formal agreements. As Eurojust is handling sensitive data on EU citizens and is funded by the taxpayer, these agreements should be subject to effective parliamentary scrutiny. The extremely late and inadequate involvement of Parliament in the agreements between Europol and the United States in 2001 and 2002 should not be repeated *(paragraph 85)*.

122. If, despite the reservations we have expressed, a European Public Prosecutor is eventually created, we agree that, as the Draft Treaty implies, it should be firmly rooted in Eurojust. Eurojust is an institution which in our view is already showing its effectiveness: it works with the grain of different national legal systems and different criminal codes (as opposed to an approach which would seek to harmonise them) and it is highly desirable that an EPP should follow a similar approach *(paragraph 96)*.

123. The establishment of Eurojust national correspondents dealing exclusively/specifically with terrorism and the adoption of high data protection standards by Eurojust would serve to address concerns about handling sensitive information. Eurojust can play a crucial part in fighting terrorism *(paragraph 98)*.

124. We are not convinced that the establishment of a European Criminal Record is necessary *(paragraph 102)*.

125. We welcome the fact that the new EU Constitution calls for the adoption of legislation to determine arrangements for involving the European Parliament and Member States' national parliaments in the evaluation of Eurojust's activities *(paragraph 104)*.

126. In view of Eurojust's central role in facilitating mutual legal assistance within the EU we recommend this report to the House for debate *(paragraph 10)*.

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

Sub-Committee F

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
Earl of Caithness
Lord Corbett of Castle Vale
Lord Dubs
Baroness Gibson of Market Rasen
Baroness Harris of Richmond (Chairman)
Earl of Listowel
Viscount Ullswater
Lord Wright of Richmond

Professor Jörg Monar, Co-Director of the Sussex European Institute, University of Sussex, was appointed as Specialist Adviser for the inquiry.

Declared interests in connection with this inquiry:

Baroness Harris of Richmond
Magistrate on the supplemental list
Former member of the National Crime Squad Service Authority

Viscount Ullswater
Magistrate on the supplemental list

APPENDIX 2: CALL FOR EVIDENCE

Sub-Committee F (Home Affairs) of the House of Lords Select Committee on the European Union is conducting an inquiry into the work of Eurojust. Eurojust was established by a Council Decision in February 2002 to facilitate judicial co-operation between the Member States. Each Member State is represented in the College of Eurojust by a senior judge or public prosecutor. Its President is Mr Michael Kennedy, the United Kingdom Member.

The inquiry is not based on a specific document, but is a general examination of Eurojust's activities two years after its formal establishment.

Evidence is invited on all aspects of Eurojust's activities. Questions on which the Sub-Committee would particularly welcome comments include the following:

(i) How successful has Eurojust been in its core objectives of co-ordinating investigations and prosecutions and improving judicial co-operation between Member States? Has it made effective use of the possibility of initiating investigations by national authorities?

(ii) Has Eurojust been able to concentrate on the most serious forms of cross-border crime? Should it assume a more strategic role in the future?

(iii) To what extent is Eurojust facilitating the use of the European Arrest Warrant?

(iv) How effectively does Eurojust interact with other bodies, in particular:

- national judicial and prosecution authorities

- third countries

- other EU bodies, including Europol, the European Judicial Network and OLAF?

(v) Are its procedures for protecting personal data, including data provided by national authorities and Schengen Information System and Europol data, adequate?

(vi) Are any changes required in Eurojust's powers, procedures or budgetary basis to improve its effectiveness?

(vii) How will enlargement affect Eurojust's work? Are its relations with the remaining candidate countries satisfactory?

(viii) How would Eurojust relate to a European Public Prosecutor, if one were set up?

12 March 2004

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

Association to combat fraud in Europe (ACFE)

Association of Chief Police Officers in Scotland (ACPOS)

* The Attorney-General, Lord Goldsmith, QC

* Crown Office and Procurator Fiscal Service, Scotland (COPFS)

* Eurojust

* European Anti-Fraud Office (OLAF)

* European Commission, Justice & Home Affairs Directorate-General

* Europol

* Home Office

The Information Commissioner

JUSTICE

Metropolitan Police Service

National Crime Squad (NCS)

National Criminal Investigation Service (NCIS)

* Hans G Nilsson, European Council, General Secretariat

* Professor Dr Joachim Vogel, Professor of Criminal Law and Criminal Procedure, University of Tübingen, and Appeal Court Judge, Criminal Division, Stuttgart

* Dr Helen Xanthaki and Dr Constantin Stefanou, Institute of Advanced Legal Studies, University of London

APPENDIX 4: GLOSSARY OF ACRONYMS

Glossary

COPFS	Crown Office Procurator Fiscal Scotland
ECR	European Criminal Record
EPP	European Public Prosecutor
EU	European Union
MoU	Memorandum of Understanding
NCS	National Crime Squad
NCIS	National Criminal Intelligence Service
OLAF	European Anti-fraud Office (Office Européen de Lutte Anti-Fraude)
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UKCA	United Kingdom Central Authority

APPENDIX 5: OTHER RECENT REPORTS FROM THE EU SELECT COMMITTEE

Recent Reports from the Select Committee

Review of Scrutiny of European Legislation (1st Report session 2002–03, HL Paper 15)

Annual Report 2003 (44th Report session 2002–03, HL Paper 19)

The Draft Constitutional Treaty (41st Report session 2002–2003, HL Paper 169)

Relevant Reports prepared by Sub-Committee E

Session 2002-2003

EU/US Agreements on Extradition and Mutual Legal Assistance (38th Report, HL Paper 153)

Session 2003–04

Strengthening OLAF, the European Anti-Fraud Office (24th Report, HL Paper 139)

Reports prepared by Sub-Committee F

Session 2002–03

Europol's Role in Fighting Crime (5th Report, HL Paper 43)

The Future of Europe: "Social Europe" (14th Report, HL Paper 79)

Proposals for a European Border Guard (29th Report, HL Paper 133)

Session 2003–04

Fighting illegal immigration: should carriers carry the burden? (5th Report, HL Paper 29)

Handling EU asylum claims: new approaches examined (11th Report, HL Paper 74)