

**EUROJUST**

January 2012

**Strategic Project on:**

***“Enhancing the work of  
Eurojust in drug  
trafficking cases”***

**Final Results**



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# Foreword

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The fight against drug trafficking is naturally a priority for Eurojust's work in helping fight cross-border crime. Almost every hour a person in the European Union dies from a drug overdose, and a fifth of all cases referred to Eurojust by national authorities concern drug trafficking.

This report carefully reviews Eurojust's experience in dealing with the drug trafficking cases referred to it over a two-year period ending in September 2010. It aims to identify the most common challenges facing judicial cooperation in the fight against drug trafficking, and to suggest possible solutions. A wide range of judicial cooperation issues (exchange of information, coordination, conflicts of jurisdiction, execution of mutual legal assistance requests, European Arrest Warrants, joint investigation teams, controlled delivery, asset recovery and relations with third States) are considered with reference to concrete cases. The report draws particularly on those cases where Eurojust brought together investigators, prosecutors and judges from Member States and beyond, its own experts and those from other EU bodies, at meetings to coordinate action against drug traffickers. From this experience, the report attempts to draw conclusions which could be of value and interest to investigative and judicial authorities.

There are encouraging signs that practitioners are making greater use of the tools provided to fight drug trafficking and cross-border crime generally at EU level. For example, last year Eurojust evaluated and supported 37 Joint Investigation Teams (6 on drug trafficking), which facilitate the work of Member State authorities in serious cross-border cases. However, as the report makes clear, much remains to be done. Accordingly, the study also contains an Action Plan on how to enhance Eurojust's work with national authorities and third States.

Thanks are due not only to those at Eurojust who contributed to this study but also to the Member States and other experts (in particular from Europol and EMCDDA), who provided valuable inputs on the preliminary results of this project at the strategic seminar held in Krakow on 5 and 6 October 2011.

Aled Williams  
President

# Executive summary

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## **Purpose and objectives**

This report collects the results of the “*Strategic Project on enhancing the work of Eurojust in drug trafficking cases*”. A primary goal of the project, covering the two-year period 1 September 2008 to 30 August 2010, was to identify the main challenges and related solutions in Eurojust coordination meetings involving drug trafficking. A second objective was to prepare the workshops for the “*Strategic Seminar on Drug Trafficking*”, which took place in Krakow, Poland, on 5 and 6 October 2011. A third objective was to provide a sound basis for an Action Plan with recommendations on how to enhance Eurojust’s work with national authorities and third States (see Appendix III of the report).

## **Methods and sources**

The report is based on a quantitative analysis of the Eurojust Case Management System (CMS) and a qualitative analysis of materials available from Eurojust coordination meetings (findings, case evaluation forms, presentations, etc). The conclusions of these analyses have been further validated with the feedback received during the “*Strategic Seminar on Drug Trafficking*”, which is included in the conclusions of the present report.

## **Scope**

The analysis is necessarily restricted to available information on drug trafficking cases dealt with at Eurojust, and seeks to stimulate reflection and discussion. Clearly, it does not purport to provide analysis of all drug trafficking in the European Union, or of cross-border judicial cooperation in criminal cases generally.

## **Main findings**

The detailed conclusions of this report can be found in Section 10. They focus on how to improve coordination of judicial responses to cross-border drug trafficking from Eurojust’s practitioner viewpoint.

For the two-year period under consideration, drug trafficking was the most common crime type in Eurojust’s casework in general, and at coordination meetings in particular. 5 Member States were involved in more than half of the cases under analysis. About 25% of Eurojust’s drug trafficking cases overall were multilateral (involving more than two countries), while about 80% of coordination meetings which dealt with drug-trafficking were multilateral. Europol participated in about a fifth of the coordination meetings. The same applies to the participation by third States. In half of the cases analysed in this report, the outcome of a case at national level (in terms of arrests, seizures, convictions, etc) is unknown. In a lower, but still significant, number of cases, Eurojust is not informed about the follow-up at national level of the decisions taken during the coordination meetings.

The most frequent judicial cooperation topics discussed during coordination meetings were the following: exchange of information, coordination, conflicts of jurisdiction and letters rogatory. To a much lesser extent, European Arrest Warrants (EAWs), Joint Investigation Teams (JITs), controlled deliveries and asset recovery were also dealt with during these meetings.

For each of these topics, the most common obstacles and related solutions identified during Eurojust’s coordination meetings have been described in dedicated sections of this report.

**Areas for improvement at Eurojust**

Practitioners in general reported positively on their experience with Eurojust’s services. However, the report’s conclusions also identify the following areas for possible improvement:

1. Preparation and follow up of coordination meetings
2. Solutions for handling sensitive data
3. Involvement of Europol and third States
4. Use of JITs and other coordination tools
5. Early assessment (and solution) of conflicts of jurisdiction
6. Focus on cross-border asset recovery
7. Role of Eurojust in controlled deliveries
8. Number of judicial coordination versus mere cooperation cases

**Key recommendations**

The Action Plan, included in Appendix I of the report, addresses each of the above areas with recommendations for Eurojust, which are briefly summarised below:

<b>AREA 1. Coordination meetings</b>	<i>Draft and promote use of good practice for consistent preparation, conduct and follow-up of coordination meetings.</i>
<b>AREA 2. Secure channels</b>	<i>Develop further secure channels for communication between Eurojust, national judicial authorities and Europol.</i>
<b>AREA 3. Europol and third States</b>	<i>Promote, where appropriate, participation of Europol and/or third States in coordination meetings.</i>
<b>AREA 4. JITs and other coordination tools</b>	<i>Enhance use of JITs, videoconferences (in combination with or instead of coordination meetings) and coordination centres via Eurojust.</i>
<b>AREA 5. Conflicts of jurisdiction</b>	<i>Prepare, before coordination meetings, an analysis of possible overlapping of investigations and develop guidelines for Eurojust College opinions on conflicts of jurisdiction.</i>
<b>AREA 6. Cross-border asset recovery</b>	<i>Encourage consideration of cross-border asset recovery procedures in cases referred to Eurojust.</i>
<b>AREA 7. Controlled deliveries</b>	<i>Provide a practical overview of controlled deliveries’ procedures and competent authorities (in cooperation with EMCDDA and Europol).</i>
<b>AREA 8. Number of coordination cases</b>	<i>Increase the number of proactive coordination cases rather than reactive cooperation cases.</i>

**Next steps**

An evaluation of the follow-up to these recommendations will be carried out at the beginning of 2014 for the period 2012-2013.



# 1. Introduction

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**Purpose** This report collects the results of the “*Strategic Project on enhancing the work of Eurojust in drug trafficking cases*”. The goal of the analysis, covering the two-year period 1 September 2008 to 30 August 2010, is to identify the main challenges and related solutions in Eurojust coordination meetings involving drug trafficking.

**Structure** The next chapter provides an overview of Eurojust’s casework on drug trafficking in the period under consideration and addresses the question, “*What types of drug trafficking cases are referred to Eurojust in general and for coordination purposes in particular?*”

Chapters 3 to 9 cover the specific topics listed below to answer the questions “*Which judicial topics are most often discussed in coordination meetings? Which obstacles are most frequently dealt with? Which solutions are proposed and with what outcome?*”:

- Exchange of information and coordination
- Conflicts of jurisdiction
- MLA requests and EAWs
- Joint Investigation Teams
- Controlled deliveries
- Asset recovery
- Third States

Chapter 10 summarises the main conclusions of the analysis in light of the feedback received at the “*Strategic Seminar on Drug Trafficking*” held in Krakow, Poland, on 5 and 6 October 2011.

**Scope** The report is based on data from a quantitative analysis of the Eurojust Case Management System (CMS)<sup>1</sup> and a qualitative analysis of materials available from Eurojust coordination meetings (findings, case evaluation forms, presentations, etc). The analysis is necessarily limited to available information on drug trafficking cases dealt with at Eurojust, and seeks to stimulate reflection and discussion. Clearly, it does not purport to provide analysis of all drug trafficking in the European Union, or of cross-border judicial cooperation in criminal cases generally.

**Next steps** An Action Plan for Eurojust will be drawn up on the basis of the conclusions of this report, with recommendations on how to enhance the work of Eurojust with national authorities and third States in drug trafficking cases.

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<sup>1</sup> The Case Management System is used at Eurojust to manage cases and process related information.





## 2. Overview

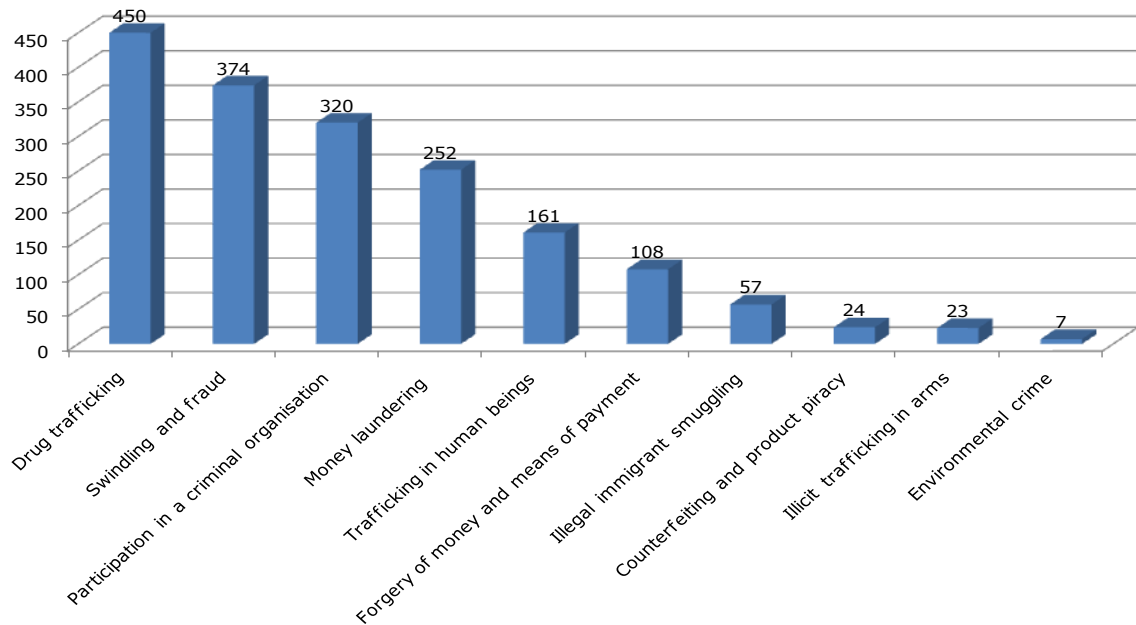
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This chapter provides a brief overview of the type of drug trafficking (DT) cases registered at Eurojust during the two-year period between 1 September 2008 and 30 August 2010.

Some of the information contributed by Eurojust to the Organised Crime Threat Assessment 2011 (OCTA) has been utilised in this exercise, as it covers the same period. 450 cases involving drug trafficking were registered at Eurojust during this time and 50 coordination meetings involving drug trafficking were held.

As shown in Chart 2.1, drug trafficking was the most common crime type in Eurojust's casework for the two-year period under consideration. The 450 cases involving drug trafficking represent 17% of the 2578 operational cases registered. This finding is consistent with Eurojust's previous contribution to the OCTA.

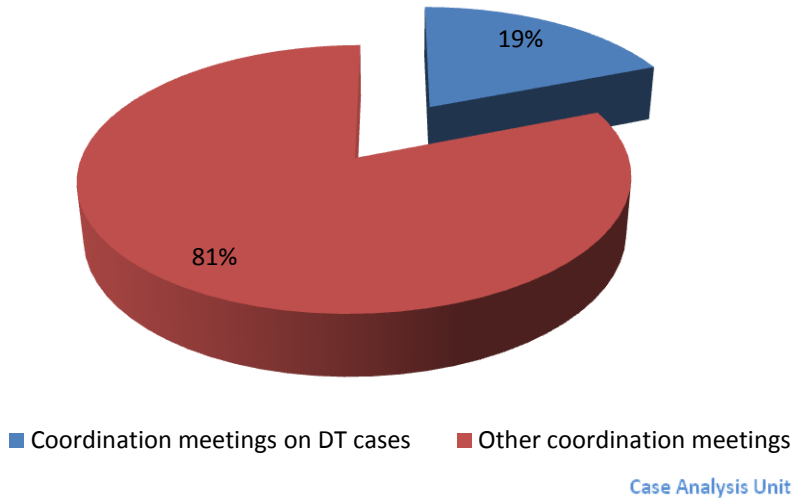
**Chart 2.1: Distribution of crime types**



Case Analysis Unit

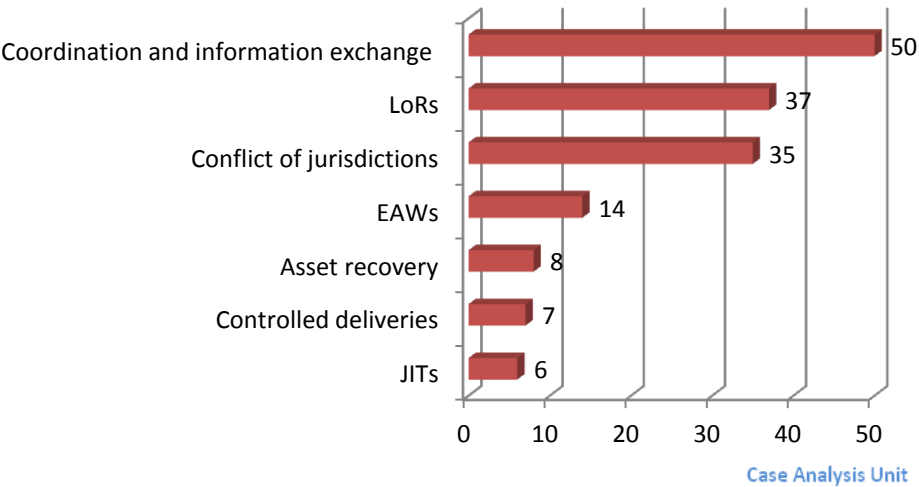
In 50 of the total 450 drug trafficking cases, at least one coordination meeting took place in the reported period. The total number of coordination meetings held by Eurojust in the two-year period was 263, and drug trafficking was also the crime priority most commonly dealt with in coordination meetings (Chart 2.2).

**Chart 2.2: Coordination meetings on DT cases compared to other coordination meeting cases**



The 50 drug trafficking cases with a coordination meeting have been selected for an in-depth analysis of judicial issues, with reference to the following topics: coordination and exchange of information, conflicts of jurisdiction, letters rogatory and European Arrest Warrants (EAW), Joint Investigation Teams (JITs), controlled deliveries and asset recovery. Letters rogatory and EAWs have been considered together, because both are requests towards another jurisdiction. Chart 2.3 illustrates how often these topics were discussed in coordination meetings.

**Chart 2.3: Judicial coordination topics discussed in DT coordination meetings**



All the above topics were also specifically analysed with regard to cases involving third States<sup>2</sup> (20 out of 50 cases).

<sup>2</sup> The term "third States" in this report refers to all non-EU countries.

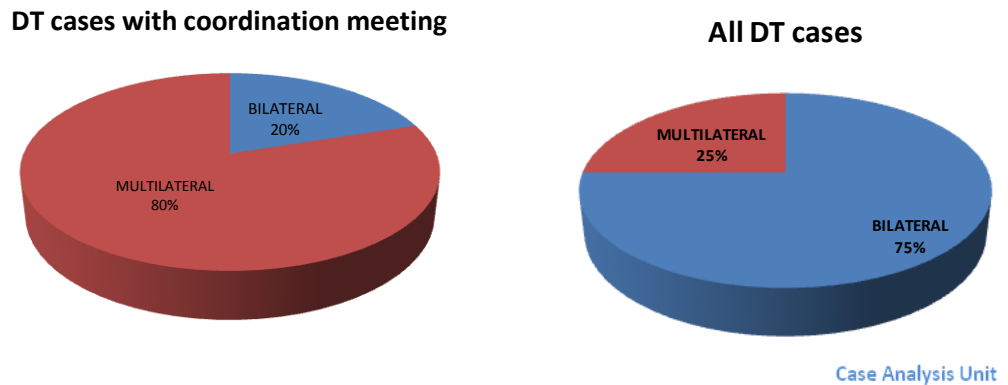
In approximately half the cases selected for in-depth analysis, Eurojust had no information on the final outcome of the case at national level and/or of the operational agreement reached during the coordination meeting.

**General findings**

The following findings have appeared from the quantitative data extracted from the Case Management System regarding drug trafficking. Whenever possible, these general findings have been compared with those available for the cases with a coordination meeting that were selected for more in-depth analysis.

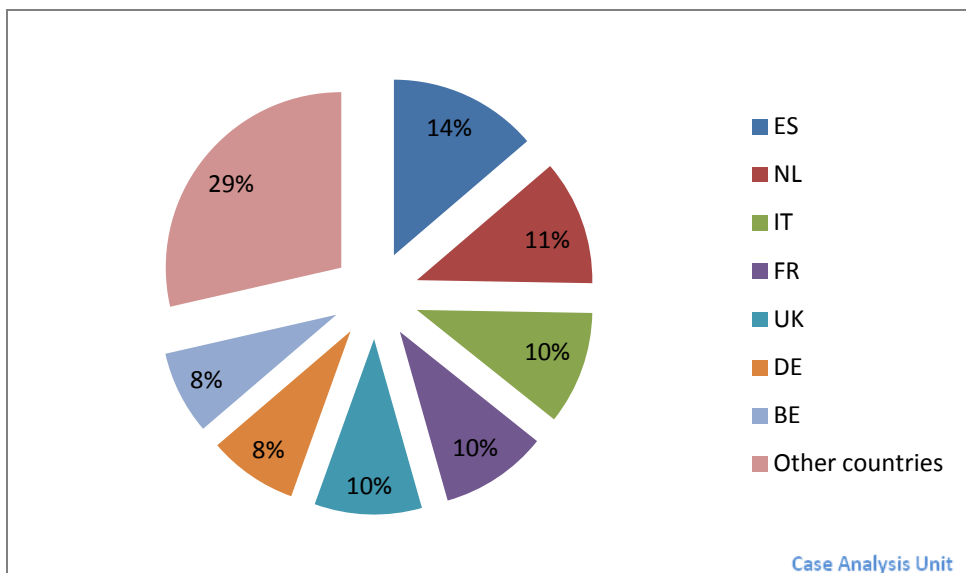
- **Multilateral and bilateral cases:** 75% of all DT cases registered during the reported period were bilateral; however, 80% of DT cases with a coordination meeting were multilateral. In some bilateral cases, more than two countries had ongoing investigations or proceedings on the same organised crime group (OCG), but judicial coordination was needed only between two countries.

**Chart 2.4: Bilateral compared to multilateral cases**



- **Overall involvement in Eurojust’s casework:** Italy, the Netherlands, France and Spain were involved in approximately 45% of the cases with a coordination meeting in this crime type. This finding represents a trend consistent with previous analysis of Eurojust’s casework (covering the period from 1 September 2008 to 31 August 2010). In addition, UK, Germany and Belgium have frequently participated in coordination meetings, either as requesting or requested Member States. In total, these seven National Desks have been involved in almost three-quarters of the total number of coordination meetings in DT cases (Chart 2.5).

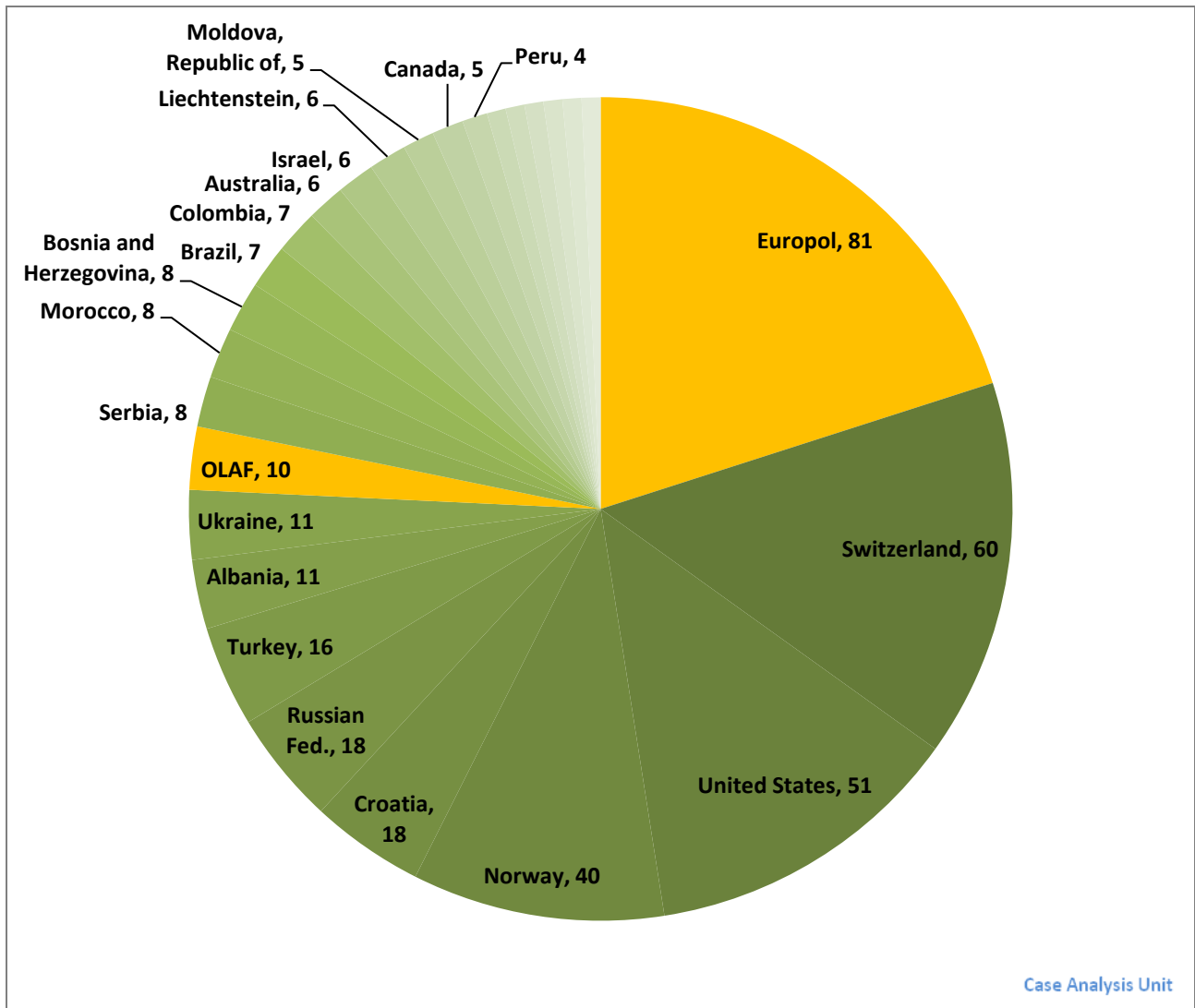
**Chart 2.5: DT cases with a coordination meeting**



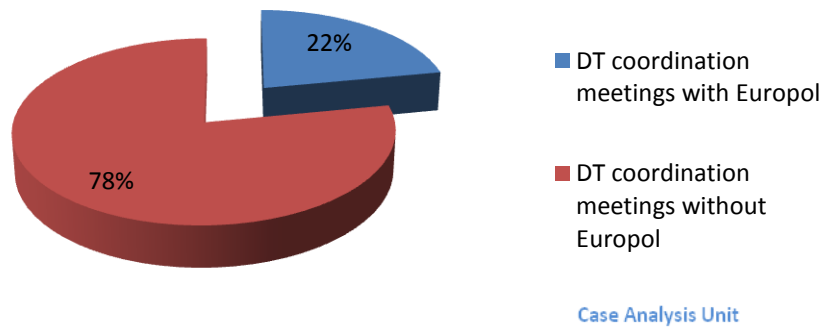
- **Requesting and requested desks:** The map in Chart 2.6 provides an overview of involvement of National Desks as requesting or requested in all drug trafficking cases registered in the period under consideration. The following National Desks are more frequently *requested* than others in this crime type: Spain, the Netherlands and Italy. Similarly, among the cases with a coordination meeting, the most requested countries were Spain, the Netherlands, Germany, Belgium and UK. The following National Desks are more frequently *requesting* than others in this crime type: Italy, France and the Netherlands. Similarly, among the cases with a coordination meeting, the most frequently requesting countries are Italy, France, Spain and UK.
- **Third States and international/European bodies:** Eurojust has registered cases with 54 different third States and organisations during the time under consideration. The 10 with the largest number of contacts were Europol, Switzerland, the USA, Norway, Croatia, the Russian Federation, Turkey, Albania, Ukraine and OLAF. Chart 2.7 provides figures on the involvement of third States and organisations in Eurojust’s casework as a whole during the period under consideration. Among the drug trafficking cases with coordination meetings, third States were involved in 13 cases and the following third States have been requested in more than two cases: Norway, Switzerland, Turkey and Colombia; 22% of the drug trafficking cases with a coordination meeting also involved Europol (Chart 2.8).



**Chart 2.7: Third States and other territories (green) and European bodies (yellow) in all Eurojust casework (involvement under 3 cases is not detailed in the chart)**

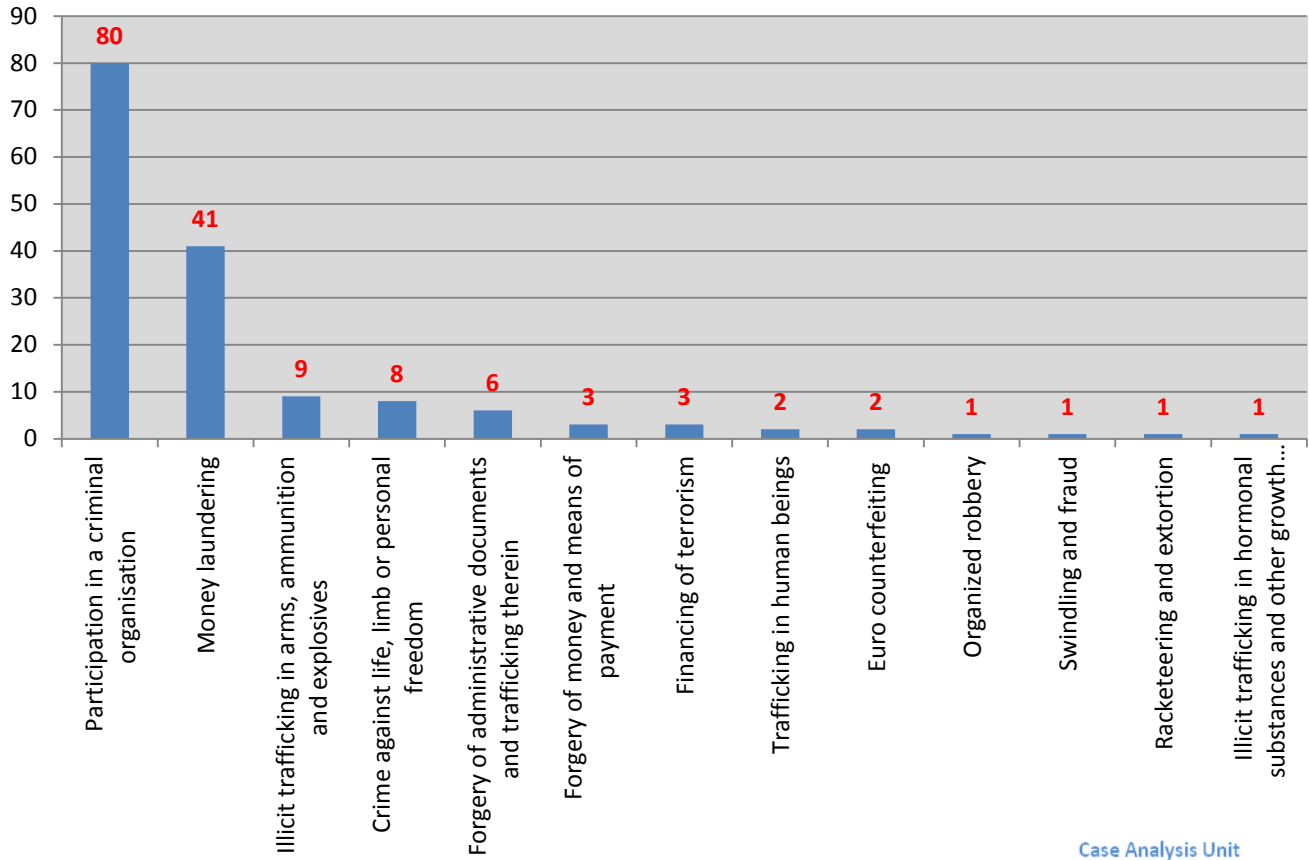


**Chart 2.8: Drug trafficking cases with coordination meetings involving Europol**



- **Crime type association:** The crime type most frequently associated with drug trafficking is, by a large margin, *Participation in a criminal organisation*, followed by *Money laundering* and *Illicit trafficking in arms, ammunition and explosives*. Violent crimes (against life, limb or personal freedom), including *grievous bodily harm* and *murder*, are also frequently associated with DT. Financing of terrorism also appears in the list of crime types associated with DT (Chart 2.10).

**Chart 2.9: Incidence of other crime types in all DT cases**



This type of association also occurs in cases where coordination meetings were held: 30% of the drug trafficking cases which had a coordination meeting are associated with *Participation in a criminal organisation*, 18 per cent with *Money laundering* and 10% with both *Participation in criminal organisation* and *Money laundering*.





### 3. Exchange of information and coordination

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**Introduction** Coordination of investigations and prosecutions among Member States is relatively recent in judicial cooperation, and its evolution may be traced in the development of international legal instruments, through the following phases:

- *Phase 1 (end 1950s/mid-1980s)*: judicial cooperation, where country A has a prosecution and requests evidence and/or extradition of a person from country B via formal letter rogatory, with need for double criminality and observance of the formalities of the requested state (e.g. Article 5 of the 1959 European Convention on Mutual Assistance in Criminal Matters).
- *Phase 2 (mid-1980s/early 2000)*: judicial cooperation, where exchange of information becomes more direct and spontaneous between judicial authorities (e.g. the Schengen Convention, the 2000 Convention on Mutual Assistance in Criminal Matters, and EU mutual recognition instruments in general, the most prominent of which is the EAW).
- *Phase 3 (early 2000/present)*: judicial coordination, where investigations and prosecutions are undertaken with regard to proceedings in different jurisdictions and where arrangements are established for the simultaneous retrieval of evidence (e.g. JITs).
- *Phase 4 (possible development)*: supranational judicial authority taking the lead and directing prosecutions in a specific field (e.g. the establishment of a European Public Prosecutor's Office from Eurojust, provided for in article 86 of the Treaty on the Functioning of the European Union – TFEU).

Article 3 of the Eurojust Decision lists, as its first objective, the improvement of coordination of cross-border investigations and prosecutions concerning two or more Member States. Eurojust's coordinating action is carried out at three levels:

- Information level: to overcome "information asymmetries" among the Member States affected by a cross-border crime case and promote a European perspective to the case.
- Operational/tactical level: to define a common strategy that enables all competent authorities involved to focus on the entire criminal network.
- Judicial/jurisdictional level: to encourage the opening of parallel investigations when appropriate and to prevent or resolve conflicts of jurisdiction.

This chapter highlights the problems and solutions identified during coordination meetings in drug trafficking cases with specific reference to the first two levels (information exchange and joint operations). The third level (conflicts of jurisdiction) will be dealt with in the next section. Due to their importance, specific coordinating tools (JITs and controlled deliveries) will be also dealt with in separate sections.

## **Problems**

### *Exchange of information:*

In all 50 cases under examination, one reason for holding a coordination meeting was to exchange information among the countries involved. Indeed, the first challenge in achieving coordination among authorities affected by a common criminal phenomenon is to address the possible lack of awareness of ongoing investigation(s)/prosecution(s) and to clarify how investigations and prosecutions are linked in order to ensure a shared understanding of the case. Fragmented information about common targets can be addressed via an open exchange of information among competent national authorities. Exchange of information can take place upon request (following the traditional mechanism of letters rogatory (LoR) or spontaneously (as foreseen by the more recent instruments of judicial cooperation). Eurojust's coordination meetings can be used as a venue to exchange information under Articles 6(1)(b) and (7)(1)(b) of the Eurojust Decision and Title II of Eurojust's Rules of Procedure (2002/C 286/01). The most common challenges encountered at this level are the following:

- Difficulties in identifying counterparts in a cross-border case;
- Different procedural stages in linked investigations/prosecutions or lack of investigation in the Member States involved;
- Reluctance to exchange information spontaneously;
- Differences in laws governing the confidentiality of investigations/prosecutions;
- Lack of ratification of basic legal instruments;
- Technical limitations (e.g. secure channels of communication);
- Timely transmission of information; and
- Inclusion of information exchanged spontaneously in national files.

### *Coordination:*

Coordination at operational/tactical level very often follows the exchange of information facilitated by coordination meetings at Eurojust. Specifically, the information provided by a country where the investigation is more developed might prompt other jurisdictions to open related investigations. These activities will need to be coordinated so as to prevent disruption of each other's investigation/prosecution strategy. The most common challenges encountered at this level are the following:

- Need to agree on a common strategy to avoid the possibility that investigative activities in one country impair those in another country;
- Need to execute simultaneous EAWs and investigative activities that are the object of LoRs (e.g. searches and seizures) to avoid loss of evidence;
- Setting up and coordination JITs;
- Logistical problems (e.g. delays experienced in the organisation of a coordination meeting, availability of resources, etc); and
- Language issues during an action day, when information needs to be passed on as quickly and clearly as possible.

## Solutions

Eurojust exercises its coordination role in different ways. Among the most important is the coordination meeting, which provides an official setting to exchange information and discuss judicial cooperation problems among the competent authorities of the countries involved, with the assistance of their National Desks at Eurojust. During such meetings, opportunities are provided for a spontaneous exchange of information, facilitated by secure translation/interpretation facilities. The representatives from the Desks, who are in most cases prosecutors with relevant international experience, assist in suggesting possible solutions, preventing future problems and moderating the discussion. The meeting will normally be chaired by a Eurojust representative of the Member State organising the meeting. By the end of the meeting, an operational agreement, allocating follow-up actions to responsible authorities, is usually reached and included in the findings.

In this setting, competent authorities are more willing to exchange information and coordinate, as confirmed by the findings of this study. In the majority of the cases under examination, the coordination meeting itself led to a positive outcome in terms of information exchange, coordination and initiation of investigations. More precisely, in 33 out of 50 cases, solutions to most of the problems highlighted above were identified and followed by the participants. In four cases, no positive outcome was reached. In three of these cases, the information was not exchanged or was only partially exchanged; in the fourth case, information was exchanged, but coordination of investigations was not fully achieved. In the remaining cases, whether the solutions identified during the coordination meeting were followed is not known.

Besides providing the formal setting and the facilities for the exchange of information and discussion on how to coordinate, Eurojust's coordination meetings led to positive results in countering some of the problems highlighted in the previous section of this chapter by identifying the following specific solutions:

- Related investigations: Initiation of related investigations was discussed in 31 of the 50 cases under examination, with the following results: positive in 17 cases, negative in 8 cases, unknown outcome in 6 cases. More details are given in the next section from the perspective of conflicts of jurisdiction (almost always potentially present when several investigations focus on the same targets). In this section, the opening of investigations is considered as correcting the often fragmented investigative picture about an organised crime network which operates in several countries. By opening an autonomous investigation, the lengthy procedures associated with the formal mutual legal assistance procedures (LoRs) can be overcome. Information can then be exchanged spontaneously, allowing the other authorities leading related investigations to identify exactly which acts and information could be inserted in their files for a successful prosecution. In this way, the overall investigation becomes more effective, because it is not confined to specific requests. Additionally, MLA requests can then be focussed on specific pieces of information, allowing for speedier execution.
- Joint Investigation Teams: JITs are a powerful tool for exchanging information and coordinating the activities of parallel investigations without resorting to traditional MLA requests. More details on this instrument and its use in the cases under examination can be found in Chapter 6.
- Europol's involvement: Europol was involved in approximately one-fifth of the cases under examination. Europol's involvement in the early stages of a case allows a better identification of the links between existing investigations and the discovery of related investigations, which need to be coordinated. Europol's role is thus potentially important in reconstructing the overall investigative picture, although sometimes the information transmitted to Europol is of very poor quality. In addition, Europol can support joint

operations by deploying a mobile office for the fast and secure exchange of information during days of action.

- Preliminary case analysis: In addition to the reconstruction of the investigative picture from information contributed by the countries involved, another useful analytical tool consists of a simple comparison of the persons/legal persons that are the subject of investigations in the countries involved, the corresponding preliminary charges and the period of the criminal acts under investigation. When this information is available prior to the coordination meeting, strategic decisions can be made regarding the coordination of the investigations and division of tasks to avoid possible conflicts of jurisdiction.
- Common strategy: For the positive outcome of a case involving several jurisdictions, reaching an agreement on a joint action by national authorities during one or more action day(s) may be crucial. By acting at the same time in different countries, loss of evidence and flight of criminals can be avoided. Furthermore, relevant information can be obtained by judicially authorised simultaneous wiretapping of the targets during the operation. As mentioned above, one aim of meetings at Eurojust is to coordinate joint actions even when investigations are at different stages in different countries. Additionally, National Members are available during an action day to help solve potential judicial cooperation issues arising during the execution of a joint action.

## **Case illustration**

In Operation "Andromeda", more than 30 drug traffickers were arrested in a Europe-wide operation against a drug trafficking network run by an ethnic Albanian organised crime group. Cocaine was transported from Peru to the Netherlands and then on to Belgium; from Belgium, the drugs were sent mainly to UK, Italy and other European countries. The identified network consisted of 42 persons, of whom 10 were in leadership positions, 4 were involved in logistics, 5 were couriers, 20 were pushers and 3 performed a mixed role. They used vehicles specifically designed for transporting drugs.

The investigation began with an Italian operation of the *Guardia di Finanza* of Pisa under the direction of the Anti-Mafia District Directorate (DDA) of Florence, which referred the case to Eurojust at the end of 2008 due to the links with other jurisdictions (UK, the Netherlands, Belgium, Germany, Lithuania, Sweden and Norway). Europol was immediately involved and provided key support from a very early stage of the police investigations, while Eurojust coordinated the judicial portion of the case. Europol analysts identified network contacts in 42 countries, and links across the entire criminal network.

Three coordination meetings were held at Eurojust throughout 2009, during which preparations for joint operations were made. On 2 December 2009, a day of synchronised action took place in Italy, the Netherlands, Germany, Belgium, UK, Lithuania and Norway. A Europol mobile office was set up in Pisa and an Operational Room was activated at the offices of AWF Copper, with Eurojust's participation.

The simultaneous execution of European Arrest Warrants and requests for mutual legal assistance led to the arrest of 30 persons and seizures of significant amounts of drugs (49 kg of cocaine, 10 kg of heroin and 101 kg of hashish). A trial took place for the targets arrested in Norway, and, in late spring 2010, they were convicted of drug trafficking.

## 4. Conflicts of jurisdiction

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**Introduction** Three elements in the investigation and prosecution of DT offences indicate that conflicts of jurisdiction have a particular importance in this crime type compared to others:

- When regulating DT offences, most States provide for extraterritorial jurisdiction, on the basis of certain conditions being met (*inter alia* nationality or residence of the offender, location of legal entities involved, links of the investigation with the State or infringement of its interests, impossibility of granting an extradition request)<sup>3</sup>. Various international and European instruments establish extraterritorial jurisdiction in DT and offences involving participation in criminal organisations<sup>4</sup>.
- Globalisation has affected every form of criminality. However, drug trafficking is by its nature a transnational activity, because the whole process of cultivation, production, manufacture, transport, distribution and consumption normally involves different countries.
- The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is the leading instrument in the fight against these crimes from an international perspective and has had a particular impact in raising awareness amongst practitioners regarding the need to have an international approach to tackling DT. Prosecutors, investigative judges and law enforcement bodies are nowadays willing to investigate and prosecute DT crimes to their full extent, which involves the concomitant cross-border dimension of the crimes.

Given the extended scope of national jurisdictions and willingness to prosecute DT offences, positive rather than negative conflicts of jurisdiction are likely to arise before or during coordination meetings in DT cases<sup>5</sup>.

Eurojust has been allocated a particular role in preventing and resolving conflicts of jurisdiction under art. 7.2 and art. 13.7(a) of the Eurojust Decision, under art. 12 FD of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, and under art. 85 TFEU. To date, only three DT cases of unsolved conflicts of jurisdiction have been dealt with by Eurojust, but with the application of the provisions mentioned, a significant increase in the referral of these types of cases to Eurojust can be anticipated. As highlighted in the Budapest strategic seminar, "in cases of transnational crime, conflicts exist 'by nature', and the focus should be on solving them".

### General remarks:

Pursuant to art. 1.2(a) of the FD on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, conflicts of jurisdiction may arise in "situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States thereby

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<sup>3</sup>Some of these criteria (nationality, impossibility to grant extradition) are applicable to other or even all offences.

<sup>4</sup> Art. 8.1 of FD of 24 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, art. 7.1 of FD of 24 October 2008 on the fight against organised crime at EU level, art. 4 of Convention against illicit traffic in narcotic drugs and psychotropic substances of 1988, and art. 15 of Convention against transnational organized crime of 2000 at UN level.

<sup>5</sup> In fact, only one negative conflict has been identified but insufficient information is available to make a suitable assessment of the reasons for this negative conflict.

constituting an infringement of the principle of 'ne bis in idem'. The *ne bis in idem* principle as defined in art. 54 of the Convention implementing the Schengen Agreement has been considered by the ECJ in various cases including Van Esbroeck and Van Straaten in 2006, and Kraaijenbrink in 2007, all significantly involving DT prosecutions.

Among the 50 cases subject to analysis, examples of parallel investigations with identical scope and suspects are rare; in only two bilateral cases is the scope of the investigation roughly the same,<sup>6</sup> and, in a few cases, the national investigation is actually a minor aspect of a broader investigation conducted in another Member State<sup>7</sup>. As for the rest, although there may be some factual overlap in related cases, it is more appropriate to talk of linked investigations rather than parallel investigations.

After an analysis of the outcomes of the coordination meetings:

- In 35 cases, there was discussion of the linked/parallel investigations conducted in the Member States involved; in the remaining 15 cases, discussion centred on a single investigation by the Member State that was the "owner" of the case and assistance was needed from the other Member States involved, so that in these instances no potential conflict of jurisdiction existed.
- Among those 35 cases, the majority were related to linked/parallel investigations opened by three States (16 cases), followed by bilateral investigations affecting only two States (10 cases), four States (7 cases) and finally five States (1 case) and six States (1 case).
- Most investigations subject to analysis had been opened by Member States; only in six cases were investigations conducted by third States discussed in coordination meetings (3 for Norway, 1 for Switzerland, 1 for Colombia and 1 for Iceland).

The issues related to possible conflicts of jurisdiction were dealt with on a case-by-case basis; the main finding is that concentration of proceedings in one jurisdiction was considered in very few cases:

- In 29 out of the 35 cases mentioned, national investigations continued as independent proceedings after the coordination meetings, and concentrating the investigation in one jurisdiction was not considered.
- In 6 out of the 35 cases, the conflict was approached with a proposition to transfer the proceedings from one or more jurisdictions to another, and:
  - In three cases, an agreement to concentrate the proceedings in one jurisdiction was reached. On two occasions the decision affected two jurisdictions and in the other case it affected three jurisdictions<sup>8</sup>.
  - On another two occasions, the concentration and further transfer was proposed by one jurisdiction, but this proposal was not acceptable to the other jurisdiction.
  - Finally, in one case, a proposal was made to transfer part of the case (relating only to charges of participation in a criminal organisation), but the proposal was not accepted.
- A negative conflict of jurisdiction arose in one case where two jurisdictions did not investigate and prosecute, mainly because of other priorities and

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<sup>6</sup> Neither of these two cases is related to investigations of large or sophisticated groups.

<sup>7</sup> The usual profile of the case involves the arrest of one member of the group in one MS, often when transporting or delivering drugs to another MS where the main investigation is being conducted.

<sup>8</sup> In this latter case, although an agreement was reached in the coordination meeting, only two proceedings were eventually merged.

application of the opportunity principle. This illustrates a conclusion of the Budapest strategic seminar, namely that “the different priorities set at national level – and the way in which such priorities are dealt with by the MS - can lead to negative conflicts of jurisdiction.”

In most cases of parallel/linked investigations analysed, the competent national authorities at coordination meetings did not consider the concentration of proceedings as adding value. This view was mainly taken because the scope of all national investigations was clearly defined, with little risk of separate prosecutions infringing the *ne bis in idem* principle, and because possible duplication of work could be avoided by coordination and division of tasks. Concentration of prosecutions is not always the appropriate response to a possible conflict of jurisdiction. In fact, the experience of Eurojust might suggest the contrary: normally, possible overlap is overcome by efficient and effective coordination leading to a clear definition of the scope of the investigation. Instances that support this can be found in:

- investigations related to different cells or sub-groups, each cell or sub-group being interconnected but active in a different jurisdiction as part of a bigger organisation and linked hierarchically through one or various leaders: each national investigation would focus on the cell operating in its territory,
- same organisation whose different activities (import/production, manufacturing, transport, storage, distribution) are carried out in different jurisdictions: each jurisdiction would focus on the part of the process carried out within its territory, and
- division of the investigations according to the crimes investigated: some crimes would be investigated by one jurisdiction and others by another jurisdiction. In some cases, tasks are divided between jurisdictions: one jurisdiction focuses on drug trafficking, while the other focuses on money laundering. However, this arrangement might weaken the collection of the necessary evidence in the money laundering investigation where proof of the predicate offence is required. Merging the investigations could facilitate the gathering of evidence required for both drug trafficking and money laundering prosecutions.

Analysis and diagnosis should always take into account that most OCGs are linked at some point. Links among many of the OCGs exist because they share common objectives and use the same criminal resources. The existence of these links does not mean that conflicts of jurisdiction necessarily follow; sharing all relevant information is fundamental to a proper assessment of the case both to identify a possible conflict of jurisdiction and to ensure that it is managed adequately.

### **Problems when proceedings are concentrated**

A general finding from Eurojust’s analysis is that bringing investigations and prosecutions from different Member States together in one jurisdiction can help resolve *bilateral* conflicts of jurisdiction. This is so even when cases or coordination meetings are multilateral, because experience suggests that strong data linking investigations usually affect two jurisdictions. If three or more jurisdictions are involved, the links are less strong and concentration is less likely to provide added value.

Concentration of proceedings may create problems for national authorities. The most relevant issues, according to the information gathered, are the following:

- Existence of equally complex investigations in separate jurisdictions. The more complicated the investigations are in different jurisdictions, the more difficult it is to merge them in a single concentrated investigation. This is because of the difficulties of evidence handling when the investigation affects many subjects and facts, leading to an extremely complicated trial. Eurojust's experience leads to the conclusion that transfer is considered and eventually agreed upon when a broad investigation is being conducted in one Member State and a smaller, very limited investigation is being conducted in another Member State which is identified as a branch of the main investigation. In this situation, concentration could lead to a successful outcome. When two or more important investigations are being conducted that at some point have coincidental targets, concentration is less likely to occur.
- Admissibility of the evidence obtained in the Member State transferring the proceedings to the receiving Member State. Here, most problems in coordination meetings (and subsequent development of the case) are related to use of intercept evidence (a frequently vital element in DT investigations) especially when the content of the intercepts is deemed necessary evidence in the receiving Member State. Examples of difficulties which arise in practice are:
  - impossibility of providing telephone records which are only kept for a short period of time and are no longer available when the transfer is decided<sup>9</sup>,
  - legal prohibition against using intercept evidence in the transferring Member State, which means that such evidence cannot easily be forwarded to the receiving Member State<sup>10</sup>,
  - unacceptability in the receiving Member State of the way the information has been managed in the transferring Member State, i.e. selection of parts of conversations or subjective comments made by police<sup>11</sup>, and
  - differences in the constitutional standards related to judicial control: if national law imposes judicial controls every 15 days, intercepts not following this pattern would be difficult to use.
- Obstacles and difficulties in providing trial evidence. After the transfer of the file to the receiving Member State, the transferring Member State may experience difficulties in providing the necessary evidence, e.g. in cases where, according to national legislation, police officers cannot give statements in foreign proceedings or can do so only under certain circumstances and protocols.

Another type of difficulty is that transferring proceedings will almost always entail that some evidence will come from the transferring Member State. LoRs must be issued for witness or expert interviews, etc, creating additional problems<sup>12</sup> such as the lesser weight that evidence by videoconference might be accorded in some jurisdictions.

- Difficulties related to the management of the transfer of the entire file. If the proceedings to be transferred contain too much information, documents,

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<sup>9</sup> Compliance of national legislation with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks should be established.

<sup>10</sup> In UK, domestic intercept product cannot generally be used as evidence. However, intercepts ordered abroad according to the relevant national law may be used as evidence in UK proceedings. Nonetheless, a general reluctance to base an investigation only on this sort of evidence has been demonstrated.

<sup>11</sup> This information comes from the only case where a final judgement has been accessible for this assessment.

<sup>12</sup> This circumstance can also occur when investigations are followed up separately, but the likelihood of this type of obstacle decreases.



pieces of evidence, etc, normally in a foreign language, sending the file without any filter might be overwhelming for the receiving Member State and increase difficulties in an investigation already broadened by the addition of the new file. On the other hand, provision of only part of the file may raise fair trial concerns: what material has not been provided? On what basis has the decision to provide only part of the file been made? Member State differences in the protection of, for example, informant material could be an additional issue.

- Concentration only for the crime of participation in criminal association. When the members of an OCG in different jurisdictions are liable to prosecution, both for participation in a criminal organisation and for substantive DT offences, the decision of where to prosecute for participation in a criminal organisation has been, on at least two occasions, very complicated. Unless prosecutions for both participation in a criminal organisation and substantive DT offences are concentrated together, prosecution for the substantive offence alone may be prejudiced<sup>13</sup>. Equally, prosecution for a substantive DT offence in one jurisdiction and for participation in a criminal organisation in another may create problems of *ne bis in idem*.
- Transmission of seized property or evidence to the receiving Member State. Property and evidence may be seized in a jurisdiction's own proceedings, or following a request by LoR either before or after a decision to concentrate. Either circumstance can give rise to both legal and logistical problems of transfer, which may not be apparent until after the coordination meeting at which the agreement for transfer is reached.
- The need to issue EAWs against the suspects in custody or on bail in the Member State that will transfer the proceedings. The issue of EAWs may complicate proceedings in both jurisdictions and is a matter normally addressed during coordination meetings. Coordination and issuance of the necessary EAW simultaneously with the transfer of proceedings are needed for effective execution.
- Legal instruments to channel the transfer of proceedings. When the legal instruments applicable to one Member State are not the same as the legal instruments for other Member States, obstacles can arise<sup>14</sup>. Different rules on the mechanics of transfer of proceedings may create obstacles to concentration.
- Variety of transmission channels. Once transfer of proceedings has been agreed, different possibilities exist for securing transfer: via request from the Member State giving up jurisdiction, via request from the Member State assuming jurisdiction, or via requests issued simultaneously by all Member States involved. The variety of approaches available may not be efficient.

### **Problems when proceedings are not concentrated**

When a decision has been reached that the investigations should remain separate but coordinated, some issues may arise, such as:

- Lack of perspective. Fragmented investigations focused on one segment of the

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<sup>13</sup> In one case, prosecution for participation in a criminal association along with the substantive offence of DT was vital, as the substantive offence of DT had difficulties, whereas the evidence for participation was stronger; thus, there was no possibility to proceed only for the substantive crime and to transfer the investigation for participation in a criminal organisation to the other jurisdiction involved.

<sup>14</sup> CoE Convention of 1972 on the transfer of proceedings in criminal matters has only been ratified by 13 Member States; and the 2000 MLA Convention has still not been ratified by all Member States.

OCG sometimes lack perspective of the full dimension of the group and can leave its structure unharmed if the targets are medium- or low-level associates.

- Lack of direct contacts among national authorities. Although an important added value of coordination meetings is fostering the establishment of direct contacts among national authorities, a frequent occurrence, even after coordination meetings, is that direct contacts are not set up and communication continues, for linguistic or other reasons, to be via Eurojust.
- Possibility that an investigation is jeopardised if efficient coordination is lacking. When the investigations are at different stages and pursued separately, the decision to proceed with an operation involving detentions, house searches, etc, without previous notification to all authorities involved, can seriously harm the successful outcome of the other investigations. This situation has actually occurred. Coordination meetings are a very useful way to prevent this “short circuit” from occurring.
- Legal obstacles to obtaining the necessary information from the other investigations involved. Different jurisdictions have different rules on the secrecy of prosecution and court files, which may prevent or make difficult the transmission of information. This can lead to one national court dealing with a case without a complete picture of the circumstances of the offence or offender before it. In one case examined, this circumstance was a reason for the imposition of an inappropriate sentence; the necessary information, requested via a LoR, was not provided by the requested Member State because the secrecy of proceedings in its case was a legal obstacle, and thus the sentencing court did not have all the necessary information regarding the scope of criminal activities in which the subject was involved<sup>15</sup>.
- Possible legal obligation to disclose information obtained via LoR from another jurisdiction where the proceedings are secret. An important issue that has been identified in the study is the extent to which evidence gathered during an investigation must be disclosed to the defendant; when part of the evidence comes from an investigation in another Member State obtained via a LoR or spontaneous exchange of information, the need to disclose this information can jeopardise the investigation in the Member State from which the information comes, e.g. intercept evidence if this investigation is still secret.
- Limited use of the spontaneous exchange of information. An important and underused channel for international judicial cooperation is the spontaneous exchange of information at judicial level by competent authorities.<sup>16</sup> This spontaneous exchange of information is particularly relevant in the coordination of parallel/linked investigations where a conflict of jurisdiction has been or is likely to be identified; nevertheless, information flow between authorities is on most occasions via LoRs. Even when information is exchanged informally at coordination meetings, arrangements are then made to formally transmit the information upon receipt of a LoR rather than using the spontaneous exchange provisions. Moreover, the information exchanged during the meeting normally provides a sufficient basis for all the involved parties to be aware of the scope of the other investigations, but only

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<sup>15</sup> No study has been made regarding the regulation of the secrecy of proceedings in different jurisdictions and the impact that this can have in the field of MLA; further research is required.

<sup>16</sup> Legal bases for spontaneous transfer applicable to DT cases are to be found in: UN Conventions (Art. 9.1 of 1988 UN Convention against illicit trafficking in narcotic drugs and psychotropic substances, Art. 18.4 of 2000 UN Convention against transnational organized crime) and EU instruments (Art. 7 of 2000 Convention on mutual legal assistance in criminal matters between Member States of the EU).

occasionally do the authorities in the course of an investigation after a coordination meeting forward spontaneously new information that would be important for the linked investigations in another Member State. Having said that, Eurojust National Desks actively encourage the exchange of information during and after coordination meetings.

### **Brief analysis of reasons for lack of agreement on the transfer of proceedings**

An assessment of the reasons for the lack of a common approach on the concentration of proceedings must be tentative given the limited information available. Nevertheless, some reasons can be suggested:

- Unwillingness to transfer proceedings. National authorities are still very much focused on their own domestic proceedings and, in general terms, are highly cautious when dealing with international cooperation. This is so even when investigating a case with extraterritorial jurisdiction. When dealing with a conflict of jurisdiction, national authorities are sometimes reluctant to give up jurisdiction for a number of very different reasons: lack of knowledge of how to proceed, lack of experience in such decisions, lack of trust in their counterparts, unwillingness to lose control of a case based on a “feeling of ownership”, and a belief that their system of justice would respond more efficiently. Some of these reasons are not based on legal or technical considerations but are nonetheless very powerful. As a result, unwillingness is more often encountered from the transferring Member State than from the receiving Member State.
- Failure to make an adequate assessment of the advantages and disadvantages. When addressing problems related to transfer of proceedings, national authorities at times may fail to adequately assess the advantages or disadvantages of concentrating the proceedings; this failure could be due to, *inter alia*, lack of basic information regarding the content and scope of the other investigations involved, misunderstandings due to differences in legal systems, or lack of a cross-border approach leading to a fragmented perception of the case.
- Opportunity vs. legality. Member States governed by the opportunity principle are more open to the decision to transfer than Member States governed by the legality principle.
- Concerns about admissibility of evidence and other factors in prosecution decision-making. Different jurisdictions have different rules regarding the institution of proceedings. A national judicial authority may have to decide whether to accept a case on the basis of evidence gathered according to rules which differ from its own, and in the light of general principles which are differently expressed to its own.
- Differences in the stages of national proceedings. When national investigations have reached different procedural stages, the likelihood of agreement to concentrate proceedings in one jurisdiction is smaller. This is particularly so when one of the proceedings is nearing conclusion or has concluded, and the indictment is ready to be produced or is only awaiting the trial to be scheduled. Even when the investigation at national level is still ongoing but close to its finalisation, competent authorities are reluctant to transfer jurisdiction or to accept the transfer from other jurisdictions.

National legislations regulate the time limits for the investigative phase of proceedings in different ways: some Member States do not establish time

limits at all and offences are only time-barred by the statute of limitations or judicial control. Other Member States establish strict terms for investigations that cannot be breached<sup>17</sup>. Even when linked investigations have been initiated at the same time in Member States (which is a very common situation due to the effectiveness of police-level information exchange), the fact that the investigations may have developed at different “speeds” can cause difficulty in reaching a common approach. If national investigations are undertaken at widely differing times, then the problems become even more difficult to resolve. Different timelines in proceedings has been given as the ground for not accepting the concentration of the proceedings in at least one case, and in others it has been a reason for not even considering the transfer of proceedings by any of the parties involved.

**Solutions** The first lesson to be drawn from this assessment is that prevention is the best solution for the settlement of conflicts of jurisdiction. The earlier the problem is identified and addressed, the greater the likelihood of reaching a consensus that satisfies the expectations of all parties involved and serves the interest of justice in a more effective and efficient way<sup>18</sup>. Among the cases analysed, some examples can be found where Eurojust has been involved for coordination purposes since the beginning of the investigation. In these instances, early Eurojust coordination has facilitated decision-making about the scope and measures to be taken for each investigation; and Eurojust has promoted JITs as a valuable tool for the coordination of parallel/linked investigations. Eurojust’s contribution can be vital to raising awareness about the real dimension of criminal organisations, and making practical proposals on the way to combat such organisations.

Other elements in managing possible conflicts of jurisdiction are listed below:

- Crucial to a successful solution to this challenging problem is the motivation and training of practitioners, who should become familiar with the legal instruments applicable<sup>19</sup>, in order to ensure a cross-border vision of organised crime phenomena. Eurojust’s experience in the practical coordination of cross-border prosecutions can assist practitioners in this respect.
- The adoption of a “common strategy” or “investigative model” and the establishment of a list of contact points to avoid lack of coordination that could jeopardise the outcome of one national investigation when actions are taken in another national investigation have been agreed at coordination meetings. The practical application of “common strategy” and “investigative model” as agreed at coordination meetings remains unclear because detailed feedback on the investigations and prosecution outcomes of such meetings in

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<sup>17</sup> Breaches of time limits have different consequences depending on national law: in some jurisdictions, the consequence is the cancellation of the investigative measures taken; in others, there is no consequence beyond a possible negative appraisal of the prosecutor.

<sup>18</sup> This perspective is very much in line with the 2009 FD on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

<sup>19</sup> CoE Convention on mutual assistance in criminal matters (art. 21), CoE Convention on the transfer of proceedings in criminal matters of 1972 (arts. 8 and 11), UN Convention against illicit traffic in narcotic drugs of 1989 (art. 8), UN Convention against transnational organized crime of 2000 (art. 21), Convention on mutual assistance in criminal matters between the MS of the EU of 2000 (art. 6, Guidelines for deciding which jurisdiction should prosecute, included as an Annex in Eurojust Annual Report 2003), FD on the fight against organized crime of 2008 (art. 7.2), FD on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings of 2009 and Eurojust Decision (arts. 6 and 7).

Member States is not available.

- Spontaneous exchange of information should be fostered. This is valuable, both after the coordination meeting where the information needs have been identified, as well as at any later stage when information relevant to parallel/linked investigations where possible conflicts of jurisdiction may arise. Here, again, Eurojust has an important role to play through its coordination meetings. The issue of a LoR implies that the requesting authority already knows what is sought. Spontaneous exchange within the scope of a coordination meeting can provide avenues for enquiry which had not previously been apparent.
- One reason for concentrating investigations is to increase the chances of reaching the upper-level members of the OCG. Another is to provide the responsible court with a full picture of the OCG. Concentration of prosecutions allows the profile of the OCG to be more clearly depicted and its extent to be revealed; with a fragmented investigation, the court is deprived of information which would allow it to exercise its judgement and sentencing powers appropriately. (National authorities underlined this point when they became aware of a sentence delivered in another jurisdiction in a specific case linked to their own investigations.)
- When transferring proceedings with a voluminous amount of documents, proposals have been made during coordination meetings that a follow-up meeting at police level should be held to assess which documents are necessary in order to conduct the transfer in a structured and organised way. This procedure would indeed help the receiving authority in managing the additional information. Eurojust may add value by ensuring awareness of the differing legal secrecy and disclosure requirements in Member States which will arise in such information exchange.
- Following agreement to transfer the proceedings, a comprehensive strategy among the involved parties should be established to ensure that the transfer promotes a better administration of justice; the creation of this strategy involves close cooperation with and full involvement of the authority in the Member State that is surrendering jurisdiction. The receiving Member State should inform the transferring authority of the outcome of the case (no information is available about whether this strategy has been followed in the cases analysed).
- A consistent approach to transfer of proceedings at EU level is advisable; some of the problems regarding concentration listed here could be reduced or resolved with common rules for such transmission.
- Art. 7.2 of the Eurojust Decision provides that Eurojust may issue a non-binding opinion where a conflict of jurisdiction has not been resolved. This could provide a useful instrument for analysing the gaps and problems to be overcome whenever national authorities have failed to reach an agreement on a conflict of jurisdiction. Eurojust may also issue opinions where recurrent refusals or difficulties in judicial cooperation have occurred. Both tools, although general in application, may be of particular help in the fight against DT.

**Case illustrations**

Conflict of jurisdiction affecting three Member States.

UK, the Netherlands and Spain were investigating an OCG devoted to transporting cocaine and hashish from Spain to UK, using vehicles previously modified in UK to transport a commodity undetected. The leader and close collaborators resided in UK, while the members of the OCG in charge of receiving the drugs from abroad and of contacting drivers were located in Spain. Four operations against the OCG had been conducted in Spain from August to December 2009. Significant quantities of cocaine and hashish and four cars were seized, and four persons were arrested. In the Netherlands, in September 2009, a van with a large quantity of hashish was seized, but the driver fled to Spain to carry out another drug transport, and therefore was not arrested. In the meanwhile, the mastermind of the organisation remained in UK.

During the coordination meeting, a comprehensive description of the scope of the three national investigations was provided and a consensus was reached to concentrate the three proceedings in Spain, as in this jurisdiction the main activities of the OCG had taken place, most evidence had been gathered against all suspects (including those based in UK where the leaders had so far only been charged with participation in a criminal association and where the mastermind was on bail), and most of the suspects were living or had been arrested.

The investigation in the Netherlands was considered a relatively minor episode and very little information was available; no particular problem arose regarding evidence transmission and the use of applicable legal instruments (Spain and the Netherlands have both ratified the 1972 CoE Convention on the transfer of proceedings in criminal matters). An in-depth discussion took place regarding the evidence needed from UK in the Spanish proceedings; concerns were raised regarding the difficulty of providing Spain with the content of the intercepts<sup>20</sup> compared to the provision of details of the numbers, dates and lengths of the conversations. Other issues discussed were related to the legal instruments applicable to the transfer of the proceedings. The Spanish court decided to accept the transfer of the files from UK and the Netherlands and merge them with the Spanish file, but eventually only the file from UK was transferred and the Dutch case remained as a separate investigation.

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<sup>20</sup> UK can provide intercept evidence at the request of a Member State. The exception is when a UK warrant to intercept was already in existence before the other Member State's request.

## 5. MLA requests and EAWs

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**Introduction** The fight against drug trafficking always includes an important cross-border element. The drugs are produced in different countries worldwide. They must be transported and distributed, meaning that in a serious drug case, investigations take place in several Member States and with frequent links to third States. To achieve good results in this fight, mutual legal assistance (MLA) is crucial.

The Council of Europe and the European Union have both been prominent in developments in this field. Many treaties and agreements, such as the 1959 and the 2000 Conventions on Mutual Legal Assistance, now govern the exchange of information and entitle Member States to ask for action to be taken in other Member States. In addition, many bilateral agreements between the Member States are in force.

In the future, the European Investigation Order (EIO) will concentrate most agreements and treaties in one piece of legislation, to facilitate the processing of MLA and to replace the MLA scheme based on requests with mutual recognition of judicial orders. This aim will only be reached if all Member States involved adhere to the terms of the EIO.

Following the introduction of the European Arrest Warrant (EAW), also based on the principle of mutual recognition, the time needed for the surrender of suspected and convicted persons within the European Union has been dramatically reduced. The speed of EAW execution has afforded opportunities for the authorities in charge of a drug investigation to gain information from the surrendered persons; it has also demonstrated that criminals can no longer hide outside national borders.

Eurojust has made a significant contribution to improving coordination and cooperation in the fight against cross-border drug-trafficking, as evidenced by the number of cases referred to it by Member State authorities and EU partners. Its work has helped mitigate some drawbacks of traditional MLA tools in fighting cross-border crime, while its coordination meetings have been an important practical development in helping ensure that international drug trafficking is met by a corresponding judicial response.

## Problems

**Delay in the execution of MLA:** Problems with traditional judicial cooperation tools are very often related to slowness in execution of the requests. Common reasons for delays are:

- *Translation issues:* Accurate translations of LoRs take time. When this step is rushed due to operational needs, the results are often poor, creating difficulties in understanding exactly what is being requested. Additional questions about the contents or sense of the LoR must then be sent to the requesting authority, leading to further delay in execution. Translation of some legal terms can create difficulties because they have a technical meaning, with important procedural consequences. For instance, the difference between “suspect” and “accused” can be vital to the execution of a European Arrest Warrant. In some jurisdictions, the term “suspect” does not exist as a legal term in criminal proceedings, and any difference with “accused” has no legal consequence for extradition; in others, “suspect” suggests that a decision to prosecute has not been made, and that surrender is either barred or that further enquiry as to the precise legal status of a fugitive is necessary. Such important practical distinctions can easily be lost in translation.
- *Identification of the authorities responsible for the execution of the requested measure of legal assistance:* A frequent issue in Eurojust cases is the identification of the authority competent for the execution of a particular request, especially when rapid execution is needed. This problem may be particularly acute when a measure needs to be executed in several places that are subject to different territorial jurisdictions within a Member State. To mitigate the problem, in the case of direct transmission of the LoR to the judicial authorities, clear identification of the activities to be carried out and their location are necessary.
- *Lack of resources/prioritisation:* A frequent problem encountered is a lack of resources, both human and financial, in the requested Member State to execute the request. This problem is especially pronounced in Member States that receive many requests or are relatively small. Solutions are constantly sought. For instance, the implementation of the 2001 Protocol to the 2000 MLA Convention is designed to make bank searches much simpler (see, in particular, the provisions included in articles 5 and 6, which are aimed at simplifying mutual legal assistance). Prioritisation is another way to tackle the problem of capacity, but the criteria are not always known by the requesting countries. Differing judicial policies might create misunderstandings. For instance, the amount of money to be seized (a concept used to prioritise freezing orders) can be considered huge in some countries, but small in others. Seizures of bank documents might not be considered a priority, because no risk of disappearance of evidence in established banks can occur, unless the bank itself is a suspect.

**Ratification of the main international cooperation instruments:** Some of the most relevant conventions on judicial cooperation, such as the European Convention on the Transfer of Proceedings in Criminal Matters of 1972,<sup>21</sup> the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 2000<sup>22</sup> and the Protocol to the Convention on Mutual

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<sup>21</sup> The current state of play of ratification can be viewed at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=073&CM=8&DF=10/14/2008&CL=ENG>).

<sup>22</sup> The current state of play of ratification can be viewed at: <http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=EN&aid=2000023&doclang=EN>).



Assistance in Criminal Matters between the Member States of the EU of 2001<sup>23</sup>, have not been ratified by all Member States. This lack of ratification has caused some difficulties in the application of recent cooperation instruments. More specifically, in some cases referred to Eurojust, the creation of a JIT, considered by many of Eurojust's representatives to be a very effective tool for the exchange of information and evidence, was impaired by the lack of ratification of the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 2000. Similarly, in one case, a Member State was unable to obtain assistance with cross-border interception of communication.

**Approximation of procedural provisions related to judicial cooperation in criminal matters:** The need to approximate procedural provisions was mentioned several times at the coordination meetings under consideration. Procedural difficulties are often encountered in Eurojust cases during the coordination of simultaneous searches and seizures. In some Member States, for instance, a mere LoR is not enough to carry out search and seizure activities; a certified translation of a search warrant (or even a confiscation order) from a judicial authority also needs to be included. Additionally, the level of description of the grounds on which such measures can be authorised varies greatly.

Mutual recognition tools<sup>24</sup> could be used to overcome differences in criminal procedures, but their implementation has been slow and patchy. As a result, mutual recognition instruments are not often used in this field for various reasons, which range from the need to respect the constitutional principles of the Member States to the limited scope and lack of flexibility of some of these instruments.

**Approximation of legal definitions:** Although the substantive criminal law provisions seem to present fewer problems in Eurojust's casework, some relevant issues were identified in the harmonisation of organised crime legislation. In spite of the Framework Decision on the Fight against Organised Crime (to be implemented in domestic law by 10 May 2010), national legislation on this topic continues to differ greatly between Member States. There are notable differences on specific matters (e.g. type of predicate offences, continuity, penalties, etc), with some Member States lacking any criminal organisation offences in their criminal codes.<sup>25</sup>

**European Arrest Warrants:** Unlike some mutual recognition tools, the EAW is widely used by practitioners. Still, several issues have been identified in the practical application of the EAW. The most frequent problems are listed below:

- *Request to re-issue an EAW* to amend possible mistakes or integrate additional information: in some countries, reissue of an EAW is not possible and the only option is to draft a separate act correcting the already-issued EAW, a procedure which may not be acceptable to the receiving authority.
- *Different national implementations*, which lead to continual requests for clarifications and weaken the principle of mutual recognition.

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<sup>23</sup> The current state of play of ratification can be viewed at:

<http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=EN&aid=2001090&doclang=EN>.

<sup>24</sup> COUNCIL FRAMEWORK DECISION 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. Practitioners also need to send a traditional MLA request following a freezing order according to FD 2003/577/JHA.

<sup>25</sup> See the study "Organized Crime Legislation in the European Union. Harmonization and Approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime" carried out in 2009 with the cooperation of Eurojust (Calderoni: 2010, Springer).

**Language barriers:** In addition to the delays due to translation issues, language in itself might be an issue in some requests. For example, in one case, the interception of communications of Nigerian OCGs was complicated by the lack of trustworthy translators from the dialects spoken in that region. This difficulty makes the execution of MLA almost impossible, because no available translators for that dialect are available.

## **Solutions**

The problems mentioned above have been addressed in the following ways in the cases under examination:

**Delay in the execution of letters rogatory:** For urgent cases, some National Desks have developed a practice that involves asking the competent authority to open an investigation (according to article 6.a.i of the Eurojust Decision) and to attach a report detailing the reasons for this action (together with the MLA request). In this way, certain activities can be anticipated within the framework of domestic law pending the decision of the court on the MLA request. This is also a good practice in non-urgent cases, because it allows the investigations to go beyond mere execution of the LoR (see Chapter 3). Another way to mitigate the lengthy execution periods associated with LoRs is to use JITs (when appropriate), since the information exchanged in that context can be considered officially included in the proceedings of the participating countries without the need for a LoR. For more details about this instrument and its use in the cases under examination, see Chapter 6.

**Translation problems:** Eurojust's prosecutors, judges and police officers, who are seconded from all executing Member States, can help counter these problems by advising on the language and content of especially sensitive requests before they are forwarded by their issuing authorities.

**Identification of the executing authorities:** A second-level meeting at Eurojust (where prosecutors, judges and police officers of the National Desks involved establish how a case is to be progressed) can help in the identification of the territorially competent authorities. If necessary, several different LoRs (instead of one) should be drafted with different content according to the recipients/requested activities.

**Lack of ratification of judicial cooperation instruments.** Eurojust's role in these cases has been to find alternative ways to accomplish the same results using the other international cooperation instruments available (for instance, the provisions on spontaneous exchange of information in article 18 of the UNTOC Convention).

**Coordination meetings:** This is a unique tool in the European Union. Solutions at judicial level are mostly generated during these meetings, which also facilitate mutual understanding and allow participants to communicate freely through expert simultaneous interpretation. In most cases, draft LoRs have been prepared to provide all parties with the relevant information for the best possible execution in the different jurisdictions. This reduces delays and enables the parties to improve the quality of the LoRs and to overcome obstacles during the coordination meeting. In most of the cases under consideration, due to direct contacts and trust between the parties developed during the coordination meetings, no further meetings were needed. The creation of a better understanding of the needs of the colleagues from other Member States and third States has been regarded by all practitioners as very valuable.

**Case  
illustration**

This case involves heroin trafficking between Turkey and Spain. The drugs were put in a hidden compartment in a car prepared and loaded in the Netherlands by a Turkish national living in the Netherlands. He appeared to be a member of a network. The deliveries were made to Spain and the money was transported back to Germany.

Links to Belgium, Germany, the Netherlands, Spain and Turkey demonstrated the need for coordination. LoRs were exchanged with France, Turkey, Germany and Belgium. In addition, the Turkish authorities took part in the coordination meeting at Eurojust, and helped to identify the Turkish counterparts.

The meeting brought immediate results: execution of the LoRs was accelerated, and the exchange of information led to the execution of EAWs. Investigations in other countries were launched. Due to the involvement of Europol, forwarding information via police channels was fast and easy and helped to prepare the mutual legal assistance in the involved country.

The involvement of Turkey with the help of the contact point was very successful, as Turkey immediately agreed to join the meeting and offered the relevant information. As a result, the level of trust between EU and Turkish authorities has been raised.



## 6. Joint Investigation Teams

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### Introduction

The legal framework for setting up Joint Investigation Teams (JITs) can be found in article 13 of the 2000 MLA Convention and in the Framework Decision of 2002. The overall goal of the Convention is to improve cooperation between judicial and law enforcement authorities within the European Union, Norway and Iceland.

Ratification of the Convention took considerable time, which led Member States to agree on the JIT provisions in the Framework Decision of 2002. Quicker implementation was needed to combat serious cross-border crime more efficiently.

Member States have implemented the Framework Decision in different ways. Some countries have adopted specific laws on JITs or inserted JIT provisions in their criminal procedural law; others have referred to the applicability of the 2000 MLA Convention in their national law. The Framework Decision itself will cease to have effect when the 2000 MLA Convention has entered into force in all Member States. Italy has not yet implemented the Framework Decision or ratified the 2000 MLA Convention. Greece has implemented the Framework Decision but has not ratified the 2000 MLA Convention.

In article 13(1) of the 2000 MLA Convention, JITs are approached from an international and cross-border perspective. According to article 13(1), the seriousness of the crime is not the sole criterion for setting up a JIT. Consequently, national jurisdictions may have different approaches to the use of JITs.

Member States, Eurojust and Europol can suggest establishing a JIT<sup>26</sup>. The involvement of Eurojust and Europol in a JIT is not mandatory, but the involvement of both organisations can bring added value and even prove essential to the success of the investigation. Community funding of JITs is conditional on the involved Eurojust National Member being asked to participate.

For a period after the adoption of the JIT Framework Decision in 2002, Member States were cautious about the use of JITs. Several actions have subsequently been taken to promote the use of JITs. The Hague Programme called upon the Member States to designate experts on JITs to exchange best practices and encourage the use of JITs, which led to the establishment of a Network of National Experts on JITs in July 2005. The Network has held annual meetings since then.<sup>27</sup> Since mid-January 2011, the JITs Network has a Secretariat to promote its activities and to support the National Experts in their work.

A JIT manual for practitioners has been produced by Eurojust and Europol and is available in 22 official languages. Eurojust and Europol have also collaborated in producing a compilation of Member State legislation and practice on JITs.

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<sup>26</sup> Eurojust Decision (articles 6 and 7).

<sup>27</sup> More information about JITs and the legal framework for JITs is available in the Joint Investigation Team Manual, prepared by Eurojust and Europol (Council of the European Union, doc. no. 13598/09, 23 September 2009).

## **Problems**

Analysis suggests that there may be room for further use of the JIJs tool. In the 50 drug trafficking cases with a coordination meeting considered in this report, two JIJs were established. In 10 cases, creation of a JIT was not discussed. In 34 cases, no information is available as to whether formation of a JIT was discussed. In six cases, formation of a JIT was discussed, leading to agreement to establish a JIT in two cases.

The analysis shows that, in some cases, a JIT was not established because the proposal for it came too late. The coordination meetings, where the JIJs were proposed, were arranged just before the case was going to be concluded in one of the participating countries. Clearly, when the investigations in a Member State are nearing conclusion, there will be less interest in forming a JIT. A JIT will have greater added value the earlier it is formed in the investigation phase.

In some cases, a JIT was not considered because of past disappointments in judicial cooperation with Member State partners. However, once established, working in a JIT usually builds mutual trust and understanding between practitioners from different jurisdictions.

In one case, a JIT was not created due to the lack of legislative implementation in one Member State. This type of problem should be avoided in the future, when all Member States have implemented the Framework Decision or the 2000 MLA Convention.

The Framework Decision stipulates that each participating country may appoint a leader to the JIT. The JIT leader changes according to the Member State on whose territory the action takes place. When simultaneous actions are taking place in different Member States, there may be several JIT leaders at one time.

## **Solutions**

The results of the study show that awareness of the tool itself and the advantages of using it should be promoted further.

Discussion and common agreement on establishing a JIT as early as possible are essential.

Sharing positive experiences and feedback about JIJs among the Member States should be encouraged. Eurojust National Desks, which are frequently involved in advising and drafting JIT agreements, have an important role to play in developing a positive attitude towards JIJs.

It is clear that successful JIJs need the active support of all parties involved, and should not be established without a shared commitment to their operational efficiency. In the two cases where a JIT was established, cooperation improved and the JIJs brought true added value. Although 80% of drug trafficking coordination meetings involved more than two Member States, JIJs could be considered more often in bilateral cases.

The leadership issue has been resolved by coordinating the actions with the help of Eurojust. Eurojust has helped JIT leaders to coordinate when conducting the actions simultaneously in many countries.

In Eurojust's general drug-trafficking casework, its assistance was often requested to facilitate or accelerate MLA requests. If a JIT had been set up, the Member States in most cases could have shared information and

requested investigative measures directly between the team members without formal LoRs. Facilitation of MLA requests would have been necessary only when addressed to countries outside of the JIT.

**Case  
illustration**

Establishing a JIT first between Member State X and Member State Y and later extending it to Member State Z was essential to operational success when investigating large-scale cocaine trafficking from South America to Europe. The JIT agreement was signed first for six months, but extended later several times, allowing the JIT to work continuously for more than two years. The three jurisdictions exchanged information and evidence without sending MLAs to each other, and met regularly to decide on common strategies. The prosecutors and law enforcement authority from Member State X were present during the hearings of some of the suspects in Member State Y. Mutual understanding and willingness to find optimum solutions for all helped the team to overcome problems. One leader for the JIT was selected from each country. Agreement from all three leaders was needed to decide on allocating funding and other common issues. At operational level, following the legal framework, the leadership was divided, giving to the JIT leaders the power to head the entire JIT when operating in their own countries. Eurojust coordinated the work of the leaders and facilitated an agreement on the strategy to be followed by holding several coordination meetings. Europol was also actively involved in the case. The JIT received funding from Eurojust to cover costs such as interpretation during meetings, translation of documents, transportation and accommodation. The communication between the JIT members was also supported by Eurojust, e.g. by lending secure communication devices for the period of the JIT. The close cooperation in the JIT led to the arrest of approximately 30 suspects in several countries around the world, seizure of more than 1000 kg of cocaine and the recovery of millions of euros in assets.





## 7. Controlled deliveries

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### Introduction

A controlled delivery is a specific form of MLA that is potentially very effective in DT cases. Controlled deliveries are defined as<sup>28</sup>

*"(...) the technique of allowing illicit or suspect consignments of (...) drugs (...) or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences (...)"*.

At European level, two legal provisions are especially relevant. Article 73 of the Convention implementing the Schengen Agreement of 14 June 1985 provides for controlled deliveries of drugs and psychotropic substances. Article 12 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000) states that Member States shall undertake to ensure that controlled deliveries may be permitted in their territories in the framework of criminal investigations into extraditable offences. Furthermore, the new Eurojust Decision (articles 9c and 9d) gives National Members the power to authorise and coordinate controlled deliveries in their Member States.

According to the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), controlled delivery is an investigative technique infrequently regulated by national legislation. Many countries prefer to work with administrative rules, guidelines, etc. An overview of the legal framework for controlled deliveries is provided in a table on the EMCDDA website. Member States differ considerably in their legal requirements for authorisation. Some Member States need details about the criminal investigation in order to assess the proportionality of the measure. A number of Member States ask for details about the type and quantity of drugs. In some cases, permanent surveillance during the delivery is required. Some Member States maintain the right to seize the drugs at any moment.

Controlled delivery was discussed at seven of the 50 drug trafficking coordination meetings under consideration. Five cases were multilateral and two cases were bilateral. Italy was the requesting country in three instances. Germany, France, Lithuania and Slovenia were the other four requesting countries. Germany, France, Spain, Belgium and the Netherlands were the Member States most frequently requested to attend, followed by Italy, Portugal, Greece, Czech Republic, Luxembourg, Latvia, Poland and UK. Third States whose participation was requested were Albania, Colombia and Venezuela.

In two cases, the controlled delivery was successful. Important evidence was gained from these controlled deliveries. In one case, the controlled delivery enabled an OCG to be dismantled. In another, the controlled delivery did not occur, as the suspects were arrested in a third State before the shipment was made. A legal obstacle was encountered in two cases. In one case, wiretaps could not be directly conveyed to Italy since Italy had not implemented the 2000 MLA Convention. In another case, the time needed to

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<sup>28</sup> Article 1 g) of [the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances](#).

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follow the transport to the market exceeded the time allowed by the legal framework.

## **Problems**

Only two successful controlled deliveries occurred in the 50 drug trafficking cases with a coordination meeting. In practice, controlled deliveries are not often agreed between countries. Various factors might hinder the full use of controlled deliveries.

In a number of Member States, a judicial authorisation is needed for the execution of a controlled delivery; in other Member States, the police authorise controlled deliveries. At the international level, this situation can create uncertainty in identifying the appropriate interlocutor.

Because information about the timing and route of the controlled delivery may be uncertain, operations often carry a high risk, and the investment of resources to comply with legal requirements of different jurisdictions may be considerable.

Both tactical and judicial issues were at stake in the selected cases. First, the specific operational details concerning practical implementation of the controlled deliveries were dealt with. Available resources in the requested country determined whether full cooperation was possible, especially when the controlled delivery took place at an unexpected moment or during the weekend. Second, the legislative framework of involved countries needed to be taken into account. For instance, in the Netherlands, postponement of drug seizure is possible, but drugs must be seized after a maximum of three days. In some cases, arrangements were made to place GPS devices in cars used by suspects. Requesting permission from each country on the route of the drug delivery was sometimes cumbersome.

## **Solutions**

At Eurojust, coordination meetings, tactical solutions and answers to questions about legal possibilities concerning controlled deliveries can be found relatively easily, even in complicated cases. Direct contacts between law enforcement authorities of different countries may follow coordination meetings.

If a controlled delivery cannot be carried out, another investigative strategy may be applied, such as following the money trail instead of the drug trail, or using other forms of surveillance.

JITs provide an efficient tool for executing controlled deliveries in countries conducting simultaneous investigations.

The execution of controlled deliveries is a task assigned to national law enforcement bodies, but as mentioned above the procedure for authorisation of controlled deliveries varies by Member State. In some Member States, a prosecutor needs to be involved, while in other Member States, the police force can act independently. Because powers to authorise controlled deliveries have been allocated to different levels and authorities throughout the Member States, a situation arises that could lead to overlap or even miscommunication. These problems may be mitigated but not resolved by the new On Call Coordination facility established by the revised Eurojust Decision, which allows prosecutors from all Member States to have 24/7 access to Eurojust experts when urgent authorisation of controlled

deliveries is needed. A high-level structural solution to this possible recurring issue could be considered, such as establishing a central point for the authorisation of controlled deliveries in each Member State.

To counter problems of admissibility of evidence, Eurojust could facilitate judicial cooperation in controlled deliveries by providing information on different systems and requirements.

**Case illustration** Information was obtained about persons suspected of setting up companies in different countries to produce and trade counterfeit synthetic drugs using false certificates of authenticity. The main target and his accomplices were also suspected of using violence and extortion. A controlled delivery was carried out, which led to arrests. Eurojust held a coordination meeting, as different jurisdictions had arrived at the stage when the findings of separate investigations needed to be exchanged and decisions taken about prosecution. During the coordination meeting at Eurojust, the available evidence was assessed against legislation in different countries, including regulations concerning controlled deliveries. An agreement was reached about transfer of proceedings from France to Germany. Tactical details such as secure destruction of the seized chemicals, admissible evidence of illegal transactions and exchange of evidence were discussed. At national level, the case is ongoing (trial phase). The controlled delivery was an essential part of the case and provided strong evidence.



## 8. Asset recovery

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### Introduction

This section considers the recovery of the proceeds of crime in the DT cases analysed by the project, and examines the role played by Eurojust in assisting the Member States in recovering the assets/property derived from criminal activities in these cases.

Drug traffickers often conceal money in bank accounts in other jurisdictions or convert cash into assets or property to hide their illegal origin. An important element in any coordinated attack on drug trafficking is to ensure that crime does not pay: judicial seizure and confiscation of criminal property are important deterrents. Equally important, seizure and confiscation can help disrupt the activities of OCGs by starving them of the assets with which to finance further criminal activity.

This section considers the process of asset recovery from the perspective of the efforts of Member States to confiscate and repatriate the proceeds from DT that are hidden in other jurisdictions, either within the European Union or in a third State. Proceeds from DT constitute any economic advantage/gain acquired through such an offence (it may consist of any assets/property, such as money in bank accounts, real estate, vehicles, artworks, etc). This section does not deal with the seizure of narcotic drugs or psychotropic substances.

Asset recovery is a complex process, involving identifying, tracing, freezing, confiscating, returning and sharing assets that have been unlawfully acquired.

The European Union has put in place a package of measures to ensure that criminals cannot enjoy their illegally obtained profits and to reduce the damage that criminals cause by shrinking their working capital. In 2001, the Council adopted Framework Decision (FD) 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This Framework Decision provided for the approximation of national legislation on confiscating assets derived from organised crime. Further, the Council adopted FD 2003/577/JHA of 22 July 2003, which allows the execution in the European Union of orders freezing property or evidence, and FD 2006/783/JHA of 6 October 2006, which applies the principle of mutual recognition to confiscation orders. Additionally, FD 2007/845/JHA builds on the informal cooperation taking place in the CARIN network, requiring Member States to set up or designate a national Asset Recovery Office (ARO).

### Problems

Despite measures adopted at EU level, implementation of existing legal instruments and application of the mutual recognition principle to freezing and confiscation orders are still problematic in many Member States. Fuller implementation of these instruments would be needed for efficient confiscation actions and subsequently for successful management of confiscated proceeds of crime (repatriation of assets and asset sharing).

Differences in both substantive and procedural rules in the Member States constitute major obstacles in the investigation, identification, tracing and recovery of assets stemming from cross-border organised criminal

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activities. Further, the identification and tracing of assets require the execution of MLA requests that often touch upon sensitive issues (e.g. access to banking data, interception of communications). Moreover, assets are often hidden in countries outside the European Union that might not share the same level of focus and commitment to retrieving such assets and might not be responsive to requests for legal assistance. Many countries can freeze, but not return, money or assets.

All the problems described above mean that effective coordination and international cooperation are extremely necessary for the successful recovery of proceeds of crime. In the 50 DT coordination meetings considered, eight featured issues related to identification, tracing, freezing, confiscation, return and/or sharing of criminal assets. This statistic suggests (while the statements are not mutually exclusive) that either:

- the Member States refer only a very limited number of DT cases to Eurojust where matters related to confiscation and asset recovery need to be solved, preferring instead to work bilaterally with other countries, or
- insufficient focus is placed on asset recovery by the Member States as an effective tool to deal with DT.

A summary of some of the main problems identified and the support provided by Eurojust is presented below:

- The requesting Member State focussed on the confiscation of the OCG profits that were located abroad, which in itself presented major problems of seizure and repatriation. Eurojust's coordination of the asset recovery process was considered essential for a successful action. A detailed illustration of this case, and of the role played by Eurojust is presented at the end of this section.
- €1,600,000 had been frozen in a bank account in a third State during investigations of DT taking place in a Member State. A final confiscation order was issued, and a decision about ways to transfer/return the confiscated money from the third State to the requesting Member State could not be easily reached. A Eurojust coordination meeting allowed consideration of these matters and agreement to be reached on the return and sharing of confiscated money between the parties.
- An investigation encountered difficulties in the exchange of relevant information needed to identify and trace the assets unlawfully acquired by an OCG and to begin a money laundering investigation. With Eurojust's support through a coordination meeting and after information exchange with the relevant Analysis Work Files at Europol, LoRs to trace the illegal funds laundered in other countries were sent and executed successfully.
- A Eurojust coordination meeting clarified that not only were freezing and confiscation orders needed, but also that legal obstacles to their execution existed. Eurojust provided advice on execution and on how the return of confiscated assets to the requesting Member State could best be accomplished.
- DT proceeds were laundered in several Member States and in third States, which led to considerable practical difficulties in tracing and restraining assets. Eurojust was requested to support the work of several countries in conducting simultaneous searches and seizures

of assets. Eurojust's assistance was also requested in drafting the freezing orders to ensure that the orders were acceptable to both issuing and executing authorities.

- In two other cases, difficulties arose in obtaining information and details about bank accounts of the leaders of the OCG and in identifying their vehicles and properties. Eurojust was requested to assist in facilitating this information, which was a condition precedent to the issue of freezing orders in the jurisdiction in question.

## **Solutions**

As illustrated in the examples above, Eurojust played an important role in facilitating and accelerating MLA requests for executions of freezing and confiscation orders. It assisted the Member States in exchanging information needed for identification and tracing of assets belonging to the OCGs. It provided advice on practical solutions to overcome legal obstacles for the execution of freezing and confiscation orders and encouraged common understanding and cooperation among the authorities concerned. It assisted Member States in drafting freezing orders, taking into consideration the specific requirements of each jurisdiction. In one case, Eurojust successfully assisted a Member State in concluding a bilateral agreement with a third State for disposal of confiscated property and for asset sharing.

As Eurojust receives little feedback from the national authorities as to how the case evolves, and whether confiscation occurs, more assets may have been seized and confiscated by the national authorities than were reported by the project.

## **Case illustration**

In a large money laundering case related to DT and tax evasion, a national criminal investigation started in parallel with an international asset recovery investigation. Priority was given to the confiscation of illegally acquired assets by the OCG as having greater impact than imprisonment. A confiscation strategy was also adopted because of its deterrent effect, as it makes committing crimes less attractive, and because it would deprive the OCG of the financial resources needed to commit organised crimes. Most of the illegal assets were located abroad; a request was sent to a Member State to execute several LoRs: (1) to identify users of local telephone numbers and trace addresses; (2) to check the ownership of certain real estate properties; (3) to check the trade register and hand over relevant documentation; (4) to verify the existence of any other illegally acquired assets; (5) to check several bank accounts of the criminal group; (6) to provide data from tax authorities; (7) to hear witnesses; (8) to seize assets; and (9) to perform house searches, etc. The requesting Member State registered the case at Eurojust and held a coordination meeting with the requested Member State to discuss the state of play of the LoRs and to agree on a coordinated asset recovery process. A simultaneous action day, which was agreed during the coordination meeting, involved house searches, telephone intercepts, and freezing of assets in two Member States. With support from Eurojust, the action day led to arrests of three members of the criminal group, and seizure of all the money in bank accounts, real estate properties, luxury vehicles and other assets belonging to the leader of the OCG (assets estimated at €1,200,000).





## 9. Third States

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**Introduction** Links with third States are particularly relevant in DT cases because, with the exception of domestic cultivation of cannabis or production of synthetic drugs within the European Union, drug trafficking affecting the European Union usually starts in third States where either cultivation or manufacture is located, or which are used as transit routes by OCGs because of the permeability of their frontiers<sup>29</sup>.

Given its structure and its agreements with third States and international judicial cooperation networks, Eurojust has been identified in the Council Drugs Action Plan for 2009-2012 as a responsible party in the action related to the EU focus on *coordinated and joint efforts between the MS and regions most highly exposed to particular drug production/trafficking phenomena*<sup>30</sup>.

From analysis of the coordination meetings in cases involving third States, three regions have figured as the main areas of drug production and transit:

- the Balkan region and Turkey in connection with the regions of the Golden Triangle and the Golden Crescent in Asia (Turkey, Serbia and FYROM were present in coordination meetings),
- Morocco and West African countries, particularly Nigeria (not present in coordination meetings), and
- Latin America and the Caribbean (Colombia was present in a coordination meeting).

This finding is in line with the Council Conclusions setting EU priorities in the fight against organised crime based on the OCTA 2009 and the ROCTA; the Council states in one of the conclusions that *drug trafficking, especially using the West and Central African Route (including drugs from Latin America and Caribbean), for storage and transit, but also processing, trading and/or production* should be one of the priorities of the European Union in the fight against organised crime for 2009/2010. This priority was adopted by Eurojust in Decisions taken in 2009.

The involvement of third States in Eurojust cases has been variable. Some Member States are more likely to involve third States as soon as the third State is identified in the national investigation, while other Member States are more reluctant to do so. Eurojust should play a role in ensuring consistency in this approach. Consideration of the Eurojust cases under review shows the following :

- Cases opened towards third States in general casework: 20 cases have been opened towards third States; with one exception, all these cases are multilateral, frequently involving a large number of Member States<sup>31</sup>. This suggests that whenever third States are involved in a coordination meeting, the profile of the OCG subject to investigation is extremely high. On two occasions, the case was extended to the third State involved as a result of the information exchanged during the coordination meeting, and the representatives from those third States were invited to a follow-up coordination meeting.

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<sup>29</sup> See EMCDDA Annual Report 2011 and UNODC World Drug Report 2011 for the situation of the drugs market in Europe and worldwide.

<sup>30</sup> Objective 13 (supply reduction): *respond rapidly and effectively at operational, policy and political levels to emerging threats (e.g. emerging drugs, new routes)*.

<sup>31</sup> The exception is a case related to execution of a confiscation order, and thus not related to the investigative phase of the proceedings.

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- Cases with participation of third States in coordination meetings: in 13 of those cases, a coordination meeting was held with participation of a third State: Norway attended six meetings; Turkey three; Switzerland two; and FYROM, Iceland, Serbia, Colombia and the USA each attended one meeting<sup>32</sup>.
  - Cases not opened towards third States in which the investigation led to the identification of third States where the criminal activities were being conducted: in the majority of the cases subject to analysis, the third State from where the illicit substances originated or which served as transit areas have been identified, but only on some occasions have third States then been involved. In some instances, pending LoRs or extradition requests with third States where problems and obstacles were identified have not justified opening the case towards them. On one occasion, the contacts with the third State had been smoothly made at police level, but at judicial level, the contacts were not maintained.

## **Problems and solutions**

From consideration of Eurojust's coordination meetings involving third States, the following comments can be made:

### Exchange of information and coordination

The goal of most coordination meetings with attendance by third States was to exchange information regarding investigations and prosecutions carried out in the Member States, and, in particular:

- To provide the counterparts from third States with information related to the criminal activities conducted by the investigated OCG in the territory of those third States and to raise awareness of the criminal activities. On some occasions, the lack of effective and efficient communication channels with competent authorities in third States to follow the thread of OCGs in those third States has sometimes been identified as a recurring obstacle; coordination meetings have provided an ideal opportunity to convey the relevant information. This obstacle has been particularly serious when high-ranking members of the OCGs were based in third States and the cooperation of these third States was regarded as essential for dismantling the OCGs. On at least three occasions, the exchange of information was the basis for the institution of a criminal investigation in the third State, and on one occasion led to the leaders of the OCG being arrested.
- To exchange information on the national investigations conducted in the involved Member and third States. This situation affected mainly the cases involving Norway and, to a lesser extent, Turkey; the objectives were to exchange information on the national proceedings, but no conflicts of jurisdiction were identified apart from the case referred to in the following paragraph.
- To seek assistance and coordination for the execution of LoRs in the third State involved (Colombia) and at the same time to exchange information on the national investigations conducted in the Member States and in the third State. This particular case is one of the most relevant examples of exchange of information about both national investigations and the execution of measures requested in LoRs. Exchange of information allowed an agreement to be reached about operational issues, leading to the arrest of the suspects, the establishment of a communication channel for exchanging information in

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<sup>32</sup> Ukraine was invited once but did not attend.

real time regarding intercepts, and the execution of judicial requests for assistance in the third State in a coordinated way.

### Conflicts of jurisdiction

The UN Convention against transnational organised crime foresees in art. 21 the possibility for States Parties to transfer criminal proceedings when this transfer is considered to be in the interest of the proper administration of justice. Similarly, the Council of Europe Convention on the transfer of proceedings in criminal matters has been ratified by several European third States in close proximity to the European Union<sup>33</sup>.

Nevertheless, the comparatively low level of interaction with third States (apart from Norway) has impeded a thorough exchange of information which could lead to the proper identification of parallel investigations at coordination meetings attended by third States and which could have fostered proposals for the concentration of proceedings.

In the coordination meetings considered, on only one occasion was a proposal made to concentrate proceedings involving a third State. The case affected a number of Nordic countries, including Norway. All third States involved considered but did not accept the proposal and investigations were continued separately, but with awareness of the other proceedings. The Member State proposing the concentration considered that the outcome was not wholly satisfactory due to the fragmentation of investigations and impossibility to reach the higher echelons of the OCG.

### Letters rogatory

The main issues regarding the execution of LoRs issued towards third States are the following:

- Obstacles and difficulties in execution, such as undue delays or requests to comply with additional formal procedures,
- Difficulties contacting the competent executing authorities or the central authority of the third State to gather information regarding the state of play of the request, and
- Wrong identification of the authority competent to receive and route the requests (in some third States, the central authorities competent for the execution of requests vary, depending on the international instrument employed).

Most of the difficulties relate to LoRs issued for the purpose of financial investigations in off-shore jurisdictions where proceeds of crime are allegedly invested.

### Extradition

The main extradition problem related to third States that has been raised in coordination meetings is the impossibility for many third States, unless otherwise stated in bilateral treaties, to extradite their nationals. In one case, this legal obstacle was an impediment to enforceability of decisions taken by Member States (both extradition requests for the purpose of prosecution and requests for the

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<sup>33</sup> Albania, Bosnia and Herzegovina, FYROM, Liechtenstein, Moldova, Montenegro, Serbia, Turkey, Ukraine.

purpose of execution of penalties). Enforcing sentences rendered *in absentia* has also been identified as an obstacle to surrender of the requested persons under the jurisdiction of the third State requested.

An extradition issue was the subject of discussion with the third State in one coordination meeting. An agreement was reached to investigate and prosecute the targets (who could not be extradited for the purpose of prosecution as requested by a Member State) in compliance with the principle of *aut dedere, aut iudicare*. The agreement also provided for the execution of a sentence issued in another Member State as foreseen in the international instruments<sup>34</sup> ratified by the third State (Serbia).

Extradition issues involving third States arose in other two coordination meetings but without their attendance (Morocco and Dubai); in one of these cases, obstacles and difficulties in the extradition process had been raised during the meeting.

### Joint investigation teams

International instruments applicable in this field, such as the UN Convention against illicit traffic in narcotics (art. 9.1 c) and the UN Convention against transnational organized crime (art. 19), foresee the possibility of forming JITs. These instruments have been ratified by most third States<sup>35</sup> which are likely partners in JITs in the fight against DT (regardless of the existence of the necessary implementing instruments). An initiative at ministerial level in Latin America has been introduced to create JIT agreements among different third States following the EU model.

Although no EU framework decision provides for setting up a JIT between a Member State and a third State other than by a bilateral treaty<sup>36</sup>, formation of a JIT was proposed and considered in two cases involving Norway. Both involved investigations into OCGs operating in the Nordic countries. In one of the cases, a proposal to set up a JIT was made by one of the Member States involved. This proposal was extended to Norway. Although no national legislation is in force in Norway regarding JITs, practical arrangements have permitted the participation of Norway in some JITs affecting Nordic countries. Nevertheless, the proposal was not adopted. Norway considered that the difference in the stage of the proceedings there and the lack of manpower were reasons against involvement in the JIT. In the other case, the proposal to form a JIT was accepted by all at the coordination meeting, including Norway. However, no further information about the outcome of the case is available. Norway's relationship with Member States is qualitatively different than the relationship between most other third States and Member States. This special relationship allowed such a proposal to be considered.

### Controlled deliveries

Controlled deliveries constitute a particularly relevant special investigative technique in DT cases involving third States where cultivation, production or manufacture are located or which are used as transit routes. Most of these third States have signed and ratified the UN Convention against illicit traffic in narcotic drugs and the UN

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<sup>34</sup> Art. 6.9 of UN Convention against illicit traffic in narcotic drugs and psychotropic substances, and arts. 16.10 and 16.12 of UN Convention against transnational organized crime.

<sup>35</sup> For status of ratifications, see: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en) and [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en).

<sup>36</sup> There are bilateral cooperation agreements in criminal matters that foresee the possibility of setting up JITs.

Convention against transnational organized crime, both of which foresee the possibility to adopt measures to allow controlled deliveries when deemed appropriate (arts. 11 and 20, respectively).

This particular topic was addressed during one coordination meeting attended by a competent national authority from a third State. The competent national authority from the source country (Colombia) reached an agreement with the national authorities from the Member States involved to conduct a controlled delivery with the assistance of an undercover agent. The participation of foreign undercover agents in criminal investigations and operations involving controlled deliveries is a practice with which Colombia is familiar<sup>37</sup>. For operational reasons, proceeding with the agreed controlled delivery was not possible.

In other cases, the third States acting as source or transit areas were identified and in some cases information regarding a particular shipment or consignment being sent by the OCG to Europe was obtained, but a controlled delivery was not taken forward operationally and those third States were not contacted. In a particular case involving Russia, the authorities of the Member State involved had frequent contacts with the Russian authorities in order to conduct a controlled delivery. Premature arrests could have been avoided by Russian attendance at Eurojust's coordination meeting.

#### Asset recovery

Raising awareness about the need to foster the exchange of information with third States where the OCG may have assets and proceeds of crime in order to conduct financial investigations in those States is extremely important. A spontaneous exchange of information can be considered a basis for the institution of civil confiscation proceedings by some third States.

Only one case involving third States was devoted to asset recovery issues. The goal of the coordination meeting was to break the deadlock in the execution of a confiscation order on a frozen account in Switzerland<sup>38</sup>. Following the meeting, and enforcing the provisions foreseen in one of the applicable national laws, the Swiss authorities decided to share the confiscated account and transferred 50% of the amount to the requesting Member State.

No other specific issues have been raised in coordination meetings attended by a third State regarding assets to be seized or confiscated in that third State.

#### **Final remarks**

An important conclusion to be drawn from this assessment is the infrequent participation of third States in coordination meetings, despite the fact that third States are normally part of the production, transport and delivery process in DT cases. Awareness should be raised regarding the need to involve third States more frequently in coordination meetings, in order to fight more efficiently and effectively against DT OCGs through a more comprehensive perception of the threat posed by OCGs. Third States from the three major drug source or transit regions, whose presence might provide added value in terms of widening the scope of the case, have been infrequently present at coordination meetings. Turkey was the third State from a priority route which attended most coordination meetings (3); FYROM, Serbia

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<sup>37</sup> Particularly in operations with the USA.

<sup>38</sup> One case assessed was devoted to issues related to execution of a sentence rather than the investigative phase of the proceedings.

and Colombia each attended one coordination meeting. National authorities from Morocco were invited to one coordination meeting, but did not attend.

The reasons for not involving third States in coordination meetings are varied. They include lack of trust, perceptions of the vulnerability and permeability of some third State administrations to the immense power of corruption of criminals dealing with drugs (such a case was identified in one coordination meeting), and data protection issues. These circumstances can lead Member States and Eurojust to discourage involving third States, but arguments for and against the decision need to be carefully balanced, with analysis of all the circumstances on a case-by-case basis.

Contacts among law enforcement agencies/bodies of Member States and third States are more frequent than those at judicial level; Eurojust has an important role to play in ensuring that appropriate judicial contacts are maintained through the stages of a case. This is linked to fostering the spontaneous exchange of information which constitutes one of the most relevant coordination instruments for Member States and third States. Coordination meetings provide a secure and effective venue for promoting this exchange.

Case analysis also indicates that Eurojust has little involvement in controlled deliveries involving third States. Their use must be evaluated extremely carefully in light of the risks involved, but the tool is nevertheless a particularly suitable investigation technique in the fight against DT. Hundreds of shipments with EU destinations are intercepted in third States every year, and no action is taken to carry out controlled deliveries due to lack of contacts with third State partners. Eurojust should facilitate contacts between Member States and third States to promote this technique.

Making full use of existing Eurojust contact points in third States is an important means of facilitating the involvement of competent national authorities; their participation in coordination meetings can be arranged via these contact points<sup>39</sup>. Action is also needed to ensure that Eurojust's requests for nomination of contact points in those third States considered as particularly relevant to drug cultivation, production and/or transportation (e.g., Morocco, Colombia, Mexico, Golden Crescent and Golden Triangle regions<sup>40</sup>) are responded to promptly. The current list of Eurojust contact points needs revision to include these key third States<sup>41</sup>.

Similar considerations apply as regards the Ibero-American Network for International Legal Cooperation (IberRed); the Memorandum of Understanding signed with this network has provided the basis for contacts by which valuable information can be provided. So far, 36 consultations have been channelled via the central contact point for the Memorandum of Understanding at Eurojust.

Involvement and interaction with EU liaison magistrates in third States is highly advisable and their participation in coordination meetings should also be considered<sup>42</sup>, especially when the competent authorities from the third States cannot attend. The added value of the participation of liaison magistrates in third States is their expertise in the national legal systems of their places of secondment as well as

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<sup>39</sup> Contact point for Turkey has assisted successfully in the identification of competent national authorities to be invited to coordination meetings.

<sup>40</sup> Of the Golden Triangle region countries, Thailand has designated a contact point.

<sup>41</sup> Current list as of 31/01/2012: Albania, Argentina, Bosnia and Herzegovina, Brazil, Cape Verde, Croatia, Canada, Egypt, FYROM, Iceland, India, Israel, Japan, Kazakhstan, Korea, Liechtenstein, Moldova, Mongolia, Montenegro, Norway, Russian Federation, Serbia, Singapore, Switzerland, Thailand, Turkey, Ukraine and USA.

<sup>42</sup> In fact, in one French case, the French liaison magistrate to Morocco attended a coordination meeting, and in an Italian case, the Italian liaison officer in Bogotá attended a coordination meeting.

their relationships with competent authorities and central authorities in their places of secondment with whom they can liaise.<sup>43</sup>.

In order to agree upon a common EU approach to threats from third States, Eurojust can play a fundamental role by bringing together judicial practitioners from Member States; such was the case in a meeting devoted to particular OCGs from existing Nigerian DT groups operating in the European Union.

### **Case illustration**

With the support of Colombian authorities, a complex transnational network active in the trafficking of cocaine and heroin using different routes from Peru, Argentina and Colombia via Nigeria and Turkey to several Member States was uncovered. After disruption of a large part of the group, the criminal activity continued and the traffic route was modified, involving mainly Colombia, the Netherlands and Italy. At this point, the case was referred to Eurojust with the following objectives: (1) agreeing on a common strategy for the investigations, (2) clarifying the links between the OCG and Colombia, the origin country for the drugs, and (3) coordinating controlled deliveries and other actions. Eurojust's assistance was requested to set up a coordination meeting to which Colombia, one of the main transit countries for cocaine coming from South America to Europe, was invited. Europol's Analysis Work File (AWF) COLA actively participated by providing analysis reports. Colombian officials provided insight into the links of Nigerian targets with Colombian traffickers, the relationship with other South American countries and the existence of a two-way route, in which cocaine was exchanged for Ecstasy. The leaders of the OCG were Nigerian nationals, some of them resident in Italy and some of them in African States, the Netherlands, Colombia and Turkey. The couriers were either Africans or Europeans. Money laundering activities of the OCG were also detected. Member State authorities agreed to use an undercover informant to organise controlled deliveries on the Colombia-the Netherlands-Italy route. The objectives of the case were reached successfully, a large number of arrests were made and the OCG was dismantled. The secondary objectives of the case were to pave the way for improved strategic cooperation between the European Union and Colombia with regard to operational and legal aspects of international investigations and prosecutions. Questions regarding the interception of telecommunications, exchange of investigative information, documentary evidence in the form of laboratory analysis of seized drugs, transfer of seized objects, extradition and surrender and asset recovery were clarified.

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<sup>43</sup> In this regard, the Council Drugs Action Plan for 2009-2012 identifies Eurojust as one of the responsible parties to make "more systematic use of Member State liaison officers and liaison magistrates, where appropriate, in third countries for the exchange of information and intelligence". Objective 11 (supply reduction): *enhance effective law enforcement cooperation in the EU to counter drug production and trafficking.*





## 10. Conclusions

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The following conclusions bring together the analysis of Eurojust's case and coordination work in this report and the input from participants at the strategic seminar held in Krakow on 5 and 6 October 2011. The focus is on how to improve the coordination of judicial and law enforcement responses to cross-border drug trafficking from Eurojust's practitioner viewpoint.

### **Eurojust's support in general**

- *Case follow-up*: In half of the cases analysed in this report, the outcome of a case at national level (in terms of arrests, seizures, convictions, etc) is unknown. In a lower, but still significant, number of cases, Eurojust is not informed about the follow-up at national level of the decisions taken during the coordination meetings. One possible explanation for this lack of feedback is that many issues are resolved during the coordination meeting and Eurojust's continued assistance is thus no longer necessary. In such cases, the follow-up to coordination meeting conclusions is dealt with at bilateral level. In more complex cases, where coordination was to continue beyond the meeting, a follow-up by National Desks helped ensure that issues arising during a day of action were managed expeditiously. A balance clearly needs to be struck between the need for feedback (to enhance Eurojust's usefulness in ensuring cooperation and coordination) and overburdening practitioners with reporting duties. Informal contact between the National Desks and national authorities on a case-by-case basis may suffice.
- *Videoconferences and telephone conferences*: Practitioners advocate a more frequent use of these tools to make best use of scarce judicial and law enforcement resources. However, practitioners recognise that these tools may have limitations and might not be appropriate for complex cases.

### **Exchange of information**

- *Preliminary analysis* is a key to a successful coordination meeting, a tool for triggering parallel investigations and a basis for issuing MLA requests to acquire and use information in proceedings:
  - *Europol* is involved in one-fifth of Eurojust's coordination meetings, but its analytical contribution in constructing the criminal investigative picture should be more proactively pursued as providing the basis for coordination efforts and the opening of parallel investigations where appropriate. If a coordination meeting is prepared on the basis of an earlier operational meeting among investigators at Europol, a clearer picture can be presented during the coordination meeting, allowing the participants to focus on the judicial aspects of the case.
  - A preliminary *analysis* of the state of play of judicial cooperation represents a good starting point for the discussion and strategy formulation during the meeting.
  - *Article 13*: the proper implementation of article 13 of the Eurojust Decision (including the obligation for Member States to notify Eurojust of serious cross-

border cases) should improve the ability to establish links between criminal proceedings on the same targets and to coordinate responses.

- *List of contact points*: the identification of contact points per country on both judicial and police level facilitates the rapid exchange of information and resolution of issues.
- *Spontaneous exchange of information*: promoting the use of article 18.4 of the UNTOC Convention as the fastest way to exchange preliminary investigative results; this can then be the subject of LoRs if specific elements need to be acquired formally in the national proceedings.
- *Secure channels* should be made available to all practitioners involved in a judicial coordination case for the fast transmission of operational information, LoRs, amendments to draft EAWs, etc.
- *Confidentiality of the information exchanged*: some practitioners raised concerns about access by defendants and their lawyers. Differing practices and requirements in relation to disclosure of information to suspects and defendants should be clarified at the beginning of coordination meetings. These requirements should not normally affect the exchange of information between law enforcement and judicial authorities in the investigation phase. Use could be made of national provisions allowing a delayed disclosure of investigative proceedings when they could harm other proceedings.

## **Coordination**

- *Preparatory meetings (Level II meetings)*: these meetings are organised internally at Eurojust among the representatives of the National Desks of the countries involved in a case. They are a useful preparatory phase that allows later consideration of issues at a coordination meeting to be properly focussed. In some cases, these meetings may even make travel of investigators and prosecutors from Member States to Eurojust unnecessary.
- *Coordination meetings (Level III meetings)*: this type of meeting is one of the main tools used by Eurojust to ensure cooperation and coordination among the national authorities involved in a case.
  - *Feedback from participants*: Practitioners who have participated in one or more coordination meetings have appreciated the opportunity to meet with their colleagues, to exchange information, to discuss judicial cooperation problems and to find solutions with the assistance of Eurojust's representatives and expert interpretation facilities. Experience is generally positive as problems can be solved in one coordination meeting, and subsequent contact is made easier. In complex cases, the possibility of having more than one meeting with the national authorities involved ensures continuity in coordination actions. In this sense, a series of coordination meetings to some extent mirrors the context in which a JIT works.
  - *Results*: one of the keys to the success of coordination meetings is their flexibility in finding practical solutions to working with different judicial systems and legislation. However, different opinions exist on the use of findings and the nature of the agreements reached during coordination

meetings. Some practitioners value the informality of these meetings as opportunities to freely exchange information and ideas. With a clearer picture of the case at European level, they can focus on retrieving formally what is needed for their proceedings. Other practitioners feel that the results of these meetings can be immediately incorporated into their files. The use of the findings and their format should be thus discussed in the beginning of the coordination meeting. A coordinated approach to this topic is currently being considered at Eurojust.

- *Improvements*: National authorities manage a variety of factors which may militate against their taking the cross-border view of a case which is offered by Eurojust. These include financial problems, busy agendas (making it difficult to find a suitable date for a meeting), reluctance to share information, the potential complexity of introducing evidence and suspects from other jurisdictions into the case, and the natural familiarity with domestic procedures. All these factors encourage a focus on the domestic dimensions of a case. The establishment of guidelines on setting up coordination meetings with faster procedures combined with the use of different tools (e.g. videoconferences) might help to reduce these obstacles.
- *Coordination centre* at Eurojust: this recently created tool offers a central point for all parties on the specific day of action, with dedicated telephone contacts/e-mail addresses and persons able to speak the languages needed to distribute and forward any information in real time. This tool is already popular with practitioners and will play an important role in the future.
- *On-Call Coordination (OCC)*: Article 5a of the Eurojust Decision provides for a 24 hour/7 day mechanism to receive and process requests referred to Eurojust in urgent cases at all times. OCC became available in the summer of 2011. Its use is anticipated, at least initially, to be limited to contacts outside normal office hours. It formalises the practice which allows practitioners in Member States to make urgent contact with national representatives at Eurojust in appropriate cases.

## **Conflicts of jurisdiction**

- *Early assessment and identification of the problem*. As mentioned, most DT cases will involve a potential conflict of jurisdiction issue because factually growth, production, transport and distribution normally involve different countries and due to the existing extraterritoriality principles included in national legislations, exercised in different ways by the Member States. The earlier the problem is identified and addressed, the greater the likelihood of reaching consensus.
- *Parallel investigations and common strategy*. Concentration of proceedings is not appropriate in all cases. With early coordination and an agreed strategy about division of tasks, targets, timeframes and crimes, the continuation of autonomous investigations might bring better results. Where this is the better approach, coordination meetings can add value by addressing some problems linked to the decision not to concentrate (lack of overall perspective and possible inadequate penalties, scarce use of the spontaneous exchange of information, lack of direct contacts, risk of jeopardising one investigation with measures taken in another investigation, etc).

- *Concentration of investigations.* Where concentration of proceedings is appropriate, a strategy to address potential difficulties must be in place. These difficulties will vary from case to case but may include, *inter alia*, admissibility of the evidence gathered, identification and management of documents to be transferred, and the transfer of seized property or evidence. The transferring Member State must be in a position to provide proactive assistance to the receiving Member State, so that the transfer is conducted for the better administration of justice. A major benefit of concentrating investigations is that concentration provides the trial court with a more comprehensive picture of the criminal network, which may allow the upper echelons of the OCG to be tried in one venue, and allows the court to administer justice on a more informed basis. The decision to concentrate proceedings is not straightforward, and needs to be taken into consideration bearing in mind the full exchange of information and contact between participants that a coordination meeting can offer.
- *A common EU procedure to transfer proceedings* could mitigate various problems such as, *inter alia*, differences in the instruments applicable depending on the Member States involved<sup>44</sup>, validity of evidence, the transfer of materials in a structured way, solutions for the measures taken in the Member States transferring jurisdiction, i.e. provisional custody of suspects, freezing orders (taken in own proceedings or upon request from the other jurisdiction involved) or procedures for transfer.
- *Role of Eurojust in decisions on concentration versus separation of proceedings.* Practitioners confirm the important role of Eurojust in helping prevent and resolve conflicts of jurisdiction. Guidelines could be further developed for the issuance of Eurojust's opinions in this area under article 7(2) of the Eurojust Decision. Practitioners differ in their opinions about whether a need exists for Eurojust to issue binding decisions.
- *Training of practitioners.* Raising awareness of the international aspect and motivating national authorities to encourage an international approach to their prosecutions are very important policy steps. This training should cover recurrent issues in judicial cooperation in criminal matters; the principal modes of cooperation and how to make appropriate use of EU resources such as Eurojust and the EJN could be dealt with by a manual.
- *Common rules on new psychoactive substances* could avoid emergence of safe havens and the risk of a negative conflict of jurisdiction when delays are encountered in penalising substances in the different Member States. Safe havens could be avoided by strengthening the existing mechanism, Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances, which is currently under revision by the Commission. This FD intends to create a mechanism for rapid exchange of information on new psychoactive substances and provides for an assessment of the risk associated with these new substances in order to permit control measures<sup>45</sup>.

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<sup>44</sup> As stated in the report, only 13 Member States have ratified the 1972 CoE Convention on the transfer of proceedings in criminal matters.

<sup>45</sup> See the EMCDDA report "Responding to new psychoactive substances" of 2011 for the current situation of these substances in Europe. According to the EMCDDA, the new substances are included in national lists of controlled drugs in the Member States in different ways and at differing speeds, a circumstance that is considered an issue for a harmonised drug control policy.

## MLA requests and EAWs

- *Evaluation of judicial cooperation via Eurojust*: Eurojust is regularly consulted when the execution of MLA requests is critical for the outcome of a case. Eurojust should consider the development of an evaluation tool with a view to drawing conclusions which can improve performance. Eurojust has similar experience in assisting with the execution of European Arrest Warrants upon which practical guidance could be formulated.
- *Common definitions* of “organised crime” are needed to focus on large-scale cross-border drug trafficking cases, but are still lacking at national level due to the differences in the implementation of the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.
- *Controlled drugs*: in spite of the EU and international instruments aimed at creating a coherent framework for controlling drugs, discrepancies persist at national level. For instance, criminalisation and control of certain substances (e.g. “new psychoactive substances” or anabolic substances) vary greatly across the Member States.
- *Common understanding of legal terms*: a common lexicon among practitioners is needed to avoid misunderstandings. Some technical terms are particularly prone to causing confusion, and may lead to requested measures not being executed (e.g. the difference between the term “accused” and the term “suspect” in the EAW context). To this end, appropriate training initiatives aimed at the key players and focussing on the most common terminology pitfalls need to be further enhanced.
- *Availability of resources*: Cross-border investigations in drug trafficking cases are expensive. Resources might not be available to the same extent across the Member States. For this reason, promotion of the priorities concerning drug-related crimes in line with the decisions agreed upon by the Member States during the EU policy cycle would be desirable.

## JITs

- *Awareness* of JITs as a tool and the advantages of its use must be promoted further in Eurojust cases. JITs may bring particular benefits to multilateral DT cases where coordinated work over time is essential.
- Discussion should take place about establishing a JIT at *as early a stage* of investigation as possible and when there is sufficient time to prepare for it. Eurojust has an important facilitating role in this process.
- Positive experiences and *best practices* related to working in JITs must be shared. The National Desks could take an active role in developing a positive attitude towards JITs. A monitoring instrument could be created with regard to the results of the JITs and the relevant jurisprudence in the Member States. The location of the JITs Network Secretariat at Eurojust should become the channel for this process.
- The *leadership* issue, which may arise when working in a JIT, can be solved by coordinating actions via Eurojust. Multilateral JITs may be difficult to lead. Eurojust has helped JITs to take into consideration all aspects (including judicial) when conducting actions simultaneously in many countries.

- *Flexibility* is important when cooperating in JITs. Initially, JITs were seen as unduly bureaucratic in both formation and action and this perception discouraged their use. While this perception has changed (Eurojust supported 37 JITs between October 2010 and October 2011), flexibility should be maintained in the operation of the JIT. Not all cross-border investigations require a JIT. Similar results may sometimes be achieved by using more agile tools, such as coordination meetings. A preliminary evaluation of potential benefits of the one or the other coordination instrument is thus advisable.
- JITs are vital tools for exchanging information and evidence in cross-border drug trafficking cases, but they are also expensive. The need for more funding was mentioned in the workshops in Krakow. Although Eurojust currently evaluates and administers JIT funding, the sum is limited both in terms of time (2013) and amount (2.3m euros).

### **Asset recovery**

- International asset recovery depends on a *timely and close collaboration* between the requesting and requested jurisdictions. Once illegally acquired assets are transferred and/or hidden abroad, recovery can be very difficult and requires concerted action.
- *Eurojust*, with its growing number of cooperation agreements and contact points, should play a *greater role in facilitating a successful asset recovery process*. The results of the project show that in cases where Eurojust has been requested to assist, the outcome is positive. However, the results of the project also show that Eurojust's role in facilitating international cooperation in recovering proceeds from DT is limited. By involving Eurojust in cases requiring international cooperation for the identification, tracing, freezing, seizure and confiscation of proceeds from crime, many problems in making sure that crime does not pay could be resolved.
- Eurojust's immediate practitioner impact in this area is both to facilitate (and accelerate) the execution of MLA requests and also to provide national authorities with *relevant information and advice needed to resolve legal or practical issues*. An added value of Eurojust coordination meetings is to bring together the competent national authorities, Eurojust National Members and representatives from relevant EU partners, so that such problems can be identified and managed at the appropriate stage. In light of this role, participants in a Krakow seminar workshop recommended that Eurojust provide more assistance in asset recovery.
- Accordingly, more asset recovery cases should be referred to Eurojust by Member States and, equally importantly for the effectiveness of cross-border action to be evaluated, more information on the outcome of the cases registered at Eurojust, including whether a confiscation and a return of assets occur, should be provided.
- The results of the project show that freezing and confiscation orders based on Council Framework Decisions 2003/577/JHA and 2007/783/JHA are infrequently used. The fact that these instruments are not widely used in practice requires reflection and possible solutions, including perhaps stronger, more effective EU legislation on confiscation of criminal assets (including their repatriation).

## Controlled deliveries

- Eurojust can facilitate judicial cooperation by providing practical input on dealing with different systems and requirements. Beyond this immediate practitioner role, the Eurojust Decision requires Member States to notify Eurojust of controlled deliveries in certain multilateral cases. The application of this provision should bring together information about DT cases which would be of use to policymakers and allow Eurojust both to provide an overview of the effectiveness of the tool and to coordinate cases from an early stage.
- The Eurojust Decision also provides for National Members to authorise controlled deliveries in certain circumstances and in accordance with national powers. With early referral to Eurojust, the existence of these powers may be useful in operational cases where controlled deliveries deviate from expected routes into different jurisdictions and where immediate assessment and response is required. Establishing central points in each Member State to authorise controlled deliveries may also be considered where these do not already exist.
- In DT cases, an international dimension in a controlled delivery case is almost always present. If this dimension is borne in mind, opportunities will arise to invest resources more effectively in attacking an organisation rather than single instances of drug seizure at national level.

## Third States

- *Participation of third States in coordination meetings* has been limited principally due to lack of trust, difficulties in communicating with counterparts, corruption concerns and data protection issues. Nevertheless, participation of third States should be fostered, given that the DT process, including growth, production, transport and distribution of drugs, almost always involves third States. Eurojust can play a role in raising awareness among practitioners about the need to involve third States, thus building bridges and enhancing contacting mechanisms with them, particularly with those third States identified in this report as key areas. An internal meeting at Eurojust, at which an analysis of possible legal obstacles with third States and an assessment of pros and cons regarding their involvement is discussed, can precede a coordination meeting to which third States are invited. When the case is closed, Eurojust could evaluate the performance of the third State. Subject to data protection considerations, this information could be used by other National Desks at Eurojust whenever that third State is involved in another case. Initiatives coming from third States to cooperate with Eurojust are welcome in the framework provided for in the Eurojust Decision.
- *A common approach to the decision to involve third States in Eurojust cases* should be fostered, as decisions about this involvement have not always been consistent. A distinction between third States nearing accession to the European Union or with similar data protection standards and other States would be useful when building a common approach. Possible third State involvement should be assessed on a case-by-case basis but with consideration of common factors such as fundamental rights, data protection and past experience. Eurojust can play a role by encouraging consistency in approach and build trust toward third States also by use of its contact points.

- *Early contact with competent third State authorities and Eurojust in MLA and extradition requests.* This approach is clearly advisable where the execution is expected to be lengthy and entail complicated measures. Eurojust should be involved, particularly if obstacles or difficulties are likely to arise. For the future, the posting of Eurojust liaison magistrates to certain third States may provide Member States with an important additional resource in combating global crime threats to the European Union.
- *Investigative techniques*, such as controlled deliveries, which may allow the tracking of a DT organisation from its activity in third State sourcing to final Member State retailing of drugs, should be promoted among practitioners. *Spontaneous exchange of information* should also be fostered with a view to instigating criminal proceedings for asset recovery purposes in those source and/or transit States where criminal assets are invested. Legislation on civil confiscation in some third States already provides for international cooperation for the same asset recovery purposes. It should be borne in mind, given Member State practice that some third States may insist upon asset sharing as a condition to proceeding with a national investigation after spontaneous exchange of information with another State.

*JITs* could be similarly important in developing effective third State involvement. However, apart from the agreement with the USA, no EU legal instrument for setting up JITs with third States exists. The possibility of setting up a JIT is included in some bilateral agreements between individual third States and individual Member States. Initiatives to set up JITs are ongoing in the Western Balkans. Given that Community funding of JITs requires that Eurojust be invited to participate, Eurojust could be tasked to develop third State involvement through its contacts, as indicated below.

- *Liaison magistrates, liaison officers, Eurojust contact points and IberRed* are especially useful when liaising with national competent authorities and central authorities in third States. Since communication between judicial authorities has its own particularities and might not always be smooth, Eurojust can assist in enhancing contacts with third States. Efforts should be made with some third States to counter the need to rely merely on individual willingness to cooperate. All available avenues should be explored, including informal networking, and the use of all existing contacting mechanisms should be encouraged. Exploring the existence of other judicial networks with which to liaise could prove to be valuable. Member States with bilateral agreements with a third State could provide assistance to other Member States needing to contact that third State. In key regional areas serving as source or transit countries or safe havens, new Eurojust contact points should be designated. In the future, the posting of Eurojust liaison magistrates to certain third States may be the optimum solution.
- *When the nationality of the requested person is an obstacle to extradition*, the principle of either surrender or prosecute (*aut dedere, aut iudicare*) should apply. Where prosecution – or execution of a sentence – in a third State is to be considered, active steps must be taken to ensure that all relevant material is made available. A Eurojust coordination meeting may provide the appropriate forum where the difficult issues in such a course of action can be fully considered. Where no formal extradition agreement exists, *ad hoc* surrender may be possible when reciprocity applies. However, reciprocity will not be possible with all third States.
- *Assisting third States in strengthening their judicial infrastructure* to fight more efficiently and effectively against crime within their jurisdictions is a fundamental



precondition for international cooperation. *Technical assistance for capacity building* for judges and prosecutors could be coordinated by Eurojust to foster a coherent and consistent EU-wide approach. Technical assistance has so far mainly been focussed on training of law enforcement bodies. EU initiatives to provide training for prosecutors and judges should be encouraged, ensuring continuity and stability. Awareness should be raised about the need to cooperate with third States regarding international relocation of victims/witnesses as foreseen in international instruments and bilateral agreements.

- Eurojust can provide an excellent *forum* by bringing together judicial practitioners from Member States where general issues related to threats from third States affecting at EU level could be addressed in order to reach a common European approach.



## **Appendix I. Action Plan (main features)**

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Sections 3 through 9 of this report describe how Eurojust's intervention in drug trafficking cases has helped to find a solution to some of the most recurrent judicial cooperation challenges.

Although the experience of practitioners with Eurojust's services is generally regarded as positive (as confirmed by the feedback received during the Strategic Meeting on Drug Trafficking in Krakow on 5 and 6 October), this report's conclusions (Section 10) also point to areas for improvement. Some of them can be addressed by Eurojust with recommendations on how to enhance its work with national authorities.

The table in the following page summarises the main features of the Action Plan for 2012 and 2013, which has been developed on the basis of this report, to address some of the key areas for improvement directly related to Eurojust's work. For each identified area, a recommendation for action has been drafted, together with a Key Performance Indicator and a target date to measure the progress.

This Action Plan remains a high-level document, the goal of which is to guide a more detailed planning of activities in each of the identified areas (responsible actors, risks, budget implications etc will be specified at that stage).

At the end of the two-year period, an evaluation will be carried out by comparing the results of the present analysis (covering two years) to an analysis to be conducted for the period 2012-2013.

<b>Areas for improvement</b>	<b>Recommendations</b>	<b>Key Performance Indicators</b>	<b>Target</b>
<b>AREA 1. Coordination meetings</b>	<i>Draft and promote use of good practices for a consistent preparation, conduction and follow-up of coordination meetings.</i>	Collection of good practices. Revised guidelines on coordination meetings (including documentation handling). Outcome of Eurojust's interventions known in 75% of the coordination meeting cases.	June 2012 December 2012  Period 2012-2013
<b>AREA 2. Secure channels</b>	<i>Develop further secure channels for communication between Eurojust, national judicial authorities and Europol.</i>	Secure and user-friendly connections established with key Member State judicial authorities.	December 2013
<b>AREA 3. Europol and third States</b>	<i>Promote, where appropriate, participation of Europol and/or third States in coordination meetings.</i>	Number of coordination meetings attended by Europol and/or third States increased by 10%.	Period 2012-2013
<b>AREA 4. JITs and other coordination tools</b>	<i>Enhance use of JITs, videoconferences (in combination with or instead of coordination meetings) and coordination centres via Eurojust.</i>	Increase by 20% in the use of JITs, videoconferences and coordination centres. Report on JITS results (and relevant jurisprudence) in cases referred to Eurojust.	Period 2012-2013
<b>AREA 5. Conflicts of jurisdiction</b>	<i>Prepare, before coordination meetings, an analysis of possible overlapping of investigations and develop guidelines for Article 7.2 of the Eurojust's decision</i>	Preliminary analysis to be provided before coordination meetings. Guidelines for Article 7.2 of the Eurojust's decision.	Period 2012-2013  Spring 2012
<b>AREA 6. Cross-border asset recovery</b>	<i>Encourage consideration of cross-border asset recovery procedures in cases referred to Eurojust.</i>	Analysis of asset recovery possibilities included in 30% of the coordination meeting agendas.	Period 2012-2013
<b>AREA 7. Controlled deliveries</b>	<i>Provide a practical overview of controlled delivery procedures and competent authorities (in cooperation with EMCDDA and Europol).</i>	Joint report on practical experience with controlled deliveries.	December 2013
<b>AREA 8. Number of coordination cases</b>	<i>Increase ratio between the number of coordination cases vs. simple cooperation cases.</i>	Increase number of coordination cases to one-fourth of total number of cases.	Period 2012-2013

## Appendix II – Methodology

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### Objectives

On 17 February 2011, the College agreed on the following objectives for the project:

1. Identify the main obstacles and difficulties faced in coordination meetings organised by Eurojust in DT cases.
2. Identify the problems and obstacles encountered in the application of existing cooperation mechanisms with third States in the field of DT.
3. Organise a strategic meeting with the participation of specialised prosecutors and investigative judges in the field of DT, find possible solutions to the identified problems and contribute to the exchange of information and good practices.
4. Prepare an action plan for implementing solutions related to problems and obstacles identified and execute the plan.

### Sources and methods

In the first phase of the project, the project team carried out the following activities to achieve these objectives:

- *Quantitative analysis of all drug trafficking cases*: the results of Eurojust's contribution to the OCTA (based on CMS statistical information) were used to determine the basis for analysis (types of drug trafficking cases referred to Eurojust).
- *Selection of cases for in-depth study*: 50 DT cases with a coordination meeting held in the period 1 September 2008-31 August 2010.
- *Collection of available documents*: findings of the meetings, presentations, case evaluation forms, etc.
- *Identification of the main research questions*: 7 research topics dealing with the judicial issues most commonly encountered during coordination meetings.
- *Identification of the related areas of analysis/indicators* (specific problems encountered on the judicial cooperation topic, solutions proposed during coordination meetings, outcome of the coordination meetings, outcome of the cases).
- Preparation of a *standardised case report* to collect the information in a uniform way.
- *Consolidation* of the case reports in one matrix, collecting all results per indicator and area of analysis.
- *Drafting* of the report.

## Appendix III – Staff acknowledgments

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### **Project Team**

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