

IN THE BEGINNING, WAS THE EUROPEAN PUBLIC PROSECUTION OFFICE

ABSTRACT

The new Regulation changed the Eurojust model, transforming it into a European Agency directly dependent on the European Commission and abandoning the initial idea of a common platform of national judicial authorities working together to the common cooperation targets.

The new Regulation created an executive board, centralized the Eurojust management system, reduced the College competencies, and reduced, almost to the inexistence, the institutional references to the National Desks.

The new Regulation created, in parallel, a new type of National Member (NM), who can exist beyond the structure and hierarchy of the national judicial authorities. Therefore, it gives this new type of NM direct powers and procedural competencies to deal with national cases even when they cannot have them under their national law.

The Eurojust Regulation recitals encourage the NM to privilege a European initiative and guidance in the course of the national criminal investigations when this Agency is called to coordinate different cases existing in several countries.

Thus, the new Regulation created the conditions to a coordinated work and a possible future fusion of Eurojust Agency with the European Prosecution.

In the beginning, was the European Public Prosecution Office (EPPO), the EPPO fostered the birth of the European Judicial Network (EJN), and the EJN generated Eurojust, from who the EPPO was, finally created.

EPPO was conceived in the nineties by the then President of the European Parliament, Klaus Hänsch.

It was inspired by the ideas and projects coordinated by Mireille Delmas-Marty in the famous Corpus Juris and it was one of the ten proposals presented by Klaus Hänsch at the inter-parliamentary Conference in April 1996.^{1/2}

¹ Ed. Economica, 1997, Paris.

² **Frédéric Baab**, « LE DOUBLE CONTEXTE DU REGLEMENT INSTITUANT LE PARQUET EUROPEEN », in *Revue de Science Criminelle et de Droit Pénal Comparé* – juillet - septembre, 2108, p. 619.

However, due to the subsequent failure of the European Constitution at that time, there were no political conditions to go forward with that proposal.

Consequently, in the meantime, the European Judicial Network, a less ambitious project started in 1998, to support criminal cooperation at the EU level (Joint Action 98/428 JHA of 29 June 1998 and later replaced by Council Decision 2008/976/JHA, of 16 of December 2008).

The New York terrorist attacks that occurred on 11 September 2001 and some other critical terrorist attacks changed the political will to accelerate judicial cooperation procedures and mechanisms.

Given the EJNI's fluid and uncertain forms of intervention in the cooperation process, it soon became clear that it was essential to move, in parallel, towards a more effective, integrated, and accessible system able to deal promptly with serious and organised crime.³

Therefore, Eurojust was created by the Council Decision 2002/187/JAI.

It was first meant to be a more condensed, specialised, and stable system appropriate to support the criminal judicial cooperation within the space of the EU.

Although the initial idea of creating the EPPO had not been entirely forgotten, Decisions 2003/659 /JAI and 2009/406/JAI successively amended this Council Decision to extend the operative capacity of Eurojust.^{4/ 5}

In 2007, article 86. 9, 1 of the Lisbon Treaty stated, «*In order to combat crimes affecting the financial interests of the Union, the Council (...), may establish a European Public Prosecutor's Office from Eurojust.* »

Finally, the Council Regulation (EU) 2017/1939 of 12 October 2017 established the EPPO.

Almost one year later, the Council and the Parliament approved the Eurojust as a new European agency created by the Regulation (EU) 2018/1727 of 14 November 2018.

In its recital 5, the new Eurojust Regulation explained:

«*As the European Public Prosecutor's Office (EPPO) has been established by means of enhanced cooperation, Council Regulation (EU) 2017/1939 is binding in its entirety and directly applicable only to Member States that participate in enhanced cooperation. Therefore, for those Member States, which do not participate in the EPPO, Eurojust remains fully competent for forms of serious crime listed in Annex I to this Regulation.* »

³ In December 2000, at the initiative of Portugal, what was called Pro Eurojust was instituted, which worked since 2001.

⁴ The **Hague Program (2005)**, referring to Eurojust, proposed: «... Effective combating of cross-border organized and other serious crime and terrorism requires the cooperation and coordination of investigations and, where possible, concentrated prosecutions by Eurojust, in cooperation with Europol. »

⁵ After describing Eurojust's life since its birth, **Martin Zwiers**, alluding to Council Decision 2009/426 / JHA of 16 December 2008, explained that, «The Decision Strengthening Eurojust, has, however, upgraded the competences of the agency compared to the original Eurojust Decision, allowing it to play a more intense role, sometimes bordering on the exercise of executive competences... » - *THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE*, Ed. Intersentia, Cambridge, 2011, p. 266/257.

Moreover, the recital 8 added « (...) *The Members States which do not participate in enhanced cooperation on the establishment of the EPPO may continue to request Eurojust's support in all cases regarding offences affecting the financial interests of the Union. The EPPO and Eurojust should develop close operational cooperation in line with their respective mandates.* »

In summary, this is the interconnected story of both institutions: Eurojust and EPPO.

This brief appointment gives you a broad idea of some of the doubts and perplexities of the European legislator about the pathways and the tools to improve the investigation of serious and organised criminality within the EU.

That is why, whether we like it or not, the destiny of both institutions are intrinsically connected, even if they actually have explicit diverse competencies and targets.

Eurojust is now – after the new Regulation - a European Union Agency designed to support and strengthen the coordination and cooperation between national investigating and prosecuting authorities.

EPPO is a body of the EU responsible for investigating, prosecuting, and bringing to criminal judgment offences affecting the financial interests of the Union.

Each one of them elected a different organisational model.

The first one changed to a model similar to Europol; the second copied the original organisational model of Eurojust collegiality.^{6,7}

Rigorously, Eurojust is not an investigative agency.

Rigorously, it only aims to strengthen the coordination and the cooperation between national judicial authorities leading their own national investigations.

EPPO is a real investigative EU body, with the equivalent competencies of the national judicial authorities committed to the criminal investigation.

2. Until now, we have underlined the different organisational models and legal competencies really endorsed by the articles of both Regulations to those bodies.

However, when we look more closely at the recitals of the Eurojust new Regulation, we can understand that the European legislator has – in fact, it always had – a broader ambition in what concerns the assignments of Eurojust.

Let us look at what the recital 12 of the new Eurojust Regulation really says:

⁶ **Frédéric Baab**, Op. Cit. p. 650.

⁷ **Víctor Moreno Catena**, *FISCALIA EUROPEA Y DERECHOS FUNDAMENTALES* Ed. Tirant Lo Blanch, Valencia, 2014, p.31.

« Eurojust may take a more proactive role in coordinating cases, such as by supporting the national authorities in their investigations and prosecutions. »

Nevertheless, this recital should not be read out of context.

To understand its full meaning, we also need to take into consideration what recital 70 states because its text explains more clearly what should be the real meaning of recital 12.

«When exercising its operational functions in relation to concrete criminal cases, at the request of the competent authorities of Member States or on its own initiative, Eurojust should act either through one or more of the national members or as a College. By acting on its own initiative, Eurojust may take a more proactive role in coordinating cases, such as by supporting the national authorities in their investigations and prosecutions. »

In my opinion, these two recitals go beyond what the Eurojust Regulation effectively states in the articles concerning its competence, but this is the reason why we need to read them attentively.

In those recitals, the Eurojust Regulation is no longer speaking just about the coordination and cooperation of the national investigations.

In fact, both of them encourage the National Members (NM) acting on Eurojust's own initiative, to orientate direct and actively participate in those investigations.

Those recitals suggest that Eurojust should have a productive and active role of guidance in what concerns the more relevant cases that the national authorities decided to refer to it.

As such, the legislator's intention expressed in those recitals goes further than what the articles of the Regulation really states.

These recitals reveal, actually, a new and more ambitious approach to the Eurojust commitments.

They disclose the will of a more proactive reading of the Eurojust competencies: a direct European investigative competence proposal.

Despite some ambiguity expressed in these recitals, we are already talking about a concrete Eurojust investigative activity.

That means to give to the National Members, not only the initiative for opening investigations at a national level but also to improve the Eurojust's own guidance on the cases it can lead.⁸

⁸ To see in this regard **Maria Esther Jordana Santiago**, *EL PROCESO DE INSTITUCIONALIZACIÓN DE EUROJUST Y SU CONTRIBUCIÓN AL DESARROLLO DE UN MODELO DE COOPERACIÓN PENAL DE LA UNIÓN EUROPEA*, Ed. Marcial Pons, Madrid, 2018, p. 208.

That is, by the way, the only reason for what is stated at point 3 of article 2 and in point 2 of article 3 of the Eurojust Regulation on the division and possible conflict of competences between the EPPO and Eurojust.

Actually, if the legislator had not in mind, some direct investigative competences of Eurojust, those two points of the two referred articles should not make any sense.

Nevertheless, at the moment, articles 2 and 3 of the new Regulation, do not give to Eurojust any real and autonomous investigative powers.

Consequently, there should be no possibility of conflict between EPPO investigative activity and the Eurojust tasks related to the coordination of the national or EPPO investigations.

Despite what recital 15 states about the competencies of NM who simultaneously can maintain their quality of national authorities, both bodies - Eurojust and EPPO - have different and not confounded tasks.⁹

Article 2, 1 of the Eurojust Regulation, is definite about its tasks:

«Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime which Eurojust is competent to deal with in accordance with Article 3(1) and (3), where that crime affects two or more Member States, or requires prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities, by Europol, by the EPPO, and by OLAF.»

3. Nevertheless, it is not only there that the new Eurojust Regulation is aimed probably to change the character of the former Eurojust Unit.

In addition, the requirements to be a Eurojust National Member (NM) seem to have been changed.

Under the new Regulation, to be, or not to be, a national authority according to the law of the country is no more a requirement.

On the contrary, the new Regulation gave the Member States an option.

It depends, from now on the will of the State to give – or to maintain – to the NM that status.

Surely, they shall be recruited among judges, prosecutors, or representatives of judiciary authorities, but nowhere is it said that those NM should maintain their previous status when exercising at Eurojust.

The text of recital 15 of the Eurojust Regulation could not be more precise about this subject.

⁹ It was also the **Victor Moreno Catena** opinion, Op. Cit. p.31.

It says, «National members should be granted those powers that allow Eurojust to appropriately achieve its mission. Those powers should include accessing relevant information in national public registers, directly contacting and exchanging information with competent authorities and participating in joint investigation teams. **National members may**, in accordance with their national law, retain the powers which are derived from their capacity as national authorities».

In this recital, it is visibly stated that **NM may retain**, and not that **they should maintain** their capacity of national authorities.

It gives the State members the option: to maintain the NM in that status or just provide them with enough powers to accomplish the main tasks attributed to Eurojust.

Actually, this recital better explains the sense of point 4 of article 7 of the Regulation.

*«National members and deputies shall have the status of a prosecutor, a judge or a representative of a judicial authority with competences equivalent to those of a prosecutor or judge under their national law. The Member States shall grant them **at least** the powers referred to in this Regulation in order to be able to fulfil their tasks. »*

In fact, if the status of prosecutor or judge should not be assumed just as a requirement to be nominated NM, how could we understand the second phrase of this point?

*«The Member States shall grant them **at least** the powers referred to in this Regulation in order to be able to fulfil their tasks. »*

What is essential from now under the new Regulation – which can be directly applicable - is that the NM may have, under the national law, adequate competencies to accomplish the tasks attributed to Eurojust.

Both ideas – the emphasis on the investigation's guidance by Eurojust and the focus on the Eurojust specific competencies of the NM – show us the new course wanted towards Eurojust activity.

Eurojust Regulation wants that NM, being they national authorities or not, have the competencies enough to allow the new European Agency to achieve, by itself, its skills.

4. On the other hand, we also shall underline an innovative nuance introduced in the new Regulation about the quality of NM: in its text, the new Regulation talks about Judicial Authorities and not only on National Authorities.

That means a new requirement on the status of the NM.

From now on, only judges, prosecutors, or representatives of Judicial Authorities - whatever it could be - can assume the post of NM for Eurojust.

Consequently, no more Member States can appoint police officers as NM, even if, under their national law, only the Police can direct the criminal investigations and formalise the following indictments.

From now, when an NM is not recruited among judges or prosecutors, he needs to have, at least, the quality of representative of judicial authority.

The reference stays, consequently, in the judicial authority quality of the future NM.

Bearing in mind the new jurisprudence of the CJUE about what can be considered, or not, under the European Law, a judiciary authority – necessarily an independent authority - this new option is likely to create some legal difficulties within the judicial systems of some countries.¹⁰

In summary, I think we can look at these recent changes in the Eurojust new Regulation as if they intend to introduce two new but complementary perspectives on the paths that will be followed by European judicial cooperation in criminal matters.

The first one tries to emphasise the direct – and European – competencies of the NM with regard to the cases submitted to Eurojust.

If the nominating State does not want to give to its NM for Eurojust the quality of national authority, it should at least, empower and allowing him to accomplish the Eurojust leading competences.

That requirement will entail internal difficulties and systemic contradictions.

The second idea concerns the quality of the NM, who should, from now on, be recruited only among judicial authorities.

That is also a consequence of the introduction of mutual recognition instrument's logic within the Eurojust structure.

Moreover, if as a consequence of that nomination for NM, the nominating Member State decides to remove from him his previous quality of national authority, it should, at least, provide that NM with enough powers to allow Eurojust to accomplish its main competencies (article 8, n. 91).

In that case, however, this NM will keep another and a different hat.

If that will happen, the concerned NM will become necessarily a pure European judicial authority, even because the Regulation is directly applicable in the European legal space and it provides all the Eurojust NM with enough powers to accomplish its key missions.

¹⁰ Among others: [Case C-625/19 PPU XD](#) (Swedish Public Prosecutor's Office); [Case C-627/19 PPU ZB](#) (Public Prosecutor, Brussels); [Case C-489/19 PPU NJ](#); [Joined Cases C-508/18 and C-82/19 PPU](#) Minister for Justice and Equality v OG and PI (Public Prosecutor's Office in Lübeck and Zwickau); [Case C-452/16 PPU](#) Openbaar Ministerie v Poltorak; [Case C-477/16 PPU](#) Openbaar Ministerie v Kovalkovas; [Joined Cases C-566/19 PPU and C-626/19 PPU JR](#) and YC (Public Prosecutors' Offices, Lyons and Tours).

Consequently, if some states, as it happens nowadays, continue to withdraw the quality of national authority to their National Members, we will have at Eurojust NM with different hats.

Some of them will continue to be national authorities while others will exercise their tasks at Eurojust, directly as European authorities.

In fact, some national authorities, to which Eurojust NM belong, or from whom they have been recruited, are not even allowed to exercise in their internal quality, several powers stated by Eurojust Regulation in their own country.

I'm referring, for instance, about the competence for issuing or executing mutual legal assistance or mutual recognition instruments, or even order, request or execute investigative measures in urgent cases, that Eurojust Regulation gave them directly (article 8, 3, and 4).

Recital 15 explains these differences quite well.

5. We can, consequently, keep some central ideas from what was said.

First, the new Regulation opted for judicial authorities regarding the mandatory requirements to recruit NM to Eurojust.

That also means a clear option for real judicial cooperation in disfavour of any other conception of criminal investigation when it comes to Eurojust activities like the use of MLA and especially the use of mutual recognition instruments.

Eurojust should be not competent to deal, for instance, with police investigations if they are not under the concrete supervision and guidance of judicial authority.

Only judicial authorities should be in charge of the cases dealt with by Eurojust.

This option means, necessarily, an exclusive preference for independent authorities in a sense given to this concept by the recent jurisprudence of the Court of Justice of the European Union (CJUE).

Second, the new Regulation favours a broader set of competencies that can go beyond the traditional tasks related to the cooperation and coordination activities of the NM.

It aims to give to the NM – and thus to Eurojust - the initiative and the investigative competencies, even if they could be, for the time being, subordinated to the national authorities' control.

Third, the new Regulation created, to transcend national legal barriers, a new figure: a kind of a European National Member who can receive directly from the Regulation the necessary powers to act, when the national law has not given those competencies to them.

This new European National Member has, therefore, a status similar to the (EPPO) European national Prosecutors.

Yet, he is not a national authority under his national law, this new kind of European NM can be directly empowered by article 8, 1, 3, and 4, and, like that, he should act in his own country as a national authority.

That implies an apparent reinforcement of the European dimension of Eurojust to the detriment of its previous multi state-dimension.

In support of this idea, we shall also note the fact that the new procedural rules of Eurojust ignored completely the existence and the organization of the National Desks, which, were, up to now, the cornerstone of its functioning.¹¹

The EU has created the objective and subjective internal conditions to prepare a future and possible fusion between Eurojust and EPPO.¹²

Accordingly, if both institutions could be in the future, entitled with different but concurrent investigative powers, it is not wise to keep those two European bodies separated.

Thus, the original circle of the creative European initiatives to build a real EPPO reached its end.

We do not know, for the moment, if, one day, that could happen or not.

I'm afraid, however, that the current political situation in Europe is not aligned with this vast and somehow voluntarist ambition.

We have assisted recently to the *Brexit* and the exit of Denmark from the EU judicial system.

We could also see dangerous derelictions happening in some other European judicial systems in what regards its independence.

We should not forget that in many historical European democracies, the Prosecution continues to be subordinated to the executive power.

What I have learned during those years at Eurojust is that the building of a common democratic judicial culture in Europe still needs many steps.

¹¹ Until now, National Desks and its participants – National Members, Deputies and Assistants - were seen as representatives of the national authorities within Eurojust. Now on, in the context of the new Agency, after the entry into force of the new Regulation and the new Rules of Procedure, the subjacent idea is to transform them into representatives of the Commission and its Justice Agency (Eurojust) policies and guidelines to the national states authorities. That is why all the Eurojust internal recent texts intentionally want to avoid configure, or even nominate, National Desks as autonomous structures primarily linked to the respective home authorities. That is also, why the Commission is now represented in all the Eurojust governance bodies.

¹² **Maria Esther Jordana Santiago**, op. cit. P.213, 214.

Only working on a daily basis, together – all the national judicial authorities -, we can go ahead and improve the necessary national tools to increase in Europe the rule of law in all Member States.

In this regard, the recent contribution of CJUE jurisprudence, even because confronted with the everyday reality of the mutual recognition requirements in different countries, proved to be much more useful than all the determined Decisions and Regulations stated by the various political and executive bodies of the EU.

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