EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area

Study for the LIBE Committee

EN

2014

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area

STUDY

Abstract

Upon request by the LIBE Committee, this study aims at analysing the current relationship and foreseeable cooperation between several EU agencies and bodies: Europol, Eurojust, the European Anti-Fraud Office, the European Judicial Network and the future European Public Prosecutor's Office. The study reflects on their cooperation regarding the fight against serious transnational crime and the protection of the European Union's financial interests. It also identifies good practices and difficulties and suggests possible ways of improvements.

PE 510.000 EN

DOCUMENT REQUESTED BY THE
COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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LINGUISTIC VERSIONS

Original: EN

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Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

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European Parliament, manuscript completed in November 2014.

This document is available on the Internet at:
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DISCLAIMER

ACKNOWLEDGMENT

The authors would like to express their sincere gratitude to the experts and practitioners whose interviews and/or written contributions considerably enriched this study.

CONTENTS

CONTENTS 3

LIST OF ABBREVIATIONS 5

EXECUTIVE SUMMARY 6

1. INTRODUCTION 8

1.1. Context of the study 8

1.2. Scope, methodology and structure of the study 9

2. INTERAGENCY COOPERATION IN THE FIGHT AGAINST SERIOUS CROSS-BORDER CRIME 11

2.1. Cooperation between Europol and Eurojust 11

2.1.1. Europol and Eurojust are two sisters agencies, both involved in the fight against serious cross-border crime affecting two or more EU Member States 11

2.1.2. Evolution of their cooperation framework 14

2.1.3. State of their cooperation and points of concern 17

2.2. Cooperation between Eurojust and the European Judicial Network 26

2.2.1. The coexistence of a network and an agency in the field of judicial cooperation 26

2.2.2. Evolution of the cooperation framework between Eurojust and the EJN 27

2.2.3. State of play of their cooperation and points of concern 28

3. INTERAGENCY COOPERATION IN THE PROTECTION OF THE UNION'S FINANCIAL INTERESTS 31

3.1. Present cooperation 31

3.1.1. General remarks 31

3.1.2. Cooperation between OLAF and Europol 35

3.1.3. Cooperation between Eurojust and OLAF 38

3.2. The arrival of the EPPO: an uncertain scenario 43

3.2.1. Introduction 43

3.2.2. Numerous uncertainties which impact the EPPO's relations with the other EU agencies and bodies 44

3.2.3. General considerations on the EPPO's relations with the other EU agencies and bodies 48

4. CONCLUSIONS AND RECOMMENDATIONS 57

4.1. Recommendations relating to each bilateral cooperation 57

4.1.1. The fight against serious transnational crime 57

4.1.2. The protection of the EU's financial interests 58

4.2. Cross-cutting recommendations 59

ANNEXES **63**

Annex 1 – Structure of Eurojust 63

Annex 2 – Structure of Europol 64

Annex 3 – Structure of the European Public Prosecutor's Office 65

Annex 4 - List of interviews 66

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AWF	Analysis Working File
CMLR	Common Market Law Review
COSI	Standing Committee on Operational Cooperation on Internal Security
EJN	European Judicial Network
ENCS	Eurojust National Coordination System
EPPO	European Public Prosecutor's Office
EU	European Union
JIT	Joint Investigation Team
JHA	Justice and Home Affairs
MS / MSs	Member State / Member States
MLA	Mutual legal assistance
MTIC	Missing Trader Intra Community
OLAF	European Anti-Fraud Office
PIF	Protection of the EU's Financial Interests
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union

EXECUTIVE SUMMARY

Background and aims of the study

Several EU agencies and bodies coexist within the Area of Freedom, Security and Justice (AFSJ). The present study focuses on the cooperation between Europol, Eurojust, the European Judicial Network (EJN), the European Anti-Fraud Office (OLAF) and the future European Public Prosecutor's Office (EPPO). Departing from a presentation of the legal framework circumscribing interagency relations, this study aims at reviewing the current state of play and foreseeable developments in the relations between the different EU agencies and bodies in order to identify good practices and difficulties and suggest, where possible, ways of improvement.

Introduction

Complementarity, consistency and a good articulation between the different EU agencies and bodies is crucial if the purpose is to establish an AFSJ that has a multidisciplinary approach to crime. A clearer definition of the competences and functions of the respective agencies/bodies has been called for. Overlaps and grey zones are however inevitable, and may even present advantages. The key issue is therefore complementarity, which requires respect for each other's mandate and expertise as well as good communication and coordination in case of an overlap. In that regard, smooth and close cooperation between the EU agencies/bodies is crucial. Although several reasons may complicate their cooperation, it has generally improved over time. However, difficulties remain and are particularly noticeable in the current climate of tensions linked to the negotiations on the proposals for Regulations on Eurojust and Europol and the uncertain scenario with regard to the establishment of an EPPO.

First Part – Interagency cooperation in the fight against serious cross-border crime

In this part we analysed two bilateral relations: the one between Europol and Eurojust and the one between Eurojust and the EJN.

Concerning the former, the need to coordinate law enforcement services and judicial authorities led to the establishment of close links between the two agencies and to the conclusion of a second Cooperation Agreement in 2010. Despite numerous joint initiatives and past success stories, four problems/areas of tension have been identified and analysed: the coordination of judicial authorities, the support of joint investigation teams, the exchange and the analysis of information. Tensions are especially noticeable in the current negotiation context.

Concerning the latter, since the two entities share the common objective to support and strengthen judicial cooperation in cross-border cases, the allocation of cases between them constitutes the main "problematic issue" in their relationship. None of the EU texts provide for criteria, leading to diversity among Member States' practices and differential treatment of similar situations depending, among other factors, on the performance of the EJN in a given Member State.

Second Part – Interagency cooperation in the protection of the Union's financial interests

In this part we analysed the relationship between the EU agencies and bodies active in the field of the protection of the Union's financial interests, namely OLAF, Europol and Eurojust, and also reflected on the likely interagency relations scenario once the EPPO is established. A first step resides in the identification of a common field of action, which basically covers PIF (protection of the EU financial interests) criminal cases having a transnational dimension.

Concerning the current situation, cooperation between Europol and OLAF is regulated by an administrative arrangement currently under review. Its impact is rather limited, and problems arise mainly with regard to information exchange and analysis. The upcoming agreement is expected to bring about significant changes and lead to an enhanced cooperation between the two. In turn, the cooperation between Eurojust and OLAF has been difficult mainly because of the overlap between their mandates and the difficulty in identifying cases of common interest. Recent developments, notably the entry into force of the new OLAF Regulation, seem to offer the possibility to improve this trend.

Concerning the future scenario, whereas everyone agrees that the establishment of the EPPO will affect interagency relations, the forms these take largely depend on the type of EPPO finally set up. The early stage of the negotiations within the Council on the EPPO Regulation impedes a detailed analysis of the likely cooperation between the EPPO and its counterparts. The importance of a coherent inclusion of the EPPO in the AFSJ must in any case be stressed.

Conclusions and recommendations

Whereas a good horizontal relationship between the EU agencies and bodies is crucial to ensure the establishment of a coherent area of criminal justice, complementarity, consistency and good cooperation are not always present. The current negotiation context offers a unique opportunity to clarify some elements and move towards more coherence in this field. Our recommendations thus include not only proposals to improve bilateral relations, but also proposals of a cross-cutting nature, addressing political and operational concerns.

1. INTRODUCTION

1.1. Context of the study

For the time being, there are 9 JHA decentralised agencies: 6 depending from DG Home, namely EUROPOL, CEPOL, FRONTEX, the European Asylum Support Office (EASO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) and the EU Agency for large-scale IT systems (Eu-LISA) and 3 depending from DG Justice, namely Eurojust, the European Union Agency for Fundamental Rights (FRA) and the European Institute for Gender Equality (EIGE). Besides the agencies, some other EU bodies/networks, which do not have the agency status, are to be mentioned, such as the EU Anti-Fraud Office (OLAF), the European judicial network (EJN) or the European judicial training network (EJTN). Others are yet to be established, the main one on its way being the European Public Prosecutor's Office (EPPO).

Complementarity, consistency and a good articulation between all these bodies is crucial if the purpose is to establish a consistent Area of Freedom, Security and Justice (AFSJ) and effectively implement its three components. A good articulation between the EU bodies is also crucial to develop a multidisciplinary approach in the fight against serious cross-border crime.

This need has been repeatedly underlined, particularly by EU institutions[1]. A better delineation or a clearer definition of each EU agency/body's competences and functions has been requested. Overlaps are however inevitable (i.e., grey zones) and may even present advantages. The key issue lies in learning how to manage them in good will and good faith. The key word here must be complementarity, which implies working hand in hand for the realisation of common goals, respect of respective mandates and expertise and good communication and coordination in case of overlap. Establishing such complementarity might prove a difficult task, and this for different reasons:

- The different agencies and bodies have been established at different times, in different contexts and in various decisional frameworks. The current agencies/bodies belong to different generations and are more or less mature, the three oldest being OLAF (ex-UCLAF), Europol and the EJN. Some of them are still under the pressure of figures, still fighting/struggling or feeling they have to fight/struggle to justify their existence and prove their added-value.
- The different agencies and bodies are driven/marked by different philosophies/natures/logics: for instance, OLAF has an EC nature, with real « autonomous »/supranational administrative powers, whereas Europol and Eurojust are still marked by the « intergovernmental third pillar spirit » and constitute « service providers » depending on the final decision taken by national authorities;
- They are also marked by differences in professional cultures, be it administrative, police, or judicial;
- Their structure differs (e.g. very different organisation/structure within Europol and Eurojust);
- The resources/means available to each of them are different. Some agencies/bodies are more powerful than others, including in the field of policy orientation. For

[1] See for instance the negotiations that led to the Stockholm program; see also J. Martin, "*Europol: nécessité, statut, fonctionnement et devenir*", Mémoire en vue de l'obtention du grade de Master en sciences politiques, IEE, 2013-2014, p. 45 ff.

instance, the major role played by Europol in the design of the EU Internal Security Strategy (ISS) and in the EU policy cycle must be mentioned.

- The articulation between the EU agencies/bodies must accommodate the differences between the different national criminal justice systems. These include the different distribution of competences/tasks between the administrative/criminal, police/justice and police/intelligence services. The treaty imposes respect to such differences, with the result that the EU agencies/bodies must be able to adapt to all the concerned systems. Thus, there is a need to remain vague in the definition of mandates/tasks and to safeguard flexibility. Such vagueness might however make more difficult a good articulation and relationship between the bodies concerned.
- The abovementioned difficulties result in a lack of a consistent vision of the EU area of criminal justice, which is somehow to be built/organised a posteriori… The fact that the different EU agencies/bodies are dealt with by different DGs within the Commission (that do not always entertain the best relations) and the silo approach taken by the General Secretariat of the Council[2] clearly do not improve the situation.
- Against this background, the legislative instruments governing each EU agency/body remain quite vague with regard to cooperation with counterparts. Interagency relations are thus mostly left to the EU agencies/bodies themselves.
- Last but not least, the importance of personal relations must be stressed. Sometimes people understand each other and sometimes they do not...

Generally speaking, an improvement in the relations between the EU agencies/bodies has been witnessed, due to the conclusion/revision of bilateral agreements/memorandum of understandings and to the passage of time and the consequent gain of experience. Such improvement is also due to other reasons such as the creation of coordination/monitoring mechanisms and the encouragement of inter-agency cooperation in the JHA field. It has especially taken the form of the JHA contact group and the JHA Heads of Agencies meetings. They annually report to the Standing Committee on operational cooperation on internal security (COSI)[3], notably through a scorecard on cooperation, which is annexed to the annual report.

However, and in spite of a lot of quite positive official declarations, difficulties remain. Identifying them is the main purpose of this study, in order to suggest, where possible, ways of improvement.

1.2. Scope, methodology and structure of the study

As requested by the LIBE Committee, this study will not cover the relations between all EU agencies/bodies, but will instead concentrate on the relations between Europol, Eurojust, EJN, OLAF and the future EPPO.

Space and time constraints impede an exhaustive analysis of the interactions between the different EU agencies and bodies in the context of this study. Firstly, this study will focus on the « internal » aspects of their relationships, while setting aside data protection issues[4]. Their external relations, i.e. their relations with third States and third bodies/organisations

[2] As a result of the division of the ex Directorate 2 devoted to judicial cooperation in civil and criminal matters, police and customs cooperation.
[3] This Standing Committee was set up within the Council by Council decision of 25 February 2010 and meets regularly since March 2010.
[4] Indeed, these are the object of a separate study by P. De Hert and V. Papaconstantinou.

will thus not be covered by this study and will only be accessorily addressed. Secondly, the authors of this study merely aim at highlighting the main points of concern and make some recommendations. Thirdly, assessing interagency relations is quite a difficult task, particularly because public information on the subject is scarce[5] and transparency is often lacking. Thus, interviews proved essential to the purpose of our study (see the list of interviews in Annex 4). Interviews with the representatives of the EU agencies/bodies (notably Eurojust, Europol and OLAF) were of course crucial and considerably enriched our study. However, these interviews clearly showed the current climate of tensions linked to the on-going negotiations of the proposals for Regulations on Eurojust, Europol and the EPPO and to the uncertainties resulting from this state of play. The authors of this study endeavour of course to remain scientific, objective and neutral.

This study will be divided into two main parts:

- the first part (2) will concern the interagency/interbody relations in the fight against serious cross-border crime, with a focus on the Europol-Eurojust relationship (2.1.) and the Eurojust-EJN relationship (2.2.);
- the second part (3) will deal with interagency/interbody relations in the specific PIF (protection of the EU financial interests) domain. The relationship between the different agencies/bodies competent in this field, i.e. OLAF, Europol, Eurojust and the future EPPO, will be examined.

[5] The main documents available are the national reports elaborated in the framework of the 6th round of mutual evaluations (mainly covering the cooperation between Eurojust and the EJN), the EU agencies/bodies' annual reports and the documents presented to COSI, such as the joint Europol and Eurojust reports.

2. INTERAGENCY COOPERATION IN THE FIGHT AGAINST SERIOUS CROSS-BORDER CRIME

2.1. Cooperation between Europol and Eurojust

2.1.1. Europol and Eurojust are two sisters agencies, both involved in the fight against serious cross-border crime affecting two or more EU Member States

According to the TFEU, Europol's mission is to "support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy" (Art. 88 (1) TFEU). Europol was set up to gather police and law enforcement information from national authorities and to provide strategic and/or operational analyses on the basis of this information. It has been compared to a '*mega-search engine*'[6]. It also coordinates law enforcement authorities' actions, and may support operational activities with its mobile office, analysis in real-time of information gathered on actions days, forensic tools, etc.[7]

According to the TFEU, Eurojust's mission is to "support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases" (Art. 85 (1) TFEU). Eurojust is a 'facilitator' of judicial cooperation, which intervenes to smoothen the effective functioning of judicial cooperation instruments (such as the European Arrest Warrant), to resolve legal issues arising in complex cases (such as *ne bis in idem* issues or conflicts of jurisdiction) and/or to stimulate the coordination of judicial authorities[8]. It has been compared to a '*control tower*'[9], whose members will intervene when they notice the need to investigate in a coordinated manner cross-border and/or complex cases.

2.1.1.1. Main differences

a) History: two agencies of different generations

Meeting in Luxembourg in June 1991, the European Council agreed in the creation of a "central European criminal investigation office" to fight serious crime[10]. As a result, the Maastricht Treaty included a provision, according to which Member States should regard police cooperation as a matter of common interest "in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)" [11]. Subsequent negotiations resulted in the signature on 26 July 1995 of a Convention on the establishment of a European Police Office[12]. Europol began operations the 1st July 1999. The disadvantages of the Convention, and in particular the difficulty to amend it rapidly, were soon noticed[13]. The entry into force of the Amsterdam Treaty (ex Art. 30 TEU)

[6] Sénat, *Europol et Eurojust : perspectives d'avenir,* Rapport d'information No. 477, 17 April 2014*,* p. 10.
[7] Europol, 2013 Europol Review, p. 14.
[8] Eurojust, 2013 Annual Report, p. 14.
[9] Sénat, *Europol et Eurojust,* supra note 6, p. 39.
[10] European Council, Presidency conclusions, 28-29 June 1991.
[11] Art. K1 (9).
[12] Council Act of 26 July 1995 drawing up the Europol Convention & Convention on the establishment of a European Police Office (*OJ* C 316, 27 Nov. 1995, p. 1). The Convention only entered into force on 1 October 1998.
[13] House of Lords, EU Committee, *Europol: coordinating the fight against serious and organised crime*, Nov. 2008, p. 11 and f.

provided the legal basis to change the instrument establishing Europol and to extend its mandate[14]. On that basis, Council Decision 2009/371/JHA[15] was adopted and is still in force.

By contrast, the idea of establishing a judicial cooperation unit was first brought up at the European Council meeting of Tampere[16]. In 2000 a provisional judicial cooperation unit was formed under the name of Pro-Eurojust[17]. The 9/11 terrorist attacks served as catalyst, and Council Decision 2002/187/JHA[18] formally established Eurojust. In July 2008, Council Decision 2009/426/JHA[19] amending the 2002 Council Decision was adopted. Its purpose is to enhance the operational capabilities of Eurojust, increase exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and establish relations with partners and third States[20].

Finally, Arts. 85 and 88 TFEU foresee the organisation of the two agencies by means of Regulations, adopted in accordance with the ordinary legislative procedure. In March and July 2013 the Commission put forward the two proposals[21] that are currently under negotiation.

b) Nature and logic: "police v. judicial"

Whereas Europol provides support and coordination to national police officers and other law enforcement services, Eurojust supports and coordinates national investigating and prosecuting authorities. Since theoretically at least their services target different audiences, their activities are driven by different logics and concerns. In general terms, Europol's activities are marked by efficiency/proactiveness and pragmatism, which is characteristic of the law enforcement mentality, whereas Eurojust is marked by formalism and law-compliance, typical of the judicial philosophy.

Mirroring the distinction that is often made at national level between law enforcement and judiciary and their attachment to the Ministry of Interior and the Ministry of Justice respectively, Europol and Eurojust depend of different DGs within the Commission. While Europol is attached to DG Home Affairs, Eurojust is attached to DG Justice.

c) Structure and resources

Europol's structure is hierarchical. The agency is headed by a Director, appointed for a four-year period, and assisted by three Deputy Directors, also appointed for four years. They are notably responsible for the performance of the tasks assigned to Europol.[22] The current director is Robert Wainwright, who was appointed in 2009. The Director has

[14] In particular to facilitate and support the preparation, and to encourage the coordination and carrying out of specific investigative actions by the competent authorities, including operational actions of joint teams (see Art. 30 (2) TEU)
[15] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), *OJ* L 121, 15 May 2009, p. 37.
[16] European Council, *Tampere Conclusions*, Oct.1999, Conclusion No. 46.
[17] Eurojust, *Eurojust News - Eurojust 10th Anniversary*, Issue No. 6, Feb. 2012, p. 1.
[18] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view of reinforcing the fight against serious crime, *OJ* L 63, 6 March 2002, p. 1.
[19] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust (and amending Decision 2002/187/JHA (…), *OJ* L 138, 4 June 2009, p. 14.
[20] Eurojust, *Eurojust news - Eurojust 10th Anniversary*, Issue No. 6, Feb. 2012, pp. 1 – 2.
[21] Commission, Proposal for a regulation of the European Parliament and of the Council on the EU Agency for Law Enforcement Cooperation and Training (Europol), 27 March 2013, COM (2013) 173 final, 109 pages. Commission, Proposal for a regulation of the EP and of the Council on the EU Agency for Criminal Justice Cooperation (Eurojust), 17 July 2013, COM (2013) 535 final, 60 pages.
[22] Art. 38 Europol Council Decision.

extensive powers, for instance he is competent to open Analysis Working Files (AWFs)[23] and to intervene to solve disagreements concerning access to AWFs by liaison officers[24].

By contrast, Eurojust has a collegial structure. The College, composed of the 28 National Members, is responsible for the organisation and operation of Eurojust[25]. The College has important operational powers[26]. The elected President and Vice-presidents exercise their duties on behalf of the College and under its authority. Their functions are detailed in the Rules of Procedure[27] and include the representation of Eurojust, the organisation and presidency of the College's meetings, etc.

Turning now to the two agencies' resources, important differences also exist. Whereas they are both funded by the EU budget, as opposed to Member States' contributions[28], the amounts they receive and the staff they employ are not comparable[29]. Nevertheless, both agencies face the challenge to "do more with less".[30] Their tasks and activities are increasing, because of the new responsibilities allocated to them and/or because of the increased recourse national authorities make to their services, whereas this increase in their workload is not reflected in their respective budgets.

2.1.1.2. Main common features

Both agencies are still marked by an "intergovernmental third pillar spirit". For instance, and in spite of the improvement brought about by Eurojust's 2008 Council Decision, the limited approximation of the standing and powers of Eurojust's National Members is a good example of Eurojust's intergovernmental nature[31].

Neither Europol nor Eurojust are intended to replace national authorities, but rather assist them mainly in transnational cases[32]. Europol has no vocation of being a European FBI and has never received operational powers enabling its members to perform investigative acts on the ground. Similarly, Eurojust has no vocation of becoming a European prosecutor, and cannot directly perform investigative or prosecution acts.

They may both address requests to national authorities but their requests do not bind national authorities. On the one hand, national authorities shall "deal with any request by Europol" and give them "due consideration"[33]. On the other hand, Eurojust, acting through

[23] Art. 16 Europol Council Decision.
[24] Art. 14 (5) b) Europol Council Decision
[25] Art. 28 Eurojust Council Decision (2008).
[26] Art. 7 – requests to national authorities, assistance to them, etc.
[27] *Rules of Procedure of Eurojust*, 2002/C 286/01, *OJ* C 286, 22 Nov. 2002, p. 1.
[28] Europol was funded by Member States' contributions until the change for legal basis and the entry into force of the Council Decision.
[29] Europol's numbers: For 2012 - Budget of 84 million EUR, 800 personnel at headquarters; For 2013 - Budget of 82,5 million EUR, 850 staff members at headquarters, including 160 liaison officers. Budget for 2014: budget of 84,25 million EUR[29].
Eurojust's numbers: For 2012 - Budget 32,9 million EUR, 274 personnel at headquarters (217 staff members); for 2013 - Budget of 32,4 million EUR, 230 Staff members and 65 representatives composing the national desks. Budget for 2014: 32,63 million EUR[29].
[30] J. Mönar, Developing Europol and Eurojust, contribution to the joint CRIM/LIBE Committee Hearing, 19 March 2013, p. 6, available on the Parliament's website.
[31] P. Jeney, *The Future of Eurojust*, study at the request of the LIBE Committee, available here, April 2012, p. 23. D. Bigo, L. Bonelli, D. Chi and C. Olsson, "*Mapping the field of EU Internal Security Agencies*", available here, p. 16: creation of the Eurojust Unit within the Council could be interpreted as an affirmation of the intergovernmental logic in the field of judicial cooperation in criminal matters.
[32] D. Bigo, L. Bonelli, D. Chi and C. Olsson, supra note 31, p. 35.
[33] Art 7 Europol Council Decision

its National Members or as a College[34], can address requests to national authorities. In both cases, if the competent national authorities decide not to comply with the request, they must inform Europol or Eurojust of their decision and state their reasons thereof[35].

Their involvement in specific cases depends of the goodwill of national authorities. The EU agencies remain 'service providers'[36], which can only advertise and offer their support and assistance. National authorities remain the 'masters' of the investigations and/or prosecutions. The two agencies must therefore gain the trust of national authorities and convince them of their added value[37].

2.1.1.3. Strong complementarity of their tasks

Close cooperation between these two agencies is essential in order to assist national authorities in fighting serious crime from the preliminary police investigation phase up to the trial stage. Indeed they both pursue the same objective, but "Eurojust's role is mainly to help prosecute and ensure the judicial follow of police results »[38].

The judicial follow-up of investigations carried out by law enforcement authorities is necessary[39], notably to ensure that the information collected can at a later stage become admissible evidence. Similarly, judicial authorities rely extensively on law enforcement authorities to carry out investigation acts and to gather the information necessary to the formulation of criminal charges.

Judicial co-ordination and co-operation activities are complementary to the criminal analysis and police co-operation activities carried out by Europol, as is well illustrated by the *Skanderberg, Koala* and *Baghdad* operations. In these cases, Europol's criminal analyses allowed the identification of targets and the links among them. On this basis, Eurojust acted in a proactive way by inviting the involved judicial and police authorities to co-ordination meetings. During these meetings, the involved authorities could safely exchange information; identify the best place to prosecute and where to collect evidence. Finally, an action plan was tabled and discussed, which led to the simultaneous execution of European arrest warrants, the retrieval of evidence and the dismantling of cross-border criminal networks[40].

2.1.2. Evolution of their cooperation framework

2.1.2.1. Past and present

The 1995 Europol Convention obviously made no reference to their cooperation since Eurojust was not yet in place. However, the 2002 Eurojust Council Decision contained a

[34] Art. 6 (1) a) (National Members) and Art. 7 (1) a) (College) Eurojust Council Decision (2008).
[35] However, in certain cases they may refer to national security or operational reasons; see Art. 7 (3) Europol Council Decision and Art. 8 Eurojust Council Decision (2008).
[36] M. L. Wade, *Developing a Criminal Justice Area*, study at the request of the LIBE Committee, available here, p. 57.
[37] M. Busuioc and D. Curtin, *The EU Internal Security Strategy, the EU Policy Cycle and the role of (AFSJ) Agencies*, Study at the request of the LIBE Committee, May 2011, available here, p. 20 – biggest challenge from the Member States side – political aspirations are not necessarily reflected in practice, with a strong dissonance between political ambitions and the willingness of national authorities to follow through on these ambitions.
[38] P. Jeney, supra note 31, p. 84.
[39] P. Jeney, supra note 31, p. 14.
[40] House of Lords, *Europol,* supra note 13, p. 126.

provision[41] requiring both agencies to "establish and maintain close cooperation, (…) taking into account the need to avoid duplication of efforts". The elements of such cooperation were to be determined by an agreement to be negotiated by the two parties and approved by the Council. A mirroring provision was then inserted in the Europol Convention through the Third Protocol of 27 Nov. 2003[42].

A first cooperation agreement between Europol and Eurojust was signed in 2004 and bilateral meetings were organised from 2006 onwards. However, because of the limited impact of such arrangements[43], the Council's conclusions adopted in June 2008 urged Europol and Eurojust to prepare amendments to their cooperation agreements by the end of 2008 (dealing especially with exchange of information). A Task Force was then set up to assist the two agencies in this task.

In the meanwhile, two new Council Decisions were adopted: one replacing the 1995 Europol Convention[44] and the other amending the Eurojust 2002 Council decision[45]. They both contain a general provision on their mutual cooperation[46], which slightly differ from the previous texts[47]. These provisions provide the legal bases giving the possibility to each agency to cooperate with its partners and sign agreements to that effect. References to each other can be found in other provisions. For instance, in the 2008 Eurojust Council Decision, Eurojust is invited to give assistance to improve cooperation between competent national authorities "in particular on the basis of Europol's analysis"[48] and Eurojust is also invited to assist Europol, "in particular by providing it with opinions based on analyses carried out by Europol"[49]. Finally a special task is entrusted to the Eurojust National Coordination System (ENCS), which shall facilitate the carrying out of the tasks of Eurojust especially by "maintaining close relations with the Europol National Unit" within each Member State[50]. Similarly, Europol's Council Decision provides that Europol shall inform Eurojust when making a request for the initiation of criminal investigations[51]. The adoption of these two instruments and the provisions contained therein illustrate the will of the EU legislator to strengthen the interactions between the two agencies.

A new cooperation agreement between Europol and Eurojust was negotiated and concluded in 2010, which replaced the former agreement. Its purpose is to establish and maintain close cooperation between the parties, in order to increase their effectiveness in combating serious forms of international crime, which will be achieved through the exchange of operational, strategic and technical information, as well as by the coordination of their activities[52]. Art. 3 provides for regular consultations between the heads of agencies (Director of Europol and President of the College of Eurojust)[53]. Detailed elements of their

[41] Art. 26 Eurojust Council Decision (2002)
[42] Council Act of 27 November 2003 drawing up, on the basis of Art. 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, *OJ* C 2, 06 Jan. 2004, p. 1. Point 21) provides for the amendment of Art. 43 (3) and inserts these elements on cooperation with Eurojust.
[43] D. Bigo, L. Bonelli, D. Chi and C. Olsson, supra note 31, p. 27
[44] Council Decision 2009/371/JHA, supra note 15.
[45] Council Decision 2009/426/JHA, supra note 19.
[46] See respectively Art. 26 of the Eurojust Council Decision as amended in 2008 and Art. 22 of the Europol Decision.
[47] Both provisions provide that insofar as is relevant for the performance of its tasks, Eurojust/Europol may establish and maintain cooperative relations (…) with Europol/Eurojust .
[48] Art. 7 (1) b), Eurojust Council Decision (2008)
[49] Art. 7 (1) f), Eurojust Council Decision (2008)
[50] See in particular Art. 12 (5) d) Eurojust Council Decision (2008). Europol National Unit are organised by Art. 8 of 2009 Europol Council Decision. They shall be the only liaison body between Europol and the competent national authorities.
[51] Art. 7 (2) Europol Council Decision.
[52] Art. 2 Cooperation Agreement between Eurojust and Europol (2010).
[53] Art. 3 Cooperation Agreement between Eurojust and Europol (2010).

general cooperation are set out in Art. 4, and cover for instance the coordination of requests addressed to the national authorities or the conclusion of practical arrangements concerning their attendance to their respective meetings. Art. 6 in turn deals with Joint Investigations Teams (JIT), and provides that the parties shall inform each other of their participation in a JIT at the earliest opportunity. Exchange of information between the two agencies is then addressed. Europol must inform Eurojust on its own motion of its findings in general and strategic analysis. On its own motion or upon request, Europol will provide Eurojust with its analysis when information provided by Eurojust matches information stored in Europol's databases[54]. A parallel obligation is imposed on Eurojust[55]. Both agencies may be associated to the activities of its counterpart: Eurojust to Europol's Analysis Working Files (AWF)[56] and Europol to Eurojust's strategic and coordination meetings[57]. The following chapters cover processing of information, confidentiality, liability and dispute settlement. Art. 22 sets out the parties' obligation to report annually to the Council and the Commission on their cooperation. Besides this formal mechanism, a Steering Committee and a Task force monitor and improve when necessary the implementation of the cooperation agreement.[58]

The analysis of the provisions contained in the Europol and Eurojust Council Decisions reveal that the EU legislator left the agencies a wide margin of manoeuvre to define the modalities of their cooperation. The assessment of this flexibility is different within each agency: whereas Europol is satisfied with the situation, Eurojust would rather have a clearer legal cooperation framework.

2.1.2.2. Future

The two proposals presented by the Commission for two Regulations based respectively on Art. 85 TFEU (Eurojust) and Art. 88 TFEU (Europol) represent a change in the approach towards cooperation between the two agencies. Both texts are indeed more detailed in that regard, establishing a more precise framework for their cooperation: besides a general provision dealing with cooperation with their partners[59], a specific Art. deals with Europol-Eurojust cooperation[60]. These provisions mainly concern access to the information processed and stored by the other agency, as well as information exchange (see infra). Their impact should not be under-estimated.

If compared with the instruments currently in force, the increase and/or the more detailed provisions dealing with the other agency is to be noted. On the one hand, Europol shall not only continue to inform Eurojust of the requests it makes to national authorities for the initiation of criminal investigations, but shall also inform Eurojust of the consequent

[54] Art. 7 Cooperation Agreement between Eurojust and Europol (2010).
[55] Art. 8 (2) Cooperation Agreement between Eurojust and Europol (2010).
[56] Art. 11 Cooperation Agreement between Eurojust and Europol (2010). Art. 9 gives Eurojust a right to request Europol to open a new AWF; Europol must reply and state its reasons if it decides not to follow the request.
[57] Art. 12 Cooperation Agreement between Eurojust and Europol. Art. 10 gives Europol the right to request Eurojust to offer national authorities its assistance; Eurojust must reply and state its reasons if it decides not to follow the request.
[58] Europol, 2012 Europol Review, p. 70
[59] i.e. Union bodies, third countries and international organisations; see Art. 29 Europol's proposal and Art. 38 Eurojust's proposal.
[60] Art. 27 Europol's proposal and Art. 40 Eurojust's proposal. The Council General Approach on Europol's proposal amended this Art., but its modifications seem to aim at mirroring even further the provision in the Eurojust proposal. Source Council, *General approach on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol),* 28 May 2014, Council Doc. No. 10033/14.

decision of the national authorities[61]. A novelty has been introduced: Europol shall support Member States' investigations in the context of JITs, "where appropriate in liaison with Eurojust"[62]. On the other hand, the Eurojust proposal does not substantially amend the previous regime. Eurojust shall continue to assist national authorities to improve their cooperation "in particular on the basis of Europol's analysis" and to provide Europol with opinions based on analysis carried out by Europol[63]. The proposal also maintains the role of the ENCS in maintaining close relations with the Europol National Unit[64].

2.1.3. State of their cooperation and points of concern

As evidenced by their respective annual reports[65], as well as by the recent elaboration of joint annual reports to the Council and the Commission, cooperation between Europol and Eurojust has developed and improved over time. It takes place at various levels and is of a different nature:

- Strategic cooperation:
  - Meetings: bilateral meetings are held between the heads of the two agencies (Presidency of Eurojust, and Director of Europol) and senior multilateral meetings are also held with the participation of the Administrative Director of Eurojust[66]. Europol-Eurojust's Steering Committee and Task force also meet regularly. Informal meetings are also organised for instance to discuss the legislative process on the two proposals for Regulations or to share experience and best practices between analysts.
  - Eurojust contributes to the elaboration of Europol's Strategic analysis reports on terrorism and serious and organised crime. It is moreover involved in the Serious and Organised Crime Threat Assessment (SOCTA) evaluation process.
  - An exchange program for post holders of the two agencies is also in place[67].

- Operational cooperation:
  - Eurojust's National Desks and Case Analysis Unit have access to SIENA, the secure communication channel developed by Europol, which is used to exchange messages, many of which are shared with Europol.
  - Eurojust is associated to most of Europol's Focal Points, and is informed of (and may eventually attend) operational meetings held by Europol in relation to them. Similarly, Europol is informed of forthcoming coordination meetings held by Eurojust and sometimes attends them.
  - JITs: the two bodies jointly organised the annual meeting of JITs national experts, participate in training programs and regularly exchange information on the JITs they support. They have also jointly elaborated a JIT Manual[68].

[61] Art. 8b Europol's Proposal (Council General Approach)
[62] Art. 4 (1) c) (ii) Europol's Proposal (Commission).
[63] Art. 4 (1) c) and 3 a) Eurojust's Proposal.
[64] See in particular Art. 12 (5) d) 2009 Eurojust Council Decision.
[65] See for instance: Europol, 2013 Europol Review, p. 26, 2012 Europol Review, p. 70 or 2011 Europol Review, p. 70 – 71; and Eurojust, 2012 Annual Report, p. 42 -43, or 2013 Annual Report, p. 43.
[66] Senior meetings are organised four times a year, but in practice cooperation at this level is rumoured to be difficult. One meeting of the Presidency, the Administrative Director of Eurojust and the Directorate of Europol took place as well as two bilateral meetings between the President of Eurojust and the Director of Europol.
[67] 10 exchange visits took place in 2013. 50 Europol staff members have (mainly from the Operations Department) participated in the program since its establishment.

- EC3: Whereas the EC3 is hosted by Europol, Eurojust has nominated one representative to the Program Board and has seconded a staff member[69].

In addition to the cooperation between the two bodies and their staff, the cooperation taking place between Eurojust's national desks and Europol's national units must be mentioned. The country reports of the 6th round of mutual evaluations reveal the existence of frequent and close contacts between them[70]. These informal exchanges are sometimes formalised, like in Belgium where a Memorandum of Understanding has been signed: a Europol liaison officer is in charge of relations with Eurojust and is invited to its coordination meetings. Europol informs Eurojust of "any Europol meetings involving Belgium. When a meeting is of judicial interest, the Belgian desk at Eurojust will be attending"[71].

Whereas it is evident that both agencies cooperate regularly, several problems have been identified, namely their respective roles on the coordination of criminal investigations, the funding of JITs, and the exchange and analysis of information.

2.1.3.1. Coordination of judicial authorities

On paper, the tasks of each agency are clearly defined. Eurojust is in charge with the coordination of judicial authorities. Its tasks include various activities, from the facilitation of the exchange of information, the implementation of instruments based on the principle of mutual recognition or the execution of mutual legal assistance (MLA) requests, to the provision of legal advice and logistical support. Coordination takes place through the organisation of coordination meetings and coordination centres[72].

In turn, Europol is competent for the coordination of police and other law enforcement authorities. Their coordination task is implemented through the organisation of operational meetings, in which action days may be planned. In addition to the performance of synchronised and coordinated investigative acts, such as house searches or arrests, Europol provides assistance through the setting up of operational centres. These centres are essential to assess the incoming data, to crosscheck it with the information stored by Europol and to elaborate strategic analysis on the spot[73].

Both roles are essential to ensure the success of a case/operation. They are often performed alongside, and Europol and Eurojust often participate to the meetings organised by their counterpart. For instance, in 2013 Eurojust participated in 31 out of the 214

[68] Council, Joint Investigation Teams Manual, Council Doc. No. 15790/1/11 REV 1, 4 Nov. 2011.

[69] Cybercrime: EC3 Program Board (PB): Eurojust is a permanent member of the EC3 Program Board since its foundation. Mr Harri Tiesmaa, National Member for Finland, is representing Eurojust in the meetings of EC3 PB. European Cybercrime Task Force (EUCTF): Eurojust is also an associate member. Strategic coordination: EC3 and the Eurojust Cybercrime Task Force meet on a regular basis (every 3 months) to discuss cooperation. EMPACT: Eurojust is involved in the 3 EMPACT Sub-priorities on cybercrime. Commission, DG Home, *Europol and Eurojust cooperation in the field of preventing and combating cybercrime.*

[70] Council, Evaluation, Report on the Sixth Round of Mutual Evaluations: Report on Austria (7 Oct. 2013, Doc. No. 11351/2/13, p. 31), Report on Denmark (22 April 2013, Doc. No. 7249/1/13, p. 29), Report on France (11 July 2013, Doc. No. 10249/2/13, p. 58) or Belgium (see infra).

[71] Council, Evaluation Report on the Sixth Round of Mutual Evaluations, Report on Belgium, 18 April 2013, Council Doc. No. 1798/2/12, p. 54.

[72] For more details, see for instance Eurojust, 2013 Annual Report, pp. 21 and 23.

[73] For instance law enforcement authorities may obtain strategic analysis of the *modus operandi* of a given criminal group, and thus they may be able to detect new suspects/links. For more details, see Europol, 2013 Europol Review, p. 17.

operational meetings held at Europol and Europol attended 75 out of 206 coordination meetings held by Eurojust[74]. In practice however the allocation of tasks, particularly in the investigation stage, is complex. One of the reasons for this complexity is the difference between national criminal justice systems[75] and the fact that acts that would in country A be performed by a judicial authority may in country B be performed by the judicial police[76]. Since respect for national diversity is an obligation under the TFEU[77], a certain flexibility is required both with regard to the definition of their respective tasks as well as in relation to the competent authorities attending Eurojust or Europol's meetings. Indeed, national authorities have a discretionary power to decide who will attend such meetings and if they so wish, they may also exclude the participation of the other agency[78].

Nonetheless, it is the need for flexibility that creates a grey zone, which in occasions leads to tensions between the two agencies. For instance, it has been brought to our attention that Eurojust is concerned that the participation of judicial authorities to Europol's meetings results in judicial issues being discussed without the involvement of Eurojust. Eurojust's concern has increased in the light of the Council's General Approach on the proposal for a Europol Regulation, according to which Europol shall assist Member States' "competent authorities". These would include police authorities, law enforcement authorities as well as *other authorities* in general[79].

Two approaches can be taken in relation to this issue. The first would be 'formal' and aim at a clear, strict division of competences and tasks between the two agencies. The second would be to favour flexibility, and thus maintain the *statu quo* which guarantees a certain margin of discretion. Whereas ideally the solution would lie in finding a combination of both (i.e. a better clarification of the respective mandates without losing flexibility) this seems impossible to achieve in practice. It must be kept in mind that a too rigid delineation could create new legal problems and have unexpected results.

In our view, the best approach is thus to maintain flexibility, but with due regard to the treaties. In this respect, it should be recalled that Art. 88 TFEU refers to "police authorities and other law enforcement services". Since the grey zone with regard to the definition of their respective tasks is both unavoidable and desirable, emphasis must be placed in ensuring that flexibility is handled in good faith. In the interest of all parties, and in order to construct a real AFSJ, both Eurojust and Europol should respect their fields of expertise and their respective '*raison d'être*'. To this end, it would be advisable to include a provision reflecting this duty in each of their Regulations, or at least a recital in the preambles. In addition, it might be wise to include a general duty to involve the other agency in its coordination activities wherever its expertise is relevant unless Member States oppose. In the later event, an obligation to inform the other party of the reasons given by the national authority should apply.

[74] Source: DG Home, Statistics on interagency cooperation for 2013.
[75] See for instance the fact that "common law countries have in the past shown a degree of nervousness about there being too close a relationship between evidence-gatherers and prosecutors" House of Lords, *Europol*, supra note 13, p. 48.
[76] For more detailed explanations, see P. Jeney, supra note 31, p. 61 – 62.
[77] See Arts. 4 (2) TEU and 83 (3) TFEU.
[78] Refusals of national authorities may be at the detriment of either Eurojust of Europol. They are often due to confidentiality issues and the wish to keep certain information away from police services/judicial authorities.
[79] See Art. 4 (1) (c) read together with Art. 2 (a) of Europol's Proposal (Council's General Approach).

2.1.3.2. Joint Investigation Teams

The possibility of having police and judicial authorities of different Member States working together in the territory of a Member State was first introduced in the Treaty of Amsterdam (ex Art. 32 TEU). The 2000 MLA Convention[80] dedicated a provision to joint investigation teams[81], which was then developed in a specific instrument, namely Council Decision 2002/465/JHA of 13 June 2002[82].

A joint investigation team is a group of competent authorities from two or more Member States who cooperate for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States setting up the team[83]. It is to be noted that the two EU secondary law texts covering JITs are instruments of judicial cooperation. Nonetheless, a glance at the TFEU reveals that the former Art. 32 TEU, now Art. 89 TFEU, is placed under Chapter 5 of Title V of Part III of the Treaty, dedicated to police cooperation. This evidences the mixed nature of JITs. Moreover, Art. 89 TFEU refers to the participation of both law enforcement and judicial authorities in JITs.

Both Europol[84] and Eurojust[85] received competences dealing with JITs, but their scope differ slightly. Under the 2008 Council Decision, Eurojust's powers[86] in relation to JITs are the following:

- Firstly, Eurojust, either through its National Members or through the College, may request the competent authorities in EU Member States to set up a JIT[87]
- Secondly, Member States are required to recognise National Members as competent authorities to set up and participate in JITs, although they may render their participation subject to the agreement of the competent national authority [88]. Furthermore, National Members shall be informed whenever national authorities set up a JIT[89].
- Finally, the Secretariat of the JIT network is created and based at Eurojust[90]; national contact points of the JIT Network are part of the ENCS[91].

In practice, the role of Eurojust in facilitating the establishment and operation of JITs is generally considered a success. It is clear that for Eurojust support of JITs was and remains a strategic area in which the agency the agency has become a key player and centre of expertise. Eurojust helped overcoming national authorities' initial reluctance to setting up JITs, notably through the provision and the administration of financial support[92]. For this,

[80] Council, Council Act of 29 May 2000 establishing in accordance with Art. 34 of the Treaty on European Union the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, *OJ* C 197, 12 July 2000, p. 1.
[81] Art. 13 MLA Convention.
[82] *OJ* L 162, 20 June 2002, p. 1 – 3.
[83] Art. 1 Council Decision 2002/465/JHA.
[84] Art. 3a introduced by the 2nd Protocol amending the Convention on the establishment of a European Police Office (Europol Convention), *OJ* C 312, 16 Dec. 2002, p. 2.
[85] Arts. 6 and 7 of Eurojust Council Decision (2002).
[86] For more details see M. Helmberg, "Eurojust and Joint Investigation Teams: How Eurojust can support JITs", *ERA Forum*, Vol. 8, 2007, pp. 245 – 251.
[87] See Art. 6 (1) a) and Art. 7 (1) a) of Eurojust Council Decision (2008) respectively.
[88] See Art. 9 f) Eurojust Council Decision (2008).
[89] Art. 13 (5) Eurojust Council Decision (2008).
[90] Art. 25a (2) Eurojust Council Decision (2008).
[91] Art. 12 (2) d) Eurojust Council Decision (2008).
[92] P. Jeney, supra note 31, p. 73.

Eurojust obtained two grants from the Commission[93], and now funds JITs on the basis of its own budget[94]. Eurojust covers expenses for travel, accommodation, translation and interpretation, as well as the loan of equipment[95]. In 2013, Eurojust provided financial support through its funding program to 34 JITs[96]. The development of funding support for JITs had a clear impact on the success of this instrument, as testified by the ever growing number of applications for funding[97], proving the significant importance of funding capacity for an effective application of JITs[98].

Europol is also competent with regard to JITs. Europol's powers pursuant to the 2009 Council Decision are:

- Europol can suggest the setting up of JITs in specific cases[99]
- Europol may participate in JITs in a supporting capacity in so far as those teams are investigating criminal offences in respect of which Europol is competent[100].
- Europol staff may liaise directly with members of a JIT and provide members and seconded members information from any of the components of its information processing systems[101].

Europol provides financial support to JITs via the provision of financial support for operational meetings[102]. Europol's financial support may cover the costs incurred by the organisation of operational meetings (travel, accommodation) as well as the costs associated to the technical equipment it offers (mobile offices, forensic support, etc)[103].

The 2010 cooperation agreement provides a clear division of their respective tasks[104], as well as a duty to inform each other of their participation in a JIT at the earliest opportunity. JITs are often mentioned as a good example of cooperation between the two agencies:

- Both agencies co-organise the JITs' experts annual meeting[105] and participate in training programs and seminars relating to JITs;
- They conducted together a joint JITs project, which led to the adoption of the "JITs Manual"[106].

[93] Two grants from the Commission (DG Home): A first grant between July 2009 – Dec. 2010, thanks to which Eurojust supported 11 JITs and a second grant between Oct. 2010 – Sept. 2013 thanks to which Eurojust supported 18 JITs. For more details, see Eurojust, *Eurojust News – Joint Investigation teams,* Issue No. 9, June 2013, p. 8 – 9.
[94] Eurojust website
[95] Eurojust, *Eurojust News – Joint Investigation teams,* Issue No. 9, June 2013, p. 8 – 9.
[96] Eurojust, 2013 Annual Report, p. 26.
[97] Whereas in 2009, Eurojust National Members were involved as participants in 7 JITs (Annual Report 2009, p. 34), they participated in 20 JITs in 2010 (Annual Report 2010, p. 39), and 29 in 2011 (Annual Report 2011, p. 37). Overall, between 2010 and 2012 the agency received 195 funding applications and supported, in 2011 and 2012, 80 JITs.
[98] Joint Europol-Eurojust Annual Report for the Council and Commission for 2012, Council Doc. No. 9038/13, 30 April 2013, p. 3.
[99] See Art. 5 (1) d) Europol Council Decision.
[100] Art. 6 (1) Europol Council Decision. For a detailed analysis, see B. de Buck, "Joint Investigations Teams: The participation of Europol officials", *ERA Forum*, Vol. 8, 2007, pp. 253 – 264.
[101] Art. 6 (4) Europol Council Decision.
[102] Joint Europol-Eurojust Annual Report for the Council and Commission for 2012, Council Doc. No. 9038/13, 30 April 2013.
[103] See Europol website.
[104] According to Art. 6 (2) of the Cooperation Agreement between Europol and Eurojust (2010): "When it is decided to participate in such a team, Eurojust shall endeavour to bring its support in order to facilitate coordination between the judicial authorities concerned and Europol shall endeavour to support the intelligence gathering and investigative efforts of the team".
[105] See for instance Eurojust, 2012 Annual Report, p. 35 or Europol, 2013 Europol Review, p. 26.

- Both agencies can participate in JITs, separately as well as jointly, and examples of their cooperation can be found in their annual reports[107].
- They also regularly exchange information on the JITs they support throughout the year[108].

While their respective roles in JITs have proved effective, they are amended in the two proposals under negotiation. Particularly with regard to their supporting capacities, the following provisions are inserted:

- Art. 4 (1) (h) of the Council's General Approach on the proposal for a Europol Regulation: "possibility to support (…- JITs, including by providing operational, technical and financial support" [part underlined added by the Council]
- Art. 4 (1) (e) of the proposal for a Eurojust Regulation: "possibility to provide operational, technical and financial support to Member States' cross-border operations and investigations, including JITs".

Beyond the practical problems to which the use of the exact same wording may lead to in practice, the mention of funding of JITs in both Regulations has created tensions. It has been criticised by some, and welcomed by others. Among the arguments against it, the risk of duplication (i.e., double requests for funding) and the increase in competition between the two agencies are to be mentioned. In this regard, France has for instance expressed reservations on Art. 4 of the Eurojust Proposal "until the mandate of Eurojust and Europol regarding JITs is clarified"[109]. Among the arguments in favour, some authorities and officials consider that the increase of funding channels will lead to an increase in JITs which is to be welcomed for instance in the field of terrorism. JITs are proving to be extremely useful in the fight against crime but are expensive tools. In the context of economic crisis we are in, it seems national authorities strongly depend on EU funding.

In any event, the establishment of a mechanism ensuring that there is no risk of double funding of JITs should be introduced. Such system could consist for instance in mutual information and consultations, to be introduced in both Regulations through mirroring provisions. An alternative option would consist in the establishment of a centralised service that would channel the requests to the most appropriate agency. Some have suggested that the JIT Secretariat, having an important expertise in the field, would be ideally placed to play this role. Nonetheless, it should be recalled that the JIT Secretariat is located within Eurojust, which makes this a sensitive issue.

It is to be noticed that this tension intervenes in a context of imbalance with regard to the funding resources of the two agencies. Whereas both may fund JITs through their own budget[110], Europol is about to conclude a budgetary delegation agreement with DG Home, which would empower Europol to implement the part of the budget relating to operational actions (including JITs) falling within the EMPACT priorities[111]. Even though the delegation

[106] Council, Joint Investigation Teams Manual, Council Doc. No. 15790/1/11 REV 1, 4 Nov. 2011.
[107] See for instance Eurojust, 2012 Annual Report, THB case, p. 27 or Europol, 2012 Europol Review, Operation Playa (drug trafficking case), p. 32.
[108] Joint Eurojust-Europol Annual Report to the Council and the Commission for 2013, Council Doc. No. 11305/14, 25 June 2014, p. 3.
[109] Council Doc. No. 11813/14, 14 July 2014, p. 4.
[110] We recall that Eurojust's is significantly inferior to that of Europol; see supra.
[111] A budget of 3,8 billion EUR has been allocated to the Internal Security Fund for the period 2014 – 2020, to promote the implementation of the EU's Internal Security Strategy. One of its two instruments, established by Regulation 513/2014 (*OJ* L 150, 20 May 2014, p. 93) focuses on police, and explicitly foresees JITs as actions

agreement shall include an obligation for Europol to systematically inform Eurojust about its support to JITs[112], if Eurojust is not granted similar funding possibilties, this will end in a true and potentially dangerous imbalance. Indeed, the risk is that Europol's increased funding power leads to a marginalisation of judicial authorities (and Eurojust) in JITs. This would be to the detriment of the superior interest of criminal justice.

2.1.3.3. Exchange of information

Information exchange between the agencies takes place for different purposes, namely for operational purposes and for policy-making or broader purposes.

Operational information exchange takes place in different contexts: firstly, it concerns information sharing concerning the meetings each agency organises. In particular, on the basis of an agreement reached between the two agencies, Europol began in 2012 to inform Eurojust of operational meetings that are financially supported by Europol. This responds to a need to ensure reciprocity in relation to the existing practice of Eurojust to provide information to Europol on forthcoming coordination meetings.

Secondly, exchange of information takes place 'on the ground', in the context of coordination/operational meetings in which both agencies participate[113], as well as other joint operational activities such as JITs. As to the latter, when for instance both agencies take part in a JIT, Europol may transfer to Eurojust the analytical reports it prepared on the basis of the information and intelligence gathered by the JIT[114].

Thirdly, an exchange of information takes place in the context of Europol's analysis working files (AWF)[115] and Focal Points. By virtue of Art. 11 of Europol-Eurojust's cooperation agreement, Europol may invite experts from Eurojust to be associated with the activities of a specific analysis group, subject to an association agreement concluded between Europol and Eurojust. Eurojust can also request to be associated with the activities of a specific analysis group. Being associated to an AWF has important practical consequences as it allows Eurojust to attend analysis group meetings and to be informed on the development of the AWF[116]. Their cooperation in this respect is very effective: in 2013, Eurojust was associated with 20 out of 23 Focal Points[117], the latest associations concerning the Focal Points on Italian Organised Crime, Motorcycle gangs and East European Organised Crime[118]. In addition, since 2013 most of Eurojust's National Desks and the Case Analysis Unit have access to SIENA, allowing them to securely communicate, including with Europol National Units and with Europol itself[119].

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eligible for funding (Art. 4 (1) a) and (2) a)). According to its work program, Europol will be the beneficiary of a delegation agreement, granting it the indirect management of 7 million EUR. The agency shall be entrusted with budget implementation tasks to finance through grants agreements operational actions including JITs).

[112] Annex to the Commission's Implementing decision, 8 Aug. 2014, COM (2014) 551, p. 13

[113] See for instance Art. 12 Cooperation Agreement between Eurojust and Europol.

[114] For the content of these reports see infra, and in particular B. de Buck, "Joint Investigations Teams", supra note 100, p. 258.

[115] Art. 11 Cooperation Agreement between Eurojust and Europol (2010).

[116] For more details on the rights of associated third parties, see Europol, *New AWF Concept, Guide for Member State and Third Parties*, 31 May 2012, p. 40 – 41.

[117] A Focal Point is an area within an Analysis Working File, which focuses on a certain phenomenon from a commodity based, thematic or regional angle. Europol, New AWF Concept, see supra116, p. 5.

[118] Joint Eurojust-Europol Annual Report to the Council and the Commission for 2013, Council Doc. 11305/14, 25 June 2014, p. 5, available here.

[119] Ibid.

Finally, and with a policy-making objective, Eurojust contributes to SOCTA and to the Serious and Terrorism Situation and Trend Report (TE-SAT), providing relevant information and analysis (see infra)[120]. For instance, Eurojust contributes to Europol's TE-SAT by providing quantitative and qualitative analysis of terrorism-related_court decisions, which reflect the number of convictions and the level of penalties pronounced by national courts over the last twelve months[121]. Eurojust also provided an overview of the amendments of terrorism related legislation in the Member States[122].

It must be noted that in the field of information exchange, interagency relations has not always been smooth[123]. One of the basic principles in the field is known as 'the owner principle', which implies that information sharing can only go as far as Member States allow it. Indeed, the information provider remains the owner of the information, and is therefore entitled to refuse any further transmission. This principle explains for instance that Eurojust (as Frontex) only receives the third party version of the SOCTA; this is meant to preserve the confidentiality of Member States' information[124]. It also explains why Eurojust still is not involved in certain AWFs, such as those on terrorism or domestic extremism: Member States' are sometimes reluctant to share this sensitive information with the judiciary[125].

The situation has however gradually improved over time. For instance, an increase in the participation of Eurojust to Europol's AWFs is clear. Moreover, information exchange is expectedly going to improve with the adoption of the new Regulations. Indeed, the two proposals innovate with the inclusion of mirroring provisions whereby a new system is established[126]: each agency must grant its counterpart the right to have, within its mandate, indirect access on the basis of a hit/no hit system to the information it possesses, without prejudice to any restriction indicated by the 'owner'. In case of a hit, the agency shall initiate the procedure so that the information may be shared in accordance with the owner's decision. Two limitations exist: on the one hand, searches can be made only for the purpose of identifying a hit, and on the other hand, only the staff members specifically authorised may perform them. Moreover, if in the course of information processing activities, Eurojust identifies a need for Europol's intervention, it shall notify Europol and initiate the procedure for sharing the information. This provision is reciprocal.

This new system will clearly not suppress the 'owner principle'. The Member States, or any other information provider maintains its power to oppose the sharing of information[127]. However, this mechanism should improve the exchange of information between the two agencies for a series of reasons. Firstly, the provision on information exchange is transferred from the cooperation agreement to the Regulation, which is crucial both in terms of visibility and enforceability. Secondly, a comparison of the current and foreseen systems shows that a stage is eliminated of the process: a request is no longer needed to find out whether the other agency has information on the matter of the request. Finally, it

[120] M. Busuioc and D. Curtin, supra note 37, p. 60.
[121] See Europol, *TE-SAT 2014, EU Terrorism Situation and Trend Report 2014*, p. 16 – 19.
[122] Eurojust, 2012 Annual Report, p. 25.
[123] In 2008, the extent to which sensitive data in Analysis Working Files could be passed by Europol to Eurojust still caused problems. Eurojust was frustrated by the limits on its access to AWFs, and would have liked to see the cooperation agreement amended to allow a freer flow of information (House of Lords, EU Committee, *Europol: coordinating the fight against serious and organised crime*, November 2008, p. 49.).
[124] M. Busuioc and D. Curtin, see supra note 37, p. 9.
[125] ibid.
[126] Art. 27 Europol's proposal and Art. 40 Eurojust's proposal. The Council's General Approach on Europol's proposal amended this Art., but its amendments seek to mirror even further the content of the Eurojust proposal.
[127] Both provisions stress that the procedure by which the information may be shared must be taken in accordance with the decision of the provider of the information, which may indicate at the moment of providing the information any restriction on access or use, including as regards transfer, erase or destruction (Art. 25 (2) Europol proposal– Council General Approach and Art. 40 (5) Eurojust proposal).

reflects the evolution of mentalities and the decreased mistrust of national authorities with regard to information sharing.

2.1.3.4. Analysis of information

Both agencies analyse the information they obtain. Broadly speaking, analysis can be divided into two categories: operational and strategic analysis.

Analysis has always been at the core of Europol's mandate[128]. Its expertise is well established[129] and the existence of specific devices enabling national authorities to load data automatically enhances even further its analytical capacities[130]. For Eurojust, analysis of information is a more recent activity. Even though the transmission of data from national authorities to Eurojust is not fully ensured[131], the agency is now fed by a sufficient amount of information[132]. It gradually establishes its own analytical capacities[133].

This recent evolution, together with confusion created by the terminology employed, may give the impression of an overlap between Europol and Eurojust's analytical activities. Some have criticised Eurojust for investing in analysis of information, arguing that they duplicate Europol's tasks without even having the required resources or expertise[134]. A real overlap, should indeed lead to criticism. However, a closer look at the content and purpose of the analysis carried out by the two agencies reveals their differences:

- Europol's analysis[135]

Operational analysis: focused on a specific operation → this type of analysis is of a short term nature, and aims at providing the investigative team of a specific case with hypotheses and interferences concerning for instance the *modus operandi* of a criminal network, individuals potentially involved in unlawful activities, etc.[136] It traditionally involves the information and evidence gathered during an investigation, which is then analysed in the context of AWFs. Information gaps can be identified leading to more targeted information gathering. Europol can disseminate analytical reports containing assembled intelligence (description of criminal organisation, links between criminals, etc.)[137]

Strategic analysis: this type of analysis focuses more on the long-term aims and objectives of law enforcement services. It reviews current and emerging trends to illuminate changes in the crime environment and emerging threats to public order, in order to identify opportunities for action and likely avenues for changing policies, programs and

[128] About Europol's intelligence-led rationale, see D. Bigo, L. Bonelli, D. Chi and C. Olsson, supra note 31, p. 39.
[129] Sénat, *Europol et Eurojust,* supra note 6, p. 12.
[130] Europol's website.
[131] Art. 13 of the Eurojust Council Decision (2008) has not yet been transposed by some Member States, such as Italy (Report on Italy, Council Doc. No. 15858/1/13, p. 29). Moreover in countries where it is transposed, difficulties arise in its concrete implementation by national authorities (Sénat, *Europol et Eurojust,* supra note 6, p. 24).
[132] Numerous evaluation reports describe how the obligation to exchange information has been implemented in different Member States: Report on Estonia, Council Doc. No. 17899/2/12, p. 19; Report on Finland, Council Doc. No. 7989/2/13, p. 24 f; or Report on Poland, Council Doc. No. 13682/1/13, p. 34 f.
[133] P. Jeney, supra note 31, p. 85.
[134] The Case Analysis Unit of Eurojust counts approximately 20 members (European Voice, Oiling the wheels of Justice, October 2013, available here, whereas Europol employs around 100 criminal Analysts (Europol's website).
[135] Europol, 2013 Europol Review, p. 14.
[136] S. Roberston, *Intelligence-Led Policing: a European Union View*, in IALEIA, Intelligence Led Policing, International perspectives on policing in the 21st century, 1997, p. 12, available here.
[137] B. de Buck, "Joint Investigations Teams", supra note 100, p. 258.

legislation[138]. In this framework, Europol elaborates, with the collaboration of other JHA agencies, threats assessments, notably Serious and Organised Crime Threat Assessment (SOCTA), and Terrorism Situation and Trend Report (TE-SAT). SOCTAs play an important role in the EU policy cycle for organised and serious international crime[139], which embodies a more rational, efficient and accountable policy-making in the field of security[140]. They indeed constitute the basis on which to reflect on policy developments, as they provide a complete picture of criminal threats impacting the EU[141].

- Eurojust's analysis

Operational analysis: case-oriented and generally aimed at preparing coordination meetings, i.e., identifying connections between judicial investigations and prosecutions, both on factual and possible legal issues, based on requests for MLA and depending on the request made by the national authorities to the relevant Eurojust National Desk.

Strategic analysis: it aimes at identifying recurring judicial cooperation issues and possible solutions in the prosecution of criminal networks operating cross-border. An example of Eurojust's strategic analysis can be found in the strategic project on Trafficking in Human Beings[142]. The analysis carried out allowed to identify recurrent problems and best practices in judicial cooperation among 29 selected THB cases dealt with by Eurojust[143]. Eurojust's contribution to the TE-SAT[144] is another good example of Eurojust's strategic analytical activities.

Eurojust's analysis thus appears to be judicially-oriented, and this is a type of analysis in which Europol is not active. A pedagogical effort seems necessary to solve the existing confusion with regard to analysis of information. This confusion not only affects EU actors but extends to national authorities, who are often unaware of the judicially-oriented information needs of Eurojust.

2.2. Cooperation between Eurojust and the European Judicial Network

2.2.1. The coexistence of a network and an agency in the field of judicial cooperation

EJN was established by Joint Action 98/428/JHA[145], which was replaced by Council Decision 2008/976/JHA of 16 December 2008[146]. EJN has co-existed with Eurojust since the latter's establishment in 2002.

[138] S. Roberston, see supra note 136, p. 12.
[139] Council, *Conclusions on the creation and implementation of a EU policy cycle for organised crime and serious international crime,* Council Doc. No. 15358/10, adopted during the 3043rd JHA Council meeting, 8 and 9 Nov. 2010.
[140] L. Paoli, "How to tackle (organised) crime in Europe? The EU policy cycle on serious and organised crime and the new emphasis on harm", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 22, Issue 1, p. 1.
[141] Idid, p. 5.
[142] Eurojust, Strategic project on Eurojust's action against trafficking in human beings, Oct. 2012, 72 pages, available here.
[143] ibid, p. 1.
[144] Eurojust, Annual Report 2012, p. 25: providing quantitative and qualitative analysis of terrorism-related court decisions and an overview of the amendments of terrorism related legislation in the Member States.
[145] *OJ* L 191, 7 July 1998, p. 4.
[146] *OJ* L 348, 24 Dec. 2008, p. 130.

EJN is similar to Eurojust in terms of its judicial logic – it brings together authorities with specific experience in the field of international judicial cooperation[147] – and of its objectives – it aims at facilitating judicial cooperation.

However, EJN and Eurojust present essential differences: EJN is a « first generation » network adopted in the framework of the third pillar of the Maastricht Treaty. Contrary to Eurojust, which is a « second generation tool » adopted in the framework of the third pillar of the TEU as revised by the Nice Treaty, EJN is not an agency and it has a very limited "institutional" dimension (one Secretariat, which is responsible for the administration of the network and which forms part of Eurojust's secretariat[148] but functions as a separate unit, and a rotating Presidency). It thus represents a different level of legal integration, which is reflected in its structure and functioning. It is composed of contact points that act as active intermediaries to ease judicial cooperation. They liaise either with a judicial authority of their own State or with the contact points of other Member States. The contact points are appointed by the Member States in accordance with national law and following the internal division of responsibilities. Therefore, the number of contact points per Member State varies. Contact points keep their national functions and remain in their Member State but are points of reference for judicial cooperation.

The coexistence of EJN and Eurojust has sometimes been questioned and is still by some. However, with the adoption of the 2008 Council Decision[149], a fusion of both bodies or an absorption of EJN by Eurojust seems to have been excluded.

2.2.2. Evolution of the cooperation framework between Eurojust and the EJN

2.2.2.1. Past and present

The EJN Joint Action was of course silent about Eurojust, since the latter was only established in 2002.

The collaboration between Eurojust and EJN was explicitly mentioned in Art. 31 (2) c) TEU as amended by the Treaty of Nice. The 2002 Eurojust Decision contained some references to EJN[150] but, when that Decision was amended in 2008, the number of references increased, as did the details concerning the interactions between the two bodies[151]. The 2008 EJN Council Decision also contains various provisions in this regard[152].
Among the most important provisions are Art. 25a (1) of the Eurojust Decision and Art. 10 (1) of the EJN Decision. They contain a similar wording, stating that both bodies shall maintain privileged relations with each other based on consultation and complementarity, especially between the contact points of a Member State, the Eurojust national member of the same Member State and the national correspondents for the European Judicial Network and Eurojust. They both have a duty to inform their counterpart of cases they consider the other to be in a better position to deal with[153]. The National Members of Eurojust *may*

[147] Art. 2 Eurojust Council Decision (2008).
[148] Art. 26 (2) b) Eurojust Council Decision (2008).
[149] Their co-existence "demonstrates both the need to maintain the two structures and the need to clarify their relationship" (EJN Council Decision, Preamble, point 7).
[150] For instance in Art. 6 and 7 Eurojust Council Decision (2002). In total EJN is mentioned 12 times.
[151] For instance Art. 6 (1) e), Art. 7 (1) e) (Eurojust acting through National Members and acting as a College « *shall cooperate and consult with the EJN, including making use of and contributing to the improvement of its documentary database* »***);*** Art. 12 and Art. 25a (1) Eurojust Council Decision (2008). In total, 19 mentions of EJN.
[152] See especially Art. 10 Eurojust Council Decision (2008).
[153] See Art. 10, b) of the EJN decision and Art. 25a (1) Eurojust Council Decision (2008).

attend meetings of the European Judicial Network at the invitation of the latter, whereas European Judicial Network contact points *may be* invited on a case-by case basis to attend Eurojust meetings. A broader margin of discretion seems thus to be left to Eurojust.

Finally, Art. 12 of the Eurojust Decision concerning the Eurojust National Coordination System (ENCS) must be mentioned, since it has been set up to ensure coordination of the work carried out by notably the national correspondent of EJN and up to three other EJN contact points. The ENCS shall facilitate within the Member State the carrying out of the tasks of Eurojust, in particular by (…) assisting in determining whether a case should be dealt with with the assistance of Eurojust or of the EJN (para 5).

2.2.2.2. In the future

The Lisbon Treaty acknowledges the importance of a close cooperation between Eurojust and EJN. According to Art. 85 (1) c) TFEU Eurojust's tasks may indeed include "the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network".

The proposal for a Regulation on Eurojust does not bring about changes in relation to EJN. In fact, Art. 39 (1) of the initial proposal on Eurojust (2013)[154] is almost a copy-paste of the pre-existing provision (i.e. of Art. 25a (1) of Eurojust decision). An opportunity for clarifying the distribution of tasks and cases between them has been lost.

2.2.3. State of play of their cooperation and points of concern

Besides the fact that communication between the EJN Secretariat and Eurojust is not always as smooth as the location of the first within the second would suggest, the main issue concerns the allocation of cases between both entities. Whereas a risk of overlap between them is clear, no criteria for attributing cases are set out in either Eurojust or EJN's Decisions.

The criterion for allocating cases between the two that is most commonly put forward is the following: EJN is competent for "simple cases", i.e. bilateral cases requiring the mere acceleration of the execution of MLA requests and/or mutual recognition instruments. Cases concerning more than two Member States and/or presenting a certain level of complexity shall be referred to Eurojust. This idea is for instance explicitly provided for in some national guidelines/provisions organising the allocation of cases between Eurojust and the EJN. Confronted with the silence of the EU texts, some Member States have indeed adopted

[154] Full text: "*Eurojust and the European Judicial Network in criminal matters shall maintain privileged relations with each other, based on consultation and complementarity, especially between the national member, the European Judicial Network contact points of the same Member State and the national correspondents for Eurojust and the European Judicial Network.*
In order to ensure efficient cooperation, the following measures shall be taken:
a) national members shall, on a case-by-case basis, inform the European Judicial Network contact points of all cases which they consider the Network to be in a better position to deal with;
b) the Secretariat of the European Judicial Network shall form part of the staff of Eurojust. It shall function as a separate unit. It may draw on the administrative resources of Eurojust which are necessary for the performance of the European Judicial Network's tasks, including for covering the costs of the plenary meetings of the Network;
c) European Judicial Network contact points may be invited on a case-by-case basis to attend Eurojust meetings."

national guidelines/provisions to clarify the situation and assist national practitioners[155]. Other Member States have not adopted guidelines, considering that it is not easy to determine in abstract terms what entity is best placed to deal with a case, and therefore opt for flexibility. A bilateral case can indeed be extremely complex, for example when it involves cyber-crime; and the EJN may then not be in the best position to assist judicial authorities.

In practice the allocation of cases is made on a case-by-case basis[156], with total discretion left to national authorities. Thus, complaints are frequently made because cases are often 'misallocated'. For instance, Eurojust is too often involved in 'simple cases' that rather 'belong' to EJN. There are different reasons for this:

- Some of the national laws transposing the Eurojust Decision make it very difficult to refer cases to EJN: in some Member States, there is an obligation for the national member to handle the case (e.g. Bulgaria).
- The success rate of EJN varies according to the Member State[157]: not all Member States satisfy the selection of contact points requirements set out in the EJN decision[158]; for example the required experience in international judicial cooperation or the knowledge of at least one EU language besides the national one. This makes direct contact with those contact points very difficult, if not impossible.
- Finally, the 'human factor' is of crucial importance: a judicial authority will often refer the case to whatever entity it had previous contact with in the past.

In order to improve the situation, a clear division of competences between both could be considered by means of legislative action[159]: some advocate that the forthcoming Eurojust Regulation should clarify their respective mandates, or at least define the criteria to be considered when allocating cases between them[160]. Since the proposal does not provide any such criteria, this is seen as a missed opportunity[161], especially since almost all the national reports published in the framework of the sixth round of mutual evaluation mentioned this issue[162]. Whereas laying down fixed criteria in abstract terms is a difficult task, it should be recalled that criteria can be combined with flexibility, as is for instance the case with regard to the criteria laid down in conflict of jurisdiction provisions. Other mechanisms include:

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[155] For instance, German authorities have adopted *Guidelines on Relations with Foreign Countries in Criminal Law Matters* (RiVAST), dealing notably with the allocation of cases between Eurojust and EJN (Report on Germany, Council Doc. No. 6996/1/14, p. 51).

[156] See EJN, report for 2011-2012 - Statistics on type of requesting authority includes Eurojust National Member/national desk/ ENCS: 6 % in 2011, 7 % in 2012

[157] In some Member States the EJN is considered as very active and efficient. For instance in Germany, the EJN reports around 1000 cases per year (Council Doc. No. 6996/1/14, 23 May 2014, p. 66). Similarly in Poland (Council Doc. No. 13682/2/13, p. 48) or in Hungary (Council Doc. No. 10251/2/13, p. 48), the EJN is frequently used and practitioners are satisfied with its functioning. On the contrary, in other Member States, the awareness about the EJN still has to be improved (see for instance Hungary or Report on Estonia, Council Doc. No. 17899/2/12, p.33 or Report on Latvia, Council Doc. No. 6998/1/14, p. 35), and/or the level of involvement of the Contact Points varies considerably (see for instance report on Italy, Council Doc. No. 15858/1/13, p. 28).

[158] Complaints have been made in the national Reports of the 6th round of mutual evaluations*, for instance in the reports of* Austria (Council Doc. No. 11351/2/13, p. 37) or Poland (Council Doc. No. 13682/2/13, p. 49), and gaps mentioned in the Report on Italy (Council Doc. No. 15858/1/13, p. 25).

[159] See Eurojust/ERA conference "10 years of Eurojust. Operational achievements and future challenges", The Hague, 12 and 13 Nov. 2012, Council document 8862/13, 26 April 2013,p. 10.

[160] About this issue, see delegates' interventions in Council of the EU, 27 June 2014, Doc. Council No 11233/14.

[161] See 'Report from the Eurojust seminar on the new draft Regulation on Eurojust "an improvement in the fight against cross-border crime?" The Hague, 14-15 Oct. 2013, Council Doc. No. 17188/1/13 REV 1, 4 Dec. 2013, p. 34

[162] See in this regard A. Weyembergh, "An overall analysis of the proposal for a regulation on Eurojust", *EUCRIM,* 2013/4, p. 128 -129, available here.

- Monitoring the requirements of the EJN Decision by the Presidency[163];
- Better training of national authorities as to the competences of the two bodies: in this regard, the Join Task Force Paper prepared by EJN and Eurojust on "Assistance in International Cooperation in Criminal Matters for Practitioners"[164], which explains the differences between the agencies and their respective roles in Mutual Legal Assistance, must be mentioned;
- Strengthening and improving mutual knowledge and cooperation between National Members and EJN contact points[165]. To that end, regular contacts/meetings should be organised in order to foster personal links. Other initiatives should be explored, for example regular meetings between the Eurojust presidency, the EJN secretariat and the EJN rotating presidency;
- Full 'entry into force' and exploitation of the ENCS[166], which is to provide a forum for national correspondents for Eurojust and EJN contact points to coordinate their work and assist *" in determining whether a case should be dealt with the assistance of Eurojust or the EJN".* The ENCS is indeed often presented as a solution to the identified problem [167]: that is why once the ENCS is operational in all Member States, it should be assessed in terms of its added value as to complementarity between Eurojust/EJN ;
- Last but not least, adoption of common guidelines at EU level with regard to the allocation of cases between Eurojust and EJN: the above mentioned Join Task Force Paper prepared by EJN and Eurojust does not go as far as to issue guidelines on when and how each Agency should be contacted…

[163] Recommendation to the EJN: the Presidency (through the EJN Secretariat) should monitor the respect of requirements by the Member States when designating contact points (see for instance Report on Hungary, Council Doc. No. 10251/1/13, p. 60, Report on Sweden, Council Doc. No. 13666/12, p. 56 and Report on Lithuania, Council Doc. No. 15372/1/12, p. 61).
[164] This paper was presented to the meeting of the EJN Plenary in Athens on 24 June 2014.
[165] In most countries close and regular contacts/professional exchange between them (reports on Austria – Council Doc. No. 11351/1/13, p. 35, Denmark – Council Doc. No. 7249/1/13, p. 31 or France – Council Doc. No. 10249/1/13, p. 60)
[166] For the time being, not all Member States have set up ENCS.
[167] See for instance the Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 Sept. 2010), 'Eurojust and the Lisbon Treaty, towards more effective action?", Council Doc. No. 17625/10 REV 1, 9 Dec. 2010, p. 20

3. INTERAGENCY COOPERATION IN THE PROTECTION OF THE UNION'S FINANCIAL INTERESTS

3.1. Present cooperation

3.1.1. General remarks

3.1.1.1. Presentation of OLAF

While PIF (from the French acronym: *protection des intérêts financiers*) offences fall within the mandate of all of the EU bodies and agencies covered by this study, it is clear that the European Anti-Fraud Office (OLAF) plays a prominent role in the field. OLAF was established in 1999[168] to replace UCLAF ('*Unité de Coordination de la Lutte Anti-Fraude*')[169] following the events that led to the collapse of the Santer Commission in 1999[170]. OLAF was therefore created within the first pillar, as a supranational body guided by European interests[171]. As its predecessor, OLAF is a part of the Commission, however, it carries out its investigations 'in complete independence'[172].

OLAF can best be defined as the EU body in charge of carrying out *administrative* investigations[173] into irregularities affecting the EU's financial interests, both internally, that is, within the EU institutions and bodies[174], and externally, investigating the beneficiaries of EU funds/economic operators in the individual Member States, or third countries[175]. While OLAF's legal framework is complex and fragmented[176], its main role and remit in relation to administrative investigations is defined in Regulation 883/2013[177], which came into force on 1 October 2013.

As a consequence perhaps of its origins[178], "the administrative investigations of OLAF do not only aim at detecting (administrative) irregularities, but also at collecting information to establish if a criminal offence (i.e. fraud or corruption) has occurred"[179]. Besides its role as autonomous investigator[180], OLAF may also coordinate national investigations[181].

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[168] Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (*OJ* L 136, 31 May 1999, p. 20), amended by Commission Decision 2013/478/EU of 27 September 2013 (*OJ* L 257, 28 Sept. 2013, p. 19). At the time of its creation, Eurojust had therefore not yet been set up.

[169] The Task Force "Anti-Fraud Coordination Unit" was created in 1988 as part of the Secretariat-General of the European Commission.

[170] For a historical development of anti-fraud mechanisms within the EC see A.A. Murawska, *Administrative anti-fraud measures within the European Union*, Nomos, Baden-Baden, 2008, pp. 62 ff.

[171] This is in stark contrast with Europol and Eurojust, both third pillar bodies whose activities are strongly marked by national interests.

[172] See Art. 3 of Commission Decision 1999/352/EC.

[173] 'Administrative investigations' are described in Art. 2 (4) of Regulation 883/2013 concerning investigations conducted by the European Anti-Fraud Office (*OJ* L 248, 18 Sept. 2013, p. 1).

[174] For investigations concerning members and staff of EU Institutions OLAF also derives its mandate from the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) of 25 May 1999 (*OJ* L 136, 31 May 1999, p. 15).

[175] In so far as mutual assistance agreements with third countries and international organisations so provide; see Arts. 1(1) and 3(1) of Regulation 883/2013.

[176] For an overview, visit OLAF's website.

[177] Regulation No. 883/2013, see supra note 173.

[178] As it has been pointed out, "the context of OLAF's creation displayed a clear connection to criminal offences such as corruption and fraud. The need to create OLAF was because existing mechanisms were not adequately dealing with the threats – both internal and external – to the financial interests of the EC", quoted from M. Wade, "OLAF and the Push and Pull Factors of a European Criminal Justice System", *EUCRIM*, Vol 3/4, 2008, p. 129, available here.

[179] K. Ligeti and M. Simonato, "Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept", in F. Galli and A. Weyembergh, *Do labels still matter?*

OLAF is nonetheless an administrative body with no prosecutorial powers. Whereas it has a mandate to investigate all PIF irregularities (which by definition include criminal offences[182]), the decision to open criminal proceedings remains the exclusive competence of the national judicial authorities[183]. Therefore, in the event that an investigation reveals that a criminal offence may have taken place, OLAF will draw up a report and pass on its recommendations to the relevant competent national authority for judicial follow up[184]. As was made clear by the General Court in *Tillack*[185] and subsequently confirmed in *Violetti*[186], those reports and recommendations are not binding[187]: all the competent national authority is compelled to do is to examine OLAF's findings and take the appropriate action to comply with EU law[188]. Member States are under no obligation to institute criminal proceedings following a recommendation to do so stemming from OLAF. In the light of figures, national judicial follow-up to OLAF's findings is its Aquilles heel[189]. This is indeed one of the arguments commonly put forward in support of the EPPO[190]. Another argument advanced relates to the uncertain evidential value of OLAF's reports[191]. It is well known that, in spite of Art. 11 (2) of OLAF' Regulation[192] suggesting otherwise, OLAF's reports are often not admissible evidence, and often OLAF's investigations are replicated in the context of criminal proceedings whenever these are instituted following a recommendation from OLAF[193].

3.1.1.2. The difficulty of identifying their common field of intervention

The protection of the Union's financial interests concerns all EU bodies/agencies covered by this study only inasmuch as PIF irregularities amount to a criminal offence. Indeed, only

Blurring boundaries between administrative and criminal law. The influence of the EU, Editions de l'Université de Bruxelles, Bruxelles, 2014, p. 91.

[180] In line with Art. 5 (1) of Regulation 883/2013, the decision by OLAF's Director-General whether or not to open an investigation shall take into account the investigation policy priorities and the annual management plan of the Office. OLAF's 2014 investigation policy priorities are set out in the 2014 Management Plan, p. 31.

[181] Following a re-organisation on 1 February 2012 aimed at streamlining OLAF's investigative procedures, no differentiation is made between cooperation and assistance cases but only between coordination and investigation cases. Before February 2012, the term assistance case was used to refer to cases in which OLAF supported criminal investigations in a Member State.

[182] 'All frauds are necessarily irregularities; however, not all irregularities are fraud' A.A. Murawska, supra note 170, p. 40.

[183] According to certain authors, "if a national criminal inquiry procedure has been opened, the Community investigatory activity is excluded. In case of an initial suspicion in accordance with national criminal procedure, OLAF must refer the case to the competent national authority. The case must also be transmitted to the national judicial authorities if conclusive evidence must be obtained for acts under criminal law (e.g. searching a suspect's home or examining their bank account"; see A.A. Murawska, supra note 170, p. 116.

[184] See Art. 11 of Regulation 883/2013.

[185] General Court, Judgement of 4 October 2006, Case T-193/04, *Tillack v Commission*.

[186] General Court, Judgement of 20 May 2010, Case T-261/09 P, *Commission v Antonello Violetti and Nadine Schmit.*

[187] For a comment on the *Tillack* case, see S. White "EU anti-fraud enforcement: overcoming obstacles", *Journal of Financial Crime,* Vol. 17 No. 1, 2010, p. 83.

[188] Upon OLAF's request, the competent authorities of the Member States concerned shall, in due time, send to the Office information on the action taken, if any. See Art. 11 (6) of Regulation 883/2013.

[189] Figures on the actions taken by national judicial authorities following OLAF judicial recommendations per Member State between 1 January 2006 and 31 December 2013 are available in OLAF's 2013 Annual report, p. 23.

[190] OLAF's 2013 Annual report, p. 23.

[191] On the gathering of evidence by OLAF, see J.A.E. Vervaele, "Gathering and use of evidence in the area of freedom, security and justice, with special regard to EU fraud and OLAF investigations", in C. Nowak (ed.), Evidence in EU fraud cases, Wolters Kluwer Polska, Warsaw, 2013, p. 21 ff.

[192] According to which OLAF's final reports "constitute admissible evidence in administrative or judicial proceedings of the Member States in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors".

[193] Commission staff working document, Impact assessment accompanying the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, 17 March 2013, p. 14.

OLAF has a role to play in relation to purely administrative irregularities such as genuine errors in custom declarations or, in relation to internal investigations, cases in which OLAF investigates serious matters relating to the discharge of professional duties by members and staff of the EU institutions and bodies not amounting to fraud, corruption or any other PIF offence (e.g. the "Eurostat affair"[194] or the "Dalli case"[195]). Determining when OLAF's investigations relate to criminal activities is therefore essential to understand where cooperation between the different EU actors may be required.

The distinction between administrative irregularity and criminal irregularity is unfortunately not easy or clear-cut. The general concept of irregularity embraces fraud, which is distinguished from other irregularities by, among other things, the intention behind the offence[196]. Moreover, the assessment of the legal status of a case may evolve over time: a case initially considered an "irregularity" might be reclassified at the end as "fraud", and vice versa. More important is anyway the fact that OLAF has no power to settle the question whether an irregularity is a criminal offence, since its investigations aim solely to ascertain whether on the facts there is an irregularity, leaving it to the Member States' authorities to classify the irregularity in terms of criminal law[197].

In this regard, it is important to underline that at present there is no uniform definition of what constitutes a PIF offence. The most important substantive criminal law instrument in force is the Convention of 1995 on the protection of financial interests of the EU[198], which was subsequently complemented with other legal texts[199]. However, national definitions and sanctions of fraud, corruption and money laundering in relation to the EU's financial interests continue to differ because the approximation brought about by those text is minimal, and Member States implemented them in different –not always satisfactory– ways[200]. As a result of these shortcomings, the protection of PIF through criminal law is not equally ensured in the different Member States. As has been pointed out by the Commission, this state of affairs is highly likely to lead to differing outcomes in similar individual cases, depending on the applicable national criminal provisions[201]. This situation prompted the proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law[202], which is currently being negotiated.

[194] OLAF press release of 9 March 2006.
[195] See in this regard EUObserver, "OLAF leak: no clear evidence against Dalli" available here.
[196] Many Member States have adopted guidelines to distinguish fraud from other irregularities, and have organised staff trainings to clarify the distinction; see Protection of the European Union's financial interests — Fight against fraud: 2012 Annual Report, COM (2013) 548 final, 24 July 2013, p. 28.
[197] Protecting the communities' financial interests and the fight against fraud – Annual report 1998, COM (1999) 590 final, 17 Dec. 1999, p. 9-10.
[198] Convention of 26 July 1995 on the Protection of the European Communities' financial interests, *OJ* C 316, 27 Nov. 1995, p. 49.
[199] First Protocol (*OJ* C 313, 23 Oct. 1996, p. 2) and Convention of 26 May 1997 (*OJ* C 195, 25 June 1997) (corruption); Protocol of 29 November 1996 (*OJ* C 151, 20 May 1997, p. 2) (court interpretation); Second Protocol of 19 June 1997 (*OJ* C 221, 19 July 1997, p. 12) (money laundering).
[200] Commission, Staff Working Paper accompanying the Communication from the Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigation, SEC(2011)621, p. 11, which includes a table that illustrates the discrepancies in the implementation of those offences in a sample of Member States (p. 12). See also the First report on the implementation of the Protection of Financial Interests instruments – COM (2004) 709 and the Second Report – COM (2008) 77, which sets out in the annex the concrete implementation issues encountered in the Member States. Other deficiencies arise because of the loopholes in those instruments, which for instance do not require Member States to criminalise criminal activities that are relevant for the protection of the EU financial interests such as abuse of power or embezzlement.
[201] Commission, *Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations*, COM (2011) 293 final, 26 May 2011, p. 5.
[202] Commission, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 11 July 2012. Once adopted, this directive should clarify the scope and meaning of a PIF offence.

It should be noted that, whereas Europol and Eurojust are undoubtedly competent in the field of PIF, their mandates refer more generally to fraud, corruption or money laundering. This further complicates the task of identifying the common field of intervention of EU agencies and bodies. Moreover, whereas OLAF is competent in all PIF cases, Europol and Eurojust's mandates focus on cases involving two or more Member States. Nonetheless, pursuant to Art. 3 (3) of Eurojust's Council Decision, "at the request either of a Member State's competent authority or of the Commission, Eurojust may also assist investigations and prosecutions concerning only that Member State and the Community".

The practical cooperation between OLAF and the two JHA agencies is strongly marked by their different nature and logics. As has already been stressed, OLAF is a first pillar body which actions are guided by EU interests. Moreover, its intervention does not depend on national authorities' will since it can carry its own autonomous investigations. By contrast, Europol and Eurojust's involvement in a PIF case is much more dependent on Member States' good will: they either intervene upon national request, or because an offer of their services has been accepted[203].

This characteristic of JHA agencies might have a specific (negative) effect in the field of PIF, since it appears that national authorities are not sufficiently engaged in the fight against PIF offences, which would often go undetected and/or unpunished[204]. Logically, the number of national PIF criminal cases directly affects the number of cases in which JHA agencies can get involved in[205]. Furthermore, recent studies show that the European dimension of PIF crimes is overlooked by a majority of national PIF authorities, which tend to limit their investigation to the part of national relevance[206]. These two factors taken together significantly reduce the possibilities of either Europol or Eurojust intervening in PIF-related cases for which they are nonetheless formally competent.

From a national perspective, certain PIF offences are however given priority given that not only EU financial interests are at stake but also national financial interests. This is especially true with regard to offences affecting the EU's revenue, for instance VAT evasion cases, given that VAT fraud firstly diminishes Member States' tax receipts[207]. Moreover, this type of offence often has cross-border elements, or is committed in the context of organised crime. This would explain why the bulk of PIF-related cases in which the EU agencies are involved relate to custom fraud (namely smuggling and counterfeiting of certain goods, particularly cigarettes) and/or tax evasion cases[208] (particularly tax carousel fraud, also known as Missing Trader Intra Community). PIF offences relating to EU expenditure would be less well protected at national level[209] and consequently EU agencies

[203] In the words of the Commission: "Whilst both Eurojust and Europol can provide important support to deal with these issues, they are dependent on the willingness of national authorities to make use of their services" Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 21.
[204] See Commission Staff Working Paper – Impact Assessment (Part I) accompanying the proposal for a PIF directive (SWD (2012) 195 final), 11 July 2012, p. 9.
[205] 'Eurojust and Europol do not always receive the information they need to be able to support the Member States' Proposal for a Council Regulation on the establishment of the EPPO's, COM (2013) 534 final, 17 July 2013, p. 52.
[206] M. Wade, *Evaluating the need for and the needs of a European Criminal Justice System*, Preliminary report of the EuroNEEDS Project, Jan. 2011, p. 21 and 47, available here.
[207] Actually, VAT cases are generally considered 'national cases', and are thus not reported to OLAF. Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 81. This situation explains member states reluctance to include VAT fraud in the PIF directive.
[208] OLAF*, Memorandum*, Written Evidence before the Select Committee on European Union of the House of Lords, 19 Jan. 2007, available here.
[209] "Killmann stated that OLAF was set up precisely in order to improve efficiency in the financial management of European funds – something Member States give less priority to than they do with national funds". Fourth Annual Conference of the CHALLENGE Project, *Democratic Control and Judicial Accountability in the Area of Freedom, Security and Justice,* Brussels, 7 Sept. 2007, p. 39, available here.

would play a less prominent role in the offences related to this side of the European budget.

3.1.2. Cooperation between OLAF and Europol

3.1.2.1. History

As of 1st January 2002 Europol's mandate was extended to deal with all serious forms of international crime as listed in the Annex to the Europol Convention, amongst which fraud and corruption[210]. Whereas not all fraud and corruption relate to the EU budget, at this occasion it was agreed that account should be taken of OLAF's powers as regards tax evasion and customs fraud, what led to the negotiation and conclusion, in February 2003, of the first administrative agreement between Europol and the Commission[211].

3.1.2.2. Legal framework: evolution

Pursuant to its Art. 9(2), that agreement was complemented in April 2004 with an administrative agreement between Europol and OLAF[212], which is still "in force" although currently under review. Among other things, this agreement allows the exchange of technical and strategic information between the two bodies from any of their databases (but explicitly excludes the exchange of personal data)[213], and foresees mutual assistance in the field of threat assessment and risk analysis. It further recommends the parties to inform the other of its involvement in a JIT, and to jointly recommend national authorities to set one up[214]. The administrative agreement provides for the possibility to consult the other party when preparing its reports, and establishes a mechanism for evaluating its application through periodical meetings of representatives of both bodies.

Art. 22 of Europol's 2009 Council Decision, as Art. 13 of the 2013 OLAF Regulation, includes a legal basis for the conclusion of a cooperation agreement between the two bodies, which may concern the exchange of operational, strategic or technical information, including personal data and classified information[215]. The 2009 Europol's Council decision includes a transitional arrangement whereby OLAF and Europol may, pending the conclusion of any such agreement, directly exchange information, including personal data, in so far as that is necessary for the legitimate performance of their respective tasks. This is for the time being the legal basis underpinning the exchange of personal data between the two bodies[216].

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[210] Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, *OJ* C 362, 18 Dec. 2001, p. 1.
[211] Europol – OLAF Press release, EUROPOL-OLAF/09/2004, 7 April 2004, available here.
[212] Only after years of negotiations could a framework be concluded for strategic cooperation between Europol and OLAF; see A. de Moor and G. Vermeulen, "The Europol Council Decision: Transforming Europol into an agency of the European Union", *CMLR,* Vol. 47, 2010, p. 1110.
[213] Which is nonetheless possible since the entry into force of the 2009 Europol's Council decision, see below.
[214] No case of joint cooperation in the field of JITs has been brought to our attention. This is perhaps due to the fact that joint custom operations fulfil a similar role. In this regard the Commission has stated: "the difference between mutual assistance in criminal matters and administrative cooperation poses a problem as regards Joint Investigation Teams, which are foreseen only between judicial authorities. At EU level, the participation of the Commission in joint administrative investigation teams may currently be established only in the customs field (Naples II Convention)", Commission staff working document: impact assessment accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final, 17.7.2013, p. 22.
[215] According to Art. 22 (4) of Europol's 2009 Council decision, transmission of classified information to OLAF shall be permissible only in so far as an agreement on confidentiality exists between the two bodies.
[216] Art. 22 (3) of Europol Council decision (2009).

A Joint Europol/OLAF Working Group was established in order to revise the terms of the present administrative arrangement. The new text will largely focus on the modalities of information exchange, including data protection and data security issues, and is expected in the course of 2014.

3.1.2.3. Identified problems

A preliminary exercise must focus on determining the precise fields requiring close ties between the two entities. As has been pointed out, Europol's activities and priorities are Member State-driven. 80 % of Europol's resources are thus committed to the priority areas identified by the Council in the context of the policy cycle for the period from 2014 until 2017. Excise[217] and VAT fraud (particularly carousel fraud, also known as missing trader intra-community, hereafter MTIC) and intellectual property crimes (i.e. counterfeiting, hereafter IPR crimes) are among those priorities, and these are areas in which OLAF is also active.

As OLAF itself points out, the goal in the area of common interest would be to combine Europol's analytical resources with OLAF's established operational experience in a way that avoids any unnecessary duplication of efforts and ensures the best possible service is available to the Member States[218]. However, a number of issues remain to be solved in the Europol-OLAF relationship, both with regard to information exchange and analysis and with regard to other forms of operational cooperation. In addition to legal and technical issues, there is a lack of awareness and mutual understanding between the two bodies.

a) Information exchange and analysis

Whereas back in 2005 it was already evident that information exchange between the two organisations was not exploited to its fullest extent[219], still today the exchange of operational information between the two organisations leaves room for improvement. The conclusion of the new operational agreement is expected to greatly improve the situation.

As in other areas of crime, in the area of excise fraud, IPR crime and MTIC Europol plays a central role in the identification of transnational or poly-crime links[220]. Nonetheless, for the time being, "there is not a direct data connection between Europol and OLAF, and there is not a regular matching of subjects or identifiers (telephone numbers, bank account numbers) from actual investigations of the two organisations. This implies that links are not automatically discovered, if at all"[221]. The lack of a secure communication channel between the two bodies does not of course foster information exchange. Whereas OLAF has expressed its intention to request access to SIENA, the details concerning its use by OLAF will for the first time be addressed in the forthcoming cooperation arrangement.

It is argued that to improve operational information flow in both directions, OLAF and Europol should explore the possibilities of access to their respective databases. The Joint

[217] Smuggling of cigarettes, alcohol and mineral oil
[218] OLAF, Annual Report 2009, Summary version, p. 19, available here.
[219] OLAF, Annual Report 2005, p. 77, available here.
[220] Links with other forms of serious and organised crime.
[221] Price Waterhouse Coopers Belgium and Netherlands, *How does organised crime misuse EU funds?,* Study requested by the European parliament's Committee on Budgetary Control, May 2011, p. xiv, available here.
Direct cross-checks of suspect individuals and companies appearing during a joint customs does however take place when EUROPOL is involved in OLAF's operations, see for instance Operation "Warehouse", press release available here.

Working Group referred to above found for instance that Europol's participation in OLAF's information processing systems, i.e. MAB (Mutual Assistance Broker), CIS (Custom Information System) and FIDE (Customs Investigation Files Identification Database), is particularly important. Art. 27 of the Commission's proposal for a Europol Regulation grants OLAF indirect access (on a hit/no hit basis) to Europol's databases, what should ensure that any relevant link is established in relation to PIF crimes. This provision is however at stake and will most likely confront the two legislative institutions, since the European Parliament's first reading deletes OLAF from Art. 27[222] while the Council's general approach[223] maintains it.

With regard to information analysis, it should be noted that since the signing of the administrative arrangement with Europol in April 2004, regular meetings have taken place between members of OLAF Intelligence units and their counterparts in the economic crime section of Europol. However, OLAF's association to Europol's relevant Focal Points[224] is essential to avoid unnecessary duplication of efforts and offer Member States the best possible threat and risk analysis. For the time being, and in spite of the possibility offered by Art. 14 (8) of Europol's Council Decision[225], OLAF is not associated to any Focal Point. The revised cooperation arrangement should lay down the details of OLAF's association to the Focal Points on cigarette smuggling, IPR and VAT fraud (SMOKE[226], COPY and MTIC respectively) within the Analytical Work File[227] on serious and organised crime.

Finally, with regard to the coordination of strategic planning, it is to be noted that the Council conclusions[228] that followed the Commission's 2013 Cigarette Communication[229] required the Commission Strategy on cigarette smuggling to be linked to the EU Policy Cycle[230]. This should reinforce OLAF's role as a member of the EU crime priority 'MTIC/Excise fraud' and the Operational Action Plans implementing it[231], which is judged limited so far.

b) Other operational cooperation

In 2012, following discussions between the two bodies in a number of meetings at various levels over the topic of areas of common interest, an agreement was reached on the

[222] European Parliament, Legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol), 25 Feb. 2014, available here.
[223] Council, General approach on the Europol's Proposal, supra note 60.
[224] A Focal Point is the main tool by which Europol performs a concerted and proactive information gathering and exchange on a certain phenomenon, allowing Europol to provide operational analysis as well as expert and strategic support. Europol, *New AWF Concept*, supra note 116, p. 5.
[225] OLAF is however of the view that the new working arrangement will be the basis for OLAF's association to Europol Focal Points.
[226] FP Smoke is however invited to the OLAF Task Group Cigarette annual conference from 06-09/10/2014 in Prague.
[227] 'An AWF is a database on a specific crime area which is intrinsically linked to specific forms of operational support offered by Europol. In effect an AWF is the only existing legal tool at European level to store, process and analyse factual information ('hard' data) and in particular 'intelligence' (or 'soft' data), including personal data of sensitive nature at the same time. Once information is received within an Analysis Work File, Europol will make sure that all the data is made available for analysis. This means, to start with, that data is processed in a structured way so it can be continuously exploited and enhanced', for more details see Europol's website.
[228] Council, *Conclusions on stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products in the EU*, ECOFIN Council meeting, 10 Dec. 2013, p. 3.
[229] Commission, Communication, "*Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products, A comprehensive EU strategy",* COM (2013) 324, 6 June 2013. And its Anti-smuggling Action Plan, Commission Staff Working Document, SWD (2013) 193, 6 June 2013.
[230] Click here for a graphic explanation of the EU Policy Cycle.
[231] It is planned that under the Priority 'Excise & MTIC Fraud' there will be some joint customs and/or police operations developed under the Policy Cycle 2014-2017. A partially declassified version of the 2014 Operational Action Plan related to the EU crime priority "Excise fraud" can be found in Council Doc. No. 16717/2/13 of 25 Feb. 2014.

creation of a joint working group focusing on customs cooperation[232]. A good example of the two bodies cooperation is found in the field of cigarette smuggling. As acknowledged by an OLAF official: "In the cigarette area, our work is a bit more similar, because most of our cigarette-related work up to now has been co-ordination and analysis"[233]. Perhaps this overlap explains why Europol described "the relationship between OLAF and the group within Europol which deals with the illegal smuggling of cigarettes as 'strained'"[234].

In average one case per year is reported on the successful cooperation between OLAF and Europol in the field of cigarette smuggling[235]. Europol often participates in Joint Customs Operations (JCO) set up by OLAF or Member States, in which case Europol's liaison officers are present during JCOs' operational meetings as observers, cross-checking the information obtained during the operation with its databases.

3.1.3. Cooperation between Eurojust and OLAF

Although the relationship between Eurojust and OLAF has improved overtime, co-operation remains unsatisfactory. Sometimes overlapping responsibilities of both organisations in relation to EU budgetary fraud might explain the situation[236].

3.1.3.1. History

Although the powers of OLAF and Eurojust differ (OLAF conducts administrative investigations while Eurojust deals with criminal investigations and prosecutions) it was clear from the start that a potential overlap existed between OLAF and Eurojust's respective mandates[237], particularly with regard to the coordination of judicial authorities in cross-border PIF cases. Cooperation therefore began immediately after the creation of Pro-Eurojust in 2001[238].

[232] 2012 Europol Review, p. 69. Another one was created in relation to euro counterfeiting, which is however not covered by the scope of this study.
[233] House of Lords, *Inquiry on Enhanced Scrutiny: EU Cigarette Smuggling Strategy*, Transcript of evidence taken on 17 July 2013 before the Select Committee on the European Union, p.17, available here.
[234] House of Lords, EU Committee, *The Fight Against Fraud on the EU's Finances*, 12th Report of Session 2012–13, p. 33, available here.
[235] The first operation, ROMOLUK, was carried out in the context of the EU Action Plan to fight smuggling of cigarettes and alcohol along the Eastern border of the EU. It was jointly coordinated by OLAF and Romanian Customs, with the participation of the Ukrainian and Moldavian authorities, EU-BAM, FRONTEX and EUROPOL. OLAF provided its expertise, as well as analytical and logistical input. 2013 OLAF Report, p. 30
In June 2010 the joint customs operation "SIROCCO" focused on deep-sea containers loaded in China or the United Arab Emirates and arriving in the Mediterranean area. The objective was to identify consignments suspected of containing counterfeit or smuggled genuine cigarettes, as well as other counterfeit and illegal goods. It is estimated that the seizure of cigarettes alone prevented a potential loss of approximately € 8 million in customs duties and taxes in the EU. The European Commission, OLAF and the Commission's Directorate-General for Taxation and Customs Union, volunteered to organize the JCO with the support of the World Customs Organization, EUROPOL and INTERPOL. OLAF provided logistical and technical support throughout the operation. It coordinated the operation from a Permanent Operational Coordination Unit based within OLAF's premises in Brussels. The unit was staffed by customs liaison officers from nine EU Member States (Belgium, Denmark, Germany, Italy, the Netherlands, Poland, Portugal, Spain and Romania), Egypt, Morocco and Turkey, as well as a liaison officer from Europol. 2010 OLAF Report, p. 27-8
Organised by the Polish Customs Service in close cooperation with OLAF, Operation Barrel was conducted in October 2011. Twenty-four Member States, as well as Norway, Switzerland, Croatia and Turkey, participated in this first joint customs operation targeting rail traffic along the EU's eastern border. The Taxation and Customs Union DG, Europol, Frontex and the World Customs Organisation also provided their support. Operation Barrel resulted in the seizure of 1.2 million cigarettes. 2011 OLAF Report, p. 29
[236] Eurojust, 2004 Annual Report, p. 16.
[237] OLAF, 2005 Annual Report, p. 76.
[238] Preliminary meetings took place between OLAF's Unit 5 (magistrates and judicial advisers), and Pro-Eurojust in order to identify how to co-operate and organise operational work; 2001 annual report (Provisional Eurojust), p. 17.

Their relationship has however been a troubled one from the beginning[239], with the result that this may be the best example of the gap between formal relations and reality[240]. Historical as well as institutional reasons lie behind the original tensions between the two bodies. Before the establishment of Eurojust, OLAF was the sole body competent to liaise with national judicial authorities in PIF crimes. OLAF may have thus perceived Eurojust as a competitor, what would explain that "no sooner was the former created as a provisional unit in 2001 than the latter appointed a magistrate's unit"[241]. This antagonism would be reinforced by the different models of European integration that OLAF and Eurojust embody, the former being of a communitarian and the later of an intergovernmental nature[242]. OLAF would consequently bring a European vision lacking within Eurojust. Mr de Baynast, one of Eurojust's Vice-Presidents at the time, believed that OLAF considered Eurojust responsible "for there not being a European prosecutor on fraud"[243][244].

3.1.3.2. Legal framework: evolution

The Decision establishing Eurojust indicated that "Eurojust shall establish and maintain close cooperation with OLAF. "To that end, OLAF may contribute to Eurojust's work to *coordinate investigations and prosecution* procedures regarding the protection of the financial interests of the Communities, either on the initiative of Eurojust or at the request of OLAF where the competent national authorities concerned do not oppose such participation"[245]. To ensure the flow of information from OLAF to Eurojust, a provision was inserted obliging Member States to ensure their National Member of Eurojust is regarded as a competent authority for the purposes of OLAF's investigations[246]. By contrast, recital 5 of the same text seemed to limit the flow of information from Eurojust to OLAF, in that OLAF was to be denied access to any document or evidence in light of 'the sensitive work carried out by Eurojust in the context of investigations and prosecutions'[247].

A Memorandum of Understanding (MoU) between the two parties was signed in April 2003, followed by the creation of Joint Liaison Working Groups for cooperation on common cases[248] in order to give effect to the provision whereby the parties were to exchange information on cases of potential common interest. The MoU established contact points, and sought to facilitate the participation of the two services in joint investigation teams[249]. It further promoted participation of their respective representatives in conferences and meetings of mutual interest[250].

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[239] House of Lords, EU Committee, *Judicial cooperation in the EU: the Role of Eurojust,* 23rd Report of Session 2003-2004, available here, para. 63. See on this point V. Mitsilegas, *EU criminal law*, Hart Publising, Oxford, 2009, note 280.
[240] D. Bigo, L. Bonelli, D. Chi and C. Olsson, supra note 31, pp. 23, 27.
[241] V. Covolo, "From Europol to Eurojust – towards a European Public Prosecutor. Where Does OLAF Fit In?", *EUCRIM,* 2012/2, p. 85, available here.
[242] Ibid.
[243] House of Lords, *Judicial cooperation in the EU: the Role of Eurojust,* supra note 239, para. 63.
[244] B. Quirke, "OLAF's role in the fight against fraud - do too many cooks spoil the broth?", *Crime Law and Social Change*, Vol. 53, 2010, p. 100.
[245] Art. 26 (3) of Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), OJ L63/1 of 6.3.2002. An almost identical provision is now in Art. 26(4) of Eurojust's consolidated text.
[246] Art. 26 (4) Eurojust Council Decision (2002).
[247] This may be a reflection of some Member States restrictions to 'the cooperation with non-judicial bodies like OLAF based on rules of judicial secrecy', Proposal for a Council Regulation on the establishment of the EPPO's, COM (2013) 534 final, 17 July 2013, p. 52.
[248] P. Jeney, supra note 31, p. 85. The MoU enabled the two parties to exchange information on cases of concern.
[249] OLAF, 2002 Annual Report, p. 51.
[250] House of Lords, Select Committee on European Union, Memorandum by Eurojust, available here.

A revised cooperation agreement to further facilitate cooperation between OLAF and Eurojust saw the light the 24th September 2008. That practical agreement, which remains in effect, 'codifies' the joint teams work (composed of Eurojust's National Members and/or their assistants and of officials of the relevant OLAF unit), which meet regularly, exchange case summaries[251], resolve practical problems arising from the application of the agreement and in general are the permanent cooperation channel between the two bodies. Besides that, direct operational cooperation between the persons in charge of a common case is foreseen. As a general rule, the involvement of OLAF in a Eurojust case is not possible if a national authority opposes. Otherwise, collaboration includes the exchange of operational information, participation in operational meetings and the provision of the necessary mutual assistance and advice. Finally, point 10 of the practical agreement deals with cooperation in professional training, seminars and workshops. The last (big) section of the agreement deals with the protection of personal data[252]. In that regard, it should be noted that a secure communication system to exchange information between Eurojust and OLAF was established on the basis of Council Decision 2009/917/JHA[253], and became operational in 2011[254], allowing a secure electronic exchange of case-related information.

Eurojust's Council Decision as amended in 2008 does not substantially change the wording of the provisions concerning OLAF, although the recital forbidding the transmission of documents and evidence from Eurojust to OLAF is no longer there. A change is however noticeable with regard to OLAF's legal framework: for the first time, the 2013 OLAF Regulation mentions Eurojust. Art. 13 not only provides a legal basis for the conclusion of an administrative agreement with Eurojust, but more importantly provides specific reference to the transmission of relevant information to Eurojust, and so in the following terms: "Where this may support and strengthen coordination and cooperation between national investigating and prosecuting authorities, or where the Office has forwarded to the competent authorities of the Member States information giving grounds for suspecting the existence of fraud, corruption or any other illegal activity affecting the financial interests of the Union in the form of serious crime, it shall transmit relevant information to Eurojust, within the mandate of Eurojust."

3.1.3.3. Identified problems: what is a common case?

The most important problem relates to the identification of cases of common interest, which is evidently a pre-requisite to the collaboration between the two bodies at an operational level (although, as stated in para. 3 of point 5 of the practical agreement, "nothing prevents one party from directly requesting the other party to collaborate in a specific case without exchanging case summaries beforehand"). Worryingly, this problem was first identified in 2003[255]: the MoU had been in place for several months when the absence of further significant practical co-operation became a matter of concern.[256] Eurojust overtly proclaimed that "we have not developed the close working relationship we would have wished with an organisation which should be one of our close collaborators"[257].

[251] The exchange of case summaries is a key element to the identification of cases requiring cooperation. The agreement requires Eurojust to transmit OLAF case summaries on all cases affecting PIF, while OLAF is required to transmit to Eurojust case summaries on 'judicial cooperation cases' or cases concerning one MS and the EC (in accordance with Art. 3(3) Ejust 2009 CD)
[252] Indeed, back in 2005 the Council had fostered legal work between the two bodies on how to best exchange personal data; Council's conclusions on the third Eurojust Annual Report, p. 5. On this point see Els De Busser, "Data protection in EU and US criminal cooperation" p. 159.
[253] Eurojust, 2010 Annual Report, p. 54.
[254] Eurojust, 2011 Annual Report, p. 52.
[255] Eurojust, 2003 Annual Report, p. 12.
[256] Eurojust, 2003 Annual Report, p. 12.
[257] Eurojust, 2004 Annual Report, p. 17.

Apparently OLAF only envisaged a role for Eurojust in cases where PIF fraud concerned broader criminal conduct falling within Eurojust's mandate[258]. While in 2005 OLAF forwarded Eurojust an increased number of case summaries[259], in 2006 Eurojust insisted that operational contacts were an on-going challenge[260]. Besides the institutional and historical reasons underpinning their relations, two legal obstacles might explain the "failure" of this first MoU. The information flow from Eurojust to OLAF was hampered by recital 5 of the 2002 Eurojust Decision[261]. In turn, problems in the information flow from OLAF to Eurojust might have arisen because some Member States did not give effect to Art. 26(4) of the Decision to ensure that the National Members of Eurojust are regarded as a competent authority for the purposes of investigations conducted by OLAF[262].

Whereas the 2008 practical agreement sought to improve the situation, requiring OLAF to inform Eurojust as soon as possible of the existence of any case involving judicial cooperation between two or more Member States, or of any case concerning a Member State and the Community (around 20 % of OLAF investigations would fall into these categories)[263], it appears that it has had limited impact[264]. In 2008 information on five cases was transmitted from OLAF to Eurojust and in 2009 on just one case[265]. Following the establishment of the secure communication system to exchange information between Eurojust and OLAF, transmission of case-related information from OLAF to Eurojust apparently increased: in 2011 OLAF referred eight cases to Eurojust compared with four cases in 2010[266]. In 2011, criteria for the selection of common cases involving criminality and cross-border elements were agreed[267], and in 2012 Eurojust and OLAF expressed their commitment to initiate cooperation whenever the need for coordination became apparent (regardless of the bilateral or multilateral nature of the case). An agreement was also reached on a 'common mission' approach to cases where an administrative investigation requires judicial follow-up[268]. Nonetheless, the need to strengthen casework cooperation also emerges in OLAF and Eurojust's respective 2013 annual reports[269]. As OLAF acknowledges, it "has an established practice on cooperating with Eurojust *on cases that need additional attention* from national prosecutors"[270]. Two cases may illustrate their respective cooperation spirit:

- "OLAF approached the Member States concerned in order to initiate adequate criminal investigations of the perpetrators. Various suspects were identified in Italy, Hungary and Austria. However, due what were claimed to be local legal constraints, Hungarian judicial authorities and Hungarian Customs were not in a position to contribute to OLAF's coordination activities. Various attempts were made by OLAF, without success, to find a practical solution to this rigid interpretation of national laws which is not in compliance with EU anti-fraud legislation currently in force. In the circumstances, OLAF relied mainly on the Austrian and Italian Customs to

[258] House of Lords, Memorandum by Eurojust, supra note 250.
[259] Eurojust, 2005 Annual Report, p. 21-23. Eurojust was provided with case summaries of eleven cases, but National Members often reported that OLAF referred cases to Eurojust too late.
[260] Eurojust, 2006 Annual Report, p. 18-9.
[261] House of Lords, Memorandum by Eurojust, supra note 250.
[262] Eurojust, 2003 Annual Report, p. 12. A questionnaire on this issue was carried out by Eurojust and its results forwarded to the General Secretariat of the Council in 2006 (Eurojust, 2006 Annual Report, p. 18-9). The problem seems to continue, since the same provision is again included in the proposal for a Eurojust Regulation.
[263] European Court of Auditors, Special Report No 2/2011 concerning the management of the European Anti-Fraud Office', 2 May 2011, p. 25 available here.
[264] Ibid., p. 6.
[265] Ibid., p. 25.
[266] Eurojust, 2011 Annual Report, p. 51.
[267] ibid., p. 52.
[268] Eurojust, 2012 Annual Report, p. 43.
[269] OLAF, 2013 Annual Report, p. 28, Eurojust, 2013 Annual Report, p. 46.
[270] OLAF, 2013 Annual Report, p. 28.

collaborate in this landmark customs fraud case. OLAF also involved EUROJUST to coordinate further judicial activities in this complex case. Links to counterfeited goods, cigarette smuggling and transit fraud were also discovered during the investigation'[271].

- "The European Parliament had denied OLAF the right to conduct an administrative investigation in the case without an order from the national judicial authorities, and had refused to allow anti-fraud officers to search the offices of the suspected MEPs. The competent national authorities in the involved Member states initiated investigations, and the case was referred to Eurojust for assistance. At the suggestion of Eurojust, the Austrian judicial authority asked OLAF for expert support, especially in searching the premises of the European Parliament. With the assistance of OLAF and Eurojust, the premises of the European Parliament were searched by the French and Belgian authorities, as ordered by the Austrian judicial authority, within a brief period of time. A coordination meeting involving Austria, Romania, Slovenia, Belgium and France was held with the support of OLAF and Eurojust. OLAF contributed to a successful and timely search of the European Parliament premises ordered by the national authorities"[272].

As these cases indicate and Eurojust claims, in the cases where Eurojust and OLAF have worked together, clear benefits have been achieved. Indeed, Eurojust may not only help detect links to cases in other Member States[273], but may also incite national authorities to open a criminal case after OLAF's investigations[274]. Its early involvement might also foster the admissibility of the evidence collected[275].

The new OLAF Regulation is expected to change the established dynamic, since Art. 13 specifically addresses the transmission of relevant information from OLAF to Eurojust[276]. In this regard, "on October 2013, OLAF's Director-General adopted new internal guidelines for OLAF investigators regarding the transmission of case-related information to Eurojust"[277].

Cooperation is nonetheless satisfactory on other levels. For instance, joint conferences and workshops are often organised[278], and exchange/study visits became a regular feature for both institutions[279]. In 2005, the President of Eurojust and the Director General of OLAF met to review the joint activities and discuss further development of cooperation, a meeting that paved the way to annual reunions between the heads of the two entities[280].

[271] OLAF, 2008 Annual Report, p. 50.
[272] Eurojust, 2011 Annual Report, p. 34.
[273] 'One Member State' PIF cases (Art. 3(3) Eurojust Decision) often turned out to be – after closer scrutiny – 'multiple Member State' PIF cases (Art. 3(1) Eurojust Decision). Thus, many more Member States were involved than originally envisaged'; Eurojust, 2013 Annual Report, p. 46
[274] "Eurojust would be the ideal unit to co-operate with OLAF in addressing the latter's concerns that its investigations are not followed up by prosecutions in Member States—but this had not happened at a practical level"; House of Lords, Memorandum by Eurojust, supra note 250.
[275] The first training session for OLAF investigators organised by Eurojust in December 2013 should be mentioned in this regard; Eurojust, 2013 Annual Report, p. 46.
[276] Eurojust, 2012 Annual Report, p. 43.
[277] OLAF, 2013 Annual Report, p. 28. For instance, the internal guidelines indicate that Eurojust could lend support in cases where it is appropriate to extend the scope of national criminal investigations beyond the domestic jurisdiction.
[278] The First OLAF/Eurojust Joint Seminar was held on 26-27 March 2007 on fraud and corruption affecting the European Communities' financial interests, with the aim of improving the cooperation between Member States and the two agencies.
[279] Eurojust, 2007 Annual Report, p. 10. OLAF, 2011 Annual Report, p. 36.
[280] This practice was then included in the 2008 'practical agreement'.

OLAF is also a permanent observer at the European Judicial Network (EJN) meetings hosted by Eurojust[281].

3.2. The arrival of the EPPO: an uncertain scenario

3.2.1. Introduction

The EU budgetary change brought about in 1971 from a system of Member States' contributions to a system of own resources for the general budget made the Commission want to ensure equivalent protection of the EU budget to that of Member States[282]. The establishment in 1988 of UCLAF (*'Unité de Coordination de la Lutte Anti-Fraude'*), the principle of equivalent protection consecrated in the TEU (Art. 280 TEU – ex 209a TEU) as well as all other measures adopted in order to protect the EU budget against fraud and other PIF offences, such as the PIF Convention of 26 July 1995 [283] and its protocols, proved to be insufficient. The Commission therefore started to envisage the possibility of setting up a European Prosecutor (see notably the *Corpus Juris* project[284]), and in 2001 issued a Green Paper to that end[285]. The idea of creating an EPPO was first inserted in the failed Constitutional Treaty (Art. III-274) and then inherited, slightly amended, by the Treaty of Lisbon (Art. 86 TFEU[286]). This is one of the most sensitive provisions of the new treaty with regard to national sovereignty. It has unsurprisingly given rise to numerous questions, many of which remain unresolved.

[281] OLAF, 2007 Annual Report (summary version), p. 18.
[282] L. Erkelens, 'Criminal law protection of the European Union's financial interests: a shared constitutional responsibility of the EU and its Member States?', in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.)*, The European Public Prosecutor's Office – an extended arm or a two-headed dragon?,* Springer, The Hague, 2015, p. 2.
[283] *OJ* C 316, 27 Nov. 1995, p. 49.
[284] M. Delmas-Marty, *Corpus Juris, Introducing penal provisions for the purpose of the financial interests of the European Union*, Economica, Paris, 1997, 179 pages; M. Delmas-Marty and J.A.E. Vervaele (eds), *The implementation of the corpus juris in the Member States,* volumes 1 – 4, Antwerp, Intersentia, 2000.
[285] Commission, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, COM (2001) 715 final, Brussels, 11 Dec. 2001.
[286] Art. 86 TFEU reads:
"1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.
In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.
Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Art. 20(2) of the Treaty on European Union and Art. 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.
2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.
4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission".

The long awaited proposal for an EPPO was finally presented by the Commission in July 2013[287]. Negotiations in the Council are on-going and will probably last years, as the European Council's strategic guidelines of 26 and 27 June 2014 referring to the "advancing [of] negotiations of the EPPO" in the coming 5 years shows[288]. The substantial changes brought about in the course of the negotiations of the past months raise the question as to how much of the initial Commission proposal will remain in the final text.

Negotiations seem to point in the direction of a collegial model for the EPPO (to see what it might look like see the graphic in Annex 3 – Structure of the European Public Prosecutor's Office). Whereas this model is less ambitious than the decentralised model as proposed by the Commission, the fact remains that the EPPO will be essentially of a different nature than the existing EU actors competent in the field of criminal justice (e.g. Eurojust[289] and Europol). The TFEU indeed foresees the setting up of an EPPO with binding powers vis-à-vis national authorities with regard to the opening of an investigation, launching of a prosecution and bringing to judgement of the perpetrators (Art. 86(2) TFEU). Even if the maximum use had been made of Art. 85 TFEU, under the Lisbon Treaty, Eurojust could not have the same powers as the EPPO, notably prosecuting criminals before national courts[290]. Similarly, the powers of Europol are also limited by the TFEU. Under Art. 88 TFEU Europol cannot independently investigate crime, and any operational action must be carried out by Europol in liaison and with the agreement of the national law enforcement authorities[291]. Indeed, it is important to bear in mind that the EPPO represents a different model of integration than Eurojust and Europol. Whilst these two agencies work on a horizontal model via coordination functions, the EPPO would work vertically, exercising its own investigating and prosecuting powers[292].

3.2.2. Numerous uncertainties which impact the EPPO's relations with the other EU agencies and bodies

Most issues remain unsolved in relation to the EPPO. Though it seems clear that the EPPO Regulation will limit the EPPO's material competence to the field of PIF[293], thus not making recourse to the possibility of extending its competence to serious cross-border crime as laid down in Art. 86(4) TFEU, the precise definition of PIF offence remains uncertain. Such a definition is not detailed in the EPPO Regulation, which merely refers to "the offences provided for by the [PIF Directive currently under negotiation] as implemented by national law"[294]. The proposal thus refrains from providing a uniform PIF definition for the EPPO's activities, and choses to leave the issue to the national implementation of the PIF Directive, what has been severely criticised[295]. That directive is still under negotiation. Among the

[287] Commission, Proposal for a Council Regulation on the establishment of the EPPO's, COM (2013) 534 final, 17 July 2013, 63 pages.
[288] European Council, Conclusions on Freedom, Security and Justice, EUCO 79/14, 27 June 2014, p. 6.
[289] In this regard, the fear of a simple duplication of Eurojust is incorrect; see House of Lords, European Union Committee, *The impact of the EPPO's on the United Kingdom,* 4th Report of Session 2014-2015, p. 17, available here. Another difference between the collegial EPPO model and Eurojust is that the EPPO would be headed by a Chief prosecutor.
[290] Commission, Impact Assessment accompanying the EPPO's Proposal, supra note 193, p. 14.
[291] Ibid.
[292] K. Ligeti quoted in 'Report from the Eurojust seminar on the new draft Regulation on Eurojust "an improvement in the fight against cross-border crime?" The Hague, 14-15 Oct. 2013, Council Doc. No. 17188/1/13 REV 1, 4 Dec. 2013, p. 36.
[293] With regard to the EPPO's competence over ancillary competences see infra.
[294] Art. 2 (b) of the Commission proposal. See also Art. 12 of the proposal.
[295] Especially by the doctrine, among other see J.A.E. Vervaele, "The material scope of competence of the European Prosecutors' office: *lex uncerta and unpraeva*", in *ERA Forum* (2014) 15, p. 85 and seq.; K. Ligeti and A. Weyembergh, 'The European Public Prosecutor's Office: Certain constitutional issues', in L.H. Erkelens, A.W.H. Meij

differences between the Council and the Parliament's positions are the inclusion or not of VAT fraud in the scope of the definition of PIF offence[296] or the definition of public officials, and in particular whether or not they should cover members of the "institutions, offices and agencies". The European Parliament's first reading position indeed seeks to exclude, among others, the MEPs from the definition of public official[297].

Among the other unresolved questions, some will have an impact on the future relations between the EPPO and the other EU agencies/bodies. Consequently, it is difficult to reflect on such relations since the type of EPPO that will be established remains uncertain. At least five general and unsettled issues relating to the EPPO will bear an impact on the future relationship of the EPPO with it counterparts in countering PIF offences.

3.2.2.1. The recourse to enhanced cooperation and the number of (non-) participating Member States

The specific status of Denmark[298], the UK[299] and Ireland[300] evidences that under no circumstance will the 28 Member States of the EU take part in the EPPO, what renders the quasi-silence of the proposal with regard to non-participants rather surprising[301]. Moreover Art. 86 (1) TFEU organises the possibility of establishing the EPPO under enhanced cooperation[302]. For the time being however, negotiations in the Council go on under the assumption that all Member States will take part in the adoption of the EPPO Regulation, with the result that the Commission's proposal continues to be watered down. Indeed, the Council's legal service, applying by analogy the ECJ's case-law with regard to enhanced cooperation in the field of patents[303], takes the view that such procedure can only be launched as a 'last resort' measure. The difficulty of the exercise lies therefore in deciding at what point of the negotiations the enhanced procedure can be applied. In this regard, there is a risk that the enhanced cooperation sets off on the basis of the last version of the negotiated text, which will by definition be far less ambitious than the original Commission proposal. In any case, the protection of PIF in non-participating States as well as the relations between those countries and the EPPO will have to be addressed[304]. The mere fact of having Member States outside the EPPO does not only affect the efficiency and coherence of prosecuting PIF offences in the EU; but it is to be noted that the more numerous the group of non-participating Member States is, the more need there may be to ensure cooperation between the EPPO and the other EU agencies/bodies. However, this relation of cause-effect depends to a certain extent on the relation between non-

and M. Pawlik (Eds.), *The European Public Prosecutor's Office – an extended arm or a two-headed dragon?,* Springer, The Hague, 2015, pp. 64 ff. See also K. Ligeti, 'Approximation of substantive criminal law and the European Public Prosecutor's Office', in F. Galli and A. Weyembergh (Eds.), *Approximation of substantive criminal law in the EU. The way forward,* Eds. de l'Université de Bruxelles, Bruxelles, 2013, pp. 73 ff.

[296] One should keep in mind the enormous impact the inclusion of VAT fraud in the EPPO's material competence would have on its workload. The possibility of including VAT fraud in the PIF directive and excluding it from the scope of the EPPO's competence is being considered by the Council. See Council, *Preliminary exchange of views on the proposal for a PIF directive*, Council Doc. No. 12880/14, 5 Sept. 2014.

[297] *Preliminary exchange of views on the proposal for a PIF directive*, Council Doc. No. 12880/14, 5 Sept. 2014.

[298] Protocol 22 on the position of Denmark.

[299] With regard to the UK's participation in the EPPO, note that its policy of non-participation has been reinforced by the enactment of the European Union Act 2011 Section 6(3) which makes the UK's future participation in the EPPO subject to a referendum and an Act of Parliament.

[300] Commission, Press release, *EPPO: Commission proposal gains momentum,* 20 Feb. 2014, available here.

[301] The sole explicit reference to non-participants is found in art. 57(2)(f).

[302] On this point see J.J.E. Schutte, 'Establishing enhanced cooperation under Art. 86 TFEU', in , in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), *The European Public Prosecutor's Office – an extended arm or a two-headed dragon?*, Springer, The Hague, 2015, pp. 195 and ff.

[303] ECJ, Joined Cases C-274/11 and C-295/11, 16 April 2013, *Spain and Italy v Council*, not yet published.

[304] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289.

participating Member States and the EPPO. Their cooperation should particularly address potential conflicts of jurisdiction and the application of the instruments of mutual legal assistance and mutual recognition. In this regard, the question remains how or whether non-participating members will recognise and accept to cooperate with the EPPO[305]. Whereas some defend that the principle of loyal cooperation suffices to oblige non-participants to cooperate in good faith with the EPPO[306], others argue that, even if that principle applies, its concrete implications are not clear enough[307]. At least four different solutions could help solve this gap:

- first, there is the possibility that non-participating Member States internally recognize the EPPO as a legitimate authority to cooperate with because of their fear of becoming a PIF 'safe haven'[308];
- a second option would be for non-participating Member States to be treated as 'third countries'[309] and thus sign an agreement with the EU/EPPO in order to recognize it that status;
- a third solution would be to make recourse to the European delegated prosecutors' 'double hats', i.e. to have them, in their national capacity, deal with non-participating Member States[310];
- finally, all relevant EU instruments could be amended through a transversal instrument in order to include a provision assimilating the EPPO to national authorities. This solution would of course require the agreement of non-participating Member States, with due regard to their possible opt-out regimes. This solution would for instance not address the specific situation of Denmark with regard to the EU area of criminal justice[311].

The amount and type of interactions to be established between the EPPO and its counterparts vary in each of these different scenarios.

3.2.2.2. The system of shared competence

Secondly, it seems clear from the Council's negotiations that the EPPO will not have exclusive competence over PIF offences. However, the organisation of the shared competence and the system of concrete allocation of cases between the EPPO and its participating Member States remain unclear. The Council's presidency has proposed that the EPPO has a priority right and a right of evocation[312] (i.e. if the EPPO can take over any national investigation or prosecution of PIF offences). In such a case, if the EPPO exercises its right of evocation, this may take place after the national authorities have already

[305] On this point see S. Pawelek, 'Implications of enhanced cooperation for the EPPO model and its functioning', in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), supra note 302, pp. 216 and ff.
[306] See J. Espina quoted by the House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 20.
[307] See K. Ligeti quoted by the House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 20. See also the UK government position, arguing that Art. 2 of Protocol 21 and Art. 327 TFEU protects the UK from being bound in any way to the UK (Home Office, Written Evidence on the EPPO, available here). In view of the Home Secretary this means that there are legal arguments to support that the UK could refuse to respond to EPPO requests House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 21.
[308] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 21.
[309] S. Pawelek, 'Implications of enhanced cooperation for the EPPO model and its functioning', in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), supra note 302, p. 219.
[310] *Ibid.*
[311] Protocol 22 on the position of Denmark.
[312] Council, Proposal for a Regulation on the establishment of the EPPO*, State of Play/Orientation Debate*, Council Doc. No. 9834/1/14, 21 May 2014.

involved the other EU agencies and bodies in relation to the PIF offence. Therefore, coordination between these entities and the EPPO might be needed.

3.2.2.3. The EPPO's competence over ancillary offences

The EPPO's competence over ancillary offences will significantly increase the need for cooperation with both Europol and Eurojust. In this regard, it is to be noted that the Council seems to have widened the EPPO's ancillary competence since the good administration of justice test included in the proposal[313] is no longer mentioned[314]. The 'preponderant test' nonetheless remains. However, considering the stage of negotiations, nothing can be taken as final in this respect.

3.2.2.4. The EPPO's seat

One of the most sensitive political questions concerns the location of the EPPO's seat. Para. 49 of the Preamble of the Commission's proposal for an EPPO Regulation simply refers to the decision adopted at the highest level more than ten years ago, without giving additional information. As is well known, the Member States' representatives, meeting at Head of State or Government level the 13th December 2003 determined that the seat of the EPPO would be Luxembourg[315]. For the time being, the decision of 2003 applies. However, establishing the EPPO in Luxembourg would have important consequences on the cooperation with the other EU agencies and bodies. It would particularly endanger the idea of having an EPPO "from Eurojust", the special relationship to be developed between those two bodies and especially the idea of the EPPO being strongly supported by Eurojust in its functioning[316] (see *infra*). A location close to Eurojust would of course be better suited to guarantee such objectives, since it would be more efficient and less expensive. However, and in spite of the huge impact the decision on the EPPO's seat will have in this regard, the final decision will most probably be taken in the very end of the negotiations on the EPPO.

3.2.2.5. The objective of setting up the EPPO at zero cost

The Commission proposal and accompanying documents refer in a number of occasions to the fact that the envisaged EPPO will cost no extra EU money. Whereas this declaration sought to reassure Member States in a time of financial crisis, no one really believed that the creation of such an EU body would come at zero cost. The idea is nonetheless to limit the expenses as much as possible and to rationalise available resources. This search for savings will necessarily impact interagency relations in the field of PIF, and notably those between the EPPO and OLAF/Eurojust. Indeed, the more restraints are placed on the EU budget, the more important reliance on OLAF's staff and Eurojust's ressources becomes. In this regard, voices have raised concerns, particularly within Eurojust, which rightly fears that its mandate will suffer if no extra money is devoted to its supporting tasks in relation to the EPPO. In this regard, it must be noted that non-participating Member States have

[313] See Art. 13 of the proposal.
[314] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 11
[315] On this issue see also the Presidency Conclusions, European Council of Laeken, 14 and 15 Dec. 2001, para. 57, referring to the Decision 67/446/EEC of 8 April 1965 of the representatives of the Governments of the Member States on the provisional location of certain institutions and departments of the European Communities (notably art. 3).
[316] M. Coninsx 'The European Commission's legislative proposal: an overview of its main characteristics", in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), supra note 302, p. 38.

already opposed the idea of a detrimental effect on the other EU agencies and bodies as a consequence of the establishment of the EPPO[317].

3.2.3. General considerations on the EPPO's relations with the other EU agencies and bodies

The importance of inserting the EPPO in the AFSJ in a coherent and efficient way has been and must be stressed[318]. However the integration of the EPPO's work with existing institutions, in particular Eurojust and OLAF is considered one of the main difficulties of its establishment[319]. Actually, consistency among the proposals currently on the table of negotiations is not always present. One sometimes has the impression that it is confronted to a puzzle where there are missing pieces and pieces of other puzzles.

The bilateral relationship between the EPPO and Eurojust will be first developed (3.2.3.1), followed by the EPPO's relation with OLAF (3.2.3.2.); finally its relationship with Europol will be addressed (3.2.3.3.)

3.2.3.1. Bilateral relations between the EPPO and Eurojust

The special link between the EPPO and Eurojust has been established in the Treaty itself, via the final wording of Art. 86(1) TFEU referring to the establishment of an EPPO "from Eurojust". As it is well known, the exact meaning of such expression is far from clear and its concretisation has been particularly debated[320].

In comparison with its relationship with Europol and OLAF (see infra 3.2.3.2.), the initial EPPO proposal dealt rather extensively with the cooperation with Eurojust[321]. According to its explanatory memorandum, 'special rules apply to the relationship of the EPPO with Eurojust given the special links that tie them together in the area of operational activities, administration and management'[322]. According to Recital 40 of the proposal, 'they should organically, operationally and administratively co-exist, co-operate and complement each other'. Art. 3(3) of the proposal states that '[t]he European Public Prosecutor's Office shall cooperate with Eurojust and rely on its administrative support in accordance with Art. 57'. According to para. 6 of the later, which is more or less duplicated in Art. 41(7) of the Eurojust proposal, 'the EPPO shall rely on the support and resources of the administration of Eurojust'. This provision lists the services to be provided (which include technical support, security, Information Technology, financial management, and 'any other services of common interest') and leaves the details to an agreement between the two bodies.

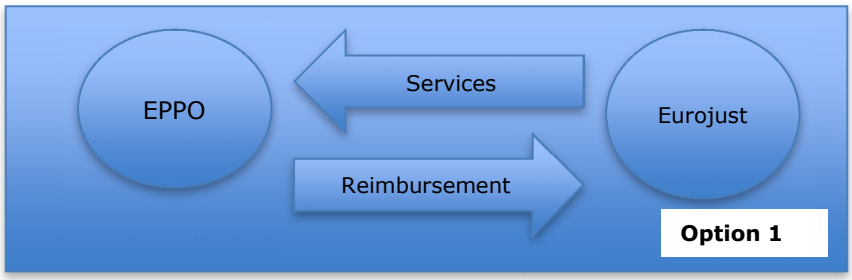
[317] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289.
[318] "Thus, EPPO should not be conceived as an isolated actor, but rather seen in the context of part of a multilevel interaction", M. Coninsx, supra note 316, p. 28.
[319] Commission, Impact Assessment accompanying the EPPO's Proposal, supra note 193, p. 5.
[320] See among others, Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 Sept. 2010), 'Eurojust and the Lisbon Treaty, towards more effective action?", Council Doc. No.17625/10 REV 1, 9 Dec. 2010 (see especially A. Klip at p. 11 and workshop 6 pp. 22 ff); Eurojust/ERA conference "10 years of Eurojust. Operational achievements and future challenges", The Hague, 12 and 13 Nov. 2012, Council document 8862/13, 26 April 2013, pp. 15 and 16; L. Hamran and E. Szabova, "European Public Prosecutors Office – *Cui Bono*?", *NJECL*, Vol. 4, issue 1-2, particularly pp. 46 and ff.
[321] The number of references to each other in their respective proposals witness their privileged relationship.
[322] Commission, Explanatory memorandum, in Proposal for a Regulation on the establishment of the EPPO, supra note 287, p. 8.

The proclaimed 'special relationship' between Eurojust and the EPPO has (at least) two components: a structural one on the one hand (a) and an operational one on the other (b).

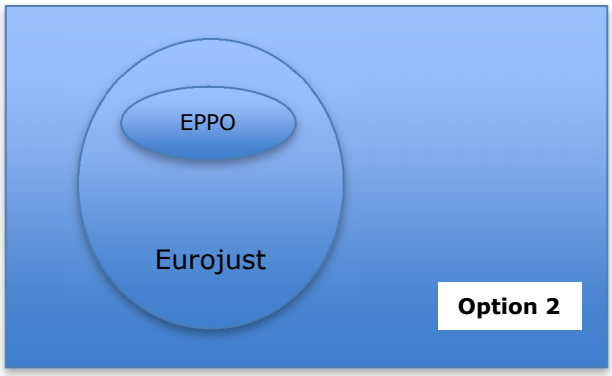
a) *Structural link: institutional and functional*

Structurally, and from an institutional point of view, the interpretation of the phrase "from Eurojust" had, in the forerun of the proposal, led to consider various possible scenarios[323]. In the aftermath of the presentation of the Commission proposal the debate goes on, with mainly three scenarios being considered:

- The first option sees the EPPO as a completely separate and autonomous entity; an EPPO alongside Eurojust, but outside its structure.[324] Two bodies with two budgets. Nonetheless, the EPPO would benefit from the administrative support of Eurojust. The EPPO could for instance use Eurojust's IT services but should then "reimburse" Eurojust.



- According to the second option, the EPPO would be a specialised unit within Eurojust. In this second option the EPPO would organisationally be a part of Eurojust, the horizontal and vertical functions would, however, not merge.[325] They would share one budget.

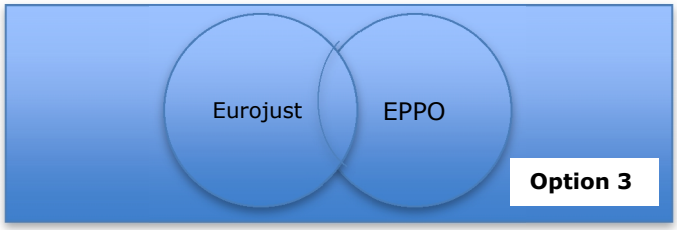


[323] In this regard, see for instance Conclusions of the Strategic seminar organised by Eurojust and the Belgian Presidency (Bruges, 20-22 September 2010), 'Eurojust and the Lisbon Treaty, towards more effective action?", Council Doc. No.17625/10 REV 1, 9 Dec. 2010, especially workshop 6, pp. 22 ff. See also K. Ligeti and A. Weyembergh, "The European Public Prosecutor's Office: Certain constitutional issues", supra note 295. See also S. White, "A Decentralised European Public Prosecutor's Office - Contradiction in Terms or Highly Workable Solution?", *EUCRIM,* 2 / 2012, p. 73, available here.

[324] Many argued that this is the most straightforward solution in terms of accountability and internal organisation. It would have the further advantage that since the two entities (EPPO and Eurojust) would be kept completely separate it would be clear that there is one unit for judicial cooperation in general whereas the other one is for investigating and prosecuting EU fraud.

[325] In this case the EPPO would be located on Eurojust's premises in order to be able to use Eurojust's facilities, but it would function independently from Eurojust.

- In the third option, the EPPO and Eurojust would be two separate entities which share common services (for instance IT services).



Both the EPPO and the Eurojust proposals appear to conceive the special institutional link between both actors as a rather loose one. They indeed seem close to the first scenario, conceiving the EPPO as a separate entity[326]. Arts. 12(3) and 16(7) of the Eurojust proposal provide some form of institutional link, in particular via the possibility for the EPPO to participate in Eurojust's College and Executive Board's meetings wherever issues are discussed which it considers relevant to its functioning –albeit without the right to vote. According to Art. 16(8), the EPPO may also address written opinions to the Executive Board, to which it shall respond in writing without undue delay. The Eurojust proposal thus gives the impression that the EPPO is a sort of 29th Eurojust member, albeit with limited powers. This impression is further confirmed by Art. 41(2) of the Eurojust proposal, according to which requests for support by the EPPO should be treated by Eurojust as if they had been received from a national authority. This provision however relates to operational cooperation, to which we will come back later.

Turning now to the structure from a <u>functional</u> point of view, the question arose in the negotiations as to whether Eurojust's National Members could simultaneously become European prosecutors to the EPPO. This option is especially supported by small Member States. However, this possibility has been severely criticized and this mainly for two reasons: on the one hand, the foreseeable conflict of interests to which such "double hat" system would give rise to and, on the other hand, because the independence condition that European prosecutors have to satisfy (Art. 5) is not required from Eurojust's National Members.

b) Operational relationship between the EPPO and Eurojust

As regards the operational relationship between the EPPO and Eurojust, a preliminary remark must be made with regard to the fact that, even after the EPPO is established, Eurojust will continue to play a role in PIF cases. Eurojust will play a role in at least the following situations[327], in most of which cooperation with the EPPO may/will take place:

- Eurojust will maintain its current competence in PIF cases with regard to cases that only concern non-participating Member States. In such situations the EPPO will of course not be involved, and there will thus be no need for the two bodies to cooperate.
- Eurojust would play a new role in mixed PIF cases (i.e, concerning participating and non-participating Member States). In such cases, Eurojust would cooperate with the EPPO, for instance in relation to mixed JITs, coordination meetings, etc. Art. 57(2)(f)

[326] 'Report from the Eurojust seminar on the new draft Regulation on Eurojust "an improvement in the fight against cross-border crime?" The Hague, 14-15 Oct. 2013, Council Doc. No. 17188/1/13 REV 1, 4 Dec. 2013, p. 36.
[327] On this point see C. Deboyser 'European Public Prosecutor's Office and Eurojust: 'love match or arranged marriage'?', in in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), supra note 302, particularly p. 84.

of the EPPO proposal indeed foresees that the EPPO may request the support of Eurojust in the transmission of its decisions or requests for mutual legal assistance in cases involving non-participating Member States.

- Eurojust may continue to play its classic facilitator role with regard to all Member States wherever the EPPO does not exercise its competence or in cases of minor fraud, since as we have seen the Council has excluded the principle of the EPPO's exclusive competence over PIF offences.
- Eurojust may play a role in the relations between the EPPO and third countries[328]. Indeed, the EPPO proposal foresees that the EPPO may request the support of Eurojust in the transmission of its decisions or requests for mutual legal assistance in cases involving third countries (Art. 57(2)(f)). That provision must be read in combination with Art. 41(3) of the Eurojust proposal providing that Eurojust shall make use of its agreements with third countries and its liaison magistrates in order to support the cooperation of the EPPO with third countries. However, it should be noted that, like Eurojust, also the EPPO would be able to establish working arrangements (including the secondment of liaison officers to the EPPO) with third countries and international organisations and may designate contact points in third countries.
- Last but not least, Eurojust will play a role in hybrid cases where PIF offences are connected to other offences (the so-called "ancillary offences"). Firstly, Arts. 13(2) and 57(2)(c) of the EPPO proposal foresee a role for Eurojust in the determination of the competent authority (EPPO or the Member State concerned) to deal with the ancillary offence. If the EPPO is not competent over those other offences, then cooperation between the EPPO and Eurojust becomes essential. If by contrast the EPPO takes over the investigation and prosecution of ancillary offences, then there could be a role for Eurojust as an advisor/expert in judicial cooperation issues related to those ancillary offences. Beyond the connected offences falling under the definition of ancillary offence, one cannot rule out that other offences are somehow connected to PIF offences, for instance where the suspect is the same. In such cases, there would be room for Eurojust, for example, in relation to competing EAWs.

Generally speaking, operational support and expertise of Eurojust will be crucial for the effectiveness of the EPPO's action. This is reflected by the provisions of the two proposals on exchange of information. Of course, the EPPO will need to have access to all relevant information concerning offences that fall within its competence. Consequently, both proposals insist on the importance of exchange of information, including personal data between Eurojust and the EPPO under certain conditions[329]. We can find an obligation for Eurojust to report any suspicion of a PIF offence to the EPPO,[330] the obligation to transmit information when so requested[331] and other provisions on the sharing of relevant information between the two bodies.

The effectiveness of the exchange of information will largely depend on the concrete mechanisms put in place. Eurojust has developed its case management system (hereafter CMS). Art. 24 of the Eurojust proposal foresees that the CMS and its temporary work files

[328] On the risk of diminishing Eurojust's relations with third parties in light of the proposal for a Eurojust Regulation, see C. Deboyser, ibid., p. 93.
[329] Art. 41(4) Eurojust proposal and Art. 57(4) of the EPPO proposal.
[330] Art. 15 of the EPPO proposal.
[331] Art. 21 of the EPPO proposal.

shall be made available for use by the EPPO. At the same time, Art. 22 of the EPPO proposal provides for the establishment of a 'Case Management System, index and temporary files' for the EPPO. It is, however, unclear how the two systems would interact[332]. The proposals envisage a system of automatic cross-checking of data.[333]

Moreover, according to Art. 57(2)(b) and (d), the EPPO may request Eurojust or its competent National Members to use the powers attributed to them by Union legislation or national law and/or to participate in the coordination of specific acts of investigation regarding specific aspects which may fall outside the material or territorial competence of the EPPO. Critics have been made against these arrangements. In particular, the UK Government opposes them, especially when read in combination with Art. 41 (2) of the Eurojust proposal[334].

3.2.3.2. Bilateral relations between the EPPO and OLAF

In spite of the obvious overlap between their mandates[335], Art. 86 TFEU on the establishment of an EPPO is silent with regard to OLAF. Art. 325 TFEU does however recall the Commission's role in the field of the protection of the EU's financial interests. Indeed, OLAF will continue its current mission with regard to non-participating member states. It is thus appropriate to reflect on the future of OLAF under two different headings: its role with regard to the EPPO, and its role with regard to non-participating member states and the resulting interaction between OLAF and the EPPO.

In relation to the former, and while it is safe to assume that OLAF will probably be one of the most affected EU body by the setting up of the EPPO, the Commission's proposal for an EPPO Regulation does not really clarify what will happen with OLAF once the EPPO is established[336]. Whereas the possibility of eliminating OLAF has been raised by certain authors[337], the EPPO proposal rules out this possibility. Indeed, certain points in the proposal address the future of OLAF: 1) a partial and gradual transfer of OLAF's staff to the EPPO is foreseen, and is justified for budgetary reasons[338] and as a measure ensuring OLAF's expertise and networks are duly exploited[339]; 2) Art. 66 of the proposal enables OLAF to carry out internal PIF investigations within the EPPO; and 3) certain aspects of their operational cooperation are evoked. Art. 58(3) of the proposal provides that the EPPO "shall cooperate with the Commission, including OLAF, for the purpose of implementing the obligations under Art. 325(3) of the Treaty[340]. To this end, they shall conclude an agreement setting out the modalities of their cooperation". Their relationship in the field of the protection of the financial interests is however far from clear. The proposal refers to the

[332] C. Deboyser, 'European Public Prosecutor's Office and Eurojust: 'love match or arranged marriage'?', in in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), supra note 302, pp. 87 ff.
[333] It is interesting to note that this mechanism of automatic cross-checking goes further than the hit no-hit system proposed between Eurojust and on Europol.
[334] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, pp. 25 and 26.
[335] M. Zwiers, *The European Public Prosecutor's Office. Analysis of a multilevel criminal justice system,* Intersentia, Cambridge, 2011, p. 371.
[336] Note that the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor called for a clear definition of the relationship between OLAF and the EPPO (see Commision, supra note 285, p. 679).
[337] V. Covolo, 'From Europol to Eurojust', supra note 241, p. 86.
[338] Commission, EPPO's Proposal, supra note 287, p. 8
[339] Commission, EPPO's Proposal, supra note 287, p. 53 - 54.
[340] Art. 325(3) TFEU reads: « Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities ».

objective of avoiding duplication of administrative and criminal investigations[341], and seems to confer OLAF a special role in ensuring suspicions of PIF offences are transmitted to the EPPO via a preliminary evaluation of reported allegations[342]. It thus seems that the double obligation lying on national authorities to report PIF cases to OLAF and the EPPO would be maintained[343], and the former would become a sort of centralised service ensuring all relevant information reaches the EPPO. Moreover, the proposal sets out an obligation for OLAF (and other national authorities and EU actors) to actively support the EPPO's investigations and prosecutions[344]. Some hints are offered in relation to the precise form in which OLAF could assist the EPPO's investigations when reference is made to the « specialised support to facilitate forensic analysis and technical and operational support to investigations and for the establishment of evidence in criminal cases affecting the Union's financial interests »[345], or to the need to "enable the EPPO to obtain the relevant information at their [Europol and OLAF's] disposal as well as to draw on their analysis in specific investigations"[346]. Unfortunately the later reference is made in the preamble and finds no equivalent in the body of the proposal. This is rather inexplicable given that OLAF is for the time being the most important EU body in relation to information and analysis of PIF offences. Finally, Art. 28 of the proposal allows the EPPO to refer dismissed cases to OLAF (or to the competent national administrative or judicial authorities) for recovery, other administrative follow-up or monitoring.

It is difficult to envisage how these three elements can be simultaneously ensured in the future. For instance, the staff transfer might be difficult to reconcile with the necessary independence OLAF would need to carry out internal investigations within the EPPO. This is particularly true if OLAF ends up becoming a department hosted by the EPPO[347].

The Commission's communication accompanying the proposals took the view that, once the EPPO is in place, OLAF would cease carrying out administrative investigations into PIF offences[348], in order to avoid a situation where parallel investigations are carried out at administrative and criminal levels. However, the Commission had proposed an EPPO with exclusive competence over PIF offences, and the perspective of shared competence might change the situation. Therefore, it is unclear whether OLAF will continue to carry out external administrative investigations into PIF offences.

Another unresolved issue relates to OLAF's role in internal investigations. In the Commission's communication on OLAF, one can read: "A consequence of the future establishment of the EPPO is that OLAF's role in relation to possible criminal conduct affecting the EU's financial interests in internal matters (i.e., in the EU institutions, bodies and agencies of the Union) will be reduced. Once the EPPO is established OLAF will, in these cases, only provide preliminary evaluation of allegations reported to it. It will no

[341] Commission, EPPO's Proposal, supra note 287, p. 53 – 54.
[342] Recital 27 of Commission, EPPO's Proposal, supra note 287.
[343] See on this point the Commission, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, supra note 285, p. 67.
[344] Recital 13 of Commission, EPPO's Proposal, supra note 287. Recalling the EPPO's exclusive competence over PIF offences, recital 26 especifies that the faciliation of the EPPO's investigations should take place 'from the moment a suspected offence is reported to the European Public Prosecutor's Office until it determines whether to prosecute or otherwise dispose of the case'.
[345] Commission, EPPO's Proposal, supra note 287, p. 53 – 54. The reference to OLAF's support in relation to the establishment of evidence in criminal cases is paradoxal in view of the constant allusions to the admissibility problems of OLAF's investigations and reports, see for instance the impact assessment accompanying the proposal, p. 5.
[346] Recital 41 Commission, EPPO's Proposal, supra note 287.
[347] Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 54.
[348] Commission, Communication – *Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust,* COM (2013) 532 final, 17 July 2013, pp. 7, 8 and 9.

longer conduct investigations but may provide assistance to the EPPO on its request (as it already does today to national prosecutors). This change will facilitate a speedier investigation process and will help to avoid duplications of administrative and criminal investigations into the same facts"[349]. OLAF would however continue to carry out administrative investigations into offences of staff of the EU institutions falling outside the scope of the EPPO proposal as well as into wrongdoings of EU staff which result in disciplinary proceedings[350]. What the EPPO proposal seems to have ruled out is the idea of giving OLAF judicial investigation powers in relation to internal investigations as had been considered in the Green Paper[351]. Moreover, and given that Art. 18 of the EPPO proposal entrusts the undertaking of investigative measures to the European Delegated Prosecutor or to national law enforcement authorities, the more ambitious possibility of transforming OLAF into a European police unit seems to be ruled out[352].

It is interesting to note that, in its impact assessment, the Commission does not exclude the possibility of embedding OLAF's remaining administrative investigation functions in a department hosted by the EPPO[353]. The Commission leaves however the adjustments to OLAF's legislative framework in view of the setting up of the EPPO to a later stage, while indicating that such reform should enter into force at the same time as the EPPO[354]. Whereas no proposal has been tabled in this regard, in June 2014 the Commission did put forward a proposal to revise OLAF's Regulation in order to create a Controller of procedural guarantees[355]. The House of Lords has criticised this proposal, considering its justification unacceptable and arguing that it is premature, since any OLAF reform should await until the EPPO proposal is well advanced[356]. The need for such a reform may indeed be questioned at a time when so many changes are on-going in the field of PIF. The argument that 'the reinforcement of procedural guarantees of persons concerned by OLAF investigations through the establishment of a Controller of procedural guarantees represents, to a certain extent, a preparatory step in the direction of establishing the EPPO'[357] is far from convincing if seen isolated. However, the opinion of OLAF's Supervisory body might shade some light into the real aim of the proposal: to assimilate OLAF's procedural guarantees to that of the EPPO's in view of the risk of parallel investigations in participating and non-participating Member States[358]. Even if that is indeed the aim of the proposal, one may wonder if a Controller of procedural guarantees could be equalled to a judicial authority, and if this reform would suffice to solve the problems in relation to multidisciplinary investigations[359].

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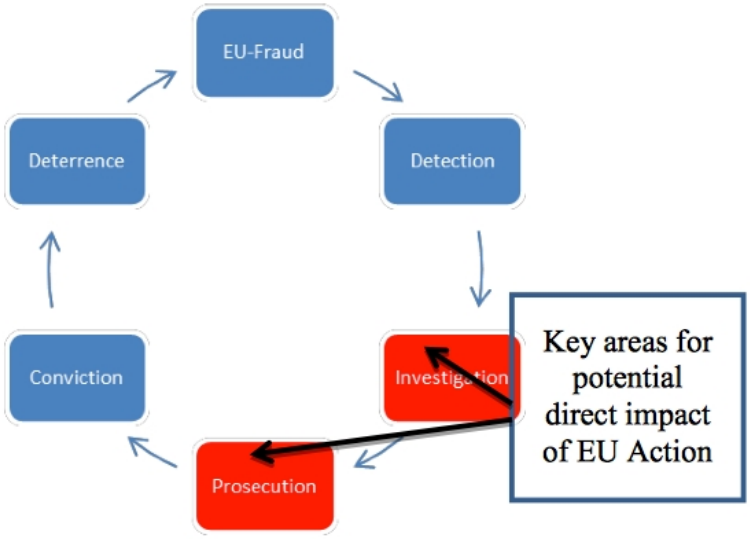
[349] Commission, Communication - *Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office*, COM (2013) 533 final, 17 July 2013, p. 3.
[350] Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 54.
[351] Commission, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, supra note 285, p. 68.
[352] V. Covolo, 'From Europol to Eurojust', supra note 241, p. 86.
[353] Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, pp. 54 and 57.
[354] Commission, Communication – *Better protection of the Union's financial interests, supra note 348*, pp. 7, 8 and 9. The Commission says 'this will mean a system change, moving from administrative to judicial investigations, and bring about substantial changes to the way investigations on fraud and other criminal activities affecting the EU's financial interests are conducted. It will entail a substantial reinforcement of applicable procedural safeguards', ibid., p. 5.
[355] Commission, Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees, COM (2014) 340 final, 11 June 2014, 24 pages.
[356] House of Lords, European Scrutiny Committee, 8th Report of Session 2014-2015, available here.
[357] Commission, Proposal for a regulation as regards the establishment of a Controller of procedural guarantees, supra note 355, p. 13.
[358] OLAF Supervisory Committee, *Reinforcing Procedural Safeguards in OLAF*, available here.
[359] According to the Commission: "There are also a number of gaps and loopholes in the procedural framework applying to the investigation of offences affecting the EU's financial interests which are related to the multidisciplinary character of these investigations involving not only criminal investigation authorities, but also

In any case, we hope the announced proposal to reform OLAF in view of the setting up of the EPPO will address all the unsettled issues raised in relation to the interaction between OLAF and the EPPO. In this regard, the possibility of turning OLAF into a PIF offence 'detection body' might want to be considered. Indeed, whereas the EPPO proposal sets an obligation for all actors concerned to report any PIF offence to the EPPO (Art. 15), the improvement of the detection levels seems not to be addressed or solved with the EPPO proposal[360].



PIF enforcement cycle – *source: COM impact assessment, p. 12*

The special regime of non-participating Member States adds an extra layer of complexity to the already unforeseeable relationship between OLAF and the EPPO. Whereas the Commission's proposal for an EPPO Regulation is silent in this regard, the impact assessment accompanying the proposals did point out that "OLAF, would need to be adjusted to this new reality, with the likely separation of Member States into two groups, one which still uses OLAF for administrative (external) investigations and another which does not. The impact on OLAF's work would indeed be substantial: part of its staff and resources would need to be transferred to the EPPO to handle the latter's criminal investigations in relation to Member States participating in its establishment, while another part would stay and carry on conducting administrative investigations"[361]. In this regard, the UK fears that the creation of the EPPO will undermine OLAF's assistance[362]. If the assurances given by OLAF's Director-General in the sense that sufficient resources would remain available to maintain OLAF's current commitment to the UK are true[363], one can conclude that the level of staff transfer from OLAF to the EPPO will vary in relation to the number of non-participating member states. A further consequence of having Member States outside the EPPO has to do with what EU body/agency will lead (if any) the interaction between non-participating Member States and the EPPO: will it be Eurojust or

administrative, customs and tax authorities in the Member States. These difficulties arise mainly because of the lack of a level playing field in administrative procedural law". Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 21. See also K. Ligeti and M. Simonato.

[360] The Commission's impact assessment does touch upon the issue of detection, identifying it as a week point which is nonetheless a national issue. Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 93.

[361] Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 57.

[362] House of Lords, *The impact of the EPPO's on the United Kingdom,* supra note 289, p. 22 ff.

[363] Ibid., p. 22.

OLAF? The EPPO proposal entrusts this role to Eurojust (Art. 57(2)(f)), at least with regard to judicial cooperation in criminal matters. However, this role does not necessarily exclude cooperation between OLAF and the EPPO. One should recall here the important difference between Eurojust and OLAF's mandate, namely that whereas the former is dependent on national authorities' will, the latter may carry out autonomous investigations. The risk of overlap must in any case be highlighted, and clear legislation must be laid down in each of the EU agencies/bodies' roles in relation to non-participating Member States.

3.2.3.3. Bilateral relations between the EPPO and Europol

Europol is mentioned in Art. 86(2) TFEU in a rather mysterious way, stating that: "the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests". Not much clarification is provided by the EPPO proposal on the precise meaning of this wording. Besides the general provision establishing the obligation to report PIF offences to the EPPO (Art. 15), Art. 21 enables the EPPO to request Europol any information at its disposal in relation to offences falling within its competence (thus including ancillary offences) and allows the EPPO to ask Europol to provide analytical support to a specific investigation. Art. 58 in turn requires that the two bodies "develop a special relationship", which shall entail the exchange of information, including personal data.

Moreover, further reflection is needed with regard to what EU agency or body is to become the information hub in relation to PIF crimes. Our study has evidenced that the information currently available in Europol in relation to such offences is rather limited[364] (see supra), and that it is rather OLAF that has the bulk of this information. Therefore, in the event that following the establishment of the EPPO it is decided that Europol is to play a key role in providing information and analysis with regard to PIF offences, a transfer of information or staff from OLAF to Europol should take place, and the EPPO Regulation must include a provision whereby the EPPO is to feed any relevant information to Europol. Indeed, since information on suspected PIF offences would flow to the EPPO without necessarily involving Europol, a specific provision obliging the EPPO to refer relevant information to Europol should be inserted, since the wording of Art. 58 seems too general to ensure this. Alternatively, the EPPO could become the information hub in relation to PIF offences. In that case, OLAF's analysts should be transferred to the EPPO and a solid system of information exchange should be established between the EPPO and Europol.

The previous statements show quite clearly the interactions or mutual impact between the different bilateral relations themselves ("chain effect"). This means that reflection on one particular bilateral relation should take into consideration the impact it will have on the other bilateral relations. This situation pleads for an overall strategy concerning interagency relations, particularly in the field of PIF.

[364] As acknowledged by the Commission, "Eurojust and Europol do not always receive the information they need to be able to support the Member States"; Commission, Impact Assessment accompanying the EPPO Proposal, supra note 193, p. 15.

4. CONCLUSIONS AND RECOMMENDATIONS

The establishment of a coherent area of criminal justice requires not only a good vertical cooperation between national authorities and EU agencies and bodies but also a good horizontal relation between the EU entities themselves. This study has revealed the high sensitivity of the subject, particularly in the current negotiation context and related uncertainties. In spite of an improvement in the horizontal relations over the years, complementarity, consistency and a good articulation between the EU agencies and bodies are not always present. Tensions and competition remain, which are detrimental to the achievement of a true area of criminal justice. The current negotiation context offers a unique opportunity to clarify some elements and move towards more coherence in this field.

Considering the main issues previously identified, we first recommend the adoption of certain measures relating to each bilateral cooperation (4.1.). We will end with several cross-cutting recommendations (4.2.).

4.1. Recommendations relating to each bilateral cooperation

4.1.1. The fight against serious transnational crime

4.1.1.1. Eurojust-Europol

Concerning the coordination of judicial authorities, we do not advocate for a formal and strict division of tasks between Europol and Eurojust, since that would prejudice the flexibility enjoyed by national authorities. We do insist however on the importance of respecting the allocation of tasks foreseen in the Treaties and keep in line with the wording of Art. 88 TFEU. Moreover, the need to mutually respect each other's expertise and *raison d'être* must be stressed. The inclusion of a mirroring provision establishing that obligation in both Regulations should be considered. We further recommend that both Regulations include a general duty to involve the other agency in its coordination activities wherever its expertise is relevant. In the event that national authorities refused such involvement, they must state their reasons thereof and the respective agency must be kept informed. It would be interesting to keep track of all refusals and justifications. These should be regularly assessed in an objective and scientific way in order to reflect upon the opportunity of rendering both agencies' participation mandatory. The opportunity of abolishing the possibility Member States enjoy to oppose the participation of an EU agency, which reflects the persistent intergovernmental nature of their work, might need to be reconsidered in the longer run. This would indeed be more in line with the communitarisation brought about by the Lisbon Treaty. In doing so, one should nevertheless take into account the potential counterproductive effect such move could have on the good functioning of EU agencies and the trust national authorities place on them.

The possibility to fund JITs in both Eurojust and Europol's draft Regulations offers some advantages, namely that there will be more money to spend on JITs. The risks of judicial authorities being marginalised and of double funding must however be addressed. Indeed, with regard to the risk of marginalisation, which could arise as a result of the increased funding powers of Europol, one should recall the important expertise accumulated by Eurojust in JITs and the important role judicial authorities play in ensuring that information gathered in JITs can be used as evidence before national courts. To address this problem, balance between the funding capacities of the two agencies should be pursued. Moreover,

the recommendation made with regard to the coordination of judicial authorities should apply, *mutatis mutandis*, to the participation of both agencies in JITs. The establishment of a coordination mechanism is advisable to avoid the risk of double funding. Such coordination mechanism could take the form of a mutual obligation to keep the other agency informed of any funding decision or the more ambitious form of a centralised service that would channel the request to the most appropriate agency. The JITs Secretariat might be well placed to play that role considering its expertise. However, this solution has proved to be highly sensitive in view of the Secretariat's seat within Eurojust.

With regard to information exchange between the two agencies, we have seen that the "owner principle" remains but that mutual access to each other's databases on the basis of a hit-no hit system as foreseen in the proposals should significantly improve the situation. We recommend a close monitoring/evaluation of this new mechanism, including the follow up of a hit, in order to assess its functioning and added value.

Finally, concerning analysis of information (both operational and strategic), there seems to be no overlap between the two agencies' activities since Eurojust's analysis are 'judicially-oriented'. Therefore, pedagogy is needed to highlight the differences that exist in the information analysed, the methods used and the objectives pursued. Besides, a general effort should be made by all EU agencies and bodies to avoid the use of terminology that may create confusion and give the impression of an overlap.

4.1.1.2. Eurojust and the EJN

Besides the fact that communication between the EJN secretariat and Eurojust seems to not always be smooth, the main problem affecting their relationship concerns the allocation of cases since no criteria is laid down in the respective instruments. Close monitoring of the implementation and work of national correspondents of EJN and Eurojust to the ENCS[365] is highly recommended. Other solutions include the establishment of indicative criteria in the future Eurojust Regulation, although the wording of such criteria may prove difficult since some flexibility must be ensured to national authorities. A more feasible solution could consist in the adoption of EU guidelines.

4.1.2. The protection of the EU's financial interests

We will first address the current bilateral relations between OLAF and its counterparts (4.1.2.1) to then make some general recommendations on interagency relations once the EPPO is set up (4.1.2.2).

4.1.2.1. OLAF and its counterparts

As we have seen, OLAF's cooperation with Eurojust remains modest. Art. 13 of the OLAF Regulation offers a unique opportunity, and we thus recommend a close monitoring of this provision. More generally, we insist on the importance of respecting each other's mandates and recommend they mutually exploit their respective expertise. The possibility of involving OLAF's contact points in the ENCS should also be considered[366].

[365] See Art. 12 (5) b) of Eurojust Council Decision and Art. 20 (5) b) of Eurojust Proposal.
[366] Council, *Report from the Eurojust seminar on the new draft Regulation on Eurojust - "An improvement in the fight against cross-border crime?"* The Hague, 14-15 Oct. 2013, Council Doc. No. 17188/1/13 REV 1, 4 Dec. 2013, p. 34.

Concerning cooperation between OLAF and Europol, it appears that the flow of information between the two is unsatisfactory. On the one hand, OLAF has no access to Europol's databases, and on the other, for the time being, OLAF is not involved in any of Europol's Focal Points. The cooperation agreement currently under negotiation is supposed to improve the situation particularly with regard to the involvement of OLAF in Europol's activities. We thus recommend monitoring this new agreement. With regard to OLAF's access to Europol's databases, we have seen that the European Parliament and the Council differ on the possibility of granting OLAF access to such databases on the basis of a hit-no hit basis. There are arguments to support both views, and we thus trust that interinstitutional negotiations lead to a satisfactory outcome.

4.1.2.2. The EPPO and its counterparts

The early stage of the negotiations and the number of uncertainties with regard to the EPPO unfortunately impede engaging in precise recommendations. The same difficulty applies to the EU legislator at a time when the type of EPPO remains unknown. Whereas we support the insertion of detailed legislative provisions dealing with the interactions of the EPPO with its counterparts, we believe it is too early to engage in such an exercise. We thus recommend to consider the possibility to postpone the negotiation and adoption of the core provisions dealing with the cooperation between the EPPO and its counterparts until the latter is established or at least until negotiations are significantly advanced. Moreover, the need to consider the effect one precise bilateral relation might have on the others ("chain effect", see *supra*) further advocates in this direction. A few examples might illustrate this chain effect. For instance, if Europol becomes the PIF information hub, then the relationship between OLAF and Europol will need to be strengthened to ensure OLAF feeds Europol all relevant information. Similarly, if Eurojust is in charge of cooperation between the EPPO and non-participating Member States, then mechanisms must be put in place to ensure a good cooperation exists between OLAF and Eurojust. The cooperation provisions dealing with the cooperation between the EPPO and its counterparts could be developed in the EPPO Regulation itself, although in that case the European Parliament would lose its co-decision power. Alternatively, a more transversal text on interagency relations in the field of PIF could be proposed and adopted. In this case, the ordinary legislative procedure could apply.

4.2. Cross-cutting recommendations

Several recommendations are first addressed to the EU political actors/legislators. There is indeed an urgent need to raise awareness among the different EU institutions of the difficult relations between the existing EU entities covered by this study and the lack of a consistent vision in their set up and organisation. Moreover, EU institutions need to be made aware of their responsibility in improving the situation, not only for the sake of the efficient fight against crime, but also vis-à-vis EU citizens who would be amazed if they were aware of the existing climate between EU actors.

This study has revealed that the bulk of bilateral relations are left to the EU agencies and bodies themselves through the conclusion of cooperation agreements/administrative arrangements/memorandums of understanding. This reflects the need for flexibility, which is indeed important. Nonetheless, and particularly where there are clear overlaps between their respective mandates or a proven lack of collaboration, the EU legislator should make an effort to insert more concrete provisions regulating bilateral cooperation in the

instruments of secondary law. Recently adopted texts and the proposals under negotiation show that this effort has already been made in part, for instance with Art. 13 of the OLAF Regulation or with the establishment of the hit-no hit system in the information sharing regime between Eurojust and Europol[367]. Further efforts should be made in this direction. In this respect, we refer to our previous recommendations on the relations between Eurojust and Europol[368]. Similarly, with regard to the setting up of the EPPO and its relations with its counterparts, we remind of the necessity to regulate in secondary law the relationship between the actors concerned, particularly where there are (risks of) overlaps between their respective mandates.

The current context, with key texts being simultaneously discussed, offers a unique opportunity to ensure coherence and consistency. However, the challenge lies in the fact that these negotiations have different timings and paces and involve different negotiators. With regard to the different paces of each of the on-going negotiations, and particularly with regard to the EPPO we recommend as stated before to postpone the negotiation and adoption of the provisions concerning its relations with its counterparts until the EPPO is established or at least until the negotiations are advanced.

Generally speaking, the European Parliament's new powers offer this institution the opportunity to make a difference. Indeed, the role of the European Parliament is key, since it is the best placed EU institution to provide a comprehensive and consistent vision of the EU criminal justice area. As co-legislator of the Eurojust and Europol Regulations, the European Parliament has the duty to ensure consistency and coherence between both texts. With regard to the EPPO Regulation, and in spite of the European Parliament's reduced role under Art. 86(1) TFEU, its power under the consent procedure should not be underestimated. Indeed, as the field of EU external relations reveals (e.g., PNR, SWIFT agreements) its right of veto offers the European Parliament true leverage in the negotiation process, which would allow it to seek consistency with the other texts. However, the LIBE committee is not competent to deal with any reform of OLAF, and thus particular efforts must be place in ensuring a good coordination with the competent committee. Finally, with regard to coherence, hope is placed on the newly appointed first vice-president of the Commission, Mr. Frans Timmermans, since he has the specific responsibility to coordinate the work of the different AFSJ portfolios within the Commission[369].

EU institutions should also be wary of the increasing imbalance between law enforcement agencies and the judiciary at EU level. Whereas a similar move can also be witnessed at national level, EU institutions must realise that they contribute to this trend. In this regard, the crucial role of Europol and national Home Affairs Ministries in the Internal Security Strategy and in the EU policy cycle for serious and transnational crime is to be noted. Moreover, the difference in terms of resources, both human and financial, between Europol and Eurojust necessarily impact their respective role and weight in the EU area of criminal justice. While intelligence-led policing is not negative in itself, one must not forget that criminals will ultimately be brought to trial and therefore the role of the judiciary should not be neglected. Again, considering its new decisional powers, the European Parliament could play an essential role in ensuring the required balance between law enforcement and judicial authorities is established at EU level.

[367] See Art. 40 of the proposal for a Eurojust regulation and Art. 27 of the proposal for a Europol regulation.
[368] See particularly the recommendations made above in 4.1.1.1.
[369] See Jean-Claude Juncker, *Political Guidelines for the next European Commission,* Opening Statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014, p. 8 -9, available here. See also Mission Letter to Frans Timmermans, Vice-President in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, Brussels, 1 Nov. 2014, p. 5, available here.

On a more operational level, some of the good practices identified previously should be encouraged and promoted in order to foster synergies and reinforce mutual knowledge and mutual understanding between the different actors involved. Among them, one should recall the favourable impact of exchange of staff programs and other joint activities. Such programs take place between Europol and Eurojust as well as between Eurojust and OLAF. Other good practices include the 'double hat' system of some of Eurojust's National Members, who are at the same time EJN contact points[370], or the frequent and close contacts between the Eurojust desk and the Europol liaison officers, sometimes formalised via Memorandums of Understanding as is the case in Belgium[371].

The necessity to improve awareness, both at national and EU level, of the roles and added value of each entity cannot be attained without appropriate training measures, sharing of expertise and other joint initiatives such as the development of joint manuals. Good examples of such activities include the Europol-Eurojust JITs manual, the joint Task Force Paper prepared by EJN and Eurojust or the training session for OLAF investigators organised by Eurojust. Similar measures should also target national authorities, which are often confused with regard to each EU agency/body's competence.

In general, every opportunity to establish personal contacts and improve mutual knowledge, be it via conferences, workshops, seminars, etc. must be welcomed and encouraged.

Finally, whereas certain monitoring or evaluation mechanisms of multilateral/bilateral interagency relations have been set up - for instance the JHA heads of agencies meetings, the multilateral cooperation scorecard in the context of COSI, or the 6th round of mutual evaluations - we believe these mechanisms should be further developed and its results be made more visible. Indeed, one of the difficulties we encountered in carrying out this study was the lack of transparency and of available documents. Fostering transparency would not only improve the monitoring and assessment of interagency relations, but would also indirectly improve these relations. Indeed, when you are made publicly accountable not only with regard to your individual activities but also with regard to bilateral and multilateral relations with the other relevant EU bodies, your sense of responsibility is necessarily reinforced and your cooperation should logically improve. Keeping in mind the need to avoid overwhelming EU agencies/bodies with reporting duties, assessments or monitoring, we especially suggest:

- to detail the parts of the annual reports dealing with cooperation with their counterparts, and to do so not only through figures but also in qualitative terms. These reports could be presented by the heads of agencies on the same day in the Parliament, which could ask them questions as to their mutual cooperation. This would be in line with Art.s 85(1) *in fine* and 88(2) *in fine* of the TFEU.
- Furthermore the European Parliament could make use of its budgetary power to "push" for better interagency cooperation[372].

[370] See for instance the practice introduced by the Belgian authorities, under which a EJN contact point has been appointed within the national desk at Eurojust (such as the seconded national expert), in order to promote and maintain a strong relationship between Eurojust and the EJN (Report on Belgium, Council Doc. No. 17898/1/12, p. 19).
[371] Ibid. p. 54.
[372] See in particular the powers conferred to the European Parliament for the discharge of the budget of each agency (Art. 36 (10) of Eurojust's Council Decision and Art. 46 (10) Europol's Council Decision). Similar powers

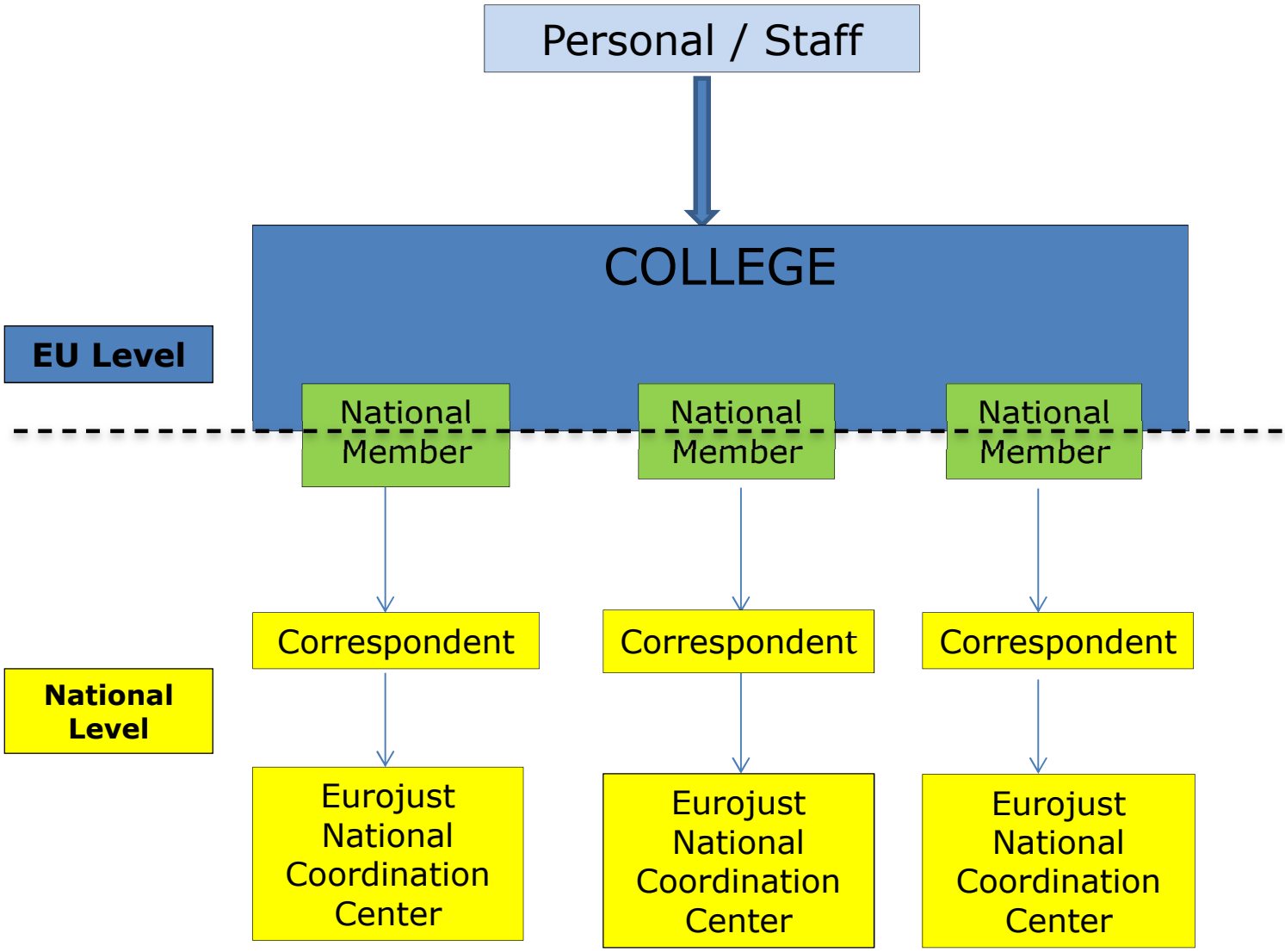
- An evaluation round of both interagency relations and national authorities perception/degree of satisfaction (inspired by the round of mutual evaluations) could be launched.
- Last but not least, an independent, regular and general monitoring mechanism of interagency relations could be conferred to a surveillance committee, the latter being independent from any EU institutions.

In conclusion, there is an urgent need for all actors involved, ranging from the political to the operational level, to make an effort and keep in mind the common overall objectives. After all, fighting crime is difficult and challenging enough without adding extra layers of complexity. There is enough work for all. Whereas competition is human, it nonetheless runs counter the general objective of establishing a consistent, balanced and efficient area of freedom, security and justice. This objective must become the priority, and guide every EU agency and body in order to ensure all resources are exploited to the fullest extent. This cannot be achieved without mutual understanding, complementarity and respect for each other's mandates and expertise.

are also envisaged in the future Regulations (Art. 51 of the Proposal for a Eurojust's Regulation and Art. 62 (10) of the Council's General Approach on the Europol Regulation).

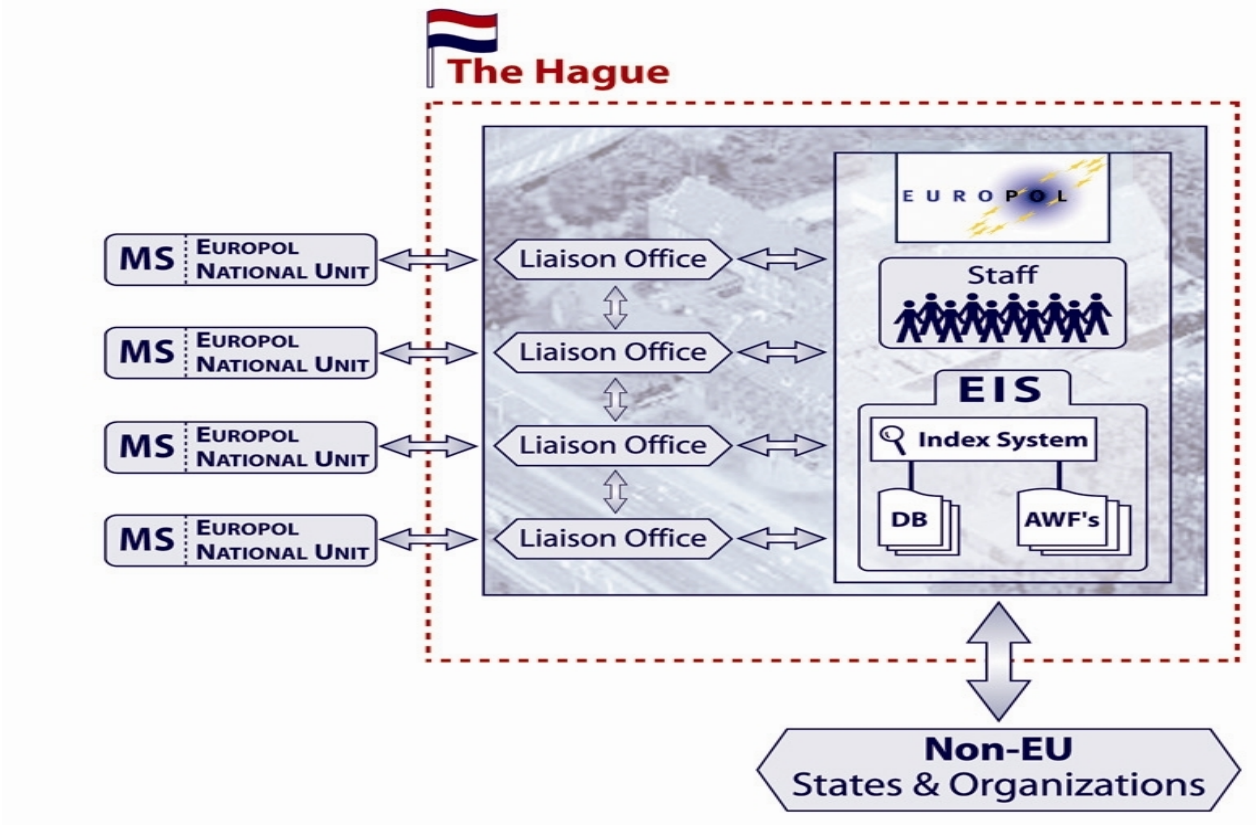
ANNEXES

Annex 1 – Structure of Eurojust



Source: COPEN Training

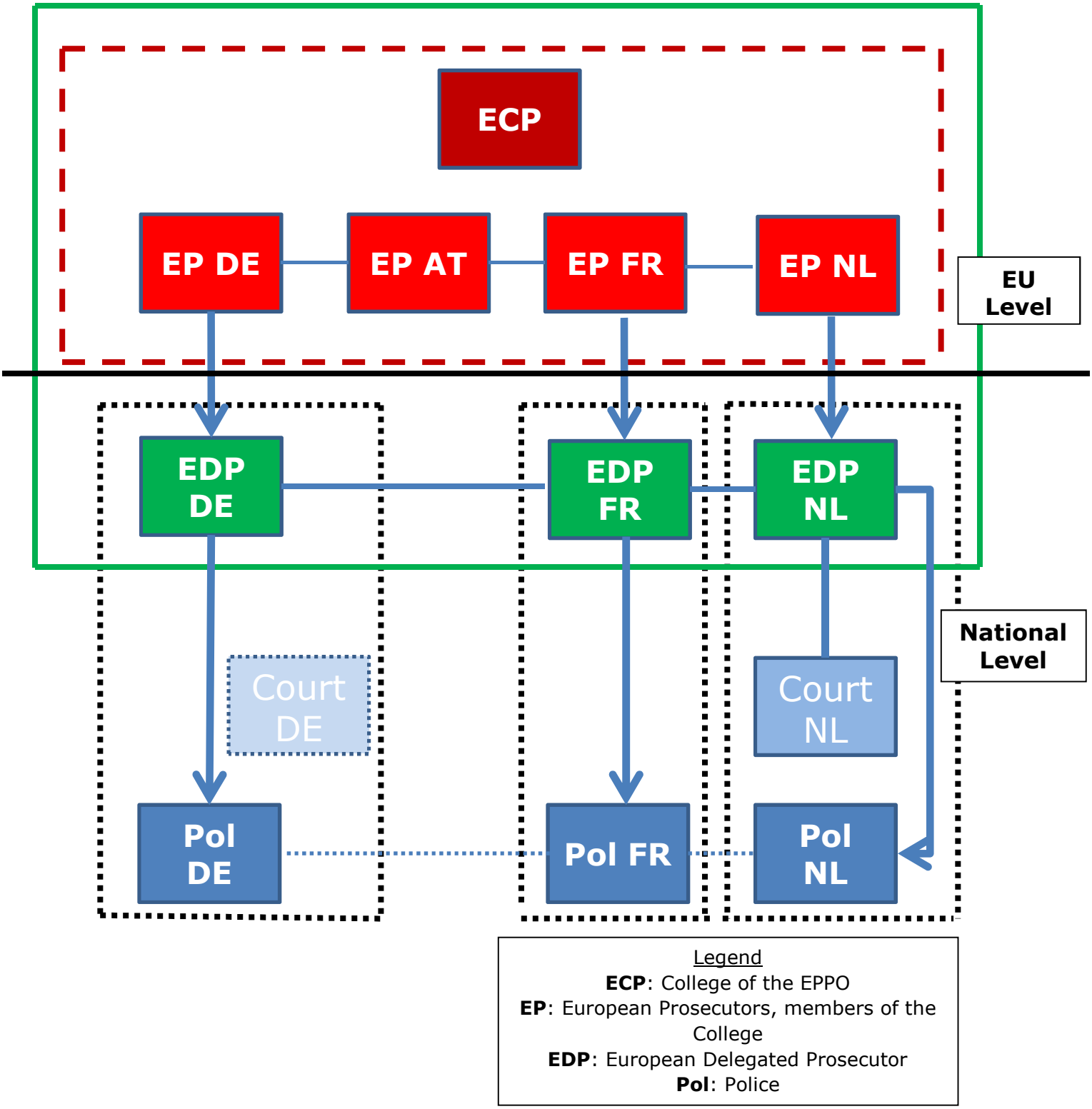
Annex 2 – Structure of Europol



Source: COPEN Training

Annex 3 – Structure of the European Public Prosecutor's Office

Disclaimer: This scheme represents the structure of the EPPO as envisaged by the Council in its draft of the Proposal for a regulation the establishment of the EPPO of 21 May 2014 (Council Doc. No. 9834/1/14 Rev 1). The structure of the EPPO may still evolve throughout the negotiations.



Source: Hans-Holger Herrnfeld.

Annex 4 - List of interviews

- 3 June: Hans Nilsson, General Secretariat of the Council of the EU.

- 5 June: Daniel Flore, Service Public Fédéral Justice, Belgium.

- 10 June:
    - Jolien Kuitert, Deputy National Member for the Netherlands and Dutch contact point for the European Judicial Network.
    - Vincent Jamin, Head of JITs Network Secretariat.

- 11 June: Katalin Ligeti, Professor, University of Luxembourg.

- 25 June: Martin Wasmeier, Legal Service, European Commission (formerly member of OLAF).

- 30 June: Roland Genson, General Secretariat of the Council of the EU.

- 2 July: Serge de Biolley, Cabinet of the Belgian Minister of Interior.

- 3 July:
    - Nathalie Pensaert, General Secretariat of the Council of the EU.
    - Andrea Venegoni and Ute Steigel, OLAF

- 7 July, Eurojust:
    - Ladislav Hamran, Vice-President and National Member for Slovenia.
    - Catherine Deboyser, Laura Surano, Anna Danieli, Legal Service.
    - Sylvie Petit-Leclair, National Member for France.
    - Ingrid Maschl-Clausen, National Member for Austria.
    - Klaus Rackwitz, Administrative Director.

- 31 July: Andrea Venegoni and Ute Steigel, OLAF (Reception of written answers).

- 9 September: Christiane Hoehn, Adviser to the EU Counter-terrorism Coordinator.

- 16 September, Europol:
    - Bart De Buck, Legal Affairs.
    - Dietrich Neumann, Head of Business Area Corporate Services.
    - Olivier Burgersdijk, Head of Strategy and Outreach, EC3 Cybercrime Centre.
    - Ben Waites, Office of the Director.

- 17 September, Parquet fédéral belge:
    - Bernard Michel,
    - Tom Lamiroy, responsible for the international section),
    - Cédric Visart de Bocarmé.

- 18 September, DG Justice, European Commission:
    - Peter Csonka,
    - Alexandra Jour-Schroeder
    - Dick Heimans

- 18 September, European Commission, DG Home[373]
    - Victoria Amici
    - Magdalena Jagiello,
    - Francoise Comte
    - Catherin Bauer-Bulst and Julie Ruff

- 24 September: Michèle Coninsx, President of Eurojust.

- 8 October: Francisco Jiménez-Villarejo, Vice-President and National Member for Spain, Eurojust (Reception of written answers).

- 3 November: Hans-Holger Herrnfeld, Special Advisor to DG Criminal Law on the EPPO, German Federal Ministry of Justice, Berlin

- 10 November: Fritz Zeder, Head of Criminal law division, Ministry of Justice, Austria.

- 20 November: Daniel Flore, Service Public Fédéral Justice, Belgium.

- 21 November: Andrea Venegoni and Ute Steigel, OLAF (Reception of written answers).

[373] (The interview of 29 August, with Francesco Tricario, Floriana Sipala and Françoise Comte, DG Home Affairs, D.1. Strategic policy, Inter-institutional relations and agencies was cancelled)

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PHOTO CREDIT: iStock International Inc.

ISBN: 978-92-823-6320-1
DOI: 10.2861/452825

Publications Office