

Eurojust's Fledgling Counterterrorism Role

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Abstract

The article offers an analysis of Eurojust's contributions to the European Union counterterrorism policy and questions whether all EU Member States fully support the strengthening of Eurojust's role in the fight against terrorism. The allegations concerning the existence of an inter-agency rivalry between Europol and Eurojust in the area of counterterrorism are also analyzed. Finally, the article provides an assessment of the possible impacts of the 2008 Council Decision on the Strengthening of Eurojust and the Lisbon Treaty provisions for possible establishment of a European Public Prosecutor's Office from Eurojust when it comes to EU's counterterrorism efforts.

Keywords

Eurojust; Europol; European Union; Terrorism; Counterterrorism; Judicial cooperation; Criminal matters

THIS ARTICLE OFFERS AN ANALYSIS OF EUROJUST'S CONTRIBUTIONS TO THE EUROPEAN Union (EU) counterterrorism policy. Building on criteria for assessing value-added of EU agencies identified in the intelligence studies literature, it is argued that Eurojust currently does not offer genuine value-added in the fight against terrorism by producing something that the EU Member States (MSs) are either unwilling or unable to produce on their own. Moreover, the official EU documents, internal reports, secondary sources, as well as interviews with practitioners suggest that it is questionable whether all EU MSs fully support the strengthening of Eurojust's role in the fight against terrorism. This is largely due to the persisting differences in national legal standards, the absence of genuine pro-integration thinking in the area of criminal justice, and the lack of trust from national agencies. On the other hand, however, some of these constraints are diminishing over time, as Eurojust's contributions to the fight against terrorism are incrementally taken into account by national counterterrorism experts and practitioners. Similarly, it appears that the initial inter-agency rivalry between Europol and Eurojust in the area of counterterrorism has largely been surmounted. The Council also tried to remedy several important shortcomings in its December 2008 Decision on the strengthening of Eurojust, particularly regarding the clarification, and to some extent expansion, of the powers of Eurojust national representatives. In consequence, Eurojust is currently better positioned to support national counterterrorism efforts in a number of important areas.

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This article proceeds as follows. A succinct overview of the origins of judicial cooperation in criminal matters and the actual creation of Eurojust is offered in the first section, followed by brief accounts of Eurojust's original mandate and its post-9/11 counterterrorism role. Section four reviews Eurojust's current counterterrorism activities. The alleged inter-agency rivalry between Europol and Eurojust is analysed in section five. Sections six and seven review the current and the potential value-added of Eurojust in the area of counterterrorism, respectively. The concluding section offers some thoughts on the possible impact of the 2008 Council Decision on the Strengthening of Eurojust and the Lisbon Treaty provisions for the possible establishment of a European Public Prosecutor's Office from Eurojust when it comes to EU's counterterrorism efforts.

Origins of judicial cooperation in criminal matters and the creation of Eurojust

The origins of major judicial cooperation initiatives at the EU level, especially in the field of criminal justice, are relatively recent. The founding treaties of the then European Communities did not contain any specific cooperation in criminal justice matters. Over time, both internal and external factors led to the establishment and gradual deepening of European criminal justice institutions (Vlastnik 2008: 35-36), but when contrasted with police cooperation under the TREVI framework (Peek 1994: 201), judicial cooperation clearly lagged behind. It was only in the early 1990s that the continuing progress in police cooperation resulting in the creation of Europol prompted many judicial and political actors in EU MSs to express their concerns about the establishment of "a Europe of the polices devoid of complementary judicial system" (Megie 2007: 67). In particular, there was a fear that "Europol has been developing outside of any judicial control", which also led to the increased emphasis on the need for the defence of individual rights (French Office of Plans, cited in Megie 2007: 68). These concerns were also shared by the DG Justice, Liberty and Security (DG JLS) at the European Commission, which tried to use them to further assert its previously limited role and powers in the field of security.

The Commission and the EU MSs did not, however, agree on how to address these concerns. Specifically, many MSs, as well as the Secretariat General of the Council, were determined to prevent a further strengthening of the Commission's, and to a certain extent of the European Parliament's, assertiveness in the sphere of judicial cooperation in criminal affairs. This clash of interests manifested itself in the failure of the Corpus Juris Project and the European Chief Public Prosecutor, which had the support of the Commission, but was blocked by the Council. Instead, several other actions and initiatives were approved, all less supranationalist in nature. In 1998, the European Judicial Network (EJN) was created after two years of preparation.¹ The entry into force of the Treaty of Amsterdam in May 1999, with its emphasis on the creation of an Area of Freedom, Security and Justice, added further impetus to judicial cooperation in criminal matters. Nevertheless, it is important to note that, according to some experts, "the decision to create Eurojust was a political response to the proposition for the European Chief Public Prosecutor made by DG JLS" (Megie 2007: 75) that must "be interpreted as an affirmation of the intergovernmental logic in the field of judicial cooperation in criminal affairs" (Bigo 2007: 16).

The actual political decision to establish a European Judicial Cooperation Unit was made by the Tampere JHA Council in October 1999, which called for the creation of a Eurojust unit composed of national prosecutors, magistrates or police officers of equivalent competence from each MS by the end of 2001. In 2000, a Provisional Judicial Cooperation

¹ EJN is essentially a decentralised information sharing network connecting EU lawyers and judges working on criminal cases. It is composed of Contact Points of the Member States, as well as the European Commission and a Secretariat based in the Hague. (European Judicial Network 2009)

Unit (Pro-Eurojust) was created. Formally, however, Eurojust was only created by means of a Council Decision on 28 February 2002 (Council Decision 2002), thus becoming the first permanent network of judicial authorities to be established anywhere in the world. The Treaty of Nice, which entered into force in February 2003, provided an explicit treaty basis for this new EU agency, thereby confirming its role as one of the key players in the criminal justice cooperation field within the territory of the EU.

Eurojust's original mandate

When it comes to the analysis of Eurojust's mandate, it is important to bear in mind its "double nature" (Vlastnik 2008: 37). On the one hand, Eurojust is essentially a high-level team of senior magistrates, prosecutors, judges and other legal experts, who are seconded from every EU Member State.² They may be assisted by one or more person(s) when carrying out their powers.³ Both the national representatives and their assistant(s) remain subjected to their national law. According to the original 2002 Council Decision, EU MSs were also free to determine from which national body the national representative will come from⁴, which powers they will keep within their jurisdiction, what their term of office will be and what salary they will earn. Nevertheless, once the December 2008 Council Decision on the Strengthening of Eurojust is implemented by all EU MSs⁵, all national representatives will be assisted by one deputy and by another person as an assistant. Acting on behalf of Eurojust, they will be entitled to ask national authorities to take special investigative measures and/or any other measure justified for the purposes of the investigation or prosecution. In order to create an equivalent level of powers for national representatives, the 2008 Decision also contains provisions to regulate the powers conferred on national representations in their capacity as national authorities, specifying that they shall be at a minimum granted the power to receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for judicial cooperation. Nevertheless, even with these new provisions in place, it is still possible to speak of the national feature of Eurojust.

On the other hand, the national representatives together form the College of Eurojust, which functions as a management board of Eurojust and can be described as "a collective organ of European character deciding in principle by majority vote" (Vlastnik 2008: 37). The main advantage of having all national experts in one building lies in the instant accessibility of information and expertise – the individual team members know the legal systems and practical arrangements of their home countries inside out, and they can consult other team members at any time. This enables them to put any cases referred to Eurojust into an EU context and "more easily spot any patterns or trends in EU crime than colleagues in their home countries" (Commission 2004a). Moreover, Eurojust is the only point where the national criminal records of all MSs come together – each national member of the College of Eurojust has both the access to national criminal records of his/her MS and is empowered to exchange information with other members of the College (Müller-Wille 2004: 26). Last, but not least, Eurojust also enables direct contact between judges, so that, for example, a judge in Greece can ask a judge in France to issue an order against a suspect living in France (Bensahel 2003: 41).

² There are also liaison magistrates from three non-EU countries: Croatia, Norway, and the United States.

³ As of 2008, fifteen Member States had appointed deputies and/or other assistants to support their national member (Eurojust 2009).

⁴ According to the data provided in the 2008 Eurojust Annual Report, the majority of national members are prosecutors (Eurojust 2009).

⁵ If necessary, the MSs must bring their national law into conformity with the Decision by 4 June 2011 (Council Decision 2008).

According to its official web-page (Eurojust 2007a), Eurojust's key functions include the following:

- 1) Stimulate and improve the co-ordination of investigations and prosecutions between competent authorities in the Member States;
- 2) Improve co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;
- 3) Support the competent authorities of the Member States in order to render their investigations and prosecutions more effective when dealing with cross-border crime.

More specifically, the primary task of Eurojust is to provide "immediate legal advice and assistance in cross-border cases to the investigators, prosecutors and judges in different EU Member States" (Eurojust 2007a). It can also handle letters rogatory, which ask for information, or enquiries to be carried out by the authorities in another country, and direct them to the appropriate authorities for action; assist and cooperate with OLAF, the EU's anti-fraud organisation,⁶ in cases affecting the EU's financial interests; recommend certain steps to national authorities to take, "such as to initiate and/or coordinate investigations or to set up investigation teams" (Commission 2004a). On its own, however, Eurojust has no legal authority to launch or execute investigations and it cannot impose any penalties if its requests are not complied with – although it may publish details of failures to comply in its annual report. Instead, it relies on a system of lateral links among its members, which are based on the idea that "cross-border issues such as terrorism and organised crime require increased cooperation among judicial authorities" (Bensahel 2003: 41).

Eurojust's counterterrorism mandate

According to the first President of Eurojust (Kennedy 2007: 60), countering terrorism "has been a priority for Eurojust since it was established as a provisional unit on the 1st of March of 2001." The first operational meeting dealing with counterterrorism issues under the auspices of the then still Pro-Eurojust indeed pre-dates the 9/11 events. It took place in June 2001, when seven EU MSs met to discuss the issue of extremist Islamic terrorism. According to the current Chair of the Counter-Terrorism Team of Eurojust (Coninx 2009), it was "a very difficult meeting" due to the lack of trust among the participating national representatives. Their willingness to share information on what in many cases were still on-going criminal investigations was rather low, although there was a generally accepted need to "discuss, coordinate and cooperate." Ultimately, however, the meeting led to the arrests of several suspects in Spain in August 2001, setting an important precedent that EU-level judicial cooperation is able to deliver tangible practical results.

As in other areas of EU's counterterrorism efforts, the 9/11 terrorist attacks represented a wake-up call and revealed the need for much closer cooperation and information-sharing in the area of criminal justice (Bures 2006; Spence 2007). The Council immediately asked Eurojust to convene strategic level meetings of representatives of all EU MSs. The first of these occurred in October 2001 and it became apparent that "a lot of things were missing" and that "there was no uniform approach to counterterrorism related issues" among EU MSs. As in the pre-9/11 meeting, it was also evident that counterterrorism was still perceived as a national security issue and it was therefore "extremely difficult to make professionals work together" because they felt that sharing information on on-going criminal investigation amounts to a breach of professional secrecy and, as such, "it is

⁶ OLAF can be regarded as a collector of data that is forwarded to national authorities to initiate and/or support criminal proceedings. On its own, however, OLAF does not run any criminal investigations.

absolutely not possible" (Coninx 2009). After a series of similar meetings in late 2001, where the same problems had been encountered, Eurojust representatives "detected the need for uniform legislation, better information flows, and a clear approach to terrorism and counterterrorism" (Coninx 2009), which were all subsequently reported to the Council, Commission and the European Parliament, and thus contributed to the formulation of the aforementioned February 2002 Council Decision that formally established Eurojust proper (Council Decision 2002).

Since 2002, according to the Chair of the Counter-Terrorism Team of Eurojust and the Eurojust annual reports, Eurojust has been convening counterterrorism meetings at three levels. At the operational level, the national counterterrorism magistrates focus on the on-going criminal investigations (Eurojust 2009: 16). At the tactical level, Eurojust representatives decided to push the MSs towards the sharing of best practices regarding their own national counterterrorism experiences with different kinds of terrorist groups and the mapping out of the potential linkages between these nationally-based terrorist groups.⁷ A special questionnaire was sent out to MSs prior to the first series of the tactical meetings so that the specialised national magistrates were then able to come to Eurojust to really share meaningful information. At the strategic level, Eurojust convenes an annual meeting where national representatives are reminded about their duty to share all information regarding on-going criminal investigations with Eurojust.⁸ In cases where information has not been forthcoming, explanations are requested from national representatives. These range "from no relevant information to be shared due to the lack of on-going, terrorism-related investigations, to the lack of interest in the European level and the persisting reluctance to share." Apart from putting "gentle pressure" on the MSs to fulfill their obligations towards Eurojust, the strategic level meetings are also used by Eurojust representatives to show the MSs representatives "what Eurojust had been doing with the received information and what value-added was provided in the fight against terrorism" (Coninx 2009).

In the aftermath of the March 2004 Madrid terrorist attacks, the Eurojust College decided to create a special Counter-terrorism Team and a scoreboard to keep track of the progress achieved in major counterterrorism initiatives. The rationale behind these steps was to further improve networking to the point where Eurojust's counterterrorism role would eventually progress "from purely reactive coordination efforts to more proactive and preventative contributions in the fight against terrorism" (Coninx 2009). The Counterterrorism Team was also put in charge of enhancing the links with other EU institutions (especially, but not only, with Europol and the EU's Counterterrorism Coordinator), as well as non-EU bodies (including the Council of Europe, the UN) and third countries. Eurojust also pushed for the establishment of the Case Management System (CMS), an EU-wide judicial database that contains information on all investigations and prosecutions reported to Eurojust. A proposal to further enhance the capacity of the CMS with regard to information on convictions was tabled in 2007 and another legal database on terrorism giving an up-dated overview of the available national, European and international legal documents on terrorism was set up in the same year (Eurojust 2008: 56, 61). Most recently, there has been a more targeted attention to specific forms of terrorism (such as cyberterrorism and terrorism involving the use of, and focus on, nuclear, biological and chemical materials) and counterterrorism (such as the fight against terrorist finances) (Eurojust 2009: 23).

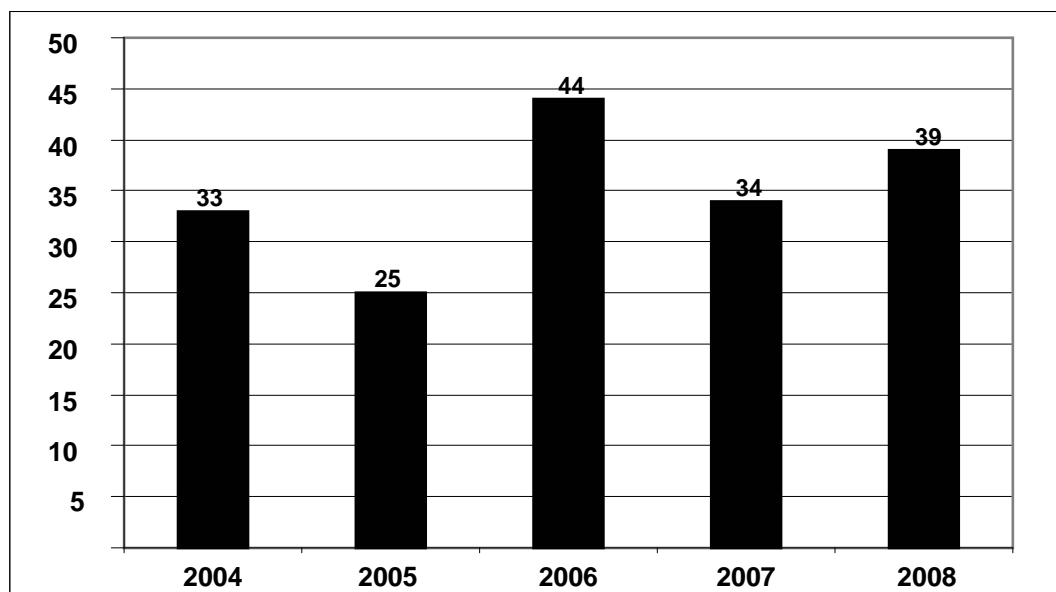
⁷ In 2007, for example, a tactical meeting brought 19 Member States, third States and Europol together to discuss an ethno-nationalist separatist terrorist group (Eurojust 2008: 27).

⁸ In 2007, for example, the focus of the strategic meeting was on the implementation of the JHA Council Decision of 20 September 2005 on information exchange (Eurojust 2008: 27).

Eurojust's counterterrorism activities

As of early 2010, Eurojust is still a relatively young organisation attempting to establish its own procedures and mechanisms for cooperation. Nevertheless, a number of provisional observations can be made about its workload and value-added in the fight against terrorism from the data published in its annual reports. Although the number of terrorism-related cases referred to the College remains rather small compared to other major types of criminal activity (such as drug-trafficking, or crimes against property and public goods), it has been steady over the past years (see Chart 1). There has been an increase in the number of cases involving financing of terrorism, which appears to confirm the findings of a recent analysis that public prosecutors have started to coordinate on a voluntary basis via Eurojust, including in the field of combating terrorist finances (John Howell & Co 2007: 31). Moreover, many cases are increasingly referred to Eurojust at an early stage of investigation, thus saving resources for those fighting international crime and terrorism. Eurojust has also increased the analytical capacity of the Case Management Analysts by recruiting seven assistants. Thus far, Eurojust's analysts have supported fourteen complex operational cases involving co-ordination and produced strategic analysis on the basis of statistical data from the CMS (Eurojust 2008: 56). While it is difficult to compile evidence and statistics on cases where Eurojust's input contributed to tangible counterterrorism outcomes – such as arrests and/or convictions – the recent annual reports do provide information about several such cases. Based on this evidence, one may argue that Eurojust is increasingly fulfilling its key role: enhancing the development of EU-wide cooperation on criminal justice cases.

Figure 1: Evolution of terrorism cases at Eurojust, 2004-2008



Source: Eurojust 2009: 23.

More pessimistically, however, a number of high-profile EU reports have criticised the slow progress in implementing the relevant EU decisions, as well as the persistent lack of tangible results in the area of judicial cooperation at the EU level. For example, a report drawn up by the EU Council's security experts following the March 2004 terrorist attacks in Madrid claimed that EU MSs adopted "a minimalist approach to Eurojust" and criticised several of them for paying lip-service to this important EU agency (Dempsey 2007: 6). Another report by the European Commission pointed out that even as of mid-2004, two MSs had yet to establish their national contact points to exchange information on

terrorism with Eurojust, which had prevented this agency from pursuing its envisaged coordination functions throughout the entire territory of the EU (Commission 2004b). Moreover, some MSs apparently do not use Eurojust for cross-border cases, thus *de facto* restricting its usefulness (Coninx 2009) and, as argued in detail in the next section, cooperation with Europol in the area of counterterrorism has not always been perfect either.

In the aftermath of the 2004 Madrid and the 2005 London terrorist attacks, Eurojust representatives “insisted on the establishment of a network of national counterterrorism correspondents who were obliged to provide information on on-going investigations in all stages”, including interviews, arrests, pre-trial detentions (Coninx 2009). This kind of information is different from that collected by police agencies (who focus on information about telephone numbers, identity cards numbers, card plates, etc.), but the two are naturally complementary and, when consolidated, can significantly facilitate counterterrorism cooperation. Eurojust’s requests were acted upon in September 2005, when a Council Decision (2005: Article 2.2) obliged the EU MSs to appoint one national correspondent who should collate “all relevant information concerning prosecutions and convictions for terrorist offences” and forward it to Eurojust. In practice, however, even as of 2008, only ten Member States provided Eurojust with the required information. Moreover, although Eurojust confirmed that the contributions “were of better quality compared to 2006 with a much higher level of detail”, it was not always possible to compare the findings due to differences in the data contributed to Eurojust for 2006 and 2007 (Europol 2008: 9).

Eurojust’s own Annual Reports (2008; 2009) have also raised a number of critiques and concerns, including the following:

- 1) The speed and level of implementation of the 2002 Eurojust Decision has been uneven among EU Member States.
- 2) The support given by Member States to their National Members has been uneven. As late as 2006, the Polish and Lithuanian National Members have not even been able to establish a permanent residence in Eurojust headquarters in the Hague.
- 3) There are more cases which could and should be referred to Eurojust, whose capacity to deal with casework is not being fully exploited.
- 4) A number of crucial and practical JHA instruments, such as the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States and its Protocol of 16 October 2001 on mutual co-operation in banking information, as well as the Council Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence, have not yet been implemented in several Member States, thus preventing Eurojust from fulfilling its role in the coordination of investigations and prosecutions.
- 5) Very few Member States provide Eurojust with data concerning terrorist offences, as prescribed in the Council Decision of 20 September 2005.
- 6) A 2007 survey among all National Members showed that a vast majority have casework which is not registered in Eurojust’s Case Management System, and almost two-thirds do not have statistics on this unregistered casework.

The annual reports also revealed a potentially useful, though thus far under-utilised mechanism formally falling under Eurojust’s watch – the Joint Investigations Teams (JITs). Available evidence suggests that despite the creation of an informal Network of National Experts on Joint Investigation Teams in July 2005, only a few MSs have actually set up JITs in practice. A survey of all National Members conducted by Eurojust in 2008, for example, showed that very few MSs have even formally recommended the setting up of a JIT. It also revealed that JITs have not been considered necessary by concerned MSs because they found other forms of cooperation sufficiently effective. A few National Members have also

referred to the lack of implementation of the Council Decision on JITs at the domestic level (Eurojust 2008: 57-59).

Critical remarks concerning the (non-)use of Eurojust by EU MSs can also be found in a number of non-EU reports and analyses. A report by the UK House of Commons (2007: para. 152), for example, stated that "Eurojust's capacity is limited by some Member States' unwillingness to use it fully." The Centre for European Policy Studies (cited in UK House of Commons 2007: para. 152) pointed out that Eurojust itself says that it has the capability and possibility to go further but it cannot work when no cases are referred to it: "Apart from the 500 additional cases arising in 2005, it [Eurojust] says that it had the capability and capacity to deal with more but it is not able on its own to instigate this work." This has been confirmed by Eurojust's representatives interviewed for a French study, who argued that their institution "can only become perennial and produce concrete outcomes provided national judges resort to it" (Megie 2007: 82-3). However, other interviews conducted with French, Belgian, Dutch and Italian magistrates showed that the majority of them remain, albeit for different reasons, 'alien' to European issues. This is partly due to the obstacles related to cognitive issues (*e.g.* language, knowledge of foreign legal systems ,etc.), but as in the case of police and intelligence cooperation, it is also explicable by the occupational culture of magistrates and judges where personal and informal relations remain the preferred mode of action when dealing with a transnational affair (Megie 2007: 83).

Some observers have also criticised the configuration of Eurojust's College: it is nearly entirely composed of national prosecutors, *e.g.* magistrates from the respective MSs accusatory authorities. This has allegedly led to a problematic dominance of the intelligence-led rationale within Eurojust because the main role of the magistrates is to assist the police in transforming the collected data into legally compelling evidence that can be used in a court of law:

Prosecutors are *de facto* involved in the intelligence approach to threats as opposed to an approach focusing on the rights of the defence. At the European level, we are hence witnessing a dual judicial subfield: one mainly linked to prosecutors and very close to accusatory authorities of the Member States and a second more marginalised one focusing on the accusation than on procedural rights and especially the rights of the defence (Bigo *et al.* 2007: 40).

Such remarks testify to the presence of occasional tensions between justice and security (Balzacq and Carrera 2006; Guild and Geyer 2008). In addition, they also reveal that the new Stockholm Programme's suggestion that the 2008 Council Decision together with the Lisbon Treaty offer "an opportunity for the further development of EUROJUST in the coming years, including in relation to initiation of [criminal] investigations" (Council 2009: 24), may be problematic because there are only few investigative officers at Eurojust at the moment.

Eurojust-Europol cooperation in counterterrorism: an inter-agency rivalry?

In the past few years, significant efforts have been devoted to developing a working relationship between Eurojust and Europol, including the EU's police cooperation agency already established in 1994⁹ on counterterrorism issues.¹⁰ The problem is that, while officially strengthening cooperation with Europol has been Eurojust's objective from the outset, the practical relations between the two agencies have been rather complicated. Already the negotiations preceding the signing of a cooperation agreement aimed at

⁹ For a good introduction into Europol's history and functions, see Occhipinti 2003.

¹⁰ For a detailed analysis of Europol's counterterrorism role, see Bures 2008.

enhancing the exchange of strategic and operational information and the coordination of activities in 2004 were rather difficult, primarily because of Europol management board's reluctance to meet some of Eurojust's data sharing requests. In this regard, according to the Chair of the Counter-Terrorism Team of Eurojust (Coninx 2009), Europol's strict data-protection regime initially proved to be a major obstacle for information sharing between the two agencies:

At some of the initial meetings, we would have a national judge complaining "how come Europol is not giving the information? I am the owner of the information and I gave the permission to include it in the Analytical Working File, so how come we cannot share it today with my colleagues?" So the owner of the information gave the permission to the policeman to include the information in one of the [Europol's] Analytical Working Files, but, at the meeting with Eurojust, Europol officials said "we cannot talk about this." So it was leading to absolute stupid, hallucinate things. This is something we [at Eurojust] cannot accept.

Legally, these complications were often due to the strict legal conditions that the onward transmission of data from Europol to third parties must meet, and the fact that Member States 'own' the information that they transfer to Europol (Argomaniz 2008: 186). In practice, however, the problem was also that some of the big MSs (especially France, Italy and Germany) were quite concerned about Eurojust's access to Europol's Analytical Working Files (AWFs) because of their intelligence information input in them (Coninx 2009). In 2005, Eurojust adopted its own Rules of Procedure on the Processing and Protection of Personal Data, which stressed the right to privacy and data protection, and principles of lawfulness and fairness, proportionality and necessity of processing of all personal data (Eurojust 2005). As in the case of Europol's data protection regime, this has been welcomed by some and criticised by others. The critics have argued that:

The increase in the powers of Europol and Eurojust to receive, process and exchange personal data is symptomatic of a broader and growing trend in EU criminal law towards the maximisation of the collection, access and exchange of personal data. (...) However, this proliferation of data collection mechanisms (...) has not been accompanied by a coherent framework for the protection of personal data and privacy. Up until recently, there was no horizontal EU legal instrument in force governing data protection or privacy in the third pillar (Mitsilegas 2009: 557-558).

Following the adoption of the 2008 Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters and the entry into force of the Lisbon treaty, data protection in the former third EU pillar has indeed been significantly improved. Nevertheless, as one senior Council official (2008) put it, the opposite view is that:

Data protection is indeed important but seems to cause extraordinary difficulties in data exchange between EU agencies to no obvious purpose. It is currently to the extent that the EU agencies and institutions have to conclude data protection agreements to share data with each other. One would assume that as in the national governments, there is a standard set of rules and procedures that all national agencies adhere to, which allows them to freely exchange data between each other, bearing in mind the purpose for which the data was collected. This does not seem to exist at the European level and huge amount of effort has to be put just into sorting out the ways how EU institution can exchange data.

It is beyond the scope of this article to resolve this justice and/or/versus security debate, which has been subjected to several book-length analyses (Balzacq and Carrera 2006; Guild and Geyer 2008). What matters for the current discussion, however, is that although many of the initial complications in information sharing between Europol and Eurojust were resolved, the overall progress has not been smooth. In the area of access to Europol's

AWFs, for example, significant advances were made only in the past couple of years. The so-called Danish Protocol amended the Europol Convention in order to create the possibility for Europol to invite experts from third states or third bodies to be associated with the activities of its analytical groups already in 2003, but a Europol-Eurojust joint working party on AWFs was only established in 2007 with the mandate to examine legal and practical difficulties of Eurojust's involvement in these working files. Eurojust eventually became associated with the first six AWFs in June 2007 and several of its analysts were appointed as experts on judicial co-operation (Eurojust 2008: 47-48). In 2008, a secure communication link was established to facilitate the exchange of information between Eurojust and Europol, and Eurojust became associated with a further six Europol AWFs, bringing the total number of associations to twelve. This development is encouraging, but it would be beneficial for Eurojust to become associated with all Europol AWFs in view of enhancing effective cooperation in all areas (Eurojust 2009: 41). This was confirmed by the EU Counterterrorism Coordinator in his testimony in front of the British House of Lords European Union Committee (2007: para 181): "Professor de Kerchove, looking at the counter-terrorism aspect, thought that in that field it made sense that Eurojust should get access, if not to 100 per cent of the AWFs on Islamic terrorism, at least to the main findings, and that conversely Eurojust should feed information to the AWFs."

Eurojust's annual reports further indicate that it has provided Europol with information for the Terrorism Trend and Situation Report (TESAT), the CTF Glossary on terrorist organisations, and the Organised Crime Threat Assessment. Eurojust's contributions to the aforementioned Europol's products was also confirmed by the Chair of the Counter-Terrorism Team of Eurojust, although she also admitted that Eurojust began to contribute to the Europol's annual TESAT report only in 2006, providing data on judgments (including both convictions and acquittals), appeals, types of terrorist activities, and profiles of convicted terrorists (Coninx 2009). Moreover, as highlighted in Table 1, the overall increases in data exchange are relatively recent and the data flows have been, at least from Europol's perspective, rather imbalanced. On the other hand, it should be noted that since 2007 Eurojust publishes its own Terrorism Convictions Monitor (TCM), which "goes far beyond the information available in TESAT reports in that it provides detailed judicial analyses of terrorism related criminal investigations and judgments" (Coninx 2009). It is, however, only available to the judicial authorities upon request.

Table 1: Exchange of Information between Eurojust and Europol in 2004 and 2005

	2004	2005
Requests sent by Europol to Eurojust	0	1
Answers received by Europol from Eurojust	0	1
Requests received by Europol to Eurojust	8	64
Answers sent by Europol to Eurojust	4	52
Total	12	118

Source: Bigo et al. 2009.

Note: The table represents Europol's perspective.

Some experts have argued that difficulties in Europol-Eurojust cooperation run much deeper than the aforementioned information sharing complications suggest. They point out that some interviews with Eurojust and Europol officials have revealed that formal relations between the two EU agencies have in fact often been used “as a tool of inter-institutional surveillance” (interviews with Eurojust and Europol Officials, 2005-2006, cited in Bigo *et al.* 2007: 24). Bigo *et al.* (2007: 16-17, 24, 38-39) have even hinted towards the existence of an inter-agency rivalry in the early years of this century, which allegedly culminated in the move of Eurojust headquarters from Brussels to the Hague, where Europol headquarters have been located since its creation.¹¹ The interviews conducted for this research project with both Eurojust and Europol officials indicate that although “some really stupid problems were initially encountered” (Coninx 2009), these were allegedly more of a personal, rather than institutional, nature (Europol Official 2009). The current relations have been described as “very good” and “flawless” by the heads of units in charge of counterterrorism at both Eurojust and Europol, respectively. This may be due to the fact that in 2005 a special Eurojust team dedicated to cooperation with Europol was created to “temper the ongoing struggles between different professional sectors and built trust between them” (Bigo *et al.* 2007: 24). As a result, unless prohibited due to remaining data-protection differences, Europol currently invites Eurojust officials to relevant counterterrorism meetings, and vice versa, Europol representatives are invited to Eurojust’s meetings.

In 2006, both organisations also cooperated on a project to provide a guide on Member States’ legislation regarding the setting-up of the Joint Investigative Teams and followed this with a number of expert meetings in 2007 (Eurojust 2007b: 28-34). The fivefold increase in the number of cases dealt with by Eurojust involving Europol (from six cases in 2006 to 30 in 2008) indicates that Europol-Eurojust cooperation has rapidly accelerated in the last few years (Eurojust 2009: 19), although “the potential for further progress is constrained, as shown by the lengthy negotiations of their cooperation agreement, by their differences in institutional structure and legal basis”¹² (Argomaniz 2008: 187). Thus, as a November 2007 discussion paper from the EU Counterterrorism Coordinator emphasised (cited in Argomaniz 2008: 187), further structural links should be created so that Eurojust can fully benefit from Europol’s analytical capacity without duplicating tasks. A greater involvement of the EU Counterterrorism Coordinator was also suggested as a possible way to remedy the remaining data-protection issues that prevent unrestricted information exchange between the two EU agencies (Coninx 2009).

Eurojust’s current value-added in the area of counterterrorism

Despite the billions spent annually on counterterrorism, we still lack an adequate performance evaluation baseline to assess what ‘works’ and why. To some extent, this is due to the methodological difficulties of finding the right proxy indicators that would complement the readily available, yet inherently limited quantitative criteria (such as the number of arrests, requests for assistance or amounts of frozen terrorist money) that do not shed much light on the actual effects of counterterrorism measures on specific groups and individuals (Bigo *et al.* 2006; Guild and Geyer 2008). Moreover, as discussed above, Eurojust has a double nature due to its composition of seconded high-level national

¹¹ It should also be noted, however, that the two buildings are not in the same part of the city, which is a fact that many have regretted. As of early 2010, Europol has allegedly outgrown its existing building and thus is due to move to a new building on a new site that should be within a walking distance from the current Eurojust building. Nevertheless, the top representatives of Eurojust and Europol, as well as the EU Counterterrorism Coordinator, have agreed that the two agencies should ideally be located under one roof in the same building. Cited in UK House of Lords 2008b: para 183.6.

¹² It should be noted that Europol’s legal basis has become similar to that of Eurojust on January 1, 2010, when Europol became an official EU agency (see Bures 2008: 511-512).

experts who together form a College, whose key job is to support, not replace, the competent authorities of the MSs. As a consequence, there are serious methodological issues when it comes to evaluating the contributions of Eurojust to the fight against terrorism and only few studies have attempted to do so thus far. One of these exceptions is a recent study by Jiri Vlastnik (2008: 38), who argued that it is possible to identify two principal Eurojust missions that also provide value-added in the fight against terrorism. The first – trust promotion – is a rather informal, yet as discussed below, perhaps the most crucial Eurojust function in the long-run because it represents an indispensable pre-condition for cross-border cooperation in criminal justice. In contrast, the second Eurojust's key contribution – prosecution facilitation – is based on a formal division of powers, which is based on national and EU law foundations.

In the context of the EU, Vlastnik (2008: 38) has identified four sources of mistrust that Eurojust ought to help overcome in the medium- to long-term: 1) lack of knowledge (of relevant legal regulations, national institutions and their representatives, as well as foreign cultures, languages and practices in other EU MSs); 2) different legal standards; 3) bad experience; and 4) traditional conservatism. In the first area, Eurojust was designed from its inception to promote trust among the representatives of EU MSs by working as a permanent and centralised College of national representatives. In addition, Eurojust has also tried to overcome mistrust by educational means, *e.g.* by convening seminars, meetings and conferences on various criminal justice topics, including counterterrorism (see above). The second problem of different legal standards stems from the fact that there are currently at least thirty different legal systems in the EU, which translates into 30 different rules for gathering evidence, arrests, trial processes and penalties.¹³ Thus, even the basic Eurojust's functions of legal co-operation and coordination can themselves represent a daunting challenge. Moreover, even a good knowledge of existing legal standards in EU MSs can be a source of mistrust, provided that some of these standards that are crucial for criminal justice (*e.g.* protection of basic human rights such as the right for fair trial, the principle *nullum crimen sine lege*,¹⁴ personal data protection etc.) differ to the extent that some are deemed insufficient. According to Vlastnik (2008: 40), "this shows well the interdependence of the three grounds of EU criminal justice cooperation – mutual recognition principle, institutional cooperation and harmonisation of national laws". Of these three, Eurojust has attempted to address only some of the institutional cooperation issues with the other, formerly EU's third pillar, bodies and agencies. However, as has been highlighted in the discussion of Eurojust-Europol cooperation in the area of counterterrorism, even here progress has been piecemeal.

Criminal justice cooperation can also be hindered by past bad experiences, including police and judicial malpractice, corruption, information leakages, bureaucracy, or non-reciprocity. According to Vlastnik (2008: 40), "Eurojust has a double role here – (a) to be 'a good' experience for national organs referring cases to it and (b) to remove causes of bad behaviour on national level". Regarding the former, apart from being a role model in terms of not engaging in the above-mentioned malpractices, the original idea was that Eurojust would help the national agencies by focusing on the most complicated multilateral cases. In practice, however, in line with its role-model strategy, Eurojust has not refused to deal even with the more mundane operational cases, which actually comprise the vast majority of its workload.¹⁵ Regarding the latter, personal contact-building and "public pressure that Eurojust may exert upon foreign national authorities through the threat of a public

¹³ Although there are currently only 27 Member States in the EU, in the UK there are different legal systems in Scotland, England and Wales, and Northern Ireland.

¹⁴ No punishment for an act which has not been previously and unambiguously declared criminal.

¹⁵ In 2008, for example, 1153 of the newly opened cases dealt with operational issues, while only 40 cases were registered "to provide support to and expertise on general topics related to each legal system or judicial questions or practicalities not involving the operational work of the College". In 2007, the ratio was 1081:20. (Eurojust 2008: 13; Eurojust 2009: 11-12).

critique in the Annual Report” are Eurojust’s key contributions (Vlastnik 2008: 40), although it appears that the name and shame approach has been used only sparingly as a measure of last resort.

Finally, when it comes to the problem of traditional conservatism of law-enforcement and criminal justice authorities, it is to a large extent based on the first three categories of mistrust. However, as Vlastnik (2008: 41) noted, it can also be gradually removed provided the existence of “a clear definition of common values and priorities of both the EU and Member States.” Unfortunately, in the area of counterterrorism, such a consensus is clearly missing at the moment due to the persisting differences in the national perceptions of the nature and salience of terrorist threat across the EU MSs (Bures 2010; Monar 2007). Moreover, as the Chair of the Counter-Terrorism Team of Eurojust noted (Coninx 2009), there is a lack of consensus on the larger criminal justice priorities as such:

What is the top priority in European criminal policy today? You can see that events are influencing our activity and it is very difficult to have a European approach when you have not decided what is the European priority, what is the European criminal policy and what do we really need – what is really bothering the citizen in Europe? Is it organized theft, is it money laundering, or is it terrorism?

While Eurojust on its own cannot ensure that either common values or clear priorities emerge, its unique, ‘double nature’ architecture allows it to both keep criminal law powers at the national level and to profit from the physical cumulation of these powers in one place. In addition, this arrangement also “certainly promotes trust of other national organs, as their national member is ‘one of them’”, whereas other European bodies are often considered as “rather strange, distant and incredible” (Vlastnik 2008: 41).

Can Eurojust provide more genuine value-added in the area of counterterrorism?

Setting the standard of evaluation far higher than the aforementioned Vlastnik’s analysis, Bjorn Müller-Wille’s study of Europol’s intelligence role (2004: 33) suggested that an EU agency may offer genuine added value only if:

- 1) It produces something that can, is or will not be produced at the national level;
- 2) The responsibility for a certain form of intelligence product is transferred to the European level, *i.e.* if the European unit can relieve national authorities.

As discussed above, at the moment, Eurojust does not meet either of these two “genuine value-added” criteria. There are, nevertheless, some areas where Eurojust has the potential for such value-added. Perhaps most importantly, this includes prosecution facilitation, the second key area where Eurojust’s ‘double nature’ has to be taken into account. When it comes to the powers of national members of Eurojust within their home jurisdictions, Bigo *et al.* (2007: 24) have pointed out that the relations between Eurojust and the individual MSs have been highly asymmetric in general, because the latter have been completely free in their nomination of the national correspondents to Eurojust and, as discussed above, they also determine both the terms of their mandate and wages. Thus, despite the fact that already the original 2002 Council Decision specified a minimum definition of a common standard of national member powers¹⁶, in practice they have thus far varied quite considerably, reflecting the differences among MSs criminal justice systems: “Whereas a majority of national members dispose of prosecutorial powers (even if these

¹⁶ It stipulated that a Eurojust national member a) “shall have access to the information contained in the national criminal records or in any other register of his Member State in the same way as stipulated by his national law and b) “may contact the competent authorities of his Member State directly” (Council Decision 2002: art. 9).

powers differ very much as well), others serve only as transmission channels for mutual legal assistance" (Vlastnik 2008: 42).

The Council tried to remedy some of these shortcomings in its December 2008 Decision on the Strengthening of Eurojust, which was adopted "with the purpose to enhance the operational capabilities of Eurojust, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and strengthen and establish relationships with partners and third States" (Eurojust 2010). The Decision introduces a number of significant changes, in particular with regard to the clarification and to some extent expansion of the powers of Eurojust members. Thus, once its provisions are implemented by the MSs, all national members of Eurojust should be granted minimum powers to receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for judicial cooperation. In addition:

They shall be entitled to exercise, subject to agreement with the competent national authority, the following powers: issuing and executing requests for judicial cooperation, ordering in their Member States investigative measures considered necessary at coordination meetings organised by Eurojust, and authorising and coordinating controlled deliveries in their Member States. In urgent cases, where it is not possible to identify or to contact the competent national authority in a timely manner, the National Members are also entitled to authorise and coordinate controlled deliveries and execute requests. When the granting of powers exercised in agreement with a competent national authority or in urgent cases is contrary to constitutional rules or fundamental aspects of the national criminal justice system, the National Member shall be at least competent to submit a proposal to the national authority competent for the carrying out of those powers (Eurojust 2008: 47-48).

Although this increase of the minimum standard of national member's powers does not reduce national sovereignty because these powers are still national, rather than European in their origin, it was nonetheless for a long time perceived as controversial by several MSs (Vlastnik 2008: 43-44). Moreover, although the new Eurojust Decision refrained from introducing changes with regard to the mandatory character of Eurojust's requests to national authorities to initiate investigations and prosecutions, its potential impact on state sovereignty and the relationship between the EU and the national level in judicial cooperation in criminal matters should not be underestimated:

The detailed provisions on the powers of national members of Eurojust under their national law may transform this relationship. Union law would make Member States confer on their Eurojust national members a series of powers which must be "equivalent" to the powers of national officials, potentially transforming the relationship between national law and Union law and increasing the impact of Union structures on domestic criminal justice systems. The emphasis on national law as the basis for powers of Eurojust national members and the insertion of exceptions to these powers based on the need to preserve domestic constitutional and criminal justice systems reflects Member States' unease with this prospect (Mitsilegas 2009: 557).

In this light, it is not surprising that the 2008 Council Decision did not address the second source of Eurojust power which is of European origin, *i.e.* the powers of the College. The only new provision concerns cases of disagreement among national members as to which jurisdiction should prosecute, where the College will newly be asked act as a "broker" and issue "a written non-binding opinion on how the case should be solved" (Mitsilegas 2009: 555). Even in these cases however, Eurojust College will have to continue with its current tasks of coordinating, recommending and supporting nature, without having the recourse to any enforcement or sanctions mechanism, apart from the occasional naming and shaming of the most flagrant laggards in its Annual Report. The only area where the remit

of Eurojust has been extended quite considerably is the collection, processing and exchange of personal data, including the establishment of the Case Management System, index, and temporary work files.

It is also important to note that the European Commission and some EU Member States have been strongly supportive of even further strengthening Eurojust's role in the area of counterterrorism. The *European Commission Action Paper in Response to the Terrorist Attacks on Madrid* (2004), for example, suggested that

Eurojust should be given a stronger role in the fight against terrorism. The Council should give it a clear mandate to coordinate the activities of national prosecuting authorities across the Union in relation to terrorism. We should open an urgent debate about giving Eurojust an initiating role in this regard too. Presently, Member States may, provided they come forward with a justification, refuse to pursue an investigation requested by Eurojust. This should be abrogated, at least when Eurojust's request would relate to investigations on terrorism.

Similarly, article 85 of the recently ratified Reform Treaty stipulates that Eurojust's mission "shall be 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, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol." The Treaty also brings Eurojust under the control of the European Court of Justice (ECJ) and the European Parliament, and the Council is now empowered to adopt regulations to determine Eurojust's structure, operation, field of action and tasks, including:

1. The initiation of criminal investigations, as well as proposing the initiation of prosecutions;
2. The coordination of such investigations and prosecutions;
3. The strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

Eurojust representatives suggested that, while these substantive Treaty of Lisbon provisions were unlikely to affect its operations to any great extent, the procedural changes (the move to qualified majority voting and co-decision, the greater role for the Commission, and the extended jurisdiction of the ECJ) would "have a significant impact on Eurojust's structure and operations in the medium and longer terms" (UK House of Lords 2008a: para 6.190). The Chair of the Counter-Terrorism Team of Eurojust specifically noted that "the Lisbon Treaty will help because then we will have to have together with Europol a more integrated approach and the trans-pillar approach will no longer be possible. The effect will be huge and we will be forced to have a more integrated approach" (UK House of Lords 2008a: para 6.190).

Similarly, it is important to note that the Reform Treaty kept the provision for possible establishment of a European Public Prosecutor's (EPP) Office from Eurojust, which was already resuscitated in article III-274 of the stillborn Constitutional Treaty. If it is ever created, the EPP's Office would be "a judicial body with direct enforcement authority, responsible for investigating, prosecuting and bringing to judgment offences against the Union's financial interests" (Carrera and Geyer 2007: 4). In this respect, it would exercise the functions of prosecutor directly in the competent courts of the MSs. Moreover, while the term "offences against the Union's financial interests" is already quite broad, there will also be the possibility to extend the powers of this body to include "serious crimes having a cross-border dimension". A fully fledged European Public Prosecutor's Office responsible for investigating and bringing to trial all serious cross-border crime throughout the EU would therefore represent "a quite fundamentally new and powerful actor in the area of

judicial cooperation in the EU" (Carrera and Geyer 2007: 4). As such, the new EPP's office would most likely meet at least some of the intelligence studies' criteria for genuine value-added.

While the proposal for a European Public Prosecutor is not new, it is the first time that the structure for implementing this idea has been included in the Treaties, which makes it more likely that this post may be created one day. At the same time, however, it is worth noting that article 86 merely provides a basis for a possible future regulation to be adopted by consensus by all EU Member States. However, as discussed above, the very idea of an EPP has been so controversial that it is unlikely to garner the necessary unanimous support among MSs in the foreseeable future. It is therefore more likely that any future EPP would have to be created under the enhanced cooperation provisions provided by the Lisbon Treaty (UK House of Lords 2008a: para 12.89). It is also important to note that, at present, the debate about the EPP does not focus on counterterrorism issues, but rather on anti-fraud issues, though according to the personal opinion of the Chair of the Counter-Terrorism Team of Eurojust this may change "if there is a major terrorist attack tomorrow. Then the need for an EPP also in counterterrorism-related issues would be felt very strongly" (Coninx 2009).

Finally, when confronted with the discussion about Eurojust's value-added in the fight against terrorism, the current Chair of the Counter-Terrorism Team specifically mentioned two areas of concern (Coninx 2009). The first concerns the persisting lack of human resources:

[I would like] to have more human resources and more possibilities to create a real team because nowadays I am chairing a team based on voluntary inputs. Most of the team members work only part-time on counterterrorism and have to follow other teams as well. I am also doing this together with my other work and this is not the way we should be dealing with this. If it is really a priority, than prioritise it. Now it is based on the good work of people who are doing this as an extra.

The second, and "the most important message," concerned "the real need for an integrated approach" to counterterrorism (not only) at the EU level: "It is never a police thing only, or an intelligence thing only, it is together – police, intelligence and judicial. And if you separate these three, you are lost. Because yes, Europol is very active, Eurojust starts to be active and SitCen is extremely active, but it is not about being active or complacent, but about working together." This confirms that even at the EU level, talking about coordination is one thing, and the willingness to be coordinated and work together in a truly integrated manner is often quite another thing. However, it is precisely in the area of coordination where Eurojust's counterterrorism activities could offer genuine value-added. It is therefore also important to note that, according to the Chair of the Counter-Terrorism Team of Eurojust (Coninx 2009), due to the work of her unit, the powers of Eurojust were strengthened in other areas as well:

The quite revealing thing is that what we established under the frame of terrorism is now being transposed into other areas, including an obligatory information stream. This is a good point because it shows that European policy-makers at the Council level have found it worthwhile to take what has been achieved in counterterrorism and transpose it into other areas.

Thus, it appears that some of the aforementioned changes introduced by the 2008 Council Decision may not have been introduced without the work Eurojust had done in the area of counterterrorism. Interestingly, this also suggests that, while initially – after the 9/11 and 3/11 terrorist attacks – some politicians may have used the windows of opportunity to push through multi-purpose pieces of anti-crime legislation under the rubric of counterterrorism (Den Boer and Monar 2002: 14), Eurojust's counterterrorism best

practices are being used as a model for adjusting the more general anti-crime legislation. If this indeed turns out to be a long-term trend, Eurojust's counterterrorism efforts could provide genuine value-added that goes well beyond their original purpose.

Conclusion: Eurojust's fledgling counterterrorism role

Overall, it remains debatable as to whether all EU MSs fully support the strengthening of Eurojust's role in the fight against terrorism. On the one hand, the uneven utilisation of Eurojust reflects the deeper and older differences concerning judicial cooperation at the EU level, with countries such as Belgium, Italy, Portugal, Spain and France considered to be committed and countries such as the UK and some of the 'new' MSs being rather reluctant to the idea of enhancing cooperation in criminal justice at the supranational level. These divisions were already present at the time of Eurojust's creation, when the project laying out its current legal foundations that was jointly proposed by France, Sweden, Portugal and Belgium competed with another one coming from Germany¹⁷, with the UK opposing both proposals for the fear of a "too far reaching European judicial cooperation in criminal affairs" (Bigo *et al.* 2007: 17). While the UK was ultimately appeased with the nomination of a British prosecutor as President of the College of Eurojust, the old cleavages have yet to fully disappear. This also appears to be the case when it comes to Eurojust's counterterrorism role in particular, where, even in the case of Islamist extremist terrorism, it is still "the same eight, nine or ten MSs having a lot of experience and interest in sharing information" with Eurojust (Coninx 2009). As discussed above, this is at least partly due to the different terrorist threat perceptions across the EU, which was also confirmed by the Chair of the Counter-Terrorism Team of Eurojust (Coninx 2009):

But then we have different forms of terrorism and there we see that other countries are coming in the picture. So it is different from phenomenon to phenomenon. (...) The new countries like Bulgaria simply do not have any terrorist activity. (...) If you have some experience, you are more attracted to sharing information with organisations like Europol and Eurojust because you are also sharing it with other countries. If you are not really concerned by these problems, you come to the meetings, but you do not have a problem.

Eurojust is attempting to remedy this problem by ensuring that all MSs have "a full overview of activities to show that today you are not affected, but tomorrow you might be, so please be alert" (Coninx 2009), but in the absence of a genuine independent EU terrorist threat assessment, this is bound to remain a rather difficult endeavour.

On the other hand, the relative under-utilisation of Eurojust is sometimes also due to the more general shortcomings of inter-agency cooperation in the former EU's third pillar. The first, and arguably most important one, is the persisting lack of trust. As one Europol official noted:

We rarely collaborate with Eurojust. Last time we invited a judge of Eurojust and he hasn't said anything. He has taken notes but has not given any information. He hasn't been very useful for us, but he certainly collected information. (...) If we know and trust each other, the exchange will be much easier. (Interview with a Europol Official 2004, cited in Megie 2007: 93)

This was also confirmed by the President of Eurojust (Kennedy 2004: 62), who stated that the lack of confidence and trust is "something that Eurojust comes up against and it is part of our role to remove this block – that concern of the investigator or prosecutor that sharing information means losing control over that information". The problem is that the frequent change of personnel seconded from the EU MSs to EU security agencies makes

¹⁷ Germany preferred the model of the Europol liaison officers for Eurojust (see Mangenot 2006: 34-62).

the development of long-term relations rather difficult. In the case of Eurojust's counterterrorism team, the situation is further complicated by the fact that the majority of its members work on counterterrorism issues only part-time.

The second general shortcoming is due to the differences in national police and judicial systems that significantly influence the perceptions of the 'proper' relations between judges and policemen. Consequentially, as another Europol official stated, "depending on the country, we do not have the same kind of relation with judges. The Italian and Dutch judges are often authoritarian with the policemen of their country. But they cannot behave in the same fashion with other European policemen" (Interview with a Europol Official 2004, cited in Megie 2007: 93). More generally, the shortcomings of national counterterrorism structures in some MSs can also represent serious complications to Eurojust's counterterrorism activities. In 2006, for example, Eurojust organised a coordination meeting to ensure the prompt implementation of several urgent letters rogatory in a case related to the financing of terrorism opened by the Belgian judicial authorities and with links to Italy due to money transfers.¹⁸ The main obstacle identified in this case was the lack of a central anti-terrorism authority in Italy to which to address urgent requests for assistance. The solution proposed during the coordination meeting in 2006 – sending the same letters rogatory to all potentially competent authorities – ultimately proved unsatisfactory, because a conflict of territorial jurisdiction arose and consequently the Italian Supreme Court became involved, which led to a two-year delay in this urgent procedure (Eurojust 2009: 31).

These shortcomings are an important reminder that the most daunting challenges to Eurojust's counterterrorism role are still due to the persisting limitations regarding some MSs' will and/or capacity to duly implement and fully utilise existing EU counterterrorism institutions and mechanisms. The EU is ultimately its Member States, without whose wholehearted support even the most elaborate and innovative counterterrorism mechanisms remain useless. As the Chair of the Counter-Terrorism Team at Eurojust (Coninx 2009) put it:

Every year we remind MSs of their obligation to send information to Eurojust, not to please us but for their own sake, because the sooner they inform us about on-going investigations, applications of EAW, cases of mutual legal assistance in cases of terrorism, the sooner we can detect links with other countries and maybe have a more pro-active approach in coordination. Now we are waiting for requests from Member States, and so we are depending on the good will of Member States.

Because of the dependence on MSs' good will, Eurojust's potential for value-added in counterterrorism has not been fully exploited yet. This was admitted by the President of Eurojust, who told the British Members of Parliament that "initially, we found that countries were reluctant to co-operate with us because they felt that we were an unnecessary link in the chain" (cited in UK House of Commons 2007: para 152). However, he also emphasised that this negative picture has begun to change. "As time has gone on and we have been able to demonstrate the added value we can bring by bringing people together ... it has meant that we have been able to build trust and confidence amongst the various specialist investigators particularly" (cited in UK House of Commons 2007: para 107). This was confirmed in the interview with the current Chair of the Counter-Terrorism Team of Eurojust (Coninx 2009):

We see that things are evolving. If that would not be the case, I would quit, I am not that motivated. If you do not see progress, if you do not see that MSs want to see the

¹⁸ Two main defendants (one was arrested in June 2006 and the other fled to Pakistan) were accused of setting up illegal trafficking of phone cards, the profits of which were supposed to be directed towards several terrorist groups in Pakistan.

added value of the organisation, I mean we are not organising the meetings for the pleasure of keeping everybody busy. That is not at stake and we cannot accept that everybody is sitting there as an observer.

Thus, it is possible that over time Eurojust will succeed in convincing the MSs and the relevant national judicial authorities that it can be trusted even in the highly sensitive area of counterterrorism. How long this process of trust-building will take, and whether it will really succeed, remains to be seen.

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