

JUSTICE's submission on the proposals for the establishment of EUROJUST

November 2000

INTRODUCTION

1.1. JUSTICE welcomes the opportunity of commenting on the initiatives for a Eurojust Unit. Two proposals have been advanced, one on behalf of Germany, and the other from the Four Presidencies. The former is briefer, providing for the establishment of a body which is fundamentally administrative in nature. The latter is more detailed with greater powers to act quasi-judicially. We note that the UK Government¹ is in favour of the Four Presidencies proposal. A decision is also expected to be taken to establish a provisional judicial co-operation unit as a forerunner to Eurojust (see below).

1.2. This paper outlines the main areas of concern that JUSTICE has identified with regards to the various proposals. These are:

- The powers to be granted to Eurojust
- The data protection regime
- The relationship between Eurojust and other EU bodies

1.3. JUSTICE believes that the key issue is around the nature of the powers of this new body. Although establishing an administrative body along the lines of the German proposal raises questions of accountability, a quasi-judicial unit as proposed by the Four Presidencies does so to a far greater extent. This is not reflected in either of the proposals as presently drafted and, in our view, is the most critical question that needs to be examined and explored for its implications.

1.4. It is understood that some member states are keen to see the development of a networked EU Prosecutor's office with a competence for prosecuting serious crime

wider than that of the *Corpus Juris* proposal. Whilst JUSTICE has not formed a view on this, we would nevertheless be concerned if the Eurojust proposal is in anyway used as a 'backdoor' way of achieving this.

THE POWERS OF EUROJUST

Under the German proposal

2.1. There seems to be a consensus that the overall function of Eurojust is to facilitate cooperation between the investigating and prosecuting bodies of member states in relation to serious crime affecting two or more member states. Under Article 2 of the German proposal this is to be carried out largely through operating a legal advice and resource centre. Although, this includes the possibility of supporting the conduct of joint investigations (Art 2, 2(c)), there is no suggestion that the unit can either make decisions or requests which could affect the conduct of an investigation or prosecution.

2.2. The extent to which this assigned role is already carried out by the European Judicial Network, as claimed by the Home Office, is perhaps a matter worth pursuing for more detail. However, it should also be remembered that the precise role of the European Judicial Network is itself likely to change and develop under the Tampere agenda for greater mutual assistance and it is therefore inevitable that some rationalisation of roles will need to take place.² The fact that some overlapping tasks can be identified at this stage should not, in our view, automatically preclude an administrative body along the lines of the German proposal.

2.3. The draft proposal does not include a detailed management or accountability structure. Apart from the fact that as a third pillar body it would fall within the Council's overall management and supervision, there are no details on how it would be publicly accountable, for instance. More problematic (and one which arises under both models to different degrees) is the question of the management and accountability of the individual team members (see below).

Under the Four Presidencies proposal

¹ Explanatory Memorandum on Justice and Home Affairs Matters: Proposals to Establish Eurojust 29th September 2000

² In fact, this is acknowledged in para.52 of the Government's Explanatory Memorandum.

2.4. This proposal sets up a 'judicial coordination unit' with a similar task but with far greater powers to influence the investigation and prosecution of individual cases.

Under Art. 6, this includes being able to:

- *request a member state to undertake an investigation or prosecution or allow another a member state to do so instead*
- *ask the competent authorities to coordinate current investigations and prosecutions taking place in two or more member states*
- *provide opinions based on Europol analyses*

2.5. In most EU countries these are functions carried out by either the judiciary or the prosecution. They involve making decisions on key aspects of the criminal justice system including questions of jurisdiction and the transforming of material into admissible evidence. Even though the request to investigate or prosecute is to be non-binding, it will undoubtedly be highly persuasive and difficult to decline in practice.

2.6. If Eurojust is to have a quasi-judicial role the question of accountability becomes even more important. Its decisions will have implications for how cross-border crime is investigated and prosecuted in the future. One obvious risk is that of 'forum shopping' – that is investigations and trials being steered towards those countries where a conviction is more likely because of lower standards either in the controls over surveillance policing or the trial process itself. It is important therefore that there is a rigorous system of accountability and transparency to ensure against such an abuse. In this respect, JUSTICE believes that it would be particularly problematic – and fundamentally wrong in principle - if police officers acting as national members are competent to decide on matters of jurisdiction and the conduct of a prosecution.

2.7. The draft proposal is silent on some key organisational and management issues, as indicated by the Home Office. The following are some of the questions we would pose: for example, who is responsible for taking a decision on requesting a state to undertake a prosecution? Is it the national member from the country that is to be requested who makes the decision; or, is it a joint decision of those national members from countries affected by the decision; or is it in fact a management team decision (under Art.18)? In addition, to whom are these persons accountable either at national or EU level? As the national member is subject to national law (Art.8), is a prosecutor member to be accountable to the prosecuting authority to which he or she

directs a request? This kind of arrangement may be appropriate for a liaison officer at Europol whose role is essentially only to liaise; it is questionable whether it is satisfactory when the person concerned is taking key decisions affecting the criminal justice system. In the same context, we are unsure what is envisaged under Art.8.2 which leaves it to each member state to define 'the nature and extent of the powers' to be given to its national member 'in its own territory'.

2.8. As far as accountability is concerned, some of the same concerns around the establishment of EUROPOL, and more recently the *corpus juris* proposal, may also be relevant here.³ For example, there is presently no mention of judicial supervision either by the European Court of Justice or national courts. In particular, the position of national members being subject to judicial review is unclear.

2.9. There is also no reference (as there is under the *Corpus Juris* provisions) to the standards guaranteed under the European Convention on Human Rights and the International Covenant on Civil and Political Rights. These should be expressly incorporated into the work of the unit.

DATA PROTECTION REGIME

Under the German proposal

3.1. It is not clear to what extent this proposal envisages holding details about individual cases or other personal data. This would need to be clarified as presently it is silent on data protection controls for the unit itself.

Under the Four Presidencies proposal

3.2 The following are some of the sources mentioned in the proposal from which Eurojust will receive data:

- a documentary database (Art 6 (f))
- access to national criminal records (Art 8.3)
- access to data held on the Schengen Information System (SIS) (Art 8.3)
- any information 'useful for carrying out its tasks' from national judicial authorities (Art 9.1)
- from Europol and member states' judicial authorities (Art 9.2)
- from member states setting up joint investigation teams (Art 9.3)

3.3. Clearly much of this data is going to be highly sensitive personal data, combining both factual and 'soft' criminal intelligence. The presence of a stringent data protection regime is therefore crucial. As the Home Office says⁴ there are currently significant gaps within the proposed regime especially with regards to subject access rights and independent supervision.

3.4. As the Committee is aware, JUSTICE has consistently expressed concern over the question of data protection regulation in respect of third pillar bodies, particularly the lack of uniformity between the various regimes. In our forthcoming publication, *the Schengen Information System: a human rights audit* we strongly argue that the time has come for a consistent and equal level of protection to those whose data is processed by a Community institution, irrespective of whether it is established under the first or third pillar. For example, we believe that it is increasingly anachronistic and unjustified that only first pillar bodies are to be governed and supervised by a harmonised regime based on the 1995 EC Directive. Similarly, that first pillar bodies are now to be supervised by the proposed European Data Protection Supervisor with significantly greater powers than those exercised by any of the third pillar supervisory bodies.

3.5. Whilst we welcome the recent decision to set up a joint secretariat for the third pillar supervisory bodies, the recent draft Resolution on the principles of data protection for third pillar instruments is far from satisfactory.⁵ Not only is it non-binding, but it lacks sufficient detail to overcome this problem of lack of uniformity. JUSTICE believes that having different standards of privacy protection – especially when the lesser standard under the third pillar regimes cover areas involving extremely sensitive data – raises questions of compliance with Article 8 of the European Convention on Human Rights. This is in addition to the fact that the regimes themselves may fall short of the requirements of Article 8.

3.6. We would therefore urge the Committee to seek a response to the general points raised above. In the meantime, we believe that the Home Office should be asked to

³ House of Lords Select Committee on the European Communities Session 1998-99 9th Report 8 May 1999: Prosecuting Fraud on the Communities' Finances- *The Corpus Juris*

⁴ Explanatory Memorandum on Justice and Home Affairs Matters: Proposals to Establish Eurojust 29th September 2000

⁵ Draft Resolution on the principles of personal data protection in the field of judicial cooperation in criminal matters as well as police and customs cooperation, 10968/00, JAI 82.

undertake a detailed comparison of the Eurojust provisions with those in existing third pillar regimes, especially that of Europol and report on any significant differences. Only by undertaking such an exercise is it possible to achieve some uniformity in the absence of a common set of rules.

RELATIONSHIP WITH OTHER BODIES

4.1. Both proposals envisage that Eurojust develops a close relationship with several other bodies, especially Europol, the European Judicial Network and OLAF. Although the draft only mentions access to SIS data, it is likely that this will develop into including other EU databases such as the CIS and the proposed DNA database. There is also likely to be considerable pressure for exchanging data with non-EU bodies such as Interpol.

4.2. The relationship between the various EU bodies – and particularly the sharing of personal data between them – has been the subject of previous House of Lords enquiries. JUSTICE has urged the need for a formal inquiry at EU level to examine the various proposals and existing practices whilst the discussions are still in a relatively formative stage. This should now include the Eurojust proposals. We disagree with the Government's response that such an enquiry would necessarily mean reopening the kind of negotiations that preceded each instrument to set up the respective databases; rather, its aim would be limited to bringing together the various proposals already being discussed for sharing data between them.⁶ There are serious risks in continuing to deal with this matter on an *ad hoc* basis, not least to having a coherent and consistent approach to the proper privacy protection required by Art. 8 ECHR. We would therefore again urge the Committee to press the case for such an inquiry.

PROVISIONAL JUDICIAL COOPERATION UNIT

5.1. It would appear that the proposed powers of the provisional unit fall somewhere between the above two proposals. To the extent that the members are to be empowered to support the coordination and operation of joint investigative teams, their role goes beyond that of being purely an administrative facilitator. On the other

⁶ See Memorandum by the Home Office (20 March 2000) Thirteenth Report, HL European Union Committee

hand, the members are not permitted to make requests of national authorities as proposed under Art 6 of the Four Presidencies document.

5.2. Insofar as the members of the provisional unit have a hands-on role that can affect the course of an investigation or prosecution, the issues raised above in relation to the need for proper management and accountability apply. Similarly, to the extent that this and any other role involves the unit holding and sharing personal data with other members and national authorities, there is a clear need for data protection controls that apply to the unit itself. It is insufficient to rely solely on national laws in this situation. Indeed, the European Drugs Unit, which was the precursor to Europol included detailed data protection controls for this very reason.

6 November 2000.