



COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**On the Legal Transposition of the Council Decision of 28 February 2002 Setting up
Eurojust with a View to Reinforcing the Fight Against Serious Crime**

{SEC(2004)884}

1. INTRODUCTION

According to Article 31(2) TEU as amended by the Treaty of Nice, the Council shall encourage cooperation through Eurojust, particularly by enabling it to facilitate proper coordination between national prosecuting authorities. Eurojust is an essential element of the area of freedom, security and justice (Article 29 TEU).

Eurojust was set up as a body of the European Union by Council Decision of 28 February 2002¹ (hereafter: “the Eurojust Decision”) in order to stimulate and improve the coordination of criminal investigations and prosecutions in the Member States, to improve cooperation between the competent national authorities and to support the latter.

The Eurojust Decision as such does not aim at an approximation of national laws – unlike a framework decision according to Article 34(2)(b) of the Treaty on European Union (TEU). However, it may be necessary for some Member States to amend their national law to bring it into conformity with the Decision. According to Article 42 of the Eurojust Decision this is to be done “at the earliest opportunity and in any case no later than 6 September 2003”.

Both the European Council and the Council have, on several occasions, repeated the important role Eurojust plays in the fight against terrorism. An example is the Council Decision of 19 December 2002, which provides for national terrorism correspondents to Eurojust.²

Following the terrorist attacks of 11 March 2004 in Spain, the European Council of 25 March 2004 again highlighted the crucial role of Eurojust in its Declaration on combating terrorism. It urged Member States to take any measures that remain necessary to fully implement the Eurojust Decision by June 2004 and called on them “to ensure that the optimum and most effective use is made of existing EU bodies, in particular Europol and Eurojust, to promote cooperation in the fight against terrorism” and that Eurojust “is used to the maximum extent” for this purpose.³ Apart from the specific area of the fight against terrorism, Eurojust is an essential backup for the application of many general EU instruments on judicial cooperation, as particularly reflected in Article 16 of the Framework Decision on the European Arrest Warrant.⁴

It follows from Articles 41 and 42 of the Eurojust Decision that there is no general rule applicable to all Member States saying which provisions are to be transposed by national legislation, in what manner and to what extent. It is up to the Member States to examine their national law to identify possible problems of application and to take the necessary measures. Some might need to adopt specific legislation on Eurojust, while for others it might suffice to adapt certain provisions in their laws on judicial cooperation and/or data protection, or indeed not need to take any legislative steps.

¹ OJ L 63, 6.3.2002, p. 1.

² OJ L 16, 22.1.2003, p. 68.

³ Council document 7906/04 JAI 100, p. 4 ff., 16.

⁴ OJ L 190, 18.7.2002, p. 1.

When adopting the Eurojust Decision, the Council assumed that, in principle, the measures necessary for its sound application were to be taken immediately. This is clear from the above mentioned context, particularly from the Council's conclusions on the events of 11 September 2001, according to which Eurojust should "become operational at the beginning of 2002".

Such an interpretation also follows clearly from the wording of Articles 42 and 41(2) of the Decision: by way of exception, Article 41(2) allowed Member States temporarily to suspend the application of certain provisions until 6 September 2003 at the latest, by issuing a declaration in case of an incompatibility between the national law and the Eurojust Decision. In the absence of such a declaration, the Eurojust Decision was to be fully applied from its entry into force, i.e. from 6 March 2002. Consequently, a Member State which has not issued a declaration according to Article 41(2) of the Decision, but nevertheless has kept incompatible national law provisions, would be in breach of the Decision and the TEU since 6 March 2002.

The declarations according to Article 41(2) of the Eurojust Decision are, therefore, an important indicator for a Member State's need to adapt its national legislation, although the fact that a Member State has not issued such a declaration does not allow to conclude that there is no need for legislative measures. However, not all Member States who need to bring their national law into conformity with the Eurojust Decision have issued such a declaration.

2. PURPOSE OF THE REPORT AND METHOD OF EVALUATION

Although the Commission is not required to publish a report on the Decision's transposition, it has decided to do so, since a considerable number of Member States need to adapt national law provisions and since Eurojust plays a very important role for criminal justice both within the EU and for judicial cooperation with third countries.

In June 2003, the Commission requested the Member States to provide the relevant information. Reminder letters were sent in December 2003. Most Member States, though unfortunately not all, have replied to those letters. The evaluation is mainly based on these replies and on the declarations according to Article 41(2). In addition, the Commission has taken into account informal information collected by the Italian judicial ministry, who had sent a questionnaire to the Member States within a project financed under the EU framework programme on police and judicial cooperation in criminal matters (AGIS).⁵

Thus, the Commission only supposes that legislative measures are necessary where a Member States' responsible authorities have stated so, unless there are clear indications for such a need. However, national legislation (primary and/or secondary) can also be desirable in the interest of transparency and certainty of the law, as Eurojust can only work properly if there are clear-cut and unambiguous rules.

⁵ Project n° 189/2003 ("Powers of the Eurojust National Members") of the AGIS programme, which was established by Council Decision of 22.7.2002, OJ L 203, 1.8.2002, p. 5.

According to the information available, three Member States (AT, DE, FR) have adopted legislation on Eurojust after the expiry of the deadline for transposition in Article 42 of the Decision.⁶ The report takes into account any Member State reply or other information which reached the Commission by 31 March 2004. However, the report does not examine the situation in the new Member States.

3. CONCLUSIONS

The state of implementation of the Eurojust Decision is far from satisfying. By the end of the deadline (September 2003), only one Member State (PT) had passed the complete legislation necessary to comply with the Eurojust Decision. Although by April 2004, three more Member States have adopted the relevant laws (AT, DE, FR), in five Member States there is no implementing legislation as necessary according to their national law (BE, EL, ES, IT, LU). At least in one of these, not even a government bill has been presented to the national Parliament by the time of the drafting of the report (March/April 2004). Since Finland has only implemented part of the Decision, on the whole six Member States still need to bring their national law into conformity with the Decision. Given the central role and high importance of Eurojust both in the fight against terrorism and in cooperation in criminal matters in general, and the various declarations by the European Council and the Council, this is disappointing.

The remaining Member States concluded that they did not need to amend their national law. The Commission has no reason to question these conclusions, although the long time needed in some Member States to examine the need for legislation shows that the legal situation is not always entirely clear. Moreover, a smooth operation of Eurojust and its cooperation with national authorities can only be achieved through transparent, clear-cut rules guaranteeing the certainty of the law. Even where legislation is not indispensable, it might thus be preferable to have guidelines or circulars clarifying certain essential issues. However, only one Member State (SE) has communicated to the Commission such an act, a decree by the Chief Public Prosecutor. On this basis, it is difficult to get an overall picture and to carry out a thorough evaluation. Future experience will have to show whether the existing rules in the Member States will suffice to give full effect to the Eurojust Decision and to make Eurojust an efficient and effective tool.

A crucial issue to be looked at in further detail in the future is the exchange of information between the competent national authorities and Eurojust. As outlined above, it is currently not yet entirely clear whether the measures taken by Member States up to now will fully ensure that the Eurojust national members receive all the information which is needed to carry out their tasks and responsibilities. The information flow should work smoothly and, in urgent cases, sufficiently rapidly. Therefore, the Commission would like to draw the Member States' particular attention to the implementation of Articles 9(4) and 13(1) of the Decision on the national members' access to information on investigations and prosecutions.

⁶ By end of March 2004, Germany informed the Commission that a political agreement on its national law had been found by the Reconciliation Committee of the two Houses of Parliament (see press release n° 52/2004 of the Bundesrat of 31.3.2004). Thus, although the German law was not yet formally adopted at that time, its contents could be taken into account in this report.

The Commission would also like to encourage Member States to confer on their Eurojust national members the judicial and/or investigative powers that are usually conferred on a prosecutor, judge or police officer of equivalent competence under their national law. Although Article 9(3) leaves the exact scope of these powers to the Member States (apart from the question of access to information), they should be of such nature that Eurojust can carry out its tasks and that the objectives of the Decision can be met. An excessive disparity or lack of consistency of the national members' powers can harm the effectiveness and credibility of Eurojust and hamper its cooperation with the national authorities. Therefore, further attention should be given to the issue of consistency and compatibility of the members' national powers.

Since 1 May 2004, the new Member States are also obliged to take all necessary steps to implement the Eurojust Decision. The Commission will consider whether to publish a follow-up report including the new Member States in due time. In view of the foregoing, the Commission invites all Member States to ensure a rapid and complete transposition of the Eurojust Decision and to inform it of any measures taken, particularly on the issues outlined above.