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NOTE

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| From: | The Spanish delegation |
| To: | Delegations |
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| Subject: | Mutual Evaluation report on the sixth round of Mutual Evaluations "The practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters" - Follow-up to the Report on Spain |

As a follow-up to each Round of Mutual evaluations, each Member State is requested to inform the General Secretariat of the Council of the actions it has taken on the recommendations given to it. This follow-up should be submitted within the 18 months of the adoption of the report concerned.

Delegations will find in the Annex the follow-up of Spain regarding the recommendations that were made in the report 11004/2/14 REV 2 GENVAL 41 EUROJUST 116 for the Sixth Round of Mutual Evaluations.

As part of the Sixth Round of Mutual Evaluations on 'the practical implementation and operation of the Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and of the Council Decision 2008/976/JHA on the European Judicial Network in criminal matters', we hereby submit, within the scheduled time frame of 18 months, our report on the follow-up to the nine recommendations made to Spain in evaluation report 11004/2/14 REV 2 (cf. pages 75 and 76), adopted on 26 September 2014:

- i. Recommendation 1: Expedite the on-going legislative procedure concerning implementation of the 2008 Eurojust Decision and ensure its practical implementation as a matter of priority; commit clear timelines for adoption of the required legislation (cf.3.2, 3.6.1).**

This recommendation was implemented with the adoption of Law 16/2015 of 7 July 2015 governing the status of Spain's national member in Eurojust, conflicts of jurisdiction, international judicial cooperation networks and staff of the Ministry of Justice posted abroad¹ (published in the Official State Gazette of 8 July 2015). This law entered into force on the day following its publication in the Official State Gazette, in accordance with its fourth final provision.

According to its third final provision (incorporation of European Union law), *'This law incorporates Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, and transposes Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, and Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network'*.

¹ http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-7624

The key additions to this law in relation to Eurojust, as indicated in the explanatory memorandum, are:

- The strengthening of the Spanish delegation to Eurojust, which will consist of a national member, a deputy national member and an assistant. The law sets out the rules governing the new post of deputy national member, who will be based in the Hague and will have full authority to represent the national member, and stipulates that it is mandatory to appoint an assistant. With regard to the status of the national member, additions include the period of appointment, which will be four years, as well as the obligation to inform the General Secretariat of the Council of the reasons for termination.

The development of a national coordination system ensuring that all exchanges of information between the Spanish delegation to Eurojust and the competent national authorities are undertaken in a timely, efficient and secure manner. The law accordingly governs the composition and operation of the national coordination system, as well as the functions of the national correspondents for Eurojust and the national coordinator as the person with overall responsibility for the system.

- The requirement that the assistance required by the Eurojust College must be provided by any member of the Spanish delegation to Eurojust. For that purpose, the national member, deputy national member and the assistant are entitled to communicate directly with the competent national authority or with the national coordinator.
- The establishment of time frames for complying with obligations - a time limit of 10 days for national authorities to reply to the requests made by the Spanish national member at Eurojust, as well as a maximum of one month to forward the information to Eurojust.
- The regulation of the powers of the national member, distinguishing between those which he or she may exercise directly and others which, in practice, and in order to have a jurisdictional nature, will be exercised by the competent national authorities at the proposal of the national member.

- ii. **Recommendation 2: Reflect on the respective role, powers and obligations of all MLA actors in Spain (National Desk, National Correspondents, ENCS, EJM contact points, domestic networks, prosecution service, investigating judges, court clerks etc.) and their relation to each other, and provide clarity to other Member States on this in order to simplify judicial cooperation with Spain and reduce gaps and overlaps, in particular after the new law has entered into force (cf. 3.1, 5.2, 5.3, 6.3, 6.4).**

As could be demonstrated during the evaluation team's visit to Spain, the Spanish system is characterised by the existence of multiple players, whose functions are legally defined and whose actions do not overlap but are complementary.

In that respect it is worth noting Spain's statement² on Article 24 of the European Convention on Mutual Assistance in Criminal Matters, done in Strasbourg on 20 April 1959, and applicable to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, according to which '*the following are considered judicial authorities for the purposes of this Convention:*

- (a) *judges and courts with ordinary jurisdiction;*
- (b) *court clerks;*
- (c) *members of the public prosecution service;*
- (d) *the military judicial authorities.'*

² http://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-19394

Article 117 of the Spanish constitution³ provides that '*justice derives from the people and is administered in the name of the King by judges and magistrates of the judiciary who shall be independent, may not be removed from office, shall be accountable for their acts and subject only to the rule of law*' (paragraph 1), and that '*the exercise of judicial power in all types of proceedings, both in handing down judgments and having judgments executed, falls exclusively to the judges and courts specified in law, in accordance with the rules of jurisdiction and procedure that may be established therein*' (paragraph 3).

Furthermore, Article 124 establishes that '*the public prosecution service, without prejudice to the tasks entrusted to other bodies, is responsible for promoting the pursuit of justice in defence of the rule of law, the rights of citizens and the public interest as safeguarded by the law, whether ex officio or at the request of the parties concerned, as well as for ensuring the independence of the courts and seeking the satisfaction of the public interest before those courts.*'

Organic Law 6/1985 of 1 July 1985 on the judiciary⁴ (LOPJ) reproduces the articles quoted in the above paragraph in relation to judges and magistrates and to members of the public prosecution service, and defines the duties of the court clerks:

- Article 1 establishes that '*justice derives from the people and is administered in the name of the King by judges and magistrates of the judiciary who shall be independent, may not be removed from office, shall be accountable for their acts and subject only to the constitution and the rule of law*', and Article 2(1) that '*the exercise of judicial power, both in handing down judgments and having judgments executed, falls exclusively to the judges and courts specified in law and in international treaties.*'

³ http://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-31229

⁴ http://www.boe.es/diario_boe/txt.php?id=BOE-A-1985-12666

- Article 440 establishes that 'court clerks are public officials constituting a single senior judicial body operating at national level in the service of the judiciary under the Ministry of Justice, who perform their duties as an authority, and are responsible for the management of the Judicial Office.' Their duties are laid down in Articles 452 to 462, among which it is worth highlighting Article 452(2): 'In the performance of their duties, court clerks shall comply with and ensure compliance with all decisions taken by judges or the courts within their remit'; Article 453(1): 'Court clerks are exclusively and fully responsible for judicial certification'; and Article 456(1): 'Court clerks shall ensure proceedings are conducted according to the provisions of procedural law.'
- According to Article 541(1): 'without prejudice to the tasks entrusted to other bodies, the public prosecution service is responsible for promoting the pursuit of justice in defence of the rule of law, the rights of citizens and the public interest as safeguarded by the law, whether ex officio or at the request of the parties concerned, as well as for ensuring the independence of the courts and seeking the satisfaction of the public interest before those courts.' Paragraph 2 adds that 'the public prosecution service shall be governed by the provisions of its organic statute'. Article 1 of Law 50/1981 of 30 December 1981 governing the organic statute of the public prosecution service (EOMF) reiterates that 'the public prosecution service is responsible for promoting the pursuit of justice in defence of the rule of law, the rights of citizens and the public interest as safeguarded by the law, whether ex officio or at the request of the parties concerned, as well as for ensuring the independence of the courts and seeking the satisfaction of the public interest before those courts.'

The LOPJ also provides that '*requests for international cooperation shall be dealt with in accordance with the provisions of applicable international treaties, European Union regulations and Spanish law*' (Article 276) and that '*Spanish judges and courts shall provide foreign judicial authorities with any cooperation requested of them in order to perform their judicial role, in accordance with the provisions of the international conventions and treaties to which Spain is a party, European Union regulations and Spanish law in this area*' (Article 277). Article 278 lists the specific cases in which Spanish judges and courts may refuse to provide international cooperation. The EOMF adds that it is the responsibility of the public prosecution service to '*promote or, as appropriate, provide the international judicial assistance provided for by international conventions, treaties and law*' (Article 3(15)).

Given this legal basis founded on the constitution, when the draft law that became the abovementioned Law 16/2015 was being drawn up it was necessary to evaluate the duties performed by the various parties in Spain who participate in international judicial cooperation in criminal matters, with the aim of preventing overlaps and closing any gaps.

On the one hand, Chapter III (on the Eurojust national coordination system and national correspondents) of Law 16/2015 defines the duties of the Eurojust national correspondents (Article 16), of the national correspondent for terrorism matters (Article 17) and of the Eurojust national coordinator (Article 19), and sets out the Eurojust national coordination system (Article 18).

- It is the responsibility of the national correspondents, at the request of the national member, to '*... transmit requests made in the course of performing their duties to the judicial authorities or the public prosecution service. Likewise, they shall provide the National Member with the technical support required to carry out his or her tasks*'. In addition, '*... they shall provide the necessary assistance to the competent national authorities in their relations with Eurojust.*'

- *The national correspondent for terrorism matters shall perform the tasks laid down by European Union law. For this purpose, the correspondent shall have access to, and transmit to Eurojust, information relating to any investigation or judicial proceedings concerning terrorist offences, and at the least information relating to:*
 - (a) the identity of the persons or entities subject to such investigations;*
 - (b) the activities subject to investigation or proceedings and their specific circumstances;*
 - (c) any connection with other relevant cases involving terrorist offences;*
 - (d) any related action involving international judicial cooperation that may have been pursued, and the outcome of such action.'*

- *The national coordinator shall be responsible for the functioning of the Eurojust national coordination system and as such shall be able to act on his or her own initiative or at the request of the national member or of the competent national authorities.*
 - 2. *The national coordinator shall facilitate, within Spain, the carrying out of the tasks of Eurojust, and in particular shall:*
 - (a) *ensure that the case management system receives the required information in an efficient and reliable manner;*
 - (b) *assist in determining whether a case should be dealt with by Eurojust or the European Judicial Network;*
 - (c) *assist the national member in identifying the competent authorities for the execution of requests for, and decisions on, judicial cooperation, including as regards instruments giving effect to the principle of mutual recognition;*
 - (d) *maintain close relations with the Europol National Unit.'*

On the other, Chapter VI of Law 16/2015 (on international judicial cooperation networks) governs the appointment, termination of service, and duties of the contact points in the European Judicial Network and the Network of Joint Investigation Teams (Articles 33 and 34), as well as which institution should act as national coordinator for both networks and the tasks performed by those coordinators.

- iii. Recommendation 3: Set up the ENCS without delay so as to comply with the related requirement of the Eurojust Decision; organise and make use of the ENCS to help unite the various competent bodies and professions; ENCS might be best placed, in particular, to enhance the cooperation between the domestic networks of practitioners specialised in the field of judicial cooperation in criminal matters, so as to facilitate interaction, strengthen information exchange and overcome the fragmentation of the sector, with a view to optimising overall efficiency (cf. 3.1, 3.2, 3.3.1, 3.3.2, 3.6);**

The above-mentioned Law 16/2015 governs the composition and operation of the national coordination system, as well as the functions of the national correspondents of Eurojust and of the national coordinator as the person with overall responsibility for the system. In accordance with European legislation, the Eurojust national coordination system is presented as the mechanism necessary to facilitate communication with the Spanish delegation to Eurojust, while fully respecting the possibility of direct communication between the competent Spanish authorities and the Spanish national member at Eurojust. The previous model has thus been adapted to the provisions of the Decision and to the current context of international judicial cooperation, with a view to improving coordination between the various players involved and helping to determine whether a case should be dealt with with the assistance of Eurojust or the European Judicial Network. The aim is also to help the national member to identify the competent authorities for the execution of requests for judicial cooperation and to maintain close links with the national unit of Europol in order to ensure in an effective way that the case management system receives reliable information from the competent authorities.

The national coordination system was designed with the aim of ensuring that the exchange of information between the Spanish delegation to Eurojust and the competent national authorities is carried out in a timely, effective and secure manner.

The following practical measures have been taken in recent months to implement the provisions of Law 16/2015:

- The national correspondents for Eurojust have been appointed by means of Order JUS/2477/2015 of 16 November appointing national correspondents for Eurojust and designating the national coordinator for Eurojust⁵:

Seven national correspondents have been appointed:

- o a national correspondent for Eurojust, who has been designated national coordinator;
 - o two national correspondents for Eurojust for cases of corruption;
 - o two national correspondents for Eurojust for public health matters;
 - o two national correspondents for Eurojust for terrorism matters.
- As an immediate consequence of the above, the national coordination system was set up:
 - o The constitutive meeting was held on 18 December 2015.
 - o The second meeting took place on 25 February 2016.

⁵ http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-12694

Pursuant to Article 18(4) of Law 16/2015, *'The members of the national coordination system shall meet at least every six months and, in any event, whenever the management of a specific matter so requires, upon convocation by the national coordinator. The national member shall be informed of the meetings convened and may attend them if he or she deems it appropriate. As well as plenary meetings, sectoral meetings may be convened when the questions to be dealt with do not concern all the networks represented in the system.'* It should be noted that the Spanish national member has attended the two meetings held so far.

- iv. Recommendation 4: Ensure the continued practical implementation of the reporting obligation contained in Article 13 of the Eurojust Decision; clarify whose responsibility (judge or prosecutor or Court clerk) it is to comply with Article 13, to the extent necessary after the adoption of the draft Bill, and when/how this should be done, so as to avoid duplication or failure to notify (cf. 3.1, 3.6.4, 4.3).**

Pursuant to the first paragraph of Article 24 of Law 16/2015 (Transmission of information to Eurojust), *'The competent authorities, within the framework of the competences assigned to them by law, shall transmit the information referred to in this article to Spain's national member at Eurojust. The information shall be transmitted via the State Prosecutor's Office for immediate and direct transmission to the national member. It may also be transmitted directly to the national member, subject to notification of the State Prosecutor's Office.'*

It can be seen from the above that the law has established, on the one hand, the obligation for the competent authorities to send information to Eurojust and, on the other, the channels for doing so, i.e. whether through the State Prosecutor's Office, which will transmit it to the national member, or directly to the national member, with the State Prosecutor's Office being notified. It can thus be affirmed that the information obligation continues to be complied with and that the procedure for transmitting information has been established.

Moreover, it should be noted that, before the entry into force of this Law, Spain was one of the Member States that sent most notifications to Eurojust. The annual report of Spain's national member at Eurojust for 2014, dated 2 June 2015, refers on page 33 to an internal memo issued by Eurojust in May 2014 entitled 'Article 13 of the Eurojust Council Decision - a possible way forward'. That memo analyses the exchange of information provided for in Article 13 between June 2011 and June 2014, a period during which 485 notifications were received at national delegations. The report states '*...Hungary is the country that sent most notifications under Article 13 in the period in question (71 notifications), followed by France (62) and Spain (52), with Romania (47) the fourth member of the quartet of countries that were most diligent in complying with this obligation. By the end of 2014, the latter had become the delegation that sent most notifications.*'

- v. **Recommendation 5: With a view to tackling the structural overload of the Spanish National Desk at Eurojust, accelerate the planned appointment of an assistant to the National Member; consider strengthening the Desk even further by appropriate means (cf. 3.4.1, 3.6.2).**

Following the adoption of Law 16/2015, the Spanish delegation to Eurojust must include, at least, a national member, a deputy national member and an assistant. That Law establishes the new post of deputy national member, based in the Hague and with full authority to represent the national member, and provides for the mandatory appointment of an assistant, who can be based at Eurojust or in Madrid. In addition, the term of the national member's appointment has been increased to four years.

Immediately after the approval of the above Law, the Ministry of Justice drew up the report necessary to initiate the process of creating the new post of assistant.

Pending the creation and filling of the new post of assistant, the Spanish national desk, made up of the national member, the deputy member and a seconded national expert from the national police force, has been reinforced with the incorporation of two further seconded national experts, one from the Guardia Civil and the other from the public prosecution service, in 2014 and 2015 respectively. The period of secondment of the latter has recently been extended for a further year, in order to cover the two years agreed between the Spanish Ministry of Justice and Eurojust.

In the last two years, the capacity of the Spanish desk has thus been significantly strengthened with the incorporation of the two new members of staff referred to above; the procedure to recruit the new assistant as quickly as possible has also been launched.

In this connection, mention should be made of the annual report of the Spanish national member for Eurojust for 2014. An extract from page 13 of the report reads as follows: *'As mentioned in the executive summary of the report, the decision of the Ministry of Justice to reinforce the Spanish national desk at Eurojust with two seconded national experts must be seen as extremely positive. Specifically, and in chronological order, a captain from the Guardia Civil (criminal police technical unit) was recruited in December 2014 and, that same month, it was also decided to second a prosecutor from the international cooperation unit of the State Prosecutor's Office, who joined the delegation in March 2015.'*

vi. Recommendation 6: Reflect on whether the concerns expressed by some judicial and prosecutorial authorities as regards the powers of the National Member and the Deputy and their position within the Ministry of Justice have any impact on cooperation with Eurojust (cf. 3.4.3.1, 3.6.2).

Notwithstanding some of the personal opinions expressed to the evaluation team during its visit to Spain in February 2014, the report itself states that the national member and his deputy 'have confirmed that they enjoy total independence in the management of their casework' [page 28]. With regard to the fact that the national member and deputy come under the organisational chart of the Ministry of Justice, the report adds that "[t]his does not seem to hamper their independence in practice or cause practical problems in actual cooperation" and that '[c]oncern has been expressed by some practitioners the team met during the visit that this could have an impact in certain cases of cooperation with Eurojust. The team has, however, not been provided with any practical evidence in this regard' [page 34].

Indeed, the figures noted above in relation to Recommendation 4 would suggest that the fact that the national member and the deputy are organisationally accountable to the Ministry of Justice has in no way affected cooperation with Eurojust. Analysis of the data on cases opened in 2014 by the various national delegations at Eurojust leads to the same conclusion. The 2014 annual report by Spain's national member at Eurojust also provides data on cases opened that year and on the share pertaining to the Spanish delegation, based on '*cases recorded in the Case Management System (CMS) in which the Spanish delegation was involved as either the requesting country (87) or the requested country (218), which amount to a total of [305 cases] and 17 % of the total number of cases opened in Eurojust, which gives an idea of our delegation's weight in the organisation*' (page 48). The Spanish delegation is the third most active, after Italy (324 cases) and the UK (315 cases).

In light of the above, and having assessed the various options available, the legislator ultimately opted to include the provisions of Articles 1(2) and 3(2) of the previous Law 16/2006 in Article 8 (Administrative status and organisational accountability) of Law 16/2015. The aforesaid article provides that '*the Spanish national member of Eurojust, the deputy national member and the assistants shall have the administrative status that corresponds to them in accordance with Organic Law 6/1985 of 1 July 1985 on the Judiciary and Law 50/1982 of 30 December 1981 governing the Organic Statute of the Public Prosecution Service, and shall remain organisationally accountable to the Ministry of Justice*'.

vii. Recommendation 7: To the extent not clarified by Article 18 of the draft Bill, address the issue of confidentiality of information in dealing with cross-border cases and in particular in view of coordination meetings (bearing in mind that Eurojust has started a pilot-project in which Member States involved make agreements on disclosure and confidentiality related to such meetings) (cf. 3.3.2, 3.4.3.1, 4.2.2, 4.2.3, 5.2, 5.4, 7.3, 9.2).

Firstly, it should be pointed out that Article 18 of the bill sent to the evaluation team in 2014 is the current Article 24 of Law 16/2015.

Paragraph 3 of Article 24 provides that '*[s]aid transmission of information shall not be hindered by the secret nature of the criminal investigation, even if, in compliance with the provisions of the Code of Criminal Procedure, it is declared secret by the parties, and shall comply with the applicable data protection rules.*'

In view of the references made in Law 16/2015 to the Code of Criminal Procedure and the applicable data protection legislation, it can be concluded that this matter has been satisfactorily addressed.

viii. Recommendation 8: Ensure there is one coherent system in place whereby international LoRs to Spain can be effectively traced and monitored, if necessary by linking up the different registration systems (but preserving the principle of direct transmission); this would make the work of the National Desk easier and generate useful data (cf. 3.1, 4.1.1, 4.3, 5.2).

As indicated in the evaluation report, there are several parties involved in international judicial cooperation in criminal matters in Spain; it should also be noted that international letters rogatory are dealt with differently depending on whether they come from a European Union Member State, in which scenario the judicial authorities communicate with each other directly, or from a third state, in which case communication happens via diplomatic channels and/or with the involvement of the central authority.

As regards the former, although direct communication between judicial authorities in the EU is on the rise and recourse to the central authority is decreasing, in practice a significant number of requests are still processed through the central authority under the 1959 Convention (not only from Spanish judicial authorities but also from other central authorities). In particular, the Ministry of Justice maintains a database containing all letters rogatory processed by it in its capacity as central authority, together with information on their current status.

With respect to Eurojust, it is worth recalling the aforementioned Article 24(1) of Law 16/2015, according to which information is transmitted to Eurojust '*...via the State Prosecutor's Office for immediate and direct transmission to the national member. It may also be transmitted directly to the national member, subject to notification of the State Prosecutor's Office.*'

It can therefore be concluded that the State Prosecutor's Office is aware of all information transmitted from Spain to Eurojust, either because it has been informed by the competent authority or because it has been informed by the national member at Eurojust, where information is communicated directly to the latter, and the same applies to the national member.

ix. Recommendation 9: Given that continued training is not mandatory, consider how best to reach practitioners throughout Spain to promote awareness and provide information regarding international cooperation, Eurojust, EJM and JTs (cf. 4.2.1, 4.2.3, 5.7, 6.4, 7.3, 8.1, 8.2, 8.3).

As recognised in the report, the *Prontuario* intranet is the best tool available to legal practitioners in Spain for sharing existing international judicial cooperation tools and instruments. Its contents are periodically updated and are analysed in workshops organised to that end and attended by the various parties involved in international cooperation on criminal matters.

The *Centro de Estudios Jurídicos* (CEJ – Centre for Legal Studies) and the *Escuela Judicial* (Judicial School) both organise multiple training activities aimed at the different legal practitioners in Spain. Initial training given to judges, public prosecutors and court clerks includes specialised training on international judicial cooperation.

The objective of the *Centro de Estudios Jurídicos* is to provide, in collaboration with the Ministry of Justice, initial, continued and specialised training for public prosecutors and for court clerks, forensic doctors and other judicial personnel. It also provides continued and specialised training to State lawyers under the plans drawn up by the *Abogacía General del Estado-Dirección del Servicio Jurídico del Estado* (Government Attorney's Office, Directorate for State Legal Services).

In 2016, the training plans for the 55th batch of public prosecutors and the 41st batch of court clerks include training material on international judicial cooperation.

The CEJ is taking part in the EU's 'European Judicial Training for Court Staff and Bailiffs' project, funded by the 2014-2020 EU Justice Programme, which was launched in September 2015. Over the course of two and a half years, the project will help to improve training for judicial staff on Community law and cross-border proceedings as well as to create a genuine European area for the training of judicial staff. For Spain, it means that court clerks can take part in activities under the project.

The *Escuela Judicial* is a public body that forms part of the *Consejo General del Poder Judicial* (General Council of the Judiciary), to which it is accountable in budgetary and organisational terms. It also has a dual mission: on the one hand, to guarantee adequate professional preparation for those entering the judicial bodies through its initial training programmes; on the other hand, to organise continued training and professional retraining activities for members of the judiciary.

The initial training plan for the 2016-2017 course for the 67th class of the judiciary also places an emphasis on international judicial cooperation in civil and criminal matters as well as on training in EU law.

