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COVER NOTE

from:	The General Secretariat of the Council
to:	Working Party on Cooperation in Criminal Matters
Subject:	Comments from Member States on Articles 1-8 of the Draft Regulation

The Working Party on Cooperation in Criminal Matters (COPEN) held its first meeting on the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust)[1] on the 19th September 2013. At that meeting, the Commission presented its proposal and following a general discussion, delegations examined Articles 1- 8 of the proposal.

At the end of the Working Party, delegations were invited to provide written comments on these articles to the General Secretariat of the Council by 21 October 2013. Six delegations; Germany, Austria, the Czech Republic, Ireland, France and the United Kingdom submitted comments which have been included in the Annex to this document.

[1] Doc 12566/13

Austria

Article 1: Regarding para. 3 the Austrian Delegation would prefer the wording of the current Council Decision (Art. 1) which would also be in line with the respective stipulation of the European Public Prosecution Office (EPPO) in Art. 1 para. 2. Using another wording in the Eurojust regulation might give rise to misinterpretation.

Article 3: The Austrian Delegation is of the opinion that Eurojust might be able to add some value to the proceedings/investigations of the EPPO concerning coordination with third countries, as well as not participating Member States in case of an enhanced cooperation. However, para. 1 states that Eurojust should not be competent for crimes for which the EPPO is competent. The exclusive competence of the EPPO therefore makes reference to the crime irrespective of the fact that some investigative measures have to be taken in third countries or non participating Member States. Hence, Eurojust would have no competence to assist the EPPO in its investigations.

Concerning the list in Annex 1 referred to in Art. 1 para. 1 it has to be pointed out, that the mentioned forms of crime are not defined. This might cause problems for the National Members of Eurojust when they make use of their powers regulated in Art. 8. In addition, this list has the effect that Eurojust could not assist in all cases of an EAW or other requests for mutual recognition. However, Eurojust expertise is often needed in practice concerning EAW cases.

Furthermore Art. 4 para. 2 of the current Council Decision cannot be found in the proposal for the regulation. However, the legal basis mentioned before is often made use of. The Austrian Delegation is of the opinion that Eurojusts core task is to assist law enforcement authorities of the Member States in all kind of cases of transnational crime. The proposal would be a step back regarding the current situation and might be contradictory to the task set out in Art. 85 TFEU which states: "Eurojusts 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 […]"

Finally, the Austrian Delegation would welcome an explanation or definition in the recitals forthe ancillary competences, in particular referred to in Art. 3 para. 2 (c) to ensure consistent and proper interpretation throughout the Member States. One has to bear in mind – as already mentioned above – that the regulation on the powers of the National Member are interlinked with the stipulation on Eurojusts competences. Therefore it is of utmost importance to clearly define the competences of Eurojust in order to avoid problems of misinterpretation by National Members making use of their powers set out in Art. 8.

Article 5: The Austrian Delegation is in favour of having the so called "horizontal work" of Eurojust included in Art. 5. Otherwise the competence to deal with these issues would be left to the executive board according to Art. 16 para. 2 (g).

Article 8: First of all it has to be pointed out that the German translation of para. 1 (a) is not correct and would better read as follows: "das Ausstellen und die Vollstreckung von Ersuchen um Rechtshilfe oder gegenseitige Anerkennung zu erleichtern oder auf andere Weise zu unterstützen oder diese selbst auszustellen oder zu vollstrecken".

Secondly, for the Austrian Delegation it is not clear according to which law the National Member should exercise the powers granted by Article 8. Only in relation to controlled deliveries Art. 8 para. 2 (b) states that the National Member shall authorise and coordinate them in accordance with national law. One could argue that *argumentum e contrario* this rules shall not apply in the other cases referred to in Art. 8 para. 1 and 2 of the proposal.

Finally, the scope of powers set out by the proposal would encompass also judicial powers because the powers of the National Member are not limited like in Art. 9e of the current Council Decision. The Austrian Delegation is convinced that this was not intended by the European Commission and would therefore prefer further clarification in Art. 8.

Czech Republic

This part of the Regulation is essential for the functioning of Eurojust and deserves to be assessed and discussed very carefully. Experience has shown that there is a need for definition of a common minimum standard, i.e. a minimum set of powers granted to all national members throughout the Member States and, at the same time, designed with full regard and respect to the national legal systems, their specificities and traditions. The current Eurojust Decision represents a very balanced compromise in this regard and every step taken towards modifying or further extending the powers should be guided by the same principles.

The fundamental role of Eurojust has always been to support and assist the national authorities instead of replacing them, therefore the rule contained in Article 9c(2) of the current Eurojust Decision should be maintained. It has to be recalled that only the national authority which is permanently present throughout the criminal proceedings is the one who is familiar with the case-file and all its details and who also bears the full responsibility for resolving successfully the case.

As regards the individual powers defined in Article 8 of the Proposal, their composition and definition will require an extensive discussion and a significant amount of further work. The level of harmonisation achieved in Eurojust Decision should with no doubt be maintained but, at the same time, the real need for establishing new operational powers foreseen by Article 8 and their possible use in practice has to be assessed. So far, CZ has not been able to conclude (neither from the Proposal and its accompanying materials, nor from the practical experience) whether there really exists such a need. We are not aware of any facts leading to a conclusion that national members lack this kind of operational powers and are therefore prevented from fulfilling their tasks. The question of how those powers could help the national members in their daily work also remains open. In the discussion about improving Eurojust, strengthening

effectiveness of its activity and taking a step forward, this aspect should be considered at the first place.

This is one of the reasons (but in our view the most important one) why CZ does not support the inclusion of the new operational power of national members defined in Article 8(1)(a) – *issuing and executing MLA requests.* It is not clear how a national member operating in The Hague should issue or execute a MLA request independently by himself and how this would contribute to a more effective judicial cooperation. Although we acknowledge that the role of national members in MLA matters may be and often is of crucial importance, we are not convinced from a practical point of view that it could consist of an independent activity in relation to issuing and executing MLA requests. We also have serious concerns about the powers defined in Article 8(2) and the vague terms used here. Since we are dealing with a regulation, i.e. a legislative act to be applied directly without any implementing legislation, we need precise definitions or a reference to an applicable legal regime.

These are some of many problematic aspects identified by CZ in the Commission's proposal as regards the powers of national members. CZ is ready to participate actively in their eliminating and hopes to have preliminarily introduced its position in a clear and comprehensible manner.

France

Commentaires généraux

Les autorités françaises accueillent favorablement la proposition de règlement déposée par la Commission, qui consolide l'acquis des décisions 2002/187/JAI et 2009/426/JAI.

Elles veilleront à ce que cet acquis soit préservé et s'attacheront en particulier à ce qu'Eurojust garde ses prérogatives en matière de lutte contre les formes graves de criminalité organisée dans l'Union européenne et pour les infractions connexes à la protection des intérêts financiers de l'UE (PIF) pour lesquelles le futur Parquet européen pourrait être compétent. En effet, Eurojust a vocation à favoriser la coordination et à apporter son soutien aux Etats membres, missions complémentaires de celles du futur Parquet européen. Par ailleurs, le règlement Eurojust concernera l'ensemble des Etats membres, ce qui ne sera pas nécessairement le cas du Parquet européen.

Elles veilleront en outre à la cohérence générale des dispositions correspondantes des règlements Eurojust et Europol, notamment en matière d'accès réciproque à leurs bases de données respectives, de communication et d'échange de données avec des Etats tiers et des organisations internationales, ainsi que de protection des données. Elles souhaitent également que les listes de formes graves de criminalité relevant de la compétence d'Eurojust et d'Europol soient identiques.

Les autorités françaises estiment que pour plus de précision, un article définissant certaines notions et termes employés indifféremment dans les propositions de règlement Eurojust et Europol, comme « autorités compétentes » et « autorités nationales compétentes », pourrait être ajouté.

Article 1er : Au **§2**, l'expression « est le successeur légal » semble impropre et pourrait être remplacée par «succède à ».En droit des organisations internationales, le terme « succéder » se suffit à lui-même et signifie que l'entité hérite des droits et obligations de son prédécesseur.

Il serait préférable que le **§3** mentionne la « personnalité juridique » - comme dans l'article 1er de la décision 2002/187/JAI – et non la « capacité juridique »

Article 2: Au **§1**, il est incorrect d'écrire qu'Eujust conduit des « opérations » : le rôle d'Eurojust est de soutenir des opérations conduites par les services d'enquêtes nationaux, et non d'en réaliser. Pour être plus précis et tenir compte notamment du futur Parquet européen, les autorités françaises proposent la rédaction suivante:

« *Sur la base des opérations effectuées* ***par les autorités des États membres*** *et des informations fournies* ***par ces autorités, et par les institutions et organes de l'Union***, *Eurojust appuie et renforce la coordination et la coopération entre les autorités nationales chargées des enquêtes et des poursuites relatives à la criminalité grave affectant* ***plusieurs Etats membres*** *ou exigeant une poursuite sur des bases communes*. »

Article 3 : Il est nécessaire de ne pas exclure la compétence d'Eurojust s'agissant des infractions pouvant relever de la compétence du Parquet européen (en l'état, les infractions visées dans la directive "PIF") pour plusieurs raisons :

- la proposition de règlement Eurojust (article 41) prévoit explicitement qu'Eurojust peut assister le Parquet européen : cette assistance deviendrait impossible si la compétence d'Eurojust pour les infractions relevant de la compétence du Parquet européen était exclue ;

- contrairement à ce qu'indique la Commission, le champ de compétence entre le Parquet européen et les Etats membres (dont Eurojust est le prolongement) n'est pas cloisonné, qu'il s'agisse :

- des infractions accessoires aux infractions PIF, et pouvant relever tant de la compétence des Etats membres que de celle du Parquet européen ;

- des infractions relevant de la directive PIF mais impliquant des Etats qui ne participent pas au Parquet européen ;

- des infractions relevant de la directive PIF mais qui apparaissent en cours d'enquête comme étant des infractions « mineures », pour lesquelles la proposition de directive PIF prévoit explicitement qu'elles peuvent ne pas être passibles de sanctions pénales. Dans cette hypothèse, un dessaisissement du futur Parquet européen au profit des autorités nationales est envisageable.

Dans la mesure où la compétence d'Eurojust dans ces matières dépendra en réalité du contenu du futur règlement portant création du Parquet européen, la rédaction suivante de l'article 3 §1 pourrait ainsi être proposée :

"Eurojust's competence shall cover the forms of crime listed in annex 1. ***As regards offences falling under the competence of the European Public Prosecutor's Office, Eurojust exercices its competence according the provisions of Regulation n° XXX on the establishment of the European Public Prosecutor's Office.*** *"*

Par ailleurs, il convient également de prévoir un paragraphe reprenant les dispositions de l'article 4 §2 de la décision consolidée Eurojust, permettant de ne pas exclure la compétence d'Eurojust dans les matières non visées en annexe 1, lorsque son assistance aura été requise par un Etat membre ou par le Parquet européen. En effet, il n'est pas impossible qu'à l'avenir de nouvelles formes de criminalité apparaissent et nécessitent une intervention structurée et coordonnée des autorités judiciaires des Etats membres par l'intermédiaire d'Eurojust, ou du Parquet européen dont le champ de compétence pourra être étendu conformément aux dispositions de l'article 86 du TFUE. La rédaction suivante pourra être proposée (nouveau §2 à la suite du §1) :

*"****For types of offences other than those referred to in §1, Eurojust may in addition, in accordance with its objectives, assist in investigations and prosecutions at the request of a competent authority of a Member State or at the request of the European Public Prosecutor's Office.*** *"*

Enfin, concernant **l'annexe 1** à laquelle l'article 3 renvoie, il serait opportun que la Présidence se concerte avec ses collègues en charge des négociations sur l'instrument Europol afin que les listes d'infractions pour lesquelles ces deux agences seront compétentes soient identiques.

A ce titre, sur le fond, reprendre la liste des infractions prévues à l'article 2 de la décision-cadre 2002/584/JAI sur le mandat d'arrêt européen, serait une piste de réflexion pertinente.

Article 4 : Au **§1 e)**, il conviendrait de préciser ce qu'il faut entendre par « opérations et des enquêtes transfrontières menées par les États membres ».

Les nouveaux pouvoirs des membres nationaux en matière d'émission et d'exécution d'office de demandes d'entraide judiciaire, prévus à l'article 8 §2, ne sont pas reflétés dans les pouvoirs exercés par Eurojust conformément à l'article 4. Il pourrait ainsi être envisagé de compléter l'**article 4 §1 b** de la manière suivante :

"b) assist the competent authorities of the Member States in ensuring the best possible coordination of investigations and prosecutions, ***including by issuing and executing mutual legal assistance and mutual recognition requests****"*

En outre, les autorités françaises estiment dommage ne pas exploiter toutes les possibilités offertes par le nouveau traité de Lisbonne, et en particulier par l'article 85 TFUE : celui-ci prévoit expressément qu'Eurojust puisse exercer de nouvelles attributions en matière de résolution de conflits de compétence et de déclenchement d'enquêtes pénales.

Ces attributions, qui ne sont pas évoquées dans la proposition de règlement de la Commission, méritent d'être examinées car elles permettraient de répondre aux difficultés concrètes que pose l'ouverture de procédures pénales concernant des faits identiques dans deux Etats membres différents (ex : affaire de la pollution maritime provoquée par le naufrage du tanker Le Prestige). Le renforcement d'Eurojust passe en effet par l'accroissement de ses attributions, dans la lignée des précédentes décisions. L'article 4 §4 de la proposition de règlement, qui mentionne qu'en cas de conflits de compétences, Eurojust rend un avis écrit permettant de désigner l'Etat membre le mieux placé pour mener l'enquête, pourrait ainsi préciser que cet avis est contraignant :

"4. Where two or more Member States cannot agree on which of them should undertake an investigation or prosecution following a request made under point (b) of paragraph 2, Eurojust shall issue a written opinion on the case. The opinion shall be ***binding and*** *promptly forwarded to the Member States concerned."*

Article 6 : Sans préjudice de la déclaration commune du Parlement européen, du Conseil et de la Commission européenne sur les agences décentralisées de juillet 2012, les autorités françaises souhaitent que soient prises en compte les spécificités des besoins opérationnels en matière de coopération judiciaire pénale. Elles seront donc attentives à ce que la répartition des compétences entre chaque organe (directeur administratif, conseil exécutif, collège dans ses deux formations administrative/opérationnelle) :

- soit clarifiée, afin que l'objectif d'allègement des tâches administratives du collège soit effectivement rempli et que la création d'une nouvelle structure (le conseil exécutif) n'entraîne un alourdissement de la procédure décisionnelle ;

- préserve la spécificité des missions d'Eurojust, qui est de répondre aux besoins des autorités des Etats membres chargées des enquêtes et des poursuites ;

- garantisse l'indépendance d'Eurojust à l'égard des institutions européennes, en particulier dans la détermination de ses objectifs stratégiques et l'exercice de ses fonctions opérationnelles.

Article 7 : Au **§3**, le terme « officier de police » devrait être remplacée par « représentant d'une agence d'application de la loi » ou « membre d'une force de police » (« *law enforcement officer* ») qui serait plus adéquat.

Article 8 : Au **§1 c)** il convient de préciser que les contacts directs avec certaines autorité internationales peuvent être proscrits. Par exemple, le Statut d'Interpol impose que les contacts relatifs à des questions opérationnelles passent par les BCN des pays membres.

Au **§3**, les autorités françaises sont réservées sur le fait que cette disposition puisse permettre à un membre national d'ordonner une mesure d'enquête ou d'autoriser une livraison surveillée, qui aurait été préalablement refusée par l'autorité nationale à un service d'enquête.

Germany

The Federal Republic of Germany wishes to thank the Chair for the opportunity to submit a first written opinion. In light of the negotiations currently underway concerning the formation of a government, as well as the continuing coordination domestically among the parties involved, the Federal Republic of Germany upholds its general scrutiny reservation regarding the entire draft regulation and submits its preliminary position regarding Articles 1 through 8 of the draft regulation. The Federal Republic of Germany wishes to reserve the right to submit amending opinions on these and other Articles of the draft regulation.

Article 1 : Germany suggests that Article 1 paragraph 3, second sentence, be struck from the draft regulation. Pursuant to Article 1 paragraph 3, first sentence, Eurojust is already being granted the (extensive) legal capacity and capacity to conduct business in accordance with the Member States' national law applying to legal persons. Inasmuch, the statements made in paragraph 3, second sentence, may be dispensed with. Moreover, the wording "may be party to legal proceedings" could lead to the misunderstanding that Eurojust is to be accorded an independent role in criminal proceedings pursued in the Member States.

Article 2 : Not only is it necessary to clearly define the tasks of Eurojust for legal reasons – it is also essential for Eurojust to be accepted in all practical regards and for it to operate efficiently. The national law enforcement authorities must have clarity about the cases in which they may involve Eurojust as a "European service provider" and the pre-requisites therefor. In light of this understanding, Article 2 should be revised as follows:

a. Re. paragraph 1

(1.) According to paragraph 1, first half sentence, Eurojust shall be responsible where "**a prosecution on common bases**" is required. While it is true that this wording has already been established in Article 85 paragraph 1 of the TFEU, it would seem necessary to explain how this term should be understood. Which cases does it cover?

(2.) In paragraph 1, second half sentence, the words "**operations conducted and**" should be deleted. This term gives rise to questions. The relevant aspect is that Eurojust will base its work on the information that the Member States' authorities and Europol provide to it. Whether or not this information is connected to any operations most likely will not be relevant.

b. Re. paragraph 3

In paragraph 3, the term "**on its own initiative**" will need to be explained in greater detail. It is not clear what the pre-requisites are for Eurojust to take action based on an autonomous decision, and at whose instigation (only at the instigation of the national members?). This should be provided for by a stipulation that is as clear and as transparent as possible.

Article 3 :The intention of the provision made in paragraph 1 is, *inter alia*, to distinguish the competence of Eurojust from the responsibilities of the future European public prosecutor's office (EPPO). This distinction must be clear and unequivocal, and must be in line with the provisions made regarding the EPPO. Insofar, a decision on the design and structure of paragraph 1 can be taken only once the responsibilities of the EPPO have been conclusively established.

Another task of paragraph 1 will consist of establishing sufficient provisions for those Member States who will not be participating in the EPPO. In this regard as well, the results achieved in the EPPO negotiations will have to be waited for.

As it is clear already at this time that not all Member States will be participating in the EPPO, it does not seem appropriate to rule out the competence of Eurojust for all offences for which the EPPO is competent. Were this provision to remain in place, Eurojust would have no means of lending support to those Member States not participating in the EPPO, in particular where the protection of the financial interests of the European Union is concerned.

Moreover, those of the Member States who are participating in EPPO will continue to be competent, pursuant to Article 13 of the draft regulation on EPPO, for what are termed "hybrid cases," in which offences violating the financial interests of the European Union are inseparably joined to other crimes, and where the focus is on those other deeds. Accordingly, if the Member States continue to be competent for prosecuting the offences violating the financial interests of the European Union, then Eurojust must also retain the corresponding competences. Otherwise, it would no longer be possible to have the Member States request support from Eurojust in taking law enforcement measures in these fields. This would be a retrograde step away from the situation in law currently applicable.

Most likely, a decision on the final structure and design of the list of offences (= Annex 1 of the draft regulation) will be possible only once the list of offences to be included in the draft regulation for Europol has been conclusively established. As a matter of principle, ensuring coherence between these two lists is desirable, also in light of the "privileged partnership" of both agencies that Article 40 of the draft regulation stipulates. Moreover, the list of offences should not be less detailed than that of the 2008 Eurojust resolution.

This having been said, it should be noted on a preliminary basis as concerns the **list attached as Annex 1** of the draft regulation that it does not seem plausible why "**sexual abuse and sexual exploitation**" should be distinguished for women, children, and men. German law does not differentiate the liability of any abuse to punishment under law by the gender of the victim; accordingly, it may well be necessary to involve Eurojust in cases in which men were sexually exploited. Thus, it is suggested to strike out either the words "of women and children" or to add "men" to the list.

Article 4 : We would ask for an explanation of the wording in paragraph 1 lit. a as to the "**repercussions at Union level**."

We would ask that the wording in paragraph 1 lit. e be explained in detail, "**Eurojust shall provide … financial support to Member States' cross-border operations and investigations, including joint investigation teams**."

Article 23, which provides for the further procedure in following up on requests and opinions of Eurojust, is directly tied to Article 4. Accordingly, it is suggested that Article 23 be added to Article 4 as a **new paragraph 6**.

Article 5 : In analogy to the observations made regarding Article 4, an explanation is requested as to how paragraph 2 lit. a clause ii) is to be understood regarding the "**repercussions at Union level**."

As regards the case scenarios addressed in Article 5 paragraph 2 lit. a clause ii) and lit. c: **Who decides, upon whose request**, whether or not the pre-requisites set out in these provisions have been met, and, accordingly, whether or not Eurojust is to act as a College? The intention was to create provisions for an established and transparent procedure.

Article 7 : The wording used in **paragraph 3, second sentence** ("The competent national authorities shall grant them…") may give rise to misunderstandings as it is most likely the legislator (parliament) in many Member States, and not any authority, that will decide on the powers of the national members, unless this is already a direct consequence of the regulation itself. It might be sensible to word this in a more neutral way, for example, "The national members have been accorded the powers set out in the present Regulation by way of enabling them to perform their tasks."

The power of the national members to contact any national competent authority has been correctly described in Article 8 paragraph 1 lit. b. Accordingly, the repetitive provision made in **Article 7 paragraph 6 should be struck out**, not least in order to avoid any questions concerning the relationship of these two legal norms.

The definition of "**operational expenditure**" in paragraph 8 cannot be termed compelling thus far; this provision would then mean that the entirety of all expenditure by Eurojust is to be classified as "operational." To illustrate this by an example: The Eurojust President will travel extensively and attend meetings that arise "within the framework of Eurojust's tasks." Notwithstanding this fact, these trips cannot be allocated to the operational task of processing cases, and rather will be identified as arising in the context of Eurojust's administrative activities. The same applies for the attendance of meetings by national members who are acting as representatives of Eurojust and as instructed by it, for example in Council work groups of the EU.

Independently of the above, the question remains of what the definition of "operational expenditure" in the context of the Eurojust regulation is intended to achieve. Should there be a connection in terms of substance, for example to the provisions under budget law set out in Chapter VI of the draft regulation, this would have to be put in clearer terms, for example by specifically including by reference other articles of the Eurojust regulation, or by placing Article 7 paragraph 8 at a different position.

Article 8 : For Germany, the provision in its current form gives rise to questions. In particular, there are concerns as regards the stipulations of Article 8 paragraph 1 lit. a and of paragraphs 2 and 3 **as regards federal and constitutional law:** In Germany, the law enforcement authorities of the *Länder* are responsible for pursuing criminal proceedings; this is the result of the allocation of competencies under constitutional law between the Federal Government and the *Länder*. Accordingly, it is not for the German national member to itself file requests for legal assistance, to grant such legal assistance, or to pursue specific investigative actions domestically; this is the purview of the responsible authorities of the *Länder*.

Moreover, Article 8 paragraph 1 lit. a and paragraphs 2 and 3 also give rise to major **concerns in terms of investigative tactics** – these being that the exigencies of the respective investigations under criminal law will not be sufficiently complied with. If the national members are granted the power, pursuant to Article 8 paragraph 1 lit. a, to themselves file requests for legal assistance or to grant such legal assistance, then there is the risk – at least where a large Member State with a federal structure is concerned, where the allocation of competencies means that not "every department knows everything" – that the procedures followed by the national member and the competent national law enforcement authority will differ because their respective knowledge of the facts and circumstances diverges. Solely the law enforcement authorities responsible will have comprehensive knowledge of the facts and circumstances, because they alone manage the documents and files. Accordingly, the power to grant legal assistance as requested must remain with the competent national law enforcement authorities in the respectively responsible federal *Land*, as must the responsibility for pursuing the criminal proceedings.

The same concerns arise with regard to the provisions made in Article 8 paragraphs 2 and 3 of the Eurojust regulation.

Therefore, Germany requests that the **exemption** made in Article 9e paragraph 1 of the 2008 Eurojust resolution also be included in Article 8 of the Eurojust regulation. To date, no problems have arisen, either in Germany or in any other Member States that have exercised the exemption available, with regard to practical implementation, which would require the powers of the national members to be enhanced. This assessment is confirmed by the results obtained thus far by the ongoing sixth GENVAL evaluation round.

Ireland

Article 8, as it stands, is problematic for Ireland. In the previous Eurojust Decision, Member States could decide not to convey certain powers to their National Members. There is no such exemption in this proposal. The powers contained in Article 8 are incompatible with those exercised by a prosecutor in the Irish system. The powers in question would be exercised in the Irish system by a range of entities - courts, prosecutors and police, e.g., only a judge can 'order' an investigative measure such as a house search (and, even then, the judge is permitting rather than directing that the search be carried out). A prosecutor has no role in relation to authorising controlled deliveries nor participating in a Joint Investigation Team.
In the circumstances, it has been decided that it would be best for Ireland not to exercise an opt in under Protocol No. 21. The matter will be further considered with a view to Ireland opting to the measure after adoption, subject to the adopted instrument being consistent with Irish law and practice.

United Kingdom

General observations on the Eurojust Regulation proposal

Evaluation before legislation.

The UK have said consistently that we see no need to reform Eurojust at this time, and certainly not without a proper assessment of the implementation of the current measure. That evaluation was agreed both under the Stockholm Programme and indeed under the Eurojust Council Decision,

in Article 41.

We do not believe it is right in terms of sequencing that this proposal has been brought forward before the completion of the ongoing peer evaluation (under the EU Joint Action 97/827/JHA) on the practical implementation and operation of the Decisions on Eurojust and the European Judicial Network in criminal matters. This evaluation will not be completed until the middle of next year and the report and recommendations from this exercise should have been used to indicate what, if anything is needed.

Specific Impact Assessment.

The UK is surprised and concerned that no specific Impact Assessment had accompanied this proposal. The Commission's own guidance says that: *"In general, Impact Assessments are necessary for the most important Commission initiatives and those which will have the most far-reaching impacts. This will be the case for all legislative proposals of the Commission's Legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts (with the exception of routine implementing legislation) and for non- legislative initiatives (such as white papers, action plans, expenditure programmes, negotiating guidelines for international agreements) which define future policies."*

The Commission's work programme for 2013 mentions its plan to reform Eurojust (see Annex I), so by the Commission's own guidance, an Impact Assessment for the Eurojust proposal was necessary.

Powers of the National Member

We are very concerned about the loss of discretion afforded by Art.9e in the current Council Decision. This raises concerns about the implications for those Member States who rely on it in respect of fundamental aspects of their CJS and/or their constitutional arrangements.
Also, the UK has these fundamental concerns.

- The idea that Eurojust National Members should be able to issue and execute mutual legal assistance and mutual recognition requests and order investigative measures fundamentally conflicts with criminal justice system arrangements within the UK. It also undermines the operational independence of the police authorities.

- Our starting point is that there should be no new mandatory powers for National Members, such as to order investigative measures. We do not think that all National Members should be required to have additional powers if such powers are incompatible with the functioning of criminal justice systems in some Member States. The UK view is that the current arrangements on the powers of National Members, where there is flexibility for fundamental aspects of criminal justice systems and constitutional arrangements should be maintained. The Commission has not provided evidence to demonstrate why this flexibility should be removed. The UK view is that the current arrangements on powers are more than sufficient to allow Eurojust to achieve its objectives as set out in Article 85 TFEU and the proposals do not present evidence to the contrary.

Interaction of the EPPO

- We are very concerned about the links here with the parallel proposal to create a European Public Prosecutor's Office (EPPO), particularly without a clear articulation of the effect on Member States that will not or cannot participate in the EPPO. It is well known that the UK has committed not to participate in the establishment of any European Public Prosecutor and we are concerned that some elements of this proposal undermine the discretion of non-participating States to decide how we will choose to work with that new body. The EPPO would also place a strain on Eurojust's resources which risks undermining Eurojust's core functions.

Governance

We thought there was opportunity to improve the governance of Eurojust in this new proposal and we were surprised that the proposal does not follow the common approach on EU decentralised agencies in this respect, e.g. through the creation of an external Management Board because we think that this model is best suited to good governance and would also free up National Members to concentrate on core business which is operational casework. This Board would consist of representatives with relevant managerial, administrative and budgetary skills from all Member States and would enable Member States to take an active role in strategic and management decisions of the Agency, whilst freeing up National Members to concentrate on casework. This is, of course, the approach taken with Europol. We will want to ensure that Eurojust's governance does not reduce the influence that representatives of Member States have on its operation. For this reason we also have concerns about the function and composition of the proposed Executive Board

UK comments on individual Articles

Article 1: Article 1 (3); This is a new concept " In each of the Member States Eurojust shall enjoy the most extensive legal capacity accorded to legal persons under their laws" which we have not encountered previously. What does this mean as compared the statement in the current text which said "Eurojust shall have legal personality?" What more would it require?

We propose reverting to language in current measure "shall have legal personality". It appears the new language could have the effect of increasing the legal capacity of Eurojust in some Member States, the purpose and full implications are not clear to us.

Article 2 : It reads better to define "competence" first and then reference tasks for example as per the current Eurojust Council Decision. We suggest current Article 2 becomes Article 3.

We need some further clarity on the intention and meaning of Article 2(3) where it states that Eurojust should act "on its own initiative". The rest of the Article talks about 'co-ordination', 'co-operation', 'support 'and 'facilitation'; these require the input of at least one Member State. Therefore, it would be helpful to clarify what tasks will Eurojust be able to do of its 'own initiative' and in what circumstances? At present we have concerns about this proposal and do not support it.

Article 3 :The UK believes that in Article 3(1) Eurojust should continue to be able to deal with cases falling within the role of the EPPO, so that Member States not participating in the EPPO can use Eurojust in all appropriate cases. We therefore recommend deleting the sentence "However, its competence shall not include the crimes for which the European Public Prosecutor's Office is competent."

In addition, the UK does not consider it appropriate to further limit Eurojust's competence by removing the possibility for Eurojust to act at the request of a competent authority of a Member State in cases concerning 'other types of offences' as is currently the case in Article 4(2) of the Council Decision.

Also, please see our comments on Article 2 where we suggest competence be defined before referencing tasks. We suggest Article 3 becomes Article 2.

Article 4 : The UK is concerned that the right to refuse and reasons for doing so are some distance away in Article 23. The text of Article 23 is more appropriately located in Article 4(3) to ensure that this provision is clear and easily accessible to MSs and the authorities who will have to use this text.

Articles 4, 5 and 23 could be amalgamated into a single article. This would make matters related to 'operational tasks' much easier to follow for users.

Article 5 : The UK has no substantive comments on this provision but Articles 4, 5 and 23 could be amalgamated into a single article. This would make matters related to 'operational tasks' much easier to follow for users.

Article 6 : As noted in the UK's general observations, we would strongly favour the creation of an external Management Board, because we think that this model is best suited to good governance and would also free up National Members to concentrate on core business which is operational casework. This Board would consist of representatives with relevant managerial, administrative and budgetary skills from all Member States and would enable Member States to take an active role in strategic and management decisions of the Agency, whilst freeing up National Members to concentrate on casework. This is the approach taken in Europol.

Whilst we believe that the National Members should be focussed on core operational casework rather than the running of the Agency we have concerns about the Executive Board given it will have such a limited membership and would not reduce the burden of management from the four National Members on the Board but arguably increase it. We will provide more detail when we come to Section IV of the text.

Article 7: We believe that the current financial challenges will make additional obligations to post both the Deputy National Member and the Assistant permanently in The Hague very difficult. We should maintain the status quo requiring only the National Member to be permanently based in The Hague. We therefore suggest the following text for Article 7(2) second sentence "The Deputy and the Assistant **<u>may</u>** have their regular place of work at Eurojust"...

Article 8 : This is the most difficult article for the UK. It is problematic for the following reasons:

- We suggest that this Article is redrafted along the lines of current Article 9e which sensibly takes into account the fact that compulsory and additional powers need not be allocated to National Members if they are incompatible with the fundamental principles of some Member State's criminal justice systems.
- This compulsory set of powers cuts across the separation of powers between police and prosecutors and the role of the independent judiciary in England & Wales and Northern Ireland. In relation to Scotland, the proposed powers of National Members under Article 8(3) in urgent cases would undermine the position of the Lord Advocate as the head of the system of prosecution and investigation of crime, by detracting from his sole control of these processes. It will also affect the criminal justice arrangements between the UK and Gibraltar. We see no need for such changes and we do not think that all National Members should be required to have additional powers if such powers are incompatible with the functioning of criminal justice systems. For example, in the UK the execution of a Mutual Legal Assistance request for a search of a house is done by a police officer who exercises his powers having been authorised by an independent judge. Another example of where this Article is incompatible with national systems is the execution of EAWs which in all Member States is a court function.
- The proposal would also undermine the operational independence of police authorities. As well as fundamentally conflicting our criminal justice arrangements, granting powers to National Members to direct operational activity could cut across already well-established operational arrangements within UK law enforcement. This could lead to operational resources being diverted without regard for existing priorities.