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# **Dealing with overlapping jurisdictions and requests for mutual legal assistance, while respecting individual rights. What can data protection law learn from cooperation in criminal justice matters?**

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## **Introduction**

In finding ways to enhance cooperation between Data Protection Authorities (DPAs) it can prove useful to assess the experience of cooperation in other areas of law. In this contribution we examine cooperation in the criminal law area, with the purpose of drawing lessons from this experience. We aim to give a brief overview of some key characteristics of cooperation in the field of criminal law. Two specific areas are of key interest; jurisdictional issues and mutual legal assistance. The primary question this contribution aims to answer is; can DPAs, both European and globally, learn from the criminal justice cooperation experience, in particular the one developed in the European Union, in order to enhance cooperation?

Section 1 will briefly introduce the topic of jurisdiction and the problems that it poses in criminal law. The following sections (2, 3 and 4) will delve deeper into specific rules and mechanisms to handle conflicting claims of jurisdiction. In these sections reference will be made to extradition law, which contains a number of relevant rules on issues of jurisdiction. The second main topic of interest, mutual legal assistance, is examined in more depth in sections 5, 6, 7 and 8. Section 9 will underline some of the problems that have arisen regarding the position of the individual subjected to international cooperation. Sections 10, 11 and 12 then examine platforms for cooperation and coordination that have proven successful in the EU context and will take

a brief look to the future of this area. Finally, section 13 attempts to draw some general conclusions that can prove useful to further cooperation between DPAs.

The topics are presented in a manner highlighting the ‘best elements’ of criminal justice cooperation,<sup>1</sup> selecting those that can be of interest to our aim here and can provide new insights for improving cooperation between DPAs. Note that this study is not merely academic; the two fields, data protection and criminal law, are not completely unfamiliar, as criminal law is being used as a tool for the enforcement of data protection.<sup>2</sup> Although most enforcement takes place via administrative channels, the use of criminal law channels and actors remains a quasi-permanent option. Also note that by no means a complete overview of international criminal justice cooperation is given here, rather a selection of topics that we think can be relevant.

We will look at both international and European mechanisms for cooperation in criminal justice matters, however the focus will mainly be on European and EU cooperation, as this presents an example of an advanced form of cooperation between states.<sup>3</sup>

## A. Issues of jurisdiction

### 1. Jurisdiction: Conflicting claims of jurisdiction

An important question in cooperation in criminal matters (in case of trans-border crime) is how to deal with conflicts of jurisdiction.<sup>4</sup> Conflicts of jurisdiction can be either positive or negative. Positive meaning that two (or more) states claim jurisdiction in a case, negative meaning that no states claims jurisdiction for a(n) (allegedly) committed crime. In both cases coordination is needed, in the former as to what state would be best positioned to deal with the case, in the later the question is how to ensure that the alleged crime does not go unpunished because of a lack of interest to prosecute (which is often a political question). Thus, what state takes the lead in case of a cross-border crime? First, an overview will be given of national rules

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<sup>1</sup> This chapter has thankfully made use of P. De Hert, K. Weis, J. Van Caenegem and M. Holvoet, *Handboek Internationaal en Europees Strafrecht* (Larcier Uitgevers, 2014).

<sup>2</sup> See P. de Hert, ‘The EU data protection reform and the (forgotten) use of criminal sanctions’, 4(4) *International Data Privacy Law* (2014), pp. 262–268.

<sup>3</sup> The EU has since the late 1990s embarked on an enhanced model of criminal justice cooperation, see generally V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009); S. Miettinen, *Criminal Law and Policy in the European Union* (Routledge, 2013).

<sup>4</sup> See generally C. Staker, ‘Jurisdiction’, in M. Evans (ed.), *International Law* (Oxford University Press, 2014, 4<sup>th</sup> ed.), pp. 309–335.

and principles on which jurisdiction can be claimed, before we will highlight some of the various existing mechanisms that aim to facilitate cooperation between states in dealing with issues of conflicting jurisdiction.<sup>5</sup>

Conflicting claims (or a lack thereof) of jurisdiction are caused by the very diverse national rules on jurisdiction. Creating expansive territorial or even extraterritorial jurisdiction is not prohibited by international public law and is achieved by states in a variety of ways. It is possible to identify a list of principles or mechanisms used by states to expand jurisdiction beyond their territorial boundaries, and create *extraterritorial* jurisdiction. A brief overview is given here of the most important principles. Again we note that they do not apply in their entirety in all EU states (let alone all states globally), as national legislation on jurisdiction differs.

The first and foremost principle is that of *territoriality*; jurisdiction is exercised over crimes committed on a state's territory (the so called principle of ubiquity). This is the most straightforward and traditional form of exercising jurisdiction.

In addition to territorial jurisdiction, there can also be *extraterritorial* jurisdiction. This type of jurisdiction can be based on several criteria, such as the nationality of the perpetrator of a crime (*active personality principle*), the nationality of the victim of a crime (*passive personality principle*), the type of crime that is committed (*protective principle*, in case of crimes committed in a foreign country that threaten the security of a state), and the international character of some crimes (*universality principle* for the most serious crimes). What these all have in common is that a state exercises its criminal jurisdiction over a crime committed (partially) outside its territory.<sup>6</sup>

Because of the existence of extraterritorial grounds for jurisdiction, but also because of the increasing cross-border nature of crime,<sup>7</sup> it is very well possible that two states claim jurisdiction over one (alleged) crime. It is therefore important that clear and objective rules exist as to how to deal with such competing claims, since sovereign states can decide independently when to initiate proceedings against a suspect. Before listing the various mechanisms that aim to facilitate in case of competing claims of jurisdiction, it is important to stress that no such binding mechanism exists at EU level, let alone on a global level. When a positive conflict of jurisdiction appears it is often a political process by which states can use (sometimes binding) guidelines contained in (bilateral) treaties (often these are extradition treaties). One im-

<sup>5</sup> See also A. Cassese, *International Criminal Law* (Oxford University Press, 2013, 3<sup>rd</sup> ed.), pp. 271–290.

<sup>6</sup> See also M. Shaw, *International Law* (Cambridge University Press, 2014, 7<sup>th</sup> ed.), pp. 474–497.

<sup>7</sup> In addition to the more traditional cross-border crimes like human trafficking and drug trade, crimes in which it is difficult to establish a *locus delicti* have grown in importance, like for example cybercrime.

portant caveat should be made, within the EU a trans-national double jeopardy rule applies, which prohibits the prosecution of an individual for acts which have already been the subject of a final disposition in another member state.<sup>8</sup> This can lead states to rush proceedings in order to prevent another state from blocking prosecution.

At the other end of the spectrum we find negative conflicts of jurisdiction, which can lead to impunity. This situation is of course especially problematic with regard to alleged perpetrators of serious international crimes. This situation can arise when countries are not willing or capable to prosecute.<sup>9</sup> International initiatives to set up international *ad hoc* courts (like the Rwanda Tribunal set up by the United Nations) or to set up a permanent court (like the International Criminal Court) can offer relief for certain categories of the most serious crimes. Interesting also is the principle of complementarity in the Rome Treaty on the International Criminal Court (ICC); this court's jurisdiction is complementary to national criminal jurisdictions, which means that states have the primary responsibility to investigate and prosecute, by doing so to prevent the most serious international crimes. For that reason, the ICC will only step in when national judicial systems fail and it can be demonstrated that states are either unwilling or unable to bring perpetrators to justice. The ICC thus takes a subsidiary position in relation to national courts.

## 2. Rules on conflicting claims of jurisdiction in extradition treaties

Turning to the ways states 'arrange' themselves when confronted with conflicting jurisdiction, one finds some rules in extradition law. Extradition as a form of cooperation is a field of study on its own.<sup>10</sup> Extradition is the formal process by which a state transfers a suspected or convicted person to another state. Extradition is normally regulated by treaties, either bilateral or multilateral. The first multilateral treaty that enabled extradition between European states is the 1957 Council of Europe Convention on Extradition.<sup>11</sup> The treaty entered into force in 1960 and today has been ratified by 50 states, including a number of non-European states (Israel, South-Korea and South Africa). Among EU states the treaty has lost most of its value because of the European Arrest Warrant (EAW), but it is still used in relations with non-EU states in

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<sup>8</sup> See section 9 *below*.

<sup>9</sup> For example the Habré case, see W. Schabas, 'Senegal's Chambres africaines extraordinaires to judge Habré', PhD studies in human rights weblog, 5 February 2013, [<http://humanrightsdoctorate.blogspot.co.uk/2013/02/senegals-chambres-africaines.html>].

<sup>10</sup> See, e.g., C. Nicholls et. al, *The Law of Extradition and Mutual Assistance* (Oxford University Press, 2013); J. Jones and A. Sambei, *Extradition Law Handbook* (Oxford University Press, 2005).

<sup>11</sup> European Convention on Extradition, CETS No. 024 of 13 December 1957, in force 18 April 1960.

which a EAW cannot be issued. The EAW has within the EU replaced the traditional extradition framework and is based on the principle of mutual recognition; as a result extradition within the EU has become a near-automatic procedure with a limited number of grounds for refusal.<sup>12</sup>

Extradition does mostly take place on the basis of an extradition treaty. It is often assumed that a pre-existing legal basis is required for a transfer to take place. However, in some instances extradition takes place on an *ad hoc* basis when no treaty is in place. Most European civil law jurisdictions do not allow extradition to take place without a treaty, common law jurisdictions do not per definition exclude this possibility, it however remains rare and the majority of extraditions are treaty based. A set of principles and rules that underpin extradition have formed in the international legal framework that allows for states to retain (partly) their sovereignty when extraditing.<sup>13</sup>

Most extradition treaties or conventions contain rules or criteria on how to deal with conflicting claims of jurisdiction. A good example of this is the already mentioned European Convention on Extradition,<sup>14</sup> stating that

‘The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory’. (Article 7(1) European Convention on Extradition)

This refusal ground is optional (‘may refuse’), therefore it is up to the states to coordinate what state is in a better position to prosecute. Would this ground for refusal have been mandatory, any subsequent test of what state is in the best position to prosecute would have been rendered impossible. Concerning extraterritorial jurisdiction, thus crimes (allegedly) committed outside the territory of the requesting state, the Convention poses that in these situations extradition can only be refused by the requested state:

‘When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party’s territory or does not allow extradition for the offence concerned’. (Article 7(2) European Convention on Extradition)

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<sup>12</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States; on the EAW see e.g. L. Klimek, *European Arrest Warrant* (Springer, 2014).

<sup>13</sup> Examples of such rules are the specialty rule and the requirement of double criminality. These will be briefly discussed below in the context of mutual legal assistance where these principles also apply (although not to the same degree). The importance of such principles for DPAs is that these recognise differences between jurisdictions and provide a realistic framework for cooperation, leaving some discretion to states when cooperating.

<sup>14</sup> *Supra* note 11.

In these cases a sort of ‘double’ jurisdiction is required, a requested state can only refuse extradition when it has a valid claim for jurisdiction.<sup>15</sup> When this ground applies, the requested state is expected to launch a prosecution itself, if not this would lead to ‘safe havens’ within Europe where criminals could flee and remain unpunished. This is a good example of the so called *aut dedere aut judicare* principle, which refers to the legal obligation of states either to extradite or, in case no extradition is allowed for legal reasons, to prosecute themselves persons who have committed serious international crimes.<sup>16</sup> The aim is to prevent impunity and ensure that perpetrators of the most serious crimes are being prosecuted.

### 3. The 2009 EU framework decision on jurisdictional conflicts

The foregoing gave examples of jurisdictional issues being dealt with in the framework of extradition treaties. There is not one single text in international public law that deals in a comprehensive manner with all aspects of jurisdiction. At the level of the Council of Europe, the 1972 European Convention on the Transfer of Proceedings in Criminal Matters<sup>17</sup> proposed some guidelines to solve positive conflicts of jurisdiction by making it possible to transfer to one state proceedings already begun in another state.<sup>18</sup> However, the convention was limited in scope and ambition and received only a limited amount of ratifications.

Within the EU, the matter was picked up some decades later, with a 2009 framework decision on how to coordinate conflicting claims of jurisdiction between states.<sup>19</sup> This framework decision aims to enhance judicial cooperation between EU member states, and to prevent unnecessary parallel criminal proceedings concerning the same facts and the same person.

The text lays out the procedure whereby competent national authorities shall contact each other when they have reasonable grounds to believe that parallel proceedings are being conducted in another EU jurisdiction. It also establishes a framework for these authorities to enter into direct consultations when parallel proceedings exist, in order to find a solution aimed at

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<sup>15</sup> Similar jurisdiction arrangements can be found in other extradition treaties and conventions, for example between the Benelux countries, or those concluded on a bilateral basis between states.

<sup>16</sup> See C. Bassiouni, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, 1995).

<sup>17</sup> *ETS*, no. 73.

<sup>18</sup> The convention did not address negative conflicts, since ‘after examination of national legislations it was concluded that situations where no state is competent to act do not arise in member States of the Council of Europe ; a regulation of negative conflicts was therefore unnecessary’. See Explanatory Report, [<http://conventions.coe.int/Treaty/EN/Reports/Html/073.htm>].

<sup>19</sup> Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

avoiding the negative consequences arising from multiple proceedings, or in the words of the framework decision:

*Exchange of information*

‘When a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations as provided for in Article 10’. (Article 5(1) framework decision on jurisdictional conflicts)

‘When submitting a request in accordance with Article 5, the contacting authority shall provide the following information:

- a. the contact details of the competent authority;
- b. a description of the facts and circumstances that are the subject of the criminal proceedings concerned;
- c. all relevant details about the identity of the suspected or accused person and about the victims, if applicable;
- d. the stage that has been reached in the criminal proceedings; and
- e. information about provisional detention or custody of the suspected or accused person, if applicable.’

(Article 8(1) framework decision on jurisdictional conflicts)

The response by the contacted authority in accordance with Article 6 shall contain the following information:

- a. whether criminal proceedings are being or were conducted in respect of some or all of the same facts as those which are subject of the criminal proceedings referred to in the request for information submitted by the contacting authority, and whether the same persons are involved; in case of a positive answer under (a):
- b. the contact details of the competent authority; and
- c. the stage of these proceedings, or, where a final decision has been reached, the nature of that final decision.’

(Article 9(1) framework decision on jurisdictional conflicts)

*Direct consultations (Articles 10–12 framework decision on jurisdictional conflicts)*

If parallel proceedings exist, the relevant authorities shall enter into direct consultations in order to find a solution aimed at avoiding the negative consequences arising from these proceedings. This may lead to concentrating the proceedings in one jurisdiction. When the relevant authorities enter into direct consultations they must take into consideration all the facts and merits of the case and all other relevant factors. If no solution is found, the case shall be referred to Eurojust if appropriate and provided that it falls under its competence.

The framework decision does not provide for a mandatory termination of parallel proceedings. On the contrary, it leaves it entirely to the states wheth-



er to concentrate the proceedings in one state (“consultations... which may, where appropriate, lead to the concentration of the criminal proceedings”), or to continue parallel proceedings, creating the danger of imposing a double burden on suspects, as well as rushed proceedings in order to get a decision first. The instrument therefore lacks real ‘bite’ and does not offer a binding solution to conflicts of jurisdiction between EU states. It does however provide some useful guidelines on how to deal with conflicts, which might offer relief to a suspect who is being tried in various jurisdictions.

However, the instrument is silent on the topic of defendants’ rights. These rights are not listed as a specific factor to take into consideration when determining where best to prosecute a suspect. This underlines the instrument’s mostly prosecutorial intentions, as it aims to increase the efficiency in dealing with conflicts of jurisdiction. For those who would have wanted to see a binding EU measure on how to handle conflicts of jurisdiction, the current instrument might be a disappointment. But taking into account the reality that states simply do not want to go this far and lose sovereignty, the current solution might offer the best of both worlds; efficient guidelines, but no loss of sovereignty.

#### **4. The 2013 directive on attacks against information systems**

To contrast the modest and non-binding arrangement of conflicts of jurisdiction in the 2009 EU framework decision, we turn to the 2013 directive on attacks against information systems.<sup>20</sup> This directive offers an example of a specific and more developed arrangement of jurisdiction in a specific area of law that naturally triggers competing claims of jurisdiction. The 2013 directive on attacks against information systems replaces a former legal instrument on cybercrime; the 2005 framework decision on attacks against information systems.<sup>21</sup> This 2005 framework decision approximated the criminal law systems of the EU member states (by proposing definitions for illegal access to information systems, illegal system interference and illegal data interference) and enhanced cooperation between judicial authorities.<sup>22</sup> With regard to jurisdiction, the text foresaw that each member state has jurisdiction for offences committed on its territory or by one of its nationals, but that whenever several states have jurisdiction over one single offence, they must cooperate to decide in which jurisdiction proceedings will be conducted. Member states

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<sup>20</sup> Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

<sup>21</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

<sup>22</sup> See e.g. G. Vermeulen and L. Verrydt, ‘Report for Belgium’, 19<sup>th</sup> International Congress ‘Information Society and Criminal Justice’ (2013), [<http://www.penal.org/sites/default/files/files/RH%20-2.pdf>].

were required to exchange all information intended to enhance cooperation. Notably, national operational points of contact, available twenty-four hours a day and seven days a week, were to be appointed. Moreover, the 2005 framework decision established an obligation for states to prosecute in case it does not extradite its own nationals,<sup>23</sup> an example of the earlier mentioned principle of *aut dedere aut judicare*.

The framework decision also listed the factors that should be taken into consideration in case one or more states have expressed a desire to prosecute:

‘Where an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account may be taken of the following factors:

- the Member State shall be that in the territory of which the offences have been committed according to paragraph 1 (a) and paragraph 2,
- the Member State shall be that of which the perpetrator is a national,
- the Member State shall be that in which the perpetrator has been found’.

(Article 10(4) framework decision 2005 on attacks against information systems)

The recently adopted 2013 directive<sup>24</sup> on the same subject matter has continued the approach to put forward rules of cooperation for a specific type of offense, rather than a general instrument. This approach might prove more fruitful than the earlier mentioned framework decision on jurisdictional conflicts, which covers a broad range of crimes, but does not put forward any binding rules. We will highlight the most important aspects of the document here, but it has to be kept in mind that its success in practice will have to be awaited, as the directive does not have to be implemented into national law until 4 September 2015.<sup>25</sup>

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<sup>23</sup> Article 10(3) states that: ‘A Member State which, under its law, does not as yet extradite or surrender its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, the offences referred to in artt. 2, 3, 4 and 5, when committed by one of its nationals outside its territory’.

<sup>24</sup> Directives have taken over the role of framework decisions in EU criminal law after the 2009 Lisbon Treaty.

<sup>25</sup> The most important issue with this type of instrument has proven to be the sometimes rather ‘liberal’ implementation by states (i.e. the text of the instrument was not always strictly followed). A good example is the implementation of the European Arrest Warrant, see M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Intersentia, 2011).

The 2013 directive aims to amend and expand the provisions of the (previous) 2005 framework decision (in fact, it replaces the framework decision in its entirety). The amendments are substantial, as will be highlighted below, but also the nature of the new instrument offers advantages (a directive has direct effect whereas a framework decision does not).

If we turn to the substance of the directive Article 1 notes as to the general purpose of the instrument:

‘The directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of attacks against information systems. It also aims to facilitate the prevention of such offences *and to improve cooperation between judicial and other competent authorities*’ (emphasis added).

After defining the terminology, the directive requires states to criminalise the acts specified therein, as well as imposing a certain level of punishment. Interesting for our purposes here is Article 12 on jurisdiction:

- ‘1. Member States shall establish their jurisdiction with regard to the offences referred to in Articles 3 to 8 where the offence has been committed:
  - a. in whole or in part within their territory; or
  - b. by one of their nationals, at least in cases where the act is an offence where it was committed.
2. When establishing jurisdiction in accordance with point (a) of paragraph 1, a Member State shall ensure that it has jurisdiction where:
  - a. the offender commits the offence when physically present on its territory, whether or not the offence is against an information system on its territory; or
  - b. the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory.
3. A Member State shall inform the Commission where it decides to establish jurisdiction over an offence referred to in Articles 3 to 8 committed outside its territory, including where:
  - a. the offender has his or her habitual residence in its territory; or
  - b. the offence is committed for the benefit of a legal person established in its territory.’

(Article 12 directive on attacks against information systems)

The third paragraph of this provision obliges a state that decides to establish jurisdiction over an offence covered by the directive to inform the Commission (under the circumstances listed under a and b). The concept of enabling a third ‘neutral’ party to mediate between states in case of conflicting claims of jurisdiction is a potentially powerful mechanism. However, the directive does not go further than requiring states to ‘inform’ the Commission. If the Commission does not have any binding power (or binding guidelines to determine what state is best positioned for prosecution), all it can do is make a recommendation.

Article 13 establishes a platform for the exchange of information in the form of a network of national contact points.<sup>26</sup> Setting up a network of national contact points is a mechanism similar to Eurojust,<sup>27</sup> which has been a great success as states have widely used the opportunity to strengthen cooperation by improving communication. Such a platform of informal cooperation has proven to have great potential. One of the questions it begs though is whether these particular crimes could not have been brought within the already existing platform of Eurojust. This would have possibly saved resources, as well as enabling states to make use of channels that have proven to be fully functional.

In addition to the issues on jurisdiction highlighted in this section, we will see a number of further issues related to jurisdiction below in section 12. In section 9 on the position of the individual, we will have a closer look at the concerns raised by legal instruments on cooperation, like the examples presented here, that pay little or no attention to the position of the defendant.

## **B. Mutual legal assistance and cooperation**

### **5. European Convention on Mutual Assistance in Criminal Matters**

In the next sections examples of mutual legal assistance (MLA) will be highlighted that could potentially contribute to the development of cooperation mechanisms between DPAs. Mutual legal assistance can present itself in many different forms but generally facilitates the gathering and exchange of information in an effort to support another state in the enforcement of criminal laws. Next to the many forms it can take, mutual legal assistance can take place at various levels, for example bilateral or multilateral treaties have been adopted, but agreements have also been adopted in the framework of international organisations.

Most important for our purposes here is the Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters.<sup>28</sup> The treaty was linked to the adoption of the previously mentioned Convention on Extradition, as

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<sup>26</sup> 'For the purpose of exchanging information relating to the offences referred to in Articles 3 to 8, Member States shall ensure that they have an operational national point of contact and that they make use of the existing network of operational points of contact available 24 hours a day and seven days a week. Member States shall also ensure that they have procedures in place so that for urgent requests for assistance, the competent authority can indicate, within eight hours of receipt, at least whether the request will be answered, and the form and estimated time of such an answer', Article 13 directive, *supra note 20*.

<sup>27</sup> See section 10 *below*.

<sup>28</sup> European Convention on Mutual Assistance in Criminal Matters, CETS No. 030 of 20 April 1959, in force 12 June 1962.

traditionally legal assistance and extradition were dealt with in the same instrument, but here was opted for two separate instruments. The reason for this was that it was expected that it would be easier for states to ratify this convention, rather than the treaty on extradition, which involves much more sensitive issues and may result in a possible loss of sovereignty.

Article 1 of the Convention does not limit its scope to a certain type of crime, therefore any crime can serve as the basis for a request for assistance. Contrary to the Convention on Extradition, which has a limited material scope. The purpose of such a broad scope was to also enable legal assistance for less serious crimes. The Convention defines this wide scope as:

‘The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.’ (Article 1 Convention)

The Convention’s main aim is to establish a general obligation for its states parties to provide mutual assistance. The mutual assistance measures listed in the convention are therefore not exhaustive. Thus, a state cannot refuse assistance for the sole reason that the form of assistance requested is not listed in the instrument. The contracting states are obliged to provide ‘the widest measures of mutual assistance in proceedings’. This general obligation is subject to the exceptions of general principles of law, the grounds for refusal listed in the Convention and the limitations in the specific provisions on assistance. However, an obvious problem posed by a legal text without detailed provisions on the kind of collaborative acts that are required is how the assistance should be provided. In order to overcome such problems, the 1990 Schengen Convention and the 2000 EU Convention contain more detailed provisions on the kind of assistance that can be given (*below*).

Before discussing these developments, we will devote a paragraph to the general principles relevant to mutual legal assistance as they can be derived from the 1959 Convention. The principles in the 1959 Mutual Assistance Convention show similarities with those contained in the 1957 Extradition Convention, though in a weaker form. Generally speaking assistance is seen as less risky (i.e. no significant loss of sovereignty) compared to extradition and the requirements and principles tend to be more flexible. Like with extradition, these principles therefore are based on international law but are nowhere formulated in a binding form. They are derived from legal texts that states conclude. None of these texts are identical.

## 6. General Principles of Mutual Legal Assistance in Criminal Matters

### Reciprocity

The principle of reciprocity underlies cooperation based on the Mutual Assistance Convention. It is generally accepted under international law that states cannot be forced to cooperate unilaterally. This implies that states only assist when the other state would do the same if a similar request was made to them (reciprocity). Being a signatory to the Convention does satisfy the requirement of reciprocity.

Nevertheless, reciprocity will have less of an effect in cases of mutual assistance than it has in extradition cases, especially considering the large variety of potential 'assistance' measures. An example: requests for investigating measures that the requested state would have never applied on its own accord, a strict application of reciprocity would in that case prevent assistance. However, the contracting parties have obliged themselves by signing the Convention to provide 'the widest measures of mutual assistance in proceedings'.

As regards reservations (by making a prior statement) to the Convention, here also the principle of reciprocity applies (Article 23 (3)).

### Double Criminality

Double criminality (the rule which prescribes that the offence for which assistance is sought is punishable in both requesting and requested states) is, as seen *above*, an absolute requirement in classical extradition law. The Mutual Assistance Convention does not explicitly require double criminality. So states can cooperate even when double criminality is lacking.

However, the Convention does allow for states to make a declaration stating that they require double criminality for the execution of (certain) forms of assistance. The option was included because in some states infringements of for example rights to property and privacy are to be applied strictly and only allowed in case of criminal conduct. Still, a certain degree of flexibility characterises the application of these traditional principles of international law, especially when compared with extradition. This is good news for data protection law, also in the EU. Many states with data protection laws have introduced data protection crimes, but the number of crimes introduced differs and the nature of these crimes is diverse.<sup>29</sup> This state of affairs will not prevent these countries from providing each other mutual legal assistance once they decide to prosecute these crimes via the criminal way.

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<sup>29</sup> De Hert, *supra* note 2.

### Speciality

The Mutual Assistance Convention does not contain an explicit provision on the rule of speciality; a common rule in extradition law prescribing that a person who is extradited is subject to prosecution only for those offences for which she or he was surrendered. However, some implicit reference to this rule can be found in for instance Article 12 of the convention:

‘A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party’.

Another example can be found in Article 6 (2) of the Convention, according to which: ‘Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof’. The requested state is guaranteed that the documents will not be used for purposes other than those that served as the basis for the assistance. The principle is however not absolute, as the requested state can waive the return of the documents.

### Grounds for Refusal

A similar flexibility applies to the grounds for refusal. Two groups of grounds for refusal can be found in the Mutual Assistance Convention, general grounds for refusal which apply to all forms of assistance, and the specific grounds which only apply to specific measures of assistance. A number of ‘traditional’ grounds for refusal, as contained in the Extradition Convention, do not apply to mutual assistance. The Mutual Assistance Convention does not allow for more traditional grounds for refusal such as the refusal to assist in cases concerning own nationals, and territorial limitations. However, reservations made by contracting states need to be considered as these can still introduce such grounds for refusal. In addition, Article 2 (b) of the Convention provides for a wide ground for refusal: ‘if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country’. This general ground for refusal serves as a counterbalance to the wide obligations laid out by the Convention. Next to this general ground for refusal more specific grounds can be found in Articles 3–10 and 21–22. These grounds concern for example the so called ‘letters rogatory’ and the appearance of witnesses, experts and prosecuted persons. Regarding these grounds for refusal it can be noted that these are useful, or maybe more accurate; necessary. Political realities and differences between national legal

systems require such possibilities to refuse cooperation; when a nationally sensitive issue arises, a state can decide to halt cooperation. Recognition of such realities is important for cooperation between DPAs as well, as in this field similar political sensitivities and national interests are at play.

### 7. Using the criminal apparatus for cooperation in the field of administrative sanctions

The scope of the Mutual Legal Assistance Convention has been widened by the adoption of several protocols. In 1978 the 1st protocol was adopted,<sup>30</sup> which limited refusal grounds for fiscal crimes and widened the scope of assistance measures regarding documents that can be requested based on the Convention. More interestingly for our purposes is the 2<sup>nd</sup> protocol, which was adopted in 2001,<sup>31</sup> and widens the scope of the Convention to also administrative sanctions.<sup>32</sup> This has been an important move since administrative law frequently intervenes in criminal law, and the two fields have become intrinsically linked, making it in some cases even difficult to determine what actions belong to what field.<sup>33</sup> Widening the scope in this manner was not a complete novelty (see next section), but it does allow for administrative cooperation to take place on the broad ‘Council of Europe’ level and even outside as the 2<sup>nd</sup> protocol has already been ratified by more than 25 states, including Chile and Israel. This widening of the scope of the Mutual Legal Assistance Convention could be of special interest to data protection law, which is developing an administrative law approach, *i.e.* administrative sanctions to data protection breaches. If this continues DPAs could where relevant make use of the framework of the Mutual Legal Assistance Convention, provided they are state parties to the convention and have ratified the 2<sup>nd</sup> protocol.

The 2<sup>nd</sup> Protocol furthermore expands the scope of the Convention to more ‘modern’ forms of cooperation such as video interrogation and joint investigative teams. This brings us to the next section, which is devoted to the trend (as observed *above*), to a more detailed arrangement of assistance in this legal area.

<sup>30</sup> Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 17 March 1978, CETS No. 99.

<sup>31</sup> Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 8 November 2001, CETS No. 182.

<sup>32</sup> See Article 1(3) ‘Mutual assistance may also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.’

<sup>33</sup> See A. Weyembergh and F. Galli (eds.), *Do labels Still Matter? Blurring Boundaries Between Administrative and Criminal Law. The Influence of the EU* (Les éditions de l’université de Bruxelles, 2014).



## 8. More precise phrasing of powers in 1990 Schengen and 2000 EU Convention

The 1985 intergovernmental Schengen Agreement concerning the abolition of border checks was followed up with an 1990 implementing Convention.<sup>34</sup> This convention was aimed at making mutual assistance between its contracting parties more flexible. Both extradition and mutual assistance are contained in the convention and serve as a complement to the already existing arrangements of the Mutual Assistance Convention by introducing a number of changes.

First, the implementing Convention extends mutual assistance to administrative sanctions,<sup>35</sup> which was a revolutionary step for the time, as Protocol 2 to the Mutual Assistance Convention was not agreed upon until 2001. Article 49 furthermore applies to:

- b. in proceedings for claims for damages arising from wrongful prosecution or conviction;
- c. in clemency proceedings;
- d. in civil actions joined to criminal proceedings, as long as the criminal court has not yet taken a final decision in the criminal proceedings;
- e. in the service of judicial documents relating to the enforcement of a sentence or a preventive measure, the imposition of a fine or the payment of costs for proceedings;
- f. in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.’ (Article 49(b–f) Schengen)

Second, Article 50(1) enables mutual legal assistance ‘as regards infringements of their laws and regulations on excise duties, value added tax and customs duties’. The principle of double criminality cannot be used to deny assistance based on this provision’s second paragraph. The abolition of double criminality extends the scope of the regime of Article 50, and in paragraph 3 the rule of specialty is clarified: ‘The requesting Contracting Party shall not forward or use information or evidence obtained from the requested Contracting Party for investigations, prosecutions or proceedings other than

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<sup>34</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239, 22/09/2000; see D. O’Keeffe, ‘The Schengen Convention: A Suitable Model for European Integration?’, 11(1) *Yearbook of European Law* (1991), pp. 185–219.

<sup>35</sup> See Article 49(a) of the Implementing Agreement: ‘Mutual assistance shall also be afforded: in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of one of the two Contracting Parties, or of both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.’

those referred to in its request without the prior consent of the requested Contracting Party'. A breach of the principle of specialty would thus require the consent of the requested state.

Third, the Schengen convention eases the strict requirements of the 1957 Mutual Assistance Convention as regards letter rogatory:

'The Contracting Parties may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than the following:

- a. the act giving rise to the letters rogatory is punishable under the law of both Contracting Parties by a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an equivalent penalty and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;
- b. execution of the letters rogatory is consistent with the law of the requested Contracting Party'. (Article 51 Schengen)

The requirement under (a) lowers the threshold of the 1957 Convention for letters rogatory, as a result these letters can be used for a broader range of offences within the Schengen countries.

Fourth, the 1990 Convention implementing Schengen allows in Article 52 to directly send procedural documents by mail to persons who are in the territory of another state. This provision is aimed at communication between authorities in one state with witnesses or experts in another state. Furthermore, it is required that the contracting parties send the executive committee a list of the documents which may be forwarded in this way.

Fifth and lastly, the implementing Convention eases relations between Schengen states in Article 53(1) as 'Requests for assistance may be made directly between judicial authorities and returned via the same channels'. Requests, as well as decisions on these requests, can be handled directly between judicial authorities.

Ten years after the Schengen implementing Convention, a new boast to mutual legal assistance was given by the ambitious 2000 EU Convention on Mutual Assistance.<sup>36</sup> The 2000 Convention is general in character and supplements and facilitates already existing instruments.<sup>37</sup> A number of interesting

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<sup>36</sup> Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 2000/C 197/01.

<sup>37</sup> See E. Denza, 'The 2000 Convention on Mutual Assistance in Criminal Matters', 40 *Common Market Law Review* (2003), pp. 1047–1074.

innovations were introduced by the convention and it especially aimed at clarifying and streamlining mutual legal assistance. These innovations were driven by technological developments of the time. A good example: the Convention's provisions on the interception of telecommunications (Articles 17 to 22), which set out in detail how such interceptions are to take place. No such provisions were to be found in any of the previous instruments, which the 2000 convention aims to supplement. Another innovation by the 2000 CONVENTION is that, even though limited, for the first time a mutual legal assistance instrument regulates the protection of personal data exchanged between states (Article 23). The Convention restricts the purposes for which personal data communicated or otherwise obtained under the provisions of the Convention may be used. Such data may be used only for the purposes of proceedings to which the Convention applies, other directly related proceedings, or 'for preventing an immediate and serious threat to public security'. For all other purposes the consent of the subject or the consent of the communicating state must be secured. Where conditions have been imposed in the context of transfer of data, they will prevail over the provisions of Article 23.

## **C. Individual rights in inter-state criminal justice cooperation**

### **9. The position of the individual in criminal justice cooperation**

While cooperation instruments, both at the international and EU level, have undeniably improved efficient cooperation, they have often forgotten to address the position of the individual subjected to those measures (the suspect, defendant or convict). Individuals can find themselves investigated by and sent to foreign jurisdictions, of which they don't speak the language, and often they will be detained awaiting trial, possibly for long periods of time. Moreover, positive conflicts of jurisdiction and the lack of a binding mechanism to solve these have also led to due process issues, particularly when no state takes responsibility over a cross-border investigation which leads to legal uncertainty for the individual.<sup>38</sup> The cooperation measures adopted in the EU framework have been unbalanced and aimed at improving prosecutorial powers. A good example of extending prosecutorial power without due regard to individual rights is the sharing of evidence as a result of a transnational investigation.<sup>39</sup> This raises issues as to what qualitative stand-

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<sup>38</sup> See also N. Thorhauer, 'Conflicts of Jurisdiction in Cross-Border Criminal Cases in the Area of Freedom, Security, and Justice', 6(1) *New Journal of European Criminal Law* (2015), pp. 78–101.

<sup>39</sup> See S. Ruggeri, 'Transnational Prosecutions, Methods of Obtaining Overseas Evidence, Human Rights Protection in Europe', in S. Ruggeri (ed.), *Human Rights in European Criminal Law* (Springer, 2015), pp. 147–200.

ards the gathering and admissibility of evidence should be held, as well as more general issues such as how investigative powers should be distributed among several jurisdictions and the related challenge of offering those affected by such measures a fair standard of justice. The coming into being of new modes of cooperation on a global scale has led to ‘an unprecedented mode of transnational collection of evidence by joint investigation teams’, and on the EU level

‘the improved MLA system has rapidly developed into the order model by means of the general enshrinement by EU legislation of the principle of mutual recognition as the cornerstone of almost the entire area of judicial cooperation, regardless of the very different nature of the judicial products concerned.’<sup>40</sup>

This rapid growth in investigative measures has certainly improved the efficiency of international cooperation. But even though these can have far-reaching effects on individuals subjected to transnational investigations, no coherent international effort has been made to balance these effects by introducing procedural measures protecting the rights of the individual.<sup>41</sup>

At the EU level this deficit has been recognized. After years of negotiation on a proposed measure that ultimately never saw the light of day,<sup>42</sup> a series of procedural rights measures have recently been adopted under the roadmap on criminal procedural rights.<sup>43</sup> However, whether these prove to be sufficient and create the balance that one would expect in a true area of justice remains to be awaited.<sup>44</sup> When developing a new framework of cooperation, one would expect that in a rule of law the position of the individual and the safeguarding of fundamental rights would take a central role. This is a clear lesson that can be taken from the recent developments in EU criminal law cooperation and would have smoothed cooperation from the early beginnings, knowing that other states require at least an equal level of human rights protection.

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<sup>40</sup> *Ibid.*, pp. 148–149.

<sup>41</sup> See *ibid.*, p. 151.

<sup>42</sup> See M. Jimeno-Bulnes, ‘The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union’, in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), pp. 171–202.

<sup>43</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01; on the roadmap see e.g. J. Blackstock, ‘Procedural Safeguards in the European Union: A Road Well Travelled?’, 2(1) *European Criminal Law Review* (2012), pp. 20–35; T. Spronken, ‘EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach’, 1(3) *European Criminal Law Review* (2011), pp. 213–233.

<sup>44</sup> See D. Sayers, ‘Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap take Us?’, 14(4) *Human Rights Law Review* (2014), pp. 733–760.

### Double jeopardy (*ne bis in idem*)

Important to mention in the light of the above is the principle of *ne bis in idem*, also known as (the prohibition of) double jeopardy.<sup>45</sup> This principle does not contain any rules on determining what jurisdiction is better placed to bring a case,<sup>46</sup> but it works more as a limitation on criminal law enforcement, once a person has been (finally) judged for the same conduct in another jurisdiction, a second prosecution is barred.

Thus, the double jeopardy rule prohibits the prosecution of an individual for acts which have already been finally disposed.

The international variant of the principle is contained in various human rights treaties and is also contained in the EU Charter of Fundamental Rights. *Ne bis in idem* has been considered by the Court of Justice of the EU as a general principle of EU law,<sup>47</sup> and regards dual prosecutions as obstacles to freedom of movement.<sup>48</sup> The Court has given a broad interpretation to the meaning of ‘final disposal’.<sup>49</sup>

For application between EU states the Article 54 Schengen Implementing Agreement is most important.<sup>50</sup> Article 54 provides for an international rule of *ne bis in idem*, therefore when a case has been finally disposed, prosecution for the same offence is barred not only in the state where the judgment was handed down, but in all states parties to that treaty.<sup>51</sup>

Thus, an EU-wide *ne bis in idem* rule limits double prosecution throughout the EU. In the international setting no such rule exists and its reach generally has only internal effects (within one jurisdiction),<sup>52</sup> nevertheless, it is sometimes contained as a ground for refusal in extradition treaties.

<sup>45</sup> See M. Wasmeier, ‘The Principle of Ne Bis in Idem’, 77(1) *Revue Internationale de Droit Penal* (2006), pp. 121–131; B Van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer, 2010).

<sup>46</sup> For an analysis of the interplay between complementarity and *ne bis in idem* see G. Coffey, ‘Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity’ 4(1) *New Journal of European Criminal Law* (2013), pp. 59–81.

<sup>47</sup> Case C-436/04 Criminal Proceedings against Van Esbroeck (2006) ECR I-2333, par. 40.

<sup>48</sup> Joined Cases C-187/01 and C-385/01 Gözütok and Brügge (2003), par. 38.

<sup>49</sup> The Court has limited its reach though where a decision on the merits of the case has not been made, but prosecution has been abandoned to favour an ongoing prosecution in another member state, that decision does not bar the other prosecution, see e.g. C-469/03 Miraglia (2005), par. 35.

<sup>50</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

<sup>51</sup> Article 54: ‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’

<sup>52</sup> For a discussion of the different application of *ne bis in idem* in intra- and inter-jurisdictional setting see D. Bernard, ‘Ne bis in idem – Protector of Defendants’ Rights or Jurisdictional Pointsmen?’, 9 *Journal of International Criminal Justice* (2011), pp. 863–880.

## D. EU mechanisms facilitating criminal justice cooperation

### 10. Eurojust

The EU has established various mechanisms and platforms to enhance the cooperation between criminal law enforcement authorities.<sup>53</sup> Two of these, Eurojust and European Judicial Network, will be highlighted here.<sup>54</sup> Eurojust is a prime example of a successful coordination mechanism between law enforcement authorities at EU level. Article 85 Treaty on the Functioning of the EU (TFEU) provides that Eurojust's mission

‘shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more states or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the states’ authorities and by Europol’.<sup>55</sup>

Eurojust is an EU body with legal personality and seats in the Hague.<sup>56</sup> The primary aim of Eurojust is facilitating and stimulating cooperation between the ‘competent authorities’ of the 28 EU states. Eurojust was founded in February 2002 by a Council Decision with the overall purpose of strengthening the EU’s fight against serious crime. More specifically, the four main reasons for its founding are: (1) countering serious and organised crime within the EU; (2) increasing the level of safety and security for EU citizens; (3) stimulating judicial cooperation between EU states; (4) and the need for a body that could cooperate with the European Judicial Network (on which more below).

The legal framework of Eurojust was lastly amended in 2009, mainly to strengthen Eurojust, but also to accommodate any possible future expansion of Eurojust.<sup>57</sup>

The members of Eurojust are criminal justice experts and represent their member state of origin at Eurojust. Each national member is seconded by the

<sup>53</sup> See also J. Thomas, ‘Networks of the Judiciary and the Development of Common Judicial Area’, 2(1) *New Journal of European Criminal Law* (2011), pp. 5–8.

<sup>54</sup> For a fundamental discussion of the legal regime of Eurojust in the multilevel institutional setting of the EU see M. Luchtman and J. Vervaele, ‘European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor’s Office)’, 10(5) *Utrecht Law Review* (2014), pp. 132–150.

<sup>55</sup> See also A. Weyembergh, ‘The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU’, 2(1) *New Journal of European Criminal Law* (2011), pp. 75–99; A. Suominen, ‘The Past, Present and the Future of Eurojust’, 15 *Maastricht Journal of European and Comparative Law* (2008), p. 229.

<sup>56</sup> Council 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.

<sup>57</sup> See A. Weyembergh, ‘Coordination and initiation of investigations and prosecutions through Eurojust’, 14(2) *ERA Forum* (2013), pp. 177–186.

member state in accordance with its legal system, who is a prosecutor, judge or police officer of equivalent competence. The duration of their function is for a maximum of four years (un-renewable). The statute of the national members (and their employees) is part of the national law of the member state. The national members of Eurojust together form the College, the organ responsible for the organisation and operation of Eurojust. The College can act collectively, but also through one or more national members. Every national member has one vote in the College.

The most important competence of Eurojust is to provide assistance to investigation into and prosecution of serious, organised and/or cross-border crime, and can do this either on its own initiative, or when requested by a member state. The primary aim of these competences is to stimulate, improve and coordinate cooperation between national authorities. Eurojust provides support to these authorities whenever needed in cases which concern two or more states. In case of an agreement with a third (non-EU) state, Eurojust can also provide assistance in cases between an EU member state and a third state. Even in case such an agreement does not exist, Eurojust can still assist in specific circumstances in which there is an urgent need to provide assistance. In addition, Eurojust can also assist investigations or prosecutions that concern only one member state and the EU when either the Commission or the state itself has requested for this assistance.

As said, Eurojust is competent to assist investigations into, and prosecution of serious, organised cross-border crime. Eurojust is thus only competent in case of serious crime, for which a certain threshold has to be met, examples are cybercrime, fraud, corruption, money laundering, environmental crimes and criminal organisations. In addition to the general competence of Eurojust, it also covers the types of crime and the offences in respect of which Europol is at all times competent to act as well as other offences committed together with the types of crime and the offences referred to here and all forms of crime when assistance is requested by one of the EU states.<sup>58</sup> An exception is cooperation in cases concerning child protection. The EU has decided that Eurojust can assist in cases that have a relation to children, even when it does not concern organised crime. In October 2007 a contact point for child protection issues was established at Eurojust. The contact point 'shall become a center of expertise in judicial cooperation in cases concerning children', and shall be available to support and advise the National Members when dealing with cases involving children. Focusing on issues important to Eurojust, the contact point shall raise awareness on child protection-related matters, disseminate relevant information and advice on the possible actions to be taken.

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<sup>58</sup> See Article 4 *ibid.* for the minimum threshold.

The primary tasks of Eurojust include: requesting national authorities to start an investigation or prosecution; set up a joint investigation team (JIT); and/or provide all the information relevant for a JIT to fulfil its tasks. Furthermore, Eurojust can request national authorities to initiate certain investigative measures and other measures that are justified with the purpose of prosecution of criminal activities. These are the primary tasks of Eurojust.

It is important to note that none of the decisions of Eurojust are binding, Eurojust can only advise national authorities. Eurojust can also provide assistance of a more 'logistic' nature, such as for instance interpretation and translation. It is exactly the non-binding nature of Eurojust that has made it successful. Member states can benefit from the contacts and network provided by Eurojust to cooperate in criminal investigations, at the same time it does not fear to lose its sovereignty or competence over the matter.

## 11. European Judicial Network

The European Judicial Network (EJN) is the second example of a mechanism, or maybe better said forum, for cooperation between judicial authorities.<sup>59</sup> The EJN was founded in 1998 by the Council as a forum for cooperation in the fight against serious crime and opts for a decentralised, flexible and horizontal approach. The EJN was the first structured operational platform for cooperation in cross-border crime within the EU and functions as a horizontal network.

The EJN exists of a network of judicial contact points; either members of the prosecutorial service and/or representatives of the ministry of justice, who are available, from their own member state, to provide information on their own national criminal systems and the national judicial authorities. The contact points are not transferred to a common organ, like at Eurojust. In 2008, ten years after EJN was founded, a new Council Decision providing the legal framework for EJN entered into force.<sup>60</sup> The general 'spirit' of the EJN was kept; it was only the legal position of EJN that was strengthened. Previously EJN was established by a soft law instrument (a common position), now it has a strong legal foundation, namely a Council Decision.

The three primary tasks of the EJN are: (1) enhancing networking between various contact points; (2) organising meetings of national representatives; (3) and a continuous provision of up-to-date legal and practical data/information, through an adequate network of telecommunication. EJN also provides a platform for direct communication in order to enhance interstate cooperation.

Next to providing this 'network', EJN contact points have individual tasks and responsibilities, they have to: (1) actively mediate between states to

<sup>59</sup> For more on the EJN see, in Dutch, P. De Hert, *et. al, supra note 1*, pp. 60–62.

<sup>60</sup> Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network.



enhance cooperation, with the main purpose of preventing serious crime; (2) provide legal and practical data/information to foreign judicial authorities to enhance judicial cooperation in a specific case, or to improve cooperation more general; (3) and to improve the organisation of education about judicial cooperation in criminal matters by the national authorities.

Another instrument which has proven very useful in practice is the website of the EJN, which provides for various tools to improve cooperation among states. It for instance contains general information about how legal assistance is executed in the various states, a contact book with all information about contact points and a handbook with the various mutual recognition instruments.<sup>61</sup>

As can be noted from these short overviews of Eurojust and EJN, many parallels can be drawn between both bodies. They both consist of judicial contact points, and the secretariat of EJN is based within the premises of Eurojust. Most importantly they both are concerned with the enhancement of judicial cooperation in criminal matters between EU states.

The EJN Council Decision explicitly mentions the important relationship between the two bodies, and notes that its relationship is based on dialogue and complementarity. The information centralised by the efforts of EJN will be made available also to Eurojust, and when the EJN contact points believe that Eurojust is better positioned to deal with a case the national member of Eurojust will be informed. The national members of Eurojust can participate in EJN meetings, when invited by the EJN. The national terrorism correspondents at Eurojust can also use the secured telecommunication network of EJN.

## 12. The European Public Prosecutor's Office

Next to extending Eurojust's powers, as already stipulated above (Article 85 TFEU), the TFEU also lays out a legal basis for the creation of a European Public Prosecutor's Office (EPPO) in Article 86.<sup>62</sup> In short, the main role of the EPPO would be to investigate and prosecute crimes committed against the EU budget (such as EU-fraud, corruption, embezzlement and money laundering). In July 2013 the European Commission launched its legislative proposal to create an EPPO.<sup>63</sup> The proposal has been heavily debated and even though it remains unsure what form (and with the support of which

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<sup>61</sup> See <http://www.ejn-crimjust.europa.eu/ejn/>.

<sup>62</sup> On Article 86 TFEU see K. Ligeti and M. Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?', 4(1) *New Journal of European Criminal Law* (2013), pp. 7–21.

<sup>63</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013, Brussels.

member states) an eventual EPPO might take,<sup>64</sup> it shows the spirit and intentions of the EU to move ahead with its plan for an enhanced form of EU criminal justice cooperation. A possible EPPO will pose a new set of challenges by setting up a prosecutor at the European level with the power to take almost any intrusive measure that a national prosecutor can, and its territorial jurisdiction will cover the combined territory of the states joining the initiative. A look at the recent proposal for an EPPO shows that fundamental rights protection is not among the core priorities. A conclusion shared by the Meijers Committee, which aptly notes:

‘Further interferences with national criminal procedure than now on the table are often considered to be disproportionate. To better embed legal protection, three aspects should be considered more closely by the co-legislators. First, the EPPO should contain clearer rules on the determination of the applicable law. Second, procedural guarantees should be updated to function effectively in transnational criminal cases. Third, rules on the gathering and admissibility of evidence should be developed further.’<sup>65</sup>

Learning from past mistakes, it would seem wise to start an important new initiative like the EPPO with taking account of individual rights. Not only from a pragmatic viewpoint, *i.e.* to make cooperation effective in practice, but more importantly; respect for fundamental rights is one of the core pillars on which the EU rests. Recent history has shown that when the position of the individual is not given sufficient attention from the start, the fallout will be significant and it will take years and difficult political negotiations to even begin to overcome such deficiencies.

Overall, what can be taken from the EU experience of establishing agencies and platforms to facilitate cooperation is that next to legal instruments regulating cooperation *between* states, mechanism that in a sense are *supranational* are needed to guide states in their interaction. This guidance or coordination can be of a non-binding nature (such as Eurojust), but also of a binding nature (like the proposal for an EPPO). In practice a combination of the two might be most effective, binding where possible, but where the protection of national interests prevents states from entering into a binding mechanism (and this will in practice be in most areas, certainly in the early stages of protection between DPAs) a non-binding platform can prove valuable.

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<sup>64</sup> See L. Erkelens, A. Meij and M. Pawlik (eds.), *The European Public Prosecutor’s Office: An extended arm or a Two-Headed dragon?* (Springer, 2015); S. White, ‘Towards a Decentralised European Public Prosecutor’s Office?’, 4(1) *New Journal of European Criminal Law* (2013), pp. 22–39.

<sup>65</sup> Meijers Committee, ‘Gaps and inconsistencies in legal protection in EU criminal law’, 3 March 2015.

## E. Discussion

### 13. What lessons can data protection draw from cooperation in criminal justice matters?

#### The political lesson

In this chapter we saw that international public law does not provide for any binding rules in the field of criminal justice cooperation, or at least not to the extent that states are bound without prior consent, firstly in the field of jurisdiction (part A), and secondly regarding mutual legal assistance (part B). In response to the jurisdictional issues, states have extended the reach of their national law by applying jurisdiction in a broad (extraterritorial) sense. As a result states are 'independent' (to an extent) in enforcing national criminal law, in some cases even when crimes have been committed partly or completely outside of a state's territory. In cases in which national law is not sufficient, states engage in cooperation in the form of treaties, either bilateral or multilateral. Criminal justice cooperation mostly takes place within a pre-existing legal framework, *ad hoc* cooperation is rare. The legal framework regulating criminal justice cooperation is often an expression of differences between national legal systems and cultures. These differences take shape in the form of exceptions (or grounds for refusal) written into cooperation agreements (mostly in the form of treaties). These exceptions allow states to retain control over certain aspects that are regarded as fundamental, while it promotes cooperation where none of the exceptions apply. This might at first seem like limiting the reach of cooperation, but it is not. Especially in a field as sensitive as criminal law, but in cooperation more general, national differences have to be acknowledged. Without such recognition, cooperation would be very unlikely, as states often simply cannot do away with fundamental (constitutional) principles. Cooperation instruments (including grounds for refusal) in criminal law have resulted in an increase in efficiency and have enabled cooperation. In developing cooperation mechanisms between DPAs it would be extremely useful to think about principles and rules, as these help provide a realistic path towards fruitful cooperation.

The example of the EU is extremely important for our purposes here. The EU has aimed to enhance cooperation, with the ultimate purpose of automatic recognition of foreign judicial decision with abolished or minimised grounds for refusal. When there is a closer tie between certain states (like in the EU), it is easier to negotiate cooperation agreements than in a global setting. The same is true for cooperation between DPAs; cooperation within Europe will take shape along different lines than international cooperation. At the same time, even though EU states are part of the same 'political family', the differences between national legal systems and cultures are fundamental

and this has put a break on smooth cooperation. This shows that states cannot be 'naïve' in putting forward rules for cooperation, but even in the relatively integrated European Union it is important to keep in mind national differences. Because EU criminal law itself is in development and is still a relatively new form of integration no hard lessons can be drawn, but the experience with the EAW has shown that the initial approach of automatic cooperation was not feasible, subsequent cooperation measures (for example the European Investigation Order on the gathering and exchange of evidence) have therefore reintroduced certain grounds for refusal, acknowledging differences between national systems.

Taking the international and the European examples together, it seems that for a field of cooperation that still has to take shape (the case of DPAs), it would be wise to retain a 'political element' in cooperation measures. Allowing states to pull the emergency break when fundamental national rules and principles are threatened can prove a first step toward a workable cooperation framework.

#### Legal lessons

The downside of effective cooperation in criminal law has been the position of the individual, as briefly shown in part C. The increase in efficiency has often come at the expense of the suspect who sees his or her rights eroded by becoming a 'subject' of international cooperation. And even though within the EU measures have been adopted to improve defence rights and an EU-wide *ne bis in idem* rule prevents suspects from being prosecuted multiple times for the same conduct, this has not yet proven sufficient to balance the prosecutorial bias in cooperation measures. An area of justice cooperation cannot be viewed only from the interest of states (in the case of criminal law prosecution),<sup>66</sup> the position of the individual has to be given the consideration it deserves right from the start.

Moreover, our contribution has highlighted a slow development towards precision in the legal texts on mutual cooperation. Detailed description of forms of cooperation were absent in the 1959 Convention on Mutual Assistance. Only towards the turn of the century, in particular with the 2000 EU Convention on Mutual Legal Assistance, care was taken to spell out the most important forms of cooperation that could be asked for between states, including the necessary legal guarantees for far going request such as carrying out telephone taps. The same 2000 Convention was also the first to pay attention to the need for data protection between cooperating authorities and

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<sup>66</sup> See I. Anagnostopoulos, 'Criminal Justice Cooperation in the European Union After the First Few "Steps": a Defence View', 15(1) *ERA Forum* (2014), pp. 9–24.

restricts the purposes for which personal data communicated may be used. Such data may be used only for the purposes of proceedings to which the Convention applies, other directly related proceedings, or 'for preventing an immediate and serious threat to public security'. For all other purposes the consent of the subject or the consent of the communicating state must be secured. This was a significant improvement and shows that the framework's modernisation does not only lead to benefits for prosecutors, but also for individual rights.

Another interesting lesson from the EU example, as demonstrated in part D, is that more informal (without binding powers) platforms of cooperation (like Eurojust) can prove extremely useful, and might provide a first step towards further integration (the development from Eurojust to the EPPO is this 'further step'). In providing channels for cooperation and communication, Eurojust has proven to be well-functioning and strongly embedded in the EU legal culture. A mixed-model with on the one hand non-binding cooperation mechanisms, to enhance cooperation by way of central coordination, and on the other binding legal rules (for example the EAW), might be the way forward and presents an example of a valuable and workable system for cooperation between DPAs.