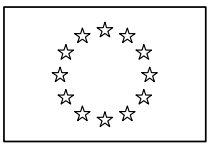

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.7.2004
SEC(2004) 884

COMMISSION STAFF WORKING PAPER

Annex to the

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

{COM(2004)457 final}

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1. INTRODUCTION

Eurojust was set up as a body of the European Union by Council Decision of 28 February 2002[1] (hereafter: "the Eurojust Decision") in order to stimulate and improve the coordination of criminal investigations and prosecutions in the Member States, to improve cooperation between the competent national authorities and to support the latter.

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

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

According to Article 31(2) TEU as amended by the Treaty of Nice, the Council shall encourage cooperation through Eurojust, particularly by enabling it to facilitate proper coordination between national prosecuting authorities. Eurojust is an essential element of the area of freedom, security and justice (Article 29 TEU). To fully appreciate the important role that Eurojust plays, it is useful to briefly recall its political and legal context.

In October 1999, the Tampere European Council concluded that:

> "*To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of*

[1] OJ L 63, 6.3.2002, p. 1.

letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001."[2]

To start as soon as possible with the necessary work, on 14 December 2000 the Council adopted a Decision setting up a Provisional Judicial Cooperation Unit.[3] This unit served as a precursor and test for the definitive Eurojust. Since the experience gained with this provisional unit was promising, the Council provided for a smooth transition from the provisional unit to Eurojust to avoid any interruption in the relevant activities (see Article 41 of the Eurojust Decision).

In the aftermath of the terrorist attacks on 11 September 2001, the Council underlined again the importance both of the provisional unit and of the definitive Eurojust and confirmed its determination "to finalise the Draft Decision setting up Eurojust at its meeting on 6 and 7 December 2001 so that it may become operational at the beginning of 2002".[4] Both the European Council and the Council have, on several occasions, repeated the important role Eurojust plays in the fight against terrorism. An example is the Council Decision of 19 December 2002, which provides for national terrorism correspondents to Eurojust.[5]

Following the terrorist attacks of 11 March 2004 in Spain, the European Council of 25 March 2004 again highlighted the crucial role of Eurojust in its Declaration on combating terrorism. It urged Member States to take any measures that remain necessary to fully implement the Eurojust Decision by June 2004 and called on them "to ensure that the optimum and most effective use is made of existing EU bodies, in particular Europol and Eurojust, to promote cooperation in the fight against terrorism" and that Eurojust "is used to the maximum extent" for this purpose.[6] Apart from the specific area of the fight against terrorism, Eurojust is an essential backup for the application of many general EU instruments on judicial cooperation, as particularly reflected in Article 16 of the Framework Decision on the European Arrest Warrant.[7]

Given this background, it is clear that sound implementation of the Eurojust Decision is a core element of an area of freedom, security and justice, and in particular for the fight against terrorism and organised crime, and a prerequisite for its further development on the judicial level.

2. OBLIGATION FOR MEMBER STATES TO ADAPT THEIR NATIONAL LAW

A Council decision taken under Article 34(2)(c) TEU does not impose on Member States an obligation to approximate their laws and regulations. However, this Treaty provision makes clear that such a Council decision is legally binding. Member States are obliged to take the necessary measures to ensure sound application of the decision. Where necessary, this can imply an obligation to remove obstacles in

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2 Conclusion n° 46 of Tampere, Commission document SI(1999)800.
3 OJ L 324, 21.12.2000, p. 2.
4 Council document 12156/01 JAI 99, conclusion n° 6.
5 OJ L 16, 22.1.2003, p. 68.
6 Council document 7906/04 JAI 100, p. 4 ff., 16.
7 OJ L 190, 18.7.2002, p. 1.

national legislation. Since a decision within the meaning of Article 34(2)(c) TEU does not entail direct effect, it is also conceivable that national legislation will be necessary, for example with regard to legal relations between Eurojust and private persons.

By adopting the Eurojust Decision, the Member States have accepted the obligation to bring their national law into conformity with the Eurojust Decision no later than 6 September 2003 (Article 42). After this date, the national law must be completely compatible with the Eurojust Decision.

To avoid misunderstandings, it has to be said that the TEU does not currently provide for an infringement procedure in the area of Title VI TEU (Articles 29 and following on police and judicial cooperation in criminal matters): Articles 226 and following of the EC Treaty providing for an infringement procedure in Community law do not apply to Title VI TEU. The relevant Treaty provisions (Articles 35 and 46 TEU) provide only for preliminary rulings on request of national courts and for disputes between Member States (Article 35(7) TEU). This does, however, not change the fact that Article 34(2) clearly imposes a legal obligation on the Member States.

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

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

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

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

3. PURPOSE OF THE REPORT AND METHOD OF EVALUATION

The purpose of this report is mainly to deal with the question of whether and where there is a need for national legislation or whether the latter is in conformity with the Eurojust Decision. Thus, this first evaluation deals mainly with the minimum requirements of the Decision. Apart from measures to be taken at the level of Eurojust (e.g. the completion of its rules of procedure according to Article 10(2)), an appropriate national legislative environment is an indispensable prerequisite for the functioning of this EU body.

From the beginning of the evaluation exercise undertaken by the Commission it has been clear that there are problems regarding the implementation of the minimum requirements: by the deadline of Article 42, and despite the declarations according to Article 41(2) of the Eurojust Decision, only one Member State (PT) had passed specific legislation, and another one (FI) had partly adapted its law beforehand. This report focuses on national legislation to transpose the Council Decision, particularly on legislation by national Parliaments, which in the following is called "primary legislation". Where appropriate, it also refers to government regulations ("secondary legislation").

In June 2003, the Commission requested the Member States to provide the relevant information. Reminder letters were sent in December 2003. Most Member States, though unfortunately not all, have replied to those letters. The evaluation is mainly based on these replies and on the declarations according to Article 41(2). In addition, the Commission has taken into account informal information collected by the Italian judicial ministry, who had sent a questionnaire to the Member States within a project financed under the EU framework programme on police and judicial cooperation in criminal matters (AGIS).[8]

At the current stage, the Commission must rely on the information provided by the Member States, since it seems neither appropriate nor possible within a reasonable period of time thoroughly to examine any national law which might be relevant to the Eurojust Decision, i.e. to "browse" through the entire legal system of all Member States. Nor can the Commission rely on the presence or absence of individual complaints on the functioning of Eurojust and on particular problems concerning national laws, because it might be difficult for the actors involved (Eurojust members, national correspondents, national judicial and police authorities, etc.) to inform the Commission of a lack of application, since they are subject to national authorities and thus are rather supposed to report to those than to the Commission. Furthermore, in the absence of an infringement procedure in the area of Title VI TEU, possible complainants might perhaps have doubts about the usefulness to report problems to the Commission.

Thus, the Commission only supposes that legislative measures are necessary where a Member States' responsible authorities have stated so, unless there are clear indications for such a need. However, national legislation (primary and/or secondary)

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

can also be desirable in the interest of transparency and certainty of the law, as Eurojust can only work properly if there are clear-cut and unambiguous rules.

According to the information available, three Member States (AT, DE, FR) have adopted legislation on Eurojust after the expiry of the deadline for transposition in Article 42 of the Decision.[9] The report takes into account any Member State reply or other information which reached the Commission by 31 March 2004. However, the report does not examine the situation in the new Member States.

4. OVERVIEW OF MEMBER STATES' REPLIES AND DECLARATIONS ACCORDING TO ARTICLE 41(2) OF THE EUROJUST DECISION

The following table lists the declarations by Member States according to Article 41(2) of the Eurojust Decision, indicating the number of the Council document and the Articles of the Decision on which the relevant Member States thought that they need legislative action:

Table 1

Member State[10]	Date[11]	Council doc. n°	Articles on which legislation is needed
DE	7.6.02	9738/02	1, 6(a)(v), 6(b), 7(a)(v), 7(b), 9(2)/(4), 13(1), 14-16, 19(3)/(6), 20(1), 21(5), 24(1)/(2), 26(4), 27(6), 29(3), 30(1)
EL	11.6.02	9891/02	6, 7, 9, 13, 15
FR	6.6.02	9707/02	6, 8, 9, 13
IE	6.6.02	9709/02	6(a)(ii), 7(a)(ii)
IT	10.9.02	11853/02	6(a)(iv)/(v), 7(b), 7(a)(iv)/(v), 7(b), 8, 9, 13

Ireland, having indicated in its declaration that its position was under review, informed the Commission that its authorities concluded that legislation was not necessary to enable it to comply with the terms of the Decision. In addition to the Member States mentioned above (DE, EL, FR, IT), four more Member States later concluded that they needed to amend their legislation (AT, BE, LU, PT). Moreover, legislation also seems to be necessary in Spain, according to information provided within the AGIS project mentioned above. Finland said that it had adapted its legislation before the entry into force of the Eurojust Decision, although this Member State still needs to take further steps.

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9 By end of March 04, Germany informed the Commission that a political agreement on its national law had been found by the Reconciliation Committee of the two Houses of Parliament (see press release n° 52/2004 of the Bundesrat of 31.3.2004). Thus, although the German law was not yet formally adopted at that time, its contents could be taken into account in this report.

10 For a list of the official abbreviations of Member States see document SEC(2004) 325 of 10.3. 2004.

11 Dates as they appear in the Council documents. Since the declarations had to be issued within three months after the entry into force of the Decision (i.e. by 6.6.02), the Italian declaration was delayed.

Table 2 summarizes the situation with regard to the question of whether primary or secondary national legislation is needed in the 15 States which have been Members before May 2004, according to the information available by 31 March 2004.

Table 2

Legislation not required	DK, IE[12], NL, SE[13], UK
Legislation required, but not yet adopted	BE, EL, ES[14], IT, LU
Legislation adopted within the time limit (6.9.2003)	PT
Legislation partly adopted within the time limit	FI[15]
Legislation adopted after expiry of the time limit	AT, DE, FR

Since not all Member States replied to the Commission, and not all of the Member States which have to amend their legislation specified which Articles of the Decision are concerned, it is not possible completely to identify all Articles which need to be transposed into the national law. Part of the lacking information could be obtained from the results of a questionnaire within the AGIS project mentioned above, but the picture remains incomplete, particularly concerning Luxembourg and Spain. In any case, it can be said that the overall situation is not satisfactory, with five Member States not yet having transposed the Eurojust Decision into national law.[16] Table 3 lists the provisions of the Decision on which Member States see a need for legislation.

Table 3

Article	Subject	Member State(s)
Art. 1	Legal Personality	DE
Art. 6 (with Art. 5)	Requests by national members to national authorities	BE, DE (partly), EL, FR, IT (partly), PT
Art. 7 (with Art. 5)	Requests to nat. authorities by the Eurojust College	BE, DE (partly), EL, FR[17], IT (partly), PT
Art. 8	Reasons to be given by national authorities if they do not comply with a Eurojust request	AT, BE, DE, FR, IT,

12 Although legislation was initially envisaged, see explanation on the Member State declarations above.

13 Apart from immunity of Eurojust staff, on which SE had adopted legislation within the time limit.

14 No information provided to the Commission, but available from the AGIS project n° 189/2003.

15 Additional legislation will be needed on Articles 13(2), 29(3), and 30(1) of the Eurojust Decision.

16 On this situation, see also the Council conclusions of 6 April 2004, Council document 8284/04, on the Eurojust annual report 2003 (Council document 8284/1/04 REV1, p. 15 and following).

17 In addition to its declaration according to Article 41(2), France indicated that Article 7 is to be transposed.

Art. 9 (with Art. 2)	Status of the national members, and their powers under national law	AT,BE,DE ((2)/(4)), EL, FR, IT
Art. 12	National correspondents	PT
Art. 13	Exchange of information	DE ((1)), EL, FI ((2)), FR, IT, PT
Art. 14-16, 19, 20(1), 21(5)	Data processing; access to personal data	DE (all), EL (Art. 15)
Art. 23	Joint Supervisory Body for data protection	AT, BE, PT
Art. 24(1)/(2)	Liability for unauthorised or incorrect data processing	DE
Art. 26(4)	Exchange of information with OLAF	DE, PT
Art. 27	Exchange of information with third countries	DE ((6)), PT
Art.29(3), 30(1)	Immunity of Eurojust Administrative Director and Staff	DE, FI, SE[18]

5. SPECIFIC COMMENTS ON CERTAIN ARTICLES

Based on the information presented above, this section of the report examines the situation concerning provisions of the Eurojust Decision, for which a need for legislation has been identified. Hereafter, the national laws transposing the Eurojust Decision are referred to as "the Austrian law",[19]"the French law"[20], "the German law"[21] and "the Portuguese law",[22]

Article 1 (legal personality)

So far, one Member State (Germany) indicated that recognition of Eurojust as a legal person within its national system would pre-suppose that Article 1 be transposed into national law. Germany later made clear that secondary legislation was sufficient and passed the relevant government regulation on 7 July 2003, i.e. within the deadline of Article 42.[23]

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18 Secondary legislation is considered sufficient, at least in Germany.

19 Federal Act on judicial cooperation in criminal matters between the Member States of the European Union of 25.3.2004, Bundesgesetzblatt I n° 36 of 30.6.2004, entry into force on 1.5.2004.

20 *Journal Officiel*, 10.3.2004, p. 4577 f.

21 Law of 16.4.2004, *Bundesgesetzblatt* 2004 I n° 23 of 17.5.2004, p. 902, entry into force on 18.5. 2004.

22 Law of 22.8.2003, n° 36/2003, DR n° 193-de22/08.

23 See *Bundesgesetzblatt* 2003 I of 14.7.2003, p. 1271.

Articles 2, and 41(1) *(appointment of national members)*

Eurojust is composed of national members seconded by each Member State being a prosecutor, judge or police officer of equivalent competence (Article 2). At the time of the entry into force of the Eurojust Decision, all Member States had appointed members of the Provisional Judicial Cooperation Unit,[24] so that these members could immediately take on the role of national members as foreseen in Article 41(1) Eurojust Decision. Subsequently, all Member States definitively appointed their national members according to the requirements of Article 2. For this appointment no legislation was considered necessary by any Member State. Some Member States later decided to put forward legislation on the procedure for the nomination and/or appointment[25]such measures rather seem necessary with regard to the details of the status and powers of the members, but not for the appointment itself. Issues of status and powers are considered in relation to Article 9.

Article 4, 5 and 10 *(competence and tasks; composition)*

It seems that most Member States do not consider legislation to be necessary in order to define Eurojust's tasks and competence. Nevertheless, where legislation is needed to transpose provisions of the Decision specifying Eurojust's competence and tasks (particularly Articles 6 and 7), it might be useful to recapitulate these provisions or at least to refer to them. This has been done, for instance, by the Portuguese, the French and the Austrian laws.

According to Article 5, Eurojust can act both through its individual national members and/or through the College, i.e. the assembly of the national members representing Eurojust as a collective body (Article 10). Although so far no Member State has indicated that specific legislation regarding Articles 4, 5 or 10 was necessary, the situation is different with regard to Articles 6 and 7, through which Article 5 is being put into more concrete terms (see below).

Article 6 (tasks of Eurojust acting through its national members)

While the heading of this Article merely refers to "tasks", letter (a) authorises the members to ask the competent national authorities to undertake certain measures ((i), (iii), (iv)), to give priority to another authority ((ii)), or to provide information ((v)). According to letter (g), national members may forward requests of judicial assistance under certain circumstances. Insofar as Article 6 implies certain rights for national members within the procedure of national investigations and prosecutions (see also letter (b)), it seems that many national legal systems require a legal basis for the members to be able to exercise those activities effectively.

In particular where a Member State has not conferred on its national member the entire status and the usual powers of a national prosecutor and/or investigating judge, a specific legal basis might be required. This is the case for a number of Member States (see comments below on Article 9). But even where the national member in

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[24] Council Decision OJ L 324, 21.12.2000, p. 2.

[25] See § 64 of the Austrian, Article 3 of the Portuguese, Article 695-8 of the French, and § 1 of the German law.

effect exercises the powers of a national prosecutor, the fact that the national members operate beyond the territory of their Member State may in certain national legal systems require specific legislation.

So far, only very few Member States have adopted primary legislation specifically transposing Article 6 of the Decision. The Portuguese law transposes Article 6 explicitly, referring especially to letters (a), (b) and (g). The Austrian law generally reflects the competence and tasks of the unit without referring expressly to Article 6. The French law refers to the general tasks of Eurojust[26], while a specific reference is only made to certain aspects, i.e. to Article 6(a)(ii), 6(a)(iv) and 6(g) of the Decision, on the forwarding of national requests for judicial assistance, and on Eurojust requests to launch an investigation or to set up a joint investigation team.[27] The German law refers to the Eurojust Decision in general.[28]

In addition to the various possibilities for Eurojust to act that are mentioned in Article 6 of the Decision, the French law contains an interesting provision: it provides that Eurojust (through the College and/or a national member) can ask the French Prosecutor General to lay information on a criminal offence before a prosecuting and/or investigating authority in another Member State.[29] It seems that this provision has been inspired by Article 6(a)(ii) of the Decision, whereby Eurojust can ask a national authority to accept that another one is "in a better position to undertake an investigation or to prosecute specific acts". The provision of the French law seems useful, although it does not fully transpose Article 6(a)(ii).

Article 7 *(tasks of Eurojust acting as a College)*

In the same way as Article 6 does for national members, Article 7 defines the tasks and rights of the Eurojust College. Again, letters (a) and (b) on the right to ask the competent national authorities to undertake certain measures ((a) (i),(iii),(iv)), to accept that another Member State is "better placed" ((a)(ii)), to provide information ((a)(v)) and to ensure mutual information ((b)) are the points which were particularly considered for legislative transposition. The situation is parallel to the one on Article 6 (specific transposition by two Member States, and a general reference to the tasks by another two Member States).

Article 8 *(reasons in case of non-compliance with a College request)*

Article 8 imposes an obligation on the competent national authorities to inform Eurojust of the reasons if they do not comply with a request by the College as outlined in Article 7(a). This Article was added to increase the weight of a request by the Eurojust College. Even if a denial of a formal request by the College might rather be an exceptional situation, Article 8 is an important factor for the acceleration of judicial cooperation, since the right to ask for a reasoned reply is the only means for Eurojust of exerting pressure if this turns out to be necessary. There are only two exceptions to the obligation to give reasons for a refusal: first, if this would harm

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26 Article 695-4 of the French law.

27 See Article 695-6. On requests for judicial assistance, this Article says that Eurojust may ensure the transmission to the requested authority via the concerned national member.

28 § 13 of the German law.

29 Article 695-5, point 2, of the French law.

essential national security interests and, second, if it would jeopardise the success of ongoing investigations, or the safety of individuals.

It seems that at least five Member States need to transpose Article 8 into national law. In many Member States, the obligation to provide a reasoned reply might apply without express transposition, since in their legal system this obligation in the Eurojust Decision might suffice. According to the information available, only Austria, France and Germany have passed specific legislation on this point. The Austrian and German laws provide for a reporting procedure to higher authorities if a prosecuting authority intends not to comply with a reasoned request submitted by the Eurojust College.[30] It is particularly useful that the French law says that Eurojust is to be informed as soon as possible ("*dans les meilleurs délais")* if the national prosecutor or judge does not comply with a Eurojust request.[31]

Article 8 of the Eurojust Decision mentions exceptional situations where the national authorities do not have to justify a refusal. The law of some Member States, e.g. Germany and France, refers to this Article.

Article 9 *(status and powers of national members**)***

a) Status, term of office and judicial powers (paragraphs 1 and 3)

On the status and term of office of the national members, Article 9(1) of the Eurojust Decision refers to the national law of the Member State of origin. Although the national members must be prosecutors, judges, or police officers of equivalent competence (Article 2), in practice their status may vary considerably since the nature and extent of their judicial powers are to be defined by the Member States (Article 9(3)). With regard to the term of office, Article 9(1) adds that its length "shall be such as to allow Eurojust to operate properly"; this requirement seems to be met by all Member States (most provide for a term of office between 3 and 5 years, some for 2 years or until further notice). The Eurojust Decision does not require the members to have judicial independence. Thus, the fact that many of them are subject to supervision and/or orders by the Justice Ministry[32] does not pose a legal problem.

A large majority of Member States have nominated a person holding the formal status of a prosecutor or at least a former prosecutor. Two Member States (AT, ES) have nominated a judge (or former judge), and one has opted for a high level police officer (DK). When seconded to Eurojust, most (although not all) of the members have kept their formal status as judges, prosecutors or police officers. However, most of them are not allowed to exercise the powers which are usually conferred to a person holding such status in a national authority, i.e. with their secondment to Eurojust they lost those judicial or police powers. Although, in principle, this seems compatible with Article 9(3), this could lead to a situation which is not entirely in line with the spirit of the Eurojust Decision: the wording of Articles 2 and 9(3) seems to imply that national members should have at least certain competence and powers

30 §68 of the Austrian law refers to §8(1) of the law on prosecution services (*Staatsanwaltschaftsgesetz*), which provides for reports to the *Oberstaatsanwaltschaft* and to the Federal Ministry of Justice. See also §5 of the German and Article 6 of the Portuguese law.

31 Article 695-6 of the French law.

32 See, for instance, Article 695-8 of the French law, or § 64(2) of the Austrian one.

of a judicial nature; moreover, an excessive disparity between the national members' individual powers could limit or even hinder the efficiency of Eurojust.

From the Commission's point of view, one main reason why it has been decided that Eurojust – unlike Europol[33] - be composed of national members subject to the national law of their Member State of origin was that this concept would allow Eurojust to make use of national powers attributed to judicial and/or high police officers. In its Communication of November 2000 on Eurojust, the Commission had proposed that the members should be able to exercise powers under the national law of their Member State and that to that extent they could be subject to this national law.[34] The Commission considers the possibility for a national member to exercise powers according to the national law as an essential advantage of this concept.[35]

In its Communication, the Commission explained why it is necessary that Member States confer certain minimum judicial powers to their national members to render Eurojust strong and effective, particularly in cases of urgency, and why there should be "a minimum common denominator of equivalent individual powers". It also made proposals as to what judicial powers should be conferred to the members, including participation in joint investigation teams.[36] The European Council has expressly referred to the latter aspect in its conclusions of 25 March 2004, calling on Member States to ensure that "Eurojust representatives are associated with the work" of such teams. The Eurojust annual report 2003 also notes that the participation of national members in joint investigation teams is dependent on the members' powers.[37]

In its discussion paper "Bringing Member States' national law into conformity with the Decision setting up Eurojust" of June 2002 the General Secretariat of the Council has taken a point of view similar to the one of the Commission Communication.[38] In particular, it is said there that "it is desirable that Member States make the declarations provided for by the Convention of 20 April 1959 (Article 24) and the Convention of 29 May 2000 (Article 24) to ensure that their national member is regarded as a judicial authority and that they make the necessary legislative arrangements, if need be". The Council Secretariat also refers to possible operational problems in case of "excessive disparity" of the national members national powers.[39] Similar reflections can be found in the Eurojust annual report 2003,[40] and in the conclusions of a seminar on this issue as part of the above mentioned AGIS project.[41]

When adopting the Decision, the Council could only agree expressly on a minimum common denominator on the question of access to information and direct contacts (Paragraph (4) and (5) of Article 9). However, it is clear from the wording of Articles 2, 3 and 9(3) that the Eurojust Decision is based on a concept of national members

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33 The Management Board of Europol is composed of national officials, but the operational work is mainly carried out by Europol officials, while at Eurojust the casework is done by the national members.

34 COM(2000)746 final, point 4.2., p. 7.

35 Ibid, point 3.3, p. 5.

36 Ibid, p. 6.

37 Council document 8284/1/04 REV 1, p. 14.

38 Council document 9404/02 of 14.06.2002, JAI 107 EUROJUST 16.

39 Ibid, p. 4, 6.

40 Council document 8284/04 EUROJUST 24, p. 15.

41 Council document 15279/03 EUROJUST 15, p. 3, 6.

being prosecutors, judges or police officers, i.e. acting on an operational and mainly judicial level, as already outlined by the conclusions of the Tampere European Council. Therefore, if a Member State merely confers the formal status of a prosecutor to its national member, without this being linked to a prosecutorial and/or judicial status and powers, the question of whether this is entirely in line with the spirit of the Eurojust Decision arises.

The current situation is, therefore, not satisfying: first, because, several Member States have not passed the legislation necessary according to their own statements; second, because many national members do not have any prosecutorial and/or judicial powers. Positive exceptions to the second point seem to be Finland, Ireland, Portugal, Sweden and the UK. Out of those Member States only Portugal provided for specific primary legislation, while in Finland, Sweden and the UK a decree or government regulation was considered sufficient. By virtue of his position as Crown Prosecutor, the UK national member has authority to issue letters of request for legal assistance, but no other judicial powers. The Irish national member seems to be able to exercise domestic prosecutorial competence on the basis of administrative arrangements.

The relevant Decree of the Swedish Prosecutor General[42] may serve as an example of a provision which is entirely in line with the spirit of the Eurojust Decision. It says: "The national member may carry out the duties of prosecutor throughout the country". The territorial competence of the Finnish national member also comprises its whole country.[43] Another example for sound implementation is the Portuguese law: the national member is a Deputy General Prosecutor, and may receive requests for judicial assistance from other Member States, and may in certain cases partially reply to them and/or add further elements to a request sent from a Portuguese prosecutor (e.g. in case of urgency or on request of the latter). In these cases, he or she is entitled to collaborate with the competent authorities from other Member States (Article 10 of the Portuguese law). The Portuguese national member may also participate in joint investigation teams.[44]

When being appointed, the Austrian national member has to exercise the function of a judge or prosecutor. However, the Ministry of Justice decides whether and to what extent he or she continues to exercise such functions. Currently, the Austrian national member is considered a judicial authority in the meaning of Article 24 of the European Convention on mutual legal assistance of 20 April 1959.[45] The judicial functions of the French national member seem to be limited to requests and exchanges of information with the competent national authorities.[46]

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42 Decree of 16.6.2003, Section 2.

43 In order to enable an extension of the territorial competence of the Eurojust national member, the Finnish Public Prosecutors Act (Article 3) has been amended before adoption of the Eurojust Decision.

44 See Articles 9, 10 of the Portuguese law. On joint investigation teams, see Article 13(12) of the EU Convention on Mutual Assistance in Criminal Matters of 29.5.2000, OJ C 197, 12.7.2000, p.1. Since many Member States have not yet ratified this Convention, the Framework Decision on joint investigation teams (OJ L 162, 20.6.2002, p.1) takes up the contents of its Article 13.

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46 Articles 695-8, 695-9 of the French law. The French national member is a "*magistrat hors hierarchie"*.

b) Access to information (paragraph 4)

The most basic and essential power under national law for the Eurojust members is access to information. Since this is an essential prerequisite for the work of Eurojust,[47] the minimum power needed by the members effectively to fulfil their tasks, this is the only judicial power the Eurojust confers expressly to the Members: according to Article 9(4), the national member shall have access to the information contained in the national criminal records "or in any other register of his Member State in the same way as stipulated by his national law in the case of a prosecutor, judge or police officer of equivalent competence". Since all the national members formally have such a status, it seems that they automatically have access to such information. This is particularly the case where a Member State has conferred judicial powers to its member, as e.g. in Portugal.

However, it is currently not entirely clear whether all Eurojust members have full access to exactly the same information as their national colleagues. Since the information to be exchanged usually concerns personal data of a highly sensitive nature, it is conceivable that in many Member States national legislation is needed to put Eurojust members in the same situation as their colleagues in the national authorities. So far, only some Member States have adopted national legislation on this point. France, Germany and Austria provide for their members' right to ask for and/or obtain any information which is necessary to fulfil the tasks of Eurojust,[48] and the French law also expressly grants the member access to criminal records and investigative police files. The Portuguese law makes clear that the national member may ask the competent authorities for information on the progress of prosecutions, investigations, and requests for legal assistance.[49] The UK has informed the Commission about arrangements with its police which grant the national member access to information from national records.

c) Direct contacts with competent authorities (paragraph 5)

Article 9(5) makes clear that national members may contact the competent national authorities directly. Direct contacts among judicial authorities are an essential prerequisite for facilitating and accelerating judicial cooperation, including for the cooperation through Eurojust, as foreseen in Article 29 second indent and 31(1)(a) TEU. During the legislative procedure on the Eurojust Decision, a consensus was soon achieved on the necessity of direct contacts between the Eurojust members and the prosecuting and/or investigating authorities. Therefore, recital 7 and Articles 3, 6-8, 9(5), and 13(1) of the Eurojust Decision refer to contacts with the "competent authorities", and Article 12(3) makes clear that even the existence of national correspondents shall not preclude "direct relations" between those authorities and Eurojust.

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47 See also the annual report of Eurojust 2003 (Council document 8284/04), p. 15 and following, and the conclusions on a seminar within the AGIS project mentioned above, Council doc. 15279/04, p. 3, 5.

48 Articles 695-5 and 695-9 of the French, § 4 of the German, and § 64(3) of the Austrian law.

49 Article 8(4), letters (b) and (f).

Only a few Member States have considered it necessary to provide expressly for direct contacts, e.g. Austria, France and Germany.[50] In the absence of any contrary information, it can be assumed that in the remaining Member States no specific legislation is needed for establishing direct contacts. However, it would be useful if those Member States would clarify this by a circular or guidelines, to make sure that national authorities may directly exchange information with Eurojust national members (see also comments on Article 13 below).

Article 11 *(role of the Commission)*

In accordance with Article 36(2) TEU, Article 11(1) of the Eurojust Decision makes clear that the Commission is to be fully associated with the work of Eurojust, while its participation is limited to areas within its competence. Recital 11 adds that "the Commission should be fully involved in Eurojust's proceedings concerning general questions and questions coming within its competence". Detailed arrangements are provided for in Eurojust's Rules of Procedure.[51] Leaving aside the more specific rules on cooperation with OLAF (Article 26 of the Decision, see below), no specific legislation seems to be required in any Member State.

Article 12 *(national correspondents), and Article 3 of the Council Decision of 19 December 2002 (correspondents for terrorism matters)*

The designation of general correspondents to Eurojust is merely optional (Article 12(1) of the Decision), and only some Member States have provided for such correspondents.[52] However, the second sentence of Article 12(1) identifies the designation of correspondents for terrorism matters as a matter of high priority. This priority has been transformed into a clear legal obligation by another instrument:

According to Article 3(1) of **Council Decision 2003/4/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Common Position 2001/931/CFSP**[53] "each Member State shall designate a Eurojust national correspondent for terrorism matters under Article 12 of the Eurojust Decision or a[n] appropriate judicial or other competent authority or, where its legal system so provides, more than one authority". Member States shall ensure that this correspondent or authority "has access to and can collect all relevant information concerning and resulting from criminal proceedings … with regard to terrorist offences" involving any of the persons, groups or entities listed in the Annex to Common Position 2001/931/CFSP.[54] The list in this Annex is regularly updated.

In its conclusions of 25 March 2004, the European Council called on Member States to ensure that Eurojust national correspondents for terrorist matters are designated by all Member States. Moreover, according Article 3(2) of the Council Decision of 19

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50 See, e.g., §§ 64(3), 66 of the Austrian, §§ 3, 4(1) of the German, and Artt. 695-5, 695-9 of the French law (the latter referring to the General Prosecutor and/or the investigating judge).

51 OJ C 286, 22.11.2002, p.1, Article 21.

52 E.g., see section 3 of the SE Prosecutor General Decree of 16.6.2003; § 7 of the German and Article 12 of Portuguese law.

53 OJ L 16, 22.1.2003, p. 68.

54 OJ L 344, 28.12.2001, p. 93.

December 2002, Member States have to ensure that certain information, collected by the national correspondent or authority is communicated to Eurojust.

Despite the fact that the Council Decision of 19 December 2002 took effect on 23 January 2003, only three Member States had made the necessary designations by the end of the year 2003.[55] In the aftermath of the terrorism attack in Spain on 11 March 2004, this situation has improved, but it seems that still not all Member States have complied with the obligations of that Council Decision.

Article 13 *(exchanges of information)*

Article 13 of the Eurojust Decision requires Member States to ensure that Eurojust members can have access to any information necessary for Eurojust to fulfil its tasks properly. Together with Article 9 (particularly paragraphs 2-5), Article 13 provides for a crucial prerequisite for Eurojust's capability to fulfil its tasks, and to comply with the European Council's ambition to ensure that the optimum and most effective use is made of Eurojust, and to use Eurojust "to the maximum extent" in the fight against terrorism.[56] It is of utmost importance that the national members can exchange information both with their national authorities and among themselves without legal barriers blocking the information flow, while fully taking into account the human rights dimension. Although one might expect that legislation or a government decree would be needed in many Member States to allow for a transborder data flow, so far only a few Member States have declared that they need legislation to transpose Article 13. In any case, it is highly recommended that Member States inform the Commission on the national rules applicable to exchange of information between Eurojust national members and the competent national authorities, whether these are specific rules on Eurojust or general rules on data protection.

According to Article 13(1), Member States have to ensure that the competent national authorities may exchange with Eurojust "any information necessary for the performance of its tasks". Where Eurojust needs information, national authorities may not prevent an exchange on the grounds of the secrecy of their investigations and prosecutions. As the information shall be directed to the relevant national members (Article 9(2) of the Decision), the question of whether legislation is needed to implement Article 13(1) is linked to the status and powers of the national members. Consequently, several Member States have transposed Articles 13(1) and Article 9(4) of the Decision by the same national provisions. Thus, reference can here be made to the above mentioned provisions of the Austrian, French, German and Portuguese laws (comments on Article 9, points b and c). However, it should be noted that Article 13(1) may require, in certain cases, more information to be exchanged than the types of information expressly identified in Article 9(4).

For instance, beyond access to criminal records, which usually only refer to final convictions, Eurojust members may need to have access to certain details of judicial files and/or to a national or regional register of proceedings (where such a register exists). Where a Member State has indeed conferred on its Eurojust national member

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55 See Communication of the General Secretariat of the Council of 8.1.2004, CM 27/04 JAI EUROJUST.

56 See the conclusions of the European Council of 25.3.2004, quoted in the introduction to this report.

the effective status of a prosecutor or investigating judge with judicial powers, this requirement could be fulfilled quasi automatically. Where this is not the case, a specific provision or decree might be necessary to transpose Article 13, as for instance has been done in the relevant German and French laws.[57]

On the other hand, the national members must be able to pass on information to their respective national authorities. The question of the extent to which a national member may transfer information to a national authority, is addressed by the second paragraph of Article 13, which makes clear that no prior authorisation may be required for this.[58] It seems that currently most national members only are allowed to send information to the authorities in their own Member State. This is sufficient to comply with the minimum requirements in Article 13(2). However, Eurojust could work more efficiently if its national members were also allowed to contact national authorities in other Member States, as foreseen for instance in the Austrian law.[59]

Article 13(2) refers to exchange of information within Eurojust, i.e. among the national members. Very few Member States see a need for legislative implementation. The Austrian law provides that the Austrian national member may pass on information to other national members only to the extent that this is permitted under public international law and/or the Austrian law on judicial assistance.[60] It can be noted that, according to Article 10(2) of the Eurojust Decision, details on processing of personal data are to be specified in the Rules of Procedure of Eurojust. So far, only the general part of these Rules has been adopted and approved by the Council,[61] while the specific provisions on the processing of personal data are still being drawn up. This cannot, however, justify the absence of national legislation in three Member States, who have concluded that they need legislation for Article 13.

Finally, Member States may also consider obliging national prosecuting or investigating authorities to inform Eurojust spontaneously, i.e. without an express request, of certain facts which are relevant for its work. Although they are not required to do so, it is encouraging that some Member States have created such an obligation: Germany had done so on joint investigation teams and proceedings on serious transborder crime (where there might be a particular interest of Eurojust),[62] and France on multilateral investigations falling in the competence of Eurojust.[63]

Articles 14-21 (processing and storage of, and access to personal data)

Articles 14 and 15 of the Eurojust Decision define the power of Eurojust to process personal data and its limits. Articles 16-18 concern rather the internal organisation of work at Eurojust and might therefore be less relevant for national law.[64] While on exchange of information (Article 13), at least four Member States consider national

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57 Art. 695-5 (n° 4) of the French, and § 4 of the German law.

58 An example for transposition into national law is § 67 of the Austrian law.

59 § 64(3) of the Austrian law.

60 § 67 of the Austrian law.

61 OJ C 286, 22.11.2002, p. 1.

62 § 6 of the German law. The Eurojust annual report 2003 suggests this on joint investigation teams (p. 14).

63 Article 695-9 of the French law.

64 However, see the declaration by Germany mentioned above (table 1).

legislation indispensable, there are only two Member States that have declared so concerning data processing. Again, this is surprising with regard to the general principles of protection of personal data, which usually require a legal basis. Germany currently is the only Member State that has adopted detailed provisions on processing of personal data, access to these data by external persons, correction, deletion etc.[65] Even those Member States which replied to the Commission that they need to adapt their national law have mostly not created specific provisions on Articles 14 and following. In any case, Member States are invited to inform the Commission on the applicable national rules.

On Articles 19 and following of the Decision, the German law allows requests on the access to personal data, correction and/or deletion of such data to be sent to the Federal Ministry of Justice, which will transfer them to Eurojust; in accordance with Articles 19(3) and 20(1) of the Decision, the national law on the protection of personal data shall apply[66]. Other Member States, however, do not see a need to implement these provisions, or see only a need to designate a national authority for the transfer of requests to Eurojust.

Article 22 *(data security)*

Despite the fact that Article 22 of the Eurojust Decision contains an obligation for Member States to protect personal data transmitted from Eurojust "against accidental or unlawful destruction, accidental loss or unauthorised disclosure, alteration and access or any other unauthorised form of processing", no Member State has informed the Commission of national legislation on Eurojust regarding data security. However, there might indeed be no need for specific measures, as long as Member States apply their general provisions on data security to data transmitted from Eurojust.

Article 23 *(Joint Supervisory Body for data protection)*

The nomination of the members of the Joint Supervisory Body, as provided by Article 23(1), should have taken place with the entry into force of the Eurojust Decision, i.e. on 1 March 2003, since no Member States had issued a declaration according to Article 41(2) on this issue. It is to be regretted that the nominations for the Joint Supervisory Body were only completed by end of 2003, but by today no further problems were to be observed. On the procedure for the nomination, several Member States have now adopted legislation or government rules.[67]

Article 24 *(liability for unauthorised and incorrect processing of data)*

For the liability of Eurojust for damages resulting from unauthorised and incorrect data processing, Article 24 of the Eurojust Decision refers to the national law and the courts of the headquarters, i.e. to the Netherlands. Only Germany has considered it necessary to transpose this provision into national law.[68]

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65 See §§ 4, 8 of the German law.

66 § 8 of the German law, referring to the *Bundesdatenschutzgesetz*.

67 See § 65 of the Austrian, § 9 of the German, and Article 14 of the Portuguese law.

68 See § 10 of the German law.

***Article 26 and 27** (relations with partners)*

Articles 26 and 27 of the Eurojust Decision lay down principles on the relations between Eurojust and its "partners", i.e. EU and international bodies, authorities of third States, etc. In particular, Article 26(4) requires Member States to ensure that the Eurojust national members shall be regarded as competent authorities for the purposes of Regulations 1073/1999(EC) and 1074/1999(Euratom) on investigations conducted by the European Anti-Fraud Office (OLAF).[69] Article 26(4) ensures that OLAF is able to transfer information on investigations to Eurojust. This is necessary, because information obtained by OLAF during an internal investigation may only be transferred to national "judicial authorities", and in the case of external investigations to the national "competent authorities",[70] and since Eurojust is not a national (judicial) authority.

The Commission considers that for the sound application of Article 26(4) of the Eurojust Decision Member States should designate their Eurojust national members as competent authorities according to those Regulations. It is essential for the cooperation between OLAF and Eurojust in the area of fraud affecting the Community budget that OLAF can pass on the relevant information to Eurojust, on the grounds of a clear legal basis that leaves no doubt or risk. Therefore, it would clearly be preferable that Member States expressly designate their national members as competent authorities. If the designation derives implicitly from the powers granted to their national members, they should at least inform the Commission (OLAF) and Eurojust. Unfortunately, only some Member States have informed the Commission of an express designation (NL, UK, and – on a legislative level – DE, FR and PT).[71]

Another provision in the Eurojust Decision, which might have to be transposed into the national law of certain Member States, is Article 27 which provides that exchange of information with partners is normally subject to an agreement with Eurojust. Only by way of exception and with the sole aim of taking urgent measures to counter imminent serious dangers to persons or public security may a national member carry out an exchange of personal data (paragraph 6). This provision can be particular important e.g. in terrorism casework. Since the national member would act in his or her national capacity, it seems useful, if not necessary, to have clear-cut rules on the legality of communications under Article 27(6). However, so far only the national law of two Member States (DE and PT)[72] refers explicitly to this question.

***Articles 29(3, 30(1)** (status of the Eurojust administrative director and staff)*

According to Articles 29(3) and 30(1), the administrative director and the staff of Eurojust shall be subject to the rules and regulations applicable to officials and other

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69 OJ L 136, 31.5.1999, p.8.

70 See Article 10 of Regulation 1073/1999(EC).

71 Article 695-9(4) of the French, § 11 of the German, and Article 11 of the Portuguese law. The annual report of Eurojust 2003 (Council document 8284/04 of 14.4.04, p. 12) leaves open whether there is an obligation.

72 See §§ 4(6), 12 of the German law, and Article 15 of the Portuguese law. While the latter implements Article 27 as a whole, by referring to the provisions of this law applying to exchange of data within the EU, the German law focuses on Article 27(6) of the Eurojust Decision.

servants of the European Communities, which implies that the EC staff regulations apply to the administrative director and the Eurojust staff. Most Member States, therefore, did not see a need to pass specific legislation on this matter. Germany and Sweden adopted regulations[73] on the immunity and privileges of the administrative director and staff. Finland also came to the result that such steps were necessary.

6. CONCLUSIONS

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

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

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

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[73] DE: *Verordnung* of 7.7.2003, *Bundesgesetzblatt* 2003 I of 14.7.2003, p. 1271; SE: legislative act of 28.2.2002, SFS 2002:87 of 12.3.2002, in force since 1.9.2002

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

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