

**8TH MEETING OF THE CONSULTATIVE FORUM
OF PROSECUTORS GENERAL AND DIRECTORS OF PUBLIC PROSECUTIONS
OF THE MEMBER STATES OF THE EUROPEAN UNION**

THE HAGUE, 12 DECEMBER 2014

REPORT AND CONCLUSIONS

Introduction

The 8th meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union (hereinafter Consultative Forum or Forum) was organised in The Hague on 12 December 2014 in combination with the Eurojust Strategic Seminar “Towards Greater Cooperation in Freezing and Confiscation of the Proceeds of Crime: a Practitioners’ Approach” that preceded it on 11 December.¹ The meeting of the Forum was convened by the Prosecutor General of Italy with the support of Eurojust.

The meeting was opened by *Michèle Coninx (President of Eurojust)* and chaired by *Gianfranco Ciani (Prosecutor General at the Italian Supreme Court)*. *Efterpi Koutzamani (Prosecutor General of Greece)* gave a brief overview of the activities of the Forum under the Hellenic Presidency (January-June 2014).

Forum members discussed and reached conclusions on two main topics: (I) Freezing and confiscation of proceeds of crime, and (II) THB & illegal immigrant smuggling involving migration flows through the sea. During the open debate, Forum members also exchanged views on issues emerging from the negotiations on the Regulation on the establishment of the European Public Prosecutor’s Office (EPPO).

Session I – Freezing and Confiscation of Proceeds of Crime: Improving Mutual Recognition

The first session was devoted to continuing the discussions of the Strategic Seminar on how to further improve cooperation between Member States to enhance mutual recognition in freezing and confiscation of the proceeds of crime.

Michèle Coninx (President of Eurojust) presented an overview of the outcome of the Strategic Seminar of 11 December.² She briefly recalled the key challenges in investigating and prosecuting cross-border asset recovery cases and noted the best practices arising from the discussions and conclusions of the workshops. Ms Coninx stressed that confiscation procedures remain underused and that there is an increased need for effective international

¹ A separate report of the Strategic Seminar including the outcome of the three workshops is available on the Eurojust website.

² For details, see the report of the Strategic Seminar.

cooperation and mutual legal assistance on asset recovery. She also highlighted how Eurojust can contribute to facilitating mutual trust and cross-border cooperation in this field.

Ignazio Patrone (Deputy Prosecutor General at the Italian Supreme Court) recalled the work of the Consultative Forum on corruption in its meetings of June 2011 and June 2014, and the outcome of the Forum meeting of December 2012 which further examined issues related to freezing and confiscation. Mr Patrone then gave an overview of the written responses received from Forum members to a set of questions included in the background paper and circulated prior to the meeting. He briefly noted the key challenges and best practices identified in asset recovery cases and highlighted the new developments in EU law in this field.

Following these presentations, the Chair opened the session up to general discussion. Forum members intervened to share their experiences and give their views on legal and practical solutions that could further improve judicial cooperation and mutual recognition in this area. The main conclusions stemming from the discussion and the written contributions received from Forum members³ can be summarised as follows:

Conclusions of the Consultative Forum on Freezing and Confiscation

Need to promote greater coherence and simplification of the existing EU legal framework

1. Forum members express concerns about the lack of coherence and consistency among the asset recovery-related instruments adopted at EU level, as well as the lack of clarity and guidance on the interrelations among these instruments. As a result, practitioners are confronted with a fragmented EU legal framework, which is in addition sometimes poorly implemented at national level. While the new Directive 2014/42/EU on freezing and confiscation is an important step forward, it will not provide for a consolidated legal framework in the area of asset recovery.
2. In this regard, Forum members emphasise that it is time to evaluate and consequently simplify the existing legal framework, improving the quality and not the quantity of legislative measures.
3. Forum members call upon EU institutions to prepare for a proper consolidation or codification of the EU legislation in this field. As also indicated in the Post-Stockholm Strategic Guidelines of June 2014, this would be a first essential step to overcome the problems arising from the incompleteness and imbalances of the EU Area of Criminal Justice.
4. Furthermore, there is a need for more harmonisation of the substantial and procedural criminal provisions with a view to enhancing mutual trust, a key condition for effective mutual recognition.

³ 14 written contributions were received by Forum members prior to the meeting. These were provided by Forum members from the following Member States: Austria, Belgium, Cyprus, Germany, Greece, Hungary, Ireland, Lithuania, Poland, Portugal, Romania, the Slovak Republic, Spain, and the United Kingdom.

Challenges and best practices in judicial cooperation

5. Forum members identified a number of common challenges. These mostly stem from the complex and cross border nature of asset recovery cases, the differences in national legislation and the lack of clarity concerning the existing legal framework.
6. The difficulties in identifying assets and obtaining access to financial records are among the key challenges that hamper judicial cooperation. Best practices identified include the promotion of financial investigations alongside the criminal investigation, the early involvement of financial experts (such as specialised units composed of tax experts and auditors) and the adoption of central bank- and land registers in all Member States.
7. Further challenges in asset tracing relate to the nature of instant electronic transactions and the widespread use of anonymous companies. These challenges will increase with the wider adoption and use of virtual currencies such as Bitcoins. A greater transparency of company ownership and control is necessary.
8. Forum Members emphasise that training programmes and practical manuals for judges, prosecutors and law enforcement authorities must be a priority for Member States and the EU institutions. Some jurisdictions have opted for mandatory courses for specialised prosecutors to raise awareness, competence and confidence in asset recovery decision making.
9. It is crucial to adopt a multidisciplinary approach and promote the interaction amongst different stakeholders involved in the investigation and prosecution of asset recovery cases. Close cooperation between the judiciary, police and financial authorities is necessary and direct communication between those authorities should be fostered.
10. Forum members highlight the possibility to use confiscated property for public interest or social purposes, also as a way to enhance public confidence in the justice system.
11. Requests for the anticipated sale of property frozen, in particular of perishable or rapidly depreciating goods, at the same time as issuing a confiscation order should also be promoted to preserve the economic value of frozen goods.

Recognition and execution of non-conviction based confiscation orders

12. Forum members acknowledge that the new Directive 2014/42/EU does not address the issue of mutual recognition of conviction based or non-conviction based confiscation orders. It provides a prudent approach to non-conviction based confiscation. Accordingly, Forum members welcome the Statements issued by the Parliament and the Council upon the adoption of the Directive (Council doc. 7329/1/14 REV1 ADD1).
13. In the absence of formal harmonisation, Member States need to strive for an efficient practical cooperation between the authorities on the ground to recognise and execute non-conviction based confiscation orders received from the judicial authorities in other Member States.
14. Some Forum members indicate that the concern raised, that non-conviction based confiscation should not be subject to mutual recognition as orders may be in breach of

fundamental rights protected under the European Convention on Human Rights, may need a more nuanced analysis.

15. In this regard, further legislative action could be considered at EU level to support non-conviction based asset recovery. Forum members suggest the definition of a limited non-conviction based confiscation remedy with minimum safeguards which could enjoy mutual recognition at EU level.

Eurojust's assistance to national authorities

16. Forum Members refer to the added value of Eurojust's operational tools, such as coordination meetings, as a trusted forum where practitioners can share information and where searches, seizures and arrests can be coordinated. Eurojust can also support Member States in setting up and running JITs or facilitating judicial cooperation with third States.
17. Forum members consider that best practices in Member States should be collected and shared among practitioners. Moreover, Eurojust could consider continuing research towards designing an acceptable common model with the support of the Consultative Forum.

Session II – Investigating and Prosecuting Cases of THB & Illegal Immigrant Smuggling Involving Migration Flows Through The Sea: Challenges and Best Practices

The second session was devoted to reflections on the possibility for national authorities of all Member States to join efforts to enhance the prosecution and bring to justice traffickers and smugglers of persons involving migration across the sea. It also examined if the relevant legislation is sufficient to ensure that the criminal organisations which are behind these serious cross-border crimes are detected, identified, prosecuted and convicted. The session was based on a background paper and points for discussion circulated in advance.

Ignazio Patrone briefly presented the background paper emphasising the challenges caused by the sophisticated *modus operandi* of the organised crime groups and the difficulties in the judicial cooperation with third States. An overview of the responses to the discussion points was then presented. Mr Patrone referred to the very few cases prosecuted in the Member States mainly due to difficulties in detecting the facilitators of illegal immigration or trafficking. He highlighted the need for all Member States to act together and promote an effective criminal judicial response alongside the efforts to ensure the rescue and protection of rights of smuggled migrants or victims of trafficking.

Giovanni Salvi (Chief Prosecutor, Public Prosecutor Office of Catania, Italy) presented the Italian experience in addressing the smuggling of migrants in the Mediterranean Sea. He referred in detail to the extremely organised criminal networks which are behind the smuggling of migrants. Migrants are boarded on large vessels to be transported to Italy and, while still on the high seas, are transferred into small and unsafe boats without a flag, to avoid interception of the large vessels and to trigger rescue obligations by the Italian authorities. Mr Salvi explained that after his office intercepted vessels without flags on the high seas, they were able to seize them and arrest their crew on the basis of the Protocol against the Smuggling of Migrants, the national

provisions on transnational crime and the UN Convention on the Law of the Sea. However, he pointed out that, recently, criminal networks have changed their *modus operandi* and transport migrants in vessels with flags. It remains to be seen whether this situation is likely to cause difficulties associated with the legality of interventions on the high seas under the international law of the sea. He also stressed the need for closer judicial cooperation and coordination and the importance of collecting and handling evidence properly to ensure that it is admissible in court.

Lukáš Starý (Eurojust National Member for Czech Republic) pointed to the difficulties in establishing whether a given case is actually one of smuggling of migrants by sea or of human trafficking. The distinction between these two crimes is not always obvious to authorities. An overview of the scope of the crime may not initially be available, as migrants may be smuggled into exploitation later in the process and become “trafficked”. Furthermore, rather numerous and fragmented legislation at EU and international level regulates these two crimes and may create difficulties in the choice of the rules that need to be observed and in the application of *lex specialis*. Mr Starý highlighted that a discrepancy exists between the large number of THB victims and migrants and the low number of convictions for these crimes. In this context he mentioned the Eurojust Strategic Project and Action Plan against THB which aims to assist national authorities in increasing the number of investigations and successful prosecutions. Consideration could be also given to extending the powers of the EPPO to cover these two crimes.

Katarzyna Cuadrat-Grzybowska (Office of the EU Anti trafficking Coordinator) presented the European Commission’s efforts to address human trafficking. THB is a severe violation of human rights, a complex transnational phenomenon that is difficult to detect and that requires a comprehensive and multidisciplinary approach at all levels. There is a need to work together to implement EU legislation and the strategy towards the eradication of THB. Differences exist between the smuggling of migrants and THB, but there are also links between the two. More information on these links is needed and the role of the Consultative Forum could be vital in this respect. The Commission is developing a new complete strategy to combat migrant smuggling in Europe to be published in the first half of 2015. Ms Cuadrat-Grzybowska invited Forum members to provide the Commission with their expertise in view of the developments at EU level to address THB and the smuggling of migrants.

Following these presentations, the Chair invited Forum members to participate in a general discussion. Practical experiences in detecting, investigating and prosecuting cases of THB and of smuggling of migrants were shared. A number of proposals were suggested for addressing challenges encountered in such investigations. The main conclusions which can be drawn from the oral interventions and the written contributions received from Forum members⁴ are as follows:

⁴ 13 written contributions were received from Forum members prior to the meeting. These were provided by Forum members from the following Member States: Belgium, Cyprus, Ireland, Greece, Spain, Lithuania, Hungary, the Netherlands, Poland, Portugal, the Slovak Republic, Finland and the United Kingdom.

Conclusions of the Consultative Forum on THB & Illegal Immigrant Smuggling

1. Forum members recognise that the phenomena of smuggling and trafficking of migrants through the sea are not only a problem for the coastal Member States, but an EU problem affecting, directly or indirectly, all Member States, which requires a joint effort at judicial level to enhance the prosecution and bring to justice smugglers and traffickers.

Challenges in the investigation and prosecution of THB and illegal immigrant smuggling

2. A number of Forum members pointed to the numerous challenges encountered by investigative and prosecuting authorities, in particular in detecting and identifying the organised crime groups and their leaders. This is mainly due to the sophisticated *modus operandi* of the criminal organisations. Most prosecutions relate to the criminal activity committed by those who provide the transport of migrants in boats, whereas only a few of them address the leaders of the organised crime groups behind this phenomenon. The limited exchange of information through Europol and the lack of coordination between Member States are seen as the main obstacles in identifying these organised crime groups.
3. Cross jurisdictional issues arise in these types of investigations; difficulties and delays are associated with finding, assessing and relying on evidence located in other Member States or in (neighbouring) third States. The execution of MLA requests addressed to third States proves to be particularly problematic.
4. According to some Forum members, destination countries face difficulties in verifying whether the migrants arrived in the EU by sea, as in many cases migrants have resided in different Member States before reaching their final destination country.
5. Forum members point to recurrent issues in considering prosecutions, in particular: the credibility of witnesses and their reluctance to cooperate; the absence of evidence of force, coercion, threats or fraud or difficulty attributing any such evidence to the suspects; establishing the age of a complainant in the case of children; the absence of independent corroborative evidence of the offence of THB in case there is no oral evidence obtained from victims or suspects; translation and interpretation problems in relation to victims from third States; and fragmented legislation.
6. Some Forum members point to problems related to the implementation of the Dublin II Regulation. In this respect, there are additional burdens for Member States of entry into the EU, due to the large amount of asylum applications that they are obliged to examine, regardless of where the applicants have lodged their asylum requests.
7. Furthermore, criminals, including smugglers and traffickers and even potential terrorists (i.e. foreign fighters in Syria that return to the EU) have been found among the migrants detected in vessels arriving in coastal Member States.
8. Alternative offences are prosecuted instead of or in addition to a human trafficking offence. A further challenge exists in establishing at first hand whether the offence committed is one of smuggling of migrants or one of human trafficking.

Best practices in investigation and prosecution of THB and illegal immigrant smuggling

9. Forum members recognise that challenges could be best addressed through cooperation and coordination between countries of origin, transit countries and destination countries. At the same time, effective legislation is considered essential to address this phenomenon and to clearly distinguish between smuggling and trafficking activities. Draft legislation is under consideration in one Member State aiming at extending law enforcement's powers to enter adjacent territorial waters when in hot pursuit of vessels suspected of trafficking.
10. Setting up joint investigation teams (JITs) where there might be identified criminality in more than one Member State is considered a best practice. The participation in coordination meetings organised by Eurojust is encouraged, including when agreeing on setting up a JIT.
11. Forum members consider the need for specialisation of prosecutors and the advantages of setting up nationwide networks of prosecutors to deal with this type of criminality.
12. The importance of supporting prosecutions by way of provision of appropriate evidence in the Member State(s) that are countries of origin of victims of human trafficking, when victims return to reside there, was also mentioned.
13. Another best practice is sharing the information collected with other Member States and channelling information at police level through Europol and Interpol.
14. A proposal is made for the initiation of and wide participation in European operations to tackle this type of criminality in the framework of the EMPACT (European Multidisciplinary Platform against Criminal Threats) on THB and illegal immigration.
15. Another proposal is to proceed with an inventory of illegal immigrants in an international database, so they could be more easily identified, their movement could be followed within the EU territory and their international protection could be better achieved, in particular in the case of unaccompanied minors.
16. Some Forum members suggest the consideration of posting Eurojust liaison magistrates in certain third countries of origin of migrants and victims of THB to reinforce judicial cooperation with such countries.
17. Sea border checks and participation in Frontex coordinated operations to intercept vessels on high seas and protect migrants have proved to be successful and should be further utilised.

The role of the Consultative Forum

18. The Consultative Forum can play an important role in exploring in further detail the key legal and practical issues identified in this field. It could be a "strong awakening voice" of the EU institutions, highlighting the difficulties and needs faced by Member States in investigation and prosecution of these offences.

19. Moreover, the Forum could share experiences, practices and relevant court decisions in the Member States. In this respect, in order to support the Forum, the latter asks Eurojust to consider the possibility of setting up an operational working group.
20. Forum members also identify the need for additional support from Eurojust, for example, in providing assistance in situations where conflicts of jurisdictions arise and coordination between Member States is needed, in assisting in information exchange, and in considering the setting up of JITs.
21. In the medium and long term perspective, given the trans-border nature of smuggling and human trafficking, consideration should be given to the need to ensure prosecution at EU level of THB and smuggling of migrants crimes, as well as the opportunity to extend the competence of the future European Public Prosecutor's Office (EPPO) to these crimes.

Session III – State of Play of Negotiations on the Draft Eurojust and EPPO Regulations

Hans G. Nilsson (Head of Division, Fundamental Rights and Criminal Justice, General Secretariat of the Council of the EU) presented a comprehensive state of play of the negotiations on the Regulation on the establishment of the EPPO and the Regulation on Eurojust. As to the EPPO, Member States' support has increased since the beginning of the negotiations in the Council but on the basis of a new collegial model differing from the hierarchical one initially proposed by the Commission. The Italian Presidency started the discussions on several issues which are still open (e.g. functioning of College and Permanent Chambers, the EPPO's competence, procedural guaranties, judicial review, dismissal of cases, choice of jurisdiction, etc.). The negotiations went more smoothly with regard to the Eurojust Regulation, probably because no major changes were introduced compared to the current situation. On 4 December 2014, the Council agreed on a Partial General Approach that covers the whole text of the draft Regulation with the exception of the provisions on the EPPO, data protection and confidentiality/security. Negotiations will continue within the Council and the European Parliament.

Open debate by Forum members

During the open debate, some Forum members expressed their serious concerns vis-à-vis the EPPO's collegial model currently under discussion in the Council: an overly complex structure and functioning would hamper the work of the EPPO in practice. In addition to these interventions, *Péter Polt's (Prosecutor General of Hungary)* opinion on an alternative "network model" was presented on his behalf. According to this model, each Member State should establish a dedicated prosecution office specialised in PIF crimes that would be connected at EU level by a special network, centrally coordinated at Eurojust and lead by the President of Eurojust who would also exercise the function of the European Prosecutor.

Pavel Zeman (Prosecutor General of Czech Republic) highlighted difficulties encountered by the Czech judicial authorities in prosecuting cases involving a non-regulated drug precursor. Awareness was raised regarding the threat posed by the spreading within Europe of this specific drug precursor found to be used in the Czech Republic on a large scale for the manufacture of methamphetamine. At the same time, Mr Zeman addressed a request to all

Forum members to support the initiative of listing this drug precursor in the category of scheduled substances stipulated by the relevant EU legal framework on drug precursors.

Closing Session

Next Meetings of the Consultative Forum

Aivars Ostapko (Deputy Prosecutor General of Latvia) announced that the 9th meeting of the Consultative Forum will be convened under the Latvian Presidency, with the support of Eurojust and in combination with a Strategic Seminar, on 4-5 June 2015 in The Hague. The focus of the Seminar and part of the Forum meeting will be on conflicts of jurisdiction and transfer of proceedings. The second part of the Forum meeting will be devoted to the interaction among JHA agencies and bodies under the new institutional and operational landscape that will emerge from the Regulations currently under preparation.

Robert Biever (Prosecutor General of Luxembourg) informed the Forum members of his intention to organise a meeting of the Forum under the Luxembourgish Presidency (second semester of 2015), in cooperation with Eurojust, also in the form of a two-day combined event. The main focus of the seminar and meeting would be the impact and consequences of the new EU Directives relating to procedural safeguards on the national criminal justice systems.

Meeting Conclusions

The main conclusions reached in Sessions I and II were presented. The Chair announced that, as usual, the report of the meeting will be circulated to all participants and the conclusions of the Forum, reflecting both the outcome of the discussions and the written contributions received, will be transmitted to the relevant EU institutions.