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NOTE

From : General Secretariat
To : Delegations

Subject : MEETING OF THE CONSULTATIVE FORUM OF PROSECUTORS
GENERAL AND DIRECTORS OF PUBLIC PROSECUTIONS OF THE
MEMBER STATES OF THE EUROPEAN UNION
EUROJUST (THE HAGUE), 23 JUNE 2011
OUTCOME REPORT

Delegations will find enclosed a report made by Eurojust on the above mentioned meeting.

OUTCOME REPORT

1. Introduction

A meeting of the *Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union* ('the Forum') took place at Eurojust's premises in The Hague on 23 June 2011. The meeting was organised with the support of Eurojust on the basis of the decision adopted by the Forum at the previous meeting held in December 2010, and was convened by the Prosecutor General of Hungary.

Aled Williams (President of Eurojust and National Member for the United Kingdom) welcomed the representatives of Prosecutor Generals' Offices from 25 Member States, as well as representatives of the Council of the EU, European Commission and Council of Europe. Eurojust was ready to provide assistance to the Forum from its practical experience in dealing with cross-border crime cases.

Péter Polt (Prosecutor General of Hungary) chaired the meeting and underlined the importance of the current meeting of the Forum as the first one dealing with substantive issues. He thanked the many Forum members who had provided in advance valuable written contributions on the two agenda topics: corruption and the European Investigation Order. He subsequently introduced these topics as well as the other items on the agenda.

2. Session I – Corruption

Communication of the European Commission on an EU Anti-Corruption Policy

Søren Schönberg (Member of the Cabinet of EU Commissioner for Home Affairs Cecilia Malmström, European Commission) presented the Communication of the European Commission on an EU Anti-Corruption Policy. He gave an overview of the new set of measures proposed by the Commission and described in particular the motivation behind the development of the measures, content and goals of the new package, including the new EU anti-corruption report that will be issued by the Commission every two years, starting in 2013. This report will provide an objective picture of selected aspects of corruption, measure trends and efforts across the European Union against a number of indicators, and contain specific recommendations to each Member State. In the long run, the report should also strengthen cooperation with other international monitoring systems, and in particular with GRECO, which could provide essential input to the new EU monitoring mechanism as well as prepare the ground for new EU initiatives to combat corruption.

GRECO's cooperation with the European Union and the possible contribution of its evaluation system to the development of an EU anti-corruption policy

Wolfgang Rau (Executive Secretary of GRECO) gave a presentation on GRECO's cooperation with the European Union and the possible contribution of its evaluation system to the development of an EU anti-corruption policy. Strengthening cooperation between the European Union and GRECO has been a constant agenda item in mutual discussions, but no decisive steps have been taken until recently. He pointed out the advantages of EU participation in GRECO, such as better coordination of anti-corruption policies in Europe, avoiding duplication of efforts and generating synergies, and identifying successful practices. EU participation could also lead to further strengthening of the impact of GRECO's recommendations. Mr Rau pointed out that, given its long-standing monitoring experience, GRECO can offer a suitable framework for discussing the key issues of anti-corruption policies.

Communication of the European Commission on the protection of the financial interests of the European Union

Alexandra Jour-Schroeder (Head of Criminal Law Unit, Directorate General Justice, European Commission) presented the Communication of the European Commission on the protection of the financial interest of the European Union. National judicial authorities do not always appear to have sufficient legal tools at their disposal to act effectively. As a result, although there is only one EU budget, the EU's financial interests are not protected with the same efficiency in all Member States. This problem, however, does not only depend on lack of effectiveness at national level, but it is also due to structural gaps and loopholes in the current EU legal framework. The new tools offered by the Lisbon Treaty, such as a new legal basis for legislation on fraud affecting the EU's financial interests (Article 325(4)), new measures on procedural judicial cooperation (Article 82), new directives containing minimum criminal law rules (Article 83), the future reform of Eurojust (Article 85) and the establishment of a European Public Prosecutor's office (Article 86), could offer appropriate solutions and further improve the protection of the EU's financial interests.

Summary of written contribution

Cedric Visart de Bocarmé (Prosecutor General of Liège, Belgium) presented a summary of the advance contributions received from the Forum members on the topic of corruption. The main contents of those contributions are included in the paragraph directly below. He also highlighted, *inter alia*, the importance of the existing international legal framework, and stressed that the implementation of these international legal instruments at national level can also trigger increased approximation among national legislations.

Main outcome of debate and written contributions

The Forum members stressed, in general, that corruption is an extremely serious problem causing major political, economic and social harm in the European Union and that criminal conduct related to public funds and EU financing constitute high-scale corruption cases with transnational links and heavy, damaging effects on the EU's financial interests. The main outcome of the debate and the advance written contributions can be summarised as follows:

- *New EU anti-corruption system:* The Forum welcomed the adoption by the European Commission on 6 June 2011 of the set of anti-corruption measures and the opportunity to comment on them at an early stage. These measures should bring added value, and duplications should be avoided. The participation of the European Union in the activities of GRECO was welcomed and GRECO's valuable experience was considered an extremely important input to the new EU anti-corruption strategy. Some Forum members suggested that the EU anti-corruption report should focus on a limited number of specific topics, mainly gathering comparable data and identifying trends and best practices. A number of topics were mentioned: prevention of corruption; corruption of EU officials, notably Members of Parliament and political leaders; corruption in public procurement; corruption in economic and financial activities (both in the public and the private sectors); cross-border corruption cases and their investigation and prosecution; corruption in manipulating sports results; procedural safeguards and protection of whistleblowers; and corruption in the health care system and within the pharmaceutical sector.
- *Concrete problems:* The Forum expressed concerns in relation to problems faced by prosecutors in corruption-related crimes, notably with regard to cases having a cross-border dimension. The following major obstacles to investigation and prosecution in corruption cases were identified: difficulties related to gathering and use of evidence (e.g. evidence collected by OLAF during administrative investigations that can often not be used because of national restrictions on using evidence from foreign administrative authorities); lack of coordination of investigations occurring simultaneously in various Member States; difficulties in getting timely intelligence, as the crime has no direct victims and brings benefits to those involved; in cases of high-level corruption, the public attention and the impact on politics; often fragmented national systems.

- *Best practices:* The following best practices were identified and recommended:
 - In cross-border corruption cases, Eurojust coordination meetings and Joint Investigation Teams have proved to be extremely helpful; more extensive use of these tools is advisable.
 - Specialisation of prosecution services is indispensable to fight more efficiently against corruption; in countries where specialised prosecution units do not yet exist, they should be set up with competence to deal with all types of corruption-related criminal offences, including in cross-border cases.
 - Appropriate training for prosecutors at all levels on specific problems, features and legislation on corruption should be provided.
 - Early involvement of prosecutors and close cooperation with financial and other experts in relevant professions should be ensured.
 - A combination of covert investigative measures and fundamental rights should be used.
 - Increased transparency, e.g. in the area of taxation and use of public funds, could have a strong preventive effect. For instance, a register of how much individuals earn and owe to tax authorities would help transparency and discourage corruption.

- *Seizure and confiscation of criminal assets:* Confiscation and recovery of the proceeds of crime are crucial tools in the fight against serious cross-border crime, in particular in the fight against corruption and money laundering. In this context, the difficulties in identifying assets and asset holders, especially when hidden in third States, and the lack of a consolidated register for bank accounts, should be overcome. Direct access by prosecutors to relevant registers (vehicles, vessels, real estate) is essential.

- *Measures to be taken by the European Union:* The European Union should establish a clear and simple regulatory framework, i.e. without ambiguities, gaps and contradictions, to secure the development of common standards in the legislation against corruption. The Treaty on the Functioning of the EU paves the way to further approximation of laws and regulations in specific areas of criminal procedure (Article 82(2)), and in various areas of crimes, including corruption (Article 83(1)). The principle of mutual recognition needs to be reinforced and the obstacles to judicial cooperation must be overcome. Furthermore, a common definition of corruption crimes, including those with a cross-border dimension, and minimum rules of criminal procedure could greatly facilitate the execution of requests for MLA. Finally, common standards for the gathering and admissibility of evidence are needed, and the shortcomings stemming from the variety of competent national authorities, and the diversity of related competences, must be addressed.

- *Conclusions on concrete endeavours:* The Forum could provide active support to the elaboration of the future EU anti-corruption report by helping identify the most successful practices against corruption, raising awareness, and promoting sharing of experiences. A suggestion was made that Eurojust should set up a working group to serve as a hub for exchanges of information and best practices in the fight against corruption. This group could also assist the Consultative Forum in its contribution to the EU anti-corruption report.

3. Session II – The European Investigation Order (EIO)

Status of negotiations

Hans G Nilsson (Head of Division, Criminal Judicial Cooperation, General Secretariat of the Council of the European Union) gave an overview about the status of negotiations and the main characteristics of the Draft Directive on the European Investigation Order in criminal matters in light of the partial agreement reached on Articles 1 to 18 during the most recent JHA Council meeting (9-10 June 2011). Discussions on the remaining articles of the Draft Directive (from Article 19 to the end) had just commenced in CATS on 22 June 2011. Since the ordinary legislative procedure applies, the proposed Directive will need to be agreed upon by both the Council and the European Parliament. Both institutions will look at the proposal in parallel. The overall process is likely to last several months and thus room for discussion and new changes still exist, including on Articles 1 to 18. In this context, the opinion of the Forum was very much welcomed.

Eurojust opinion on the EIO

Vincent Jamin (Assistant to the Eurojust National Member for France) presented the opinion of Eurojust regarding the draft Directive on the EIO¹. In January 2011, Eurojust was requested by the Hungarian Presidency to provide the Council preparatory bodies with an opinion on the EIO and also suggested collecting the views of the EU's Prosecutors General via the Consultative Forum. The Eurojust opinion, after approval by the College, was presented at the CATS and COPEN meetings in March 2011.

Summary of written contributions

Cándido Conde-Pumpido Tourón (Prosecutor General of the Kingdom of Spain) and *Jorge Espina (Prosecutor, Office of the Prosecutor General of Spain)* introduced and presented the summary of the written contributions provided in advance by Forum members. The main contents of those contributions are included in the paragraph directly below.

¹ Council doc. 6814/11 COPEN 26 EUROJUST 22 EJM 15 CODEC 270.

Main outcome of debate and written contributions

The Forum members welcomed the opportunity to contribute to the discussions on the draft Directive regarding the EIO. The main outcome of the debate and the written contributions received from the Forum members beforehand can be summarised as follows:

- *General remarks:* The initiative for a Directive aimed at replacing the current MLA framework by a single comprehensive instrument based on the principle of mutual recognition was welcomed. The vast majority of the Forum members considered that the consolidation of MLA instruments into one single instrument is likely to facilitate and simplify judicial cooperation in criminal matters. However, the instrument to be adopted should be efficient and user-friendly for practitioners. Any step backward in the development of judicial cooperation should be avoided.

A few members of the Forum expressed concerns regarding the impact on the investigative capacity and available resources of the Member States to be able to execute an “order” (with mandatory set of rules and deadlines) instead of a “request” for legal assistance.

- *Scope of the EIO:* A few members of the Forum suggested initially limiting the scope of the EIO to a set of specific investigative measures (such as searches, seizures or phone-tapping) and, possibly, gradually expanding the areas covered at a later stage.

However, the majority of the Forum members stressed that the scope of the Directive should be as broad as possible, covering those investigative measures that are most frequently used. The exclusion of Joint Investigation Teams (JITs) from the scope of the Directive is justified due to the specific regime applicable in that field, which constitutes in itself an enhanced cooperation mechanism. However, in line with Eurojust's opinion, the Forum members expressed concerns about the exclusion of freezing of instruments and proceeds of crime from the scope of the new instrument. The use of different forms and regimes (according to Framework Decision 2003/577/JHA and the Directive on the EIO) might seriously hamper cooperation and the existing fragmentary regime would not be completely replaced and simplified.

- *Competent issuing and executing authorities – proportionality issue:* The definition of ‘issuing authorities’ according to Article 2(a)(ii) respects the diversity of national systems, and the validation procedure according to Article 5a(3) ensures that the issuing of the EIO remains within the limits of *judicial* cooperation. However, minimisation of the risk of delays caused by the validation procedure was considered necessary. To achieve this goal, the introduction of practical arrangements to avoid exchanges between issuing and executing authorities, as suggested by Eurojust in its opinion, was welcomed. Furthermore, clarification of the definition and judicial nature of ‘executing authorities’ are equally important.

Article 5a(1), which attempts to address the proportionality issue in order to overcome the problems currently experienced in the operation of the EAW, was welcomed. The majority of the Forum members considered the issuing authority as best placed to decide on the measure. A few members suggested introducing a threshold in the Directive in order to exclude the application to minor offences.

A suggestion was made to replace, where necessary, the term ‘States’ by ‘authorities’, as the principle of mutual recognition applies to judicial authorities.

- *Recognition and execution:* The Forum welcomed the principles contained in Article 8(1) and (2) on recognition and execution that follow the current legal framework (1959 and 2000 Conventions) and provide good practical results (e.g. facilitating the admissibility of the evidence gathered). Adopting a short and simple form to enable smooth execution of the order was recommended. The importance of the possibility for the issuing authority to be present during the execution of the investigative measure requested (Article 8(3) and (3a)) was also stressed.
- *Recourse to a different type of investigative measure:* The recourse to an investigative measure other than the one requested should not jeopardise the achievement of the requested outcome. Principles of mutual recognition and mutual trust should apply in this regard. The importance of consultation between the competent authorities before the executing authority takes recourse to a different type of investigative measure, e.g. to ensure that the evidence gathered is admissible in the issuing State, was underlined. The importance of the role of Eurojust in assisting and facilitating the consultation process, upon request of the competent authorities, was also highlighted.

- *Grounds for non-recognition or non-execution:* The vast majority of the Forum members were of the opinion that the grounds for non-recognition or non-execution should be as limited and specific as possible in order to make the instrument applicable in practice. Some concerns were expressed with regard to Article 10, which was considered too complex and cumbersome for practitioners. Furthermore, these provisions run the risk of different interpretations in the Member States and consequent hampering of judicial cooperation. Finally, while the application of the ground for refusal based on the principle of *ne bis in idem* might create problems in practice, the draft text as resulting from the last JHA Ministers meeting of 9-10 June 2011 was considered an improvement.

4. Other business and conclusions

Suggestions for future working methods of the Consultative Forum

Following an initial suggestion put forward by Cándido Conde-Pumpido Tourón to support the Forum in its future activities, Péter Polt presented, on behalf of the Board of the Forum, an alternative proposal to the representatives of the next Trio Presidency (Poland, Denmark and Cyprus), whereby the current Trio Presidency (Spain, Belgium and Hungary) offers its active support and commitment to the next Trio Presidency in carrying on the activities of the Forum to ensure continuity. This decision would not prevent the Forum from making any other arrangements beyond 2012. The representatives of the Polish Presidency thanked the Board for this proposal.

Priorities for the upcoming Polish Presidency

Andrzej Seremet (Prosecutor General of Poland) presented the priorities of the Polish Presidency in the area of judicial cooperation in criminal matters: the promotion of MLA, the strengthening of mutual recognition for the gathering of evidence and the launch of a programme for the protection of witnesses. With regard to witness protection, a questionnaire had already been sent to all Forum members to collect information on national regulations and practices. The results of this questionnaire will be presented at the next meeting of the Forum in December 2011, and the proposals of the Forum will be conveyed to the competent EU institutions.

Robert Kucharski (Prosecutor, Office of the Prosecutor General of Poland) provided additional information on the new Witness Protection Programme, focusing in particular on the aspects to be discussed in the next meeting of the Forum. The goal of the programme is to put in place a consistent and harmonised set of standards and appropriate measures throughout the European Union.

Conclusions

Péter Polt provided a summary of the main conclusions of the meeting (*see supra* ‘Main outcome of debate and written contributions’) and informed the participants that the opinions of the Forum will be transmitted to the competent EU institutions.

The next meeting of the Forum, convened by the Prosecutor General of Poland, will take place at Eurojust’s premises on 16 December 2011.