



# Report on Eurojust's casework in the field of migrant smuggling



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## Executive summary

The report is based on the analysis of a selection of 30 migrant smuggling cases presenting specific judicial cooperation challenges and features, out of a total of 189 registered at Eurojust, covering the period from 1 January 2015 to 31 December 2017. The analysis was complemented by practitioners' views, expressed during dedicated Eurojust meetings. The report draws on statistical information, identifies the main features of the cases at hand, highlights specific obstacles and challenges, presents the judicial responses developed to address those obstacles and challenges and summarises best practice and lessons learned.

The casework analysis reveals that while the number of migrant smuggling cases registered at Eurojust is limited, such cases require a significantly higher level of judicial cooperation than other cases at Eurojust due to their multifaceted and cross-border nature. Coordination meetings (CMs) at Eurojust routinely include more than two Member States. This is indicative of the complexity of the cases and the practitioners' overarching approach to addressing the phenomenon, beyond the strict remits of their national jurisdictions, by involving transit and destination States, when possible.

In the context of judicial cooperation, migrant smuggling cases are prone to generate conflict of jurisdiction. Further, the sophisticated, demand-driven and adaptable activities of most organised crime groups (OCGs) complicate the judicial response even more. OCGs operate in different States and have developed poly-criminality activities, as indicated, for example, by the extensive use of forged or fraudulently obtained administrative documents. It is an even greater challenge to provide an all-encompassing judicial response to these activities due to the inherent difficulties of bringing together national cases in various degrees of advancement, involving specialised OCGs operated by different individuals in a variety of countries, including third States. Collaboration with the latter proves to be challenging and results in a limited level of judicial cooperation.

The challenge is exacerbated by the limited range of investigative tools. Controlled deliveries because they might prolong the danger to migrants' safety are rarely used; financial investigations are hampered by the use of alternative banking systems, such as *hawala*.

A coordinated approach at European Union (EU) level is essential for an effective judicial response to migrant smuggling. Eurojust is a key facilitator of early information exchange, when available, including by organising coordination meetings and by seeking the involvement of Europol. Eurojust is instrumental in detecting links between national investigations, thus enabling to dismantle the entire cross-border OCG. Agreeing on prosecutorial strategies contributes to unveiling previously undetected activities of the OCG network and minimises the risk of conflict of jurisdiction. Joint investigation teams (JITs) are a useful tool to identify common objectives, exchange information and agree on joint strategies.

Eurojust's casework also reveals that creative solutions are being developed by practitioners. The North Sea Task Force exemplifies a successful regional mechanism of judicial cooperation fostering prosecutorial cooperation amongst States along the smuggling routes. Providing practitioners with ready-to-use tools that allow the speedy establishment of JITs is intended to limit the OCGs' ability to regenerate. These developments are indicative of efforts made by practitioners to design a tailor-made judicial response to migrant smuggling. Mutual trust and confidence remain the preconditions for a successful engagement at EU level.

## Methodology

The report is primarily based on the analysis of 30 migrant smuggling cases registered at Eurojust, regarding the period from 1 January 2015 to 31 December 2017 (the reporting period). The cases were selected from the 189 migrant smuggling cases registered at Eurojust during the reporting period, based on their particular obstacles, challenges, legal issues and best practice.

The statistics presented in Section 1 of this report have been generated from the Eurojust Case Management System and reflect the main features of all migrant smuggling cases registered at Eurojust during the reporting period. The reporting period is at times extended back to 2012 to put trends and patterns into perspective.

Supplementary statistical information is occasionally provided to support or complement the findings stemming from the casework analysis. Documents and reports from EU partner organisations along with practitioners' views expressed during dedicated Eurojust meetings also supplement or complement the findings.

## Introduction

Owing to a wide variety of push factors, ranging from poverty to persecution, the European Union has seen an unprecedented flow of migrants into its borders over the last years. In 2015 alone, more than one million migrants entered the European Union. Many migrants utilise the illegal services of criminal networks, which have managed to thrive on their needs by providing a broad range of means and methods to facilitate migrant smuggling into the European Union.

Migrant smuggling is a lucrative business supported by a high and continuous demand. Migrant smuggling jeopardises the migrants' physical integrity or even their lives, is disruptive to the economy and society of the States impacted, and, as such, is criminalised in the majority of Member States.

Within the broader United Nations (UN) context, the reference instrument is the '[Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime](#)', which establishes a series of guidelines for criminal offenses and a framework for cooperation, particularly by way of information exchange.

In the European Union, migrant smuggling is understood as the facilitation of third State nationals' entry into, and transit across, the territory of a Member State in breach of the legislation of the Member State(s) concerned, as well as the facilitation of residence of third State nationals.

The definition of **migrant smuggling implies that this crime type involves more than one State**. As such, migrant smuggling cases are natural candidates for international judicial cooperation.

At EU level, the legal basis for sanctioning migrant smuggling is provided for in the 'Facilitators' Package' composed of [Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence](#) and [Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence](#).

Eurojust's casework is a useful source of information which identifies specific obstacles in the context of judicial cooperation and the way they can be overcome by feeding the discussion on how to best address this phenomenon.

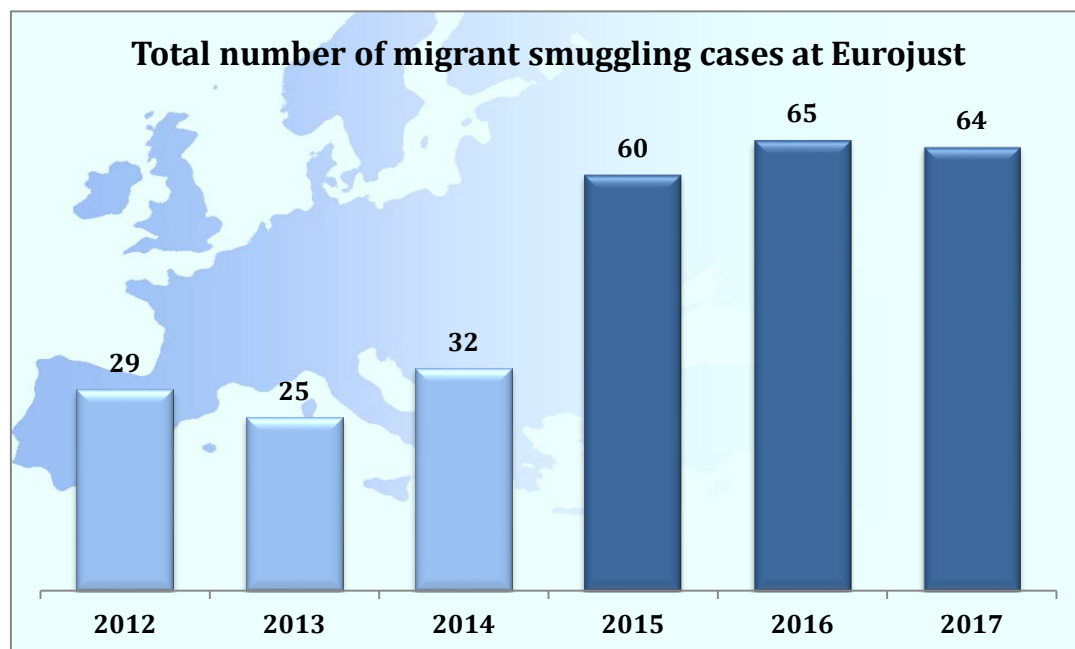
The report draws on statistical information (Section 1), identifies the main features of migrant smuggling cases (Section 2), highlights the specific obstacles and challenges (Section 3), analyses how the judicial tools and instruments are applied (Section 4) and provides an overview of best practice and main lessons learned (Section 5).

## 1. Statistical overview

### 1.1. Migrant smuggling cases: number and main features

In this subsection, the reference period is extended to 2012, 2013 and 2014 to better describe general trends and features. The overall number of cases registered at Eurojust in the reporting period (2015-2017) remains stable, but if those cases are analysed starting from 2012, a clear and sustained increase is detectable since 2015, when more than a million entered the European Union.

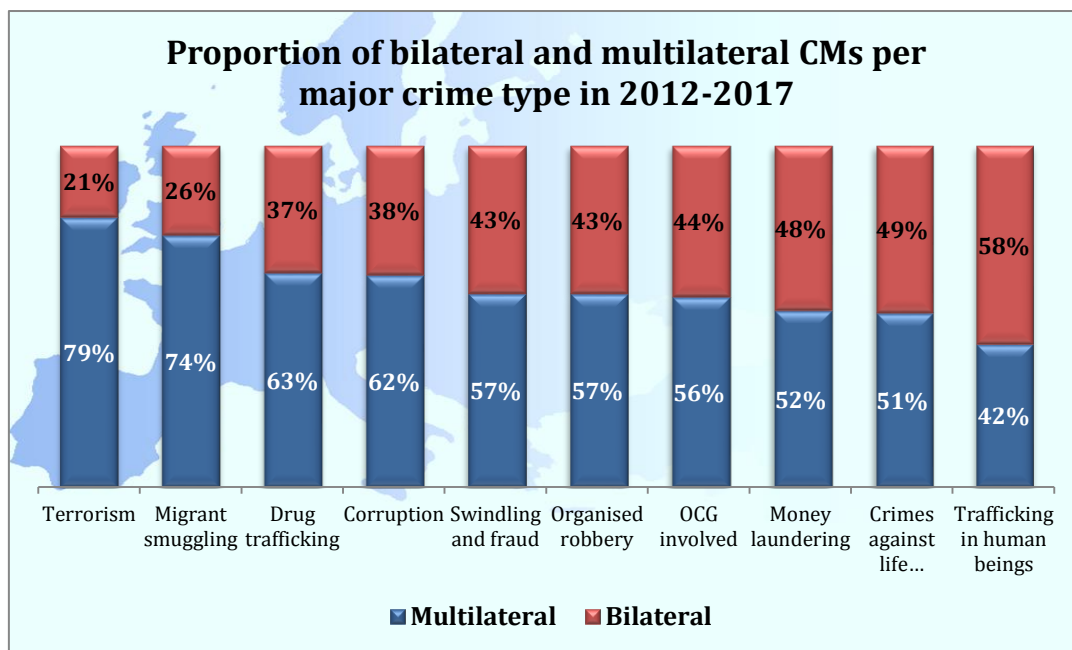
The overall number of cases registered at Eurojust seems to be relatively marginal, compared to the magnitude of the migration flows since the beginning of the migration crisis and the assumed number of facilitated entry and residence of migrants in the European Union. The relatively low number of migrant smuggling cases registered at Eurojust is also limited in comparison with the overall number of cases in other crime types. Migrant smuggling cases amount on average to 2,7 per cent of the overall number of cases registered at Eurojust in the reporting period, compared to 1,7 per cent in the period 2012-2014



Coordination meetings (CMs), coordination centres (CCs) and joint investigation teams (JITs) are the main judicial cooperation tools at Eurojust. They facilitate the exchange of information amongst the competent national authorities, support the execution of legal assistance measures, coordinate

ongoing investigations and prosecutions, as well as detect, prevent and overcome judicial cooperation obstacles, such as conflict of jurisdiction.

Eurojust’s casework on migrant smuggling indicates that the majority of the CMs are multilateral (as opposed to bilateral). The chart below illustrates the practitioners’ efforts to address the issue in a holistic fashion, beyond a bilateral approach, by seeking to involve, when possible, transit and destination Member States. It further indicates the percentage of bilateral versus multilateral CMs, within the same crime type, for the period 2015-2017. Migrant smuggling ranks second with a 74 per cent of multilateral CMs, after terrorism-related CMs.

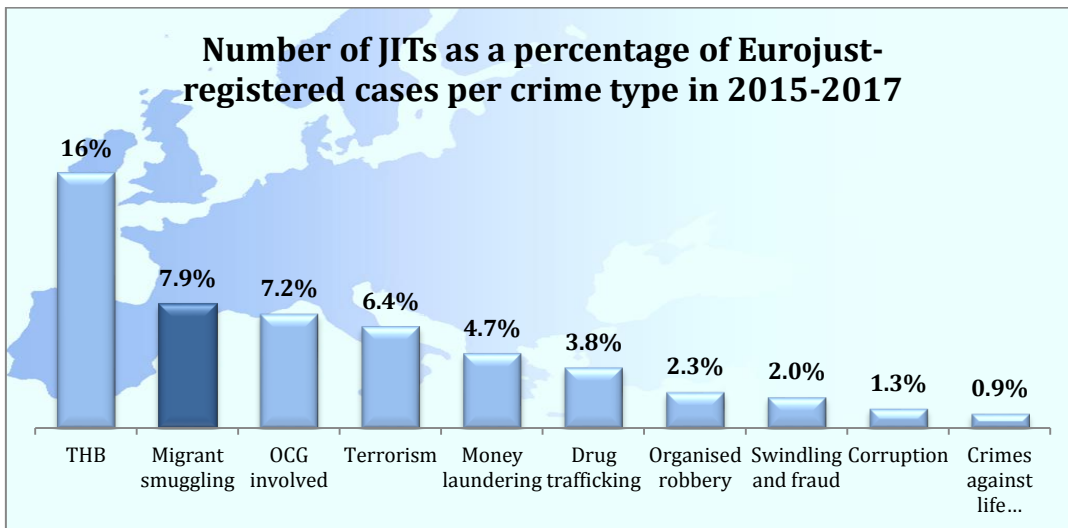
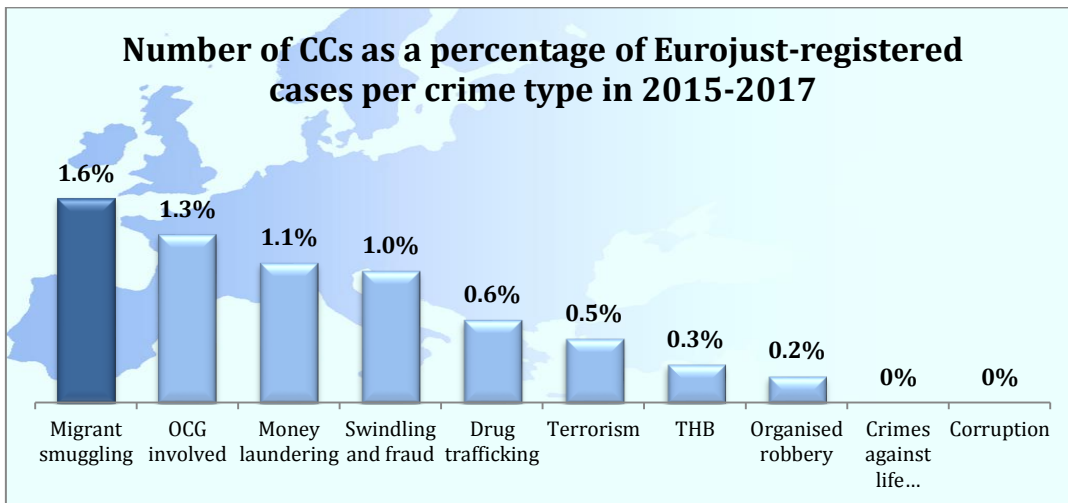
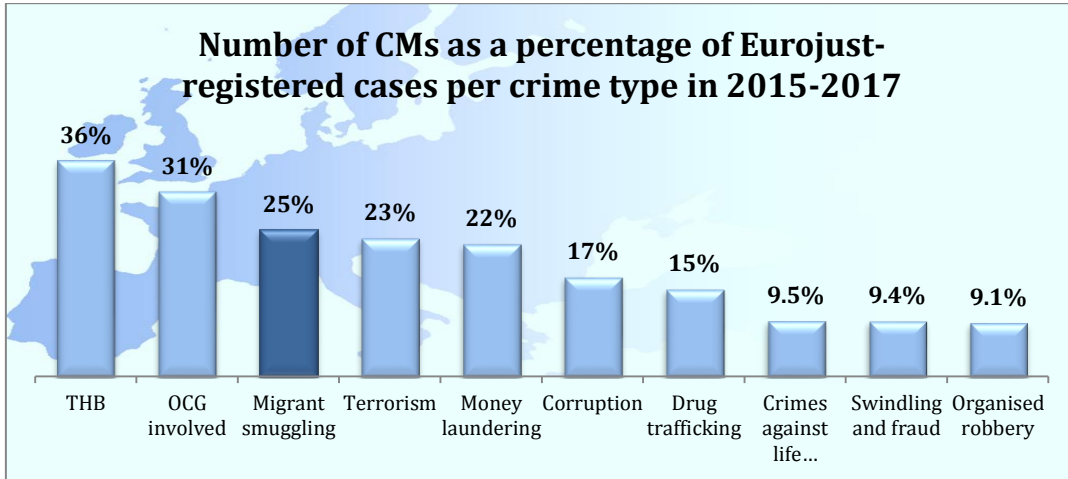


The table below indicates a yearly breakdown of the total number of multilateral and bilateral CMs on migrant smuggling cases since 2012. Except in 2013, the ratio between bilateral and multilateral CMs ranges from 1-2 to 1-5.

Calendar year	Total number of CMs	Bilateral	Multilateral
2012	18	3	15
2013	5	3	2
2014	10	3	7
2015	20	4	16
2016	12	3	9
2017	15	5	10

The three charts below reflect the number of CMs, CCs and JITs, respectively, as a percentage of the total number of Eurojust-registered cases per crime type. The charts show that compared to other crime types, migrant smuggling cases rank on average first in terms of CCs, second in terms of JITs and third in terms of CMs. With respect to CCs, however, the overall number of CCs at Eurojust is

limited regardless of the crime type. Nonetheless, **migrant smuggling cases belong to the top three crime types triggering the most frequent use of judicial cooperation tools** within Eurojust.

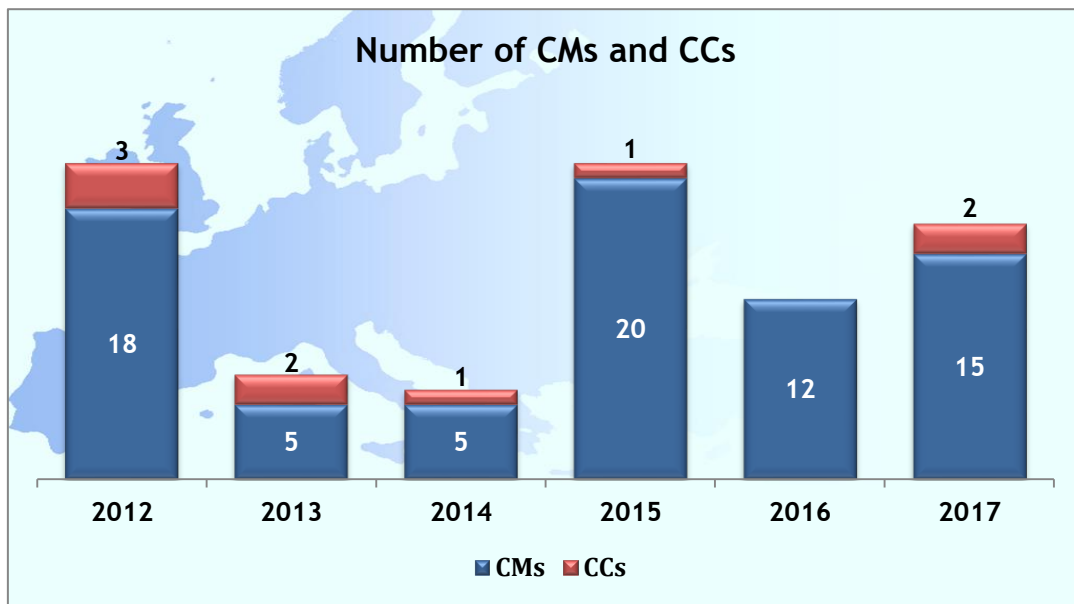




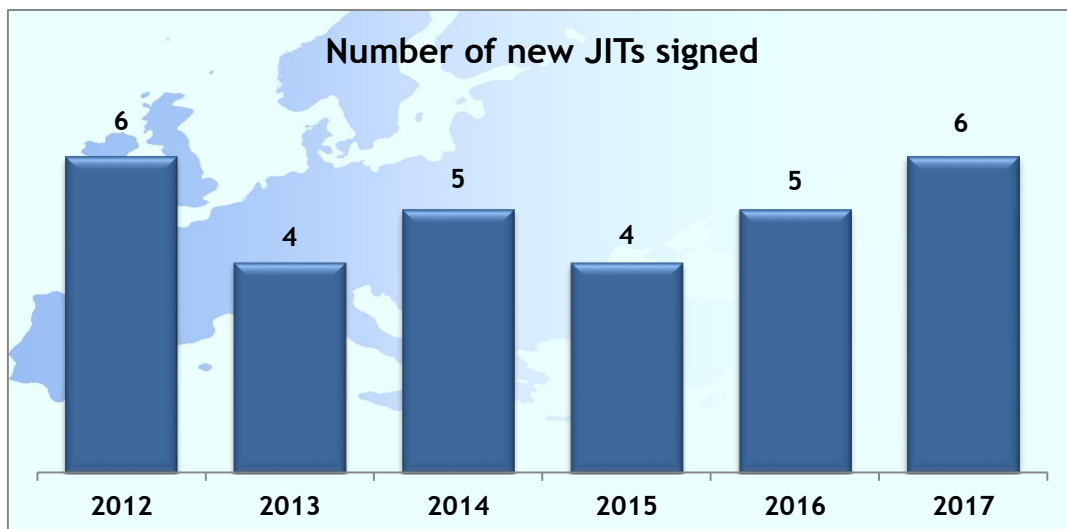
In summary, despite the overall limited number of cases registered at Eurojust, **migrant smuggling cases require a significantly higher level of judicial cooperation**, supported through CMs, CCs and JITs.

### 1.2. Number of CCs, CMs and JITs in migrant smuggling cases

This subsection puts figures into perspective by extending the reference period to 2012, 2013 and 2014. The number of CMs tends to remain relatively stable, with the exception of the period 2013-2014.



The number of JITs remains stable with an average of five per year, as indicated in the chart below<sup>1</sup>.

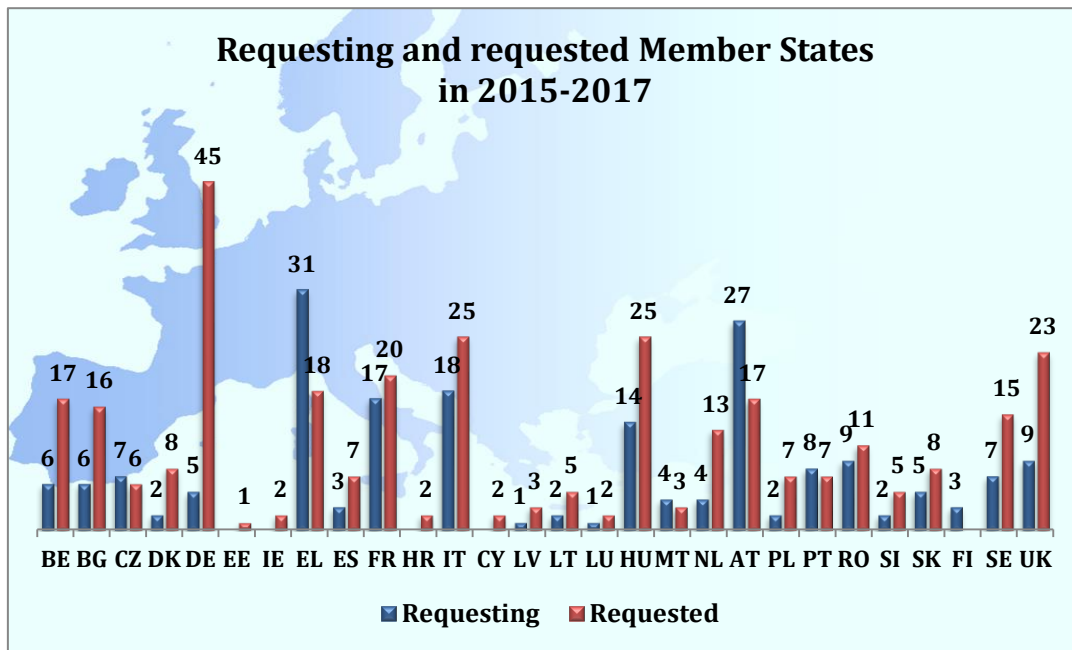


<sup>1</sup> For a more detailed analysis of the main features and challenges of JITs set up in migrant smuggling cases, see *Section 4.5*, on page 36.

### 1.3. Requested and Requesting Member States

The chart below indicates that requests for international assistance are in most cases submitted by Greece, Austria, Italy and France. Germany ranks by far first as a requested State, followed by Italy, Hungary, the UK, France and Greece.

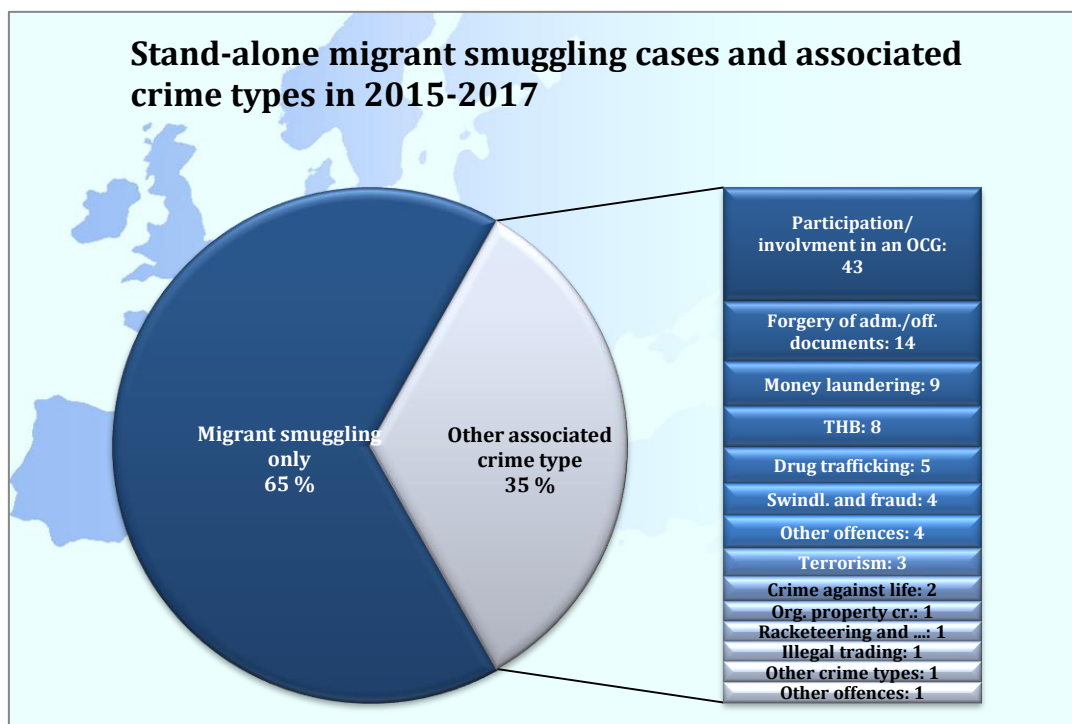
While some Member States are admittedly more active than others in this crime type, the overall distribution of requests among the Member States demonstrates that this is an EU-wide phenomenon.



## 2. Complexity and diversity of migrant smuggling cases

### 2.1. Nexus between migrant smuggling and other forms of criminality

Eurojust's casework reveals the poly-criminality that is linked to migrant smuggling. The most frequently associated crime types are the participation/involvement in an OCG, forgery of documents, money laundering and trafficking in human beings (THB), as indicated below.



The prevalent use of fake, forged or fraudulently obtained documents, primarily identity documents, is apparent in a significant number of cases.

In a case illustrating the nexus between fake, forged or fraudulently obtained documents and migrant smuggling, a group of non-EU smugglers located in one Member State was shipping forged travel documents across Europe. Most of the final recipients of these documents were other OCGs and the migrants themselves. One Eurojust case<sup>2</sup> revealed that an OCG operated four forgery facilities, where it allegedly produced counterfeited documents. The OCG was believed to have facilitated the smuggling of Iranian nationals from Greece to the UK, often via France and Spain, by using counterfeit documents or impersonating their legitimate owners. As a result of a joint action day, the facilities were dismantled. Forgery equipment, EUR 50 000 in cash and hundreds of documents were seized.

Eurojust's casework also shows that, at times, OCGs fraudulently used Schengen visas. In one case, the authorities of Member State A realised that, although a Schengen visa was issued by Member State B, migrants would actually never transit the latter. The use of fraudulently obtained Schengen

<sup>2</sup> See Eurojust/Europol joint press release of 25 March 2015, titled '[Pan-European operation dismantles immigrant smuggling network with 77 arrests](#)'.

visas was also noted in that case. Further inquiry revealed in particular the abuse of EU companies, as their details were downloaded from the internet and utilised to support visa applications.

One case revealed links between an OCG involved in smuggling into the EU migrants from third States, including but not limited to the Middle Eastern and North African Region, and the fact that the OCG operated the same route to also smuggle jihadists who belonged to a terrorist cell. Specifically, the OCG was believed to have facilitated the terrorist cell's activities, by providing counterfeit documents and other logistical support to allow the suspected terrorists to freely travel across the European Union.

The abuse of the asylum procedure is also evident: migrants claim asylum in one Member State before being smuggled to their final destination Member States. Some cases reviewed indicate that the *modus operandi* of certain OCGs is to persuade migrants to fraudulently apply for asylum. The assumed rationale behind it is to grant a semi-official legal status to migrants, thus allowing the OCG to organise their smuggling while they are waiting to be transferred to asylum centres.

Links between migrant smuggling and THB were also detected. One case notably refers to an OCG suspected of trafficking women from Member State A to Member State B to enter into sham marriages with non-EU nationals to facilitate migrant smuggling into Member State C. Further, some of the women involved may have been forced into prostitution. Money laundering investigations were also initiated in that context.

The difficulty in delineating between THB and migrant smuggling activities is also evident in one Italian case in which investigations against an OCG focused on migrant smuggling but were subsequently redirected as the OCG was apparently engaged in trafficking Nigerian women for sexual exploitation. The proper legal qualification of the crime type bears significant consequences, mainly but not exclusively in relation to the protection of victims of THB, as regulated by [Directive 2011/36/EU](#)<sup>3</sup>, since the protection requirement in the Directive does not apply to migrants being smuggled.

A nexus also exists between migrant smuggling and fraud. The investigations in one case revealed that EU 'wives' of third State nationals, contracted through sham marriages, became active partners of companies linked to the OCG and registered in Belgium, as they bought companies' shares to allow their husbands to reside in the EU and receive undue social and other types of benefits. The wives were self-employed to meet the obligation to sustain their spouses. Shares were being transferred from one wife to another, allowing them to become partners of the companies, thus perpetuating the scheme. The women travelled back to Portugal and would occasionally return to Belgium in case of police/immigration checks. The investigations in Belgium also revealed that Romanian, Polish and Slovakian females were being recruited for the same purpose.

Some OCGs jeopardise even the lives of migrants. Consequently, certain smugglers were charged with manslaughter or accused of harassment and inhumane treatment.

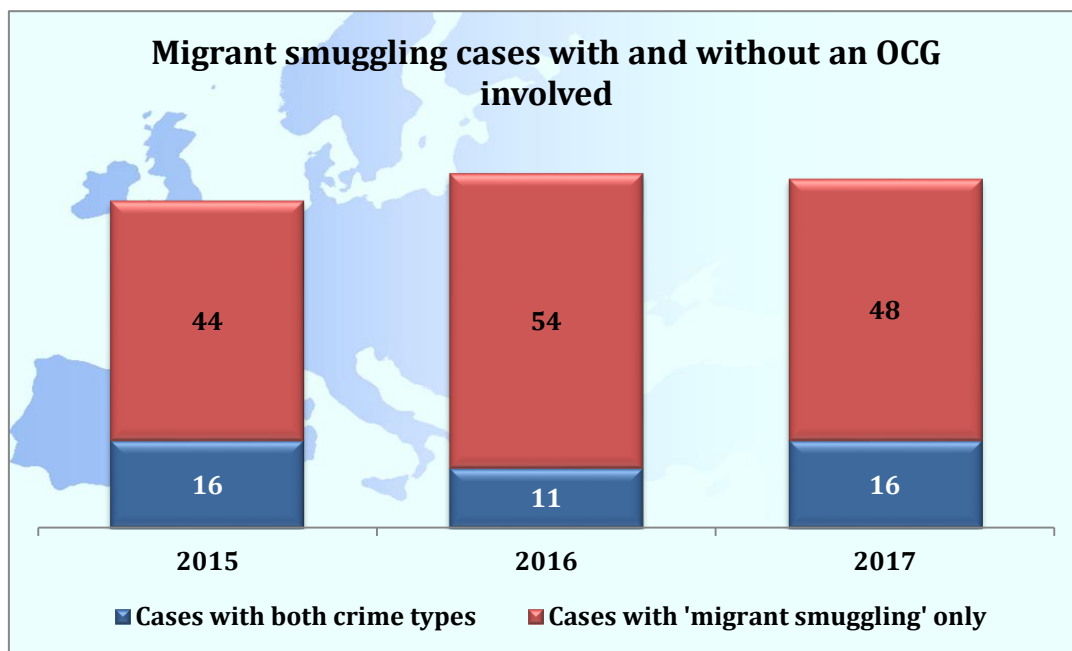
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<sup>3</sup> [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.](#)

## 2.2. Main features related to OCGs

As participation in an OCG is the crime type mostly associated with migrant smuggling in Eurojust’s casework, it is important to analyse the main features of migrant smuggling cases that involve OCGs.

The chart below indicates the yearly proportion of migrant smuggling cases where an OCG is mentioned. The significant proportion of migrant smuggling cases involving OCGs is indicative of the complexity of the criminal activities associated with those cases.



The majority of Member States have introduced in their legislation a self-standing offence provision on ‘participation in a criminal organisation’ (or similar) as defined in Article 2 of the Council Framework Decision 2008/841/JHA [on the fight against organised crime](#)<sup>4</sup>. In addition, Member States may regard offences committed within a criminal organisation as an aggravating circumstance in combination with a predicate offence. In the above-mentioned cases, migrant smuggling is the predicate offence.

The legal qualification of participation in an OCG could be utilised by Member States **to cover within their investigations those forms of criminal behaviour which would otherwise not be considered illegal and thus punishable**. For example, in Member States where sham marriages are not criminalised, such marriages can still be criminalised if considered as activities performed by an OCG.

Different levels of sanctions imposed by the Member States in their implementation of the Council Framework Decision 2008/841/JHA might incite OCGs to forum shopping. Agreeing at EU level on which jurisdiction is best placed to prosecute in each case may mitigate this risk.

<sup>4</sup> [Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime](#).

In addition, Eurojust casework describes a number of specific features associated with the *modus operandi* of the OCGs.

Firstly, OCGs have the ability to remain unnoticed, particularly in EU transit States where, apparently, no stopovers or changes of transportation are made *en route* to the final destination States, thus complicating the creation of an overview of the entire smuggling route as well as the initiation of criminal proceedings in those States. For example, the decision to establish a JIT might not be made if the participants come to realise that they are at different investigative stages. In such a case, some of them might be dissuaded from committing to a JIT agreement as they would require more time to build their own case.

Secondly, the complexity of the OCGs, including at times their segmented structure, is also a frequent feature. In one case, the structure of the OCG allowed to offer full service to the migrants: provision of false documents at source, facilitation of the issuance of a residence permit, transportation, accommodation as well as jobs provided while in transit and at destination. Moreover, OCGs are typically divided into specialised sub-cells, such as suppliers, drivers, money handlers and couriers. It stems from the cases analysed that each member of the OCG has a predefined role and acts under the supervision of a leader.

Thirdly, the hierarchical structure of the OCGs has also been identified as a distinct feature in Eurojust's cases. One case pointed out the existence of three layers: (i) the leaders of the OCG who smuggle migrants into the EU; (ii) the ones providing logistical support, tasked with the recruitment of drivers; and (iii) the drivers themselves.

Eurojust's casework, however, lacks the required information to conduct a detailed analysis of whether and how various OCGs interact with one another.

### 3. Obstacles and challenges in the prosecution of migrant smuggling cases

#### 3.1. Legal, operational and practical topics discussed

This section highlights the legal, practical and operational topics discussed in the migrant smuggling cases analysed. The results listed in the charts below stem from all migrant smuggling cases registered at Eurojust in the reporting period (2015-2017).

The chart below indicates that evidence-related issues, *ne bis in idem* issues, conflict of jurisdiction and transfer of proceedings were among the most discussed topics.

Legal Topics under Discussion	Cases
Evidence issues	18
<i>Ne bis in idem</i> issues	12
Conflict of jurisdiction	8
Transfer of proceedings	8
Confidentiality issues	2
Recognition of foreign decisions	1
Other issues	8

The chart below shows that the different stages of national proceedings and the identification of the competent executing authority are the operational issues most commonly discussed.

Operational Topics under Discussion	Cases
Different stages of national proceedings	15
Identification of the competent executing authority	7
Simultaneous and coordinated execution of measures	5
Other issues	7

The urgency of the execution of requested measures and translation issues are the two main practical issues discussed.

Practical Topics under Discussion	Cases
Urgency of the execution of requested measures	5
Translation issues	4

Expenses issues	3
Other issues	3

The following section substantiates the above-mentioned statistical information with concrete examples stemming from the cases analysed.

### 3.2. Gathering of information and evidence-related issues

Gathering information in migrant smuggling cases and ensuring its preservation and transformation into admissible evidence sometimes pose a challenge for practitioners.

For instance, the risk of destroying or altering evidence, particularly during military operations in the Mediterranean Sea, such as EUNAVFOR MED<sup>5</sup>, was highlighted in one case. Such evidence may include documentary evidence, telecommunication devices, fingerprints/DNA traces, as well as statements of victims, witnesses and suspects. One case revealed that the difficulties related to the collection of evidence are often exacerbated by the urgency of the operations, unfavourable weather conditions and the time lapse between the detection of the smuggling vessel and the start of the first inspection on board. As a result, **evidence may not be gathered in accordance with the required standards of national procedures**, which raises concerns with regard to securing admissible evidence.

To overcome this challenge, participants in one CM discussed the possibility of gathering and exchanging evidence within the framework of military operations. They considered that such gathering and exchange should be based on common guidelines or protocols, which should be binding for all relevant parties (e.g. national authorities, Frontex and EUNAVFOR MED officials).

Determining the migrants' and suspects' identity was considered as a specific challenge. This is particularly the case when migrants refuse to undergo the identification procedure due to their interest in leaving the territory of the Member State concerned to continue their route to the final destination States.

In one case, recourse to private companies' information, such as airlines, was sought in the form of a request for communication of a passenger list. This case highlighted the limitations due to the airlines' obligation of confidentiality in the absence of criminal charges against identified suspects.

The lack of translations of the available information was pointed out as a practical problem in one case. Numerous requests for translation were made by national authorities due to the significant number of intercepted phone calls. However, the limited budget for translations could not accommodate all the requests. Verifying the identity of suspects is even more challenging due to the necessary transliteration from the Arabic into the Latin alphabet.

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<sup>5</sup> EUNAVFOR MED Operation Sophia was established by [Council Decision \(CFSP\) 2015/778 of 18 May 2015](#) with a view to identifying, capturing and destroying vessels, as well as identifying assets used or suspected of being used by migrant smugglers or traffickers.



### 3.3. Risk of conflicts of jurisdiction

As already highlighted<sup>6</sup>, Eurojust's casework indicates that the majority of the cases are multilateral (as opposed to bilateral). As a consequence, national investigations run often in parallel, thus increasing the risk of conflicts of jurisdiction and/or the violation of the *ne bis in idem* principle.

**Deciding which Member State is best placed to prosecute is essential** to maximise the effect of parallel investigations in complex cases and minimise the risks. Eurojust has developed dedicated *Guidelines*<sup>7</sup> to help practitioners determine which jurisdiction is best placed to prosecute. The *Guidelines* are a flexible tool designed to guide the competent authorities on the factors to be considered in multijurisdictional cases to avoid or resolve conflict of jurisdiction situations.

In complex migrant smuggling cases, **parallel investigations can prove to be beneficial**, if well-coordinated. Parallel investigations help, for example, to reveal the full extent of the OCG's activities and detect connections between different national investigations. The complexity of migrant smuggling cases was particularly evident in the following case: the main suspect directed the criminal enterprise from Member State A, where he was a legal resident, Member State B, where his brother and accomplice lived and which was a key point for all smuggling routes, and Member State C, which had limited involvement in the activities of the OCG. If investigations had focused only on the latter Member State, they would have revealed only a small part of the illegal activities. Furthermore, the main suspect expanded his activities into several other EU and third States. The need for coordinated multinational investigative initiatives was identified as a necessary condition for a successful prosecution and for avoiding a conflict of jurisdiction.

Parallel proceedings can be detected at level II meetings<sup>8</sup> or at CMs at Eurojust. In this context, Eurojust can proactively help coordinate national investigations and find common solutions. In one case, at a CM, Eurojust even assisted in triggering the opening of investigations in another Member State for the benefit of all parties involved. As a result, the international response was improved through additional information and evidence.

In this context, Eurojust assists practitioners in designing robust prosecutorial strategies to avoid conflicts of jurisdiction. Eurojust also updates regularly its reports on the prevention and resolution of conflicts of jurisdiction<sup>9</sup>.

The *Kashmir* case showed that a joint and coordinated judicial response resulted in the dismantling of a major portion of an OCG. In this case, Eurojust facilitated the detection of parallel investigations and prevented a conflict of jurisdiction, as explained below.

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<sup>6</sup> See section 1.1.

<sup>7</sup> [Guidelines for deciding 'which jurisdiction should prosecute'](#), Eurojust, revised 2016.

<sup>8</sup> Level II meetings are held between the National Desks at Eurojust and mainly serve to facilitate the preparation of CMs.

<sup>9</sup> See the [Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction](#), Eurojust, updated 2018.

## Operation Kashmir

### Case summary

This case was referred to Eurojust by the Hungarian authorities in April 2015 and was connected to criminalities in Austria, Germany and Serbia. The investigation revealed a hierarchy of mainly Hungarian perpetrators under the leadership of a Pakistani national and his Serbian accomplice.

In this complex investigation, the OCG consisted of approximately 25 people, five of whom were already in pre-trial detention when Eurojust's assistance was requested.

The *modus operandi* of the OCG involved the transport of migrants (mainly Afghans, Iraqis, Syrians, Sudanese and Eritreans) from Serbia to Hungary through land border. The migrants were then transferred to other EU Member States, mainly Germany and Italy. The investigation in Hungary concerned 18 transports smuggling 366 migrants and the parallel investigation in Austria covered 13 transports involving more than 200 migrants.

### Eurojust's involvement

In June 2015, a CM was held at Eurojust to coordinate the parallel investigations in Hungary, Austria and Serbia, to dismantle the criminal organisation and to avoid a possible violation of the *ne bis in idem* principle. The participants exchanged information on the state of play in the respective national investigations and proceedings. The targeted suspects and the related offences in each jurisdiction, as well as the possible establishment of a JIT, were discussed. In November 2015, the case was extended into Italy after Eurojust had been informed that the Italian authorities were conducting an investigation against two suspects of the same OCG.

Furthermore, a related investigation in the Czech Republic, which had been already closed, was identified. As a result of coordination, the Czech investigation was reopened and taken over by the Hungarian authorities on the basis of Art. 7 of the MLA 2000 Convention.

### Encountered issues

The ongoing investigations in Hungary, Austria and Serbia concerned the same OCG as well as the same offences in various EU Member States and a third State. Due to the resulting risk of conflict of jurisdiction, it was considered necessary to coordinate investigations and prosecutions among the involved national authorities.

### Best practice and lessons learned

The excellent direct exchange of information, including through a JIT, between the Hungarian, Austrian and Serbian authorities helped clarifying the actions to be taken by each prosecuting authority.

Another benefit of the case is that the Hungarian authorities could receive information from the Czech authorities on the closed Czech investigation via a Letter of Request (LoR). In relation to the suspects detained in Austria, Hungary supported the Austrian authorities with all available information. Europol supported the case with a crossmatch analysis of the information they were provided with. The case is ongoing.

Exchange of information is crucial to understand the complexity of a case, pave the way for

further analytical support to help detect cross matches and links and transfer of proceedings. This will ultimately determine who is best placed to prosecute.

The issue of **negative conflict of jurisdiction** was apparent in a case involving operations on the high seas.<sup>10</sup> In one CM related to the 'Glauco' case, which was triggered by the shipwreck of 3 October 2013 by the island of Lampedusa, Italy, and resulted in the death of more than 360 migrants, practitioners discussed the difficulty in determining if and how national jurisdiction should be exercised. As discussed by the participants at the CM, the timely identification of the suspects by the naval crew members and the early involvement of the competent national authority(ies) ensured efficient prosecution of the suspects.

In general, such cases require the determination of jurisdiction for criminal activities occurring outside the territorial waters of a Member State.

Regulation (EU) No 656/2014<sup>11</sup> lays down the coercive powers of a coastal Member State on the high seas. Article 7 expands on the right of interception and search on the high seas of a flag State's vessel. According to the Regulation, the flag State is responsible for authorisation. Article 97 of the 1982 Montego Bay Convention also provides the jurisdiction in case of collision or any other incident of navigation.

To supplement the above-mentioned tools, practitioners have developed legal means to further assert their jurisdiction, as indicated in the Italian and Spanish jurisprudence.

For example, Italian jurisprudence justifies the assertion of jurisdiction by national authorities in migrant smuggling cases on the high seas.<sup>12</sup> The leading doctrine focuses on the notion of *autore mediato*, establishing that members of OCGs, involved in a situation that has consequences on the Italian territory, are ultimately liable to domestic criminal law.

Similarly, the *principle of ubiquity* is followed in Spain<sup>13</sup>, according to which a crime is also deemed to have been committed wherever the consequences of the unlawful actions are felt, thereby triggering national jurisdiction.

Although none of those cases have yet been registered at Eurojust, they are indicative of the practitioners' efforts to avoid impunity gaps.

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<sup>10</sup> On this topic, see [Italian Jurisprudence on Illegal Immigrant Smuggling, Asserting Jurisdiction on the High Sea](#) and [Spanish Jurisprudence on Illegal Immigrant Smuggling](#), Eurojust, March 2016.

<sup>11</sup> [Regulation \(EU\) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union](#).

<sup>12</sup> Cass. pen., sez. I, 23.05.2014, n. 36052; Cass. 1.02.2013, n. 9816 in DeJure; Cass. 23.06.2000, n. 4586, in Cass. pen., 2001, 2187; Cass. 28.11.2000, n. 325; Cass. 27.03.2014, n. 14510; Cass. sez. I pen., 27.03.2014, n. 14510.

<sup>13</sup> This doctrine was formally stipulated by the Spanish Supreme Court in its Judgement STS 1/2008 of 23 January 2008, and has been followed ever since. Its origins can be retraced in a non-binding agreement, adopted by the Court on 3 February 2005.

### 3.4. Differences in national legislation

Infringements related to the facilitation of migrant smuggling and minimum related penalties are provided in the two instruments of the 'Facilitators' Package'. In March 2017, the European Commission provided an [evaluation of both instruments](#).

Eurojust's casework indicates that some of the provisions of the Facilitators' Package pose difficulties in the context of judicial cooperation.

For example, the scope of application of Article 1(1)(a) of the Directive 2002/90/EC varies in the Member States. While some criminalise the facilitation of entry into, and transit through, their own territories (e.g. the Czech Republic, Bulgaria, Romania), others expand their jurisdiction over such criminal activity committed in any of the countries of the Schengen area (e.g. France), the European Free Trade Association (e.g. Sweden), or the territory of any signatory of the Protocol against the Smuggling of Migrants by Land, Sea and Air concluded in New York on 15 November 2000<sup>14</sup> (e.g. the Netherlands, France).

The lack of legislative harmonisation had a significant impact on Operation 'Saigon'. The relatively narrow interpretation of the Directive by the Czech Republic led to prosecutorial constraints. In this case, the offence needed to be committed on the territory of the Czech Republic to be able to trigger a domestic judicial response. Operation 'Saigon' exemplifies how this difficulty was overcome.

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<sup>14</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air concluded in New York on 15 November 2000 supplementing the Convention against Transnational Organised Crime concluded in New York on 15 November 2000.*

## Operation 'Saigon'

### Case summary

The case was referred to Eurojust by the Czech authorities. An OCG facilitated the entry of Vietnamese migrants into the European Union, using real or forged passports and counterfeit identification and residence documents. Each migrant paid between EUR 10 000 and EUR 15 000 for documents and transport, predominantly to the Czech Republic, Finland, France, Poland and the UK.

### Encountered issues

The Czech Criminal Code provides that the *serious crime of organising and facilitating illegal border crossing* applies to '[w]hoever organises for another unauthorised crossing of a state border or whoever facilitates or enables another to cross a state border without authorisation or facilitates or assists another after crossing a state border in transportation through the territory of the Czech Republic or whoever organises such transportation' (emphasis added).

In some of the investigated transports, the facilitators as well as the migrants themselves did not cross the Czech state borders. As a result, although the facilitators are Czech nationals or persons with permanent residence in the Czech Republic and did organise such transportation, prosecuting them for transporting the migrants was not possible, as such conduct was not punishable under the domestic Criminal Code.

### Eurojust involvement

Three operational meetings were held at Europol, and two CMs were held at Eurojust. Eurojust and Europol facilitated the setting up and activities of a JIT with Finland, the Czech Republic and the UK. During the last CM, all parties agreed on a common action day, with the CC to be held at Eurojust.

### Best practice and lessons learned

The case gave rise to the determination of the best placed to prosecute: all the above mentioned acts that could not be prosecuted by the Czech authorities were handed over to the French counterparts for evaluation. The Czech Republic processed only the suspects over whom its competence was ascertained.<sup>15</sup> The case demonstrates the added value of judicial cooperation, *inter alia*, to mitigate the gaps in legislation.

In cases in which the national investigation for a cross-border crime is legally limited to the territory of that Member State, preventing impunity by triggering judicial cooperation at the outset is a crucial factor.

<sup>15</sup> In the Czech Republic, members of the OCG were handed down prison sentences between 12 months and 26 months in September 2015. The accused (all of Vietnamese origin) were found guilty of facilitating illegal crossings of the borders of the Czech Republic and other EU Member States and, as aggravating circumstances, for financial benefit and membership in an OCG.

The differences in legislation related to the way some aspects of the Facilitators Package are regulated at national level were highlighted in the preparatory work of the evaluation of the Facilitators' Package. Such difference could theoretically have an impact on judicial cooperation.

For example, the way renting accommodation to irregular migrants is regulated could potentially be posing an issue with regard to the application of the principle of dual criminality. As indicated in the EU Agency for Fundamental Rights (FRA), Report of 2014<sup>16</sup>, the vast majority of the Member States criminalise the renting of accommodation to irregular migrants. Some Member States do so through criminal sanctions, others through administrative sanctions. According to the Report, Belgium and Ireland offer a relatively relaxed legislation, as none of them provide a specific sanction to individuals renting accommodation to irregular migrants. Italy punishes landlords only if they gain an "unfair profit".

Such differences in legislation, however, did not translate into problems in the casework of Eurojust during the reporting period.

This might be explained by the fact that, as most of the cases are dealt with at national level, differences in legislation governing issues such as the renting of accommodation, the constitutive element and the nature (administrative versus criminal) of the offence, or the status of aiders and abettors, do not impact as such and for now on judicial cooperation, as they relate mainly to small facilitators. Should judicial cooperation increase in this respect, it might turn otherwise in the future.

### 3.5. Differences in the level of criminalisation of smuggling-related offences

Analysis of Eurojust casework reveals challenges in prosecution caused by differences in legislation, notably due to differences in, or the lack of, legislation penalising activities related to the facilitation of migrant smuggling.

Activities qualified by some legal systems as petty crimes or as administrative offences may not benefit from the full range of investigative tools. Two such activities are demonstrated in Eurojust's casework.



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<sup>16</sup> [Criminalisation of Migrants in an Irregular Situation and Persons Engaging with them](#), FRA, page 13, 2014.

<sup>17</sup> For more information on this case, please refer to Eurojust the press release dated 23 November 2016, entitled: 'Organised crime group behind illegal immigration dismantled'.

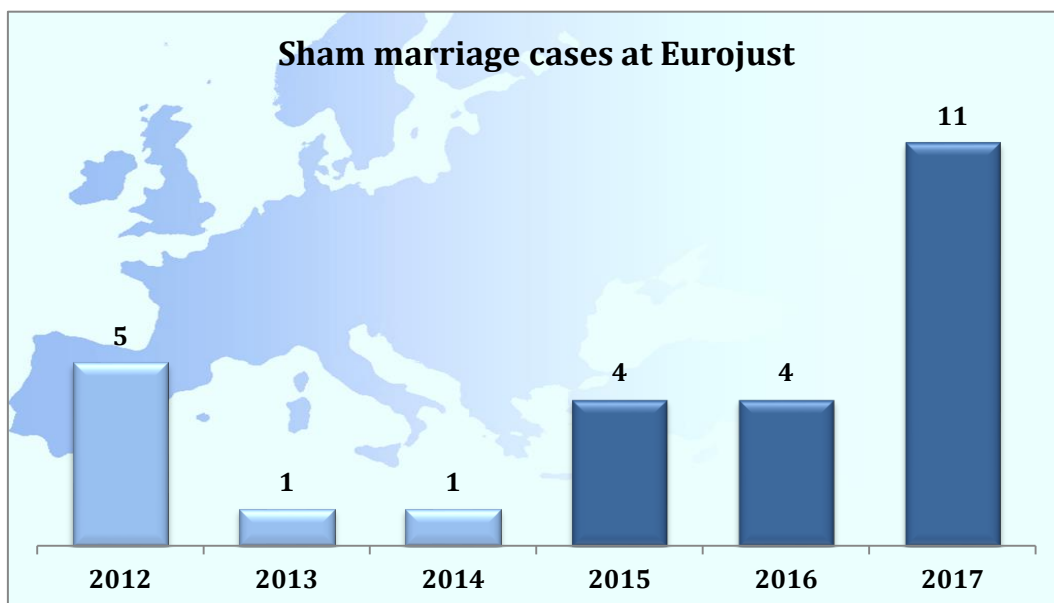
Another activity concerns the use of sham marriages, also known as marriages of convenience. These marriages are used to facilitate the entry and residence of third State nationals, who, in turn, receive social benefits as residents, and, after divorce, often seek to bring their own families to the European Union.

Sham marriages are not listed as a distinct crime type in the Case Management System (CMS) of Eurojust. To gather further information, a search in the CMS was conducted using particular keywords such as *marriage of convenience* and *sham marriages*. As a result, sham marriages are mentioned in relation to all crime types in the period 2012-2017.

The chart below indicates that sham marriages are prominently registered in migrant smuggling cases.



The chart below indicates that, despite the limited number of registered cases, the overall number of references to sham marriages is increasing.



A Eurojust case demonstrates the thin line between migrant smuggling (through organising sham marriages) and THB. The case highlighted not only the differences in legislation regarding the qualification of the offences but also the difficulties encountered by practitioners in identifying from the outset whether exploitation is also involved, thus qualifying the criminal conduct as a trafficking offence. In this case, on the one hand, the Czech Republic and the UK recognised sham marriages as a form of THB for other purposes, and, on the other hand, Ireland, did not criminalise entering into a sham marriage. Therefore, the act of luring women into Ireland for this purpose was not regarded as a trafficking offence. Two Eurojust CMs were held and a JIT was established between the UK and the Czech Republic. Ireland provided evidentiary support to the JIT parties. Such cooperation demonstrated that the lack of criminalisation of an activity in one Member State does not prevent judicial cooperation, as any information and evidence shared with Ireland could be used to support investigations of other offences.

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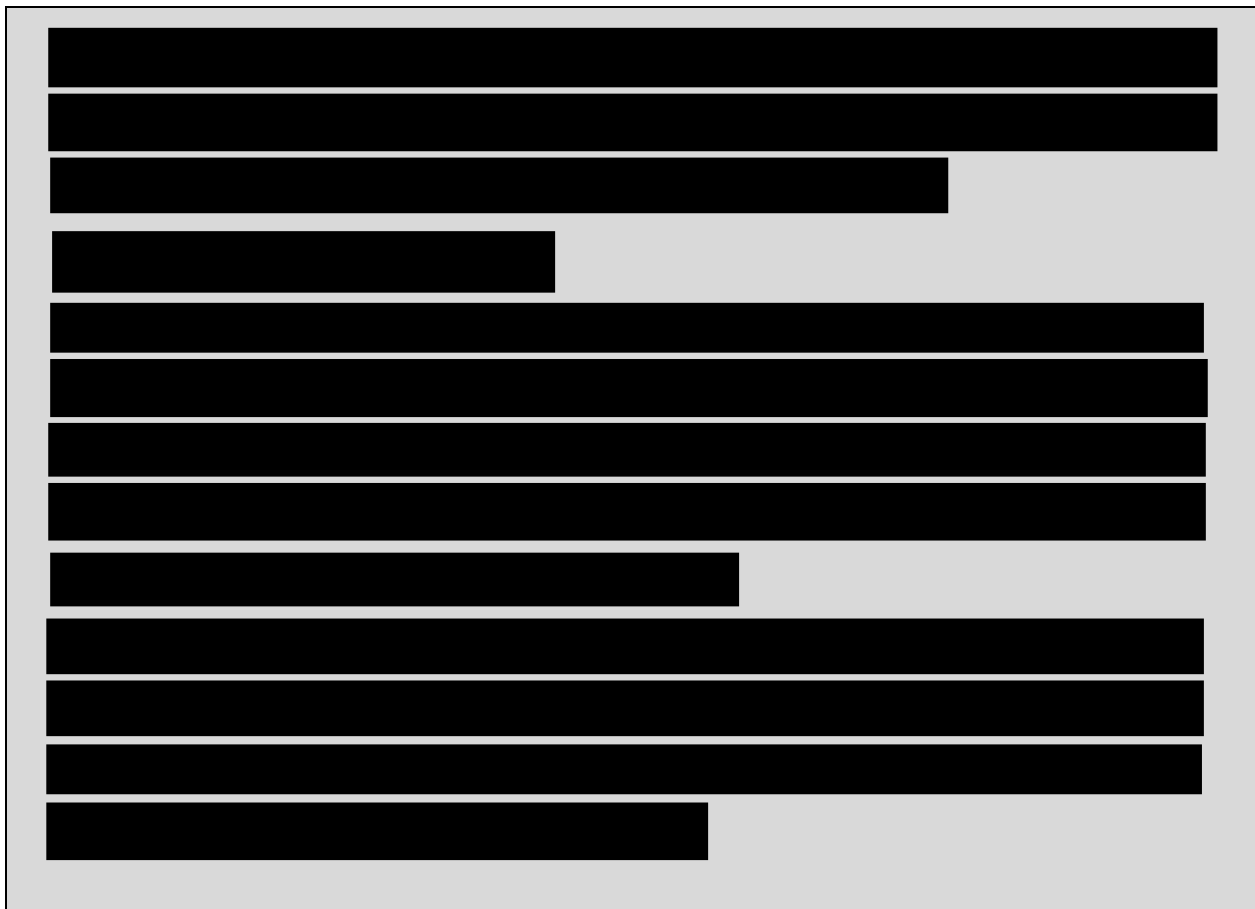
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### 3.6. Cooperation with third States

The involvement of third States is inherent in migrant smuggling cases. Such States would seem to be logical partners in the context of judicial cooperation, considering that the movement of a vast majority of the migrants into the European Union is facilitated from third States of origin and transit.

Overall, however, analysis of the casework indicates that cooperation with the main countries of origin, such as Syria, Iraq, Afghanistan, Pakistan, Cote d'Ivoire, Guinea, Eritrea, Nigeria and Gambia<sup>18</sup>, is either limited or non-existent. The same applies to the main countries of transit, such as Libya, Egypt, Niger, Chad and Turkey<sup>19</sup>.

Eurojust's casework identifies obstacles encountered in cooperation with third States. For example, in one case, cooperation with Libya and Turkey was reported as challenging, particularly with the execution of international arrest warrants and requests for information on suspects (e.g. financial transactions and telephonic communications). In the same case, identifying the current and former owners of the merchant vessels used for smuggling purposes proved challenging due to the reluctance of the requested authorities to transmit information regarding the companies owning or sailing those vessels.

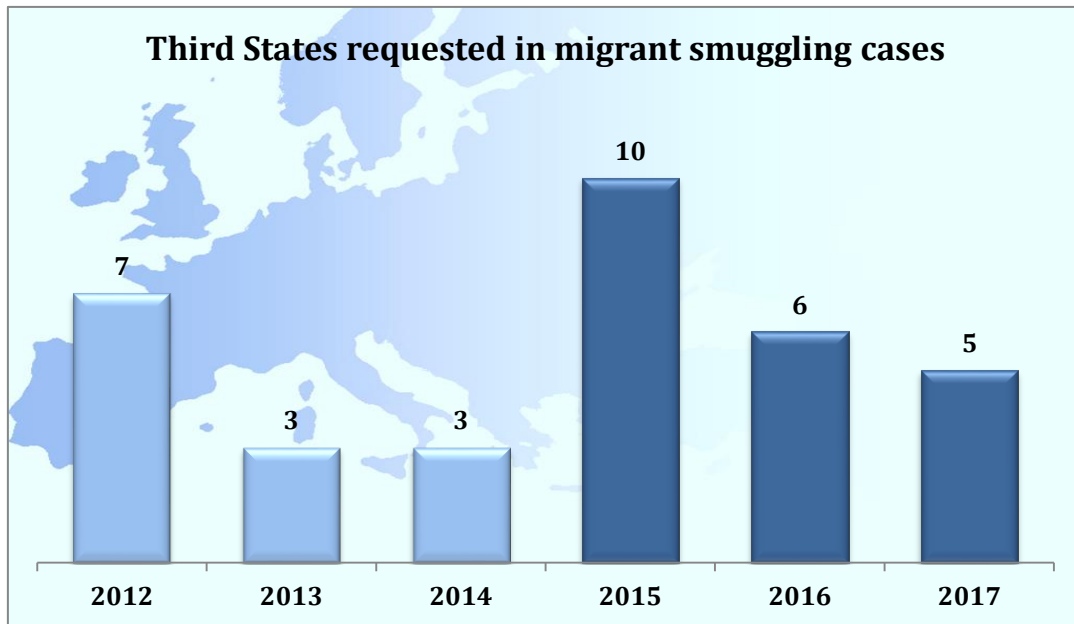
<sup>18</sup> Source: Frontex – Risk Analysis for 2017, page 19.

<sup>19</sup> UNHCR/European Commission map: [https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean\\_en](https://ec.europa.eu/epsc/publications/strategic-notes/irregular-migration-central-mediterranean_en).

Often, collecting such information requires the search and seizure of financial documents located outside the European Union. In such situations, judicial cooperation with third States was outlined as being of paramount importance.

In an average of 63 migrant smuggling cases registered per year in the reporting period (2015-2017), 11 per cent of those cases involved requests toward third States for judicial cooperation.

The chart below indicates that, despite a peak in 2015, the proportion remains relatively stable.



The chart below shows that the top third States requested in Eurojust casework, with the exception of Norway, are primarily countries of transit (Serbia and Turkey, with six and four cases, respectively).



The table below shows the third States involved in CMs. More than one third State might have participated in the same CM.

Calendar year	Third States
2012	Norway, Albania, fYROM, Turkey
2013	—
2014	Turkey
2015	Norway(3), Turkey
2016	Norway
2017	Switzerland, Serbia(2)

Statistical information, corroborated by the analysis of the casework, indicates that the level of cooperation with such third States is relatively limited. For instance, only one JIT was set up with a third State (Serbia) in the reporting period (2015-2017).

The necessity to enhance cooperation with third States was also outlined by practitioners, notably at the [Eurojust meeting of 15 June 2017](#) and at the [tactical meeting of 4-5 February 2016](#).

To enhance cooperation between the judicial authorities of the Member States and third States, Eurojust continuously works to extend its worldwide network of judicial contact points in third States. One new contact point, in Niger, was established in 2017, making a total of 42 third States<sup>20</sup> that now have Eurojust contact points in place. Eurojust is actively working towards enhancing cooperation with the countries from the MENA region. Eurojust also continued to facilitate the posting at Eurojust of Liaison Prosecutors from countries that signed cooperation agreements with Eurojust, as is the case for Montenegro<sup>21</sup>, which seconded a Liaison Prosecutor to Eurojust beginning at the end of 2017. The College of Eurojust identified Albania, Georgia, Tunisia and Turkey as priority counterparts for 2017. These countries were selected for the operational or strategic interest they represent, their interest in cooperating with Eurojust, or the feasibility of concluding a cooperation agreement of operational or strategic nature.

To be able to sign cooperation agreements<sup>22</sup> with third States, particularly those of origin and transit, strict personal data protection rules need to be respected. As a result, the ability to engage with a number of such States is made more difficult. In relation to transit countries, in the reporting period, cooperation agreements were signed with Montenegro and Ukraine in 2016, bringing the number of cooperation agreements with third States to nine. No cooperation agreement has yet been signed with any of the main countries of origin.

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<sup>20</sup> To date, contact points were appointed by the following third States: Albania, Algeria, Argentina, Bolivia, Bosnia and Herzegovina, Brazil, Canada, Cape Verde, Chile, Colombia, Egypt, fYROM, Georgia, Iceland, India, Iraq, Israel, Japan, Jordan, Kazakhstan, Korea, Lebanon, Libya (not yet officially confirmed), Liechtenstein, Moldova, Mongolia, Montenegro, Niger, Norway, Palestinian Authority, Peru, the Russian Federation, Saudi Arabia, Serbia, Singapore, Switzerland, Taiwan (Republic of China), Thailand, Tunisia, Turkey, Ukraine and the USA.

<sup>21</sup> Norway, Switzerland and the USA also second a Liaison prosecutor to Eurojust.

<sup>22</sup> Cooperation agreements were signed with the following countries in the following years: Ukraine and Montenegro (2016), the Republic of Moldova (2014), Lichtenstein (2013), Switzerland and fYROM (2008), USA (2006), Iceland (2005) and Norway (2005).

Eurojust's casework indicates that occasional cooperation takes place. For example, the Italian authorities reported in one CM that their bilateral cooperation with the Egyptian and Tunisian authorities has improved since 2014, partly due to the fear of possible terrorist attacks linked to the flow of Syrian migrants into Egypt.

### 3.7. Use of investigative techniques

The use of investigative techniques, such as covert investigations and controlled deliveries, requires an extended period of time, during which the unlawful situation persists to the detriment of the migrants and the benefit of the OCG. They are therefore not systematically used in investigating migrant smuggling-related offences for either legal or practical reasons, as indicated by Eurojust's casework.

**Controlled deliveries** are typically not allowed in migrant smuggling cases in the majority of the Member States, although some Member States may be willing to accept their use under certain conditions, notably the assurance that the lives of the migrants are not endangered.

While the limitations associated with the use of controlled deliveries may hinder an investigation, the use of this technique may also raise admissibility of evidence challenges if the controlled deliveries are not recognised in another involved Member State. However, in no specific case was the matter reported as causing difficulties.

The use of **covert agents and covert investigations** is occasionally reflected in Eurojust's casework, and, if so, is mentioned in limited terms that do not allow specific conclusions to be drawn on their use and impact, nor whether they pose specific problems.

In the majority of countries, the use of special investigative techniques requires a certain threshold to be met in relation to the nature of the criminal offence or the penalty. As an example, until recently, **interception of telecommunications** could not be used in migrant smuggling cases in Norway. One case at Eurojust provided an important contribution to the parliamentary debate to subsequently adjust national legislation<sup>23</sup>.

Differences in legal regimes related to telecommunication intercepts may hinder the investigations and prosecutions, given the prevalence of telecommunication intercepts in migrant smuggling cases. This situation is particularly problematic when servers are located in third States with which judicial cooperation is difficult.

The use of telecommunication intercepts follows different legislative and prosecutorial rules.

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<sup>23</sup> As a result, a new law was passed in Norway that allows, since June 2016, interception in migrant smuggling cases if the perpetrators smuggle human beings for the purpose of gain, and either the smuggling is part of an organised illegal activity or endangers a smuggled person's life. In any event, procedural safeguards must be respected.

### 3.9. Financial investigations

One of the objectives of launching financial investigations in parallel with migrant smuggling investigations is to target the financial assets of the criminal networks.

The complementarity of cooperation on the financial aspects of an investigation between Eurojust and Europol was outlined by participants at Eurojust's CMs. In the framework of CMs, Europol can present their analysis of financial investigations. For example, in one case, links between migrants and payments (via Western Union and MoneyGram) and telephone calls made by migrant family members to the middlemen and the heads of the OCGs were detected.

In the analysed cases, only limited information is available on the criminal proceeds, illicit financial flows and money laundering processes associated with migrant smuggling activities.

Europol corroborates the lack of information available in this respect<sup>24</sup>. Europol further highlights that the use of cash predominates (52 per cent) in migrant smuggling cases, while the use of alternative banking systems, such as *hawala*, constitutes 20 per cent of the cases<sup>25</sup>.

The uses of alternative banking systems and cash payments have a negative impact on the ability to conduct fully-fledged financial investigations, as tracking financial flows and establishing the origin and destination of senders and receivers of transfers become more difficult.

One Eurojust case referred specifically to the fact that some banks accept money transfers without proper identification checks, thus enabling the use of false identities. Identifying how the money is transferred and by whom are bigger challenges.

Western Union and MoneyGram are also frequently referred to when money is transferred through the 'regular' banking system.

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<sup>24</sup> In 2015, fewer than 10 per cent of the investigations into migrant smuggling activities produced intelligence on suspicious transactions or money laundering activities. Source: *Migrant smuggling in the EU*, page 13, Europol, February 2016.

<sup>25</sup> *Ibid.*

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From the cases analysed, CMs and action days do occasionally result in seizures. For example, in one case, drugs worth EUR 1.5 million were seized. However, the confiscation of proceeds of crime remains limited by the lack of parallel financial investigations, the difficulty to cooperate with third States and the use of informal banking systems.

Confiscation of proceeds of crime relates to a certain extent to the difficulty of arresting the top leaders of the OCGs. The *'Tantaluf'*<sup>27</sup> case demonstrates the success of going after the entire smuggling chain, including the leaders. The case resulted in the confiscation of EUR 200 000, thanks to a well-designed prosecutorial strategy.

Another example of a successful confiscation can be found in the lengthy Italian investigation, triggered by the shipwreck in 2013 which resulted in the death of 365 migrants. The first instance verdict was handed down by the Tribunal of Palermo on 22 March 2018. Thirteen people were sentenced to prison terms ranging from 4 to 13 years. Eurojust supported the case since the beginning (*'Glauco 1'* and *'Glauco 2'*) and was instrumental in facilitating the confiscation of EUR 500,000 and USD 25 000, the seizure of additional sums of money deposited in six savings accounts and one company's assets in the last phase of the case (*'Glauco 3'*). The case proved particularly successful, as the investigations in the context of *'Glauco 3'* focused primarily on the financial aspect of the case.

### 3.10. Execution of European Arrest Warrants

A number of migrant smuggling cases at Eurojust involved the use of European Arrest Warrants (EAWs). The cases relate to the [Framework Decision on the European Arrest Warrant](#), 2002/584/JHA, which provides for an exception to the execution of an EAW if the concerned targets are subject to national prosecution.

For example, as was apparent in one case, some Member States interpret the provisions of Article 4(2) of the EAW Framework Decision, which sets an optional ground for non-execution of an EAW when a requested person is being prosecuted for the same act in the executing Member State, as also covering the stage of investigation.

The method of implementation of the Framework Decision in some Member States may occasionally result in delaying or refusing the surrender of targets. In migrant smuggling cases, delays may be especially detrimental, as this particular crime type usually requires swift judicial action.

One case highlighted similar limitations in other Member States, such as the UK, where the surrender might be barred in the interests of justice, as regulated by law<sup>28</sup> in situations in which a

<sup>26</sup> See *infra*, Section 3.3, page 15.

<sup>27</sup> See *infra* page 31.

<sup>28</sup> Extradition Act 2003.

substantial amount of the subject's relevant activity was performed in the UK. The law provides the court with the possibility to deny an extradition request if an investigation into the offence is undertaken and the criteria set in the law is met. The law also gives the court an option not to extradite even if an investigation is not yet taking place in England and Wales.

In another case, the Italian authorities opened an investigation following the transmission of an EAW issued by Belgium. The EAW was the trigger for Italy to join the case, as the EAW revealed that criminal activities took place on Italian territory and as such constituted a ground for refusing the execution. Shortly after, the Italian authorities decided to transfer the proceedings to Belgium, which had more advanced proceedings, following a Eurojust joint recommendation<sup>29</sup> to the authorities involved.

To overcome possible delays in executing an EAW, and, more generally, the risk of violation of the *ne bis in idem* principle provoked by the issuance of an EAW, a transfer of proceedings can be envisaged, as seen in the case above, or a temporary surrender. More generally, possible obstacles related to the execution of an EAW can be identified at an early stage of investigation and an agreement on the best place to prosecute could also minimise the risk of delaying cooperation. Finally, the hearing of suspects held in custody, as provided by the [European Investigation Order](#), could provide solutions worth exploring. Except for the transfer of proceedings, these options, however, were not reflected in the casework during the reporting period.

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<sup>29</sup> Joint recommendations can be issued by Eurojust in accordance of Article 6(1)(a)(ii) of Council Decision 2002/187/JHA setting up Eurojust as amended by Council Decision 2009/426/JHA.

## 4. Application of judicial cooperation tools and instruments

### 4.1. Early exchange and analysis of information

Eurojust is in a unique position to promote and stimulate information exchange, thus facilitating the detection of links between parallel national investigations.

Given the complexity of migrant smuggling cases, Eurojust is instrumental in preparing detailed and substantiated analysis, which can entail, for example, an overview of pending investigations, a compilation of the information from the investigative files or of pre-trial detention requests. This support contributes to the identification of possible legal challenges and potential links, which could be further discussed and addressed in CMs.

For example, detection of links between national investigations allowed, on at least one occasion, the authorities of a Member State to take over a case previously closed by another Member State.

The information exchange that takes place during CMs also illustrates the accelerator role of judicial cooperation towards less advanced investigations. . In one case, Member State A's investigations were less advanced than Member State B's and C's. To bring the authorities of Member State A up to speed, agreement was reached that the MLA requests issued by Member State B would be processed through the respective National Desks at Eurojust, which helped all investigations to reach a similar level, a critical element in judicial cooperation, especially for signing a JIT.

The availability of recent and accurate information appears to be a key factor in a number of cases. Bilateral communications were mentioned as a way to obtain information quickly.

The '*Lorry*' case illustrates a pragmatic way of gathering information, first, by ensuring a high level of participation in the CMs, and, second, by drafting a questionnaire to collect and act upon information available in different jurisdictions. The case posed challenges due to the large amount of victim information found in Austria, the involvement of different Public Prosecution Offices, and the parallel investigations in other Member States and Serbia.

#### **The '*Lorry*' case**

##### **Case summary**

In August 2015, the Hungarian authorities referred a case to Eurojust involving an abandoned truck in Austria in which the bodies of 71 migrants were discovered. They had been smuggled and left by members of an OCG to suffocate, close to an Austrian motorway. The investigation into the OCG in Hungary led to the initial prosecutions of five suspects: four Bulgarians and one Afghan, while other alleged members of the OCG were brought before courts in Germany, Bulgaria and Serbia.

##### **Eurojust involvement**

A CM was organised by Eurojust within 48 hours after the discovery of the lorry. The meeting revealed the existence of ongoing investigations concerning the same OCG in different Member States.



**Issues encountered**

The investigation revealed a widespread OCG, the activities of which triggered several proceedings in Germany, Austria and Hungary. Due to the significance of the case, a number of countries launched investigations immediately. To avoid the risk of a conflict of jurisdiction, evidence and information needed to be shared without delay. Specifically, an effective strategy was needed to exchange a large amount of information, due to the identification of the victims.

**Best practice and lessons learned**

The case revealed that the most cost-efficient way of ensuring the timely and accurate exchange of information with the largest possible number of represented authorities was the combined organisation of a Europol operational meeting followed by a Eurojust CM. A large number of representatives could participate in both meetings, achieving both operational efficiency and financial savings.

Moreover, with the support of the Hungarian and German Liaison Bureaux at Europol as well as Europol Focal Point Checkpoint, the parties agreed to create a short 'questionnaire' to identify and collect details of all the related national investigations in the involved Member States. Consequently, expert opinions, autopsy reports and DNA tests gathered in Austria were provided for the proceedings in Hungary, and additional exchanges of information and inquiries took place between Germany and Hungary. Using this information, the Hungarian authorities also took over another parallel case from Austria.

As a result of these efforts, the case was brought to court in Hungary in May 2017 against eleven suspects, four of whom were charged with murder and all eleven with human smuggling. The judgement is expected in spring 2018.

In cases in which several national investigations are being conducted, a well-coordinated and early exchange of information is pivotal to ensure proper judicial cooperation.

## 4.2. Designing common prosecutorial strategies

Eurojust served on a number of occasions as a forum for the agreement of prosecutorial strategies. Such agreement is based on the mutual understanding that one Member State may be in a better position to undertake an investigation or to prosecute specific acts<sup>30</sup>.

Indeed, in complex cases, keeping criminal proceedings running in parallel to a certain point and ultimately deciding to prosecute according to pre-defined strategies may be advisable.

Two types of strategies emerged from analysis of the casework:

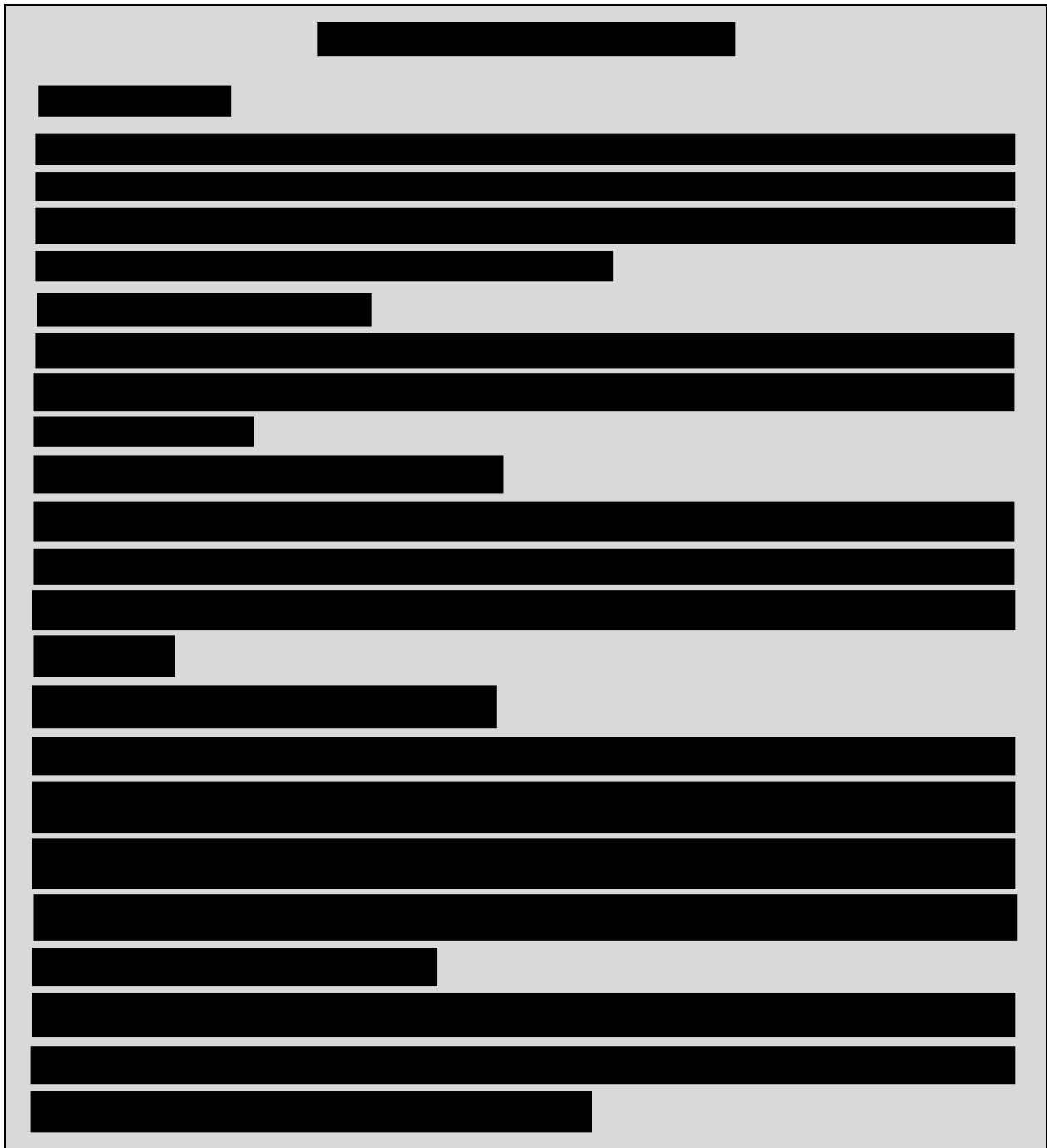
- **Split national prosecutions.** For example, the competent judicial authorities can decide to build a strategy based on the individuals considered the organisers, while deciding to leave drivers/*passeurs* to be prosecuted by another jurisdiction. A segmented strategy was also used in the '*Saigon*' case<sup>31</sup>, in which the decision was taken to split the investigations. In this

<sup>30</sup> See Article 6(1)(a)(ii) of Council Decision 2002/187/JHA setting up Eurojust as amended by Council Decision 2009/426/JHA.

<sup>31</sup> See *supra*, page 19.

case, the decision was informed by the lack of jurisdiction of the Czech Republic, which, to overcome this obstacle, transferred part of its proceedings to France, while retaining the part of the investigation for which jurisdiction was ascertained.

- **Entrust one Member State to act as prosecuting jurisdiction.** This strategy was illustrated by the *'Tantaluf' case*<sup>32</sup>. The decision was informed by the fact that the selected prosecuting country, Belgium, appeared to be the hub of the smuggling operation.



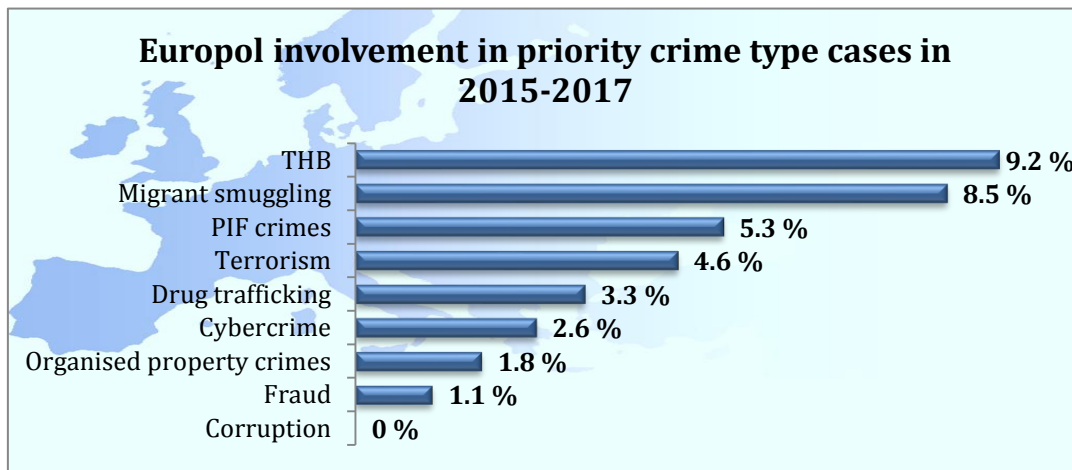
<sup>32</sup> See below.



### 4.3. Early involvement of the law enforcement sector, including Europol

As shown in the chart below, compared with other crime types, migrant smuggling cases benefit from an 8.5 per cent involvement by Europol in the reporting period, which is the second largest involvement after THB (9.2 per cent).

The involvement of **Europol** is measured by their participation in CMs, JITs, CCs and level II meetings. Although seemingly low, the overall figures need to be read in conjunction with the fact that a number of cases registered at Eurojust do not require the involvement of Europol *per se*, as they may concern, for example, the mere facilitation of the execution of an MLA request.



Europol’s involvement in Eurojust CMs in the period 2012-2014 remains close to 60 per cent, as indicated below:

Calendar year	Total number of CMs	Europol involvement in CMs
2012	18	12
2013	5	3
2014	10	7
2015	20	11
2016	12	5
2017	15	9

Close coordination between Eurojust and Europol facilitates the cross-checking of information and the verification of further connections between national investigations and prosecutions at an early stage of investigation. The support of Europol translates, *inter alia*, into participation in JITs, the organisation of operational meetings, and the deployment of a mobile office on action days. Europol is also instrumental in performing real-time analysis and cross-checks against Europol’s databases.

Frontex's new mandate is expanded to cover cross-border crimes. Consequently, Frontex is now able to collect a wider range of personal data related to suspects involved in cross-border crimes, including, but not limited to, THB, migrant smuggling and terrorism. Frontex's new legal framework particularly entails the new obligation to cooperate with Eurojust, including the possibility that Frontex could facilitate the exchange of information (Article 46 Frontex Regulation), which may include personal data, provided that certain conditions are met (Article 47 Frontex Regulation). As a result, Frontex and Eurojust are assessing how best to maximise this new opportunity.

The '[Poker Face](#)' case illustrates, *inter alia*, cooperation between the judicial authorities and the law enforcement sector, as it led to the conviction in France of all ten suspects prosecuted in the French proceedings.

### **The '[Poker Face](#)' case**

#### **Case summary**

A French investigation revealed a sophisticated OCG, composed of individuals from Kosovo<sup>33</sup>, Austria, the Czech Republic and Slovakia, who recruited migrants in Kosovo and organised their illegal entry into the European Union. The migrants often travelled to Serbia on their own, and then made contact with facilitators, who subsequently smuggled them into Hungary. Upon their arrival in Hungary, the migrants were handled by another cell of the same OCG. In many cases, the migrants claimed asylum in Hungary prior to being smuggled onwards to their final destinations in Switzerland, Italy, Germany and France. Migrants were smuggled in vehicles travelling through Slovakia, the Czech Republic, Germany and Austria.

#### **Eurojust involvement**

A CM took place in March 2015, and the information exchanged showed that investigations in Austria had identified many offences committed by the OCG, ranging from burglary and drug trafficking, to forgery of identity papers and driving licenses. A joint action day was agreed and supported by Europol.

The main suspect was investigated for criminal offences in France, and the Austrian authorities agreed to provide their French counterparts with all the information that had been collected in the course of the Austrian investigation concerning him. The exchange of information was based on an MLA request from France and on the spontaneous exchange of information on the basis of Article 7 of the 2000 MLA Convention.

#### **Encountered issues**

During the CM, participants realised that the investigations and prosecutions in the involved Member States were at very different stages. The possibility of establishing a JIT to facilitate and enhance cooperation was discussed. However, as proceedings in some States were already very advanced, JIT cooperation was not considered suitable.

<sup>33</sup> References to Kosovo are without prejudice to positions on status. They are in line with United Nations Security Council Resolution 1244/1999 and the opinion by the International Court of Justice on the Kosovo declaration of independence.

Information in one of the transit countries was still confidential, which meant that according to the procedural rules of that State, no arrests could be made there until such information was declassified.

### **Best practice and lessons learned**

For the joint action day, Europol deployed a mobile office to France to support the operation with on-the-spot intelligence analysis. Eurojust and officers from Europol supported the operation by carrying out cross-checks and analysing incoming information. Throughout the investigation, Europol facilitated the exchange of intelligence, hosted operational meetings and provided tailored analytical support to investigators, and Eurojust organised a CM.

The joint action day was a result of the implementation of the EMPACT<sup>34</sup> Operational Action Plan 2015.

In March 2017, all ten suspects charged in the French proceedings were convicted of facilitation of entry and residence of migrants and sentenced to prison terms ranging from 18 months to 4 years and, for 3 of them, to a permanent ban on entering French territory. Two appeals concerning the ban are ongoing.

Intensive and coordinated preparatory work at police level is pivotal for a successful joint action day.

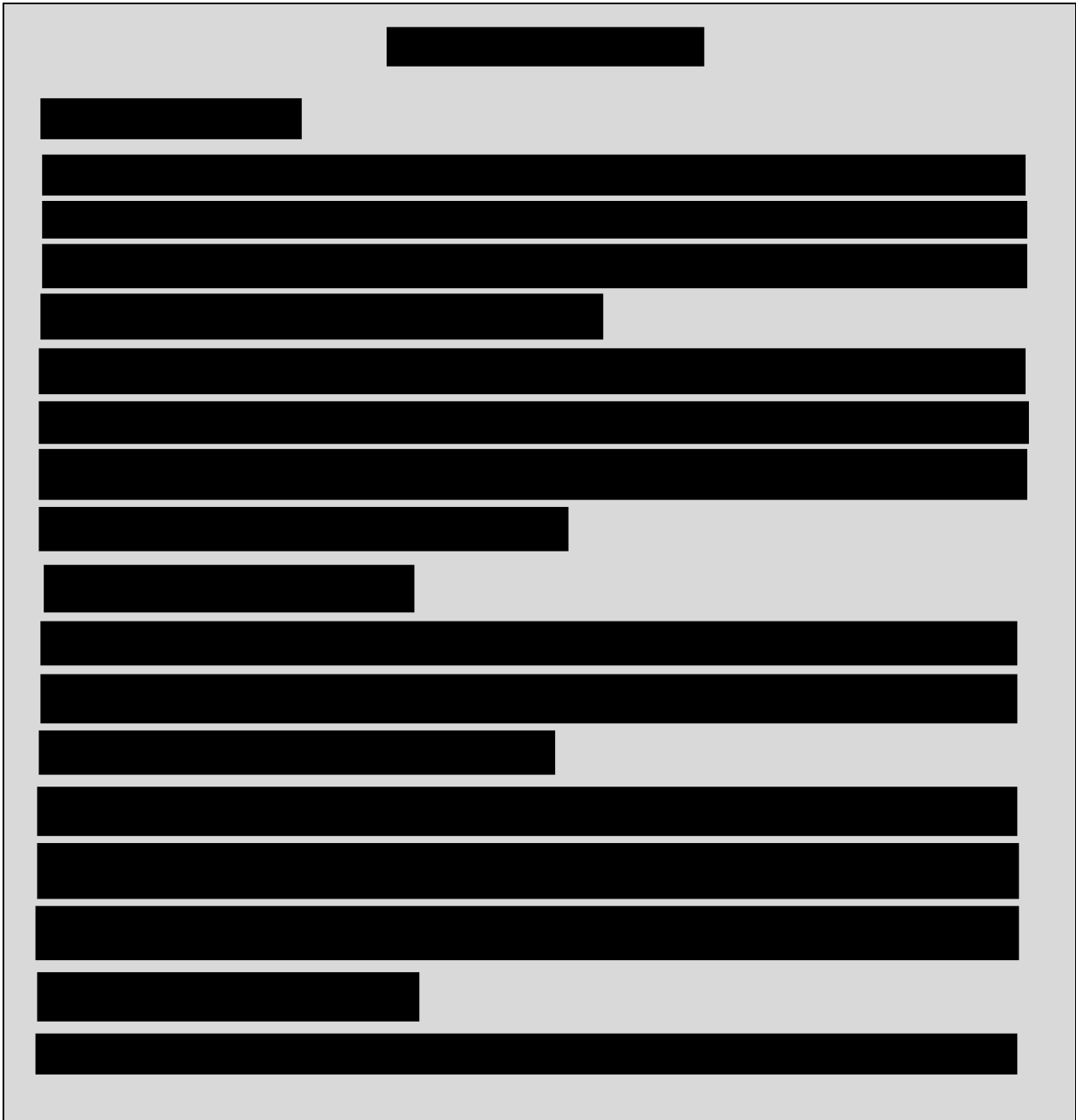
## **4.4. The regional approach: the example of the North Sea Task Force**

The North Sea Task Force (the 'Task Force') was created under the auspices of Eurojust in 2016. It gathers judicial and law enforcement professionals from France, the UK, Belgium and the Netherlands, as well as liaison magistrates and specialists from Eurojust and Europol. The Task Force meets regularly in Lille, France, at the *Tribunal de Grande Instance*.

The Task Force shares experience and knowledge related to trends and new threats in the field of migrant smuggling. It also explores the possibilities for more efficient cooperation and information-sharing in related cases. The '*Halifax*' case illustrates the successful activities of the Task Force.

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<sup>34</sup> European Multi-disciplinary Platform Against Criminal Threats (EMPACT). The fight against the facilitation of migrant smuggling was one of the nine EMPACT priorities, as well as Europol's priority crime areas, under the 2013-2017 EU Policy Cycle. This crime type will remain a priority in the next Policy Cycle 2018-2021.



## 4.5. Joint investigation teams

### 4.5.1. Number of JITs

In the reporting period, 15 new JITs (4 in 2015, 5 in 2016 and 6 in 2017) were set up. The number of JITs set up in migrant smuggling cases is larger than in other crime types<sup>35</sup>.

Eurojust participated in all JITs and provided support in their setting up, running, financing and/or evaluation. Europol was also involved in the majority of those JITs.

<sup>35</sup> See the statistical overview on page 7.

The Member State most involved in the setting up of JITs in migrant smuggling cases is the UK (8 JITs), followed by France (4 JITs) and Austria and Belgium (3 JITs, respectively).

One of the JITs set up in the reporting period also included a third State (Serbia). None of the JITs set up in the reporting period include third States of origin. This situation is due to a variety of reasons, including, but not limited to, difficulties in engaging with the relevant local authorities, strict personal data protection requirements, and lack of resources and lack of political will to address the phenomenon beyond the European Union.

#### **4.5.2. Added value of JITs**

The casework highlights that JITs are seen by practitioners as an important judicial cooperation tool.

JITs facilitate, *inter alia*, accurate and speedy exchange of information in cases in which information is often scattered. JITs are the ideal tool through which the global picture of a given OCG can be best identified, revealing the structure, locations and *modus operandi* of the suspects. As such, JITs allow participants to better understand the interactions between the different segments of the OCG. However, not all cases are suitable for JITs, as explained in subsection 4.5.3.

The timely identification of cases most likely to derive the greatest benefit from JITs depends on the early involvement of Eurojust to help identify connections and assess the risk of *ne bis in idem* stemming from parallel investigations.

JITs also help identify common objectives and agree on practical arrangements in complex cases. After information is exchanged, JITs are the instrument by excellence in which prosecutorial strategies can be designed and implemented. From an evidentiary perspective, JITs ease the process of fast and efficient exchange of evidence while securing admissibility. JITs also benefit from the financial support provided by Eurojust.

#### **4.5.3. Specific obstacles and possible remedies**

In the [\*Conclusions of the 12<sup>th</sup> Annual meeting of the National Experts on JITs\*](#) (June 2016), practitioners identified timing as one of the main challenges to setting up a JIT for a migrant smuggling case, as is also reflected in Eurojust's casework. The analysis of the casework points out the different stages of investigations and prosecutions as major hindrances in setting up a JIT. Such differences involve a number of factors.

First, the fragmented information available does not always allow all participants to have launched their own investigations at the time of the decision to set up a JIT. While some of the countries are at an advanced stage of investigation and ready to enter into a JIT agreement, others – for example transit countries in the European Union – may be barely aware that an OCG is operating on their soil, particularly if the transiting does not entail stop-overs or change of transportation means. As such, they may not be ready or able to quickly enter into a JIT.

Second, when investigations are launched in all participating States, the different stages of maturity of investigations may pose difficulties, as some States may require additional time to build their cases, which may have an impact on the ability of certain Member States to take action if their

investigations are at a less advanced stage. Another obstacle is illustrated by the 'Kashmir' case<sup>36</sup>, which highlighted the difference in legal basis governing JITs.

In this case, as some members to the JIT had not implemented the Council of Europe-based Convention<sup>37</sup>, they consequently could sign a JIT with third States only by relying on the UN Convention against Transnational Organised Crime (the 'Palermo Convention'). However, the Palermo Convention is less detailed regarding the requirements of a JIT and how it is governed. This situation may create difficulties at the implementation stage in relation to third States that can only be party based on the Palermo Convention and, consequently, may run the risk of uncertainties as to the rules governing the functioning of a JIT.

OCGs may be able to regenerate rapidly if only small *passeurs* are targeted. Therefore, JITs might prove to be an efficient tool to dismantle the entire OCG. To maximise the effect of a JIT, a speedy setting up process may contribute to preventing the OCG from adjusting.

A number of steps are being considered at Eurojust or are already being implemented:

1. First, the JIT model agreement could be complemented by specific features associated with migrant smuggling to enable a quick and tailored judicial response by providing practitioners with a ready-to-use template, shortening discussions on the draft, and thus matching urgent cooperation needs that often motivate potential JIT members. For example, the JIT model agreement could be refined by including standard wording related to the purpose (identification of and dismantling/disrupting the entire OCG), the summary of the facts (standard wording identifying the interactions between the various parties) and a specific section on the protection of witnesses.
2. Second, to pre-identify issues to be covered in migrant smuggling cases and submit them to practitioners in a form of guidelines. In the course of the discussion in the context of JITs or more generally in CMs a number of aspects could be envisaged. For example, taking specifically into account that migrants could also be considered as witnesses may facilitate later proceedings. Ensuring admissibility of statements taken at the scene of a rescue could also be considered.
3. Finally, as expressed by practitioners, the collaboration of JIT partners could be extended beyond the action day. For example, a joint assessment of the evidence collected within the framework of the JIT could be envisaged systematically.

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<sup>36</sup> See *supra*, page 16.

<sup>37</sup> Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.



## 5. Main findings in relation to best practice and lessons learned

1. The inherent complexity of migrant smuggling cases calls for an early exchange of information to reach a complete understanding of the functioning, activities, composition and location of the OCG. The combined involvement of Eurojust and Europol to detect additional connections between parallel investigations at national level is crucial.
2. CMs provide an efficient forum for the spontaneous exchange of information. A detailed list of documents exchanged, and their level of confidentiality, should be included in the CM conclusions to facilitate turning this information into evidence if relevant.
3. Holding a Europol operational meeting followed by a Eurojust CM the following day was identified as a cost-efficient meeting practice, maximising the use of resources and securing the presence of most of the participants.
4. The quality of information received as evidence is a key factor in a successful prosecution. Information must be exchanged expeditiously, thus avoiding the risk that OCGs re-form the moment actions are taken.
5. Political will to devote resources to dismantling the entire OCG is crucial, including by engaging with third States.
6. The design of prosecutorial strategies<sup>38</sup> to either vest all the prosecutions in one jurisdiction or agree on a segmentation of prosecutions, depending on the specifics of the cases, will help avoid a conflict of jurisdiction and define joint common objectives while deriving the greatest benefit from parallel investigations.
7. National procedural details related, for example, to telecommunication intercepts and the geographical scope of the application of Directive 2002/90/EC must be taken into consideration at an early stage of the investigation. Particular attention should be paid to the way national criminal legislation governs key aspects of smuggling-related activities, such as *hawala* and sham marriages, to inform the decision on where best to prosecute.
8. JIT agreements could reflect specific features associated with migrant smuggling to ensure the setting up of a speedy and all-encompassing JIT, for example, by:
  - Taking specifically into account that migrants could also be considered as witnesses to facilitate later proceedings;
  - Exploring the possibility of taking statements at the scene of the rescue of migrants and ensuring the admissibility of such statements; and
  - Extending the collaboration between JIT partners beyond the action day by conducting a joint assessment of the evidence collected within the JIT framework.
9. The use of a multi-disciplinary approach, especially the training of civil registry staff or consular authorities, may be a successful way to detect sham marriages and visa fraud at an early stage.

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<sup>38</sup> In 2016, Eurojust revised its [Guidelines for deciding which jurisdiction should prosecute](#).



10. Enhance information exchange with Frontex and Europol to maximise synergies between the various EU actors. Gathering and exchanging evidence within the framework of EU-led military operations should be carried out following common guidelines or protocols binding on all relevant actors (e.g. national authorities, officials from Frontex and EUNAFVOR MED).
11. The North Sea Task Force demonstrates that a regional approach based on the smuggling routes brings results and that mutual trust and confidence are vital factors in judicial cooperation.

## 6. Conclusions

The following conclusions can be drawn from the analysis:

1. The number of migrant smuggling cases referred to Eurojust is relatively small (2.7 per cent of Eurojust registered cases in the reporting period) if compared to the assumed number of facilitated entries into the European Union. However, **migrant smuggling cases require a significantly higher level of judicial cooperation** through the use of CMs, CCs and JITs, and are routinely of a multilateral nature.
2. In this context, practitioners recognise the added value of joining efforts and acknowledge specifically the **key facilitating role of Eurojust**.
3. The sophisticated, highly agile and specialised structure of the OCGs, the fast and constantly evolving *modus operandi* and the poly-criminality associated with migrant smuggling are indicative of a complex form of criminality. OCGs place the lives of migrants in jeopardy and diversify their activities by engaging, for example, in the related production of forged documents.
4. A judicial response is made more difficult by the **higher risk of conflict of jurisdiction**, due to the number of parallel national investigations and, at times, the difficulties in asserting jurisdiction. Differences in the definitions of smuggling-related offences may have an adverse impact on the ability to initiate prosecutions. Investigations may be hindered by the limited recourse to some investigative tools. Financial investigations in particular are rendered more difficult by the common use of alternative banking systems, such as *hawala*. The differences in legislation may be conducive to forum shopping by the OCGs, as illustrated in sham marriage cases.
5. **Judicial coordination and cooperation at an early stage**, including with third States, emerged as valid responses to the phenomenon. Eurojust casework echoes such conclusion drawn by practitioners at the [tactical meeting on migrant smuggling held on 4-5 February 2016](#). The informed choice of the best forum to prosecute appears to be a key element in ensuring effective investigations and prosecutions, with detection and prosecution of migrant smugglers through an early and efficient exchange of information at EU level and possibly beyond. The timely exchange of information is vital in cases in which information is often scattered amongst different countries and prompt action is needed. Such exchange helps highlight the different stages of investigations in the participating States, thus allowing the most appropriate judicial cooperation tool to be used. In this context, JITs proved their efficiency in formalising arrangements between all parties involved to decide on a joint investigative and prosecutorial strategy. The North Sea Task Force is a relatively novel way to develop effective prosecutorial strategies along the smuggling routes.
6. An EU-wide coordinated response has clear and significant added value.
7. Eurojust, by virtue of its privileged relationship with the national judicial and law enforcement authorities and liaison magistrates in Member States and in third States, plays a key role in enhancing judicial coordination based on analytical work and cooperation with Europol. Eurojust is in a unique position to detect connections between parallel



investigations and to facilitate the creation of a prosecutorial strategy to disrupt and dismantle the entire OCG.

8. In this context, **Member States are encouraged to refer more cases to Eurojust.**

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