Report of Eurojust's casework experience in the field of Prevention and Resolution of Conflicts of Jurisdiction

4 June 2015

REPORT ON EUROJUST'S CASEWORK IN THE FIELD OF PREVENTION AND RESOLUTION OF CONFLICTS OF JURISDICTION

This report concerns Eurojust's experience in the field of the prevention and resolution of conflicts of jurisdiction, in particular, in the period from 2009 to 2014. The report is based on Eurojust's casework, seminars organised or co-organised by Eurojust and contributions made by Eurojust.[1] The report also reflects the outcome of interviews conducted by the University of Luxembourg with several national desks in February 2015 as well as the College Thematic Discussion on Conflicts of Jurisdiction that took place in March 2015.

The report starts by recalling the main legal provisions on conflicts of jurisdiction (*infra* I) and then addresses Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction from four different angles: the identification and coordination of parallel proceedings (*infra* II); the criteria and decisions on which jurisdiction should prosecute (*infra* III); the transfer of proceedings (*infra* IV) and issues related to the application of the principle of *ne bis in idem* (*infra* V).

I. Legal background

The major role that Eurojust has to play in supporting Member States in determining the appropriate jurisdiction, is highlighted in Articles 82(1)(b) and 85(1)(c) TFEU which refer to the tasks of Eurojust in preventing, settling and resolving conflicts of jurisdiction.

Pursuant to the Eurojust Decision (EJD), Eurojust may ask the competent authorities of the Member States concerned to undertake an investigation or prosecution of specific acts as foreseen in Articles 6(1)(a)(i) and 7(1)(a)(i) EJD. Likewise, it may ask them to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts according to Articles 6(1)(a)(ii) and 7(1)(a)(ii) EJD. Moreover, the Eurojust Decision enables the College of Eurojust to intervene in the resolution of a case of conflicts of jurisdiction when two or more national members cannot agree on how to resolve it. If that is the case, the College shall be asked to issue a written, non-binding opinion pursuant to Article 7(2) EJD, provided that the matter could not be resolved through mutual agreement between the competent national authorities concerned. The Eurojust Decision also foresees in Article 13(7)(a) that Member States shall ensure that their national members are informed of cases where conflicts of jurisdiction have arisen or are likely to arise. These provisions of the Eurojust Decision must be read together with the Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (FD 2009/948/JHA), which prescribes a

[1] *See*, in particular: Eurojust, Report Strategic Seminar on "Eurojust and the Lisbon Treaty; towards more effective action. Conclusions of the Strategic Seminar organized by Eurojust and the Belgian Presidency (Bruges, 20-22 September 2010), Council Doc. No 17625/1/10; Eurojust, Report Strategic Seminar on "New perspectives in Judicial Cooperation", Budapest, 15-17 May 2011, Council Doc. No 14428/11; Eurojust's Commentary on the Commission Green Paper Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings, p. 1, retrievable at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eurjust_ne_bis_in_idem/eurjust_ne_bis_in_idemen.pdf

specific role for Eurojust in assisting the national authorities in its Article 12 in case the national authorities cannot agree amongst themselves in a case of conflict of jurisdiction.

Additionally, several other legal instruments in the area of criminal matters, such as e.g. the Framework Decision on the European Arrest Warrant (Article 16 FD 2002/584/JHA), the Framework Decision on combating terrorism (Article 9 FD 2002/475/JHA), the Framework Decision on attacks against information systems (Article 10 FD 2005/222/JHA) and the Framework Decision on the fight against organised crime (Article 7 FD 2008/841/JHA), include relevant provisions which might lead to Eurojust's involvement in the area of conflicts of jurisdiction.

II. Identification and Coordination of Parallel Proceedings

Parallel investigations are very common in the European Union, in particular in cases where the offence itself is of a cross-border nature such as trafficking in human beings or drugs trafficking. But also cases of VAT fraud and cybercrime often lead to parallel investigations. That being said, Eurojust casework indicates that, in principle, *all* kinds of crime can lead to parallel proceedings, including crimes that occurred within the territory of only one Member State. For instance, when a person has become a victim whilst travelling, he or she will sometimes report the incident both in the Member State where the crime occurred and in the Member State of origin after having returned home,, which can then lead to parallel proceedings.

Parallel proceedings are considered to be very beneficial for combating crime in the European Union, provided that they are performed in a coordinated way. Parallel proceedings are seen as essential to get the overall picture of complex cases, to exchange information and clarify links between different parts of a network and to facilitate subsequent decisions on which jurisdiction should prosecute. Possible drawbacks stemming from parallel proceedings - such as waste of resources, risk of mutually jeopardising each other's investigations or *ne bis in idem* problems - tend to arise precisely where no coordination takes place. Eurojust Level II meetings and coordination meetings, and Joint Investigations Teams (JITs) are considered excellent tools to coordinate parallel proceedings and they demonstrate Eurojust's important role in this regard.

The detection of parallel proceedings, which is often a crucial, preliminary step, before any coordination can take place, can occur in different ways, often long before a case is brought to Eurojust's attention, and often by mere coincidence. Cases can, for instance, be identified via police cooperation or when mutual recognition or mutual legal assistance requests are sent to a competent authority in another Member State or when defendants or their counsels bring it up during investigations. Also Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, is aimed at improving the detection of parallel investigations. It obliges competent authorities of a Member State that have reasonable grounds to believe that parallel proceedings are being conducted in another Member State, to contact the competent authority of the latter Member State (Article 5 FD 2009/948/JHA). Of course, such duty implies that there are already indications or reasons to believe that there are parallel proceedings, which is not always the case.

Parallel proceedings can also be identified by Eurojust. First of all, Article 13(7) EJD obliges Member States to inform their national members of all cases where conflicts of jurisdiction have arisen or are like to arise. The actual number of cases that is reported to Eurojust on the basis of Article 13(7) is relatively low (see Annex 2). This low figure, together with the maximum three-year time retention period for the storage of data at Eurojust (Article 21(2)(b) EJD), possibly explains the low rate of actual "hits" when cases are cross-checked in Eurojust's Case Management System (CMS). Additionally, parallel proceedings can be detected when Eurojust is informed of competing European arrest warrants on the basis of the Framework Decision on the European Arrest Warrant. Finally, on some occasions, parallel proceedings can come to light in the framework of coordination meetings that are held at Eurojust or when Eurojust is contacted by national authorities to solve diverging views on the scope and application of the principle of *ne bis in idem* (see *infra* V).

III. The Criteria and Decisions related to which Jurisdiction should Prosecute

As mentioned above, Eurojust is entitled to issue recommendations and non-binding opinions under Articles 6 and 7 EJD indicating which Member State is in a better position to undertake an investigation or to prosecute specific acts (see *supra* I). In its casework, Eurojust makes generally limited formal use of these powers.

As far as Article 6 EJD is concerned, conflicts of jurisdiction are normally settled consensually between the national authorities during level II meetings or coordination meetings at Eurojust, or in the framework of JITs. Formal recommendations by national members are the exception and tend to be limited to specific Member States which are often bound to do so by their national legislation. The limited number of cases registered in the CMS (see Annex 1) confirms indeed this informal approach to address conflicts of jurisdiction.

As far as Article 7 is concerned, formal recommendations by the College (Article 7(1)(a)(ii) EJD) or written non-binding opinions by the College (Article 7(2) EJD) are rather exceptional. For the period 2003-2014 there have been four cases registered at Eurojust on the basis of Article 7(1)(a)(ii) EJD, concerning a case of environmental crime, a fraud case, a murder case, and a VAT fraud case.[2] Article 7(2) EJD has not been applied yet. Again, this low number of cases could be an indication that most conflicts of jurisdiction are settled consensually amongst the concerned parties and do usually not need the intervention of the College.

The Eurojust *Guidelines for deciding which jurisdiction should prosecute,* which were published in the Eurojust Annual Report 2003, are considered very useful in particular in view of their flexibility and reasonableness. Since each case is different, the variety of factors allows that in each case the position and interests of all involved parties and all relevant aspects of the case can be taken into account. Even though "territoriality" - and, in particular, the place where the majority of the criminal acts took place - remains a dominant criterion, it is also clear that it is not an all-decisive factor. For instance, in cross-border cases where criminal acts take place in different Member States, also other factors - such as the nationality/place of residence of the

[2] *See*: Council doc No 17308/08 pf 17.12.2008, p. 104-105; and "Jurisdiction conflicts and the principle of *ne bis in idem* in Europe", 2006, p. 18-21, retrievable at: https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Conflictos_de_jurisdiccion.pdf?idFile=fbf92f7d-a1c2-4f9a-bf0c-8b93debc2c8b

defendant(s) and/or the victims(s), the more advanced stage of the proceedings, the broader scope of the investigations, or the place where most evidence is present - often play a decisive role. But also in cases where the criminal offence took place within one single Member State there can still be overriding reasons to decide that another Member State is in a better position to prosecute the case than the Member State of the place where the offence actually occurred. Eurojust therefore opted for having a flexible list with a variety of criteria, rather than a rigid hierarchical list with limited criteria.

Whilst the 2003 Eurojust Guidelines tend to be very helpful for "positive" conflicts of jurisdiction, the same does not necessarily hold true for "negative" conflicts of jurisdiction. The latter - which should not only be understood as situations where none of the Member States involved can prosecute because none of them has jurisdiction, but also, and in particular, as situations where Member States are in principle competent, but prefer not to prosecute for reason of lack of resources or other priorities (principle of opportunity) - also occur. Even though "negative" conflicts of jurisdiction are much more exceptional than "positive" conflicts of jurisdiction, they do occur and are rather difficult to solve.[3] In this regard, reference can be made to a number of fraud cases where Eurojust offered support and where no Member State was willing to proceed with the investigation and prosecution. Fraud was committed on a global scale with the use of the Internet. In these cases, the experience was that the principle of territoriality was sometimes an obstacle for solving conflicts of jurisdiction.[4] The fraud was intentionally committed in various countries with individuals of different nationalities and the suspects were always located in other countries, which did not suffer the effects of the crime and whose courts did not have competence to prosecute on the basis of the territoriality and nationality principles.

IV. The Transfer of Criminal Proceedings

Eurojust's casework confirms that the transfer of criminal proceedings is considered to be an indispensable tool to settle jurisdictional issues. In the absence of a specific EU instrument dealing with this issue – an initiative for a Framework Decision on Transfer of proceedings was brought forward in 2009, but the discussions seized in light of the coming into force of the Lisbon Treaty - ,[5] Member States currently rely on different legal bases to settle transfer of criminal proceedings. First of all, Member States apply the 1972 Council of Europe Convention which specifically deals with the Transfer of Proceedings in Criminal matters and which spells out detailed conditions and procedural rules for the transfer. However, due to the limited number of ratifications of this instrument in the Member States, Member States also transfer proceedings on the basis of other, more general, multilateral instruments. For instance, Article 21 of the 1959 Council of Europe Convention on mutual assistance in criminal matters, in conjunction with Article 6(1) last paragraph of the 2000 EU Convention on mutual assistance in criminal matters between the Member States, is very common in cases that are dealt with by Eurojust. But also Article 21 of the United Nations Convention against Transnational Organized

[3] *See* Eurojust's Commentary on the Commission Green Paper Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings, p. 1 (see footnote 1).
[4] *See*, Eurojust Annual Report 2011, p. 33.
[5] Initiative for a Council Framework Decision on transfer of proceedings in criminal matters, Council doc No 11119/09 of 30 June 2009 and Council doc No 11704/1/09 REV 1 of 3 July 2009.

Crime has been used on some occasions. In other cases, where no relevant multilateral legal instrument was ratified by the Member States concerned and in the absence of a bilateral agreement, the principle of reciprocity has been used as legal basis in combination with relevant national provisions on transfer of proceedings. Even though this patchwork of legal bases tends to offer workable solutions for day-to-day practice, it can also create difficulties that trigger the national authorities to call upon Eurojust.

Eurojust's casework shows that the reasons for difficulties in transferring criminal proceedings vary and that some of them relate to the following issues:

- The lack of a derivative jurisdiction clause can lead to situations where Member States are reluctant to take over proceedings on the basis of a lack of jurisdiction, for example in cases of VAT fraud committed in several Member States;[6]

- A clear interest on the part of the requested State to accept the transfer of proceedings is not always easily established;[7]

- The transfer of proceedings is often time-consuming and, in the absence of tight deadlines, it usually takes a long time before a decision is actually made; the latter can be problematic in view of statutory time bars;

- The great margin of discretion entails the risk that cases are being transferred to another Member State, but then closed in the latter State without further investigation and, sometimes, without any clear explanations given on the reasons for the closure;

- The possibility of direct contact between judicial authorities, which has become a main feature of the EU's criminal justice area, but which is not available under the 1972 Council of Europe Convention, is sometimes used as an argument for not using the latter instrument, but instead Article 21 of the 1959 Council of Europe Convention on mutual assistance in criminal matters, in conjunction with Article 6(1) last paragraph of the 2000 EU Convention on mutual assistance in criminal matters;

- A partial transfer of proceedings, with different suspects involved, is not always easy to agree upon;

- The fact that investigations are on-going in the requested Member State can be an impediment to a transfer of criminal proceedings;

- Differences between the Member States in substantive criminal law (e.g. different constitutive elements of a specific crime) or procedural criminal law (e.g. different rules on the gathering and admissibility of evidence) can complicate the transfer of proceedings;[8]

- The costs related to the translation of the entire file, which needs to be made on the basis of a preliminary assessment of the case and thus before a final decision on the

[6] *See*, for instance, Eurojust Annual Report 2013, p. 24-25.
[7] *See*, Eurojust Annual Report 2011, p. 22; Eurojust Annual Report 2012, p. 20.
[8] *See*, Eurojust Annual Report 2011, p. 22; Eurojust Annual Report 2012, p. 20.

transfer of proceedings has been taken, can lead to frustration, in particular if, after the translation, the final decision on the transfer of proceedings is negative;

- Member States which have not foreseen the transfer of criminal proceedings in their criminal procedural code and which follow the principle of legality rigidly are prevented from considering a transfer of proceedings if they have jurisdiction over the crime that has been committed.

Even though coordination meetings and JITs serve to find solutions and to address many of the issues mentioned above, some issues are more difficult to overcome.

V. The Principle of *Ne Bis In Idem*

By facilitating the effective and early exchange of information through Eurojust coordination meetings, Member States are not only enabled to identify possible parallel proceedings, to detect links with cases to other Member States, to prevent conflicts of jurisdiction or to agree upon transfer of proceedings, but also to avoid *ne bis in idem* cases. Over the years, Eurojust has encountered that problems related to *ne bis in idem* are a significant issue and that it is desirable to find appropriate and practical solutions within a reasonable time.[9] Level II meetings or coordination meetings at Eurojust are often used, at an early stage, to examine whether related facts that are under investigation in two or more Member States constitute "the same facts" in the meaning of Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA). Depending on the outcome of such an examination, parallel proceedings can either be continued or can lead to the discontinuation of the proceedings in one Member State and/or a possible transfer of proceedings.

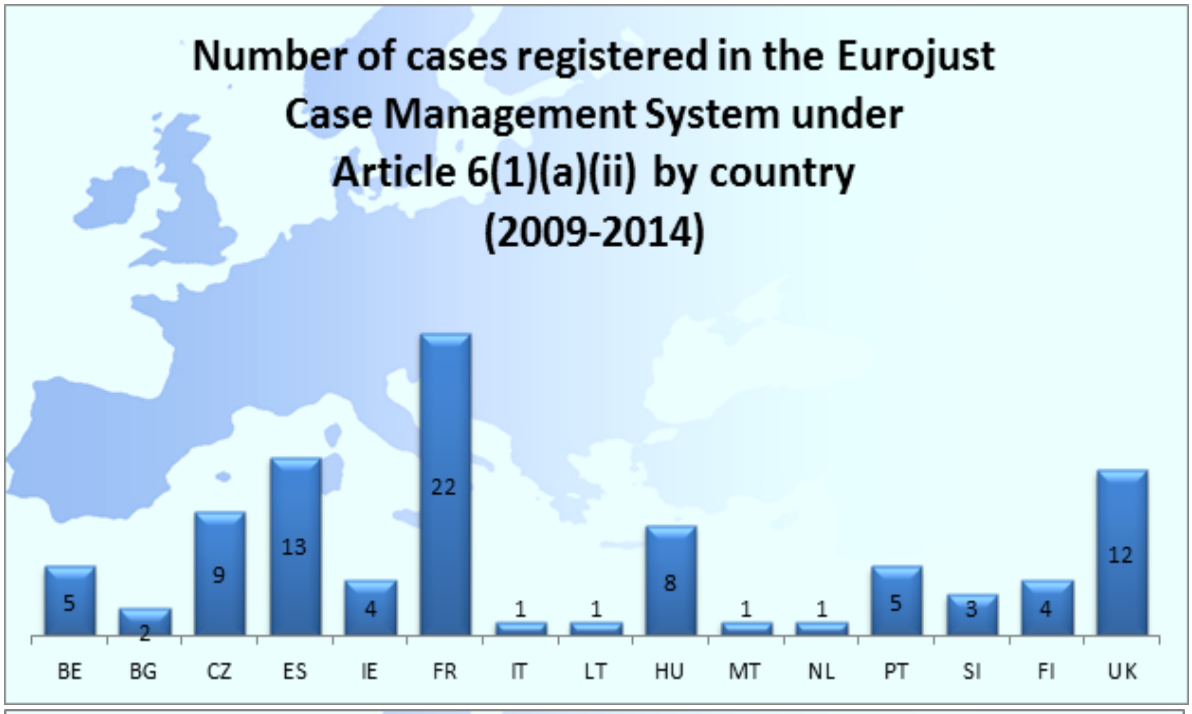
Even though in many cases a possible *ne bis in idem* can easily be discarded, for instance, if different victims are involved, this is not true for all cases. The case law of the Court of Justice of the European Union (CJEU) on Article 54 CISA and Article 50 of the Charter of Fundamental Rights of the European Union has been very helpful in clarifying the scope and content of these provisions.[10] Yet Eurojust's casework also illustrates that there are a number of grey areas where the application of the principle of *ne bis in idem* still raises questions for practitioners. In this regard, reference can, for instance, be made to:

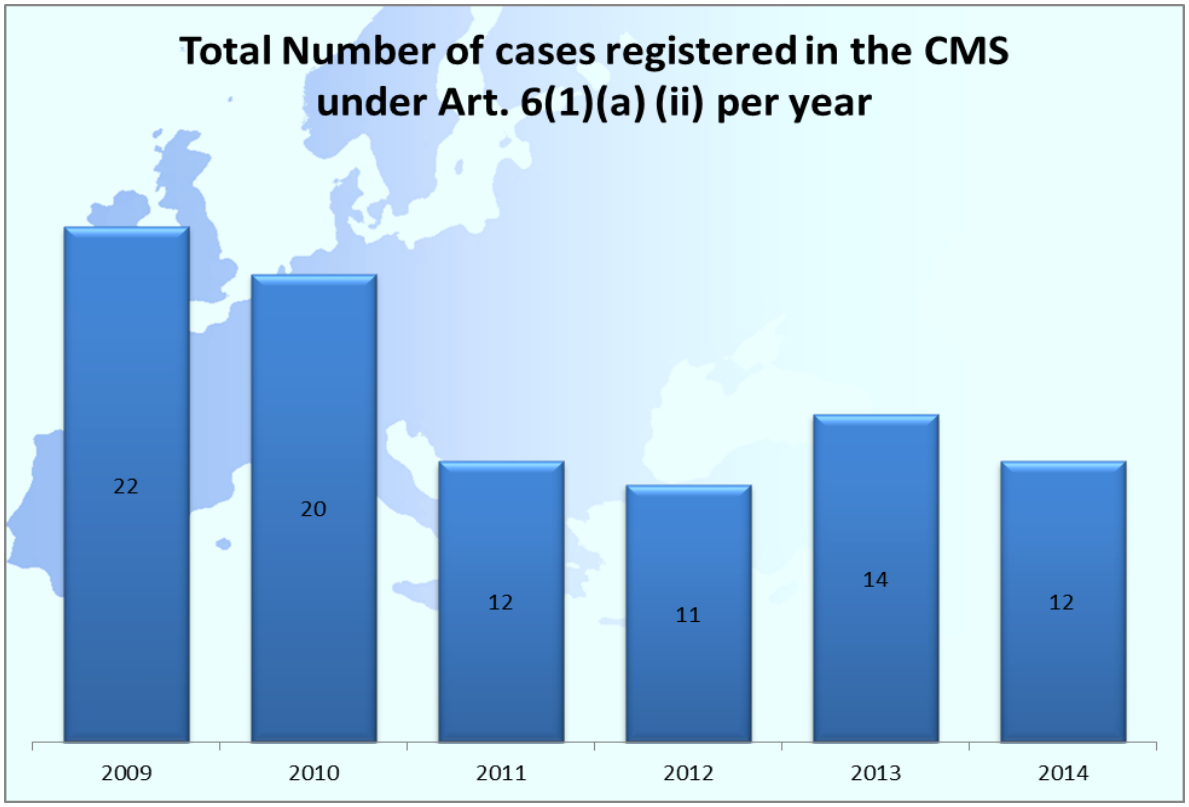
- Cases that relate to criminal activities performed by a criminal organization and where the question is raised as to whether the proceedings can be split up so that one Member State can prosecute the membership in a criminal organization and another Member State the individual acts. The CJEU's *Mantello* judgment, which concerns a similar scenario, and where the CJEU focuses on the assessment and information provided by the Member State where the first conviction took place, does not clarify all issues.

[9] See Eurojust's Commentary on the Commission Green Paper Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings (footnote 2), p. 7.
[10] For an overview of this case law, *see:* Eurojust Note on "Overview of the CJEU's case law on the principle of *ne bis in idem* in criminal matters".

- Cases in which a discontinuation of an investigation was based on an agreement between the suspect and the authorities. The CJEU's statement in *Turanský* that the consequences of a discontinuation of proceedings in another Member State should be determined by the law of the Member State in which this discontinuation took place, does not resolve all questions. The national law is not always clear as to the consequences of a discontinuation which then raises problems of interpretation, in particular in a cross-border context.
- Cases in which a judicial authority is confronted with two requests for the execution of a sentence regarding the same person and the same facts. In this regard, a point of concern, which has not yet been addressed in the CJEU's case law, is the question as to which criteria need to be applied to decide which sentence should be executed. Does the ratio legis of the principle of *ne bis in idem* require that the first judgment should be executed? Or should preference be given to the judgment for which the execution was requested first? Should the mildest sentence be executed? Or should more general principles such as "a good administration of justice" be applied? In cases where no explicit rules are available (neither at European nor at national level) this creates doubts and Eurojust has been asked to provide assistance.
- Cases in which there is an imminent risk of having the co-existence of an administrative sanction and a criminal sanction. The CJEU's *Fransson* judgment and the *Engel* criteria developed by the ECHR offer some guidance, but have not removed all doubts. The correct application of national provisions in light of the CJEU's and ECHR's case law remains a challenging task.

ANNEX 1 – Charts on the application of Article 6(1)(a)(ii) of the Eurojust Decision

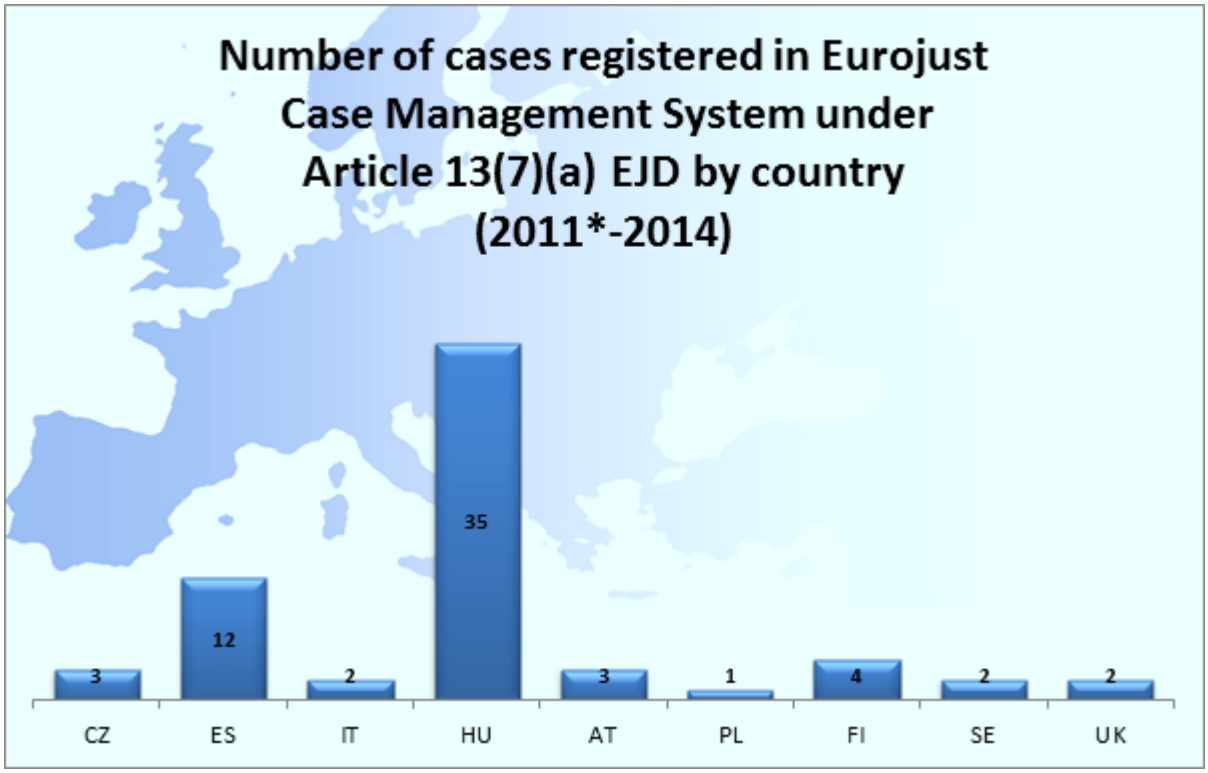




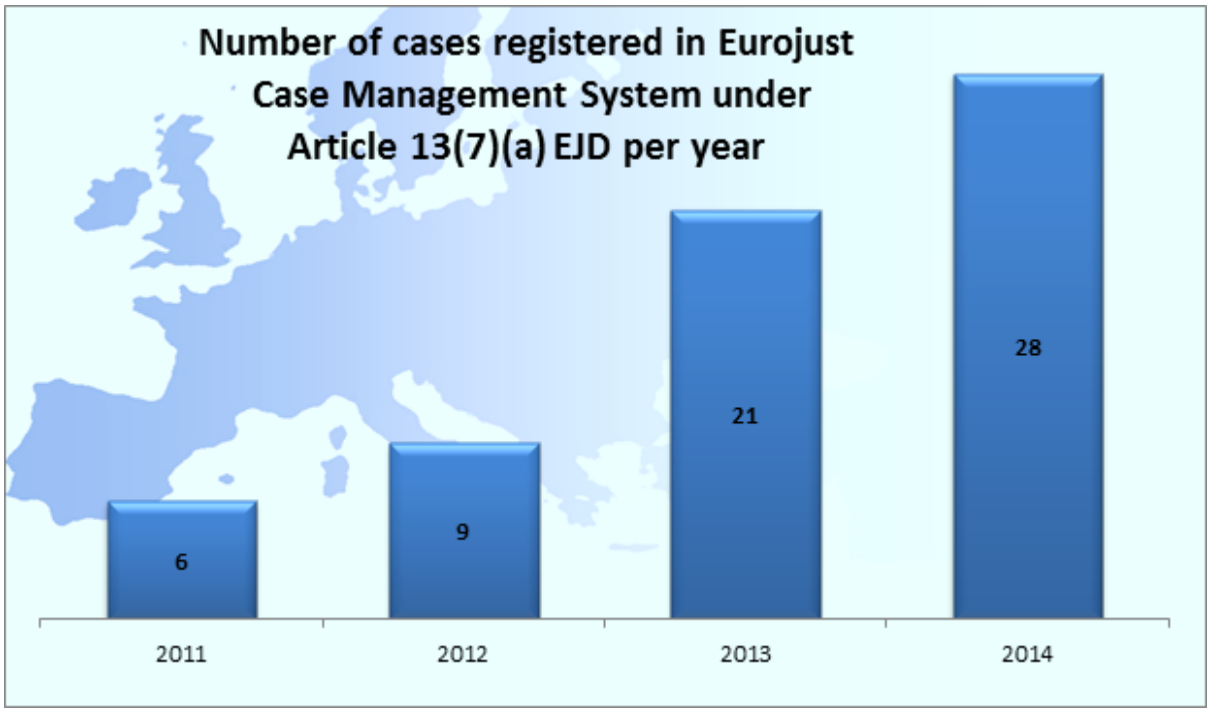
Number of cases registered in the Eurojust Case Management System under Article 6(1)(a)(ii) EJD by country per year

Country	2009	2010	2011	2012	2013	2014
BE		1	1			3
BG	2					
CZ	1	4	1		3	
IE	1	2			1	
ES	4	4		2		3
FR	6	5	4	6		1
IT		1				
LT	1					
HU		1	3	1	1	2
MT					1	
NL			1			
PT	1			2	1	1
SI	1				2	
FI	2		1			1
UK	3	2	1		5	1

ANNEX 2 – Charts on the application of Article 13(7)(a) of the Eurojust Decision



***Article 13 EJD was only implemented in July 2011**


Number of cases registered in Eurojust Case Management System under Article 13(7)(a) EJD per year
6
9
21
28
2011
2012
2013
2014

Number of cases registered in the Eurojust Case Management System under Article 13(7)(a)EJD by country per year

	2011	2012	2013	2014
country	Art. 13(7)(a)	Art. 13(7)(a)	Art. 13(7)(a)	Art. 13(7)(a)
BE				
CZ			1	2
DK				
DE				
ES	1		3	8
FR				
IT	1	1		
LT				
LU				
HU	3	5	12	15
MT				
NL				
AT			1	2
PL			1	
PT				
SK				
FI		2	1	1
SE	1		1	
UK		1	1	

Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, Netherlands
Phone: +31 70 412 5000 - E-mail: info@eurojust.europa.eu - Website: www.eurojust.europa.eu

Catalogue number: QP-02-17-923-EN-N • *ISBN*: 978-92-9490-165-1 • *Doi*: 10.2812/56323