



*Consultative Forum
of Prosecutors General and
Directors of Public Prosecutions
of the Member States of the European Union*



CONSULTATIVE FORUM OF PROSECUTORS GENERAL AND DIRECTORS OF PUBLIC PROSECUTIONS OF THE MEMBER STATES OF THE EUROPEAN UNION

11TH MEETING

THE HAGUE, 3 JUNE 2016

CONCLUSIONS

**11TH MEETING OF THE CONSULTATIVE FORUM OF PROSECUTORS GENERAL
AND DIRECTORS OF PUBLIC PROSECUTIONS OF THE MEMBER STATES
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CONCLUSIONS

Introduction

The 11th meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union (the Forum) was, for the first time, jointly convened by the Chair of the Board of Prosecutors General of the Netherlands, *Herman Bolhaar*, and the Prosecutor General of the Slovak Republic, *Jaromír Čižnár*.

The meeting was opened by the President of Eurojust, *Michèle Coninx*, and was co-chaired by *Herman Bolhaar* and the Deputy Prosecutor General of the Slovak Republic, *Jozef Szabó*, on behalf of the Prosecutor General of the Slovak Republic.

The Forum discussed and reached conclusions on the following topics:

1. Cybercrime;
2. Terrorism and illegal immigrant smuggling;
3. Cooperation with key third States in serious and organised crime; and
4. European Investigation Order.

Session I – Cybercrime: Keys to Cyberspace/European Judicial Cybercrime Network

The following conclusions are based on the written contributions submitted in advance,¹ and on interventions expressed by Forum members during the meeting:

1. With regard to the outcome of the strategic seminar on cybercrime, *Keys to Cyberspace*, Forum members take note of discussions among judicial authorities specialised in cybercrime, which revolved around frequent challenges encountered by prosecutors in the investigation and prosecution of cybercrime. The seminar provided a very useful platform to address these challenges and suggest possible ways to overcome certain difficulties, *in primis* regarding cooperation with service providers located in third States and the

¹ Written contributions were received from 18 Forum members from the following Member States: Austria, Cyprus, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and UK.

widespread use of encryption tools.

2. The Consultative Forum also takes note of the Netherlands Presidency's initiative to establish a European Judicial Cybercrime Network (the Network). Forum members support such an initiative as a way to foster contacts among judicial authorities with an expertise in cybercrime and increase efficiency of investigations and prosecutions of cybercrime and cyber-enabled crime cases and investigations in cyberspace.
3. A number of Forum members stress the importance of avoiding duplication and ensuring synergy with existing structures, particularly Eurojust and the European Judicial Network (EJN). There is a large consensus that the Network should not replace the statutory functions of Eurojust or the EJN, and will cooperate closely with other relevant partners operating in countering cybercrime, *in primis* the European Cybercrime Centre at Europol (EC3), and also the Council of Europe and the T-CY Committee on the implementation of the 2001 Council of Europe Convention on Cybercrime.
4. Forum members note that the Network will serve as a 'think tank' information portal for judicial authorities. It should assist practitioners in obtaining better results in the fight against cybercrime by, for example, facilitating informal contacts among specialised practitioners, exchanging information on relevant domestic legislation and recurrent challenges in connection with the volatile nature of e-evidence, and lengthy mutual legal assistance procedures, particularly when third States are involved. E.g., the Network should collect and share best practice on the impact of encryption on the gathering of e-evidence, its admissibility in court, and challenges posed by the variety of data retention regimes in the Member States.
5. A number of Forum members stress the need to facilitate the sharing of relevant information swiftly, also in view of continuously developing internet technology, for example via a website that should be punctually and regularly updated.
6. Forum members encourage the Network to begin its activities by establishing contacts among judicial authorities with an expertise in cybercrime, and to develop gradually, depending on the needs of practitioners and the level of available support.
7. It was indicated that the support which Eurojust would provide to the Network should be explored.

Session II – Latest developments in key crime areas, including terrorism and illegal immigrant smuggling

1. Following the terrorist attacks that recently took place in Paris and Belgium, Forum members attentively listened to the experience of French and Belgian representatives dealing with the related investigations. Forum members were also informed about some very interesting developments in the legal framework and judicial responses to some new challenges posed by terrorist cases, and about Eurojust’s increasing operational support in terrorism cases and continued analysis of the judicial response to the foreign terrorist fighters phenomenon.
2. French and Belgian representatives stressed, among other things, the importance of involving the judiciary at a very early stage, of ensuring prompt information exchange with other Member States, as well as the crucial role that information coming from the intelligence might have for the prosecuting authorities.
3. Forum members were also invited to reflect on the possibility to apply international humanitarian law to the acts committed by foreign terrorist fighters, e.g. in Syria, which might lead to the consequence that national provisions criminalising terrorist offences would not be applicable.
4. Furthermore, the challenges posed by the use of electronic communication services (particularly WhatsApp and Telegram), combined with the widespread use of encryption and the lack of response from some service providers, were also underlined as detrimental to effective investigations and prosecutions.
5. Forum members also carefully followed a presentation by the Italian representative on the new *modus operandi* and innovative ways to tackle organised criminal groups involved in the smuggling of migrants to the European Union. Forum members were informed of some of the obstacles faced by Italian prosecutors dealing with illegal immigrant cases and the new judicial approach that has enabled Italy to assert jurisdiction and exercise enforcement powers on vessels on the high seas based on the doctrine of the so-called ‘mediated perpetrator’ (*autore mediato*).
6. Forum members underline the advantages of considering illegal immigrant smuggling as a serious organised crime *per se*, as this characterisation would enable the use of special investigative techniques and the involvement of specialised prosecutors and investigators to effectively bring to justice leaders of this criminal phenomenon.
7. Based on the experience of Eurojust and the speakers, including the President of Eurojust and the Dutch Liaison Prosecutor posted in Italy and dealing mainly with illegal immigrant smuggling cases who stressed again the need to be “generous in international cooperation”, Forum members agree on the need to proactively deal with this crime type and to further develop personal contacts among prosecutors dealing with such crimes, with a view to

building trust and ensuring an appropriate level of judicial cooperation throughout the European Union.

Session III – Cooperation with key third States in serious and organised crime, including terrorism and illegal immigrant smuggling

The following conclusions are based on the written contributions submitted in advance,² and interventions made by Forum members during the meeting:

1. Forum members acknowledge that judicial cooperation with key third States in serious and organised crime, particularly in terrorism and illegal immigrant cases, is a vital precondition for successful investigations and prosecutions. However, they recognise that it can still pose difficulties for practitioners. Such difficulties can be either of legal and/or practical nature, and can possibly adversely impact the execution of MLA requests and other forms of judicial assistance. In this respect, Forum members reiterate the crucial importance of improving judicial cooperation between Member States and key third States.
2. Many Forum members highlighted that differences between national legislation of Member States and third States may also pose difficulties in the collection and admissibility of evidence from another jurisdiction. Forum members identified these possible differences, particularly the non-criminalisation of illegal immigrant smuggling in several national legal systems, different legal regimes for using special investigative techniques and for using information gathered via intelligence services, as well as an insufficient legal basis for, *inter alia*, setting up JITs or conducting video hearings of witnesses.
3. Several Forum members agree on the fact that the practical obstacles to judicial cooperation with third States can lead to delays in or even lack of execution of MLA requests in third States. These obstacles may concern little or no direct (informal or formal) contacts with third States' judicial authorities, language barriers, using diplomatic channels for transmitting MLA requests, lack of information on the progress of execution of MLA requests, difficulties in the swift exchange of information, intelligence and evidence, as well as obstacles in gathering evidence.
4. Based on their experience in cooperating with the judicial authorities from key third States, Forum members suggest possible solutions to address the above-mentioned obstacles. In this respect, encouraging third States to ratify relevant international legal instruments enabling judicial cooperation is considered a crucial element in successful cooperation. For example, the ratification of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air by relevant third States was mentioned as a fundamental precondition for the thorough investigation and prosecution of illegal immigrant smuggling cases. Furthermore, conclusion of bilateral/multilateral agreements between Member States and third States to enhance cooperation is also recommended by several Forum members.

² Written contributions were received from 20 Forum members from the following Member States: Austria, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and UK.

5. Moreover, the majority of Forum members emphasizes that intensified personal and informal contacts between practitioners from Member States and third States would contribute to the facilitation of judicial cooperation.
6. The possibility of setting out a clear legal framework in relation to operations carried out by EUNAVFOR MED is also emphasized as one factor that would contribute to improved cooperation in criminal matters with the relevant third States.
7. Forum members also identified several ways through which Eurojust could further assist national practitioners to enhance cooperation with key third States. In this context, the Forum recommends that Eurojust continue offering support to the national judicial authorities both at operational (e.g. by organising coordination meetings, facilitating the setting up and funding of JITs, facilitating the execution of requests related to special investigative techniques, particularly in terrorism cases) and strategic levels (e.g. by organising strategic and tactical meetings for practitioners, and by holding regional conferences).
8. Eurojust's assistance is judged to be valuable in providing assistance to Member States on MLA processes with third States to better plan and progress investigations involving judicial cooperation with these third States.
9. Several Forum members stress the important role the Eurojust network of contact points in third States could play in improving judicial cooperation, and also suggest their further expansion.

Session IV – Open debate by Forum members

On the topic of **Directive 2014/41/EU of 3 April 2014 on the European Investigation Order in criminal matters (EIO)**:

1. The vast majority of Forum members, being aware of the historical challenge the EIO means for the future of judicial cooperation in the European Union, would like to stress the importance of its timely and adequate implementation before the deadline of 22 May 2017. Failing to do so would have serious negative consequences for ongoing and future cases, given the substitution of the corresponding provisions of the Conventions used so far in this field by the Directive, as established by its Article 34. However, in this context a Forum member also calls upon the European Commission to significantly reduce the number of legislative initiatives taking into account the time required for proper implementation and training of the practitioners at national level.
2. As legal certainty is a basic principle in the field of criminal law, the Forum would welcome any efforts aimed at specifying which 'corresponding provisions' of the existing Conventions are to be deemed replaced by the Directive, in order to identify and avoid any possible practical conflict between the Directive and the relevant Conventions.
3. Forum members offer, where applicable, their expertise, experience and assistance to the national legislators, who are in charge of ensuring that this new instrument is transposed

into national legislation, with a view to contributing, from a technical perspective, in improving the legal framework on judicial cooperation under the umbrella of mutual recognition as provided for by Article 82 TFEU.

Other topics raised in this session included: *(i)* a proposal by one Forum member inviting Eurojust to carry out an assessment of the cases it dealt with, particularly with regard to cooperation between Member States and third States, and encouraging Eurojust to continue sharing with relevant experts in Member States the information gathered by Eurojust on judicial cooperation instruments and practices; *(ii)* information on the outcome of the EU-US Justice and Home Affairs Ministerial meeting held in Amsterdam on 1 and 2 June 2016; and *(iii)* an update concerning the negotiations on the draft Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO).
