

Coordinating Investigations in a Cross-border Context

Dr Lutz Roth

The EuroNEEDS Study

- Interviewed:
 - 132 prosecutors in 17 member states and Croatia
 - 35 definitively identified as experts for crimes against the EU's financial interests
 - 64 as trans-national crime experts (THB, drug smuggling, corruption)
 - 60 defence lawyers in 15 member states and Croatia
 - 30 practitioners in Europol, Eurojust and OLAF

The EuroNEEDS results allow the identification of four areas in which cross-border cooperation presents particular challenges:

- A. Non-binding/informal nature of member states criminal justice agency cooperation.
- B. Investigations by member state prosecutors/ investigators reduced to nationally relevant aspects.
- C. Leading investigations at an international level is problematic.
- D. Cross-border evidence gathering and the admissibility of its results.

A: Cooperation between criminal justice agencies of the member states is non-binding/informal.

- Lack of deadlines when requests are made.
- Non-disclosure even that will not respond, e.g. because requested action is not legally possible or request not well-founded.
- Delayed caused by freedom in when to respond to request can mean cases drag on or peter out entirely.
 - This can lead to frustration and unwillingness to consider international dimension altogether.
- Supranational practitioners criticise EU level dependency upon the will of the member states.

Potential Solutions

- EIO
 - “Comply or explain” approach.
 - Lack of conflict solving mechanisms.
 - Problem associated with protocol 36, Treaty of Lisbon – UK, DK no participation.
- Resolution using EU institutions.
 - Eurojust’s potential to solve conflicts.
- Compulsory deadline – would solve problem but unprecedented even in e.g. BRD.

B: Reducing Cases to Nationally Relevant Aspects

The EuroNEEDS studies indicate several reasons for this:

- The national aspects are weightier.
- Fear of delay.
- Conscious decision to limit cases, no matter how serious the cross border aspects.
- National prosecutorial cultures primed close cases efficiently. Delays caused by cross-border aspects run contrary to this.

B. Supra-national Practitioner's Perspective

- Supranational practitioners confirm there is no cooperation problem if EU and member state investigators have the same aim in prosecution. Otherwise, coordination of investigations becomes difficult.
 - Resource problems in member states, but also e.g. within OLAF.
 - Especially supranational practitioners, point to negative conflicts of jurisdiction.

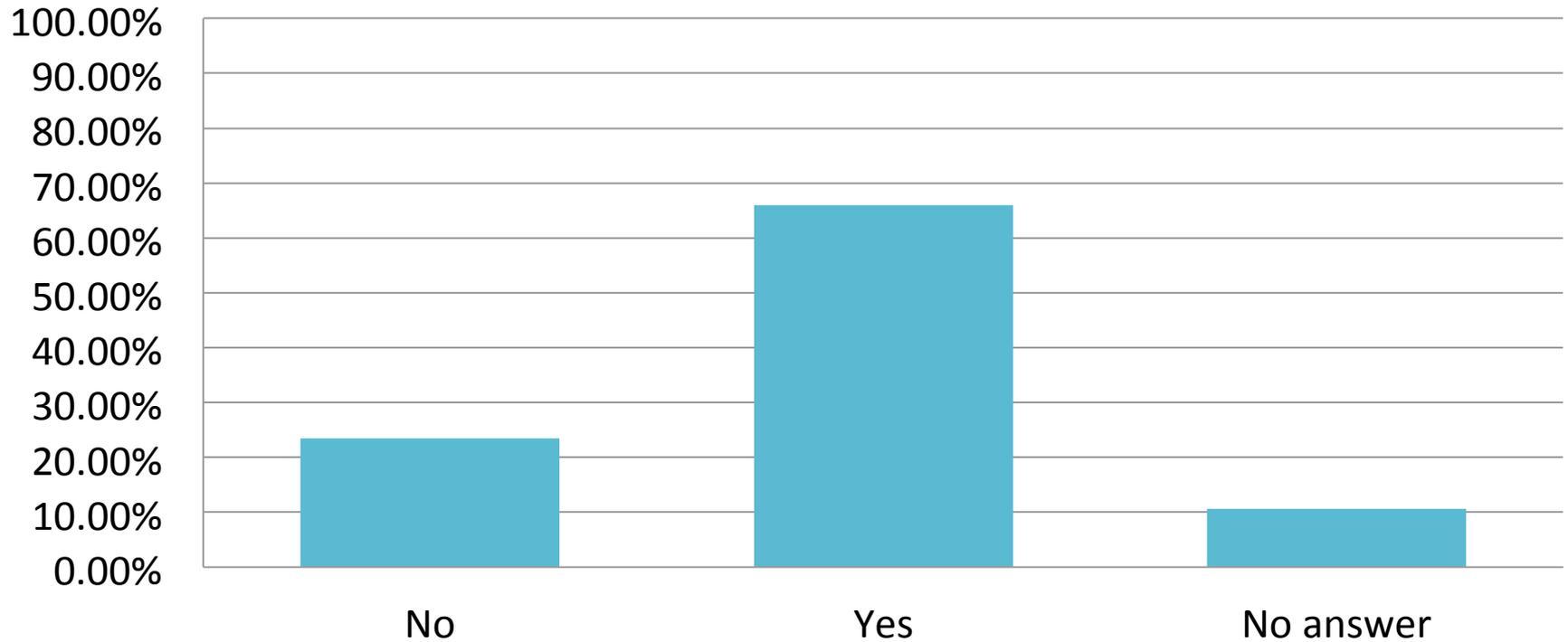
Discussion

- Impossible to control prosecutorial discretion. Conflict to be expected.
- Discouraging effect of previous frustrating experience, difficult to counter and internalised institutionally.
- Conflicts of jurisdiction – Eurojust decision reform should help. Countering negative conflicts effectively – difficult.
 - Minimum requirements before turning to Eurojust mean these solutions only available for very serious cases.
 - Solution only possible via mechanisms which disproportionately ignore sovereignty.

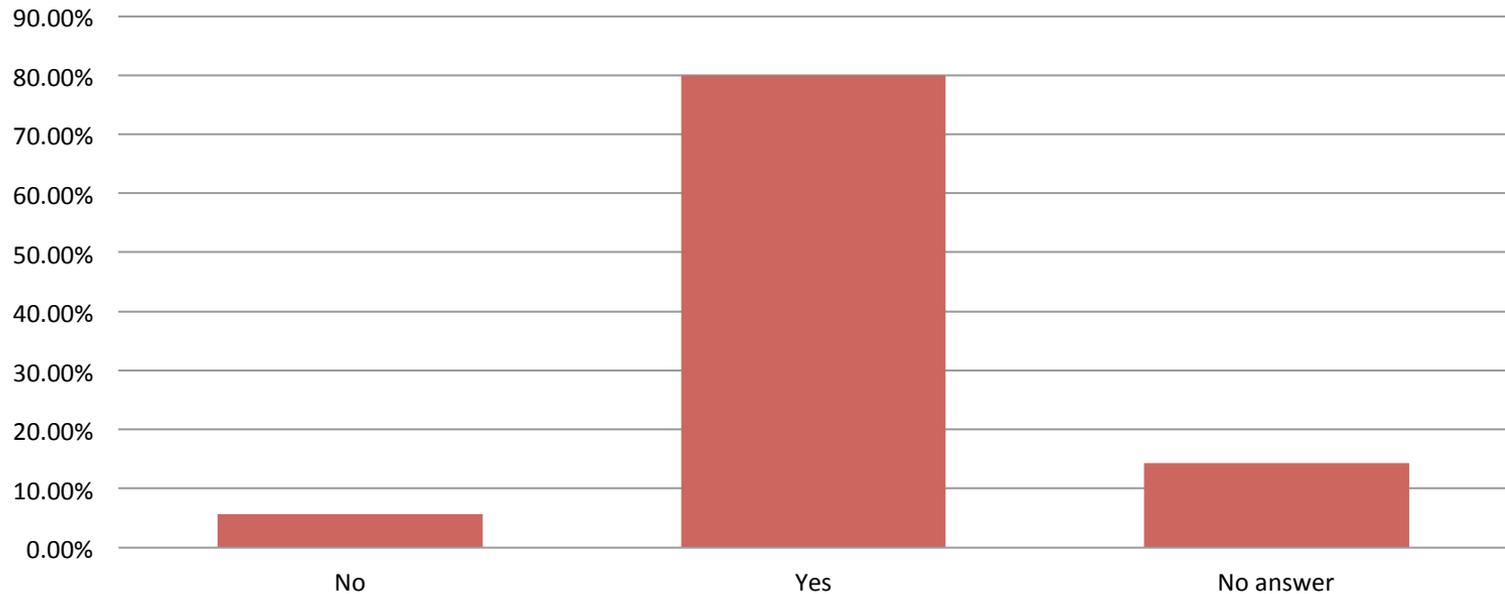
C: Leadership of investigations at international level.

- No standard process by which cross-border investigations can be opened.
 - EJM, Eurojust, Europol, classic MLA.
- Member state investigators generally little knowledge of MLA and EU mechanisms.
- Who leads?
 - JITs complicated.
 - Initiating investigator cannot influence investigation in requested states.
 - Desire to lead investigation comprehensively.

National Prosecutors: preference to become directly involved in collecting evidence in another MS



National Prosecutors Financial Interests: preference to become directly involved in collecting evidence in another MS



Improving Leadership of European Cases

- Supranational practitioners say linguistic cultural and legal differences are important.
- The more common ground there is, the better.
- Knowledge of EU law and cooperation mechanisms will improve the situation.
- Closer dovetailing of EU institutions' work with that of member state agencies necessary.

Discussion

- Joint investigation teams appear complicated and in no way guarantee success.
- Member states currently unwilling to surrender sovereignty further. Therefore, JITs the best way.
 - Via Lisbon Treaty, coherence may slowly improve.
 - Possible use of Model Rules.
- Evolution of EIO demonstrates how difficult political reality can be.
 - Success of EIO t.b.c. appears acceptable compromise between the interest of the requesting and requested agency.
- Very serious cases – JIT will be used, or lead investigator can be personally present under MLA rules.

D – Uncoordinated evidence gathering.

Deficits:

- uncertainty whether evidence gathered in several member states can be used at trial in any member state.
- Evidence gathered illegitimately can sometimes be used in other member states.
- Uncertainty in protecting individual rights, but also as to powers of investigators.
- Lack of knowledge.

D - Supranational Practitioners'

Perspective

- Lack of coordination of parallel investigations means results cannot always be used at trial
- Multiple agencies in a single member state responsible for the same procedure - causes cooperation problems when not clear to outsiders.
- OLAF investigations.
 - Administrative agency v. requirements of criminal procedure in the member states.
 - Lengthy investigations.
 - Member state agencies duplicating and updating work.

Discussion

- Problems in 2009 Transfer of Criminal Proceedings led to minimum solution = communication required in *ne bis in idem* cases.
- Efficiency and manageability vs. rule of law guarantees and fundamental rights.

Conclusions

- 1) Europeanisation vs. Formalisation.
 - European cases currently handled via “indirect competence”. European cases in a grey zone may lead to lack of support for further integration.
 - The average member state investigator does not recognise the difference between current institution, e.g. ENJ and Eurojust.

Conclusions II

Human factor is key.

- Prosecutors, above all, used to disposing of cases efficiently.
- Collective experience (frustration) must be taken seriously.
- User friendliness and coherence require focus. Stockholm programme foresees; political reality difficult.
- Improve help for user, e.g. to improve coordination (limits to involvement of Eurojust for mutual recognition instruments).

Conclusions III

Expecting too much.

- How efficient can (potentially competing) multi-level systems become?

Thank you for your attention.

Dr. Lutz Roth

Current stationed as the Permanent
Representative of The Federal Republic of
Germany, in Brussels.