Oikeusministeriö E-KIRJELMÄ OM2006-00004

LAVO Monto Mikko 16.01.2006
JULKINEN

EDUSKUNTA
SUURI VALIOKUNTA

Viite

Asia
EU; oikeus- ja sisäasiat; toimivaltaristiriitoja ja ne bis in idem –periaatetta rikosoikeudenkäynnissä koskeva komission vihreä kirja

E-tunnus:- **EUTORI-numero:EU/2005/1801**

TOIMIVALTARISTIRIITOJA JA NE BIS IN IDEM -PERIAATETTA RIKOSOIKEUDENKÄYNNISSÄ KOSKEVA KOMISSION VIHREÄ KIRJA (COM(2005)696 FINAL)

Ohessa lähetetään perustulain 97 §:n mukaisesti eduskunnan suurelle valiokunnalle tiedoksi toimivaltaristiriitoja ja ne bis in idem –periaatetta rikosoikeudenkäynnissä koskeva komission vihreä kirja (COM(2005)696 final).

Ylijohtaja Pekka Nurmi

LIITTEET Perusmuistio 16.1.2006, COM(2005) 696 final, SEC(2005) 1767

Oikeusministeriö PERUSMUISTIO OM2006-00008

LAVO Monto Mikko 16.01.2006
JjulkinEN

Asia
EU; OSA; toimivaltaristiriitoja ja ne bis in idem -periaatetta rikosoikeudenkäynnissä koskeva komission vihreä kirja

Kokous

Liitteet Viite

EUTORI:

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Asiakirjat:

COM(2005)696 final
SEC(2005)1767

EU:n oikeuden mukainen oikeusperusta/päätöksentekomenettely:

Sopimus Euroopan Unionista, artikla 31(1)(c ja d)

Käsittelijä(t):

LsS Mikko Monto (p. 16067484)

Yleistä
Komissio antoi 23 päivänä joulukuuta 2005 vihreän kirjan (COM(2005)696 final) toimivaltaristiriidoista ja ne bis in idem –periaatteesta rikosoikeudenkäynnissä. Vihreän kirjan tarkoituksena on käynnistää laaja konsultaatiomenettely koskien jäsenvaltioiden välisiä rikosoikeudellisia toimivaltaristiriitoja sekä jäsenvaltioiden välisiin suhteisiin ulottuvaa niin sanottua ne bis in idem –periaatetta.

Vihreässä kirjassa on esitelty suuntaviivoja toimivaltaristiriitoja koskevien riitojen ratkaisemiseksi sekä jäsenvaltioiden välisen bis in idem-periaatteen uudistamiseksi. Vihreässä kirjassa on esitetty 24 kysymystä, joihin kiinnostuneilta tahoilta odotetaan vastauksia. Vihreään kirjaan liittyy komission valmisteluasiakirja SEC(2005)1767, jossa on tarkemmin analysoitu vihreässä kirjassa esitettyjä kysymyksiä. Vastaukset tulee toimittaa komissiolle ennen 31 päivää maaliskuuta 2006.

Komissio tullee tekemään puitepäätösehdotuksen aiheesta vuoden 2006 kuluessa. Komission toimet asiassa perustuvat muun muassa niin sanotun Haagin ohjelman 3.3 kohtaan ja neuvoston 29 päivänä marraskuuta 2000 Tampereen päätelmien mukaisesti hyväksymään toimenpideohjelmaan vastavuoroisen tunnustamisen periaatteen täytäntöönpanemiseksi (erityisesti kohta 2.3 ja toimenpiteet 1 ja 11).

Pääasiallinen sisältö

Vihreän kirjan mukaan taustana nyt käynnistetyille toimenpiteille on muun muassa se, että rikollisuuden kansainvälistyessä ja varsinkin EU:n alueella syntyy yhä useammin tilanteita, joissa useammalla jäsenvaltiolla on rikosoikeudellinen toimivalta syyttää tietystä rikoksesta (positiivinen toimivaltaristiriita). Useassa valtiossa samanaikaisesti tapahtuva oikeudenkäynti aiheuttaa kustannuksia ja vaikeuksia kaikille oikeudenkäynnin osapuolille.

Tällä hetkellä kunkin jäsenvaltion viranomaisilla on pääsääntöisesti mahdollisuus käynnistää samaa asiaa koskeva rinnakkainen rikosoikeudenkäynti toisessa jäsenvaltiossa käynnissä olevasta rikosoikeudenkäynnistä huolimatta. Ainoa este on niin sanottu ne bis in idem –sääntö, joka ilmenee Schengenin yleissopimuksen 54-58 artikloista. Mainittu sääntö estää toiseen kertaan tapahtuvan syyttämisen toisessa jäsenvaltiossa, jos yhdessä jäsenvaltiossa asia on jo saatettu lopullisesti päätökseen. Mainittu tilanne on komission mukaan ongelmallinen, sillä nykyisen tilanteen mukaisesti syytetoimenpiteet suoritetaan siinä valtiossa, joka ensiksi ehtii asiaa käsittelemään ja asian käsittelypaikan valinta jää näin sattuman varaan. Tämä on komission käsityksen mukaan syy sille, miksi ne bis in idem –sääntöön on edelleen olemassa poikkeuksia.

Ratkaisu positiivisten toimivaltaristiriitojen ongelmaan olisi komission mukaan se, että luodaan järjestelmä, jolla yksittäinen rikosasia voidaan ohjata sille sopivimpaan käsittelypaikkaan. Jos oikeudenkäynti keskitetään yhteen jäsenvaltioon, voidaan ne bis in idem –säännön soveltamistilanteet välttää. Lisäksi tällainen järjestelmä täydentäisi vastavuoroisen tunnustamisen periaatetta taaten sen, että toisessa jäsenvaltiossa annettu päätös tunnustetaan.

Komission suuntaviivat vihreässä kirjassa kohdistuvat a) toimivaltaisen jäsenvaltion valintaa koskevaan menettelyyn, valintakriteereihin ja niin sanottuun vireilläolovaikutukseen (lis pendens) b) ne bis in idem –säännön uudistamiseen ja c) edellä mainittujen uudistusten johdosta mahdollisiin kieltäytymisperusteiden muutoksiin muissa rikosoikeudellista yhteistyötä koskevissa instrumenteissa (vastavuoroisen tunnustamisen periaatteen vahvistaminen).

a) Toimivaltaisen jäsenvaltion valinta (kohta 2.1 ja 2.2)

Edellytyksenä tehokkaalle toimivaltaisen jäsenvaltion valinnalle on komission mukaan se, jäsenvaltiot ovat tietoisia toisissa jäsenvaltiossa käynnissä olevista tai käynnistyvistä rikosprosesseista. Toinen edellytys järjestelmän toimivuudelle on se, että jäsenvaltion viranomaiset kykenevät keskeyttämään menettelynsä, jos asia päätetään keskittää johonkin toiseen jäsenvaltioon.

Menettely voisi komission mukaan olla kolmivaiheinen. Ensimmäisessä vaiheessa tapahtuisi asiasta ”kiinnostuneiden” jäsenvaltioiden identifiointi ja informointi. Perusajatus on, että tilanteessa, jossa yhden jäsenvaltion viranomaiset ovat aloittaneet tai aloittamassa syytetoimet asiassa, jolla on merkittäviä yhteyksiä toiseen jäsenvaltioon, tulisi tällaisen toisen jäsenvaltion viranomaisia informoida asiasta. Toisen valtion viranomaisten tulisi puolestaan ilmoittaa mahdollinen kiinnostuksensa asiaan.

Toisessa, eli konsultaatiovaiheessa ”kiinnostuneiden” jäsenvaltioiden viranomaisilla olisi velvollisuus keskustella sopivimman käsittelyvaltion valinnasta. Keskustelua voitaisiin käydä suorin yhteyksin tai esimerkiksi Eurojustia hyväksi käyttäen. Jos päästään sopuun, tulisi muiden kuin käsittelyvaltion keskeyttää asian käsittely. Komission mukaan yksi mahdollisuus olisi luoda EU:n mallisopimus oikeuspaikan valinnasta, jota jäsenvaltiot voisivat halutessaan käyttää.

Kolmas vaihe, eli riidan ratkaisu tulisi käytettäväksi, mikäli asiaan osalliset jäsenvaltiot eivät pääsisi asiassa sopuun. Sovittelijana voisi toimia Eurojust tai jokin muu elin, joka luotaisiin tätä tarkoitusta varten. Riidan ratkaisijalla ei kuitenkaan olisi toimivaltaa ratkaista asiaa sitovasti, mikäli osapuolet eivät pääse asiassa sopuun. Tämä olisi kuitenkin komission mukaan riittävää tässä vaiheessa, sillä useimmissa tapauksissa asioista tultaneen sopimaan. Jos niin ei kuitenkaan käy, tulee ne bis in idem –sääntö jälleen sovellettavaksi.

Mahdollisena lisäaskeleena voitaisiin komission mukaan tulevaisuudessa harkita sellaisen elimen luomista, joka voisi sitovasti ratkaista toimivaltaristiriitoja. Tämä ei kuitenkaan ole nykyisten sopimusten mukaan mahdollista.

Myöskin oikeudenkäynnin osapuolia kuten epäiltyä ja asianomistajaa tulisi mahdollisuuksien mukaan kuulla oikeuspaikan valintaa koskevasta kysymyksestä (Kohta 2.3). Heitä tulisi informoida oikeuspaikan valinnan pääsyistä viimeistään siinä vaiheessa, kun haastehakemus jätetään oikeuteen. Kansallinen tuomioistuin voisi tutkia kysymyksen siitä onko oikeuspaikkaa valittaessa toimittu asianmukaisesti ja kohtuullisesti. Asiaan osallisilla henkilöillä tulisi olla valitusmahdollisuus oikeuspaikan valinnasta ainakin niissä tapauksissa, joissa se on tehty sitovalla sopimuksella.

Vireilläolovaikutus (lis pendens, kohta 2.4)
Edellä esitetyn oikeuspaikan valintaa koskevan menettelyn lisäksi voitaisiin luoda määräys, joka velvoittaisi keskittämään oikeudenkäynnin yhteen jäsenvaltioon. Tietystä ajankohdasta alkaen muut jäsenvaltiot olisivat velvolliset keskeyttämään omat menettelynsä ja pitäytymään uusista samaa asiaa koskevien menettelyjen käynnistämisestä. Tämä olisi niin sanottu ”ensisijaisuussääntö”. Komission mukaan sopivin ajankohta ensisijaisuussäännön käynnistymiselle olisi hetki, jolloin haastehakemus jätetään oikeuteen. Ensisijaisuussääntö tulisi sovellettavaksi vain, mikäli konsultaatio ja mahdollinen riidanratkaisuvaihe olisi suoritettu.

Oikeuspaikan valintakriteerit (kohta 2.5)
Komission mukaan valintakriteereiden pitäisi olla joustavia ja niitä pitäisi arvioida tapauskohtaisesti. Kriteereiden tulisi olla objektiivisia. Ne voisivat liittyä esimerkiksi alueperiaatteeseen sekä syytetyn, uhrin tai valtion intresseihin. Myös tehokkuus- ja nopeusnäkökohdat voitaisiin huomioida. Komission mukaan voitaisiin luetteloida myös sellaisia tekijöitä, jotka eivät saisi vaikuttaa ratkaisuun. Vaikka edellä mainitut kriteerit olisivat vain ohjaavia, olisi järkevää sopia sellaisista ohjaavista periaatteista kuten tarkoituksenmukaisuus ja asianmukaisuus.

b) ne bis in idem (kohta 3.)
Schengenin yleissopimuksen 54-58 artiklat sisältävät säännökset ne bis in idem –säännöstä. Kreikan asiaa koskevasta puitepäätösehdotuksesta (EYVL C 100, 26.4.2003, s. 24) ei päästy sopuun ja asiaan päätettiin palata sitten, kun komissio antaa nyt käsiteltävän tiedonannon.

Komission mukaan ne bis in idem –sääntöä koskevat keskustelut voidaan avata uudelleen paremmin menestymisen mahdollisuuksin, jos oikeuspaikan valintaa koskevasta järjestelmästä päästään sopuun.

Komission mukaan voidaan pohtia ensinnäkin sitä, onko tarvetta selkeyttää tiettyjä määritelmiä, kuten sitä, minkä tyyppisillä päätöksillä voi olla ne bis in idem –vaikutus tai mitä tarkoitetaan ”idemillä” tai ”samoilla tosiasioilla”.

Toiseksi tulee huomioida, että langettavan tuomion tapauksissa periaate soveltuu nykyisin vain, jos tuomio on pantu täytäntöön, sitä ollaan panemassa täytäntöön tai sitä ei voida enää panna täytäntöön. Tämä rajoitus oli perusteltu silloin, kun jäsenvaltioiden välisessä tuomioiden täytäntöönpanossa oli ongelmia. On kyseenalaista, onko uusien vastavuoroisen tunnustamisen mukaisten täytäntöönpanoinstrumenttien myötä mainittu edellytys enää perusteltu.

Kolmanneksi komission mukaan on kyseenalaista ovatko kaikki ne bis in idem –säännöstä sallitut poikkeukset enää tarpeen, jos luodaan tasapainoinen oikeuspaikan valintaa koskeva järjestelmä. Nykyiset poikkeukset säännöstä liittyvät alueperiaatteeseen, kansallista turvallisuutta koskeviin rikoksiin ja virkarikoksiin.

c) vastavuoroisen tunnustamisen periaatteen vahvistaminen (kohta 4).
Komission mukaan edellä ehdotetut muutokset voisivat mahdollistaa oikeusapuinstrumenteissa olevien kieltäytymisperusteiden vähentämisen. Komission mukaan esimerkiksi alueperiaatteeseen liittyvät kieltäytymisperusteet ovat nykyjärjestelmässä perusteltuja toimivaltaristiriitojen vuoksi. Esimerkkinä komissio esittää Eurooppalaista pidätysmääräystä koskevan puitepäätöksen artiklan 4(7)(a).

Kansallinen lainsäädäntö

Vihreässä kirjassa tarkoitetut kysymykset kuuluvat lainsäädännön alaan. Suomen voimassaolevassa kansallisessa lainsäädännössä ulkomaisen tuomion vaikutuksista säädetään rikoslain 1 luvun 13 §:ssä ja eräissä kansainvälisissä instrumenteissa. Eräs keskeisimmistä kansainvälisistä instrumenteista on niin sanottu Schengenin yleissopimus (SopS 23/2001), jonka 54 – 58 artiklat sisältävät ne bis in idem –periaatetta koskevia määräyksiä. Mainitut määräykset ovat lakina voimassa Suomessa.

Suomen kansallisessa lainsäädännössä ei ole säännöksiä ulkomailla aloitetun rikosoikeudellisen menettelyn vireilläolo eli lis pendens –vaikutuksesta ja toimivallan jaosta.

Valtioneuvoston kanta

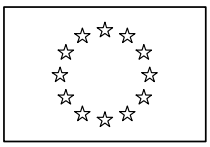
Menemättä tarkemmin vihreän kirjan 24 yksityiskohtaisen kysymyksen sisältöön voidaan todeta, että valtioneuvosto suhtautuu myönteisesti siihen, että pyritään luomaan mekanismi, jolla jäsenvaltioiden väliset rikosoikeudelliset toimivaltaristiriidat kyetään mahdollisuuksien mukaan ratkaisemaan. Prosessiekonomian pitäisi johtaa siihen, ettei samaa asiaa tulisi käsitellä monessa paikassa. Mekanismin tulisi kuitenkin olla kevyt, eikä se saisi aiheuttaa viivytyksiä. Vihreässä kirjassa esitetty perusajatus kolmivaiheisesta menettelystä (informaatio, konsultaatio, riidanratkaisu) toimivaltaisen jäsenvaltion määrittämiseksi on periaatteessa kannatettava. Kuten komissiokin toteaa, tässä vaiheessa ei ole perusteltua ryhtyä luomaan järjestelmää, jossa jokin mahdollinen EU:n elin voisi sitovasti ratkaista toimivaltaisen jäsenvaltion. Kuten myös komissio on todennut, toimivaltaisen jäsenvaltion valinnassa käytettävien kriteereiden tulisi olla joustavia, ohjaavia ja niitä tulisi soveltaa tapauskohtaisesti perusohjeena tarkoituksenmukaisuus. Valtioneuvosto suhtautuu lähtökohtaisesti myönteisesti niin sanotun etusijasäännön (lis pendens) luomiselle.

Valtioneuvosto suhtautuu periaatteessa myönteisesti myös ne bis in idem –säännön kehittämiseen. Euroopan yhteisön tuomioistuin on viimeaikaisessa Schengenin sopimuksen 54 artiklaa koskevassa tulkintakäytännössään antanut vaikutuksen myös muille päätöksille kuin tuomioille. Myös tämän vuoksi on aiheellista tarkistaa säännön sanamuotoja. Säännöstä uudistettaessa pitää kuitenkin varmistaa, että se ei voi johtaa rikosoikeudellisen vastuun välttämiseen. Erityisesti alueperiaatetta koskevan poikkeuksen tarpeellisuutta voidaan harkita sellaisessa tilanteessa, jossa toimivaltaisesta jäsenvaltiosta oltaisiin kaavaillussa menettelyssä päästy sopuun. Aineellisen rikosoikeusjärjestelmän eroavaisuuksiin ja niin sanottuihin kansallisesti rajoittuneisiin rikoksiin liittyvien poikkeusten (Schengenin yleissopimuksen 55 artiklan 1 kohdan b ja c alakohdat) uudistamisessa on kuitenkin huomioitava, että alakohdissa tarkoitetuista rikoksista ei välttämättä voida syyttää kuin tietyssä jäsenvaltiossa.

Valtioneuvosto on valmis tarkastelemaan myös rikosoikeudellista yhteistyötä koskevien instrumenttien kieltäytymisperusteiden tarpeellisuutta, mikäli toimivaltaisen jäsenvaltion valintaa koskevan

järjestelmän luominen aiheuttaa tilanteen, jossa jokin kieltäytymisperuste tulee tarpeettomaksi. Kieltäytymisperusteiden olemassaolo ei tosin aiheuta vakavia ongelmia silloin, kun ne ovat harkinnanvaraisia, sillä mainittu harkinnanvaraisuus mahdollistaa sopeutumisen mahdolliseen tilanteeseen, jos toimivaltainen jäsenvaltio kyetään valitsemaan.

Asiasanat	oikeus- ja sisäasiat, oikeudellinen yhteistyö rikosasioissa
Hoitaa	
Tiedoksi	



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23.12.2005
COM(2005) 696 final

GREEN PAPER

On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings

(presented by the Commission)

{SEC(2005) 1767}

GREEN PAPER

On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings

The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on issues of conflicts of jurisdiction in criminal matters, including the principle of *ne bis in idem*. The Green Paper identifies problems that may arise under the current situation and suggests possible solutions. The attached working paper provides a more detailed analysis.

The Commission invites interested parties to submit comments before 31 March 2006 to the following address:

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Unit D3 – Criminal Justice
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B - 1049 Brussels

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Interested parties are requested to mention explicitly if they do not wish their comments to be published on the Commission's website.

1. BACKGROUND

With crime becoming more international in scale, EU criminal justice is increasingly confronted with situations where several Member States have criminal jurisdiction to prosecute the same case. Moreover, multiple prosecutions on the same cases, or "positive" conflicts of jurisdiction, are currently more likely to occur as the scope of many national criminal jurisdictions has been extended considerably in the past years.

Multiple prosecutions are detrimental to the rights and interests of individuals and can lead to duplication of activities. Defendants, victims and witnesses may have to be summoned for hearings in several countries. Most notably, repeated proceedings entail a multiplication of restrictions on their rights and interests, e.g. of free movement. They increase psychological burdens and the costs and complexity of legal representation. In a developed area of freedom, security and justice it seems appropriate to avoid, where possible, such detrimental effects; by limiting the occurrence of multiple prosecutions on the same cases.

Currently, national authorities are free to institute their own parallel prosecutions on the same cases. The only legal barrier is the principle of *ne bis in idem*, laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). However, this principle does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States; it can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State.

More importantly, without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle. The choice of jurisdiction is currently left to chance, and this seems to be the reason why the principle of *ne bis in idem* is still subject to several exceptions.

An adequate response to the problem of (positive) conflicts of jurisdiction would be to create a mechanism for allocating cases to an appropriate jurisdiction. Where prosecutions are concentrated in a single jurisdiction, an issue of *ne bis in idem* would no longer arise. Moreover, such a mechanism would complement the principle of mutual recognition, which provides that a judicial decision taken in one Member State is recognised and - where necessary – enforced by other Member States.

In this Green Paper, the Commission outlines the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction in criminal proceedings, and also for a possible revision of the rules on *ne bis in idem*. It responds to point 3.3 of the Hague Programme, and to the Mutual Recognition Programme of 29.11.2000 (in particular, points 2.3, and measures 1 and 11 of the latter). Relevant EU measures could be adopted as a framework decision, based on Article 31(1)(d) of the Treaty on European Union (TEU), according to which common action shall include preventing conflicts of jurisdiction between Member

States. If deemed necessary, letter c of Article 31(1) could serve as a complementary basis to ensure compatibility in rules applicable in the Member States as may be necessary to improve judicial cooperation.

2. CREATING A MECHANISM FOR THE CHOICE OF JURISDICTION

2.1. Prerequisites

A mechanism aiming to allocate cases to an appropriate jurisdiction should avoid red tape, while guaranteeing a balanced approach with due respect to the rights of the individuals concerned. To make it function, two fundamental prerequisites need to be met.

Firstly, the competent authorities should become aware of proceedings and/or related decisions in each others' jurisdiction: they should be allowed, and perhaps even be obliged, to exchange the relevant information.

Secondly, once they become aware of proceedings in other Member States, the prosecuting authorities of a Member State should have the ability to refrain from initiating a prosecution, or to halt an existing prosecution, on the mere ground that the same case is being prosecuted in another Member State.

Refraining from initiating a prosecution (or halting an existing one) could raise problems to the legal order of Member States which adhere to the legality principle, where the competent authorities have a duty to prosecute every crime which falls within their competence. This could raise problems, in particular, when the principle is provided for in a national Constitution. Therefore, an exception to the application of this principle could be provided for in a future instrument. In this respect, it can validly be argued that in a common area of Freedom, Security and Justice this principle is satisfied when another Member State prosecutes such a case.

2.2. Procedure

Once the above prerequisites are fulfilled, the following procedural steps could form part of the suggested mechanism.

Step 1: identification and information of "interested parties"

At first, it seems useful to identify and inform the Member States which could be interested to participate in the process of choosing the most appropriate jurisdiction for a specific case. To this end, an EU rule could provide that the national authorities of a Member State which **has initiated or is about to initiate a criminal prosecution** ("initiating State") **in a case which demonstrates significant links to another Member State, must inform** the competent authorities of that other Member State, in due time. Such an obligation could apply to prosecuting authorities, and/or to other judicial/ investigating or law enforcement authorities depending on the particular characteristics of the criminal justice systems of the Member States. In turn, the informed authorities could indicate their interest in prosecuting the case in question. One might envisage that this expression of interest should be declared within a fixed period of time. However, the system could also allow for reactions outside the deadline on an exceptional basis. If no Member State expresses an

interest, the *initiating* State could continue with the prosecution of the case without further consultation – unless new facts change the picture.

Step 2: consultation/discussion

When two or more Member States are interested in prosecuting the same case, their respective competent authorities should be able to examine together the question of the "best place" to prosecute the case. An option would be to create **a duty to enter into discussions** so that the opinions of all the interested Member States can be taken into account. At this stage, direct contacts among them seem to be the most efficient means of discussion. If need be, they could ask for the assistance of Eurojust and/or other Union mechanisms of assistance.

Step 2 might often lead to an early consensus on the choice of the most appropriate jurisdiction to prosecute a case which raises issues of conflicts of jurisdiction. As a result, some national authorities will *close or halt* their proceedings voluntarily (or will refrain from initiating proceedings), while another authority would initiate or continue with its proceedings on the case. In such a scenario the competent national authorities could simply proceed according to their national law. Therefore, it seems that there is no need for binding rules on EU level for such arrangements. Under the suggested mechanism, such domestic decisions could be revised by the Member States concerned if new findings change the picture. Nonetheless, in certain cases, the domestic authorities might prefer to conclude a binding agreement to ensure legal certainty and to avoid the reopening of a debate. If they wish to do so, they may make use of an **EU model agreement**, which could, *inter alia*, provide common rules for the denunciation of such agreements.

Step 3: dispute settlement/mediation

Where an agreement cannot be easily found, a mechanism for dispute resolution will be needed. This step should offer the opportunity for a structured dialogue between the interested parties which would allow for an objective consideration of the interests involved. To this end, it seems appropriate to involve a body at EU level to act as a **mediator** by assisting the Member States concerned to reach a voluntary agreement using the criteria outlined below**.** Eurojust appears to be well placed to take over this role. It would also be conceivable to create a new body for dispute resolution, for instance a board or panel composed of senior national prosecutors and/or judges.

This third step could be initiated on the request of any Member State which has expressed an interest in prosecuting the case. It would also be valid to argue that a dispute settlement procedure should be compulsory after a period of time has elapsed in step 2, to ensure that cases of disagreement will be promptly transferred to an EU assisted/centred stage. Where a consensus is reached in step 3, the competent authorities should then have the same options as in step 2 (voluntary halting of proceedings in some Member States with a view to prosecution in another one, or conclusion of a binding agreement).

A sound adherence to the rules of the suggested three-step mechanism, combined with a set of criteria for the choice of jurisdiction as outlined below (point 2.5.), is likely to lead to a consensus in many, if not most cases. It can be established in the

short term, and may be considered sufficient unless further experience would reveal a need for further steps. In the absence of a consensus, the *ne bis in idem* principle would come "back" into play.

Possible additional step: binding decision by an EU body?

In the long run, for cases in which the suggested dispute settlement would fail, one might consider as a further step whether a body on EU level should be empowered to take a binding decision as to the most appropriate jurisdiction. This additional step would however be very difficult to realise with the current Treaty framework. First, a new body would have to be set up, since the roles of a mediator and of an instance taking binding decisions do not appear compatible. Secondly, difficult questions on the judicial review of a decision on EU level would arise, as outlined hereafter.

2.3. Role of individuals and judicial review

During the **pre-trial stage**, the suggested mechanism focuses on consultation among the competent prosecuting authorities. Discussing jurisdiction issues with the concerned individuals might often reveal facts which could jeopardise a prosecution or affect the rights and interests of victims and witnesses. Whether such a risk is present in a specific case could probably be left to be decided by the national courts. If no such risk is identified, the competent authorities could be required to promptly inform the defence and the concerned victims on the determination of the most appropriate jurisdiction. In any case, the concerned individuals will have to be informed of the main reasons for the choice of a certain jurisdiction at the latest when an indictment is being sent before a court.

In contrast to the pre-trial phase where normally the role for the concerned individuals is rather limited, at the trial phase (and/or at an intermediary phase) a national court which receives an indictment usually examines whether it has jurisdiction to try the case. It is also conceivable that an EU provision could require the jurisdiction which is chosen through the use of the suggested mechanism to examine whether **it is an appropriate forum** for dealing with the case. National courts seem well placed to carry out such a review. An extensive review of every aspect possibly playing a role in an allocation would seem neither feasible nor necessary. Therefore, judicial review could amount to adjudication on whether the principles of **reasonableness** and of **due process** have been respected. A choice of jurisdiction could thus be set aside by the competent tribunal if it finds that the choice made is arbitrary. This review could be made on the basis of doctrines which are known to the national legal order of the Member States, such as 'abuse of process'**.** In accordance with Article 35 TEU, questions of interpretation of Union-wide rules on the procedural mechanism and the criteria for the choice of jurisdiction could be presented to the European Court of Justice (ECJ) for preliminary rulings.

On the request of concerned individuals, a judicial review of jurisdiction allocations seems to be necessary, at least, when a case is allocated to a specific jurisdiction through a binding agreement. This is because such binding agreements would fetter the ability of the concerned Member States to denounce the jurisdiction allocation at a later stage. The question of whether judicial review should also be made available in the situations where no binding agreements takes place could possibly be left to the discretion of the Member States and their national laws. (I.e. where authorities in

certain Member States have simply closed down, or not initiated, a prosecution with a view to another Member State prosecuting the case)

More complex questions would arise if, as an additional step, a power to take decisions would be conferred on an EU body. Judicial review would be indispensable in this case. However, giving national courts the task of reviewing decisions by an EU body is inappropriate and currently legally impossible. On the other hand, the current Treaties do not contain a legal basis for giving such a power of review to the ECJ. The Treaty Establishing a Constitution for Europe provides a legal basis for such a review in Article III-359.Within the current Treaty framework, the possibility for a comparable Treaty amendment could be explored.

2.4. Priority for prosecution in the "leading" Member State

Alongside the allocation mechanism, an EU provision could oblige Member States to concentrate proceedings on the same case in one "leading" jurisdiction. From a certain procedural stage onwards, the other Member States could be obliged to halt their prosecutions and refrain from initiating new ones. The application of such a **priority rule** would have to run parallel to the mechanism outlined above; otherwise the results would depend on chance.

Since new findings can often change the picture of what at first might seem the "best place" to prosecute, it may not be wise to force the competent authorities to make a definitive choice of jurisdiction at an early stage. The most appropriate stage for a rule requiring all parallel prosecutions to be concentrated in a single jurisdiction appears to be **the moment of the sending of an accusation** or indictment before a national court, as at this stage, the necessary information which would be needed for a thorough assessment of jurisdiction issues will be available to the competent authorities. Besides, the main burdens for the individuals concerned often follow after the accusation and multiplication of those burdens can thus still be largely avoided if the rule applies from this stage onwards.

To avoid a circumvention of the procedural mechanism, it should not be permitted to bring an indictment before a court while a consultation and/or dispute settlement procedure is still ongoing. In other words, before national authorities bring an accusation/indictment, they will have to meet their information and consultation duties. Where they have not done so, they would have to halt court proceedings on the request of another Member State.

In no case, however, should a priority rule prevent other Member States from any possible form of support to the *leading state,* by means of the existing EU and international arrangements. On the contrary, they should afford assistance even pro-actively.

2.5. Relevant Criteria

Together with a procedural mechanism and a priority rule, a list of criteria to be used by the Member States in choosing the leading jurisdiction should be the third element of a complete strategy to prevent and resolve conflicts of jurisdiction. It is feasible to define a number of relevant criteria, which are to be applied and weighted on a rather

flexible case-by-case approach, i.e. the competent authorities would need to have a considerable scope of discretion.

Those criteria, or relevant factors, which will influence the process of determining an appropriate jurisdiction, should be objective and could be listed in a future EU instrument. In particular, the list could include *territoriality, criteria related to the suspect or defendant, victims' interests, criteria related to State interests, and certain other criteria related to efficiency and rapidity of the proceedings*. Perhaps, certain factors which should *not* be of relevance could also be identified.

As a further step, Member States could agree on some basic principles on the prioritisation or sequencing within the list of criteria, if this proves to be necessary. On the other hand, a more flexible approach could be preferred. Irrespective of whether such a prioritisation or sequencing among the relevant criteria would be laid down in an EU instrument, it seems feasible and necessary to at least agree on a general guiding principle for jurisdiction allocation. For example, such a principle could refer to **reasonableness** and/or **due process**. In other words, the competent authorities could be obliged to take into account the interests of the concerned individuals. The yardstick, as well as the leading question for a possible judicial review, should be a fair administration of justice, based on a comprehensive consideration of the relevant facts and a balanced weighting of the relevant criteria.

3. THE PRINCIPLE OF *NE BIS IN IDEM*

Articles 54 to 58 of CISA on the *ne bis in idem* principle are currently binding throughout the Schengen Area, in the ten EU Member States which acceded in 2004, in Iceland and Norway and in the United Kingdom; an extension to Ireland should follow soon. The mutual recognition programme of December 2000 called for a reconsideration of those provisions, particularly of the exceptions to the principle. The Council could not agree on the related initiative by Greece for a Framework Decision,[1] but it stressed that work should continue, "in the light of the publication of the Commission's Communication on Conflicts of Jurisdiction in order to ensure that proven added value could be achieved".

If a mechanism which would lead to balanced choices of jurisdiction can be established, instead of conferring an exclusive effect to the "fastest" prosecution ("first come, first served"), discussions on *ne bis in idem* could be re-launched with increased prospects of success. In this context, the following questions could be addressed.

First, further consideration should be given to whether there is a need for clarifying certain elements and definitions, for instance regarding the types of decisions which can have a *ne bis in idem* effect, and/or what is to be understood under *idem* or "same facts".

Secondly, in case of a conviction the principle currently applies only where the imposed penalty "has been enforced, is actually in the process of being enforced or

[1] OJ C 100, 26.4.2003, p. 24.

can no longer be enforced…" This condition was justified in a traditional system of mutual assistance, where enforcing a penalty in other Member States sometimes proved to be difficult. It is questionable whether it is still needed in an area of freedom, security and justice, where cross-border enforcement now takes place through the mutual recognition EU instruments.

Thirdly, it is questionable whether the current possibilities for derogations from the principle of *ne bis in idem* are still necessary. Currently, Article 55 CISA enables Member States to provide for exceptions, which are related to interests in prosecuting specific cases in a certain jurisdiction (e.g. territoriality, national security offences or acts of officials of a Member State). Those exceptions might become obsolete with the creation of a balanced mechanism for the choice of jurisdiction.

4. STRENGTHENING THE PRINCIPLE OF MUTUAL RECOGNITION

The suggested measures could also enable the Union to reduce the number of grounds for non-execution of judicial decisions from other Member States which are currently found in EU instruments. Because of the existing situation on conflicts of jurisdiction in criminal matters, some of these grounds for non-execution may be considered necessary. For example, this seems to be the case for grounds based on the fact that an act took place on the territory of the executing state, as e.g. in Article 4(7)(a) of the Framework Decision on the European Arrest Warrant.

Questions

(1) Is there a need for an EU provision which shall provide that national law must allow for proceedings to be suspended by reason of proceedings in other Member States?

(2) Should there be a duty to inform other jurisdictions of ongoing or anticipated prosecutions if there are significant links to those other jurisdictions? How should information on ongoing proceedings, final decisions and other related decisions be exchanged?

(3) Should there be a duty to enter into discussions with Member States that have significant links to a case?

(4) Is there a need for an EU model on binding agreements among the competent authorities?

(5) Should there be a dispute settlement/mediation process when direct discussions do not result in an agreement? What body seems to be best placed to mediate disputes on jurisdiction?

(6) Beyond dispute settlement/mediation, is there a need for further steps in the long run, such as a decision by a body on EU level?

(7) What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?

(8) Is there a need for a rule or principle which would demand the halting/termination of parallel proceedings within the EU? If yes, from what procedural stage should it apply?

(9) Is there a need for rules on consultation and/or transfer of proceedings in relation to third countries, particularly with parties to the Council of Europe? What approach should be taken in this respect?

(10) Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?

(11) Apart from territoriality, what other criteria should be mentioned on such a list? Should such a list be exhaustive?

(12) Do you consider that a list should also include factors which should not be considered relevant in choosing the appropriate jurisdiction? If yes, what factors?

(13) Is it necessary, feasible and appropriate to "prioritise" criteria for determining jurisdiction? If yes, do you agree that territoriality should be given a priority?

(14) Is there is a need for revised EU rules on *ne bis in idem* ?

(15) Do you agree with the following definition as regards the scope of *ne bis in idem*: "*a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority*"?

(16) Do you agree with the following definition of "final decision": "*...a decision, which prohibits a new criminal prosecution according to the national law of the Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU*?

(17) Is it more appropriate to make the definition of "final decision" subject to express exceptions? *(e.g. "a decision which prohibits a new criminal prosecution according to the law of the Member State where it has been taken, except when…*")

(18) In addition, to the elements mentioned in question 16 and 17, should a prior assessment of the merits be decisive on whether a decision has an EU wide *ne bis in idem* effect?

(19) Is it feasible and necessary to define the concept of *idem,* or should this be left to the case law of the ECJ?

(20) Do you see any situations where it would still be necessary to retain an enforcement condition, and if yes, which ones? If yes, can the condition be removed if a mechanism for determining jurisdiction is established?

(21) To what extent can the derogations in Article 55 CISA still be justified? Can they be removed if a mechanism for determining jurisdiction is established, or would you see a need for any further measures to "compensate" for a removal of the derogations under these circumstances?

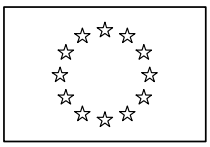
(22) Should *ne bis in idem* be a ground for mandatory refusal of mutual legal assistance? If yes, which EU law provisions should be adapted?

(23) Is there a need for a more coherent approach on the *ne bis in idem* principle in relation to third countries? Should one differentiate between parties of the Council of Europe and other countries?

(24) Do you agree that with a balanced mechanism for determining jurisdiction?

(a) certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?

(b) certain grounds for optional non-execution should be converted into grounds for mandatory non-execution or *vice versa*? Which grounds, in particular?



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION STAFF WORKING DOCUMENT

Annex to the

GREEN PAPER

On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings

{COM(2005) 696 final}

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PART I: Introduction – Purpose of the Green Paper

1. INTRODUCTION

According to Article 31(1)(d) of the Treaty on European Union (TEU), common action on judicial cooperation in criminal matters shall include "preventing conflicts of jurisdiction between Member States". This paper aims to launch an EU wide consultation on the line that a future EU legislative initiative should take in addressing the problem of 'conflicts of jurisdiction' in criminal proceedings. In this paper, the term 'conflict of jurisdiction' will refer to constellations where two or more Member States have initiated or are likely to initiate their own parallel prosecution for the same case. These are sometimes called "positive" conflicts, as distinct from constellations where no Member State has established jurisdiction or is willing to exercise it ("negative conflicts"). Since, so far, the issue of "positive" conflicts has received less attention; this paper focuses on "positive" conflicts of jurisdiction. It should be noted, that the term 'criminal proceedings', in its broad sense, can include all stages of a criminal case. In other words, it can include the investigation, prosecution and the trial stage of a case. However, this paper is only concerned with the question of parallel proceedings from the moment that criminal proceedings reach the prosecution phase. The question of parallel investigations thus falls outside the scope of this paper.

Currently, there are no binding rules at EU level which adequately deal with conflicts of jurisdiction in criminal matters. The current EU provisions on conflicts of jurisdiction neither require Member States to take concrete steps so that to avoid/solve conflicts of jurisdiction cases nor do they provide for a procedure/mechanism which would assist them in dealing with such questions. These rules merely provide that Member States shall cooperate in deciding which of them shall prosecute offenders when an offence falls within the jurisdiction of more than one Member State. Furthermore, these rules only apply within specific sectors of criminal law. As a result, when several Member States have criminal jurisdiction for the same case, their competent authorities are free to start respective prosecutions. This contrasts with the domestic level where national criminal laws usually prohibit parallel prosecutions on the same case.

Multiple prosecutions can affect the efficiency and duration of the respective proceedings. Duplication of work is almost unavoidable, and efficiency reasons may plead against multiple prosecutions even if the competent national authorities co-ordinate their work well. Moreover, multiple prosecutions can impose considerable additional burdens on the individuals involved. If there are several parallel prosecutions, defendants, victims and/or witnesses might have to be summoned and heard several times. As a consequence, the concerned individuals can be subjected to disproportionate restrictions as parallel or repeated national prosecutions can limit their freedom of movement and impair their rights and interests. They can also increase the costs and complexity of their defence and, last but not least, the psychological burdens coming along with criminal proceedings.

As said, at present, national authorities are allowed to start their own parallel prosecutions on the same cases. The only legal barrier is the principle of *ne bis in*

idem, laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). However, this principle does not prevent conflicts of jurisdiction while parallel prosecutions are ongoing in two or more Member States; it can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State. More importantly, without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle. The choice of jurisdiction is currently left to chance, and this seems to be the reason why the principle of *ne bis in idem* is still subject to several exceptions.

Since the question of which Member State prosecutes a case clearly affects both the rights and interests of the concerned individuals (defendants and victims) and the efficiency of the proceedings, it should not be left to fortuitous circumstances. This is particularly important since, according to the so-called *lex fori* rule in international criminal law, the jurisdiction under which a case will be dealt with determines not only the procedural law to be applied but also the substantive criminal law under which the merits of the case will be decided on.[1] In view of these realities, it could certainly be argued that in the European area of freedom, security and justice (Articles 2 and 29 TEU) it is both desirable and appropriate to limit and/or restrict the multiplication of prosecutions.

This Green Paper analyses the current legal situation regarding "positive" conflicts of jurisdiction and presents possible courses of action in order to meet the mandate of Article 31(1) (d) TEU. With this Paper, the Commission intends to launch an EU wide discussion on the type of measures that could be taken in the Union in order to prevent multiple prosecutions for the same cases; primarily, concerning an appropriate procedure and the substantive criteria that could be put in place so that to facilitate a balanced choice of jurisdiction within the common EU area of freedom, security and justice.

In particular, the Commission analyses the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction to prosecute a case which raises issues of conflicts of jurisdiction. This analysis will examine issues such as mutual information and consultation on national proceedings, possible criteria and procedures for concentrating prosecutions in one "leading" Member State. The guiding principle should be that with the creation of an effective mechanism for choosing jurisdiction before any final decision is taken, *ne bis in idem* would not need to come into play. The principle of *ne bis in idem* would only need to come into play in the situations where the envisaged mechanism fails to succeed in concentrating a prosecution in one jurisdiction.

In addition to such a mechanism, this Paper suggests possible courses of action in order to clarify the law with regard to the applicability and the role of the trans-national EU principle of *ne bis in idem*, which is contained in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). These provisions

[1] See also the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001)715 final, point 6.3.1.

incorporate to the national legal order of the Member States a *ne bis in idem* principle, which prevents a second prosecution, as a result of convictions and acquittals, (and other "final decisions" in general) which have been handed down in *other* EU Member States.

The Commission thereby further develops the relevant reflections in the Vienna Action Plan of 3.12.1998,[2] in its Communication on Mutual Recognition of 26.7.2000[3], and in the Mutual Recognition Programme of 29.11.2000.[4] In particular, point 2.3 of the latter states that it is "necessary to facilitate the settlement of conflicting claims to jurisdiction and, wherever possible, to avoid multiple prosecutions"; measure 11 suggests to establish an "instrument enabling criminal proceedings to be transferred to other Member States" and "criteria to help determine jurisdiction", and measure 1 calls for a reconsideration of Articles 54 to 57 CISA.[5]

2. PURPOSE

On the whole, the suggested measures aim to contribute to the further developing of the Union as a common area of freedom, security and justice on the following three aspects:

Firstly, the measures outlined in this Paper would contribute to the reduction of the restrictions and burdens on individuals which result from multiple prosecutions. As stated above, multiple prosecutions for the same case can lead to excessive restrictions on individual rights; i.e. obligations to appear before or to report to various judicial authorities. From a European perspective, the multiplication of such restrictions and burdens could be regarded as disproportionate.

Secondly, the suggested approach would contribute to the further building of mutual trust among the Member States' judicial authorities. It is clear that mutual trust is a crucial prerequisite for a sound application of the principle of mutual recognition of judicial decisions, which has been identified as a cornerstone of an area of freedom, security and justice[6]. Much has been achieved since the European Council of Tampere in 1999,[7] but experience shows that on certain points there is a need to increase mutual trust by means of further EU legislation. For instance, it would be

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2 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19, 23.1.1999, p. 1, point 49(c, e).

3 COM(2000)495 final.

4 See above, footnote 3 and OJ C 12, 15.1.2001, p. 10. Action in the matters discussed in this paper also found in the so called Hague programme, annexed to the presidency conclusions from the European Council of Brussels 4 and 5 November 2004, points 3.3.1 and 3.3.

5 This paper, however, does not discuss arrangements on the determining of jurisdiction by a possible future European Public Prosecutors' Office, for which the Treaty Establishing a Constitution for Europe provides a legal basis (Article III-274). The Commission has analysed such arrangements in a previous Green Paper COM(2001)715 final.

6 Presidency conclusions from the European Council of Tampere 15 and 16 October 1999 paras 33 to 37, see http://www.europarl.eu.int/summits/tam_en.htm; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10; The Hague programme, annexed to the presidency conclusions from the European Council of Brussels 4 and 5 November 2004, point 3.3.1, available at http://www.europarl.eu.int/summits .

7 See the Commission's Communication on the assessment of the Tampere Programme, COM(2004)401 final.

easier for national authorities to fully recognise and enforce decisions originating from other Member States if there would be a mechanism which would ensure that final decisions would be taken in the most appropriate jurisdiction and if they would have the ability to provide input as regards their interests and/or findings on a case. In this context a good example is the principle of *ne bis in idem*, which should be understood as a consequence of the principle of mutual recognition.[8] It might sometimes be difficult for a Member State to accept that it may not prosecute a case because an authority in another Member State has taken a final decision, if this decision did not take into account its sensitive national interests in the case. This is probably one of the main reasons why currently many Member States insist on providing for various exceptions to *ne bis in idem*. As a further example one may refer to various grounds for non-execution of a European Arrest Warrant.[9] Perhaps some of these grounds could be waived if a mechanism for choosing the most appropriate jurisdiction would be established. As a result, with the creation of a mechanism which would facilitate choice of jurisdiction, the principle of mutual recognition could be applied more widely and more consistently.

Thirdly, the suggestions put forward in this paper endeavour to increase the efficiency and the swiftness of the national investigations and subsequent prosecutions on cases which could be prosecuted by two or more Member States. The respective competent national authorities would achieve more efficient use of their resources by concentrating the prosecutions in cross-border cases in one Member State. Under the current system, which allows parallel prosecutions, (at least for a considerable period of time) it seems unavoidable that their activities can overlap if they are prosecuting the same case. This can lead to duplication of tasks, even if good coordination between them takes place. More importantly, where coordination does not work well or when no coordination takes place the ability of the Member States to effectively punish the whole criminal conduct associated with cross-border crimes can even be endangered or become more difficult.

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8 As established by the case law of the Court of Justice, see below at 11.3

9 See Article 4 of the Framework Decision on the European Arrest Warrant (EAW), OJ L 190, 18.7.2002, p. 1.

PART II: Preventing and Resolving Conflicts of Jurisdiction

3. PREVIOUS ATTEMPTS

In its Communication on mutual recognition of final decisions in criminal matters,[10] the Commission had brought up the idea for the laying down of jurisdiction rules which would have given exclusive jurisdiction to a single Member State, for each type of case. The feasibility of such an approach was examined in an expert meeting on 3.12.2001 based on reactions to a discussion paper which was disseminated among competent practitioners and experts including Eurojust. A large majority of the experts and practitioners pronounced that they were sceptical of such a system, and underlined the need for flexibility and the need for ensuring that the competent national authorities would have the ability to take into account the specific circumstances of each individual case when choosing the most appropriate forum for trying a case. As a preliminary conclusion, it can be said that it hardly seems feasible to set up a strict hierarchy of criteria for choosing jurisdiction, which would "automatically" lead to one Member State being identified as the best place to prosecute, and that rather a case-by-case approach is needed.

These findings have been confirmed both by a project under the EU Grotius programme[11] and a seminar organised by Eurojust in November 2003 with a view to Eurojust's competence to issue requests on determining jurisdiction. In this respect, it should be noted that the Guidelines that have been laid down by Eurojust following the seminar it organised[12], which brought together practitioners and researchers from a large scope of legal systems, state that:

"Each case is unique and consequently any decision made on which jurisdiction is best placed to prosecute must be based on the facts and merits of each individual case. All the factors which are thought to be relevant must be considered."

Subsequently, the focus of attention shifted to a Member State initiative by the Hellenic Republic, in February 2003, for a Framework Decision on *ne bis in idem*[13]. The initiative included an article on "*lis pendens*". According to draft article 3, the competent authorities of the Member States having jurisdiction "*may, after consultation ... choose the forum Member State to be given preference*". As a consequence of this draft article, proceedings pending in other Member States shall be suspended. The proposal also contained certain criteria for determining jurisdiction. It listed the same determining factors as those in Article 9(2) of the Framework Decision on Terrorism, but without referring to a sequence among them as it is the case in the latter instrument or in the Framework Decision on attacks against information systems[14].

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10 COM(2000)495 final, chapter 13, notably Chapter 13.2.

11 Project no. 2001/GRP/025.

12 The guidelines were published as an annex to the Eurojust annual report 2003, available at www.eurojust.eu.int .

13 OJ C100, 26.04.03, p.24

14 OJ L69, 16.3.2005, p.67. The Commission has followed this sequential approach in its Proposal for a Framework Decision on the fight against organised crime, COM(2005)6 final, Article 7.

In general, the Greek initiative provided a good basis for discussing the form of a future instrument on the subject. However, Member States could not agree on a procedural mechanism and the criteria for determining jurisdiction, which are essential prerequisites for a possible agreement on a rule which shall provide for the suspension/halting of parallel proceedings in other Member States. In the Commission's view, if the best placed jurisdiction would be determined by a "first come first served" rule, Member States would tend to reserve their right to prosecute the same case, as the "choice" of jurisdiction would thus not be transparent and could appear to be either accidental or biased, with the latter known as "forum shopping". It may seem unacceptable for a Member State to waive its right to prosecute a case on this basis. Therefore, before, considering the approach that should be taken concerning the suspension/halting of parallel proceedings, it would be necessary to make suggestions on the procedure (mechanism) which could effectively facilitate a balanced choice of an appropriate forum for prosecuting a case which raises issues of conflicts of jurisdiction.

4. THE NECESSARY ADDITIONS TO THE EXISTING LEGAL FRAMEWORK

The objective of the envisaged procedure/mechanism should not only be to deal with conflicts when they appear. The procedure should be of such nature that it would encourage the avoidance of conflicts from coming into being. It could thus be argued, that a possible approach could be to put a halt to the further inciting on national jurisdiction rules, such as by limiting the jurisdiction of the Member States to the territoriality and/or the personality principle. However, there is a high risk that this route could encourage the creation of loopholes or safe havens for criminals. Such an approach would run contrary to the spirit that has been applied in many EU legal instruments where the ambition was to exclude "negative" conflicts.

In this respect, there are numerous EU instruments, dealing with specific types of criminality, which require Member States to establish their jurisdiction on certain offences beyond the mere territoriality principle. The relevant rules require only a minimum of jurisdiction and do not limit the criminal law powers of the Member States. In particular, this applies to the Convention on the Protection of the EC's financial interests of 26 July 1995 (Article 4) and the Protocol thereto of 27 September 1996 (Article 6)15, the Convention on the Fight against Corruption of 26 May 1997 (Article 7),16 and the Framework Decisions

- on the protection of the Euro against counterfeiting (Article 7),[17]
- combating fraud and counterfeiting of non-cash means of payment (Article 9),[18]
- combating terrorism (Article 9),[19]
- combating trafficking in human beings (Article 6),[20]

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15 OJ C 316, 27.11.1995, p. 49; OJ C 313, 23.10.1996, p. 2.
16 OJ C 195, 25.6.1997, p. 2.
17 OJ L 140, 14.6.2000, p. 1.
18 OJ L 149, 2.6.2001, p. 1.
19 OJ L 164, 22.6.2002, p. 3.

– strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Article 4), [21]

– combating corruption in the private sector (Article 7),[22]

– combating the sexual exploitation of children and child pornography (Article 8),[23]

– laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (Article 9).[24] And

– on attacks against information systems[25]

While these provisions aim at avoiding negative conflicts, the existing legal framework as regards the prevention and resolution of positive jurisdiction conflicts is rather "thin" (the relevant provisions can be found in the Annexed provisions). First of all, according to the **European Convention on Transfer of Proceedings** of 15 May 1972, elaborated by the Council of Europe (hereafter: "Transfer Convention"),[26] Contracting States can request each other to take proceedings under certain conditions (Articles 6 ff.). If a transfer request has been accepted, the requesting State can no longer prosecute (Article 21). Furthermore, Articles 30 ff. provide for consultation regarding offences which are not considered to be of a political or purely military nature: a Contracting State being aware of proceedings going on in another Contracting State in respect of the same offence, "shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State" (Article 30); if it does not, it shall postpone judgment on the merits for at least 30 days (Article 31).

However, this Convention has only entered into force in 11 Member States. More than 30 years after its elaboration, it does not seem very likely that all Member States will ratify it in the near future. Moreover, the Convention does not provide for a shared, common and multilateral procedure for determining jurisdiction. A transfer only comes about if a Contracting State decides to waive its right to prosecute and a second State is willing to take the case. In addition, the transfer procedure (comprising 24 Articles) is rather onerous and might not be appropriate for the EU common area of justice. Although it may be useful for all Member States to ratify the Convention, in the Commission's view this could only be a partial step towards the objective of preventing and resolving jurisdiction conflicts.

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20 OJ L 203, 1.8.2002, p. 1.
21 OJ L 328, 5.12.2002, p. 1.
22 OJ L 192, 31.7.2003, p. 54.
23 OJ L 13, 20.1.2004, p. 44.
24 OJ L 335, 11.11.2004, p. 8.
25 OJ L 69, 16.3.2005, p. 67
26 Convention of 15.5.1972, ETS 073.

A second relevant instrument is the Council Decision setting up **Eurojust**.[27] According to its Article 7(a), Eurojust may ask the competent authorities of the Member States,

"(i) to undertake an investigation or prosecution of specific acts;

(ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts".

While Article 7 applies to the Eurojust College as a whole, the national members of Eurojust may also ask the competent authorities "to consider" these measures (Article 6(a)). In principle, the competent authorities need to give reasons if they do not follow a reasoned request by the College (Article 8). The use of these provisions could facilitate and accelerate the process of determining jurisdiction and contribute, where necessary, to a settlement of disputes both on "positive" and "negative" jurisdiction conflicts. Thus, the Eurojust Decision can be an important element in a mechanism for determining a single jurisdiction. The Treaty Establishing a Constitution for Europe demonstrates that there is political willingness for giving an even more important role to Eurojust in settling conflicts of jurisdiction. Article III-273(1)(c) provides that the tasks of Eurojust may include "resolution of conflicts of jurisdiction". This could provide a basis for using Eurojust in settling conflicts of jurisdiction under mechanisms established pursuant to Article III-270(1)(b) of the Treaty Establishing a Constitution for Europe .

However, under the current legal framework, Eurojust could not suggest a solution for every conflict of jurisdiction which arises among the Member States. Article 4(1) of the Council Decision setting up Eurojust limits its competence to serious crime, particularly as regards certain types of offences. Therefore, the referral of every such conflict to Eurojust would require a significant extension of Eurojust's capacity. In the light of the subsidiarity principle one might rather seek a decentralised solution, especially in cases where the "EU dimension" is not very strong (both regarding the severity of the crime and the number of Member States involved).

As regards **specific types of criminality**, EU criminal law obliges the Member States or their authorities to cooperate with each other with the purpose of coming to a decision as to the appropriate jurisdiction under which a concrete case should be dealt with. This is the case for Article 6(2) of the Convention on the Protection of the EC's Financial Interests and Article 9(2) of the EU Corruption Convention[28], Article 4(2) of the Joint Action on Criminal Organisations,[29]Article 7(3) of the Framework Decision on Euro Counterfeiting, Article 9(2) on the Framework Decision on combating Terrorism and Article 10(4) of the Framework Decision on attacks against information systems[30]. According to these provisions, the Member States involved

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27 Decision of 28.2.2002, OJ L 63, 6.3.2002, p. 1, amended by Council Decision of 18.6.2003; OJ L 245, 29.9.2003, p. 44. See also the Commission's report on the implementation of the Eurojust Decision, COM(2004)457 final with annex.

28 OJ L 192, 31/07/2003, p. 54

29 Joint Action on making it a Criminal Offence to participate in a Criminal Organisation in the Member States of the EU of 21.12.1998, OJ L 351, p. 1. The Commission has proposed to replace this Joint Action by a Framework Decision, see COM(2005)6 final.

30 OJ L 69, 16.3.2005, p. 67

"shall cooperate in order to decide which of them will prosecute the offenders in question with the aim, if possible, of centralising proceedings in a single Member State".[31]It is interesting to note the relevant provisions in the Framework Decision on Terrorism and those in the Framework Decision on attacks against information systems, provide that in achieving the centralising of proceedings in a single Member State, "the Member States may have recourse to any body or mechanism established within the EU in order to facilitate cooperation between their judicial authorities and the coordination of their action". Therefore, the use of EU bodies such as Eurojust is encouraged for these specific crimes. For terrorism specifically, there is a specific link to Eurojust via the national terrorism correspondents established by Article 3 of the Council Decision of 19.12.2004 on terrorism.[32]

On the whole, the existing set of piecemeal rules does not provide a general procedure to avoid and, if need be, resolve conflicts of jurisdiction. It appears to be insufficient for two reasons; Firstly, most of these rules are quite general and abstract and it is, therefore, questionable to what extent they are being put into daily practice[33]. Secondly, these rules are only applicable to specific types of crime; this can even complicate the work of legal practitioners and it thus seems preferable to approach this issue holistically.

5. PROCEDURAL ARRANGEMENTS FOR DETERMINING JURISDICTION

This part will make suggestions on the procedural characteristics of an effective mechanism of determining an appropriate jurisdiction. In particular, it will deal with the stages of identification and information of other potentially interested Member States, consultation-discussion and dispute resolution/mediation.

It should be emphasised that this Green Paper does not deal with the system created by Article 85 of the EC Treaty and by Regulation No 1/2003[34], where the Commission and the national competition authorities have parallel competence for the enforcement of Articles 81 and 82 of the Treaty. Under that system, and in accordance with the case-law of the Community courts,[35] the Commission is entitled to adopt at any time individual decisions under Articles 81 and 82 of the Treaty, even where an agreement or practice has already been the subject of a decision by a national court. The criteria for the allocation of the cases between various enforcers may only be flexible criteria of work-sharing. Furthermore, in the area of competition law the concerns raised by multiple actions are less relevant as the

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31 Quoted from the Framework Decision on Terrorism. Apart from Article 4 of the Joint Action on Criminal Organisations, the text of other provisions mentioned above corresponds to this one. The Commission has proposed to replace this Joint Action by a Framework Decision which would include the quoted reference, see COM(2005)6 final.

32 Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP, OJ L 16, 22.1.2003, p. 68.

33 For example, the Commission's report on the implementation of the Framework Decision on combating terrorism noted that "none of the Member States appear to have incorporated in their national legislations the criteria for solving positive conflicts of jurisdiction referred to in [Article 9]": COM(2004)409 final, 8.6.2004.

34 OJ L 1, 04.01.2003, p.1

35 Masterfoods Case C-344/98, ECJ Judgment of 14 December 2000, paragraph 48

procedures tend to target large corporations. Finally, the Regulation already provides for mutual information[36] and includes a mechanism designed to settle conflicts.[37] This paper therefore does not intend to cover this area.'

5.1. Pre-conditions

a) Mutual exchange of information

An indispensable prerequisite both for the sound application of a mechanism for determining jurisdiction and for the consistent application of the *ne bis in idem* principle, is that the competent national authorities should become aware of proceedings and/or related decisions in each others' jurisdiction: they should be allowed, and perhaps even be obliged, to exchange the relevant information. In other words, such a mechanism can only function effectively if the competent authorities are promptly informed of ongoing proceedings in other Member States on cases which have led or are about to lead to a criminal prosecution in those Member States and which are significantly linked to their own jurisdiction. As of yet, this is not guaranteed. At present, investigators and prosecutors, on their personal or on their authorities' initiative, might inform their colleagues in other Member States of such cases. Often, such information is only exchanged where a concrete need for cross-border cooperation has been identified, e.g. on collecting evidence.

Therefore, the purpose of this chapter is to suggest measures for improving mutual information as regards the existence of parallel proceedings and/or conflicting decisions. The following options, in the long run, may also contribute to other ends too, which do not fall within the scope of this Green paper: for instance, by ensuring that prosecutors and judges inform each other on proceedings and decisions, offences committed in other Member States can be taken into account for sentencing, in particular by considering recidivism[38]. The latter issue has been addressed by a Commission proposal for a Framework Decision on the taking-into-account of convictions[39]. Improved exchange of information on criminal proceedings is also part of the efforts on information exchange for law enforcement purposes, on which the Commission has presented several proposals, including on the use of computerised means and the necessary safeguards for protection of personal data.[40] In addition, there is a Member State initiative on related issues[41].

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36 See Article 11, paragraphs 3 to 5 of Regulation No 1/2003.

37 See Article 11.6 of the said regulation.

38 See point 1.2 of the Mutual Recognition Programme (measures 2 to 4).

39 Cf. White Paper COM(2005)10 final on exchanges of information on convictions and the effect of such convictions in the European Union, in particular point 4 thereof. See, in particular: Communication on measures to be taken to combat terrorism and other forms of serious crime and Proposal for a Council Decision on the exchange of information and cooperation concerning terrorist offences, COM(2004)221 final; Communication towards enhancing access to information by law enforcement agencies, COM(2004)429 final; Proposal for a Council Decision on the exchange of information extracted from the criminal record, COM(2004)664 final. A Commission Proposal for a Council Framework Decision on adequate safeguards for the transfer of personal data for the purpose of police and judicial co-operation in criminal matters is expected.

40 See, in particular: Communication on measures to be taken to combat terrorism and other forms of serious crime and Proposal for a Council Decision on the exchange of information and cooperation concerning terrorist offences, COM(2004)221 final; Communication towards enhancing access to information by law enforcement agencies, COM(2004)429 final; Proposal for a Council Decision on the

aa) Information on final decisions (including criminal records)

Article 57 of the Convention Implementing the Schengen Agreement ("CISA") states that the competent authorities "shall, if they deem it necessary, request the relevant information" if they "have reasons to believe" that a charge relates to the same acts as those in respect of which a final decision, terminating the possibility of prosecution, has been taken. The information requested shall be provided as soon as possible and be taken into consideration.

However, apart from the fact that this provision might not always be fully observed in practice (there are indications of this, such as individual complaints and press reports), it does not suffice to exclude the possibility for the initiation of repeated/parallel proceedings, as the provision only applies where there are concrete reasons for putting forward a request. While prosecuting authorities may often request such information from other Member States because of references from the accused or their lawyer, the latter might sometimes either abstain from referring to a previous decision or the decision may have been rendered in absentia and the accused may not be aware of its existence or content. To ensure mutual information, certain obligations to inform on a pro-active and systematic basis might be needed.

bb) Information on Convictions

Within the traditional system of mutual assistance, Articles 13 and 22 of the 1959 Convention on Mutual Assistance in Criminal Matters, which is ratified by all EU Member States,[42] it is provided that Contracting Parties shall communicate convictions on request, and inform other Contracting Parties on convictions in respect of their nationals. Under Measure 3 of the Mutual Recognition Programme of 29.11.2000 there is a call for a standard form for criminal record applications "like that drawn up for the Schengen bodies".

The Extraordinary European Council on 25 and 26 March 2004 has endorsed as part of the fight against terrorism[43], the creation of a "European register of convictions and disqualifications". This was given further support at the Justice and Home Affairs Council meeting on 19 July 2004. On 13 October 2004 the Commission adopted a proposal for a decision designed to improve exchanges of information on criminal convictions, which corresponds to the first part of that action.[44] Its aim is to improve in the short term the existing machinery for exchanging information on criminal records, originally set up under the 1959 European Convention on mutual assistance in criminal matters. The proposal will help to speed up the transmission of information between national registers. It stipulates that if a Member State convicts a

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exchange of information extracted from the criminal record, COM(2004)664 final. A Commission Proposal for a Council Framework Decision on adequate safeguards for the transfer of personal data for the purpose of police and judicial co-operation in criminal matters is expected.

41 Initiative of the Kingdom of Sweden with a view to adopting a Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts, OJ C 281, 18.11.2004, p. 5.

42 Convention of 20.4.1959, Council of Europe, ETS 030. See also additional protocol, ETS 099, of 17.3.1978 and second additional protocol, ETS 182, of 8.11.2001.

43 See the Declaration on Combating Terrorism (Brussels, 25 March 2004) point 5 a).

44 COM(2004)664 final

national of another Member State, it must without delay inform the Member State of which the convicted person is a national. The proposal would also create an obligation to respond to requests within five days and by using model forms for requests and for replies, contributing to better mutual understanding of the information that is sent. To this end, within 2005, the Commission will table more ambitious proposals on the setting-up of an EU computerised system for exchanging information on convictions.[45]

cc) Information on other final decisions with ne bis in idem effect

Criminal records in most Member States do not contain information on acquittals or on decisions following an agreement between prosecutor and defendant comparable decisions finally terminating the possibility of prosecution. Including information on acquittals in criminal records may in some Member States be controversial as the person acquitted may consider that such a practice would diminish his acquittal.

However, it is difficult to imagine how the *Ne bis in idem* principle will be fully respected without a mechanism which would ensure that this information is available to the courts and to prosecuting authorities throughout the EU. In this vein, point 2.3 of the Mutual Recognition Programme encourages a feasibility study on the setting up of a central register of proceedings (i.e. not a criminal record), "which would make it possible to avoid bringing charges that would be rejected under the ne bis in idem principle and which would also provide useful information on investigations concerning offences involving the same person". Issues of data protection and security, as well as of access to such a register would have to be thoroughly examined in this context.

Currently, the Commission does not envisage creating a central register of proceedings. Maybe a certain linkage among existing domestic registers could be discussed, but the added value would be limited as long as not all Member States have such a register (or if they at least have regional registers which could be linked with each other).

dd) Information on ongoing proceedings and interim decisions

In order to deal with jurisdiction conflicts, certain steps will also have to be considered for mutual information about ongoing proceedings. Only if the competent authorities become aware of proceedings taking place in other Member States will they be able to enter into discussions among each other as to where to prosecute a case and to agree as to the most appropriate jurisdiction.

In turn, reference is to be made to point 2.3 of the Mutual Recognition Programme and to point 49(e) of the Vienna Action Plan, which suggests "examining the possibility of registering whether there are proceedings against the same person on the same offence pending in different Member States". The experience to be gained through an improved exchange of criminal records might help to decide what kind of mechanism for an exchange of information on ongoing proceedings would be suitable and feasible. The purpose should be to enable the authorities to assess

[45] See White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM(2005)10 final.

whether their proceedings are identical or overlap with those in other Member States. This could mean that the prosecuting authorities would have the ability to request and receive data on the identification of the suspect or accused, on the suspected offence and its time and place, and possibly also an abstract of related facts. One can contest whether further data such as aliases and contact details (address etc.) related to suspected persons would also have to be exchanged, as well as certain pieces of information on related legal persons and victims for identifying cross-links between investigations. As said above, these courses of action go beyond the aims of this paper; the aim is not to suggest ways of improving intelligence and/or investigation techniques but to avoid multiple proceedings.

It also appears appropriate to consider whether in choosing the most appropriate jurisdiction, the competent authorities would also need to be informed of cases in which proceedings have been discontinued, withdrawn, or temporarily suspended. ("Interim decisions"). In other words, is the transmission of information about cases where the decision does not bar or finally terminate the possibility of a further prosecution also necessary? The motives for such decisions under domestic law can be manifold, such as factual findings (e.g. insufficient evidence, in dubio pro reo)[46], or that a penalty does not appear indispensable because of penalties expected to be imposed on the same person for other offences[47]. It is possible that by taking into account information stemming from other Member States, the Member State where such a decision has been taken turns out to be the most suitable jurisdiction to prosecute, and could thus reconsider the possibility of further proceedings. Particularly in cases where a prosecution was discontinued because of insufficient evidence, a transfer of such information would be probably very useful in giving the whole picture of the underlying act.

b) Ability to halt/close proceedings

Secondly, once the national authorities of a Member State become aware of proceedings in other Member States, the prosecuting authorities of a Member State should have the ability to refrain from initiating a prosecution, or to halt an existing prosecution, on the mere ground that the same case is being prosecuted in another Member State.

Refraining from initiating a prosecution (or halting an existing one) could raise problems to the legal order of Member States which adhere to the legality principle, where the competent authorities have a duty to prosecute every crime which falls within their competence. This could raise problems, in particular, when the principle is provided for in a national Constitution. Although all Member States applying the legality principle also provide for certain exceptions in their domestic law, it seems that currently many of them do not provide (explicitly) for discontinuing proceedings merely on the ground that a case is being prosecuted in another Member State which is equally or better placed to do so. It seems that even in systems based on the opportunity principle guidelines by Prosecutors General and/or other superior

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46 E.g., in France a *arrêt de non-lieu pour de motifs de fait*, does only have a provisional, but not a full *res judicata* effect (*affaire définitivement jugée*), even when pronounced by a *chambre d'accusation de la cour d'appel* (see Articles 188, 189 *Code de Procédure Pénale*).

47 See, for instance, § 154 of the German *Strafprozessordnung*.

authorities are not always formulated in a manner that allows, if need be, to discontinue proceedings merely on this ground. It is not sufficient that they are allowed to discontinue proceedings on acts which occurred outside of their own territory, or with regard to offences for which an (European) arrest warrant has been issued in another Member State, because it is conceivable that an act occurred on several Member States' territories and it might also be appropriate to concentrate proceedings in a Member State which has not, or not yet, issued an arrest warrant.

Therefore, it becomes necessary to consider the creation of a provision at EU level which would allow an authority in one Member State to suspend or to close a prosecution on the ground that an authority in another Member State is dealing with it or has already dealt with it. Article 3 of the Transfer Convention could serve as a model text. In addition, with regard to the co-ordination of proceedings and possible synergy effects, one might also consider taking an approach analogous to that of Article 28 of Regulation 44/2001 on civil and commercial matters which states that where *related* proceedings[48] are pending in different Member States, the competent authorities could be permitted to stay their own proceedings with a view to a transfer to and/or an accumulation with the related proceedings in the other Member State.

In this respect, it can validly be argued that in a common area of Freedom, Security and Justice this principle is satisfied when another Member State prosecutes such a case.

Question 1: Is there a need for an EU provision which shall provide that national law must allow for proceedings to be suspended by reason of proceedings in other Member States?

5.2. Creating a "Duty to inform"

While a European register of proceedings would currently seem theoretical, a feasible measure could be to create an EU-wide duty for domestic authorities to inform their counterparts in other Member States under certain circumstances.

To avoid premature decisions and/or actions originating from a lack of knowledge of the situation in other Member States, a mutual exchange of information and of views on the best place to prosecute should start as early as possible[49]. An appropriate stage could, for instance, be the (formal) stage when a prosecution is launched. Under certain circumstances, for example in cases extra-territorial jurisdiction, a transfer of information might already be required, when an authority considers initiating a prosecution, as foreseen in an agreement concluded among the Prosecutors General

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48 According to Article 28(3) of this Regulation, actions are deemed to be related "where they are so closely connected that it is expedient to hear and determine them together…". With a view to cumulative sentencing, in criminal matters one could take a wider approach, e.g. as where proceedings concern the same defendant(s) and the same or similar offences (offences against property, violent offences, etc.).

49 This is also said in the Eurojust guidelines "which jurisdiction to prosecute?" annexed to the Eurojust annual report 2003, p. 60 (available at www.eurojust.eu.int).

of the Nordic States (which, however, is not legally binding)[50]. And even after a certain jurisdiction has been agreed there can still be a need for exchanging information on proceedings, e.g. on important procedural steps (e.g. the first questioning of or taking declaration from the suspect, an indictment and/or a waiver or discontinuation of proceedings).

However, because of the need for adequate protection of personal data and the need for maintaining the efficiency of prosecutions, such a duty should not go beyond what is necessary in enabling the competent authorities in other Member States to express their view and effectively contribute to a possible solution. Law enforcement and prosecuting authorities often work under high time constraints and suffer a heavy workload. These burdens should not be increased where it is not absolutely necessary. A mutual information mechanism should not hinder measures which may be urgent. It should be as plain and simple as possible. This means that where a duty to inform is deemed necessary there should be enough flexibility regarding the timing and the contents of the information to be supplied.

In this vein, an option would be to make it obligatory to inform only when a Member State decides to prosecute a case (or as soon as it launches a prosecution) in a case which demonstrates significant links to another Member State. The mere fact that another Member State has jurisdiction should not trigger such a duty: first, as this would be tantamount to requiring domestic authorities to examine jurisdiction under other Member States' law; secondly, as the jurisdiction of some Member States is very wide, sometimes even based on the universality principle. Neither should such a duty come into play by the mere fact that an initial investigation is taking place; a later stage in the criminal proceedings seems more appropriate. However, if an authority considers that it is necessary inform others about a case from an earlier stage then it should be allowed to do so.

What appears to be necessary is the laying down of an EU rule which would oblige the authorities of the Member States to contact the authorities of other Member States, when a case before them demonstrates a real possibility that other Member States would also be interested in prosecuting the same case. Such a potential interest could objectively be identified if the case before them demonstrates significant links to another jurisdiction. In other words, such a rule could oblige national authorities to inform the competent authorities of other Member States of their intention to initiate a prosecution (or of their actual initiation of a prosecution) when the facts of a case before them indicate significant links to another Member State.

Alternatively, it could be argued that an interest of another to prosecute the same case could be objectively identified in cases where it appears that another Member State could also bring a "viable" prosecution on the same case. Of relevance to this is the text which is found in article 7 of the Framework Decision on Increasing Protection by Criminal Penalties and other Sanctions against Counterfeiting in Connection with the Introduction of the Euro, which states that: "...Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an

[50] Article 7 of the agreement on proceedings in Nordic countries of 6.2.1970, see circular C 65 of 28.9.1970, amended on 1.9.1979. This Article only refers to cases of extra-territorial jurisdiction. In such cases, the country in which the offence has been committed is to be notified.

offence based on the same facts, the Member States involved shall cooperate in deciding which Member State shall..."[51] However, this suggestion could be quite vague as the possibility for a viable prosecution could prove to be a very unclear term and thus difficult to apply consistently in practice. Furthermore, it is doubted whether a prosecuting authority could objectively ask this question of viability for another. Finally, it could be argued that with the available instruments of mutual assistance which are currently in place more and more Member States can bring a viable prosecution if the assistance is actually provided to them. Therefore, the test of the ability to bring a viable prosecution appears to be too wide and could thus lead to a duty to inform in an excessive number of cases. Therefore, the test for "significant links" appears more objective in identifying potential interests and easier to apply consistently in practice.

As regards the moment that this duty to inform could begin to apply, it is suggested, that an appropriate stage could be the moment when the authorities decide to proceed beyond the investigation stage or as soon as they launched a prosecution in such a case. As said above, such an exchange of information could also take place earlier if this is considered appropriate in a case. As communication channels one could revert to existing bodies such as the European Judicial Network (EJN), Eurojust (possibly on the basis of information provided by Europol) or – in the future – the mechanism for an exchange of criminal records. In any case, sensitive information must be transferred in a strictly confidential manner respecting established data protection requirements[52] and through secured information channels[53].

Question 2. Should there be a duty to inform other jurisdictions of ongoing or anticipated prosecutions if there are significant links to those other jurisdictions? How should information on ongoing proceedings, final decisions and other related decisions be exchanged?

5.3. Creating a "Duty to enter into Discussions"

A duty to inform should be combined with effective consultations/discussions between the competent authorities of the Member States concerned. Consultation should also be an integral part of the envisaged mechanism as regards the effective prevention of conflicts of jurisdiction.

The competent authorities should strive to identify the best place(s) for further proceedings, by taking into account each other's positions. The objective should be to reach consensual solutions at an early stage, through bilateral discussions between the concerned Member States. As expressed in the Commission's Communication on computer crime of 26.1.2000,[54] the finding of consensual solutions will depend on effective bilateral and multilateral consultation. Only through consultation could the right balance be struck between the rights and interests of the persons (victims and defendants) and States concerned. Based on a mechanism which would guarantee the

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51 OJ L 140, 14/06/2000, p. 1

52 A Commission Proposal for a Council Framework Decision on adequate safeguards for the transfer of personal data for the purpose of police and judicial co-operation in criminal matters is expected.

53 Eurojust is currently building up a secured IT system.

54 Creating a safer information society by improving the security of information infrastructures and combating computer-related crime, COM(2001)890 final, p. 23.

open exchange of information, the authorities concerned should be enabled to quickly contribute their point of view during their discussions and, if need be, to provide additional facts.

How could it be safeguarded that this process of consultation/discussion takes place effectively? An option would be to create **a duty to enter into discussions** so that to ensure that the opinions of others would be taken into account or at least put forward. However, what has been pointed out above concerning the option of creating a duty to inform also applies for the stage of consultations: excessive obligations and formalism could hamper the operations and tasks of the prosecuting and judicial authorities. Red tape is to be avoided. What is needed is a flexible, direct and rapid consultation. Prosecuting authorities must be able to proceed with urgent measures without having to wait for an opinion from another authority.

In view of the above preliminary considerations, the suggested mechanism could be composed of the following steps;

5.4. The characteristics and the "Steps" of the suggested mechanism

(a) Step1: Identification and information of other potentially interested Member States

As said, as a first step, it is essential that the competent national authorities which intend to initiate or have already commenced a prosecution (the "initiating States") in a case which contains foreign elements, to consider whether these elements are so important that another Member State could also be interested to prosecute the case as well. Accordingly, the competent authorities of the *initiating* State, could be obliged to communicate the commencement (or their intention to commence) of a prosecution to the authorities of other Member States which could also be interested to prosecute the same case. Such an obligation could apply to prosecuting authorities, and/or to other judicial/ investigating or law enforcement authorities depending on the particular characteristics of the criminal justice systems of the Member States.

An analogous obligation of informing others could also apply to the authorities of a Member State which are dealing with cases which initially do not demonstrate a significant link to another jurisdiction, but such a link only appears at a later stage of the proceedings. Furthermore, such a duty could be "reborn" in the situation that the mechanism is applied and the prosecution of a case is allocated to a "leading" State, but at a later stage the latter's authorities discover an important fact (which was not known when the mechanism was initially applied) which could trigger the interest of another Member State.

The Member States which will be informed of the commencement of prosecutions in other Member States which are linked to their own jurisdiction, could in turn respond by indicating their actual interest in prosecuting the same cases as well. Possibly, a provision could state that this expression of interest should be declared within a fixed period of time. Such a suggested deadline for issuing a “declaration of interest” could run from the point of time of receiving the relevant information from the *initiating* State. However, in exceptional cases Member States could be allowed to react outside the deadline so that to deal with situations where a Member State identifies an interest to prosecute a case at a later stage.

It is fair to argue that the prosecuting authorities who initiate this consultation procedure should hear the views of any other Member State. However, it appears more practicable to limit, in principle, the consultation process to those which have been identified by the initiating State as having a potential interest to prosecute through the identified links to their jurisdiction.

In order to ensure that the mechanism functions efficiently, the suggested system could also provide that if the initial transmission of information did not result any objections by the Member States which were initially consulted, then the *initiating* State would have the right to continue, according to its national law, with the prosecution of a case. However, it needs to be stressed that, as mentioned above, if facts which point to a new potential ground of interest of a Member State are discovered at a later stage, a new duty to transmit information shall arise. (Possibly accompanied by a deadline to allow for responses)

In any case, the domestic authorities who declare their interest to prosecute should stay in close contact with the *initiating* State and inform each other of any important decisions relating to their domestic proceedings. In particular, this should apply to any final decision enfolding a *ne bis in idem* effect, but possibly also to an indictment being sent to court, a delivered judgment and of a suspension and/or discontinuing of proceedings.

(b) Step 2: Consultations/Discussions

The concerned authorities will then have to examine the question of which is the best place for concentrating the prosecution of the case under discussion (by taking into account the substantive criteria are outlined in section 9 below). Direct contact – consultations between the competent authorities of the concerned Member States seems to be the most appropriate means of discussion, at least for the first exchanges of views. Moreover, where necessary, these authorities could ask for the assistance of Eurojust, which has adequate facilities, such as premises for coordination meetings, a secured communications network and experience in the field. However, it might not be feasible and appropriate to refer all cases exclusively to this body.[55] Member States should especially ask for Eurojust's assistance in serious and/or multilateral cases, particularly on organised crime,[56] and in cases of a particularly complex nature.

In an ideal scenario, step 2 would lead to an early finding of consensus as to the ideal jurisdiction. Such a scenario would lead to the practical state of affairs that an authority voluntarily decides to either close its proceedings or to refrain from initiating its own prosecution in the case, thus allowing another authority to initiate and/or continue with a prosecution. The relevant authorities could thus simply proceed according to their national law.

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55 In its above mentioned guidelines (footnote 48), Eurojust says that it would expect "any cases of this type", particularly where an agreement cannot be reached between the representatives of the Member States concerned as to where a case should be prosecuted. In the current situation, national authorities can be encouraged to refer any such case to Eurojust (provided it has competence); however, in the long run, the caseload might have to be limited or the capacity of Eurojust adapted.

56 See Article 7 of the Commission proposal for a Framework Decision on the fight against organised crime, COM(2005)6 final.

In essence, there seems to be no need to formalise such a voluntary/ consensual situation. It seems preferable to leave sufficient flexibility and freedom for further revision of such arrangements so that to deal with situations where new findings change the picture. However, in certain cases it could be desirable to provide for an appropriate legal framework for binding agreements. In order to achieve legal certainty and avoid the risk of a reopening of the debate of where to prosecute a case, the national authorities could conclude a binding agreement if they consider this appropriate. Where they decide to do so, they could be required to use an EU model for such formal agreements. Furthermore, such an agreement could be subject to legal review by the defendant and possibly by victims. The relevant EU model/framework could also define the situations in which an agreement could be denounced by one of the parties.

In the situation that one jurisdiction gets the case while others step back, (by either closing their own proceedings or stating that they will refrain from initiating a parallel prosecution on the same case) it is important to point out that the latter jurisdictions should continue to play an active role by providing information, evidence and any other requested assistance to the *leading* jurisdiction. To this end, a future legislative instrument could provide that the closing of national proceedings, without imposing a penalty or deciding on the merits, by reason of a better placed jurisdiction should not be a bar to the provision of mutual assistance to the Member State which will continue with the prosecution of the case. This would avoid the occurrence within the Union of situations where assistance is refused after proceedings are closed on the mere ground that proceedings are ongoing in another Member State, as it was the case in the *Miraglia* [57]case which is discussed at part 11.3 below.

In contrast, if consensus can not be attained at this second step of the suggested mechanism, the question of determining the most appropriate jurisdiction could be transferred to the third step of the suggested mechanism.

Question 3: Should there be a duty to enter into discussions with Member States that have significant links to a case?

Question 4: Is there a need for an EU model on binding agreements among the competent authorities?

(c) Step 3: dispute settlement / mediation

As a next step in the mechanism, a further stage could be envisaged so that to deal with the situations where the competent authorities can not easily agree on the most appropriate jurisdiction. In these cases, a swift and flexible mechanism for dispute settlement/mediation will be needed.

An appropriate option would be to involve a body at EU level to act as a **mediator**. Where there is not merely a temporary problem of lack of information, but where a "real" dispute arises, dispute resolution should be promoted both through the

[57] Case C-493/03

mechanism itself and pro-actively by the authorities concerned. To this end, several options can be envisaged.

In this respect, Eurojust appears to be well placed to take over the role of mediator on the request of one of the concerned authorities. To some extent, this is already possible according to the existing Council Decision setting up Eurojust. According to its Articles 6(a), 7(a) and 8, Eurojust can request the competent authorities "to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts". Moreover, Eurojust can currently also contribute in avoiding "negative" conflicts of jurisdiction, i.e. cases where no authority is willing to prosecute.

Alternatively, it is also conceivable to create a new mechanism to promote dispute resolution. For instance, one could set up a board or panel (e.g. a troika or quadriga composed of senior national prosecutors or judges) which would suggest the most appropriate jurisdiction to the concerned authorities (by means of a non-binding "advisory opinion"). It is interesting in this context to look at the agreements among the Prosecutors General of the German *Länder*, according to which three Prosecutors General are entrusted with the task of identifying an appropriate jurisdiction for cumulative proceedings[58]. Although different circumstances exist on the European level, it is possible that a comparable mechanism could be created at EU level. Details on the composition of such a panel would have to be agreed on, e.g. whether the panel would have a permanent structure or rather be created *ad hoc,* whether representatives from the concerned Member States should be included or not. In any case, if a new mechanism such as a panel were to be set up, it should not interfere with the competences of Eurojust, particularly in the fields of terrorism and serious and organised crime.

This third step of dispute resolution/mediation could be launched on the request of any Member State which expresses an interest in prosecuting a case which raises questions of jurisdiction conflicts. Any such Member State could be given the right to refer the case for dispute settlement. It would also be valid to argue that a dispute settlement procedure could become compulsory after a period of time elapses in step 2 (consultations – discussions), to ensure that cases which can not be allocated easily due to significant disagreements are promptly transferred to this EU centred / assisted stage of the mechanism. It should also be noted that the creation of an obligation to enter into such a process may strengthen the willingness of those involved to arrive at a consensual solution from an earlier stage.

Furthermore, the comments on the previous step as regards the practical effect in the situations that consensus is easily reached, could also be made for the mediation/dispute resolution stage. The competent authorities could voluntarily decide that one of them continues and the other(s) closes down any national proceedings (or waives its interest to initiate a prosecution) on the same case.

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[58] Informal agreement on a workshop of the Prosecutors General and the Federal Prosecutor, 6-8 May 2002. Although this procedure has been set up for streamlining several proceedings against the same offender or group of offenders (not necessarily based on the same facts) such a procedure might also be appropriate where the same facts are about to be prosecuted in different Member States.

Alternatively, they could decide to put this down in writing and conclude a binding agreement in line with a suggested EU model.

It should be stressed that this step of the mechanism should aim to provide active assistance in the resolution of all real "jurisdiction conflicts" between the Member States. This step should strive to ensure that the principle of *ne bis in idem* would become of less practical use. In other words, provided that the cases which raise real "conflicts" questions are promptly identified by national authorities and provided that consensus is successfully reached, at the latest by this last stage of the mechanism, there would hardly be cases where Member States would come to final decisions without considering the interests of other Member States.

Whatever the nature of this step, (dispute resolution through Eurojust or through the creation of a Panel to undertake dispute resolution-mediation) it should in any case offer the opportunity for a structured dialogue between the interested parties which would allow for an objective consideration of the interests involved. Besides, in the long term, such a mediation process may allow for the building up of a consistent approach in dealing with similar conflicts.

Question 5: Should there be a dispute settlement/mediation process when direct discussions do not result in an agreement? What body seems to be best placed to mediate disputes on jurisdiction?

(d) Possible additional step: a binding decision by an EU body?

A sound implementation of the three-step mechanism outlined above, together with the laying down of the relevant criteria for the choice of jurisdiction and a priority rule as outlined below, is likely to lead to a consensus in many, if not most cases. These 3 steps are *prima facie* feasible to create, and may be considered sufficient unless further experience would reveal a need for a further step. One may well take the position that such a need has not yet been demonstrated, and therefore be content with such a flexible mechanism which would finish with step 3. In cases where no consensus can be achieved through mediation, multiplied prosecutions would have to be accepted temporarily, until the *ne bis in idem* principle would come “back” into play.

In the long run one could envisage a further procedural step, which could consist of referring the matter to a body on EU level which would be empowered to take a binding decision on the (most) appropriate jurisdiction. However, this additional step seems difficult to realise. In any case, the main objective should be to achieve consensual solutions, so that the possibility of a binding decision should be considered an *ultima ratio* where the mediation process has failed. The overall procedure should be as simple as possible. In this respect, the mediator and/or one of the competent authorities could end the process of dispute settlement after a certain period of time by declaring that an attempt of finding a consensus has failed. Decision-making would depend on the structure and composition of the relevant body, but in essence, to ensure efficiency it should be based on majority (if deemed necessary, qualified majority).

One difficulty is that the roles of a mediator and of an instance taking binding decisions do not appear to be compatible. Therefore, a new additional body on EU

level would have to be created if a need to create a further step arises in the long term: if Eurojust plays the role of a mediator, a new body would have to take a binding decision where a dispute could not be settled; on the other hand, if Eurojust were to receive a power to take binding decisions,[59] which would change its nature considerably, mediation would have to be carried out by a new body. Another even more difficult hurdle in issuing binding decisions on jurisdiction at EU level would be the question of providing for judicial review. It seems indispensable that such a binding decision should be made subject to judicial control. However, as explained below, the current Treaties do not provide for a competence of the European Court of Justice in this regard, while control by a national court of decisions taken at EU level is both inappropriate and legally impossible.

Question 6: Beyond dispute settlement/ mediation, is there a need for further steps in the long run, such as a decision by a body on EU level?

5.5. The legal effect of the allocation of a case to the most appropriate jurisdiction

The legal effect of a successful allocation of a case to the most appropriate jurisdiction through the 3 steps suggested above is another important practical element of the suggested mechanism that deserves consideration. In order to put forward suggestions as to the validity and/or binding effect of such arrangements/agreements, the various possible end results on the cases that would be filtered through the suggested mechanism should firstly be summarized.

As suggested above, if there is no expression of interest by any of the potentially interested Member States in response to the communication to them of the intention of an *initiating* State to commence (or of its actual commencement of) a prosecution in a case which is linked to their jurisdiction, the initiating State shall continue with the case according to its national law. On the other hand, when a Member State which has been informed of such a prosecution expresses an interest to prosecute the same case the following developments-scenarios could arise;

(a) After brief direct discussions (step 2) or after the dispute-resolution/mediation (step 3), a State(s) voluntarily decides to close down an ongoing national prosecution for the same case or decides to refrain from launching a prosecution on a case which another Member State also wants to prosecute.

(b) After brief discussions (step 2) or after the dispute-resolution/mediation (step 3), the concerned Member States could consensually decide as to which shall be the appropriate jurisdiction, but this time they decide to put this down in a binding agreement. The EU could supply a model and an appropriate legal framework for such binding agreements.

The voluntary arrangements resulting form scenario (a) do not have to be made legally binding. Similar voluntary arrangements are already taking place between Member States within the current legal framework. The relevant authorities could

[59] While Article III-273(1)(a) of the Constitution provides for the possibility of an "initiation of criminal investigations" by Eurojust (based on a European law), Eurojust could only "propose" the initiation of "prosecutions", which would still have to be "conducted by national authorities".

thus simply proceed in line with their national laws. After such voluntary arrangements, the Member States concerned should be allowed to reopen the procedure at a later stage if they consider this appropriate, by launching new consultations/discussions (e.g when the picture changes at a later stage). Such a right to reopen the discussions could be permitted irrespective of the reason that a Member State puts forward and could be subject to the same rules as steps 1-3 above.

In scenario (b), the competent authority would conclude a binding agreement, using the terms contained in a potential ´EU model agreement´. In this occasion, the reopening of the procedure by launching new discussions would only be possible under certain common conditions laid down in the agreement itself which would be protected by EU law. In other words, Member States would not have an unfettered right to reopen the consultation procedure after a binding agreement has been concluded.

6. THE ROLE OF INDIVIDUALS AND JUDICIAL REVIEW

The 3-step mechanism described above focuses on consultation between the prosecuting authorities of the Member States which are concerned with a specific case. This follows from the fact that during the pre-trial stage an intensive discussion of what is to be considered an appropriate jurisdiction with the suspected person or defendant and/or his lawyer is often not the most appropriate as it might often lead to the revelation of facts which could jeopardise the proceedings or the rights and freedoms of third parties.[60] Where this is not the case, the competent authorities are usually required by their national law to grant the defence a right to be heard and, if need be, access to the relevant files. To that extent, additional EU rules on the right to be heard, access to records and disclosure might perhaps be dispensable, at least in the pre-trial or preliminary phase.

Nevertheless, it might be desirable for EU law to require the competent authorities to include the defence during an early stage in a discussion dealing with the determination of the most appropriate jurisdiction. However, it seems difficult to set up a detailed rule on EU level which would cope with the various types of national proceedings of the Member States' legal systems. An EU wide consultation mechanism should not force the prosecuting authorities to disclose information to the defence where the national law does not provide for this. Therefore, if an EU rule on the implication of the defence is deemed necessary, it would have to leave sufficient scope for flexibility and discretion to the competent authorities as to how to involve the defence when deciding jurisdictional issues at the pre-trial stage.

Although the role of the concerned individuals in criminal proceedings can often be rather limited during the pre-trial phase, the possibility for a legal review of jurisdictional issues appears to be more necessary at the trial phase. Determining jurisdiction, which in criminal matters usually includes determining the applicable law, can have significant effects on the concerned individuals' rights and must, therefore, be subject to an effective remedy (Article 47 Charter, Article II-107 Treaty

[60] On this jeopardy see, for instance, Article 19(4) of the Council Decision setting up Eurojust.

Establishing a Constitution for Europe). This, however, does not exclude leaving a considerable margin of discretion to the competent authorities.

The most obvious option for an EU rule on the requirement for legal review seems to be to leave this review to the national court which receives the relevant indictment or accusation after the jurisdiction allocation procedure is successfully completed, without excluding any other remedies that are available under national laws. It seems that the procedural law of all Member States provides for an examination of the admissibility of the charge including the jurisdiction of the court. In some Member States there is a preliminary chamber and often there is an intermediate stage before the trial is formally initiated. However, at first hand, the national courts would mainly examine *whether* at all they have jurisdiction under the applicable domestic law. A legal review on the additional question of which of the several competent Member States should be given preference in a certain case might not be foreseen in all legal systems. This question, which is crucial in the given context, could perhaps be solved by resorting to well established general principles of procedural criminal law, through specific rules or guidelines, adapted to the situation of an EU common area of justice, which would control the allocation of the *leading* jurisdiction among the Member States. General principles such as the right to a fair trial or due process, and/or the right to have one's case heard by a legally competent court or by a "tribunal established by law" could be of relevance in this context. Where another Member State has jurisdiction for the same case, the defence could thus ask for a review on whether it was justified to bring the case before a particular jurisdiction[61].

It is thus reasonable to suggest that an EU rule should provide for the availability to individuals of the remedy of judicial review, at least for those situations where the resulting jurisdiction allocation becomes binding according to EU law. (i.e. When the agreement by the concerned Member States as to which of them shall prosecute a case is incorporated in a binding agreement). Those binding allocations could be made subject to common rules as regards, *inter alia*, the opportunities that a Member State would have in re-opening the procedure / denouncing the agreement. Since such binding allocations of jurisdiction would probably fetter the Member State's ability to put forward arguments and /or act according to the provisions and the remedies which are available in their national law to protect the interests of their citizens, it is necessary to suggest that such binding allocations should become subject to a right of judicial review in the hands of individuals. The question of whether to provide a right of judicial review should also be made available in the other non-binding consensual jurisdiction allocations could be left to the discretion of the Member States and their national laws, as the case is at present with regard to such consensual arrangements.

Another relevant issue relates to the grounds of challenge that could be used in the suggested judicial review of (binding) jurisdiction allocations. Judicial review could be limited to adjudication on whether the principle of reasonableness / due process has been respected and on whether the Member State which will try the defendant has jurisdiction to prosecute the case in question. Accordingly, a jurisdiction allocation would only be set aside by the competent tribunal if the latter finds that it

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61 A similar approach has been taken in the Green Paper on a European Public Prosecutor in the specific area of crime affecting the EC's financial interests COM(2001)715 final.

is arbitrary, following doctrines inspired from the Member States national laws, such **as abuse of process** or **abuse of discretion** as a limit to the national authorities' discretion.

A further relevant issue that needs consideration relates to whether concerned victims should also be given standing to challenge jurisdiction allocations. *Prima facie*, due to the impact that this could have on the swiftness of the proceedings and the impact on defendants if allocation decisions are being continuously reversed, this does not appear to be the most preferred course of action. However, this possibility should not be excluded from the debate on the matter.

As regards the possibility of judicial review in the hands of individuals there are voices calling for a European preliminary chamber which would review the decision on determining jurisdiction from an EU level, possibly as part of the ECJ. In particular, there could be a judicial control by an EU tribunal. (Or by an independent EU body, subject to control by the ECJ) This option would have the advantage that the review would be carried out from a European perspective and that conflicting decisions by national tribunals could be avoided. Sometimes it is also said that it would be asking too much from national judges to resolve questions of several domestic laws. The latter argument, though, seems not so compelling, as national judges would only have to verify *whether* other Member States also have jurisdiction and whether the allocation was fair/ in line with principles of due process; they would not need to go into details of foreign procedural law.

Anyhow, the current Treaties do not contain a sufficient legal basis for the creation of an EU preliminary chamber or for a competence for the ECJ to review the legality of the decisions of national authorities which take place in individual proceedings in the area of criminal law. In criminal matters, Articles 35 and 46 TEU confer only a limited competence upon the Court. At least, Article 35 provides for preliminary rulings (paragraph 2 ff.) and for a ruling on disputes (paragraph 7) by the ECJ. However, the procedures envisaged in these Treaty articles do not concern acts relating to individual cases, but only questions on the validity and interpretation of an EU instrument. If a framework decision were to be adopted on conflicts of jurisdiction, the Court could rule on its general validity and interpretation but the ability to review individual allocations is lacking in concrete and would require changes to the primary EU Treaties. Moreover, the competence to issue preliminary rulings is subject to declarations by the Member States according to paragraph (2), and unfortunately not all Member States have issued such a declaration; secondly, although national courts can request a preliminary ruling, in some Member States they are not obliged to do so; thirdly, a dispute on the interpretation of a framework decision (paragraph 7) can only be initiated by Member States. In other words, neither the concerned individuals, nor the Commission nor any other EU body could ask for such a review.

Therefore, under the current EU Treaty legal framework only national courts are competent to perform judicial review of specific jurisdiction allocations. This brings us back to the suggestion for the long run concerning the possibility of making an EU body responsible for taking decisions on jurisdiction allocations in specific cases; Since there is currently no possibility for judicial review at EU level and no ability for national courts to review EU decisions it is more than clear that the creation of an EU body with a role of allocating the appropriate jurisdiction in individual cases is

impossible to attain. In other words there is no possibility to provide for judicial review of binding EU decisions. On the other hand it is not appropriate to provide for such decisions without the possibility for judicial review.

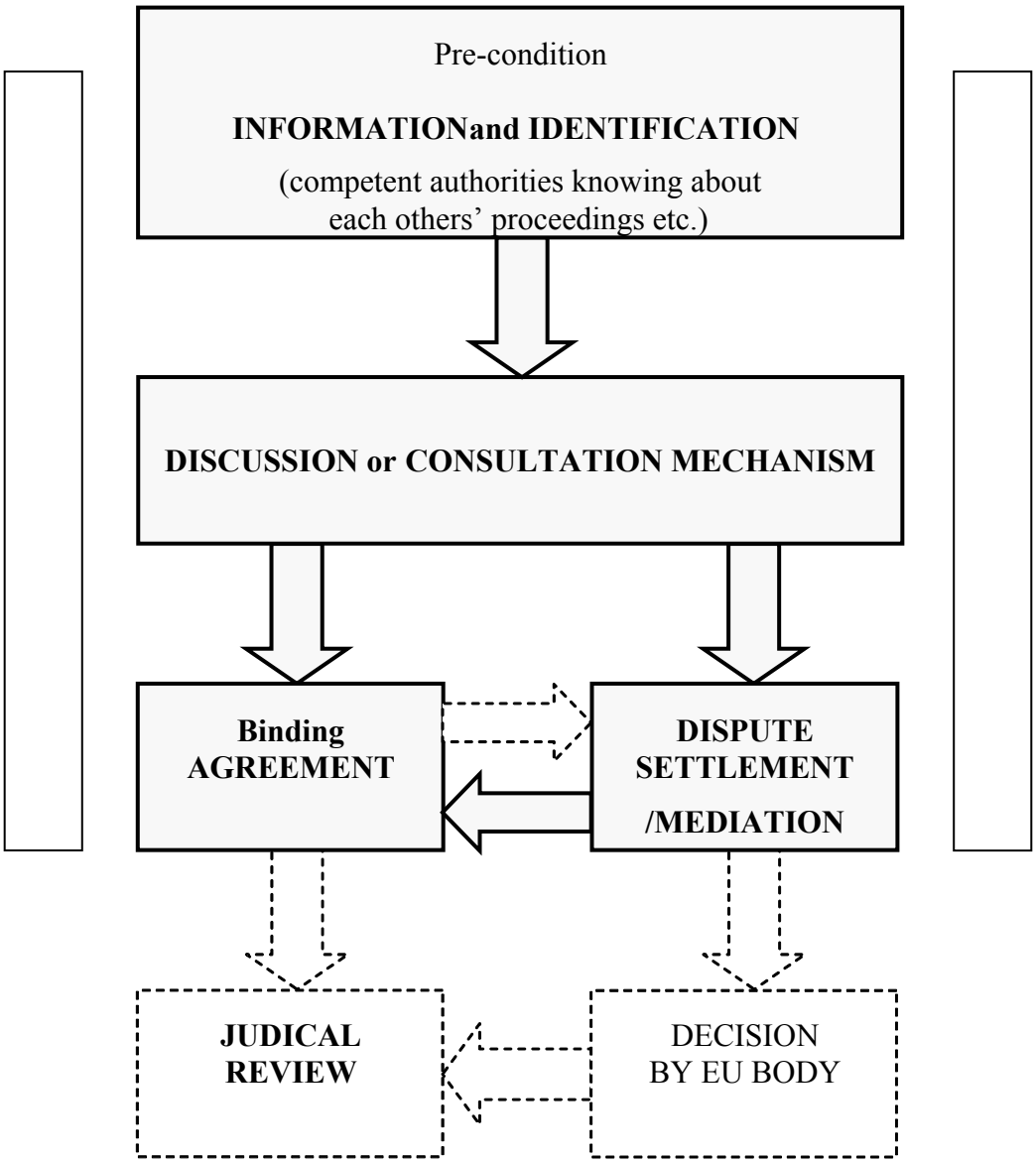
For the future, it is to be noted that The Treaty Establishing a Constitution for Europe, under Article III-359, provides that a preliminary chamber or a court of first instance specialised in criminal matters could be established by a European law, therefore a competency by a European court to review individual allocations should not excluded under a new Treaty framework.

Anyhow, one should not underestimate the importance of the time factor in criminal proceedings, which are often highly urgent, particularly where the defendant is in custody, therefore the possibility of a provision which would impose time limits on national courts for coming to a final decision in such a judicial review could also be considered by a future EU instrument. Rapid decisions would be required in this area, and specific arrangements regarding the procedure, structure and resources might be needed if the ECJ is to be put in charge of a review, particularly if it concerns individual cases.

Question 7: What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?

A flow chart outlining the possible elements of a procedure for determining jurisdiction and for guaranteeing a balanced solution in that respect is provided below. The bolded lines indicate the main features of the procedure and the dotted lines indicate the possibility of judicial review and other possible long term additions.

DETERMINING JURISDICTION



GUARANTEEING A BALANCED SOLUTION

7. CONCENTRATION OF PROCEEDINGS

The ultimate purpose of the procedure/mechanism outlined above should be to give priority to one Member State. This would result a concentration of criminal proceedings, based on the same case, in a *leading* Member State. This should be the state of affairs at least after a certain stage is reached in the national proceedings. Such a priority rule would be entrusted with a similar role to what is called *lis pendens* in the area of civil law. The fact that in criminal matters, determining jurisdiction usually amounts also to determining the applicable law makes such a rule even more important than in civil matters where courts often apply the law of other Member States.

It is reasonable to argue that if combined with the procedural arrangements outlined above and with a set of criteria for choosing the most appropriate jurisdiction, such a priority rule (which would demand the concentration of a prosecution in a single jurisdiction) would lead to balanced choices of jurisdiction (instead of a fortuitous "first come first served").

Despite the substantial differences between civil and criminal law, Article 27 of Regulation 44/2001 on civil and commercial matters may serve as a source of inspiration for a comparable rule or principle in criminal proceedings, despite the fact that both paragraphs of this Article are based on timely priority. In civil matters, at an intermediate phase, the jurisdiction of the "court first seized" is to be given priority, while others have to "stay" their proceedings (1); once the jurisdiction of the court first seized is established, any other court has to decline jurisdiction (2). This gives rise to several questions as to the transferability of this approach to criminal law.

A crucial question is whether the reference (exclusively) to "courts" would be appropriate in criminal matters too. While in civil and commercial matters there is usually no judicial pre-trial stage, in criminal matters the preliminary proceedings are highly important, although their nature and type varies considerably among the Member States' legal systems. Therefore, in criminal matters one could envisage a reference to "prosecuting authorities" (or even law enforcement authorities in general, where they have instituted some form of proceedings-e.g an investigation) instead of courts[62]. This would mean that a priority rule would apply already as from an early stage of a criminal procedure. From an individual rights perspective, e.g. regarding free movement, this could at first sight seem desirable. However, in the course of a criminal prosecution, new findings might change the picture of what at first hand might seem to be the most appropriate jurisdiction. Therefore, it may not be wise to force the competent authorities to precipitate a choice of jurisdiction at an early stage. Moreover, applying a priority rule at such an early stage could considerably shorten the time available for determining the most appropriate jurisdiction and could also have negative effects on the implementation of the mechanism envisaged in this Paper. Therefore, until the moment when the trial phase is reached in a case, parallel proceedings (such as investigations by the Police authorities) in two or more Member States could be encouraged, in order to assist the concerned Member States to get as much information as possible before coming to a decision as to which of them is better placed to prosecute the case in question.

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62 In such a case, the word "action" would have to be replaced by "prosecution" and/or "investigation".

Regardless of the significant input that parallel proceedings could provide on the discussions between the concerned Member States when deliberating to decide which of them is better placed, parallel proceedings should not be allowed to continue indefinitely. They would have to be limited in time, or more appropriately up to a certain stage of the proceedings. The most appropriate moment for the application of a priority rule, which would demand the concentration of criminal proceedings in one Member State, seems to be **the moment of the sending of an indictment or accusation before a court**; by that stage, on the one hand, prosecutors would possess the necessary information to conduct a thorough assessment of the question of the appropriate jurisdiction. On the other hand, the main legal, financial and psychological burdens for the concerned individuals normally result after the indictment. Therefore, the multiplication of burdens, which normally result from multiple proceedings in various States, can still be avoided even if a priority rule would only apply from the moment of the accusation and /or sending of an indictment before a court.

Another matter to be considered in this respect is whether timely priority is a proper concept in the area of criminal law. As explained above, the risk of an accidental or even arbitrary result when determining jurisdiction can be avoided by setting sound procedural and substantive rules (mutual information, consultation, decision making, legal review, and substantive criteria). In order to maintain a balanced approach, a priority rule, which would require the halting/suspension of parallel proceedings in favour of the jurisdiction which proceeds to the indictment stage, should not be left in a vacuum. In contrast to the situation in civil cases where the parties in a case (which raises issues of conflicts of jurisdiction) are usually the same, irrespective of the place (jurisdiction) where the case is brought before, in criminal cases the defendant could be the same but the prosecuting authority would differ. It thus appears necessary to provide that the priority rule should only apply as long as the mechanism is properly followed; especially as regards informing others and as regards entering into discussions.

Moreover, in order to avoid that a Member State, while in consultation with other foreign authorities, is able to reach the indictment stage so that to enjoy a priority rule and thus be free to complete its own national proceedings, such a rule could be combined with another rule which could provide that **an indictment may not be brought while a consultation and/or dispute settlement-mediation** procedure is still ongoing. In other words, the bringing of the indictment before the court would not be permitted during an open consultation and/or dispute settlement.

If the suggested rules are adopted, any communication of an intention to prosecute a case and the subsequent launch of the jurisdiction mechanism would bring into play, at least temporarily, a prohibition on indicting a defendant, irrespective of whether this communication of commencement /intention to commence is made by one which came second to another or is made by a State that had a temporal priority. In the event of a re-launching of the 3-step mechanism (because of new findings) similar rules would have to apply. However, where an indictment has already been brought before the court in line with the procedure set out above (e.g information obligation properly complied with), it could be provided that it would be up to the discretion of the competent national court whether to continue or stay the proceedings, despite any new findings (at a later stage of the court procedure) which would point to an interest of another Member State. This is crucial so that to avoid the repeated indicting of

defendants in various jurisdictions. When exercising this discretion the court should take into account any adverse consequences on the accused.

In any case, the coming into play of a priority rule (which would prohibit parallel proceedings on the same cases after the indictment stage has been reached in one Member State and provided the Member State which indicted the defendant complied with its duty to inform others) should not prevent other Member States from providing any possible form of assistance and support to each other by means of the existing EU and international arrangements in accordance with their national law. National authorities in Member States, other than the ones chosen by the mechanism to continue with prosecutions, should provide information and advice whenever they have indications of further findings on the same case. If need be, they should provide information spontaneously as foreseen by Article 7 of the Mutual Legal Assistance Convention. However, they should not be allowed to take measures against any evidence, proceeds, suspects or witnesses without the previous agreement of the authorities in which prosecutions are concentrated[63].

In the exceptional situation that the authorities of a Member State dealing with a case which has **already reached the indictment** stage are informed that another Member State has also launched proceedings, they would have to immediately inform the authorities of that other[64]. Prima facie, it appears that together with this obligation to inform it appears necessary to attach a duty to halt court proceedings immediately so that a determination of the appropriate jurisdiction can promptly take place. However, it is suggested that this latter duty to halt their proceedings should only apply if the authorities in the first jurisdiction have not complied with their initial duty to inform and consult others. If they have complied, it would be a matter of discretion of the court which firstly reached the indictment stage whether to halt its proceedings or not. In such a scenario, the first authority should be given priority, unless it decides to enter into discussions.

In contrast, in the scenario that **both Member States have reached the indictment stage** already (without knowing about the other's proceedings), then the rule as regards halting of the proceedings would apply in both States until the mechanism results an allocation. This latter rule could apply irrespective of whether one or both have breached their duty to inform. In any case, as regards these unfortunate scenarios (indictment in more than one Member State or indictment and parallel proceedings already launched in another) it could be provided that if the defendant has already been through court proceedings in one Member State that should be a relevant consideration in deciding where to concentrate the proceedings.

Another relevant question relates to what should be considered to cover the "same cause of action"–i.e. the same case – in criminal matters. Referring to what would be said below on *Ne bis in idem*, in the absence of opposing comments, the Commission would presume that the same concept of **"same facts"** should be applied both to the treatment of pending cases through the mechanism and as to the principle of *ne bis in*

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63 It could be discussed whether in exceptional situations of outmost urgency, certain measures (e.g. Freezing of Assets) could perhaps still be taken by other authorities during their proceedings being stayed or when a prosecution has been suspended.

64 With a functioning information mechanism as set out below (at 5.2), this should be a rare scenario.

idem. Applying a different rule on pending cases than on final decisions would lead to a lack of legal certainty and to frictions among both types of rules.

Question 8: Is there a need for a rule or principle which would demand the halting/termination of parallel proceedings within the EU? If yes, from what procedural stage should it apply?

8. THIRD COUNTRIES

In an international context the ambitions would have to be much more modest than within a common area of freedom, security and justice. Nonetheless, it could be useful to improve exchange of information and perhaps establish a consultation mechanism in relation to certain third countries, particularly those with comparable fundamental rights and data protection standards, such as the parties to the Council of Europe and the ECHR.

In this context, it should be mentioned that Eurojust is empowered to negotiate agreements with third countries, under the approval of the Council, which may include the exchange of judicial information on ongoing proceedings and convictions. It is thus feasible to improve exchange of information in general and, in the long term, to establish consultation mechanisms. The focus of an exchange with third countries might be put on final judgments (convictions and acquittals) with a view to strengthening the ne bis in idem principle. Beyond that, a closer cooperation seems possible towards certain States.

It is also noteworthy that the Council of Europe's European Committee on Crime Problems (CD-PC) has taken up suggestions for setting up a "European area of shared justice" based on enhanced mutual trust, which could include certain rules on determining jurisdiction[65]. Besides setting up a mechanism within its area of justice, the EU could perhaps also support and/or complement such activities in a wider context. In this regard, it should be examined whether such arrangements should be based on a mutual (and if need be multilateral) consultation process, possibly even including provisions for dispute settlement, or rather on the approach taken in the Transfer Convention. While the first seems preferable in the EU area of justice, an approach based on a request for a transfer of proceedings could be sufficient in an international context. Multilateral arrangements such as the agreement among the Nordic States of 25 September 1970[66] demonstrate that within this approach simplification of procedures is possible. This agreement allows for requests from one country to start proceedings in another country, under certain conditions.

Question 9: Is there a need for rules on consultation and/or transfer of proceedings in relation to third countries, particularly with parties to the Council of Europe? What approach should be taken in this respect?

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65 See the « New Start Report » quoted above at point 3.5, Council of Europe doc. PC-S-NS(2002)7.

66 See quotation above, footnote 50.

9. CRITERIA FOR DETERMINING JURISDICTION

Together with a procedural mechanism for determining jurisdiction and with a rule which would demand the concentration of parallel proceedings in a single jurisdiction, the laying down of substantive criteria for determining jurisdiction should be the third element of a complete strategy to prevent and resolve conflicts of jurisdiction. As stated above, the Commission is of the preliminary view that each case is unique. Therefore, the decision on which jurisdiction is best placed to prosecute a case which of interest to several Member States, must be based on the particularities and the specific facts of the case at hand. All the relevant factors would have to be considered in order to allocate a case. As every case is unique, no 'hard and fast' jurisdiction rules should apply. However, guiding principles and criteria could still be identified and possibly be mentioned in a future instrument.

There are already some legal texts both by the EU and the Council of Europe, which can serve as a basis for the discussion on a comprehensive approach for the EU common area of freedom, security and justice.

Article 8 of the Council of Europe Transfer Convention[67] lists the following criteria which determine exhaustively the cases where one Contracting State may request another to take proceedings:

– place of residence, nationality and "State of origin" of the suspect (letters a, b)

– place of detention of the suspect (if serving a sentence, letter c)

– ongoing proceedings against the suspect(s) (letter d)

– location of the most important items of evidence etc. (letter e)

– possibilities of enforcement and rehabilitation (letters f and h)

– And possibilities to ensure the presence of the suspect at hearings (letter g).

In EU law, there are currently certain provisions which lay down relevant criteria for choosing an appropriate jurisdiction. However, they only apply to specific types of crime. For example, regarding the participation in a criminal organisation, Article 4(2) of the relevant Joint Action[68] requires the Member States to take into account, in particular, the location of the organisation's different components. On terrorism offences, according to Article 9(2) of the Framework Decision combating terrorism,[69] "sequential account shall be taken of the place of commitment, the nationality or residence of the perpetrator, the "Member State of origin of the victims", and the place where the perpetrator was found.

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67 Council of Europe, European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972 Council ETS No. 073

68 OJ L 351 of 29/12/1998, p. 1

69 OJ L 164, 22.6.2002, p.3

A number of factors may influence the decision-making process when determining jurisdiction. In its Guidelines on where to prosecute, Eurojust proposes a non-exhaustive list of the following relevant factors:

– the location of the accused, and the possibilities for extradition and surrender

– the possibility of accumulation or division of prosecutions in complex cases

– the attendance and protection of witnesses

– the expected length of time of proceedings

– the interests of victims

– evidential problems

– legal requirements and sentencing powers

– the possibilities to seize, restrain and/or recover proceeds of crime

– the resources and costs of prosecuting.

Together with the criteria of the Transfer Convention[70], the Eurojust Guidelines can serve as a starting point for reflections on the possible relevant criteria which could be contained in an EU instrument. Such an instrument could perhaps also identify factors which should *not* be considered as relevant factors.

9.1. Territoriality

Based on the findings of its seminar, Eurojust starts from the preliminary presumption, "that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained". This can be understood as a more developed version of the criterion of territoriality (or place of commission), since it takes into account that the "loss" (or damage) forms part of the elements of many, if not most, offences. Territoriality is also mentioned as the first and thus most important factor within the Framework Decision on terrorism. An analogous provision is also found in the recently adopted Framework Decision on attacks against information systems. In addition to the latter instruments, one may conclude indirectly from other EU law provisions, that there is a consensus among EU Member States on the validity of the territoriality principle as an important criterion. In particular, this seems to follow from Articles 55(1)(a) CISA and 4(7) of the EAW Framework Decision. Moreover, the territoriality principle is an established principle of doctrine of public international law.[71]

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70 See Annex

71 In the *Yerodia* Case before the International Court of Justice, Democratic Republic of Congo v. Belgium, Judgment of 14.2.2002, Congo argued that Belgium violated the principle that a State may not exercise its authority on the territory of another State, which followed from the principle of sovereign equality among all UN Members, by prosecuting a Minister of the first. However, the Court did not pronounce itself on this question, as it finally was not considered decisive for the judgment. Moreover, as outlined below, several international Conventions provide for a criminal jurisdiction beyond territoriality.

Therefore, territoriality is not to be treated as a mere objective criterion but also as a criterion which is widely recognised[72]. Territoriality refers to the place of commission of an offence and, depending on the nature of the offence, where appropriate, it can also include the place where the harmful consequences or effects occurred. To that extent, determining jurisdiction based on territoriality would automatically include a certain link to the interests of the persons suffering loss or injury, i.e. victims and, in certain cases, concerned States.

In any case, it would be difficult, if not impossible, to develop a general definition of "place of commission". Where the constituent elements of an offence are not approximated by EU law, it is possible that the criterion of territoriality leads to different results, even more as different legal systems may take different approaches on such a definition. Even if an EU wide definition was created for "place of commission" (which perhaps would have to differ according to different relevant types of crime) an approach merely based on territoriality would not always point to one Member State. The place of commission may lie in more than one Member State, and the number of such cases may grow with increasing linkages among criminals operating beyond national borders, particularly in the areas of organised, financial and economic crime, environmental crime and crime committed through the use of the Internet.

Nevertheless, even in complex cases it is possible to identify a focal point of the relevant conduct of the accused so that often one Member State's territory can be identified as a "**centre of gravity**" and where this is the case, this can be a strong argument for prosecuting the case there. Thus, territoriality can be considered a useful criterion of major importance, although there is also a need for other criteria, at least as supplementary factors.

Question 10: Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?

9.2. Criteria related to the suspect or defendant

Both in the quoted instruments and in the Eurojust guidelines, various circumstances with regard to the suspect or defendant play an important role as well. In particular, their nationality and residence, or location, the place of arrest or detention, the fact that other proceedings against the same defendant are being carried out in a certain Member State and the prospects for their rehabilitation in case of a sentence to be enforced are factors which can be taken into account. From these factors, as well as from the principle of due process, it follows that one must take into account the circumstances related to the defendant. The burdens and restrictions on a defendant's freedom which (on aspects related e.g. to family, job, language, finances, and property) go along with criminal proceedings can be limited if the proceedings take place in an area where he has his main residence. This is particularly true for the trial itself.

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[72] That the territoriality principle is not mentioned in Article 8 of the Transfer Convention could be because the authors of the Convention seemed to assume that the State requesting a transfer of proceedings to another State would basically be the country where the offence occurred, see for instance the principles in Articles 7(1) and 11(h) of the Convention

With a view to proportionality and reasonableness, the main residence of the defendant, or the majority of the defendants where there is more than one, could therefore be seen as a suitable and important criterion. However, in some cases the interests of the defendant could conflict with the interests of other parties and concerned persons, in particular with the interests of victims, and in specific cases (e.g. offences against State security) with the interests of States or other persons (e.g. witnesses). It is also possible that sometimes the interests of the defendant could be overruled by considerations relating to the efficiency and other practical matters of a trial, i.e with regard to the location of the evidence. Therefore, the interests of the defendant can be seen as a rather one-sided criterion (less objective than the place of commission), which needs to be balanced with criteria which point to the interests of other parties and/or concerned persons.

It seems that usually the interests of the defendant would be best taken into account by convening the trial at the place where he has his **main residence**. The defendant's **nationality** may also be an important aspect, but perhaps less decisive, unless specific circumstances point to a closer relation of the person to the State of nationality rather than to the State of his main residence. Such circumstances and legal relations should be taken into account on request of the defendant or where they are known to the competent authorities. Moreover, the prospects of enforcement of a possible sentence could also be taken into account (with regard to rehabilitation), but in the pre-trial stage this factor is rather difficult to assess and its importance might be reduced more and more with the mutual recognition instruments in the EU area of justice. In any case, when surrendering its nationals or residents, a Member State can impose the condition that they be re-transferred for an execution of the sentence (Article 5(3) EAW).

As regards the **place of arrest** of defendants, it is doubtful whether this should ever be considered as a suitable and/or objective criterion. It is possible that a solution merely based on this factor would produce fortuitous results, or could even be abused with a sort of "forum shopping". It could be argued that when Article 9(2) of the Framework Decision combating terrorism (Eurojust guidelines also included this factor as a lower priority) the further progress of mutual recognition, in particular the implementation of the EAW, was not yet sufficiently predictable, and therefore this criterion seemed to be necessary at the time (not so much in the interest of the defendant, but rather for efficiency and rapidity). With a sound implementation of the EAW (of which the Framework Decision has now been transposed in all Member States) and of further mutual recognition instruments, the perspective can change and this factor may become dispensable.

9.3. Victims' interests

Victims have natural and legitimate interests in participating in a trial. The EU has recognised these relevant interests in various legal provisions.[73] Some domestic law provisions provide for a concurrence between criminal proceedings and related civil and/or administrative actions for compensation. Whether this is the case or not, the place of the trial is nearly always important for the victims. The legal, financial,

[73] In particular, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001, p. 1.

linguistic and psychological burdens which a trial imposes on victims could be reduced considerably if it could be carried out in the same Member State as a related civil and/or administrative action, particularly if this would also be their Member State of origin or where they have their main residence.

Despite their legitimacy, (as it is the case with the interests of defendants) the victims' interests are by nature also rather "one-sided" and need to be reconciled and balanced with the sometimes conflicting interests of the former. While they also do not seem to be a suitable "first rank" criterion, they could still be given a certain "second or third rank" priority. Within this criterion, in concrete terms, it seems that the **main residence** should be regarded as the dominating factor, while other aspects such as **nationality** should also be considered.

In this context, the Eurojust guidelines also mention the possibilities to seize, restrain and/or recover proceeds of crime. Again, this is an aspect related both to victims' interests and to the efficiency of the proceedings. In this respect, this is a factor to be considered. However, in the present context, its importance is diminished through other EU instruments, in particular the Framework Decision on freezing orders and the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime[74] or the draft Framework Decision on the application of the principle of mutual recognition to confiscation orders.[75] Moreover, since the purpose of the main trial is to decide guilt or innocence and to determine, if need be, an appropriate sentence, the possibilities to seize, restrain and/or recover proceeds of crime could rather be considered a secondary consideration.

9.4. Criteria related to State interests

Besides the general interest which Member States have in criminal proceedings in general with a view to their law enforcement role, sometimes they can have particular interests in certain types of cases. In particular, this is true for offences related to State **security** and to, a lesser extent, for offences committed by holders of an **office**. Article 55(1)(b) and (c) CISA point to these factors and demonstrate that Member States recognise State interests to prosecute such cases (even to the point where there is already a final decision which enfolds a *ne bis in idem* effect in another Member State). With regard to acts committed by officials, Article 7(2) of the Transfer Convention can also be mentioned here[76]. The situation with regard to such specific State interests is comparable to the one of victims' interests; as with the latter, these should also be taken into account as legitimate criteria.

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74 Framework Decision on the execution in the EU of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45. Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182, 5.7.2001, p.1.

75 The Council has achieved political agreement on this draft Framework Decision subject to parliamentary reservations. On the draft, see Council doc. no. 10027/04.

76 It needs to be noted that no Member State has issued a declaration for derogating from the application of ne bis in idem as regards Article 55 1(c) of CISA, relating acts of officials. For more on this, see below at part 11.5 (e) .

9.5. Criteria related to the efficiency and rapidity of the proceedings

Rightly, the Eurojust guidelines state that "justice delayed is justice denied" and to the necessity of completing criminal proceedings as soon as possible, in the interest of all concerned parties. Article 6(1) of the ECHR is also relevant to this consideration. Therefore, it is undisputed that the expected length of the proceedings is a legitimate factor, which can and should be taken into account when determining jurisdiction. However, it should not be based on subjective predictions, but rather on concrete, specific factors which can determine the speed and efficiency of proceedings. Moreover, as Eurojust adds, "time should not be the leading factor in deciding which jurisdiction should prosecute…"

Both the Transfer Convention and the Eurojust guidelines seem to give particular attention to aspects relating to efficiency of the proceedings. In particular, the former point to other proceedings against the suspect(s), to the location of the most important items of evidence, and possibilities to ensure the presence of the suspect at hearings, while the latter list the possibilities for extradition and surrender and for an accumulation or division of prosecutions in complex cases, the attendance and protection of witnesses, evidential problems and the resources and costs of prosecuting. As already stated above, some of these considerations (e.g. the possibilities for surrender and extradition, the protection of witnesses, and the costs of prosecution) might become less important or even obsolete with improved judicial cooperation among the Member States based on the principle of mutual recognition. In the light of the Commission's proposal for a European Evidence Warrant[77], this could also be true for the location of evidence obtainable by the EEW, but this currently excludes requests to interview or requests to take of statements from witnesses. The whereabouts of witnesses therefore will probably remain highly relevant and might be considered not only a legitimate criterion but even afforded a certain priority, at least pending the extension of the mutual recognition principle to the interviewing or taking of statements from witnesses.

Question 11: Apart from territoriality, what other criteria should be mentioned on such a list? Should such a list be exhaustive?

9.6. Factors which should not be considered relevant

In the guidelines for deciding where to prosecute, Eurojust says that prosecutors must not only look at jurisdiction, but also on a "realistic prospect of successfully securing a conviction". This statement is perfectly understandable from the viewpoint both of the investigating and prosecuting authorities and of the victims. However, as stated in those guidelines, the solution must be fair and objective. In other words, a balanced choice needs to be made, which would also take into account the interests of the suspected persons/defendants. It should not be the case that Prosecutors will decide for a certain jurisdiction "simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another".

Therefore, one might question whether a choice of jurisdiction based on the prospect of conviction could be considered as balanced if regard is given to the principles of

[77] COM(2003)688 final.

due process. Certainly a specific criminal conduct can not anymore be prosecuted in a State where a time limit has run out or an amnesty has been granted.[78] It is also true that, possibly except in the case of an amnesty, if a person's conduct is subject to criminal responsibility and punishment in at least one Member State which has jurisdiction, he or she could expect that he would be prosecuted there, even if elsewhere this would not be the case. The fundamental principle of nullum crimen / nulla poena sine lege (Article 7 ECHR, Article 49 Charter, and Article II-109 of the Treaty Establishing a Constitution for Europe) would not in the latter scenario prohibit a prosecution. However, it is highly doubtful whether a decision to prosecute based merely on choosing the strictest regime could be considered fair and balanced. The same argument should apply to a decision to choose a jurisdiction which is based on the type of criminal procedure e.g. prosecution or offer of settlement. Similar reflections apply to the question of whether the prospect of a higher or lower penalty could be a relevant criterion. While a prosecutor might come to the conclusion that the proceedings should take place in the jurisdiction with the highest minimum penalty or range of penalty, a defence lawyer would tend to argue the contrary, that one should choose the jurisdiction with the lowest penalty. Neither argument would seem balanced and objective. Therefore, it is fair to argue that the prospect and likelihood of a higher or lower penalty should not be decisive either. It is also possible that an EU instrument could expressly provide that such factors should be considered as irrelevant.

Question 12: Do you consider that a list should also include factors which should not be considered relevant in choosing the appropriate jurisdiction? If yes, what factors?

10. PRIORITISATION, DISCRETION AND JUDICIAL REVIEW

Logically, once the relevant criteria have been identified, a next task could be to examine their prioritisation. This becomes particularly relevant to situations where a number of factors point to different jurisdictions. Some of these factors are based on State interests, some on the interests of the suspect or defendant or on interests of other persons, particularly victims. These factors can sometimes point to the same jurisdiction, while in other cases they may point to different jurisdictions or even be in conflict. When these factors would be dispersed among different countries, it would certainly be difficult to determine the most appropriate jurisdiction. Although, prioritisation could prove useful for such situations and some could characterise such a method of choosing jurisdiction as being more structures, at the same time it should also be ensured that the suggested mechanism should function with the necessary flexibility. In this respect, it is useful to refer to the Guidelines which were produced by Eurojust. As rightly said in those Guidelines, the competent authorities should balance carefully and fairly all the factors, by taking into account all interests at stake. The priority and weighting which should be given to each factor will be different in each case. At the same time, those Guidelines also explore the possibility of applying a **"matrix"** for the case-related prioritising and weighting. Such a matrix

[78] Therefore, an EAW would not have to be executed there, see Articles 4(4) and 3(1), respectively, of the Framework Decision on the EAW.

would allow a direct comparison and weighting of the relevant factors which will apply in the different jurisdictions which could prosecute the same case.

Anyhow, it can validly be stated that it would be quite impracticable to impose a strict legal priority for the relevant factors, through the laying down of a hierarchical relationship between them which would be applied in every case. A considerable scope for **discretion** must be left to the prosecuting authorities to choose the most appropriate jurisdiction on a case-by-case basis. They should be allowed to react with the necessary flexibility and rapidity to urgencies and new facts relating to their cases. The issue of jurisdiction forms part of a set of deliberations, which in turn form part of an investigation and prosecution strategy which sometimes also includes the question of whether related cases are to be investigated and prosecuted together or separately. Therefore, there must be a certain *marge de manoeuvre* for considerations of expediency, as long as due process is guaranteed.

Despite the need for flexibility, it is still possible for the EU legislator to provide for some basic principles on the prioritisation or sequencing among a list of applicable criteria, within the overall balancing of all the factors relevant to a specific case, if this proves necessary. In this regard, one might follow the approach of Article 9(2) of the Framework Decision combating terrorism,[79] where territoriality is the first factor to be taken into account. The above analysis on the various factors which can be used on choosing jurisdiction, demonstrates that **territoriality** is a widely recognised and objective factor, which often overlaps with or even implies interests of defendants, victims and concerned States. It is also a factor which allows for flexibility as the place of commission is to be determined according to the relevant offences. Therefore, it seems justified to put territoriality in the first place of a scrutiny sequence, and one may even consider a rule which would oblige the competent authorities to base their decisions mainly on territoriality,[80] except where this criterion does not lead to a clear result.

The model of that Framework Decision on Terrorism could also be followed as to a second and third priority, i.e. to the interests of the defendant and the victims. However, these criteria could be reformulated more precisely, perhaps by putting the emphasis on the main residence rather than on nationality or "origin". After these criteria, one might want to connect other priorities such as State interests, the location of the main evidence and/or the protection of witnesses. On the other hand, in the light of the progress in mutual recognition and particularly the facilitation and acceleration of surrender through the EAW, one should consider removing the factor of "the territory where the perpetrator was found". Finally, one could add "**irrelevant" criteria** or priorities, among which differences in national law could appear, as for instance the range of penalties, time limits and/or procedural provisions.

Irrespective of whether the criteria for choosing jurisdiction would be prioritised, it appears to be necessary that at least a guiding principle for the choice of jurisdiction should be laid down in an EU instrument. This guiding principle could refer to

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79 OJ L 164, 22.6.2002, p. 3. Same provisions are found in the recently adopted Framework Decision on attacks against information systems, OJ L69, 16.3.05, p.67

80 As in the Eurojust guidelines ("majority").

reasonableness and/or **due process**. In other words, it should be the duty of the competent authorities to strive for a balanced result. If prosecuting authorities are given a considerable scope of discretion, they must be obliged to fully take into account the legitimate interests of all concerned parties. The yardstick should be a reasonable, proper and fair administration of justice, based on a comprehensive consideration of the relevant facts and their balanced weighting and, if necessary, according to the priorities that would be identified by the EU legislator.

The proper application of such a principle would have to be guaranteed by legal remedies leading to a possibility, in appropriate situations, for judicial review in the hands of the individuals concerned. As stated above, judicial review could be limited to the respect for the principle of due process, reasonableness and the actual establishment of jurisdiction by the Member State chosen to try the case in question. An allocation decision/agreement could thus be overridden by the competent tribunal if the latter finds that it is arbitrary, following doctrines in national law such as abuse of process or abuse of discretion.

If a detailed judicial comparison of two or more jurisdictions would be allowed for allocations in individual cases, which would go beyond the test of due process and reasonableness, there is a real risk that the proposed system could become too inflexible by developing (strict) case-law rules on exact jurisdiction criteria for specific types of cases which would be ranked in strict hierarchy. This would have the inevitable result that these court-made jurisdiction criteria for jurisdiction would lead to hard and fast rules which would "artificially" and "automatically" lead to one Member State being identified as the most appropriate jurisdiction. Inevitably, this would unjustifiably fetter the discretion and flexibility of the concerned national (prosecuting) authorities to adapt their choices of jurisdiction to the facts of a specific case. Moreover, detailed comparisons between various competent jurisdictions could lead to repeated challenges of a jurisdiction allocation in the same case before various national courts. This would naturally lead to undue delays in the completion of cross-border prosecutions. As said, the aim should rather be to develop and retain a swift and effective system which would determine jurisdiction on a case-by-case basis, which would at the same time develop general or specific principles for prioritising, together with checks and balances to ensure that jurisdiction allocations are made in a fair manner.

Question 13: Is it necessary, feasible and appropriate to "prioritise" criteria for determining jurisdiction? If yes, do you agree that territoriality should be given a priority?

PART III: CLARIFYING THE EXISTING LEGAL FRAMEWORK ON *NE BIS IN IDEM*

11. ANALYSIS OF THE EXISTING RULES ON *NE BIS IN IDEM*

11.1. International instruments and the EU Charter of Fundamental rights

a) European Convention on Human Rights (ECHR) and other international rules

Ne bis in idem is a fundamental legal principle which is enshrined in most legal systems,[81] according to which a person cannot be prosecuted more than once for the same act (or facts). It is also found in regional and international instruments, particularly in Article 4 of the 7th Protocol to the ECHR of 22 November 1984[82] and in Article 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966. However, under these international provisions the principle only applies on the national level, i.e. prohibits a new prosecution under the jurisdiction of a single State.[83] These instruments make the principle binding in the State where a final judgment has been passed, but do not prevent other States from launching further proceedings for the same facts/offence.

The position is different as regards Articles 53 to 57 of the European Convention on the International Validity of Criminal Judgments of 28 May 1970 and Articles 35 to 37 of the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972, both of which were elaborated by the Council of Europe. With nearly identical texts, these Conventions introduce an international *ne bis in idem* principle ("…in another Contracting State"), although providing for numerous exceptions. However, these Conventions have not been ratified by the majority of the EU Member States.[84]

b) Article 50 of the EU Charter

Article 50 of the Charter (Article II-110 of the Treaty Establishing a Constitution for Europe) clearly aims at a *ne bis in idem* principle between the Member States. Although the Charter can potentially play an important role for the interpretation of EU law, it is currently not legally binding. It should further be noted that the Charter only applies to the Member States when they are implementing Union law.

Of relevance is also Article 52 of the Charter which reads:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.

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81 Its historical roots go back to ancient Roman times.

82 European Treaty Series (ETS) 117 (as amended by the 11th Protocol; ETS 005 is the ECHR), not ratified by all EU Member States.

83 From the text of the 1966 International Covenant this is not obvious, but it follows from an *aide memoire* (UN doc. A/4299 of 3.12.1959, p. 17). See also UN Human Rights Committee, 2.11.1987, *A.P. v. Italy*.

84 See ratification charts on ETS 070 and 073 at http://conventions.coe.int (January 2005, 9 respectively 11 EU Member States had ratified these Conventions).

Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

11.2. The trans-national *Ne bis in idem* EU principe.

a) The Convention Implementing the Schengen Agreement ("CISA")

Chapter 3 of the Convention Implementing the Schengen Agreement ("CISA") (Articles 54 to 58) deals with the application of an EU wide *ne bis in idem* principle. In contrast to the other international instruments mentioned above, which only provide for the applicability of the *ne bis in idem* at national level, (application of the rule in the legal order of a State for convictions/acquittals delivered in the legal order of that State), the CISA applies the principle of *ne bis in idem* between EU Member States on a trans-national level. In other words, the CISA incorporates to the national legal order of the Member States a *ne bis in idem* principle which can result from convictions and acquittals, (or for other "final decisions" in general) which have been handed down in other EU Member States. The text of CISA was taken from a Convention between the Member States of the European Communities on Double Jeopardy signed in Brussels on 25 May 1987[85] which is not in force in default of ratification, although some Member States apply it provisionally.

aa) Scope of application of CISA

The CISA rules on *ne bis in idem* are now binding and applicable throughout the EU, including in the new Member States,[86] and in Norway and Iceland. (Through their Schengen association agreement with the EU). Neither Ireland nor the UK signed the complete CISA, but they have requested to take part in Articles 54 to 58 CISA. Their request has been accepted by the Council in two separate Decisions.[87] So far, however, it is only for the UK that the relevant provisions of CISA have been put into effect.[88]

On the scope of application *ratione materiae*,[89] one may raise the question of whether Article 54 only covers criminal law proceedings, or whether and to what extent it is to be interpreted as also referring to proceedings regarding administrative offences.

In this vein, one may also distinguish between decisions taken by judicial authorities or other ("non-judicial") authorities. Before considering the distinction between judicial/non-judicial authorities, it has to be noted that the notion of 'judicial authority' is well known in the European legal order, particularly in the context of

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85 For the text and ratification state of play see http://ue.eu.int/ueDocs/cms_Data/docs/polju/EN/EJN231.pdf .

86 See Article 3 of the Accession Act, OJ L 236 of 23.9.2003, p. 33, and Annex I thereto (no. 2), p. 50.

87 Council Decisions of 29.5.2000, OJ L 131, 1.6.2000, p. 43, and of 28.2.2002, OJ L 64, 7.3.2002, p. 20, as regards the UK and Ireland respectively.

88 Council Decision of 22.12.2004, OJ L 395, 31.12.2004, p. 70.

89 On the scope of application *ratione tempore* see the pending ECJ Case C-436/04 (see also Case 493/03 *Hiebeler* , which however has been withdrawn).

mutual assistance and extradition. Under the relevant Conventions, both tribunals and prosecutors can be considered as 'judicial authorities'.[90]

In seeking an answer for these questions, one could refer to Article 49 of CISA which states that mutual assistance shall also be afforded "in proceedings brought by administrative authorities in respect of … infringements of the rule of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters".[91] However, this provision should not in any case be conclusive as Article 49 is not applicable to Articles 54 to 58 as they form a separate chapter from that on mutual assistance (Articles 48 to 53). On the contrary, it may be concluded from the specific words which are used in Articles 54 to 58 (e.g. from Article 58, but also from words like "trial", "prosecution", and "sentencing" elsewhere), that they only refer to decisions taken by judicial authorities taken within criminal proceedings.

bb) Issues of interpretation

According to the mutual recognition programme of December 2000,[92] the legal certainty concerning the *ne bis in idem* principle should be strengthened. Measure 1 of the programme provides for a reconsideration of Articles 54 to 57 CISA "with a view to full application of the principle of mutual recognition", since the CISA had only "partly realised" the aim of precluding further proceedings for acts that have already been judged; particular attention should be given to types of decisions other than convictions, such as acquittals and decisions following mediation.

With regard to the latter, some clarification has been provided by the case law of the European Court of Justice (ECJ), through its judgment of 11 February 2003[93] in the joined cases of *Gözutok and Brugge* and by its judgment in the *Miraglia* case of 10 March 2005[94], which will be discussed below. Moreover, it is now widely recognised that Article 54 CISA covers both convictions and acquittals. However, several questions of interpretation still remain unanswered.

cc) Limitations and exceptions

Articles 54 to 58 CISA provide for considerable limitations to and exceptions from the *ne bis in idem* principle. First, in case of a conviction the principle only applies if the imposed penalty "has been enforced, is actually in the process of being enforced

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90 See Article 6 of the EU Convention on Mutual Assistance in Criminal Matters of 29.5.2000, OJ C 197, 12.7.2000, p. 1; Article 53 CISA. Furthermore, see the explanatory reports to the Conventions on mutual legal assistance and extradition, to which those EU Conventions refer (Council of Europe Conventions on of 13.12.1957, ETS no. 24, and of 20.4.1959, ETS no. 30). ..

91 See also Article 3(1) of the Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the EU, OJ C 379, 29.12.2000, p. 7 (hereafter: MLAC). The inclusion of 'in particular' at the end of the paragraph makes it clear that the court before which the proceedings may be heard does not have to be one that deals exclusively with criminal cases (see explanatory report to the MLAC, OJ C 379, 29.12.2000, p. 7).

92 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10, point 1.1.

93 Joined cases *Gözütok,* C-187/01, and *Brügge*, C-385/01, [2003] ECR I-1345, particularly para 27 ff.

94 Case C-469/03 *Miraglia*, judgment of 10 March 2005, not yet published in the ECR.

or can no longer be enforced under the laws of the sentencing Contracting Party".[95] The purpose of this "enforcement condition" is the avoidance of impunity in cases where a conviction is not enforced. While this has been a legitimate concern under the traditional system of mutual assistance, one may question whether and to what extent such a condition is still necessary in an EU common area of freedom, security and justice where cross-border enforcement is facilitated by various mutual recognition instruments that have already been adopted.[96] Secondly, Article 55 CISA leaves considerable scope for reservations by Member States. It allows the Member States, by declaration at the time of ratification of the CISA, to establish exceptions from the applicability of *ne bis in idem* in three situations:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; and provided that the offence did not take place, at least in part, on the territory of the Contracting party where the judgment was delivered.

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party.

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

In substance, Article 55(1) recognises for these 3 situations, an overriding interest of the concerned Member State to prosecute despite the handing down of a final decision in another Member State. Of the EU Member States, AT, DE, DK, EL, FI, SE and UK have issued declarations concerning the reservation possibilities in letters a and b.[97] The mutual recognition programme[98] calls for a reconsideration of those exceptions, particularly the one on territoriality (exception 'a'). In this respect, it is important to note that no Member State has made use of the third possibility for reservations (the acts committed by officials of that Contracting Party in violation of the duties of their office).

Both with regard to the enforcement condition and the permitted reservations in Article 55 of CISA, there seems to be a lack of coherence with Article 50 of the Charter. Unlike the CISA, the latter provision contains neither an enforcement condition nor exceptions. However, Article 52 of the Charter allows limitations on *ne bis in idem* where this is necessary and proportionate. The fact that, if a second prosecution is permitted, any period of deprivation of liberty arising from the same facts is to be deducted from a "second" penalty (Article 56 CISA) cannot alleviate

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95 See also the European Conventions on the International Validity of Judgments of 28.5.1970 (ETS 070), Article 53, and on the Transfer of Proceedings in Criminal Matters of 15.5.1972 (ETS 073), Article 35.

96 Framework Decision on the European Arrest Warrant (EAW), OJ L 190, 18.7.2002, p. 1, Framework Decision on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005, p. 16 and Framework Decision on the execution in the EU of orders freezing property or evidence, OJ L 196, 2.8.2003. See also the draft Framework Decision on confiscation orders OJ L 76, 22.3.2005, p. 16, seeArticle 7(2)(a); [on confiscation orders, the Council has achieved political agreement subject to several national parliamentary reservations, see Council doc. 10027/04, Article 7(2)(a)

97 All these Member States have made use of letter a, four of them (AT, DK, EL, FI) also of letter b.

98 OJ C 12, 15.1.2001, p. 10, point 1.1, measure 1.

the requirements of the necessity and proportionality tests of Article 50. It should further be pointed out that within the CISA legal framework this rule does not apply to acquittals and penalties other than imprisonment, which are only to be taken into account "to the extent permitted by national law".

b) Other EU provisions referring to ne bis in idem

Some other EU law instruments also contain provisions which refer to *Ne bis in idem*; For example, Article 4 of the Convention on the protection of the European Communities' financial interests of 26 July 1995,[99] Article 7 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union,[100] and Articles 3(2), 4(3) and 4(5) of the Framework Decision on the European Arrest Warrant (hereafter: EAW) can be mentioned here.[101] Generally, the wording of these provisions is in line with Articles 54 to 58 CISA.

11.3. The case-law of the ECJ on *ne bis in idem*

In its path breaking judgment of 11 February 2003 (*Gözütok/Brügge*, Joined Cases C-187/01 and C-385/01)[102], the ECJ developed important guidelines for the interpretation of the CISA, which shall be the guiding principles to any further steps by the EU legislator as regards the EU wide principle of *ne bis in idem*.

The question before the ECJ was whether a specific type of national decision by a prosecutor, which barred a further prosecution according to the law of that Member State where it was given, could have *ne bis in idem* effect in another Member State despite the fact that it did not have to be approved by a court of the Member State where it was given. In particular, in the case before the ECJ, a public prosecutor discontinued criminal proceedings once the accused had fulfilled certain obligations, in particular has paid a certain sum of money determined by the Public Prosecutor. It has to be noted that the national law of the Member State which provided for this type of decisions expressly stated that such a procedure would bar a further prosecution if the accused performed the obligations imposed by the prosecutor.

The main issue at stake was whether such a procedure, which finally terminated the proceedings in a Member State (and which did not involve an approval by a court in the State where it was given) could have a *ne bis in idem* effect in another Member State where such a procedure did actually require the approval of a court. The findings of the ECJ in that case can be summarised in three points:

Firstly, Articles 54 to 58 CISA are to be interpreted in the light of "the objective of maintaining and developing the Union as an area of freedom, security and justice in which free movement of persons is assured"; "the integration of the Schengen acquis (…) into the framework of the EU is aimed at enhancing European integration and, in particular, at enabling the Union to become more rapidly the area of freedom,

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99 OJ C 316, 27.11.1995, p. 48, ratified by all Member States and in force since October 2002.

100 OJ C 195, 25.6.1997, p. 1, ratified by 20 Member States (January 2005), but not yet in force.

101 OJ L 190 , 18.07.2002, p.1

102 Joined cases *Gözütok,* C-187/01, and *Brügge*, C-385/01, [2003] ECR I-1345

security and justice which is its objective to maintain and develop".[103] Free movement is recognised as an important aspect of the *ne bis in idem* principle, which points to the possibility of interpreting CISA in a coherent way.

Secondly, Articles 54 to 58 CISA are based on the assumption;

"…that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[104]

Thirdly, differences in the legal systems of the Member States as regards the concept of final judgment do not justify measures that run contrary to the principle of mutual recognition. As the ECJ stated in paragraph 32, it is not stated anywhere in the TEU or in the Schengen Agreement that the application of Article 54 is conditional upon harmonisation or approximation of the criminal laws of the Member States relating to procedures where further prosecution is barred.

It has to be noted that the ECJ took account of the fact that the effects of the procedure in prohibiting a further prosecution were dependent on the performance of certain obligations by the accused, and concluded that this penalised the unlawful conduct in question. The ECJ also stated that once the accused complied with his obligations this should be regarded as a penalty which has been enforced for the purposes of Article 54.

However, the judgment of the ECJ did not state that every national decision (by a prosecutor or otherwise) which bars a further prosecution should have a *ne bis in idem* effect. The ECJ only pronounced on the *ne bis in idem* effect of the national procedure which involved a public prosecutor and which was alone in issue at the case before it. Neither did it state that a procedure which did not provide for a penalty but nevertheless barred a further prosecution could never have *ne bis in idem* effect.

In a second judgment on *ne bis in idem*, which was delivered on 10 March 2005 in the case of *Miraglia* (Case C-469/03), the ECJ has provided further clarification on the types of final decisions which would trigger a *ne bis in idem* effect. After *Miraglia*, it is clear that *ne bis in idem* is *not* to be applied in *all* situations that a further prosecution is barred according to the law of the Member State which hands down the first decision.

In *Miraglia*, the question before the ECJ related to the consequences of a decision in one Member State which discontinued national proceedings by declaring a case to be closed, without adjudicating as to the merits of the case. The sole ground for closing the case was that proceedings had earlier been initiated in another Member State. Interestingly, the law of the Member State in which it was given barred a further prosecution on that case.

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103 Idem, para 36 and 37.

104 Idem, para 33.

In its decision the ECJ found that such a decision "cannot constitute a decision finally disposing of the case against that person" within the meaning of that provision,[105] and added:

"The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that that article has proper effect."[106]

The Court noted that conferring a *ne bis in idem* effect to such a decision to close proceedings would make it more difficult or even impossible to actually penalise the unlawful conduct for which the accused was charged. Therefore, as a result of *Miraglia* it could be argued that not every decision which bars a further prosecution according to the law of the Member State in which it is given should produce a *ne bis in idem* effect in other Member States. As the ECJ concluded, although in that case a prosecution was barred in the Netherlands that did not produce an EU wide *ne bis in idem* effect as the sole ground for closing the case in the Netherlands was that proceedings had been initiated in another Member State. Furthermore, in its conclusion the ECJ took account of the fact that no assessment whatsoever of the unlawful conduct had taken place when the decision was taken. As the ECJ emphasized in paragraph 34 of its judgment, such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the TEU, (as set out in the fourth indent of the first subparagraph of Article 2 of the TEU) which is to maintain and develop the Union as an Area of Freedom, Security and Justice, in which free movement of persons is assured in conjunction with appropriate measures with respect to the prevention and the combating of crime.

It is to be noted, that further preliminary rulings are to be expected in Case C-436/04 *Van Esbroeck* (Case C-436/04), *Gasparini* Case (C-467/04), *Van Straaten* (Case C – 150/05), *Bouwens* (C-272/05) and *Kretzinger* (C-288/05). In the case of *Van Esbroeck*, questions are raised on the scope of Article 54 CISA *ratione tempore* (whether a final judgement rendered before the entry into force of CISA has *ne bis in idem* effect) and on the notion and interpretation of the *idem* ("same acts").[107] In *Gasparini*, the questions submitted to the ECJ include the issue of whether an acquittal based on the ground that the offence in question is time-barred precludes proceedings against the same defendant, whether such a decision also has a *ne bis in idem* effect with respect to proceedings against other persons based on otherwise the same facts and once again on the question of *idem*. The latter, is also the main issue at stake in the *Van Straaten*, *Bowens*[108]and *Kretzinger* cases. The latter case also raises questions regarding the enforcement condition of Article 54 of the CISA.

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105 Idem, para 30.

106 Idem, para 31.

107 I.E. whether export of narcotic drugs from one Member State and import (of the same drugs) into another Member State are to be considered the "same act" under Article 54 CISA.

108 *Bowens* case C-272-05 has been frozen by the Court pending the outcome of the *Van Esbroeck* case

11.4. Previous attempts for a revision

Based on the 2000 mutual recognition programme, in February 2003 the Hellenic Republic presented a Member State initiative with a view to adopting a Council Framework Decision concerning the application of the *ne bis in idem* principle.[109] However, despite intensive discussions and a legislative resolution by the European Parliament of 2 September 2003,[110] no final agreement could be achieved in the Council. On 19 July 2004, the Council stressed that work should continue, "in particular in the light of the publication of the Commission's Communication on Conflicts of Jurisdiction in order to ensure that proven added value could be achieved".[111] The reasons why this discussion has not produced tangible results are manifold. It seems that one of the main reasons was that the initiative did not deal exhaustively with the question of how to find and identify the most appropriate place to prosecute, i.e. the procedure and criteria for determining jurisdiction.

11.5. Possible revision of the existing legal framework on the EU wide *ne bis in idem*

a) General approach

The above brief analysis on the application, interpretation and the limitations to the *ne bis in idem* principle in CISA, demonstrate a need for further clarification of the existing legal framework on *Ne bis in idem*. This can be done either by revising Articles 54 to 58 CISA or by replacing them by a new EU instrument.

However, in order to achieve added value, such a possible measure has to take into account the following context: the *ne bis in idem* principle in itself cannot provide adequate response to conflicts of jurisdiction: to avoid that it only bestows an exclusive effect to the "fastest" prosecution, there needs to be a mechanism for determining the appropriate jurisdiction *during* proceedings. The setting up of such a mechanism would enable Member States to find an agreement on clarifying the applicability of the *ne bis in idem* principle, while without such a mechanism such an agreement seems unlikely, as it would even extend the priority of the fastest prosecution. For example, it only seems acceptable for Member States to waive the territoriality exception in Article 55(1)(a) CISA if they can be sure that a case is being dealt with in a well placed jurisdiction, i.e. that the choice of jurisdiction is based on widely accepted criteria and through a procedure which guarantees that the interests of the concerned Member States would be duly taken into account. This can also be said with regard to the enforcement condition.

Furthermore, a revision of the existing rules on *Ne bis in idem* must be fully in line with the principle of mutual recognition, which has been identified by the European Council as the cornerstone of an area of freedom, security and justice.[112] Consequently, for an EU instrument there is no need to deal with *Ne bis in idem* within a purely national context. The options outlined below only concern cross-border situations, i.e. *Ne bis in idem* between two or more Member States. Insofar, it seems sufficient to lay down a clear and concrete principle rather than establishing

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109 OJ C 100, 26.4.2003, p. 24. The initiative also contained an Article 3 establishing a *lis pendens* rule.

110 Resolution no. 7246/2003 - C5-0165/2003 - 2003/0811(CNS), P5_TA(2003)0354.

111 See Council doc. no. 11161/04.

112 See also above, at footnote 3.

meticulous definitions on each of its elements, which would require an approximation of fundamental aspects of criminal procedure, such as *res judicata*, appeal avenues, or the relation between courts, prosecutors and the police etc. This means that the details of certain definitions (e.g. when a decision is to be considered final) could be left to the case law of the ECJ. As stated in the *Miraglia* case, national law should be read in conjunction with Article 54 of CISA and with the purposes of Article 2 of the TEU.

As to the suitable legal instrument to be used if legislative action it to take place for the purpose of clarifying *ne bis in idem*, the Commission has a preference for a framework decision under Article 34(2)(b) TEU rather than an amendment of CISA. Substantively, a framework decision on *ne bis in idem* could be based on Article 31 TEU.[113]

Question 14: Is there a need for revised EU rules on *ne bis in idem* ?

b) Scope of application and the definition of "final decision"

Title VI TEU and the existing rules on *ne bis in idem* deal only with criminal matters. Basically, the Treaty framework of the Union (namely Article 47 TEU), does not enable the EU legislator to deal with matters in an instrument under Title VI TEU, if and as far as there is Community competence. This Paper, therefore, does not address the question of whether the principle of *ne bis in idem* should be applied in areas other than criminal law.[114] Nor does it seem necessary at this stage to deal with the question of whether a non-criminal judgment should preclude criminal proceedings, and *vice versa*[115] Currently, though, there is no clear-cut definition of criminal matters in EU law,[116] and it might be difficult to establish one, as the Member States' national rules on the nature of the relevant offences and the applicable procedure differ substantially. This is particularly true for misdemeanours such as road traffic offences, whose legal nature (criminal or administrative) varies strongly among the national legal systems. Under a mutual recognition approach, it does not seem necessary (and neither feasible) to establish a detailed definition of criminal matters. As in other EU instruments,[117] it might be sufficient and even preferable to refer to the types of decisions which can lead to a prohibition of further (criminal) proceedings.

As regards what should be included within the phrase "final decision", a definition in a future instrument on *ne bis in idem* should reflect the Court's case law. For example, a "final decision" with an EU wide *ne bis in idem* effect could be defined as one which prohibits a new criminal prosecution according to the national law of the

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113 As explained above, such rules would not only prevent jurisdiction conflicts (Article 31(1) letter d, but also enable the EU to further facilitate cooperation and extradition and/or surrender of persons (letter a/b). If it were also to contain minimum rules, it would also ensure compatibility of the Member States' rules (Article 31(1) letter c).

114 On multiple disciplinary proceedings, see ECJ judgment of 15.3.1967, *Gutmann v Commission*, joined cases 18 and 35/65, [French edition 1967] ECR 75.

115 On the relation between civil and criminal judgments, see Commissioner Vitorino's reply to written question no. P-1476/01 by MEP Baroness Ludford, OJ C 350E, 11.12.2001, p. 166.

116 An attempt for a definition can be found in Advocate-General *Jacobs'* conclusions on Case C-240/90 *Germany/Commission*, para 11.

117 See e.g. Article 49 CISA and Article 3(1) MLAC.

Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU.

Alternatively, a future instrument could be more specific and provide **expressly for certain exceptions** to the conclusiveness of a national prohibition for a further prosecution. For example, a situation such as the one in *Miraglia*, could be included as an express exception; i.e. "*the prohibition is in place because of pending criminal proceedings in another Member State*".

aa) Judicial decisions outside a trial and decisions by the administration (and police)

A crucial step towards increased legal certainty would be to clarify the type of decisions which can have a *ne bis in idem* effect. Articles 54 to 58 CISA currently refer to the terms "trial" and "judgment". Since the ECJ has held that this may include a prosecutor's decision outside a trial,[118] it would be more appropriate today to refer to a "final decision" rather than specifically to *trial* and *judgments* alone.

As explained above, Articles 54 to 58 CISA apply to decisions taken by judicial authorities. Currently, there is no ECJ case law or other EU law jurisprudence which suggests otherwise. Should one go beyond this and also cover certain decisions taken by the police and/or administrative authorities, which may be regarded as "non-judicial"? Under the national law of the Member States, police authorities may sometimes take decisions on criminal investigations, and administrative authorities may sanction certain offences (e.g. "*Ordnungswidrigkeiten*" in Germany).

When deciding whether an EU wide *ne bis in idem* effect should extend to certain administrative decisions, the following differences between administrative authorities and the judiciary should be taken into account: administrative authorities often enjoy a considerable margin of discretion as to whether they take action and if so, in which form. As a rule, judicial authorities work under stricter procedural requirements, for instance on evidence, and are obliged to scrutinize the entirety of the factual and legal aspects of a case. Administrative authorities are often specialised and may be subject to reduced requirements regarding the procedure and/or scope of their scrutiny. Judicial control/possibilities to appeal are often structured differently. Thus, the findings of a specialised administrative authority might not always be as comprehensive as those of a judicial procedure.

Having this in mind, should one extend *ne bis in idem* to decisions that "may give rise to proceedings before a court having jurisdiction in particular in criminal matters"? Such an approach has been taken on mutual legal assistance according to Article 49 CISA and Article 3(1) MLAC[119], With regard to convictions, the Commission also proposed a similar approach in Article 1(b) of its recent proposal on criminal records.[120] However, *ne bis in idem* may not only cover convictions but also certain other decisions. The legal effects of *ne bis in idem* differ substantially

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118 Joined cases C-187/01 and C-385/01 *Gözütok/Brügge,* judgment of 11 February 2003, [2003] ECR I-1345, particularly at paras 30 and 33.

119 Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the EU, OJ C 379, 29.12.2000, p. 7

120 Proposal for a Framework Decision on the exchange of information extracted from the criminal record, COM(2004)664 final of 13.10.2004.

from those of mutual assistance and of an exchange of excerpts from criminal records, therefore the analogy with mutual assistance should not be considered of much relevance.

In order to strike a fair balance, it seems more appropriate to include the following element into a future definition of final decision for the purposes *ne bis in idem*: "**a decision in criminal matters which has either been taken by a judicial authority or one which has been subject to an appeal to such an authority**". In short, such a decision could be called a "judicial decision" as irrespective of whether the original acquittal/conviction was handed down by a mere administrative authority, it would be ensured that for it to produce a *ne bis in idem* effect some form of review should have been taken by a judicial authority which has jurisdiction in criminal matters. This definition would take into account the differences between the national legal systems while avoiding risks for the community and the concerned individuals. Such an approach would allow for more specific rules where this is appropriate for specific areas where sanctions are usually being imposed by administrative authorities.

The application of the principle to administrative decisions calls for a careful approach when it comes to the definition of acquittals and convictions. While it is often argued that decisions imposing fines or any other punishment can be assimilated to convictions although taken by administrative bodies[121], most of the decisions taken by administrations can be described neither as convictions nor as acquittals. These decisions may trigger some sort of legitimate expectations on the part of their addressees but should in no circumstance prevent prosecution in another Member State.

However, an EU instrument could also provide for the *taking into account* of other decisions by way of deducting penalties imposed by those decisions according to the model of Article 58 CISA. Unlike that provision, in this case the "principle of accountancy" or deduction should apply (also) to financial penalties.

Question 15: Do you agree with the following definition as regards the scope of *ne bis in idem*: "*a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority*"?

Question 16: Do you agree with the following definition of "final decision": "*a decision, which prohibits a new criminal prosecution according to the national law of the Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU*?

Question 17: Is it more appropriate to make the definition of "final decision" subject to express exceptions? *(e.g. "a decision which prohibits a new criminal prosecution according to the law of the Member State where it has been taken, except when…*")

bb) Relevance of the grounds for a decision

[121] See for instance the *Öztürk*-case, judgment 21 February 1984 in application no. 8544/79 and the case of *Engel and others*, judgment 8 June 1976 (application nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72) and the case Neste and others of 3 June 2004.

Most decisions on whether to prosecute are based on the merits of the case, i.e. on the legality or illegality of the relevant behaviour and the criminal responsibility of the accused person. While convictions constitute an infringement of law and criminal responsibility, i.e. guilt – or *mens rea*,[122] an acquittal usually constitutes the absence of at least one of those elements.

However, sometimes certain decisions which are not based on an assessment of the merits or substance of the case can bar a further prosecution – in particular where a time limit for prosecution has elapsed. Should a decision not to prosecute a case because of lapse of time in a first Member State also exclude prosecution in other Member States? An affirmative answer would result the prevailing of decisions in the Member State with the shortest time limits, and thus privilege cross-border crime against "national" crime in Member States with longer time limits – all the more as cross-border investigations often take longer than national ones. And yet, a negative answer would cut back on the mutual recognition principle. Similar questions arise where persons have been amnestied or pardoned in the Member State where they have been convicted.[123] In such situations, *prima facie* the logic of mutual recognition suggests prohibition of further proceedings in the EU. The words "…or can no longer be enforced" in Article 54 CISA seem to refer to this situation.[124] Nevertheless, this consequence might be difficult to accept in certain cases where the pardoning or discharging authority has ignored relevant interests of or in another Member State. In most Member States' legal systems, whether they are based on the legality or on the opportunity principle, prosecuting authorities seem to possess a considerable scope of discretion.

In the Commission's view, an appropriate tool which would reduce the occurrence of such dilemmas **would be the establishment of a balanced and effective mechanism for determining jurisdiction**, as outlined above: if the exercise of jurisdiction for the first proceedings were based on common criteria and would take due account of other Member States' interests, the latter could accept the recognition of a prescription or other similar decision taken in the first Member State.

Useful considerations in answering these issues could also be drawn from the case law of the ECJ; In *Gözütok/Brügge*, which concerned a prosecutors decision to close a prosecution but which penalised unlawful conduct" and/or obliged the accused person "to perform certain obligations, the ECJ held that the principle of *ne bis in idem* applied as a further prosecution was barred according to the national law of that Member State. [125] However, in *Miraglia*, which concerned a decision which closed a prosecution on the ground that another prosecution was ongoing in another Member State and without an assessment of the merits of a case, the ECJ has rejected an approach which would only take into account the effect of the decision in the legal

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122 Guilt or *mens rea* is a fundamental concept of criminal responsibility, which is confirmed in the presumption of innocence (Article 6(2) ECHR, Article 48(1) Charter). Other concepts may be applied in specific circumstances.

123 The possibility of amnesty or pardon in *another* Member State would, however, run against mutual recognition and will therefore not be discussed here.

124 Article 692 of the French *code pénale*, which partly has inspired the text of Article 54 CISA, refers expressly to grace ("… qu'il a subi ou prescript sa peine ou obtenu sa grace").

125 Joined cases C-187/01 and C-385/01, *Gözütok/Brügge,* judgment of 11 February 2003, [2003] ECR I-1345, paras 27-29, 33

order of the Member State in which it was pronounced, if that would run counter to the purposes of the TEU. Does this finding imply that every prosecution which is closed without looking at the merits (i.e because of prescription) should be exempted from producing a *ne bis in idem* effect? The answer can not be given just by considering *Miraglia*, since the question referred by the national court related specifically to the fact that the proceedings were closed down by reason of the proceedings in another Member State. Therefore, one can not conclude that the decisive reason for the judgment of the ECJ is the fact that no assessments of the merits took place. The issue of whether an assessment of the merits is a pre-requisite for *ne bis in idem* to come into play is not yet settled by case law of the ECJ[126].

In any case, although these two cases do not provide us with a definite answer as to the current state of EU law on the effect of decisions based on prescription or other decisions which omit to asses fully or at least partly the merits of a case, it could nevertheless be argued that the decision in *Miraglia*[127] inspires the adoption of a flexible rule for decisions which *bar a further prosecution* in the Member State where they are given without *necessarily looking at the merits of a case*. A reasonable way forward to deal with such situations would be to firstly look at whether or not the accused could be charged again for the same offence domestically and whether this national consequence would be in conformity with the objectives of the TEU. It is to be noted that the Court will pronounce itself on the issue of prescription in the pending case of *Gasparini*. (Case C-467/04)

Question18: In addition to the elements mentioned in question 16 and 17, should a prior assessment of the merits be decisive on whether a decision has an EU wide *ne bis in idem* effect?

c) Idem: factual identity

The wording of Article 54 CISA is based on a factual approach to *idem*, i.e. it prohibits a second prosecution on the "same facts", rather than on the "same offence". In most language versions this is explicit.[128] In its case law, the ECJ refers expressly to the "same facts"[129]. Furthermore, during the discussions on the Member State initiative for a framework decision, a factual approach was supported by the European Parliament, the Commission and a majority of delegations in Council.

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126 "It should however be mentioned that, outside the scope of the CISA, in a competition case (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375, paragraphs 59, 62 and 96 (PVC II)), the Court of Justice decided that *"The application of [the ne bis in idem] principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed.*"

127 Case C-469/03 *Miraglia*, judgment of 10 March 2005, not yet published in the ECR.

128 See, in particular, the authentic 1990 versions, Dutch ("feiten"), French ("faits") and German ("Tat", which in the legal language refers to a factual conduct). The official English translation (OJ L 239, 22.9.2000, p. 19/35) uses a more flexible term ("same acts"). However, the EU Convention on Double Jeopardy of 1987 also refers to "same facts". The jurisprudence of the European Court of Human Rights refers to the "same essential elements",

129 Joined Cases C-187/01 and C-385/01, *Gözütok/Brügge,* judgment of 11 February 2003, [2003] ECR I-1345, para 38, Case C-469/03 *Miraglia*, judgment of 10 March 2005, not yet published in the ECR, para 32.

When it comes to details, though, it is not always clear how factual identity is to be defined.[130]

Such a clarification was made in the Opinion of the Advocate General[131] delivered on 20 October 2005 in the *Van Esbroeck* case, which raises the question of whether export of narcotic drugs from one Member State and import (of the same consignment of drugs) into another Member State are to be considered as the same idem for the purposes of Article 54 of the CISA. In his opinion the Advocate General confirms the factual approach as regards the definition of *idem* by analysing Article 54 CISA both substantively and linguistically; he argues that the entirety of the factual conduct of the accused has to be looked at in order to reach the (legal) conclusion whether ne bis in idem applies. Accordingly, he takes the position that the offence of exporting drugs should bar a second prosecution on the import of the same consignment of drugs. He states that an approach, which would focus on the legal qualification of the offence (i.e exporting/importing), rather than on the factual conduct of the accused, would conflict with the aim of Article 2 of the Treaty of the EU, which is to create a European area of freedom, security and justice, as well as with the general right of the individual to move freely as this is safeguarded by the Schengen Agreement. Moreover, an approach which focuses on the legal qualification would conflict with the purpose of Article 54 as it would allow the same conduct to be subject to several proceedings. Any other approach would prevent the effective application of the *ne bis in dem* principle in an international context.

According to Article 50 of the Charter one may not be tried again "for an offence...". However, the two provisions do not contradict each other: the Charter sets just a minimum standard for fundamental rights, and an EU legislative instrument, such as a Framework Decision, may provide for higher protection. Indeed, in comparison with a legal concept of identity, a factual *idem* extends the protection: where, as often is the case, the same set of facts constitutes several offences, under the factual approach a decision dealing only with one of those offences may exclude any further proceedings, while under a legal approach it might not necessarily do so. Thus, a factual *idem* reinforces the rule in line with the Charter. The wording of the Charter was mainly taken from Article 4 of the 7th ECHR Protocol, a provision which is to be interpreted as referring to the "same essential elements", but which originates from a different legal framework[132]

It is difficult to imagine that a future EU instrument on *ne bis in idem* would fall below the achieved standard of protection in CISA and the ECJ case-law. Nonetheless, some difficulties of interpretation may appear.

Should the effects of a behaviour play a role, and under what conditions? In certain areas of criminal law the effects of a given behaviour and its geographical scope may

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130 Case C-436/04 *Van Esbroeck* could provide an opportunity for the Court to clarify the meaning of *idem*; in Case C-493/03, related questions were referred to the ECJ, but later withdrawn.

131 Opinion of Advocate General Colomer, paras 44-52.

132 European Court of Human Rights judgment *Franz Fischer,* 29.5.2001, Application no. 37950/97, para 25: , where an act appears to constitute more than one offence, it is to be examined whether or not such offences "have the same essential elements". The Court came to this conclusion, since Article 4 of the 7th Protocol to the ECHR refers to trial and punishment "for an offence …".

need to be taken into account. Application of the *ne bis in idem* principle should not become an obstacle to the imposition of effective sanctions

A further issue relates to the identification of additional facts in a second prosecution. It is fair to say that additional facts should not always lead to the conclusion that there is a different set of facts; otherwise the *ne bis in idem* principle could be easily circumvented. On the other hand, a second prosecution would for instance seem justified where a person has been fined in a Member State for infringing certain safety regulations, but without taking account of the fact that his behaviour also caused damage in another Member State, e.g. an additional damage to the human beings and/or the environment.

In general, such cases could perhaps be dealt with along the following line: differences in factual details should basically not lead to the conclusion that there is a different set of facts, while such a conclusion would seem justified where additional facts change the nature of the relevant offence and/or amount to a different quality of wrong. In any case, it is fair to argue that answers to such questions will rather have to be given by the courts on a case by case basis rather than through a detailed definition of *idem.* Alternatively, this could possibly be made clearer by referring to *idem* as "**essentially the same facts**".

Question 19: Is it feasible and necessary to define the concept of *idem,* or should this be left to the case law of the ECJ?

d) Enforcement condition

A major step towards the strengthening of *ne bis in idem* and increased legal certainty would be to abolish the enforcement condition currently laid down in Article 54 CISA. In the light of the principles of necessity, proportionality and of guarantee of the essence of fundamental rights (as expressed in Article 52(1) Charter, Article II-112(1) of the Treaty Establishing a Constitution for Europe), this condition should be re-examined. During recent years, cross-border enforcement of convictions has been facilitated and accelerated considerably. In the past, one could e.g. argue that a convicted person could move to a Member State where the "foreign" sanction could or would not be enforced, and that he would thus enjoy a form of impunity there.

However, under new EU rules such as the Framework Decision on the European Arrest Warrant and the Framework Decision on financial penalties, criminal sanctions can be effectively enforced in other Member States. Further measures are under way, such as the Member States initiative for a Framework Decision on the European enforcement order and the transfer of sentenced persons.[133] Taking these into account, in the Commission's view one can no longer justify the retaining of an enforcement condition. However, as it has been argued above with regard to the other suggested measures which aim at clarifying *Ne bis in idem*, the abolition of this condition would be facilitated considerably by an effective mechanism for determining an appropriate jurisdiction.

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133 This initiative was tabled on 24.1.2005, see Council doc. no. 5597/05.

Question 20: Do you see any situations where it would still be necessary to retain an enforcement condition, and if yes, which ones? If yes, can the condition be removed if a mechanism for determining jurisdiction is established?

e) Optional derogations

Furthermore, it should be examined whether the optional derogations in Article 55 CISA can still be justified. In an area of freedom, security and justice ideally there should be no such derogations, as they lead to a fragmentation of the law and thus hamper judicial cooperation. The requirements of Article 52(1) Charter may be recalled in this context. The fact that up to now only seven EU Member States saw the necessity to make use of these exceptions illustrates that they are not entirely indispensable.

It seems that the original objective of Article 55 CISA was to avoid the situation of a Member State that has a particular interest in prosecuting a case being prevented from doing so just because another Member State, which might have less interest, came first. Such a risk would indeed continue to exist if the Union were not able to establish a mechanism for determining an appropriate jurisdiction. However, if Member States had a possibility of influencing the place of proceedings and to bring in their particular concerns, and if the choice of jurisdiction was based on objective and comprehensible criteria, then it would be possible to give full effect to the principle of *ne bis in idem*.

To take the example of the territoriality exception in Article 55(1)(a): It could validly be argued that a Member State on whose territory a criminal act was committed might often be better placed to prosecute than another in which none of the criminality took place. It would thus be difficult for such a Member State to accept that it should abstain from prosecuting as a result of a decision which has been taken in a State in which none of the acts amounting to the offence in question took place, if that decision was taken without the Member State on whose territory the offence took place being consulted. Instead of "repairing" this deficit *ex post* by derogating from *ne bis in idem*, it would be more reasonable **to tackle it at its roots**, i.e. to ensure that consultation takes place before a final decision is taken. Moreover, Article 55(1)(a) does not hit the core of the problem, as territoriality may be only **one** of several important criteria for determining the jurisdiction under which the case ought to be dealt with.[134]

Corresponding reflections apply to letter b ("security or other equally essential interests"); within a mechanism for determining jurisdiction, an essential interest of a Member State in a case could be an affirmative argument for prosecuting the case therein. However, it is doubtful whether it can justify overriding a fundamental right. In any case, through increased efficiency, proceedings under the lead of one Member State can allow to conserve national security interests better than doubling national proceedings, especially since other Member States' services can be involved through information and close cooperation. Apart from this, the notion of "equally essential interests" seems very vague.

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134 See above, point 9

As regards the third possibility for a derogation from the applicability of the principle (letter c which allows a reservation for acts committed by officials of that Contracting Party in violation of the duties of their office), it is fair to argue that since no Member State has made use of it there is no need for retaining in the CISA the possibility for such an exception to the principle.

On the whole, the derogations in Article 55 CISA rather provide a "crutch", while the "remedy" seems to be a mechanism for determining an appropriate jurisdiction. Certain limits to the *ne bis in idem* principle might have to apply in exceptional cases, e.g., in case of an abusive process, including denial of justice to victims, or where the norms of due process were not respected. While on an international level Article 20(3) of the Statute of the International Criminal Court (ICC) provides for such exceptions,[135] in an area of justice based on mutual recognition, it seems sufficient to provide generally for a reopening of proceedings in such cases. However, in most (if not all) Member States proceedings can be reopened under certain conditions, which however vary considerably.[136] Article 4(2) of the 7th Protocol to the ECHR allows a reopening of proceedings – but does not prescribe it – in case of evidence of new or newly discovered facts, or of a fundamental defect in the proceedings. The CISA remains silent on this issue.[137] One may discuss whether an EU instrument should contain common minimum standards for a reopening of proceedings. At least regarding new evidence or facts, though, a consultation mechanism between the Member States seems sufficient, allowing the Member State where new evidence or facts are discovered to inform the Member State where the final decision was taken thereof – in turn enabling the competent authorities of the latter to decide on a reopening the case under the criteria laid down in national law.

Question 21: To what extent can the derogations in Article 55 CISA still be justified? Can they be removed if a mechanism for determining jurisdiction is established, or would you see a need for any further measures to "compensate" for a removal of the derogations under these circumstances?

f) Legal consequences

The consequence of the EU wide *ne bis in idem* principle is that the accused may not be prosecuted again in another Member State. To that extent, the wording of Article 54 CISA seems adequate. This would not only exclude a further trial or punishment (as foreseen as a minimum protection in Article 50 Charter) but pre-trial proceedings, too. Accordingly, requests for judicial assistance and/or for the execution of prosecutorial acts other than those aiming at a reopening of proceedings could no longer be justified.

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135 This provision has been inspired by works of the International Law Association; see Report of its 67th Conference, Helsinki, 12.-17.8.1996, London 1996, p. 223.

136 Conditions for a reopening to the detriment of the defendant are often stricter than those to their favour.

137 This is coherent with the mutual recognition approach taken in the CISA: the question of reopening of proceedings is left to the Member State where the first decision was taken. Rightly, CISA does not provide for a reopening in another Member State, as this would amount to a refusal to recognize the first decision.

Coherently, *ne bis in idem* is a ground for mandatory non-execution of a EAW,[138] and in the Commission's proposal for a European Evidence Warrant.[139] However, the Framework Decisions on freezing orders,[140] on mutual recognition of financial penalties and on confiscation orders[141] only name it as an *optional* ground for non-execution. The existing mutual legal assistance rules remain silent on this point. Within an area of justice, *ne bis in idem* should be a ground for mandatory non-execution or non-recognition of any request be it for mutual recognition or execution of a decision, or for legal assistance. It will have to be discussed whether this could be made clear in one horizontal instrument, or whether the text of specific instruments will also have to be aligned.[142]

Furthermore, it should be examined to what extent specific provisions in certain instruments, such as Article 3(2) and/or Article 4(3) EAW, should be amended.[143] E.g., Article 4(3) EAW provides for an optional ground for non-execution; this is partly outdated, since under the case law of the ECJ a decision not to prosecute can, under certain circumstances, have *ne bis in idem* effect; where *ne bis in idem* applies, however, non-execution should be mandatory. On the other hand, it should be examined whether the remaining situations mentioned in Article 4(3) EAW, where *ne bis in idem* does not apply according to the case law, should still be considered a ground for non-execution. Finally, one might consider clarifying in Article 3(2) EAW that surrender is to be refused if the International Criminal Court has judged on the same facts.

Question 22: Should *ne bis in idem* be a ground for mandatory refusal of mutual legal assistance? If yes, which EU law provisions should be adapted?

11.6. Third countries

As a further step, one could examine whether EU citizens should be equally protected through the principle of *Ne bis in idem* in relation to proceedings in third countries. Only some Member States have ratified an international instrument providing for a cross-border *Ne bis in idem* rule[144] for decisions which originate from outside the EU. Presently, there is a wide variety of national provisions on *Ne bis in idem* regarding third countries. The fact that an EU citizen whose trial has been finally disposed of in a third country cannot be prosecuted in one Member State,

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138 Article 3(2) EAW.

139 COM(2003)688 final:.

140 Framework Decision on the execution in the EU of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45, Article 7(1)(c) (and only, if an infringement of *ne bis in idem* is "instantly clear").

141 OJ L 76, 22.3.2005, p. 16, see Article 7(2)(a); [on confiscation orders, the Council has achieved political agreement subject to parliamentary reservations, see Council doc. 10027/04, Article 7(2)(a)

142 In COM(2003)688 final, Article 15(1) of the proposal for a Framework Decision on the European Evidence Warrant, refers to a framework decision on *ne bis in ide*m (see also para 2 with respect to proceedings in a third State).

143 See also Article 10 of the Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, p. 49; Article 7 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25.6.1997, p. 2; Article 7(2)(a) of the Framework decision on the application of the principle of mutual recognition to financial penalties.

144 See particularly the Council of Europe Conventions of 28.5.1970 and 15.5.1972 (ETS 070 and 073 respectively).

while in another this is still possible, does not fully accord with the logic of an area of justice and can have repercussions on cooperation among the Member States: for instance, Article 4(5) EAW allows, but does not oblige, a Member State to refuse to execute an EAW based on a third country judgment.

Clearly, in an international context the approach would have to be considerably less ambitious than within a single area of freedom, security and justice. Conditions and derogations comparable to those in Articles 54/55 CISA or in Article 20 of the ICC Statute may still be necessary on the international level. Nonetheless, both on the effect of third country judgments in the EU, and on the effect of EU Member State judgments in third countries, an EU wide minimum protection standard could be envisaged in international negotiations. To achieve a balanced approach based on reciprocity both aspects could be treated in a linkage.

As a matter of principle, where *ne bis in idem* does not apply, any previous penalties concerning the same facts could nevertheless be taken into account when repeated proceedings take place. As in Article 56 CISA, this principle has been laid down in several international Conventions.[145]

Question 23: Is there a need for a more coherent approach on the *ne bis in idem* principle in relation to third countries? Should one differentiate between parties of the Council of Europe and other countries?

[145] E.g., see the above mentioned Council of Europe Conventions ETS 070 (Articles 54 and 56) and 073 (Article 36).

PART IV: FURTHER OPTIONS AND CONCLUSIONS

12. FURTHER POSSIBLE MEASURES

12.1. Revising grounds for non-execution in other mutual recognition instruments

Mutual recognition and a sound mechanism for guaranteeing a balanced choice of jurisdiction depend on each other. As outlined above, once the Member States have agreed on the form of a mechanism which would determine the most appropriate jurisdiction to prosecute a case, their readiness to fully recognize judicial decisions taken in other Member States could increase considerably.

Therefore, in parallel to the arrangements discussed above it should also be examined whether there should be an abolition of certain of the grounds for non-execution which are contained in the Union's mutual recognition instruments. Although these grounds have so far been regarded as necessary, it could validly be argued that they are not completely in line with a European criminal justice system based on mutual recognition. On the same basis, and in the interest of the individuals concerned, other grounds for non-execution could perhaps be converted from grounds for optional non-execution into grounds for mandatory non-execution. In particular, reference can be made to the following grounds for optional non-execution of a European Arrest Warrant ("EAW"), as set out in Article 4 of the Framework Decision,[146] which do not seem to be fully compatible with the concept of a common area of justice:

- ongoing prosecution of the same act (Art. 4(2)) which should only be a ground for non-execution insofar as the procedures for determining jurisdiction have been applied; as long as those procedures are going on, there would be a ground for non-execution; where a leading jurisdiction has been identified, the leading Member State should refuse execution, while other Member States would not have a ground for non-execution of an EAW to that Member State.

- a decision not to prosecute or to halt proceedings (4(3), first part) and

- Territoriality aspects (Article 4(7) (a)), which should not be a ground for non-execution, neither mandatory nor optional.

(The above examples are set out with an EAW issued for the purposes of conducting a criminal prosecution in mind. As regards an EAW issued for the purposes of executing a custodial sentence or a detention order, the situation may be different. For instance, ongoing prosecution of the same act should in this respect be abolished as a ground for non-execution altogether rather than partly converted into a mandatory ground for non-execution.)

Furthermore, one could carefully examine the question of whether the ground for optional non-execution on account of time-limits (Article 4(4) EAW), also included

146 OJ L 190, 18.7.2002, p. 1.

in the Draft Framework Decision on Confiscation Orders[147], as well in the recently adopted Framework Decision on Financial Penalties,[148] could be restricted or subjected to certain conditions, to the extent that decisions based on the expiry of time-limits are not recognised as final decisions under the *ne bis in idem* principle. In a well functioning jurisdictional system one could even start making reflections on whether the so far obligatory ground for non-execution in Article 3(3) on age-limits could not later be converted into a ground for optional non-execution, as with Confiscation Orders and Financial Penalties, and whether the dual criminality rule in Article 4(1) could be further restricted or abolished altogether.

In any case, at least the terminology of the relevant EU instruments would have to be adapted to a future instrument on determining jurisdiction. For instance, as regards Article 4 of the Framework Decision on the EAW (particularly in paragraphs (3) and (4)) and Article 7 (2)(a) of the Framework Decision on Financial Penalties, one should refer to "facts" rather than "acts".

Question 24: Do you agree that with a balanced mechanism for determining jurisdiction,

a) certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?

b) certain grounds for optional non-execution should be converted into grounds for mandatory non-execution or *vice versa*? Which grounds, in particular?

12.2. The applicable criminal law

The reflections made in this paper are based on the assumption that Member States, in principle, only apply their own criminal procedural and substantive law (*lex fori*). This is currently an established principle in international criminal law. Consequently, allocating a case to a certain jurisdiction basically determines also the applicable law, including the range of penalties to be imposed. Therefore, determining under which jurisdiction a case is to be dealt with is a particularly sensitive and important issue with important implications on fundamental rights.

In the existing domestic legislation, there are some, although very limited, deviations from this general principle of applying the *lex fori,* which providing for instance that the law of another State is to be taken into account where it is more favourable to the defendant. Those provisions do not provide for a general applicability of foreign law, but only for a limit of the applicable penalty. For instance, in Austria an act which has been committed outside the Austrian territory cannot be punished more severely than is possible in the State where the act was committed, and the punishment ends if the act is statute barred in that State. Portuguese law has similar provisions. Again, the principle of territoriality proves to be important in this context. Latvian law even knows a provision according to which foreign procedural law can be applied in certain cases.

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147 On mutual recognition of Confiscation Orders, the Council has achieved political agreement subject to a (national) parliamentary reservation which is still in force; see Council doc. 10027/04.

148 OJ L76, 22.3.2005, p. 16

In theory, the exigency of a solution for the problem of determining jurisdiction could be reduced, if Member States were to agree on rules determining the applicable law, as known in international private law. However, such an approach seems hardly to be realistic. In any case, there would still be a need for procedural arrangements and criteria for determining jurisdiction as suggested above.

13. CONCLUDING REMARKS

In criminal law, where two or more Member State have jurisdiction with regard to the same case, several parallel proceedings may be initiated. Although it may be necessary for parallel investigations to take place, the same can not be said about parallel prosecutions. Through the serious burdens that criminal proceedings often entail for the persons involved, multiple prosecutions for the same criminal case can harm the rights and interests of the persons involved. Furthermore, multiple prosecutions can seriously affect the efficiency and duration of the proceedings. Duplication of work is almost unavoidable when defendants, victims and/or witnesses might have to be summoned and heard several times in different countries. Currently, there is no rule preventing the respective national authorities of the Member States from proceeding with parallel prosecutions on cases which are already prosecuted by others. This contrasts with the domestic level where there is usually some form of rule which governs the halting or termination of parallel prosecutions. In civil and commercial matters European law contains rules dealing both with parallel proceedings and with choice of jurisdiction.

In a common area of freedom, security and justice, it seems both desirable and necessary to limit and/or restrain multiplication of prosecutions. In this vein, currently European law only provides for one restriction with a rather limited scope of application: the principle of *ne bis in idem*. And in addition to that, the current rules laying down the *ne bis in idem* principle on the EU level provide for exceptions or derogations which seem incompatible with a true common area of freedom, security and justice. In addition, there are matters concerning its scope and applicability which need further clarification. Moreover, as stated above, the principle of *ne bis in idem* does not prevent conflicts of jurisdiction where proceedings are still under way, since it can only apply where a final decision with binding effect (*res judicata*) has been taken. In the absence of an effective mechanism for allocating jurisdiction, the *ne bis in idem* principle may lead to accidental or even arbitrary results. For example, where a final decision can first be taken, *ne bis in idem*, in the current framework, constitutes a form of "first come first served" principle.

In the Commission's view, the issue of determining the most appropriate criminal jurisdiction under which a concrete case should be dealt with in the event of a conflict of jurisdiction, the creation of an EU-wide rule for the concentration of parallel proceedings and the principle of *ne bis in idem* are very much interrelated. Moreover, it seems not only feasible but also necessary, to address this problem in the context of the mutual recognition principle, which has been identified as a cornerstone of the Union's common area of freedom, security and justice. That principle presupposes that Member States have trust in each others' criminal justice systems.

This Paper therefore suggests that a solution to the problem – dealing with conflicts of jurisdiction and clarifying the scope and applicability of the *ne bis in idem* principle in order to better protect the individual while safeguarding Member States' legitimate interests – should be based on mutual recognition of decisions by judicial authorities and mutual trust in the operation of each others' criminal justice systems through an active collaboration/cooperation between the Member States. In view of these considerations, this Green Paper suggests the creation of a mechanism which consists of a procedure for information, consultation and dispute settlement and a list of relevant substantive criteria to be taken into account in choosing the most appropriate jurisdiction.

ANNEX

PART V: Appendix with relevant provisions from EU and International Instruments – Initiatives

A. PROVISIONS ON NE BIS IN IDEM IN INTERNATIONAL AND EU INSTRUMENTS

19 December 1966

International Covenant on Civil and Political Rights

Article 14(7)

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

28 may 1970

European Convention on the International Validity of Criminal Judgments Part III – International effects of European criminal judgments

Section 1 – Ne bis in idem

Article 53

1. A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

a. if he was acquitted;

b. if the sanction imposed:

i. has been completely enforced or is being enforced, or

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

iii. can no longer be enforced because of lapse of time;

c. if the court convicted the offender without imposing a sanction.

2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of ne bis in idem if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, of if the subject of the judgment had himself a public status in that State.

3. Furthermore, any Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of ne bis in idem unless that State has itself requested the proceedings.

Article 54

If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

Article 55

This section shall not prevent the application of wider domestic provisions relating to the effect of ne bis in idem attached to foreign criminal judgments.

Section 2 – Taking into consideration

Article 56

Each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment

all or some of the effects which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.

Article 57

Each Contracting State shall legislate as it deems appropriate to allow the taking into consideration of any European criminal judgment rendered after a hearing of the accused so as to enable application of all or part of a disqualification attached by its law to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration

15 May 1972
European Convention on the Transfer of Proceedings in Criminal Matters
ETS No. 073

Article 3

Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. Having regard to Article 21, paragraph 2, any such decision to waive or to desist from proceedings shall be provisional pending a final decision in the other Contracting State.

Article 35

1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

a. if he was acquitted;

b. if the sanction imposed:

   i. has been completely enforced or is being enforced, or

   ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

   iii. can no longer be enforced because of lapse of time;

c. if the court convicted the offender without imposing a sanction.

2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of ne bis in idem if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.

3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of ne bis in idem unless that State has itself requested the proceedings.

Article 36

If new proceedings are instituted against a person who in another Contracting State has been sentenced for the same act, then any period of deprivation of liberty arising from the sentence enforced shall be deducted from the sanction which may be imposed.

Article 37

This Part shall not prevent the application of wider domestic provisions relating to the effect of ne bis in idem attached to foreign criminal judgments. 22 November 1984

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
ETS No. 117

Article 4 – Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

19 June 1990
Convention Implementing the Schengen Agreement

Chapter 3 Application of the ne bis in idem principle Articles 54 to 58

Article 54

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another contracting Party for the same acts provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Article 55

1. A Contracting party may, when ratifying accepting or approving this Convention declare that it is not bound by Article 54 in one or more of the following cases;

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case however this exception shall not apply if the acts took place in part in the territory of the Contracting party where the judgment was delivered

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that contracting Party

(c) where the acts to which the foreign judgment relates were committed by official of that contracting party in violation of the duties of their office.Article 56

If further proceedings are brought by a Contracting Party against a person who has been finally judged for the same offences by another Contracting Party, any period of deprivation of liberty served on the territory of the latter Contracting Party on account of the offences in question must be deducted from any sentence handed down. Account will also be taken, to the extent that national legislation permits, of sentences other than periods of imprisonment already undergone.

Article 57

1. Where a Contracting Party accuses an individual of an offence and the competent authorities of that Contracting Party have reason to believe that the accusation relates to the same offences as those for which the individual has already been finally judged by another Contracting Party, these authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings in progress.

3. At the time of ratification, acceptance or approval of this Convention, each Contracting Party will nominate the authorities which will be authorized to request and receive the information provided for in this Article.

Article 58

The above provisions shall not preclude the application of wider national provisions on the "non bis in idem" effect attached to legal decisions taken abroad.

Charter of Fundamental Rights of the European Union

Official Journal C 364, 18 Dec. 2000, p.1

Article 50 "Right not to be tried or punished twice in criminal proceedings for the same criminal offence"

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

13 June 2002

Council Framework Decision on the European arrest warrant and the surrender procedures between Member States

Official Journal L190, 18 July 2002, p. 1

Article 3 "Grounds for mandatory non-execution of the European arrest warrant"

The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

Article 4 "Grounds for optional non-execution of the European arrest warrant"

The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;

2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;

5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory

B. EU PROVISIONS ON CONFLICTS OF JURISDICTION (INCLUDING PENDING INITIATIVES)

26 July 1995
Convention on the Protection of the European Communities' Financial Interests
Official Journal C 316 of 27.11.1995, p. 49**Article 4, "Jurisdiction":**

"1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Article 1 and 2 (1) when

– fraud, participation in fraud or attempted fraud affecting the European Communities' financial interests is committed in whole or in part within its territory, including fraud for which the benefit was obtained in that territory,

– a person within its territory knowingly assists or induces the commission of such fraud within the territory of any other State,

– the offender is a national of the Member State concerned, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred.

2. Each Member State may declare, when giving the notification referred to in Article 11(2), that it will not apply the rule laid down in the third indent of paragraph 1 of this Article."

19 January 1996
Commission Proposal for a Council Act drawing up the additional Protocol to the Convention on the Protection of the European Communities' Financial Interests
(COM/95/0693 FINAL)
Official Journal C 083 , 20.03.1996 p. 10

TITLE IV – Priority jurisdiction

Article 7

1. In the interests of the sound administration of justice, investigations shall be grouped together within a centralized procedure each time a fraud offence concerns several Member States, or when one or more offences arise from a series of acts done by persons acting together in pursuance of a jointly agreed plan, or when offences are linked with one another.

2. The procedure in paragraph 1 is not intended to confer exclusive jurisdiction. It shall be applicable unless there are overriding objective reasons for derogation.

3. To implement the centralized proceedings, each Member State shall deem acts done on the territory of another Member State to have been committed on its own territory.

Article 8

1. The power to implement the centralized procedure shall lie with the authorities responsible for investigation for the purpose of prosecution in the Member States on whose territory the greatest number of the following are satisfied:

– place where the material acts or omissions occur,

– place of arrest of persons having participated in the fraud,

– home or usual residence of the same persons,

– place where the evidence is identified or located,

– head office of the legal person or other business establishment involved in the fraud.

2. Where jurisdiction cannot be determined on the basis of the criteria set out in paragraph 1, the Member State whose

authorities are responsible for investigation for the purpose of prosecution and to whom the essential facts of the fraud were first submitted shall have jurisdiction to implement the centralized procedure.

27 September 1996
Protocol to the Convention on the Protection of the European Communities' Financial Interests
Official Journal C 313 of 23.10.1996, p. 2

Article 6, "Jurisdiction":

"1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with Articles 2, 3 and 4 where:

(a) the offence is committed in whole or in part within its territory;

(b) the offender is one of its nationals or one of its officials;

(c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the institutions referred to in Article 4 (2) who is one of its nationals.

(d) the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State concerned.

2. Each Member may declare that when giving notification provided for in Article 9 (2) that it will not apply or will apply only in specific cases or conditions one or more of the jurisdiction rules laid down in paragraph 1 (b), (c), and (d)."

26 May 1997
Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union
Official Journal C 195 of 25.6.1997, p. 2

Article 7, "Jurisdiction":

"1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3, and 4 where:

(a) the offence is committed in whole or in part within its territory;

(b) the offender is one of its nationals or one of its officials;

(c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the European Community institutions referred to in Article 4 (1) who is at the same time one of its nationals;

(d)the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.

2. Each Member State may declare, when giving the notification provided for in Article 13 (2), that it will not apply or will apply only in specific cases or conditions one or more of the jurisdiction rules laid down in paragraph 1 (b), (c) and (d)."

21 December 1998
Joint Action on Making it a Criminal Offence to Participate in a Criminal Organisation in the Member States of the EU
Official Journal L 351 of 29.12.1998, p. 1

Article 4:

"Each Member State shall ensure that the types of conduct referred to in Article 2(1)(a) or (b) which take place in its territory are subject to prosecution wherever in the territory of the Member States the organisation is based or pursues its criminal activities, or wherever the activity covered by the agreement referred to in Article 2(1)(b) takes place.

Where several Member States have jurisdiction in respect of acts of

participation in a criminal organisation, they shall consult one another with a view to coordinating their action in order to prosecute effectively, taking account, in particular, of the location of the organisation's different components in the territory of the Member States concerned."

22 December 1998
Joint Action on Corruption in the Private Sector
Official Journal L 358 of 31.12.1998, p. 2

Article 7, "Jurisdiction":

"1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3 where the offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or

(c) for the benefit of a legal person operating in the private sector that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply, or will apply only in specific cases or circumstances, the jurisdiction rule set out in:

– paragraph 1(b),

– paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

4. Any Member State which, under its law, does not extradite its own nationals shall also take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, when committed by its own nationals outside its territory."

Initiative for a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market
Official Journal C 253, 4.9.2000, p.3

Article 7, "Jurisdiction"

"1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to a criminal offence pursuant to Article 2 where the criminal offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals, provided that the law of that Member State may require the offence to be punishable also in the country where it occurred; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply, or will apply only in specific cases or circumstances, the rule set out in paragraph 1(b) and paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council where they decide to invoke paragraph 2, where appropriate with an indication of the specific cases or circumstances in which that decision applies.

4. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction with regard to the criminal offences referred to in Article 2, when committed by its own nationals outside its territory."

Initiative for a Framework Decision on Combating Serious Environmental Crime
Official Journal C 39, 11.2.2000, p. 4

Article 4:

"1. Each Member State shall ensure that its authorities have jurisdiction in respect of serious environmental crime committed:

(a) in whole or in part on its territory, including on vessels registered in that Member State;

(b) by a natural person who is a national of or permanently resident in that Member State;

(c) by a legal person based on its territory.

2. Where the criminal offence has been committed on the territory of another State, the national authorities' jurisdiction in the cases referred to in paragraph 1(b) and (c) may be conditional upon the matter also constituting a criminal offence under the legislation applicable in that other State.

3. Each Member State shall ensure that its authorities have jurisdiction in respect of serious environmental crime affecting or intended to affect its territory."

29 May 2000
Framework Decision on Increasing Protection by Criminal Penalties and other Sanctions against Counterfeiting in Connection with the Introduction of the Euro
Official Journal L 140, 14.6.2000, p. 1

Article 7, "Jurisdiction":

"1. Without prejudice to paragraph 2 of this Article:

– each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 5, where the offence is committed in whole or in part within its territory,

– Articles 8 and 9, as well as Article 17 of the Convention[149] are applicable to the offences referred to in Articles 3 to 5 of this framework Decision.

2. At least the Member States in which the euro has been adopted shall take the appropriate measures to ensure that the prosecution of counterfeiting, at least in respect of the euro, is possible, independently of the nationality of the offender and the place where the offence has been committed.

3. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which Member State shall prosecute the offender or offenders with a view to centralising the

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149 These provisions of the 20 April 1929 Geneva Convention for the Suppression of Counterfeiting Currency read as follows:
"**Article 8**
In countries where the principle of the extradition of nationals is not recognised, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence. This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.
Article 9
Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.
The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

prosecution in a single Member State where possible."

22 December 2000
Council Regulation(EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Official Journal L 12, 16 January 2001, p. 1

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

28 May 2001
Framework Decision Combating Fraud and Counterfeiting of Non-Cash Means of Payment
Official Journal L 149, 2.6.2001, p. 1

Article 9, "Jurisdiction":

"1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2, 3, 4 and 5 where the offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals, provided that the law of that Member State may require the conduct to be punishable also in the country where it occurred; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Subject to of Article 10, any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rule set out in:

– paragraph 1(b);

– paragraph 1(c).

3. Member States shall inform the General Secretariat of the Council accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies."

Proposal for a Council framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking
Official Journal C 304 E, 30.10.2001, p. 172

Article 9 "Jurisdiction and prosecution"

"1. Member States shall take the necessary measures to establish their jurisdiction as regards the offences referred to in Articles 2 and 3 where:

(a) the offence was committed entirely or partly within their territory;

(b) the offender is one of their nationals;

(c) the offence was committed for the benefit of a legal person established in their territory.

2. Member States may decide not to apply or to apply only in specific cases or

circumstances the rules on jurisdiction set out in paragraph 1(b) and (c), if the offence in question was committed outside their territory.

The Member States shall inform the General Secretariat of the Council and the Commission of their decision to apply the first subparagraph, where necessary indicating the specific cases or circumstances in which the decision will apply.

3. Member States which, by virtue of their legislation, do not extradite their nationals, shall take the necessary measures to enable them to establish their jurisdiction in respect of the offences referred to in Articles 2 and 3, where these are committed by one of their nationals outside their territory."

Initiative for a Convention on the suppression by customs administrations of illicit drug trafficking on the high seas
Official Journal C 45, 19.2.2002, p. 8

Article 5, "Jurisdiction"

"1. Save as provided for in the Convention on mutual assistance and cooperation between customs administrations, Member States shall exercise sole jurisdiction in relation to offences committed in their territorial and national waters including situations where offences originated or are due to be completed in another Member State.

2. As regards the offences described in Article 3 and committed outside the territorial waters of a Member State, the Member State under whose flag the vessel was flying and on board which or by means of which the offence was committed shall exercise the preferential jurisdiction."

Proposal for a Council Framework Decision on combating racism and xenophobia
Official Journal C 075 E, 26.3.2002, p. 269

Article 12, "Jurisdiction"

"1. Each Member State shall establish its jurisdiction with regard to the offences referred to in Articles 4 and 5 where the offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals and the act affects individuals or groups of that State; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall ensure that its jurisdiction extends to cases where the offence is committed through an information system and:

a) the offender commits the offence when physically present in its territory, whether or not the offence involves racist material hosted on an information system in its territory;

b) the offence involves racist material hosted on an information system in its territory, whether or not the offender commits the offence when physically present in its territory.

3. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rule set out in paragraphs 1 (b) and (c).

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 3, where appropriate with an indication of the specific cases or circumstances in which the decision applies."

13 June 2002
Framework Decision on Combating Terrorism
Official Journal L 164, 22.6.2002, p.3

Article 9 "Jurisdiction and prosecution"

"1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:

(a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;

(b) the offence is committed on board a vessel flying its flag or an aircraft registered there;

(c) the offender is one of its nationals or residents;

(d) the offence is committed for the benefit of a legal person established in its territory;

(e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:

– the Member State shall be that in the territory of which the acts were committed,

– the Member State shall be that of which the perpetrator is a national or resident,

– the Member State shall be the Member State of origin of the victims,

– the Member State shall be that in the territory of which the perpetrator was found.

3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country.

4. Each Member State shall ensure that its jurisdiction covers cases in which any of the offences referred to in Articles 2 and 4 has been committed in whole or in part within its territory, wherever the terrorist group is based or pursues its criminal activities.

5. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation."

19 July 200
Framework Decision on Combating Trafficking in Human Beings
Official Journal L 203, 1.8.2002, p. 1

Article 6, "Jurisdiction and prosecution":

"1. Each Member State shall take the necessary measures to establish its

jurisdiction over an offence referred to in Articles 1 and 2 where:

the offence is committed in whole or in part within its territory, or

the offender is one of its nationals, or

the offence is committed for the benefit of a legal person established in the territory of that Member State.

A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) as far as the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 1 and 2 when it is committed by its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies."

28 November 2002

Framework Decision on the Strengthening of the Penal Framework to prevent the Facilitation of unauthorised Entry, Transit and Residence

Official Journal L 328, 5.12.2002, p. 1

Article 4, "Jurisdiction":

"1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the infringements referred to in Articles 1(1) and committed:

in whole or in part within its territory;

by one of its nationals, or

for the benefit of a legal person established in the territory of that Member State.

2. Subject to the provisions of Article 5, any Member State may decide that it will not apply or that it will apply only in specific cases or circumstance, the jurisdiction rule set out in:

– paragraph 1(b),

– paragraph 1(c).

3. Each Member State shall inform the Secretary-General of the Council in writing if it decides to apply paragraph 2, where appropriate with an indication of the specific circumstances or conditions in which its decision applies."

Article 5, "Extradition and prosecution"

"1. (a) Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the infringements referred to in Article 1(1) when such infringements are committed by its own nationals outside its territory.

(b) Each Member State shall, when one of its nationals is alleged to have committed in another Member State the infringements referred to in Article 1(1) and it does not extradite that person to that other Member State solely on the ground of his nationality, submit the case to its competent authorities for the purpose of prosecution, if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6(2) of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed

of the prosecution initiated and of its outcome.

2. For the purpose of this Article, a "national" of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) and (c) of the European Convention on Extradition, where appropriate as amended by any declarations made with respect to the Convention relating to extradition between the Member States of the European Union[150].

Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle

Official Journal C 10, 26 March 2003, p. 24

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(d) and Article 34(2)(b) thereof,

Having regard to the initiative of the Hellenic Republic (1),

Having regard to the opinion of the European Parliament (2),

Whereas:

(1) The principle of 'ne bis in idem', or the prohibition of double jeopardy, i.e. that no one should be prosecuted or tried twice for the same acts and for the same criminal behaviour, is established as an individual right

in international legal instruments concerning human rights, such as the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4) and the Charter of Fundamental Rights of the European Union (Article 50) and is recognised in all legal systems which are based on the concept of respect for and protection of fundamental freedoms.

(2) The principle of 'ne bis in idem' assumes a special significance at a time when transborder crime is on the increase and problems of jurisdiction in connection with criminal prosecutions are becoming more complicated. The importance of this principle is furthermore apparent in the areas of asylum, immigration and

extradition and within the framework of the European Union and in agreements between the Union or certain Member States and third countries.

(3) Point 49(e) of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (3) provides that measures will be established within five years of the entry into force of the Treaty 'for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the ne bis inidem principle'.

(4) In the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (4) established by the Council and the Commission the 'ne bis in idem' principle is included among the immediate priorities of the Union, in particular as regards the taking into account of final criminal judgments delivered by a court in another Member State. Measure No 1 in that programme recommends a reconsideration of Articles 54 to 57 of the Convention implementing the Schengen Agreement, which reiterate the corresponding articles of the Convention between the Member States of the European Communities on

150 OJ C 313, 23.10.1996, p. 12.

Double Jeopardy, signed in Brussels on 25 May 1987, with a view to the full application of the principle of mutual recognition, which has, however, not been ratified by the Member States.

(5) The Communication from the Commission to the European Parliament and the Council of 26 July 2002 on the mutual recognition of final criminal judgments acknowledges the positive contribution of the application of the 'ne bis in idem' principle to the mutual recognition of judgments and the strengthening of legal certainty within the Union, which presupposes confidence in the fact that judgments recognised are always delivered in accordance with the principles of legality, subsidiarity and proportionality.

(6) In the legal systems of a number of States the principle of 'ne bis in idem' is recognised only at national level, i.e. vertically, observing the criminal procedure followed in the State in question. Such recognition is provided for either in constitutional provisions or in legal provisions and is based: (a) on Article 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966; and (b) on Article 4 of the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Transnational application of the principle, i.e. horizontally, is established by Articles 54 to 57 of Chapter 3 of the Convention implementing the Schengen Agreement.

(7) The application of the 'ne bis in idem' principle has thus far raised many serious questions as to the interpretation or acceptance of certain substantive provisions or more general rules (e.g. the concept of idem) because of the different provisions governing this principle in the various international legal instruments and the difference in practices in national law. The aim of this Framework Decision is to provide the Member States with common legal rules relating to the 'ne bis in idem' principle in order to ensure uniformity in both the interpretation of those rules and their practical implementation.

(8) Since the above objectives of the Framework Decision cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

(9) As regards Iceland and Norway this Framework Decision constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (1) which fall within the scope of Article 1(B) of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of that Agreement (2).

(10) The United Kingdom is taking part in this Framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community and with Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (3).

(11) Ireland is taking part in this Framework Decision in accordance with Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on

European Union and to the Treaty establishing the European Community and with Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (4),

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this Framework Decision:

(a) 'criminal offences' shall mean:

— acts which constitute crimes under the law of each Member State,

— acts which constitute administrative offences or

breaches of order that are punished by an administrative authority by a fine, in accordance with the national law of each Member State, provided that they fall within the jurisdiction of the administrative authority and the person concerned is able to bring the matter before a criminal court;

(b) 'judgment' shall mean any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, and also any extrajudicial mediated settlement in a criminal matter; any decision which has the status of res judicata under national law shall be considered a final judgment;

(c) 'Member State of the proceedings' shall mean a Member State in which the proceedings took place;

(d) 'lis pendens' shall mean a case where, in respect of a criminal offence, a criminal prosecution has already been brought against a person, without a judgment having been delivered and where the case is already pending before a court;

(e) 'idem' shall mean a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character.

Article 2

Right of any person not to be prosecuted or convicted twice for the same criminal offence

1. Whoever, as a result of committing a criminal offence, has been prosecuted and finally judged in a Member State in accordance with the criminal law and the criminal procedure of that State cannot be prosecuted for the same acts in another

Member State if he has already been acquitted or, if convicted, the sentence has been served or is being served or can no longer be enforced, in accordance with the law of the Member State of the proceedings.

2. The procedure may be repeated if there is proof of new facts or circumstances which emerged after the judgment or if there was a fundamental error in the previous procedure which could have affected the outcome of the proceedings, in accordance with the criminal law and the criminal procedure of the Member State of the proceedings.

Article 3

Lis pendens

If, while a case is pending in one Member State, a criminal prosecution is brought in respect of the same criminal offence in another Member State, the following procedure applies:

(a) preference is given to the forum Member State which will better guarantee the proper administration of justice, taking account of the following criteria:

(aa) the Member State on whose territory the offence has been committed;

(bb) the Member State of which the perpetrator is a national or resident;

(cc) the Member State of origin of the victims;

(dd) the Member State in which the perpetrator was found;

(b) where a number of Member States have jurisdiction and the possibility of bringing a criminal prosecution in respect of a criminal offence based on the same actual events, the competent authorities of each of those States may, after consultation taking account of the criteria mentioned in paragraph (a), choose the forum Member State to be given preference;

(c) where preference is given to the forum of one Member State, proceedings pending in the other Member States shall be suspended until a final judgment is delivered in the Member State whose forum was preferred. Where proceedings are suspended in a Member State, the competent authorities of that State shall immediately inform the corresponding authorities of the Member State

whose forum was preferred. If for any reason no final judgment is delivered in the Member State whose forum was preferred, the competent authorities of the latter shall without delay inform the corresponding authorities of the first Member State which suspended proceedings.

Article 4

Exceptions

1. A Member State may make a declaration informing the General Secretariat of the Council and the Commission that it is not bound by Article 2(1) and (2) if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of his official duties.

2. A Member State which makes a declaration pursuant to paragraph 1 shall specify the categories of offence to which the exception may apply.

3. A Member State may at any time revoke the declaration concerning the exceptions set out in paragraph 1. Such revocation shall be notified to the General Secretariat of the Council and to the Commission and will take effect from the first day of the month following the date of notification. 4. An exception which may be the subject of a declaration pursuant to paragraph 1 will not be applied if the Member State concerned has asked for the same offences to be prosecuted by the other Member State or has ordered the extradition of the person involved.

Article 5

Accounting principle

If a new prosecution is brought in a Member State against a person who has been definitively convicted for the same offences in another Member State the period of deprivation of freedom or fine handed down by that State in respect of those offences shall be deducted from the sentence which he would probably receive. As far as allowed by national law, any penalties other than deprivation of freedom which have been imposed, or penalties imposed in the framework of administrative procedures, shall also be included.

Article 6

Exchange of information between competent authorities

1. If a prosecution has been brought against a person in a Member State and the competent authorities of the latter have reasons to believe that the charge concerns the same acts for which he has been definitively convicted in another Member State, those authorities shall request the relevant information from the competent authorities of the Member State of the proceedings.

2. The requested information shall be provided as soon as possible using all available technical means and shall be taken into account in order to determine whether the procedure is to be continued.

3. Each Member State shall make a declaration to the General Secretariat of the Council and to the Commission indicating the authorities which are authorised to request and receive the information referred to in paragraph 1.

Article 7

Application of broader provisions

The provisions of Articles 1 to 6 shall not preclude the application of broader national provisions on the rule of 'ne bis in idem' when it is connected with judgments delivered abroad.

Article 8

Application

1. Member States shall take the measures necessary to comply with this Framework Decision before . . . (*).

(*) Two years after the date of entry into force of this Framework Decision.

2. Member States shall transmit by the date referred to in paragraph 1 at the latest to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

3. On the basis of this information the Commission shall submit before [. . .] a report to the European Parliament and the Council on the application of this Framework Decision, accompanied where necessary by legislative proposals.

4. The Council shall assess before [. . .] the measures adopted by the Member States in order to comply with the provisions of this Framework Decision.

Article 9

Repeal

Articles 54 to 58 of the 1990 Schengen Convention shall be repealed upon the entry into force of this Framework Decision. Where a Member State transposes this Framework Decision before that date, pursuant to Article 8(1), the provisions in question shall cease to apply to the Member State concerned from the date of transposition.

Article 10

Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Union.
Done at Brussels,
For the Council
The President

Initiative for a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues

Official Journal C 100 , 26.4.2003, p. 27

Article 7 "Jurisdiction and prosecution"

"Each Member State shall take the necessary measures to establish its

jurisdiction over the offences referred to in Articles 2 and 3 where:

(a) the offence is committed in whole or in part within its territory;

(b) the perpetrator is one of its nationals; or

(c) the offence is committed for the benefit of a legal person established in its territory."

22 July 2003
Framework Decision on Combating Corruption in the Private Sector
Official Journal L 192, 31/07/2003, p. 54

Article 7, "Jurisdiction"

"1. Each Member State shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, where the offence has been committed:

(a) in whole or in part within its territory;

(b) by one of its nationals; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. Any Member State may decide that it will not apply the jurisdiction rules in paragraph 1(b) and (c), or will apply them only in specific cases or circumstances, where the offence has been committed outside its territory.

3. Any Member State which, under its domestic law, does not as yet surrender its own nationals shall take the necessary measures to establish its jurisdiction with regard to the offences referred to in Articles 2 and 3, when committed by its own nationals outside its territory.

4. Member States which decide to apply paragraph 2 shall inform the General Secretariat of the Council and the Commission accordingly, where appropriate with an indication of the specific cases or circumstances in which the decision applies."

22 December 2003
Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography
Official Journal L 13, 20/01/2004, p. 44

Article 8, "Jurisdiction and prosecution":

"1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2, 3, and 4 where:

(a) the offence is committed in whole or in part within its territory;

(b) the offender is one of its nationals; or

(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1 (b) and 1 (c) where the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2, 3 and 4 when it is committed by one of its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

5. Each Member State shall ensure that its jurisdiction includes situations where an offence under Article 3 and, insofar as it is relevant, under Article 4, is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory.

6. Each Member State shall take the necessary measures to enable the prosecution, in accordance with national law, of at least the most serious of the offences referred to in Article 2 after the victim has reached the age of majority."

24 February 2005
Council Framework Decision on attacks against information systems
Official Journal L 69, 16.3.2005, p. 67

Article 11, Jurisdiction

"1. Each Member State shall establish its jurisdiction with regard to the offences referred to in Articles 3, 4 and 5 where the offence has been committed:

(a) in whole or in part within its territory; or

(b) by one of its nationals and the act affects individuals or groups of that State; or

(c) for the benefit of a legal person that has its head office in the territory of that Member State.

2. When establishing jurisdiction in accordance with paragraph (1)(a), each Member State shall ensure that it includes cases where:

(a) the offender commits the offence when physically present on its territory, whether or not the offence is against an information system on its territory; or

(b) the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory.

3. A Member State which, under its law, does not as yet extradite or surrender its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, the offences referred to in Articles 2, 3, 4 and 5, when committed by one of its nationals outside its territory.

4. Where an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account may be taken of the following factors:

– the Member State shall be that in the territory of which the offences have been committed according to paragraph 1(a) and paragraph 2,

– the Member State shall be that of which the perpetrator is a national,

– the Member State shall be that in which the perpetrator has been found.

5. A Member State may decide not to apply, or to apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c).

6. Member States shall inform the General Secretariat of the Council and the Commission where they decide to apply paragraph 5, where appropriate with an indication of the specific cases or

circumstances in which the decision applies.

12 July 2005
Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution
Official Journal L 255, 30.09.05, p.164

Article 7, Jurisdiction

1. Each Member State shall take the measures necessary to establish its jurisdiction, so far as permitted by international law, with regard to the offences referred to in Articles 2 and 3 where the offence has been committed:

(a) fully or in part in its territory;

(b) in its exclusive economic zone or in an equivalent zone established in accordance with international law;

(c) on board of a ship flying its flag;

(d) by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction;

(e) for the benefit of a legal person with a registered office in its territory;

(f) outside of its territory but has caused or is likely to cause pollution in its territory or its economic zone, and the ship is voluntarily within a port or at an offshore terminal of the Member State;

(g) on the high seas, and the ship is voluntarily within a port or at an offshore terminal of the Member State.

2. Any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in:

(a) paragraph 1(d);

(b) paragraph 1(e).

3. Member States shall inform the General Secretariat of the Council accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

4. When an offence is subject to the jurisdiction of more than one Member State, the relevant Member States shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the detailed arrangements for mutual assistance.

5. The following connecting factors shall be taken into account :

(a) the Member State in whose territory, exclusive economic zone or equivalent zone the offence was committed;

(b) the Member State in whose territory, exclusive economic zone or equivalent zone the effects of the offence are felt;

(c) the Member State in whose territory, exclusive economic zone or equivalent zone a ship from which the offence was committed is in transit;

(d) the Member State of which the perpetrator of the offence is a national or a resident;

(e) the Member State in whose territory the legal person on whose behalf the offence was committed has its registered office;

(f) the Member State of the flag of the ship from which the offence was committed.

6. For the application of this Article, the territory includes the area referred to in Article 3(1)(a) and (b) of Directive 2005/35/EC.

C. EU AND INTERNATIONAL RULES ON COORDINATION OF PROSECUTIONS

15 May 1972
Council of Europe
European Convention on the Transfer of Proceedings in Criminal Matters
ETS No. 073

Article 8:

"1. A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:

a) if the suspected person is ordinarily resident in the requested State;

b) if the suspected person is a national of the requested State or if that State is his State of origin;

c) if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

d) if proceedings for the same or other offences are being taken against the suspected person in the requested State;

e) if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;

f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;

g) if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;

h) if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;

2. Where the suspected person has been finally sentenced in a Contracting State, that State may request the transfer of proceedings in one or more of the cases referred to in paragraph 1 of this article only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence."

26 July 1995
Convention on the protection of the European Communities' financial interests
Official Journal C 316 of 27 November 1995, page 49

Article 6, "Cooperation":

"1. If a fraud as define in Article 1 constitutes a criminal offence and concerns at least two Member States, those States shall cooperate in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. When more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member State where possible."

26 May 1997

Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union

Official Journal C 195 of 25 June 1997, page 2

Article 9, "Cooperation":

"1. If any procedure in connection with an offence established in accordance with the obligations arising out of Articles 2, 3, and 4 concerns at least two Member States, those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member States[151] where possible."

21 December 1998

Joint Action on Making it a Criminal Offence to Participate in a Criminal Organisation in the Member States of the EU

Official Journal L 351 of 29/12/1998, p. 1

Article 4:

"(…)

Where several Member States have jurisdiction in respect of acts of participation in a criminal organisation, they shall consult one another with a view to coordinating their action in order to prosecute effectively, taking account, in particular, of the location of the organisation's different components in the territory of the Member States concerned."

29 May 2000

Framework Decision on Increasing Protection by Criminal Penalties and other Sanctions against Counterfeiting in Connection with the Introduction of the Euro

Official Journal L 140, 14/06/2000, p. 1

Article 7, "Jurisdiction":

"(…)3. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which Member State shall prosecute the offender or offenders with a view to centralising the prosecution in a single Member State where possible."

Proposal for a Council framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking

Official Journal C 304 E, 30.10.2001, p. 172

Article 10 "Cooperation between Member States"

"1. In accordance with the conventions, bilateral and multilateral agreements and other arrangements in force, the Member States shall lend each other every possible assistance in the procedures relating to the offences referred to in Articles 2 and 3.

2. If several Member States have jurisdiction over an offence referred to in Article 2 or 3, they shall consult one another with a view to coordinating their action and, where appropriate, to bringing a prosecution. They shall make full use of judicial cooperation and other mechanisms.

[151] Sic.