Addressing the Problems of Jurisdictional Conflicts in Criminal Matters within the EU

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Article

ABSTRACT

The current EU approach to jurisdictional conflicts is discussed in the first part of this article. The article highlights the persistent problems of the existing legal framework as well as those emanating from Eurojust's approach to the matter. After linking the topic with the ne bis in idem principle, the Member States' interests in prosecuting criminal offenses under their competence, and the EU's objective in the AFSJ when fighting impunity, the author presents some pivotal reflections on a better solution in the second part. Any solution first and foremost has to respect the EU's main characteristic as a supranational organisation aligned to its constitutional treaties and to its Charter of Fundamental Rights. Within this framework, the article:

- Opts for models that not only solve but also prevent conflicts of jurisdiction
- Highlights the possibility of distinguishing between more flexible and less flexible models;
- Illustrates a model based on the territoriality principle (locus delicti criterion) for both the assignment of jurisdiction and conflict resolution
- Advocates a model with definitive and binding jurisdictional rules on: forum selection, proceedings and rights of concerned persons, arguing that it is of secondary importance whether such a model would be construed horizontally (i.e., through interaction between competent state authorities) or vertically (i.e., by giving a substantial role to Eurojust and the ECJ)

The article also discusses other critical issues that are affected by the EU's choice to safeguard the ne bis in idem principle within the framework of preventing and solving jurisdictional conflicts, e.g., the exclusion of parallel investigations, the rights of suspects and victims to intervene in the proceedings judicial review of the relevant decisions, etc. Lastly, it addresses the legal basis of the EU's competence to regulate jurisdictional conflicts and the proper legal instruments to be used according to the characteristics.

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I. The Current EU Approach on Jurisdictional Conflicts and the Persisting Questions

Even after the entry into force of the Lisbon Treaty, *the ne bis in idem principle*, which was reformulated in Art. 50 CFR,[1] does not hinder several states from prosecuting and adjudicating against a person for the same criminal act. The pursuit and conclusion of such cases depend procedurally on the Member State that finalises the decision first (“first come-first served principle”).[2] From that point on, *ne bis in idem* is applicable. This is *substandard for both the states and the persons involved*[3].

To date, the majority of the *EU's legislative instruments* invite Member States to criminalize certain criminal behavior and to establish corresponding *extraterritorial* jurisdictional competence.[4] Thus, the odds for jurisdictional conflicts increase. It seems, however, that this is a way to avoid impunity in the EU. Fighting impunity is a legitimate objective in the EU area of freedom, security and justice. All the same, when this approach is pursued in the above-mentioned manner, it creates significant problems, on the one hand, as it is doubtful whether it presents any significant added value in terms of efficiency. On the other hand, common rules on jurisdiction do not exist at the EU level. Indeed, EU legal instruments obligate Member States to coordinate actions when deciding which Member State is to prosecute when jurisdictional conflicts arise. However, they provide neither tangible criteria for such coordination nor a concrete relevant procedure.

Today, Eurojust for its part is actually maintaining or even triggering parallel criminal proceedings.[5] This amounts to maintaining or even triggering conflicts of jurisdiction. The justification of Eurojust with regard to triggering parallel criminal proceedings, i.e., causing conflicts of jurisdiction, obviously concerns the effectiveness of criminal investigations. This approach is quite problematic for several reasons.[6]

- First, it opposes the very concept of preventing conflicts of jurisdiction in the EU and overall it seems inconsistent with Art. 82 TFEU. Since preventing and settling conflicts of jurisdiction is a clear objective of EU primary law, conflicts of jurisdiction cannot be used as an instrument to enhance the effectiveness of investigations.

- Second, as a result of the fact that criminal proceedings directly affect the suspect's or accused person's fundamental rights – but also for the purpose of determining the truth regarding the commission of a criminal offence and thus serving the administration of justice –, the Member States and the EU have established specific safeguards and rights that apply to criminal proceedings Since many of these guarantees, which are also included in the Charter of Fundamental Rights of the European Union, are violated by criminal proceedings in which conflicts of jurisdictions occur, effectiveness is not a valid justification for maintaining the conflicts (and, incidentally, ECJ case law increasingly confirms that legality is superior to effectiveness).

- Third, the problems emanating from parallel criminal proceedings should not be overlooked due to the lack of rules governing the practical aspects of such situations (for example, the fact that there are no procedures by which to end criminal proceedings in certain Member States in which Eurojust merely triggered the proceedings to collect evidence and no longer has any use for them).

- Fourth, using the initiation of criminal proceedings before a national court as a tool to obtain evidence for criminal proceedings before another court would be unthinkable in the context of one and the same legal order. Obviously, this should be what the EU aims at when constructing the area of freedom, security and justice.

It is true, of course, that Eurojust – authorised under Art. 85 TFEU to aid in jurisdictional conflict resolution – has issued relevant guidelines on jurisdiction.[7] The guidelines, which follow no hierarchical pattern, are not binding on Member States and lack a set of fixed criteria,.

This makes the competent forum in a transnational case impossible to foresee and thus renders the *nullum crimen nulla poena sine lege* principle (Art. 49 (1) CFR) void, given that the it also covers the forum for the criminal act, and consequently a person's "legal and *ex ante* defined judge" in the EU common area of justice. Such a situation is not tolerable, especially for suspects, because it frankly jeopardizes their rights. But it is also inacceptable for the states themselves, which might be deprived from exercising their penal power, although they might have a stronger link to the case than the legal order that was the first to adjudicate.

Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction does not exclude such effects either.[8] In fact, by lacking firm criteria and the outcome of consultation proceedings having a binding effect, it is likewise deficient, envisaging no safeguards whatsoever for the rights of involved persons as regards the forum choice. Above all, suspects have to carry the burden of uncertainty until a final decision on their case is issued in one of the EU Member States as well as that of ambiguity as to the exact forum that will adjudicate first. In this context, we should bear in mind that the forum might not even be the *locus delicti* or even one chosen by the prosecuting authorities as the most favorable for them. As a result of the lack of firm criteria for selecting the adjudicating forum with regard to transnational cases, forum shopping both by prosecuting authorities and by perpetrators cannot be forestalled.

The existing institutional framework shows that the Union practically accepts its Member States' sovereignty as a priority when deciding on forum selection and on possible jurisdictional conflicts. The wider the discretion afforded to states to resolve jurisdictional matters in criminal cases in a non-binding manner, the stronger the threat against citizens' rights.

II. Reflections on a Better Solution

Thus, the question raised is whether it is possible for the EU to reach a better solution. This question can be answered in the affirmative. A better solution with regard to the prevention and/or settlement of jurisdictional conflicts within the EU requires first and foremost a fundamental understanding that the Union is a *supranational organisation aligned to its constitutional treaties (TEU and TFEU) and to its Charter of Fundamental Rights.*

Different models could be suggested for addressing the problems of jurisdictional conflicts.[9] The one presently incorporated in FD 2009/948/JHA introduces a *horizontal* design entailing direct interaction and mutual consultation between competent Member State authorities to decide on jurisdiction, supplemented by a *vertical* component if there is lack of consensus (i.e., cooperation with Eurojust, Art. 13 FD 2009/948/JHA). This method covers the *settlement* of jurisdictional conflicts, but not their *prevention* and has the above-mentioned flaws. An alternative model could also be vertically focused, by envisaging a more active role for Eurojust – even from the very beginning.

However, in the absence of definitive and binding jurisdictional rules on: (i) forum selection, (ii) procedure, and (iii) rights of concerned persons, neither model can properly serve the essence of the EU selection to safeguard *ne bis in idem* as a fundamental right. Therefore, the core prerequisite concerns European rules that cover all relevant issues and hence set a minimum level of required protection and a clear procedural framework. It is of secondary importance whether or not these imperatives will be implemented mostly horizontally (i.e., through interaction between competent states' authorities) or vertically (i.e., by acknowledging a substantial role for Eurojust and the ECJ).

One should, however, also consider models, already proposed by scholars and bar associations, which aim to *prevent* jurisdictional conflicts in the first place. Such solutions better convey the essence of the selection made by the European constitutional legislator with the present system of safeguarding *ne bis in idem* in Art. 50 CFR.

Even within the framework of such models, one can distinguish between more and less flexible ones. For example, the "territoriality principle"[10] could become the rule for assignment of jurisdiction and conflict resolution without exception; when more Member States fulfill the *locus delicti* (territoriality) criterion, one of them could be selected to exercise jurisdiction by applying *additional* criteria. The latter could be prioritized according to their degree of relevance to the offence (e.g., *locus delicti* in terms of majority/center of criminal activities or of criminal outcome, defendant's domicile or habitual residence). Such benchmarks constitute a much more transparent – albeit less flexible – formula when more states fulfill the territoriality criterion. By preventing jurisdictional conflicts before they even arise, such models defend the *ne bis in idem* principle much more effectively. However, conflicts might still occur when more Member States fulfill the set of criteria or when they have foreseen exceptions considered essential to protecting legitimate defendant interests or to focusing on the alleged acts, considering in particular the subsequent local prerequisites for obtaining evidence.

Nonetheless, the EU's choice to safeguard the *ne bis in idem principle* within the framework of preventing and solving jurisdictional conflicts also affects *other critical questions,* ,e.g.: (i) Should the prevention of jurisdictional conflicts also cover the investigative phase by excluding parallel investigations?; (ii) What should the main characteristics of a procedure be that prevents and/or settles jurisdictional conflicts?; (iii) Should the right to intervene be recognized for the suspect or even for the victim?; (iv) Should settlement decisions be judicially reviewable?

One could argue that *parallel investigations* are neither reasonable nor necessary in a common area of freedom, security and justice under gradual yet unremitting enhancement.[11] The dynamics of the current regime of judicial cooperation in criminal matters render this approach understandable. *Exclusive jurisdiction models* (even including the investigative stage) naturally require an adequate and comprehensive regulatory framework and a provision for transferring proceedings to another Member State, if investigations push in such a direction at a later point in time. However, *such provisions need to safeguard suspects' rights* and should thus foresee that any such transfer does not take place after conclusion of the investigation stage.

The *2009 initiative on transferring criminal proceedings* has certain positive points, but it does not appear to be an appropriate solution for an EU legislative act based on the current developments. The positive aspects of the 2009 initiative are mainly the fact that it included a list of criteria in Art. 7 ("criteria for requesting transfer of proceedings") as well as the fact that it was comparatively detailed. However, the overall approach of the proposal towards transferring proceedings (i.e., basically as the right of a Member State to ask for the transfer of proceedings in order to increase the efficiency of prosecution) does not correspond to the current legal bases of the Treaties, namely Art. 82 TFEU. Introducing a Member State's right to ask for a transfer of criminal proceedings regardless of a conflict of jurisdiction severely *adds* to the problems emanating from conflicts. In addition, several elements of this initiative amounted to expressions of state interests and are thus alien to the legal regime introduced by the Treaty of Lisbon. Likewise, the initiative lacked any mention of concrete safeguards for individual rights, so it is not suitable for use as such today.

Thus, transferring criminal proceedings should be examined from the start and on a new basis. Most importantly, it should be examined within the context of resolving conflicts of jurisdiction and for the purpose of dealing with procedural challenges relating to these conflicts; hence, any EU provision on the subject would be covered by Art. 82(1)(b) TFEU. Transfers should be regulated as a stage of the procedure of resolving a conflict and, in particular, the stage that follows the choice of forum and the decision as to which Member

State should prosecute and where to concentrate the proceedings. The respective provisions should thus be incorporated or, at least, be linked to the legal framework that will be constructed for resolving the conflicts. In comparison to the 2009 initiative, they should not include any criteria themselves (the choice of forum will have to be taken much earlier), whereas they should include rules on ceasing the proceedings in the transferring Member States, so that the defendant need not face multiple proceedings. They should also provide for the procedural rights of the individuals concerned, i.e., rights tailored to the transfer procedure.

Furthermore, allowing suspects to safeguard their rights makes sense, especially where models leave room for a decision on different or exceptional criteria. When exceptional criteria apply that serve the interests of the suspect/defendant, then victims could be allowed to challenge such decisions.

Arguments related to the essence of the principal mindset of integrating *ne bis in idem* into the Charter's framework as a fundamental right are also helpful when deciding on the issue of *allowing the suspect to exercise a right to judicial review by the ECJ when the Member State argues for its right to prosecute*. Both sides should be heard during a procedure that attempts to weigh their conflicting interests and finalize a state's investigative and adjudicative competence. The legislative act (regulation/directive) that will provide for the prevention and resolution of conflicts of jurisdiction should attribute such criteria to the decision on which Member State should prosecute, so as to enable the application of Art. 263(4) TFEU ("act addressed to a natural or legal person or which is of direct and individual concern to them"). National authorities reporting to Eurojust are by no means equivalent to a judicial review. Triggering criminal proceedings to avoid impunity in *specific situations* should be considered only as an exception, in predetermined cases where *impunity actually occurs* (e.g., when there is unwillingness to prosecute due to high-level corruption in a Member State) and within a framework regulating the issue.[12]

III. Does the EU Have Competence to Regulate Jurisdictional Conflicts?

Last but not least, the question of whether the EU has the competence to regulate jurisdictional conflicts is clearly to be answered in the affirmative by Art. 82 (1)(b) TFEU, which stipulates: "… The European Parliament and the Council acting in accordance with the ordinary legislative procedure, shall adopt measures to: … b. prevent and settle conflicts of jurisdiction between Member States … " Thus, both a regulation and a directive could be considered; the type of legal instrument preferred depends on the model to be chosen. Vertical models, for instance, would make a regulation more appropriate.

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1. Several scholars (e.g., *M. Böse,* in Böse/ Meyer/ Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Vol. II, 2014, pp. 146 et seq.) and the ECJ in Spasic (27 May 2014, C-129/14 PPU) read in Art. 50 CFR the same restrictions as provided for in Arts. 54 and 55 CISA.↩
2. P. Asp*, The procedural criminal law cooperation of the EU*, 2016, pp. 91–93.↩
3. For further arguments and bibliographical references on the problems related to jurisdictional conflicts in criminal matters within the EU as well as on relevant proposals, see M. Kaiafa-Gbandi, "Jurisdictional conflicts in criminal matters and their settlement within EU's Supranational settings" (2017) *European Criminal Law Review (EuCLR)*, 30 et seq.; Ath. Giannakoula, "Impunity and conflicts of jurisdiction within the EU: the role of Eurojust and challenges for fundamental rights", in: L. Marin/S. Montaldo (eds.), *The Fight Against Impunity in EU law*, 2020, pp. 117 et seq.↩
4. Cf. P. Caeiro, "Jurisdiction in criminal matters in the EU: negative and positive conflicts and beyond" (2010), *KritV*, 366, 373.↩
5. See Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (updated 2018), pp. 3, 9.↩
6. Ath. Giannakoula, "Impunity and conflicts of jurisdiction within the EU: the role of Eurojust and challenges for fundamental rights", in: L. Marin/S. Montaldo (eds.), *The Fight Against Impunity in EU law*, 2020, pp. 126 et seq.↩
7. Eurojust, Guidelines for deciding "Which Jurisdiction Should Prosecute?" (revised 2016).↩
8. Giannakoula, *op. cit*. (n. 6), pp. 122 et seq.↩
9. See, e.g., K. Ambos, Internationales Strafrecht, 3rd ed., 2011, § 4; Biehler/Kniebühler/Lelieur-Fischer/Stein (eds.), Freiburg proposal on concurrent jurisdictions and the prohibition of multiple prosecutions in the European Union, 2003; Bitzilekis/Kaiafa-Gbandi/Symeonidou-Kastanidou, "Alternative thoughts on the regulation of transnational criminal proceedings in the EU", in B. Schünemann (ed.), A programme for European Criminal Justice, 2006, pp. 250 et seq, 493 et seq.; Böse/Meyer/Schneider (eds.), Conflicts of Jurisdiction in Criminal Matters in the European Union, Vol. II,

pp. 381 et seq.; Bundesrechtsanwaltskammer (Stellungnahme Nr. 33/2016, Oktober 2016), Eckpunktepapier: Für eine klare, verässliche und verbindliche Regelung zur Vermeidung paralleler Strafverfolgung in der Europäischen Union; P. Caeiro,(2010) KritV, op. cit. (n. 4),, 374; A. Eickert, Transstaatliche Strafverfolgung: Ein Beitrag zur Europäisierung, Internationaölisierung und Fortentwicklung des Grundsatzes ne bis in idem, 2004; European Law Institute, Draft legislative proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union (Reporters: K. Ligeti/J. Vervaele/A. Klip), available via <https://www.europeanlawinstitute.eu/projects-publications/publications/> (accessed 26 October 2020); H. Fuchs, "Zuständigkeitsordnung und materielles Strafrecht", in: B. Schünemann (ed.), Ein Programm für die europäische Strafrechtspflege, 2006, pp. 112 et seq.; W. Gropp, Kollision transnationaler Strafegewalten nulla prosecution transnationalis sine lege, in: A. Sinn (ed.), Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität, 2012, pp. 41 et seq.; L. Hein, Zuständigkeitskonflikte im internationalen Strafrecht. Ein europäisches Lösungsmodell, 2002; A. Klip, Criminal Law in the European Union, 2005, pp. 79 et seq.; O. Lagodny, Empfiehlt es sich eine europäische Gerichtskompetenz für Strafgewaltkonflikte vorzusehen?, Gutachten im Auftrag des Bundesministeriums der Justiz, 2001, <http://www.uni-salzburg.at/strafrecht/lagodny>, B. Schünemann (ed.), Ein Programm für die europäische Strafrechtspflege, 2006; A. Sinn (ed.), Jurisdiktionkonflikte bei grenzüberschreitender Kriminalität, 2012, pp. 575 et seq.; H. Thomas, Das Recht auf Einmaligkeit der Strafverfolgung. Vom nationalen zum internationalen ne bis in idem, 2002; Vander Beken/Vermeulen/Steverlynck/Thomaes, Finding the best place to prosecute, 2002; F. Zimmermann, Strafgewaltkonflikte in der Europäischen Union, 2014, pp. 369 et seq. For a systematic presentation of different models proposed for the prevention and/or settlement of jurisdictional conflicts in criminal matters and their critical evaluation, see in particular F. Zimmermann, ibid., pp. 320 et seq.↩

10. Cf. Bitzilekis/Kaiafa-Gbandi/Symeonidou-Kastanidou, *op. cit.* (n. 9) , pp. 250 et seq, 493 et seq.; P. Caeiro,(2010) KritV, *op. cit.* (n. 4), 374; H. Fuchs, , *op. cit.* (n. 9), 362 et seq.↩
11. See, for a relevant model, B. Schünemann (ed.), *op. cit.* (n. 9), pp. 257 et seq.↩
12. Ath. Giannakoula, *op. cit.* (n. 6), p. 135.↩

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