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ADDENDUM TO THE INITIATIVE

from :	Council General Secretariat
to :	Delegations
Subject :	Proposal for a COUNCIL FRAMEWORK DECISION on prevention and settlement of conflicts of jurisdiction in criminal proceedings

EXPLANATORY REPORT

Council Framework Decision
on prevention and settlement of conflicts of jurisdiction in criminal matters

Grounds and objectives of the proposal

Owing to the increase in the movement of persons and capital in the European Union ("EU"), advances in technology which took place in the last decades and the extraterritorial application of national jurisdictions in a number of Member States, the criminal justice systems of the EU Member States are increasingly confronted with situations where several Member States have criminal jurisdiction to investigate and bring to trial the same facts relating to the commission of criminal offences.

This means that two or more Member States may for example be able to establish their jurisdiction for the same facts in situations where the commission of a criminal offence involves the territory of several Member States or the effects of an offence are felt in the territory of several Member States. If in these cases it is discovered that two or more Member States are conducting criminal proceedings for the same facts and against the same person, this may lead to a conflict of jurisdiction as the respective authorities exercise their respective competences in parallel. Moreover, in such situations it may be also discovered that two or more Member States are not conducting criminal proceedings against the same person, but are doing so for the same facts or for related facts involving different person(s). Even though such cases do not lead necessarily to conflict as such, it may be appropriate to ensure close cooperation between the respective authorities in order to improve the efficiency of the criminal proceedings and thus enhance the proper administration of justice.

In the interests of effective justice, in light of the aim of the EU to create a common area of Freedom, Security and Justice where primarily the legal certainty for citizens must be guaranteed by avoiding situations which might result in ne bis in idem cases and in order to improve judicial cooperation in criminal matters between the authorities which exercise parallel competence, it is necessary to ensure that in situations where the facts leading to the commission of a criminal offence fall within the jurisdiction of more than one Member State, criminal proceedings are conducted in the best placed jurisdiction and that this jurisdiction is chosen in a transparent and objective way.

Therefore it should be the overriding aim for authorities of the Member States, which are conducting criminal proceedings for the same facts against the same person to agree to concentrate the proceedings in a single jurisdiction, having regard to the specific circumstances of each case In order to ensure that the jurisdiction chosen is the most appropriate one to conduct the proceedings, it is imperative that the respective authorities should be able to exchange information with each other so as to become aware promptly and at an early stage of national proceedings which are ongoing in another jurisdiction. Where proceedings in two or more Member States are conducted for the same or related facts but against different persons, a proper and early exchange of information within the mechanism of direct consultations must be ensured in order to discuss whether concentration of the proceedings in a single jurisdiction is appropriate and effective or to find another effective solution concerning the negative aspects of parallel exercise of competence.

At present, the level of exchange of information relating to cases which may give rise to the situations described above cannot be described as satisfactory. Currently, national authorities may initiate proceedings for facts that are significantly linked to another Member State and proceed to the trial stage without having informed the authorities of that Member State. It might be argued that the authorities of the Member State which is linked to the ongoing proceedings of another Member State would eventually be informed of such proceedings because at some point they would be requested to provide assistance, such as a request to transfer the proceedings, gather evidence or request execution of an European Arrest Warrant, or because the accused person or defendant would raise the question during the trial.

This, however, cannot be considered as sufficient for various reasons.

First of all, such assistance would not always be necessary as sometimes in a cross-border crime there would be enough evidence to bring the case to trial in the jurisdiction where the crime has been detected or a person arrested. Second, a request to assist another Member State does not necessarily arrive at an early stage of the proceedings. Third, jurisdiction issues would not usually be part of such requests and, most importantly, the responsible authorities dealing with such requests are not obliged to raise or even to discuss the question of the best placed jurisdiction.

Owing to the unsatisfactory level of information exchange and the lack of an obligation to enter into consultations on the best placed jurisdiction in situations where there are parallel ongoing proceedings in two or more Member States for the same facts involving the same persons, or for the same or related facts involving different persons(s), in certain situations the choice of jurisdiction is made without any transparency or consideration of any of the characteristics of the various jurisdictions of Member States dealing with the case. This may lead to situations where the jurisdiction in which the proceedings actually take place is not the best placed one. Under the current legal framework, it could be argued that the choice of jurisdiction for specific facts which could be the subject of criminal proceedings in several Member States is left to chance and that this is governed by a "first come-first served" rule. Moreover, parallel proceedings are ineffective, as they amount to dual investment of time, money and energy on part of judicial authorities. This consideration is all the more important in the light of the broad applicability of the EU wide trans-national *ne bis in idem* principle, which is contained in Articles 54-58 of the Convention Implementing the Schengen Agreement, as interpreted by the ECJ in several recent cases[1]. Within the scope of applicability of this principle it is more than obvious that parallel proceedings for the same facts involving the same persons will eventually result in the impairment of the legal certainty of individuals and one of the proceedings will in fact inevitably result into a waste of resources.

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[1] See for example cases C-187/01 and C-385/01 Gözütok and Brügge, C-469/03 Miraglia, C-436/04 Van Esbroeck, C-367/05 Kraaijenbrink

Thus the current legislative status quo does nothing to enhance national authorities' awareness of actual jurisdiction conflicts or their ability effectively to resolve such conflicts. This would not be the case if the national authorities concerned took the initiative to notify other Member States about their proceedings.

In line with the aim of creating a common European area of freedom, security and justice, it therefore becomes necessary to take action so as to eliminate the deficits of the existing legal framework.

The proposed action aims to achieve, in particular, the following objectives:

- avoid, as early in the proceedings as appropriate,[1] situations where the same person is subject to parallel criminal proceedings in different Member States which might lead to ne bis in idem situations;

- ensure closer cooperation in the exercise of the competence of two or more Member States to conduct criminal proceedings in respect of the same facts involving the same person(s) or in respect of the same or related facts involving different person(s) or in respect of the same criminal organization.

Such objectives should be achieved through the following means:

1. ensuring that there is sufficient exchange of information between Member States, from an early stage, about ongoing proceedings which are significantly linked to another jurisdiction,

[1] The precise moment will depend upon the discretion of the competent authority in the MS.

2. making it possible for the authorities of the Member States concerned to enter into direct consultations with each other in order to agree which one is the best placed jurisdiction for conducting the criminal proceedings,

3. putting in place transparent rules and common criteria which will be applied when Member States are seeking the agreement on the best placed jurisdiction.

These improvements in the exchange of information and the creation of a procedural framework for direct consultations and rules for reaching an agreement could bring multiple benefits for judicial cooperation in the EU. In addition to the more effective avoidance of negative aspects of jurisdiction conflicts, the improved awareness of each other's proceedings, the better determination of the place of the criminal proceedings and the increased transparency and greater objectivity to the way the place for the trial is chosen, the following further benefits could also be expected:

- better coordination of parallel investigations and more efficient allocation of resources between the authorities of the Member States which are concerned by the same or related facts;
- more thorough consideration of the rights and interests of individuals in relation to the place of the trial including the victims protection;
- less likelihood of parallel or repeated criminal proceedings for the same facts;
- better application of the principle of mutual recognition both in the pre-trial and post-trial stage as the Member States concerned could be consulted on the place of the criminal proceedings from an early stage; and
- fewer instances where evidence is gathered in a manner which is incompatible with the law of the place where the criminal proceedings will be conducted since the venue of the trial can be decided jointly by the Member States concerned before these measures are sought.

The phenomenon of parallel criminal proceedings for the same facts involving the same persons, or parallel criminal proceedings for the same or related facts involving different person (s) that are conducted in two or more Member States is occurring ever more often throughout the European Union. This observation is empirically supported by the results of the survey based on the questionnaire the Czech Republic has drawn up and submitted to the Member States and Eurojust in October 2008.

The questions contained in the questionnaire sent to the Member States was intended to find out the indicative number of parallel criminal proceedings for the same facts that had been revealed in the Member States in recent years, at what stage it was identified that there was a conflict of jurisdiction, how it was resolved, and whether Eurojust was involved or a report was issued on particular problems in communication with the authorities of other Member States. The questionnaire also included questions concerning the prediction of growth of such cases and whether such cases might exist unknown to the authorities.

Concerning the questionnaire sent to Eurojust, it addressed the numbers of cases of conflicts of jurisdiction referred to Eurojust, the nature of those cases, the timing of the referral and the methods of resolving such conflicts. Officially there are 52 cases registered as conflicts of jurisdiction in the Eurojust Case Management System, where approximately two thirds of the cases are bilateral and the rest multilateral. Eurojust reported that such cases are often revealed through MLA requests for competing European Arrest Warrants. Eurojust itself may discover them when cross checking, and in the framework of coordination meetings. Another question concerned the duration of the cases of conflict of jurisdiction, where Eurojust stated that the average time from registration of the case until its closure is around 10 months; however, this information refers only to the period of the registration of the case in the Case Management System and is not related to the resolution of the cases of conflicts of jurisdiction.

The replies to the questions (21 Member States plus Eurojust) are presented in a separate document of the Council Secretariat General (17308/08 COPEN 254 + ADD 1; a summary is set out in 17553/08 COPEN 263).

An annex is also attached to this explanatory report to illustrate the nature and description of the facts of some cases of conflicts of jurisdiction which were identified in Czech judicial practice, as well as cases dealt with by Eurojust.

Background and existing provisions in the area covered by the proposal

As shown above, the current EU legal framework cannot ensure that the authorities of the Member States are aware of each others' ongoing proceedings when the facts of a case could lead to a conflict of jurisdiction or where the facts are related. Moreover, there is no EU-wide binding procedure in place which would facilitate joint discussions on the best placed jurisdiction for the criminal proceedings in such cases.

In 2000 in its Communication on mutual recognition of final decisions in criminal matters,[1] the Commission suggested laying down jurisdiction rules which would have given exclusive jurisdiction to a single Member State. The feasibility of such an approach was examined at an experts' meeting in December 2001. A large majority of the experts and practitioners were skeptical about such a system; they underlined the need for flexibility and to ensure that the competent national authorities would be able to take into account the specific circumstances of each individual case when choosing the most appropriate forum for trying a case.

[1] COM(2000)495 final, chapter 13, notably Chapter 13.2.

These findings were confirmed both by a project under the EU Grotius programme [1] and a seminar organized by Eurojust in November 2003 on Eurojust's competence to issue requests on determining jurisdiction. In this respect, it should be noted that the Guidelines laid down by Eurojust following the seminar, which brought together practitioners and researchers from a wide range 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".

Further, the initiative of the Hellenic Republic (February 2003, a proposal for a Framework Decision on *ne bis in idem)* [2] should be noted. In addition to the principle of *ne bis in idem* it contained provisions which related to the resolution of jurisdiction conflicts. 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 combating terrorism, but without referring to an order of priority unlike that Framework Decision or the Framework Decision on attacks against information systems[3]. The Member States could not agree on this initiative, in particular on various issues relating to the subject of *ne bis in idem*, and as a result discussions came to a halt. It should be however emphasized that the current proposal differs to a great extent from the proposal of the Hellenic Republic, as it does not deal with the principle of *ne bis in idem* as such and concentrates prima facie on the exchange of information on ongoing criminal proceedings and on rules on resolving the conflicts of jurisdiction. However, as pointed out above, the very existence of *ne bis in idem* principle is a fundamental reason for the establishment of mechanism as is the one laid down in present proposal which as a kind of a preventive measure approach diminishes the probability of the *ne bis in idem* situations.

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[1] Project no. 2001/GRP/025.
[2] OJ C100, 26.04.03, p.24
[3] OJ L69, 16.3.2005, p.67.

In 2005 the Commission gave consideration to the current legal framework in the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* [1] (the "Green Paper"). Additionally, in that Green Paper the Commission outlined possibilities for creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction and made suggestions which aimed at clarifying the scope and the applicability of the EU wide trans-national *ne bis in idem* principle, which is contained in Articles 54-58 of the Convention Implementing the Schengen Agreement. The present proposal does not comprise nor does it define the concept of *ne bis in idem* as such and generally does not follow other proposals included in the Green Paper; for example it does not establish a body which would give binding decisions. The present proposal is also linked appropriately with the Eurojust decision in order to have a complementary system, unlike the Green Paper.

At present there are various EU instruments dealing with specific types of criminality, which require Member States to extend their national jurisdiction beyond the territoriality principle for certain offences – e.g. with the active or passive personality principles. However, these provisions do not oblige Member States to exercise their jurisdiction in specific cases. Such provisions can be found in 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)[2], the Convention on the Fight against Corruption of 26 May 1997 (Article 7),[3] and the Framework Decisions on the protection of the Euro against counterfeiting (Article 7),[4] combating fraud and counterfeiting of non-cash means of payment (Article 9),[5]combating terrorism (Article 9),[6] combating trafficking in human beings (Article 6),[7] strengthening the penal framework

1 COM (2005) 696
2 OJ C 316, 27.11.1995, p. 49; OJ C 313, 23.10.1996, p. 2.
3 OJ C 195, 25.6.1997, p. 2.
4 OJ L 140, 14.6.2000, p. 1.
5 OJ L 149, 2.6.2001, p. 1.
6 OJ L 164, 22.6.2002, p. 3.
7 OJ L 203, 1.8.2002, p. 1.

to prevent the facilitation of unauthorized entry, transit and residence (Article 4),[1] combating corruption in the private sector (Article 7),[2] combating the sexual exploitation of children and child pornography (Article 8),[3] the laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (Article 9)[4] and on attacks against information systems[5]. It needs to be noted that these provisions aim at preventing negative jurisdiction conflicts rather than avoiding or resolving conflicts.

As regards existing legal instruments which may facilitate the avoidance or resolution of jurisdiction conflicts or facilitate the choice of jurisdiction, it is of relevance to mention the European Convention on Transfer of Proceedings of 15 May 1972, drawn up by the Council of Europe[6], where several articles deal with preventing and resolving the problem of parallel criminal proceedings However, this Convention has only entered into force in 13 Member States and does not provide for a shared, comprehensive and multilateral procedure to determine jurisdiction.

The second relevant instrument which may facilitate the avoidance or resolution of jurisdiction conflicts is the Council Decision on Eurojust.[7] According to Article 7(a), Eurojust may ask the competent authorities of the Member States to undertake an investigation or prosecution of specific acts or to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts. If a case of conflict of jurisdiction is referred to Eurojust and two or more national members cannot agree on how to resolve it, the College must be asked to issue a written non-binding opinion on the case, provided that the matter cannot be resolved through mutual agreement between the national competent authorities concerned.

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[1] OJ L 328, 5.12.2002, p. 1.
[2] OJ L 192, 31.7.2003, p. 54.
[3] OJ L 13, 20.1.2004, p. 44.
[4] OJ L 335, 11.11.2004, p. 8.
[5] OJ L 69, 16.3.2005, p. 67
[6] Convention of 15.5.1972, ETS 073.
[7] Decision on strengthening Eurojust XX/2008/JHA amending Council Decision 2002/187/JHA of 28 February 2002

While Article 7 applies to the Eurojust College as a whole, 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). These two articles solve the problem of conflicts of jurisdiction, once the case is referred to Eurojust. However, there is no obligation to ask Eurojust to solve such cases.

On the other hand, a new Article 13(8)(a) of Decision on strengthening Eurojust states that the national member should be informed of cases where conflicts of jurisdiction have arisen or are likely to arise. Thus a duty to inform Eurojust has been newly set. However, it does not go beyond the duty to inform, whereas the present proposal provides for a comprehensive procedural framework in order to solve conflicts of jurisdiction.

As regards specific types of criminality, EU criminal law obliges Member States or their authorities to cooperate with each other for the purpose of coming to a decision as to the appropriate jurisdiction under which a case should be dealt with. This is so 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[1], Article 4(2) of the Joint Action on Criminal Organizations,[2] 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[3]. According to these provisions, the Member States involved "must cooperate in order to decide which of them will prosecute the offenders in question with the aim, if possible, of centralizing proceedings in a single Member State". First, these rules do not provide for a specific procedure to avoid and, if need be, resolve conflicts of jurisdiction and these rules are general and abstract.

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

2 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.

3 OJ L 69, 16.3.2005, p. 67

Second, these rules are only applicable to specific types of criminality. It should also be noted that the relevant provisions in the Framework Decision on combating terrorism and in the Framework Decision on attacks against information systems provide that in achieving the centralizing 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". This text indeed implies the use of Eurojust. However, though provided the legal regime under the Eurojust Decision, these provisions do not create an obligation on Member States to refer a case to Eurojust.

Finally. the role of the European Judicial Network should be mentioned in this respect. The network was established primarily in order to improve the relations between the competent authorities as regards the exchange of information. This efficient and informal means of fast information exchange may also often contribute to a better awareness of ongoing criminal proceedings conducted in two or more Member States regarding the same or related facts.

Legal Framework

This proposal is being presented with a view to legislative action on the basis of, *inter alia*, Article 31(1)(d) of the Treaty on European Union ("TEU"), according to which common action between judicial and other competent authorities of the Member States on judicial cooperation in criminal matters must include preventing conflicts of jurisdiction between Member States.

Moreover, this proposal is designed to give effect to what has been declared in the Hague Programme for strengthening freedom, security and justice in the EU ("Hague Programme") which was approved by the European Council at its meeting on 5 November 2004. In particular, it follows point 3.3 which stated that "with a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State" and point 3.3.1 which asked that further attention should be given to additional proposals, including on conflicts of jurisdiction so as to complete the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters.

Summary of the present proposal and explanations concerning its most important Articles

The proposed Framework Decision aims to create a mechanism to prevent potential conflicts in parallel exercise of competence between two or more authorities of the Member States and a mechanism for better awareness of ongoing criminal proceedings which could be related to each other.. It establishes a procedural framework under which national authorities must exchange information about ongoing criminal proceedings for specific facts in order to find out whether there are parallel ongoing proceedings for the same facts involving the same persons in other Member State(s) and under which the national authorities must enter into direct consultations in order to reach an agreement on the best placed jurisdiction for conducting criminal proceedings for specific facts which fall within the jurisdiction of two or more Member States. It also aims at addressing the situations of parallel criminal proceedings in respect of same facts or related facts involving different persons, where in such cases the direct consultations would improve the cooperation between the respective authorities. Moreover, it establishes rules and common criteria which must be taken into account by the national authorities of two or more Member States whenever they seek the agreement on the best placed jurisdiction for conducting criminal proceedings for specific facts.

The instrument establishes a procedure for exchange of information where competent authorities of one Member State are conducting criminal proceedings for specific facts and need to find out whether there are ongoing proceedings for the same facts involving the same person in other Member State(s). It also applies where competent authorities of one Member State are conducting criminal proceedings for specific facts and are already aware, by other means than a notification procedure, that competent authorities of other Member State(s) have been conducting criminal proceedings for the same facts involving the same person, or for the same or related facts involving different person(s). In such cases, the notification procedure (Articles 5 to 11) does not apply and the respective States should enter straight into direct consultations.

The proposed Framework Decision is not intended to address the negative conflicts of jurisdiction where a negative conflict means that no Member State has established its jurisdiction over the committed criminal offence. It is neither the aim of the proposed instrument to harmonize the rules on jurisdiction in the Member State.

One of the key provisions is Article 5 which establishes an obligation for a competent authority to notify the authorities of other Member State(s). The purpose of the notification is to find out whether there are ongoing criminal proceedings for the same facts involving the same person(s) in other Member State(s). Such obligation would apply in the event that the authorities of a Member State discover that facts which are the subject of ongoing proceedings demonstrate a significant link to a Member State other than the one where proceedings are ongoing. In that event, the competent notifying authority of a Member State where the proceedings are ongoing must notify the existence of these proceedings to the responding authority of a Member State which is significantly linked to them.

Article 6 gives a definition of a "significant link". A link must always be regarded as "significant" where the conduct or its substantial part which give rise to the criminal offence took place in the territory of another Member State. In other cases, such as for example the location of important evidence or nationality of the accused person, it must be decided on a case by case basis whether a link is of such a significance that it might lead to a presumption that there could be ongoing proceedings for the same facts in other Member State. When deciding, reference should be made in particular to the common criteria which are listed in Article 15. The notification procedure does not cover criminal offences punishable in the notifying State by a custodial sentence or a detention order for a maximum period of up to one year, and thus the very minor cases, which could cause undue bureaucracy, are excluded. The moment of such notification to the responding Member State must happen as soon as practicable, that means a moment when it is flexible and effective to make such notification having in regard the specific circumstances of each case which might not allow to make the notification always as soon as possible. Furthermore, the term "as soon as practicable" also provides for flexibility in the discretion of the judicial authority, whether to notify or not, in connection with Article 20 which stipulates the relationship with other legal instruments or arrangements. It should be understood that it might not be deemed in any case practicable to notify in situations where EAW or request for the transfer of criminal proceedings is sent to another Member State.

Another important element of the proposal is to be found in Articles 9 and 10 which lay down an obligation for the responding authority to respond to the notification. The response should contain the basic information as to whether or not there are ongoing proceedings in the responding State for some or all of the facts which are subject to the ongoing proceedings in the notifying Member State, or whether there have been proceedings for the same facts in the past. Article 10 provides for time limits within which the information should be conveyed to the notifying authorities. These time limits are especially important if delays in the criminal proceedings where there are not any ongoing proceedings in the responding State are to be avoided. The compulsory elements suggested for Articles 9 and 10 will enable the notifying authority to perform a qualitative assessment of the circumstances of the particular criminal offence which gave rise to the prosecution.

Article 12 opens Chapter 3 concerning direct consultations, which represent another step towards settling conflicts of jurisdiction. The respective authorities must enter into direct consultations. Firstly, the obligation to enter into direct consultations arises when the responding authority confirms that there are ongoing proceedings for some or all of the facts involving the same persons which are the subject of a notification, or it intends to initiate such criminal proceedings. In this case the commencement of direct consultations is directly linked to the procedure of notification and relates to the contents of the response. The consultation may be initiated by either of the respective authorities, but in all cases the response should be sent to the notifying authority. Secondly, direct consultations are obligatory if a competent authority of a Member States becomes aware, by whatever means, that parallel criminal proceedings for the specific facts involving the same persons are already ongoing or anticipated in other Member State(s). In this case, the notification procedure is not necessary as the conflict of jurisdiction is already known. It should be understood that the consultation phase is not mandatory if the conflict has already been resolved during the notification-response procedure. This Article does not prevent the authorities from entering into direct consultations where they feel them to be necessary in order to reach agreement on the best placed jurisdiction or to solve any other problem related to the parallel ongoing proceedings concerning the same or related facts involving different persons.

The aim of direct consultations, leading to effective closer cooperation between the competent authorities conducting the criminal proceedings in two or more jurisdictions, is to reach agreement between the competent authorities as regards the best placed jurisdiction. Where appropriate and practical, the agreement should be such that the criminal proceedings are concentrated in a single Member State. If possible, concentration of the criminal proceedings in one Member State, e.g. through the transfer of criminal proceedings, should then take place; otherwise the setting, timeframe and modalities for any other effective solution concerning the negative aspects of parallel exercise of competence should be explored. Article 15 establishes the rules under which the best placed jurisdiction must be chosen. There is a rebuttable presumption in favour of conducting the proceedings in the territory of the State where most of the criminality occurred, that is in the place where most of the factual conduct performed by the persons involved occurred. This general presumption is based on the fact that presumably the most important items of evidence as well as the victims will be located in the territory of the Member State where most of the criminal activity has occurred. In addition the territoriality principle was chosen because it is a leading principle of criminal jurisdiction common to all Member States. However, where the general presumption according to paragraph 1 does not apply due to the fact that there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction, the competent authorities of Member States must consider those additional factors in order to reach agreement on the best placed jurisdiction. Article 15(2) gives a non-exhaustive list of those factors, which are not in any order of priority. The set of criteria was mainly inspired by the Eurojust guidelines, set out in the 2004 Annual report as well as by the 1972 Convention on Transfer of proceedings.

Article 16 addresses the very important link to Eurojust and its mechanisms in solving conflicts of jurisdiction. Generally, any competent authority may ask for an opinion or refer a case to Eurojust at any time during the criminal proceedings, which is in line with the Eurojust Decision. Article 16 par. 2 addresses situations before the referral to Eurojust. It makes the referral of a case to Eurojust mandatory for cases which fall within the jurisdiction of Eurojust where it has not been possible to reach an agreement on the best placed jurisdiction for conducting criminal proceedings for specific facts or in situations where an agreement has not been reached within 10 months following entry into direct consultations.

Article 17 addresses situations where even Eurojust cannot intervene anymore, and agreement has not been reached, either at all or within a time limit. It covers cases which do not fall within the competence of Eurojust and cases where Eurojust intervened but agreement has not been reached. In such cases, the Member States must have a duty to inform Eurojust of the failure and the reasons for it. The purpose of this article is to provide for collection of such information and for conclusions to be drawn on possible future improvements of the mechanism on the settlement of conflicts of jurisdiction.

Article 18 is of a slightly different nature, although related to the exchange of information on parallel proceedings. It deals with the cases where it becomes apparent, either through the notification procedure or by any other means, that the facts which are the subject of ongoing or anticipated criminal proceedings in one Member State were the subject of proceedings which have been finally disposed of in another Member State. This usually signifies the existence of a *ne bis in idem* situation, in which only the authorities of the State where the proceedings have been finally disposed of may further deal with the case and possibly reopen proceedings , if this is permitted under their national law. This Article encourages the exchange of information and evidence which should help the respective authorities in duly assessing the possibility of reopening as well as in the conducting of ensuing proceedings, if appropriate.

Article 20 deals with the relationship to other legal and non-legal instruments which contain provisions related to prevention and settlement of conflicts of jurisdiction. Basically it states that all instruments which contribute to or reach the aims of this Framework Decision more effectively must have priority over it.

Legal basis and choice of instrument

The proposal is based on Article 31(1)(c) and (d) and Article 34(2)(b) Treaty on the EU and has the form of a Framework Decision based on Article 34(2) (b) TEU.

Subsidiarity and proportionality principles

Member States do not currently provide through their national laws and criminal procedure rules for an obligation to exchange information for facts which demonstrate links to another Member State or for a duty to exchange views and/or jointly to discuss on the basis of common criteria which is the best placed jurisdiction for bringing to trial facts that could be prosecuted by several Member States. Therefore, in the absence of any common action and in order for there to be progress in terms of better exchange of information about proceedings for facts which could lead to a conflict of jurisdiction and of laying down a duty to discuss jurisdiction issues on the basis of common criteria, Member States would have to act unilaterally to make provision in their national law so as to provide for these matters. This approach would be unlikely to succeed since it would require uniformity of national provisions across 27 Member States acting separately. Such uniformity would be more readily achievable by common action in the form of a Council Framework Decision. This Framework Decision does not go beyond what is necessary to achieve that objective. It is also without prejudice to Article 33 TEU.

Budgetary implication

It is expected that the implementation of the proposed Framework Decision will entail no significant additional operational expenditure to be charged to the budgets of the Member States or to the budget of the European Union. Moreover, in the long run costs are expected to be saved as in many cases it is assumed that the costs of conducting the whole proceedings in several Member States will be prevented.

Examples of jurisdictional conflicts between EU Member States as experienced by judicial authorities of the Czech Republic and by Eurojust

To demonstrate better the existence of the problem in practice see a short illustration of some real cases of conflict of jurisdiction that have been revealed (i) in the Czech Republic, and (ii) cases dealt with by Eurojust:

(I) CZECH REPUBLIC

The Czech authorities were conducting criminal proceedings against a German national. The case was brought to a trial in 2004; however the accused person was evading the process. Consequently, the arrest warrant was issued and sent to Germany, but German authorities refused to execute the arrest warrant and decided to conduct the proceedings themselves. Thus, the proceedings in the Czech Republic were suspended (in 2005) and in about two years the German prosecuting authority informed of the decision not to proceed with the case as all the relevant witnesses and important evidence were available on the Czech territory. At the end, the German authorities re-considered the previous decision when saying that the Czech Republic was a better placed jurisdiction for conducting this particular proceedings. The proceedings are not ended by far.

The Czech judge stated that if the matter would have been thoroughly communicated with the German authorities already in the year 2004, the case could have already been resolved and the proceedings would have been finally disposed of by now. The lack of agreement caused more than 2 years delay and did not lead to the procedural economy.

A German national was in 2007 convicted by a Czech court for smuggling of drugs which he was buying in the Netherlands and transporting through Germany to sell it in Plzen, in the Czech Republic. He was performing this criminal activity since 2001 to 2006. German authorities issued a European arrest warrant for the purpose of conducting the criminal prosecution for a criminal offence of importing heroine from the Netherlands in order to sell it in February 2006, which constituted one of the acts of the criminal offence for which he was convicted in the Czech Republic. The European Arrest Warrant was issued in about the same time as the judgment of conviction by the Czech court.

From the above-mentioned it is clear that without the existence of the issued EAW, the German and Czech authorities would not know that they are (or were) conducting parallel criminal proceedings for the same facts. However, if there was a proper knowledge of the important facts already at the very early stage, with most probability the German authorities would have not started the proceedings, moreover, they could have been in close cooperation with the Czech authorities and either discovered other important relevant facts enabling to handover the case to the Czech authorities or together with the Czech authorities decided that the German authorities had better placed jurisdiction for conducting the criminal proceedings.

The above mentioned cases are just examples from the numerous cases of a similar type that have happened in the Czech Republic during several past years and we were lucky to get to know about them. The Czech Republic, as well as some other Member States, does not have a centralized information database concerning numbers of such cases of conflicts of jurisdiction, but from the information of the judges, prosecutors or evidence of the EAW issued or refused, it is clear that the cases do exist and are not of marginal number. The parallel proceedings are for example discovered via the transmission of the EAW issued by German, Austrian or Slovakian authorities or via sending a MLA request. Many cases are concerned with criminal offences of smuggling of drugs or enabling other persons of illegal crossing of the border, where one or more states have jurisdiction for conducting criminal proceedings.

The significant link to the other state(s) in such cases is usually clear, e.g. the sustained loss or the nationality of the offender, but currently the judicial authorities do not have any obligation to inform the other state. When the EAW reaches the respective authority, the proceedings are usually at an advanced stage, and it is not effective anymore to agree that the authority which issued the EAW would continue the proceedings. If the communication about the facts between the respective authorities was commenced already at the early stage of the proceedings, such approach would lead to the more effective determination of the best placed jurisdiction.

(II) EUROJUST

Below an illustration of cases of conflicts of jurisdiction which have been referred to and dealt with by Eurojust is given:

Portugal/France

In 2005, the French authorities seized in French territory a Portuguese truck with a Portuguese driver who transported among other goods considerable amount of packs of cigarettes of different brands. The absence of proper legal documents that justified such cargo led the investigators to assume that they were in the presence of a crime of smuggling of cigarettes and tax fraud. Two different investigations started in Portugal and in France partially for the same facts. Some elements were retrieved that might let do the conclusion that all the proceedings should be concentrated in Portugal, even including those facts investigated in the French criminal file.

Spain/UK

In 2001 the British citizen "A" died in Alicante in Spain. The British prosecution service was seeking assistance in co-ordinating enquiries into the activities of another British citizen "B" bearing in mind the forgery of various documents that belonged to "A". In the file opened in 2001, there was a suspicion that the "B" had been involved in the death of "A", but it was decided that there was insufficient evidence to prosecute her for murder. In 2006, new evidence of forgery and fraud were presented to the anti-fraud prosecution services in the UK by the relatives of the victim. It was decided that a new series of enquires should be conducted by the Spanish authorities in order to reopen the criminal proceeding initiated in 2001.

Portugal/Spain

A criminal organization operated from Spain by recruiting Portuguese workers, who were initially retained in Portugal and, at a later stage, sent to Spain to work in similar conditions to slavery. The crime itself and the respective criminal proceedings were initially discovered and initiated by the Office of Prosecution Services of Porto in Portugal. It was considered that there was a need to undertake parallel investigations in both countries in a well coordinated way. This coordination led to the concentration of the proceedings in Portugal that was considered the best place to prosecute.

Germany/France/Spain

Between 1978 and 2006 19 murders were committed in different countries (Germany, Spain, France, Italy and Czech Republic). A German national was suspected having committed these crimes and was put in detention. The Spanish authorities issued an EAW to Germany requesting the surrender of the suspect but when all the investigations were connected, the German authorities announced that the EAW could not be executed because of the pending investigation in Germany. On the other hand, the French and Spanish jurisdictions are not competent to deal with murder offences when they are perpetrated in foreign countries by foreign citizens. In 2006 a positive conflict of jurisdiction between Germany, Spain and France had to be solved.

For reason regarding the "fair trial principle", the suspect should have the possibility to stand trial in his own judicial system and language and the victims' relatives from foreign countries should take part in the proceedings as parties. It was considered that the German judicial authorities were better placed to handle the totality of the crimes committed by the defendant.

Portugal/Germany

German authorities sent an EAW to Portugal, requesting the surrender of a German citizen who was accused of drug trafficking. The suspect was in custody in Portugal awaiting trial. Another Portuguese investigation related to the same criminal activity and facts were in progress. In the meantime, the time limit for the execution of the EAW was exceeded due to ongoing co-ordination between both authorities. The final result of this case was that the Portuguese proceedings were transferred to Germany and Portuguese Court of Appeal – the executing authority – after suspending the execution of the EAW, decided to surrender the suspect to Germany.

Luxembourg/France

A French citizen based in Luxembourg used a complex company and account structure, located in Luxembourg, Austria, Spain, UK, Channel Islands, Monaco, Switzerland, Belgium and Liechtenstein, to defraud a large number of persons in France and its Overseas Departments and Territories. More than 400 people were defrauded. The suspect was arrested in Luxembourg and the investigation and prosecution started in that country. At the same time, France also claimed jurisdiction over the same suspect and facts, citing the fact that several of the main suspect's accomplices, as well as the majority of the victims, lived in France. It was decided and agreed by common consent that France should carry on with the investigations and remaining judicial procedures. The Public Prosecutor in Marseille was informed by the Luxembourg authorities that they agreed on the principle not to proceed with the case if the French authorities sent a certificate indicating that they would take into account the period of preventive detention carried out in Luxembourg, where the defendant served his sentence.

Spain/the Netherlands

Spanish and Colombian members of a criminal organization were arrested in the Netherlands for drug trafficking. The drugs were coming from Colombia and Venezuela through Rotterdam in order to be distributed in Europe. The drugs were seized in Rotterdam and several Spanish and Colombian citizens were arrested. The Dutch authorities initiated criminal proceedings in the Netherlands and issued an EAW against a Spanish suspect who had remained in Spain. A criminal investigation commenced in Spain because part of the development of the crime was carried out in that country. The Dutch authorities were in a better position to carry out the necessary investigations and further judicial procedures.