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NOTE

From: Presidency
To: Delegations

Subject: Conflicts of jurisdiction and application of the *ne bis in idem* principle in practice

Delegations will find attached a paper with questions by the Presidency on 'conflicts of jurisdiction'.

The Presidency intends to discuss this paper at the meeting of the Friends of the Presidency that is scheduled to take place on 21 May 2019.

Paper by the Presidency**CONFLICTS OF JURISDICTION AND
APPLICATION OF THE *NE BIS IN IDEM* PRINCIPLE IN PRACTICE**

The criteria according to which Member States establish jurisdiction vary across the European Union (territorial jurisdiction, passive or active personality jurisdiction, the universality principle). As a consequence, the same criminal conduct may fall under different jurisdictions and be the subject of concurrent trials. When several Member States claim jurisdiction, there is a risk of a breach of the ‘*ne bis in idem*’ principle. Hence, clear rules are necessary in order to avoid such a risk occurring.

Article 82/1(b) TFEU provides:

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

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;

Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings aims to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts. As such, this instrument seeks to prevent an infringement of the principle of *ne bis in idem*, as set out in Articles 54 to 58 of the Convention implementing the Schengen Agreement and in Article 50 of the EU Charter of Fundamental Rights. Other instruments that address conflicts of jurisdiction are Directive 2017/541 on combating terrorism (in particular Article 19(3) thereof), Framework Decision 2008/841/JHA on the fight against organised crime (in particular Article 7 thereof), and Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (in particular Article 16 thereof).

However, Council Framework Decision 2009/948/JHA¹ stopped halfway, since it only deals with preventing conflicts of jurisdiction and does not provide a solution in cases where the conflict of jurisdiction has already occurred. A possible legal solution in the form of an EU instrument on transfer of proceedings has not been adopted so far.

Under these circumstances, when deciding to transfer criminal proceedings, the Member States have to consider different legal instruments, such as those of the Council of Europe.

The Council of Europe's European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15.V.1972) has been ratified by only 13 EU Member States (Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Spain and Sweden) and therefore has limited application. Moreover, it provides for communication through central authorities, which creates additional layers of bureaucracy and means it takes longer to solve the requests.

Another Council of Europe instrument which seems to be more frequently used by the Member States, although it has its limitations, is the 1959 European Convention on Mutual Assistance in Criminal Matters - Article 21 (laying of information).

In order to prevent emerging conflicts of jurisdiction, or to solve existing ones, it is necessary that the States involved enter into direct consultations in order to determine which State should assume, and which State should renounce prosecution.

Eurojust plays a very important role in this respect. Council Decision 2002/187/JHA on Eurojust (as amended by Council Decision 2003/659/JHA and Council Decision 2009/426/JHA) and the new Regulation 2018/1727 on the European Union Agency for Criminal Justice Cooperation (Eurojust)² establish several ways in which Eurojust can be of assistance.

¹ See the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (COM(2014) 313 final of 2.6.2014).

² OJ L 295, 21.11.2018. The Regulation will effectively apply as of 12 December 2019.

Taking into account the experience gained so far in the process of accomplishing its tasks, Eurojust has issued several useful documents: 'Guidelines for deciding which jurisdiction should prosecute' (9628/18); 'The principle of *ne bis in idem* in criminal matters in the case law of the Court of Justice of the European Union' (9629/18); and 'Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction' (6864/18). The latter document acknowledges an increase in cases where Member States have sought the assistance of Eurojust when trying to solve conflicts of jurisdiction.

The Presidency is seeking the opinions of the Member States on this important topic, using the three documents mentioned above as a starting point. To that end, the Presidency invites Member States to respond to the following questions at the meeting on 21 May:

Questions

1. When your authorities become aware of parallel proceedings, do they carry out the consultations established under Framework Decision 2009/948/JHA? How would you evaluate the cooperation based on this Framework Decision?
2. Are your authorities frequently confronted with conflicts of jurisdiction? If so, what type of offences has mostly been encountered?
3. How do your authorities usually solve conflicts of jurisdiction and what are the best practices used in this field? (e.g. use of cross-border evidence, transfer of proceedings, surrender based on the European arrest warrant, joint investigation teams (JITs))?
4. Are your authorities aware of the possibilities established under the Eurojust Decision/new Eurojust Regulation when dealing with conflicts of jurisdiction? If so, what methods are preferred: level II meetings, coordination meetings, JITs, use of Eurojust written opinions under Article 7(2) of the Eurojust Decision/Article 4(4) of the Eurojust Regulation, etc.?
5. What criteria are mainly taken into account when deciding which Member State is in the best position to prosecute (e.g. territoriality, location of suspects/accused persons, availability and admissibility of evidence, stage of proceedings, obtaining evidence from witnesses, experts and victims, other)?

6. Have your authorities been confronted with negative conflicts of jurisdiction (meaning situations in which none of the Member States involved is competent, or in a position, to prosecute)? If so, what solutions have been adopted by your authorities in order to solve such conflicts?

 7. Have your authorities been confronted with the application of the *ne bis in idem* principle as grounds for refusal in the execution of requests based on mutual recognition instruments? Do your national judicial authorities correctly apply the criteria emerging from the case-law of the Court of Justice of the European Union when deciding on whether the *ne bis in idem* principle is applicable? More precisely, please explain how the '*bis*' requirement is interpreted by your national judicial authorities? Have you developed (non-binding) guidelines to assist your national judicial authorities when assessing the '*bis*' requirement in concrete cases?
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