



Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction



Updated 2018



REPORT ON EUROJUST'S CASEWORK IN THE FIELD OF PREVENTION AND RESOLUTION OF CONFLICTS OF JURISDICTION

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This report provides an update of a report issued in 2015 concerning Eurojust's experience in the field of prevention and resolution of conflicts of jurisdiction. The report is based on Eurojust's casework, a College thematic discussion, meetings organised or co-organised by Eurojust and contributions made by Eurojust.¹ It specifically covers the period from 2009 to 2017.

¹ See, particularly, Eurojust, Report of strategic seminar, *Conflicts of jurisdiction, transfer of proceedings and ne bis in idem: successes, shortcomings and solutions* (The Hague, 4 June 2015, Council doc. No. 14172/15); Eurojust, Report of strategic seminar, *New perspectives in judicial cooperation* (Budapest, 15-17 May 2011, Council doc. No. 14428/11); Eurojust, Report of strategic seminar, *Eurojust and the Lisbon Treaty; towards more effective action* (Bruges, 20-22 September 2010, Council doc. No. 17625/1/10); Eurojust's participation in the project, *Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law*, led by the University of Luxembourg in the period 2014-2017; Eurojust's Commentary on the Commission Green Paper Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings, p. 1, retrievable at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eurjust_ne_bis_in_idem/eurjust_ne_bis_in_idem.pdf



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Executive summary

Questions related to concurrent jurisdictions if parallel proceedings are ongoing in two or more Member States, as well as the consequent issue of which jurisdiction is better placed to prosecute to avoid potential *ne bis in idem* situations, are core issues for Eurojust. For example, jurisdictional issues are commonly discussed – and solutions are found – in coordination meetings organised by Eurojust and involving the national authorities of the Member States concerned.

After outlining the legal framework for Eurojust's involvement, this report addresses Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction from four different perspectives:

- I. Identification and coordination of parallel proceedings:** parallel proceedings are considered very beneficial for combating cross-border crime, provided that Member States coordinate their actions. Eurojust provides support to the national authorities to identify or even trigger parallel proceedings, ensure coordination – particularly via coordination meetings – and find common solutions.
- II. Jurisdictional issues and decisions on which jurisdiction should prosecute:** in most Eurojust cases, conflicts of jurisdiction are settled between the national authorities during level II meetings and, especially, coordination meetings in which the most appropriate solution is found. Sometimes, Eurojust issues recommendations through its National Members, individually or jointly, indicating which Member State is in a better position to prosecute. In this regard, the Eurojust *Guidelines for deciding 'which jurisdiction should prosecute?'*, revised in 2016, are considered a useful tool in view of their flexibility and logical approach.
- III. Transfer of criminal proceedings:** Eurojust's casework confirms that, in the absence of a specific EU instrument dealing with transfer of proceedings, practical and legal difficulties (*e.g.* translation cost and quality, differences between Member States in substantive and procedural criminal law, etc.) can arise. In these cases, Eurojust's support is requested by the national authorities to facilitate the day-to-day practice.
- IV. Principle of *ne bis in idem*:** Over the years, Eurojust has experienced that issues related to the application of the principle of *ne bis in idem* might be significant and need appropriate and practical solutions within a reasonable time. Eurojust's support helps to detect and consequently avoid the occurrence of *ne bis in idem* situations. In these cases, such issues are also properly examined in level II meetings or coordination meetings.



Legal framework for Eurojust's involvement

The present EU legal framework for the prevention and resolution of conflicts of jurisdiction recognises a **major role for Eurojust** in supporting Member States' competent authorities in determining the appropriate jurisdiction, and thus preventing and settling issues related to concurrent jurisdictions.

Article 85(1)(c) of the Treaty on the Functioning of the European Union expressly refers to this important Eurojust task.

Articles 6 and 7 of Council Decision 2002/187/JHA setting up Eurojust, as amended by Council Decision 2009/426/JHA (Eurojust Decision or EJD), further specify how National Members and the College may play an advisory role vis-à-vis their respective national authorities by issuing requests/recommendations and non-binding opinions. Eurojust – acting through its National Members (individually or jointly) or as a College – may ask the competent authorities of the Member States concerned, giving its reasons, to undertake an investigation or prosecution of specific acts, as foreseen, respectively, in Articles 6(1)(a)(i) and 7(1)(a)(i) EJD. Likewise, Eurojust may ask the competent authorities to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts according to Articles 6(1)(a)(ii) and 7(1)(a)(ii) EJD. Moreover, the Eurojust Decision enables the College of Eurojust to intervene in the resolution of a conflict of jurisdiction case when two or more National Members cannot agree on how to resolve it. If so, the College shall be asked to issue a written non-binding opinion pursuant to Article 7(2) EJD, provided that the matter could not be resolved through mutual agreement between the competent national authorities concerned. If the competent authorities of the Member States concerned decide not to comply with a Eurojust request or written opinion, they shall inform Eurojust of their decision and the reasons for it (**Article 8 EJD**).

The Eurojust Decision also foresees in **Article 13(7)(a)** that Member States shall ensure that their National Members are informed of cases where conflicts of jurisdiction have arisen or are likely to arise.

These provisions of the Eurojust Decision must be read together with **Framework Decision 2009/948/JHA** on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings – the only EU instrument currently devoted to this matter – which prescribes a specific role for Eurojust in assisting the national authorities if the latter cannot agree among themselves in a conflict of jurisdiction case (Article 12 FD 2009/948/JHA).

Additionally, several other legal instruments in the area of criminal matters, such as **Framework Decision 2002/584/JHA** on the European Arrest Warrant (Article 16), **Framework Decision 2008/841/JHA** on the fight against organised crime (Article 7) and **Directive 2017/541** on combating terrorism (Article 19(3)), include relevant provisions that might lead to Eurojust's involvement in the area of conflicts of jurisdiction for the facilitation of cooperation between judicial authorities and the coordination of their actions.



I. Identification and coordination of parallel proceedings

Parallel investigations are very common in the European Union, particularly in cases involving an offence of a cross-border nature, such as migrant smuggling, trafficking in human beings or drug trafficking. Nonetheless, cases of money laundering, VAT fraud, cybercrime and crimes committed by organised crime groups operating in several countries can also often lead to parallel investigations. That being said, Eurojust casework indicates that, in principle, **all types of crime can lead to parallel proceedings**, including crimes that occurred within the territory of only one Member State. For example, when a person has become a victim while travelling, he or she will sometimes report the incident both in the Member State in which the crime occurred and in the Member State of origin after having returned home, a situation which can then lead to parallel proceedings. Even in murder cases, the suspect may be investigated both in the Member State in the territory in which the crime was committed, based on the territoriality principle, and in the Member State of origin of the suspect or of the victim, based on the active or passive personality principle.

Parallel proceedings are considered to be **very beneficial** for combating crime in the European Union more effectively, provided that cooperation between the Member States involved starts as early as possible and **coordination** is ensured. Parallel proceedings are seen as essential to get the overall picture of complex cases, to collect and exchange information and evidence, to clarify links between different parts of the investigations and to facilitate subsequent decisions on which jurisdiction should prosecute. However, such benefits can arise only from a coordinated action. Possible drawbacks stemming from parallel proceedings - such as waste of time and resources, duplication of work, risk of mutually jeopardising each other's investigations or *ne bis in idem* problems - tend to arise precisely when no coordination takes place.

Good communication between the national authorities involved is crucial but not always present or possible. Eurojust supports the national authorities with a coordinated approach, *e.g.* by making use of '**level II' meetings** (*i.e.* discussions between the National Members – or members of the Eurojust National Desks – involved in the case) and **coordination meetings** (to which, in addition to the Eurojust representatives, the competent judicial and law enforcement authorities from the countries involved in the case participate), and by assisting the national authorities with the setting up and smooth running of joint investigation teams (**JITs**).

Considering that solving jurisdictional issues requires the national authorities involved to reach a consensus, the **coordination meetings** facilitated by Eurojust represent a unique operational tool to establish a direct dialogue, understand each other's legal system and requirements and, ultimately, agree on shared solutions under Eurojust's guidance. Direct communication is facilitated by the simultaneous interpretation provided during the coordination meetings, which allows the competent authorities from the Member States to discuss complex legal and practical issues in their own language.



The **detection of parallel proceedings**, which is often a crucial preliminary step before any coordination can take place, can occur in different ways, often long before a case is brought to Eurojust's attention, and sometimes by mere coincidence. Cases can, for example, be identified via police cooperation (also with the involvement of Europol) or if mutual recognition (particularly European Arrest Warrants (EAWs) and European Investigation Orders (EIOs)) or mutual legal assistance (MLA) requests are sent to a competent authority in another Member State or if defendants or their counsel raise the issue during the proceedings. In addition, Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings – which has been implemented now by almost all Member States and, as far as can be seen from Eurojust's casework, has been increasingly applied recently – is intended to improve the detection of parallel investigations. It obliges competent authorities of a Member State with reasonable grounds to believe that parallel proceedings are being conducted in another Member State to contact the competent authority of the latter Member State (Article 5 FD 2009/948/JHA). Of course, such duty implies that indications or reasons to believe that parallel proceedings are taking place are present, which is not always true.

Parallel proceedings can also be **identified or even triggered by Eurojust**. For example, they can come to light in the framework of coordination meetings that are held at Eurojust, when Eurojust is informed of competing EAWs on the basis of the Framework Decision on the EAW, when Eurojust is requested to assist with the execution of MLA requests or EIOs, or when Eurojust is contacted by national authorities to solve differences of opinion on the scope and application of the principle of *ne bis in idem* (see *infra* IV). Additionally, in a growing – although still rather limited – number of cases, Eurojust receives information from the Member States in accordance with Article 13(7)(a) EJD on cases in which conflicts of jurisdiction have arisen or are likely to arise (from 10 notifications received by Eurojust in 2012 to 49 in 2017).

On the basis of such information, Eurojust can detect parallel proceedings and proactively provide support to the national authorities by coordinating and finding common solutions based on **dialogue and mutual trust**. Moreover, in many cases, especially if complex and with a European dimension, thanks to the intervention of Eurojust, relevant elements are brought to the attention of the competent national authorities which, consequently, decide to open their own investigation in their country rather than simply execute a request for assistance received from the national authorities of another Member State. By doing so, in some cases, the new investigation opened leads to the detection of other offences committed or reveals the full extent of the criminal activity conducted by an organised criminal group active in several countries. In this context, to ensure close coordination of parallel investigations, particularly those that are complex and intertwined, Eurojust occasionally proposes to the national authorities involved that a JIT be set up which, once established, will often continue its activities while relying upon the coordination support provided by Eurojust.

In all the situations mentioned above, the **initiation of parallel proceedings**, sometimes 'provoked' by Eurojust, is **controlled and coordinated** from the beginning, without risks of overlapping or duplication of effort, for, ultimately, the full benefit of justice.



II. Jurisdictional issues and decisions on which jurisdiction should prosecute

As mentioned above, Eurojust cases often concern parallel proceedings and their consequent need for coordination. In such cases, at a certain point in time, the national authorities in charge will need to consider whether to continue dealing with the prosecutions separately, in **different jurisdictions, or to concentrate** all the proceedings in **one jurisdiction**. Such a decision is particularly important when the parallel proceedings concern the same facts and thus a potential future **infringement of the *ne bis in idem*** principle emerges, assuming that prosecution and trial will take place in more than one Member State.

However, even when the **facts investigated are not identical**, the same question might need to be considered and a decision taken. In very complex cases, for example those concerning organised crime groups active in several Member States and committing a number of different transnational criminal activities (drug trafficking, fraud, money laundering, etc.), keeping the criminal proceedings ongoing in parallel and prosecuting different offences or suspects in different jurisdictions might be a preferred option. The same might occur, for example, in cases of migrant smuggling, where a decision may be taken to split the prosecution on the basis of a 'segmented strategy', *i.e.* each country involved deals, in a coordinated way, with different suspects having different roles in the commission of the crime (*e.g.* the country of origin prosecutes the facilitators in charge of transport, while the country of destination prosecutes other facilitators and organisers operating in its territory).

Conversely, quite often different offences investigated in two Member States concerning the same suspect(s) or the same criminal group (*e.g.* money laundering in one State and the related predicate offence in the other State) are **closely connected**, so that developments of parallel proceedings are mutually dependent. Under these circumstances, provided that both Member States have jurisdiction, concentrating the proceedings in one of them that would **prosecute for the totality of the criminal acts committed** might be appropriate, because bringing the offences before court separately, in two different jurisdictions, would create an **undesirable and artificial partition of the overall criminality** carried out by the suspect(s) or the criminal group and would be eventually detrimental to the appropriate administration of justice.

In all these situations, **Eurojust extensively supports, at any time**, the national authorities to find the most appropriate solution **in each individual case**, on the basis of **dialogue, mutual trust and coordination**. By assessing the status of the proceedings, the possible existence of a conflict of jurisdiction and the potential violation of the *ne bis in idem* principle, Eurojust is able to assist the national authorities in deciding, at prosecutorial level and by common agreement, whether to split the proceedings or concentrate them in one State. If a decision is taken to concentrate the proceedings in one State, Eurojust guides the national authorities through the subsequent step, which is assessing and agreeing on which jurisdiction would be better placed to prosecute. Sometimes, in very sensitive and urgent cases, Eurojust's intervention allows solutions to be found, sometimes **within hours**. Moreover, Eurojust's advisory and



coordinating role showed its importance when specific issues emerge concerning involved **third States** (e.g. the legal possibility to concentrate the proceedings in a third State and legal consequences related to the transfer of the proceedings and extradition procedures).

In most situations, these cases are **consensually settled** between the national authorities with the assistance and, frequently, upon **recommendation of the involved National Members (Article 6 EJD)**, during level II meetings or coordination meetings at Eurojust, sometimes in the framework of a JIT. Usually, the solutions reached are then reflected, for example, in the conclusions of the meeting.

In a more limited – but growing – number of cases, Eurojust formulates, through the National Members involved in the case, a **written request or recommendation** to the relevant competent authorities in accordance with Article 6 EJD. In addition to the individual requests issued by a National Member to his or her national authorities, in 2016, in a case between Italy and Spain, the Italian and Spanish National Members agreed to sign a so-called **joint recommendation** under Article 6(1)(a)(ii). In this joint recommendation, the National Members *jointly* asked their respective competent authorities, as a conclusion to a **reasoned opinion** on the matter based on a thorough analysis and legal assessment of all the information received from the Italian and Spanish national authorities, to accept that Italy was in a better position to handle the totality of the proceedings and prosecute to dismantle the criminal organisation. Consequently, the Spanish authorities were asked to take the appropriate steps for a swift transfer of their proceedings to Italy and the Italian authorities to swiftly accept the proceedings transferred by Spain.

Considering the effectiveness of this **innovative Eurojust practice**, in 2017, approximately ten recommendations were issued jointly by two or three National Members from nine different Member States (Spain, Italy, Romania, Belgium, Portugal, Germany, Ireland, Bulgaria and the Netherlands), following a coordination meeting or after a level II meeting. Joint recommendations have been increasingly used because they are positively received by the national authorities. The latter can rely upon a **more solid** (because shared among two or more National Members), **reasoned** (because a legal assessment is included) **and commonly agreed opinion of Eurojust** that contributes to the successful outcome of the procedural steps to concentrate, transfer, open or close a case in accordance with the respective national rules. For example, if the final decision on the transfer of proceedings eventually lies with the Prosecutor General or with the competent court of a Member State, a joint recommendation issued by the Eurojust National Members of the involved countries, although not binding, greatly affects such a final decision to be taken by the competent authority, demonstrating the added value of **Eurojust's persuasive and advisory role** vis-à-vis the national competent authorities, and bringing a European perspective and solution to complex cross-border cases.

To assist the national authorities in determining which jurisdiction is better placed to prosecute, in 2003, Eurojust adopted the **Guidelines for deciding 'which jurisdiction should prosecute?'**. The Eurojust Guidelines are a flexible tool conceived to guide and remind the competent authorities of the factors to be considered in multi-jurisdictional cases. In the absence of an EU 'horizontal' legal instrument in this respect, they provide a shared starting point on the basis of which a decision can be reached. Considered useful by practitioners in



view of their flexibility and logical approach, and even mentioned as a reference in the preamble of Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, the Eurojust Guidelines were **revised in 2016** to take into account developments in the EU Area of Freedom, Security and Justice as well as the experience acquired by Eurojust over more than a decade. Since their recent revision, the Guidelines have been increasingly used in Eurojust casework (*e.g.* in coordination meetings, joint recommendations, legal opinions) and widely disseminated to practitioners.²

Each case is unique, and the Guidelines are sufficiently broad and flexible to take into account the various positions and interests of the involved parties and all relevant aspects of the case. In practice, when deciding which jurisdiction should prosecute, the jurisdiction(s) in which a **realistic prospect of success** in bringing the case to prosecution is (are) identified (preliminary key principle of the Guidelines). Even though the **'territoriality'** - and, particularly, the place in which the majority, or the most important part, of the criminal acts took place - remains an important factor, it is not an all-decisive factor, as seen in Eurojust's casework. Other factors - such as the **nationality** and the **actual location of the suspect(s)**, the **stage of the proceedings**, the **broader scope of the investigations**, or the **place where most evidence is located** - often play a decisive role. The possibility to secure a **smooth transfer of the proceedings or surrender of the suspect**, as well as the possibility to **apply any EU instrument** based on the mutual recognition principle, can also affect the assessment and consequently the decision on where to prosecute.

In addition, in cases in which the criminal offence took place within one Member State, overriding reasons to decide that another Member State is in a better position to prosecute the case than the Member State in which the offence actually occurred can still be present, because the location of the suspect or of the evidence/witnesses are considered more relevant. This situation occurred, for example, in murder cases for which Eurojust's assistance has been sought specifically to solve the conflict of jurisdiction. Moreover, some factors are then more decisive, depending on the offence subject to prosecution or the specific circumstances. For example, the **interests and protection of the victims** are particularly significant in trafficking in human beings cases, while the **procedures for seizing and confiscating** proceeds of crime are of relevance in money laundering cases.

In the majority of the cases in which Eurojust is involved, a solution to overcome jurisdictional issues is found with the intervention of the **National Members involved who perform Eurojust's tasks under Article 6 EJD**. This trend is confirmed by the fact that recommendations issued by the **College** in accordance with Article 7(1)(a)(ii) EJD or written non-binding opinions in accordance with Article 7(2) EJD are **rather exceptional**. Since Eurojust's establishment, the College has intervened in only four cases on the basis of Article 7(1)(a)(ii) EJD (all dating back to the first years of Eurojust) concerning, respectively, environmental crime, fraud, murder and VAT fraud.³ Article 7(2) EJD, a provision introduced with the 2009 revision of the Eurojust Decision, has not yet been applied. The small number of cases indicates that most conflicts of jurisdiction are indeed settled among the concerned

² The Eurojust Guidelines, revised in 2016, are available in all EU languages at the following link: <http://www.eurojust.europa.eu/Practitioners/operational/Pages/Guidelines-on-jurisdiction.aspx>.

³ See Council doc. No. 17308/08 of 17.12.2008, pp. 104-105.



parties with the support of the Eurojust National Desks (acting under Article 6 EJD), and do not usually require the intervention of the College.

However, in some **complex or controversial situations**, the intervention of Eurojust might not be sufficient to reach a common satisfactory result. For example, even if, in the best interests of justice, an agreement is made to concentrate the proceedings in one Member State, after the transfer of proceedings takes place, the Member State in which the totality of the proceedings should be handled may not eventually initiate proceedings for the offences not committed in its territory. When performing its tasks, Eurojust pays particular attention to these difficult cases to find suitable solutions and minimise undesirable outcomes as much as possible.

Challenging cases are also those relating to so-called '**negative**' **conflicts of jurisdiction**, *i.e.* situations in which none of the Member States involved is competent, or in a position, to prosecute for different reasons. Even though negative conflicts of jurisdiction occur much less often than 'positive' ones, they do occur and are **rather difficult to solve**.

In a case supported by Eurojust, a person suspected of having imported rough diamonds into the European Union in violation to the requirements imposed by EU law (*i.e.* without the necessary documentation) was eventually not prosecuted for illegal trade of rough diamonds in either the Member State of final destination (in which the suspect was found in possession of the diamonds) or the Member State of transit (in which the actual import occurred), because, on the one hand, the subsequent transport of the diamonds from the Member State of transit to the Member State of final destination was not criminalised in the latter State, and, on the other hand, the Member State of transit was not prosecuting the case. Eurojust provided assistance regarding the EU legal context and obtained information and clarifications from the respective national authorities. Nevertheless, the national authorities eventually decided to dismiss the case.

In other cases, **Eurojust's mediation** has been **crucial** in determining the suitable jurisdiction and avoiding a negative conflict of jurisdiction. Notable are Eurojust cases related to crimes committed on board airplanes, trains (when there is uncertainty as to where the train was when the offence took place) and ships in high seas, especially when third States are involved and international legal instruments may apply. For example, in a very serious case concerning a shipwreck causing the death of 300 passengers, the States involved, after having exchanged views and information with the prompt assistance of Eurojust and one of the Liaison Prosecutors from third States seconded to Eurojust, agreed to have the case prosecuted in the flag State of the ship, in compliance with Article 97 (*Penal jurisdiction in matters of collision or any other incident of navigation*) of the United Nations Convention on the Law of the Sea (so-called 'Montego Bay Convention' of 1982).

In a number of fraud cases in which Eurojust offered its support, no Member State was willing to proceed with the investigation and prosecution. Fraud committed on a global scale with the use of the Internet is a good example of a case in which experience showed us that the principle of territoriality was sometimes inadequate when attempting to solve a conflict of jurisdiction if fraud was intentionally committed in various countries with individuals of



different nationalities and the suspects were located in other countries, which did not suffer the effects of the crime and whose courts did not have competence to prosecute on the basis of the territoriality and nationality principles.

III. Transfer of criminal proceedings

Eurojust's casework confirms that the transfer of criminal proceedings is often the **subsequent step** following a decision to concentrate parallel proceedings in one Member State. Sometimes the actual possibility, in a specific case, to transfer the proceedings is one of the determining factors in settling jurisdictional issues, and is **carefully considered** during level II meetings, coordination meetings with the involved authorities, joint recommendations and in the framework of JITs.

In the absence of a specific EU instrument dealing with this issue (an initiative for a Framework Decision on transfer of proceedings was brought forward in 2009, but the discussions halted in light of the coming into force of the Lisbon Treaty)⁴ Member States currently rely on **different legal bases** to transfer proceedings. The most specialised international instrument is the 1972 Council of Europe Convention, which specifically deals with the Transfer of Proceedings in Criminal Matters, and which spells out detailed conditions and procedural rules for the transfer. However, practice shows that due to the limited number of ratifications of this instrument in the Member States, other, more general, multilateral instruments are commonly used as a basis for transfer of proceedings. For example, Article 21 of the 1959 Council of Europe Convention on mutual assistance in criminal matters, in conjunction with Article 6(1) last paragraph of the 2000 EU Convention on mutual assistance in criminal matters between the Member States, is very often found in cases that are dealt with by Eurojust. Article 21 of the United Nations Convention against Transnational Organized Crime has also been used on some occasions. In other cases, for which no relevant multilateral legal instrument was ratified by the Member States concerned, and in the absence of a bilateral agreement, the principle of reciprocity has been used as a legal basis in combination with relevant national provisions on transfer of proceedings.

Even though this patchwork of legal bases tends to offer workable solutions in day-to-day practice, it can also create **difficulties** that trigger the national authorities to call upon Eurojust. Eurojust's casework shows that the reasons for difficulties in transferring criminal proceedings vary, and that some of them relate to the following issues:

- A **clear interest** on the part of the requested State to accept the transfer of proceedings is not always easily established;
- The transfer of proceedings is often **time-consuming** and, in the absence of mandatory time limits, a decision will usually only be taken after a long delay or the finalisation of

⁴ Initiative for a Council Framework Decision on transfer of proceedings in criminal matters, Council doc. No. 11119/09 of 30 June 2009 and Council doc. No. 11704/1/09 REV 1 of 3 July 2009.



the translation of all the documents; the latter can be problematic in view of **statutory time bars**;

- The possibility of **direct contacts** between judicial authorities, which has become a main feature of the EU's criminal justice area, but which is not available under the 1972 Council of Europe Convention, is sometimes used as an argument for not using the latter instrument. Requests for transfer of proceedings channelled *via* central authorities may put at stake the efficiency and effectiveness of the proceedings. In these cases, Article 21 of the 1959 Council of Europe Convention on mutual assistance in criminal matters, in conjunction with Article 6(1) last paragraph of the 2000 EU Convention on mutual assistance in criminal matters, might be used instead;
- The question of the **legal basis** to apply for the transfer of proceedings can include the question of how to **transfer** to the requested country the **actual evidence** gathered in the requesting country;
- **Differences** between the Member States in **substantive criminal law** (*e.g.* different constitutive elements of a specific crime) or **procedural criminal law** (*e.g.* different rules on the gathering, validity and admissibility of evidence) can complicate the transfer of proceedings;
- A **partial transfer of proceedings**, with different suspects involved, is not always easy to agree upon;
- Coordination of the **execution of provisional measures** between the involved Member States (*e.g.* pre-trial detention, handling of seized assets) and the simultaneous execution of transfer of proceedings and EAWs might prove difficult;
- The **costs** related to the **translation** of the entire file, which needs to be made on the basis of a preliminary assessment of the case – and thus before a final decision on the transfer of proceedings has been taken – as well as the **quality** of the translation can lead to frustration, particularly if, after the translation, the final decision on the transfer of proceedings is negative;
- Member States that have not foreseen the transfer of criminal proceedings in their criminal procedural code and that rigidly follow the **principle of legality** are prevented from considering a transfer of proceedings if they have jurisdiction over the crime that has been committed.

While some of the issues mentioned above are more difficult to overcome, **practical solutions** for others can be found in some cases. For example, to minimise the negative effects of costs and delays resulting from the translation of files, national authorities can decide, in a coordination meeting at Eurojust, to identify the essential documents that need firstly and more urgently to be translated and (initially) transmitted electronically so that the investigation can proceed as swiftly as possible; they can determine to have the wiretapped conversations transmitted in the original language – without need for translation – when the language is the one of the receiving country; in addition, they can agree to share the translation costs between the involved Member States, or even to have only the receiving State bear all the



costs or, in the framework of a JIT, if all requirements are met, to have such costs covered by the JIT funding.

Additionally, Eurojust has learned from practical experience that sometimes the **proceedings do not need to be formally transferred** because the national authorities of the Member State in which the proceedings are concentrated have already acquired, *via* MLA request or EIO, all the information and evidence at the disposal of the colleagues of the other Member State, or because the latter had not acquired any additional elements in the framework of their investigation. Thus, *de facto*, what was available in the file had already been transferred or nothing new needed to be transferred. In these cases, the national authorities of the Member State that is not proceeding further must ensure that, pending the prosecution and trial in the other Member State, their investigation is closed or at least suspended.

All cases in which Eurojust intervenes in these matters reveal that **smooth and continuous communication** between national competent authorities is needed until the judicial cooperation process is completed. For example, difficult legal and practical questions can emerge after the decision to transfer the proceedings is consensually agreed. Therefore, Eurojust remains at the disposal of the national authorities during all phases preceding and following the actual transfer, and also provides support in transmitting the necessary information easily and rapidly.

IV. Principle of *ne bis in idem*

By facilitating the effective and early exchange of information through Eurojust, Member States are able to identify possible parallel proceedings, to detect links with cases to other Member States, to prevent conflicts of jurisdiction or to agree upon transfer of proceedings, and also to **avoid *ne bis in idem* situations**. Over the years, Eurojust has found that problems related to *ne bis in idem* raise **significant issues** and that finding appropriate and practical solutions within a reasonable time is desirable. For example, when the proceedings in the different jurisdictions dealing with a case concerning the same facts and suspects occur at different speeds without coordination between them, the faster one may undermine the outcome of the other one(s).

Data and information collected from the competent authorities during parallel proceedings in more than one State are **analysed at Eurojust** – sometimes in case notes that highlight overlaps and connections in the investigations, and legal assessments that develop legal issues and possible solutions – and discussed at level II meetings or coordination meetings. As a result, Eurojust is in a position to assist the competent authorities in **examining**, even if at an early stage, whether related facts that are under investigation in two or more Member States may constitute the '**same acts**' within the meaning of Article 54 of the Convention on the Implementation of the Schengen Agreement (CISA) and Article 50 of the Charter of Fundamental Rights of the EU (Charter), in light of the interpretation given by the Court of Justice of the European Union (CJEU) in its rulings. Depending on the outcome of such a preliminary examination, the national authorities can be **advised by Eurojust** to either



continue the parallel proceedings or discontinue a proceeding in one Member State and/or to transfer it to another Member State.

Very often when Eurojust intervenes, no final decision has been reached in the proceedings, and thus only an assessment is possible of whether a **potential future *ne bis in idem* situation** can occur, assuming that prosecution and trial will take place in more than one Member State. Moreover, and in any event, the definitive assessment of a *ne bis in idem* situation is left to the competent national courts, as repeatedly stated by the CJEU in its rulings.

Even though in many cases a possible *ne bis in idem* situation can easily be excluded, for example, if different suspects or victims are involved, this determination is not true for all cases. The **case law of the CJEU** on Article 54 CISA and Article 50 Charter has been very helpful in clarifying the scope and content of these provisions. As a reference and supplementary tool for practitioners, Eurojust published, and regularly updates, an **overview of this case law**, entitled *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the EU*, the objective of which is to provide guidance in the application of the *ne bis in idem* principle in a transnational context.⁵

Eurojust's casework also points out a number of **grey areas** for which the application of the principle of *ne bis in idem* still raises questions for practitioners. In this regard, reference can, for example, be made to:

- Cases in which questions about **what constitutes the same acts** occur, particularly cases that relate to criminal activities performed by a criminal organisation. In these situations, for example, the question is raised whether the proceedings can be split up so that one Member State can prosecute the membership in a criminal organisation and another Member State the single criminal acts committed within the context of such organisations. The CJEU's *Mantello* judgement, which concerns a similar scenario, focuses on the assessment and information provided by the Member State in which the first conviction took place, and does not clarify all issues.
- Cases in which a discontinuation of an investigation was based on an **agreement between the suspect and the authorities**. The CJEU's statement in *Turanský*, that the consequences of a discontinuation of proceedings in another Member State should be determined by the law of the Member State in which this discontinuation took place, does not resolve all questions. National legislation is not always clear as to the consequences of a discontinuation, which then raises problems of interpretation, particularly in a cross-border context.
- Cases in which a judicial authority is confronted with **two requests for the execution of a sentence** regarding the same person and the same facts. In this regard, a point of concern, which has not yet been addressed in the CJEU's case law, is the question regarding which criteria need to be applied to decide which sentence should be executed. Does the *ratio legis* of the principle of *ne bis in idem* require that the first

⁵ See *The Principle of Ne Bis in Idem in Criminal Matters in the Case Law of the Court of Justice of the EU* (last updated in September 2017), available at: <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Pages/Case-law-analysis.aspx>.



judgement be executed? Or should preference be given to the judgement for which the execution was first requested? Should the most lenient sentence be executed? Or should more general principles such as a 'good administration of justice' be applied? In cases for which no explicit rules are available (either at European or at national level), doubts are created, and Eurojust has been asked to provide assistance.

- Cases in which an imminent risk of both an **administrative sanction and a criminal sanction** co-exist. The CJEU's *Åkerberg Fransson* judgement and the *Engel* criteria developed by the European Court of Human Rights (ECtHR) offer some guidance, but have not removed all doubts. Moreover, recent judgements by the ECtHR, such as *A. and B. v. Norway* of 15 November 2016, raised new questions. Pending cases before the CJEU are also expected in this matter. Thus, the correct application of national provisions in light of the CJEU's and ECtHR's case law remains a challenging task for national judicial authorities that, when needed, sought Eurojust's opinion to find convincing solutions in complex transnational situations.

Finally, issues related to the *ne bis in idem* principle are also encountered in Eurojust's casework in the framework of the **execution of EAWs** in which *ne bis in idem* violations are invoked by the executing authority as a **ground for non-recognition**. In those cases, Eurojust's role has often been crucial in gathering the relevant information to make the necessary assessment in relation to the *ne bis in idem* ground. More information on this matter can be found in the **Report on Eurojust's Casework in the Field of the European Arrest Warrant (2014-2016)**, published in May 2017.⁶

Conclusions

The experience of Eurojust in preventing and solving conflicts of jurisdiction is the result of fifteen years of work in this field. Jurisdictional issues that arise when parallel proceedings are taking place in two or more Member States, and the subsequent question of which jurisdiction is better placed to prosecute to avoid potential *ne bis in idem* situations, are frequently encountered in Eurojust's casework. Within its mandate, Eurojust helps facilitate preliminary contacts and consultations between competent authorities, coordinate their actions, encourage and expedite the exchange of information to gain a complete picture of the cases, ensure a smooth application of judicial cooperation instruments, clarify links between different parts of criminal networks, and facilitate subsequent decisions on which jurisdiction should prosecute and possible transfers of proceedings. Thanks to its advisory and coordinating role, in most cases supported by Eurojust, issues are settled between the competent national authorities and consensus is reached through dialogue and the building up of mutual trust.

⁶ See *Eurojust's Casework in the Field of the European Arrest Warrant (2014-2016)*, esp. pp. 6-7, available at: <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Pages/casework.aspx>.



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Catalogue number: QP-04-18-163-EN-N • *ISBN:* 978-92-9490-216-0 • *Doi:* 10.2812/03988