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10 YEARS OF EUROJUST
Operational Achievements and Future Challenges

Conflicts of jurisdiction and judicial cooperation instruments: Eurojust's role

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1. In civil and commercial matters the EU has a well established and almost complete set of Regulations on jurisdiction (starting from the Brussels Convention of 1968) through which a party can establish in advance, with a very slight margin of incoherence and uncertainty, whether the judge has or does not have the power to decide on the case brought before the court. On the contrary, **in criminal matters there is no standard set of agreed rules to determine which State's courts have jurisdiction over a crime in the case of a positive or negative conflict.**
2. Jurisdiction itself, especially in criminal matters, is strictly related to the sovereignty of Member States; so, **when we touch jurisdiction we touch the core of Member States' constitutional systems**. **That is something more than "mutual trust", it is previous mutual acceptance of another jurisdiction.** "Refraining from initiating a prosecution (or halting an existing one) could raise problems to the legal order of Member States which adhere to the legality principle, where the competent authorities have a duty to prosecute every crime which falls within their competence. This could raise problems, in particular, when the principle is provided for in a national Constitution (Annex to the GREEN PAPER On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings - COM(2005) 696.
3. Article 81 (2) of the TFEU provides that the EU *shall* adopt measures … aimed at ensuring: … (c) the compatibility of the rules applicable in the Member States concerning *conflict of laws and of jurisdiction*; Article 82 (1) provides that the EU *shall* adopt measures to: … (b) *prevent and settle conflicts of jurisdiction* between Member States. Article 85 considers that new Eurojust regulations

may include … the strengthening of judicial cooperation through the *resolution of conflicts of jurisdiction*. The coordination and full implementation of these provisions is now the aim of a good criminal policy governance. **The goal is to move beyond intergovernmental cooperation towards a clear and new common area of justice.**

4. For the defendant to be on trial before another country's court can be a real pain. He/she must use another language, face different procedural rules and standards of defence, have to choose a legal counsel competent in that jurisdiction and, last but not least, spend more money. From this point of view, **the new provisions of the TFEU about jurisdiction should be handled with a lot of care and with a step-by-step and very prudent approach**.
5. As to Article 47 of the Charter of Fundamental Rights **the independent and impartial tribunal must be *previously established by law*:** As a consequence, in my opinion, any rule about jurisdiction and competence of judges should be established before the crime has been committed or at least before the prosecution, and not following a decision by the prosecuting authorities; otherwise the choice of the judge would be discretionary or even arbitrary. So, new measures founded on the provisions of the TFEU should, in principle, be binding and suited to every national judge, even if there could be a certain (inevitable) margin of appreciation in the hands of national courts in the interpretation of them. **In no case should they be only in the hands of prosecutors, because it is inconceivable that the place for the trial could be chosen by one of the parties, even if this is the public one**. Prosecutors must have the power and the duty to make their choices in the light of the enforcement of measures established by EU law, in a certain sense anticipating the judge's probable decision, and not in accordance with prosecution offices' interests.
6. Clear measures established to settle possible conflicts of jurisdiction should be adopted by the EU also to avoid another pathological effects of a non-regulated possible competence of two or even a number of judges regarding the same crime: i.e. **the respect of the *ne bis in idem* principle.**
7. **The EU legislation which is now in force** (which was elaborated under the former Third Pillar's scope and rules) appears to be inadequate, remarkably late and above all incapable of dealing with some crucial decisions about "who shall decide" and "what shall be decided" in the case of a real, positive or negative,

conflict between two or more judicial authorities. **The tools existing today** – which have been written under the scope of cooperation between national authorities and not in view of the adoption of a common rule on jurisdiction – **are often vague and ineffective**. Moreover, they regulate only means of cooperation and mediation between investigating and prosecuting authorities and not measures fit for settling possible real conflicts. **The 1972 Council of Europe Convention on the Transfer of proceedings in Criminal matters** has been ratified and implemented, as of today, by only thirteen EU Member States. **The Framework Decision of 30 November 2009 on prevention and settlement of conflicts of jurisdiction**, that should have been applied by 15 June 2012, has been implemented by only three MSs. These measures can constitute a good basis for the work that must be done, but not the solution in the event of an effective conflict.

8. **EJ's 2003 Guidelines** do not constitute "law" but are useful tools to frame possible future solutions to the issue. Even if they are not definite or binding, the guidelines establish a valuable starting point: they actually not only show the need for a method (general discipline for the criteria of prevention and settlement of conflicts), but also propose a body and its functional competence as a way of applying this method. Some criteria are too vague, others are – from my point of view – not aligned with a fair trial notion, but the list of problems and possible solutions is still useful although they should be updated. Also the **2005 European Commission's Green paper on Conflicts of Jurisdiction** contains an interesting overview of issues and criteria and could be used to focus future assessments of legislation.
9. It is a paradox, but nearly all measures on jurisdiction contained in former Third Pillar' legal instruments which are still in force can create much confusion instead of a clear solution of possible conflicts. That is because the basic rule adopted (with some exceptions) is that MSs *must* take territorial jurisdiction when a crime was committed, even partly, on their territory and *may* take jurisdiction when a criminal act was committed by their nationals. Without a hierarchy of these criteria, **this enlarged concept of jurisdiction can lead to conflicts, both positive and negative, at every stage of criminal proceedings**.
10. There should be **a judicial review** of the decisions taken by the courts regarding their jurisdiction according to European law. This review should best

be placed in a unique EU jurisdiction in order to avoid differing interpretations of the measures that will come into force.

11. **What will be the role of Eurojust in the framework of a well-established and solid legislation for the prevention and settlement of conflicts of jurisdiction ? My answer is: a crucial one.** EJ was created on the basis of the Nice Treaty to enhance judicial cooperation in criminal matters: even after the 2009 Decision it is still a useful tool to facilitate all direct contacts between national authorities and a better use of existing measures for horizontal criminal cooperation. Now it is time to implement all the new potentials of this new discipline.
12. The prevention of conflicts of jurisdiction will be ever more important when we have general rules on jurisdiction and the settlement of conflicts; that is because **a conflict is always a pathological effect of something that has previously gone wrong**, as a *ne bis in idem* clause enforcement by a judge implies that two or even more prosecutions have been carried out, with a consequent waste of time, resources and tax-payers' money.
13. As was affirmed at the EJ's Bruges Strategic Seminar, the new Article 85 offers concrete possibilities to transform Eurojust from a simple mediator and player at horizontal co-operation level (which is already a very important role) to a player with (possibly binding) operational powers at vertical integration level. To this aim, the revised EJ Decision is, I guess, in the middle of its path: **EJ today is still more than a simple coordination and mutual information tool, but is not yet an operational and independent player on the stage of criminal policy**. Why ?
14. **First of all because of its structure**. The source of powers of National members is now often based on political decisions and appointments by MSs' governments: the effective powers of NMs can vary widely in consideration of national laws about the implementation of the two EJ Decisions (bearing in mind that the Decision of 2009 is still largely unimplemented). I am not sure that a judge or even a prosecutor (especially in national systems where they share a level of independence comparable with that of judges) will ever accept a binding decision adopted by the representatives of MSs' Governments.
15. Rec. 19/2000 of the Committee of Ministers of the C.o.E. And the case-law of the ECHR. Minimum rules about the independence of the Public Prosecutor.

16. **Secondly because**, also following the revised Decision, National Members' powers can be (and, I assume, still are) too asymmetric in relation to their national prosecuting authorities. If every member in a College has their own different powers, the risk is creating something like a Tower of Babel, at least in the perception of its activities by outsiders.
17. **Thirdly**, because many national Authorities are still reluctant to give EJ the information that is necessary for it to fully perform its new role, including the prevention of conflicts of jurisdiction. EJ should be aligned with the new provisions of the reformed Treaties, abandoning its inter-governmental DNA profile and becoming a true EU Agency.
18. One opportunity is round the corner: it is **a coordinated implementation of both Articles 85 and 86 of the TFEU**. All stakeholders know perfectly well that the wording "… *from Eurojust*" of Article 86 is rather ambiguous and a source of argument. I presume that this impasse can be overcome. Let us think of two concentric circles: a) in the smaller one we find the EPPO, with direct judicial powers of prosecution but with its competence strictly limited to the so-called PIF crimes: b) in the larger one there is Eurojust, with its wide-ranging competences in all the fields of article 85 of TFEU, more independent from National Governments than it is today and with the necessary powers to truly coordinate investigations and prosecutions. The two institutions will have to be truly independent of each other yet, at the same time, closely coordinated in their work.
19. Another opportunity will be a swift approval of the European Commission's **Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law** (COM 2012 363). This text contains – Article 11 – a clear rule on MSs' jurisdiction and can be a good basis for the next necessary step: **a rule on positive and/or negative conflicts to be contained in the future EPPO regulation**.
20. Conclusions: (a) The concentration of prosecution and trial before one judge of one MS where the alleged criminal activity took place is an interest of the Union and of the accused. (b) But this aim can never mean that there could be a forum-shopping by the prosecution or the defence. (c) What we need are clear rules on possible conflicts of jurisdiction and not only rules about enlarged jurisdiction or mediation and cooperation of prosecuting authorities, like the ones that we have today. (d) These rules should be based on one fundamental

principle, with some (and possibly few) exceptions, like the criteria adopted by the EU in civil and commercial matters and foreseeable, to help the early concentration of investigations and prosecution. (e) To this aim the role of EJ should be implemented, assuring effective information about the activity of national Prosecutors and reforming the body towards a larger independence of its national members from their governments. (f) Starting from the PIF crimes, the approval of the Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law and the future regulations for the institution of the EPPO and the reform of EJ are two key opportunities to settle these issues, giving an example for future developments also in other fields of EJ competence.

21. About the PIF crimes there is now a very interesting work carried out by the University of Luxembourg about EU "model rules of criminal procedure"; Rule 64 (forum choice) provides that 1. The EPPO shall prosecute the case in the jurisdiction which is most appropriate, taking into consideration, in the following sequence: a) the Member State in which the greater part of the conduct occurred, b) the Member State of which the perpetrator(s) is (are) a national or resident, and c) the Member State in which the greater part of the relevant evidence is located. 2. If none of the criteria listed in subsection (1) apply, the case shall be prosecuted in the jurisdiction where the EPPO has its seat. 3. The accused and the aggrieved party may appeal against the EPPO's choice of forum to the European court.
22. I agree to the criteria and to their hierarchy. I do not agree to the title; this is not a matter of "choice", is a matter of duty.