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## **Conflicts of Jurisdiction in Criminal Proceedings**

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**Abstract:** This paper will consider the practical settlement of conflicts of jurisdiction both in relation to the forum for prosecution and transfer of proceedings. The corollary of free movement of people is free movement of judgments, sentences and related powers of investigation and prosecution. Cross border crime requires to be addressed by equipping law enforcement and prosecution authorities with mechanisms to ensure the public interest in the investigation and prosecution of crime is met. The starting point for any consideration is the place where the criminal conduct took place. Sometimes the crime is such that criminal jurisdiction will be fixed - such as theft of property, crimes of violence - where others have an impact or criminal conduct in more than one jurisdiction - drug importation, major transnational drug dealing, human trafficking, terrorism.

**Keywords:** offences; investigations; legislature; trial

### **1. Introduction**

In the latter types of criminal conduct consideration has to be given to how the relevant law enforcement and prosecution authorities liaise with each other to determine which will take on responsibility for the investigation and prosecution of the crime.

If the conduct becomes known at a sufficiently early stage the relevant authorities could seek to establish a joint investigation team. These teams being together the relevant players from each jurisdiction - law enforcement, prosecution, investigating judge, computer analysts. These teams, in the appropriate case can be highly effective.

The more traditional route is to liaise either directly with each other or to liaise through Europol. Parallel investigations, where each jurisdiction continues its own inquiry while keeping in touch with the other jurisdiction and sharing intelligence and outcomes can also be highly effective. It is not every case that sees all the criminal conduct being prosecuted in one jurisdiction. There can be very good strategic reasons why certain parts of a wider actor criminal conduct would be prosecuted in one jurisdiction with other elements prosecuted in another jurisdiction.

What is essential is flexibility and awareness of mechanism and frameworks to enable best use of those to ensure the best outcome, which should not be where the conviction is most easily achieved nor where the toughest penalty is imposed but where the public interest is best served having regard to

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a range of factors such as location of witnesses, evidence, accused –especially where the person is in custody- and if conviction achieved where the person can best be rehabilitated having regard to the convicted person's article 8 family rights.

## **2. Settlement of Jurisdiction**

The settlement of jurisdiction in cases where there is early engagement will then inform the future course of the investigation and the mechanisms that can be deployed. For example, once law enforcement of one jurisdiction has responsibility for the investigation, they can then seek to recover evidence from the other by letter of request.

The issue of evidence both its recovery but as importantly its use in proceedings is a vital consideration. It should be at the forefront of the prosecutors mind before an decision is taken to seek the transfer of proceedings. The prosecutor needs to be aware of the mechanisms of recovery of evidence in one state and how evidence recovered by those measures can be introduced into evidence in proceedings in their state. This is a particularly difficult issue for common law states.

Member States who are signatories to the Council of Europe Convention on Transfer of Proceedings 1972 can formally transfer the case to another jurisdiction. The mechanism provides “Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. Having regard to Article 21, paragraph 2, any such decision to waive or to desist from proceedings shall be provisional pending a final decision in the other Contracting State.

The Framework Decision on Settlement of Conflicts of Jurisdiction 2009/948/JHA aims to encourage where there are parallel investigations: Direct communication between national authorities, to determine jurisdiction, with a view to reducing the impact of any *ne bis in idem* principle

As the framework decision provides at Article 1.1: “where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States thereby constituting an infringement of the principle of ‘ne bis in idem’. However the decision recognizes that no Member State's national authorities are obliged to relinquish prosecution.

The considerations that national authorities are encouraged to consider in determining jurisdiction are those contained in the Guidelines which were published in the Eurojust Annual Report 2003.

It is envisaged that “When a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations as provided for in Article 10”

The competent authority is the judicial authority. If the authorities do not know who they ought to contact, the decision encourages contact to be made through the European Judicial Network.

The authorities should exchange sufficient information to ensure they are satisfied parallel investigations exist and if so, then enter into direct discussion about which jurisdiction will undertake the investigation and prosecution of the case.

The decision provides that this framework is supplementary to the Eurojust decision and the new council decision on Eurojust should also be considered.

In addition, Article 7.2 of the Eurojust decision provides the college of Eurojust may issue a non binding opinion where national authorities of Member States cannot agree on a resolution of a conflict of jurisdiction. Eurojust provided guidance on the relevant criteria it would apply in reaching a decision.

The decision provides at Article 13.6 that Member States authorities must provide the national member at Eurojust with information on letters of request which they have issued to two or more jurisdictions in the range of cases referred.

This provision should enable the national members to raise awareness and make aware other national desks of the existence of the enquiry and to consider whether they, through Eurojust, can offer greater coordination in cases which clearly relate to serious cross border offences. What can the national members through Eurojust offer? In addition to this provision, article 13.7 places an obligation on national authorities to make national members aware of “cases where conflicts of jurisdiction have arisen or are likely to arise.”

Article 13 EU Mutual Assistance Convention 2000 provides the legal base for the establishment of joint investigation teams. Article 13 provides “By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement.”

A joint investigation team may, in particular, be set up where:

- (a) a Member State’s investigations into criminal offences require difficult and demanding investigations having links with other Member States;
- (b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.

A request for the setting up of a joint investigation team may be made by any of the Member States concerned. The team shall be set up in one of the Member States in which the investigations are expected to be carried out.

These teams can be highly effective. The secretariat for Joint Investigation Teams was recently established in Hague.

Article 16.1 Framework Decision on the European Arrest Warrant 2002/584/JHA provides guidance to executing authorities where there is competition between a request for extradition based upon an EAW and from a third state. Article 16.1 provides the relevant factors as being: Relative seriousness of the offences, dates of issue of the requests, execution of sentence v sought for trial.

### **3. Practical Case**

P. is a national of country A. Country A has jurisdiction to prosecute its own nationals who commit crime abroad. It operates the principle of legality. P. lives in country B but travels frequently to country A. P. is believed to be involved in the cross border shipment of significant amounts of drugs

between country A and country B. The police in country B have recovered some drugs from F. a known criminal associate of P.

The police in country A have also recovered equipment for the division and packaging of drugs when they searched premises. They find evidence in the premises that links P. to there unlawful use.

The police in both country A and country B have approached their respective prosecutors to seek guidance on how to proceed.

Consequently, P. has been seen in country C with a know drug dealer. The police arrest the drug dealer but during the operation, they find P. in the premises and when he is searched he is found in possession of three mobile phones and a key. The key is found to be for premises where the police find 50 kg of cocaine. P. is arrested. The prosecutor in country C wishes to prosecute P. However, evidence recovered in the premises shows the cocaine was imported from country A.

On being interviewed by the police, P. discloses that he has a bank account in country D which has €3 m. The police believe some of this money, if not all of it, represents the proceeds of crime.

Following issues arising from the practical case: Is there a conflict in jurisdiction?, How could the prosecutors in each jurisdiction find out about the criminality and state of investigation in the other jurisdiction?, How could they discuss their respective cases with each other?, Is there a role for the European Judicial Network?, Is there a role at this stage for Eurojust? If so, how would that be initiated?, Should the prosecution authorities discuss their cases with each other?, Should evidence be recovered from any country for use in another?

#### **4. Conclusion**

It can be seen there are a number of mechanism which seek to prevent conflicts of jurisdiction but that where that issue arises either through investigation measures or extradition, these issues can be resolved through cooperation.

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