TEAM ITALY – THEMIS 2019 SEMIFINAL A

EU and European criminal procedure

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TITLE
"DON'T TOUCH MY CRIMES. PREVENTION AND SOLUTION OF CONFLICTS OF JURISDICTION."

1. Introduction; 2. The transnational dimension of the *ne bis in idem* principle; 3. The cornerstones of the *ne bis in idem* principle: the Convention Implementing the Schengen Agreement; the 7th Protocol of the European Convention on Human Rights; the Charter of Fundamental Rights of the European Union; 4. The *ne bis in idem* principle in the mutual recognition instruments; 5. The benefits and drawbacks of parallel proceedings; 6. Prevention and solution of conflicts of jurisdiction among European States; 6.a. The legal framework and its critical issues; b. The role of Eurojust; c. The Joint Investigation Teams; 7. Prevention and solution of conflicts of jurisdiction among Member States and Third States; 8. The European Convention on the Transfer of Proceedings of 1972; 9. The conflict of jurisdiction in the frame of the European Public Prosecutor's Office; 10. Conclusion: letter to public prosecutors

1. Introduction

A conflict among two or more jurisdictions arises when several States consider themselves respectively competent to decide about a case.

Multiple prosecutions may occur within two or more States for several reasons: different criteria used to exercise jurisdiction;[1] the adoption of international instruments setting up the principle of extra-territoriality in order to strengthen the fight against most serious crimes, such as torture and genocide;[2] the development of cybercrime, which entails a new concept of territory;[3] globalization itself, as the perpetration of cross-border crimes is easier in an area of freedom of movement.

Moreover, the principle of sovereignty plays a dominant role on criminal matters, meaning that States are eager to maintain their jurisdiction and to apply their own national law to offences. In order to protect their sovereignty, in fact, States never adopted an international legal instrument providing a strict set of rules to allocate criminal jurisdiction for all types of offences. Similarly, no agreed EU-wide rules on the allocation of criminal jurisdiction exist.[4]

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[1] In establishing criteria on exercising jurisdiction, States may take into consideration not only the *locus commissi delicti*, but also other elements, such as the offender and victim's nationality. In this sense, Giulia Giacomelli, 'Ne Bis In Idem Profiles in EU Criminal Law', (Graduate Thesis, University of Florence 2013) 4. For instance, according to the Italian Law, jurisdiction on criminal matters can be based on: 1) the principle of territory; 2) the principle of the active personality; 3) the principle of the passive personality; 4) the principle of security of the State; 5) the principle of universality. See F. Mantovani, *Diritto Penale*, (CEDAM 2015) 878.

[2] *Ex multis*, Rome Statute of the International Criminal Court (adopted 17 July 1998 entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute).

[3] Armando A. Cottim, 'Cybercrime, Cyberterrorism and Jurisdiction: An Analysis on Article 22 of the CoE Convention on Cybercrime' (2010) 2 (3) European Journal of Legal Studies 7.

[4] Case C-398/12 M (2014) OJ C253/7, Opinion of AG Sharpston, para 51.

Anyway, the risk that a person is sentenced successively for the same facts in different Countries can be avoided by applying the principle of *ne bis in idem*. This principle is fundamental, because it stands as a guarantor of the rights of the individuals and as a guardian of legal certainty. In other terms, although the *ne bis in idem* principle cannot prevent conflicts of jurisdiction, it logically follows them as an *a posteriori* instrument.[5]

Still, a shortcoming of this principle is the so called "first come, first served" effect,[6] that is to say that the *ne bis in idem* may end up acting as an "improper mechanism for a preference of jurisdiction".[7] As a matter of facts, it can lead to arbitrary results, because it gives preference to the jurisdiction of the State which comes first to a final decision.

In this paper, the authors aim at analysing practical solutions to prevent and solve conflicts of jurisdiction in today's European legal framework.

Therefore, the legal provisions outlining the principle of the *ne bis in idem* will be first examined together with the interpretations of this principle given by the Court of Justice of the European Union (hereinafter also ECJ) and by the European Court of Human Rights (hereinafter also ECtHR).

Then, the analysis will focus on the mutual recognition instruments which could help the surfacing of parallel proceedings, whose benefits and drawbacks will be also dealt with.

Subsequently, the possible ways to solve conflicts of jurisdiction will be outlined considering, on the one hand, the case in which the conflict arises between Member States of the European Union and, on the other hand, the case in which the conflict concerns also Third States.

Finally, the attention will be shifted to the management of conflicts of jurisdiction provided by the Regulation establishing the European Public Prosecutor Office.

2. The transnational dimension of the *ne bis in idem* principle

The Latin name of *ne bis in idem* shows the genesis of it dates back to Roman law.[8] Such principle of common sense has been further elaborated in the development of the modern legal framework, in fact it is known in the common law systems with the expression "double jeopardy principle".

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[5] Giulia Giacomelli (n 1) 1, 2.

[6] Martin Wasmeier and Nadine Thwaites, "The development of ne bis in idem into a transnational fundamental right in the EU Law: Comment on Recent Developments" (2006) European Law Review 565, 576.

[7] John AE Vervaele, 'Ne bis in idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 (4) Utrecht Law review, 211, 222.

[8] Ulpianus, *De officio proconsulis, 7*, in *Corpus iuris civilis, Digestum* 48.2.7.2: *Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit*. Imperatores Diocletianus, Maximianus, in *Corpus iuris civilis, Codex* 9.2.9 pr.: *Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest.*

As well as its denomination, the content of the principle is not uniform in the legal systems of the European Union (hereinafter also EU); still a common core exists. In particular, the *ne bis in idem* principle avoids that the same individual faces more than one criminal proceeding for the same material fact(s).

More specifically, the word *bis*, literally translated as two times, indicates the forbidden repetition of a second or more criminal proceedings and the locution *idem*[9] refers to the identity of judicial decision in terms of its object.

Traditionally, *ne bis in idem* has been construed as a principle applicable within national jurisdictions.[10] This circumstance has revealed itself as a problem in the context of EU law, since the EU forms a new legal order, in which it can be seen as a concrete difficulty to transpose the different constituent elements of criminal law to the supranational level.[11]

Moreover, the EU legal framework, with regard to the *ne bis in idem* principle, is characterized by a perceptible fragmentation.[12] From a general perspective, it is essential to refer to Article 54 Convention Implementing the Schengen Agreement (hereinafter CISA);[13] to Article 50 Charter of Fundamental Rights of the European Union (hereinafter Charter) and to Article 4 7th Protocol of the European Convention on Human Rights (hereinafter Article 4 P7 ECHR).

Likewise, the preservation of the principle of *ne bis in idem* is paramount in the European instruments based on the principle of mutual recognition, which subject the recognition and execution of judicial decisions and judgments taken in another Member States to the respect of *ne bis in idem*.[14]

Indeed, a *bis in idem* situation constitutes a common ground for non-recognition and non-execution of: a) a European Arrest Warrant (Article 3(2) Framework decision 2002/584/JHA on the European

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[9]Willem Bas Van Bockel, The Ne Bis in Idem Principle in EU Law (Kluwer Law International BV 2010), 45-46.

[10] John AE Vervaele, "Ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights" (2005) 1 (2) Utrecht Law review, 100.

[11] Johannes Bjork, 'Ne Bis in Idem in EU Law - Late Developments in the Case law of the ECJ', (Graduate Thesis, Lund University 2013) 23.

[12] Case C-17/10 Toshiba Corporation and Others (2012) ECR 1-00000, Opinion of the AG Kokott, paras 111-24.

[13] "Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders" (CISA) (2000) OJ L239/19

[14]The *ne bis in idem* is one of the grounds for non-recognition that Eurojust dealt with mostly, according to Eurojust, *Report on Eurojust's Casework in the field of the European Arrest Warrant* (2017) 6-7 <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20the%20EAW%202014-2016%20(May%202017)/2017-05_Eurojust-EAW-Casework-2014-16_EN.pdf > accessed 30 March 2019.

Arrest Warrant (hereinafter FD 2002/584/JHA on EAW)); b) a European Investigation Order (Article 11 of the Directive 2014/41/EU of the European Parliament and of the Council (hereinafter Directive 2014/41/EU on EIO)); c) a freezing and confiscation order (Articles 8(1)(a) and 19(1)(a) of the Regulation (EU) 2018/1805 of the European Parliament and of the Council on the mutual recognition of freezing orders and confiscation orders (hereinafter Regulation 2018/1805 on freezing and confiscation orders)).

Despite the different wording of the *ne bis in idem* principle in the various legal provisions,[15] the jurisprudence has gradually elaborated a uniform interpretation of its main requirements. Indeed, it is acknowledged that the application of *ne bis in idem* requires: 1) the criminal nature of the proceedings;[16] 2) the "same person" being the subject of the criminal proceedings; 3) the "bis"; 4) the "final decision" and, limited to Articles 54 CISA and 3(2) FD 2002/584/JHA on EAW; 5) the enforcement condition.

3. The cornerstones of the *ne bis in idem* principle: the Convention Implementing the Schengen Agreement; the 7th Protocol of the European Convention on Human Rights; the Charter of Fundamental Rights of the European Union

As the CISA entered into force, the Contracting Parties acknowledged the resulting increase of cross-border crimes as a side effect of the creation of a borderless area. In this context, it would be unconceivable and contradictory that the freedom of movement were frustrated by the fear to feel subject to a double prosecution or to a double sanction for the same offence, whenever travelling throughout Europe.[17] This is why the *ne bis in idem* principle was necessarily to be included in the provisions implementing such an agreement.

As for the interpretation of the principle's requirements, the concept of "the same acts" within the meaning of Article 54 CISA was solidly focused by the ECJ on the concrete acts that made the offender twice responsible, not on the legal qualifications that each Member State attributed to criminal facts. Import-export cases, such as The Esbroeck case, are a milestone in the interpretation of the *idem* requirement. By analyzing the conduct of the indicted, who had trafficked narcotic drugs among different Member States, the ECJ evaluated the practice of import from a certain State and of export to another State as a single material act.[18]

[15] See Articles 54 CISA; 50 Charter; 3(2) FD 2002/584/JHA on EAW; Article 4 P7 ECHR.
[16] The application of the *ne bis in idem* principle presupposes that the measures which have already been adopted against the accused person are of criminal nature. In order to establish whether a measure has a criminal or administrative nature, the jurisprudence of the ECtHR has elaborated the so-called Engel criteria. See Engel and Others v. Netherlands (1976) Series A no 22.
[17] Willem Bas Van Bockel (n 9) 21.
[18] Case C-436/04 Van Esbroeck (2006) ECR I-2333 para 36-8.

Another aspect to clarify in order to define the extension of *ne bis in idem,* as expressed in Article 54 CISA, is the concept of "finally disposed of". According to the ECJ precedents, the expression "final decision" includes both convictions and acquittals,[19] since not only the former but also the latter are considered as an exercise of the *ius puniendi*.

While the aforesaid aspect is quite undisputed in the ECJ jurisdiction, a more controversial issue is whether a decision, not facing the merits of the case, but just taken on the basis of procedural grounds, might represent a final disposition of a case for the purpose of Article 54 CISA. This thorny issue was faced by the ECJ, with different outcomes, in two cases: Miraglia[20] and Gasparini.[21] While in the Miraglia case the Court excluded the application of the double jeopardy rule, not feeling up to boost the free movement to the detriment of the security exigencies of preventing and fighting crimes,[22] in the Gasparini case the conclusion was opposite. In particular, in the Gasparini judgment the *ne bis in idem* principle was applied, since the Court considered an acquittal, based on procedural grounds and with no assessment of the merits of the case, as a "final judgment", namely a binding one for all Member States.

Article 4 P7 ECHR is indirectly important for the development of *ne bis in idem* on a transnational level, since it refers to "the jurisdiction of the same State". In other terms, Article 4 P7 ECHR has the huge limit of being confined by its own wording to a mere internal dimension, with the result that it does not avoid double prosecutions in case of trans-border crimes.

Albeit such a point of weakness, this version of the principle distinguishes itself from the wording of the sources examined so far, since it does not provide for any enforcement condition. With regard to the concept of *idem* in the meaning of the norm, after an initial uncertainty in the jurisprudence of the ECtHR, due to the use of the expression "offence" instead of "same acts", the Court adapted to what other supranational jurisdictions did within the same field. More precisely, the ECtHR clarified that "Article 4 P7 ECHR must be understood as prohibiting the prosecution or trial of the same 'offence' in so far as it arises from identical facts or facts which are substantially the same".[23]

As stated, *ne bis in idem* is guaranteed at EU level not only by Article 54 CISA, but also by Article 50 Charter, meaning that this principle has become a fundamental right of individuals. After the entry into force of Article 50 Charter, the ECJ held that Article 54 CISA has to be interpreted in the light of

[19] Case C-150/05 Van Straaten (2006) ECR I-9327.
[20] Case C-469/03 (2005) ECR I-2009.
[21] Case C-467/04 (2006) ECR I-9199.
[22] Richard Lang, 'Third Pillar Developments from a Practitioner's Perspective', in Elspeth Guilt and Florian Geyer (eds), Security versus Justice?: Police and Judicial Cooperation in the European Union (Ashgate Publishing 2008) 265, 270.
[23] Sergey Zolothukhin v. Russia, (Appl. No. 14939/03), Judgement of 10 February 2009 para 82.

the latter provision and that the enforcement provision of Article 54 CISA is compatible with the Charter, being a limitation provided by law within the meaning of Article 52(1) Charter.[24]

As for the evident differences between Article 50 Charter and Article 4 P7 ECHR, Article 52(3) Charter states that the right guaranteed by the Charter has the same meaning and the same rationale as the corresponding right in the ECHR, so it is vital to ensure that the interpretation of Article 50 Charter fulfils the level of protection guaranteed by the ECHR. Moreover, it has to be noted that, pursuant to Article 6(1) Treaty of European Union, the Charter has the same value of the Treaties, thus having direct effect whenever a situation comes within the scope of EU law.[25]

4. The *ne bis in idem* principle in the mutual recognition instruments

Article 3(2) FD 2002/584/JHA on EAW contemplates the existence of a final judgment in respect of the same acts as one of the mandatory grounds for refusal of the execution of an EAW. As stated by the ECJ in the Mantello case,[26] the provision shares the same rationale of Article 54 CISA, conferring to the charged persons the same form of protection as to the finally judged ones, although from a different point of view. In particular, while Article 54 CISA prevents the exercise of jurisdiction, allowing those who have been finally judged to move freely within the Schengen area, Article 3(2) FD 2002/584/JHA on EAW creates an obstacle to the execution of a cooperation request.

Moreover, another nexus between the two provisions is that both of them provide enforcement conditions. In the light of this similarity, the ECJ jurisprudence is prone to assimilate the notion of "same acts" as mentioned in Article 3(2) FD 2002/584/JHA on EAW to that of Article 54 CISA, as interpreted by the Court itself. This is evident in the aforementioned Mantello case, which is at stake for the definition of the "final judgment" requirement too.

In order to have a plain view on the issue, a hint of the facts of this case is appropriate. An EAW was issued in respect of Mr. Mantello in the context of criminal proceedings instituted in Italy for conducts of unlawful possession of large amounts of drugs and participation to a criminal organization. The German judicial authorities posed the issue whether the surrender should be refused on the basis of *ne bis in idem* principle. In fact, in order not to jeopardize the investigations over the association, at the time of the EAW request Mr. Mantello had already been convicted for unlawful drug possession. About this issue, the ECJ clearly stated as follows: "whether a person has been finally judged for the purpose

[24] Case C-129/14 PPU, Spasic (2014).
[25] The Italian Court of Cassation (decision No. 54467/2016) held that, due to the direct effect of Article 50 Charter, the Italian judicial authorities had to reject a Turkish request of extradition on the grounds of *ne bis in idem* even in a case in which the final decision had not been rendered by an Italian Court, but by a German Court. The ECJ recognised the direct effect of the Charter in various cases, also in disputes between private parties (for instance, joined Cases C-569/16 and C-570/16 *Bauer et al*).
[26] Case C-261/09 Mantello (2010) ECR I-11477.

of Article 3(2) FD 2002/584/JHA on EAW is determined by the law of the Member State in which judgment was delivered".[27] In conclusion, the Court established that the executing judicial authority cannot apply the mandatory *ne bis in idem* non-execution ground, if the law of the issuing State denies the existence of a previous final judgment covering the same facts.

Moreover, the Italian legislation provides for a broad application of the *ne bis in idem* principle as a ground for refusal of an EAW, since Article 18(1)(o)(p) Italian Law 69/2005 envisages the pendency of criminal proceedings as a ground for refusal, both whether such pendency is actual or potential.[28]

As said, also Article 11 Directive 2014/41/EU on EIO and Articles 8(1)(a) and 19(1)(a) Regulation 2018/1805 on freezing and confiscation orders foresee, as ground for non-execution of a request, the principle of *ne bis in idem*.[29]

5. The benefits and drawbacks of parallel proceedings

As said, the *ne bis in idem* principle comes into play only once a final decision has been rendered.

In order to avoid that two or more proceedings are initiated against the same person for the same fact(s), it is essential to determine in advance whether parallel proceedings for the same offence are being carried out in two or more States and, if so, to concentrate them under the jurisdiction of only one Country.

In these terms, the mutual legal assistance instruments, mentioned in the above paragraph, could function as indicators of the existence of parallel proceedings as soon as the need to arrest a person, to obtain evidence or to execute seizures in another Member State arises. The usage of such cooperation

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[27] Eurojust, *Case Law by the Court of Justice of the European Union on the European Arrest Warrant* (2018) 38 < http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20Law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20(October%202018)/2018-10_EAW-case-law_EN.pdf> accessed 1 April 2019.

[28] The grounds for refusal mentioned in the text are superseded in the context of the applicability of bilateral treaties, such as the Addendum to the European Convention on Extradition of 13 December 1957, signed in Rome on the 24th October 1979 between Italy and Germany (Italian Court of Cassation 22/03/2018 - 23/03/2018, n. 13868). Moreover, the scope of the ban on the execution of EAWs for potential *lis pendens* must be interpreted narrowly (Italian Court of Cassation 04/04/2018 - 10/04/2018, n. 15866; 13/06/2018 - 18/06/2018, n. 27992). Such ban does not encompass EAWs issued because of final judgements (Italian Court of Cassation 25/01/2018 - 30/01/2018, n. 4444; 22/05/2014 - 26/05/2014, n. 21323).

[29] Furthermore, the 17th recital Directive 2014/41/EU on EIO suggests an interesting usage of such cooperation instrument providing for the possibility to issue it with the specific purpose to establish whether a possible conflict with the *ne bis in idem* principle exists. In this case the execution of the EIO should not be refused and the interested Member States could ask for the support of Eurojust for a settlement of jurisdiction.

tools is beneficial because the decision on where to prosecute, which usually follows the recognition of parallel proceedings, could be already reached at an early stage in the investigations.[30]

The phenomenon of parallel proceedings can occur due to the fact that each State regulates its own criminal jurisdiction, usually extending its powers outside its borders,[31] thus creating the risk, already outlined in the introduction, of positive conflicts of jurisdiction (*i.e.* two or more States claim jurisdiction).

Actually multiple proceedings can turn out to be beneficial in struggling crime, especially transnational offences.[32] As a matter of fact, opening investigations in several Countries could lead to detect offences, to secure evidence and to reveal the complexity of a criminal activity carried out across more States.

Nonetheless, parallel proceedings entail also undeniable drawbacks. In particular, if parallel proceedings are not coordinated, they can result in a waste of time and resources, in a duplication of work and, above all, they can negatively affect the rights of the individuals involved in them.

Mainly, the accused person could be subject to multiple investigations, custody orders, judgements and convictions for the same offence, finding him/herself compelled to invoke *ne bis in idem* just after one of the decisions becomes final. Defendants, victims and witnesses could be summoned by numerous Courts, thus suffering a heavier loss of time and possibly money to attend hearings.

6. Prevention and solution of conflicts of jurisdiction among European States

a) The legal framework and its critical issues

Despite the obvious need for coordination, underlined also by Article 82(1)(b) Treaty on the Functioning of the European Union (hereinafter TFUE), few legal instruments were adopted in this field and they do not provide strict rules to avoid conflicts of jurisdiction, so as not to impinge on the already mentioned principle of sovereignty, which is dominant in criminal law.

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[30] The *Guidelines for deciding 'which jurisdiction should prosecute?'* (2016) 2 <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20(2016)/2016_Jurisdiction-Guidelines_EN.pdf>, accessed 23 March 2019, hereinafter Guidelines for deciding.

[31] Giulia Giacomelli (n 1) 4

[32] Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (2018) 6 <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20prevention%20and%20resolution%20of%20conflicts%20of%20jurisdiction%20(2018)/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf > accessed 26 March 2019, hereinafter Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction.

The most important European act is the Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (hereinafter FD 2009/948/JHA on conflicts of jurisdiction).[33] The said framework decision plays a key role in this matter. In fact, the legal system of some Member States (such as Italy) provides for the principle of mandatory prosecution, as a consequence of the principle of legality in criminal matters, which in principle could jeopardise the aim of concentrating the proceedings. However, as pointed out in the 12th recital of the FD 2009/948/JHA on conflicts of jurisdiction, in the common area of freedom, security and justice provided by Article 67 TFEU, the principle of legality is deemed to be respected if any Member State prosecutes the offence.

Other European instruments dealing with the issue of conflicts of jurisdiction are the Framework Decision 2008/841/JHA on the fight against organised crime (hereinafter FD 2008/841/JHA on organised crime), the Directive 2017/541 on combating terrorism (hereinafter Directive 2017/541 on terrorism) and the Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. All these legal tools provide multiple criteria to found the jurisdiction of the Member States, in order to ensure that crimes are prosecuted, but do not set binding criteria to determine which State is in a better position to prosecute.

The main aim of these instruments is to foster contacts between States in order to: 1) detect the existence of parallel criminal proceedings in cases presenting links to more than one Country and 2) reach a consensus on the most appropriate jurisdiction to prosecute.

However, all the above-mentioned instruments have shortcomings, mainly due to the fact that Member States are eager to maintain their sovereignty on criminal matters.

First of all, it has to be pointed out that the initiative of contacting foreign authorities, in order to verify if parallel proceedings are being conducted, is mainly left to the discretion of Member States.

For instance, Article 1 FD 2009/948/JHA on conflicts of jurisdiction states that "*when a competent authority of a Member State has reasonable grounds to believe that parallel criminal 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*". Such a wide discretion characterises also Article 19(3) Directive 2017/541 on terrorism

[33] The FD 2009/948/JHA on conflicts of jurisdiction has not been implemented by Greece, Luxemburg (on 21 May 2018 the implementation process was ongoing) and the United Kingdom <https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=66>, accessed 30 March 2019.

and Article 7(2) FD 2008/841/JHA on organised crime. So broad a discretion has a negative impact on the efficiency of the procedure, also because statutory deadlines are not outlined.[34]

Secondly, these instruments do not provide strict criteria to determine which State should have the priority to prosecute. They only enumerate some factors that should be taken into account,[35] specifying that the final decision must be adopted in the light of the particular facts of each case. Such a case-by-case approach clearly made it possible to avoid the resistance that States would have put up to a precise hierarchy among criteria, which would have restricted their sovereignty.

Thirdly, the same principle of protection of sovereignty appears to be the basis of the provisions which, as we are to further outline later, enable Member States to require the assistance of Eurojust in order to facilitate the cooperation among them. Actually the decisions of this Agency are not binding, so that - in the end - States cannot be obliged to refrain from starting to prosecute or to suspend a prosecution already initiated.[36]

In addition, none of these acts regulates the role of individuals or the judicial review.

These aspects were taken into consideration only by the Green Paper on conflicts of jurisdictions and the principle of *ne bis in idem* in criminal proceedings presented by the European Commission in 2005. In particular, the Commission maintained that individuals involved in the proceedings should be informed that the issue of jurisdiction has been addressed by the States to which the case presents significant links. In fact, not only individuals can enlighten the existence of some elements that could contribute to determine which State is in the best position to prosecute, but also this information is essential to respect the rights of the defendant, since the outcome of the proceeding may vary considerably depending on the chosen jurisdiction. For this reason, the accused should be put in such a

[34] See Article 6 FD 2009/948/JHA on conflicts of jurisdiction.

[35] See 9th recital FD 2009/948/JHA on conflicts of jurisdiction which lists some of the criteria suggested by the Guidelines for deciding 'which jurisdiction should prosecute?' first published in 2003. The topic will be dealt with in Section III, paragraph 11. See also Article 19(3) Directive 2017/541 on terrorism and Article 7(2) FD 2008/841/JHA on organised crime which read as follows: "account shall be taken of the following factors: a) the Member State in the territory of which the acts were committed; b) the Member State of which the perpetrator is a national or resident; c) the Member State of the origin of the victims; d) the Member State in the territory of which the perpetrator was found".

[36] The 11th recital FD 2009/948/JHA on conflicts of jurisdiction provides that "no Member State should be obliged to waive or to exercise jurisdiction unless it wishes to do". As a consequence, if "consensus on the concentration of criminal proceedings has not been reached, the competent authorities of the Member States should be able to continue criminal proceedings for any criminal offence which falls within their national jurisdiction".

position to be able to intervene in the consultations, so as to avoid the risk that the forum is chosen by States at his/her detriment,[37] namely only having regard to the possibility of a conviction.

It is possible that the consultation of the parties in the pre-trial phase jeopardises the prosecution or impinges on the rights of victims and witnesses. In this event, it seems necessary to consult the parties, at least, in the trial phase and national Courts should be able to examine the jurisdiction issue, in the light of the principle of reasonableness, whenever States have reached a binding agreement on jurisdiction.

Finally, these instruments do not outline a mechanism to transfer criminal proceedings, once the consensus on the centralisation of the prosecution is reached.

Given the substantial absence of strict legal rules to allocate criminal procedures, the issues raised by conflicts of jurisdiction can be solved with the support of Eurojust.

b) The role of Eurojust

Eurojust was set up by the Council Decision 2002/187/JHA, which was amended by the Council Decision 2009/426/JHA (hereinafter Decision 2009/426/JHA). With effect from 12th December 2019 the Regulation (EU) 2018/1727 of the European Parliament and of the Council (hereinafter Regulation 2018/1727) will replace the Decision 2002/187/JHA, pursuant to its Articles 81 and 82.

The mission of Eurojust is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes, as stated in Article 2 Regulation 2018/1727. Within its mission, Eurojust is called to assist national authorities in solving conflicts of jurisdiction. In this regard, Article 21(6)(a) Regulation 2018/1727, in line with the previously in force Article 13(7) Decision 2009/426/JHA, provides that *the competent national authorities shall inform their national members of cases in which conflicts of jurisdiction have arisen or are likely to arise*. Despite a growth in the number of notifications received under these provisions in the last years, Member States are quite reluctant to inform the National Members about conflicts of jurisdiction.[38]

In addition, several other European provisions acknowledge a crucial role to Eurojust in the settlement of jurisdiction, namely Article 12 FD 2009/948/JHA on conflicts of jurisdiction; Article 16

[37] Zimmerman, 'Conflicts of Criminal Jurisdiction in the European Union' (2015) 3 Bergen Journal of Criminal Law and Criminal Justice 5; Ignazio Patrone 'Conflicts of jurisdiction and judicial cooperation instruments: Eurojust's role' (2013) 14 *Era Forum* 215.

[38] Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction (n 32); Eurojust, (2016) 14 Eurojust News Issue < http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%2014%20(January%202016)%20on%20conflicts%20of%20jurisdiction/EurojustNews_Issue14_2016-01.pdf>, hereinafter Eurojust News Issue 1/2016, where it is reported that cases registered under former Article 13(7) were 0 in 2010; 6 in 2011; 9 in 2012; 21 in 2013; 28 in 2014; 35 in 2015.

FD 2002/584/JHA on EAW; Article 7 FD 2008/841/JHA on organised crime and Article 19(3) Directive 2017/541 on terrorism.

The position of Eurojust is pivotal in dealing with conflicts of jurisdiction[39] for, at least, three main reasons: a) according to Article 7(4) Regulation 2018/1727, National Members and their deputies are prosecutors, judges or representatives of a judicial authority with competences equivalent to those of a prosecutor or judge under their national law. This entails that National Members are familiar with the respective legal systems and requirements, thus the settlement of the conflict of jurisdiction suggested to the national prosecuting authorities will be arguably compliant with the national rules; b) Article 7(1) Regulation 2018/1727 provides that National Members have his or her regular place of work in Eurojust where all the National Desks are located. This means that, once the notice of a conflict of jurisdiction has arisen or is likely to arise, it is very easy for the National Members of the involved Member States to meet and to discuss the issue; c) once the best place to prosecute has been agreed, National Members are also entitled to ensure a smooth opening or closing of a prosecution in accordance with the European legal framework and their respective national laws.

Specifically, Eurojust deals with conflicts of jurisdiction in four possible ways: 1) through non-binding recommendations issued by National Members or the College; 2) by means of written non-binding opinions drafted by the College; 3) arranging level II meetings and coordination meetings; 4) setting up a joint investigation team (hereinafter JIT). This last possibility will be examined in the following paragraph.

Of course, these solutions do not run on parallel lines, since, on the contrary, they may join and mix up. For instance, according to the features of the case in which a decision on which State should prosecute has to be taken, during a coordination meeting a JIT could be set up or a recommendation could be issued. With reference to the data collected by Eurojust, in 2017 approximately 10 recommendations were issued jointly by two or three National Members, following a coordination meeting or after a level II meeting. These joint recommendations are quite appreciated by the national authorities because they are perceived as "solid (because shared among two or more National Members), reasoned (because a legal assessment is included) and commonly agreed".[40]

First, recommendations will soon be based on Article 4(2)(a)(b) Regulation 2018/1727, which empowers National Members to ask the competent authorities to undertake an investigation or a prosecution of specific acts (in the case of negative conflict of jurisdiction) or to consider to accept that one Member State may be in a better position to undertake an investigation or to prosecute specific acts

[39] Ignazio Patrone (n 37).
[40] *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (n 32) 8.

(in case of positive conflict of jurisdiction). Data collected before the entry into force of the Regulation 2018/1727 proved that recommendations by the National members were quite used.[41] Also the College can issue recommendations as provided by Article 4 (2)(a)(b) Regulation 2018/1727.

Secondly, as said, the College can also express written non-binding opinions on how to resolve a case of conflict of jurisdiction according to Article 4(4) and Article 5(2)(b) Regulation 2018/1727, where two or more Member States cannot agree as to which of them should undertake an investigation or prosecution. Data collected before the entry into force of the Regulation 2018/1727 demonstrated, instead, that the intervention of the College, both in issuing recommendations and writing non-binding opinions, was rather exceptional: the College issued recommendations in just four cases and it has never issued a written non-binding opinion.[42]

In 2009 Article 85(2)(c) TFUE entered into force and paved the way to the attribution to Eurojust of binding powers vis-à-vis national judicial authorities in relation to the initiation of criminal investigations and the resolution of conflicts of jurisdiction.[43] Despite the proposals for a new Regulation of Eurojust and for the establishment of EPPO were tabled together,[44] the Regulation 2018/1727 has not given Eurojust binding powers to solve a conflict of jurisdiction; differently, the Regulation 2017/1939 has furnished EPPO with binding powers, as it will be explained below.[45]

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[41] *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (n 32) 9. Specifically, according to Eurojust News Issue 1/2016 (n 38) recommendations issued on the base of Article 6(1)(a)(ii) Decision 2009/426/JHA were 20 in 2010; 12 in 2011; 11in 2012; 14 in 2013; 12 in 2014; 34 in 2015.

[42] *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (n 32) 9.

[43] Filippo Spiezia, 'The European Public Prosecutor's Office: How to implement the Relations with Eurojust?' (2018) Eurocrim 130 < https://eucrim.eu/media/issue/pdf/eucrim_issue_2018-02.pdf > accessed 30 March 2019; Ignazio Patrone (n 37); Council of the European Union, 'Eurojust and the Lisbon Treaty: Towards more effective action Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency' (2010) <*http://eurojust.europa.eu/doclibrary/Eurojust-framework/strategicmeetingsonfutureofeurojust/Eurojust%20and%20the%20Lisbon%20Treaty%20-%20Towards%20more%20effective%20action,%20September%202010/17625-2010-12-09-EN.pdf* > accessed on 30 March 2019.

[44] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)' COM/2013/0535 final; Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM/2013/0534 final; Filippo Spiezia (n 43).

[45] Article 4(6) Regulation 2018/1727 has introduced only sharp differences in relation to the case in which a Member State is the addressee of a recommendation or an opinion. Member States shall respond without undue delay to the recommendation or opinion in any case and not only if the State decides not to comply with the advice of Eurojust, as previously stated in Article 8 Decision 2009/426/JHA. Moreover, the Regulation introduces a new ground for refusing to comply with the request when there is the risk to jeopardise the success of an ongoing investigation, whilst Article 8 Decision 2009/426/JHA provided just for the cases related to harm essential national security interests or to endanger the safety of an individual.

The third way in which Eurojust can support national authorities in defining which the best place to prosecute is, consists in arranging level II meetings or coordination meetings.

Level II meetings take place in Eurojust among the members of the National Desks of the States involved in the conflict of jurisdiction, without the physical presence of the national competent prosecuting authorities. After the meeting, National Members could sign a recommendation asking their respective competent authorities to take on the jurisdiction on the case or to drop it.

A coordination meeting (or level III meeting) could follow a second level meeting or could be arranged when the peculiarities and complexity of the case make the level II meeting not enough. When a coordination meeting is planned, all the national authorities of the Member States involved in the conflict of jurisdiction meet in Eurojust: on the advice of their respective National Members and with the support of simultaneous interpretation, the judicial authorities in charge with the case confront face to face.[46]

In order to facilitate and guide the confrontation, Eurojust has elaborated *Guidelines for deciding 'which jurisdiction should prosecute?'*, which for the first time were published in 2003 and have been revised in 2016.[47]

As seen, the usage of these guidelines is also suggested by the 9th recital FD 2009/948/JHA: they constitute a shared starting point on the basis of which a decision can be reached. Naturally, the approach to the guidelines must be flexible and the peculiarities of each case must be considered.[48]

In the solving of a conflict of jurisdiction, quantitative evaluations could be done: the best place to proceed could be the one in which the majority of criminality was committed or where the majority of losses was sustained. Other times, the preference could be accorded following a qualitative approach: the jurisdiction could be allocated to the State where the most significant part of the criminality was committed or where the most significant part of the loss was sustained. Again, it could be relevant where the suspect was found or his/her nationality or his/her usual place of residence; the presence of witnesses' protection programmes; the compliance of the State with Directive 2012/29/EU on victims' rights; the stage of the proceeding. The guidelines exclude the possibility to take into account aspects, like the potential higher penalties available in a State rather than in another and the impact on the resources of a prosecution office. One State could not refuse to prosecute just because the crime is not considered a priority.[49]

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[46] *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (n 32) 5; Filippo Spiezia (n 43).
[47] Guidelines for deciding (n 30).
[48] Ignazio Patrone (n 37).
[49] Guidelines for deciding (n 30) 2- 4.

c) The Joint Investigation Teams

The JIT could be another useful tool to prevent and resolve conflicts of jurisdictions. The JIT is a judicial cooperation tool introduced by Article 13 Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union (hereinafter MLA Convention of 2000), which was entirely reproduced in the Framework Decision 2002/465/JHA on JITs (hereinafter FD 2002/465/JHA). The two main advantages that follow to the setting up of a JIT are that: a) any investigative measure can be requested without the need to issue letters of request or EIOs (Article 13(7) FD 2002/465/JHA); b) information available can be directly exchanged within the team (Article 13(9) FD 2002/465/JHA).[50]

The JIT is established with the signature of an agreement between the competent authorities of two or more Member States involved by investigations linked with other Member States. The Council of the European Union has proposed a model agreement to facilitate the setting up of JITs: the original one, provided by the Recommendation of 8 May 2003, was revised by the Council Resolution of 26 February 2010 and recently by the Resolution 2017/C 18/01.

The point 14) of this last model agreement, entitled "consultation and coordination", provides that *the parties will ensure they consult with each other whenever needed for the coordination of the activities of the team, including, but not limited to: […] the best manner in which to undertake eventual legal proceedings, consideration of appropriate trial venue […].*[51] This entails that, in the context of a JIT, competent authorities may also agree on which jurisdiction should prosecute after the closing of the investigation in order to prevent a possible conflict of jurisdiction and a possible infringement of the *ne bis in idem* principle.

The agreement could provide either 1) to detach one jurisdiction responsible for prosecuting all the crimes investigated by the team, so as to avoid partition of the overall criminality carried out by the suspects or the criminal group, or 2) to opt for a segmented strategy, splitting the prosecution in all the States involved in the joint investigation, having care not to break the *ne bis in idem* principle, but fulfilling the interest of the participating States to prosecute part of the crime.

Once the JIT has operated for the established duration, the settlement of jurisdiction can also be modified by mutual agreement by the JIT's participants in the light of the results obtained during the investigation.[52]

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[50] Council of the European Union, 'Joint Investigation Teams: Practical Guide' (2017) 4, <http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/JITs%20Practical%20Guide/JIT-GUIDE-2017-EN.pdf>, accessed 23 March 2019, hereinafter the Practical Guide on JITs.
[51] The Practical Guide on JITs (n 50) 32.
[52] The Practical Guide on JITs (n 50) 11.

National Members of Eurojust can participate in a JIT according to Article 8 Regulation 2018/1727. Their participation could be crucial considering the knowledge they have of the European and national legal framework and the experience they have collected dealing every day with cross-border criminality and related issues.

7. Prevention and solution of conflicts of jurisdiction among Member States and Third States

The principle of mutual recognition is not applicable outside European boundaries. This means that in order to identify parallel proceedings ongoing in Member and non-Member States, it is not possible to count on the aforementioned instruments based on this principle. Also between Member States, only the FD 2002/584/JHA on EAW has been implemented by them all,[53] instead Denmark and Ireland are not bounded by the Directive 2014/41/EU[54] and by the Regulation 2018/1805.[55]

Article 18(21)(c) 2000 United Nations Convention against Transnational Organized Crime provides that mutual legal assistance may be refused if the domestic Law of the requested State Party prevents its prosecution authorities from carrying out the action requested with regard to any similar offence, if such offence had been subject to investigation, prosecution or judicial proceedings under their own jurisdiction. The provision considers the similarity of the offences to be enough to reject the request of assistance. This Article could play a role in detecting a possible infringement of the *ne bis in idem* principle between Member and non-Member States, also considering the broad field of application of the Convention, which has been ratified by 189 States.[56]

Moreover, Eurojust has signed agreements with many Third States to establish and maintain cooperation on the basis of Article 52 Regulation 2018/1727, which, for its nature, is applicable only between Member States. Thus, Third States could be invited to take part to coordination meetings and could be the addressee of recommendations, which they would accept to follow for the sake of the cooperation agreement signed with Eurojust.

Furthermore, Third States can also participate in a JIT, as stated by the 9th recital FD 2002/465/JHA. In a JIT between Member States, a Third Country could step in on the basis of international Conventions

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[53] For the status of implementation see https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120, accessed 30 March 2019.

[54] For the status of implementation see https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120, accessed 30 March 2019.

[55] See the 56th and 57th recitals Regulation 2018/1805.

[56] For the status of ratification see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en , accessed 30 March 2019.

which provide for the setting up of JIT.[57] In addition, several bilateral agreements have been signed between neighbouring Countries or Countries with close historical links and they may have included provisions on JITs.[58] The involvement of Third Countries in a JIT is of utmost importance: they could agree and sign the JIT's agreement containing the settlement of jurisdiction.

8. The European Convention on the Transfer of Proceedings of 1972

Once the most appropriate jurisdiction to prosecute a crime is identified, the proceeding has to be transferred in the chosen State. Eurojust plays a significant role also in this field.

The only international instrument devoted to regulate the transfer of proceedings is the *European Convention on the Transfer of Proceedings in Criminal matters*, adopted by the Council of Europe in 1972 (hereinafter European Convention on transfer of proceedings of 1972). Under this Convention, each Party can request another Party to prosecute in its stead, in the cases listed by Article 8.[59]

The transfer of proceeding can operate also if the requested State does not have the jurisdiction to try the offence under its national law. As a matter of fact, Article 2 of this instrument provides the jurisdiction to the requested State and makes its criminal law applicable to any offence to which the law of the requesting State is applicable. Consequently, such transfer of proceedings could operate also when there is not a positive conflict of jurisdiction.

However, under Articles 6 and 7 of this Convention, the transfer of proceedings is possible only if the principle of dual criminal liability is fulfilled, meaning that the requested State may prosecute only facts that would be considered an offence and would be sanctioned if committed in its territory.[60]

This act provides detailed rules for the transfer, stating *inter alia* that all request should be made in writing, the Ministries of Justice are competent for the communications (Article 13), no document should be translated unless required at the time of the signature of the Convention (Article 18) and the Parties cannot claim for a refund of expenses (Article 20). Moreover, Section 5 accurately regulates the

[57] See Article 9 (1)(c) 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Article 19 2000 United Nations Convention against Transnational Organized Crime; Article 49 2003 United Nations Convention against Corruption; Article 20 2001 Council of Europe Second Additional Protocol to the European Mutual Assistance Convention.

[58] The Agreement between the Kingdom of Spain and the Republic of Cape Verde on the judicial cooperation in criminal matters (2007); the Additional Protocol to the Convention of mutual legal assistance in criminal matters between the Kingdom of Spain and the Republic of Colombia of the 29 May 1997.

[59] For instance, if the suspect is ordinarily resident in the requested State, or if he/she is a national of the requested State, or if that State is his/her State of origin.

[60] See Article 7 *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters.*

application of provisional measures in the requested State, including remand in custody and seizure of property.

Despite so clear a regulation of all the aspects of the procedure, few States ratified this Convention.[61] Thus the transfer of proceedings is usually carried out according to bilateral agreements, based on a broad interpretation of Article 21 European Convention on Mutual Assistance in Criminal Matters[62] of 20 April 1959, in conjunction with Article 6 MLA Convention of 2000. The latter provision ensures a direct contact between judicial authorities to guarantee the efficiency and the speediness of the procedure.

As said, whenever the transfer of a proceeding is conducted on the basis of a bilateral agreement, Eurojust could assist Member States to face all the difficulties that may arise. The main problems are linked to the transfer of evidence to the requested Country, the translation of relevant documents, the coordination in the execution of provisional measures and, in general terms, the sharing of the costs.

9. The conflict of jurisdiction in the frame of the European Public Prosecutor's Office

Another important instrument to detect and solve conflicts of jurisdiction is the recent Council Regulation (EU) 2017/1939 (hereinafter Regulation 2017/1939) on the establishment of the European Public Prosecutor's Office (hereinafter EPPO).

The EPPO is not territorially competent in respect to some non-participating European States (i.e. Denmark, Hungary, Ireland, Malta, the Netherlands, Poland, Sweden and the United Kingdom).

According to Article 86 TFUE, the material scope of competence of the EPPO is limited to criminal offences affecting the financial interests of the Union, as defined in Directive (EU) 2017/1371. In relation to these crimes and to the offences inextricably linked to them, Article 4 Regulation 2017/1939 affirms that the EPPO is responsible for investigating, prosecuting and bringing to judgment the perpetrators.

The European Delegated Prosecutors (hereinafter EDPs) are located in the Member States and they start their own investigation provided that: 1) their respective Member State has jurisdiction over the offence (Article 26(1) Regulation 2017/1939); 2) the EPPO is competent on the basis of the rules set out in Article 25(2)(3) Regulation 2017/1939.

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[61] For the status of ratification, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/073/signatures?p_auth=9Ojmmd4r, accessed 30 March 2019.

[62] See Article 21 *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959*.

When more Member States have jurisdiction on the same crime, in the context of the EPPO, the choice of the forum is essential because it determines the applicable national criminal law, according to Article 5(3) Regulation 2017/1939.[63]

In this regard, the rule laid down in Article 26 of the said Regulation provides that when a potential conflict of jurisdiction arises at the initial stage of the investigation, the jurisdiction is allocated to the Member State 1) where the focus of the criminal activity is, or 2) where the bulk of the offences has been committed.

In some cases, investigations could be initiated and carried out by the EDP of a Member State which has jurisdiction over the crime, even though the focus of the criminal activity is not located in its territory and the bulk of the offences has not been committed there. According to the criteria listed in hierarchical order by Article 26(4), that is the case when the State is a) the place of the suspect's or accused person's habitual residence; or b) the national Country of the suspect or accused person; or c) the place where the main financial damage has occurred. The decision has to be duly justified and is taken by a Permanent Chamber (hereinafter PC), after a consultation with the European Prosecutors (hereinafter EPs) and EDPs concerned.

During the investigations, based on these criteria, Article 26(5) foresees that the PC can also reallocate the case to an EDP of another Member State if this is in the general interest of justice. Scholars have demonstrated how this possibility could result in a breach to the right of defence.[64]

When the handling EDP considers the investigation to be completed, Article 35 provides that he/she submits a report to the supervising EP, containing a summary of the case and a draft decision whether or not to prosecute before a national Court. In the report, the handling EDP can make his or her own considerations on the settlement of jurisdiction which, in their turn, will be taken into account by the PC which will definitely decide on the matter.

When more than one Member State have jurisdiction on the case, the PC could opt between two alternatives. First, under the criteria set out in Article 26(4), it may identify one Court where to bring the case to judgment, which could also be a Court other than the one where the EDP is located (Article 36(3)). Alternately, it may propose to join several cases when the investigations have been conducted

[63] Michiel Luchtman, Forum Choice and Judicial Review Under the EPPO's Legislative Framework, in W. Geelhoed et al. (eds.), *Shifting Perspectives on the European Public Prosecutor Office*, (T.M.C. ASSER PRESS 2018) 156; Fabio Giuffrida, *The European Public Prosecutor's Office: king without kingdom?* (CEPS 2017) 2.

[64] Fabio Giuffrida, 'Cross-Border Crimes and the European Public Prosecutor's Office' (2017) 149 Eurocrim.

against the same person(s), with a view to prosecuting these cases in the Courts of a single Member State that, in accordance with its law, has jurisdiction for each of those cases (Article 36(4)).[65]

Article 42(1) Regulation 2017/1939 has introduced the judicial review of the decisions taken by the PCs on jurisdiction. As stated before, the need for a judicial review on decisions on jurisdiction was deemed necessary since a long time.[66] However, the solution adopted by the Regulation 2017/1939, i.e. to leave the review in the hands of the national Courts, has been criticized. Being the EPPO a European body regulated by European statutory law, *de iure condendo*, a case can be made to propose to entrust the ECJ with the judicial review. The appeal to ECJ, pursuant to Article 267 TFEU, is foreseen only by Article 42(2)(a).[67]

In conclusion, binding powers to decide on jurisdiction have been conferred to a European body eventually. Now, the question is whether judges and prosecutors will accept such a binding decision without entrenching themselves behind the principle of sovereignty of their Member State.[68]

10. Conclusion: letter to public prosecutors

Dear public prosecutor,

as you may have experienced, today criminals do not recognise borders anymore. They did it wrong, we know, but they have fundamental rights and one of them is particularly precious: for the same offence they cannot be finally judged twice.

It would be a bad surprise to find out, at the end of your complex and demanding investigation, that "your" criminal has been already finally judged in another State.

So, wake up and pick up your investigation! Choose one of the possible ways to solve a conflict of jurisdiction pointed out in the above paper (that we kindly suggest you to read carefully) and solve it. Better a late decision than no decision on who could prosecute… the axe of *ne bis in idem* hangs over your proceeding!

Sincerely,

Team Italy

[65] Michiel Luchtman (n 63) 159.
[66] Ignazio Patrone (n 37).
[67] Fabio Giuffrida (n 64); Michiel Luchtman (n 63) 166.
[68] Ignazio Patrone (n 37).