Eurojust resolution of conflicts of jurisdiction under Article 85 TFEU

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Discussion issues

- TFEU-based discussion paper
  - competence for resolution of conflicts of jurisdiction: from “recommending” the best place to “deciding” on the best place to prosecute
    - Article 85(1)(c): possible regulation-based Eurojust tasks: strengthening of judicial cooperation, including by “resolution” of conflicts of jurisdiction and by close cooperation with the EJN
  - relations between Eurojust/national members and national authorities: compliance with subsidiarity, effectiveness & loyal co-operation principles
    - Article 85(2): in the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national authorities
  - relevance for application Article 85(1)(c) limited
- further source policy documents
  - Stockholm programme (3.1.1, last paragraph)
    - resolving conflicts of competence + further/reinforced powers or EPPO
  - March speech Viviane Reding: nothing of immediate relevance
Approach

- formerly: CoE issue
  - Convention 15 May 1972
    - Article 8: criteria allowing transfer of prosecution
    - Articles 30-34: inter-state consultation mechanism
- rediscovered by EU (principal unresolved issue EU criminal policy)
  - common issue Eurojust/EPPO
  - only poor results so far
    - failed enhancement of ne bis in idem
    - MR of decisions to prosecute?
  - 2 legal instruments (with possible ‘support’ by Eurojust)
    - November 2009 FD on conflicts of jurisdiction
    - Draft [directive] on transfer of proceedings
      - criteria allowing transfer of proceedings in Article 5
        - less elaborate than 1972 CoE Convention
- IRCP: proposals relating to jurisdiction to prescribe & enforce + beyond
IRCP contribution to the debate

- project 2001/GRP/025 - ‘Finding the best place for prosecution’
  - viewed as essential by DG JLS
    - for Eurojust work in coordinating prosecutions
    - in deepening the thinking about forum choice EP
  - input for November 2003 Eurojust seminar ‘Deciding where to prosecute’
  - served as inspiration for Eurojust guidelines for deciding which jurisdiction should prosecute, as embedded in the annex of the Eurojust 2003 annual report, promoting a matrix-based comparison and weighting of factors
  - guidelines which the Council has highlighted again as a source of inspiration in the context of application of the November 2009 FD on conflicts of jurisdiction
- further projects for DG JLS relating to witness protection, preparation of ECRIS, EULOCS, etc
Jurisdiction to prescribe

> Article 82(2)(b) TFEU
  > prevent and settle conflicts of jurisdiction
> to date: counterproductive efforts EU
  > regional universal jurisdiction in several instruments
  > Corpus Juris: European ‘territoriality’ not only for EPPO, but also for national courts (EPPO deciding)
  > GP EPPO: multiple fora, based on 1995 Convention PFI
  > negotiations on directive transfer of proceedings: call for ET jurisdiction
> whereas (asap)
  > MS should limit scope extraterritorial jurisdiction
  > concept territoriality may not be interpreted too extensively (particularly counterproductive to provide EU territoriality)
  > rejection ‘effect’ theory
Jurisdiction to enforce

- criteria for choosing the forum? - not: hierarchical list
- ‘proper’ administration of justice & reasonable enforcement of jurisdiction
  - no enforcement jurisdiction if ‘unreasonable’ (US example)
  - limitative list of potentially reasonable jurisdiction criteria
    - locus delicti (supra: not interpreted too extensively)
    - criteria 1972 CoE Convention & MR Programme (superior to EU draft)
      - ordinary residence or nationality suspected person
      - where person is (planned to) undergo(ing) sanction
      - territory of concurrent proceedings against same suspect
      - location most important items of evidence
      - territory likely to improve prospects social rehabilitation
      - guarantee of presence suspect at court proceedings
      - territory allowing enforcement possible sentence
- victim-related criteria
  - ordinary residence, nationality, origin victim
  - territory where damage has occurred
‘Proper’ administration of justice

- future legal instrumentarium
  - interpretation ‘territoriality’ not too extended
  - ne bis in idem effect to
    - irrevocable settlements preventing further prosecution
  - MR of
    - decisions other MS to prosecute
    - with possibility Eurojust conflict ‘resolution’ or ‘mediation’
      - top-down for mandated EU-worthy cases (EULOCS-based)
      - bottom-up (as currently) in further cases
  - not necessarily single MS (international case management)
- principle of ‘proper’ administration of justice
  - no unreasonable enforcement of jurisdiction
  - limitative list of potentially reasonable criteria
    - manifestly unreasonable if not in list
Judicial review

› pre-trial stage
  › ‘praetorian’ development of pre-judicial jurisprudence (in establishing negative criteria) by Eurojust
  › = prosecution guidelines (open to the public?)
  › possibility Eurojust to raise preliminary questions to ECJ on interpretation (‘unreasonable’)
    › sufficient basis in new EU legal instrumentarium to allow for interpretation
    › development jurisprudence ECJ on jurisdiction issues
    › non-binding but authoritative
  › trial stage: same possibility before national courts, including relating to Eurojust conflict ‘resolution’
› post-trial stage
  › ECHR (Article 6)?
  › ECJ (MS level)
  › ICJ The Hague (state-level): Lotus, Yerodia, …
Further proposals

› immunity from prosecution
  ‣ res judicata effect, following positive opinion Eurojust
› Eurojust access to ECRIS
  ‣ ne bis in idem etc
› benchmarking through EULOCS
  ‣ EU Level Offence Classification System
  ‣ fully compatible with Eurojust mandated crimes and CMS
  ‣ demarcation supranational mandate powers Eurojust?
› logical extension Eurojust’s new role to similar issues
  ‣ best place for witness relocation
  ‣ best place for sentence execution international tribunals