The Future of Eurojust

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Research background on the issue

› 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, EUROCS, etc
› future of judicial cooperation study for DG Justice & FR (former JLS)
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
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 (EULOCES-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, …
EPPO (1)

> PIF
>  > relative importance only - beware of overprioritization
>  > do feature among EU priority crimes
>  > not always complex – not always involving more MS
>  > if not: preferably dealt with domestically
>  > if complex or involving more MS: EU-worthy
>    > ‘normal’ involvement (further reinforced) Eurojust
>      > decisive powers coordination investigations & prosecutions
>      > right of initiative investigations and prosecutions
>      > resolution conflicts of jurisdiction
>      > formal acts of judicial procedure remaining with national competent authorities
>        > further extension national powers college members?
>    > sufficient to counter traditional inertia MS
EPPO (2)

- functioning
  - according to Article 86
    - investigating, prosecuting and bringing to judgment
    - exercise functions of prosecutor in competent courts
  - unnecessary if truly strong Eurojust in EU-worthy cases
  - discussion college-based or pyramidal decision-making
    - merely ideological
  - more important challenges (infra)
- OLAG-based?
  - beware of mixing up administrative-criminal matters
Further challenges & proposals

› further extension national powers college members
› 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
› adoption legal framework cross-border investigative powers police and judicial authorities of the MS (Article 89 TFEU; ex Article 32 TEU)
   › to be preferred over supranational investigative powers