A European Public Prosecutor’s Office, Established from Eurojust: Pro’s and Con’s

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Approach

› largely personal standpoint
› pro’s and con’s
  › EPP in general
  › EPP established from Eurojust (Lisbon-based)
  › only limited (new) detail
  › most likely historical ideas will be relied on
    › Corpus Juris
    › EC Green Paper/2000 proposal
› issues having priority over establishment EPP
Traditional pro’s?

› overcoming fragmentation criminal LE area
  › vs mutual recognition & approximation (difference retention)
  › + separate approach for PFI adding to fragmentation?
› move beyond cumbersome/inappropriate methods
  › vs radical improvement traditional cooperation mechanisms
  › including reinforcement Eurojust (cfr Vervaele)
› solve problem of inadmissibility of evidence
  › vs MLA Convention 29 May 2000
    › forum regit actum rule
    › JITs based on information sharing and admissibility
  › vs mutual recognition (free movement of) evidence
    › announced by EC in EM to EEW
    › Article 69A 2(a) Lisbon mutual admissibility of evidence
Lisbon-specific pro’s?

> setting up EPP via closer cooperation (9 MS)
  > could be done under the current TEU as well (8 MS)
> broadening to serious cross-border crime relatively easy
  > possible under current TEU as well
> to be established from Eurojust
  > better than in parallel with it + guaranteed Europol-link
> rules on functioning, procedure, admissibility of evidence and judicial review will be determined
  > necessary, including clear separation between administrative (OLAF) and judicial (EPP) investigations
> if broader than PFI = general challenge current practice of neglecting purpose limitation & separation of powers
Traditional con’s?

› disproportionality priority given to PFI
  › impact on available national LE capacity
  › concurrence with other (national) LE priorities
  › proposed legality throughout EU for PFI
    › conflicting with expediency principle in most MS

› EPP concept conflicting with Eurojust option
  › hierarchical model vs ‘mere’ coordination model
  › top-down model vs bottom-up model
  › verticalism vs horizontalism
  › supranationalism vs intergouvernementalism
  › = unfounded scepticism vs pragmatism
Lisbon-specific con’s

- no gap analysis
- added value vis-à-vis (reinforced) Eurojust?
  - for PFI
    - given Eurojust-OLAF cooperation
    - given possible participation OLAF in JITs (contested)
  - in general for serious cross-border crime
    - given new Europol and renewed Eurojust decisions
    - reinforced Eurojust: examples
- EPP still requires unanimity (PFI + broader)
  - closer cooperation likely to create messy complexity
- issues of jurisdiction choice and relationship with MS
  prosecutorial jurisdiction remain wholly unclear
Issues having priority over EPP (1)

- database of pending prosecutions throughout EU
  - at least for Eurojust-mandated crimes
  - added value vis-à-vis Eurojust’s current CMS
    - preventing single MS prosecutorial initiatives
    - reinforced Eurojust: duty to inform (3 MS) + ENCS
  - relationship with Europol databases?
    - see possible integration ENU’s & ENCS’s
- access to EU criminal records system
  - for finding out ne bis in idem situations (barring new prosecutions)
- right to information re MS’ authorities envisaging to grant immunity from prosecution to collaborators with justice
Issues having priority over EPP (2)

› urgent need for EU legal instrument on jurisdiction
   › to prescribe
   › to enforce + coordination
› = one of principal unresolved EU criminal policy issues
› of common relevance for EPP and (reinforced) Eurojust
› brief comparison current state of affairs & IRCP proposals
   › 2001/GRP/025
   › ‘Finding the best place for prosecution’
   › inspired Eurojust to internally formalize ‘forum scoring’
     › see Eurojust annual report 2003
Jurisdiction to prescribe

- Article 31(d) TEU
  - preventing conflicts of jurisdiction
  - Article 69A(b) Lisbon: + settlement
- to date: counterproductive efforts EU
  - regional universal jurisdiction in several instruments
  - CJ: European ‘territoriality’ not only for EPP, but also for national courts (EPP deciding)
  - GP: multiple fora, on basis of 1995 Convention PFI
- IRCP: needs for future (asap)
  - MS must limit scope extraterritorial jurisdiction
  - concept territoriality may not be interpreted too extensively (particularly counterproductive to provide EU territoriality)
Jurisdiction to enforce

› ne bis in idem
  › traditionally limited to final sentences
  › to be extended beyond traditional limits
    › as required by the Mutual Recognition Plan
    › ne bis in idem effect also to be given to
      › irrevocable settlements preventing further prosecution
      › decisions other MS to prosecute: requires consultation
  › consultation process = rationale for setting up Eurojust
    › coordination role
    › missing = criteria for choosing the forum
CJ/GP: ‘effective’ administration justice

- incompatibility CJ/GP
- GP: ‘proper’ administration of justice, embracing i.a. principles of fairness and effectiveness (fn 142)?
- 3 criteria
  - state where greater part of evidence is found
  - state of residence/nationality accused
  - state where economic impact is most important
- judicial review
  - competence ECJ to rule on conflicts of jurisdiction
  - preliminary chamber ECJ
    - precluding right of parties to challenge jurisdiction choice in trial stage?
IRCP: ‘proper’ administration justice (1)

› no enforcement jurisdiction if ‘unreasonable’ (US example)
› limitative list of potentially reasonable jurisdiction criteria
  › locus delicti (supra: not interpreted to extensively)
  › criteria 1972 CoE Convention & ‘Mutual Recognition Plan’
    › 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
IRCP: ‘proper’ administration justice (2)

- embedding in EU legal (3rd pillar) instrument
  - interpretation ‘territoriality’ not too extended
  - ne bis in idem effect to
    - irrevocable settlements preventing further prosecution
  - decisions other MS to prosecute, following Eurojust choice
- principle of ‘proper’ administration of justice
  - reasonable enforcement of jurisdiction
  - limitative list of potentially reasonable criteria
IRCP: ‘proper’ administration justice (3)

> judicial review
  > pre-trial stage
    > ‘praetorian’ development pre-judicial jurisprudence
      > by Eurojust; in establishing negative criteria
    > = prosecutorial guidelines (open to public)
    > possibility Eurojust to raise preliminary questions to ECJ
      > on ‘interpretation’ 3rd pillar instrument
      > non-binding
    > development jurisprudence ECJ on jurisdiction issues
  > trial stage: same right for national courts
  > post-trial stage
    > ECHR (Article 6)?
    > ICJ The Hague (state-level): Lotus, Yerodia, ...
Discussion

> ...