Relations and co-operation of the European Prosecutor with Eurojust

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Approach

› preliminary comments (scepticism)
  › premises of the debate
    › arguments for the Commission’s 2000 proposal
    › proportionality of priority given to PFI?
    › EP a primarily ideological choice?

› European Prosecutor & Eurojust (dialogue)
  › conceptual difference
  › ad hoc approach vs integrated approach?
  › criteria to choose the forum
Arguments Commission’s 2000 proposal

- overcoming fragmentation criminal LE area
- principal choice has been made for mutual recognition and thus pre-existence of differences
- separate approach for PFI adding to fragmentation?
- move beyond cumbersome and inappropriate methods
- denial of
  - radical improvement traditional cooperation mechanisms
  - without waiting for the actual difference they can make
- judicial follow-up to administrative investigations
- GP: problem of inadmissibility of evidence
- however: Mutual assistance convention 29 May 2000
  - forum regit actum rule
  - joint investigation teams based on information sharing and per se admissibility of evidence

Proportionality of priority given to PFI?

- impact on available national LE capacity
- concurrence with other (national) LE priorities
- legality throughout EU for PFI
  - conflict with expediency principle in # of MS
EP a primarily ideological choice?

- GP in this instance focused on PFI
- however: part of arguments superseding context of PFI
  - overcoming fragmentation European criminal LE area
  - move beyond cumbersome/inappropriate cooperation methods
- current limitation to PFI only temporary?
  - EP = only minimum needed; part of evolving dynamic
  - ultimately: protection European public service, above and beyond PFI > all serious transnational crime?
  - risk: true concern for PFI being instrumentalized
  - thus affecting and conflicting with explicit choice Council
    - in A’dam, Vienna, Tampere, Nice
    - to improve intergouvernemental cooperation
    - approximation, mutual recognition, Eurojust

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EP vs EJ: conceptual difference

- hierarchical model vs ‘mere’ coordination model
- top-down model vs bottom-up model
- verticalism vs horizontalism
- supranationalism vs intergouvernementalism
- = unfounded scepticism vs pragmatism
EP vs EJ: ad hoc vs integrated approach?

› current situation: Eurojust mandate covering PFI

› GP challenging this option
  › priority jurisdiction EP regarding PFI
  › Eurojust’s powers in relation to financial crime preserved
  › active cooperation in event of cross-pillar cases?
    › GP extremely vague
    › unclear what actual added value EP would be, as
      › Eurojust decision already provides for continuing close cooperation with OLAF, even on OLAF’s initiative (A 26.3)
      › role for the Commission (A 11)
      › right for Eurojust to ask MS (A 6)
        › to initiate investigations/prosecutions
        › to set up joint teams, allowing OLAF participation
      › what more does PFI need?

EP vs EJ: criteria to choose the forum

› principal unresolved issue EU in criminal policy
  › = common issue EP/EJ
    › notwithstanding difference general discussion and GP
      › GP: investigation state is not necessarily trial state
  › current IRCP research project 2001/GRP/025
    › ‘Finding the best place for prosecution’
      › viewed as essential by Commission DG JHA
        › for Eurojust work in coordinating prosecutions
        › in deepening the thinking about forum choice in GP
  › preliminary proposals project 2001/GRP/025
    › jurisdiction to prescribe
    › jurisdiction to enforce
Jurisdiction to prescribe

- Article 31(d) TEU
  - preventing conflicts of jurisdiction
- to date: counterproductive efforts EU
  - regional universal jurisdiction in several instruments
  - CJ: European 'territoriality' not only for EP, but also for national courts (EP 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 is already the case in # of MS
    - as required by the 'Programme of measures to implement the principle of mutual recognition'
  - 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
  - right to 'negative' injunction
  - missing piece of the puzzle = criteria for choosing the forum
CJ/GP: ‘effective’ administration justice

- incompatibly 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 greatest
- 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 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 of pre-judicial jurisprudence (in establishing negative criteria) by Eurojust
    › = prosecution guidelines (open to public)
    › possibility Eurojust to raise preliminary questions to ECJ on ‘interpretation’ 3rd pillar instrument
      › sufficient basis in 3rd pillar instrument to allow interpretation
      › 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, …
Conclusion

› effective PFI = important
› however
   › PFI over-prioritized vis-à-vis
      › effective LE in other areas
      › that MS and citizen are concerned about
   › denial of – scepticism vis-à-vis potential of
      › ‘mere’ coordination role Eurojust
      › right Eurojust to ask MS to initiate prosecution
      › coherent logic Europol/OLAF – joint investigation
teams – improved judicial cooperation via mutual
recognition – Eurojust
   › criteria for choosing forum = general issue

Discussion

› ...