Reflections on
The Future of Judicial Cooperation in Criminal Matters in the EU

Seminar | Collegium Iuridicum Novum
Adam Mickiewicz University | Poznań | 23 May 2016
Structure

substantive criminal law
MR & judicial cooperation
procedural criminal law | flanking measures MR
procedural criminal law & judicial cooperation | needs
broader & further criminal policy needs
EU prosecutorial policy | Eurojust (vs EPPO)
autonomous function of approximation

• special part: *ultima ratio* often overstepped | examples (+ inflatable OC notion)
  • where respected, often *de jure* eroded by EU ability to only set minima
    • maximal offence scope & maximum sanction (or maximal maximum sanction)? | hindered by subsidiarity and choice for MR as the lesser evil
  • where respected, often *de facto* eroded by (wider) national criminalization
    • perverse effects | dual criminality bubble in MR | MS’ self-centeredness

• general part & general principles
  • sanctions: in rem confiscation (in the absence of the offender)?
  • jurisdiction to prescribe | often creating potential conflicts of jurisdiction
  • needs
    • minimum concept ‘participation’
    • extraterritorial corporate liability (only) for certain offences
      • labour exploitation, THB, data protection, environmental offences
      • attribution through ‘head office’, ‘establishment’ (Google Spain, FB Belgium), chain responsibility
ancillary functions of approximation | often neglected though needed

- facilitating MR & judicial cooperation
  - vs incoherent dual criminality abolition
- defining EU (priority) crimes
- enabling EU crime statistics (jointly identified offence parts)
- facilitation ECRIS offences
- demarcation (stronger) mandates EU bodies & agencies
  - subsidiarity best served through limitation EU-worthiness or –eligibility
- EULOCs (EU Level Offence Classification) | IRCP
bench-mark for enhanced internal coherence of the EU's criminal policy

- including in the area of criminal records infoex

improved ECRIS classification

- exclusive categories

- incorporating/centered around EU approximation acquis
  - clustering of common denominator underneath “jointly identified parts of offences”
  - i.e. much wider acquis than 32 MR list, for which dual criminality test can be omitted
  - i.e. joint acquis = trust-building
  - = also tool for delineating Europol/Eurojust access (mandated offences incorporated)

- including definitions (usually from binding EU acquis) for interpretability in application FD 2008/675/JHA
## EULOCS illustrated

<table>
<thead>
<tr>
<th>0906 00</th>
<th>MONEY LAUNDERING</th>
</tr>
</thead>
<tbody>
<tr>
<td>0906 01</td>
<td>Offences jointly identified as Money Laundering</td>
</tr>
<tr>
<td>0906 01 01</td>
<td>The conversion or transfer of property</td>
</tr>
<tr>
<td>0906 01 02</td>
<td>The illicit concealment or disguise of property related information</td>
</tr>
<tr>
<td>0906 01 03</td>
<td>The illicit acquisition, possession or use of laundered property</td>
</tr>
<tr>
<td>0906 02</td>
<td>Other forms of Money Laundering</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>0201 00</th>
<th>OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>0201 01</td>
<td>Directing a criminal organisation</td>
</tr>
<tr>
<td>Article 2 (b), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
<td>Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.</td>
</tr>
<tr>
<td>0100 00</td>
<td>Open Category</td>
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<tr>
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</tr>
<tr>
<td>0100 00</td>
<td>CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT</td>
</tr>
<tr>
<td>0101 00</td>
<td>GENOCIDE</td>
</tr>
<tr>
<td>0102 00</td>
<td>CRIMES AGAINST HUMANITY</td>
</tr>
<tr>
<td>0103 00</td>
<td>WAR CRIMES</td>
</tr>
<tr>
<td>0104 00</td>
<td>CRIMES OF AGGRESSION</td>
</tr>
<tr>
<td>0200 00</td>
<td>PARTICIPATION IN A CRIMINAL ORGANISATION</td>
</tr>
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<td>0201 00</td>
<td>OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION</td>
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<tr>
<td>0201 01</td>
<td>Directing a criminal organisation</td>
</tr>
<tr>
<td>0201 02</td>
<td>Knowingly participating in the criminal activities, <em>without being a director</em></td>
</tr>
<tr>
<td>0201 03</td>
<td>Knowingly taking part in the non-criminal activities of a criminal organisation, <em>without being a director</em></td>
</tr>
<tr>
<td>0202 00</td>
<td>OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION</td>
</tr>
<tr>
<td>0300 00</td>
<td>OFFENCES LINKED TO TERRORISM</td>
</tr>
<tr>
<td>0301 00</td>
<td>PARTICIPATION IN A TERRORIST GROUP</td>
</tr>
<tr>
<td>0301 01</td>
<td>Offences jointly identified as participation in a terrorist group</td>
</tr>
<tr>
<td>0301 01 01</td>
<td>Directing a terrorist group</td>
</tr>
<tr>
<td>0301 01 02</td>
<td>Knowingly participating in the activities of a terrorist group, <em>without being a director</em></td>
</tr>
<tr>
<td>0301 02</td>
<td>Other forms of participation in a terrorist group</td>
</tr>
<tr>
<td>0302 00</td>
<td>OFFENCES LINKED TO TERRORIST ACTIVITIES</td>
</tr>
<tr>
<td>0302 01</td>
<td>Offences jointly identified as linked to terrorist activities</td>
</tr>
<tr>
<td>0302 01 01</td>
<td>Public provocation to commit a terrorist offence</td>
</tr>
<tr>
<td>0302 01 02</td>
<td>Recruitment for terrorism</td>
</tr>
<tr>
<td>0302 01 03</td>
<td>Training for terrorism</td>
</tr>
<tr>
<td>0302 01 04</td>
<td>Aggravated theft with the view of committing a terrorist offence</td>
</tr>
<tr>
<td>0302 01 05</td>
<td>Extortion with the view of committing a terrorist offence</td>
</tr>
<tr>
<td>0302 01 06</td>
<td>Drawing up false administrative documents with the view of committing a terrorist offence</td>
</tr>
<tr>
<td>0302 01 07</td>
<td>Financing of terrorism</td>
</tr>
<tr>
<td>0302 02</td>
<td>Other offences linked to terrorist activities</td>
</tr>
<tr>
<td>0303 00</td>
<td>TERRORIST OFFENCES</td>
</tr>
<tr>
<td>0303 00</td>
<td>Offences jointly identified as terrorist offences</td>
</tr>
<tr>
<td>0303 01</td>
<td>Terrorist attacks upon a person's life</td>
</tr>
<tr>
<td>0303 02</td>
<td>Terrorist attacks upon a person's physical integrity</td>
</tr>
<tr>
<td>0303 03</td>
<td>Terrorist kidnapping or hostage taking</td>
</tr>
<tr>
<td>0303 04</td>
<td>Causing extensive terrorist destruction</td>
</tr>
<tr>
<td>0303 05</td>
<td>Terrorist seizure of transport</td>
</tr>
<tr>
<td>0303 06</td>
<td>Terrorist activities related to weapons</td>
</tr>
<tr>
<td>0303 07</td>
<td>Terrorist release of dangerous substances, or causing fires, floods or explosions</td>
</tr>
</tbody>
</table>
MR & judicial cooperation

overview

• 2002 European Arrest Warrant (EAW)
• 2003 Freezing order
• 2005 Financial penalties
• 2006 Confiscation
• [2008 European Evidence Warrant (EEW)]
• 2008 Deprivation of Liberty
• 2008 Probation and Alternative Sanctions
• 2008 Taking account of previous convictions
• 2009 Supervision order
• 2014 European Investigation order (EIO)
Lisbon ‘break-through’ | 2009 Roadmap Procedural Rights | output

• procedural rights
  • directive translation and interpretation
  • directive information about the charges | letter of rights
  • directive assistance by a lawyer (Salduz+)
  • detention conditions (green paper, EC study IRCP, handbook FD 909/2008 IRCP)
  • recommendation vulnerable groups in criminal justice (children, mentally ill, ...)
  • directive presumption of innocence
• position of victims (package including directive)
• admissibility of evidence (EC study IRCP, irrelevant EIO, PhD Dr Kusak)

putting the carriage before the horse (no trust, ex-post backing up MR)
confusing carriage racing and jumping (cross-border dimension)
From lesser evil to Trojan Horse? (fundamental rights)
Procedural Roadmap bubble & distrust shifting
Procedural criminal law & judicial cooperation | needs

real needs

• halt Azerbaijan contradiction
• halt legitimization discriminatory approaches
• halt forum regit actum & one-directionality
• halt remedies/safeguards/judicial validation procedures as new defences
• EU minimum standards investigative measures (evidence admissibility)
  • anonymous testimony
  • collaboration with justice
  • interception telecommunications (Dr Kusak)
  • (house) search (Dr Kusak)
  • forensics, including DNA sample taking (dra Depauw) (European Forensic Area)
  • ...?
• MR of procedural guarantees | best of both worlds | lex mitior
• reintroduce dual criminality | limit MR to jointly identified offence parts (EUROCS)
• regulate post-trial MLA (ENFAST network)
do away with vast amount of incoherences
drop distinction judicial and law enforcement cooperation
make criminal justice finality the decisive marker (vs administrative/intelligence finality)
fundamental debate on administrative/criminal character offences & sanctions (Engel)
• also an issue in GDPR
ECRIS-extensions | legal persons, TCN, Europol/Eurojust connectivity, legal effect
 inclusion following notification, limited introduction EU-certificates of non-prior conviction
establishment of EPRIS
introduce (aut exequi aut tolerare) principle (Article 89 TFEU)
• physical border-crossing possibility in view of active investigation while respecting
 local legislation and/or agreed EU minimum procedural guarantees
establishment of double generic severity rankings
• sanctions (+ combining nature & duration)
• sanction execution modalities (idem)
establish EU policy for disqualifications in criminal matters
EU instrument on transfer of prosecution
future legal instrumentarium

- interpretation ‘territoriality’ not too extended
- ne bis in idem effect (EU wide) of
  - 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)
      - complementarity !!!
    - 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
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 multi-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 potential inertia MS
functioning

- according to Article 86 TFEU
  - 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
  - ultimately evolved to ‘college-based’ (status directive)
- more important challenges (infra)

relation to OLAF
- beware of mixing up administrative-criminal matters
Eurojust | Further challenges & proposals

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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, compatible with Eurojust crimes and CMS
• demarcation supranational mandate powers Eurojust?

Cooperation with Europol
• access to Europol analytical work files

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
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