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GREEN PAPER

On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings

(presented by the Commission)

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The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on issues of conflicts of jurisdiction in criminal matters, including the principle of *ne bis in idem*. The Green Paper identifies problems that may arise under the current situation and suggests possible solutions. The attached working paper provides a more detailed analysis.

The Commission invites interested parties to submit comments before 31 March 2006 to the following address:

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Interested parties are requested to mention explicitly if they do not wish their comments to be published on the Commission's website.

1. Background

With crime becoming more international in scale, EU criminal justice is increasingly confronted with situations where several Member States have criminal jurisdiction to prosecute the same case. Moreover, multiple prosecutions on the same cases, or "positive" conflicts of jurisdiction, are currently more likely to occur as the scope of many national criminal jurisdictions has been extended considerably in the past years.

Multiple prosecutions are detrimental to the rights and interests of individuals and can lead to duplication of activities. Defendants, victims and witnesses may have to be summoned for hearings in several countries. Most notably, repeated proceedings entail a multiplication of restrictions on their rights and interests, e.g. of free movement. They increase psychological burdens and the costs and complexity of legal representation. In a developed area of freedom, security and justice it seems appropriate to avoid, where possible, such detrimental effects; by limiting the occurrence of multiple prosecutions on the same cases.

Currently, national authorities are free to institute their own parallel prosecutions on the same cases. The only legal barrier is the principle of *ne bis in idem*, laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). However, this principle does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States; it can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State.

More importantly, without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a "first come first served" principle. The choice of jurisdiction is currently left to chance, and this seems to be the reason why the principle of *ne bis in idem* is still subject to several exceptions.

An adequate response to the problem of (positive) conflicts of jurisdiction would be to create a mechanism for allocating cases to an appropriate jurisdiction. Where prosecutions are concentrated in a single jurisdiction, an issue of *ne bis in idem* would no longer arise. Moreover, such a mechanism would complement the principle of mutual recognition, which provides that a judicial decision taken in one Member State is recognised and - where necessary – enforced by other Member States.

In this Green Paper, the Commission outlines the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction in criminal proceedings, and also for a possible revision of the rules on *ne bis in idem*. It responds to point 3.3 of the Hague Programme, and to the Mutual Recognition Programme of 29.11.2000 (in particular, points 2.3, and measures 1 and 11 of the latter). Relevant EU measures could be adopted as a framework decision, based on Article 31(1)(d) of the Treaty on European Union (TEU), according to which common action shall include preventing conflicts of jurisdiction between Member

States. If deemed necessary, letter c of Article 31(1) could serve as a complementary basis to ensure compatibility in rules applicable in the Member States as may be necessary to improve judicial cooperation.

2. Creating a mechanism for the Choice of Jurisdiction

2.1. Prerequisites

A mechanism aiming to allocate cases to an appropriate jurisdiction should avoid red tape, while guaranteeing a balanced approach with due respect to the rights of the individuals concerned. To make it function, two fundamental prerequisites need to be met.

Firstly, the competent authorities should become aware of proceedings and/or related decisions in each others' jurisdiction: they should be allowed, and perhaps even be obliged, to exchange the relevant information.

Secondly, once they become aware of proceedings in other Member States, the prosecuting authorities of a Member State should have the ability to refrain from initiating a prosecution, or to halt an existing prosecution, on the mere ground that the same case is being prosecuted in another Member State.

Refraining from initiating a prosecution (or halting an existing one) could raise problems to the legal order of Member States which adhere to the legality principle, where the competent authorities have a duty to prosecute every crime which falls within their competence. This could raise problems, in particular, when the principle is provided for in a national Constitution. Therefore, an exception to the application of this principle could be provided for in a future instrument. In this respect, it can validly be argued that in a common area of Freedom, Security and Justice this principle is satisfied when another Member State prosecutes such a case.

2.2. Procedure

Once the above prerequisites are fulfilled, the following procedural steps could form part of the suggested mechanism.

Step 1: identification and information of "interested parties"

At first, it seems useful to identify and inform the Member States which could be interested to participate in the process of choosing the most appropriate jurisdiction for a specific case. To this end, an EU rule could provide that the national authorities of a Member State which **has initiated or is about to initiate a criminal prosecution** ("initiating State") **in a case which demonstrates significant links to another Member State, must inform** the competent authorities of that other Member State, in due time. Such an obligation could apply to prosecuting authorities, and/or to other judicial/ investigating or law enforcement authorities depending on the particular characteristics of the criminal justice systems of the Member States. In turn, the informed authorities could indicate their interest in prosecuting the case in question. One might envisage that this expression of interest should be declared within a fixed period of time. However, the system could also allow for reactions outside the

deadline on an exceptional basis. If no Member State expresses an interest, the *initiating* State could continue with the prosecution of the case without further consultation – unless new facts change the picture.

Step 2: consultation/discussion

When two or more Member States are interested in prosecuting the same case, their respective competent authorities should be able to examine together the question of the "best place" to prosecute the case. An option would be to create **a duty to enter into discussions** so that the opinions of all the interested Member States can be taken into account. At this stage, direct contacts among them seem to be the most efficient means of discussion. If need be, they could ask for the assistance of Eurojust and/or other Union mechanisms of assistance.

Step 2 might often lead to an early consensus on the choice of the most appropriate jurisdiction to prosecute a case which raises issues of conflicts of jurisdiction. As a result, some national authorities will *close or halt* their proceedings voluntarily (or will refrain from initiating proceedings), while another authority would initiate or continue with its proceedings on the case. In such a scenario the competent national authorities could simply proceed according to their national law. Therefore, it seems that there is no need for binding rules on EU level for such arrangements. Under the suggested mechanism, such domestic decisions could be revised by the Member States concerned if new findings change the picture. Nonetheless, in certain cases, the domestic authorities might prefer to conclude a binding agreement to ensure legal certainty and to avoid the reopening of a debate. If they wish to do so, they may make use of an **EU model agreement**, which could, *inter alia*, provide common rules for the denunciation of such agreements.

Step 3: dispute settlement/mediation

Where an agreement cannot be easily found, a mechanism for dispute resolution will be needed. This step should offer the opportunity for a structured dialogue between the interested parties which would allow for an objective consideration of the interests involved. To this end, it seems appropriate to involve a body at EU level to act as a **mediator** by assisting the Member States concerned to reach a voluntary agreement using the criteria outlined below**.** Eurojust appears to be well placed to take over this role. It would also be conceivable to create a new body for dispute resolution, for instance a board or panel composed of senior national prosecutors and/or judges.

This third step could be initiated on the request of any Member State which has expressed an interest in prosecuting the case. It would also be valid to argue that a dispute settlement procedure should be compulsory after a period of time has elapsed in step 2, to ensure that cases of disagreement will be promptly transferred to an EU assisted/centred stage. Where a consensus is reached in step 3, the competent authorities should then have the same options as in step 2 (voluntary halting of proceedings in some Member States with a view to prosecution in another one, or conclusion of a binding agreement).

A sound adherence to the rules of the suggested three-step mechanism, combined with a set of criteria for the choice of jurisdiction as outlined below (point 2.5.), is

likely to lead to a consensus in many, if not most cases. It can be established in the short term, and may be considered sufficient unless further experience would reveal a need for further steps. In the absence of a consensus, the *ne bis in idem* principle would come "back" into play.

Possible additional step: binding decision by an EU body?

In the long run, for cases in which the suggested dispute settlement would fail, one might consider as a further step whether a body on EU level should be empowered to take a binding decision as to the most appropriate jurisdiction. This additional step would however be very difficult to realise with the current Treaty framework. First, a new body would have to be set up, since the roles of a mediator and of an instance taking binding decisions do not appear compatible. Secondly, difficult questions on the judicial review of a decision on EU level would arise, as outlined hereafter.

2.3. Role of individuals and judicial review

During the **pre-trial stage**, the suggested mechanism focuses on consultation among the competent prosecuting authorities. Discussing jurisdiction issues with the concerned individuals might often reveal facts which could jeopardise a prosecution or affect the rights and interests of victims and witnesses. Whether such a risk is present in a specific case could probably be left to be decided by the national courts. If no such risk is identified, the competent authorities could be required to promptly inform the defence and the concerned victims on the determination of the most appropriate jurisdiction. In any case, the concerned individuals will have to be informed of the main reasons for the choice of a certain jurisdiction at the latest when an indictment is being sent before a court.

In contrast to the pre-trial phase where normally the role for the concerned individuals is rather limited, at the trial phase (and/or at an intermediary phase) a national court which receives an indictment usually examines whether it has jurisdiction to try the case. It is also conceivable that an EU provision could require the jurisdiction which is chosen through the use of the suggested mechanism to examine whether **it is an appropriate forum** for dealing with the case. National courts seem well placed to carry out such a review. An extensive review of every aspect possibly playing a role in an allocation would seem neither feasible nor necessary. Therefore, judicial review could amount to adjudication on whether the principles of **reasonableness** and of **due process** have been respected. A choice of jurisdiction could thus be set aside by the competent tribunal if it finds that the choice made is arbitrary. This review could be made on the basis of doctrines which are known to the national legal order of the Member States, such as 'abuse of process'**.** In accordance with Article 35 TEU, questions of interpretation of Union-wide rules on the procedural mechanism and the criteria for the choice of jurisdiction could be presented to the European Court of Justice (ECJ) for preliminary rulings.

On the request of concerned individuals, a judicial review of jurisdiction allocations seems to be necessary, at least, when a case is allocated to a specific jurisdiction through a binding agreement. This is because such binding agreements would fetter the ability of the concerned Member States to denounce the jurisdiction allocation at a later stage. The question of whether judicial review should also be made available in

the situations where no binding agreements takes place could possibly be left to the discretion of the Member States and their national laws. (I.e. where authorities in certain Member States have simply closed down, or not initiated, a prosecution with a view to another Member State prosecuting the case)

More complex questions would arise if, as an additional step, a power to take decisions would be conferred on an EU body. Judicial review would be indispensable in this case. However, giving national courts the task of reviewing decisions by an EU body is inappropriate and currently legally impossible. On the other hand, the current Treaties do not contain a legal basis for giving such a power of review to the ECJ. The Treaty Establishing a Constitution for Europe provides a legal basis for such a review in Article III-359.Within the current Treaty framework, the possibility for a comparable Treaty amendment could be explored.

2.4. Priority for prosecution in the "leading" Member State

Alongside the allocation mechanism, an EU provision could oblige Member States to concentrate proceedings on the same case in one "leading" jurisdiction. From a certain procedural stage onwards, the other Member States could be obliged to halt their prosecutions and refrain from initiating new ones. The application of such a **priority rule** would have to run parallel to the mechanism outlined above; otherwise the results would depend on chance.

Since new findings can often change the picture of what at first might seem the "best place" to prosecute, it may not be wise to force the competent authorities to make a definitive choice of jurisdiction at an early stage. The most appropriate stage for a rule requiring all parallel prosecutions to be concentrated in a single jurisdiction appears to be **the moment of the sending of an accusation** or indictment before a national court, as at this stage, the necessary information which would be needed for a thorough assessment of jurisdiction issues will be available to the competent authorities. Besides, the main burdens for the individuals concerned often follow after the accusation and multiplication of those burdens can thus still be largely avoided if the rule applies from this stage onwards.

To avoid a circumvention of the procedural mechanism, it should not be permitted to bring an indictment before a court while a consultation and/or dispute settlement procedure is still ongoing. In other words, before national authorities bring an accusation/indictment, they will have to meet their information and consultation duties. Where they have not done so, they would have to halt court proceedings on the request of another Member State.

In no case, however, should a priority rule prevent other Member States from any possible form of support to the *leading state,* by means of the existing EU and international arrangements. On the contrary, they should afford assistance even pro-actively.

2.5. Relevant Criteria

Together with a procedural mechanism and a priority rule, a list of criteria to be used by the Member States in choosing the leading jurisdiction should be the third element

of a complete strategy to prevent and resolve conflicts of jurisdiction. It is feasible to define a number of relevant criteria, which are to be applied and weighted on a rather flexible case-by-case approach, i.e. the competent authorities would need to have a considerable scope of discretion.

Those criteria, or relevant factors, which will influence the process of determining an appropriate jurisdiction, should be objective and could be listed in a future EU instrument. In particular, the list could include *territoriality, criteria related to the suspect or defendant, victims' interests, criteria related to State interests, and certain other criteria related to efficiency and rapidity of the proceedings*. Perhaps, certain factors which should *not* be of relevance could also be identified.

As a further step, Member States could agree on some basic principles on the prioritisation or sequencing within the list of criteria, if this proves to be necessary. On the other hand, a more flexible approach could be preferred. Irrespective of whether such a prioritisation or sequencing among the relevant criteria would be laid down in an EU instrument, it seems feasible and necessary to at least agree on a general guiding principle for jurisdiction allocation. For example, such a principle could refer to **reasonableness** and/or **due process**. In other words, the competent authorities could be obliged to take into account the interests of the concerned individuals. The yardstick, as well as the leading question for a possible judicial review, should be a fair administration of justice, based on a comprehensive consideration of the relevant facts and a balanced weighting of the relevant criteria.

3. The Principle of *Ne bis in Idem*

Articles 54 to 58 of CISA on the *ne bis in idem* principle are currently binding throughout the Schengen Area, in the ten EU Member States which acceded in 2004, in Iceland and Norway and in the United Kingdom; an extension to Ireland should follow soon. The mutual recognition programme of December 2000 called for a reconsideration of those provisions, particularly of the exceptions to the principle. The Council could not agree on the related initiative by Greece for a Framework Decision,[1] but it stressed that work should continue, "in the light of the publication of the Commission's Communication on Conflicts of Jurisdiction in order to ensure that proven added value could be achieved".

If a mechanism which would lead to balanced choices of jurisdiction can be established, instead of conferring an exclusive effect to the "fastest" prosecution ("first come, first served"), discussions on *ne bis in idem* could be re-launched with increased prospects of success. In this context, the following questions could be addressed.

First, further consideration should be given to whether there is a need for clarifying certain elements and definitions, for instance regarding the types of decisions which can have a *ne bis in idem* effect, and/or what is to be understood under *idem* or "same facts".

Secondly, in case of a conviction the principle currently applies only where the

[1] OJ C 100, 26.4.2003, p. 24.

imposed penalty "has been enforced, is actually in the process of being enforced or can no longer be enforced…" This condition was justified in a traditional system of mutual assistance, where enforcing a penalty in other Member States sometimes proved to be difficult. It is questionable whether it is still needed in an area of freedom, security and justice, where cross-border enforcement now takes place through the mutual recognition EU instruments.

Thirdly, it is questionable whether the current possibilities for derogations from the principle of *ne bis in idem* are still necessary. Currently, Article 55 CISA enables Member States to provide for exceptions, which are related to interests in prosecuting specific cases in a certain jurisdiction (e.g. territoriality, national security offences or acts of officials of a Member State). Those exceptions might become obsolete with the creation of a balanced mechanism for the choice of jurisdiction.

4. Strengthening the Principle of Mutual Recognition

The suggested measures could also enable the Union to reduce the number of grounds for non-execution of judicial decisions from other Member States which are currently found in EU instruments. Because of the existing situation on conflicts of jurisdiction in criminal matters, some of these grounds for non-execution may be considered necessary. For example, this seems to be the case for grounds based on the fact that an act took place on the territory of the executing state, as e.g. in Article 4(7)(a) of the Framework Decision on the European Arrest Warrant.

Questions

(1) Is there a need for an EU provision which shall provide that national law must allow for proceedings to be suspended by reason of proceedings in other Member States?

(2) Should there be a duty to inform other jurisdictions of ongoing or anticipated prosecutions if there are significant links to those other jurisdictions? How should information on ongoing proceedings, final decisions and other related decisions be exchanged?

(3) Should there be a duty to enter into discussions with Member States that have significant links to a case?

(4) Is there a need for an EU model on binding agreements among the competent authorities?

(5) Should there be a dispute settlement/mediation process when direct discussions do not result in an agreement? What body seems to be best placed to mediate disputes on jurisdiction?

(6) Beyond dispute settlement/mediation, is there a need for further steps in the long run, such as a decision by a body on EU level?

(7) What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?

(8) Is there a need for a rule or principle which would demand the halting/termination of parallel proceedings within the EU? If yes, from what procedural stage should it apply?

(9) Is there a need for rules on consultation and/or transfer of proceedings in relation to third countries, particularly with parties to the Council of Europe? What approach should be taken in this respect?

(10) Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?

(11) Apart from territoriality, what other criteria should be mentioned on such a list? Should such a list be exhaustive?

(12) Do you consider that a list should also include factors which should not be considered relevant in choosing the appropriate jurisdiction? If yes, what factors?

(13) Is it necessary, feasible and appropriate to "prioritise" criteria for determining jurisdiction? If yes, do you agree that territoriality should be given a priority?

(14) Is there is a need for revised EU rules on *ne bis in idem* ?

(15) Do you agree with the following definition as regards the scope of *ne bis in idem*: "*a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority*"?

(16) Do you agree with the following definition of "final decision": "*...a decision, which prohibits a new criminal prosecution according to the national law of the Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU*?

(17) Is it more appropriate to make the definition of "final decision" subject to express exceptions? *(e.g. "a decision which prohibits a new criminal prosecution according to the law of the Member State where it has been taken, except when…*")

(18) In addition, to the elements mentioned in question 16 and 17, should a prior assessment of the merits be decisive on whether a decision has an EU wide *ne bis in idem* effect?

(19) Is it feasible and necessary to define the concept of *idem,* or should this be left to the case law of the ECJ?

(20) Do you see any situations where it would still be necessary to retain an enforcement condition, and if yes, which ones? If yes, can the condition be removed if a mechanism for determining jurisdiction is established?

(21) To what extent can the derogations in Article 55 CISA still be justified? Can they be removed if a mechanism for determining jurisdiction is established, or would you see a need for any further measures to "compensate" for a removal of the derogations under these circumstances?

(22) Should *ne bis in idem* be a ground for mandatory refusal of mutual legal assistance? If yes, which EU law provisions should be adapted?

(23) Is there a need for a more coherent approach on the *ne bis in idem* principle in relation to third countries? Should one differentiate between parties of the Council of Europe and other countries?

(24) Do you agree that with a balanced mechanism for determining jurisdiction?

(a) certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?

(b) certain grounds for optional non-execution should be converted into grounds for mandatory non-execution or *vice versa*? Which grounds, in particular?