Draft Proposals

for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union

ISSUES PAPER

February 2016

GENERAL PROVISIONS

- All scenarios are based on the principles of mutual trust between the Member States, and sincere cooperation based on Union loyalty between national and EU authorities[1]. A reference to these underlying principles is made in the preamble. This implies:

  a) the duty of national authorities of the Member States to share information and to coordinate with each other as well as to notify each other about parallel proceedings in order to prevent and settle conflicts of jurisdiction.

  b) the duty of the EU Member States to prevent *ne bis in idem.*

- All scenarios aim to safeguard rights and remedies of individuals in the EU, especially defendants and victims, which may be jeopardised by conflicts of jurisdiction in the AFSJ.

- The Directives on the right to interpretation and translation, on the right to information and on the right to access to a lawyer are applicable.

- To the extent that they could fall under *ne bis in idem*, the position of legal entities should be considered in the determination of the competent forum.

- All the scenarios focus on positive conflicts of jurisdiction. However, negative conflicts are also relevant.

- All scenarios need to be accompanied by practical arrangements, such as the improvement of the existing Eurojust Case Management System for the detection of conflicts of jurisdiction.

- Due to the low number of ratification of the 1972 Council of Europe Convention, every scenario should contain provisions on the transfer of proceedings and evidence.

[1] According to art. 4 par. 3 TEU, the Union and the Member States shall, in full and mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States, in particular, shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. In the case law of the CJEU, starting from the seminal judgment in *Costa* (C-6/64, *Costa v. Enel*) the principle of Union loyalty (derived from the former artt. 5 and 10 TEC) played a fundamental role in several occasions. Just to mention a few of them: C-22/70, *Commission v. Council (ERTA)*; joined cases C-6/90 and C-9/90, *Francovich;* joined cases C-46/93 and C- 48/93, *Brasserie du Pêcheur;* C-105/03, *Pupino*; C-459/03, *Commission and UK v. Ireland* (*MOX Plant*).

SCENARIO 0
Improving the applicable soft law

See separate file

Objective of the Scenario 0 instrument:

Scenario 0 instrument represents the baseline option, not involving hard law but working on the existing Eurojust Guidelines of 2003.

The main objective of this instrument is to update the Guidelines, taking into account the developments occurred in the Area of Freedom Security and Justice since their adoption and, most importantly, the new role of the Charter of Fundamental Rights of the European Union.

Furthermore, in the context of our research, the amended Guidelines will also represent a basic "building block" for both Scenarios 1 and 2. These scenarios refer to the amended Eurojust guidelines in the Annex.

Added value:

Notwithstanding its soft law character, Scenario 0 would improve the current state of affairs, aligning the contents of the Guidelines with the Charter and providing clearer guidance to national prosecutors and Eurojust.

In addition, the Guidelines will be restructured and streamlined. Reflecting the present critique on the guidelines, a negative list of criteria is added listing factors that cannot be considered in order to determine the proper jurisdiction.

Suggested amendments:

Taking also into account the conclusions of the Eurojust Strategic Seminar on Conflicts of Jurisdiction (The Hague, 4 June 2015), some amendments and updates should be considered:

- First, the Guidelines should reflect the relevant instruments of mutual recognition such as the EAW and the EIO that have been adopted since 2003. These instruments impact some of the criteria listed in the guidelines.
    - For instance, the EAW and the Framework Decision on custodial sentences renders the location of the accused of secondary importance;

- Similarly, the entry in the to force of the European Investigation Order (EIO) and the new opportunities it offers for video or telephone conferencing (Articles 24 and 25) renders attendance of witnesses unnecessary.

- Following a suggestion from Eurojust, also the territoriality and personality criteria could be reworded to ensure that not only their quantitative dimension, but also their qualitative dimension is duly considered.

  The definition of territoriality, in particular, should not only be limited to the place 'where the majority' of the criminality or loss occurred but should also allow for the consideration of the place where the 'most important' part of criminality or loss has taken place.
  - Similarly, where several co-defendants can be identified, not only their number should be relevant, but also their respective roles in the commission of the crime and their respective locations.

- The stage of proceedings in each Member State involved (the relative "trial-readiness") is currently missing from the Eurojust Guidelines and should be taken into account.

- A "negative list", could be finally inserted, including the inadmissible factors: following the current matrix of the Guidelines, such factors (to be better defined) might be: "evidential problems", "legal requirements" and "sentencing powers".

SCENARIO 1
Enhancing consultation between the EU Member States

Objective of the Scenario 1 Instrument:

- The aim of this scenario is to enhance consultation with a view to settle conflicts of jurisdiction in a mainly horizontal dimension.

- Compared to the other scenarios, Scenario 1 aims primarily at a new instrument "Lisbonising" the Framework Decision 2009/948/JHA. Its purpose is:
  - to incorporate the amended version of the Eurojust Guidelines (see Scenario 0) in the enacting terms of the new Directive. By this, the Eurojust Guidelines will become "hard law".
  - to take into account general principles of EU law (right to effective remedy, the obligation of loyal cooperation based on Union loyalty, Art. 47 and 48 CFR, Art. 4 TEU, etc.)
  - to ensure a better implementation of the existing legal framework (by clarifying uncertainties of the existing FD and practical problems reported by national authorities during the Eurojust strategic seminar).

Added Value:

- This scenario would improve the current state of affairs providing for more consistency and legal certainty. The system will remain predominantly horizontal – with a complementary non-binding intervention of Eurojust –, but both the procedure and the criteria to be applied in the consultation system will be defined by EU Law.
- Most importantly, by explicitly referring to the Eurojust Guidelines in the proposed Directive, the application of those criteria will be subject to judicial review. An effective remedy against arbitrary decisions will be granted to the defendant in front of the competent national courts.

Legal basis and choice of instrument:

- Article 82 (1) (b) leaves the choice between regulations and directives. Despite the advantages of a regulation,[2] the adoption of a **directive** seems to be more consistent with the limited objective of this scenario.

Main issues and amendments that the proposed 'Scenario 1 Directive' needs to tackle:

a) Enhancing the consultation procedure: strengthening the obligation to contact and to reply.

The Framework Decision 2009/948/JHA entails a horizontal consultation procedure between the judicial authorities of the Member State for the purpose of

[2] As highlighted by *Wasmeier* in his contribution on the legal basis.

achieving consensus on “any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings”.
This instrument currently presents some interesting features and several flaws: its “lisbonisation” should amend it maintaining the original horizontal philosophy.
The existing obligation to contact (Article 5 of the Framework Decision) needs to be strengthened as to the circumstances in which the authorities shall check the existence of a parallel proceeding in another Member State. To this purpose, the proposed Directive will complement the current obligation with a new provision detailing a set of “indications” triggering it. Likewise, it will enable defendants and victims with the possibility to ask the competent authority of one Member States to contact the corresponding authority in other Member States conducting parallel proceedings.
Scenario 1 instrument will also reinforce the obligation to reply, by stating that the deadline set by the contacting authority is mandatory (see Eurojust Strategic Seminar 2015) and, in any case, by providing for a maximum statutory period of 30 days. This deadline is consistent with the timeframe set in Article 12 para. 3 of the EIO Directive.

b) Enhancing the consultation procedure: rights for suspects and victims and judicial review.

The current Framework Decision does not contain provisions on the participation of suspects and victims in the consultation procedure, nor does it provide for an effective remedy. The proposed directive, accordingly, will:

- insert a new provision obliging national authorities to notify defendants and victims about the direct consultation (at least) after the conclusion of the investigations;

- add new provisions under the existing consultation procedure to establish certain minimum formalities (i.e. the need to have a written record etc.);

- allow the defendants and the victims to submit in the consultation procedure a written opinion on the determination of the jurisdiction to prosecute;

- add a new provision granting to the defendant the right to challenge the decision before the national Courts in case of arbitrary application of the criteria;

c) Enhancing legal certainty: a clear set of criteria.

The current Framework Decision does not identify the criteria to be applied in the consultation procedure. A vague reference to the Eurojust Guidelines of 2003 is contained in the recitals but only with an exemplificative function.

The scenario 1 instrument will go beyond the current state of affairs by incorporating the amended Eurojust Guidelines in the enacting terms of the new Directive; these criteria shall be applied in the consultation procedure between national authorities and will therefore become “hard law”.

The system will remain flexible, while the obligation to provide reasons and to justify the choice coupled with the new 'negative list' of criteria included in the amended Guidelines will ensure that the rights of the parties are adequately safeguarded

d) Enhancing burden sharing: translation and interpretation costs.

Following the suggestions coming from the field research and the Eurojust Strategic Seminar, the proposed Directive will add a new provision on translation and costs based on the principle of burden-sharing between national authorities.[3]

[3] See Eurojust strategic seminar 2015, final report p. 9. The issue of costs – especially those related to the translation of the file – has been recalled in several occasions during the field research at Eurojust.

SCENARIO 2
EU Rules for Settling Conflicts of Jurisdiction

Objective of the Scenario 2 Instrument:

- Scenario 2 focuses on the 'settlement' of conflicts of jurisdiction. It will not affect the jurisdiction to prescribe of the EU MS's, but will regulate its exercise within the AFSJ. Differently from the previous scenario, Scenario 2 goes beyond the 'horizontal philosophy' of the current legal framework by entrusting Eurojust with binding powers. The horizontal consultation between the national judicial authorities is maintained as a first step, but it will be complemented by a supranational procedure conducted by Eurojust in case of failure to reach an agreement to settle the conflict.

- Scenario 2 includes the following core elements: *(a)* a clear set of criteria to determine the competent jurisdiction and to concentrate parallel proceedings; *(b)* clear procedural rules for the settlement of jurisdictional conflicts both at the horizontal level and at Eurojust; *(c)* clear rules on the effective judicial remedy against the agreement reached at the horizontal level or the decision adopted by Eurojust.

Added value:

- Scenario 2 will enhance legal certainty and consistency in the determination of the jurisdiction to prosecute by spelling out the criteria for the choice and by empowering Eurojust with a binding decision.

- It will also improve the overall fairness of the system by according of specific participative rights to suspects and victims and by establishing clear rules on judicial review.

Legal basis and choice of instrument:

- The new instrument of Scenario 2 is based on Article 82 (1)(b) TFEU which allows the adoption of either a Directive or a Regulation. Taking into account that the new instrument shall contain binding rules on the settlement of conflicts of jurisdiction in criminal cases – in particular the definition of the criteria and the procedure as well as the role of Eurojust – a Regulation is preferred. In terms of subsidiarity and proportionality, this choice is justified. A binding decision by a European agency implies a vertical approach that can be better achieved by a Regulation than by a Directive. It would not be appropriate to make the instrument conditional on the national laws of implementation, as the main aim is not approximation or harmonisation. It is worth stressing that Art. 82 TFEU is not limited to the establishment of minimum rules, therefore – except the amendments

to the competence of Eurojust– Art. 82 (1)(b) would allow for a comprehensive Regulation on solving conflicts of jurisdiction.[4]

- In addition, as far as the role of Eurojust is concerned, the proposed Eurojust Regulation (COM (2013) 535 final, 2013/0256 (COD)) needs to be amended. This amendment can be drafted on the basis of Art. 85 TFEU, as a separate legislative initiative.

Main issues that the proposed 'Scenario 2 Regulation' needs to tackle:

a) Criteria for the determination of the jurisdiction and the settlement of jurisdictional conflicts

- Similarly to Scenario 1, Scenario 2 will transpose the amended Eurojust Guidelines into "hard law". Both the authorities of the Member States during the consultation procedure and Eurojust during the Eurojust procedure shall apply the amended Guidelines, considering also the point of view of the defendants and the victims. The system will remain based on a balancing exercise and flexible, while the obligation to state the reasons for the choice and the new 'negative list' of criteria will ensure that the rights of the parties are adequately safeguarded. The Regulation will provide for an explicit right to judicial review against both the agreement between national authorities and the Eurojust decision.

b) Procedural rules

'Scenario 2 Regulation' would provide for the procedure and formal requirements for delivering a decision. In particular, such rules should address the following aspects:

- **Detection of parallel proceedings and horizontal consultation procedure/ obligations to contact the other judicial authorities involved, to notify Eurojust and to initiate a consultation procedure.**

- Similarly to Scenario 1, the first step of 'Scenario 2' also implies a preliminary obligation for the national authorities to contact and reply each other about the existence of parallel proceedings. To this purpose, the 'Scenario 2 Regulation' could define a set of indexes, such as the transnational nature of the conduct, the nationality or residence of the offender, etc., which could trigger the obligation to contact. In order to render this obligation effective, the Regulation should limit the contents of this preliminary information exchange to the essential details of the case (date and place of commission/detection; personal details of the suspect; typology of offence according to a list of categories to be drafted on the blueprint of the EAW/MR lists);

[4] As pointed out by *Wasmeier*, Article 82(1) TFEU allows the EU legislator to go beyond minimum rules, by including also some rules which – without being considered as approximation measures according to Article 82(2) or Article 83(1) – require Member States to adapt national provisions with regard to cross-border situations

- A second paramount obligation upon the Member States arises immediately after the conclusion of the parallel investigations and should relate to the initiation of a 'horizontal' consultation procedure aimed at reaching an agreement. Such procedure should be provided with a mandatory time limit (30 days) and its initiation should be notified to Eurojust, the suspect and the victims. During the consultation procedure, the Member States should agree on the determination of jurisdiction applying the amended Eurojust Guidelines. If they fail to meet the time limit, Eurojust should intervene *ex officio* and evocate the case in order to deliver a decision.

  - **Eurojust right of evocation**

- After the unfruitful expiry of the time limit for the 'horizontal phase', Eurojust should start a settling procedure to determine the competent jurisdiction. This supranational procedure should be inspired to expediency and sincere cooperation and should end in a binding decision adopted by Eurojust on the basis of the amended Eurojust Guidelines. Mandatory time limits should be provided also for this procedure (60 plus further additional 30 days, in case additional information should be needed).

- The very existence of the possibility of an *ex officio* intervention of Eurojust with a binding outcome could play the role of an "indirect incentive" for the Member States to reach an agreement at the horizontal level. The ability granted to the defendant and the victim to submit their view already during the horizontal consultation, coupled with the right to seek the judicial review of the agreement reached by the national authorities before the national court, should adequately counterbalance the risk of rash and arbitrary agreements between the Member States.

  - **Expediency and participation of the defence. Rules on access to the file/disclosure**

- In order to ensure a speedy procedure for the determination of jurisdiction conflicts by Eurojust, there should be a permanent and specialized structure within Eurojust to deal with these requests. For the sake of expediency, the supranational procedure should be a written procedure.

- The defendant and the victims[5] (when identified), should be allowed to submit their written observations within a short timeframe (15 days) both in the horizontal consultation procedure and in the eventuality of a procedure before Eurojust.

- The **'**Scenario 2 Regulation' should contain tailored rules on the access to the file/disclosure of information in order to guarantee an effective and informed participation of the private parties and the need for expediency.

[5] On the function of victim's participative rights in the choice of jurisdiction, see the contribution of *Simonato* to the 3rd meeting of the Working Group, p. 9.

- **Justification of the decisions of Eurojust and reasons for the choice**

- Both the Member States in their agreement and Eurojust in the adoption of its decision should be obliged to justify the reasons for the choice and the application of the criteria provided by the amended Eurojust Guidelines.

- It should be clearly stated that the decision of Eurojust is binding on all Member States' competent judicial authorities.

- **Right to an effective remedy and judicial review**

- The 'Scenario 2 Regulation' would lay down clear rules on the right to an effective remedy both against the agreement reached by the Member States and against the binding decision issued by Eurojust. The two cases should be, however, differentiated for reasons of systemic consistency. Under this perspective, the review of the agreement reached by the Member States after the consultation procedure should be entrusted to the national court of the competent Member States. In this case, such review could be only asked by the suspect. Differently, the review of the binding Eurojust decision will be entrusted to the Court of Justice of the European Union through the general action for annulment according to art. 263 TFEU. Both the Member States and the suspect should be allowed to seek for such a review. Given the different nature of the interests at stake in the forum choice, the victim should not have such a possibility. In case Eurojust does not comply with the time limits set for this Regulation, the suspect and the Member States should be allowed to promote an action for failure to act *ex* art. 265 TFEU.

- Both before the national courts and the Court of Justice the review of the choice would mainly focus on the application of the amended Guidelines and on the "good use" of discretion by the Member States and Eurojust. The participative rights granted to the private parties (suspect and victim) in the previous steps of the procedure and the existence of the negative list of criteria in the amended Guidelines, however, could eventually render such review less "marginal" than could be imagined.

- Furthermore, the possibility to seek judicial review of the prosecution brought in one Member State will ensure a general control on the exercise of jurisdiction in the EU, even in cases where the obligation to carry out the consultation procedure has been disregarded. In this sense, Scenario 2 goes beyond the settlement of actual conflicts (i.e. the disagreement between national authorities) but aims to ensure a fair choice of the 'best forum'.

SCENARIO 3
EU Rules on territorial jurisdiction in the AFSJ

Objective of the Scenario 3 Instrument:

- Similarly to Scenario 2, Scenario 3 is not limited to solve actual conflicts of jurisdiction. Contrary to the previous scenarios, however, it does not rely only on a procedural framework to reach a decision, but it aims to reduce the possibility of conflicts of jurisdiction from the outset. Scenario 3 proposes therefore a reshaping of the grounds to exercise jurisdiction in criminal matters within the AFSJ. In principle, grounds for jurisdiction in the AFSJ will be formulated along the same logic as rules defining the competent court in a domestic context.

- This instrument aims essentially at preventing the prosecution in more than one Member States, and not necessarily at forbidding parallel investigations. However, due to the fact that clear rules on jurisdictions apply, the concentration of investigation in the competent Member State is a likely consequence.

- A procedural framework is necessary in order to control the correct application of the rules on jurisdiction. Such a mechanism can be shaped in a similar way to Scenario 2; however, the review will not be conducted according to a set of criteria, but according to the rules on the exercise of jurisdiction provided by the instrument.

Added value:

- The Scenario 3 instrument is not limited at establishing a procedure to solve conflicts of competent jurisdictions, but it provides for the determination of the only competent Member State to prosecute a certain criminal offence in the AFSJ. In this case, no forum choice would be necessary because the forum is already pre-determined by the rules on jurisdiction.

Legal basis and choice of instrument:

- Scenario 3 establishes uniform rules on the exercise of jurisdiction in the AFSJ. However, this instrument does not aim at a full harmonisation of the national approaches to jurisdiction, which will remain unaffected with regard offences (partly) committed outside the Union.

- These rules on the exercise of jurisdiction do not fall within the concept of 'definition of criminal offences' (covered by Art. 83), but only operate in the context of conflicts of jurisdiction. In this regard, Art. 82(1) TFEU seems to allow the EU legislator to go beyond minimum rules, by including also some rules which – without being considered as approximation measures according to Art. 82(2) or Art. 83(1) – require Member States to adapt national provisions with regard to cross-border situations.[6]

[6] See *Wasmeier*'s contribution. More explicitly, Böse – M. Böse, 'Chapter 9: The legal basis (Art. 82 TFEU)', in M. Böse, F. Meyer and A. Schneider, *Conflicts of Jurisdiction in Criminal Matters in the*

- A different approach, whereby the concept of jurisdiction is considered to be included in the 'definition of criminal offences', would require Art. 83 TFEU as a legal basis (in combination with Art. 82):[7] EU rules touching upon offence definitions can be based only on Art. 83 TFEU.[8] Nevertheless, this choice would have several consequences. In particular, the scope of application of the Directive would be limited to specific offences falling within the ambit of Article 83 (1) and (2). Limiting the instrument to certain categories of offences, however, would create an overly complicated system.

- The instrument in this case could be either a Regulation or a Directive. Due to the fact that Member States may be required to adapt national provisions with regard to cross-border situations, probably a Directive is preferable.

- In addition to a Directive based on Art. 82, Art. 85 (1)(c) could serve as secondary legal basis inasmuch as the Scenario 3 instrument touches upon the competence of Eurojust. However, as Art. 85 provides explicitly for a Regulation, the proposal within Scenario 3 would need to make specific amendments to the Proposal for a Eurojust Regulation similar to the approach specified under Scenario 2.

Main issues to be tackled:

a) Jurisdictional grounds – main rule

- As a general rule, territoriality should be identified as the only jurisdictional ground in the EU. The first problem, therefore, is the definition of territoriality. In order to have a better impact on the existing scenario, it seems appropriate to overcome the broad concept often embraced by Member State, whereby a crime is also committed where the result has occurred (i.e. 'ubiquity').[9] A narrower concept is therefore proposed: at least part of the conduct must have occurred in the territory of a Member State, i.e. it is excluded that the concept of territoriality is interpreted in the sense that facts that only produce an effect in one Member State are considered to be committed in that Member State.[10]

European Union, Vol. II (Baden-Baden, Nomos, 2014) 367 – argues that Art. 82 even 'empowers the Union to adopt rules on the ambit of Member States' criminal law and, thereby, to limit their jurisdiction to prescribe' (p. 370), whereas Art. 83 'may serve as a supplementary basis if a category of offences calls for specific jurisdictional rules (e.g., in order to avoid a negative conflict of jurisdiction)' (p. 373). Art. 82 includes also preventive measure: 'This broad interpretation corresponds to the general notion of jurisdiction and is further supported by the fact that, unlike Art. 83 TFEU, Art. 82 … is not limited to particular areas of criminal law, but provides for a general competence on conflicts of jurisdiction, irrespective of the nature of the offence' (p. 369).

[7] In other words, the Scenario 3 instrument would need to be based on a joint legal basis of Art. 83 and Art. 82 (1)(b) TFEU similar to Directive 2014/42/EU on the freezing and confiscation of assets.

[8] However, bearing in mind the debate on the PIF Directive and the scope of 325 TFEU, we should also consider the existence of other potential legal bases for harmonisation. However, with regard to legal bases placed outside Title V TFEU, their procedural compatibility with the regime of "Title V co-decision" (opt-outs and emergency brakes) shall be carefully assessed.

[9] See Böse-Meyer-Schneider proposal.

[10] See Vander Beken et al. proposal.

- The focus on territoriality entails that extraterritorial jurisdiction should no longer be allowed within the AFSJ, and this is clearly stated in the instrument. Nevertheless, for facts committed outside the EU nothing would prevent Member States from exercising extraterritorial jurisdiction. We therefore added a reference to the fact that active and passive personality may be still considered as jurisdictional grounds in case of crimes committed outside the EU.[11]

- Since this instrument will have general application in the AFSJ only when it comes to the exercise of jurisdiction, it does not seem to be necessary to tackle the problem of the relationship with other EU and international instruments imposing broad jurisdictional grounds to Member States, for example by amending other EU instruments or specifying that the CJCL instrument has primacy over other instruments.

b) Jurisdictional grounds – subsidiary rules

- In the case of multi-territorial offences it is necessary to identify which Member State would be competent to exercise its jurisdiction, by identifying a sort of order of priorities. This should be spelled out in similar terms to the rules on the competence *ratione loci* for purely domestic cases.[12]

- In some Member States the rules on competence *ratione loci* are spelled out for every category of offences. Due to the different substantive concept in the Member States, it is necessary to find rather comprehensive rules covering continuing offences, inchoate offences, etc.

- The proposed rules can be summarised as follows: if the conduct was committed in several Member States and the result occurred only in one of them, that Member State will be competent to launch prosecution. If the result also occurred in more than one Member State, or if the result is not necessary for the criminal liability, the decisive criterion is where last part of the conduct took place.
  This may be preferable to the alternative options. Considering the Member State where the conduct began would risk allocating the case to a Member State who does not have a clear overview on the entire offence. On the other hand, indicating the main part of the conduct would be a more vague criterion that could be subject to different assessment.

- A subsidiary rule is provided in the event it is not possible to identify the competent Member State following the aforementioned criteria. In this case, prosecution will be launched in the Member State where the defendant is – or most defendants are – resident. This choice seems to be more objective than a criterion based on the location of evidence. Furthermore, compared with a criterion based on the residence of victims, it seems to be more objective and in line with the rationale of an instrument preventing conflicts of jurisdiction.[13]

[11] Similarly to the Böse-Meyer-Schneider proposal (Art. 4).
[12] Some inspiration for such an order of priorities may be provided by the Recommendation 420 (1965) of the CoE Parlamentary Assembly, as in other proposals on conflicts of jurisdiction.
[13] See the contribution of *Simonato* to the 3rd meeting of the Working Group.

c) Procedural aspects

- The instrument developed within Scenario 3 should work as an automatic rule, since only one Member State would be ultimately competent to exercise the jurisdiction. Nevertheless, a procedural framework should be provided in order to ensure the possibility to control the application of the rules on the exercise of jurisdiction.

- Such mechanisms could be developed similarly to the Scenario 2 mechanism. A first phase would consist of a horizontal consultation between national authorities in order to reach a consensus on the correct application on the rules on exercise of jurisdiction. If a decision is not taken at horizontal level, a second step foresees the involvement of Eurojust, where a binding decision will be taken at supranational level.

- The right to activate the remedy mechanism should be accorded to suspects, as well as to competent authorities in one Member State when they have indications that another Member State is violating the rules on the exercise of jurisdiction by conducting parallel criminal proceedings. Due to the different interests at stake, victims should not necessary have such a possibility.

- Similarly to Scenario 2, national authorities should contact each other at the moment in which there are indications of the existence of parallel proceedings, i.e. of a wrong exercise of jurisdiction. The aim, however, is not to prohibit parallel investigations as such, because a full overview of the criminal conduct (hence of the territoriality) may become clear only at the end of them. For this reason, the decision – taken either by conflicting national authorities or Eurojust – should be taken at the end of the investigations, before the prosecution.

- In order to ensure an effective remedy according to Art. 47 CFREU, the decision taken by national authorities or by Eurojust will be subject to judicial review. In cases where a decision is taken at national level, the review would be conducted by the national court where the prosecution is launched. This option will ensure a swifter response and a higher level of specialisation. Disadvantages of this option would be the risk of inconsistency in the case law and the risks of 'unilateralism' or 'pro-forum bias' (national courts could be excessively oriented to confirm their own power to adjudicate the case). On the other hand, when the decision is taken by Eurojust, the judicial review would be conducted by the CJEU according to Art. 263(1)(1) TFEU. This option seeks to ensure consistency in the interpretation and application of the rules on the exercise of jurisdiction in the medium term.

d) Other issues to consider (not included in the draft instrument)

- Special rules on jurisdiction could be laid down with regard to offenses in cyberspace.[14]

- Since active and passive personality principles no longer fits in the common AFSJ for EU citizens, it could be worth reflecting whether some margin should be left

[14] Developing the AIDP Rio resolutions.

for the protective principle. This might be legitimate for offenses such as crimes against state security or economic interests of one Member State (e.g. treason, espionage, etc.).[15]

- It could be reflected upon whether introducing some margin of flexibility with regard to those cases in which it would be more appropriate to allocate the jurisdiction in a Member State other than the one competent according to the rules on the exercise of jurisdiction (e.g. majority of defendants and victims resident in another Member State, crime against essential interests of one particular Member State, connection with a proceeding subject to the competence of another Member State, etc.). We could therefore add a provision allowing the transfer of proceedings and establishing derivative jurisdiction, where the defendant and competent authorities of the Member States involved agree after previous consultation with victims.[16]

[15] Similarly to Böse-Meyer-Schneider proposal, Art. 3.
[16] Inspiration may be taken from Article 8 of the CoE 1972 Transfer of Proceedings convention.