

Developing a New Legal Framework for Preventing and Solving Conflicts of Criminal Jurisdiction

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Why do conflicts of jurisdiction matter?

Conflicts of jurisdiction in criminal law may be **detrimental** to:

- the proper administration of justice.
- the fundamental rights of the individual, both the defendant and the victim.

What is a conflict?

- Concrete conflicts between authorities and potential conflicts of overlapping jurisdictions.
- Positive and negative conflicts.
- Parallel proceedings and multiple proceedings.



When does a conflict arise?

Are parallel investigations admissible?

- To a certain extent, parallel investigations may appear both **unavoidable and necessary** to deal with cross border crimes.
- From the perspective of the defendant (and in a certain sense also from that of the victim), **however, they are not “neutral”**.

There is a need to strike a balance

Conflicts of Jurisdiction in the AFSJ: the state of the art

Uneven ambitions...

the existing *acquis* is essentially *acquis* characterized by a pre-Lisbon “piecemeal” approach

...and modest outcomes

lack of a clear and transparent mechanism to allocate cases to jurisdictions or to trigger jurisdiction in the EU.



A contradictory *acquis*:

- Several FDs promote extraterritorial jurisdiction (active personality passive personality principle, protective principle) and, in consequence, overlapping jurisdictional claims.
- The only “hard law”-solution offers **non-binding consultation procedures**.
- Soft law (Eurojust Decision and Eurojust Guidelines) provide for a set of criteria and a mechanism to choose the best forum for prosecution.

Gaps in light of the Lisbon Treaty

- Lack of procedural safeguards.
- No attention to the European interest.
- Lack of foreseeability.
- Lack of an EU legal framework for the transfer of proceedings.

Opinion of AG Sharpston in C-398/12, M.

“However, Council Framework Decision 2009/948/JHA does not harmonize national laws and procedures in this area of law. In particular, it does not oblige a Member State either to waive or to exercise jurisdiction. Unless and until the legislature addresses the issue of parallel proceedings more comprehensively, the principle of *ne bis in idem* in Article 54 CISA will, of necessity, have to be pressed into service to fill the gap.”

The need to rethink criminal jurisdiction post-Lisbon

- The “first come, first served” approach of *ne bis in idem* risks to deliver arbitrary results and overlooks other relevant interests.
- The present foreseeability of forum choice seems to be in tension with art. 47 EUCFR and the principle of the impartial tribunal previously established by law.
- Absence of a proper mechanism for the transfer of proceedings.

New legal bases: Art. 82 par. 1b TFEU

“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, **shall adopt measures** to:

[...] prevent and settle conflicts of jurisdiction between Member States”

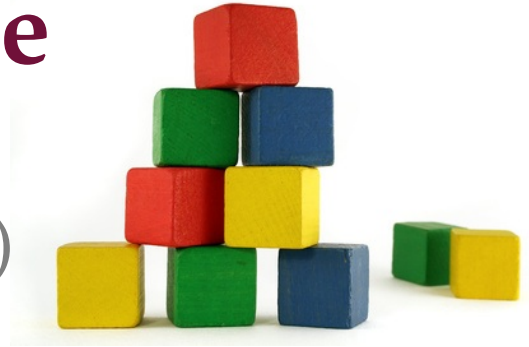
- It refers to “measures”.
- It is not limited to “minimum rules”.
- It is not subject to the “emergency brake”.

New legal bases: Art. 85 TFEU

“In this context, the European Parliament and the Council, by means of **regulations** adopted in accordance with the ordinary legislative procedure, **shall** determine Eurojust’s structure, operation, field of action and tasks. These tasks **may** include: [...]

(c) the strengthening of judicial cooperation, **including by resolution of conflicts of jurisdiction** and by close cooperation with the European Judicial Network.”

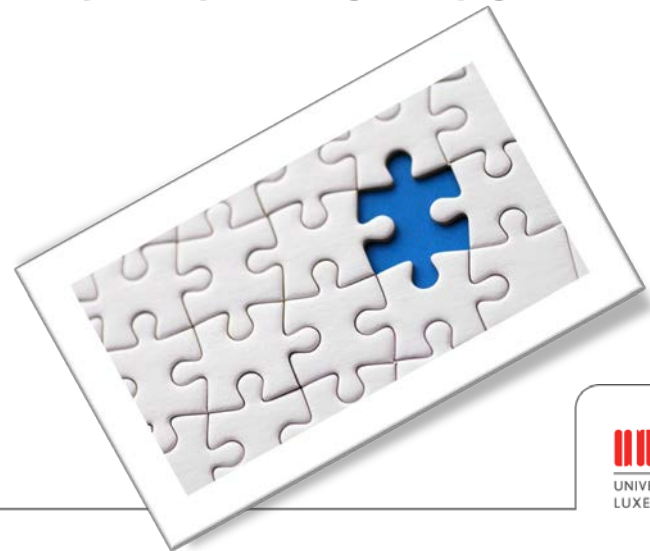
The CJCL Project: Structure



- A three years research (2014 – 2017)
- Performed by a international Working Group of academics and experts
- Funded by the FNR Luxembourg and supported by the European Law Institute
- Involving EU Institutions (EC and EP)

The CJCL Project: Objectives

- To provide a comprehensive analysis of conflicts of jurisdiction in the AFSJ
- To elaborate a new legal framework for the prevention and settlement of conflicts of jurisdiction



The CJCL Project: Methodology

- A theoretical comparison with **Private International Law**;
- An **evidence-based analysis** of conflicts of jurisdiction:
 - interviews with prosecutors at Eurojust and national level;
 - interviews with defense lawyers;
- A **policy profile** and impact;
- A **scenario approach** to the new legal framework; **no blueprint!**

Update of the Eurojust Guidelines

- “Soft law” option
- Update in view of the new opportunities offered by mutual recognition instruments (EIO) and videoconferencing
- Qualitative definition of the territorial factor
- Inclusion of trial readiness factor (stage of the proceedings)
- Negative list of criteria not to take into account

Horizontal Settlement

- Consultation between the national authorities in a horizontal setting in order
 - to prevent ne bis in idem situations
 - to ensure a non-arbitrary forum.
- Clear criteria for the choice of forum
- Possibility for the suspect and the victim to submit their written observations
- A legal basis to **discontinue the proceedings** and to transfer the case.

Vertical Settlement

- Final binding decision by Eurojust
- Clear criteria for the choice of forum
- Possibility to submit observations in the Eurojust procedure
- Judicial review of the ECJ on the Eurojust decision

Exclusive Jurisdiction

- General rule on territorial jurisdiction in the AFSJ
- Uniform subsidiary rules for multi-territorial crimes
- Conciliation procedure (controversy)
- Judicial review before the national courts and possible involvement ECJ via preliminary ruling