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Draft Legislative Proposal for the Prevention and Resolution of Conflicts of Jurisdiction in Criminal Matters in the European Union

Report of the European Law Institute

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The European Law Institute

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The views set out in this Report should not be taken as representing the views of those bodies, on whose behalf individual members of the working party and advisory group were also acting.

Principal abbreviations

AFSJ	Area of Freedom, Security and Justice
CFR	Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DG Justice	European Commission Directorate-General for Justice
EAW	European Arrest Warrant, established with Council Framework Decision 2002/584/JHA
ECHR	European Convention of Human Rights
EIO	European Investigation Order, established with Directive 2014/41/EU
EJN	The European Judicial Network in criminal matters
EPPO	The European Public Prosecutor's Office
FD	Framework Decision
GC	General Court of the European Union
MPI	The Max Planck Institute
OLAF	The European Anti-Fraud Office
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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EXPLANATORY NOTE

1. Problem setting

When two or more states claim criminal jurisdiction to investigate, prosecute and adjudicate suspicious criminal conduct, a conflict between (legitimate) jurisdictions arises. Parallel criminal proceedings can endanger the "interests" of the persons involved, who may face the risk of double prosecution and punishment, as well as different legal regimes that determine the safeguards and remedies available to reduce uncertainty and lack of foreseeability. If several countries exercise jurisdiction over the same facts, it leads to efforts and resources being wasted and potentially to arbitrary outcomes.

In the specific context of the EU, in particular, concurrence of jurisdiction coupled with the application of the principle of European *ne bis in idem* can result in the prosecution of specific offences being barred on a "first come, first served" basis[1] if the authorities of one Member State finally dispose of the case, even though this Member State is not necessarily "the best placed" to adjudicate the case. It is evident, therefore, that situations in which two or more states have concurrent jurisdictions over the same crime should be settled, or preferably, prevented.

2. Terminology

In general, the concept of a conflict refers to:

'positive conflicts', i.e. when two or more Member States exercise or intend to exercise their jurisdiction over certain facts constituting a criminal offence;

'negative conflicts', i.e. when between several Member States having jurisdiction over certain facts constituting a criminal offence, none of them is willing to exercise its jurisdiction. It is important to note that negative conflict does not refer to situations in which no state has jurisdiction, but rather to the situation in which no state is willing to exercise it.[2]

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[1] The principle of European *ne bis in idem* is enshrined in Article 54 of the Convention Implementing the Schengen Agreement of 1990, in Article 50 of the Charter of Fundamental Rights and in Article 4 of Protocol n. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Court of Justice of the European Union recognised the relevance of the principle and its application on the "first come, first served" basis in the seminal judgment Gözütok and Brügge (CJEU, 11 February 2003, C-187/01, joined cases Gözütok and Brügge; ECLI:EU:C:2003:87)

[2] Similarly to the Anglo-American concept of *forum non conveniens* that allows for the discretion of courts to deny access when there is jurisdiction, also in criminal law there can be a gap between having jurisdiction and exercising it.

It is, however, disputed whether this phenomenon belongs to the conceptual framework of jurisdictional conflict[3].

'parallel proceedings', i.e. criminal proceedings which are conducted or are about to be conducted in two or more Member States, against the same suspect or accused regarding the same facts; if both parallel proceedings continue, it will certainly lead to a *ne bis in idem* situation.

'multiple proceedings', i.e. criminal proceedings which are conducted or are about to be conducted in two or more Member States against the same suspect or accused in relation to different facts, or against different suspects or accused persons in relation to the same set of facts. Although multiple proceedings do not violate *ne bis in idem* as they concern different facts, in the case of organised crime for instance, in order to adjudicate the crime it could make sense to concentrate proceedings that relate to various individual acts that the perpetrator may have performed in different jurisdictions, but which are all related to the same organised criminal activity. Another example concerns similar but separate offences (e.g.: several thefts) committed by the same person in the territory of different Member States.[4] Due to the boundless reach of information technology, separate cybercrime offences in particular may cause harm across a great number of different jurisdictions (e.g. hate speech, training of "lone wolf" terrorists, grooming of victims by sexual predators). In such cases, although not obligatory, a decision to concentrate proceedings in a single Member State may turn out to be opportune both in the interests of the suspect (possibility to attend a single trial and, in case of conviction, to serve the sentence in one Member State, potentially enhancing the chances of social rehabilitation) and of the good administration of justice (holding a single trial, possibility to adjudicate the whole series of crimes and, in case of conviction, to modulate the sentence in a proportionate way).

'actual conflicts', i.e. when concurrence of jurisdictions occurs *in concreto* and two or more parallel proceedings are actually run in two or more Member States;

'abstract conflicts', i.e. when concurrence of jurisdictions occurs only *in abstracto* since parallel proceedings are not yet started in two or more Member States.

For the purposes of this report, the term **'criminal matter'** is understood as relating to the domain of criminal law *stricto sensu***.** Accordingly, the proposed instrument is to be applied in criminal cases. However, the Member States are free to broaden the circle of authorities which they would consider competent to apply the proposed rules. In line with the *Engel* jurisprudence of the ECtHR[5] that broadens the understanding of what is a "criminal charge" and a "criminal sanction" and also includes punitive administrative

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[3] Indeed, some authors have defined the denial of (the exercise of) jurisdiction as an enforcement gap requiring a totally different approach. See, for instance, the opinion expressed by A. Klip, What is a conflict? concept paper for the 2nd WG Group Meeting of the Project (March 2015).

[4] A recent example is provided by the case of Melvin West, a UK national who was the subject of multiple European arrest warrants in connection with multiple thefts (of ancient and rare maps and valuable plates removed from atlases), all committed at libraries in three different Member States. See Case C-192/12 PPU *West v. Virallinen syyttäjä*, 28 June 2012, ECLI:EU:C:2012:404

[5] ECtHR, *Engel and Others v. the Netherlands,* 8 June 1976, Series A no. 22; criteria at §§ 82-83.

sanctions and "quasi-criminal" proceedings[6], it is up to the Member States to determine which authorities other than criminal justice authorities would be competent to apply the proposed rules.

Finally, the term **'multi-territorial offences'** refers to offences that concern or affect the territory of two or more Member States; e.g. trafficking offences committed through the territory of several Member States. Multi-territorial offences can often trigger positive conflicts of territorial jurisdiction[7].

This project and the three draft legislative proposals presented further below apply a broad definition of the concept of 'conflict of jurisdiction' that covers:

- **Positive conflicts**: The proposed legal framework will limit its focus to positive conflicts of jurisdiction, excluding from its scope the settlement of negative conflicts. Addressing negative conflicts, in particular, would require reflection on the extent of the jurisdiction to prescribe and on the principle of mandatory prosecution. In this perspective, directly tackling this phenomenon would require the draft proposals to go beyond the scope of preventing and settling conflicts of "exercise" of jurisdiction. The proposed legal framework will, nonetheless, to some extent allay the problem of negative conflicts by clarifying responsibilities in the exercise of criminal jurisdiction, including in situations where neither Member State wishes to prosecute.
- **Parallel proceedings**: The definition of 'parallel proceedings' does in principle cover both the pre-trial and trial stage. Parallel investigations, however, should in principle be allowed as they might turn out to be necessary in order to acquire the full picture, also in the perspective of the resolution of a conflict. What is most relevant is that parallel investigations are conducted in a fair and coordinated way and, in particular, do not end up in multiple prosecutions. The proposed legal framework will therefore not focus on or rule out parallel investigations but rather parallel prosecutions.
- **Actual and abstract conflicts** of jurisdiction;
- **Multiple proceedings**.

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[6] *Ibid.* The first criterion serves as a starting point: if domestic law classifies an offence as criminal, this is decisive. If not, the second criterion, which is considered more important (Jussila v. Finland [GC], § 38), is evaluated taking into consideration as appropriate the following factors : whether the legal rule in question is directed solely at a specific group or is of a generally binding character (*Bendenoun v. France*, § 47); whether the proceedings are instituted by a public body with statutory powers of enforcement (Benham v. the United Kingdom, § 56); whether the legal rule has a punitive or deterrent purpose (*Öztürk v. Germany*, § 53; *Bendenoun v. France*, § 47); whether the imposition of any penalty is dependent upon a finding of guilt (Benham v. the United Kingdom, § 56); and how comparable procedures are classified in other Council of Europe member States (*Öztürk v. Germany* §53). The second and third criteria are not necessarily cumulative; either the nature of the offence or the severity of punishment may invoke Article 6 ECHR (*Lutz v. Germany*, § 55; *Öztürk v. Germany,* § 54). This third criterion is determined by reference to the maximum potential penalty attached to the relevant provisions (*Campbell and Fell v. the United Kingdom*, § 72; *Demicoli v. Malta,* § 34).

[7] It emerged from the field research at Eurojust that the most frequent cases of conflicts of jurisdiction do actually arise from trafficking offences (drug trafficking, trafficking in human beings).

Art. 82 (1) (b) TFEU refers to both the "prevention" and the "settlement" of conflicts of jurisdiction. This broad legal mandate has not been used to date in any concrete legislative proposal. This project is intended to provide options for legislative frameworks that could fill that legal gap.

3. Legislative gap in EU law: the background of the project

Although the problems described above also arise on a global scale, they increasingly pose a problem within the European Union. Art. 3 (2) TEU which states that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured" and the idea of European citizenship, enshrined in the Charter on Fundamental Rights (EUCFR), entails the right to a natural judge in the AFSJ and thereby sets requirements in relation to regulating jurisdiction conflicts in criminal matters. Can individuals derive rights from Union Law (including the EUCFR and the related European Convention on Human Rights (ECHR)) when it comes to choice of jurisdiction or at least in order to protect themselves against double jeopardy in a transnational setting?

The issues of parallel proceedings and conflicting decisions have long been discussed and addressed in the field of international civil procedure. In countries belonging to the Civil Law tradition, such conflicts have traditionally been avoided through the doctrine of *lis pendens*, which forbids the court seized second of the same dispute to retain jurisdiction. In countries belonging to the Common Law tradition, such issues have been handled very differently through a variety of doctrines. The most prominent is *forum non conveniens*, which enables Common Law courts to compare courts and processes for the purpose of assessing which of the competing adjudicators is the most appropriate, and should therefore decide the dispute. In the EU, the civil law doctrine of *lis pendens* was adopted in civil and commercial matters as early as 1968. For 55 years, conflicts of jurisdiction have been successfully prevented or settled in civil and commercial matters by rules currently laid down in Regulation 1215/2012 (the Brussels I Regulation recast). Similar, although not identical, mechanisms have applied in matrimonial matters since the adoption of Regulation 2201/2003.

Today, even in the EU, there are no binding instruments establishing a mechanism to resolve conflicts of (exercising) jurisdiction in criminal matters. It is worth mentioning that as early as the 1960s experts within the Council of Europe (CoE) began work on a draft convention on conflicts of jurisdiction in criminal matters, dealing with competence, transfer of proceedings and *ne bis in idem*. As a result, in 1965 the Consultative Assembly of the CoE adopted Recommendation 420, establishing factors for a priority order of jurisdictions. Member States of the CoE, however, did not follow up on this recommendation, as they did not fully endorse the hierarchical order of jurisdictions as suggested in Recommendation 420.

Despite little support from European countries for an agreement on a mechanism for the prevention of jurisdiction conflicts in criminal matters, the CoE continued with its efforts to find an appropriate solution to the problem. In the 1970s, the CoE elaborated a Convention

on the International Validity of Judgments (28 May 1970) and on the Transfer of Proceedings (15 May 1972). Although both conventions were forward-looking in their approach to resolving conflicts of jurisdiction, they received only a small number of ratifications[8]. Furthermore, they did not provide a shared, common and multilateral procedure for determining jurisdiction in criminal matters. Much more popular in the area of recognition of foreign judgements was the 1983 Convention on the Transfer of Sentenced Persons, to which no fewer than 65 states are party, including all Member States of the EU.

Even within the AFSJ, national authorities are free to initiate parallel national proceedings on the same case. In principle, national provisions on jurisdiction determine whether a Member State has the right to prosecute. However, important limits are set by the principle of *ne bis in idem*, enshrined in EU law and in the ECHR/EUCFR. It is especially the jurisprudence of the CJEU that has clarified this principle, and developed an autonomous transnational concept of *ne bis in idem*, independent from national laws of individual Member States.

Nevertheless, the principle of *ne bis in idem* has different features at the national and European levels. At the national level, it functions in a frame in which rules on jurisdiction are set and applied and it comes into play only if they lead to a conflict in which the suspect could be adversely affected. Conversely, at the European level there are no common rules on jurisdiction. However, several EU legal instruments requiring the criminalisation of certain conducts prescribe extraterritorial jurisdiction and thus trigger a potential conflict. This means that between different Member States, the risk of violation of *ne bis in idem* is much higher. The function of *ne bis in idem* converts into an instrument of jurisdiction priority on a "first come, first served" basis (i.e. the first decision in one Member State bars a second prosecution against the same person on the same facts in another country). This rule is questionable to the extent that states competing in a race to be the first may not even be aware that they are in such a race. A case in point is provided by the criminal proceedings against M., in which investigations in Belgium and Italy ran in parallel and the final Belgian decision was taken 4 days before the trial in Italy started.[9] According to the CJEU, the Belgian decision that there was no ground to refer the case to a trial court effectively barred the Italian authorities from initiating and conducting their proceedings.

This, however, in no way addresses the question of which jurisdiction is the most appropriate for the prosecution and adjudication of a suspect in the European AFSJ.

It is worth mentioning that some EU instruments (namely the 1995 Convention on the protection of European Communities' financial interests, Framework Decision 2008/919/JHA on combating terrorism, and Framework Decision 2005/222/JHA on attacks against information systems) contain provisions suggesting coordination among the Member States

[8] To date the 1970 CoE Convention on the International Validity of Criminal Judgments has been ratified by 23 Members of the Council of Europe, of which 13 are also Member States of the European Union (AT, BE, BG, CY, DK, EE, LV, LT, NL, RO, SI, ES, SE). To date, the 1972 CoE Convention on the Transfer of Proceedings in Criminal Matters has been ratified by 25 States of the Council of Europe. of which 13 are also Member States of the European Union (AT, BG, CY, CZ, DK, EE, LV, LT, NL, RO, SK, ES, SE)

[9] CJEU, 5 June 2014, Case C-398/12, Criminal proceedings against M; ECLI:EU:C:2014:1057

in order to decide which of them will prosecute. However, they do not provide for any specific procedures in that regard.

Within the EU, the first effective attempt to provide for coordination in order to prevent conflicts of jurisdiction was developed by Eurojust. In 2003, Eurojust issued guidelines for deciding which jurisdiction should prosecute.[10] These guidelines set out certain factors to be applied when solving conflicts of jurisdiction between Member States' authorities. They are applied at the meetings, held at Eurojust, between the national authorities for investigation and prosecution involved in a given cross-border case. However, the main limitations of these guidelines are clearly visible. Above all, since they have no binding effect, Member States are not obliged to comply with them. Also, importantly, interested persons are not involved, so the "forum choice" is essentially made by the prosecuting authority without notifying or consulting the interested persons, or taking into account their interests.

In 2005, the European Commission launched a consultation on conflicts of jurisdiction in criminal matters, including the principle of *ne bis in idem*. The result was the "Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings", published on 23 December 2005.[11] The Green Paper, as well as the related working paper,[12] identified and analysed the main problems in this field, envisaging a mechanism of consultation among Member States leading to the potential solution of a conflict of jurisdiction.

The outcome of the Commission's efforts was the Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, adopted on 30 November 2009, just before the entry into force of the Lisbon Treaty. The Framework Decision establishes a procedural framework for reaching consensus on which Member States should investigate and prosecute a case. Where it is not possible to reach consensus, the matter shall, where appropriate, be referred to Eurojust. The adoption of this Framework Decision, however, is not sufficient to prevent conflicts of jurisdiction. First, no binding criteria are established[13] as to how the decision should be made when choosing the best place for prosecution. Second, the outcome of the consultation proceedings is not binding and the Framework Decision provides no instruments to enforce it. Third, there is the danger that the defendants and the victims are deprived of their rights, as there is no possibility to contest the final decision on jurisdiction.

In light of the existing legal framework, one may conclude that: a) even today there are no binding rules "preventing" conflicts of jurisdiction nor mechanisms to solve conflicts of jurisdiction when parallel proceedings already exist in two or more Member States; b) the

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[10] Eurojust Guidelines for Deciding "Which Jurisdiction Should Prosecute?", included in the Annex to the Eurojust Annual Report 2003 (The Hague, February 2004).

[11] European Commission, Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, 23.12.2005, COM(2005) 696 final.

[12] European Commission staff working document, Annex to the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, cit.

[13] The current Framework Decision 2009/948/JHA refers vaguely to the Eurojust Guidelines in the recitals (Recital 9) but not in the enacting terms.

approach adopted so far at EU level has been strongly based on the concept of a "nation state", its sovereignty to exercise criminal jurisdiction and to apply national law; c) the CJEU has elaborated the autonomous concept of transnational *ne bis in idem* in the AFSJ.

Although conflicts of jurisdiction have been kept out of both the Stockholm Programme[14] and the Post Stockholm Guidelines,[15] it is likely that this issue will re-emerge on the European agenda, as it is mentioned explicitly in Art. 82 TFEU and linked to the mandatory objectives of the AFSJ, according to which "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured" (Art. 3 (2) TEU).

In particular, three provisions are of utmost importance as regards conflicts of jurisdiction: First, Article 82 TFEU provides a legal basis for the European Parliament and the Council to adopt measures to prevent and settle conflicts of jurisdiction between Member States.[16] Second, Article 85 TFEU is dedicated to Eurojust's mission "to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes affecting two or more Member States or requiring a prosecution on common bases". In this regard, future developments are foreseen: "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". Among those tasks is the "resolution of conflicts of jurisdiction".[17] Finally, Article 86 TFEU provides for the establishment of a European Public Prosecutor's Office and the Commission presented the related proposal in 2013.[18] According to the current outcome of the negotiations, the EPPO shall, where several Member States' courts have jurisdiction for the case, choose as the forum for indictment the Member State where the "focus of the criminal activity" is. However, the draft EPPO Regulation allows for the possibility of duly justified deviations from that principle, taking into account a sequential order of criteria (place of habitual residence of the suspect, nationality of the suspect and place where the main financial damage occurred).[19]

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[14] European Council, the Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C115/1, 4.5.2010.

[15] European Council, "Strategic guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice", in European Council, Conclusions - 26/27 June 2014, EUCO 79/14 (Brussels, 27 June 2014).

[16] Article 82 (1) (b) TFEU provides for the possibility to adopt "measures" on the prevention and settlement of conflicts of jurisdiction. The general reference to "measures" potentially allows for the adoption of both directives and regulations and, differently from paragraph 2 of the same article, it is not limited to "minimum rules". Furthermore, the adoption of measures on conflicts of jurisdiction is not subject to the "emergency brake" procedure provided by paragraph 3 of article 82 TFEU.

[17] The Commission Proposal for a Regulation on Eurojust, COM (2013) 535 final, envisaged the possibility for Eurojust to adopt a written decision on conflicts of jurisdiction. In the course of Council negotiations, however, the non-binding nature of such a decision was agreed upon (see Article 4 (4) of the current negotiating text of the Regulation on Eurojust, Council Doc. 6643/15 of 27 February 2015).

[18] European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17.7.2013, COM(2013) 534 final.

[19] See Artt. 30 par. 2 and 22 parr. 4 and 5 of the Council Doc. 112774/2/16 of 12 October 2016 .

4. Requirements to comply with fundamental rights

Given that post-Lisbon the EUCFR has assumed constitutional status, any legislative ambitions relating to the AFSJ, such as those emanating from this Report, ought to respect, reflect and foster its core provisions and values. Of those provisions, the right to an effective remedy and to a fair trial, set out in Article 47 CFR, is perhaps the most directly related to the proposals at hand. One of its core features is foreseeability: Article 47 provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". The latter clause – "tribunal previously established by law" – is of especial relevance in cases of parallel proceedings[20] where the jurisdiction in which a suspect is to be prosecuted is unclear and may remain undecided for an unacceptably long period of time.

In this regard, all three draft legislative models set out further below improve upon the limited approach of FD 2009/948/JHA notably by establishing a clear procedure with time-limits and, in the case of the vertical model, by envisaging a new role for Eurojust, which could include the power to adopt a binding decision on the choice of forum.

Foreseeability, moreover, could be relevant also in the perspective of substantive legality spelled out in Article 49 CFR. The core principle enshrined in Article 49 is that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.[21] Insofar as the choice of jurisdiction determines the applicability of different national substantive provisions, a new clear framework for that choice would contribute to making the applicable substantive law reasonably foreseeable (including the concrete definition of the offence, the level of the penalties and of the other consequences of conviction[22]).

In addition to the rights laid down in the EUCFR, the Council adopted in 2009 the Roadmap for strengthening procedural rights of suspected or accused persons in criminal

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[20] On the relevance of foreseeability of the choice of jurisdiction within the Area of Freedom, Security and Justice, see M. Panzavolta, *Choice of Forum and the Lawful Judge Concept*, in M. Luchtman (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, Eleven, 2013, p. 159

[21] Article 49(1) CFR. The provision thereby impliedly prohibits retroactive criminalisation, as well as expressly prohibiting the retroactive increase of criminal penalties. Moreover, the severity of penalties must not be disproportionate to the criminal offence [Art. 49(3)].

[22] On the relationship between substantive legality, foreseeability and choice of forum, see M. Luchtman, *Choice of Forum and the Prosecution of Cross-Border Crime in the European Union – What role for the Legality Principle?*, in M. Luchtman (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime,* cit., p. 46.

proceedings.[23] To date, the Roadmap has inspired the promulgation of three directives: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, and Directive 2013/48/EU on the right to access a lawyer.

The significance of these Directives is often heightened in parallel proceedings involving – in addition to the Member State or nationality or residence of the suspect – at least one and frequently two or more unfamiliar foreign jurisdictions, where the ensuring of an adequate defence must clear a series of practical hurdles. All stages of proceedings, ranging from initial information about the accusation, through access to adequate legal representation, to grasping and influencing unfolding events in the courtroom can be greatly complicated by the involvement of judicial authorities from multiple Member States with different languages and divergent criminal laws.

Whilst the directives have already somewhat redressed these disadvantages, the draft legislative models set out further below provide for the involvement of the accused person in consultations underway in order to determine the appropriate jurisdiction, thereby further implementing the rationale of Directive 2012/13/EU. In addition, the suspect is entitled to submit written observations in the course of consultations on the choice of forum procedure. Finally, it is worth underlining that in the vertical mechanism the accused person may trigger the involvement of Eurojust in order to resolve a conflict of jurisdiction.

5. Added value of a new legislative instrument

The construction of a tangible AFSJ in the EU entails the strengthening of the fundamental rights of people living in this area. Important among these fundamental rights is the right not to be prosecuted in different jurisdictions for the same facts. Furthermore, the good administration of justice would require a rational and non-arbitrary regulation of the exercise of jurisdiction. The abovementioned gaps and problems cast light on the need for new legislative solutions to conflicts of jurisdiction.

First, the added value of a new legal framework could be measured with regard to the interests of the good administration of justice in a broader sense: for the Member States, a coherent regulation of the exercise of jurisdiction could avoid the random and arbitrary effects of the principle of *ne bis in idem*. Indeed, currently the 'first come, first served' rule according to which the *ne bis in idem* principle operates does not take into account other relevant interests (e.g. state/national security interests or the interests of the victim) and may lead to a situation in which the first Member State acquits because of lack of evidence, where another Member State could have convicted.[24] A new legal instrument, instead, could provide a procedural framework to consider and balance the relevant interests before a *ne bis in idem* situation is irremediably determined.

[23] Council Resolution of 30 November 2009, Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 4.12.2009 C295/1.

[24] CJEU, Case C-467/04, *Gasparini and Others* [2006] ECR I-9199.

Following the entry into force of the Lisbon Treaty and, in particular, the new constitutional role thereby acquired by the EUCFR, the current legal framework on conflicts of jurisdiction needs to be aligned with the fundamental rights obligations stemming from EU law.

In this regard, a new legal instrument could also deliver added value with regard to the position of the suspect, providing more foreseeability and fairness by allowing for the involvement of the defence and the victim in the settlement of a conflict of jurisdiction. Such involvement is currently absent from the EU legal framework.

Secondly - and more specifically - a new legal instrument might also provide added value with regard to the existing FD 2009/948/JHA by overcoming the flaws of its horizontal and limited approach (open-ended and non-binding nature of the consultations, non-consideration of the issue of multiple proceedings) and by reinforcing the right to a judge "previously established by law", meaning a right to a reasonably foreseeable forum[25]. In this perspective, a new role for Eurojust, which could include the power to adopt a binding decision on the choice of forum, could be envisaged and contribute to enhancing foreseeability.

6. Project objectives and ELI's mission

The Member States' approach to criminal justice is traditionally based on national sovereignty, by which there is a direct link between the national definition of the crimes and related criminal procedural provisions (the applicable law) and the jurisdictional competence (mostly based on territoriality). The European integration process and in particular the free movement of persons and the constitutional objective of developing an AFSJ goes beyond the idea of this exclusive link between national sovereignty, applicable law and criminal jurisdiction. The shared sovereignty in the EU legal order has consequences not only for the applicable law (through harmonisation) but also for existence of jurisdiction and the use of it.

By striving for a common European judicial space based on mutual trust[26] and European citizenship,[27] where rights and obligations can be enforced by Member State authorities with an EU-wide effect, as well as by EU bodies and agencies, the exercise of criminal jurisdiction cannot be defined only on the basis of the prerogatives of sovereign nation states.

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[25] As required by art. 47 par. 2 CFR. On the relevance of foreseeability of the choice of jurisdiction within the Area of Freedom, Security and Justice, see M. Panzavolta, *Choice of Forum and the Lawful Judge Concept*, in M. Luchtman (Ed.), *Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-Interests*, Eleven, 2013, p. 159

[26] See CJEU, Opinion 2/13 of the Court (Full Court) on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, para 191; Cases: C-187/01 and C-385/01 *Gözütok* and *Brügge* [2003] *ECR* I-1345; Cases C-411/10 and C-493/10, *N. S. and Others* and *M. E. and Others* [2011] ECR I-13905; Case C-399/11 *Melloni* [2013] EU:C:2013:107; and Case C-129/14 *PPU Spasic* [2014] ECLI:EU:C:2014:739.

[27] Ligeti, K. and Marletta, A. (2016), 'EU Criminal Justice Actors: Accountability and Judicial Review vis-à-vis the EU Citizen, *New Journal of European Criminal Law,* 2016(2): 175-189.

This project aims at elaborating a new legal framework for the prevention and resolution of conflicts of jurisdiction in criminal matters in the AFSJ. With particular regard to the legislative gaps underlined above, the project team considered a complex set of objectives for a new legal framework. A coherent solution for conflicts of jurisdiction within the AFSJ should at least: a) avoid that *ne bis in idem* remains the only rule to resolve jurisdictional conflicts; b) ensure a non-arbitrary choice of jurisdiction; c) avoid parallel prosecutions; and aim at d) ensuring the choice of the best forum.

In delivering such solutions, the project aims at improving EU Law and developing the AFSJ, thereby contributing to the ELI's objectives. The ELI's mandate to promote better law-making and to enhance European legal integration is fully mirrored in the project's philosophy. A genuine pan-European perspective and the value of comparative knowledge are embedded in the research design, which features a Working Group of experts coming from different legal traditions, as well as academic and professional backgrounds. Furthermore, the involvement of representatives from the European institutions and agencies (European Commission, European Parliament, Eurojust) and from civil society (European Criminal Bar Association) in the discussion was intended to ensure comprehensiveness and a broader understanding of the issue and of the interests at stake.

7. Project methodology: three legislative models for the EU

This ELI project is carried out at the University of Luxembourg in cooperation with the Max Planck Institute Luxembourg (MPI) by an international team composed of practitioners and academics, in both the private law and criminal law fields, coming from different EU countries.

Since the project began in June 2014, five working group meetings have been held (4-5 November 2014, 12-13 March 2015, 1-2 September 2015, 18-19 February 2016, 21-22 June 2016). The working group meetings

- refined the project methodology,
- discussed the practical problems of conflicts of jurisdiction based on extensive field research carried out by the working group members in cooperation with Eurojust,
- carried out an in-depth comparison with international private law,
- elaborated the three proposed legislative models.

Several input papers prepared by the working group members enriched the discussions as well as the involvement of policy makers (in particular the representatives of DG Justice) and practitioners (in particular, Eurojust and the European Criminal Bar Association). In addition, the three project Reporters met three times in order to refine the drafts (2 December 2015; 11 May 2016; 15 July 2016).

The interim results of the project were presented to the ELI Members on four separate occasions:

- before the Members Consultative Committee on 4 September 2013 in Vienna,

- before the Members Consultative Committee on 26 September 2014 in Zagreb,
- before the Members Consultative Committee on 4 September 2015 (a Meeting of the Working Group of the Project took place in Vienna on the occasion of the ELI Annual Conference),
- before a meeting of the ELI Council on 12 February 2016 in Vienna.

Following extensive field research, expert consultations and comparisons with international private law, the project proposes **three legislative models** for preventing and solving conflicts of criminal jurisdiction in the AFSJ. All approaches only propose **building blocks** for a future legislative text. They are not blueprints for future legislation but contain, rather, the most important elements of the mechanism they represent and thereby offer various implementation options for the EU legislator. It is possible for the EU legislator to take an in-between step and develop a proposal that combines elements of, for instance, the horizontal and vertical mechanisms.

The three legislative models reflect different levels of approximation and thereby **three distinct policy options,** leaving the choice open to the EU legislator.

Each legislative model is an ideal-type with an inherent logic and each corresponds to a broader regulatory approach which it translates into a concrete legislative instrument. The three regulatory approaches underlying the prevention and settlement of conflicts of criminal jurisdiction in the AFSJ are as follows:

- **horizontal mechanism:** conflicts of jurisdiction are solved between the national criminal justice authorities of the concerned Member States. The horizontal mechanism relies on cooperation and coordination between national criminal justice authorities as to the exercise of their jurisdiction. Such coordination is based on the principle of mutual trust between the Member States. It implies the duty of national authorities 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.
- **vertical mechanism:** The vertical mechanism relies on a binding supranational decision in cases where coordination between the national criminal justice authorities has failed. The vertical mechanism relies on the principle of sincere cooperation deriving from Union loyalty between national and EU authorities. It implies the duty of national authorities to share information and to coordinate with each other and with Eurojust, as well as to notify each other and Eurojust about parallel proceedings in order to prevent and solve conflicts of jurisdiction.
- **mechanism for the allocation of criminal jurisdiction in the AFSJ:** conflicts of jurisdiction are prevented by establishing uniform European rules on the allocation of the exercise of criminal jurisdiction in the AFSJ.

The three regulatory approaches **serve as an analytical framework** or ideal-type for developing the legislative models. Each regulatory approach entails a variety of normative

options for its implementation. The project develops only one legislative model within each regulatory approach. The concrete features of the proposed legislative models are carefully chosen by the project team in order to best illustrate the spectrum of EU intervention. The horizontal mechanism requires only minimum approximation of national criminal laws: it primarily aims at coordinating non-approximated national criminal jurisdictions. Only the factors and the procedure for coordination are defined by EU rules. Conversely, the mechanism for the allocation of the exercise of criminal jurisdiction in the EU requires uniform EU rules on forum choice in the AFSJ and embodies a strong harmonisation. The vertical mechanism stands in between the two other regulatory approaches. Although it has lower ambitions in terms of approximation than the allocation mechanism, it empowers a supranational body with binding EU-wide decision-making powers for resolving conflicts of criminal jurisdiction. This supranational binding decision is a European decision motivated by a European prosecutorial policy. In that sense the vertical mechanism challenges national priorities in exercising criminal jurisdiction. The mechanism on the allocation of criminal jurisdiction has the broadest objective as it aims to prevent conflicts in the exercise of criminal jurisdiction in the AFSJ. It requires the development of a single unified set of factors for allocating jurisdiction, but it does not impact the Member States' jurisdiction to prescribe.

8. Factors for deciding between competing jurisdictional claims

Both the horizontal and vertical mechanisms provide for deciding between competing jurisdictional claims based on a set of factors. It is important to note that neither the horizontal nor the vertical mechanism seeks to establish a hierarchical list of jurisdictional claims. Nor does the proposed new legal framework for solving conflicts of jurisdictions in criminal matters follow the hard and fast private international law rule of *lis pendens alibi* as expressed in the Brussels I (recast) Regulation. Instead, the framework for criminal law is more akin to the *forum non conveniens* doctrine in Anglo-American private international law both as regards the distinction between having jurisdiction and exercising it and as regards the discretionary element to decide between competing jurisdictional claims.

The comparison with private international law highlighted the shortcoming of the *lis pendens* mechanism: It is rigid and open to abuse through so called torpedo actions started with the purpose of frustrating litigation elsewhere. Its rigidity may lead to a race to court, thereby frustrating attempts to reach a consensual solution. And the court being granted priority might not be the court best placed to deal with the case. In fact, the transnational *ne bis in idem* principle as developed by the CJEU has much in common with the drawbacks of the Brussels I system of *lis pendens*. Although the situation in criminal law is different, *inter alia*, because the decision to open a prosecution is not a decision of the parties (claimant), but the prerogative of the state, it seems that much of the criticism levelled at the rigidity of the *lis pendens* rule and of the transnational European *ne bis in idem principle* could also be raised in relation to a strict hierarchy of jurisdictional claims in criminal law.

A strictly hierarchical priority order, in the end, may not deliver a suitable solution for the domain of criminal justice, where different sets of interests (the public interest of the State in punishing crime while ensuring a fair trial, the opposing private interests of the defendant and the victims) may compete and require a case-by-case approach.

9. Horizontal mechanism

This legislative model follows – as a starting point – the rationale of FD 2009/948/JHA. Accordingly, it is the primary responsibility of the Member States to resolve conflicts of criminal jurisdiction among each other within the framework of a consultation procedure. It can thus be immediately distinguished from both the vertical mechanism entailing a binding decision of a supranational body (Eurojust) on the choice of forum – when such horizontal consultations reach an impasse or inertia – and the allocation model which envisions the autonomous application of concrete rules for determining criminal jurisdiction without requiring – in principle – that any horizontal consultation take place.

The horizontal model offers several implementation options (9.1). The implementation options featured in the proposed legislative model (9.2) reflect certain choices made by the project team in order to best illustrate the features of the horizontal mechanism.

9.1. Implementation options

9.1.1. Options for the objectives of the instrument:

One may distinguish between three different objectives of the horizontal mechanism:

a) Avoiding that conflicts of jurisdiction are solved only by the *ne bis in idem* rule and thereby ensuring a non-arbitrary choice of the forum to prosecute: the Member State that finally disposes of a case first is not always the one actually better placed to adjudicate the case; for instance, an acquittal for lack of evidence might occur because witnesses are located on the territory of another Member State;

b) Avoiding parallel prosecutions;

c) Ensuring the choice of the best forum to prosecute: such a choice relates to the allocation of jurisdiction on the basis of an assessment of the various interests at stake. It might indeed occur that a Member State other than the territorial State is best placed to adjudicate the case: for instance when the crime has been committed during a short stay abroad (a holiday trip) and the suspect, the victim and the witnesses are citizens or residents of another Member State (a “tourist scenario”).

The first two objectives - avoiding conflicts of jurisdiction in order to ensure a non-arbitrary choice and avoiding parallel prosecutions - represent a baseline with a view to the objectives of Art. 82 TFEU. The choice of the best forum to prosecute requires the resolution of a series

of complex questions (what is the "best forum", what should be the factors for the choice, etc…) that the project does not address in the horizontal mechanism.

9.1.2. Options for the concept of conflict

As explained above, the concept of a conflict covers both parallel and multiple proceedings. In addition, the implementation of the horizontal mechanism offers a narrow and a broad perspective:

a) The narrow perspective is limited to "actual" conflicts, where two or more proceedings are run in parallel in different Member States;
b) The broader perspective could also address potential conflicts, where parallel proceedings might be conducted in different Member States (abstract conflicts). The broader approach would thus also have a clear preventive rationale.

9.1.3. Factors for deciding between competing jurisdictional claims

The horizontal mechanism relies on agreed European factors for deciding between Member States' competing jurisdictional claims. Currently, the relevant criteria are set out in the 2003 Eurojust Guidelines. In order to be in conformity with the EUCFR and the Lisbon Treaty, the project proposes to update these guidelines. The project proposes to restructure and streamline the Guidelines and to add a negative list of factors that may not be taken into consideration when determining the proper jurisdiction.

Taking into account the conclusions of the Eurojust Strategic Seminar on Conflicts of Jurisdiction,[28] the following amendments and updates are suggested:

- The factors should reflect the relevant instruments of mutual recognition such as the European Arrest Warrant (EAW)[29] and the European Investigation Order (EIO)[30] that have been adopted since 2003. These instruments impact some of the criteria listed in the Eurojust Guidelines.
- For instance, the EAW and Framework Decision 2008/909 on custodial sentences accord secondary importance to the location of the accused. Similarly, the entry into force of the EIO and the new opportunities it offers for video or telephone conferencing (Articles 24 and 25) make the attendance of witnesses unnecessary.
- Following a suggestion from Eurojust, the territoriality and personality factors could also be reworded to ensure that not only their quantitative dimension is duly considered, but also their qualitative dimension..

[28] Eurojust Strategic Seminar, Conflicts of Jurisdiction, *Transfer of Proceedings and Ne Bis In Idem: Successes, Shortcomings and Solutions*, The Hague, 4 June 2015. See esp. Conclusions of Workshop 2, pp 7-8.

[29] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190/1, 18.7.2002.

[30] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L130/1, 1.5.2014.

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

- The stage of proceedings in the Member States involved (relative "trial-readiness") as a factor for deciding which Member State should continue is currently missing from the Eurojust Guidelines and should be taken into account. It is underlined that "trial-readiness" is not to be construed as a general evaluation of the procedural efficiency of any given national system.
- Finally, a "negative list" could be inserted, including the inadmissible factors: following the current matrix of the Guidelines, such factors are "evidential problems", "legal requirements" and "sentencing powers".

It is important to underline that a decision to concentrate proceedings does not entail the admissibility of evidence transmitted from one jurisdiction to another. By the same token, the burden of proof in any given Member State shall not constitute a reason for the allocation a case. With this in mind, in order to discourage prosecutors from "shopping around" for the most convenient forum from their perspective alone, the threshold of admissibility of evidence – as opposed to its *availability* – in any given Member State is included in the list of factors not to be considered in deliberations over the choice of forum (in Annex to each proposed model).

9.1.4. Regarding the transparency of the factors

In order to ensure the **transparency and clarity** of the factors applied by the national authorities in the consultation procedure, it is possible to:

- Leave the Eurojust Guidelines as soft law,
- Transform the Eurojust Guidelines into "hard law" through inclusion in the legislative draft, albeit whilst maintaining a case-by-case assessment of the factors (no hierarchical list),
- Establish a hierarchical list of factors of case allocation.

9.1.5. As to formalising the consultation procedure

When **formalising the consultation procedure**, it is possible that the rules applicable to the consultation procedure:

- Do not provide for the involvement of the suspect or the victim as is the case currently pursuant to FD 2009/948/JHA;
- Provide for a limited involvement of the suspect or the victim;
- Provide for the full involvement of the suspect and the victim. This option would require, however, a higher degree of formalisation of the procedure (rules on access to the file and to information, or a formalised hearing within the consultation procedure).

9.1.6. Regarding the content of the consultation procedure

As for the content of the consultations, it is possible to imagine:

- A consultation about the determination of the Member State that should carry on the prosecution
- A request from the judicial authority of one Member State to the judicial authority of another Member State to take over the prosecution of a case as the latter is better placed to do so.

9.1.7. Regarding the parties to the consultation procedure

The consultation procedure in the horizontal mechanism is by definition between the national authorities of the concerned Member States. It is possible that only the national authorities participate in the horizontal consultation. However, as the national authorities may ask Eurojust to help and to convene a consultation meeting, it is also possible under the current framework decision to involve Eurojust as a mediator[31].

9.1.8. Regarding the outcome of the consultation procedure

As to the **outcome of the consultation procedure**, it is possible to:

- Make a generic reference to achieving "any effective solution", without stipulating an obligation for the judicial authorities to reach consensus and without providing for consequences in case the consultation fails, as is the case today based on FD 2009;
- Make a reference to achieving a solution, whereby preference should be given to the concentration of the proceedings whenever possible and requiring a formal agreement, delineating the circumstances and the factors considered. This option would, however, not provide for consequences in case the consultation fails;
- To stipulate an obligation to issue a formal agreement, delineating the circumstances and the factors considered, whereby preference should be given to the concentration of the proceedings whenever possible. This option would include consequences in case the consultation fails.

[31] Currently, Article 12 of the FD 2009/948/JHA and Articles 6 and 7 of the Decision 2009/426/JHA (Eurojust Decision) allow for the involvement of Eurojust as a mediator when conflicts of jurisdiction arise or "are likely to arise".

9.1.9. Options for judicial review

As to **judicial review**, it is possible to:

- Avoid any express mention of judicial review. The silence of the new instrument on judicial review would, however, not impact the obligations of the Member States under Article 47 (1) EUCFR to ensure the right to an effective remedy.
- Include a general reference in the new instrument on the need to ensure the judicial review of the decision by the national judge.

9.2. Proposed legislative instrument

Among the implementation options set out above, the project team decided to opt for the following choices:

- Its aim is to prevent *ne bis in idem* violations and ensure a non-arbitrary choice of forum,
- It covers both actual and potential conflicts,
- It addresses both parallel and multiple proceedings,
- It refers to the amended Eurojust Guidelines as guidance for the assessment of the specific circumstances of the individual case,
- It provides for a limited involvement of the suspect and the victim in the consultation procedure,
- It obligates the national authorities to conclude a formal agreement on the solution of the conflict, delineating the circumstances and the factors considered, whereby preference should be given to the concentration of the proceedings whenever possible,
- It clarifies the need for judicial review of the formal agreement before the national judge (of the Member State where the prosecution is eventually conducted). National law should determine the procedural rules for the review.
- It provides rules for the transfer of proceedings and of evidence.

9.3. Added value of the proposed horizontal legislative model

This legislative model aims at a consultation procedure that improves the current state of affairs, providing for more consistency and legal certainty. It is not limited to "Lisbonising" Framework Decision 2009/948/JHA. Although the system will remain horizontal, EU law will define both the procedure and the factors to be applied in the consultation procedure.

Most importantly, by explicitly referring to the Eurojust Guidelines in the proposed Directive, the application of those factors may be subject to judicial review. An effective remedy against arbitrary decisions will be granted to the defendant before the competent national courts.

In addition, unlike Framework Decision 2009/948/JHA the scope of the proposed instrument is not limited to parallel proceedings, but based on a broader understanding of the notion of 'conflict', it also addresses multiple proceedings.

Article 82 (1) (b) leaves the choice between Regulations and Directives. The adoption of a **Directive** seems to be more consistent with the limited objective of this legislative model.

10. Vertical mechanism

The vertical mechanism goes beyond the horizontal philosophy of the current legal framework by involving Eurojust. It focuses on the settlement of conflicts of jurisdiction. Horizontal consultation between the national judicial authorities remains the first step, but will be complemented by a supranational procedure conducted by Eurojust in case of failure to reach an agreement to settle the conflict.

Eurojust's involvement, which may be triggered by either (or any) of the involved Member States or by the suspect, is the key distinguishing feature of the vertical model vis-à-vis both the horizontal and allocation models. The Eurojust decision on choice of forum is a binding judicial decision, taken in accordance with a detailed and transparent procedural framework provided in the model. It may be subject to judicial review before the CJEU.

10.1. Implementation options

The implementation options of the vertical mechanism largely correspond to those of the horizontal mechanism outlined in 9.1. However, the supranational decision of Eurojust offers additional implementation options.

10.1.1. Regarding the involvement of Eurojust

For the **involvement of Eurojust**, it is possible

- To maintain the current role of Eurojust, i.e. coordination and assistance upon request of the involved national authorities;
- To develop the complementary role of Eurojust, providing for its *ex officio* intervention or empowering the Member States, the suspect or accused person and the victim with the possibility of triggering a decision by Eurojust in case the consultation between the concerned national authorities has led to no decision.

10.1.2. Regarding the outcome of the intervention of Eurojust

As to the **outcome of Eurojust intervention**, it is possible:

- That Eurojust adopts a written and reasoned non-binding opinion or recommendation,
- That Eurojust takes a written and reasoned binding decision.

10.1.3. Options for judicial review

For the **judicial review** of the decision of Eurojust, the following possibilities are available:

- No judicial review of the non-binding opinion or recommendation of Eurojust, as it does not change the legal position of the affected person[32];
- Limited judicial review of Eurojust's binding decision by the CJEU based on Art. 263 TFEU. The CJEU can annul the decision if it was taken arbitrarily, but it cannot (re-) assess the facts of the case and decide on the jurisdiction to prosecute[33].

In addition, Art. 265 (1) and (3) TFEU (action for failure to act) also applies to the vertical mechanism in case Eurojust fails to act.

10.2. Proposed legislative instrument

Among the implementation options set out above, the project decided to opt for the following choices:

- It aims at preventing *ne bis in idem* violations and ensuring a non-arbitrary choice of forum,
- It maintains a preliminary horizontal consultation to allow judicial authorities to reach consensus on the basis of transparent and unambiguous factors;
- It empowers each of the involved authorities or the suspect with the power to trigger the decision of Eurojust when national authorities have failed to reach consensus in the horizontal phase;
- It provides for a procedure in front of a specialised structure within Eurojust for the adoption of a binding decision on jurisdiction to prosecute;
- It spells out a set of transparent factors for Eurojust's decision by referring to the amended Eurojust Guidelines as guidance for the assessment of the specific circumstances of the individual case;
- It grants the suspect and the victims the right to submit their views by means of a written opinion before Eurojust adopts its decision;

[32] This conclusion could rely on the current jurisprudence of the European Courts on the review of final reports of OLAF. According to consistent case law, only acts entailing "a distinct change in the applicant's legal position" may be subject to an action for annulment *ex* article 263 TFEU. Such an effect is generally not recognised by the Court when the act adopted by the EU body or agency is formally not binding, i.e. when the addressed national authorities are potentially free to decide whether or not to provide for a follow-up to the act of the EU agency or body. See, in particular, European Court of First Instance (General Court), 4 October 2006, T-193/04, Tillack v. European Commission, paras. 68 and 69.

[33] According to Article 264 TFEU, if the action for annulment is well-founded, the Court of Justice or the General Court shall declare the act void. Under an action for annulment, the EU Courts cannot substitute their own assessment to that of the author of the contested act nor issue orders, directions or injunctions to Union institutions, bodies, offices or agencies. See K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, OUP, 2014, p. 411 ff. This restriction does not apply when unlimited jurisdiction is granted to the EU judicature according to Article 261 TFEU: the conferral of unlimited jurisdiction, however, is admissible only in regard to the review of "penalties".

- It provides for the judicial review of Eurojust's decision; in particular, pursuant to Art. 263 (5) TFEU it allows the national judicial authorities and the suspect to launch an action for annulment before the CJEU (or the GC). Such review will not entail a choice of jurisdiction made by the Court, but a control of the legality of the decision adopted by Eurojust;
- In case Eurojust should fail to act within the deadlines for the adoption of the decision on jurisdiction, the general rules set out in Art. 265 TFEU apply.

10.3. Added value of the proposed vertical legislative model

The vertical mechanism enhances legal certainty and consistency in the determination of the jurisdiction to prosecute by spelling out the factors for the choice of forum and by involving Eurojust and empowering it with a binding decision.

This legislative model proposes a draft Regulation. Article 82 (1) (b) TFEU allows for the adoption of either a Directive or a Regulation. Taking into account that this legislative model contains binding rules on the settlement of conflicts of jurisdiction in criminal cases – in particular the definition of the factors 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 of national criminal laws. 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.[34]

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.

11. Model based on the allocation of the exercise of jurisdiction in the AFSJ

Differently to both the horizontal model, which provides a mechanism for the resolution of jurisdictional conflicts between Member States through direct consultation, and the vertical model, which entails a supranational decision on choice of forum by Eurojust, the third legislative model aims to reduce the possibility of conflicts of jurisdiction from the outset. It therefore proposes a reshaping of the grounds to exercise jurisdiction in criminal matters within the AFSJ, based on territoriality. Within the AFSJ, Member States should no longer exercise jurisdiction on the basis of extraterritorial jurisdictional principles, such as active or passive nationality of the accused or the victim.

[34] Article 82 (1) TFEU - differently from Article 82(2) or Article 83 TFEU - does not restrict the EU legislative intervention to the adoption of "minimum rules" and allows the resort to both directives and regulations.

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

Whereas, as a consequence of the allocation of the exercise of jurisdiction to one Member State only, many current potential conflicts of jurisdiction will no longer exist, two challenges remain that are also addressed in the model:

- Multi-territorial offences (offences for which more than one Member State claims location in its territory). This model stipulates rules to allocate the exercise of jurisdiction to one Member State only;
- Good administration of justice may indicate that a Member State other than the territorial Member State should exercise jurisdiction. There are two such situations: single territorial offences and the multiple unrelated territorial offences committed in several Member States. In these situations, the model provides for a transfer of the right to exercise jurisdiction to the Member State that is better placed to handle the case.

11.1. Implementation options

The implementation of the allocation of jurisdiction offers different options.

11.1.1. Options for defining territorial jurisdiction

As a general rule, this model identifies territoriality as the only jurisdictional ground in the EU. The first problem, therefore, is the definition of territoriality. It is possible:

- Not to define territoriality in the legislative instrument;
- To adopt a broad definition based on the theory of “ubiquity”;
- To adopt a narrow definition based on the place where the conduct or a relevant part thereof was committed;
- To adopt a definition based on the place where the event or the damage occurred.

11.1.2. Options for judicial review

Although in this model the case allocation should work automatically, judicial review should ensure the correct application of the factors. It is possible to:

- Provide for judicial review before the national trial court, with the possibility of a request to the CJEU for a preliminary ruling pursuant to Art. 267 TFEU (objections about the risk of a “pro-forum bias” of the national trial court, however, should be considered);
- Provide for a decision taken by Eurojust upon request of a dissenting national authority and subject to judicial review by the CJEU pursuant to Art. 263 TFEU.

11.2. Proposed legislative instrument

Among the implementation options set out above, the project team decided to opt for the following choices:

- It lays down a general rule on allocating jurisdiction based on territoriality,
- It tackles the issue of multi-territorial offences and provides for a consultation procedure and additional factors for the determination of the allocation of the exercise of jurisdiction in multi-territorial cases,
- It provides for judicial review of the determination of jurisdiction at the national level,
- It provides for the transfer of the exercise of jurisdiction when good administration of justice requires a Member State other than the territorial Member State to handle the case.

11.3. Added value of the proposed legislative model for the allocation of jurisdiction

This model primarily prevents conflicts of jurisdiction. In this case, no forum choice would be necessary because the forum is already pre-determined by the rules on jurisdiction. In cases of multi-territorial offences, however, rules for the determination of the only competent Member State are provided.

The model presents transfer of the exercise of jurisdiction to bring the effects of allocation of the exercise of jurisdiction, in line with the demands of good administration of justice.

This legislative model 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 to 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 TFEU), 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) TFEU – require Member States to adapt national provisions with regard to cross-border situations.[35] The proposed instrument is a Regulation.

[35] 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 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 also includes preventive measures: '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).

DRAFT TEXT

I. HORIZONTAL MECHANISM

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the settlement of conflicts of exercise of jurisdiction in criminal proceedings and the prevention of violations of the principle of *ne bis in idem*

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to Article 82 paragraph 1 (b) of the Treaty on the Functioning of the European Union,

Whereas:

(-) …

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1
GENERAL RULES

Article 1
Objective

1. The objective of this Directive is to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, with a view to improving the efficient and good administration of justice in the Area of Freedom, Security and Justice.

2. Such closer cooperation aims to:

(a) reach reasoned and non-arbitrary consensus as to the choice of forum in cases where parallel or multiple proceedings are being conducted or are about to be conducted; and

(b) prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, where these might lead to the final disposal of the proceedings in two or more Member States, thereby constituting an infringement of the principle of 'ne bis in idem'.

Explanatory note:

The objective of the new instrument is broader than that of FD 2009/948/JHA. Beyond the objectives of avoiding parallel prosecutions (parallel investigations are allowed) and ensuring that ne bis in idem is not the only rule to resolve conflicts of jurisdictions, the new instrument will also cover multiple proceedings (see the definition under the new Article 3 (b)) and will aim, more generally, at ensuring a non-arbitrary choice of jurisdiction.

Article 2
Subject matter and scope

1. With a view to achieving the objectives set out in Article 1, this Directive provides for a framework on:

(a) the procedure for establishing contact between the competent authorities of the Member States, with a view to detecting the existence of parallel or multiple criminal proceedings;

(b) the exchange of information, through direct consultations, between the competent authorities of two or more Member States conducting parallel or multiple criminal proceedings;

(c) the procedure to reach a reasoned consensus as to the choice of forum in cases where the existence of parallel or multiple criminal proceedings is detected.

<u>Explanatory note:</u>
The Directive maintains the horizontal philosophy of FD 2009/948/JHA and aims at formalising the consultation procedure between national competent authorities. As such, the Directive should enhance legal certainty.
The new instrument applies to criminal proceedings stricto sensu only. Not only competition law, but all other areas of quasi-criminal proceedings are outside the scope of the draft Directive.

Article 3
Definitions

For the purposes of this Directive:

(a) ‘parallel proceedings’ means criminal proceedings which are conducted or are about to be conducted in two or more Member States against the same suspect or accused in regard to the same facts;

(b) ‘multiple proceedings’ means criminal proceedings which are conducted or about to be conducted in two or more Member States against the same suspect or accused in relation to different facts, or against different suspects or accused persons in regard to a related set of facts;

(c) ‘competent authority’ means a judicial authority or another authority, which is competent, under the law of its Member State, to carry out the acts envisaged by Article 2 paragraph 1 of this Directive;

(d) ‘contacting authority’ means a competent authority which contacts another competent authority to confirm the existence of parallel or multiple criminal proceedings;

(e) ‘contacted authority’ means the competent authority which is asked by a contacting authority to confirm the existence of parallel or multiple criminal proceedings;

(f) ‘forum’ means the Member State whose courts may potentially adjudicate the relevant proceedings pursuant to a decision taken under Article 8 paragraph 3 of this Directive.

Explanatory note:
The new legal instrument addresses both parallel and ‘multiple proceedings’. The notion of proceedings includes both investigations and prosecutions. The term multiple proceedings refers to situations where the principle of ne bis in idem does not apply since the underlying facts or the persons concerned are different, but in the interest of efficient and good administration of justice such proceedings should be concentrated – if possible – in one Member State. Multiple proceedings – differently from Art. 30 of Regulation 1215/2012 (Brussels I Recast) – are not limited to related proceedings.

Article 4
Determination of competent authorities

1. Member States shall determine the competent authorities in a way that promotes the principle of direct contact between authorities.

2. In accordance with paragraph 1, each Member State shall inform the Commission which authorities under its national law are competent to act in accordance with this Directive.

3. Notwithstanding paragraphs 1 and 2, each Member State may designate, if it is necessary as a result of the organisation of its internal system, one or more central authorities responsible for the administrative transmission and reception of requests for information according to Article 5 and/or for the purpose of assisting the competent authorities in the consultation process. Member States wishing to make use of the possibility to designate a central authority or authorities shall communicate this information to the Commission.

4. The Commission shall make the information received under paragraphs 2 and 3 available to all Member States.

CHAPTER 2
EXCHANGE OF INFORMATION

Article 5
Obligation to contact

1. When a competent authority of a Member State has indications that parallel or multiple criminal proceedings are being conducted or are about to be conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel or multiple criminal proceedings, with a view to initiating a direct consultation as provided for in Article 7.

2. Such indications may include cases where a suspected or accused person or a victim notifies the competent authority that parallel or multiple proceedings in another Member State are being conducted or are about to be conducted, where a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel or multiple proceedings, or where a police authority provides information to this effect.

3. If the contacting authority does not know the identity of the competent authority to be contacted, it shall make all necessary inquiries, including via the contact points of the European Judicial Network, in order to obtain the details of that competent authority.

4. Without prejudice to Article 7, the procedure of contacting shall not apply when the competent authorities conducting parallel criminal proceedings have already been informed of the existence of these proceedings by any other means.

Explanatory note:
The new instrument strengthens the obligation to contact by replacing the previous threshold ("reasonable grounds to believe that parallel proceedings are being conducted in another Member State") with a more precise set of "indications".
1. The competent authorities of the Member States are obliged to contact one another in case of indications (examples of which are given in paragraph 2) that parallel or multiple criminal proceedings are being conducted or are about to be conducted in another Member State.
2. The indications are provided in a non-exhaustive fashion. They include the most typical ways in which the authorities may learn of the existence of parallel or multiple proceedings, such as reporting by the suspect or the victim, or requests for international cooperation. Suspects and victims can on an equal footing inform their national authorities and thereby trigger the obligation to contact.
3. The EJN has proven over the years to be an efficient and straightforward way to identify the competent authority in case of requests for international cooperation. National authorities involved in the consultation procedure may take advantage of the EJN.
4. Paragraph 4 sets out an exemption to the obligation to contact when the competent authorities are already aware of the existence of parallel or multiple proceedings. This exemption, however, does not affect the subsequent and autonomous obligation to enter into direct consultations provided under Article 7.

Article 6
Obligation to reply

1. The contacted authority shall reply to a request submitted in accordance with Article 5 paragraph 1 by the deadline indicated by the contacting authority, or, if no deadline has been

indicated, without undue delay and in any case within 30 days of receiving the request, and inform the contacting authority whether parallel or multiple proceedings are taking place in its Member State. In cases where the contacting authority has informed the contacted authority that the suspected or accused person is held in provisional detention or custody, the latter authority shall treat the request as a matter of urgency.

2. If the contacted authority is unable to provide a reply by the deadline set under paragraph 1, it shall promptly inform the contacting authority of the reasons therefore and indicate the time frame within which it shall provide the requested information.

3. If the authority which has been contacted by a contacting authority is not the competent authority under Article 4, it shall without undue delay transmit the request for information to the competent authority and shall inform the contacting authority accordingly.

Explanatory note:
1. Similarly to Article 6 of the Framework Decision 2009/948/JHA the contacting authority can set a deadline for the reply.
If no deadline has been indicated, without prejudice to a general rule of expediency ("without undue delay"), the maximum time frame is 30 days. This limit corresponds to the 30 days provided in Article 12 paragraph 3 of the Directive 2014/41 on the European Investigation Order and represents a reasonable length of time for the detection of the existence of parallel or multiple proceedings in the contacted Member State. There is no formal consequence if the contacted competent authority does not respond by the deadline. However, based on existing case law of the CJEU the obligation to reply remains intact even after the deadline has passed.
2. The continuing obligation to reply and the principle of sincere cooperation imply that the contacted authority, when unable to comply with the deadline of 30 days, shall indicate a timeframe for its reply.

CHAPTER 3
DIRECT CONSULTATION

Article 7
Obligation to consult and sincere cooperation

1. When it is established that parallel or multiple proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultation in order to reach reasoned consensus on an effective solution to avoid the adverse consequences arising from parallel or multiple proceedings.

2. Such consensual solution shall be pursued in adherence with the principles of sincere cooperation and good administration of justice and should, in the case of parallel proceedings, lead to the concentration of the criminal proceedings in one Member State for the purpose of prosecution in accordance with Article 8. The same shall apply to multiple proceedings, where appropriate.

3. As long as the direct consultation is being conducted, the competent authorities concerned can take all necessary procedural measures and shall inform each other of any important procedural measures which they have taken in the proceedings.

4. Whenever reasonably possible a competent authority involved in direct consultation shall reply to requests for information from other competent authorities involved in such consultations, except where doing so could harm essential national security interests.

Explanatory note:
1. This provision is based on Article 10 of FD 2009/948/JHA ("Obligation to enter into direct consultations"). The aim of the consultation is to avoid adverse consequences such as ne bis in idem.
2. Paragraph 2 stresses the relevance of the principle of sincere cooperation as an overarching obligation and defines the concentration of the proceedings in one Member State as a desirable outcome of the consultation. Whereas in case of parallel proceedings the proceedings should always be concentrated, the concentration of multiple proceedings is not always possible or desirable from the viewpoint of the proper administration of justice.
3. The opening of a consultation procedure does not rule out the adoption of procedural measures by the competent authorities. The competent authorities of the Member States may therefore continue parallel investigations, but only as long as this is necessary in order to establish the material facts of the case. They need inform each other only of important procedural measures taken (e.g. victim protection measures are important, whereas the award of legal aid is not important or relevant to the other Member State).
4. During the consultation procedure, the competent authorities should provide all necessary information to one another. However, this obligation does not apply where to provide the information would endanger national security interests.

Article 8
Reasoned consensus and formal agreement on choice of forum

1. In order to reach a consensus on the concentration of proceedings including the final choice of forum, the competent authorities of the Member States shall assess the specific circumstances of the individual case in light of the factors for the choice of forum annexed to this Directive.

2. The competent authorities should aim to achieve such consensus as soon as possible and at the latest before either of the involved authorities presents the case to court for the purposes of prosecution or takes any measures which would have the effect of a final disposal of the case.

3. Where the competent authorities of the Member States agree that to do so would not jeopardise the investigation, they shall inform the suspect or accused and the victims of the existence of the consultation procedure and of the possibility to submit written observations within 15 days of the date of such notification.

4. When the competent authorities of the Member States concerned reach consensus, they shall conclude a formal agreement delineating the circumstances and the factors applied, and

where to do so would not jeopardise the investigation, inform the suspect or accused and the victims thereof.

Explanatory note:
1. Article 8 is a completely new provision. Differently from FD 2009/948/JHA, the new instrument will include as an Annex a set of factors for the choice of forum. Non-arbitrariness of the choice of the forum and the transparency of the factors applied are strictly interrelated. The requirement to reach a consensus on the final choice of forum – with the consequences stipulated in Art. 9 – does not prevent the national authorities from reaching provisional agreement at an early stage of the consultation.
2. In case of parallel proceedings and, where appropriate, in case of multiple proceedings, the consensus should be achieved before any of the authorities takes the case to court or takes other measures with the effect of finally disposing of the case. It is, however, not prohibited for both national authorities to go ahead with parallel proceedings even though this may eventually trigger the ne bis in idem principle.
3. The suspect or accused person and the victims should have the opportunity to submit their written observations in the course of the consultation procedure before consensus is reached. Although notification of the suspect or accused person and the victims is due only "where the competent authorities agree that to do so would not jeopardise the investigation or the prosecution", this derogation is intended to be exceptional and must be applied narrowly.
4. In order to ensure non-arbitrariness and transparency, the consensus must be reasoned and formalised in a written agreement. It could be useful to develop a template annexed to the Directive for the use of national authorities.

Article 9
Consequences of the agreement and transfer of proceedings

1. Following the agreement taken pursuant to Article 8 paragraph 4 to concentrate proceedings the national authorities of the other Member State shall transfer the file, refrain from taking further investigative or prosecutorial measures and close the case.

2. Any act with a view to proceedings taken in the transferring Member State before the conclusion of an agreement pursuant to Article 8 paragraph 4 shall be recognised in the receiving Member State as if it had been taken by the national authorities of that Member State, provided that such recognition does not give such an act a greater evidential weight than it has in the transferring Member State.

3. Any act which interrupts time limitation and which has been validly performed in the transferring Member State shall have the same effect in the receiving Member State and vice versa.

4. The transferring Member State regains the right to prosecute the case if the competent authority in the receiving Member State neither presents the case to a court for the purposes of prosecution nor takes other measures which would have the effect of a final disposal of the case.

Explanatory note:

1. Article 9 is a new provision. It clarifies the consequences of the agreement and provides a legal basis to discontinue the proceedings at the national level and to transfer the file and the evidence to the other Member State. The provision is limited to parallel proceedings as multiple proceedings do not always lead to the concentration of the case.

2.-3. Drawing from the Convention on Transfer of Proceedings of the Council of Europe, the new provision also lays down rules on the equivalence of procedural acts interrupting time limitation periods and on the recognition of evidence.

4. If the receiving Member State does not prosecute the case following the transfer, the transferring Member State's right to prosecute revives.

Article 10

Remedies

Any agreement concluded pursuant to Article 8 paragraph 4 is without prejudice to legal remedies under national law to request judicial review on the choice of forum.

Explanatory note:

Article 10 does not affect national remedies. It does not define whether only the suspect or also the victim has a right to challenge the choice of forum. Nor does it define the grounds for a challenge (the forum choice or closing of the case, etc.). This does not preclude the possibility to challenge the decision in the courts of each of the Member States concerned.

ANNEX A - FACTORS RELEVANT TO THE CHOICE OF FORUM

The competent authorities of the Member States shall determine the choice of forum in accordance with the following factors:

FACTORS TO BE CONSIDERED

1. Territoriality
In principle, territoriality shall determine the jurisdiction to prosecute.
In case of crimes affecting the territory of more than one Member State, the competent authorities shall take into account where the majority or the most important part of the criminality occurred or where the majority or the most important part of the harmful effect or loss was sustained when determining the choice of forum. Harmful effect also includes state interests (such as offences against state security).

2. Stage of the proceedings – trial-readiness
When determining the choice of forum, the competent authorities shall compare and consider the state and the trial-readiness of the different proceedings.

3. Interests of the Suspect
The competent authorities shall take into account the interests of the suspect and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Interests of the suspect could relate to his or her effective links with the jurisdiction of a Member State, such as: the duration of his or her residence, the ability to understand the language spoken in the Member State, the degree of integration of the suspect in the society of one Member State, the possibility for him or her to access an effective legal defence, or the presence of dependent family members on the territory of another Member State. The vulnerability of the suspect and the possibility to ensure adequate safeguards should be carefully assessed.

4. Interests of Victims
The competent authorities shall take into account the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Interests of the victims might include the possibility to avoid their secondary victimisation and to resort to protective measures, especially in the case of vulnerable victims or violent crimes. The possibility for the victim to obtain adequate compensation could also be considered.

5. Need to resort to Mutual Legal Assistance and Mutual Recognition instruments
For example, where the majority of the evidence is located in one of the involved Member States.

6. Need for concentration of proceedings
In case of multiple proceedings, in determining the choice of forum, the competent authorities shall consider the possibility to concentrate the proceedings and the overall costs of the proceedings.

FACTORS NOT TO BE CONSIDERED

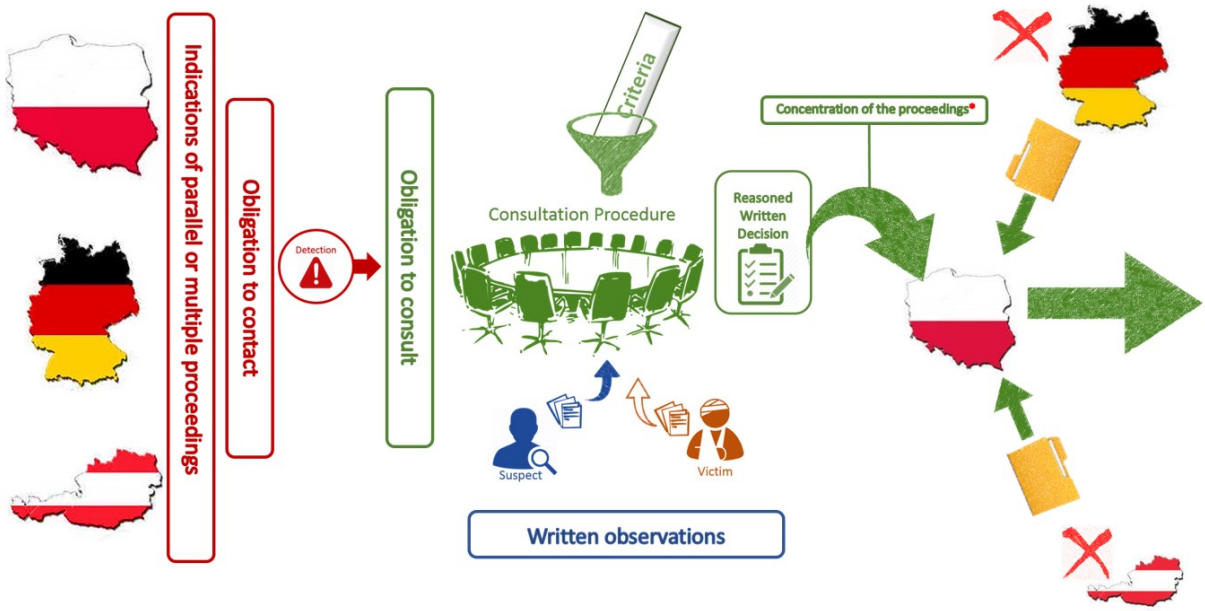
In determining the choice of forum, the competent authorities of the Member States are not to consider:

1. Diverging rules on evidence
Courts in different jurisdictions have different rules for the acceptance of evidence often gathered in very diverse formats. The potential admissibility and acceptance of evidence by a court cannot be considered as a factor to determine where the prosecution should take place.

2. Legal Requirements
The competent authorities shall not decide to prosecute in one jurisdiction rather than another simply in order to avoid having to comply with the legal obligations that apply in one jurisdiction but not in another.

3. Sentencing Powers
The sentencing powers of courts and detention circumstances in the different Member States shall not be a factor in deciding the jurisdiction in which a case should be prosecuted. The judicial authorities should not seek to prosecute cases in a jurisdiction where the penalties are highest.

ANNEX B - DIAGRAM: HORIZONTAL MECHANISM



DRAFT TEXT

II. VERTICAL MECHANISM

Glossary:
The first 10 articles correspond to those of the horizontal mechanism.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the settlement of conflicts of exercise of jurisdiction in criminal proceedings and the prevention of violations of the principle of *ne bis in idem*

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to Article 82 paragraph 1 (b) of the Treaty on the Functioning of the European Union,

Whereas:

(-) …

HAVE ADOPTED THIS REGULATION:

CHAPTER 1
GENERAL RULES

Article 1
Objective

1. The objective of this Directive is to promote a closer cooperation between the competent authorities of two or more Member States conducting criminal proceedings, with a view to improving the efficient and good administration of justice in the Area of Freedom, Security and Justice.

2. Such closer cooperation aims to:

(a) reach reasoned and non-arbitrary consensus as to the choice of forum in cases where parallel or multiple proceedings are being conducted or are about to be conducted; and

(b) prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, where these might lead to the final

disposal of the proceedings in two or more Member States, thereby constituting an infringement of the principle of 'ne bis in idem'.

Explanatory note:
The objective of the new instrument is broader than that of FD 2009/948/JHA. Beyond the objectives of avoiding parallel prosecutions (parallel investigations are allowed) and ensuring that ne bis in idem is not the only rule to resolve conflicts of jurisdictions, the new instrument will also cover multiple proceedings (see the definition under the new Article 3 (b)) and will aim, more generally, at ensuring a non-arbitrary choice of jurisdiction.

Article 2
Subject matter and scope

1. With a view to achieving the objectives set out in Article 1, this Directive provides for a framework on:

(a) the procedure for establishing contact between the competent authorities of the Member States, with a view to detecting the existence of parallel or multiple criminal proceedings;

(b) the exchange of information, through direct consultations, between the competent authorities of two or more Member States conducting parallel or multiple criminal proceedings;

(c) the procedure to reach a reasoned consensus as to the choice of forum in cases where the existence of parallel or multiple criminal proceedings is detected.

Explanatory note:
The Directive maintains the horizontal philosophy of FD 2009/948/JHA and aims at formalising the consultation procedure between national competent authorities. As such, the Directive should enhance legal certainty.
The new instrument applies to criminal proceedings stricto sensu only. Not only competition law, but all other areas of quasi-criminal proceedings are outside the scope of the draft Directive.

Article 3
Definitions

For the purposes of this Directive:

(a) 'parallel proceedings' means criminal proceedings which are conducted or are about to be conducted in two or more Member States against the same suspect or accused in regard to the same facts;

(b) 'multiple proceedings' means criminal proceedings which are conducted or about to be conducted in two or more Member States against the same suspect or accused in relation to

different facts, or against different suspects or accused persons in regard to a related set of facts;

(c) ‘competent authority’ means a judicial authority or another authority, which is competent, under the law of its Member State, to carry out the acts envisaged by Article 2 paragraph 1 of this Directive;

(d) ‘contacting authority’ means a competent authority which contacts another competent authority to confirm the existence of parallel or multiple criminal proceedings;

(e) ‘contacted authority’ means the competent authority which is asked by a contacting authority to confirm the existence of parallel or multiple criminal proceedings;

(f) ‘forum’ means the Member State whose courts may potentially adjudicate the relevant proceedings pursuant to a decision taken under Article 8 paragraph 3 of this Directive.

Explanatory note:
The new legal instrument addresses both parallel and ‘multiple proceedings’. The notion of proceedings includes both investigations and prosecutions. The term multiple proceedings refers to situations where the principle of ne bis in idem does not apply since the underlying facts or the persons concerned are different, but in the interest of efficient and good administration of justice such proceedings should be concentrated – if possible – in one Member State. Multiple proceedings – differently from Art. 30 of Regulation 1215/2012 (Brussels I Recast) – are not limited to related proceedings.

Article 4
Determination of competent authorities

1. Member States shall determine the competent authorities in a way that promotes the principle of direct contact between authorities.

2. In accordance with paragraph 1, each Member State shall inform the Commission which authorities under its national law are competent to act in accordance with this Directive.

3. Notwithstanding paragraphs 1 and 2, each Member State may designate, if it is necessary as a result of the organisation of its internal system, one or more central authorities responsible for the administrative transmission and reception of requests for information according to Article 5 and/or for the purpose of assisting the competent authorities in the consultation process. Member States wishing to make use of the possibility to designate a central authority or authorities shall communicate this information to the Commission.

4. The Commission shall make the information received under paragraphs 2 and 3 available to all Member States.

CHAPTER 2
EXCHANGE OF INFORMATION

Article 5
Obligation to contact

1. When a competent authority of a Member State has indications that parallel or multiple criminal proceedings are being conducted or are about to be conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel or multiple criminal proceedings, with a view to initiating a direct consultation as provided for in Article 7.

2. Such indications may include cases where a suspected or accused person or a victim notifies the competent authority that parallel or multiple proceedings in another Member State are being conducted or are about to be conducted, where a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel or multiple proceedings, or where a police authority provides information to this effect.

3. If the contacting authority does not know the identity of the competent authority to be contacted, it shall make all necessary inquiries, including via the contact points of the European Judicial Network, in order to obtain the details of that competent authority.

4. Without prejudice to Article 7, the procedure of contacting shall not apply when the competent authorities conducting parallel criminal proceedings have already been informed of the existence of these proceedings by any other means.

Explanatory note:
The new instrument strengthens the obligation to contact by replacing the previous threshold ("reasonable grounds to believe that parallel proceedings are being conducted in another Member State") with a more precise set of "indications".
1. The competent authorities of the Member States are obliged to contact one another in case of indications (examples of which are given in paragraph 2) that parallel or multiple criminal proceedings are being conducted or are about to be conducted in another Member State.
2. The indications are provided in a non-exhaustive fashion. They include the most typical ways in which the authorities may learn of the existence of parallel or multiple proceedings, such as reporting by the suspect or the victim, or requests for international cooperation. Suspects and victims can on an equal footing inform their national authorities and thereby trigger the obligation to contact.
3. The EJN has proven over the years to be an efficient and straightforward way to identify the competent authority in case of requests for international cooperation. National authorities involved in the consultation procedure may take advantage of the EJN.
4. Paragraph 4 sets out an exemption to the obligation to contact when the competent authorities are already aware of the existence of parallel or multiple proceedings. This exemption, however, does not affect the subsequent and autonomous obligation to enter into direct consultations provided under Article 7.

Article 6
Obligation to reply

1. The contacted authority shall reply to a request submitted in accordance with Article 5 paragraph 1 by the deadline indicated by the contacting authority, or, if no deadline has been indicated, without undue delay and in any case within 30 days of receiving the request, and inform the contacting authority whether parallel or multiple proceedings are taking place in its Member State. In cases where the contacting authority has informed the contacted authority that the suspected or accused person is held in provisional detention or custody, the latter authority shall treat the request as a matter of urgency.

2. If the contacted authority is unable to provide a reply by the deadline set under paragraph 1, it shall promptly inform the contacting authority of the reasons therefore and indicate the time frame within which it shall provide the requested information.

3. If the authority which has been contacted by a contacting authority is not the competent authority under Article 4, it shall without undue delay transmit the request for information to the competent authority and shall inform the contacting authority accordingly.

Explanatory note:
1. Similarly to Article 6 of the Framework Decision 2009/948/JHA the contacting authority can set a deadline for the reply.
If no deadline has been indicated, without prejudice to a general rule of expediency ("without undue delay"), the maximum time frame is 30 days. This limit corresponds to the 30 days provided in Article 12 paragraph 3 of the Directive 2014/41 on the European Investigation Order and represents a reasonable length of time for the detection of the existence of parallel or multiple proceedings in the contacted Member State. There is no formal consequence if the contacted competent authority does not respond by the deadline. However, based on existing case law of the CJEU the obligation to reply remains intact even after the deadline has passed.
2. The continuing obligation to reply and the principle of sincere cooperation imply that the contacted authority, when unable to comply with the deadline of 30 days, shall indicate a timeframe for its reply.

CHAPTER 3
DIRECT CONSULTATION

Article 7
Obligation to consult and sincere cooperation

1. When it is established that parallel or multiple proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultation in order to reach reasoned consensus on an effective solution to avoid the adverse consequences arising from parallel or multiple proceedings.

2. Such consensual solution shall be pursued in adherence with the principles of sincere cooperation and good administration of justice and should, in the case of parallel proceedings, lead to the concentration of the criminal proceedings in one Member State for the purpose of

prosecution in accordance with Article 8. The same shall apply to multiple proceedings, where appropriate.

3. As long as the direct consultation is being conducted, the competent authorities concerned can take all necessary procedural measures and shall inform each other of any important procedural measures which they have taken in the proceedings.

4. Whenever reasonably possible a competent authority involved in direct consultation shall reply to requests for information from other competent authorities involved in such consultations, except where doing so could harm essential national security interests.

Explanatory note:
1. This provision is based on Article 10 of FD 2009/948/JHA ("Obligation to enter into direct consultations"). The aim of the consultation is to avoid adverse consequences such as ne bis in idem.
2. Paragraph 2 stresses the relevance of the principle of sincere cooperation as an overarching obligation and defines the concentration of the proceedings in one Member State as a desirable outcome of the consultation. Whereas in case of parallel proceedings the proceedings should always be concentrated, the concentration of multiple proceedings is not always possible or desirable from the viewpoint of the proper administration of justice.
3. The opening of a consultation procedure does not rule out the adoption of procedural measures by the competent authorities. The competent authorities of the Member States may therefore continue parallel investigations, but only as long as this is necessary in order to establish the material facts of the case. They need inform each other only of important procedural measures taken (e.g. victim protection measures are important, whereas the award of legal aid is not important or relevant to the other Member State).
4. During the consultation procedure, the competent authorities should provide all necessary information to one another. However, this obligation does not apply where to provide the information would endanger national security interests.

Article 8
Reasoned consensus and formal agreement on choice of forum

1. In order to reach a consensus on the concentration of proceedings including the final choice of forum, the competent authorities of the Member States shall assess the specific circumstances of the individual case in light of the factors for the choice of forum annexed to this Directive.

2. The competent authorities should aim to achieve such consensus as soon as possible and at the latest before either of the involved authorities presents the case to court for the purposes of prosecution or takes any measures which would have the effect of a final disposal of the case.

3. Where the competent authorities of the Member States agree that to do so would not jeopardise the investigation, they shall inform the suspect or accused and the victims of the existence of the consultation procedure and of the possibility to submit written observations within 15 days of the date of such notification.

4. When the competent authorities of the Member States concerned reach consensus, they shall conclude a formal agreement delineating the circumstances and the factors applied, and where to do so would not jeopardise the investigation, inform the suspect or accused and the victims thereof.

Explanatory note:
1. Article 8 is a completely new provision. Differently from FD 2009/948/JHA, the new instrument will include as an Annex a set of factors for the choice of forum. Non-arbitrariness of the choice of the forum and the transparency of the factors applied are strictly interrelated. The requirement to reach a consensus on the final choice of forum – with the consequences stipulated in Art. 9 – does not prevent the national authorities from reaching provisional agreement at an early stage of the consultation.
2. In case of parallel proceedings and, where appropriate, in case of multiple proceedings, the consensus should be achieved before any of the authorities takes the case to court or takes other measures with the effect of finally disposing of the case. It is, however, not prohibited for both national authorities to go ahead with parallel proceedings even though this may eventually trigger the ne bis in idem principle.
3. The suspect or accused person and the victims should have the opportunity to submit their written observations in the course of the consultation procedure before consensus is reached. Although notification of the suspect or accused person and the victims is due only "where the competent authorities agree that to do so would not jeopardise the investigation or the prosecution", this derogation is intended to be exceptional and must be applied narrowly.
4. In order to ensure non-arbitrariness and transparency, the consensus must be reasoned and formalised in a written agreement. It could be useful to develop a template annexed to the Directive for the use of national authorities.

Article 9
Consequences of the agreement and transfer of proceedings

1. Following the agreement taken pursuant to Article 8 paragraph 4 to concentrate proceedings the national authorities of the other Member State shall transfer the file, refrain from taking further investigative or prosecutorial measures and close the case.

2. Any act with a view to proceedings taken in the transferring Member State before the conclusion of an agreement pursuant to Article 8 paragraph 4 shall be recognised in the receiving Member State as if it had been taken by the national authorities of that Member State, provided that such recognition does not give such an act a greater evidential weight than it has in the transferring Member State.

3. Any act which interrupts time limitation and which has been validly performed in the transferring Member State shall have the same effect in the receiving Member State and vice versa.

4. The transferring Member State regains the right to prosecute the case if the competent authority in the receiving Member State neither presents the case to a court for the purposes of prosecution nor takes other measures which would have the effect of a final disposal of the case.

Explanatory note:
1. Article 9 is a new provision. It clarifies the consequences of the agreement and provides a legal basis to discontinue the proceedings at the national level and to transfer the file and the evidence to the other Member State. The provision is limited to parallel proceedings as multiple proceedings do not always lead to the concentration of the case.
2.-3. Drawing from the Convention on Transfer of Proceedings of the Council of Europe, the new provision also lays down rules on the equivalence of procedural acts interrupting time limitation periods and on the recognition of evidence.
4. If the receiving Member State does not prosecute the case following the transfer, the transferring Member State's right to prosecute revives.

Article 10
Remedies

Any agreement concluded pursuant to Article 8 paragraph 4 is without prejudice to legal remedies under national law to request judicial review on the choice of forum.

Explanatory note:
Article 10 does not affect national remedies. It does not define whether only the suspect or also the victim has a right to challenge the choice of forum. Nor does it define the grounds for a challenge (the forum choice or closing of the case, etc.). This does not preclude the possibility to challenge the decision in the courts of each of the Member States concerned.

CHAPTER 4
EUROJUST DECISION ON THE CHOICE OF FORUM

Article 11
Notification of Eurojust

1. Where no agreement on the choice of forum has been concluded within 60 days of the opening of the direct consultation pursuant to Article 7, , any of the involved national authorities or the suspect may request that Eurojust exercise its competence to determine the choice of forum.

2. When a request pursuant to paragraph 1 has been submitted, Eurojust shall immediately notify the competent authorities of the other Member State concerned and, provided that the competent authorities of all Member States concerned agree that to do so would not jeopardise the investigation or the prosecution, also notify the suspects and the victims of the opening of a procedure to determine the choice of forum.

3. After the notification referred to in paragraph 2, the competent authorities of the Member States concerned shall transmit to Eurojust without delay all information which might be relevant for the determination of the choice of forum.

Explanatory note:
1. Article 9 enables the competent national authorities involved in the horizontal consultation procedure as well as the suspect to trigger the binding decision of Eurojust where a decision on the choice of forum has not been adopted 60 days after the start of the consultation procedure. Eurojust cannot act ex officio.
2. When the request has been made by one of the national authorities involved, Eurojust shall immediately notify the other authority (-ies) and, if all concerned authorities agree that to do so would not jeopardise the investigation or the prosecution, also the suspect. This exception to the notification of the suspect must be interpreted narrowly. In particular, if the suspect had already been notified during the horizontal consultation, no objection can be raised to their notification by Eurojust.
3. The competent authorities shall provide Eurojust with all the information which might be relevant for the determination of the choice of forum. This should include, in particular, all the information considered in the horizontal consultation procedure.

Article 12
Ongoing obligation and precautionary measures

Pending the decision of Eurojust, the competent authorities of the Member States concerned shall take appropriate investigative measures in consultation with Eurojust. They must also refrain from committing any act that may jeopardise the outcome of the procedure of Eurojust and, in particular, they must refrain from presenting the case to court for the purposes of prosecution or taking any measures which would have the effect of a final disposal of the case. The adoption of any coercive precautionary measure shall be immediately notified to Eurojust.

Explanatory note:
1. This provision aims at ensuring the development and the outcome of the procedure conducted by Eurojust by preventing the national authorities from adopting any act that may jeopardise the outcome of the procedure. Subject to this proviso, national authorities may take investigative measures, but they must first consult Eurojust.
2. In particular, it prevents the national authorities from launching a prosecution in the proceedings referred to Eurojust. Such a standstill obligation is a concrete application of the principle of sincere cooperation. However, it does not prevent the national authorities from adopting coercive investigative or precautionary measures that are necessary and urgent. The adoption of any such measures must be promptly notified to Eurojust.

Article 13
Eurojust's decision on the choice of forum

1. The Eurojust decision on the choice of forum should, in the case of parallel proceedings, lead to the concentration of the criminal proceedings in one Member State for the purpose of prosecution. The same shall apply to multiple proceedings, where appropriate.

2. In determining the choice of forum, Eurojust shall assess the facts and merits of the case in light of the factors set out in annex to this Regulation.

3. Within 15 days of notification pursuant to Article 11 paragraph 2, the competent authorities of the Member States concerned and, if they had been notified, the suspect and the victim, are entitled to submit written opinions.

4. If Eurojust deems the information transmitted pursuant to Article 11 paragraph 3 to be insufficient for determining the choice of forum, it shall request additional information from the competent authorities of the Member States concerned. This information shall be provided promptly and, at the latest, within 30 days.

5. Eurojust shall determine the choice of forum by issuing a written decision stating the reasons for the choice. The Eurojust decision on the choice of forum shall be binding upon the judicial authorities of the Member States concerned.

6. Following the adoption of the Eurojust decision on the choice of forum pursuant to paragraph 4 in case of parallel proceedings, the national authorities of the Member State(s) other than the one chosen shall transfer the file, refrain from taking further investigative or prosecutorial measures and close the case. The same applies in cases of multiple proceedings where the Eurojust decision on the choice of forum provides for their concentration.

7. Any act with a view to proceedings taken in the transferring Member State before the adoption of a decision pursuant to paragraph 4 shall be recognised in the receiving Member State as if it had been taken by the national authorities of that Member State, provided that such recognition does not give such an act greater evidential weight than it has in the transferring Member State.

8. Any act which interrupts time limitation and which has been validly performed in the transferring Member State shall have the same effect in the receiving Member State and vice versa.

9. The Eurojust decision on the choice of forum shall be adopted within 60 days of the opening of the procedure by Eurojust. When a request for additional information pursuant to paragraph 3 has been made this period can be extended by 30 days.

10. If the suspect is held in pre-trial detention during the Eurojust procedure, the period provided for the adoption of the Eurojust decision on the choice of forum under paragraph 9 is reduced to a maximum of 30 days. In the same circumstances, the extension allowed for the acquisition of additional information is limited to a maximum of 30 days.

<u>Explanatory note:</u>
Article 13 establishes a detailed procedural framework and the factors for the adoption of the decision on the choice of forum by Eurojust. Transparency, good administration of justice and sincere cooperation are the main principles inspiring the provision.
1. The Eurojust decision on the choice of forum shall normally lead to concentration in the case of parallel proceedings in order to prevent a violation of the principle of ne bis in idem. In case of multiple proceedings, concentration may often not be the

optimal solution but should be considered where appropriate in order to ensure the good administration of justice.
2. The second paragraph states the obligation for Eurojust to apply the factors for the choice of forum annexed to the Regulation. The Annex and the factors constitute an integral part of the instrument. The factors include priority factors, interest-based factors and factors not to be considered.
3-4-9-10. Similarly to the horizontal procedure, where they have been notified of the choice of forum procedure the suspect and the victim are entitled to submit written observations. The procedure must progress speedily and deadlines are provided (60 days, extendable by a further 30 days where additional information is required). Stricter time limits apply in cases where the suspect is detained pending the outcome of the procedure.
5. Eurojust's decision must provide reasons for the choice of forum. It is a judicial decision which is binding on the national authorities of the Member States; in particular, it implies the discontinuation of the proceedings in the Member State(s) other than the one recognised as competent by the Eurojust decision.
6-7-8. The proposed legal instrument regulates the consequences of the binding decision of Eurojust on the choice of forum. In case of parallel proceedings the need to concentrate the proceedings and the binding nature of the Eurojust decision require the Member State(s) other than that selected to close the case, transfer the file and to refrain from adopting any further investigative or prosecutorial measures. This provision applies to multiple proceedings only when the Eurojust decision provides for their concentration. In the same manner as for the horizontal procedure, paragraphs 7 and 8 lay down rules on procedural acts interrupting time limitation periods and for the recognition of evidence.

Article 14
Judicial review of the Eurojust decision on the choice of forum

1. The suspect is considered to be directly affected in the sense of Article 263, paragraphs 4 and 5 TFEU. The Eurojust decision on the choice of forum is intended to produce legal effects in regard to the suspect.
2. The suspect and the national judicial authorities involved may launch an action for annulment against the Eurojust decision on choice of forum before the Court of Justice of the European Union pursuant to Article 263 paragraph 5 TFEU.

<u>Explanatory note:</u>
The binding decision of Eurojust on the choice of forum shall be reviewable before the Court of Justice of the European Union. An action for annulment can be launched by any of the Member States concerned or the suspect. The suspect, in particular, shall be considered fully entitled to have the decision annulled according to Article 263 paragraph 4 TFEU.
In case of inertia of Eurojust or failure to comply with the deadlines set under Article 13 the Member States concerned and the suspect are also entitled to launch an action for failure to act under Article 265 paragraph 1 TFEU.

ANNEX A - FACTORS RELEVANT TO THE CHOICE OF FORUM

The competent authorities of the Member States shall determine the choice of forum in accordance with the following factors:

FACTORS TO BE CONSIDERED

1. Territoriality
In principle, territoriality shall determine the jurisdiction to prosecute.
In case of crimes affecting the territory of more than one Member State, the competent authorities shall take into account where the majority or the most important part of the criminality occurred or where the majority or the most important part of the harmful effect or loss was sustained when determining the choice of forum. Harmful effect also includes state interests (such as offences against state security).

2. Stage of the proceedings – trial-readiness
When determining the choice of forum, the competent authorities shall compare and consider the state and the trial-readiness of the different proceedings.

3. Interests of the Suspect
The competent authorities shall take into account the interests of the suspect and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Interests of the suspect could relate to his or her effective links with the jurisdiction of a Member State, such as: the duration of his or her residence, the ability to understand the language spoken in the Member State, the degree of integration of the suspect in the society of one Member State, the possibility for him or her to access an effective legal defence, or the presence of dependent family members on the territory of another Member State. The vulnerability of the suspect and the possibility to ensure adequate safeguards should be carefully assessed.

4. Interests of Victims
The competent authorities shall take into account the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Interests of the victims might include the possibility to avoid their secondary victimisation and to resort to protective measures, especially in the case of vulnerable victims or violent crimes. The possibility for the victim to obtain adequate compensation could also be considered.

5. Need to resort to Mutual Legal Assistance and Mutual Recognition instruments
For example, where the majority of the evidence is located in one of the involved Member States.

6. Need for concentration of proceedings
In case of multiple proceedings, in determining the choice of forum, the competent authorities shall consider the possibility to concentrate the proceedings and the overall costs of the proceedings.

FACTORS NOT TO BE CONSIDERED

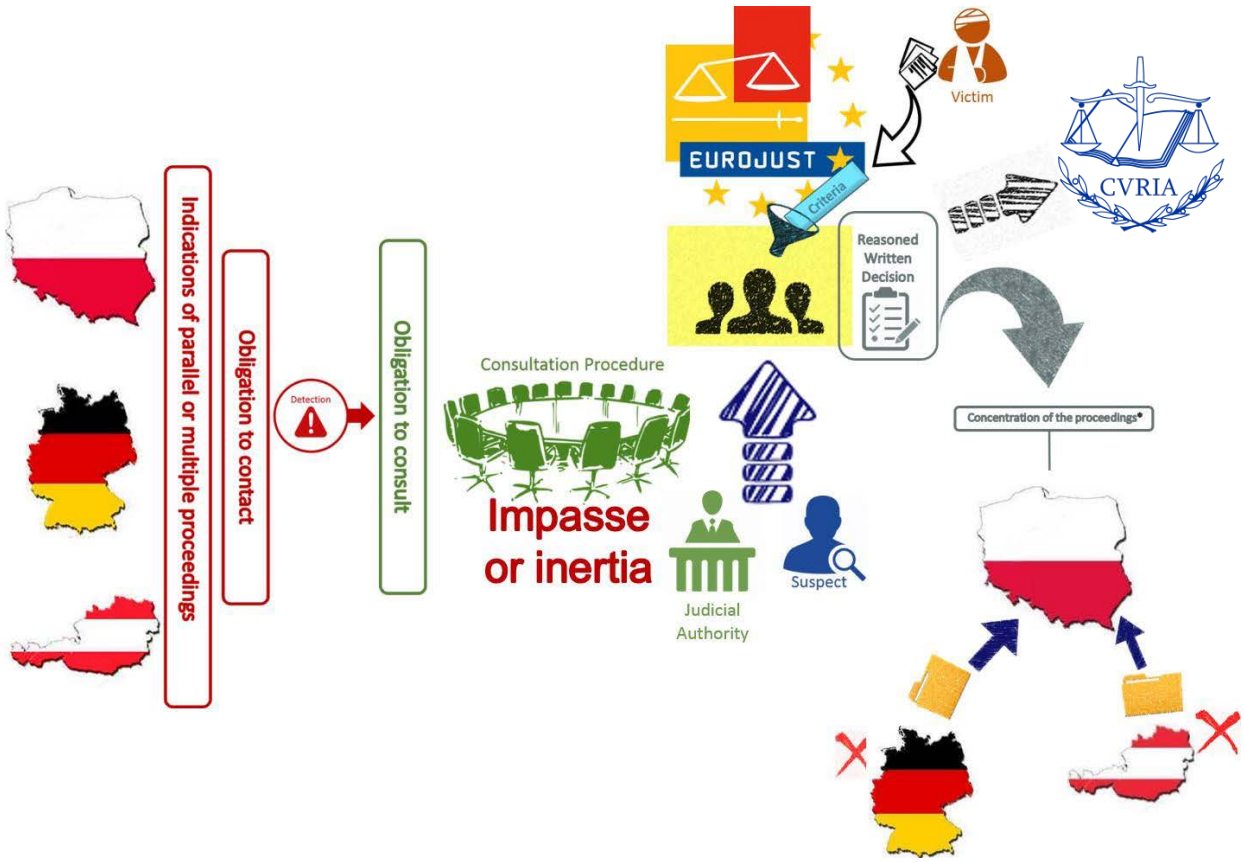
In determining the choice of forum, the competent authorities of the Member States are not to consider:

1. Diverging rules on evidence
Courts in different jurisdictions have different rules for the acceptance of evidence often gathered in very diverse formats. The potential admissibility and acceptance of evidence by a court cannot be considered as a factor to determine where the prosecution should take place.

2. Legal Requirements
The competent authorities shall not decide to prosecute in one jurisdiction rather than another simply in order to avoid having to comply with the legal obligations that apply in one jurisdiction but not in another.

3. Sentencing Powers
The sentencing powers of courts and detention circumstances in the different Member States shall not be a factor in deciding the jurisdiction in which a case should be prosecuted. The judicial authorities should not seek to prosecute cases in a jurisdiction where the penalties are highest.

ANNEX B - DIAGRAM: VERTICAL MECHANISM



DRAFT TEXT

III. ALLOCATING THE EXERCISE OF JURISDICTION IN CRIMINAL PROCEEDINGS

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the exercise of jurisdiction in the Area of Freedom, Security and Justice

The European Parliament and the Council of the European Union,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82 paragraph 1 thereof,

Whereas:

(-) …

Have adopted this Regulation:

CHAPTER 1
GENERAL PROVISIONS

Article 1
Objectives

This Regulation aims at preventing and settling conflicts of jurisdiction through:

(a) ensuring the allocation to the forum best placed on consideration of good and proper administration of justice,
(b) reaching reasoned non-arbitrary consensus as to the choice of forum in cases where parallel or multiple proceedings are being conducted or are about to be conducted; and
(c) preventing situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, where these might lead to the final disposal of the proceedings in two or more Member States, thereby constituting an infringement of principle of 'ne bis in idem'.

Explanatory note:
The objective of the new instrument is threefold. It covers the prevention of violations of the principle of ne bis in idem, the guarantee of a non-arbitrary choice and also the allocation to the "best placed" forum on consideration of the good and proper

administration of justice by prioritising territorial jurisdiction. This latter additional objective substantially distinguishes the present instrument from the previous two. The determination of the best placed forum is to be determined following the rules on the transfer in the interest of the good administration of justice (Art. 9).

Article 2
Subject matter and scope

This Regulation aims at preventing and settling conflicts of jurisdiction through allocation of jurisdiction in relation to criminal offences committed within the Area of Freedom, Security and Justice.

Article 3
Definitions

1. For the purposes of this Regulation:

(a) ‘parallel proceedings’ means criminal proceedings which are conducted or about to be conducted in two or more Member States against the same suspect or accused in regard to the same facts;

(b) ‘multiple proceedings’ means criminal proceedings which are conducted or about to be conducted in two or more Member States against the same suspect or accused in relation to different facts, or against different suspects or accused persons in relation to the commission of the same offence;

(c) ‘multi-territorial offence’ means an offence the constitutive acts of which are committed over the territory of two or more Member States;

(d) ‘competent authority’ means a judicial authority or another authority, which is competent, under the law of its Member State, to carry out the acts envisaged by Article 2;

(e) ‘contacting authority’ means a competent authority which contacts another competent authority to confirm the existence of parallel or multiple proceedings;

(f) ‘contacted authority’ means the competent authority which is asked by a contacting authority to confirm the existence of parallel or multiple proceedings.

CHAPTER 2
RULES ON THE EXERCISE OF JURISDICTION

Article 4
Territorial jurisdiction

Within the Area of Freedom, Security and Justice, each Member State shall only exercise jurisdiction in respect of offences committed in its own territory as determined by national law.

Explanatory note:
Territoriality is the general rule for the allocation of exercise of jurisdiction in the Area of Freedom, Security and Justice. Extraterritoriality is therefore excluded. The definition of locus delict is left to national law. The same applies for the rules on the location of the conduct of accomplices, instigators and other participants.

Article 5
Multi-territorial offences

1. If more than one Member State has territorial jurisdiction in accordance with Article 4, the concerned Member States are obliged to allocate the exercise of jurisdiction to one Member State following the procedure pursuant Article 6.

2. When a competent authority of a Member State has indications that the proceedings conducted concern a multi-territorial offence, it shall contact the competent authority of that other Member State to confirm the existence of such parallel or multiple criminal proceedings, with a view to initiating a direct consultation as provided in Article 6.

3. Such indications may include cases where a suspected or accused person notifies the competent authority that he is subject to parallel or multiple proceedings in another Member State, or in case a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel or multiple criminal proceedings, or in case a police authority provides information to this effect. When victims of crime have indications that parallel or multiple proceedings are being conducted in another Member State, the competent authority of a Member State shall upon request of the suspect or the victim contact the authorities of another Member State in accordance with Article 6.

Explanatory note:
Article 5 deals with multi-territorial offences, i.e. offences that are committed over the territory of different Member States (for instance, trafficking offences). In these cases the allocation of jurisdiction cannot work automatically and requires consultation between the various Member States involved.
2. This paragraph establishes an obligation upon the judicial authorities to contact the corresponding authorities in the other concerned Member State(s) with a view to consultation. The trigger of the obligation is represented by "indications" of parallel or multiple proceedings.

Article 6
Consultation procedure and the allocation of the exercise of jurisdiction over multi-territorial offences

1. In order to allocate the exercise of jurisdiction in cases of multi-territorial offences, the competent national authorities of the Member States concerned shall enter into direct consultations with a view to concentrating the proceedings in one Member State.

2. Where the competent authorities of the Member States agree that to do so would not jeopardise the investigation or the prosecution, they shall inform the suspect and the victims of the existence of the consultation procedure and of the possibility to submit written observations within 15 days from the date of notification.

3. In allocating the exercise of jurisdiction to one Member State, the competent authorities will take into account where the majority of the criminal activity took place, the interest of concentrating multiple proceedings in a single Member State, the number of suspects or accused persons involved, as well as post-offence facts, such as the location of evidence and of the suspect or accused person. In addition, factors such as residency of the suspect or accused person or victim and the prospect of resocialisation will be considered.

4. When the competent authorities of the Member States concerned reach consensus, they shall conclude a formal agreement delineating the circumstances and the factors applied.

5. The allocation of the exercise of jurisdiction as provided under this article is binding upon all Member States. The Member State to which the exercise of jurisdiction has not been allocated shall close the case.

6. The Member State that has not been allocated to exercise its jurisdiction retains an ongoing obligation to provide assistance to the Member State to which the exercise of jurisdiction has been allocated.

7. The Member State that has not been allocated to exercise its jurisdiction regains the right to prosecute the case if the Member State that has been allocated to exercise jurisdiction does not finally dispose of the case.

Explanatory note:
The consultation procedure is aimed at allocating jurisdiction by concentrating the proceedings for multi-territorial offences in a single Member State.
2. This paragraph provides for a possible involvement of the suspect and the victim in the consultation by means of written observations. The notification and the potential involvement of the suspect and victim are however conditional: notification shall be made only when it would not jeopardise the investigation or the prosecution. This caveat leaves a margin of discretion to the judicial authorities; however, such discretion – limiting the right of the defence – shall be exercised narrowly.
3. This paragraph lays down the factors for the allocation. The list of factors is not hierarchical and encompasses pre- and post-offence factors as well as interest-based factors.
5. The outcome of the consultation procedure is binding upon all Member States. As a direct effect of the allocation, the non-selected Member States shall close their cases.

6. The closing of the cases does not exempt the non-selected Member States from their obligation to provide assistance to the selected Member State. This is a concrete application of the principle of sincere cooperation.
7. If the selected Member State does not finally dispose of the case following the transfer by bringing it to court or reaching an out-of-court-settlement, the non-selected Member State's right to prosecute revives.

Article 7
Legal remedy

1. If an agreement on the allocation of exercise of jurisdiction has not been concluded 30 days after the suspect or accused person has been notified in conformity with Article 6, the suspect or accused person may make a request to the competent court in one of the Member States in which he is under investigation or being prosecuted concerning the same conduct, with a view to allocating the exercise of jurisdiction to one Member State. In doing so, the competent national court shall in particular apply the rules provided under Article 4 and 6 paragraph 3.

2. The agreement as provided under Article 6 is reviewable following the rules of the national system to which the exercise of jurisdiction has been allocated.

3. Member States shall provide a legal remedy on the exercise of jurisdiction for the suspect or accused person and victim in the event that a Member State neither exercises its jurisdiction nor transfers the exercise of jurisdiction to another Member State.

CHAPTER 3
TRANSFER OF EVIDENCE

Article 8
Transfer of evidence

The file and the evidence gathered before the exercise of jurisdiction has been allocated in accordance with Articles 5 or 6 shall be transferred to the Member State that will exercise jurisdiction.

CHAPTER 4
TRANSFER OF THE EXERCISE OF JURISDICTION

Article 9
Transfer in the interests of the good administration of justice

1. In the interests of the good administration of justice, the competent authorities of the Member States concerned may by agreement transfer the exercise of jurisdiction to another Member State in case of parallel and multiple proceedings.

2. Interests of good administration of justice are expressed by factors such as that:
   (a) the suspected person is ordinarily resident in another Member State;
   (b) the suspected person is a national of another Member State or that State is his State of origin;
   (c) the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in another Member State;
   (d) proceedings are underway in another Member State against the suspected person in relation to other offences ;
   (e) transfer of the exercise of jurisdiction is warranted in the interest of arriving at the truth and in particular that the most important items of evidence are located in another Member State;
   (f) enforcement in another Member State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;
   (g) the presence of the suspected person cannot be ensured at the hearing of proceedings in the Member State transferring the exercise of jurisdiction and that his physical presence at the hearing of proceedings in the other Member State can be ensured;
   (h) the transferring Member State considers that it could not itself enforce a sentence if one were passed, even by having recourse to surrender, and that the other Member State could do so.

3. Suspects or accused persons and victims may request that competent authorities reconsider the transfer in the interests of the good administration of justice as referred in paragraph 1.

4. Any act with a view to proceedings taken in the Member State transferring the exercise of jurisdiction before the adoption of a decision to transfer shall be recognised in the Member State accepting the exercise of jurisdiction as if it had been taken by the national authorities of that Member State, provided that such recognition does not give such an act a greater evidential weight than it has in the transferring Member State.

5. Any act which interrupts time limitation and which has been validly performed in the transferring Member States shall have the same effect in the receiving Member State and vice versa.

Explanatory note:
This Article implements the third objective of the instrument: ensuring the allocation of the exercise of jurisdiction to the best-placed forum. Such allocation operates by means of a transfer of both the proceedings and the jurisdiction when the best-placed forum is not territorially competent on its own (derivative jurisdiction). The benchmark for determining the better placement of a Member State is represented by the interests of the good administration of justice.
2. The interests of the good administration of justice are expressed by a set of factors. The list is inspired by Article 8 of the 1972 CoE Convention on Transfer of Proceedings.

Article 10

Repeal and replacement of Framework Decision 2009/948/JHA

1. Framework Decision 2009/948/JHA is hereby repealed and replaced.