



# GUIDELINES FOR DECIDING 'WHICH JURISDICTION SHOULD PROSECUTE?'



*Revised 2016*

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## PART I: BACKGROUND

The increase in cross-border crime has led over the years to more cases in which multiple Member States have, under their domestic legislation, jurisdiction to prosecute and to take such cases to trial.

In accordance with its mandate, ever since its establishment, Eurojust has been addressing the question of which jurisdiction is best placed to prosecute in cross-border cases in which a prosecution might be or has been launched in two or more jurisdictions.

To prevent and support the settling of conflicts of jurisdiction that could result in an infringement of the principle of *ne bis in idem*, and to ensure that the most effective practices with regard to criminal proceedings are in place in the European Union (EU), in 2003 Eurojust published the *Guidelines for deciding 'Which jurisdiction should prosecute?'*

The *Guidelines* suggest factors to be taken into consideration in multi-jurisdictional cases. Since their adoption, they have been of assistance to the competent national authorities for determining which jurisdiction is best placed to prosecute in cross-border cases.

The *Guidelines* also assist Eurojust, which may advise the competent national authorities on this matter. In addition, since their publication, the *Guidelines* have been used by some Member States as a reference point when developing their own legislation or guidelines on this matter.

Taking into account the developments in the EU Area of Freedom, Security and Justice, the operational experience acquired by Eurojust over more than a decade and the needs of the practitioners as expressed on a number of occasions, Eurojust is hereby issuing a revised version of its *Guidelines*.

As the vast majority of Member States have not set criteria for deciding the best place to prosecute in relation to cross-border conflicts of jurisdiction and as no 'horizontal' EU legal instrument exists in this respect, the *Guidelines* are meant to be a flexible tool to guide and remind the competent authorities of the factors to be considered. They provide a shared starting point on the basis of which a decision can be reached. The *Guidelines* do not constitute binding rules and are without prejudice to applicable national, EU and international law.

'Judicial authorities' in these *Guidelines* are intended to refer to judges, prosecutors or any other authorities competent in accordance with national law.

## EU legal framework

The *Guidelines* take into account the relevant EU legal framework, particularly:

- ▶ Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings is currently the only EU instrument devoted to this matter. It foresees a mechanism for direct consultations between competent authorities to achieve an effective solution and avoid any adverse consequences arising from parallel proceedings. Reference to some relevant factors to be considered by the competent authorities, including those in the Eurojust Guidelines of 2003, is made in the preamble (recital 9).
- ▶ Other legal instruments in the area of criminal matters, particularly texts related to specific crime types, such as Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Article 9) and Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (Article 7), include provisions referring to the factors to be taken into account with the aim of centralising proceedings in a single Member State when more than one Member State can validly prosecute on the basis of the same facts.
- ▶ Provisions related to Eurojust's assistance in facilitating cooperation and coordination between national authorities include:
  - Article 85(1)(c) of the Treaty on the Functioning of the EU;
  - Articles 6, 7 (Eurojust's recommendations and non-binding opinions) and 13(7) (Member States' obligation to inform Eurojust in cases where conflicts of jurisdiction have arisen or are likely to arise) of Council Decision 2002/187/JHA setting up Eurojust, as amended by Council Decision 2009/426/JHA;
  - Article 12 and recitals 4, 9, 10 and 14 of Framework Decision 2009/948/JHA; and
  - Article 7 of Framework Decision 2008/841/JHA.

## PART II: PRACTICAL GUIDELINES

### Key principles

- ▶ ‘*Ne bis in idem*’ is a basic principle of criminal law regulated at national, EU and international levels, according to which a defendant should not be prosecuted more than once for the same criminal conduct, regardless of whether the first prosecution led to conviction or acquittal.

Within the EU Area of Freedom, Security and Justice, the main legal sources for this principle are Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA) and Article 50 of the Charter of Fundamental Rights of the EU, to be interpreted in light of the relevant case law of the Court of Justice of the EU. (For an overview of the case law of the Court of Justice regarding the *ne bis in idem* principle, see the Eurojust document, ‘The principle of *ne bis in idem* in criminal matters in the case-law of the Court of Justice of the European Union’.)

These *Guidelines* fully adhere to and endorse the principle of *ne bis in idem*.

- ▶ In line with Framework Decision 2009/948/JHA (recital 12), these *Guidelines* fully support the idea that, within a common EU Area of Freedom, Security and Justice, the principle of mandatory prosecution, governing the law of criminal procedure in several Member States, should be considered fulfilled when any Member State ensures the criminal prosecution of a particular criminal offence.
- ▶ Each case is unique, and, consequently, any decision made on which jurisdiction is best placed to prosecute should be based on the facts and merits of each individual case. All the factors that are thought to be relevant should be considered in the best interest of justice.
- ▶ When reaching a decision, judicial authorities should balance carefully and fairly all the factors both for and against commencing a prosecution in each jurisdiction.
- ▶ Judicial authorities shall identify each jurisdiction in which a prosecution is not only possible but also in which success in bringing the case to prosecution is a realistic prospect.
- ▶ As part of their discussions on resolving these cases, judicial authorities should explore all the possibilities provided by current international conventions and EU instruments to, for example, obtain evidence cross-border, transfer proceedings or surrender persons.

- ▶ The decision must always be fair, independent and objective, and must be made by taking into consideration the European Convention on Human Rights and the Charter of Fundamental Rights of the EU, ensuring that procedural guarantees of any defendant or potential defendant are protected.

### What to do?

- ▶ As soon as parallel proceedings are detected, the competent authorities of the Member States involved should get in contact with each other. Within its mandate, the European Judicial Network (EJN) can assist the competent authorities, *e.g.* by facilitating communication and identifying and obtaining the details of the competent authorities to be contacted.
- ▶ As a next step, the competent authorities involved should start cooperating and coordinating their actions to avoid waste of resources, duplication of work or risk of breaching the *ne bis in idem* principle. In most cases, dialogue, mutual trust and coordination between competent authorities succeed in finding a solution.
- ▶ When parallel proceedings are coordinated, competent authorities should consider dealing with all the prosecutions in one jurisdiction, provided doing so is practicable, taking into account the effect that prosecuting some defendants in one jurisdiction might have on any prosecution in a second or third jurisdiction. Every effort should be made to prevent one prosecution from undermining another.
- ▶ The decision on where to prosecute should be reached as early as possible in the investigation or prosecution process and in full consultation with all the relevant authorities in each jurisdiction.
- ▶ Eurojust is in a privileged position to offer assistance to the concerned authorities in their efforts to cooperate and find solutions, at any time in all of the previous steps, and even to identify cases pending in Member States in which such conflicts could arise (*see below*).

### Main factors

A number of factors should be considered when making a decision on which jurisdiction should prosecute. All of them can affect the final decision. The priority and weight which should be given to each factor will be different in each case.

Some of the factors that should be considered are:

### **Territoriality**

A preliminary presumption should be made that, if possible, a prosecution should take place in the jurisdiction in which the majority – or the most important part – of the criminality occurred or in which the majority – or the most important part – of the loss was sustained. Hence, both the quantitative ('the majority') and the qualitative ('the most important part') dimensions should be duly considered.

### **Location of suspect(s)/accused person(s)**

A number of elements can be considered in connection with this factor, such as:

- ▶ the place in which the suspect/accused person was found;
- ▶ the nationality or usual place of residence of the suspect/accused person;
- ▶ the possible strong personal connections with one Member State or other significant interests of the suspect/accused person;
- ▶ the possibility of securing the surrender or extradition of the suspect/accused person to another jurisdiction;
- ▶ the possibility of transferring the proceedings to the jurisdiction in which the suspect/accused person is located.

In situations in which several co-defendants can be identified, not only is their number relevant, but also their respective roles in the commission of the crime and their respective locations. Again, both the quantitative and the qualitative dimensions count.

The evaluation of these elements should also take into account all the applicable EU legal instruments, notably those relating to the principle of mutual recognition. Their application can affect the assessment of this factor and consequently the final decision on where to prosecute. For instance, the application of the Framework Decision on mutual recognition of judgments imposing custodial sentences (2008/909/JHA), in combination with the Framework Decision on the European Arrest Warrant (2002/584/JHA), may render the location of the suspect/accused person a criterion of secondary importance because at a later stage the sentenced person can be transferred to another Member State to serve the custodial sentence.

### **Availability and admissibility of evidence**

Judicial authorities can only pursue cases using reliable, credible and admissible evidence. The location and availability of evidence in the proper form as

well as its admissibility and acceptance by the court should be considered. The quantity and quality of the evidence in the concerned Member States should also be taken into account, although the legal framework introduced by the European Investigation Order (Directive 2014/41/EU) can be expected to facilitate the gathering of evidence across borders.

### **Obtaining evidence from witnesses, experts and victims**

Judicial authorities will have to consider the possibility of obtaining evidence from witnesses, experts and victims, including, if necessary, the availability for them to travel to another jurisdiction to give that evidence. The possibility of receiving their evidence in written form or by other means, such as remotely by telephone or videoconference, should also be taken into account.

### **Protection of witnesses**

Judicial authorities should always seek to ensure that witnesses or those who are assisting the prosecution process are not endangered. When making a decision on the jurisdiction for prosecution, factors for consideration may include, for example, the possibility of one jurisdiction being able to offer a witness protection programme, while another jurisdiction has no such possibility.

### **Interests of victims**

In accordance with Directive 2012/29/EU on victims' rights, judicial authorities must take into account the significant interests of victims, including their protection, and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Such consideration would include the possibility of victims claiming compensation.

### **Stage of proceedings**

The stage of development of the criminal proceedings in the concerned Member States should be considered. When an investigation is already in an advanced stage in one jurisdiction, transferring the case to another jurisdiction might not be appropriate.

### **Length of proceedings**

While time should not be the determining factor in deciding which jurisdiction should prosecute, when other factors are balanced, then judicial authorities should consider the length of time that proceedings will take to be concluded in a particular jurisdiction (*'justice delayed is justice denied'*).

### **Legal requirements**

The existing legal framework, including obligations and requirements that are imposed in each jurisdiction, should be considered as well as all the possible effects of a decision to prosecute in one jurisdiction rather than in another and the potential outcome in each jurisdiction. However, judicial authorities should not decide

to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another.

### **Sentencing powers**

While it should be ensured that the potential penalties available reflect the seriousness of the criminal conduct that is subject to prosecution, judicial authorities should not seek to prosecute in one jurisdiction simply because the potential penalties available are higher than in another jurisdiction. Likewise, the relative sentencing powers of courts in the different jurisdictions should not be a determining factor in deciding in which jurisdiction a case should be prosecuted.

### **Proceeds of crime**

The applicable EU and international legal instruments and, notably, the EU mutual recognition instruments on freezing and confiscation, should be taken

into account when evaluating the powers available to restrain, recover, seize and confiscate the proceeds of crime. However, judicial authorities should not decide to prosecute in one jurisdiction rather than another only because such prosecution would result in a more effective recovery of the proceeds of crime.

### **Costs and resources**

While judicial authorities should be mindful of costs and resources, the costs of prosecuting a case, or its impact on the resources of a prosecution office, should not be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another, unless all other factors are equally balanced.

### **Member States' priorities**

Judicial authorities should not refuse to accept a case for prosecution in their jurisdiction because it is not considered a priority in their Member State.

## **EUROJUST'S SUPPORT**

- ▶ The assistance of Eurojust may be requested, at any moment, by any of the judicial authorities involved.
- ▶ Within its mandate, and preferably from an early stage, Eurojust can help facilitate preliminary contacts and consultations between competent authorities, coordinate their actions, encourage and expedite the exchange of information to gain a complete picture of the cases, ensure a smooth application of judicial cooperation instruments, clarify links between different parts of criminal networks and facilitate the subsequent decisions on which jurisdiction should prosecute. In cases in which Eurojust was not yet involved and the competent authorities could not reach a consensus on any effective solution in the context of the direct consultations provided by Framework Decision 2009/948/JHA, the matter shall, where appropriate, be referred to Eurojust by any involved competent authority.
- ▶ Eurojust can detect parallel proceedings early and proactively provide its support to national authorities, thanks to the information on cases where conflicts of jurisdiction have arisen or are likely to arise, received from Member States in compliance with the Eurojust Council Decision.
- ▶ At coordination meetings organised by Eurojust, the competent authorities of the Member States involved are able to meet and discuss the issues at stake, with the support of the National Members. In addition, joint investigation teams (JITs) may be used as a useful tool to prevent and resolve conflicts of jurisdiction as, in the framework of a JIT, the competent authorities may also agree on which jurisdiction should prosecute and for which offences.
- ▶ Moreover, acting through its National Members (individually or jointly) or as a College, Eurojust can issue recommendations and non-binding opinions asking the competent authorities to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts.

These *Guidelines* are [available on Eurojust's website](#) and will be made available online in all official EU languages.

