

# The Themis Project: solving conflicts of jurisdiction in the European Union

María Cacho

María del Carmen Rebolledo

María Teresa Vadell



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*“The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”*

*(Article 67, Treaty of the European Union)*

## **1. INTRODUCTION**

The European Union (hereinafter, “EU”) has set itself the objective of maintaining and developing a common area of “*freedom, security and justice*”<sup>1</sup>. To help that happen, the Treaty of Lisbon abolished the so-called third pillar of the EU, judicial cooperation in criminal matters becoming a field in which the EU institutions may legislate.

Despite that being a great achievement, there is still a lot of ground to be covered for the goal of a common area of freedom, security and justice in the EU to be achieved. In this regard, the most important obstacles to be overcome stem from the existence of different Criminal and Procedural Laws among the Member States (hereinafter, “MS”).

In effect, even with the application of the principle of “*mutual recognition*”, the lack of homogeneity in Criminal and Procedural legislation passed by MS gives rise to situations that result in unlawful limitations of fundamental rights of EU citizens (e.g. rights of defence or free movement) and that appear to be incompatible with the objective of a freedom, security and justice area.

For the purpose of this paper we will focus on two of the above-referred obstacles:

- (i) conflicts of jurisdiction between MS in relation to ongoing prosecutions or investigation proceedings. In this regard, the improvement and development of the European legislative framework that regulates conflicts of jurisdiction is of great importance in order to reinforce the application of the principles of mutual recognition and confidence between the MS at the pre-trial stage. We will highlight the main advantages to be gained from that development by analysing a case based on real facts (the “A and J case”); and

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<sup>1</sup> The Treaty of Lisbon has reinforced the establishment of a European common area of freedom, security and justice within which persons move freely and benefit from effective legal protection.

- (ii) the potential application of the *ne bis in idem* principle to pre-trial investigation proceedings. The *ne bis in idem* principle, according to which a person may not be tried for a crime for which he or she has previously been convicted or acquitted<sup>2</sup> is totally consolidated in the EU. That notwithstanding, the potential extension of the effects of the *ne bis in idem principle* to pre-trial investigations and to decisions made at that stage is currently under discussion in the EU.

## **2. CONFLICTS OF JURISDICTION**

### **2.1 About the concept of jurisdiction**

The term “*jurisdiction*” can be construed as “a government’s general power to exercise authority over all persons and things within its territory”<sup>3</sup>. Due to the fact that national legislations generally include provisions that *extend* such power to acts carried out outside their territory, when that authority is simultaneously exercised by different MS it often gives rise to conflicts between national jurisdictions.

These “*conflicts of jurisdiction*” can be either positive or negative. Positive conflicts of jurisdiction occur when two or more MS claim their right to investigate and prosecute the same alleged criminal offence (i.e. same facts and same perpetrators). For their part, negative conflicts of jurisdiction happen when two or more MS refuse to take on a certain case on the grounds of their lack of authority over it.

For the purpose of this paper we will only focus on positive conflicts of jurisdiction, which are the source of a number of relevant problems in terms of judicial cooperation between MS.

### **2.2. Positive conflicts of jurisdiction**

There are several circumstances that could potentially trigger positive conflicts of jurisdiction. Some of the most important ones are:

- (i) free movement of European citizens (including criminals) throughout EU territory -especially within the Schengen Area-, which facilitates the commission of a criminal offence in the territory of several MS;

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<sup>2</sup> Also known as “*double jeopardy*”.

<sup>3</sup> Black’s Law Dictionary; Eighth Edition.

- (ii) different national laws on competence and jurisdiction, which usually include provisions that extend the jurisdiction of MS to crimes committed outside their boundaries (according to the principles of “*active nationality*”, “*passive nationality*” and “*universality*”); and
- (iii) the “*internationalization*” of crime, due to the existence of criminal organizations that operate in different MS and to the fact that a great number of crimes are committed through technological means that have connections to various jurisdictions.

Practice shows that positive conflicts of jurisdiction in relation to ongoing proceedings are becoming increasingly frequent and cause a great number of problems. Indeed, multiple prosecutions carried out at the same time can affect the efficiency and duration of the respective proceedings and be very detrimental to the rights and interests of the individuals involved.

Without any doubt, a proper and more efficient administration of justice in the EU demands not to duplicate or even triplicate criminal proceedings, in order to avoid practical situations that imply a waste of efforts and expenses for both the MS and the people involved (e.g. the defendant, victims or witnesses).

### **3. THE “*NE BIS IN IDEM*” PRINCIPLE**

#### **3.1. Introduction**

The *ne bis in idem* principle, as regulated, among others, in Articles 54 to 58 of the Convention Implementing the Schengen Agreement (hereinafter, “CISA”) and in Article 50 of the Charter of Fundamental Rights of the EU, is intended to ensure that an individual is not subjected to a second trial if he or she has already been convicted or acquitted for the same facts in another MS.

Its application requires a proceeding that ends with a final decision according to the applicable law of the country in which the trial took place. Thus, it can only come into play, preventing a second prosecution on the same case, if a decision which bars further prosecution has terminated the proceedings in a MS.

Founded on the respect for *res judicata*, the *ne bis in idem* principle is deemed a constitutional and a procedural right linked to the “*due process*” right and the right to a fair trial in the constitution or domestic legislation of many MS.<sup>4</sup>

In 2003 the European Court of Justice (hereinafter, the “ECJ”) developed some guidelines for the interpretation of the Schengen Convention and the *ne bis in idem* principle in the case of Gözütok and Brügge<sup>5</sup>. The question before the ECJ was whether a specific type of national decision by a prosecutor, which barred further prosecution according to the law of that MS, could have *ne bis in idem* effect in another MS despite the fact that it did not have to be approved or reviewed by a Court of the MS before which it was issued.

The ECJ ruled that the described situation was sufficient for the *ne bis in idem* principle to be applied, stressing that the application of the principle is not conditional upon harmonisation or approximation of the criminal laws of the MS relating to procedures whereby further prosecution is barred. Moreover, it concluded that “*the ne bis in idem principle necessarily implies, regardless of the methods used to impose the penalty, that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law was applied.*”

However, no reference was made to the application of the *ne bis in idem* principle in relation to ongoing investigations, i.e., when there is a criminal offence over which different MS have jurisdiction and two or more national authorities initiate their own investigation proceedings.

Many scholars<sup>6</sup> have highlighted that such a possibility may be misused and may lead to the undesirable situation in which the preference to prosecute is given to the jurisdiction that actually acts quicker and first arrives to a final decision in the matter (popularly known as a “*first come, first served*” situation).

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<sup>4</sup> Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 8 June 2006, pertaining to the Van Straaten case (C-150/05) resolved by the Court of Justice of the European Union (par. 57).

<sup>5</sup> Joined Cases C-187/01 and C-385/01

<sup>6</sup> In this regard, the “*Analysis conflicts of jurisdiction in criminal proceedings to the European Union legal framework*” by Aghenitei Mihaela & Flamanzeanu Ion; and “*Prevenición y resolución de conflictos de ejercicio de jurisdicción en los procesos penales: comentario a la Decisión Marco 2009/948/JAI del Consejo de 30 de noviembre de 2009*” by Fernando Martín Diz. *Revista General de Derecho Europeo* 21 (2010).

### 3.2. The Green Paper

In 2005, the Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings (hereinafter, the “Green Paper”) presented by the Commission responding to point 3.3 of the Hague Programme and to the Mutual Recognition Programme of November 29<sup>th</sup> 2000, outlined a possible revision of the rules of the principle of *ne bis in idem*, based on the following recommendations:

- (i) it was said that it had to be established whether there was a need to clarify certain elements and definitions regarding for instance the types of decisions which can have a *ne bis in idem* effect, and/or what should be understood as *idem* or “*same facts*”;
- (ii) it was stressed that a decision had to be taken regarding whether in an area of freedom, security and justice, where cross-border enforcement now takes place through the mutual recognition, the *ne bis in idem* principle must be applied only where the impose penalty “*has been enforced, is actually in the process of being enforced or can no longer be enforced*”; and
- (iii) it was questioned whether the exceptions contained in Article 55 of CISA, which enables MS to provide for exceptions to the application of the *ne bis in idem* principle based on interests in prosecuting specific cases, should remain.

Unfortunately, although the importance of the above-mentioned issues was widely recognized and profusely discussed by renowned academics, no agreement on them was reached. In effect, the Green Paper initiative was put on hold, leaving the important question of the definition of the scope of the *ne bis in idem* principle unresolved.

### 3.4. The Framework Decision

The next European Union legal initiative to address this matter was the Council Framework Decision 2009/948/JHA of 30 November 2009, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (hereinafter, the “Framework Decision”)<sup>7</sup>.

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<sup>7</sup> It is known that, since the entry into force of the Treaty of Amsterdam of 2 October 1997, decisions and framework decisions have replaced joint actions in the field of police and judicial cooperation in criminal matters. A framework decision is binding on the MS solely as to the result that has to be accomplished, leaving the choice of form and methods to the national authorities.

As set forth in its Article 1, the objective of the Framework Decision -in order to prevent violations of the *ne bis in idem* principle- 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 proper administration of justice*”.

However, the Framework Decision does not regulate the scope of application of the principle of *ne bis in idem* in relation to prosecutions or investigation proceedings, as many would have wished for. Moreover, it does not lay down a much-needed specific rule to impose the obligation on MS to halt their prosecutions or proceedings and refrain from initiating new ones from the moment their national authorities are contacted by the authorities of another MS and consultations are initiated between them.

In this regard, paragraph (11) of the Preamble to the Framework Decision states that “*no Member State should be obliged to waive or to exercise jurisdiction unless it wishes to do so. As long as consensus on the concentration of criminal proceedings has not been reached, the competent authorities of the Member States should be able to continue criminal proceedings for any criminal offence which falls within their national jurisdiction*”.

Thus, it certainly leaves the problem of the scope of application of the principle of *ne bis in idem* unresolved. We are aware that obliging a MS to waive jurisdiction concerning a criminal offence over which it might be the relevant authority is a very complex issue, as it affects sovereignty. But the lack of clarification of the principle in the Framework Decision constitutes a step back from what was proposed by the Green Paper, and, certainly, a consensus on better solution should have been reached.

#### **4. REGULATION OF CONFLICTS OF JURISDICTION IN THE EU**

##### **4.1. Introduction**

The desire to look for solutions to the problem of conflicts of jurisdictions has been considered a priority by EU institutions for a long time.<sup>8</sup>

That notwithstanding, the regulation of conflicts of jurisdiction in relation to ongoing investigations or proceedings has traditionally been scarce and deficient. In effect, all the

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<sup>8</sup> Indeed, the relevance of such concern can be appropriately measured by the statement contained in Article 82.1.b) of the Treaty on the Functioning of the European Union, where it is proclaimed that “*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to [...] (b) prevent and settle conflicts of jurisdiction between Member States*”.

meetings, consultations and proposals launched at EU level have been almost useless, as the MS have been incapable of agreeing on a binding set of rules that would adequately deal with the matter<sup>9</sup>. Therefore, whenever a conflict of jurisdiction arose, the MS would apply legal instruments that were clearly inadequate to duly solve the problem, either because of their limited subjective scope in the absence of ratifications or by virtue of their scant regulation<sup>10</sup>.

#### **4.2. The Green Paper as the main precedent of the Framework Decision**

The situation has recently changed with the passing of the Framework Decision, which is due to be implemented by the MS by 15 June 2012. The aim of the Framework Decision is, as stated in paragraph (3) of the Preamble, “*to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of those proceedings in two or more Member States*”. Thus, as noted above, it also attempts to prevent the infringement of the principle of *ne bis in idem*, as set forth in Article 54 of the Convention implementing the Schengen Agreement.

The Framework Decision is the result of a number of legal precedents, the most important and direct precedent being the 2005 Green Paper. In the Green Paper the Commission outlined the

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<sup>9</sup> During the Hellenic Republic’s presidency of the EU in 2003, Greece presented an initiative to pass a Council Framework Decision concerning the application of the *ne bis in idem* principle. However, the Council failed to reach an agreement and the Greek proposal was put on hold. Despite the failed attempt, the Hague Program for strengthening freedom, security and justice in the European Union, approved by the European Council on 5 November 2004, established in item 3.3 that, “with a view to increasing the efficiency of prosecutions while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one European state”. Moreover, the European Commission, in its communication to the Council and the Parliament on the Hague Program (“Ten priorities for the next five years. An association for European renovation in the field of freedom, security and justice”) proposed as one of the key initiatives the drawing up of a green paper on conflicts of jurisdiction and the principle of *ne bis in idem*.

<sup>10</sup> Basically the sole legal instrument to reach solutions for such types of conflicts used to be the European Council’s Convention of 15 May 1972, on the transfer of proceedings. The Convention proved to have several drawbacks, the main one being that it was ratified by only 13 of the EU’s 27 MS, so it was rarely used. To make up for the lack of applicable regulation, it became common in recent years in bilateral relations between MS, to use a broad interpretation of Article 21 of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters. The mechanism established in Article 21 is known as “laying information in connection with proceedings”, and its terse drafting allows it to also be applied in cases where, while the authorities of a MS may be jurisdictionally competent, it is thought that the authorities of another state are in a better position to prosecute. Finally, in relation to certain criminal offences, EU law obliges MS to cooperate with each other for the purpose of reaching a decision regarding the appropriate jurisdiction in which a certain crime should be prosecuted. This is the case of the Framework Decision on Euro Counterfeiting and the Framework Decision on combating terrorism. Both of them contain specific provisions laying down that the MS involved “shall cooperate in order to decide which of them will prosecute”.



possibilities for the creation of a mechanism to facilitate the choice of the most appropriate jurisdiction to deal with criminal proceedings, and also for a possible revision of the rules on *ne bis in idem*.

In order to achieve such mechanism to allocate cases, the Green Paper establishes two fundamental “*prerequisites*”: firstly, that competent authorities of MS need to become aware of proceedings and/or related decisions in each other’s jurisdictions; and secondly, that once they have become aware of proceedings in other MS, national prosecuting authorities should have the ability to refrain from investigating or prosecuting, basing their decision on the fact that the same case is being prosecuted in another MS.

Once those prerequisites are met, the Green Paper suggests a mechanism based on the following procedural steps:

- (i) identification of those MS who may be interested in prosecuting the case, because they have a “*significant link*” to the case. It is established that a MS that has initiated proceedings or is about to promote criminal prosecution in a case that has “*significant links*” to another MS must inform the competent authorities of the latter;
- (ii) direct consultation and discussion between the national authorities of the MS involved in order to determine which of them is better placed to prosecute the case. In order to add some transparency to the process, the Green Paper also suggests that a list of objective criteria for allocating jurisdiction should be established.

In particular, such list could include criteria related to territoriality, the suspect’s or defendant’s nationality, victims’ interests, State’s interests, and certain other criteria related to efficiency and swiftness of the proceedings;

- (iii) if an agreement is not reached, it is suggested that a body at EU level such as Eurojust should act as mediator. It is also suggested that a possible additional step may be necessary, such as empowering a European body to take a binding decision as to the most appropriate jurisdiction should dispute resolution fail;
- (iv) as a possible last step, the Green Paper admits the possibility of a judicial review at the concerned individual’s request in order to allow the discussion of the legality of the choice of the designated jurisdiction.

As noted above, despite the great improvements on the regulation of conflicts of jurisdiction the Green Paper contained, no further progress was made towards the drafting of a proposal for a Framework Decision. In this regard, after the compilation of responses the Commission was scheduled to publish a legislative proposal in autumn 2006, but the deadline was not met, and the project was left on hold until November 2009 when the Framework Decision was passed.

### 4.3. The Framework Decision

Following the path established by the Green Paper, the Framework Decision, as it will be examined in further detail<sup>11</sup>, aims to prevent unnecessary parallel criminal proceedings by promoting cooperation between the competent authorities of MS. Thus it emphasizes the need for direct consultations between competent authorities in order to reach a consensus and to avoid the adverse consequences arising from parallel proceedings such as the waste of time and resources.

In this regard, the Framework Decision establishes that when a competent authority of a MS has “*reasonable grounds*” to believe that parallel proceedings are being conducted in another MS, it has the obligation to contact the competent authority of the latter in order to seek confirmation as to the existence of such parallel proceedings. The contacted authority must reply without “*undue delay*” or within the deadline set by the contacting authority, and both the request and the reply must contain the minimum relevant information about the case specified in the Framework Decision.

If parallel proceedings do in fact exist, the relevant authorities of the MS concerned shall enter into direct consultations in order to find a solution aimed at avoiding the negative consequences arising from these proceedings. The solution may lead to the concentration of the proceedings in one MS. However, no set of criteria has been established for determining the best jurisdiction to take over the case. In this regard, Article 11 of the Framework Decision only establishes that when the relevant authorities enter into direct consultations they must take into consideration “*all the facts and merits of the case and all other relevant factors*”.

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<sup>11</sup> See paragraph 5 of this paper.

Finally, if MS are unable to reach a solution, the case shall be referred to Eurojust if it is deemed appropriate by any of the competent national authorities, and provided that it falls under its competence according to Article 4 of the Eurojust Decision<sup>12</sup>.

## **5. REVIEW OF THE FRAMEWORK DECISION AND PROPOSALS**

### **5.1 Introduction**

The Framework Decision is a major step forward in succeeding in avoiding the adverse consequences arising out of the existence of parallel proceedings, and has to be hailed as a very important milestone in the achievement of a common area of freedom, security and justice in the EU. It should certainly be kept in mind that progress in this field is more than difficult, since it affects the core of sovereignty of MS. Taking that into account, the Framework Decision must be very highly rated.

Moreover, pursuant to Article 16 of the Framework Decision, MS are due to comply with its provisions by 15 June 2012, so we acknowledge that we will not be able to properly assess all the consequences of the Framework Decision until we get to analyse how each MS has complied with it and adapted its provisions to its own legal system.

Notwithstanding the above, we believe that the provisions of the Framework Decision contain a number of aspects that could be further developed, so as to incorporate some important suggestions that were included in the Green Paper and make the conflicts-solving mechanism more efficient.

In order to assess the importance of the issues that are yet to be properly solved, we explain below a case of conflict of jurisdiction with which we will address the problems raised, the way they could be solved according to the provisions of the Framework Decision and the regulation of the principle of *ne bis in idem*, and how they could probably be improved in future regulations.

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<sup>12</sup> Article 4.1 of the Council Decision of 28 February 2002 setting up Eurojust establishes that the general competence of Eurojust shall cover: (a) the types of crime and the offences in respect of which Europol is at all times competent to act pursuant to Article 2 of the Europol Convention of 26 July 1995; (b) the following types of crime: -computer crime, -fraud and corruption and any criminal offence affecting the European Community's financial interests, -the laundering of the proceeds of crime, -environmental crime, -participation in a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union; (c) other offences committed together with the types of crime and the offences referred to in points (a) and (b).

## **5.2. The “A and J case”**

Towards the beginning of the year 2007 continuing up to the year 2010, two German citizens put in place a scheme with the aim of obtaining unlawful gains, consisting of three stages<sup>13</sup>:

- (i) presenting an investment offer in works of art through two companies;
- (ii) luring massive funds from clients while avoiding inspection by German and Spanish tax authorities in charge of spotting irregularities; and
- (iii) profiting from the funds obtained with a large-scale failure to comply with the obligations undertaken, concealing the people responsible and closing the company’s offices.

To carry out their plan, the two perpetrators created two companies: one was German and the other one was Spanish. Both operated together under the common name “A and J”.

At the initial stage of the plan they launched a large offer of artwork by new artists addressed to German nationals living in Spain who would purchase on the basis that it would generate great profits. The offer appeared to be sound and reliable because the offerors put themselves across as renowned companies of international standing, with offices in Munich and Majorca and with considerable experience in the art market.

To present their deceptive offer to potential clients they used foreign mailing and telephone companies with native German-speaking employees working at their Majorca office under their supervision and instructions, and who were instructed on how to present the offer to potential clients.

After the initial contact, they would assess the level of interest shown by the contacted people, sending potential clients a representation package containing a leaflet setting out detailed (and also deceptive) information. Although the leaflets mentioned that the company’s offices were in Munich and Majorca, the first one was purely fictitious, so the only genuine one was the office in Majorca.

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<sup>13</sup> The facts of this case are based on true events. However, some of the circumstances of the matter, such as the nationality of the perpetrators and the victims and the dates on which the crime was committed, have been changed for the purpose of this paper.

Once the clients entered into the purchase contract, they had to authorise the company making the offer to lease and promote the purchased work in order to profit from the investment. Thus, clients never gained actual possession of the works of art during the contract term.

From 2007 to 2010 the two perpetrators succeeded in raising funds from over 700 clients, all of whom were German nationals resident in Spain. During the first months of the year 2011 they began the last stage of their criminal scheme, which consisted in dismantling their only registered office in Majorca and taking off with the funds they had received from their clients. From April 2011 they stopped answering calls made to the telephone numbers they had provided to their clients, and went into hiding.

## 5.2. Problem raised

The victims of the swindle sued the two German citizens before Spanish and German Courts. Germany started its own prosecution on these grounds based on the German Criminal Code: (i) despite the fact that the crimes were committed outside German territory, since they were committed against German nationals, they could be prosecuted by German authorities (principle of “*passive nationality*”); (ii) the perpetrators were also German nationals and one of the “A and J” companies had been set up in Germany (“*principle of active nationality*”)<sup>14</sup>.

Spain also initiated criminal proceedings because, under its Law 6/1985 of the Judiciary, Spanish Courts have jurisdiction over crimes committed in Spanish territory (principle of “*locus commissi delicti*”)<sup>15</sup>, the initiation of the proceedings being compulsory for the judicial authority that received the *notitia criminis*.

## 5.3. De lege ferenda considerations

Considering the problems raised and their possible outcomes, we would like to make some *de lege ferenda* considerations with regard to possible future amendments of the Framework Decision:

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<sup>14</sup> In this regard, please note that the German Criminal Code establishes in Section 7, under the Title “Offences committed abroad-other cases” that “(1) German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction. (2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender: was German at the time of the offence or became German after the commission [...]”

<sup>15</sup> Note that Organic Law 6/1985, of 1 July, of the Judiciary establishes in Article 23 that the Spanish courts will have jurisdiction to judge crimes and misdemeanours committed in Spanish territory.

- (i) A de facto volunteer proceeding. Article 5.1 of the Framework Decision states that national authorities of MS shall contact each other whenever they have “*reasonable grounds*” to believe that parallel proceedings are being conducted in different countries. On the other hand, paragraph 3 of the same Article establishes that “*the procedure of contacting shall not apply when the competent authorities conducting parallel proceedings have already been informed of the existence of these proceedings by any other means*”.

In our opinion, the vague and undefined concept of “*reasonable grounds*”, together with the possibility that national authorities are informed “*by any other means*”, will in practice mean that said initial contact between national authorities is left to the discretion of the MS involved. In effect, the drafting of Article 5 basically enables the competent national authorities to freely decide in each case whether they deem necessary to contact the authorities of another MS and, based on that decision, share the minimum information about the case provided for in Article 8 of the Framework Decision.

In the case at hand, taking into account the great number of circumstances that link the case both to the Spanish and to the German jurisdiction, each of their national competent authorities would soon realize that there are “*reasonable grounds*” to believe that a parallel proceeding is being conducted in the other MS. Consequently, they will have to contact the competent authority of the other MS in order to inform them of the investigation and provide them with the minimum information listed in Article 8.

Yet there will be many other cases in which, because the links or connections to other jurisdictions are not so obvious or numerous, the MS involved may not feel compelled to comply with that initial contacting obligation. Therefore, future regulations should define what “*reasonable grounds*” means or, at least, list some of them in order to determine the scope of the important obligation contained in Article 5.1.

- (ii) Absence of necessary deadlines. The procedure established in the Framework Decision in relation to the consultations or negotiations between MS is sometimes too vague. In this sense, with regard to the contacted national authority’s obligation to reply, Article 6 establishes that such reply shall be submitted within “*any reasonable deadline*” indicated by the contacting authority, or, if no deadline has been indicated, without “*undue delay*”.

Establishing concrete deadlines and time frames would bring significant benefits, as it would add certainty and security in relation to the time frame for the request to be replied to and could shorten the duration of the initial contacts and make them more efficient.

In relation to the A and J case, as a result of the initial contact by one of the competent national authorities, the contacted authority would have the obligation to reply to and inform the contacting authority of the proceedings that are taking place in that MS, as stated in Article 6 of the Framework Decision. The contacted authority would also have to share certain minimum information about its proceedings as stated in Article 9 of the Framework Decision.

However, the fact that no time frame has been established for this first contact to be carried out could result in an important delay in the beginning of the negotiations between Germany and Spain.

- (iii) No criteria to solve conflicts of jurisdiction. The Framework Decision does not establish a set of criteria to solve conflicts of jurisdiction, i.e., to determine which MS is in a better position to prosecute the criminal act, as the Green Paper did. Without a doubt, laying down such criteria would have provided the mechanism for allocating jurisdiction with certainty, transparency and objectivity.

In the A and J case, once it has been made clear that two parallel proceedings exist, national authorities of Germany and Spain would have to enter into direct negotiations. According to Article 10 of the Framework Decision, “*authorities of the Member States concerned shall enter into direct consultations*” in order to try to reach an agreement as to which jurisdiction would be in a better position to prosecute the crime.

Since the Framework Decision does not establish a compulsory set of criteria for the authorities of Germany and Spain to consider when they enter into direct consultations, they would only have to analyse “*the facts and merits of the case and all the factors which they consider to be relevant*” when trying to reach a consensus (Article 11).

Based on those “*facts and merits*” of the case German authorities could argue that they would be in a better position to prosecute on the following grounds: (a) the perpetrators are German, so it would probably be easier for German judicial authorities to obtain certain evidence related to the defendants; (b) if the defendants were finally found guilty

and the enforcement of the sentence imposed has to be done by German authorities<sup>16</sup>, it would be more efficient to take over the case from the very beginning; and (c) the victims are also German nationals, so they would probably prefer the application of German laws and procedure as they are more familiar with them.

For its part, Spain could also give convincing grounds to win jurisdiction over the case: (a) the crime was committed in Spanish territory, so most of the evidence of its commission would be in Spanish territory; (b) one of the companies used in the fraudulent scheme was set up in Spain, and the only office that was actually functioning was the one based in Majorca; and (c) although the victims are German, actually live in Spain so it may be easier for them to participate and follow the state of the proceedings if they are carried out by a Spanish Criminal Court.

For the purpose of this paper we will consider that both countries had a strong desire to win jurisdiction over the case and that no agreement between Germany and Spain was reached.

- (iv) “*Under utilisation*” of Eurojust. Article 12 states that “*this Framework Decision shall be complementary and without prejudice to the Eurojust Decision. Where it has not been possible to reach consensus in accordance with Article 10, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision*”.

Referral of the conflict to Eurojust is not only not compulsory but is considered by the Framework Decision to be a complementary solution for cases in which the competent national authorities deem it convenient after failing to reach an agreement.

In this regard, it should be noted that Decision of the European Council 2002/187/JHA of 28 February setting up Eurojust<sup>17</sup> establishes that one of the aims of Eurojust is to stimulate and improve coordination of investigations and prosecutions between the competent authorities of the EU (Article 3(1)(a)). In this sense, MS have to inform

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16 According to the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, the sentence imposed to the German defendants could be executed in Germany in order to facilitate their social rehabilitation.

17 As duly amended by Council Decision 2009/426/JHA of 16 December 2008.



Eurojust of any case where conflicts of jurisdiction have arisen or are likely to arise (Article 13(7)(a)), and Eurojust has been granted the power to request the competent authority of a MS either to carry out an investigation or prosecution or to acknowledge that the authorities of another MS are in a better position to investigate the crime.

On that basis, either the German or the Spanish national authorities could ask Eurojust to consider the facts of the case and issue an opinion as to which jurisdiction is indeed in a better position to prosecute.

However, taking into account that decisions by Eurojust are not binding for MS<sup>18</sup>, the MS that is asked to waive its jurisdiction over the case could decide not to comply with the decision. Certainly if either Spain or Germany has great interest in prosecuting the case, they could refuse to comply with Eurojust's opinion and carry on with their own proceedings.

In this regard, although this is a controversial issue on which MS are unlikely to agree, future regulations should try to make progress towards the idea of empowering a single European body with decision-making powers to solve conflicts of jurisdiction when no consensus can be reached by the MS involved, as the Green Paper suggested.

- (v) Absence of a binding mechanism. Article 5 of the Framework Decision provides that MS must initiate direct contact in order to decide which jurisdiction is in a “*better position*” to prosecute. However, the undeniable consequence of point (iv) above is that when such negotiations fail there is no binding mechanism that actually forces MS to solve the conflict of jurisdiction. On the contrary, without a consensus, national authorities involved can continue their parallel proceedings and the criminal offence will be judged in the fastest jurisdiction.

Indeed, in the A and J case, if Germany and Spain should fail to reach an agreement and to comply with Eurojust's decision, in the end both MS would carry on with their own investigations or proceedings until the trial was held and a final judicial resolution was issued in one of them. Only then would the *ne bis in idem* principle in its “*traditional*

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<sup>18</sup> Article 7.2 of the aforementioned Decision setting up Eurojust establishes that “where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution pursuant to Article 6 and in particular Article 6(1)(c), the College shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned (...)”.

*version*” come into play, forcing the slower MS to recognize the judicial decision issued in the other MS and to finish its proceedings.

In such scenario, all those contacts and consultations between Germany and Spain would have turned out to be futile and there would not be a solution to the conflict of jurisdiction and the problem of parallel proceedings, despite the enormous amount of resources and time that would probably have been invested in the described process.

- (vi) Lack of intervention of the parties to the proceeding. Many experts criticize the fact that the Framework Decision does not contemplate the intervention in the process for solving conflicts of jurisdiction of any of the parties involved, such as the defendant or the victims.

We agree with this consideration and understand that it would be advisable to include provisions in the Framework Decision imposing on national authorities a “*duty to inform*” the parties to the proceedings as soon as they become aware of the existence of a conflict of jurisdiction. Parties should also be given the opportunity to participate in the process for solving the conflict of jurisdiction by arguing whatever they may consider necessary to defend their rights and interests. Moreover, intervention of the parties to the proceeding could help the relevant authority to determine the relevant “*facts and merits*” to be considered in each case, as referred to in paragraph (iii) above.

In the A and J case, arguments made by the victims could have made a consensus possible by clarifying some of the links that had to be considered by authorities of both Germany and Spain to retain or waive their authority over the case at hand.

- (vii) Absence of the possibility of an appeal to be filed. Unlike the Green Paper, the Framework Decision does not contemplate the possibility that the individuals concerned or involved in each case (e.g. the defendant and the victim) may file an appeal for judicial review of the decisions made by the MS as to the allocation of cases.

In this regard, we believe that an appeal should be regulated. Despite the criteria for determining the competent jurisdiction being non binding and the decision being at the MS’ exclusive discretion, it would be advisable for an appeal to be available as a way of reassessing the situation.

(viii) No solution for the scope of the *ne bis in idem* principle. As we have already analysed, the Framework Decision should have gone much further in relation to the regulation of the application of the principle of *ne bis in idem*, making it compulsory for the MS to halt or stay ongoing proceedings while solving conflicts of jurisdiction, as the Green Paper proposed.

On the grounds of the principle of mutual recognition, it would be advisable for future regulations to include: (a) the obligation of national authorities to refrain from initiating an investigation or to stop their investigation proceedings while the negotiations between the MS are under way; and (b) to waive jurisdiction once an agreement has been reached. As the Green Paper highlighted, the extension of the scope of the *ne bis in idem* principle would strengthen mutual recognition between the MS.

(ix) No procedure for the transfer of criminal proceedings. The Framework Decision only focuses on the regulation of the settlement of conflicts of jurisdiction but, once the decision has been made by the MS, it does not determine a procedure for the transfer of criminal proceedings.

In this regard, MS would have to apply the Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 but, as noted above, this Convention is old and was only signed by a small number of MS<sup>19</sup>. As it now constitutes the only legal instrument that regulates the transfer of criminal proceedings maybe more MS would be willing to act as provided for therein, but in any case, a new regulation on the subject generally agreed by the MS should be passed.

#### **5.4. The European Public Prosecutor's Office as a window opportunity**

The above-mentioned strengthening of the area of freedom, security and justice enshrined in the Treaty of Lisbon is not only reflected in the development of existing institutions in the field of judicial cooperation such as Eurojust, but also takes the form of provision for new instruments, such as the European Public Prosecutor's Office (hereinafter, the "EPPO")<sup>20</sup>

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<sup>19</sup> In this regard, the Convention on the Transfer of Proceedings in Criminal Matters was never signed by Germany (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=073&CM=1&DF=&CL=ENG>), so it would not be applicable in cases like the examined one.

<sup>20</sup> In any case, if EPPO were established, it should be carefully defined and distinguished from Eurojust, by means of setting forth the functions of both institutions and preventing any overlap in their performance.

provided for in Article 86 of the Treaty on the Functioning of the European Union, which offers new prospects for action<sup>21</sup>.

The Stockholm Programme, in line with the legislative framework of the European Union, lays down in point 1 that “*all opportunities offered by the Lisbon Treaty to strengthen the European area of freedom, security and justice for the benefit of the citizens of the Union should be used by the Union institutions*” and, accordingly, envisages in paragraph 3.1.1 the setting up of an EPPO on the basis of the relevant provisions of that Treaty.

The creation of the EPPO is a controversial proposal that is going to be revolutionary if it is ever actually implemented. At this time, and considering European legislation in hand, this proposal can only be considered as wishful thinking.

However, we believe that the creation of the EPPO could strengthen judicial cooperation and coordination of investigations between MS. As European Criminal legislations move towards conferring the investigation and prosecution of crimes to their national Prosecutors, it is a logical consequence that the EPPO should be the institution to which national Prosecutors have to communicate the existence of possible conflicts of jurisdiction, and it should be granted decision-making powers as to which jurisdiction is in a better position to prosecute the crime or to even undertake the investigation of the case itself.

## **6. CONCLUSIONS**

- In order to develop a common area of freedom, security and justice in the EU, Criminal and Procedural Laws of MS need to converge so as to overcome obstacles such as conflicts of jurisdiction between MS in relation to ongoing prosecutions or investigation proceedings and those arising from the non-application of the *ne bis in idem* principle to pre-trial investigations.

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<sup>21</sup> The concept of a European Public Prosecutor’s Office is not new. Indeed, the Commission has already done preparatory work in this area, starting with the well-known “Corpus Iuris” study. The Commission took this process further by adopting a Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor in 2001, followed by extensive consultation and a follow-up in 2003. The discussion on the European Prosecutor found its way into the European Convention and the 2004 Treaty establishing the European Constitution, from where it found its way into the Treaty of Lisbon. It should be highlighted that for the first time Article 86.1 of the Treaty on the Functioning of the EU, as duly modified by the Treaty of Lisbon, allows for the possibility of establishing the European Public Prosecutor’s Office.

- The Framework Decision shows that EU institutions do care about the problem and are making efforts to try to boost judicial cooperation between MS in criminal matters. In this regard, the Framework Decision establishes the basics for direct cooperation and information-sharing between MS, which are very important means to avoid the problems arising out of conflicts of jurisdiction.
- It has to be borne in mind that, since it has to do with MS sovereignty, any progress in the regulation of conflicts of jurisdiction necessarily requires the use of broad and very vague rules, or even sometimes just mere statements of intent between MS and not formal commitments. This highlights what a great achievement the Framework Decision is.
- Despite the Framework Decision being a major step forward in this field, in order for the objective of a common area of freedom, security and justice to be achieved, future provisions should try to go further in the regulation of conflicts of jurisdiction, setting forth the criteria for allocating jurisdiction (as the Green Paper did), establishing a European institution with decision-making powers, and imposing on MS the obligation to halt or stay their own proceedings when they become aware of the existence of a conflict of jurisdiction. In this regard, the definitive establishment of a European Public Prosecutor's Office could be of great help.

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