

Conflicts of Jurisdiction

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

A Model for the Allocation of the
Exercise of Jurisdiction in the AFSJ

European Law Institute, 22 June 2021

Prof. André Klip



What is jurisdiction?

Territoriality and other principles

Overlapping jurisdiction is home made

Narcissistic approach



International law ambiguities

Full freedom on substantive criminal
law

Total prohibition on enforcement



Positive and negative conflicts?

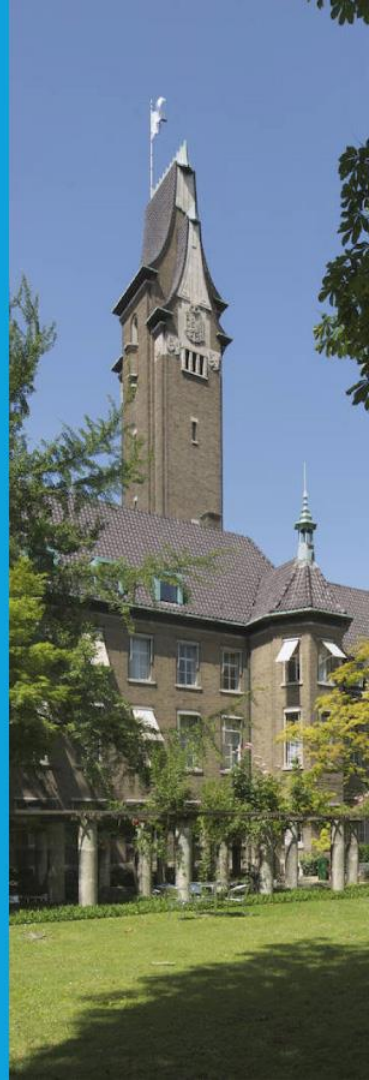
- two states having jurisdiction
- inactivity of jurisdiction state
- no state has jurisdiction



A problematic situation

- problematic ownership of jurisdiction
- crime is a common problem
- extraterritorial application of substantive criminal law and investigatory powers at the same level?

=> Model for the Allocation of Jurisdiction



General Rule for the Exercise of Jurisdiction

– Article 4

“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**”

- Art. 4 lays down the general rule for the exercise of jurisdiction **within the AFSJ**

Multi-territorial Offences (Article 5)

Definition: “‘multi-territorial offence’ means an offence whose **constitutive acts are committed over the territory of two or more Member States**” (Art. 3 par. 1 (c))

In case of multi-territorial offences the concerned Member States **are obliged to allocate** the exercise of jurisdiction **to one Member State** following a **consultation procedure**

Consultation procedure to allocate the exercise in case of multi-territorial offences – Article 6

- Direct consultations with a view to concentrating the proceedings in one Member State
- Notification of suspects and victims and possibility for them to submit written observations
- Criteria for the allocation of the exercise to one Member State (par. 3)
- The allocation is **binding** *erga omnes* (“upon all Member States”)
- “Roll-back” clause (par. 7)

Criteria for the allocation in case of multi-territorial offences – Article 6 par. 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 perspective for **resocialisation** will be considered.”

“Roll-back” clause – Article 6 par. 7

“The Member State that has not been allocated to exercise its jurisdiction **retains** the right to prosecute the case **if the Member State that has been allocated** to exercise jurisdiction **does not finally dispose of the case.**”

A safety clause to **avoid impunity** and to ensure in any case a “**final disposal**”, according to the meaning attached to this concept by the CJEU in its case law on *ne bis in idem*.

Transfer in the Interest of the Good Administration of Justice – Article 9

- The exercise of jurisdiction **can be transferred** in the interests of the good administration of justice
- **Factors** expressing the interests of the good administration of justice (par. 2):
 - Residence and nationality of the suspect
 - Perspectives of social rehabilitation
 - Evidentiary needs
 - Need to ensure the attendance of the suspect

Legal Remedy - Article 7

- The decision on the allocation of the exercise of jurisdiction for multi-territorial offences **should be reviewable following the rules of the national system** to which the exercise of jurisdiction has been allocated (par. 1)
- In case of **inertia** in the allocation of the exercise the suspect can act before the national court in order to obtain a judicial decision on the allocation (par. 2)
- Member States should provide a legal remedy on the exercise of jurisdiction for the suspect or and victim in the event that a Member State neither exercises its jurisdiction nor transfers the exercise of jurisdiction to another Member State (par. 3)