

**Open Letter  
to the National Governments of the EU Members States  
May 2009**

**RE: Council Proposal for a Framework Decision on Conflicts of Jurisdiction  
(Revised Text dated April 6, 2009)**

Dear Representatives of the National Governments of the EU Member States!

The European Criminal Bar Association (ECBA) is writing to you as a member of the Council which will decide on adopting a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, and we urge you:

- not to support the current Proposal for a Framework Decision;
- to support any improvement of consultation of interested parties (especially defence lawyers' associations) prior to issue a Proposal in the area of criminal law and procedure.

The ECBA was founded in 1997 and has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the day-to-day practice in criminal proceedings throughout Europe. More information on the ECBA can be found on our website: [www.ecba.org](http://www.ecba.org).

The ECBA accepts and appreciates the original good intentions of the Czech Presidency and other Member States in promoting the initiative to prevent and settle positive conflicts of jurisdiction within the EU: there is no doubt that multiple prosecutions in two or more Member States on the same case should be avoided, by attributing the exclusive power to prosecute to the most appropriate jurisdiction.

However, the system envisaged by the Proposal (in the text of January 20, 2009, and in the Revised text of April 6, 2009) fails properly to achieve this goal, because:

- (i)** the system is essentially based on decisions on jurisdiction to be taken by prosecuting authorities (of the Member States involved); and
- (ii)** such decisions are characterized by a huge sphere of discretion, due to the absence in the Proposal of pre-determined objective criteria for allocating jurisdiction.

The said system:

- (i)** potentially conflicts with fundamental principles of at least some Member States, according to which jurisdiction and competence of courts has to be pre-determined by law, on the basis of objective criteria, and cannot be derogated *ex post facto*, on a case-by-case basis, by agreements made by prosecuting authorities;

**(ii)** does not prevent abuses and forum shopping by prosecuting authorities. On the contrary, it potentially encourages them;

**(iii)** completely neglects any minimum safeguards for the suspect/accused in the process aimed at allocating jurisdiction (right to be informed; right to make representations on the best placed jurisdiction, prior to a decision on the point; right to challenge such a decision, and legal basis for it; etc.);

**(iv)** fails effectively to achieve what should be the primary scope of a legislation on conflicts of jurisdiction, consisting of the broadening of the reach of the principle of *ne bis in idem* (namely the fundamental principle of human rights not to be tried and punished twice for the same fact), which in the current legal scenario only operates when a final decision is reached in one of the Member States affirming jurisdiction on the same case.

Furthermore, the Revised text of the Proposal dated April 6, 2009, ignores the significant positive amendments - although not yet sufficient - contained in the Draft Report issued on February 26, 2009, by the competent committee of the European Parliament (the LIBE Committee).

In the view of the ECBA, the best way to prevent and settle multiple prosecutions on the same case in the EU Member States would be to attribute to an EU Court (such as the European Court of Justice) the power to issue binding decisions on positive conflicts of jurisdiction, on the basis of specific, objective and pre-determined criteria for allocating jurisdiction. In that scenario, the individuals concerned should have standing - before national and European courts - for challenging the non-compliance with such criteria.

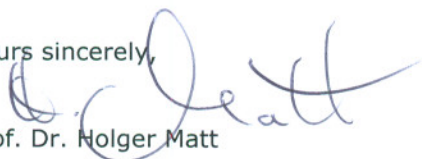
One of the reasons why the current Proposal does not provide a proper solution is the lack of adequate consultation with defence lawyers' associations.

In conclusion, for all the reasons mentioned above, we urge you, once again:

- not to support the current Proposal for a Framework Decision;
- to support any improvement of consultation of interested parties (especially defence lawyers' associations) prior to issue a Proposal in the area of criminal law and procedure.

Any enquiries should be directed to: [h.matt@ecba.org](mailto:h.matt@ecba.org) or [secretariat@ecba.org](mailto:secretariat@ecba.org).

Yours sincerely,



Prof. Dr. Holger Matt  
Chairman of the ECBA