

**RESPONSE BY ECBA TO THE GREEN PAPER AND
THE WORKING PAPER ON CONFLICTS OF
JURISDICTION AND THE PRINCIPLE OF
NE BIS IN IDEM IN CRIMINAL PROCEEDINGS
PRESENTED BY THE EUROPEAN COMMISSION**

1. Preamble – the ECBA

- 1.1 Since its foundation in 1997, the European Criminal Bar Association (ECBA) has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons.
- 1.2 Supra-national bodies, such as the European Union (EU), are increasingly influencing the future of criminal justice in Europe. Therefore we believe there is a strong need for an organisation of practising defence lawyers able to advocate rights and minimum standards for all suspected, accused and convicted persons.

2 ECBA Comments on the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings

- 2.1 The ECBA are concerned that the Green Paper and Annex provides no empirical data on which the proposals have been based and, as yet, no impact assessment or formal costs-benefit has been undertaken. To that end the ECBA are concerned that the consultation period of three months is very short and does not allow an adequate time frame for meaningful debate and analysis. In order to avoid the time and expense of drafting and consulting on a draft Framework Decision, the ECBA believe that there should be a thorough examination of conflicts of jurisdiction and the principle of *ne bis in idem* in the enlarged EU, to include (but not limited to):

2.1.1 How issues of jurisdiction are currently dealt with;

2.1.2 The number of incidents of conflicts of jurisdiction;

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- 2.1.3 The criteria being used to determine these issues;
 - 2.1.4 How such decisions are recorded;
 - 2.1.5 What mechanisms of challenge are available to the defendant and/or other interested parties to decisions of jurisdiction;
 - 2.1.6 What the impact of a Framework Decision may have on decisions on the scope of prosecutions (ie. Will it encourage prosecutors to instigate more multi jurisdictional proceedings);
 - 2.1.7 How is the principle of *ne bis in idem* protected in Member States;
 - 2.1.8 How often has the principle of *ne bis in idem* been used in national courts;
 - 2.1.9 How successful have parties been in protecting defence rights under the *ne bis in idem* principle.
- 2.2 The European Criminal Bar Association consider the Green Paper (“GP”) and the Working Paper (“WP”) highlight a significant need in the developing jurisprudence of European criminal law: namely, both identifying the most appropriate jurisdiction to try a case where there is a presence of alleged unlawful conduct with connections to jurisdictions of several Members States of the European Union, and also to avoid multiple prosecutions in the Members States concerned.

Procedural Safeguards

- 2.3 Consideration is given in this response to the proposed mechanisms for identifying the most appropriate jurisdiction. However, the ECBA considers whichever system is in place, there should be inherent procedural safeguards to protect the rights of the accused person or defendant. Such safeguards should include (but not be limited to):
- 2.3.1 pre-determined criteria for establishing the appropriate jurisdiction;

- 2.3.2 a record of any deliberations and the reasons relied on for the decision on jurisdiction;
 - 2.3.3 a means of ensuring that human rights of each party including the accused's or defendant's rights have been properly considered (see 2.5 below);
 - 2.3.4 disclosure of the basis of the decision at the appropriate time to the accused;
 - 2.3.5 a mechanism by which the accused or defendant can challenge the decision at the appropriate time;
 - 2.3.6 the provision of legal advice and free legal aid in order to challenge a decision on jurisdiction;
 - 2.3.7 agreement as to a body of appeal to which breach of the agreement can be made.
- 2.4 There are a number of means by which these safeguards could be achieved: for example the inclusion of an amicus curia within the decision making process, consideration by a European Criminal Law Ombudsman or recognition that national courts have jurisdiction to hear appeals on the decisions made by the competent authorities of other States at either surrender hearings or at the beginning of national proceedings. The ECBA are deeply concerned with the apparent reluctance of Member States to commit to procedural safeguards, demonstrated by their inability to agree the final form of the proposed Framework Decision on Procedural Safeguards in Criminal Proceedings which had been scheduled to be finalised by December 2005.
- 2.5 An example of ensuring human rights of the defendant have been properly considered (see 2.3.3) is Article 8 of the European Convention of Human Rights. This provides for a right to private and family life. The European Court of Human Rights has held that *"...it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State who will be held to be an unjustified and disproportionate interference with the right to respect for family life."* [Lauder v UK Application No: 27279/95]. However, in circumstances where the

criminal conduct has occurred in more than one EU Member State and it is possible given this to prosecute a person in their home Member State, then it would seem disproportionate and unnecessary for them to be extradited to another EU Member State to be prosecuted for the same offence. The ECBA believe it is unreasonable to expect a voluntary scheme to consider the issue to this standard, without representations on defence issues being made and recorded.

Multiple Prosecutions

2.6 Multiple prosecutions create additional burdens for the defendant including duplicated costs of representation, and coercive measures to the person and property as well as psychological burdens. The problem is not solved by the system currently in force based on the Convention Implementing the Schengen Agreement (“CISA”; Article 54 ff.), since such a system:

2.6.1 does not prevent the parallel prosecution criminal proceedings in two (or more) Member States for the “same fact” up to the moment of a “final decision” in one of the two States;

2.6.2 at the moment of a “final decision”, precedence is given to the jurisdiction with the fastest proceedings;

2.6.3 is characterised by several derogations.

EU Judicial Body

2.7 The ECBA considers that preventing multiple prosecutions and trials by identifying a single “competent” jurisdiction could only be achieved by attributing to an EU judicial body the power to issue binding decisions on positive conflicts of jurisdiction. These decisions would have to be made according to specific, objective and pre-determined criteria, with the criterion of territoriality given priority. There would need to be procedural safeguards to protect the rights of the suspect. The body would need to have enforcement powers.

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- 2.8 In the absence of such a legal framework, it appears there would need to be renunciation of sovereignty by States on an ad hoc and complete discretionary basis. A discretionary scheme would only be workable if there were statutory safeguards in place to protect the integrity of the decision making process and the rights of the suspect.
- 2.9 Members of the ECBA have experienced the nature of discussions which take place between national prosecutors in determining which EU Member State should prosecute a crime where the alleged criminal conduct may have taken place in many EU Member States. Anecdotally, these discussions are informal in nature and not transparent. They also do not necessarily take into account the rights of the suspect. As a result there can be a lack of coordination leading to multiple criminal investigations and prosecutions for the same alleged criminal conduct and a closed process of coordination in which the suspect has no involvement or ability to challenge and in which the defendants rights can be completely ignored. This can be contrasted to mechanisms for resolving disputes in civil cases terms which explicitly take into account the rights of the defendant in determining which is the appropriate forum
- 2.10 With no oversight body with enforcement powers as detailed in 2.3.7 above there would be no effective means:
- 2.10.1 of monitoring the decisions made by the States, ensuring States were determining issues of jurisdiction by using objective and pre-determined parameters;
 - 2.10.2 of ensuring “equality of treatment” of all EU citizens;
 - 2.10.3 of ensuring the rights of the accused or defendant have been considered;
 - 2.10.4 to provide an efficient and effective means to identify where decisions should be open to challenge.

Which in turn could mean the decisions were in potential conflict with the fundamental principles of the national legal systems and ECHR.

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Voluntary Agreement

2.11 It is undisputed, that under the current Treaty framework, there is no legal basis for setting up such an EU judicial body (GP, p. 6-7). Possibly for this reason, the mechanism for determining jurisdiction envisaged by the GP and the WP, is based on voluntary agreement between the competent authorities of the Member States, to close or halt proceedings (or to refrain from initiating proceedings) in favour of the chosen prosecuting jurisdiction. Such a voluntary agreement would be characterised by a considerable sphere of discretion. (GP, p. 7-8).

2.12 However, the ECBA believes that such a voluntary system will be problematical, for example:

2.12.1 Exercise of a discretion to relinquish authority to prosecute will, in many States, be unlawful and in conflict with fundamental principles provided for under the Constitution¹. Accordingly, a voluntary scheme does not avoid sensitive issues of sovereignty arising; it merely delegates resolution of those issues to the States where mandatory prosecutions are embedded into the Constitution;

2.12.2 There are a number of omissions in the voluntary scheme envisaged by the GP, for example, the issue of how the exercise of discretion is to be monitored and how the rights of the defendant or accused are protected is barely touched upon. The seniority of those exercising discretionary powers to make agreements with authorities in member states should arguably increase given the that no oversight body is proposed;

¹ For example, a voluntary scheme may well be in conflict with the following principles articulated in the Italian Constitution:

- the “*Public Prosecutor has the duty to exercise the criminal action*” (Article 112 of the Constitution; this principle cannot be derogated, especially where the criteria for derogations would not be pre-determined by law and binding);
- “*nobody can be subtracted to the natural judge pre-determined by statute law*” (Article 25 of the Constitution);
- “*all citizens (...) are equal in front of the law*” (Article 3 of the Constitution);

Similar constitutional issues will arise in other Member States.

2.12.3 A voluntary scheme would require procedural safeguards. The ECBA considers such safeguards should include those referred to in paragraph 2.3;

2.12.4 A voluntary scheme with meaningful safeguards still requires a body that can make binding decisions or a mutual recognition regime that operates with more confidence than is currently the case.

Criteria for decision making on jurisdiction

2.13 Identification of criteria is crucial to both a voluntary or mandatory regime. The ECBA considers this should be the subject of specific debate, however the ECBA believes territoriality should be a lead issue, as well as the place of habitual residence of the suspects / defendants. In accordance with Article 6 rights, issues such as location of defence evidence, costs of preparing a defence and language should also be highly relevant.

2.14 The ECBA considers that sentencing powers, compensation or confiscation regime are examples of factors which should not be included within the criteria. In addition, the fact that the statute of limitations in the “most appropriate jurisdiction” has already expired should be irrelevant. This would prevent a practice of ‘forum shopping’ by the prosecuting authorities, and the risk of forum selection being unfair or abusive and thereby undermining the process and the legitimacy of the identified jurisdiction to adopt the proceedings.

Summary / Conclusion on resolving conflict of jurisdiction

2.15 The ECBA considers the sphere of discretion suggested by the GP conflicts with fundamental principles of the legal systems of at least some Member States and, even with safeguards built into the process, is likely to prejudice the rights of suspects/defendants. The ECBA recommends that the EU institutions should continue to work on the project of preventing multiple prosecutions and trials in various Member States, through identification of only one “competent” jurisdiction. However, the ECBA considers this can only be achieved by attributing to an EU judicial body the power to issue binding decisions on positive conflicts of jurisdiction, on the basis of specific,

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objective and pre-determined criteria for attributing jurisdiction (with a leading role to be attributed to the criterion of “territoriality”). Any system must ensure that the rights of the accused or defendant are considered and accounted for in the decision making process. The ECBA recommends further research and an impact assessment is conducted followed by an informed consultation period before introducing legislation.

Ne bis in idem

2.16 The ECBA support the review of the EU rules on the principle of *ne bis in idem*, however we regard the debate in terms of revising these rules to be a complex one and again note the lack of empirical data, impact assessment or formal cost-benefit analysis within the GP or WP. The ECBA notes the lack of agreement on the proposal of Hellenic Republic that had the same aim as the current proposal.

2.17 The principle of *ne bis in idem* is a fundamental principle of criminal justice.

2.18 Historically, *ne bis in idem* was considered as an internal rule governing criminal proceedings in a domestic jurisdiction. However with the development of mutual legal assistance and increased judicial and police co-operation within the EU there is a recognised need to extend the protection to all judicial decisions within the EU. The affective application of the *ne bis in idem* principle should be in line with the mutual recognition regime with Member States accepting and adopting the judgment of another Member State. This will ensure the principle of *ne bis in idem* on a European judicial landscape, not just in respect of national proceedings.

2.19 ECBA notes that pending judgements from the European Court of Justice will go some way to minimising different interpretations to *ne bis in idem* principle.

2.20 The ECBA notes that in several Member States the *ne bis in idem* principle can be overruled and second prosecution brought forward in certain circumstances. Therefore it appears that any definition of “final decision” may conflict with these derogations from the principle in the national law of some Member States. A full review of all systems in the Member States, will need to be undertaken in order to produce an impact assessment of this legislation. Member States must not introduce

derogations or in anyway down grade the principle in their national law as a consequence of any EU legislation interested to strengthen the principle in cross border cases.

- 2.21 The European Court of Justice has developed and continues to develop the jurisprudence of case law in this area, including rulings, where there have been attempts to bring multiple prosecutions in different Member States on the same facts. However, it is noted that not all Member States are subject to the jurisdiction of the European Court of Justice and it is a costly and time-consuming process.
- 2.22 In order to ensure the *ne bis in idem* principle is adhered to in cases involving more than one Member State, the principle should be incorporated into framework decisions as an appropriate ground for refusal of mutual legal assistance. However, the ECBA recognises, that the principle should not be used to impede legitimate ongoing investigations and therefore each framework decision proposal should be carefully considered to identify if such refusal should be on a discretionary rather than mandatory basis.
- 2.23 In order to safeguard the rights of the accused person or defendant, the provision of legal advice and free legal aid is essential in order to ensure the accused person or defendant is able to challenge a prosecution or judicial decision on the grounds of *ne bis in idem*.
- 2.24 The ECBA notes the premise in the GP and WP that if the issue of jurisdiction is dealt with to the point that one lead jurisdiction can be identified, this will prevent situations of multiple and simultaneous prosecution and the related breaches of the *ne bis in idem* principle. However, the ECBA is not confident that the Commission has demonstrated its case in this regard and, in any event, the *ne bis in idem* principle should be enshrined in all EU mutual recognition instruments.

European Criminal Bar Association

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