

## ANNEX

### **GUIDELINES FOR DECIDING WHICH JURISDICTION SHOULD PROSECUTE**

In November 2003 Eurojust organised a seminar to discuss and debate the question of which jurisdiction should prosecute in those cross border cases where there is a possibility of a prosecution being launched in two or more different jurisdictions. The objective of the seminar was to establish some guidance which would assist Eurojust when exercising its powers to ask one state to forgo prosecution in favour of another state which is better placed to do so.

The seminar delegates included practitioners from all EU Member States from most of the EU Accession Countries as well as representatives from the Commission, the Council Secretariat, Europol and OLAF. There were a series of presentations and four workshops with case studies to help discuss potential criteria. The debates were enriched by the presence, as speakers and participants in the workshops, of several delegates who were university professors and or academics with an interest in this area of law. We are grateful to all the seminar delegates for their contributions.

The Eurojust College offers the following guidance:

#### **Generally**

When reference is made to ‘prosecutors’ in this guidance it is intended to refer to not only to prosecutors but also to judges and other competent judicial authorities.

Each case is unique and consequently any decision made on which jurisdiction is best placed to prosecute must be based on the facts and merits of each individual case. All the factors which are thought to be relevant must be considered.

The decision must always be fair, independent objective and it must be made applying the European Convention of Human Rights ensuring that the human rights of any defendant or potential defendant are protected.

Any decision 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. The complex question of “forum shopping”, which we would define as the arbitrary selection of the venue for prosecution, has different meanings in different legal systems and is not dealt with in this guidance. It is likely to be the subject to future discussion within Eurojust as our experience in handling this type of case develops.

As part of there discussion to resolve these cases prosecutors should explore all the possibilities provided by current international conventions and instruments for example to transfer proceedings and to centralize the prosecution in a single Member State. A number of conventions and other instruments, which have been signed but not yet ratified, could also provide assistance in the future when they have been fully implemented.

### ***Ne bis in idem***

A basic principle of international criminal law and the law of national criminal jurisdictions is that a defendant should not be prosecuted more than once for the same criminal conduct. This applies even if the defendant has been acquitted of that conduct in one jurisdiction. This guidance fully supports, adheres to and endorses that principle.

### **Initial Considerations**

The first consideration should be: “Where can a prosecution can take place?” This decision should be considered at as early a stage as possible and in any event as soon as it is realised a prosecution might take place in more than one jurisdiction.

Prosecutors must identify each jurisdiction where a prosecution is not only possible but also where there is a realistic prospect of successfully securing a conviction. Making this assessment will require expertise and knowledge, which can only be provided by experienced practitioners from the relevant jurisdictions.

### **Meeting to Discuss Action**

If the criminality occurred in several jurisdictions whose competent authorities could each institute proceedings in their own courts, there should be a meeting between nominated senior prosecutors representing each jurisdiction involved to discuss and agree where the prosecution should be mounted.

Each of the prosecutors nominated to attend such a meeting must be fully competent to discuss the issues and make decisions on behalf of the prosecuting authorities in the jurisdiction they represent. The prosecutors should apply the following guidance criteria in reaching their decisions.

### ***Reference to Eurojust***

Eurojust would expect any cases of this type, particularly where the representatives of the respective jurisdictions cannot reach agreement on where the case should be prosecuted, to be referred to it for assistance.

Eurojust would be happy to offer advice and to facilitate such meetings. If required the relevant national members of Eurojust would be pleased to be involved in these discussions. Eurojust would actively encourage all competent authorities to consider referring this type of case to it for assistance.

## **Making the Decision – “Which Jurisdiction Should Prosecute?”**

### ***A Presumption***

There should be a preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained.

When reaching a decision, prosecutors should balance carefully and fairly all the factors both for and against commencing a prosecution in each jurisdiction where it is possible to do so.

There are a number of factors that should be considered and can affect the final decision. All these factors should be considered at the meeting of prosecutors from the relevant states affected by the criminality concerned. Making a decision will depend on the circumstances of each case and this guidance is intended to bring consistency to every decision making process.

Some of the factors which should be considered are:

### ***The location of the accused***

The possibility of a prosecution in that jurisdiction and whether extradition proceedings or transfer of proceedings are possible will all be factors that should be taken into consideration.

### ***Extradition and surrender of persons***

The capacity of the competent authorities in one jurisdiction to extradite or surrender a defendant from another jurisdiction to face prosecution in their jurisdiction will be a factor in deciding where that defendant may be prosecuted

### ***Dividing the Prosecution into cases in Two or More Jurisdictions***

The investigation and prosecution of complex cases of cross border crime will often lead to the possibility of a number of prosecutions in different jurisdictions.

In cases where the criminality occurred in several jurisdictions, provided it is practicable to do so, prosecutors should consider dealing with all the prosecutions in one jurisdiction. In such cases prosecutors should take into account the effect that prosecuting some defendants in one jurisdiction will have on any prosecution in a second or third jurisdiction. Every effort should be made to guard against one prosecution undermining another.

When several criminals are alleged to be involved in linked criminal conduct, whilst often it may not be practicable, if it is possible and efficient to do so, prosecutors should consider prosecuting all those involved together in one jurisdiction.

### *The Attendance of Witnesses*

Securing a just and fair conviction is a priority for every prosecutor. Prosecutors will have to consider the willingness of witnesses both to give evidence and, if necessary, to travel to another jurisdiction to give that evidence. In the absence of an international witness warrant, or the possibility the court receiving their evidence in written form or by other means such remotely (by telephone or video-link) will have to be considered. The willingness of a witness to travel and give evidence in another jurisdiction should be considered carefully are likely to influence the decision as to where a prosecution is issued.

### *The Protection of Witnesses*

Prosecutors 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 when another has no such possibility.

### *Delay*

A maxim recognised in all jurisdictions is that “Justice delayed is justice denied”. Whilst time should not be the leading factor in deciding which jurisdiction should prosecute, where other factors are balanced then prosecutors should consider the length of time which proceedings will take to be concluded in a jurisdiction. If several states have jurisdiction to prosecute should always consider how long it will take for the proceedings to be concluded.

### ***Interests of Victims***

Prosecutors must take into account the interests of victims 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.

### ***Evidential Problems***

Prosecutors can only pursue cases using reliable, credible and admissible evidence. Evidence is collected in different ways and often in very different forms in different jurisdictions. Courts in different jurisdictions have different rules for the acceptance of evidence often gathered in very diverse formats. The availability of evidence in the proper form and its admissibility and acceptance by the court must be considered as these factors will affect and influence the decision on where a prosecution might be brought. These are factors which prosecutors must consider when reaching any decision on where a prosecution should be instituted.

### ***Legal Requirements***

Prosecutors must 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.

All the possible effects of a decision to prosecute in one jurisdiction rather than another and the potential outcome of each case should be considered. These matters include the liability of potential defendants and the availability appropriate offences and penalties.

### ***Sentencing Powers***

The relative sentencing powers of courts in the different potential prosecution jurisdictions must not be a primary factor in deciding in which jurisdiction a case should be prosecuted. Prosecutors should not seek to prosecute cases in a jurisdiction where the penalties are highest. Prosecutors should however ensure that the potential penalties available reflect the seriousness of the criminal conduct which is subject to the prosecution.

### ***Proceeds of Crime***

Prosecutors should not decide to prosecute in one jurisdiction rather than another only because it would result in the more effective recovery of the proceeds of crime. Prosecutors should always give consideration to the powers available to restrain, recover, seize and confiscate the proceeds of crime and make the most effective use of international co-operation agreements in such matters.

### ***Resources and Costs of Prosecuting***

The cost of prosecuting a case, or its impact on the resources of a prosecution office, should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another when all other factors are equally balanced. Competent authorities should not refuse to accept a case for prosecution in their jurisdiction because the case does not interest them or is not a priority the senior prosecutors or the Ministries of Justice.

Where a competent authority has expressed a reluctance to prosecute a case for these reasons, Eurojust will be prepared to consider exercising its powers to persuade the authority to act.

### ***Matrix***

The factors which should be considered in making decisions on which jurisdiction should prosecute are set out in this guidance. The priority and weighting which should be given to each factor will be different in each case. The intention of this guidance is to provide reminders and to define the issues that are important when such decisions are made.

During the Eurojust seminar on this topic a number of delegates found it useful to apply a matrix. Whilst applying a matrix rigidly may be too prescriptive, some may find a more structured approach to resolving these conflicts of jurisdiction helpful. The matrix allows a direct comparison and weighting of the relevant factors which will apply in the different possible jurisdictions.