



**Proposal for a Council Framework Decision on
prevention and settlement of conflicts of exercise of
jurisdiction in criminal proceedings**

Briefing and suggested amendments

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Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The most recent draft of the Proposal for a Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (“the Proposal”) was produced on the 6th April following the Justice and Home Affairs Council meeting.¹ The draft signifies the general approach of the Council to the issue and is a more focused version of the original. The Council awaits further consultation with Parliament. Renate Weber for the LIBE Committee recommended a number of important amendments to the original Proposal on the 26th February 2009,² largely incorporating the Law Society of England and Wales’ Position of February 2009.³ The nature of the amended draft is such that much of the problematic content has now been removed. Intended action is made clearer in this draft. We particularly welcome the inclusion of the UK European Scrutiny Committee suggested wording at Article 1(2)(a) which clarifies the intended attempt to prevent infringement of the *ne bis in idem* principle.⁴

3. However, we continue to remain concerned with regard to the:
 - **Lack of a coherent timescale for consultation**
 - **Lack of consideration of the suspect’s position**
 - **Use of terminology when referring to the direct consultation process.**

¹ COPEN 69

² 2009/0802(CNS)

³ <http://international.lawsociety.org.uk/eu/story>

⁴ <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xii/19xii.pdf>

Article 10 – *obligation to enter into direct consultations*

Amendment 1

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 10

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Amendment

1. When it is established that parallel proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultations in order to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings, which may, where appropriate, lead to the concentration of the criminal proceedings in one Member State.

1. When it is established that parallel proceedings exist, the competent authorities of the Member States concerned shall enter into direct consultations in order to reach consensus **within the reasonable deadline agreed, or, if no deadline has been indicated, without undue delay** on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings, which may, where appropriate, lead to the concentration of the criminal proceedings in one Member State. **In cases where the suspected or accused person is held in provisional detention or custody, direct consultations shall aim to reach consensus as a matter of urgency.**

Justification

No timescale is envisaged in the obligation to consult set out in Article 10. Article 6 by contrast requires a response to a request for information within a reasonable deadline or without undue delay, and where the defendant is being held in provisional detention or custody, as a matter of urgency. The same time periods should apply to the obligation to consult, as this process is likely to delay the ongoing investigations in each Member State. This delay could lead to a detrimental effect upon the parties involved in the proceedings, particularly the suspect, and particularly if they are in detention.

Recitals (9), (17) and Article 11 – Procedure of reaching consensus

Amendment 2

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Recital (9)

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

When striving to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from parallel proceedings being conducted in two or more Member States, the competent authorities should bear in mind that each case is specific and that all its facts and merits should be taken into account. In order to reach consensus, the competent authorities should consider relevant criteria, which may include those set out in the Guidelines which were published in the Eurojust Annual Report 2003 and which were drawn up for the needs of practitioners, and take into account for example the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused persons and possibilities for securing their surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused persons, significant interests of the suspected or accused persons, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur.

Amendment

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Justification

The circumstances that will be taken into consideration when consulting upon which jurisdiction is appropriate will by necessity involve the considerations that were initially set out in original Article 15. We agree that the content of original Article 15 may be considered unduly restrictive in circumstances where any number of scenarios could have an effect upon the appropriate course of action and that greater flexibility is achieved by relevant factors

being indicated in the Recitals. Indeed, the Proposal's approach of adopting the Eurojust *Guidelines For Deciding "Which Jurisdiction Should Prosecute?"* provided in the Annex to the Eurojust Annual Report 2003,⁵ where such indicators are set out in detail, seems to be sensible. However, Member States should not be able to rely on administrative or financial restraints, or political agreements to absolve them of responsibility for prosecuting a crime where it is most appropriate for that jurisdiction to do so (or indeed for electing prosecution were it is not). Whilst Recital (9) points to the Guidelines, we advocate a stronger obligation for these to be considered than the current Proposal requires. We would remove the word 'may' from the Recital to achieve this.

Amendment 3

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11

Procedure of reaching consensus

When the competent authorities of Member States enter into direct consultations on a case in order to reach consensus in accordance with Article 10, they shall consider the facts and merits of the case and all the factors which they consider to be relevant.

Amendment

Article 11(1)

Procedure of reaching consensus

When the competent authorities of Member States enter into direct consultations on a case in order to reach consensus in accordance with Article 10, they shall consider the facts and merits of the case and all the factors which they consider to be relevant.

⁵http://www.eurojust.europa.eu/press_releases/annual_reports/2003/Euj%20008%20Annual%20Report%20EN.pdf

Amendment 4

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11(2) (new)

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Amendment

No consensus shall be reached that will lead to the infringement of the rights of the suspect or accused as protected by Article 6 of the Treaty on European Union, and reflected by the Charter of Fundamental Rights of the European Union, and by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Amendment 5

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11(3) (new)

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Amendment

The Competent Authority of the Member State in which the suspect or accused is situated shall inform the suspect or accused that direct consultations have been entered into and the nature of the information exchanged in accordance with the national law of that Member State.

Amendment 6

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11(4) (new)

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Amendment

The competent authority of the Member State in which the suspect or accused is situated shall invite representations from the suspect or accused with regard to those direct consultations. The suspect or accused shall be provided with legal assistance, interpretation and translation where necessary to enable him to make such representations.

Amendment 7

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 11(5) (new)

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Amendment

The competent authority of the Member State in which the suspect or accused is situated shall inform the suspect or accused of the consensus reached between the Member States. The suspect or accused shall be afforded a right of appeal from the decision to a court of the Member State in which he is situated in accordance with national law. The suspect or accused shall be provided with legal assistance, interpretation and translation where necessary to enable him to enter such an appeal.

Justification

Recital (17) provides,

This Framework Decision is limited to establishing provisions on direct contact and direct consultations between the competent authorities of the Member States and therefore does not affect any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction, if such right exists under national law.

Article 11 as currently drafted provides,

When the competent authorities of Member States enter into direct consultations on a case in order to reach consensus in accordance with Article 10, they shall consider the facts and merits of the case and all the factors which they consider to be relevant.

In order for any practical consensus to be reached on the issue of who is to exercise jurisdiction over conducting criminal proceedings, the exercise in Article 11 logically requires the competent authority to consider the circumstances of the case, and is assisted by the factors indicated in Recital (9), as set out above.

However, neither the Eurojust Guidelines nor Recital (9) satisfactorily consider the position of the suspect. It follows that at this stage it will be imperative to the suspected person to be informed that contact has been made by another Member State in relation to the proceedings, and, where it is apparent that the factual circumstances do indicate parallel proceedings, given an opportunity to make representations about the investigation being pursued and ultimately the prospect of being tried in an alternative Member State. There may be important individual considerations in a case that affect the suspect's Convention and Treaty rights and necessitate a particular course, which would not be known without allowing consultation with the suspect.

Whilst competent authorities are obliged to act in a manner which is in conformity with the ECHR, by reference to each Member State's membership of the Council of Europe, and also in conformity with Article 6 TEU and the Charter of Fundamental Rights and Freedoms (which is recalled in Recital (20)), we consider that this obligation should be spelt out in Article 11. This is to ensure that not only do the competent authorities act in a manner which is consistent with their obligations from the outset, but that the Proposal is in conformity with Convention and Treaty obligations.

We consider that it is insufficient to simply include reference by way of Recital (17) to national law to allow for this eventuality. The national law of each Member State is unlikely to have a mechanism to deal with this type of consideration, given that the Proposal provides a new legislative system. The amended Proposal is very clear that it intends to allow a dialogue between the investigating authorities at a pre trial stage. The progress of an investigation at this stage lies in the discretion of the prosecuting or investigating authority and the decision to prosecute is taken by that authority, naturally without input from the suspect, other than through information obtained by way of questioning. The identified goal of improving the efficient and proper administration of justice (Article 1(1)) could easily bypass consideration of the suspect entirely.

The competent authority of the Member State in which the suspect is situated will need to consider the right of the suspect to a fair hearing and in doing so their access to a lawyer, interpreter, evidence relating to the charges against them, conduct of interview and subsequent trial procedure amongst other specific issues. If these matters are not taken into consideration, and conduct of the proceedings is released to another Member State (or even use of evidence from that other Member State), the suspect's Article 6 ECHR rights may be infringed, together with other relevant Convention rights. There is no readily apparent stage at which the suspect could make their views known unless this is provided for in the Proposal. Recital (17) does not allow for this process. A substantive article of the Proposal is required to obligate the creation of a mechanism by which the suspect is able to make the crucial argument Recital (17) suggests is possible.

Article 13 – Providing information about the outcome of the proceedings

Amendment 7

Initiative by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 13

Text proposed by the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and of the Kingdom of Sweden

Article 13 – Providing information about the outcome of the proceedings

If during the course of the direct consultations in accordance with Article 10 consensus has been reached on the concentration of the criminal proceedings in one Member State, the competent authority of that Member State shall inform the competent authority of the other Member State(s) about the outcome of the proceedings.

Amendment

Article 13 – Providing information about the outcome of the **direct consultations**

If during the course of the direct consultations in accordance with Article 10 consensus has been reached on the concentration of the criminal proceedings in one Member State, the competent authority of that Member State shall inform the competent authority of the other Member State(s) about the outcome of the **consultations**.

Justification

The use of the phrase ‘outcome of proceedings’ is unclear and could be misinterpreted. The discussion is not a proceeding, whereas the ongoing investigations within the respective Member States are. The wording may suggest that the actual substantive criminal investigation has concluded rather than the negotiation.

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