



JUSTICE

**Response to the
European Commission's Green Paper
on conflicts of jurisdiction and the
principle of *ne bis in idem*
in criminal proceedings**

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1. JUSTICE is an independent all party law reform and human rights organisation that aims to improve justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. JUSTICE has been strongly involved in monitoring the development of a European area of freedom, security and justice. It is part of a research network on the European Arrest Warrant, headed by the T.M.C. Asser Instituut in The Hague. Members of JUSTICE, on numerous occasions, have given evidence on EU justice and home affairs issues before select committees of both Houses of the UK Parliament.

A need for change and discussion?

3. We welcome the opportunity to respond to the Commission's Green Paper. However due to the lack of any publicly available empirical basis for the need to address the question of jurisdictional conflicts in criminal matters between EU member states, we are not convinced that a case has actually been made out for the adoption of a legal instrument (re-)addressing the interrelated issues of conflicts of jurisdiction and *ne bis in idem*.
4. While far from perfect, we believe that the system laid down in arts 54-58 CISA, particularly through the emerging jurisprudence of the European Court of Justice, provides individuals with a high degree of protection against the problems of multiple criminal proceedings. Therefore, care will have to be taken that any future Third Pillar instrument dealing with the issue of *ne bis in idem* does not go behind what has already been achieved by means of the CISA provisions.
5. We are adamant that conflicts of jurisdiction and their resolution must not have a negative impact on the fundamental rights of those most affected by criminal proceedings, notably the defendants, or lead to a race to the bottom when it comes to procedural standards and safeguards. Only where all member states operate a uniformly high level of fair trial standards can a system of jurisdiction allocation function properly and without the risk of prosecutorial *forum* shopping to the detriment of the defendants. Therefore, swift adoption and implementation of a Third Pillar instrument guaranteeing minimum defence rights in criminal proceedings throughout the EU will be a necessary corollary to the establishment of a system solving conflicts of jurisdiction between member states.
6. JUSTICE believes that
 - A mechanism for information exchange on ongoing or anticipated criminal prosecutions between the prosecuting authorities of different EU member states might help to solve conflicts of jurisdiction;
 - An EU body could be vested with the power to decide authoritatively disputes between prosecuting authorities of different member states where they fail to agree on a trial jurisdiction at the pre-trial phase;

- Member states' courts could be allowed to entertain applications by defendants for halting proceedings where it would demonstrably be in the interests of justice to conduct criminal proceedings in the courts of another member state and it is ensured that a prosecution will take place;
- The decision on the most appropriate jurisdiction should be based on what would be in the interests of justice with regard to those affected of criminal proceedings. A non-exhaustive list of factors to be taken into account with a presumption in favour of the principle of territorial jurisdiction could provide guidance to the decision-maker.
- The principle of *ne bis in idem* should be extended to the trial phase so as to prevent parallel proceedings (*lis alibi pendens* effect).

Allocation of jurisdiction and the creation of a common judicial area

7. The incremental creation of an area of freedom, security and justice in the EU through the mutual recognition measures envisaged in the Tampere Council conclusions and the Hague Programme will necessarily change the perception of the character and significance of a decision to prosecute an offence with cross-border elements in one member state rather than in another, at least where more than one member state's prosecuting authority would be willing to pursue criminal proceedings.
8. In a European judicial area, where defendants or convicted individuals can easily be transferred between prosecuting member states by means of the EAW, where evidence is readily accessible through means such as the European Evidence Warrant and through other well-established channels of mutual legal assistance or mutual recognition, and where prisoners can be transferred between member states for execution of their sentence in a procedure that will primarily be administrative – in such an area matters of practicability and trial logistics in the broader sense (such as the location of the defendant or of important pieces of evidence or witnesses) will become less of an issue in deciding a potential conflict of jurisdiction between two or more member states.
9. Yet, in the absence of any meaningful degree of harmonisation or approximation throughout the EU of both national criminal procedure and substantive criminal law, the decision on the *forum* of criminal proceedings will still be a significant one as it will generally be determinative of the applicable procedural and substantive law and thus have a very immediate impact on the actors in the criminal proceedings, especially in terms of procedure, evidentiary standards, and available sanctions.
10. One possible solution to conflicts of jurisdiction would be to impose a strict limitation upon the exercise of extraterritorial criminal jurisdiction at least for offences committed in an EU member state. A return to a more exclusive adherence to the territoriality principle or a ranked list of factors for the exercise of jurisdiction with precedence being given to the

member state in which the offence was committed (cf art 5(3) of the draft Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences of 12 July 2005, COM(2005) 276 final), might significantly reduce the risk of conflicts of jurisdiction arising between member states. Thus, while such a measure would still presuppose the existence of a working system of information exchange between law enforcement or prosecuting authorities of different member states, it would limit the need for a mechanism to settle conflicts of jurisdictions. It could not, however, entirely eradicate conflicts of jurisdiction; in cases, for instance, where the act or omission giving rise to a criminal offence has occurred in one member state and the consequences (harm, damage) have resulted in another member state, both states might be able to claim territorial jurisdiction. Furthermore, a strict application of the territoriality principle might create considerable difficulty and frustration between member states in cases of transnational organised crime, where several members of an organisation have acted in different member states to commit offences as part of an overarching plan (eg people trafficking or other forms of organised crime), and for reason of practicability and efficiency, proceedings should ideally be concentrated in a single jurisdiction.

11. While it cannot be disputed that the choice of *forum* for a criminal trial should ideally be made on the basis of the most suitable jurisdiction on a number of factors which will be discussed in this response, the crucial question in this consultation will be the extent to which persons other than the prosecutors will have to be given a voice in the process of determining jurisdictional conflicts. Should the defendant or the victim of a crime be heard when issues of jurisdiction are determined? When should they be informed of the fact that there actually is a positive conflict between two or more prosecuting authorities in different member states? Should reasons be given for the eventual choice of jurisdiction, be it by agreement between the prosecutors or by decision of a body charged with settling jurisdictional conflicts? Will defendants or victims of crimes be able to challenge the appropriateness of the jurisdiction of the member state in which proceedings are taking place on grounds akin to the common law doctrine of *forum non conveniens*?
12. JUSTICE perceives these questions to be highly complex. They demonstrate that the issue of solving conflicts of jurisdiction has two distinct but interrelated aspects: the first is the kind of mechanism that should be provided for the resolution of conflicts between prosecuting authorities at the pre-trial stage; the second, the rights that should be afforded to a defendant and/or other persons affected by criminal proceedings (such as victims and witnesses) in respect of the actual choice and allocation of jurisdiction.
13. What complicates matters further, is the uncertainty of the fate of prospective Third Pillar mutual recognition measures etc announced in the Hague Programme. At present, it is far from certain whether draft measures, such as the European Evidence Warrant or the Framework Decision on certain procedural rights of defendants in criminal proceedings, will be adopted by the Council. However, so as not to deprive this consultation exercise

of its purpose, we will proceed to discuss the Green Paper on the assumption of the European Evidence Warrant, the European Supervision Order and the European Enforcement Order eventually going ahead.

14. In the course of this paper it will become evident that the only meaningful solution to the problem of conflicts of jurisdiction (if there is such a problem at present) in a true spirit of a common judicial area throughout the EU would necessarily entail vesting in an EU body the power to determine such conflicts authoritatively and on a binding basis. Such a transfer of powers not currently vested in any EU body would most certainly need the basis of an additional convention or protocol concluded by the member states (like the Protocol on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968). Bearing in mind the current near insurmountable obstacles for agreeing on certain mutual recognition instruments in the Council, JUSTICE finds it difficult to imagine that such a step would have even a remote chance of being agreed. Any other solution to the problem of conflicts of jurisdiction would, however, in our eyes be significantly less efficient but might also, we predict, face other, equally formidable obstacles in Council. We nonetheless give the following answers in the hope that agreement on a legal instrument, if considered by the Council to be needed, can eventually be reached.

Question 1:

Is there a need for an EU provision which shall provide that national law must allow for proceedings to be suspended by reason of proceedings in other Member States?

15. JUSTICE believes that both the *ratio* behind the *ne bis in idem* provision in art 54 CISA and practical considerations make it imperative that once a criminal prosecution has reached the trial stage, no parallel proceedings should be conducted in another member state. Such parallel proceedings would be an unjustifiable burden not only on the defendant(s), victims and witnesses but also on the public purse of member states, as it is clear from art 54 CISA that parallel proceedings would have to be halted once one of the proceedings has resulted in a final disposal of the case, usually by conviction or acquittal at trial. Furthermore, parallel trials would have to be regarded as a rather unlikely occurrence as the defendant(s) in one trial will generally be unavailable for a parallel trial in another member state. Surrender of the defendant(s) on the basis of a European Arrest Warrant would most likely be refused by the executing member state on grounds of the ongoing prosecution as provided for in art 4(2) of the EAW Framework Decision, which, at least as an optional ground for refusal, has been implemented in all member states.

16. While the above answer seems obvious in its generality and in its application to parallel trials in particular, what will be more difficult to determine is the moment in time when parallel proceedings in the broader sense of the term will have to be halted and with what effect. This question will be addressed below under question no. 8.

Question 2

Should there be a duty to inform other jurisdictions of ongoing or anticipated prosecutions if there are significant links to those other jurisdictions? How should information on ongoing proceedings, final decisions and other related decisions be exchanged?

17. For positive conflicts of jurisdiction to be resolved, information about the existence of a criminal prosecution is crucial. However, the question of who should be informed of ongoing or anticipated proceedings in one member state where the case has significant links to jurisdictions other than the one in which a prosecution is taking place, goes to the very heart of the issue of this Green Paper. Answering it demands clarity about the aim and *ratio* of the Commission's consultation exercise.

18. Where the aim of this consultation and any prospective legal instrument is simply the resolution of actual existing conflicts of jurisdiction (primarily at the investigation stage of criminal proceedings), it would be sufficient to create an information mechanism that would ensure that the fact that parallel proceedings are being conducted or about to be commenced in different member states can be detected and the relevant member states in which these proceedings are taking place be identified. The problem of creating an information mechanism for the simple existence of parallel proceedings is not dissimilar to the problem of the exchange of information about criminal convictions between member states as addressed by the Commission proposal for a Framework Decision on the organisation and content of the exchange of information extracted from criminal records between member states of 22 December 2005 (COM(2005) 690 final). That proposal envisages that information about criminal convictions will, as a rule, be held by a central authority of the member state of nationality of the convicted person. This logistically quite challenging system could be extended to cover not only convictions but also ongoing prosecutions and even acquittals or other decisions finally disposing of cases short of acquittals or convictions. Thus, where a prosecution would be commenced in a case with significant cross-border elements, the prosecuting authority (or, at the very latest, the trial court) could be required to inform the member state of nationality of the defendant(s) of the ongoing proceedings. That latter member state would then be

required to inform the informing member state of the existence of parallel prosecutions or those that have been finally disposed of already. While third country nationals have been expressly excluded from the scope of the above-mentioned proposal for a Framework Decision, this problem could be addressed, for instance, by obliging the member state of (registered) residence of a third country national to store said information. Such a system would allow prosecuting authorities and/or courts to ascertain whether parallel proceedings are being conducted. They could then liaise with each other with a view to agreeing on the concentration of the proceedings in one member state.

19. Where, however, a prospective Third Pillar instrument is aimed not only at detecting and solving actual conflicts of jurisdiction, but, moreover, at ensuring that criminal proceedings are being conducted in the member state best situated to do so (on the basis of criteria to be discussed further on in this paper), the information mechanism discussed above would be insufficient. In this case, the emphasis would be on informing potentially interested prosecuting authorities of the existence of a case with significant links to its jurisdiction. This would mean that information of anticipated or ongoing prosecutions would have to be given not (just) to the member state of nationality of the defendant(s), but (also) to other member state or states that have links to the case in issue.
20. While the latter option for a duty to inform another member state of ongoing prosecutions is in greater consonance with the spirit of mutual trust and co-operation between member states and would lend greater weight to the principle of *lis alibi pendens/ne bis in idem* between member states, we believe that both options have advantages and disadvantages. Arguably, a combined approach might best serve the purposes of a prospective legal instrument in this area.
21. Generally, we believe that a duty to inform another member state should only arise where a case has significant links to another member state: Only where there is a real risk that proceedings for the same facts might be, or may already have been, commenced in another member state is there a need for information exchange. While it will be neither possible nor feasible exhaustively to list the criteria triggering the duty to inform, a number of situations can be made out where there may generally be a risk of a conflict of jurisdictions and thus a need for a duty to inform. These situations will be
 - where the suspect/defendant is a national of another member state or a third country national,

- where the suspect/defendant is ordinarily resident in another member state or a third country,
- where the victim is a member of another member state or a third country national,
- where the offence was committed in another member state ,
- where the offence was directed at another member state's protected interests (eg in national security cases)

In these cases there should be an unqualified duty to inform the member state of nationality of the suspect(s)/defendant(s) and/or the member state to which one of the above links point. In all other cases a duty should only be established where there are circumstances giving rise to a risk of multiple prosecutions.

22. JUSTICE would like to stress that any exchange of information will have to conform to strict data protection standards. We hope that the proposed Framework Decision on data protection in the Third Pillar will provide adequate safeguards for data exchange under an eventual criminal proceedings information exchange scheme.

23. The problem of violation of the duty to inform another member state of a prosecution will be addressed in the next question 3.

Question 3

Should there be a duty to enter into discussions with Member States that have significant links to a case?

24. In light of our answer to questions 5 and 6 we think any dispute settlement mechanism presupposes a certain level of communication between the prosecuting authorities of the different member states concerned. Whether the creation in a prospective legal instrument of an express duty to negotiate prior to resorting to the suggested dispute settlement mechanism will be necessary as a matter of legislative drafting is a question best left to Council and the Commission.

25. What we consider problematic about a proper duty to enter into formal negotiations about an actual conflict of jurisdiction (and also about the duty to inform other member states of ongoing or anticipated criminal proceedings) are the consequences of a breach of this duty. We cannot conceive of a meaningful way of attaching consequences to a failure to comply with these duties to inform and then, if need be, negotiate, that would effectively

discourage non-compliance. Divesting prosecutions that have been conducted in defiance of the duty to inform/negotiate of the *lis pendens/ne bis in idem* effect would primarily punish the defendant(s) and victim(s) who could not be blamed for the prosecuting member state's non-compliance with its duties under EU law. It would also be highly doubtful whether failure to enter into negotiations or to inform another member state of prosecutions could, in itself, be a ground for halting trials on the application of either a defendant or an intervening application of the member state which has fallen 'victim' to the non-compliance of the prosecuting member state with its duties.

26. While, where a member state fails to enter into *negotiations* about solving a conflict of jurisdiction, it could be provided that the dispute settlement mechanism could be activated by the other member state(s), this consequence cannot be envisaged where a member state has already failed to discharge its duty to *inform* another member state of an intended or ongoing prosecution. This constellation may prove to be a real problem as there cannot be found an adequate and immediate response to such non-compliance.

Question 4

Is there a need for an EU model on binding agreements among the competent authorities?

27. Where member states' prosecuting authorities have agreed on a 'lead jurisdiction' for criminal proceedings with a significant cross-border element, we believe an argument could be made for such an agreement to be reduced in writing for evidentiary purposes: in the case of a failure to honour the agreement by commencing the first trial in the courts of the member state that was not designated 'lead jurisdiction', the agreement could be invoked by the defendant(s) or the other state party to the agreement to halt the trial.

28. However, as it is unlikely that a suspect/defendant will be informed of an agreement between prosecuting authorities where this has been reached at an early stage of an investigation, this individual might not be informed of the existence of an agreement until the very end of his or her trial, if at all. As the other state party to the agreement might not be aware of the start of a trial in contravention of the prior agreement, it could not invoke the agreement at trial either. Once the trial is completed, it would often be unfair to rob the defendant of a *ne bis in idem* effect of the final decision on account of the prosecuting

member state's failure to adhere to a binding jurisdiction agreement, particularly where the trial has resulted in an acquittal.

29. Apart from these difficulties in bringing a purportedly binding agreement to bear, it would have to be ensured that the conclusion of a formal agreement aimed at preventing the prosecuting authorities from acting contradictorily in each and every case where an offence shows a link to another member state, would not overburden these authorities with unjustifiable paperwork and formalities.
30. Therefore, while JUSTICE recognises the theoretical advantage of introducing binding written agreements to create an element of transparency in the process of allocating jurisdiction, we doubt the practical effectiveness of such written agreements.

Question 5

Should there be a dispute settlement/mediation process when direct discussions do not result in an agreement? What body seems to be best placed to mediate disputes on jurisdiction?

Question 6

Beyond dispute settlement/mediation, is there a need for further steps in the long run, such as a decision by a body on EU level?

31. Presently, conflicts of jurisdiction are in effect 'solved' by the principle of priority of final disposal of a case under art 54 CISA. This may well be regarded as unsatisfactory for the inherent randomness of the 'solution'.
32. At a national level allocation of cases to different regional prosecuting authorities and courts is usually subject to the supervisory jurisdiction of a superior prosecutor or court (cf paragraph 143(3) of the German Court Organisation Act [GVG] and paragraphs 12 and 14 of the *Straprozessordnung* [StPO] or arts 84 and 658 *et seq* of the French *Code de Procedure Penale*). In the absence of such a jurisdiction of a superior authority or court to deal with conflicts of jurisdictions between different prosecuting authorities, however, it is difficult to imagine a more principled and convincing solution to problems of conflicts of jurisdiction than that of priority, short of vesting a dispute settlement competence in one of the EU institutions. Member states' courts will generally have to be

considered ill-suited to decide a jurisdictional conflict between different member states' prosecuting authorities, at least at the pre-trial stage.

33. JUSTICE would therefore recommend that a binding dispute settlement competence be vested in an EU institution. This seems to be the only solution acceptable in principle for the resolution of jurisdictional conflicts between member states at the pre-trial stage.
34. JUSTICE welcomes the role Eurojust already plays in solving conflicts of jurisdiction between member states' prosecuting authorities. Presently, due its institutional set-up and composition of criminal justice co-operation experts, Eurojust would be the only European institution in a position to make a meaningful contribution to the resolution of conflicts of competence and jurisdiction. We therefore believe that the college of Eurojust should be given the power, upon the application of a member state's prosecuting authority, to make binding rulings on which of the prosecuting authorities of different member states should be allowed to proceed with a prosecution where no agreement can be reached. This power, which would have to be contained in a legal instrument similar to the Protocol on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968, could be exercised on an *ad hoc* basis by an arbitral panel comprising of Eurojust's president and the members the college of Eurojust representing those member states whose prosecuting authorities are in conflict. Such a composition would ensure that a decision would be reached on the basis of profound knowledge of the concerned member states' legal systems. As the decision on a conflict of jurisdiction would not amount to a determination of a defendant's civil rights and obligations within the meaning of art 6(1) ECHR, no issue as to the independence of the seconded national members of Eurojust would arise. It would, however, have to be ensured that the national members, when deciding a given case, would act independently in the sense that they would not, in this respect, be subject to any orders from their respective member states.
35. Irrespective of the choice of dispute settlement body, JUSTICE is adamant that any dispute settlement mechanism would have to operate swiftly so as to not unduly lengthen criminal proceedings; this is especially important where a defendant has been remanded in pre-trial custody.

Question 7**What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?**

36. This question in itself would merit a very substantial consultation. Several aspects need to be disentangled and separately addressed.
37. The first question is whether defendants or other persons affected by criminal proceedings, such as crime victims and other witnesses, should have a right to challenge an agreement (be it formally binding or not) between the prosecuting authorities of at least two member states to concentrate proceedings in the jurisdictions concerned. JUSTICE believes that such a right should be created but generally be limited to the defendant(s), as he or she will be the individual affected the most by the consequences of the prosecutors' choice of jurisdiction.
38. We believe, however, that this right should *not* be understood to be aimed at judicially reviewing the abovementioned agreement between prosecuting authorities or a Eurojust decision as such. Rather, it should be construed as a general right, independent of the existence of such an agreement, for a defendant to ask the trial court, as a preliminary matter at the outset of a trial, to pronounce on the suitability of the trial jurisdiction in cases where other member states' courts could be shown, as a matter of law, to be competent to deal with the case in issue too. Such a right to object to the trial venue and to make an application to have the case transferred to another court of the same member state is well-known in member states' domestic criminal justice systems: in Germany, a defendant can make an application to the court that is commonly superior to both the actual trial court and the court in which the defendant would prefer to be tried under paragraph 12(2) *StPO*. A similar right exists for defendants tried on indictment in England and Wales under s. 76(3) Supreme Court Act 1981. It would be only logical in what is supposed to become an area of justice throughout the EU to extend these rights of defendants to situations where the allocation of jurisdiction *between different member states* is in issue.
39. Once it is accepted that there should be a right of defendants to challenge the decision on the trial venue where jurisdiction to try an offence demonstrably exists in more than one member state, the question will be in which kind of proceedings, before which court and on which grounds such a challenge should be allowed to be mounted.

40. We would consider a procedure along the lines of the abovementioned domestic procedures for challenging the allocation of a trial venue to be the most feasible solution. A challenge would thus not be brought in the form of an application to judicially review an EU prosecutorial agreement or Eurojust dispute settlement decision on the trial jurisdiction, but rather as a freestanding application to decide on the fairness or appropriateness of the choice of jurisdiction. This would entail that prosecuting authorities (or Eurojust) would not have to provide a defendant with the reasons for the initial choice of jurisdiction, as the determining body would not, technically speaking, engage in a review exercise. However, the actual prosecuting authority would obviously, in the course of the determination of the application, make representations as to the grounds of challenge of the trial venue, so that a reasonable degree of transparency of the prosecutorial decision on the trial jurisdiction would be achieved. Such a procedure would be similar to purely domestic challenges of trial venue.
41. A freestanding application and determination procedure would also be preferential in respect of factual issues that only arise or emerge after the prosecuting authorities' or Eurojust's decision on the trial jurisdiction. The decisive moment in time for the assessment of the appropriateness or fairness of the choice of jurisdiction can only be the moment of the actual decision by the court deciding the application. We also cannot see a reason why (as the Staff Working Paper asserts) the decision by an EU body on the trial jurisdiction (such as the proposed Eurojust arbitral decision) would *necessarily* have to be subject to judicial review in the strict sense of that term. The solution suggested here would allow defendants to have the decision on the trial jurisdiction looked into by a court whilst stopping short of establishing a full blown judicial review mechanism.
42. It could also be contemplated to give a 'competing' prosecuting authority of a member state other than the trial state standing to bring such an application challenging the choice of trial jurisdiction. Granting such a right to challenge the trial jurisdiction could be imagined where the prosecuting authority of the trial state had failed to discharge its information obligation towards another member state's prosecuting authority and where *lis alibi pendens* effect has thus been triggered by the start of the trial, preventing parallel or subsequent proceedings in the other member state.
43. Ideally, decisions on the choice of the trial jurisdiction would be taken by a superior court common to the courts between which jurisdiction is in issue. This is the solution under the French *Code de Procedure Penale* and the German *Strafprozessordnung* (paras 12 and 14). If a similar solution would have to be found here, only an EU judicial body could be

given the competence to deal with challenges of choice of jurisdiction between member states. This could either be the CFI or the ECJ; Eurojust would lack the appropriate judicial independence such a determination (which goes beyond the settlement of disputes between prosecuting authorities) would require. Both of these institutions, however, lack the expertise to deal with the technically intricate questions of the appropriateness of a given trial jurisdiction; furthermore it would have to be feared that such kind of interlocutory applications to the European courts might considerably delay criminal proceedings. It would therefore seem more reasonable, albeit from a strictly legalistic point of view rather disingenuous, to vest competence for entertaining challenges to the choice of trial jurisdiction in member states' courts, most presumably the actual trial courts.

44. An issue that goes beyond the scope of this consultation is the moment from which on a defendant (or other member state) could bring an application to halt proceedings on one competent jurisdiction in favour of another jurisdiction. Generally, this matter should be resolved at the outset of a trial as a preliminary matter by the trial court. However, where courts are seized with certain prosecution matters in the pre-trial phase (eg when being asked to grant search or arrest warrants), it could be argued that a defendant should, at that stage already, be allowed to raise the issue of allocation of jurisdiction, especially where the courts of different member states have made parallel pre-trial orders. This matter cannot be resolved in this reply; it will need to be analysed carefully once it is contemplated that defendants should be given the right to challenge a jurisdiction allocation decision.
45. It seems conceivable that member states' trial courts, when being seized with an application challenging the trial venue, could ask Eurojust for a non-binding advisory opinion on the issue before the court. It is anticipated that such an opinion could be drawn up relatively quickly, thus not substantially delaying the trial proceedings. The fact that a conflict of jurisdiction dispute between the prosecuting authorities of two or more member states, at the investigative or pre-trial stage, may already have been settled by a Eurojust decision would not be decisive of the disposition of the jurisdiction application to the trial court, not least for the fact that circumstances may have changed significantly or emerged only after the Eurojust decision had been made.
46. As member states' courts could not compel prosecuting authorities of other member states take over or institute criminal proceedings in their respective jurisdictions, an application challenging the choice of trial jurisdiction could only have the effect of halting the trial, similarly to the staying competence on the grounds of *forum non conveniens* of

the civil courts in the common law member states. Therefore, even where a trial court considers itself being a less appropriate 'venue' for the instant criminal proceedings than the courts of another member state having jurisdiction over the offence(s), the former court should only be required to halt proceedings where it receives undertakings from other member states' prosecuting authorities to the effect that a prosecution would take place in that authority's jurisdiction.

47. An equally difficult question as the one concerning who may decide issues of the choice of trial jurisdiction is the one as to the grounds upon which an application for the halting of criminal proceedings in one member to the benefit of another member state should be entertained (and potentially succeed). As JUSTICE believes that each case turns on its own facts and that there are only very few entirely illegitimate considerations for the choice of jurisdiction (see below questions 10-13), we agree with the tentative suggestion in the Green Paper and the Staff Working Paper that the appropriate test for challenge of the choice of trial jurisdiction could be a very strict one of 'arbitrariness', 'abuse of process', 'unfairness' or 'disproportionality', taking into account the presumptions and balancing factors which govern the jurisdiction decision (see below questions 10-13) and, of course, the relevant provisions of the ECHR, particularly arts 5, 6, and 8. It is arguable that the proportionality test, in the context of a defendant's art 8 ECHR argument, may indeed be given considerably greater weight in the future as EU judicial co-operation measures will significantly facilitate proceedings to be conducted not at the place of the commission of an offence but in the member state of residence of a defendant. In certain cases, a more defendant-friendly approach to art 8 ECHR than the one currently adopted by courts in the EU in the context of extradition or surrender decisions might indeed require such allocation decision for reasons of proportionality. However, as the court deciding the application for the halting of proceedings would only be allowed to grant the application and halt proceedings where these could be 'transferred' to another member state, it could also be contemplated to give the trial judge a significantly wider discretion to allow an application on the grounds of a more appropriate disposition of the case in another jurisdiction or of being 'in the interests of justice'. Such a wide test, not unlike the one under the common law principle of *forum non conveniens* in civil cases (which, interestingly, may not apply in the context of intra-EU civil jurisdiction issues under the Brussels I Regulation and the former Brussels Convention), would be consonant with the tests applied by some member states' higher courts when dealing with purely domestic applications for change of trial venue.

Question 8

Is there a need for a rule or principle which would demand the halting/termination of parallel proceedings within the EU? If yes, from what procedural stage should it apply?

48. This question seems closely related to question 1.

49. As already indicated above under question 1, we believe that the principle of *ne bis in idem* should already apply at the trial stage in the sense that once a prosecution has gone to trial before a court, parallel proceedings should be suspended under the well-known principle in EU civil litigation of *lis alibi pendens*. Once the case has been finally disposed of in the trial court, the suspended proceedings should be terminated completely.

50. We agree with the tentative suggestions in the Staff Working Paper that the most appropriate moment in criminal proceedings from which suspension of parallel proceedings is warranted, is the outward manifestation of the prosecutorial decision to make a case go to trial by sending an appropriate statement of offences or more formal indictment to the trial court. Obviously, considerable differences in the procedural laws of the member states will render it quite complicated to formulate conclusively a rule describing the moment from which on *lis alibi pendens* will block parallel proceedings. In most civil law jurisdictions the sending of a prosecutorial indictment to the trial court will have to be seen as the right moment from which on the defendant has to be protected against multiple demands on his presence to stand trial and appear at court hearings in different jurisdictions. For purposes of English law, it would seem that the equivalent trigger for the *lis alibi pendens* effect would be the presentation of a formal statement of offence (the so-called information) to a magistrates' court for summary offences or offences triable either way, and the reception of an indictment by the Crown Court in case of indictable offences.

Question 9

Is there a need for rules on consultation and/or transfer of proceedings in relation to third countries, particularly with parties to the Council of Europe? What approach should be taken in this respect?

51. We consider it premature to discuss extending a transfer/consultation mechanism that is not even fully operative in the EU to third countries. EU experience will show what measures may feasibly be taken in relation to these countries in the future.

Question 10

Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?

Question 11

Apart from territoriality, what other criteria should be mentioned on such a list? Should such a list be exhaustive?

Question 12

Do you consider that a list should also include factors which should not be considered relevant in choosing the appropriate jurisdiction? If yes, what factors?

Question 13

Is it necessary, feasible and appropriate to "prioritise" criteria for determining jurisdiction? If yes, do you agree that territoriality should be given a priority?

52. JUSTICE agrees with the comments in the Staff Working Paper and the Eurojust 'Guidelines for deciding which jurisdiction should prosecute' that, while there should be a primarily indicative presumption in favour of the territoriality principle, there should be no hard and fast rules as to the 'lead jurisdiction' where a conflict of jurisdiction between EU member states exists.

53. The decision on the choice of trial jurisdictions should be based on a fair balancing of all individual factors going to the issue of trial venue of a given case. In this balancing exercise, the decision-maker has to come to an allocation decision that is in the interests

of justice. A decision ignoring what the interests of justice - as overarching principle of allocation of trial jurisdiction - dictate, must not be allowed to stand.

54. The most important factors to be given due weight in this balancing exercise can easily be identified as those already listed in the Staff Working paper and the Eurojust guidelines; there is no need to rehearse them here. Drawing up an indicative, non-exhaustive list of these factors prosecuting authorities, Eurojust and courts will have to take into account when deciding on the allocation of trial jurisdiction seems to be a helpful way to sharpen the decision-maker's critical view of all the considerations he or she should have regard to and weigh up. In order to provide further guidance for the allocation decision-making process, priority should generally be given to the territoriality principle, and second to it, the principle of ordinary residence of the defendant(s). In consonance with the Eurojust guidelines on jurisdiction, we think that criminal proceedings should usually take place and be concentrated 'where the majority of the criminality occurred'. It can safely be assumed that the place of the commission of the alleged offence will generally be the place best suited for holding prosecution and trial. Territoriality has always been the main principle governing the law of criminal jurisdiction and the applicability of domestic criminal law; at common law the maxim that 'all crime is local' was a particularly time-honoured one.
55. Where, however, for whichever reason it would be considered unfeasible or contrary to the interests of justice to conduct a prosecution in the member state where an offence was committed, we consider it appropriate to give great weight to the defendant's place of residence. As it will inevitably be the defendant who is affected greatest by criminal proceedings (especially where he or she has been remanded in pre-trial custody), a prosecution should be conducted and a trial take place in the member state the legal system of which the defendant can be presumed to be most familiar with and of which he or she speaks the language. This will generally be the member state in which the defendant is ordinarily resident. Also, considerations of proportionality in the context of an art 8 ECHR argument may militate further for greater weight to be given to the place of residence of a defendant in the decision of the trial jurisdiction. Only where factors other than the place of the offence and the residence of the defendant(s) can be shown to be of sufficient importance under an interests of justice test should proceedings take place in other member states than the ones of commission and residence.
56. We think that factors not linking an offence to a jurisdiction, such as the relative severity of available penalties or evidentiary standards for convictions in a member state, must not be given any weight in the decision on the allocation of a trial jurisdiction. These

factors would not stand the interests of justice test. However, we believe there is a danger in trying to list these impermissible considerations: drawing up even a clearly non-exhaustive list of impermissible factors could be considered counter-productive in preventing prosecutorial *forum* shopping in that the list might be used to argue that factors not identified as impermissible on the list could be considered legitimate in the allocation decision. This, however, may not always be the case. It therefore seems preferable not to draw up a 'negative list' but rather trust that the interests of justice test and the presumptions in favour of territoriality or ordinary residence in a future legal instrument on jurisdiction will weed out illegitimate considerations in practice. Alternatively, it could be contemplated that a recital be formulated, disapproving of prosecutorial *forum* shopping, and, *inter alia*, listing at least some of the criteria we believe do not further the interests of justice in an allocation decision (such as severity of available sentences etc, see above).

Question 14

Is there is a need for revised EU rules on *ne bis in idem*?

57. JUSTICE considers the rules on intra-EU double jeopardy or *ne bis in idem* under arts 54-58 CISA to provide a very valuable safeguard for suspects and defendants against the risk of cascading prosecutions for the same set of facts in different member states of the EU. Through its jurisprudence in the cases *Gözütok* (C-187/01), *Miraglia* (C-469/03) and, most recently, *Esbroeck* (C-36/04), the ECJ has given effect not only to the bare wording, but, moreover, to the spirit of art 54 CISA in a way that underscores the principle of mutual recognition as a cornerstone of EU judicial co-operation in criminal matters. We are in wholehearted agreement with this jurisprudence.

58. While, as mentioned earlier, we find it difficult to assess the actual practical need for a revision of the *ne bin in idem* rules in CISA, we think that arts 54-58 CISA leave at least some theoretical room for change, further enhancing the effectiveness of the *ne bis in idem* principle throughout the EU. One of these changes already discussed above (questions 1 and 8) would be to make the relevant CISA articles applicable to the trial phase of criminal proceedings, thus extending the *ne bis in idem* effect to parallel trials under the heading of *lis alibi pendens*. A logical consequence of this change to the *ne bis in idem* regime of CISA would be the removal of the enforcement condition in art 54 (see

below under question 20). Similarly, the territoriality and national security/national officials exceptions of art 55 should be removed (see below under question 21).

Question 15

Do you agree with the following definition as regards the scope of *ne bis in idem*: “a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority”?

Question 16

Do you agree with the following definition of “final decision”: “...a decision, which prohibits a new criminal prosecution according to the national law of the Member State where it has been taken, unless this national prohibition runs contrary to the objectives of the TEU?

Question 17

Is it more appropriate to make the definition of "final decision" subject to express exceptions? (e.g. "a decision which prohibits a new criminal prosecution according to the law of the Member State where it has been taken, except when...")

59. JUSTICE would like to emphasise that while the present definition of the scope of the *ne bis in idem* principle does not, at first glimpse, look comprehensive, the ECJ in its abovementioned jurisprudence has interpreted it purposively and thus considerably extended the principle beyond what the actual wording of art 54 CISA might suggest. We fully endorse this jurisprudence and sound a note of caution not to inadvertently limit the scope of the principle in a future legal instrument by adopting a seemingly more comprehensive, highly technical and thus, in effect, perhaps more narrow definition.

60. Looking at the variance between member states in a) the way unlawful behaviour is addressed through either criminal prosecutions and/or administrative penalties subject to a recourse to the criminal courts, and b) in the way prosecutions can be terminated prior to a case going to trial for numerous reasons, we think that the definition suggested in question 15 may too narrow and might thus not cover all the situations that might currently considered to be covered by art 54 CISA.

61. The term 'criminal matters', when narrowly interpreted, could lead to regulatory offences being excluded from the scope of a future provision where these are dealt with under administrative law provisions and by administrative agencies rather than criminal courts (eg in the case of *Ordnungswidrigkeiten* in German law). This might lead to rather arbitrary results in the way *ne bis in idem* or *lis alibi pendens* would apply, making it dependent solely on the way a member state classifies certain offences as criminal or just administrative. We therefore think that a definition should be drafted more along the lines of the definition of a conviction under art 2(a) of the draft Framework Decision on the organisation and content of the exchange of information extracted from criminal records between member states of 22.12.2005 (COM(2005) 690 final).
62. Care would also have to be taken not to exclude prosecutorial decisions from the scope of decisions potentially capable of having *ne bis in idem* effect. Thus the term 'judicial authority' in the definition suggested in question 15 could be regarded as misleading in that it might be argued to exclude prosecuting authorities when interpreted strictly legalistically. And as not all prosecutorial decisions finally disposing of a case are subject to appeal under national law (eg those in the case of *Gözütok/Brügge* pursuant to para 153a of the German *StPO*), the definition suggested in question 15 might thus have the consequence of excluding prosecutorial decisions not subject to appeal from the scope of the *ne bis in idem* principle. This would be contrary to the ECJ's decision in *Gözütok* (C-187/01).
63. A slightly less ambiguous definition of the scope of *ne bis in idem* could therefore read: 'a decision of a criminal court, prosecuting authority or, in case of an administrative authority, a decision which can be appealed against before a court having jurisdiction in particular in criminal matters, finally disposing of an allegation of a criminal offence or an act punishable in accordance with national law as an offence against the law.' In case the project of a new definition of the scope of the *ne bis in idem* principle will eventually be embarked on, we would strongly urge the Commission and Council to make clear in a recital, an explanatory memorandum or other appropriate *travaux préparatoires* that the definition should not in any way diminish the scope of the principle as established by ECJ's recent case law.
64. With regard to the definition of a 'final decision' suggested in question 16 and the problem of possible express exceptions addressed in question 17, the principle of mutual recognition of judicial decisions in a European judicial area would suggest that it is indeed the domestic law of the member state in which proceedings took place that should be

determinative, or at least strongly indicative, of the finality of a judicial decision in those proceedings. This conforms to the ECJ's reasoning in *Gözütok* (C-187/01).

65. While a rather open-ended general exception to the rule as the one suggested in the definition in question 16 may eventually prove necessary as an 'emergency break' to address the very rare case of unacceptable situations arising out of the peculiarities of member states' laws, it has to be emphasised that this exception should only be resorted to in a truly exceptional case, such as the quite peculiar one in *Miraglia*. Granting *ne bis in idem* effect to a foreign decision will have to be the rule in the overwhelming number of cases.
66. In light of the formidable difficulties which would attend the drawing up of an exhaustive list of specific exceptions to the general rule that finality of criminal proceedings is determined by the domestic law of the member state in which the proceedings were taking place, JUSTICE would strongly discourage such exercise. Moreover, determining the limits to the general rule (and thus the scope of the general exception) should be left to member states' courts and especially the ECJ.
67. However, we would like to point out that a number of member states have provisions in their domestic criminal procedure laws allowing the reopening of a case that has been subject to a previous final decision in certain, generally very limited circumstances. In English law, Part 10 of the Criminal Justice Act 2003 allows acquittals to be quashed by the Court of Appeal and another trial to take place where there is new and compelling evidence and an application to quash would be in the public interest. In German law, under a somewhat stricter test, the reopening of a case (*Wiederaufnahmeverfahren*) is provided for. At present arts 54 – 58 CISA do not contain a provision limiting the *ne bis in idem* effect of a foreign final decision. It is, however, conceivable and might be considered to be consistent with the EU becoming a common area of justice, to allow the reopening of foreign proceedings under a very strict test in another jurisdiction. Art 4(2) of Protocol No 7 to the ECHR might provide a model for a clause addressing this problem, despite the fact that the *ne bis in idem* provision in art 4 of the said Protocol only covers purely domestic cases and not the situation in issue here, *viz* cross-border *ne bis in idem*. As a consequence and in light of the remarks under question 19 below, the reference in art 4(2) to new or newly discovered facts would have to be read as referring to 'new evidence'. Nonetheless, it would have to be considered very carefully whether reopening of a final decision should be governed a) by a clause modelled on art 4(2) of the Protocol containing a specific test, b) by the law of the member state in which the decision to be reopened has been rendered, or c) by the law of the member state in which reopening is

sought. However, while JUSTICE can see the argument in favour of the inclusion of a concept of reopening foreign final decisions, we would advise against such an inclusion as it would considerably limit the concept of *ne bis in idem* as it has been developed so far by the ECJ under arts 54-58 CISA, not allowing for any exceptions so far.

Question 18

In addition, to the elements mentioned in question 16 and 17, should a prior assessment of the merits be decisive on whether a decision has an EU wide *ne bis in idem* effect?

68. JUSTICE considers this to be a question that cannot be answered in its generality for reasons of its vast complexity.
69. The decisions in *Gözütok* (C-187/01) and *Miraglia* (C-469/03) suggest that a certain degree of merits assessment, be it one carried out in the course of a full trial or only cursorily by a prosecuting authority on the basis of the facts as they appear on a case file in the pre-trial stages of criminal proceedings, may be required for a final decision to have *ne bis in idem* effect. However, these two cases do not lend themselves to generalisation. *Miraglia*, in particular, seems to be a case which really turns on its own facts. The ECJ in that case cannot be understood to have required a trial court decision to *always* go into the merits of allegations of criminal wrongdoing before it can have *ne bis in idem* effect under art 54 CISA.
70. We believe that where member states' laws confer finality on a decision taken by a court of prosecuting authority, this finality should be respected by other member states under the principle of *ne bis in idem* irrespective of there having been a prior assessment of the merits of the allegations. Wholly exceptional cases such as the one in *Miraglia* could then be dealt with under the express exception to the finality rule (cf the answer to question 16 above).
71. Where, at least in the continental member states, a court after a trial has acquitted a defendant for reasons of a time bar to the prosecution of the offence in question, it should be immaterial whether there has been a prior assessment of the merits of a prosecution. The acquittal should generally be considered final for all domestic purposes. In this case, finality of a decision without merits assessment will thus have to be given full transnational *ne bis in idem* effect. (The German *Bundesgerichtshof* held to this effect on

10 June 1999 in Case 4 StR 87/98, basing its reasoning on German criminal law and an analysis of French law as submitted by the French Ministry of Justice. This issue is currently the subject matter of a preliminary reference to the ECJ in the case of *Gasparini* (C-467/04)). However, where a *prosecuting authority* has discontinued proceedings at the pre-trial stage for reasons of a time bar, this decision will usually *not* have a final effect domestically and thus should not attract finality in an EU context. (The Austrian *Oberster Gerichtshof* so held in respect of art 54 CISA on 17 June 2004 in Case 12 Os 23/04) Equally, where a court has acquitted a defendant for want of evidence, this acquittal on the merits will be final (at least when confirmed upon prosecutorial appeal). However, a similar discontinuance ‘on the merits’ of a prosecution at the pre-trial stage by a prosecuting authority for lack of evidence will not usually have the same effect and thus not attract finality domestically and *ne bis in idem* EU-wide. Cases where prosecuting authorities have the power to discontinue prosecutions on the condition of the defendant performing a restorative act or paying a sum of money, as in the case of *Gözütok*, fall in a middle category, as there quasi-punitive measures are taken against the defendant on the basis that the file indicates at least a certain level of culpability. These special features of the case justify the *ne bis in idem* effect conferred upon them by the ECJ.

72. The fact that prosecutorial decisions to discontinue prosecutions at the pre-trial stage on grounds of time bars or evidentiary insufficiency of a case do not generally enjoy finality and thus should not be given *ne bis in idem* effect as opposed to acquittals ordered by a trial court on the same grounds, is also a consequence of the logic behind the principle of *ne bis in idem*: this rule is aimed at preventing the burden of consecutive *trials* a defendant would have to shoulder were it not for the principle. It is not, however, geared towards preventing multiple or consecutive investigations or prosecutions where these do not reach the trial courts as these can be presumed to cause significantly less hardship and stress to a defendant. Where a defendant did not have to submit himself or herself to the rigours and inconveniences of a full trial, he or she will not, as a rule, be in need of, and entitled to, a protection against further proceedings.

Question 19

Is it feasible and necessary to define the concept of *idem*, or should this be left to the case law of the ECJ?

73. We believe that the present definition in art 54 CISA of the *idem* as interpreted by the ECJ in its most recent decision in *Esbroeck* (C-436/04) adequately reflects the *ratio* and purpose of the principle of EU-wide *ne bis in idem* (or later on *lis alibi pendens*) for the reasons set out in the judgment and, most convincingly, in Advocate General Colomer's opinion. Only this interpretation of *idem* as *idem factum* ('same facts') rather than *idem crimen* ('same offence') allows for the legal certainty necessary as a prerequisite to the free movement of persons within the EU. The difficulties inherent in the *idem crimen* approach have been shown in the ECtHR's rather confusing, if not contradictory, jurisprudence in *Gradinger v Austria*, *Oliveira v Switzerland* and *Franz Fischer v Austria*.
74. The rather more difficult issue in this context is how to deal with situations where only some (or even very few) of the facts that have formed the basis of a final decision in one member state, in conjunction with other, new facts, are subsequently made the subject of criminal proceedings in another member state. JUSTICE considers that this extraordinarily intricate issue is best left for the ECJ to decide in its emerging case law on art 54 CISA.

Question 20

Do you see any situations where it would still be necessary to retain an enforcement condition, and if yes, which ones? If yes, can the condition be removed if a mechanism for determining jurisdiction is established?

75. In a European judicial area where custodial and financial penalties can be enforced throughout the EU by means of European Arrest Warrants, or on the basis of the Framework Decision on the mutual recognition of financial penalties, retention of an enforcement condition in a future instrument on *ne bis in idem* seems unwarranted. The member state in which the sentence has been passed has at its disposal all the instruments it needs to ensure execution of the sentence. The present possibility that a sentence, once handed down, is executed by means of a European Arrest Warrant should thus be equated to the actual execution of the sentence, as was suggested by the

German *Bundesgerichtshof* in its order for a preliminary reference to the ECJ of 30 June 2005 in the case of *Kretzinger* (now C-288/05).

Question 21

To what extent can the derogations in Article 55 CISA still be justified? Can they be removed if a mechanism for determining jurisdiction is established, or would you see a need for any further measures to “compensate” for a removal of the derogations under these circumstances?

76. While we expect member states to be most reluctant to agree on a removal of the exceptions contained in art 55 CISA, we believe these exceptions to be unnecessary in a future legal instrument on conflicts of jurisdiction and *ne bis in idem*.
77. Considerations underlying the derogations provided for in art 55 CISA (like territoriality or ‘national security’) should be addressed at the jurisdiction stage as one of the factors to be taken into account when prosecuting authorities agree on a trial jurisdiction or when Eurojust makes a dispute settlement decision. We believe that in an area of freedom, security and justice in Europe there can be no justification for subjecting a defendant to consecutive trials on the simple grounds of territoriality (art 55(1)(a)), national security or state interests (art 55(1)(b) and (c)).

Question 22

Should *ne bis in idem* be a ground for mandatory refusal of mutual legal assistance? If yes, which EU law provisions should be adapted?

78. JUSTICE would like to stress that, as a rule, once a final decision has been rendered in criminal proceedings in one member state, criminal investigations and pre-trial proceedings *for the same acts* (in the sense of ‘same facts’ under the *Esbroeck* jurisprudence) should not subsequently be conducted in another member state, as any potential trial would be barred under the *ne bis in idem* principle. Therefore, member states should not grant mutual legal assistance where a final decision has been rendered in a member state.

79. It has to be noted that, though, that facts already adjudged in another member state might legitimately be a starting point for investigations into other, perhaps related, facts amounting to a criminal offence. Strictly speaking, *ne bis in idem* would not bar these investigations as they would cover different (f)acts from the ones having been the subject matter of the final decision rendered in another member state. In practice, however, it may prove difficult to draw a very clear line between investigations for the same or other, closely related acts, so it might be difficult for member states to decide in which case MLA may be granted and in which it would have to be refused. This practical problem notwithstanding, we still believe that, as a matter of legislative drafting, *ne bis in idem* should usually be a mandatory ground for refusal of MLA. It would be for the member state seeking MLA to convince the authorities of requested state that the investigation or proceedings concern acts not yet adjudged elsewhere.

80. While the above question uses the expression MLA, we would like to add some remarks relating to Third Pillar measures of mutual *recognition* and *ne bis in idem*. In line with our position on *ne bis in idem* and requests for MLA, we consider that the grounds for optional refusal of mutual recognition in art 4(2 and (2) of the Framework Decision on the European Arrest Warrant, art 7(1)(c) of the Framework Decision on the execution of freezing orders, art 7(2)(a) of the Framework Decision on mutual recognition of financial penalties, and the contemplated art 15(2)(a) of the proposal for a Framework Decision on the European Evidence Warrant should be converted into mandatory grounds for refusal.

Question 24

Do you agree that with a balanced mechanism for determining jurisdiction certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?

certain grounds for optional non-execution should be converted into grounds for mandatory non-execution or vice versa? Which grounds, in particular?

81. We believe that a comprehensive answer to these questions would require an in-depth analysis of each mutual recognition instrument and the individual grounds for non-recognition listed therein, which is beyond the scope of this consultation.

82. However, on a more general level, we consider that a working system of allocation of jurisdiction and settlement of jurisdictional conflicts on the basis of a presumption in favour of territorial jurisdiction would render unnecessary the optional territoriality ground for non-recognition (eg in art 4(7)(a) of the EAW Framework Decision and art 7(2)(d)(i) of the Financial Penalties Framework Decision).

Question 23

Is there a need for a more coherent approach on the *ne bis in idem* principle in relation to third countries? Should one differentiate between parties of the Council of Europe and other countries?

83. The problem of parallel or consecutive criminal proceedings is a worldwide one. While the current lack of transnationally applicable *ne bis in idem* provisions in international instruments is lamentable, the establishment of a true worldwide *ne bis in idem* principle would be fraught with formidable difficulties.

84. The transnational principle of *ne bis in idem*, while being recognised to a certain degree in most common law jurisdictions but less so in civil law ones, is still in what could be described as an experimental phase. The ECJ is slowly starting to flesh out the sparse words of art 54 CISA. Thus, once the EU system of *ne bis in idem* is shown to work smoothly within the EU, it would only seem sensible to extend the principle to the non-EU member states of the Council of Europe by way of a CoE convention. Whether or not worldwide extension of the principle of *ne bis in idem* by means of an international treaty would then be warranted remains to be seen. However, EU member states should be encouraged to consider extending *ne bis in idem* effect to non-EU final decisions under domestic criminal law; the experiences gathered in this context could then form the basis of an assessment of the need for, and possible direction of, treaty regulation of this matter with third countries.

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