



## Statewatch Analysis

# The proposed Framework Decision on conflict of jurisdiction in criminal proceedings: Manipulating the right to a fair trial?

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### Introduction

The Czech Presidency of the Council of the EU has proposed a 'Framework Decision' that would address the issue of conflicts of jurisdiction in criminal proceedings - ie cases where more than one Member State has jurisdiction to prosecute a particular person in respect of the same facts. The proposal has been discussed and partly agreed at the Feb. 2009 JHA Council, and there is a draft report on the proposal under discussion in the European Parliament (EP), which must be consulted on the proposal. But many aspects of the proposal have not yet been agreed.

This proposal is linked closely with the principle of 'double jeopardy', also known as *ne bis in idem*, which prevents a person being prosecuted twice for the same facts. The double jeopardy principle is a long-established protection for criminal suspects in national constitutions and international human rights law. In fact, the EU already has a double jeopardy rule for cross-border situations, which has been the subject of ten judgments before the Court of Justice already.

Back in 2003, the Greek government made a proposal on the linked issues of conflicts of jurisdiction and double jeopardy, but the Council failed to agree on the issue. The Commission had also subsequently planned to make a proposal on both issues, but later decided against it, following the reaction of Member States to a Green Paper on the issues. The Czech Presidency proposal only concerns the issue of conflicts of jurisdiction.

The object of the new proposal is not to amend the existing EU double jeopardy rules as such, but rather to prevent cross-border double jeopardy from arising in the first place. To do that, the proposal would set up a mechanism for national authorities to contact each other at an early stage in order to discuss how to proceed with the prosecution.

Unfortunately, there are fundamental problems with the proposal, which have been worsened during negotiations in the Council. As it stands, the proposal could

well exacerbate the problem of multiple prosecutions and provide a mechanism for cynical manipulation of the choice of jurisdiction in such cases by prosecutors.

### Details of the proposal

The Framework Decision will be limited in scope to situations of a possible double jeopardy as defined by existing EU rules - ie a case involving exactly the same person(s) and the same facts. This has been agreed by the JHA Council in February 2009. It is possible that, during negotiations, it will be agreed to apply the Framework Decision optionally when there are *related* cases pending in multiple Member States - ie cases involving connected facts or different persons.

The first step under the Framework Decision is the obligation of one national authority to contact another one. The original proposal specified that this would take place when there was 'a significant link to one or more Member States', while the latest draft specifies that this takes place when there are 'reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member State' (Art. 5 of the proposal). This has also now been agreed by the Feb. 2009 JHA Council. The concept of 'reasonable grounds to believe' will be further explained in the preamble; recital 5a of the latest draft provides as follows -

*Reasonable grounds could, inter alia, include cases where the suspected or accused person invokes, supported by relevant elements of proof, that he/she is subject to parallel criminal proceedings in respect of the same facts in another Member State, or in case a relevant request for mutual legal assistance by a competent authority in another Member State reveals the possible existence of such parallel criminal proceedings, or in case police authorities provide information to this effect.*

The JHA Council also agreed that the procedure of contacts at this stage would be fairly informal, with no obligation to use common forms and no standard deadline for replies.

The second stage is the reply by the requested Member State's authorities. The February JHA Council agreed that a reply is in principle to be mandatory, with an exception in particular cases. The latest draft provides for this exception for cases when a reply 'would harm essential national security interests or would jeopardise the safety of individuals' (Art. 5a(2), latest draft). The latest draft also sets out the minimum information that the authorities of the different Member States must exchange between each other (Arts. 6 and 7, latest draft).

The next stage, if parallel proceedings are underway, is direct consultations between the authorities concerned. Once it is clear that there are parallel proceedings underway, the authorities concerned must consult 'in order to reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings' (Art. 12(1), latest draft). This '*may*, where appropriate, lead to the concentration of the criminal proceedings in one Member State, or to any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings' (Art. 12(2), latest draft; emphasis added). This compares to the original proposal, which stated that the consultations would take place 'in order to agree on the best placed jurisdiction for conducting criminal proceedings' (Art. 12(1), original proposal).

The original proposal then contained an Article (Art. 14) specifically concerned with the issue of finding the best-placed jurisdiction, which specified that -

*The general aim of the consultations on the best placed jurisdiction shall be to agree that the competent authorities of a single Member State will conduct criminal proceedings for all the facts which fall within the jurisdiction of two or more Member States.*

However, this Article has been deleted in the latest draft.

The original proposal then set out a 'general presumption' that the single prosecution should normally take place in the Member State where the majority of the criminal activity took place (Article 15(1), original draft). This presumption could be rebutted where 'there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction' (Art. 15(2), original draft). There was then a non-exhaustive list of other factors which could be considered.

The latest draft (Article 15) contains simply a non-exhaustive list of factors to consider (including the place where the majority of criminality occurred) *without* any presumption in favour of any of them. The criteria now include 'vital interests of the State' and the 'admissibility' of evidence.

In the event of a failure to reach a consensus on the way forward, the issue shall be referred to the EU prosecutors' agency, Eurojust, if it is competent (Art. 16, latest draft). According to the Council Decision establishing Eurojust, that body can then ask one of the Member States to 'accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts'; it has already used this power in a few cases. Recent amendments to that Council Decision also provide that Eurojust also 'shall be asked to issue a written non-binding opinion on the case [of conflict of jurisdiction], provided the matter could not be resolved through mutual agreement between the competent national authorities concerned'. So Eurojust will not have the power to issue a binding decision allocating the case to one jurisdiction or the other; and the Eurojust Decision does not set out the criteria upon which Eurojust makes such requests or decisions.

Finally, if a consensus is reached on concentrating criminal proceedings in one Member State, that Member State shall inform the other Member State concerned about the outcome of the proceedings (Art. 17, latest draft). The latest draft has dropped the idea in the original proposal that in various circumstances, a Member State where the proceedings had been completed could contact another Member State where proceedings were underway or had also, been completed, in order to see if there are grounds for re-opening proceedings in the former Member State (Art. 18, original proposal). However, this issue is still referred to in point 15 of the preamble.

## Comments

The results of a questionnaire carried out by the Czech presidency indicate that there are a significant number of cases of conflicts of jurisdiction, and they are sometimes difficult to solve.

Given that the EU has rightly taken the step of ruling out, in principle, double jeopardy as regards multiple prosecutions for the same facts in more than one Member State, it is therefore pointless for the same person(s) in relation to the same facts to be subject to prosecution in more than one Member State - since in principle (subject to the exceptions to the double jeopardy rule) only the first final judgment to be delivered in the case in any Member State can have any effect.

So such multiple prosecutions are a waste of the limited time and money of the police, prosecutors and the courts, as well as the limited resources of legal aid budgets. Obviously they are also an unjustified incursion upon the individuals under suspicion, who have the right to be presumed innocent pending any conviction - since the multiple prosecutions will increase the risk of them being taken into detention, may lengthen any detention period, and will increase the costs and aggravation which are incurred. Multiple prosecutions are also likely to complicate further the lives of witnesses and compromise the legitimate interest of crime victims in seeing that justice is done. From any perspective, they are a blight upon the criminal justice system.

It follows that an EU measure designed to reduce the number of multiple prosecutions is in principle a good idea. However, such a measure should not prejudice the fundamental principle of a right to a fair trial, including in particular the principle of 'equality of arms' as guaranteed by the European Convention of Human Rights - ie placing the prosecution and the defence on an equal footing.

In order to meet the overall objective of reducing the number of multiple prosecutions, any EU measure on the issue has to ensure, as far as possible, that only one prosecution takes place. In order to meet the further essential test of ensuring that the right to a fair trial is not guaranteed, any EU measure must furthermore set out objective criteria for determining where the single prosecution takes place.

The Czech Presidency proposal fails on both counts.

First of all, it does not sufficiently ensure that any cases of multiple jurisdiction will be, as far as possible, settled by centralising prosecution in one Member State only. Rather the opposite: by setting up a requirement to contact another Member State's authorities whenever the facts of a case suggest a sufficient link to another Member State, the risk is that the number of cases of conflicts of jurisdiction will *increase*, since in at least some of these cases the Member State being informed of the relevant facts will have been unaware of them recently. That Member State will often then want to begin prosecution, or will even be *obliged* to begin a prosecution, since the law of a number of Member States obliges criminal investigations and prosecutions to start once facts have been brought to the attention of the authorities.

These additional cases of conflict of jurisdiction would not be problematic if there were a sufficiently strong obligation in the Framework Decision to centralise jurisdiction in the courts of one Member State. But there is not. There is only an *option* to centralise jurisdiction in the latest draft, with the possibility left open of any other 'effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings'. But there is *no conceivable alternative solution* that would avoid those adverse consequences. Even the original proposal, while it did not go far enough in ensuring centralised jurisdiction, at least specified that

the 'general aim' of holding consultations was to agree on where to centralise jurisdiction.

Secondly, since the latest draft of the Framework Decision contains only a non-exhaustive and indicative list of factors to consider when centralising prosecutions (if they are centralised at all), without setting any priority between those factors, it fails to ensure that the prosecution will be centralised in a jurisdiction based on objective criteria. Indeed, the latest draft has removed the provisions of the preamble of the original proposal that referred to 'bring[ing] more transparency and objectivity to the choice of criminal jurisdiction' (recital 3, original draft preamble; see also recital 4 of the original draft preamble).

Instead, the fundamental problem with the Czech proposal is that it would increase the opportunity for prosecutors - who will be in contact more often with each other at early stages of multiple prosecutions, due to the procedures to be set up by the Framework Decision - to collude together to decide that the prosecution will be conducted where they have the best chance of winning the case, and/or of obtaining the most severe sentence. The latest draft even hints at this with its reference to the admissibility of evidence as a factor to be considered. It is hardly likely that the drafters of the Framework Decision are considering the admissibility of *defence* evidence here; anyway, since the procedure will involve collaboration between prosecutors they will not usually be aware what the defence evidence is (or will be) at this stage - and if they were, they might well be motivated to select a jurisdiction where the defence evidence would be *inadmissible*.

Furthermore, in the absence of an obligation to centralise proceedings based on objective criteria, the Framework Decision would also increase the opportunity for prosecutors to decide to keep both prosecutions going, or to start a second prosecution, in order to put pressure on the accused, or to stop and start each pending prosecution depending on developments. As a worst case scenario, the Framework Decision could even be used to exploit exceptions to the double jeopardy rule in order to ensure that the accused person was indeed prosecuted twice - the exact opposite of the stated intention of the proposal.

At least the original proposal, while it did not go far enough to establish objective criteria for the selection of a prosecution venue, set out a presumption to bring a prosecution where the majority of the criminal activity occurred. This would at least have ensured that the starting point for deciding on a prosecution venue was a presumption based on an objective and reasonable ground for allocating jurisdiction. But this presumption has been dropped.

The profound objections to the unprincipled approach set out in the latest draft of the proposal were eloquently set out in the Commission's earlier Green Paper on these issues (p. 11 of the Annex to the Green Paper):

*it is highly doubtful whether a decision to prosecute based merely on choosing the strictest regime could be considered fair and balanced. The same argument should apply to a decision to choose a jurisdiction which is based on the type of criminal procedure e.g. prosecution or offer of settlement. Similar reflections apply to the question of whether the prospect of a higher or lower penalty could be a relevant criterion. While a prosecutor might come to the conclusion that the proceedings should take place in the jurisdiction with the highest minimum penalty or range of penalty, a defence lawyer would tend to argue the contrary, that one should*

*choose the jurisdiction with the lowest penalty. Neither argument would seem balanced and objective. Therefore, it is fair to argue that the prospect and likelihood of a higher or lower penalty should not be decisive either. It is also possible that an EU instrument could expressly provide that such factors should be considered as irrelevant.*

In this context, it is also striking that the proposal states that '[t]his Framework Decision does not confer any rights on a person to be invoked before the national authorities.' (Art. 2(3), latest draft; Art. 1(5), initial draft). A footnote to an early version of the proposal, which was not listed on the Council register of documents, states that the Czech Presidency 'will be considering the rewording this paragraph in order to exclude clearly the forum shopping phenomenon' (doc SN 1123/09, 14 Jan. 2009). Surely this is intended to be ironic, for the system proposed by the Presidency would conversely allow *national authorities* to use the Framework Decision *against individuals* - in other words, to facilitate 'forum-shopping' *by the prosecution*. Even if such forum-shopping is not explicitly encouraged, it is quite obviously not 'clearly excluded'.

In any event, on this point the proposal ignores that fact that, according to the Court of Justice, individuals are 'entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States' (para. 38 of the judgment in Case C-105/03 *Pupino*). So it is inherent in the nature of Framework Decisions that an individual has the right to argue for national law to be interpreted in conformity with the Framework Decision - and to that extent at least it would be invalid for the Framework Decision to assert that it 'does not confer any rights' on individuals.

Furthermore, the lack of any prioritisation of jurisdiction also means that the Framework Decision will conflict with some other Framework Decisions, such as those on terrorism and organised crime, which do contain suggested priority rules for jurisdiction, 'with the aim, if possible, of centralising proceedings in a single Member State' (for example, see Art. 9(2), Framework Decision on terrorism).

Another problem with the proposal is the absence of any amendment of the double jeopardy rules. In the Commission's Green Paper, it was convincingly argued that if a system could be devised for allocating and centralising jurisdiction of pending multiple prosecutions, the conditions and exceptions to the double jeopardy principle could be reconsidered, since Member States would have settled any potential disagreements between themselves on jurisdiction issues at an early stage, before any trials were ever concluded in the first place. But the current proposal omits to address that issue - running the risk, as noted above, that prosecutors might exploit the new consultation system in order to find ways to exploit those exceptions in order to prosecute *more* persons twice.

On a similar note, the original proposal quite explicitly attempted to facilitate second prosecutions in the *same* Member State which had prosecuted a person already, by encouraging other Member States to send information to the first Member State which could be useful to it as regards reopening proceedings. As noted above, this intention is still reflected in the preamble to the proposal. While international human rights law does allow for the re-opening of proceedings in particular situations - 'in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the

outcome of the case' (Art. 4(2), seventh Protocol to the ECHR) - the proposal makes no reference to such safeguards.

What should be done with the Framework Decision? As it currently stands, it should be rejected, since it would exacerbate the very problem it sets out to solve, by increasing the number of multiple prosecutions, and possibly even increasing the number of double jeopardy cases.

Alternatively, it could be amended significantly. The Annex to this analysis contains a number of constructive suggestions, which would meet the twin objectives of avoiding multiple prosecutions by centralising prosecutions and also establishing fair and objective criteria to determine the choice of jurisdiction, but without setting out rules which are excessively rigid and inflexible and take no account of varying circumstances.

## Sources

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## Annex - suggested amendments

### *Article X - new*

#### Trial within a reasonable time

The provisions of this Framework Decision shall not prejudice the right to trial within a reasonable time, in particular where the person concerned is detained pending trial.

*Comment: There is a risk that the consultations between national authorities pursuant to the Framework Decision would lengthen the time for a trial to take place, and furthermore lengthen pre-trial detention. This should be ruled out.*

**Article 14 - amended**

1. The Member States participating in the consultations on the best placed jurisdiction shall agree on a single Member State in which proceedings will be centralised, taking account of the criteria set out in Article 15.
2. By way of exception from paragraph 1, if it is not possible for the Member States concerned to agree upon the best placed jurisdiction in which to centralise proceedings, because they cannot agree on the interpretation of the criteria set out in Article 15, criminal proceedings may continue or be instituted in two or more Member States.

*Comment: This revised version of Article 14 would create an obligation in principle to centralise prosecutions, except where the Member States concerned could not agree on how to apply the criteria for centralisation. So it would be illegal to continue with multiple prosecutions for other reasons, for example as a tactic to put pressure on the accused.*

**Article 15 - amended**

1. The best placed jurisdiction to conduct criminal proceedings shall be the Member State in which the factual conduct constituting the alleged criminal offence occurred.

In the event that the factual conduct constituting the alleged criminal offence occurred in the territory of more than one Member State, the best-placed jurisdiction shall be the Member State in which the majority of that conduct occurred.

2. By way of exception from paragraph 1, where, in the interests of justice, there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction,...  
[text unchanged]
3. The competent authorities of the Member States concerned cannot select a jurisdiction based upon consideration of the possibility of a conviction or an acquittal, or upon the possibility of a greater or lesser sentence being imposed if the person concerned is convicted.

*Comment: This revised version would strengthen the obligation to centralise prosecutions where the criminal conduct occurred. It would also add a new rule to allocate jurisdiction where the criminal conduct occurred in more than one Member State. In order to provide for flexibility in individual cases, it would permit prosecutions to be centralised on other grounds, but subject to the overriding principle that this alternative jurisdiction must be selected 'in the interests of justice'. The new paragraph 3 would rule out selection of a jurisdiction purely in the interests of the prosecution or the defence.*



### *Alternative - new Article 15a*

An alternative approach to the suggested new paragraph 15(3) would be to insert an Article 15a, as proposed by amendment 17 of the EP's draft report on the proposal:

**Decisions on jurisdiction taken in accordance with this Framework Decision must be fair, independent and objective and must be made by applying the principles recognised 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, so as to ensure that the human rights of the suspect or accused are protected.**

### *New Article 15a (or 15b)*

#### **Consequences of centralising prosecutions**

1. In the event of agreement between the competent authorities on a single Member State in which proceedings will be centralised, proceedings shall be suspended or not initiated in all Member States which have agreed to the centralisation of prosecutions in another Member State.
2. Where a Member State suspends or refrains from initiating proceedings pursuant to paragraph 1, this shall not be regarded as a trial which has been finally disposed of pursuant to Article 54 of the Convention implementing the Schengen Agreement.
3. If the authorities of the Member State in which proceedings have been centralised suspend or terminate those proceedings without finally disposing of a trial within the meaning of Article 54 of the Convention implementing the Schengen Agreement, the other Member States which have suspended or refrained from initiating proceedings pursuant to paragraph 1 may resume or initiate proceedings in accordance with their national law.
4. As long as proceedings are still underway in the Member State in which they have been centralised, the Member States which have suspended or refrained from initiating proceedings pursuant to paragraph 1 shall not resume or initiate proceedings, unless there is evidence of new or newly discovered facts which could justify reopening consultations on the best placed jurisdiction, pursuant to the criteria set out in Article 15.

In such a case, the relevant evidence shall be notified to the Member States concerned, which shall then hold fresh consultations, pursuant to Article 12. Eurojust shall be consulted in all such cases which fall within its competence.

If, following such consultations:

- a) agreement is reached that the proceedings will continue to be centralised in the first Member State in which they were centralised, this Article will continue to apply;
  - b) agreement is reached that the proceedings will be centralised in a different Member State, then this Article will apply mutatis mutandis to those proceedings; the first Member State in which proceedings were centralised shall suspend those proceedings pursuant to paragraph 1;
  - c) there is no longer agreement on centralising proceedings, Article 14(2) shall apply.
5. If agreement is reached on the centralisation of proceedings pursuant to this Framework Decision or otherwise, and that agreement is not subsequently revoked pursuant to paragraph 3, then following the final disposition of the trial pursuant to Article 54 of the Convention implementing the Schengen Agreement, the Member States which have suspended or refrained from initiating proceedings pursuant to paragraph 1 may not invoke the exceptions from the ne bis in idem principle set out in Article 55 of that Convention.
6. In the event that proceedings are centralised pursuant to this Framework Decision, the person concerned shall be informed of this decision, and the reasons for that decision, as soon as possible in a language which he understands.

This notification may be delayed if the person concerned has not already been notified by any Member State of the criminal proceedings, and if such notification would prejudice an ongoing criminal investigation. In such a case, the person concerned must be informed of the decision to centralise proceedings and the reason for it no later than when he or she is charged with a criminal offence.

The person concerned has the right to a judicial review of the decision to centralise proceedings in accordance with the procedures applicable in the law of the Member State where proceedings were centralised. The court reviewing the decision shall be competent to rule on both the procedural aspects and the merits of the decision to centralise proceedings.

*Comments: This new Article would address a number of aspects of the consequences of centralising prosecution. First of all, paragraph 1 would spell out the obvious consequence that other Member States would have to refrain from or suspend their own criminal proceedings. Paragraphs 2 and 3 would permit the other Member States to open or re-open proceedings in the event that the Member State where prosecution was centralised suspends or terminates the prosecution without a final judgment within the meaning of the Schengen Convention double jeopardy rules (paragraph 2 reflects the existing case law of the Court of Justice: Case C-469/03 Miraglia).*

*Paragraph 4 sets out the only circumstances in which the centralised prosecution can be challenged while the proceedings are underway - where there is fresh evidence related to the decision to centralise prosecution. This clause would prevent the reopening of the decision to centralise prosecution for cynical or opportunistic reasons.*

*Paragraph 5 sets out the consequence of centralising prosecution following a final judgment. The Member States which have agreed to centralise prosecution then will have no opportunity to try the person concerned again, not even in accordance with the exceptions to the double jeopardy rule set out in the Schengen Convention. This is justified because the Member States concerned would have had an opportunity at an early stage to discuss whether or not to centralise prosecution, and would have agreed to centralise the prosecution. They should not be able to renege on their commitment following the outcome of the trial.*

*Paragraph 6 sets out essential procedural rights for the person concerned.*

### **Alternative - new Article 17a - EP report, amendment 23**

#### **Procedural guarantees**

**The person formally charged shall:**

- be notified of exchanges of information and consultations between authorities of Member States, as well as between authorities of a Member State and Eurojust, as well as of decisions taken or failure to reach agreement, made under this Framework Decision, including of actors involved, contents and reasons;
- have a right to make representations as to the best placed jurisdiction before a decision is taken,
- have a right to appeal against a decision or a failure to reach agreement, to have it re-examined.

**Member States shall ensure that appropriate translation, interpretation and legal aid is guaranteed.**

*Comment: the EP proposed amendment covers some of the same ground as the proposed Article 15a(6). However, to some extent the EP proposal includes further rights (notification right, right to make representations, right to appeal a failure to decide, legal aid), and to some extent the proposed Article 15a(6) goes further (appeal of the merits). Both approaches could be combined.*

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