Standing committee
of experts on
international immigration,
refugee and criminal law

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To European Commission
Att. The Directorate-General for Justice, Freedom and Security
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Reference CM06-02
Regarding Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings, COM(2005)696 of 23.12.2005

by e-mail
Date 30 March 2006

Dear Sir/Madam,

Please herewith find attached the response of the the Standing Committee of experts on international immigration, refugees and criminal law ('the Standing Committee') on the Green Paper *on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, COM(2005)696 of 23.12.2005.

Please feel free to publish these comments on the Commissions' website.

Yours sincerely,

On behalf of the Standing Committee,

Prof. Mr. C.A. Groenendijk
Chairman

Views of the Standing Committee on the European Commission's Green paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings

Before reacting to the questions raised by the Commission it is necessary to make some preliminary remarks regarding the topics of conflicts of jurisdiction and ne bis in idem, as well as the underlying presumptions of the Green Paper.

How big is the problem in practice?
The Commission presumes that conflicts of jurisdiction are a serious problem in the efficiency of efforts to combat crime. That may be so. However, this claim is not substantiated. No statistics have been produced to demonstrate the character and remit of the problem caused by the theoretical existence of positive conflicts of jurisdiction. An overview of the practical (not theoretical) problems of positive jurisdiction conflicts is needed before the appropriate responses can be determined.

A first step to bring Article 31 Treaty on European Union into practice
The Green Paper can be characterized as the first attempt to bring Article 31, paragraph 1, sub d of the Treaty on European Union into practice: "Common action on judicial cooperation in criminal matters shall include preventing conflicts of jurisdiction." Such an initiative must be welcomed for the reasons the Commission gives, namely to prevent inefficiency of the various efforts in Member States to investigate and to prosecute. In addition, it will prevent that accused will be subjected twice to an investigation relating to the same facts. Thus far, contrary to the clear message of Article 31 of the Treaty on European Union EU legislation only stimulated to expand, not to limit extraterritorial jurisdiction, see for instance p. 9 of the Green Paper.

Prevention of the problem is better than regulation of its consequences
It is interesting to see that the Commission makes the fundamental choice not to reduce the chances for positive conflicts of jurisdiction. This is somewhat strange if it regards positive conflicts of jurisdiction as problematic. At first sight it would be logical to take the instruction of the Treaty on European Union: **preventing** conflicts of jurisdiction seriously, instead of solving conflicts of jurisdiction. This could for instance be done by limiting the jurisdiction of the Member States mainly to territory. See for a proposal to that extent André Klip, Criminal Law in the European Union, inaugural lecture Maastricht University 2004. In addition, the Standing Committee fails to understand why the Commission only looks at the stage in which the prosecution reaches the trial stage. This means that parallel investigations already took place and all the problems the Commission wants to rule on already came into being. We certainly support the prevention of positive conflicts of jurisdiction, but then it should cover all stages of the investigation and adjudication of crime. Only then prevention can have an effective impact.

Limiting extra-territorial jurisdiction would make jurisdiction not a coincidence
The Commission is certainly right in its analysis that the fact that one Member State earlier came to a final judgement than another is not the consequence of a fair balance of weighing relevant arguments. The first prosecuting state is not necessarily the best!

Combating crime is not stimulated by new stages of consultation
The proposals of the Commission create a whole series of obligations to inform other Member States in situations where this was previously not the case. Subsequently it builds in a new stage before a national prosecutor may bring a case before court. It may take several years before the Court of Justice has finally decided the matter. This will have serious consequences for the accused European citizens (who might be in detention on remand), as well as for the possibilities of law enforcement agents to combat crime effectively and dissuasively. The proposed mechanism is far more complicated than leaving things at the current state of affairs.

The accused/ fundamental rights of European citizens are not taken into consideration
Surprisingly the Commission does not take the position of the accused into consideration in the determination of the best state for prosecution. Why would the assignment of a case to one Member State or another be an exclusive issue for the Member States and why is the accused European citizen not involved at all? The Standing Committee supports that accused should have the chance to express their views, not that they should have a final say.

Research by the Council of Europe and the International Association of Penal Law is most valuable
Regarding solving conflicts of jurisdiction the Commission does not mention the efforts of the Council of Europe. It is one of the few issues that organization was unable to legislate upon. See Council of Europe, European Committee on Crime Problems, Extraterritorial Jurisdiction, Strasbourg 1990. The Commission writes off the 1972 European Convention on the Transfer of Proceedings. In addition to the 11 Member States that ratified, a further 6 signed the Convention already. This ratification status is, although certainly deplorable, not so extraordinary in view of other EU legal instruments, that it is a convincing argument not to urge for ratification. Ratification by the remaining Member States would not need much time if the will is there.

The International Association of Penal Law produced an impressive collection of reports on "Concurrent National and International Criminal Jurisdiction and the Principle Ne bis in idem. See Revue Internationale de Droit Pénal/ International Review of Penal Law, 73e année, 3e et 4e trimestres 2002, p.673-1228. It includes a general report and national reports of 12 EU Member States as well as other states. The practitioner's perspective is covered better in these reports. We may also mention that the problems described by the Commission may be even more complicated if judgements against legal entities and possible overlap with the judgements of persons responsible for legal entities are taken into consideration. Also the application of non criminal sanctions needs further elaboration.

The Commission maintains national concepts of sovereignty over jurisdiction
The Commission apparently doe not regard the area of freedom security and justice as an area with a common (European) interest in combating crime. The current initiative strengthens the national claims for jurisdiction and stimulates the view that law enforcement is a national task only. With a more modern approach regarding crime as an European problem, one could also develop a system of **allocation of European criminal jurisdiction** to national criminal courts. Thus, one could prevent the problem, before it could arise.

In response to the questions posed in the green paper:

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?
There is no need for such a provision, because it presumes that the state that takes the first initiative has priority. There are no objective grounds for that conclusion. In addition, it is difficult to anticipate on the (positive) results of the investigations that will continue.

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?
No. It creates a burden of speculation on the shoulders of practitioners: which other states might theoretically have jurisdiction and even use it. Law enforcement agencies should not spend there time on theoretical issues but on combating crime. Exchanging information between law enforcement agencies should take place with a view of law enforcement as a common goal to strive for.

3. Should there be a duty to enter into discussions with Member States that have significant links to a case?
No. see under Q2

4. Is there a need for an EU model on binding agreements among the competent authorities?
Practitioners want to go ahead with their investigations and do not need further red tape.

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?
Theoretically one could establish a whole new dispute settlement mechanism. Ideally that would involve the states that have jurisdiction, as well as victims and witnesses as well as the accused. Since these issues also deal with the legality principle, it seems logical that an independent court (i.e. the Court of Justice) would deal with the matter.

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?
Yes. Prevent conflicts of jurisdiction by abolishing obligations in EU legal instruments for states to vest extra-territorial jurisdiction.

7. What sort of mechanism for judicial control or judicial review would be necessary and appropriate with respect to allocations of jurisdiction?
It is quite difficult to weigh priority in jurisdictional claims. We may refer to the Council of Europe report on Extraterritorial Jurisdiction. If such a time consuming process where necessary, the Court of Justice would be the appropriate decision maker.

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?
Again: prevention is better than curing the problem. If prevention is not possible, there is not a good moment yet. Then, first criteria for priority ought to be determined. There is nothing in the proposal to that extent.

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?
Certainly there is. It is wise to see that crime is not limited to the European Union and its citizens and that cooperation with other states and entities is highly important.

10. Should a future instrument on jurisdiction conflicts include a list of criteria to be used in the choice of jurisdiction?
If not, such an instrument would not make sense at all.

11. Apart from territoriality, what other criteria should be mentioned on such a list?
Should such a list be exhaustive?
As long as other extraterritorial principles of jurisdiction exist, they should be taken into consideration, as well as the criteria mentioned in Article 8 of the 1972 European Convention on the Transfer of Proceedings.

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?
Certainly. These could be criteria that demonstrate that it will be quite ineffective for a Member States to use its jurisdiction. For instance if a Member State, despite the fact that it has jurisdiction over a crime, does not have any evidence, nor the suspect on its territory, and will have to ask assistance from other (Member) States.

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?
Prioritisation is extremely difficult and a blue print cannot be given. However, if the Commission wants to follow this road, it must be done.
The Standing Committee earlier on already proposed that territory should be declared the exclusive principle of jurisdiction. However, the question obviously presumes that other principles remain in tact. Under those circumstances, territory will be one of the important principles. However, it is too simple to give it priority over other principles in all cases.

14. Is there is a need for revised EU rules on ne bis in idem ?
Not at all. The Court of Justice is doing very well in interpreting Article 54 Schengen. It recently did so in the case of Van Esbroeck, C-436/04, 9 March 2006.
The Commission does not distinguish between the effect of the application of the ne bis in idem principle, depending on whether it concerns mutual assistance situations and parallel or subsequent prosecutions. In the first scenario (a bilateral ne bis-application), the application of the principle does not hinder a state from continuing the prosecution, although it will not receive assistance from a specific state. In the second situation (a multilateral ne bis-application) a prosecution may not continue.

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"?
This question is moot because it has already been decided by the Court of Justice in Gözütok/ Brügge.

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?
This question is moot because it has already been decided by the Court of Justice in Gözütok/ Brügge. In addition, this seems to ask for a review possibility after application of ne bis. As such it runs contrary to the principle of ne bis itself.

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…")
This question is moot because it has already been decided by the Court of Justice in Gözütok/ Brügge. This also asks for unnecessary complications (it is an exception to an exception) and violates the rule of law.

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?
This question is moot because it has already been decided by the Court of Justice in Gözütok/ Brügge. A final decision can only be qualified as final, if the case was judged on its merits.

19. Is it feasible and necessary to define the concept of idem, or should this be left to the case law of the ECJ?
This question is moot because it has already been decided by the Court of Justice in van Esbroeck.

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?
No. Mutual recognition of acts of the Member States as well as the mutual trust that states have, or should have, in the way they individually and collectively combat crime does not allow for other possibilities.

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?
Since Article 55 Schengen was stipulated, quite some developments took place. The Treaties of Maastricht, Amsterdam and Nice were concluded, the Tampere conclusions were adopted and the area of freedom, security and justice was created. Under those new circumstances there must be enough mutual trust among states that they may accept that another state responded in an appropriate way to a criminal offence.

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?
See Q14. It is logical that if a state may not prosecute because of the application of ne bis in idem, it may also not assist another state. In the case of Miraglia, the issue was not that the Netherlands refused mutual assistance on the basis of its interpretation of Article 54 Schengen, but on the basis of a national concept of ne bis in idem and reservations to the relevant conventions.

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?
In principle the issue with the rest of the world is not much different, so there is a need for a more coherent approach. A world wide application of ne bis should be advocated. However, exceptions to a general recognition of ne bis, as for instance the protection against sham proceedings make sense. See Article 20 Statute of the International Criminal Court.

24. Do you agree that with a balanced mechanism for determining jurisdiction?

(a) certain grounds for non-execution in the EU mutual recognition instruments could become unnecessary, at least partly? Which grounds, in particular?

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

a. Yes. That is logical. Especially those grounds that allow for refusal because of the existence of a concurring jurisdictional claim.
b. No. This does not seem to contribute to smooth cooperation.

Utrecht, 30 March 2006