

# Reflections on The Future of Judicial Cooperation in Criminal Matters in the EU

Seminar | Collegium Iuridicum Novum

Adam Mickiewicz University | Poznań | 23 May 2016

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# Structure

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substantive criminal law

MR & judicial cooperation

procedural criminal law | flanking measures MR

procedural criminal law & judicial cooperation | needs

broader & further criminal policy needs

EU prosecutorial policy | Eurojust (vs EPPO)

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# Substantive criminal law | 1

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## autonomous function of approximation

- special part: *ultima ratio* often overstepped | examples (+ inflatable OC notion)
  - where respected, often *de jure* eroded by EU ability to only set minima
    - maximal offence scope & maximum sanction (or maximal maximum sanction)? | hindered by subsidiarity and choice for MR as the lesser evil
  - where respected, often *de facto* eroded by (wider) national criminalization
    - perverse effects | dual criminality bubble in MR | MS' self-centeredness
- general part & general principles
  - sanctions: in rem confiscation (in the absence of the offender)?
  - jurisdiction to prescribe | often creating potential conflicts of jurisdiction
  - needs
    - minimum concept 'participation'
    - extraterritorial corporate liability (only) for certain offences
      - labour exploitation, THB, data protection, environmental offences
      - attribution through 'head office', 'establishment' (Google Spain, FB Belgium), chain responsibility

# Substantive criminal law | 2

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ancillary functions of approximation | often neglected though needed

- facilitating MR & judicial cooperation
  - vs incoherent dual criminality abolishment
- defining EU (priority) crimes
- enabling EU crime statistics (jointly identified offence parts)
- facilitation ECRIS offences
- demarcation (stronger) mandates EU bodies & agencies
  - subsidiarity best served through limitation EU-worthiness or –eligibility
- EULOCS (EU Level Offence Classification) | IRCP

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# The EU Level Offence Classification System

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bench-mark for enhanced internal coherence of the EU's criminal policy

- including in the area of criminal records infoex

improved ECRIS classification

- exclusive categories
- incorporating/centered around EU approximation acquis
  - clustering of common denominator underneath “jointly identified parts of offences”
  - i.e. much wider acquis than 32 MR list, for which dual criminality test can be omitted
  - i.e. joint acquis = trust-building
  - = also tool for delineating Europol/Eurojust access (mandated offences incorporated)
- including definitions (usually from binding EU acquis) for interpretability in application FD 2008/675/JHA

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# EULOCS illustrated

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<b>0906 00</b>	<b>MONEY LAUNDERING</b>
<b>0906 01</b>	<b>Offences jointly identified as Money Laundering</b>
0906 01 01	The conversion or transfer of property
0906 01 02	The illicit concealment or disguise of property related information
0906 01 03	The illicit acquisition, possession or use of laundered property
0906 02	<b>Other forms of Money Laundering</b>

<b>0201 00</b>	<b>OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION</b>
<b>0201 01</b>	<b>Directing a criminal organisation</b>
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.

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<b>0100 00 Open Category</b>	<b>CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT</b>
0101 00	GENOCIDE
0102 00	CRIMES AGAINST HUMANITY
0103 00	WAR CRIMES
0104 00	CRIMES OF AGGRESSION
<b>0200 00 Open Category</b>	<b>PARTICIPATION IN A CRIMINAL ORGANISATION</b>
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	Directing a criminal organisation
0201 02	Knowingly participating in the criminal activities, <i>without being a director</i>
0201 03	Knowingly taking part in the non- criminal activities of a criminal organisation, <i>without being a director</i>
0202 00	OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION
<b>0300 00 Open Category</b>	<b>OFFENCES LINKED TO TERRORISM</b>
0301 00	PARTICIPATION IN A TERRORIST GROUP
0301 01	Offences jointly identified as participation in a terrorist group
0301 01 01	Directing a terrorist group
0301 01 02	Knowingly participating in the activities of a terrorist group, without being a director
0301 02	Other forms of participation in a terrorist group
0302 00	OFFENCES LINKED TO TERRORIST ACTIVITIES
0302 01	Offences jointly identified as linked to terrorist activities
0302 01 01	Public provocation to commit a terrorist offence
0302 01 02	Recruitment for terrorism
0302 01 03	Training for terrorism
0302 01 04	Aggravated theft with the view of committing a terrorist offence
0302 01 05	Extortion with the view of committing a terrorist offence
0302 01 06	Drawing up false administrative documents with the view of committing a terrorist offence
0302 01 07	Financing of terrorism
0302 02	Other offences linked to terrorist activities
0303 00	TERRORIST OFFENCES
0303 00	Offences jointly identified as terrorist offences
0303 01	Terrorist attacks upon a person's life
0303 02	Terrorist attacks upon a person's physical integrity
0303 03	Terrorist kidnapping or hostage taking
0303 04	Causing extensive terrorist destruction
0303 05	Terrorist seizure of transport
0303 06	Terrorist activities related to weapons
0303 07	Terrorist release of dangerous substances, or causing fires, floods or explosions

# MR & judicial cooperation

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## overview

- 2002 European Arrest Warrant (EAW)
- 2003 Freezing order
- 2005 Financial penalties
- 2006 Confiscation
- [2008 European Evidence Warrant (EEW)
- 2008 Deprivation of Liberty
- 2008 Probation and Alternative Sanctions
- 2008 Taking account of previous convictions
- 2009 Supervision order
- 2014 European Investigation order (EIO)

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# Procedural criminal law | flanking measures MR

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## Lisbon 'break-through' | 2009 Roadmap Procedural Rights | output

- procedural rights
  - directive translation and interpretation
  - directive information about the charges | letter of rights
  - directive assistance by a lawyer (Salduz+)
  - detention conditions (green paper, EC study IRCP, handbook FD 909/2008 IRCP)
  - recommendation vulnerable groups in criminal justice (children, mentally ill, ...)
  - directive presumption of innocence
- position of victims (package including directive)
- admissibility of evidence (EC study IRCP, irrelevant EIO, PhD Dr Kusak)

putting the carriage before the horse (no trust, ex-post backing up MR)

confusing carriage racing and jumping (cross-border dimension)

From lesser evil to Trojan Horse? (fundamental rights)

Procedural Roadmap bubble & distrust shifting

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# Procedural criminal law & judicial cooperation | needs

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## real needs

- halt Azerbaijan contradiction
- halt legitimization discriminatory approaches
- halt *forum regit actum* & one-directionality
- halt remedies/safeguards/judicial validation procedures as new defences
- EU minimum standards investigative measures (evidence admissibility)
  - anonymous testimony
  - collaboration with justice
  - interception telecommunications (Dr Kusak)
  - (house) search (Dr Kusak)
  - forensics, including DNA sample taking (dra Depauw) (European Forensic Area)
  - ... ?
- MR of procedural guarantees | best of both worlds | *lex mitior*
- reintroduce dual criminality | limit MR to jointly identified offence parts (EULOCS)
- regulate post-trial MLA (ENFAST network)

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# Broader & further criminal policy needs

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do away with vast amount of incoherences

drop distinction judicial and law enforcement cooperation

make criminal justice finality the decisive marker (vs administrative/intelligence finality)

fundamental debate on administrative/criminal character offences & sanctions (Engel)

- also an issue in GDPR

ECRIS-extensions | legal persons, TCN, Europol/Eurojust connectivity, legal effect inclusion following notification, limited introduction EU-certificates of non-prior conviction

establishment of EPRIS

introduce (aut exequi aut tolerare) principle (Article 89 TFEU)

- physical border-crossing possibility in view of active investigation while respecting local legislation and/or agreed EU minimum procedural guarantees

establishment of double generic severity rankings

- sanctions (+ combining nature & duration)
- sanction execution modalities (idem)

establish EU policy for disqualifications in criminal matters

EU instrument on transfer of prosecution

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# EU prosecutorial policy | Eurojust

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## future legal instrumentarium

- interpretation ‘territoriality’ not too extended
- ne bis in idem effect (EU wide) of
  - irrevocable settlements preventing further prosecution
- MR of
  - decisions other MS to prosecute
  - with possibility Eurojust conflict ‘resolution’ or ‘mediation’
    - top-down for mandated EU-worthy cases (EULOCS-based)
      - complementarity !!!
    - bottom-up (as currently) in further cases
  - not necessarily single MS (international case management)
- principle of ‘proper’ administration of justice
  - no unreasonable enforcement of jurisdiction
  - limitative list of potentially reasonable criteria
    - manifestly unreasonable if not in list

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# EPPO vs Eurojust | 1

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## PIF

- relative importance only - beware of overprioritization
- do feature among EU priority crimes
- not always complex – not always involving more MS
- if not: preferably dealt with domestically
- if complex or multi-MS: EU-worthy & ‘normal’ involvement (further reinforced) Eurojust
  - decisive powers coordination investigations & prosecutions
  - right of initiative investigations and prosecutions
  - resolution conflicts of jurisdiction
  - formal acts of judicial procedure remaining with national competent authorities
    - further extension national powers college members?
  - sufficient to counter potential inertia MS

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## functioning

- according to Article 86 TFEU
  - investigating, prosecuting and bringing to judgment
  - exercise functions of prosecutor in competent courts
- unnecessary if truly strong Eurojust in EU-worthy cases
- discussion college-based or pyramidal decision-making
  - merely ideological
  - ultimately evolved to 'college-based' (status directive)
- more important challenges (infra)

## relation to OLAF

- beware of mixing up administrative-criminal matters

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# Eurojust | Further challenges & proposals

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further extension national powers college members

immunity from prosecution

- res judicata effect, following positive opinion Eurojust

Eurojust access to ECRIS

- ne bis in idem etc

benchmarking through EULOCS

- EU Level Offence Classification System, compatible with Eurojust crimes and CMS
- demarcation supranational mandate powers Eurojust?

cooperation with Europol

- access to Europol analytical work files

logical extension Eurojust's new role to similar issues

- best place for witness relocation
- best place for sentence execution international tribunals

adoption legal framework cross-border investigative powers police and judicial authorities of the MS (Article 89 TFEU; ex Article 32 TEU)

- to be preferred over supranational investigative powers

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