European Territoriality and Jurisdiction: The Protection of the EU's Financial Interests in Its Horizontal and Vertical (EPPO) Dimension

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1 An Area of Freedom, Security and Justice and European Territoriality

In 1997, the Treaty of Amsterdam introduced a new political and legal concept in the EU treaty, being the area of freedom, security and justice. In 2004, Walker declared it a novel legal brand under whose name a significant volume of law (hard and soft) has already been accumulated.[1] The area of freedom, security and justice was further strengthened in the Lisbon Treaty. There is no doubt that it will increasingly play a role in the constitutional landscape and frame of the EU integration process; it is part of its constitutional Odyssey.

Despite the strengthening of the area of freedom, security and justice in the Lisbon Treaty, we still have great difficulty in defining its scope, its substantial characteristics and its legal consequences. In Article 67 TFEU we can read that the Union constitutes an area of freedom, security and justice without internal borders in which a high level of security is ensured but with respect for fundamental rights at the same time. Crime control and fundamental rights, including due process, are both part of the general provisions of the common area. From Article 82 TFEU we can deduce that judicial cooperation in the common area shall be based on the principle of mutual recognition and that the EU shall (not may!) adopt measures to prevent and settle conflicts of jurisdiction between Member States.

Is the area of freedom, security and justice a territorial or a functional concept? When it comes to judicial cooperation in criminal matters, including the establishment of a European Public Prosecutor's Office (EPPO) under Article 86 TFEU, is the common area the equivalent of a European judicial space (*espace judiciaire européen*) with European territoriality?

Why is it so important to define the scope, the substantial characteristics and the legal consequences of the area of freedom, security and justice? Let me explain it with a very concrete example of great actuality.

1 N. Walker, *Europe's area of Freedom, Security and Justice*, Oxford: Oxford University Press 2004.

The financial services sector is one the key areas for criminal law policy, both in the internal market and in the area of freedom, security and justice. In a communication from 2010 on 'Reinforcing sanctioning regimes in the financial services sector',[2] the European Commission is pleading for a minimum common standard for administrative and criminal law enforcement in the field. However, the communication is not dealing at all with jurisdiction issues. In its key communication 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' from 20 September 2011,[3] the European Commission refers explicitly to Article 83(2) TFEU, the so-called annex-competence for harmonised areas. One of the priority areas for criminal law enforcement in the communication is the one related to financial markets. The European Commission pleads for the development of a level playing field for financial services within the internal market. However, in this communication there is no reference to jurisdiction issues. Finally, on October 20th 2011, the European Commission submitted a proposal for a new regulation on insider dealing and market manipulation[4] and a proposal for a directive on criminal sanctions for insider dealing and market manipulation.[5] Neither in the latter, nor in the former proposal are there clauses included about prevention or settlement of conflicts of jurisdiction. The result is that the European Commission is aiming at further substantive harmonisation of the administrative and criminal law enforcement of insider trading and market abuse, without regulating at all in the field of prevention and settlement of conflicts. The result is that the *ne bis in idem* principle is converted into a final regulator of conflicts of jurisdiction, in other words that the first final decision on insider dealing or market abuse can bar all the other ones. Is the 'comes first, serves first' practice really a problem in the internal market and the area of freedom, security and justice? We jump to the promised actual and concrete example to illustrate it.

In 2007, just before the financial crisis and meltdown of 2008, Banco Santander, Fortis Bank and the Royal Bank of Scotland obtained the control over ABN Amro bank through a hostile takeover bid for the amount of euro 72 billion, one of the biggest-ever deals in the financial-services industry. The operation was approved by the European Commission, but Fortis Bank had to sell some activa. They were sold to Deutsche Bank. Fortis Bank had problems to finance its part of the takeover and decided to go the capital market for fresh capital and thus to offer new shares. The operation was widely advertised. Although the capital extension was successful, it was not enough to guarantee the financial position of Fortis bank and also due to the worsening financial situation of the financial market and the increasing distrust in the banking sector, Fortis Bank was about

2 COM (2010) 716 final.
3 COM (2011) 573 final.
4 Proposal for a new regulation on insider dealing and market manipulation (market abuse), COM (2011) 651 final, amended by COM (2012) 421 final.
5 Proposal for a directive on criminal sanctions for insider dealing and market manipulation, COM (2011) 654 final.

to collapse until governments of Belgium, the Netherlands and Luxembourg intervened and nationalised, dismantled and partially sold Fortis Bank. This nationalisation and dismantling was certainly not done from the perspective of a common European approach, but rather a typical example of national-driven interest.

Competent administrative and judicial authorities opened investigations against Fortis Bank for several suspicions of market manipulation and market abuse, both in Belgium and in the Netherlands. Concurring and parallel investigations were conducted in the two countries, both by administrative and criminal authorities. The administrative enforcement authorities in the field of insider trading and market abuse have a European network, the European Securities and Markets Authority ESMA. In the Netherlands, the legal framework imposes a duty upon the administrative and judicial enforcement authorities to choose at a certain stage for one of the two enforcement regimes, in other words to opt either for administrative sanctions or criminal prosecution (the so-called *una via* principle).

On February 5th 2012, the Dutch Financial Services Authority (AFM), the administrative enforcement agency, has imposed four fines[6] of 144.000 euro each upon two legal persons, being the two legal persons that integrate the Fortis Bank corporation/holding, Fortis NV Brussels and Fortis NV Utrecht. Fortis Bank has been found guilty of market manipulation/market abuse in two situations:

– After the takeover of ABN Amro, the CEO of Fortis Bank has organised a press conference in which he insisted on the strong and sane financial position of Fortis. By doing so he has been misleading the investors;
– The EC imposed upon Fortis Bank the sell of some parts of the group. While putting these activa on the market Fortis Bank decided not to publish some negative information about the financial position of the group and by doing so manipulated the trading of the shares of Fortis at the stock exchange.

Both infringements have been made by the same leading persons with instructions to the two groups. The total amount of the fine has been reduced to 50 percent for each part of the holding. These infringements are administrative irregularities both in the Netherlands and in Belgium, but also at the same time criminal offences in both countries. In the Netherlands and in Belgium there is also criminal liability of legal persons.

The imposition of the administrative fines by the AFM on the two legal persons composing the holding of Fortis Bank has for sure been coordinated with the Dutch judicial authorities. If the decision to go for the administrative enforcement

6 See <www.afm.nl/~/media/files/boete/2010/fortis-besluit-nv.ashx> and <www.afm.nl/~/media/files/boete/2010/fortis-besluit-sanv.ashx>, last visited at 25.10.2012.

way instead of the criminal was taken with the European dimension of the case in mind is unknown and difficult to guess. However, what is clear is that we can speak of a unilateral action of the Dutch authorities, without coordinating with the Belgian administrative and judicial authorities. In Belgium the Financial Services Authority (FMSA) recently finished its administrative investigation against the same legal persons for the same facts and submitted the case to its sanctioning committee, which could impose a sanction of 2,5 million euro. In April 2012 the FMSA also reported the case to the Belgian judicial authorities (already investigating the case), as they found indications of criminal offences committed by natural persons involved. Both Belgian authorities, administrative and judicial, have been investigating the case over the past three years.

The legal consequences of the Dutch fines imposed by the AFM are far from clear.[7] AGEAS (former Fortis) CEO was fast to claim that the Dutch fine would bar further sanctions based on the *ne bis in idem* principle. At least we can say that the approach in this case does not show a clear coordination of jurisdiction of choice of allocation of jurisdiction. Moreover the result might be that further administrative fines and or criminal punishment in Belgium have been barred, at least as far as the legal person is concerned.

Who says that the Dutch administrative enforcement regime was the most appropriate enforcement mechanism? The sanctions upon the legal persons seem to be rather modest, in relation to the magnitude of the victims (several hundreds of thousands) and the magnitude of the public interest at stake (integrity in the financial market in the EU). The financial markets are a key area of the internal market. The applicable substantial law is highly harmonised. The administrative enforcement regimes are harmonised as well, and the enforcement harmonisation will soon be extended to administrative and criminal law harmonisation. Nonetheless, it still seems possible that the enforcement body that comes first is the final regulator, as it bars further proceedings through the *ne bis in idem* principle. When the first seems to be an administrative enforcement agency, the question also arises if and to what extent there is national executive steering support.

What can we conclude from this striking example? First of all, even in key-areas of the internal market and the area of freedom, security and justice, the choice of jurisdiction remains exclusively in the hands of the Member States. Their rules and practices concerning jurisdiction are still a product of state sovereignty. Their rules are arms and legs of the substantive body of administrative and criminal law. Even in fields where these substantive norms have been harmonised by EU law, the Member States are using them as if they were purely national. In public law, there is a very strong relationship between the substantive norms on administrative irregularities and criminal (the

7 See also M. Luchtman in this book, section 4.3.

jurisdiction to prescribe) and the applicable law and jurisdiction (the jurisdiction to enforce and the jurisdiction to adjudicate). In public law – and this is very different from international private law – the applicable law and jurisdiction are interlinked. The choice of jurisdiction determines which law will be applicable, both procedurally and substantively and this applicable law is linked with a Member State's legal regime. In fact, the national rules on jurisdiction are not designed to prevent or to solve a conflict of jurisdiction between countries or in a common area. They are designed to claim competence, authority, *Strafgewalt*, *ius puniendi* in a unilateral way by one State. That means that the administrative or criminal judicial authority dealing with the question of competence is only checking if and to what extent he is competent, applying the classic jurisdiction criteria (*locus delicti*, active or passive personality, etc.). From this national perspective, these authorities are not dealing with the question of the most appropriate jurisdiction in the light of the common interest in the common space (internal market, area of freedom, security and justice). These authorities are not prepared and even not competent to deal with questions of appropriate allocation of cases in the common space. The national authorities are still functioning within the ratio of the Nation-State as exclusive Sovereign when it comes to *ius puniendi*.

The result is a risk of concurring investigation and prosecutions and a risk of multiple adjudications or the risk of final decisions that bar further proceedings through the *ne bis in idem* principle. The *ne bis in idem* principle is not necessarily the best regulator of conflicts of jurisdiction.[8] The result is also that in some cases nobody wants to trigger its jurisdiction and that the common area is confronted with a negative conflict of jurisdiction. To summarise, even in highly harmonised key-areas of the internal market, we have serious problems with the good and appropriate administration of justice because of lack of rules and steering when it comes to the choice of the most appropriate jurisdiction. The problem is of course broader than choice of jurisdiction, as there is no common frame for mutual exchange of law information related to judicial investigation, prosecution and bringing to judgment. There is even no duty to inform or duty to report between the national administrative and judicial authorities of the Member States on the ongoing investigations.

2 A Common Area of Freedom, Security and Justice and Joint Responsibility

In a common area of freedom, security and justice, as defined in Article 3(2) TEU, with common goals, common policies and common instruments, it is rather surprising that the chain of criminal justice still functions as if the

8 For solutions, see A. Biehler et al. (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Freiburg i.Br.: Max Planck Institute for Foreign and International Criminal Law 2003.

boundaries of the Nation-States are the gold standard. In 1999 the European Court of Justice decided in case C-9/89, *Spain v. Commission*,[9] that in the field of the enforcement of common fisheries policies Member States have a joint responsibility when it comes to information exchange, monitoring of licenses and certified documents and prosecution of infringements. The joint responsibility can even include that Member States that fail to initiate criminal or administrative proceedings or to transfer such proceedings to the Member State of registration of the vessel can be sanctioned for non-compliance. In the same line of reasoning Advocate General Bot underlines in his conclusion in the *Wolzenburg*-case: '(...) that the opening of borders has made the Member States jointly responsible for combating crime. That is actually why it became necessary to create a European criminal-law- enforcement area, in order that the freedoms of movement are not exercised to the detriment of public security'.[10] He further links it up with the European citizenship to: '(...) the confidence which each Member State and its nationals must have in the justice systems of the other Member States seems to be a logical and inevitable outcome of creating the single market and European citizenship'.[11] Finally, the ECJ has clearly used the mutual trust between the criminal justice systems and in the criminal justice systems in the area of freedom, security and justice to create a transnational *ne bis in idem* principle, applicable between the judicial authorities in the common area of freedom, security and justice.[12] The European Court of Justice did not opt for a dual sovereignty *ne bis in idem* concept, one for the federal level and one for the national level, as in the US, but for the EU-wide application of the same transnational fundamental right in an integrated area of European territoriality. Advocate-General Ruiz-Jarabo Colomer mentions even the concept of 'common market of fundamental rights' in his conclusion.[13]

It becomes clear that the shared sovereignty in criminal matters de-territorialise the criminal justice system. When the criminal justice system is acting in relation to European goals, its dimension is also European. This is not only true in relation to crime control, but also in relation to applicable human rights and due process. However, the concept of joint responsibility is not limited to these two aspects; it also includes common criminal policy and common administration of justice, including case allocation, when it comes to the criminal law enforcement of common values and common policies.

We do have to rethink allocation of jurisdiction in the light of the common European interest and in line with the common institutional framework (area of

9 ECJ, 27 March 1990, Case C-9/89, *Spain/Council*, [1990] ECR I-1383.
10 A-G Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, para. 105.
11 A-G Bot, Case C-123/08, *Wolzenburg*, [2009] ECR I-9621, Opinion, para. 138.
12 ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345.
13 A-G Ruiz-Jarabo Colomer, ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, para. 124.

freedom, security and justice). This is especially true for the jurisdiction to investigate and the jurisdiction to adjudicate in relation to a) the so-called euro-offences (the ones mentioned in Art. 83(1) TFEU and the criminal law protection of PIF and the single currency) and to b) the so-called annex-offences, being offences related to harmonised EU policies, as environment, fisheries, financial services, competition, etc., (foreseen under Art. 83(2) TFEU). For all these areas, the question of allocation of jurisdiction (both in relation to investigation and adjudication), prevention of conflicts and settlement of conflicts is of utmost importance.

The framework decision on the prevention and resolution of jurisdictional conflicts of 2009, that should have been fully implemented by June 15th 2012, falls short of the EU's stated objective of creating an area of freedom, security and justice, because is does not provide sufficient legal certainty and foreseeability as to the applicability of competing substantive laws, both for the Member State's judicial authorities and for the suspect. In fact the framework decision contains only a mediation procedure with the aim of consenting on an 'efficient solution' and that can resolute in a reasoned recommendation of Eurojust about which Member State should be the focus of the investigation or about which Member States would be less suited as the potential centre of the proceedings. If a Member State is not following the recommendation it must give reasons for the derogation. In other words, the framework decision does not include binding decisions of Eurojust on matters of choice of jurisdiction. On the other hand, the Member States were unable to agree on a draft framework decision on the transfer of proceedings in criminal matters. It is high time to deal with the duty imposed under Article 82 TFEU: the EU shall adopt measures to prevent and settle conflicts of jurisdiction between Member States in order to reinforce the principle of mutual recognition.[14]

3 Choice of Jurisdiction and the EPPO

3.1 Treaty Design of the EPPO

The Lisbon Treaty has inserted in Article 86 TFEU a legal basis for the establishment of a European Public Prosecutor's Office as an EU body within the area of freedom, security and justice. Its material scope of competence will probably be limited to PIF-offences, but can be extended to serious crimes having a cross-border dimension. This means that it has the potentiality to cover serious offences under Article 83(1) and Article 83(2) TFEU.

14 See A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreidender Kriminalität – Ein Rechtsvergleich zum Internationalen Strafrecht*, Göttingen; Osnabrück: V&R unipress; Universitatsverlag Osnabrück 2012, for a model of statutory or a model of agreed jurisdiction.

The wording of Article 86 TFEU defines the main task of the EPPO. It will be responsible for investigating, prosecuting and bringing to judgment the perpetrators of the offences under its competence. It is also clear from the Treaty provision that the adjudication will be at national level, so the EPPO has to exercise the functions of prosecutor in the competent criminal courts of the Member States. In other words, under this Treaty provision the EPPO will be combining supranational investigative powers with national adjudication in the common area of freedom, security and justice. Article 86 TFEU does not expand the institutional and procedural aspects of the EPPO but refers to regulations that shall have to determine the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. Article 86 TFEU does not mention the word jurisdictions or choice of jurisdiction, but it is clear from its general task that the EPPO will have to decide on the its competence to investigate (jurisdiction to enforce) and on the choice of the forum to try the offences (jurisdiction to adjudicate). In other words the EPPO regulations will have to deal with the material competence (the norms) and these procedural aspects, including applicable law and jurisdiction.

Article 86 (2-3) TFEU contains the parameters for the institutional and procedural design in the EPPO-regulations:

> '2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
> 3. The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.'

Dealing with our topic, we have to construct some premises before analysing the substance of the topic. The EPPO will enjoy autonomous powers to investigate, prosecute and bring to judgment. Being a European office it may investigate, prosecute and bring to judgment in the territory of all of those Member States that participate in its establishment (concept of European territoriality).

Each part of its competence (investigating, prosecuting and bringing to judgment) has consequences on related jurisdiction issues. The supranational investigation by the EPPO will not only absorb the national judicial investi-

gation(s), but the execution of some coercive measure by the EPPO will need prior or *a posteriori* judicial authorisation by a judge of freedoms. If the judge of freedoms is inserted in the judiciary of the Member States, there is a forum choice for this function. The other option is to empower the European Court of Justice with this function.

Also this decision to bring to judgment, meaning sending an indictment or accusation before a national court is of course a forum choice for the adjudication of the criminal case.

3.2 EPPO in the Corpus Juris Study[15]

The authors of the Corpus Juris study had already opted for a European judicial area when it comes to investigation and prosecution of PIF-offences. The territories of the Member State of the EU constitute a single space called the European Judicial Space, being the logical extension of the area of freedom, security and justice. One of the basic principles underlying the EPPO in the Corpus Juris study is the one of European territoriality. This means that the EPPO has autonomous investigative powers in the European judicial area. Judicial authorisation of the judge of freedom has legal value in the European judicial area and final decisions of criminal courts or out-of-court settlement have legal value in the European judicial area. The Corpus Juris study has a clear design when it comes to the jurisdiction to enforce/investigate as it spells out a clear vertical relationship in relation to allocation of investigation and division of labour between EPPO and national judicial authorities. The EPPO conducts investigations across the territory of the Union. This means that the EPPO (including its delegated structure) can apply its investigative competence in the European judicial space as a single space. The schemes of mutual legal assistance or mutual recognition are useless under that model. Of course for some coercive measures, the EPPO needs judicial approval by a national judge of freedoms.

However, when it comes to the choice of jurisdiction related to the judge of freedoms and related to the allocation of the choice of the forum to adjudicate, the Corpus Juris study still has some ground to cover. Article 26 Corpus Juris tackles the point by stating that each case is tried in the Member State which seems appropriate in the interest of efficient administration of justice. The principal criteria for the choice of jurisdiction are defined as follows:

a) the state where the greater part of the evidence is found;
b) the State of residence or of nationality of the accused (or the principal persons accused);
c) the State where the economic impact of the offence is the greatest.

15 M. Delmas-Marty & J.A.E. Vervaele, *The Implementation of the Corpus Juris in the Member States*, Intersentia, Vol. 1-4 2000.

The main focus seems to be the proper administration of justice, not the rights of the citizen or the defendant. Why these three jurisdiction criteria have been chosen is not clear from the explanatory text. It is also unclear whether these criteria have a hierarchical order.

It is interesting to compare this choice with the discussions in the Council of Europe on a draft Convention on the settlement of jurisdictions in criminal matters that failed to become reality. In 1965 the Consultative Assembly of the Council of Europe adopted Recommendation 420 on the settlement of jurisdictions in criminal matters, by which it attempted to establish a list of priorities. The starting point in the recommendation was that the State in which the act was committed should have priority to prosecute the offender. Other criteria should be subordinate to this principle. Hence prosecution in the State in which the offender is ordinarily resident would depend on the State where the offence has been committed renouncing prosecution. However, the Legal Committee drew up a text of a recommendation,[16] linked to the European Convention on the Transfer of Proceedings, dealing with conflicts of jurisdiction. The Legal Committee came to the conclusion, dissenting from the Consultative Assembly, that the assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender and securing evidence are other very important considerations. The Legal Committee came to the conclusion that:

> 'The weight to be given in each case to conflicting considerations cannot be decided by completely general rifles. The decision must be taken in the light of the particular facts of each case. By attempting in this way to arrive at an agreement between the various States concerned it will be possible to avoid the difficulties which they would encounter by a prior acceptance of a system restricting their power to impose sanctions.'[17]

The *Corpus Juris* proposal seems to be in line with this opinion, avoiding putting the national territoriality principle on the top of the list.[18] However, the *Corpus Juris* seems to put much emphasis on the effectiveness of law enforcement, by putting the seeking of evidence on the top. What remains clear is that neither the *Corpus Juris* draft nor the Recommendation is dealing with the procedure that could lead to a decision in a particular case.

Finally, Article 28 addresses the competence of the Court of Justice to deal with the choice of jurisdiction, whether on request of the defendant or on request of the national criminal court. Also the EPPO can call in the Court of Justice when

16 <conventions.coe.int/Treaty/EN/reports/html/073.htm>, last visited 25.10.2012.

17 <conventions.coe.int/Treaty/EN/reports/html/073.htm>, point 18, last visited 25.10.2012.

18 On the revision of the territoriality principle: M. Böse & F. Meyer, 'Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union', *Zeitschrift für Internationale Strafrechtsdogmatik,* 5/2011.

conflicts of jurisdiction arise in relation to the jurisdiction to investigate or related to the choice of jurisdiction for the authorisation by the judge of freedoms.

3.3 EPPO and Jurisdiction to Enforce/Investigate Under Article 86 TFEU

Given the fact that the European Commission still has to come up with its first draft proposals for an EPPO, scheduled in the second half of 2013, I propose to use the European Model Rules for the Procedure of the future EPPO,[19] as elaborated under the Hercule II Programme of the European Commission by a research team under the lead of University of Luxemburg. The advantage of doing so is that we can rely on a concrete design of the procedural framework of the EPPO.

In the general part of the Model Rules, it becomes clear that the EPPO has primary authority for investigations and prosecutions (Rule 3). This means that it can take in cases based on a set of priority criteria, as for instance the cross-border dimension or the substantial harm to EU-interest test. This means that the case inflow for the EPPO is based upon prioritising jurisdiction to investigate and prosecute at the European level. This results in a division of labour based on good administration of justice. Once the jurisdiction of the EPPO has been activated, it has also exclusive authority (Rule 5), meaning that the national judicial authorities no longer have competence to investigate and prosecute the case. Finally, the EPPO conducts its investigative and prosecutorial capacity in the European territoriality (Rule 2), which means the territory of the Member States of the EU that constitutes a single legal area.

What can be derived from this general part in relation to the EPPO jurisdiction to investigate and prosecute? First of all, I would say, it gives the EPPO the possibility to overcome negative conflicts of (exercise) of jurisdiction in cases where transnational and/or EU interests are at stake. Second, it creates great opportunities to prioritise investigative and prosecutorial capacity in relation to the interests that deserve criminal law protection. In that sense, it would be wise if the EPPO, once established, elaborates further guidelines in that respect. The primary and exclusive authority of the EPPO does, however, not solve all the problems. It has to be duly informed by national judicial authorities in order to be able to prioritise and there must be mechanisms in place between national judicial authorities and the EPPO to refer the case back to the national investigative and prosecutorial jurisdiction, for instance if becomes clear that the case is minor or too intimately related to other national interests that deserve criminal law protection (Rule 5(2)).

19 See <www.eppo-project.eu/index.php/EU-model-rules/english>, last visited 25.10.2012.

When it comes to the prior authorisation of some coercive measures, elaborated in section 4 of the Model Rules (Rule 47-57), Rule 7 provides that a judge designated by each Member State shall be competent to decide upon this authorisation and that its decision is effective within the single legal area (European territoriality). In other words, the mutual recognition concept applies to the decision of the national judge of freedoms. The Model Rules are, first of all, silent on the criteria for the choice of the forum of the judge of freedoms. It is, however, clear that this choice can affect the legal position of a defendant, as there are no harmonised or equivalent standards of procedural safeguards in relation to coercive measures in the Member States. Second, it is also unclear what the remedies are of the defendant and if the EPPO can challenge the decision of the national judge before the ECJ (as foreseen in the Corpus Juris study).

3.4 EPPO and Its Jurisdiction to Prosecute/Bring to Judgment

When it comes to forum choice for the jurisdiction to try the criminal case (adjudicative jurisdiction), there is no doubt that the EPPO is the responsible authority for the bringing to judgment (Rule 1) of the perpetrators of the offences under its material competence. Rule 64 deals with the forum choice for the trial. The starting point and basic line is the concept of the 'most appropriate jurisdiction', taking into consideration and (in the following sequence):

a) the Member State in which the greater part of the conduct occurred;
b) the Member State of which the perpetrator(s) is (are) a national or resident; and
c) the Member State in which the greater part of the relevant evidence is located.

The listed criteria under a-c are a classic set, if we suppose at least that under a) the damage dimension is also included.

Rule 64(2) provides for a residual jurisdiction in case none of the criteria under a-b-c would apply, which might happen with EU fraud cases committed under EU aid schemes in third countries for example. If the residual scenario is triggered, the case shall be prosecuted in the jurisdiction where the EPPO has its seat.

Rule 64(3) creates a remedy (right to appeal) for the accused and the aggrieved party before the ECJ on the choice of jurisdiction.

3.5 EPPO: From Conflict of Jurisdiction to Choice of Jurisdiction?

In my opinion, it will be very important to extend a mechanism of choice of forum jurisdiction for the EPPO, in order to avoid forum shopping or criticism of *forum conveniens*. The mechanism for the choice of forum to adjudicate could

also be useful for the choice of forum for the judge of freedoms, but with some important caveats. The judge of freedoms will be mostly activated in the crucial phase of gathering of evidence, i.e., when coercive measures are necessary. At that stage the EPPO cannot have a full picture of available evidence, of the *locus delicti* or of the main damage or the nationality/residence of all suspects. On the other hand, the procedure for the judicial authorisation by the judge of freedoms (*a priori* or *a posteriori*) can be harmonised under the Article 86 regulations, which is not the case with the merit proceedings at the stage of adjudication.

The EPPO does not have to deal with conflicting jurisdictions for adjudications. It has to make a choice of forum jurisdiction in the light of a number of relevant criteria. The main question is what would be the most appropriate jurisdiction to adjudicate the case from the perspective and legitimate interest of the:

a) good and proper administration of criminal justice in the area of freedom, security and justice;
b) citizen-rights in the area of freedom, security and justice; and
c) procedural guarantees of the suspect and the victim

These perspectives and legitimate interests combine effective and efficient law enforcement in the single area of freedom, security and justice, but in line with standards of rule of law and due process thus affording appropriate legal protection to those present on the European territory. Both crime control and due process have a European dimension in the single area of freedom, security and justice.

It is also important to see the choice of jurisdiction not as a limitation or imposed obligation to the *ius puniendi* of sovereign states, creating negative or positive duties, but as a mechanism to protect common EU interests (euro crimes or annex competence) in the common area. The judiciaries of the Member States are all 'juges communs' of Union Law, also in the area of criminal adjudication. The fact that they are organically national is not of so much interest; the important dimension is that they have European functions. Also the judiciaries of the Member States have to apply Union loyalty (Art. 4(3) TEU), including its positive duty of action and its negative duty of abstention.

The good and proper administration perspective of criminal justice in the common area contains several elements. It is not only about efficient use of resources related to investigation, prosecution and adjudication but also about qualitative criteria. It is a task of the EPPO to prosecute suspected perpetrators of offences in a way that fulfils the objectives of the single area of freedom, security and justice. This means that it has to contribute to effective law enforcement under the rule of law. This might affect the choice of jurisdiction. A jurisdiction where the case might be time-barred or where the penalties in law or in practice are not effective, proportionate or dissuasive could play a role in the choice of jurisdiction. In other words the outcome of the choice of

jurisdiction must contribute to effective, proportionate and dissuasive law enforcement in the light of the objectives of the single area of freedom, security and justice. The EPPO contributes to the avoidance of concurring prosecutions and trials and must motivate its choice of the forum from the perspective of the quality of the law enforcement.

From the citizen-perspective (be it either the suspect or the victim), there is not such a thing as the right to a forum choice or the right to a natural judge in a specific state. The ECHR does not grant an accused or a victim the right to choose the jurisdiction of a court under Article the 6 ECHR 'tribunal established by law' concept. However, the decision on the forum must be lawful and based on reasonable grounds.[20] The same can be said about Article 47 of the Charter of Fundamental Rights of the EU:

> 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.'

This means that the EPPO cannot bring the judgment to a tribunal that would not be independent or impartial or would have been established *post factum*.

The right to a natural judge[21] is, however, part of the European common area. As the case can end up in 29 different jurisdictions, and the applicable law is not harmonised, the choice of the forum is a choice that affects citizen rights. For this reason the EPPO's choice of jurisdiction must be based on a transparent procedure in which criteria are used that are accessible and foreseeable. In other words the right of the citizen to legal certainty does not mean the right to a preset natural judge in a particular state, but the right to a transparent procedure with accessible and foreseeable criteria for the forum choice in the European territoriality.

The Article 86 regulatory framework for the EPPO should contain a regulation on choice of jurisdiction, providing for a procedural mechanism under which there are priority rules for adjudication for related cases/related persons (concentration priority rule). Second, the regulation should provide for a basket of principle-based criteria to come to a balanced and reasoned decision. The praetorian Swiss example, when dealing with inter-cantonal choices of jurisdiction, can be of good guidance in that respect:

i. the interests of the place where most of the damaging effects of criminal conduct were felt (including the interests of the victim);

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20 See EComHR, 10 October 1990, *G. v. Switzerland*, appl. no. 16875/90 and EComHR, 2 December 1992, *Kübli v. Switzerland*, appl. no. 17495/90 and ECtHR, 12 July 2007, *Jorgic v. Germany*, appl. no. 74613/01, para. 65. For comments see M.J.J.P. Luchtman, 'Choice of Forum in an Area of Freedom, Security and Justice', *Utrecht Law Review* 2011, p. 74-101.

21 See M. Panzavolta in this book.

ii. those of the suspect and his counsel to effectively defend himself (including language problems he may experience);
iii. those of the courts, which must be put in the position to obtain, as far as possible, a complete overview of both the person of the accused and his actions; and
iv. those of the speedy and efficient administration of justice.[22]

This basket seems like a non-hierarchical set of various criteria, which could be qualified as facilitating *forum conveniens* choices. However, a hierarchical set of classic criteria (*locus delicti*, nationality, etc.), if strictly applied, does stand in the way of policy discretion in individual cases and in balancing the different perspectives mentioned. The criteria have to be applied and balanced on a rather flexible case-by-case approach with a scope of policy discretion. Important, in my view, is not the strict application of so-called hierarchical criteria, but a reasoned and foreseeable decision. The statutory regulation must contain the basket of foreseeable criteria, but in a way to allow balanced allocation of cases, taking into account the different perspectives and interest, under court supervision.

The binding decision of the EPPO on choice of forum does affect the legal position of the suspect and the victim. For this reason it must be possible for both of them to challenge the decision before the ECJ. The judicial review of a decision on jurisdiction by the ECJ presupposes that the statutory framework in the Article 85 TFEU regulation is transparent; this means that the suspect or victim can foresee how the judicial authorities will reasonably come to a decision. What would be challengeable is the lack of reasonableness, not the foreseeability of the specific applicable jurisdiction rule. In fact we are not talking here about the foreseeability of applicable law and applicable criminal sanctions (*nullum crimen, nulla poenas sine lege* and the *lex certa* principle). The guarantee of justiciability by the judicial review procedure aims at ensuring a proper, non-arbitrary exercise of discretion by the EPPO. This means that the ECJ must test, when the forum decision is challenged, the reasonable use of policy discretion in an individual case and the lawfulness of the decision. Judicial review amounts to adjudication on whether the principles of reasonableness and of due process (including lawfulness) have been respected. The European Court of Justice has a longstanding practice in reviewing process-orientated justice matters,[23] as, for instance, in the field of the competition.

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22 On that system, see P. Guidon et al., 'Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen', *Jusletter* 2007; E. Schweri & F. Bänziger, *Interkantonale Gerichtsstandsbestimmung in Strafsachen,* Bern: Stämpfli Verlag 2004; M. Waiblinger, 'Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten', *ZStr* 1943. Cf. Bundesstrafgericht, 21 October 2004, no. BK_G 127/04, to be found at <www.bstger.ch/>. For further analysis see M. Luchtman, in this book, section 4.2.2 and 6.4.

23 See K. Lenaerts, The European Court of Justice and Process-Oriented Review, College of Europe/ Research papers in law, no 1/2012, <www.coleurope.eu/sites/default/files/research-paper/ researchpaper_ 1_2012_lenaerts_final.pdf>, last visited 25.10.2012.

Under the EU Competition enforcement system under regulation 1/2003, both the European Commission competition authority as the delegated national competition authorities have to take all the time decisions on investigative allocation of forum choices on the adjudication.

If the national forum judge is not willing to activate its jurisdiction, following the decision of the EPPO, the EPPO should have the possibility to call on the Court to decide on the jurisdiction issue.[24]

4 Conclusion

In this article, I have analysed the European territoriality and jurisdiction in its horizontal and vertical (EPPO) dimension.

The discussion on the settlement of conflicts of jurisdiction between Member States finalised in a deadlock on prioritisation of hierarchical criteria. The Council of Europe Convention on transfer of proceedings in criminal matters has not been very successful in practice. The reality is that European States establish and claim jurisdiction from a classic Nation-State sovereignty perspective.

Within the frame of European integration and the establishment of a single area of freedom, security and justice, it has not been possible to make progress in the EU either. The content of the Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings has been watered down to a mediation procedure. The Member States were also unable to agree on a draft framework decision on the transfer of criminal proceedings.

Already 40 years ago, in the explanatory report on the European Convention on the transfer of proceedings in criminal matters, we can read the following recommendation and appeal:

> 'The complexity of these problems is explained by the very nature of traditional criminal law, strongly impregnated with the principle of territorial sovereignty of the State. Criminal courts almost invariably apply their own criminal law. The problems of criminal law are therefore more difficult to solve than those of other fields of law where conflicts of legislation and of jurisdiction may be solved by the application of foreign law by the national court or by harmonising the legal provisions involved.
>
> In recent years, however, crime has assumed an international character, especially as a result of the extensive development of means of communication. The result is the

24 As does the Federal Criminal Court in Switzerland when there is a conflict between the Office of the Attorney General and cantonal criminal justice authorities; see art. 28 of Code of Criminal Procedure.

> necessity of closer co-operation among States prompting them to lower their legal barriers and review the traditional consequences of their national sovereignty'.[25]

In other words, it is more than high time to deal with the duty imposed under Article 82 TFEU: the EU shall adopt measures to prevent and settle conflicts of jurisdiction between Member States in order to reinforce the principle of mutual recognition and to realise the objectives of the single area of freedom, security and justice.

The vertical (EPPO) dimension is not replacing the horizontal dimension, but reconfiguring it to a certain extent. The EPPO is of course not the catchall solution for the choice of jurisdiction in the single area of freedom, security and justice. It probably will have, in an initial stage, very limited material scope (the protection of the financial interest of the Union) and a limited number of participating Member States under the enhanced cooperation regime. The EPPO will moreover not deal with all cases for which conflicts of jurisdiction could arise. This means that with its establishment it will remain important to regulate, under Article 82 TFEU, the prevention and settlement of conflicts of jurisdiction and to tackle the problems in the single area from a perspective of joint responsibility between the Member States, taking into account that the joint enforcement must not only meet the criteria of efficiency and effectiveness, but also comply with the applicable human rights standards.

The EPPO, as a European Office, will have great influence on the concentration of jurisdiction to investigate in its field of substantial competence. The elaboration of the division of labour between EPPO and the national judicial authorities will be of utmost importance. Prioritisation will be an important tool of criminal policy and to be elaborated in the perspective of the interests that deserve adequate and proper protection in the single area of freedom, security and justice. This division of labour does not mean that the EPPO is not embedded in the national system: actually, quite the contrary. The EPPO should be fully embedded in the national system, through its deputy structure and should work with the national enforcement community, being it judicial or administrative. The specialised law-enforcement agencies in the PIF-field should form a law-enforcement network with a clear European dimension. This delegated and embedded structure of the EPPO is part of its supranational architecture.

The EPPO will also be very useful to deal with problems of negative jurisdiction conflicts, as it can open investigative proceedings and decide on the adjudicative forum.

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25 See <conventions.coe.int/Treaty/EN/reports/html/073.htm>, point 9, last visited 25.10.2012.

When it comes to the choice of the adjudicative forum, there will be a need for a specific regulation under Article 86 TFEU, dealing with the statutory criteria for the choice of jurisdiction. These criteria do not have a hierarchical order, but are criteria to come to a balanced and reasoned decision that complies with the need for foreseeability for the citizen and can be challenged before the ECJ and thus providing for European justiciability in the single area of freedom, security and justice.