



# Freedom, Security and Justice within the European Union

- with special emphasis on criminal justice issues

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## MODULE 3

### Legal Innovation within AFSJ: Ideas and Solutions

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#### Reading Lecture 4

#### European Territoriality

##### 1. In this lecture you will learn about...

- the general concept of jurisdiction within criminal matters,
- the basic understanding of jurisdictional conflicts,
- how jurisdictional issues have changed because of European integration and
- the models devoted to solving jurisdictional conflicts.

**Learning time - approximately 2 hours**



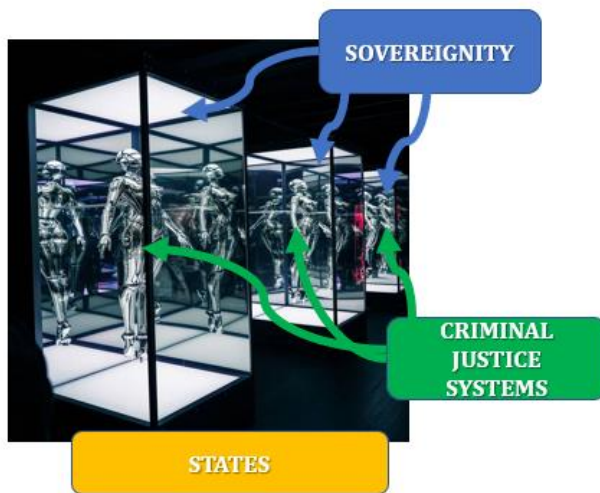
## 2. Jurisdiction and sovereignty

Read the text!

Traditionally criminal justice is 'detained' in the **glass cell of sovereignty**, which basically means that neither the exercising state power outside of the national territory nor the acceptance of foreign state power within its own territory are options for authorities in criminal matters not even for accelerating procedures or enhancing effectiveness of investigations or judicial procedures.

*(Exhibition in NYC, Hajime Sorayama, 2019)*

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How do you understand the visual metaphor?

Integration within the EU has changed the landscape in this regard and has introduced the concept of European territoriality – also in criminal matters – which has emerged to become a leading principle of current and future legislative ideas on the EU level. The core of this concept is the integration idea, based on which the judicial systems of the different **MS shall be viewed not as if they were systems of separate states independently of one another, but instead as if being comprised of one common area**. This means that the relationships and allocation of tasks among the single units within the system regulation would be governed based solely on regulation through judicial competence, and not from the perspective of jurisdiction. Under the common European legal and jurisdictional area, cooperation would be based not on the jurisdiction of the foreign MS, but instead

Traditionally criminal justice is 'detained' in the glass cell of sovereignty.



under the authority with jurisdiction and competence. Within this area, **there would be no barriers** to using evidence collected by such an authority, but there are also no limitations on taking procedural action for acts committed in the territory of another MS. The fundamental character of the principle is that the conflict of jurisdiction would be conceptually excluded, procedural resources can be allocated along both territorial competence- and jurisdictional regulation. Logically therefore, this corresponds with jointly opening up the punitive demands of MS, that is, it means that the MS shall cease their independently articulated and represented prosecution claims. Of course, we are presently far from this, but the partial enforceability of European territoriality is 'in the ballpark' of achieving this and with regards to certain crimes, it is limited to investigation only. If however partial enforceability were to be implemented, then further 'spill over' could be expected, because multiple procedural systems operating in conjunction and in parallel would result in such discrepancies and discriminative procedures the dissolution of which would require even further integration. Or the development of a dual system would result like that in the US. The **European principle of territoriality would also be capable of reducing the risk of forum shopping to a minimum**. In the event of full acknowledgment of the principle, the theoretical and legal issues that arise from an authority of an MS in this capacity could initiate procedural (or operative) action in the territory of another MS and would diminish only according to specific regulation, because under a unified jurisdiction, representatives of public authority may undertake acts in connection with legal procedures according to identical regulation.

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The general formulation of the principle was published as early as 1977 and Valéry Giscard D'Estaing<sup>1</sup> presented it at the Brussels Summit that year. This idea, which was then, if not as an immediate goal, part of European public policy. Thus, for example, the principle also played a role in setting up the pillar system (1992). European territoriality although not in its entirety, prevails to this day. However, it is important to see that over the course of more than 35 years of development, the idea has gradually developed and **even the system of Community law (today union law)** and the (explosive) development of civil law cooperation over the last 15 years served the implementation of the principle.

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<sup>1</sup> A former French politician who served as President of France from 1974 to 1981 and has always been a proponent of a deeper and greater European Union (in his time, the European Economic Community).



### 3. Jurisdiction conflicts – an introduction

Read the text!



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“When two or more states claim criminal jurisdiction to investigate, prosecute and adjudicate suspicious criminal conduct, a conflict between (legitimate) jurisdictions arises. **Parallel criminal proceedings** can endanger the “interests” of the persons involved, who may face the risk of double prosecution and punishment, as well as different legal regimes that determine the safeguards and remedies

available to reduce uncertainty and lack of foreseeability. If several countries exercise jurisdiction over the same facts, it leads to efforts and resources being wasted and potentially to arbitrary outcomes. In the specific context of the EU, in particular, concurrence of jurisdiction coupled with the application of the principle of European ne bis in idem can result in the prosecution of specific offences being barred on a “**first come, first served**” basis if the authorities of one Member State finally dispose of the case, even though this Member State is not necessarily “the best placed” to adjudicate the case. It is evident, therefore, that situations in which two or more states have concurrent jurisdictions over the same crime should be settled, or preferably, prevented.”<sup>2</sup>

How do you understand the concept of ‘first come, first served’ in this context?

**Sinn:** “Competency conflicts – conflicts of jurisdiction or criminal-law authority – result from the fact that multiple states’ criminal law extends its scope to cover the same offence and offender. The accumulation of various nations’ criminal jurisdiction puts a defendant

competing jurisdictional claims of MS

at risk of being prosecuted for the same offence in multiple countries, and sometimes even being punished repeatedly. The framework decision of the Council on the exchange and content of criminal records between Member States of 26 February 2009, which entered into force on 27 April 2009, sets out certain mechanisms under which a Member State (the “verdict state”) which has convicted a citizen of another Member State must convey certain information to the convicted defendant’s home state (the “state of origin”). **But the duty to exchange information does not arise until after conviction.** Neither does the transnational ban on multiple prosecution set out in Art 54 of the Convention Implementing the Schengen Agreement (see in the next reading lecture) necessarily

<sup>2</sup> European Law Institute: Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law. Project Report, 2017.



hinder multiple parallel criminal proceedings in multiple Member States against the same defendant for the same crime as long as proceedings in the state where they were first begun have not reached a conclusion. Art 54 of the Convention is not an adequate solution to the problems created for individuals by jurisdictional overlap. Uncoordinated competition between several national prosecuting authorities also brings with it the very real possibility of conflicts between the states themselves. **Parallel prosecution in several countries can create a ‘race to adjudication’** – and the state who loses will have expended its police and judicial resources in vain, since the prior conclusion in the state that ‘wins’ the race bars the still-ongoing proceedings from continuing. More fundamental problems of justice arise when the sentencing in the first country is considered disproportionately mild considering new consequences or revelations brought about by the investigations of other states. These problems are made more severe when sentencing in the first state is too strict, ignoring mitigating circumstances that have come to light in other investigations.”<sup>3</sup>

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**Note:** parallel and coordinated investigations in different MS are very effective and useful to track down international organised crimes and criminals. Check an example:

<https://www.europol.europa.eu/newsroom/news/parallel-investigations-bring-down-sexual-exploitation-network-and-freeze-criminal-profits-in-12-counties>

The problem above is the not-coordinated version when the authorities or jurisdictions are competing in the given case.

**Panayides:** “Owing to the increase in the movement of persons and capital in the European Union, the extended scope of the national jurisdictions of the Member States and the advancements in technology which took place in the last decades, the criminal justice systems of the EU Member States are increasingly confronted with situations where several Member States have criminal jurisdiction to investigate and bring to trial the same facts relating to the commission of criminal offences. Accordingly, two or more Member States may for example be able to establish their jurisdiction for the same facts in situations where the commission of a criminal offence crosses the territory of

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<sup>3</sup> Arndt Sinn: Draft models of a regulatory mechanism for the avoidance of jurisdictional conflicts. In: Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität. Conflicts of jurisdiction in cross-border crime situations; VR Unipress, Osnabrück, 2012; 579-620-p-



several Member States or the effects of an offence are felt in the territory of several Member States or in situations where an offence is being committed in a Member State but the nationality or the place of residence of the perpetrators persons or victims points to another Member State. Consequently, such situations may lead to a conflict of jurisdiction, for example when **two or more Member States have initiated parallel proceedings for the same facts or when none of the Member States concerned is willing to bring to trial certain of those facts**. Additionally, the commission of a criminal offence which falls within the jurisdiction of two or more Member States may lead to repeated proceedings by two or more Member States. Therefore, one may validly argue that the EU legislator has to lay down rules which would deal with the consequences of such situations.”<sup>4</sup>

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#### 4. European Public Prosecutor’s Office – EPPO

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The European Public Prosecutor’s Office will be **an independent and decentralised prosecution office of the European Union**, with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. The Regulation establishing the European Public Prosecutor’s Office under enhanced cooperation was adopted on 12 October 2017 and entered into force on 20 November 2017. At this stage, there are 22 participating EU countries.

Currently, only national authorities can investigate and prosecute fraud against the EU budget. **But their powers stop at national borders.** Existing EU-bodies such as Eurojust, Europol and the EU’s anti-fraud office (OLAF) lack the necessary powers to carry out criminal investigations and prosecutions.<sup>5</sup>

Remember: ‘glass cell of sovereignty’

Check the info sheet for basic knowledge about EPPO:

[https://ec.europa.eu/info/sites/info/files/eppo\\_brochure\\_en.pdf](https://ec.europa.eu/info/sites/info/files/eppo_brochure_en.pdf)

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<sup>4</sup> <https://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-113.htm#>

<sup>5</sup> [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office\\_en#mission](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en#mission)



## CRIMES INVESTIGATED BY THE EPPO

The EPPO can investigate any type of fraud involving EU funds, for example fraud of Regional Funds, Common Agricultural Policy Funds and so on. These include the abuse of tender procedures. The EPPO will also be able to investigate complex VAT carousel fraud cases.

### VAT carousel fraud

A supplier established in Member State 1, the 'conduit company', supplies goods (VAT exempted) to a second entity established in Member State 2, the 'missing trader'.

This trader then takes advantage of the VAT-exempted intra-Community supply of goods and resells, at a very competitive price, the same goods in the domestic market of Member State 2.

The competitive price is possible because, despite the trader charging its customer VAT, it does not declare this to the tax authorities, thus increasing its profit margins.

The missing trader then disappears, making tax collection impossible in the State in which goods or services are consumed.

The same transaction can be repeated in a circular, or 'carousel', manner.

### How does the EPPO add value?

- Has the mandate, the powers and the resources to fill the enforcement gap in the participating Member States to tackle crimes against the EU budget.
- Can share and cross-check information in respect of cross-border cases with other EU bodies and national authorities.
- Receives information, by obligation, from Member States on VAT fraud cases connected to cross-border VAT fraud that may cause damage above EUR 10 million.

### Tender procedures

EU tender procedures are often very technical and can be distorted by gaining access to confidential information in order to favour one competitor.

In such cases it can be very difficult for national authorities to detect and investigate any irregularity of fraud warning signs.

### How does the EPPO add value?

- Combines technical expertise of highly-specialised staff and key partners.
- Has the capacity to conduct cross-border investigations on the territory of different participating Member States.
- Uses simplified procedures identical to those available to national prosecutors.

One of the most important ideas behind the procedural rules of EPPO is the principle of **European territory**. Finally, it has to be mentioned that the idea of EPPO ascended already in 1997 in an international academic project (so-called Corpus Juris project<sup>6</sup>).

EPPO is an excellent example, how academic ideas become reality within the EU integration.

<sup>6</sup> Mireille Delmas-Marty, Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union, *Economica*, 1997.



## 5. Questions for review

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1. What is a conflict of jurisdiction?
2. What are the European aspects of this issue?
3. What is European territoriality?
4. What are the reasons to establish European Public Prosecutor's System?

### References

**European Law Institute:** Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law. Project Report, 2017.

[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Conflict\\_of\\_Jurisdiction\\_in\\_Criminal\\_Law\\_FINAL.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Conflict_of_Jurisdiction_in_Criminal_Law_FINAL.pdf)

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