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Diritto penale europeo

Derecho penal europeo

European Criminal Law

Granting Due Process of Law to Suspected and Accused Persons Involved in Parallel Criminal Proceedings in the EU*

Asegurar el derecho al debido proceso a investigados y acusados sujetos a procedimientos penales paralelos en la UE

Assicurare il diritto al giusto processo agli indagati e agli imputati sottoposti a procedimenti penali paralleli nell'UE

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Diritti processuali fondamentali, Giusto processo, Ne bis in idem
Derechos procesales fundamentales, Debido proceso, Ne bis in idem
Fundamental Procedural Rights, Fair Trial, Ne bis in idem

Abstracts

This paper aims to reflect on the deficiencies, from the criminal safeguards perspective, that can be found in the current procedure for the settlement of conflicts of criminal jurisdiction in the European Union. After a brief introduction and overview of the legal framework on conflicts of jurisdiction and the system of protection of rights and procedural safeguards in the European Union, the paper is divided into two different parts. The first part will focus on identifying and examining the principles, rights and safeguards at stake in a transnational situation of conflict of criminal jurisdiction between Member States. In the second part of this paper, the author will reflect on the improvements that should be adopted to grant a better standard of protection for the suspected or accused person, including the critical analysis of proposals made by scholars on this matter.

El objetivo del presente trabajo es reflexionar sobre las deficiencias, desde el punto de vista de las garantías procesales, que pueden encontrarse en el procedimiento de prevención y resolución de conflictos de jurisdicción penal actualmente en vigor en la Unión Europea. Tras una breve introducción y panorámica general sobre el marco legal sobre conflictos de jurisdicción y el sistema de protección de derechos y garantías procesales en la Unión Europea, el trabajo se divide en dos partes diferentes. La primera parte se centrará en identificar y examinar los principios, derechos y garantías susceptibles de vulneración en una situación transnacional de conflicto de jurisdicción penal entre Estados miembros. En la segunda parte del trabajo, el autor reflexionará sobre las mejoras que deberían adoptarse para garantizar un mejor estándar de protección para el sospechoso o acusado, incluyendo el análisis crítico de propuestas realizadas por otros investigadores en esta materia.

L'obiettivo del presente lavoro è quello di riflettere sulle lacune, dal punto di vista delle garanzie processuali, in cui ci si può imbattere nel procedimento di risoluzione dei conflitti di giurisdizione nell'Unione europea. Dopo una breve introduzione e panoramica generale circa il quadro normativo sui conflitti di giurisdizione e sul sistema di protezione dei diritti e delle garanzie processuali nell'Unione europea, il lavoro si divide in due distinte parti. La prima parte si concentra nell'identificare e analizzare i principi, i diritti e le garanzie che possono essere violati in una situazione di conflitto di giurisdizione transnazionale tra Stati membri. Nella seconda parte del lavoro, l'autore riflette sulle possibili modifiche volte a garantire un più alto standard di protezione dell'indagato o dell'imputato, includendo l'analisi critica delle proposte già avanzate da altri studiosi di questa materia.

This paper is part of the author's research carried out in the framework of the research projects "Garantías procesales de investigados y acusados: la necesidad de armonización y fortalecimiento en el ámbito UE" (MINECO ref. DER2016-78096-P); "Sociedades seguras y garantías procesales: el necesario equilibrio (Junta de Castilla y León, Consejería de Educación, ref. VA135G18).

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1. Introduction.

According to art. 3.2 TEU, "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers (…) in conjunction with appropriate measures with respect to (…) the prevention and combating of crime". In fulfilment of this mandate, the EU is developing a sort of European Area of Criminal Justice, based on mutual recognition instruments (from the EAW to the EIO), the establishment of specialized bodies and agencies (from Eurojust to EPPO) and the approximation and harmonization of criminal law. However, EU action in this field have not yet included an effective mechanism to determine the competent criminal jurisdiction in transnational criminal proceedings and, therefore, different national criminal jurisdictions (to prescribe, to adjudicate and to enforce) still coexist within the AFSJ.

As a consequence, the limits of each jurisdiction are established unilaterally by the Member States according to the rules laid down in their domestic law. Numerous different criteria and principles are often used to claim criminal jurisdiction, which are not only grounded in the principle of territoriality, but also on a variety of extraterritorial principles (*e.g.* personality, protection, vicarious applicability, universality), allowing States to extend their own jurisdiction to crimes partially or completely committed abroad. To make matters worse, some EU instruments on the harmonization of criminal law have established their own criteria to determine the competent criminal jurisdiction[1], which stimulates the existence of overlapping prosecutions over the same criminal acts.

Applying all of these different criteria to cross-border criminal cases may eventually lead to a situation where two or more Member States are virtually competent to prosecute the same criminal acts or, technically speaking, a positive conflict of criminal jurisdiction. In these situations, given that there are no binding guidelines to decide which jurisdiction is in the best position to undertake the case where several States could claim the exercise of their own jurisdiction —the guidelines issued by Eurojust which will be discussed later in this paper shall not be considered as such—, the settlement of the conflict and the subsequent determination of the applicable criminal law might be an extremely complex task that currently relies on the conclusion of an agreement between the national authorities involved in the conflict, using a settlement procedure described in passing in FD 2009/948/JHA[2], which may include the optional and non-binding assistance of Eurojust.

Among the numerous legal questions stemming from the (un)determination of the jurisdiction and the applicable criminal procedure law, one of the key issues to be answered is how can a minimum standard of protection of the safeguards of suspected and accused persons involved in parallel proceedings be guaranteed in these conditions. It is important to note that procedural safeguards in criminal proceedings are still enshrined and protected, in the first instance, at national level. But, despite Member States sharing a common tradition and values, the protection standards and the limits of the exercise of those rights are far from equal. These standards vary according to the national principles of criminal procedure law, frequently enshrined as fundamental rights, and the interpretation of the same by the case-law of the national High and Constitutional Courts[3].

[1] See *e.g.* art. 19 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism (OJ L 88, 31 March 2017).

[2] Council Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (OJ L 328, 15 December 2009).

[3] On the relationship between national legal systems and EU procedural rights development, see MITSILEGAS (2016), pp. 153-184.

Nevertheless, to ensure that an AFSJ based on mutual trust works properly, the Union has assumed that a minimum standard of protection for these safeguards shall be established at EU level, an ambitious objective that is being developed through the approximation and harmonization of national legal systems through Directives —the "successful" Stockholm Roadmap[4]—, in conjunction with the case-law of the ECJ, closely bound by the jurisprudence of the ECtHR on this matter[5]. In fact, the fundamental rights enshrined in the ECHR, just like those resulting from the constitutional traditions common to the Member States, shall constitute general principles of the EU's law according to the treaties[6].

Is this system of protection practical in cross-border scenarios? Should the EU distinguish between national and transnational situations regarding rights and procedural safeguards? The aim of this paper is twofold: first, to critically analyse and expose the current status of the protection of the rights of suspected and accused persons in transnational criminal proceedings, particularly focusing on those specific situations where a conflict of jurisdiction has arisen or might arise. Second, to reflect on the possible changes that the EU could introduce in order to improve the settlement procedure for the conflict to properly guarantee due respect for these rights and safeguards.

2. The impact of the conflict of jurisdiction in the principles, rights and safeguards of suspected and accused persons.

2.1. *Applying the transnational dimension of the ne bis in idem to parallel prosecutions.*

The first and perhaps most important risk that the coexistence of two or more parallel criminal proceedings towards the same person in different criminal jurisdictions represents is an alleged violation of the principle of *ne bis in idem*, translated as the right to not be prosecuted —and subsequently, punished or sentenced— twice or multiple times for the same criminal offence.

Also known as the prohibition of double jeopardy, it could be currently considered as one of the main and primary principles of criminal law enshrined in the vast majority of national legal systems. The main purpose of this principle is to avoid double criminalization and punishment, an action that would be extremely disproportional and, ultimately, to guarantee the principle of personal legal certainty, closely related to the effects of *res iudicata (pro veritate habitur)*[7].

Since its alleged Roman origins (*nemo debet bis vexari pro una et eadam causa*)[8], it has been assimilated through history by the legal traditions of the most part of the countries, currently enjoying widespread international recognition. Consequently, this principle is laid down in the most important international legal instruments on Human Rights (*e.g.* art. 14.7 ICCPR[9], art. 8.2 ACHR[10], art. 4 Protocol 7º ECHR[11]). It is also laid down in the national legal systems, either at the constitutional level (*e.g.* § 103 (3) German *Grundgesetz*), or as one of the core principles of criminal law (*e.g.* art. 6 French *Code de procédure pénale*; § 68 Dutch *Wetboek van Strafrecht*).

However, the rationale and scope of the *ne bis in idem* principle enshrined in the national and international provisions previously mentioned only refers to the prohibition of double jeopardy and double punishment regarding domestic criminal proceedings[12] —or national dimension of the principle—, which only prevents the conduct of cumulative criminal proceedings against the same person for the same criminal acts within the same criminal juris-

[4] Action plan implementing the Stockholm Programme (OJ C 115, 4 May 2010).
[5] See art. 52.3 CFREU.
[6] Art. 6.3 TEU.
[7] In this sense, LELIEUR (2013), pp. 198-210.
[8] CONWAY (2003), p. 221.
[9] International Covenant on Civil and Political Rights (New York, 16 December 1966. In force since 23 March 1976).
[10] American Convention on Human Rights (San José, 22 November 1969. In force since 18 July 1978).
[11] Protocol n.º 7 to the European Convention on Human Rights (Strasbourg, 22 November 1984. In force since 1 November 1988).
[12] Except for the *Wetboek van Strafrecht* (Dutch Penal Code), which enshrines the transnational effect of the principle (see § 68.3).

diction. Therefore, this dimension of the principle does not cover the possible application of the consequences of the *ne bis in idem* to those transnational situations where parallel criminal proceedings against the same person are being conducted in two or more different criminal jurisdictions. It is this second —or transnational— dimension of the principle that exceeds the national boundaries and really matters at the European level to assure a correct functioning of the AFSJ.

For that reason, the transnational dimension of the principle was primarily set up[13] by art. 54 CISA[14] and, later, enshrined as a fundamental right of the European Union by art. 50 CFREU. In the same way, it is laid down as a ground for refusal and/or non-execution in many mutual recognition instruments of secondary European Union law[15]. The scope and limits of the different elements of the principle of *ne bis in idem* in transnational criminal proceedings, as they are differently stated in art. 54 CISA and art. 50 CFREU, are being constantly redefined, shaped and delimited by the ECJ's case law[16].

Undoubtedly, the proper application of this principle is a key issue for the prevention and resolution of conflicts of criminal jurisdiction. It is with good reason that this principle might act as a last resort mechanism to settle the conflict, since the prohibition of double jeopardy and double punishment prevents any jurisdiction from prosecuting the same person for the same criminal acts once a final decision has been disposed against the same person for the same criminal acts in any other Member State. This implies, in practice, that in a case of conflict of criminal jurisdiction, the principle would act not only as a safeguard for the suspected and accused person, but also as a sort of "first come first served" rule for the national authorities, in which the jurisdiction which first conducts —and concludes— the criminal proceedings shall become, *de facto*, the only competent criminal jurisdiction.

This would lead to an unintended use of the *ne bis in idem* principle, neither as a right or safeguard for individuals nor as a limit to the exercise of the *ius puniendi* of national authorities, but as a mere *prior in tempore potior in iure* sort of rule to settle the conflict of criminal jurisdiction, which incentivises national authorities to be the first to start prosecuting in order to assume the competence over the case. The latter is an example of the undesired consequences of the principle, as it prevents the national authorities from weighing up all the relevant factors and merits of the case to reach a due solution after considering all the interests of the parties involved[17]. Besides, it has to be noted that the *ne bis in idem* consequences would not only be applicable to those judgments convicting the suspected or accused person, but also to final decisions acquitting or finally disposing the prosecution[18], which could lead to undesired impunity situations. Having said that, the main positive aspect that this principle represents from the suspected and accused´s safeguards perspective is that it would always act, in a transnational prosecution context, as an absolute guarantee that he/she should not be cumulatively punished in the Union for the same criminal acts.

Foreseeability and equality at stake: the right to be heard by an impartial court previously established by law.

[13] In reality, we can consider that the first multilateral attempt was the Convention on the application of the principle *ne bis in idem* (Brussels, 25 May 1987), signed and ratified by Denmark, France, Italy, The Netherlands and Portugal. However, the low ratification ratio of this convention has clearly undermined its importance.

[14] According to VERVAELE (2013), p. 218 *in fine*, "The CISA Convention can be qualified as the first multilateral convention that establishes an international *ne bis in idem* principle as an individual right *erga omnes*, be it limited to the regional Schengen area".

[15] *E.g.* art. 3.2 FD 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18 July 2002); art. 7.1 c) FD 2003/577/JHA on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2 August 2003); art. 9.1 c) FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327, 5 December 2008); art. 11.1 d) Directive 2014/41/EU regarding the European Investigation Order in criminal matters (OJ L 130, 1 May 2014).

[16] *Cfr.* ECJ cases *Gözutök y Brügge* (C-187/01 y C-385/01), ECLI: EU:C:2003:87; *Miraglia* (C-469/03), ECLI: EU:C:2005:156; *Van Esbroeck* (C-436/04), ECLI: EU:C:2006:165; *Gasparini* (C-467/04), ECLI:EU:C:2006:610; *Van Straaten* (C-150/05), ECLI: EU:C:2006:614; *Kretzinger* (C-288/05), ECLI: EU:C:2007:441; *Kraaijenbrink* (C-367/05), ECLI:EU:C:2007:444; *Bourquain* (C-297/07), ECLI: EU:C:2008:708; *Turansky* (C-491/07), ECLI:EU:C:2008:768; *Mantello* (C-261/09), ECLI: EU:C:2010:683; *Baláž* (C-60/12), ECLI: EU:C:2013:733; *M* (C-398/12), ECLI: EU:C:2014:1057; *Spasic* (C-129/14), ECLI: EU:C:2014:586; *Kossowski* (C-486/14), ECLI:EU:C:2016:483. On the early case-law of the ECJ with regard to the principle *ne bis in idem* in criminal matters, see RAFARACI (2010), pp. 126-140, VAN BOCKEL (2010), pp. 119-170.

[17] See the reflections made by OUWERKERK (2011), p. 277.

[18] *Cfr.* ECJ cases *Gözütok and Brügge, Van Straaten, Gasparini,* and *M*.

2.2.

The cornerstone of the settlement procedure established in the current legal framework on conflicts of criminal jurisdiction is not the prior allocation of the exercise of criminal jurisdiction —which is the main cause of the problem—, but the search for and conclusion of an agreement between the national judicial authorities involved to decide which of them is in a better position to undertake the investigation or prosecution of the case after exchanging information and establishing direct consultations. Furthermore, there is no any binding criterion or list of hierarchized factors applicable to the merits of the case to come to a consensus, just the guidelines issued by Eurojust in 2003 and recently revised in 2016[19]. Hence, the allocation of jurisdiction and, subsequently, the final determination of the competent judicial authority to prosecute and judge the suspected or accused person, would mostly depend on the opinion and goodwill of the national judicial authorities involved in the conflict, with hardly any possibility for the suspect to participate in the settlement procedure.

As a consequence, given two substantially equivalent hypothetical cases, the final decisions on which jurisdiction should undertake the investigation or prosecution could be completely opposite, as they could be based on the application of a diverse kind of criteria and connecting factors, or a different ponderation of those factors by the competent national authorities involved in each case. Therefore, it is actually very plausible that the suspected or accused person subjected to parallel proceedings would not know in advance which judicial authority and criminal jurisdiction will be finally competent to prosecute and judge him/her. In fact, according to the current legal framework, the suspected person may not even know that a procedure for the settlement of the conflict of jurisdiction is being carried out, especially if the decision on the best jurisdiction to prosecute has been reached at an early stage of the transnational criminal investigation, *e.g.* after a coordination meeting held in the Hague by the national judicial authorities and the representatives of Eurojust involved, where often the suspected or accused person is not even aware that he/she is being investigated and, consequently, has no opportunity to participate in the settlement procedure and in the agreement on the choice of forum.

This scenario, governed by unpredictability, not only undermines the principle of equality: it is also a breach of the principle of legal certainty. It makes it impossible to foresee what the direction of the final decision of the judicial authorities on the allocation of the competent jurisdiction could be, and it also makes extremely challenging for the suspected or accused person to successfully appeal that decision, provided that he/she has the possibility to do so. From my point of view, this lack of foreseeability and legal certainty is not in accordance with the right to be heard by a court previously established by law laid down in art 6 ECHR, art. 47 CFREU, and the different national provisions on the same matter stated at national level.

2.3. *The legality principle*[20].

The decision on the allocation of the "best-placed" jurisdiction will not only determine the criminal jurisdiction to adjudicate and the competent judicial authorities that will undertake the case, but it will also determine the criminal law to prescribe. In spite of the renewed efforts by the EU on substantive criminal law harmonization after the entry into force of the Lisbon Treaty[21], the differences between national legal systems are still significant. Subsequently, from a substantive criminal law perspective, the choice of forum will affect to the definition of the criminal offence, the elements of the crime, the seriousness of the penalty associated to the unlawful behaviour, and the aggravating and extenuating circumstances applicable to the merits of the case.

The application of the principle of double criminality as a ground for refusal in mutual recognition instruments is a perfect sample of this diversity, and the problems that this may entail

[19] See *Guidelines for deciding "which jurisdiction should prosecute?"*, DOI: 10.2812/29631.
[20] For an in-depth study on this particular issue, see LUCHTMAN (2013).
[21] *E.g.* Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15 April 2011); Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31 March 2017); Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28 July 2017). On this topic, see GALLI and WEYEMBERGH (2013).

have been recently shown with regard to the last EAW issued against Carles Puigdemont. In the criminal proceedings in Spain, the former president of Catalonia was prosecuted, among other criminal offences, for a crime of rebellion, a serious criminal offence that could be punished with up to more than twenty years of imprisonment according to the Spanish Penal Code[22]. Whereas, in Germany, the *Schleswig-Holstein Oberlandesgerich* ruled, in the framework of an EAW procedure, that the facts described in the request form by the investigating judge of the High Court of Spain could not be considered a crime in Germany, provided that the elements required on the equivalent crime according to the German criminal law —allegedly, High Treason[23]— were not fulfilled in this case, specifically, the element of "force". Hence, the German court decided that the Spanish request did not meet the principle of double criminality and finally refused the surrender of Mr. Puigdemont for the most severe crime[24]. Leaving aside the criticism that, in my opinion, the decision of the German Court highly deserves, this case clearly shows how differences between substantive criminal laws could be of major importance in any transnational situation in the EU.

From the criminal procedure law perspective, the allocation of jurisdiction would also determine the main aspects of the criminal proceedings such as the legal requirements on the gathering and admissibility of evidence, including the protection of fundamental rights, the regime on plea bargains, transactions or any sort of out-of-court resolutions, which broadly differ from one European country to another. Hence, when several Member States could exercise its criminal jurisdiction and, therefore, prosecute the same criminal acts, the suspected or accused person involved in the conflict would probably seek and prefer to be prosecuted or tried in the jurisdiction which establishes lower penalties or better procedural benefits and/or alternatives to the classic penalty of imprisonment for the crimes for which he or she is being investigated or charged.

Logically, seeking the application of a *lex mitior* criterion in the interests of the suspected or accused person is not guaranteed in the procedure of prevention and resolution of conflicts of jurisdiction currently in force at EU level. Nonetheless, it is true that in the guidelines issued by Eurojust we can find a recommendation to the national authorities not to choose the jurisdiction with the higher penalties or higher sentencing powers for the criminal acts allegedly committed by the suspected or accused person[25]. However, we can only consider it a mere recommendation that could be followed —or not— by the national authorities, and not a true principle or right that could be claimed by the suspected or accused person. Thus, it is not currently envisaged that the *lex mitior* criterion would be applied in the agreement reached by the national judicial authorities on the best jurisdiction to prosecute, or even that this criterion could be effectively appealed before a court in a potential judicial review of the decision, a review that currently is limited to the national level.

This situation raises a lot of concerns on the actual nature of the agreement on the settlement of conflicts of criminal jurisdiction. In my opinion, the main concern could be if this agreement between national authorities should be considered as an arrangement on the choice of forum in the interests of Justice, concluded after a thorough examination of all the merits of the case to determine the jurisdiction best placed to undertake the investigation or prosecution, which should be the main objective of the entire settlement procedure; or, on the contrary, if the nature and purpose of this agreement could be easily alienated by the national authorities involved —especially, by public prosecutors— and become an arrangement to choose the best jurisdiction just for prosecution and punitive purposes, in order to get a potentially easier or higher conviction of the suspected or accused person —a situation of *forum shopping* that goes against the interests of the person being investigated or charged[26]—. In other words: the main concern should be to clarify if the judicial authorities could apply a *lex gravior* criterion discretionally to settle the conflict against the interests of the suspected

[22] Art. 472, paragraphs 5 and 7 and art. 473 *CP*.
[23] § 81 *StGB*. For a critical analysis of this matter from a substantive criminal law perspective, see JAVATO (2018), pp. 65-70.
[24] The *Schleswig-Holstein Oberlandesgerich* granted the surrender of Carles Puigdemont for the crime of embezzlement, but the Spanish Investigating Judge refused the surrender and finally withdrew the EAW.
[25] The guideline is laid down as follows: "While it should be ensured that the potential penalties available reflect the seriousness of the criminal conduct that is subject to prosecution, judicial authorities should not seek to prosecute in one jurisdiction simply because the potential penalties available are higher than in another jurisdiction. Likewise, the relative sentencing powers of courts in the different jurisdictions should not be a determining factor in deciding in which jurisdiction a case should be prosecuted.". See *Guidelines for deciding "which jurisdiction should prosecute?*, *op.cit.*, p. 4.
[26] In the same sense, see PATRONE (2013), pp. 215-225.

or accused person.

In view of this, I think that it is crystal clear that, given that the suspected or accused person has little margin for intervention, the present legal framework on conflicts of jurisdiction does not prevent the latter scenario, naively relying in the goodwill of the national judicial authorities involved. I am not trying to defend that the suspected or accused person should have an absolute right to be prosecuted and tried by the jurisdiction and criminal justice system that is most favourable for his or her legal interests. However, neither do I believe that the national judicial authorities should have such an absolute power for determining the competent jurisdiction through a system without a thorough —and, perhaps, supranational— judicial review on the choice of forum.

From my point of view, within a situation of cross-border parallel criminal procedures, none of the parties involved —public prosecutor services, suspected or accused persons— should have the power to choose the competent jurisdiction according to the seriousness of the penalties envisaged, *in abstracto*, in each national legal system for the criminal offence allegedly committed. Regretfully, the absence of hierarchized factors to determine the competent jurisdiction and the lack of a supranational judicial review on the agreement reached by the national judicial authorities involved prevents, in my opinion, a true judicial control of the choice of forum according to European legal standards of protection, which would better prevent this detrimental scenario to the suspected and accused person's interests.

2.4. *Granting procedural safeguards in multiple criminal proceedings.*

Transnational criminal investigations and proceedings unavoidably entails facing added difficulties for the exercise of rights and procedural safeguards. From the perspective of the suspected or accused person it involves, among other issues, the need to count on professional legal advice and expertise in every single jurisdiction involved, including but not limited to the assistance of a lawyer and to be legally represented before the Court. In Spain, unlike other European countries, these roles have to be assumed by two different legal practitioners —*abogado* (lawyer) and *procurador* (legal representative before the court)— ¸which could also imply an extra cost for individuals. In the event that the suspected or accused person does not speak or understand the language in which the investigation or criminal proceedings is being conducted, a translation and interpretation service must be provided in order to safeguard his or her right to be informed of the criminal charges and to ensure the correct exercise of the right to defence at every single stage of the proceedings. While all these burdens are typically borne by the suspected or accused person in any transnational criminal context, they would be aggravated if he/she must exercise all these procedural safeguards before several national criminal jurisdictions in different Member States simultaneously. The latter —and worse— scenario would occur in a situation of conflict of criminal jurisdiction.

In this sense, in recent years, the EU has been developing a successful action plan on the application of the Stockholm program to partially harmonize criminal procedural safeguards in the EU. This roadmap has led to the adoption of up to six different directives establishing minimum rules in the EU on the following procedural safeguards in criminal proceedings: the right to interpretation and translation[27]; the right to information of suspects or accused persons[28]; the right of access to a lawyer and to have a third party informed upon deprivation of liberty[29]; the strengthening of the presumption of innocence and the right to be present at the trial[30]; on the procedural safeguards for suspected and accused children[31]; the right to legal

[27] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26 October 2010).

[28] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1 June 2012).

[29] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6 November 2013).

[30] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11 March 2016).

[31] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21 May 2016).

aid[32]. The main objective of these directives is to grant that, no matter the competent criminal jurisdiction, the suspected or accused person will have a minimum equivalent standard of protection with regard to these safeguards. The establishment of a minimum standard of protection also aims to strengthen the mutual trust between national legal systems and, therefore, to foster judicial cooperation in criminal matters between Member States based on the mutual recognition principle.

Conversely, it does not mean that the differences between national legal systems have been abolished, not even with respect to these safeguards. While criminal procedure law safeguards are not fully harmonized, we must bear in mind that all the provisions laid down in these directives act as minimum rules. This implies that Member States shall not use the directive for reducing the standard of protection previously established by the CFREU, the ECHR and domestic provisions, and they shall maintain any previously established higher standard —the so-called non-regression clauses[33]—. Consequently, in a situation of conflict of criminal jurisdictions, the suspected or accused person will unavoidably encounter, even on these rights that have been partially harmonized, a different degree of protection depending on the Member State in which the criminal proceedings are being conducted. Moreover, despite the clear transnational dimension that they intend to achieve, the provisions laid down in these directives are meant to be applied to domestic criminal proceedings, so they do not address nor place special emphasis on the exercise of these safeguards in specific transnational circumstances[34]. The provisions laid down in the directives regarding the specific exercise of safeguards in EAW proceedings[35] constitute the only exception to this.

This notwithstanding, these specific provisions, combined with the most recent case law of the ECJ on the EAW, are leading, in practice, to achieve a higher standard of protection for requested persons via establishing fundamental rights-based grounds for refusal. In the *Aranyosi and Căldăraru* case[36], the ECJ ruled that it is in accordance with EU law to refuse the surrender of persons if there is a real risk of violation of fundamental rights —particularly, inhuman or degrading treatment, a violation of art. 4 CFREU—, even though the Framework Decision on the EAW does not specifically include this ground for refusal[37]. Particularly interesting is the recent judgment of the Court in the *Minister for Justice and equality* v. *LM.* judgment[38], in which the Luxembourg Court put the justice system of Poland on the spot declaring that the existence of an ongoing procedure of infringement of fundamental rights against this Member State concerning the independence of the judiciary could justify the non-surrender of a person[39].

Accepting these possible fundamental rights-based grounds for refusal, it seems that the current case law of the ECJ is trying to find the right balance between the effectiveness and primacy of the European Union law in criminal matters on the one hand, and the protection of fundamental rights of the individuals on the other[40]. However, this practice could arguably be understood as a system which distinguishes between the rights and safeguards of individuals involved in national and transnational criminal proceedings, which could also hinder mutual trust and the effectiveness of judicial cooperation in criminal matters.

Since the EU directives on criminal safeguards do not specifically address the rights of the suspected and accused persons subjected to parallel transnational criminal proceedings —except for EAW proceedings—, unfortunately, the suspect or accused will be hampered by this situation until the conflict is finally settled. This would only happen where the national

[32] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4 November 2016).

[33] *E.g.* art. 14 Directive 2013/48/EU: "Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection".

[34] See BACHMAIER (2018), pp. 56-63.

[35] *E.g.* art. 10 Directive 2013/48/EU; art.5 Directive 2016/1919.

[36] ECJ case *Aranyosi and Căldăraru* (C-404/15), ECLI: EU:C:2016:198.

[37] The reasoning of this judgment has been further clarified by the ECJ, *cfr. Generalstaatsanwaltschaft (detention conditions in Hungary)* (C-220/18 PPU), ECLI:EU:C:2018:589.

[38] ECJ case *Minister for Justice and Equality v. LM* (C-216/18), ECLI:EU:C:2018:586.

[39] For a critical opinion on this practice, see VILAS ÁLVAREZ, (2018), pp. 64-71. However, we have to bear in mind that fundamental rights-based grounds for refusal have been introduced in the wording of the latest mutual recognition instruments, see art. 11.1 (f) Directive 2014/41/EU.

[40] For a quick perspective of the evolution of the ECJ case-law on this issue, *cfr.* cases *Melloni* (C-399/11), ECLI:EU:C:2013:107; *Taricco* (C-105/14), ECLI:EU:C:2015:555; *M.A.S. & M.B.* (*Taricco II*) (C-42/17), ECLI:EU:C:2017:936.

judicial authorities reach an agreement to decide which jurisdiction is best placed, or where everything fails and the principle *ne bis in idem* becomes applicable. But, even then, transnational side-effects could still persist after all (*e.g.* when the enforcement of the penalty has to be served in another Member State). Therefore, it is not yet guaranteed that in every single criminal jurisdiction involved in the conflict and, in particular, in those which differ from the nationality or legal residence of the suspected or accused person, an equivalent standard of protection of these rights and safeguards, which are all stemmed from the right of defence, is effectively provided.

2.5. *The interest of the victim on the allocation of jurisdiction.*

The suspected or accused person is not the only party in the criminal proceedings that could be harmed by the negative consequences stemmed by a conflict of criminal jurisdictions. Analogously, the interests of the victim of the criminal offence could be at stake by the allocation of the competent jurisdiction, making the role of the victim in the criminal proceedings a matter that should be, at least, considered.

With the aim of guaranteeing that victims in criminal proceedings can count on a minimum standard of rights and protection within the AFSJ, the European Union adopted a specific directive[41] and a mutual recognition instrument, the European Protection Order[42] —which was actively promoted by Spain—, to ensure that a minimum standard of protection is granted to victims of criminal offences within the Union[43]. However, despite the efforts made at the European level, victims in criminal proceedings will still experience a different status or role in the criminal proceedings depending on the Member State where the criminal investigation or proceedings is being conducted.

In this sense, the role of the victim in criminal proceedings varies enormously attending to the different European legal systems[44]. Some national legal systems permit the victim to exercise the criminal action independently of the opinion of the Public Prosecutor, allowing them to act before a Court as an independent accusation—which is the case under Spanish criminal procedure law—. Meanwhile, some national legal systems void this possibility to the victim with respect to public felonies, leaving the monopoly of the prosecution to the Public Prosecutor's Office —that is the case of the Dutch and German criminal systems—. Moreover, it is important to note that, in some criminal systems, in application of the expediency principle, the Public Prosecutor has a wide margin of discretion to not prosecute an offence or to dispose a criminal investigation, even against the opinion of the victim —Dutch system—; whereas, in other systems, the Public prosecutors are strongly bound by the principle of legality and, therefore, cannot decide not to prosecute a criminal act that may constitute a public criminal offence according to the Penal Code —current Spanish system, with very few exceptions[45]—.

While it is right, as has been previously mentioned, that the European Union has adopted a Directive establishing minimum standards on the rights, support and protection of victims of crime, it is also true that its scope of application with regard to the participation of victims in criminal proceedings was practically limited to ensuring the right of the victim to be heard and to providing evidence and, in the event that the public prosecutor decides not to prosecute, to having the right to appeal for a review of the decision. Consequently, this minimum standard is far from guaranteeing an equivalent role of the victim in any criminal proceedings in any Member State. For that reason, in a situation of conflict, the victim might have a rightful interest in participating in the procedure for the allocation of the competent jurisdiction, in order to try to retain the investigation/proceedings allocated to the jurisdiction that offers him/her a more important role in the same. From the safeguards of the victim perspective, this should be a concern for the national authorities involved in the conflict.

As a consequence, the guidelines issued by Eurojust already state that the interests of the

[41] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14 November 2012).
[42] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L 338, 21 December 2011).
[43] On this topic, see ARANGÜENA FANEGO (2015), pp. 491-535.
[44] On this topic, see HOYOS SANCHO (2017), pp. 125-261.
[45] See *e.g.* art. 803 *bis LECrim*.

victim shall be a main factor that must be taken into account to decide which is the best-placed jurisdiction in a situation of conflict of criminal jurisdictions[46]. However, while I think it is true that it is necessary to protect and respect the interests of the victim in criminal proceedings, we must remember at the same time that the victim does not truly have any kind of "right of punishment" towards the suspected or accused person. Nonetheless, *ius puniendi* is and should be an exclusive prerogative of the State as it constitutes a classic sign of national sovereignty[47]. Therefore, even though the interests of the victim have to be borne in mind and might be relevant as a factor to determine the competent jurisdiction, particularly in view of some kind of crimes —*e.g.* Trafficking in Human Beings—, from my point of view these interests should only be taken into account as a complementary or secondary factor, which means that the allocation of the best-placed jurisdiction could never be solely based on the best interests of the victim of the crime but on a conjunction and ponderation of different criteria.

3. The way forward. Reflections and proposals from the perspective of the protection of rights and criminal safeguards of individuals.

3.1. *The rocky road to legal certainty: establishing clear rules to allocate the criminal jurisdiction in the AFSJ.*

In order to assure that the procedure of settlement is in accordance with the requirements of due process of law that have been previously outlined —*inter alia*: legal certainty, right to be heard by a court previously established by law, respect of the principle of legality—, the first and foremost step to be taken in order to protect the rights and safeguards of the suspected or accused person shall be to establish a system for the allocation of jurisdiction that clearly determines which criminal jurisdiction would be competent in case of conflict. Therefore, establishing clear rules to allocate the criminal jurisdiction in the European Union shall become the main priority of any future instrument on this matter, making the determination of the competent criminal jurisdiction foreseeable and made according to connecting factors previously established by law.

Perhaps, it could be thought that the best way to achieve this objective would be to create a model to allocate criminal jurisdiction within the European Union based on the principle of territoriality and, subsequently, limiting the extraterritorial grounds for claiming jurisdiction currently applied by the national jurisdictions of the Member States. Switching to this system would prevent, *a priori*, the genesis of any conflict of criminal jurisdiction, avoiding the most part of the issues mentioned above. Some scholars have reflected on and explored this possibility, making proposals in this sense[48]. However, from my point of view, this system presents significant practical problems that would be extremely hard to resolve.

Primarily, it would be impossible to determine the competent jurisdiction solely based on the principle of territoriality in those multi-territorial cases, where the criminal offence has been committed in more than one Member State's soil. Furthermore, Member States might be reluctant to accept this degree of intromission into their national sovereignty, especially considering the current political situation at the European level, where Euroscepticism is clearly on the rise. The recent experience with other ambitious initiatives in the field of European criminal justice like the establishment of the EPPO, that has been adopted by means of an enhanced cooperation mechanism, could anticipate that this model might be rejected by the States in terms of due respect of EU law principles of proportionality and subsidiarity.

From a different perspective, it could be thought that, to guarantee due respect for the principle of legal certainty and the right to be judged by a court previously established by law,

[46] "In accordance with Directive 2012/29/EU on victims' rights, judicial authorities must take into account the significant interests of victims, including their protection, and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another. Such consideration would include the possibility of victims claiming compensation.", see *Guidelines for deciding "which jurisdiction should prosecute?"*, *op. cit.*, p. 3.

[47] See AMBOS (2006), p. 84.

[48] See the different approaches and proposals made by BÖSE *et al.* (2014), pp. 381 *et seq*; MAPELLI MARCHENA (2014), pp. 503 *et seq.*; LIGETI *et al.* (2018), pp. 70-76.

it would be mandatory to establish, at least, some kind of priority or hierarchy between the different connecting factors that are being commonly used by the national authorities to settle the conflict. Some scholars have defended that this option would be the most reasonable to attain this purpose[49]. Even though I agree with them to the extent that it could be the best solution to allocate criminal jurisdiction in transnational cases in terms of foreseeability and legal certainty, from my perspective this option should not be accepted as the best solution in terms of good administration of justice.

Legal expertise in judicial cooperation in criminal matters shows that each transnational criminal investigation/proceedings has particularities that must be borne in mind on a case-by-case basis. Thus, giving an absolute priority to one main factor (*e.g*. principle of territoriality) with respect to other secondary or tertiary factors (*e.g.* location of the suspect or accused person, availability of evidence, stage of proceedings) would not automatically lead to a good decision on the jurisdiction with respect to the interests of the individuals and the national authorities involved. Moreover, even if a hierarchized list of factors is used to allocate the jurisdiction, those situations in which several states claim an equal link to the case would still be problematic[50] and will have to be solved by means of using additional mechanisms[51].

All things considered, the option that in my opinion should prevail is the establishment of a non-hierarchized list of connecting factors to resolve a conflict of criminal jurisdictions on a case-by-case basis. But, unlike the current situation, in which there are no factors laid down in the main instrument at the European level on conflicts of jurisdiction —the preamble of the FD 2009/948/JHA just refers to the guidelines issued by Eurojust in 2003[52]—, I think that these factors should be included in a new legal instrument of the European Union, which must replace and repeal the Framework Decision currently in force[53] .

However, this measure will not on its own be enough to improve the current system of settlement of conflicts regarding the rights and safeguards of individuals. There are other numerous gaps that must be filled in order to adequate the decision on the choice of forum to the post-Lisbon requirements and to respect the fundamental rights enshrined by the CFREU. For that reason, I will finally reflect on two specific issues that are currently neglected in the Framework Decision on conflicts of jurisdiction: the obligation to issue a reasoned decision on the conflict and the possibility for the suspected and accused person to be heard and to appeal the decision on the allocation of jurisdiction.

3.2. *Compulsory issue of a reasoned decision on the conflict.*

According to the wording of the FD 2009/948/JHA, national authorities are not strictly obliged to reach a consensus. It just states that, where it has not been possible to reach consensus, the case shall be referred, "where appropriate" (emphasis added), to Eurojust by any competent authority of the Member States involved[54]. Provided that the national authorities are not currently legally bound to request the assistance of Eurojust and, even if they do, the role of Eurojust in the conflict is currently limited to that of a "mediator" between the positions held by the national authorities involved, it would be perfectly feasible that, after wasting lots of time, resources and efforts, the conflict still persists just because the national authorities were not able to come to an agreement. If the latter scenario occurs, the conflict will be unnecessarily extended until there is a final decision in one jurisdiction and the principle of *ne bis in idem* then becomes directly applicable.

In view of this, I would suggest two main amendments to the European legal framework. First, if national authorities are not able to reach a consensus, requesting the assistance of Eurojust should always be mandatory and not only "where appropriate", which could be easily misunderstood as a euphemism for discretionary. Although Eurojust has no binding powers

[49] In this sense, see ZIMMERMAN (2015); ORTIZ PRADILLO (2012), p. 535.
[50] Therefore, applying a cumulative criterion to settle the conflict, as suggested by ORTIZ PRADILLO (2012), *op.cit.*, pp. 35-36, might not be the best solution in practice.
[51] For that reason, the solution suggested by ZIMMERMAN (2015), *op. cit.*, pp. 14-21, combines hierarchy of factors, a flexibility clause and a "strictly regulated" (emphasis added) direct consultations procedure as a last resort mechanism to settle the conflict.
[52] See recital 9 FD 2009/948/JHA.
[53] In the same sense, LIGETI *et al.* (2018), *op. cit.*
[54] Art. 12 FD 2009/948/JHA.

to solve the conflict, it is best placed to address this issue thanks to its resources and expertise on the topic. In this sense, the new Regulation of Eurojust[55] seems to slide towards this approach, when it states that where two or more Member States cannot agree as to which of them should undertake an investigation or prosecution, Eurojust "shall" (emphasis added) issue a written opinion on the case[56]. Although this written opinion remains to be non-binding[57], Member States may only refuse to follow it whether doing so would harm essential national security interests, would jeopardise the success of an ongoing investigation or would jeopardise the safety of an individual[58]. Nonetheless, national authorities tend to follow Eurojust's suggestions and opinions on the allocation of jurisdiction, even though they are not bound to do so.

Second, if even after requesting the assistance of Eurojust, the national judicial authorities involved in the conflict are still not able to come to an agreement on the best-placed jurisdiction, they must be bound to issue a written and reasoned resolution stating the outcome of the settlement procedure. This resolution should be notified to Eurojust and to the individuals involved in the conflict unless there is a good and extraordinary reason which prevents it (*e.g.* if it would put the investigation at risk), letting them know all the relevant circumstances and criteria applied to the merits of the case. The suspected or accused should also have the opportunity to appeal that decision where appropriate[59].

Alternatively, some authors have explored the possibility of switching to a new vertical mechanism for the settlement of conflicts of criminal jurisdiction in the European Union[60]. In this new system, Eurojust would have binding powers to resolve the conflict in case of lack of agreement between the national authorities involved. This hypothetical new role of Eurojust, which goes beyond the provisions laid down in the new Regulation (EU) 2018/1727, would be still possible in accordance with the treaties, given the wording of art. 85.1 (c) TFEU[61], and will ensure that, once the conflict has been detected, it shall be settled after a thorough study of the merits of the case.

However, this model raises a lot of concerns, once more, in the view of the principles of proportionality and subsidiarity, but also in terms of legitimacy. Could the current Eurojust be legitimated to decide in a binding way on a purely jurisdictional matter? Would national judicial authorities accept a decision on the choice of forum issued by a non-jurisdictional European Union body that clearly undermines their own grounds for claiming jurisdiction? What about the judicial control of the decision issued by Eurojust? I believe that all these concerns are well-founded, particularly considering the current nature and structure of Eurojust, which is composed by national members that are frequently appointed by national governments in a discretionary way. Thus, granting binding powers on this matter to the present Eurojust would be an extremely tough decision to make.

3.3. *The right to access to a legal remedy: towards a supranational judicial review on the choice of forum?*

The current legal framework neither addresses the issue of hearing individuals before taking a decision on the choice of forum nor specifically includes a judicial review of the decision taken by the authorities. Thus, this matter must be referred to the different legal remedies available at national level. In this sense, the Spanish national law of transposition offers both possibilities —hearing and judicial review— to the individuals subject to a procedure for the settlement of a conflict of jurisdiction in criminal proceedings[62]. That said, it would be very

[55] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust) (OJ L 295 21 November 2018). According to art. 82.2, it shall apply from 12 December 2019.
[56] Art. 4.4 Regulation (EU) 2018/1727.
[57] Recital 14 Regulation (EU) 2018/1727.
[58] Art. 4.6 Regulation (EU) 2018/1727.
[59] In similar terms, LIGETI *et. al.* (2018), *op. cit.*, pp. 48-50.
[60] *Ibidem*, pp. 54-69.
[61] Art. 85.1(c) TFEU: "the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network". On this matter, see WEYEMBERGH (2011), pp. 75-99.
[62] See arts. 30-32 Spanish Act 16/2015 (*BOE* n.º 162, 8 July 2015). For an overview of this topic, see HERNÁNDEZ LÓPEZ (2016), pp. 117-127.

difficult in practice to appeal successfully, particularly considering that the judicial authorities have such an all-embracing power to decide which factors should be applied to the merits of the case.

Certainly, this situation would not be substantially improved if, as I proposed before, a non-hierarchized list of factors is included in a new legal instrument. In that case, besides the legal remedies envisaged at national level, it is true that it might be possible to access a supranational judicial review of the case, via preliminary ruling, on the interpretation and application of the factors included in the hypothetical new instrument. But, despite the fact that this decision would affect the rights and safeguards of the individuals involved in the conflict, the preliminary ruling procedure before the ECJ can only be requested by the national judicial authorities and not by individuals[63]. Furthermore, the preliminary ruling should be solely requested, in principle, by the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision[64].

A completely different judicial review system would be necessary if the European Union decides to implement a vertical mechanism granting binding powers to Eurojust on the resolution of the conflict. In this new scenario, it would be indispensable to establish a judicial review of the decision issued by the agency, and that judicial review should necessarily be granted at supranational level, allowing individuals to intervene in the proceedings and to access an effective legal remedy. But, is there a legal basis in the treaties to make this kind of supranational judicial review possible?

Despite the initial doubts that this matter brought to me, after examining the judicial review system envisaged for the EPPO activity[65], I strongly believe that it is actually feasible. In this sense, the judicial review system proposed by LIGETI, KLIP and VERVAELE[66] as part of its proposed vertical mechanism shows that it would be perfectly possible to grant the suspected or accused persons this access to an effective legal remedy in accordance with the current wording of the treaties. Provided that he or she should be considered directly affected by the decision on the choice of forum issued by Eurojust, art. 263 paragraphs 4 and 5 TFEU would be directly applicable. Thus, the suspected or accused person —as well as the national judicial authorities involved— may request an action for annulment before the ECJ. To avoid any loopholes, the system is completed with the possibility to launch an action for failure to act (art. 265 paragraph 1 TFEU) in case of inertia of Eurojust[67].

Last but not least, we could briefly reflect on a third possible and unexplored way to opt for a supranational judicial review on the conflict of jurisdiction. According to art. 257 TFEU, specialized courts attached to the General Court may be established to hear and determine, at first instance, certain classes of action or proceeding in specific areas. In other words, the current treaty offers the opportunity to create a special chamber which would deal with cases on choice of forum in criminal proceedings[68].

However, would this hypothetical solution be reasonable and proportional? According to the statistics on problematic conflicts of jurisdiction issued by Eurojust[69], this option does not seem to be proportional at all. The relatively low volume of cases of conflicts of jurisdiction that requires the assistance of Eurojust, in comparison with other legal issues which are frequently dealt with by the agency (*e.g.* issues on the transmission of EAW), plus the fact that the intervention of the College in the settlement of the conflict is rather exceptional as it is considered a last resort mechanism reserved for the most problematic cases[70], there are no solid grounds to trigger this provision and, subsequently, to create a court exclusively specialized in conflicts of criminal jurisdiction in the AFSJ.

Nevertheless, the opportunity to establish a specialized court with a wider competence

[63] See art. 267 TFEU; *cfr.* ECJ case *Kelly* (C-104/10), ECLI:EU:C:2011:506.

[64] *Cfr.* ECJ case *Sleutjes*, (C-278/16), ECLI:EU:C:2017:757, Paragraph 21. However, in the framework of an EAW, the most recent ECJ case law has admitted a preliminary ruling requested by the issuing national authority. *Cfr.* ECJ case *AY* (C-268/17), ECLI:EU:C:2018:602, paragraphs 23-31.

[65] Art. 42 Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ L 283, 31 October 2017).

[66] LIGETI *et al.* (2018), *op. cit.*, p. 66.

[67] *Ibidem*.

[68] See PATRONE (2013), *op. cit.*, p. 222.

[69] See *Eurojust Annual Reports 2002-2017*.

[70] Actually, the power laid down on Article 7 (2) of the Eurojust Decision —as amended in 2008— to issue a written non-binding writing opinion on the case has not been used yet according to the *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction (updated 2018)*, DOI: 10.2812/03988.

could be explored, namely, a specialized court to deal with all the cases related to criminal law provisions in the AFSJ. In point of fact, statistics show that the ECJ is currently overloaded, a situation that may prevent a due response within a reasonable time[71]. Considering that the amount of cases —as well as their complexity— shall increase in the future, this could be, in my opinion, a reasonable step forward that would benefit both individuals' and Member States' interests in this field.

4. Concluding remarks

As occurs in any cross-border situation, conflicts of criminal jurisdiction represent a burden from the point of view of the exercise of the procedural safeguards, guarantees and fundamental rights of the suspected or accused person in criminal proceedings. After an in-depth analysis of the current situation, it must be stated that the procedure for the settlement of conflicts of jurisdiction currently in force presents systemic deficiencies in terms of respect of these rights and safeguards.

As far as the current legal framework was adopted in a context where the development of the AFSJ was extremely unbalanced in favour of security and effectiveness of judicial cooperation in criminal matters, it does not devote any special attention to the situation of individuals. Therefore, is clear that it is no longer in line with the renewed approach on criminal justice adopted in Europe after the entry into force of the Lisbon Treaty.

Some of the proposals and recommendations that have been explored in this paper to improve this situation would be relatively easy to implement: establishing a non-hierarchized list of factors in any new instrument on conflicts of criminal jurisdiction could be easily done by simply transposing the newest guidelines issued by Eurojust into the text of the instrument. In fact, some national legal systems have already established their own national list of connecting factors when transposing FD 2009/948/JHA, despite there not being any mandate to do so —as in the case of Spain—. Moreover, that would allow to the automatic establishment of a clear legal basis for a supranational judicial review on the choice of forum by the ECJ via preliminary ruling requests.

On the other hand, some other proposals and models could be more difficult to adopt, but it would still possible to succeed according to the current wording of the treaties: moving to a vertical mechanism granting binding powers to Eurojust to settle the conflict could be done by means of art. 85 TFEU and provided that a supranational judicial review of its decision would be possible. However, in view of the recently adopted new regulation for Eurojust, which shall apply from December 2019, this possibility will remain unexplored in the short term.

At any rate, the defective *status quo* should not be maintained any longer. Hence, no matter the path Member States decide to choose, it is about time to move on and replace the current legal framework on prevention and settlement of conflicts of criminal jurisdiction in the EU with new post-Lisbon instruments and rules on this matter observing higher standards of due process.

[71] According to the statistics issued by the ECJ, the average duration of the proceedings before the court is above fifteen months. See *Court of Justice of the European Union Annual Report 2017 – Judicial activity*, DOI:10.2862/531984, pp. 114 and 216.

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