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## Choice of forum in an area of freedom, security and justice

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### 1. Introduction

It is common knowledge that the European integration process has also posed new challenges for national criminal justice systems, especially with regard to cross-border crime. This development has all the more underscored the importance of effective inter-state cooperation and coordination. In an area of freedom, security and justice (AFSJ), a fugitive criminal must, on the one hand, be prevented from escaping justice, but, on the other, it is also not desirable for this person to be punished on multiple occasions for the same offence. Positive conflicts of jurisdiction (multiple states commencing criminal prosecutions) and negative jurisdictional conflicts (no state reacts to crimes which have been committed) between states must be avoided, as the Treaty of Lisbon also states in so many words.<sup>1</sup>

Since the Maastricht Treaty, criminal law has been an explicit policy domain of the European Union. The European Union's legislative efforts in the past few years have primarily focused on the harmonisation of substantive criminal law, the intensification of cooperation in the criminal law area and the establishment of European agencies or networks, like Eurojust. Through an expansion of the Member States' criminal jurisdiction, partly at the instigation of European framework decisions,<sup>2</sup> and the assurance that, at all stages of the criminal proceedings – in the preliminary investigation, during trial and upon the execution of the sentence –, assistance may be obtained from other Member States, criminals must be prevented from escaping justice. Attempts are made to steer positive competence conflicts arising from broad state

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1 Art. 82(1)(b) TFEU: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, *shall* adopt measures to: (...) (b) prevent and settle conflicts of jurisdiction between Member States; (...) [emphasis added].'

2 See, for instance, Art. 9 Framework Decision 2002/475/JHA on combating terrorism, OJ L 164, 22.6.2002, p. 3, as amended by Framework Decision 2008/919/JHA, OJ L 330, 9.12.2008, p. 21; Art. 8 Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335, 11.11.2004, p. 8; Art. 6 Framework Decision 2002/629/JHA on combating trafficking in human beings, OJ L 203, 1.8.2002, p. 1. For further examples, see S. Peers, *EU Justice and Home Affairs Law*, 2006, pp. 456 et seq., and A. Klip, *European criminal law*, 2009, pp. 178 et seq.

jurisdictional claims towards a satisfactory resolution through mutual coordination and consultation, whether with the help of Eurojust or not.

In the final analysis, the decision as to whether a state, and, if so, which one, must initiate criminal proceedings is currently being taken by the Member States themselves. This may lead to the situation in which several Member States start investigations, which in turn may lead to diverging outcomes, but it may also result in the situation in which no Member State takes further action. In that respect, the *ne bis in idem* principle has not yet provided much direction (aside from the fact that this principle fosters inter-state consultation).<sup>3</sup> Moreover, this principle does not relate to complex investigations involving different Member States, different offences and different perpetrators. Yet, here too, or more accurately, here in particular, the choice of forum issue arises.

The question is the extent to which the retention of national discretion, so fiercely defended by the Member States, is still tenable as the creation of the aforementioned AFSJ leads one to suspect that the European Union is striving for something more than just streamlining inter-state criminal cooperation. In the AFSJ, room has also been explicitly created for EU citizens,<sup>4</sup> constitutional guarantees and fundamental rights. Given the major differences between the Member States, the consequences of the forum choice can potentially be very significant for all actors involved in the criminal justice system. Sieber, for instance, has emphasized how the decision to prosecute a suspect in a state other than his own confronts this suspect not only with significant practical problems (for instance, a lack of working knowledge of the trial state's language),<sup>5</sup> but also with legal problems.<sup>6</sup> Given the differences in criminal justice systems that currently exist within the European Union, the choice to prosecute and try a suspect in one Member State or another is certainly not a neutral one. A suspect's legal position during the investigation, the trial, or after the trial may vary significantly, depending on whether he is prosecuted in one Member State or the other. Moreover, he may be subjected to concurring criminal proceedings, for the same offence or for different offences, in several Member States at the same time. To what extent, then, can a suspect, in an area of freedom, security and justice, influence the choice of the Member State of prosecution and trial? The same question may be asked regarding the position of the victim.

Another actor that certainly cannot be overlooked is the national judiciary. The decision to bring a case to one country or another inevitably also affects the position of the trial courts. For one thing, it has been argued that the requirements that tribunals be 'independent', 'impartial' and 'established by law' in Article 6 European Convention on Human Rights (ECHR) are closely connected.<sup>7</sup> A choice of forum, certainly if it involves various Member States with substantial differences in criminal law and procedure, may also give rise to questions as to the position of the judiciary itself. This may be the case, for instance, where the choice of forum anticipates differences in the 'repressive climate' between the Member States involved. In those situations

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3 See also A. Eser & C. Burchard, 'Interlokales "ne bis in idem" in Europa? Von "westfälischem" Souveränitätspathos zu europäischem Gemeinschaftsdenken', in H. Derra (ed.), *Freiheit, Sicherheit und Recht: Festschrift für Jürgen Meyer zum 70. Geburtstag*, 2006, pp. 521-522.

4 Cf. the 'Stockholm Programme – An open and secure Europe serving and protecting the citizens', Brussels, 2 December 2009, Council Document 17024/09. See also the Communication of the Commission 'Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme', COM(2010) 171.

5 See in this respect the initiative of several Member States (and the proposal by the Commission) for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, Council Document 10420/10, of 31 May 2010.

6 Cf. U. Sieber, 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystemes', 2009 *Zeitschrift für die Gesamte Strafrechtswissenschaft*, pp. 11-12 and 14-15.

7 Most notably by the German Bundesverfassungsgericht in relation to the German concept of the lawful judge, discussed below; see BVerfG, 18 March 2009, 2 BvR 229/09; BVerfGE 6, 45 (50 et seq.); BVerfGE 9, 223 (226); BVerfGE 4, 412 (416). See also, in relation to Art. 6 ECHR, S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 49-50, with further references.

the anticipated attitude of individual courts towards criminal behaviour becomes a factor of relevance for the prosecution services. Yet by doing so, the position of the judiciary itself also becomes the subject of debate. Moreover, the position of individual courts regarding interstate choice of forum is at present unclear. This will normally become most visible when a national court is of the opinion that, for whatever reason, a court in another Member State is in a better position to deal with the case. Here too, questions arise. For instance, in such a case is that court allowed to declare itself not competent? If so, on what basis? If not, how are positive conflicts avoided? Should they be avoided?

Finally, I would certainly not exclude the position of the European Union itself from the debate. This position not only concerns questions of effective and efficient law enforcement, i.e. avoiding positive and negative conflicts of jurisdiction (cf. Article 82(1)(b) TFEU), but also upholding constitutional standards and affording appropriate legal protection to those present on European territory. The now binding EU Charter of Fundamental Rights (CFR),<sup>8</sup> for instance, directly confers rights upon EU citizens and other persons present on European territory. Pernice has stated that this is directly linked to the enhanced powers of the European Union in the area of justice and home affairs under the Treaty of Lisbon.<sup>9</sup> In his view, the Charter serves as a counterbalance to these new powers at European level. The perception of the AFSJ as a single area, where law enforcement is the responsibility of national authorities which, in principle, are bound by the territory of their state, has already affected the interpretation of the *ne bis in idem* principle. This principle now encompasses the entire European territory and is therefore viewed differently than in federal states, such as the United States, where the state and federal jurisdictions are considered as legal systems which are distinct from each other (dual sovereignty doctrine).<sup>10</sup> Compared to traditional international criminal law, this has significantly increased the role of *ne bis in idem* in an interstate context, and rightly so. The question at hand here is whether there are also other human rights or constitutional guarantees that play a role regarding the choice of forum. Can we for instance say that issues relating to choice of forum are not only related to effective crime control, but also call for a sufficient degree of legal certainty, for instance by laying down the case allocation criteria in the law? If so, then how must the national prosecuting authorities deal with these European interests when deciding on the competent forum to deal with a case?

The questions raised above – summarised as the question regarding the regulation of the choice of forum in the European Union – are the topic of this article. Its purpose is two-fold. I not only wish to show how the many recent legislative initiatives concerning criminal cooperation in the EU will lead to the Member States, particularly the executive branches, gaining (or more precisely: retaining<sup>11</sup>) enormous discretionary power, but also emphasise that the results of all these legislative initiatives may be at odds with the aforementioned legal principles and fundamental rights which have become an integral part of the integrated European area of justice. In this regard, I will focus on the requirement, also set forth in Article 6 ECHR and Article 47 of the Charter, of a ‘tribunal established by law’, which has a constitutional equivalent in many Member States.

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8 Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010, p. 389.

9 I. Pernice, ‘The Treaty of Lisbon and Fundamental Rights’, in S. Griller & J. Ziller (eds.), *The Treaty of Lisbon. EU Constitutionalism without a Constitutional Treaty?*, 2008, pp. 236-239.

10 Cf. J.A.E. Vervaele, ‘Fundamental Rights in the European Space for Freedom, Security and Justice: the Praetorian *ne bis in idem* principle of the Court of Justice’, in E.J. Hollo (ed.), *National Law and Europeanisation*, 2009; Eser & Burchard, *supra* note 3.

11 See already A.H.J. Swart, *Goede rechtsbedeling en internationale rechtshulp in strafzaken*, 1983.

The focus on the requirement of a ‘tribunal established by law’ calls for an explanation. In the national context this requirement is a specific corollary of the legality principle. Unlike in substantive criminal law, where the principle *nulla poena, nullum crimen sine lege* requires that citizens must be in a position to know beforehand what conduct constitutes criminal conduct, the legality principle here addresses first and foremost the state and its organs. The requirement of a ‘tribunal established by law’ is, as we will see, primarily concerned with the administration of justice governed by legal rules. This means, for instance, that any court which is competent to deal with criminal charges within the autonomous meaning of Article 6 ECHR must have a basis in the law. Regarding the choice of forum, questions that arise in this regard typically relate to the criteria to be used when choosing the competent forum (What interests must be taken into account? Must these criteria meet the requirements of accessibility and foreseeability?), their status (Should these be binding criteria or only guidelines?), their origin (Must these criteria be defined by the democratic legislator or does any other constituent power suffice?) and to the question as to whether there is any role for the suspect or victim in this regard and whether these criteria can be invoked before a court or are under any form of judicial control.

Within the European Union, without any doubt, similar questions are on the agenda, although the context is completely different.<sup>12</sup> It is in this light that it is justified and necessary not only to use these questions as a frame of reference for assessing the current EU framework, but also to ask the question of whether the requirement of a ‘tribunal established by law’, in addition to its role in the national context, has any role in the AFSJ as well. By doing so, it makes sense, for the sake of confinement, to limit my comparison between the national and European context to the issue of overlapping territorial competences of courts (competence *ratione loci*; *örtliche Zuständigkeit*).

I will start by discussing several recent legislative initiatives which essentially deal with the choice of forum in criminal cases (Section 2). Next, in Sections 3 and 4, I will deal with the issue of to which extent choice of forum is a matter that needs regulation by law. For this, I will first pinpoint what is the meaning of the requirement of a ‘tribunal established by law’ and the corresponding guarantees in the national context (Section 3), and, second, I will address the issue of whether the requirement of a ‘tribunal established by law’ should be accepted as a principle of Union law and – more importantly – what this might mean in the AFSJ (Section 4). Depending on the interpretation of this requirement by the courts, the Court of Justice in particular, the European legislator may be encouraged to take further legislative action. In Section 5, I will try to pinpoint what problems may arise here, but I will also make a suggestion to overcome these problems by comparing the situation in the European Union with the system of inter-cantonal case allocation in the Swiss legal order. I will conclude with my main findings in Section 6. Finally, it is worth noting beforehand that, although Eurojust (or Europol) plays an important role in this issue, the two will only be referred to tangentially below. Choice of forum is a problem which transcends Eurojust or Europol.

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12 Incidentally, these questions not only relate to the choice of forum in criminal matters, but also to other areas of EU law, for instance competition law, see S. Brammer, *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law*, 2008, pp. 174-230; financial law, see P. De Sousa Mendes, ‘Was tun im Falle von transnationalem Marktmissbrauch? – Der Fall Citigroup’, 2009 ZIS, pp. 55-58; and civil law, see Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p.1.

## 2. Coordination of criminal prosecution in Europe

### 2.1. Introduction

Particularly in the last year before the Treaty of Lisbon took effect, there was a rush to improve cooperation in criminal cases. For virtually every ‘traditional’ variant of international criminal cooperation, there is now a ‘European’ equivalent. Whether the issue is cooperation in extraditing suspects, cooperation in gathering evidentiary material or the enforcement of criminal sanctions, mutual recognition has been the cornerstone of criminal cooperation since ‘Tampere’. Through the ‘European Arrest Warrant’ (EAW),<sup>13</sup> the ‘European Freezing Order’ (EFO),<sup>14</sup> the ‘European Confiscation Order’ (ECO)<sup>15</sup> and, in the future, the ‘European Evidence Warrant’ (EEW),<sup>16</sup> the ‘European Enforcement Order’ (EEO)<sup>17</sup> and/or the ‘European Supervision Order’ (ESO)<sup>18</sup> or possibly the ‘European Protection Order’ (EPO),<sup>19</sup> measures to effectuate substantive criminal law are carried out throughout the European area of justice. The basic principle is that all these orders/warrants emanating from the one (‘issuing’) Member State should be executed in the other (‘executing’) state without additional conversion proceedings (*exequatur proceedings*). The intention is that, where gaps still exist in this system, these will be filled under the Stockholm Programme, the successor to the Hague Programme.<sup>20</sup>

The European Commission originally had ambitious plans to support this process in the area of the coordination of prosecutions. In its Communication on Mutual Recognition of Final Decisions in Criminal Matters, it wrote that, given the potential for jurisdictional conflicts, ‘in the absence of a ranking of competent jurisdictions, all one could do would be to foresee a derogation from mutual recognition in cases where the recognising Member State has jurisdiction and does prosecute or had jurisdiction but decided not to take proceedings. This, however, appears like a serious undermining of the principle of mutual recognition.’ The Commission therefore felt that the recognition instruments should be accompanied by measures to avoid positive *and* negative jurisdictional conflicts. It expressed a preference for exclusive EU rules regarding jurisdiction and maintained that, as a result of this, the number of grounds for refusal in the instruments effectuating the principle of mutual recognition could also be limited.<sup>21</sup>

It cannot be denied that the Commission was somewhat prophetic in its vision. After all, mutual recognition relating to criminal cooperation is different from the other areas of EU law,

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13 Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1 (hereinafter: FD EAW).

14 Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45 (hereinafter: FD EFO).

15 Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p.59 (hereinafter: FD ECO).

16 Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, p.72 (hereinafter: FD EEW). The European Evidence Warrant may be replaced by the European Investigation Order, see the Initiative for a Directive regarding the European Investigation Order, Council document 9145/10.

17 Framework Decision 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, 5.12.2008, p.27 (hereinafter: FD EEO).

18 Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p. 20 (hereinafter: FD ESO).

19 Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, 5 January 2010, Council Document 17513/09.

20 The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3.3.2005, p. 1.

21 COM(2000) 495, p. 18.

where mutual recognition has existed for a long time.<sup>22</sup> In criminal law, the Union citizen or economic actor does not determine, certainly not exclusively, which country is the country of origin (and, hence, which other countries must recognise its decisions), because this person is taking advantage of the freedoms guaranteed by the EU ('voting with one's feet');<sup>23</sup> rather, it is the police and judiciary which do this, based on a – for the time being – jurisdictional claim unilaterally fleshed out by their national legislature. The mutual recognition instruments therefore include, where relevant, exceptions to the principle, for example, when the criminal offence occurred on the executing state's territory,<sup>24</sup> or this state also has a criminal investigation pending in the same or a related case.<sup>25</sup> In this way, Member States have retained the freedom to initiate or continue an investigation themselves, as well as to refuse or suspend the enforcement of foreign orders/warrants.

Binding EU rules on the coordination of proceedings have been a long time in coming. Not until very recently have proposals been submitted which seek to avoid *positive* jurisdictional conflicts, also outside the framework of Eurojust. The impetus came not so much from the Member States, but primarily from the European Court of Justice. Specifically, with its interpretation of the *ne bis in idem* principle, the Court of Justice *de facto* gave a clear field for a simple conflict rule: first come, first served.<sup>26</sup> The rulings promptly led to a Greek proposal concerning the *ne bis in idem* principle<sup>27</sup> and, later, to a Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings by the European Commission.<sup>28</sup> In the Green Paper, the Commission opted for a more modest approach to the problem than in its communication from 2000. The Green Paper envisages examining whether positive (and no longer negative) conflicts may be avoided through mutual consultation, dispute resolution and, *possibly*, a binding decision by an EU body.

## **2.2. The Framework Decision on prevention and settlement of conflicts of jurisdiction<sup>29</sup>**

This discussion has recently received a new impulse, first, as a result of a proposal for a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings,<sup>30</sup> which was submitted by a number of Member States. The original proposal was intended, 'in particular, to prevent and resolve conflicts of jurisdiction, ensure that the jurisdiction where the proceedings take place is the most appropriate one and bring more transparency and objectivity to the choice of criminal jurisdiction in situations where the facts of a case fall within the jurisdiction of two or more Member States.'<sup>31</sup> To this end, the proposal not only introduced an

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22 For an overview of the mechanisms used in those other areas, see A.M. Keessen, *European Administrative Decisions: How the EU Regulates Products on the Internal Market*, 2009, pp. 23 et seq.

23 M. Poiars Maduro, 'So close and yet so far: the paradoxes of mutual recognition', p. 150, in S.S.K. Schmidt (ed.), *Mutual recognition as a New Mode of Governance*, 2008; Klip, *supra* note 2, pp. 423-424; M. Möstl, 'Preconditions and limits of mutual recognition', 2010 *CMLR* 47, no 2.

24 Cf. Art. 4(7) FD EAW, discussed by N. Keijzer, 'The Double Criminality Requirement', in R. Blekxtoon & W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, 2004, pp. 160-162; Art. 13(1)(f) and (4) FD EEW; Art. 9(1)(l) and (2) FD EEO.

25 Cf. Arts 4(2) and 24 FD EAW; Art. 8(1)(c) FD EFO; Art. 16(2) FD EEW.

26 Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345.

27 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle, OJ C 100, 26.4.2003, p. 24.

28 COM(2005) 696.

29 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (hereinafter: FD on conflicts of jurisdiction), OJ L 328, 15.12.2009, p. 42.

30 Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Council Document 5208/09, 20 January 2009 (hereinafter: original proposal on conflicts of jurisdiction). For the Explanatory Report, see Council Document 5208/09, ADD 2, Brussels, 20 January 2009.

31 Third recital of the preamble to the original proposal on conflicts of jurisdiction.

information and consultation procedure for the relevant authorities in situations in which it is determined that the criminal case has a significant connection with one or more other Member States,<sup>32</sup> but also suggested substantive criteria to decide on which country is the most appropriate jurisdiction for initiating a criminal prosecution.<sup>33</sup> Article 14(1) of the proposal stated that '[the] general aim of the consultations on the best placed jurisdiction shall be to agree that the competent authorities of a *single* Member State will conduct criminal proceedings for *all the facts* which fall within the jurisdiction of two or more Member States [emphasis added].' A binding role was not foreseen for Eurojust.

It is telling to see just how much the goals of this proposal were adjusted downwards during the course of the negotiations. Nearly all of the sensitive aspects of the proposal were removed during the negotiations. The fact that the proposal's scope was limited to begin with did not prevent the Member States' delegations from limiting its scope even further. The final version of the framework decision merely pertains to situations which might fall under the *ne bis in idem* principle.<sup>34</sup> It only encompasses proceedings in respect of the same facts involving the same persons.<sup>35</sup> The resolution of two important categories of problem cases, to wit the situation in which different offences are committed by one or more perpetrators, has been put off.<sup>36</sup>

In addition, only the information and consultation procedure in the original proposal has been retained, with a few modifications. The original provisions, which attempted to articulate the *purpose* of the consultation and the *criteria* for this, including the binding, but refutable,<sup>37</sup> presumption in Article 15(1),<sup>38</sup> were deleted. Instead, it is now stated that an attempt will be made to reach consensus on *any* effective solution (Article 2(1)(b)), which, for that matter, is also taken to mean the referral of the case to Eurojust if mutual agreement cannot be reached.<sup>39</sup> Article 11 now provides that the competent authorities of the Member States consulting with each other on a case must consider all the factual and legal aspects of the case, as well as all the factors which they consider to be relevant. The executive, and not the legislative, branch thus decides which factors are relevant. Only the Ninth Recital of the Preamble and a joint declaration on the modified proposal still make reference to the – non-binding – Eurojust *Guidelines for Deciding which Jurisdiction Should Prosecute* and the factors mentioned there.<sup>40</sup>

Eurojust's role has been limited even further. Although Article 12(2) states that 'where it has not been possible to reach consensus in accordance with Article 10, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, *if* Eurojust is competent to act under Article 4(1) of the Eurojust Decision [emphasis added],' there is a risk that the parties concerned will point to each other, and nobody will refer the case. The practical, non-insignificant effect of this will be that unsuccessful consultation will not necessarily be reported, let alone discussed within the ranks of Eurojust.

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32 Art. 5 original proposal on conflicts of jurisdiction.

33 Art. 15(2) original proposal on conflicts of jurisdiction.

34 Council document 8338/09 (hereinafter: modified proposal on conflicts of jurisdiction).

35 Art. 2(1)(a) FD on conflicts of jurisdiction.

36 See the Draft Council Declaration relating to the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction ('other than bis-in-idem cases'), Council Document 10225/09 COPEN 95, of 20 May 2009.

37 See Art. 15(2) of the original proposal.

38 Art. 15(1) of the original proposal reads: 'There shall be a general presumption in favour of conducting criminal proceedings at the jurisdiction of the Member State where most of the criminality has occurred which shall be the place where most of the factual conduct performed by the persons involved occurs.'

39 Fourth recital of the preamble to the FD on conflicts of jurisdiction.

40 The Guidelines can be found in the Annex to the Eurojust 2003 Annual report, p. 60 et seq., <<http://www.eurojust.europa.eu>>.

### 2.3. The proposal on transfer of criminal proceedings

The limited ambitions of the Framework Decision on conflicts of jurisdiction created room for yet another proposal, which once again originated from a number of Member States. The proposal for (what was then still) a Framework Decision of 30 June 2009 on the transfer of proceedings in criminal matters *does* seek to bring about binding legal consequences.<sup>41</sup> Its goal is ‘to increase efficiency in criminal proceedings and to improve the proper administration of justice, including the legitimate interests of victims and suspected or accused persons, within the area of freedom, security and justice by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States’ (Article 1 proposal).<sup>42</sup>

To achieve this goal, it links up with the system in the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters from 1972,<sup>43</sup> and the Agreement of 6 November 1990 between the Member States of the European Communities on the transfer of proceedings in criminal matters, which never took effect. The proposal provides for a system based on which the one state can ask the other to take over criminal proceedings which are pending in the first state. In that case, the first state may terminate prosecution, even if that country has a duty to pursue criminal prosecution (Articles 6 and 16 proposal). Where the state which is asked to take over the case has not itself already established jurisdiction, it can exercise ‘*subsidiary jurisdiction*’ (Article 5 proposal). Provided that the transferring state’s law is applicable *and* this state makes a request to transfer the proceedings, the requested state will then have jurisdiction to prosecute the offence, based on its own law (*lex fori*).<sup>44</sup> In later versions of the proposal, however, this power has been limited.<sup>45</sup> The disagreement on this subject resulted in a failure to reach consensus on this issue before Lisbon took effect. There has not been any movement on this issue since 27 November 2009. Thus, it is unclear whether the current proposal will be enacted into law.

The proposal expressly does not opt for cooperation based on mutual recognition. The one state cannot therefore ‘order’ the other state to take over the criminal prosecution. This has to do with the nature of the cooperation. After all, the requested state now takes over the responsibility for the criminal proceedings from another state (primary assistance), rather than ‘only’ assisting the latter (secondary assistance). For this reason, there is also no mention of ‘issuing’ or ‘executing’ parties, but of ‘transferring’ and ‘receiving’ parties (Article 3).<sup>46</sup> The latter party can, within the framework of the proposal, itself judge whether it will take over prosecution from the transferring state.

Article 7 indicates in which cases a transfer may be requested: ‘When a person is suspected or accused of having committed an offence under the law of a Member State, the transferring authority of that Member State may request the receiving authority in another Member State to take over the proceedings if that would improve the efficient and proper administration of justice’, in particular, should one or more of the criteria referred to in Article 7 be fulfilled. The explanation to the original proposal makes clear that an array of different, often contradictory, interests are behind these criteria. Not only are the interests of the suspect, particularly his future

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41 Draft Council Framework Decision on the transfer of proceedings in criminal matters, Council Document 11119/09; for the Explanatory Report, see Council Document 11119/09 COPEN 115 ADD 1.

42 See also the 9th Recital of the preamble to the draft Framework Decision on the transfer of proceedings in criminal matters, Council Document 11119/09.

43 European Treaty Series 073.

44 Art. 5 of the first draft of the Framework decision, Council Document 11119/09.

45 See Council documents 11119/09 COPEN 115, 30 June 2009; 13504/09 COPEN 173, 21 September 2009; 14133/09 COPEN 191, 7 October 2009; and 16437/1/09 REV 1 COPEN 231, 26 November 2009 respectively.

46 Explanatory Report, Council Document 11119/09 COPEN 115 ADD 1, p. 4.

rehabilitation, or those of the victim, crucial; what also counts is efficiency, which apparently refers mainly to making the prosecuting authorities' job easier.<sup>47</sup>

Neither the suspect nor the victim has been given any right of consent. Where appropriate and in accordance with national law, the suspect is merely *informed* of the transfer before the request is made (Article 8). As for the victim, the transferring authority must properly consider his interests before a transfer request is submitted. It must ensure that the victim's rights, especially his right to be informed of the intended transfer, are fully respected under national law.

The proposal contains further provisions regulating the legal consequences of a transfer. Although these provisions have great practical relevance, they are not all relevant to this article. It should be noted, though, that the transferring authority must discontinue or suspend the criminal proceedings no later than upon receipt of the notification of acceptance of the transfer by the receiving authority (Article 16(1)). At the same time, however, the proposal does not compel the receiving authority to initiate criminal proceedings. The question whether prosecution will ultimately occur is governed by its national law. Any applicable right to exercise prosecutorial discretion will not be impaired.<sup>48</sup>

### 3. Choice of forum as a European constitutional issue

#### 3.1. Introduction

As we reflect on what has been stated above, several items stand out. First, the European Union is primarily proceeding along the traditional path, followed by the Council of Europe. The Member States are clearly not in favour of a mandatory ranking order of jurisdictional rules or mandatory coordination mechanisms. The European Commission now seems to have given up on this plan; the Action Plan Implementing the Stockholm Programme is silent on the transfer of criminal proceedings or the choice of forum issue.<sup>49</sup> For now, Eurojust cannot force a resolution either, when the Member States cannot reach agreement among themselves; nor can this agency compel Member States to bring criminal proceedings.<sup>50</sup> Second, the Commission lost the initiative just before Lisbon came into effect. Most of the proposals submitted in the past two years came from the Member States. Third, and, in my opinion, consistent with the foregoing, the principle of mutual recognition has been downplayed considerably in many recent framework decisions. The condition of double criminality is making a comeback;<sup>51</sup> refusal grounds from older framework decisions are being accepted somewhat automatically in newer framework decisions, even though they were previously unknown for this specific type of cooperation. Sometimes, the Member States are even able to determine the precise scope of a framework decision in mutual consultation.<sup>52</sup> Fourth, the degree of discretion which the Member States gained for themselves in the pre-Lisbon era is quite substantial. In the end, it is still the states themselves which determine whether they will initiate a criminal prosecution or not. If it is adopted at all, the proposal on transferring prosecution discussed above must be regarded as an alternative to other forms of cooperation, such as an arrest warrant.<sup>53</sup> By extension, other states

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47 Explanatory Report, Council Document 11119/09 COPEN 115 ADD 1, pp. 8-10.

48 Explanatory Report, Council Document 11119/09 COPEN 115 ADD 1, p. 13. For this reason, Arts. 16(2) and 16(3) specify that, under certain circumstances, the transferring authority's right to prosecute may be revived.

49 COM(2010) 171.

50 See however the Commission's Action Plan Implementing the Stockholm Programme, COM(2010) 171, p. 18.

51 See for instance Art. 7(1) and (4) FD EEO; Art. 14(1) and (4) FD ESO; and, as a matter of course, Art. 11 of the draft on the transfer of proceedings.

52 See for instance Art. 4(1)(c) FD EEO.

53 Explanatory Report, Council Document 11119/09 COPEN 115 ADD 1, pp. 4 and 10.

cannot be made to automatically recognise arrests/warrants issued by foreign courts. Numerous exceptions enable the Member States to safeguard their sovereignty.

If we put these findings in a broader perspective, it transpires that case allocation is first and foremost regarded as a matter for the Member States and their prosecuting authorities in particular. Yet, as I indicated in the introduction, this is not self-evident. Particularly from the viewpoint of the legality principle, of which the requirement of a ‘tribunal established by law’ is a specific corollary, executive discretion in the administration of justice that is not accounted for may be problematic. Therefore, it is necessary not only to establish what exactly follows from this requirement, but also how to deal with it in the context of the AFSJ.

Regarding the first question,<sup>54</sup> I will take the approach of the Court of Justice, which has been repeatedly confronted with the dilemma consisting of, on the one hand, the fact that national (constitutional) courts, the German constitutional court for example, have repeatedly sent out warning signals in the past and urged the European Court of Justice to keep watch over the constitutionality of the European legal system, while, on the other hand – as we just saw –, European legislators seem to want to make sure that they go no further than the Court’s jurisprudence compels.<sup>55</sup> Long before the coming into existence of the Charter, the Court already found a way out of such impasses by ruling that ‘fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.’<sup>56</sup> Thus, the all too sharp edges of European legislation which was too instrumental could be softened without jeopardising the supremacy of EC/EU law. The question is therefore the following: what exactly is the common constitutional tradition of the Member States and what does Article 6 ECHR exactly entail in relation to the choice of forum?

### **3.2. Inspiration drawn from national constitutions: history of the *ius de non evocando***

At the national level, what is particularly worth mentioning is the development of the so-called *ius de non evocando*. *Ius de non evocando* was developed around 1350 within the borders of the Holy Roman Empire. With respect to the sovereign lords, and especially the electors, to whom the *privilegium de non appellando* had been granted, the Emperor waived his *ius evocandi*, that is, his right to intervene in a pending legal action and to have the action adjudicated by courts which pronounced decisions in his name.<sup>57</sup> In combination with the *privilegium de non appellando*, which developed somewhat later and through which the Emperor waived his right to intervene in an action at the appellate level, the *privilegium* enabled the sovereign lords to construct their own system of justice.<sup>58</sup> In its effect, *ius de non evocando* primarily protected the

54 The latter issue is dealt with in Section 4.

55 See, amongst many others, H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen: Die Entwicklung eines Modells zur Lösung von Konflikten zwischen Gerichten unterschiedlicher Ebenen in vernetzten Rechtsordnungen*, 2008; J. Komárek, ‘European constitutionalism and the European Arrest Warrant: in search of the limits of “contrapunctual principles”’, 2007 *CMLR* 44, no. 1; M. Kumm, ‘Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice’, 1999 *CMLR* 36, no. 2, pp. 351-386; V. Mitsilegas, ‘The constitutional implications of mutual recognition in criminal matters in the EU’, 2006 *CMLR* 43, no. 5, pp. 1294 et seq.

56 Cf. Case C-305/05, *Ordre des barreaux francophones et germanophone et al. v. Conseil des Ministres*, [2007] Jur. I-5305.

57 U. Eisenhardt, ‘Die Rechtswirkungen der in der Goldenen Bulle genannten privilegia de non evocando en appellando’, 1969 *ZSR* 86, pp. 75-96; U. Eisenhardt, *Die kaiserlichen Privilegia de non appellando*, 1980, p. 27; see also E. Kern, *Der gesetzliche Richter*, 1927, pp. 45-47.

58 Eisenhardt 1980, supra note 57, p. 4; M. Kotulla, *Deutsche Verfassungsgeschichte – Vom Alten Reich bis Weimar (1495 – 1934)*, 2008, p. 9 and pp. 267 et seq.

lords' subjects and not the persons to whom the right had been granted;<sup>59</sup> through the *privilegium de non appellando*, however, subjects who appealed to the Emperor's courts (or the courts of someone other than their own lords) were threatened with punishment.<sup>60</sup> These privileges diminished the Emperor's influence considerably. In addition, the Emperor's electors were able to get him to create the Imperial Chamber Court (*Reichskammergericht*) in 1495, thereby establishing a court at the imperial level which, although it pronounced judgment in the Emperor's name, was nevertheless independent of him. The Emperor responded by establishing an Imperial Royal Council which was completely subordinate to him and whose jurisdiction overlapped substantially with that of the Imperial Chamber Court. Worried that their powers would be eroded, however, the electors resisted this, too. The idea was that no one should be able to escape the Imperial Chamber Court's jurisdiction.

The *privilegia* and the establishment of an independent judicial system at the 'central' level were primarily viewed as a means to contain the Emperor's power and less so as an interest of his subjects.<sup>61</sup> 'Cabinet law' (*Kabinettsjustiz*), in the form of sovereign or royal intervention in specific cases, or the creation of *ad hoc* courts (*Ausnahmegerichte*), was still very much present. It was not until much later, after the excesses of absolutism (enlightened or otherwise), and under the influence of liberalism, that a right to the 'lawful judge' developed in Germany. Only then were these efforts, which, to that point, had mainly been directed at keeping a 'hostile' higher judiciary at bay, expressly linked to constitutional requirements, and, specifically, the separation of powers doctrine. It was not until then that the German territory could also justifiably be said to have a *Recht auf den gesetzlichen Richter*, which no longer only fulfilled an *Abwehrfunktion*, but also (or perhaps especially) a *Leistungsfunktion*, because it imposed requirements on the organisation of the administration of justice.<sup>62</sup>

These days, the German *Bundesverfassungsgericht* regards Article 101 of the Basic Law (*Grundgesetz (GG)*)<sup>63</sup> as important in preventing 'extraneous influences' (*sachfremde Einflüssen*) from creeping into the system by promulgating general rules on the allocation of court jurisdiction beforehand.<sup>64</sup> These rules should encompass both the subject-matter jurisdiction (*sachliche Zuständigkeit*) and territorial jurisdiction (*örtliche Zuständigkeit*) of the courts. Article 101 GG addresses all three branches of state power, including the legislator. The latter is not only obliged to establish the jurisdiction of the courts beforehand, but also to prevent, as much as possible, the concurring jurisdiction of the courts.<sup>65</sup> Otherwise, it would provide the prosecution service with a right of choice as to which court to seize.<sup>66</sup> However, although the goal for the legislator is to pinpoint court jurisdiction as much as possible, it is also recognised that this may not always be possible, because it could come at the expense of the interests of a proper administration of justice. Therefore, regarding territorial jurisdiction,<sup>67</sup> the German Code of Criminal Procedure declares competent, for instance, not only the court of the place where the act was committed (*forum loci delicti commissi*),<sup>68</sup> but also the court of the place of residence of the suspect (*forum*

59 Eisenhardt 1980, supra note 57, p. 28.

60 Eisenhardt 1969, supra note 57, p. 79; Kern, supra note 57, p. 46.

61 Kern, supra note 57, pp. 52-53.

62 Cf. D. Oehler, 'Der gesetzliche Richter und die Zuständigkeit in Strafsachen', 1952 ZStW, p. 296; Kern, supra note 57; C. Sowada, *Der gesetzliche Richter im Strafverfahren*, 2002, pp. 146 et seq. and p. 812.

63 Art. 101 Abs. 1 of the German Basic Law reads: 'Ausnahmegerichte sind unzulässig. Niemand darf seinem gesetzlichen Richter entzogen werden (...)'.  


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64 BVerfG, 18 March 2009, 2 BvR 229/09; BVerfGE 6, 45 (50 et seq.); BVerfGE 9, 223 (226); BVerfGE 4, 412 (416).

65 BVerfGE 20, 336 (344); Schulze-Fielitz, Art. 101 GG, no. 19, in H. Bauer et al., *Grundgesetz – Kommentar*, 2006.

66 Cf. BVerfGE 9, 223 (226); Oehler 1952, supra note 62, pp. 296-297; Sowada, supra note 62, pp. 466 et seq.

67 See §§ 7-21 DE-StPO.

68 § 7 DE-StPO.

*domicilii*),<sup>69</sup> and even the court of the place where the suspect was apprehended (*forum apprehensionis*).<sup>70</sup> There is no ranking between these court jurisdictions.<sup>71</sup> The constitutionality of this system has, as far as I know, not been raised before the *Bundesverfassungsgericht*.<sup>72</sup> Many point out, though, that, in light of Article 101 GG, overlapping territorial jurisdiction is acceptable,<sup>73</sup> now that cases are allocated over courts with similar competences and similar rules of procedure.<sup>74</sup> Under the German system the suspect is entitled to challenge prosecutorial decisions on case allocation before a court<sup>75</sup> and, moreover, in cases of conflicts of jurisdiction, positive or negative, between various prosecutors or courts, ultimately a (higher) court must decide on where to prosecute.<sup>76</sup> The latter is not in contradiction with the principle of the ‘lawful judge’.<sup>77</sup>

The German Article 101 GG is regarded as the most encompassing guarantee regarding court organisation and case allocation on European territory. Still, in my view, it is in the endeavour to curtail *Kabinettsjustiz* in favour of an independent judiciary and in placing the law above the sovereign’s omnipotence that the above, principally German, history overlaps with the developments elsewhere in Europe.<sup>78</sup> Even though the German legal system imposes more stringent requirements on the organisation of the courts than many other European legal systems, the lawful judge concept is found, in written or unwritten form, in many European constitutions. There are differences in the names given to the concept and its particular details.<sup>79</sup> While the Netherlands speaks about ‘*ius de non evocando*’, and Germany refers to the ‘*gesetzliche Richter*’, the term ‘*juge naturel*’ is used in France, and the ‘*giudice naturale*’ is mentioned in Italy. But even in those legal systems where the principle currently does not exist, for example, in the United Kingdom’s legal system(s), the idea behind it seems to be endorsed.<sup>80</sup> Its core lies in the prohibition on the sovereign establishing *prerogative courts*.<sup>81</sup> Nowadays, to use Müßig’s words, this core function reflects a *common European tradition*.<sup>82</sup>

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69 § 8 DE-StPO.

70 § 9 DE-StPO.

71 § 12 I StPO however stipulates that: ‘Unter mehreren nach den Vorschriften der §§ 7 bis 11 zuständigen Gerichten gebührt dem der Vorzug, das die Untersuchung zuerst eröffnet hat’ (*forum praeventionis*).

72 Most cases before the *Bundesverfassungsgericht* in relation to Art. 101 GG deal with issues of subject-matter jurisdiction.

73 See for instance, *Bundesgerichtshof* 18 March 1975, 1 StR 559/74, mentioned in Kleinknecht/Meyer-Goßner, *Strafprozessordnung*, 2005, Vor § 7, no. 10, and Erb, in Löwe/Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Großkommentar*, 2006, Vor § 7, no. 22; Sowada, supra note 62, p. 648. Dissenting opinions are found in Kern, supra note 57; T. Rotsch, ‘Materielle Strafrechtsdogmatik und strafprozessuale Zuständigkeit’, 2006 ZIS; M. Heghmanns, ‘Auswahlermessung der Staatsanwaltschaft bei Anklageerhebung und gesetzlicher Richter’, 2000 *Strafverteidiger*, pp. 277 et seq., with further references.

74 Cf. Kleinknecht/Meyer-Goßner, supra note 73, § 16, no. 1; Sowada, supra note 62, p. 632 et seq.; Rotsch, supra note 73, p. 25.

75 See § 16 DE-StPO.

76 See § 12 and § 14 StPO (positive conflicts) and §§ 13a, 15 and 19 DE-StPO (negative conflicts).

77 BVerGE 20, 336 (343). This corresponds with the (scarce) case law of the EComHR, discussed in the next section.

78 For comparative overviews, see Kern, supra note 57; D. Oehler, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht*, 1983; A. Eser, ‘Der “gesetzliche Richter” und seine Bestimmung für den Einzelfall – Rechtsvergleichende Beobachtungen und rechtspolitische Überlegungen zur spruchkörperinternen Geschäftsverteilung’, in A. Eser (ed.), *Straf- und Strafverfahrensrecht, Recht und Verkehr, Recht und Medizin: Festschrift für Hanns Karl Salger zum Abschied aus dem Amt als Vizepräsident des Bundesgerichtshofes*, 1994; H.-W. Rengeling & P. Szczekalla, *Grundrechte in der Europäischen Union*, 2004, pp. 960-965; U. Müßig, *Gesetzlicher Richter ohne Rechtsstaat? Eine historisch-vergleichende Spurensuche*, 2006.

79 Cf. Eser 1994, supra note 78.

80 Müßig, supra note 78, pp. 20-21, points out that the concepts *sovereignty of parliament* and *rule of law* limited the *royal prerogative* in favour of ordinary justice. The lack of a ‘professional’ public prosecutor also made this problem much less relevant in England, according to Oehler 1952, supra note 62, p. 299.

81 In fact, it is maintained by some that this core originates from the English Petition of Rights (1628), cf. B. Pieroth, p. 26, with further references, in D. Merten & H.-J. Papier (eds.), *Handbuch der Grundrechte*, Band 2, 2006.

82 Müßig, supra note 78, p. 73.

Moreover, regarding the German ‘lawful judge’ concept it has to be stressed that, at present, its scope seems limited to the German legal order.<sup>83</sup> It does not relate to issues of, for instance, transnational judicial organisation, let alone case allocation.<sup>84</sup> Rather, there appears to be a nexus between Article 16 GG (the prohibition on extraditing nationals),<sup>85</sup> on the one hand, and the guarantee of Article 101 GG. Both have their historical roots in *ius de non evocando*. In the famous (or infamous) *Darkanzanli* case, the German *Bundesverfassungsgericht* used Article 16 GG to protect German nationals against – in its view – overly broad jurisdictional claims by other countries.<sup>86</sup> Article 16 GG was thus used as protection against unjustified outside interference with those belonging to the German legal order, whereas Article 101 GG provides the safeguard of the ‘lawful judge’ to those being prosecuted in Germany, on the basis of, for instance, the active personality principle.

### 3.3. The right to a ‘tribunal established by law’ as in Article 6 ECHR

From the foregoing it follows that the common European tradition, referred to in the Court of Justice’s case law, has a narrow scope.<sup>87</sup> But this is not the end of the story. The right to a ‘tribunal established by law’ is part of Article 6 ECHR. It is not exactly clear why the drafters of the Convention inserted this requirement. The Court itself has clarified that its rationale lies in the separation of powers doctrine, but also in the rule of law.<sup>88</sup> The aim of the requirement is to ensure ‘that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament.’ Hence, the Court’s starting point is unequivocally that, in the interest of the administration of justice, the executive is bound by the law, specifically the democratically legitimated law.<sup>89</sup> The requirement of a ‘tribunal established by law’ therefore refers to statutory law. Although this is a narrower concept than elsewhere in the Convention,<sup>90</sup> it still has a broader meaning than constitutional law.<sup>91</sup> It implies that the court organisation must be dealt with by the national legislator, but need not necessarily be vested in the constitution.

From the text of Article 6 itself one may derive that this article entails nothing more than that those faced with a criminal charge within the autonomous meaning of Article 6 should be brought before a court with a decent statutory basis. As such, Article 6 ECHR is silent on the issue of overlapping territorial or subject-matter jurisdiction of various courts. Indeed, as I indicated earlier, there may be numerous good reasons for the national legislator not to limit the territorial jurisdiction to hear a criminal case to one single court, for instance the court of the

83 See O. Lagodny, *Emphiehlt es sich, eine europäische Gerichtskompetenz für Strafgewaltskonflikte vorzusehen?*, Gutachten im Auftrag des Bundesministeriums der Justiz, 2001, p. 114; Eser & Burchard, supra note 3, pp. 518-519; B. Schünemann (ed.), *Ein Gesamtkonzept für die europäische Strafrechtspflege – A programme for European Criminal Justice*, 2006, p. 106.

84 Incidentally, the *Bundesverfassungsgericht* has already deemed the European Court of Justice to be a lawful judge within the meaning of Article 101 GG; BVerfGE 73, 339.

85 Art. 16, Section 2, GG reads in the official translation: ‘No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.’

86 *Bundesverfassungsgericht*, 18 July 2005, 2 BvR 2236/04, <<http://www.bundesverfassungsgericht.de>>.

87 See also ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case no. IT-94-1-AR72, A.CH., 2 October 1995, discussed by Fischer, and published in A. Klip & G. Sluiter, *Annotated leading cases of International Criminal Tribunals*, Vol. 1, 1999, p. 57, which narrows down its scope even further: ‘As a matter of fact – and of law – the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try *political offences in times of social unrest* without guarantees of a fair trial [emphasis added].’

88 ECtHR, 12 July 2007, *Jorgic v. Germany*, appl.no. 74613/01, Para. 64.

89 ECtHR 22 June 2000, *Coëme et al. v. Belgium*, appl.nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, Para. 98.

90 After all, the phrase ‘prescribed by law’, as in, for instance, Art. 8, Section 2 ECHR, also includes case law; ECtHR, 24 April 1990, appl.no. 11801/85, *Kruslin v. France*. See also M. Kuijer, *The blindfold of Lady Justice – Judicial independence and impartiality in light of the requirements of article 6 ECHR*, 2004, pp. 185-186.

91 Trechsel, supra note 7, pp. 50-51.

*locus delicti commissi*. In this context, however, it is important that both the European Commission of Human Rights (EComHR) and the Court itself have stressed that the requirement of a ‘tribunal established by law’ envisages ‘the whole organisational set-up of the courts, including [for instance] (...) the matters coming within the jurisdiction of a certain category of courts.’<sup>92</sup> Inevitably, if a legislator wants to ascertain that (especially negative) conflicts of jurisdiction are avoided, it has to lay out the design of its whole judicial organisation.<sup>93</sup> This means that, *inter alia*, a court should not only have subject-matter jurisdiction, but also personal jurisdiction in the cases brought before it. Without a statutory basis, a court cannot, for example, hear the co-suspects’ related cases.<sup>94</sup> Moreover, the EComHR’s precedents imply that territorial jurisdiction must also be provided for by law.<sup>95</sup> The Court has not yet affirmed this in so many words, but it seems likely that it will follow the Commission here.<sup>96</sup>

It is not the Court’s aim to abandon every form of executive or judicial discretion, as long as it stays within the limits of the laws on judicial organization. The Strasbourg institutions have stated that: ‘Article 6 par. 1 does not require the legislature to regulate every detail in this area by formal Act of Parliament if the legislature establishes at least the organisational framework for the judicial organisation.’<sup>97</sup> It is not exactly clear what the meaning of this is in relation to the choice of forum. One could for instance argue that once the jurisdiction of a court has a solid legal basis in the law, then a tribunal may be said to have been ‘established by law’. In order to avoid negative conflicts of jurisdiction, any resulting positive conflict as such does not affect the competence of the court to which the case was ultimately brought. Yet others may be of the opinion that this approach would be too narrow, especially in criminal matters. Although prosecution services, as a general rule, are not part of the judiciary within the autonomous meaning of Article 6 ECHR, they are an essential part of the criminal justice system. It is the prosecution service that holds the key to that system, not only by deciding on whether prosecution as such is indicated, but also by deciding before which court to bring the case. Therefore, in this view, to deny that the choice of forum is a matter of judicial organization would be nothing more than relocating the element of unwanted arbitrariness from within the walls of the judicial organization to the gates of that organization. Forum shopping may affect the functioning of that system and therefore the proper administration of justice.<sup>98</sup> It may have adverse consequences for, for instance, judicial impartiality and independence.<sup>99</sup> This view therefore urges the legislator to determine court jurisdiction as precisely as possible, also in cases of concurring jurisdiction.

The case law of the Strasbourg institutions does not provide us with a clear answer as to which view is the right one. Very few decisions and judgments deal with it, most likely because overlapping territorial jurisdiction is not considered a major problem in the national context. However, what is of interest is that, precisely for the sake of avoiding conflicts of jurisdiction, the legislator may have chosen to provide for binding, and therefore almost by definition:

92 See, for instance, ECtHR 20 July 2006, *Sokurenko & Strygun v. Ukraine*, appl.nos. 29458/04 and 29465/04, Para. 24.

93 Cf. J.A. Frowein & W. Peukert, *Europäische Menschenrechtskonvention – EMRK-Kommentar*, 1996, p. 249; Trechsel, supra note 7, pp. 51-52.

94 ECtHR 22 June 2000, *Coëme et al. v. Belgium*, appl.nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, Para. 98; ECtHR, 12 July 2007, *Jorgic v. Germany*, appl.no. 74613/01.

95 EComHR, *Zand v. Austria*, appl.no. 7360/76, Para. 68.

96 Cf. Trechsel, supra note 7, pp. 51-52.

97 Cf. EComHR, 10 October 1990, *G. v. Switzerland*, appl. no. 16875/90; ECtHR, 4 May 2010, *El Motassadeq v. Germany*, appl.no. 28599/07.

98 Within the context of Dutch criminal justice, Corstens has argued, for instance, that the more room there is for prosecutorial discretion in choosing the forum, the greater the need for an institute like the Dutch *ius de non evocando*; see G.J.M. Corstens, *De verhouding rechter – openbaar ministerie. Een lat-relatie in het strafrecht*, 1983, p. 30; see also G.J.M. Corstens, ‘Naar een geïnternationaliseerd strafrecht? Enkele inleidende opmerkingen’, in J. Fieselier et al., *Internationalisering van het strafrecht*, 1986, p. 10 (international context) and E. Beyeler, *Das Recht auf den verfassungsmässigen Richter als Problem der Gesetzgebung*, 1978, p. 15 and Oehler 1952, supra note 62.

99 On the relationship between a ‘tribunal established by law’ and judicial impartiality and independence, see in particular supra note 7.

statutory, mechanisms of case allocation. In fact, it is not far-fetched to assume that as soon as a national legislator accepts overlapping competences of courts, it will automatically deal with these mechanisms as well. These mechanisms may have taken the form of case allocation by statutory rules, i.e. by the legislator itself, but they may also involve case allocation or dispute resolution by prosecutors or courts and, hence, provisions dealing with these authorities' competences in this respect. Of course, these situations do come under the scope of a 'tribunal established by law'. In those situations, the question that once again becomes relevant is how much discretion a legislator may leave to the prosecuting services or the courts.

From the scarce case law available, it can be derived that the requirement of a 'tribunal established by law' is not concerned primarily with providing a suspect with the right to be tried by 'his' judge. It does not give a suspect the right to choose the forum desired by him or to demand that different criminal cases pending against him be heard jointly.<sup>100</sup> On the other hand, the Strasbourg institutions do not completely give away scrutiny over situations like these. One older case before the EComHR specifically deals with concurrent jurisdiction. In this case, the applicant was charged in the Swiss Canton of Aargau for fraud in May 1984 and in the Canton of Zurich, later Basel-Landschaft, for false accusations in October 1989. He requested the Federal Court of Switzerland to order that these proceedings be joined and dealt with by one canton. The Federal Court, however, rejected this request. Before the Commission the applicant consequently maintained that Swiss law leaves too big a margin of appreciation to the federal court in this regard and, therefore, he was not tried by a court 'established by law'.

The Commission started by ruling that: 'Article 6 (...) of the Convention does not grant an accused the right to choose the jurisdiction of a court. Rather, in such circumstances the Commission's task is limited to examining whether *reasonable grounds* existed for the authorities *to establish one of the various jurisdictions* and whether their decision was *lawful* [emphasis added].'<sup>101</sup> The Commission went on by stating that in the case before it, the Swiss Federal Court was acting within the confines of Article 350 (old) of the Swiss Penal Code, which determined penal jurisdiction in the case of concurring offences, and of Section 263 of the (old) Federal Code of Criminal Procedure, which granted the Indictment Chamber the possibility, with regard to concurring offences, to determine another jurisdiction.<sup>102</sup> The Commission consequently ruled that it was not unreasonable for that court, when interpreting these provisions and determining the jurisdiction of the various courts, to rule that the offence of false accusation was of recent date, and that in the interests of procedural economy and in view of the applicant's previous indictment in the Canton of Aargau, the proceedings should be conducted by two different authorities.

From this, it follows that national statutory rules on case allocation, when existing, must be observed and that any decision based on these rules must be reasonable. Therefore, as soon as the legislator intervenes in order to deal with conflicts of jurisdiction, choice of forum comes under the scope of the requirement of a 'tribunal established by law', although the test to be applied is limited; that decision must be lawful and reasonable. Still, this test explicitly covers the choice between the 'various jurisdictions'. Open questions, of course, relate to the scope of the reasonableness test and to whether this reasonableness test must always be performed by an

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100 EComHR, 10 October 1990, *G. v. Switzerland*, appl.no. 16875/90 (competence *ratione loci*); EComHR, 2 December 1992, *Kübli v. Switzerland*, appl.no. 17495/90 (competence *ratione materiae*).

101 See also ECtHR, 12 July 2007, *Jorgic v. Germany*, appl.no. 74613/01, Para. 65.

102 I will discuss the Swiss system in more detail below, in Section 5.2.

independent and impartial court. In the Swiss case discussed here, statutory Swiss law provided for case allocation by a court. This need not necessarily be the case in other legal systems.

### **3.4. Questions for the European Union**

The previous sections have tried to define what common denominator exists regarding choice of forum *at the national level*. What stands out, first of all, is that the primary aim of the guarantees is not to allow the suspect to predict which court will try his case or to allow him to choose the court most to his liking. Neither is it their aim to avoid negative conflicts of jurisdiction as such. Rather, the administration of justice requires that criminal charges are dealt with by an independent judiciary, not by prerogative courts, and that the judicial organization, specifically the competences of individual courts, have a basis in the law.

From the foregoing it follows, secondly, that the guarantees discussed here address not only the executive. Although the hard core of the common European tradition is directly aimed at the executive, by prohibiting it to establish *prerogative* courts Article 6 ECHR goes a step further. It specifically addresses the legislator. As soon as criminal charges within the autonomous meaning of Article 6 are dealt with, it is the legislator which must ensure that a manipulation of justice is prevented beforehand by designing the framework of the judicial organisation, thus reducing the discretionary powers of the executive, but also of the judiciary itself. Its rationale lies in the separation of powers doctrine.

Third, within this legislative framework, a certain degree of discretion is not forbidden. As illustrated above, there may be compelling reasons for designing a framework which *in abstracto* allows multiple courts to hear a case. This will inevitably lead to some degree of prosecutorial discretion *in concreto*. As far as a court's competence *ratione loci* is concerned, all courts must have a legal basis, but the case allocation criteria do not necessarily have to be laid down in the law. In order to deal with any resulting conflict of jurisdiction, however, a legislator may need to provide for further rules. It is fair to assume that in the light of the separation of powers doctrine, these rules, as well as the way in which they are applied, are subject to a test of lawfulness and reasonableness. Ultimately, this may be checked by 'Strasbourg' itself.

Now, what would the foregoing mean in relation to the choice of forum in the AFSJ? The guarantees discussed were developed in a national context. It is not necessarily so that they should also play a role in the transnational, European context. In fact, in the *Tadić* case, where the applicant stated that the International Criminal Tribunal for the former Yugoslavia (ICTY) had not been 'established by law', the Appeals Chamber accepted that all tribunals must be established by law, but it also ruled that this does not mean that this requirement has the same meaning as in the national context. According to the Appeals Chamber, in the international setting, the requirement must be understood as meaning 'in accordance with the rule of law'. What ultimately is important 'is that [an international tribunal] be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.'<sup>103</sup>

Yet in the European context, I believe, things are different. As such, the European legal order is an autonomous, integrated legal order, not easily comparable with the international one, as I also pointed out in the introduction. The role of constitutional guarantees, such as the separation of powers doctrine, and the fundamental freedoms and human rights have been explicitly recognised by the Court of Justice. This has already reduced the role of the nation state

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103 ICTY, *Prosecutor v. Tadić*, supra note 87, p. 50.

as the principal actor in transnational relationships. Regarding the choice of forum, the obvious question then is not just *whether* the requirement of a ‘tribunal established by law’ – and now as a European *Leistungsgarantie* and not a Member-State *Abwehrrecht*<sup>104</sup> – exists, but also *what* this might mean, in particular, for the regulation of the choice of forum. Although it may be confidently stated that the Member States will not, certainly not voluntarily, set up a European justice system which controls cooperation in criminal cases through European regulations regarding choice of forum, the extent to which the Member States have a monopoly in this matter is questionable. It is fair to expect that, at some point, national courts or the European Court of Justice will be confronted with the issue of the extent to which existing regulations on the forum choice in criminal law can withstand scrutiny by the requirement of a ‘tribunal established by law’.

#### 4. The ‘tribunal established by law’ as a principle of Union law (Article 47 Charter)

##### 4.1. *The position of the Court of Justice*

The Charter of Fundamental Rights has produced a third body of human rights in the European Union.<sup>105</sup> In addition to the common constitutional guarantees of the Member States and the ECHR itself as a source of inspiration, the Charter contains a series of rights of its own. It directly confers rights upon European citizens and, sometimes, others present on European territory. Article 47 CFR reads, as far as is relevant here: ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.’<sup>106</sup>

The drafters of the Charter were exceedingly keen to emphasize that, as such, it does not give any new powers to the European Union and that it only applies to, *inter alia*, the institutions of the Union and the Member States, as long as the latter are implementing EU law (Article 51(1) CFR). Yet, as such, this will not prevent the Charter becoming an important, binding source of law for all EU institutions, including the Court of Justice. The latter may be asked, by way of a preliminary ruling (Article 267 TFEU), to interpret a provision in a Framework Decision or a future directive or regulation in light of the requirement of a ‘tribunal established by law’. As I indicated earlier, the European Court of Justice’s position is precarious: it must protect the autonomy of EU law, but also guard the constitutionality of the European legal order.<sup>107</sup>

Article 16 of the Framework Decision on the European Arrest Warrant, for instance, deals with the issue of multiple arrest warrants received by the state where the suspect is located. That state must then take a decision on which of those arrest warrants it shall execute. By doing so, in effect, a case allocation decision is required by the executing state. That state must take into account various considerations, some of which are mentioned in Article 16(1) FD EAW. When dealing with this provision, a national court, when competent,<sup>108</sup> may ask the Court of Justice how to interpret it in light of Article 47 CFR. First and foremost, the Court may be asked whether or not this requirement also applies in the context of the AFSJ. Moreover, it may be faced with

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104 For an excellent example of the latter, see the interpretation of the Bundesverfassungsgericht of Art. 16 Abs. 2 (and Art. 103) GG in the *Darkazanli* case; Bundesverfassungsgericht, 18 July 2005, 2 BvR 2236/04, discussed by, *inter alia*, Komárek, supra note 55.

105 See, for instance, Pernice, supra note 9.

106 The reader will have noticed that this article introduces a new element in comparison to Article 6 ECHR: the tribunal must have been *previously* established by law; see on the interpretation of this element, Kuijer, supra note 90, pp. 191-193. For this article, this is less relevant. In the remainder of this article I will continue to refer to the requirement of a ‘tribunal established by law’, also when addressing Art. 47 CFR.

107 Supra Section 3.1.

108 Of course, it may very well be that national law leaves this issue solely to the prosecutor.

the question of whether or not the judicial scrutiny of case allocation decisions is a requirement which follows from the requirement of a ‘tribunal established by law’. The referring court may also want to know how, in light of a proper administration of justice in the AFSJ, it must determine which warrant it must execute. Relevant questions would then not only relate to the criteria to be applied, but also to the intensity of the test or to the question of whether these criteria must be accessible and foreseeable.

Similar questions may arise when the Court is asked, for instance, to interpret the phrase ‘any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings’, introduced in Article 2(1)(b) of the Framework Decision on conflicts of jurisdiction. Indeed, what would be an effective solution in light of Article 47 CFR, more specifically in light of reducing the possibility of arbitrary decisions? Must ‘effective’ be understood to mean ‘reasonable’? And what exactly are the adverse consequences arising from parallel proceedings? As I illustrated in Section 2.2, the legislator was careful not to be too specific. Moreover, from the Preamble, Recital 4, it becomes clear that the concern is primarily to avoid wasting the time and resources of the competent authorities concerned. The interests of the accused, for instance, are not mentioned. So, how should we interpret this phrase? Is the Court allowed to insert other considerations – for instance the position of the defence in light of diverging national defence rights – as well and to balance those interests against those of efficient criminal proceedings?

Moreover, if the proposal on the transfer of proceedings, discussed in Section 2.3, were ever to be adopted, one of the issues that most likely will draw attention is the issue of the compatibility of the principle of subsidiary jurisdiction with Article 47 CFR. In the literature on the law on international criminal cooperation this issue is a hotly debated topic in light of the German *Recht auf den gesetzlichen Richter* and the corresponding national constitutional guarantees.<sup>109</sup> The debate centres not only on the applicability of these national constitutional rights in the international context, but also on the question of whether the criteria used for exercising this type of jurisdiction meet the requirements of accessibility and foreseeability. After all, many of those criteria relate to circumstances that come into play after the offence was committed.<sup>110</sup> In the literature on international criminal law it is well documented that these criteria may easily be manipulated. Judicial authorities may for instance wait with apprehending a suspect until this person shows up on the territory of a certain state, for instance the state with the most repressive penal regime. The creation of the AFSJ in which people are free to move has without doubt facilitated this. When such a situation is brought before the Court, once again, it is confronted with the question of whether or not this is ‘reasonable’. In such a case, the Court cannot rely on the argument that, now that the AFSJ is based upon the principle of mutual trust, interstate differences in criminal law must be accepted. That is not the issue here. Rather, the issue is why it is reasonable to refer the case to exactly that state. Similar questions may arise with regard to the application of the Framework Decisions on the European Arrest Warrant or Evidence Warrant.

At present, there are no cases which deal specifically with case allocation in the AFSJ. Case law that comes most close to the issue at hand is found in two cases of the Court of First Instance, where the system of case allocation between national competition authorities and the European

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109 Cf. R. Linke, ‘Zwischenstaatliche Kompetenzkonflikte auf dem Gebiet des Strafrechts’, in D. Oehler & P.G. Pötz (eds.), *Aktuelle Probleme des internationalen Strafrechts: Beiträge zur Gestaltung des internationalen und eines Supranationalen Strafrechts: Heinrich Gützner zum 65. Geburtstag*, 1970, pp. 90-91; N. Witschi, *Die Übernahme der Strafverfolgung nach künftigem schweizerischem Recht*, 1977, pp. 80-82; F. Thomas, *De Europese rechtshulpverdragen in strafzaken*, 1980, pp. 436-437; Lagodny, *supra* note 83, p. 114; Eser & Burchard, *supra* note 3, pp. 518-519; Schünemann, *supra* note 83, p. 106.

110 See Article 7 of the proposal, discussed in Section 2.3.

Commission under competition law, based on Regulation 1/2003,<sup>111</sup> was examined.<sup>112</sup> In those decisions, the Court of First Instance accepted the large measure of discretion which competition authorities, and the European Commission in particular, have in allocating cases among themselves. Its standard of review, however, was, among others, the principle of loyal cooperation. Unfortunately, the Court did not address, on procedural grounds, the issue (which was raised too late) of whether the system in Regulation 1/2003, which has been developed further in a notice<sup>113</sup> and joint statement by the Council and the Commission,<sup>114</sup> is also consistent with the principle of the proper administration of justice.<sup>115</sup> The question of whether the requirement of a ‘tribunal established by law’ plays any role in this regard was not asked.

#### **4.2. The applicability of Article 47 CFR in a transnational context**

When the occasion arises, the Court of Justice will be asked, first and foremost, whether the requirement of a ‘tribunal established by law’ actually applies to the AFSJ as a whole. This would extend the scope of that requirement beyond the national context in which it has been used until now. For one thing, this may be at odds with Article 52(3) CFR: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention,’ even though this section also states that ‘[t]his provision shall not prevent Union law providing more extensive protection.’ Moreover, it may be argued that matters of judicial organization and jurisdiction in criminal matters, despite the occasional harmonization of rules on jurisdiction,<sup>116</sup> are predominantly still a matter for the Member States, not for the European Union. The Charter, by conclusion, would not be applicable here (cf. Article 51(1) CFR), even though the resulting conflicts of jurisdiction may be of concern to the EU as a whole. Now that every court in itself has – or should have – its jurisdictional basis in national law, for which the Member States themselves and not the EU are ultimately accountable to the European Court of Human Rights, ‘Strasbourg’ and not ‘Luxembourg’ is the place to go.

This article takes a different approach. Indeed, the requirement of a ‘tribunal established by law’, or for that matter, *ius de non evocando* or the lawful judge concept, were all developed within a nation-state context. Yet, first of all, it seems rather unconvincing to derive from this, using an *argumentum a contrario*, that the requirement is thus of no importance for the EU, particularly the AFSJ, as a whole. The rationale behind Article 53(3) CFR is to avoid diverging interpretations of similar rights by (ultimately) the Court of Justice and the European Court of Human Rights,<sup>117</sup> not to limit their scope to the national context.

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111 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

112 Case T-339/04, *France Télécom SA/Commissie* and Case T-340/04, *France Télécom SA/Commissie*, both dated 8 March 2007, discussed by F. Rizzuto, ‘Parallel Competence and the Power of the EC Commission under Regulation 1/2003 According to the Court of First Instance’, 2008 *ECLR* 29, no. 5, pp. 286-297; A. Schwab & C. Steinle, ‘Pitfalls of the European Competition Network – Why better protection of leniency applicants and legal regulation of case allocation is needed’, 2008 *ECLR* 29, no. 9, p. 523-531; Brammer, *supra* note 12, pp. 224-225.

113 Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

114 Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87 – Adoption, Council document 15435/02 ADD 1.

115 Case T-340/04, *France Télécom SA/Commissie*, Paras. 161 et seq.

116 *Supra* note 2.

117 See Explanations relating to the Charter on Fundamental Rights, OJ C 303, 14.12.2007, p. 33.

Moreover, such an approach would be in denial of the fact that with the removal of internal border controls, the Member States became ‘jointly responsible’<sup>118</sup> for combating crime in the EU, and chose to deal with this problem by introducing a well-known concept of ‘European governance’<sup>119</sup> – i.e. mutual recognition – as the dominant principle for cooperation in criminal matters. The European Union’s mutual recognition project has, in particular, ensured that a national legal system can no longer be linked one-to-one to the Member State’s own territory or own nationals. On the one hand, the effect of national criminal law has, through European orders or warrants, been extended beyond the Member State’s own territory. On the other hand, foreign orders or warrants apply to the entire area of justice, thus to the territories of all Member States. In this way, different national legal systems ‘compete’ with each other on the European Member States’ territories.<sup>120</sup>

As a result, as was shown earlier,<sup>121</sup> interstate choice of forum is already touched upon by many EU instruments, albeit in a very fragmented way. This, for instance, becomes visible in relation to the European Arrest Warrant, where a decision, based upon national law, to refuse the execution of a warrant on account of the fact that the offence has been committed on the territory of that state or because that state is also prosecuting the suspect, clearly favours the jurisdiction of the executing state and in effect leaves the issuing state (or issuing states) with empty hands, i.e. without a suspect to prosecute. As such, of course, this does not withhold the latter state from continuing its proceedings; the decision by the executing state is after all not a mechanism for *final interstate* dispute settlement. Still, the issuing state has to proceed without a suspect, because the executing state was of the opinion that it was in a better position to deal with the case (or *not* to deal with the case). These decisions are based upon national, unilateral mechanisms determining court jurisdiction in favour of the issuing state. Similar issues emerge with regard to the (refusal of any) transfer of evidentiary materials.

The argument that the judicial organization as such is a matter for Member States alone, therefore fails to appreciate that the judicial organizations of the Member States have already become intertwined through the implementation of these EU legislative instruments. This has not been done by providing, for instance, European statutory rules on case allocation, but by explicitly allowing for national decisions to refuse assistance and thus mitigating the full effect of mutual recognition. Concerned as the Member States are for a further loss of sovereignty, they chose to administer the AFSJ in a horizontal way, through mutual recognition, leaving as much to the national level as possible. Yet in order to deal with the inevitable conflicts arising from this, provisions were inserted into the framework decisions that require national authorities to decide upon which Member State is the appropriate place for prosecution.

It is exactly the requirement of a ‘tribunal established by law’ that is concerned with the question of whether any national competence that is exercised in this regard is lawful and reasonable. There seems to be no justification for limiting the scope of the Charter to the implementation of EU law in the national legal order, thereby ignoring the fact that the European legal order to a large extent is dependent on cooperation between the Member States (horizontal cooperation), or – for that matter – cooperation between Member States and EU institutions (vertical cooperation). To some extent, there is a similarity with the Court’s case law on the *ne*

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118 Opinion of A-G Bot, Case C-123/08, *Wolzenburg*, Para. 105.

119 Schmidt, *supra* note 23.

120 Cf. R. Barents, ‘De voorrang van unierecht in het perspectief van constitutioneel pluralisme’, 2009 *SEW*, pp. 44-53; L.J. Brinkhorst, *Europese Unie en nationale soevereiniteit*, 2008, pp. 7 et seq.; Mitsilegas, *supra* note 55, pp. 1281 et seq.; Möstl, *supra* note 23.

121 *Supra* Sections 2.1 and 4.1.

*bis in idem* principle. The transnational effects of this principle were already acknowledged before the entry into force of ‘Lisbon’, especially in Article 54, and further of the Schengen Convention, which was later integrated in the *acquis* of the former Third Pillar.<sup>122</sup> Article 50 CFR is now the only article in the Charter which explicitly acknowledges the transnational effect of a human right, i.e. the *ne bis in idem* principle.<sup>123</sup> But does this also mean that, therefore, other rights (and principles) contained in the Charter lack this effect? This would be difficult to except, because the rationales behind *ne bis in idem* – especially the ideas of interstate mutual trust and the need for legal certainty for those moving over European territory<sup>124</sup> – are interpreted in the context of the AFSJ as a whole. By analogy, I would argue that Article 47 CFR and its rationale – the doctrine of separation of powers and the closely connected principle of legality – seek to limit the exercise of unfettered discretion in this area. Although those moving over European territory will not be granted ‘the right to choose the jurisdiction of a [Member State] court’, they are still entitled, in the case of concurring jurisdictions, to an examination as to ‘whether reasonable grounds existed for the authorities to establish one of the various [Member States] jurisdictions and whether [this] decision was lawful [emphasis added].’<sup>125</sup>

In my opinion, this interpretation of Article 47 CFR does not confer new powers on the European Union (cf. Article 51(2) CFR); on the contrary, it limits its competences and those of the Member States, when implementing Union legislation.<sup>126</sup> In fact, regarding the choice of forum, there is good reason to be more cautious in the transnational context than in a national one, now that the choice of forum in the AFSJ is not a ‘neutral’ one, i.e. a choice between judges all applying the same substantive and procedural framework,<sup>127</sup> but also encompasses an assessment of the differences between the criminal law systems of the Member States. Interstate differences in legal systems, for instance in the wording of offences, the sanctions likely to be imposed, the investigate measures or the defence rights available, have now become relevant factors for the choice of forum. Particularly in the AFSJ, the question is how to prevent differences between legal systems being played off against each other for the benefit of the prosecution services, but at the expense of the interests of the accused, the victim and/or the proper administration of justice in general.

In light of the foregoing, one may also pose the question of whether the Member States still are in a position to confine themselves to securing the national interests at stake, for instance by transforming optional grounds for refusal in mutual recognition instruments into mandatory ones. It is submitted here that in the AFSJ, a ‘reasonable’ decision implies that the interests of all ‘stakeholders’ (which, incidentally, have already been recognized as such in the AFSJ, i.e. other Member States, the suspect, the victim, the European Union itself) are taken into account and balanced against each other. Ultimately, this may bring along, for instance, that a Member State must accept that another state is in a better position to deal with a case. Unlike in the present situation, where a Member State may come to the same conclusion on its own volition, the fundamental difference is that under my interpretation of Article 47 CFR there is a legal obligation to do so. I find support for this argument in the principle of loyal cooperation.<sup>128</sup> By definition, the reasonableness of any case allocation decision cannot be limited to the interests of the

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122 See also Protocol (No. 19) on the Schengen *acquis* integrated into the Framework of the European Union, OJ C 83, 30.3.2010, p. 290.

123 See Explanations relating to the Charter on Fundamental Rights, OJ C 303, 14.12.2007, p. 31.

124 Cf. ECJ 9 March 2006, Case C-436/04, *Van Esbroeck*, [2006] ECR I-2333, Paras. 30-34.

125 Cf. *supra* note 100.

126 Cf. Pernice, *supra* note 9, p. 244, with regard to the Charter in general.

127 *Supra* notes 73 and 74.

128 Cf. ECJ, Case 105/03, *Criminal proceedings against Maria Pupino*, [2005] ECR I-5285.

legal order of one single Member State. Loyal cooperation implies that the interests of the other stakeholders are also taken into account.

## 5. A dialogue between the judiciary and legislator?

### 5.1. *The limits of the competences of the judiciary*

The foregoing has several implications for the AFSJ. Most importantly, the requirement of a ‘tribunal established by law’ encompasses the AFSJ as a whole and not only the legal orders of the Member States. Within the AFSJ a court is not competent to try a case as long as it has no jurisdiction *ratione loci*, *ratione materiae* and *ratione personae*. At present, the basis for this will be found in national law. In the second place, where framework decisions or future instruments require Member States to deal with conflicts of jurisdiction, European and national law, as well as the decisions based thereon, also come under the scope of the requirement. These decisions need to be lawful and reasonable, taking into account all relevant interests and not only those of one particular Member State. Finally, in light of the foregoing, national constitutional guarantees must be interpreted in light of the AFSJ as well. A perspective in which the national constitutional guarantees, such as *ius de non evocando* are utilised, on the one hand, by the Member States as *Abwehrrecht* against ‘extraneous’, European influences,<sup>129</sup> but, on the other hand, are limited in scope to their own internal legal systems,<sup>130</sup> is outdated.

However, even though the foregoing illustrates that we are dealing with a matter that is not only of concern to the legal orders of the individual Member States, the main difficulty at present is that there is no general frame of reference. By definition, the requirement of a ‘tribunal established by law’ needs a law to interpret. The fragmentary approach regarding the choice of forum thus far and the fact that many issues are left open under European law is a tremendous complication. After all, Article 47 CFR only comes into play as long as Member States are implementing EU law. With the latter being virtually silent on case allocation as such, Article 47 CFR is a factor of relevance mainly in relation to matters of transnational cooperation, which is extensively dealt with by EU law, and, more specifically, only in relation to ‘true’ or actual interstate conflicts of jurisdiction. In the present situation, negative conflicts are barely addressed by EU laws. And even in cases of positive conflict, the effect of the application of Article 47 CFR may be limited further where Member States’ legislators have chosen to transform any optional ground for refusal, provided for in an EU instrument, into a mandatory one. In those situations, national law prohibits its prosecuting authorities and courts from performing a reasonableness test.<sup>131</sup> The rather strange result of this is that, if we were to follow the interpretation of Article 47 CFR advocated here, case allocation decisions are only a relevant issue under the Charter, as long as states seek cooperation and this cooperation leads to interstate conflicts, but not in other situations in which the interests of the courts, suspects, victims, et cetera, may equally be affected.

In short, therefore, we are in need of a horizontal approach to the problem, dealing with choice of forum in criminal matters in general. The judiciary cannot completely fill all the gaps identified; that would be contrary to the very thoughts behind Article 47 CFR. As we have seen above, the requirement of a ‘tribunal established by law’ refers to statutory law, leaving it to the

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129 Cf. Bundesverfassungsgericht, 18 July 2005, 2 BvR 2236/04 (*Darkanzani*).

130 Cf. Section 3.2.

131 I will not deal with the question of whether the application of such a mandatory ground for refusal, albeit without any doubt lawful under national law, is still in violation of Art. 47 CFR because it may be unreasonable.

legislator to enact those rules or not.<sup>132</sup> Yet, in light of the foregoing and bearing in mind that the prevention and settlement of conflicts of jurisdiction is a task that the European Union has attributed to itself (Article 82(1)(b) TFEU), it is certainly not unthinkable that, sooner or later, the choice of forum will re-emerge on the European agenda, whereas now it has been kept out of the Stockholm Programme.<sup>133</sup> Until now, there have been no incentives for the Council (and, more surprisingly, the Commission) to deal with this subject further. This may change if the European and national courts were to accept the interpretation of the requirement of a ‘tribunal established by law’ as advocated here, for instance by answering the questions raised in Section 4.1. In that case, it is fair to expect that the rulings of, in particular, the Court of Justice will have indirect consequences for future legislative action, as has also been the case after the landmark decisions on *ne bis in idem*.<sup>134</sup> Several items then need to be dealt with by the European and national legislators.

In the first place, the position of the judiciary needs attention. As such, the judicial supervision of case allocation decisions or case allocation by the courts themselves seems contradictory to the very notions behind the requirement of a ‘tribunal established by law’. In practice, however, and with the proviso that the exercise of any such competence is lawful and reasonable, it may be a valuable mechanism for dealing with conflicts of jurisdiction and a good alternative for EU statutory case allocation, which may often prove to be too rigid, and case allocation exclusively by prosecution services, which may easily lead to situations in which too much emphasis is put on the prosecutorial perspective. In itself, nothing prevents the European or national legislator from assigning this task to *national* courts. A national court may for instance rule that a suspect may not be surrendered to the issuing state on account of the fact that prosecution in the executing state is indicated. There are some rulings by Dutch courts, for instance, that have dealt with this matter in relation to the European Arrest Warrant.<sup>135</sup> If national law allows it to do so, a trial court may even declare itself not competent, because it is of the opinion that another Member State is in a better position to deal with the case.

Leaving this issue to national law, however, has several shortcomings. Regarding choice of forum, the European legislator has been very careful not to include any court competence in the existing European legislation. As a consequence, a national legislator may decide either to deal with the issue itself, or to assign the task to the judiciary, but may also leave it entirely to its prosecution services. For instance, Recital 17 of the Preamble to the Framework Decision on conflicts of jurisdiction states that ‘this Framework Decision (...) does not affect any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction, *if such right exists under national law* [emphasis added].’ This approach does not exclude any judicial review under national law, but it does not guarantee it either.<sup>136</sup> If national law is silent on the issue, this flaw appears to be difficult, if not impossible, to challenge before the Court of Justice, exactly because it is regarded as a matter for national law.

Moreover, it is doubtful whether a national court is in a position to take into account all the interests involved. National courts will only be asked to decide on the lawfulness and reasonable-

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<sup>132</sup> Supra note 91.

<sup>133</sup> Supra Section 3.1.

<sup>134</sup> See supra Section 2, Subsection 2.2 in particular.

<sup>135</sup> For instance, by the Dutch Supreme Court, HR 28 November 2006, *LJN AY6634*, Para. 3.5.

<sup>136</sup> Incidentally, the lack of coordination of legal protection in transnational cases is not only a concern regarding the choice of forum; cf. M.J.J.P. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities*, 2008, pp. 156-175 and 192-218; A.A.H. Van Hoek & M.J.J.P. Luchtman, ‘Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights’, 2005 *Utrecht Law Review* 1, no.2, pp. 1-39; C. Rijken, ‘Re-balancing security and justice: protection of fundamental rights in police and judicial cooperation in criminal matters’, 2010 *CMLR* 47, no. 5, pp. 1455-1492.

ness of a decision to bring a particular suspect (or suspects) before it. It is not unconceivable that a decision that at first sight seems reasonable, becomes questionable, if it turns out that the case is part of a broader transnational investigation and that other criminal proceedings are conducted simultaneously in other states. Then, the question not only arises as to whether these circumstances must be taken into account as well, but also if this court is in a position to perform this test.

In the third place, case allocation or supervision by a national court by definition has limited effect. If national law so allows and a court consequently declares itself not competent, because it holds that the decision to seize this particular court is unreasonable, it is not at all guaranteed that any other state will continue the prosecution. It may also occur that several courts from several states are all of the opinion that they are competent, which would lead to parallel investigations and – possibly – diverging outcomes. Either way, the result is a conflict of jurisdiction.

Inevitably, therefore, it will turn out that national judicial scrutiny of transnational case allocation decisions has some serious drawbacks. By its very nature, this seems to be a matter for supervision at the European level.<sup>137</sup> The best way forward would be to assign this task to the Court of Justice, but at present this is not possible (cf. Article 276 TFEU). The alternative would be to assign the task to Eurojust, even though Eurojust consists mainly of representatives of the Member States' prosecution services.<sup>138</sup> Therefore, this solution could only work as long as national courts – the independent judiciary therefore – retain/gain the right to reject such a decision by Eurojust.<sup>139</sup>

Not only the judicial organization as such is a concern, the same holds true for the substance and intensity of the lawfulness and reasonableness test to be applied. In the absence of a general framework, the position of any authority involved – European or national; judiciary or executive – is complicated. On the one hand, as I indicated earlier, there is ample reason to keep a close watch over case allocation by prosecution services.<sup>140</sup> On the other hand, when taking up this task, the present situation in criminal matters leaves the authorities very little to work with. This is best illustrated if we first take a look at the system of case allocation that currently exists in Switzerland. This system is particularly informative as it has been dealing with issues of case allocation in criminal matters on Swiss territory for a long time. It may serve as an inspiration for the European Union.

### ***5.2. Inspiration drawn from the Swiss legal system***

Like the European Union,<sup>141</sup> the Swiss territory is viewed as a single area, where law enforcement is the responsibility of authorities which, in principle, are bound by the territory of their component canton. This perception, I believe, affects the interpretation of the legality principle, to which both the requirement of a 'tribunal established by law' and the Swiss concept of the

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137 This, incidentally, has already been explicitly acknowledged in civil matters; see Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

138 Incidentally, it is conceivable that in the future, on the basis of Art. 263(5), TFEU Eurojust will be brought under the Court of Justice's jurisdiction. This paragraph reads: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.' Then, the question arises whether or not a case allocation decision actually produces 'legal effects'. In relation to OLAF and in the area of competition law, the Court's position is reserved, although this does not automatically imply that the Court will take the same position in criminal matters; see, for instance, CFI 4 October 2006, Case T-193/04, *Tillack*, [2006] ECR II-3995, Paras. 66 et seq. and *Brammer*, supra note 12, pp. 212-228.

139 Yet, here too, problems arise; see T. Vander Beken et al., 'Kriterien für die jeweils "beste" Strafgewalt in Europa', 2002 *NSStZ*, p. 624.

140 See supra Section 3.3; see also infra Section 5.2.

141 Supra note 10.

*verfassungsmässige Richter* are closely connected.<sup>142</sup> Within Switzerland, this concept offers citizens protection against arbitrary decisions and provides authorities with direction within the entire Swiss territory. It specifically includes the coordination of the activities of the authorities in different cantons.

The Swiss scheme assumes a statutory assignment of cases across the cantons, which – within the federal framework – can then themselves organise their legal systems, and which is binding on the police, the public prosecutor and the judiciary.<sup>143</sup> Although the situation in the EU is similar to the one in Switzerland, it is also much more complex. While substantive and, recently, procedural federal criminal law have been harmonised in Switzerland, this is only true to a limited extent in the European Union. At first sight, this fundamental difference in the substantive and procedural law framework hampers a comparison between the two legal orders. What is of relevance here is that, until recently, procedural criminal law in Switzerland was not harmonized. Like in the European Union, inter-cantonal differences in criminal procedure were therefore a factor of relevance in case allocation. Moreover, the relatively autonomous position of the Swiss cantons in relation to the administration of criminal justice forced the federal legislator to provide for a framework that would avoid positive and negative conflicts of jurisdiction.<sup>144</sup>

With respect to the ‘inter-cantonal forum choice’, Swiss law includes statutory choice of forum rules which pertain to a variety of situations.<sup>145</sup> They cover the relatively simple situation in which there is one suspect and one offence,<sup>146</sup> the situation in which there is one offence and multiple suspects,<sup>147</sup> the situation in which one suspect has committed multiple offences<sup>148</sup> and, finally, the situation in which multiple suspects have committed multiple offences.<sup>149</sup> The legal system is designed for related criminal cases preferably to be tried before a single court, even if multiple courts from different cantons have jurisdiction.<sup>150</sup>

Because it would be virtually impossible to cover all possible scenarios regarding the choice of forum by legislation, the legal system explicitly allows for deviations.<sup>151</sup> This is not considered to be in contrast to the *verfassungsmässige Richter* concept, nor does it violate Article 6 ECHR.<sup>152</sup> On the contrary, in situations like these, the right to the *verfassungsmässige Richter* protects suspects against arbitrary application of the law.<sup>153</sup> In the very abundant case law and practical experience, which are now codified in the federal *Strafprozessordnung*, it is clear that such deviations from the statutory scheme are subject to strict limitations and are reviewable

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142 Art. 30 Abs. 1 of the Swiss Constitution (*Bundesverfassung*) reads: ‘Jede Person, deren Sache in einem gerichtlichen Verfahren beurteilt werden muss, hat Anspruch auf ein durch Gesetz geschaffenes, zuständiges, unabhängiges und unparteiisches Gericht. Ausnahmegerichte sind untersagt.’

143 Arts. 340-345 of the Swiss Penal Code (*Strafgesetzbuch/CH-StGB*). Once the Federal Code of Criminal Procedure of 5 October 2007 (*Schweizerische Strafprozessordnung/CH-StPO*, *BBl.* 2007, 6977) enters into force, these articles shall be replaced by arts. 29-41 CH-StPO.

144 It is remarkable that the relevant rules, until recently, were laid down in the federal Penal Code (*Strafgesetzbuch/CH-StGB*). As such, the issue is more a matter for procedural law. This is explained by the fact that a system of case allocation was considered to be essential for the implementation of substantive federal criminal law; see E. Schweri & F. Bänziger, *Interkantonale Gerichtsstandsbestimmung in Strafsachen*, 2004, p. 2.

145 See also Schweri & Bänziger, *supra* note 144.

146 Arts. 340-342 CH-StGB, to be replaced by Art. 31-32 CH-StPO.

147 Art. 343 StGB, to be replaced by Art. 33 CH-StPO.

148 Art. 344 StGB, to be replaced by Art. 34 CH-StPO.

149 In those situations, both Art. 343 and Art. 344 StGB may be used, see further M. Waiblinger, ‘Die Bestimmung des Gerichtsstandes bei Mehrheit von strafbaren Handlungen oder von Beteiligten’, 1943 *ZStr* 57, p. 81.

150 In Swiss legal doctrine and case law, this is called the *Vereinigungsprinzip*; cf. BGE 95 IV 32 (35); Art. 29 CH-StPO; Schweri & Bänziger, *supra* note 144, p. 6. Incidentally, this preference is also found in Germany, see §§ 2, 3 and 13 DE-StPO.

151 See for instance Arts. 262 and 263 of the *Bundesgesetz über die Strafrechtspflege/BSStP*, to be replaced by Art. 38 CH-StPO.

152 *Supra* note 100. Incidentally, the same holds true for the situation in Germany, *supra* note 77.

153 Standard case law, cf. BGE 105 Ia 172 (175) and BGE 119 IV 102.

by the courts, specifically the federal *Bundesstrafgericht*. One obvious limitation is that the authorities cannot themselves establish their territorial jurisdiction; they must already have jurisdiction under the law.<sup>154</sup> Moreover, deviations from the statutory scheme are only possible if there are compelling reasons (*triftige Gründe*) which ‘automatically come into play’ (*gebieterisch aufdrängen*).<sup>155</sup> This power to deviate from the statutory rules may therefore only be exercised if a strict application of the statutory rules would be contrary to the purpose of that law.<sup>156</sup> The *Bundesstrafgericht* expressed this as follows: ‘Wird vom gesetzlichen Gerichtsstand abgewichen, sollten jedoch folgende Bedingungen erfüllt sein: Die Tat sollte dort verfolgt werden, wo das Rechtsgut verletzt wurde; der Richter sollte sich ein möglichst vollständiges Bild von Tat und Tater machen können; der Beschuldigte sollte sich am Ort der Verfolgung leicht verteidigen können; das Verfahren sollte wirtschaftlich sein.’<sup>157</sup> It is clearly not enough that only considerations of prosecutorial efficiency are taken into account. The interests of, *inter alia*, the accused (which, by the way, include not only his future reintegration, but also the possibility to defend himself adequately) and those of the (local) community most affected by the crime must also be included in the assessment.

### **5.3. Lessons for the European Union – a way out of the institutional stalemate?**

How different is the situation in the European Union. Compared to Switzerland, the European legislator leaves the actors involved in criminal justice virtually nothing to work with. The position of the courts is left to the national level. The same is true for the suspect(s) or the victim(s). As a result, courts, for instance, are forced either to operate in a vacuum, leaving them vulnerable to reproaches of judicial activism, or to refrain from one of their core tasks, i.e. the assessment of what is reasonable.<sup>158</sup> Performing a reasonableness test seems difficult, if not impossible, as long the legislator ensures that it does *not* define too precisely what should be the outcome of any deliberations between prosecuting authorities, what interests must be taken into account and how they are to be balanced in order to reach that outcome. At the same time, however, a question that is equally concerned with the balance of powers in the European Union is disregarded. In this sense, indeed, there is a link between the requirement of a ‘tribunal established by law’ and the requirements that courts be ‘impartial’ and ‘independent’.<sup>159</sup>

It is noteworthy in this regard that, in the academic literature, there have already been many proposals dealing with the choice of forum. Some of them argue for an *ex ante*, substantive law solution through a ranking of jurisdiction criteria,<sup>160</sup> others for (binding) *ex post* problem solving through interstate consultation and coordination.<sup>161</sup> Some regard the issue as a matter for the prosecution services only; others include other stakeholders – the courts or the suspect – as

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154 Standard case law, cf. BGE 120 IV 280 and BGE 119 IV 250 (252-253).

155 Standard case law, cf. Bundesstrafgericht 30 March 2009, BG.2008.22 and BGE 119 IV 250. See also Art. 38 CH-StPO.

156 Standard case law, cf. Bundesstrafgericht 8 January 2009, no. BG.2008.26 and BGE 123 IV 23 (25-26).

157 Bundesstrafgericht, 21 October 2004, no. BK\_G 127/04. See also Schweri & Bänziger, *supra* note 144, p. 148; P. Guidon et al., ‘Die aktuelle Rechtsprechung des Bundesstrafgerichts zum interkantonalen Gerichtsstand in Strafsachen’, 2007 *Jusletter*, no. 45.

158 Cf. Vander Beken et al., *supra* note 139, p. 626.

159 *Supra* note 7.

160 Cf. Council of Europe Recommendation 420 (1965) – Draft European Convention on Conflicts of Jurisdiction in Criminal Matters; A.H. Klip, *Criminal law in the European Union*, 2005, pp. 56 et seq.; Eser & Burchard, *supra* note 3; in principle also by Schünemann, *supra* note 83.

161 Cf. T. Vander Beken et al., *Finding the best place for prosecution – European study on jurisdiction criteria*, 2002; Lagodny, *supra* note 83; A. Eicker, ‘Zur Vermeidung simultaner Strafverfahren im zwischenstaatlichen Kontext’, 2005 *StV*.

well.<sup>162</sup> Some are limited to *ne bis in idem* situations;<sup>163</sup> others take a broader approach. Indeed, there are many roads that lead to Rome.

I would add to this that inspiration may also be found in the Swiss approach to the choice of forum. Particularly the latter is, in my opinion, informative for the European Union, as it has proven in practice, moreover in a context fairly comparable to the one in the AFSJ, that there is a way out of the dilemma between a statutory system, which would provide optimal legal certainty, but may also prove to be too rigid, on the one hand, and the mechanisms of *ex post* case allocation which may be too permissive, on the other. It does so by taking statutory regulation as its starting point, but it also acknowledges that, in certain circumstances, deviations may be necessary, but under court supervision. Such deviations are only allowed if a) the *goals* of the statutory framework *clearly* call for a different solution than the statutory *rules* provide and b) those deviations duly take account of the interests of the place where most of the damaging effects of criminal conduct were felt; those of the suspect (and his counsel) to effectively defend himself; 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 those of the speedy and efficient administration of justice.<sup>164</sup> This, it would seem to me, is a system courts can work with, without jeopardizing the need for prosecutorial leeway.

Of course, it would be overly simplistic to argue that the Swiss model could simply be ‘copy pasted’ on to the European context, nor do I imply that the Swiss approach is the single right answer. After all, this model refers back to criminal law doctrine on numerous occasions.<sup>165</sup> To give but a few examples: the question of whether a criminal case against a (presumed) accomplice must be joined with the proceedings against the (presumed) perpetrator also depends on criminal law doctrine regarding complicity. Is complicity a criminal offence of its own or does it have an accessory character?<sup>166</sup> A statutory regime of European rules would most certainly have to deal with this issue and, therefore, would automatically interfere with national criminal law doctrine. Likewise, it is conceivable that such a framework would interfere with criminal law doctrine on criminal jurisdiction, attempt or preparatory acts, the criminal liability of legal persons, *concursum* (*idealis* or *realis*), et cetera.

This is not the place for a final answer to these questions. First and foremost, this article addressed a ‘preliminary’ issue; it was born out of the fact that, although there are more than enough materials to start from, the primary concern of the Member States of the European Union at present lies somewhere else; the protection of national sovereignty.

## 6. Conclusion

This article has taken a look at the choice of forum – the designation of the Member State with authority to investigate, prosecute and try a criminal case – in an area of freedom, security and justice. The issue was approached from the vantage point that, with the creation of this area, a new course has been set out in the sense that the forum choice in criminal cases, traditionally governed by international criminal law rules (jurisdiction and transfer of prosecution), is no longer only the domain of the Member States, particularly the executive branch, but also of the judiciary and, not least, EU citizens and the EU as a whole. I have specifically tried to describe

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162 Cf. A.H.J. Swart, ‘De overdracht van strafvervolgelingen’, 1982 *NJB*; Witschi, *supra* note 109, p. 83; Vander Beken et al, *ibid*.

163 Cf. A. Biehler et al. (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, 2003; Eser & Burchard, *supra* note 3.

164 *Supra* note 157.

165 For an extensive overview, see Schweri & Bänziger, *supra* note 144.

166 Cf. for instance, Art. 343 StGB, to be replaced by Art. 33 CH-StPO.

how much discretion the prosecuting authorities currently have and why and to what extent such discretion is problematic in light of the requirement of a ‘tribunal established by law’.

The conclusion which I draw in connection with the foregoing is that there is reason to be concerned. Just before the Treaty of Lisbon was set to enter into effect, the recognition programme seems to have been derailed. Despite the original intentions, a major focus in recent framework decisions on cooperation in criminal cases has been the retention of national discretion. In that sense, the lofty texts in the Tampere Programme have not led to much. The Framework Decision on conflicts of jurisdiction, the proposal on the transfer of criminal proceedings and the other framework decisions mentioned will not be sufficient to correct this situation. They do not provide enough to go on. But as a result, current European regulations on choice of forum, in my opinion, fall below the minimum standards which do apply in the individual Member States, under the supervision of the European Court of Human Rights and, increasingly, the European Court of Justice.<sup>167</sup>

Rather than presenting a variety of possible solutions regarding the choice of forum, this article mainly addressed a ‘preliminary’ issue. Only if concerns of loss of national sovereignty are overcome will it be possible to start the debate on what actions must follow. This article’s main finding is that the choice of forum is not an issue only for the Council, the Member States’ governments and their prosecuting authorities. The position defended here is that it has a clear constitutional dimension and, hence, a role for the courts as well. In the absence of any foreseeable legislative activity in this field, a way out of the stalemate is that the courts, by applying Article 47 CFR in the AFSJ in the way advocated here, first and foremost remind the European and national legislators that, when dealing with conflicts of jurisdiction, they must live up to the requirements of Article 47 CFR. Consequently, it is the European legislator that is called upon to provide for a statutory, binding mechanism that not only provides guidance to the prosecuting authorities, but also ensures that national or European authorities, preferably the impartial and independent judiciary, can check the reasonableness of any such decision. As long as no statutory frame of reference exists, it will be difficult for any court – national or European – to determine how and why any such a decision is reasonable or unreasonable. The current situation therefore seems to be a recipe for future institutional conflicts between the executive and the judiciary.

What is more, the approach currently taken leads to a conflict with the task which the European Union has attributed to itself: preventing and settling conflicts of jurisdiction (Article 82(1)(b) TFEU). The protection of national sovereignty and any effective conflict settlement mechanism simply do not go together. Both the European Union and the Member States have to accept that, just as European regulation of the forum choice will be an imperfect system, in the sense that it will, most likely, only determine which *Member State* has authority to investigate, prosecute and try cases, and does not designate the competent national *court*, the national systems will, conversely, have become imperfect without binding European coordination.

Therefore, it is high time that all the participants concerned, and not just the delegations from the Member States’ governments and, subsequently, the Member States’ prosecution services, be heard on the choice of forum in criminal cases. The requirement of a ‘tribunal established by law’ should, I believe, play an important, guiding role in this regard and hopefully will ultimately force the European legislature to make further choices.

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<sup>167</sup> I will leave aside for now the extent to which this is compatible with Article 53 of the Charter.