The Challenges of Transnational Investigations: Conference Report

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With generous support from the Hercule programme of the European Commission the Institute of Judicial Administration at Birmingham Law School hosted a conference on the Challenges of Transnational Investigations in March 2013.

The conference took place in the University's Winterbourne House and Horton Grange conference facilities and provided for an in-depth exchange between academics and practitioners. Attended by 90 participants the conference approach, marrying specialist papers with generous time for discussion, provided for extremely fruitful and enlightening (if sometimes controversial) debate. The academic papers resulting from the conference are to be published in a special issue of the European Journal on Crime, Criminal Law and Criminal Justice. Other papers and contributions are presented here.

The conference **programme (/Documents/college-artslaw/ija/challenges-transnational-programme.pdf)** began with a report on the in-depth evaluation of the EuroNEEDs study results exploring the common experiences of responding prosecutors and identifying problems faced more generally during transnational investigations (see **presentation (1) (/Documents/college-artslaw/ija/transnational/(1)LutzRothEUCJandEqualitybeforelaw.pdf)**). Some of these points were explored by Aled Williams - former President of the College of Eurojust - in his speech (see **presentation (2) (/Documents/college-artslaw/ija/transnational/(2)AledWilliamsProsecutorscoordinatinginvestigationsacrosstheEU.pdf)**). Williams also emphasised the need for calm in considering the future development of mechanisms to assist prosecutors in conducting transnational investigations, emphasising the improvements achieved and highlighting a number of dangers associated with rushing to solutions such as a European Public Prosecutors' Office (EPPO). He pointed out the options available under the Treaties, highlighting articles 85 and 86 as in competition with each other in many ways. For example, article 85 will not be used to grant Eurojust powers to initiate investigations in his opinion if article 86 is used to create an EPPO. The ensuing discussion featured questions as to the details of transnational investigations, detailed reports from the speakers, flanked by a number of prosecutors and investigators in the audience discussing their experiences as well as challenging questions from defence lawyers as to the costs of some of the investigative mechanisms discussed.

Particular Challenges of Financial Investigations

Thereafter a panel focusing on the particular challenges of financial investigations ensued. John Vervaele of the University of Utrecht began by highlighting the difficulty of determining precisely the subject of discussion when concerned with protecting the financial interests of the EU. In such cases a bundle of interests is to be found; singular national interests, pooled national interests of the member states alongside Union interest. Given this he set out the futility of purely national enforcement systems. The law as well as current enforcement systems were analysed as patchworks providing an inadequate basis for the necessary cooperation. Vervaele speculated that this is all the more true for administrative enforcement systems. The path to effective and dissuasive law enforcement was highlighted as plagued by many factors including the external dimension of protecting against financial crimes. Threats stem also from third countries, for many of whom investigations are reliant upon the traditional mutual legal assistance treaties whose mechanisms are to be regarded as inadequate in our digital age. The first step to finding solutions was identified as further knowledge - the dearth of which is marked and problematic, at least a degree of legal harmonisation and institutional provision. Relating to this final point, Vervaele highlights that the EPPO is only one potential solution and the most supra-national of these.

Lothar Kuhl, head of the policy department of the European Union's Anti-Fraud Office (OLAF) developed the theme of lacking knowledge further. Pointing to fraud as a long-standing concern, he highlighted the lack of statistics and the problem of tactical reporting only from the administrative agencies of the member states. The complete lack of a reporting system for VAT frauds was described as a serious problem. Compounding this is the slow progress of cases passed on to the judicial authorities of the member states - and indeed occasionally at OLAF. The lack of decisions as to whether to lodge indictments, let alone cases adjudicated was demonstrated as deeply concerning. Alongside the disproportionate nature of these results to the criminal phenomena involved, negative conflicts of jurisdiction were emphasised as a major cause for worry. Kuhl emphasised the situation as improving due to the legal and institutional developments of the last 15 years. Nevertheless provision is required for better information flow and far stronger control of investigations. A specialised service able to deliver evidence admissible across the Union and above all facilitating more efficient and effective prosecutorial work is needed and likely to provide the basis of the EPPO proposal the Commission will soon publish.

In the following discussion, members of the audience highlighted a multitude of problems they have faced in financial investigations as well as significant concerns relating to a supra-national prosecution service without equivalent defence provision. Alternative mechanisms for improved cooperation amongst the member states were explored.

Changing and Reviewing the Parameters of Transnational Investigations

The next session witnessed Simon Clements - Head of Welfare, Rural and Health Casework Division of the British Crown Prosecution Service - reporting on challenges facing prosecutors in individual cases (see **presentation (3) (/Documents/college-artslaw/ija/transnational/(3)SimonClementsTransnationalInvestigations22ndMarch2013.pdf)**). Taking the counterfeiting of medicines as a central example, he demonstrated what has been achieved and what still needs to be done to ensure successful investigation and the bringing to justice of perpetrators. Outlining the jurisdictional rules of the British jurisdiction, he reported on the mechanisms put in place and what is seen to work in transnational cases from this perspective. Above all he emphasised the need for flexibility and quick reaction as essential to making sure transnational cases can be pursued successfully. Interestingly also utilising the example of counterfeit medication, William Hughes - the inaugural Director of the UK Serious Organised Crime Agency - demonstrated the position of organised crime in relation to undermining stability and faith in governments (see **presentation (4) (/Documents/college-artslaw/ija/transnational/(4)BillHughesBhamspeechMarch2013.pdf)**). He highlighted the freedom of criminals to operate across borders and therefore the need for equivalent law enforcement. Emphasising asset recovery as a vital tool, he insisted upon the integration of serious organised crime into broader security strategies pointing out that most countries have such planning only for terrorism. Hughes describes serious organised crime as likely to become the most serious problem facing governments because it corrupts officials. He stressed that it must not be regarded as a matter for law enforcement only but requires far broader, international cooperative activity. Essentially any competition between law enforcement agencies must be overcome and long-term, trustworthy networks of specialised agencies built internationally. These must act based upon tactical and strategic intelligence in accordance with clear priorities set by government.

Discussion following this panel ranged from further accounts of experience with cooperative measures with many practitioners also emphasising the importance of flexibility and trust amongst a network of prosecutors. Defence lawyers participating in the discussion emphasised that precisely this flexibility was in some cases deeply problematic.

The Potential Contribution of a European Public Prosecutor's Office

Turning back to prosecution questions the next panel concerned itself with the potential contribution an EPPO can make. Lorena Bachmaier-Winter of Complutense University Madrid discussed the ease with which criticisms can be aimed at any such idea and pursued what she described as the more difficult task. She stressed, however, that the EuroNEEDs study provides a number of indicators supportive of the need for an EPPO. Highlighting the current lack of overview as to the number and nature of cases, the tendency towards restricted investigations and prosecutions and the evidence of broad and serious criminal activity, Bachmaier called for the acceptance of an EPPO - her contribution is to be published in print.

Following in this vein, Carlos Zeyen - Vice-President of the College of Eurojust, described his case experiences and the potential for a variety of institutions to improve matters, particularly relating to financial crimes. He demonstrated the mechanisms by which Eurojust has positively contributed to the successful investigation and prosecution of crime in the past ten years (see presentations **(6a) (/Documents/college-artslaw/ija/transnational/(6a)CarlosZeyenPPPCZConferenceTheChallengesofTrans-nationalInvestigations,Birmingham,220313.pdf)** and **(6b) (/Documents/college-artslaw/ija/transnational/(6b)CarlosZeyenwrittenpresentationUniversityofBirmingham.pdf)**). Whatever the contribution of any EPPO in the coming years, he stressed the remaining and durable importance of Eurojust given that even an EPPO can at most relieve it of five percent of its caseload. His presentation demonstrated how an EPPO may emerge from Eurojust, what role Eurojust can play within an EPPO and how the two institutions can work alongside each other. He emphasised that any development must address a number of crucial questions of considerable difficulty.

Discussion following this panel revealed further prosecutorial and investigatory experiences reflecting over what is working well and what changes are necessary with defence lawyers expressing concern that the advent of an EPPO will leave them at an even greater disadvantage. The difficulties of setting standards in legal harmonisation were also explored.

Defence Rights in Transnational Investigations

The next session turned to the securing of defence rights in transnational investigations. Using EuroNEEDs study results, Marianne Wade of the University of Birmingham showed the concerns defence lawyers have relating to European cases. The statistics indicate a scenario in which the odds tend to be stacked against an effective defence though a considerable minority of defence lawyers can be seen as well able to deal with such cases. Potentially socio-economic differences between clients were highlighted as important - a cause for concern as no governance level can aim to increase the advantage of the rich. Interestingly defence lawyers across Europe were demonstrated as far more positive than prosecutors expected of them towards institutional developments such as an EPPO; a sign interpreted as demonstrating their distress at the status quo - this contribution is to be published in print (watch this site for details. See also **presentation (7 (/Documents/college-artslaw/ija/transnational/(7)EU-CJ-and-Equality-of-Arms.pdf)**) for current article published in Crime, Law and Social Change related to the matters discussed).

Jonathan Mitchell Barrister at 25 Bedford Row Chambers as well as of the European Criminal Bar Association spoke to precisely the distress of defence lawyers mentioned above highlighting a number of cases in which the unfair nature of European proceedings can be seen. Fundamentally opposing an EPPO development, he emphasised that no such institution should be created until the asymmetric powers of the current situation has been addressed. Legal aid and provision of adequate, impartial defence able to work freely were emphasised as areas of urgent importance. Mitchell stressed that nationally based solutions to problems facing the Union should be sought to avoid unfairness and ensure protective standards are maintained.

Audience participation following this panel focused upon potential solutions as presented by the two presentations with the merits of many being tested and controversially discussed. In particular the idea of a centralised court was discussed with concerns about potential delays caused by any bottle neck expressed alongside the desire for a centralised instance to which all parties to criminal proceedings can turn in European cases.

The Right to Silence and its Meaning in Financial Cases

A specialised panel was then convened concentrating on the right to silence and, in particular its meaning in financial cases which are so frequently document based. Because the person who ends up as suspect is obliged to provide such documents, a fundamental tension was identified. Jackie Hodgson of the University of Warwick began presenting an overview of the right to silence as iterated in jurisprudence of the European Court of Human Rights (see **presentation (8) (/Documents/college-artslaw/ija/transnational/(8)JacquelineHodgsonPresofinnocence.pdf)**). She emphasised provision having been made for a clear right, strengthened by case-law and concern at a variety of practices in the light of this.

Holger Matt, President of the European Criminal Bar Association pointed to the current EU legal discussion, despite being an ambitious approach, misses the central legal point of the right to silence. By regarding it purely as a principle which flows from the presumption of innocence, the Green Paper missed the human dignity aspects of this right. Outlining the factual pressure upon suspects to cooperate with investigations because it leads to lighter sentences, Matt highlighted a number of tangled points in this area: the direct conflict with labour law and contractual obligations which oblige a suspect to speak, the meaning of this right for legal entities - especially when it's interests conflict with that of persons leading it, insolvency requirements and the question of release from confidentiality obligations were raised. The reversal of the burden of proof was analysed as an obligation to prove ones innocence and the widespread obligation to passively cooperate, e.g. to provide blood samples, highlighted. Matt closed citing the German Bundesverfassungsgericht(Federal Constitutional Court)'s approach of 1995 and that of the ICCPR linking the right to silence with human dignity as the more appropriate and providing for absolute protection.

Rounding off the panel, Alex Tinsley of Fair Trials International presented a few practical examples from the NGO's case files to underline the demand that if an EPPO is introduced, it must be accompanied by procedural guarantees of the highest order. Pointing to the Meloni case, he emphasised that even if one accepts such cases in their context, the failure to develop clear standards will lead to only a minimum one being set. The need to regard a case as a whole to prevent pressure building up gradually to render a conviction unsafe as in Brusco as well as to find balance between the encouraging approach of the German European Arrest Warrant cases imposing proportionality and the efficacy of measures was analysed. Tinsley highlighted innovations such as an EPPO as requiring exemplary standards and not simply the acceptance of controversial national ones (as demonstrated in Condron v UK); thus the ICTY approach acknowledging variety in standards and pursuing the higher was praised as more principled than e.g. the US approach which excludes blood and documents and indeed anything but testimony from protection.

In the intense discussion which followed the issue of non-criminal proceedings and transfer of evidence from them was raised. The European Convention on Human Rights was identified as blocking the use of administrative procedures to achieve punitive ends. Although recent case-law was regarded as reinforcing article 6 as blocking any obligation to produce evidence it was analysed as inconclusive. In other contexts we simply do not know: the influence if the European Charter is not yet clear, comparative law is inconclusive and whilst competition law allows defendants to rely on the right against self-incrimination, the European Court of Justice has limited this as not applying to legal persons. Nevertheless the Court has clearly required a prosecutor to do his/her job and not simply to pressure a defendant to produce information. We may well see the ECJ rather than the ECtHR developing jurisprudence on this issue. Thus far ECJ case-law is inconclusive but bears significant potential to uphold different standards and this is hoped for alongside developments such as an EPPO. Discussants pointed to the Scot case of Ambrose, post-Kader, as interesting whilst the ECtHR was analysed as increasingly concerned potential penalties are being utilised to compel information.

Adjudication in Transnational Investigations

In the final panel of the conference, issues of adjudication relating to transnational investigations were explored. Silvia Allegrezza of the University of Bologna discussed the potential to control investigative and prosecutorial decisions should an EPPO be created (see **presentation (9) (/Documents/college-artslaw/ija/transnational/(9)SilviaAllegrezzapresentazionebirminghamjudicialreviewallegrezza2.pdf)**). Outlining the various structural options, she highlighted differences between the French and English versions of article 86 TFEU as causing problems in defining what is meant by judicial review. In the English and Welsh sense she identified this as a genuine remedy enforced by a hierarchy of courts whilst other jurisdictions provide merely for a peer review of sorts with the same court reviewing its own decision or merely providing for legal supervision. Referring to the difficulties experienced determining the meaning of a judicial authority and thereby acknowledging continental practice by the English courts in the Assange case as well as the problems seen in the Melloni case - in which the ECJ was viewed as having been right in the specific case but advancing a theoretically incorrect approach of not acknowledging constitutional limits - Allegrezza identified the problems facing us as very significant indeed.

Emphasising the factual deterrence of measures upon financial offenders - and open prisons as meaning even the threat of imprisonment is not strongly feared - Michael Hopmeier judge at Kingston Crown Court (speaking in a personal capacity) emphasised the importance of civil asset recovery proceedings (see **presentation (10) (/Documents/college-artslaw/ija/transnational/(10)MichaelHopmeier.pdf)**). The practicality of reversals of burdens of proof and their practice was highlighted and the mechanisms by which the UK courts are operating explained. Upon conviction, if a person is found to have profited from crime and order to pay will be made and any property; whether purchased by legitimate means or not, may be sold to pay this. Failure to pay will result in an additional sentence. 1 million pounds not paid equates to a further ten years imprisonment meaning this addition can be longer than the main sentence. As a convict will, however, usually only serve three of these years, some are sitting such sentences out sparking calls for higher sentencing ranges. A number of continental European jurisdictions were explained not to have such sentences or to provide for confiscation even of actual proceeds of crime, let alone featuring such orders to pay. The EU Directive was analysed as basically advocating the UK system and praised for initiating discussion concerning what recovered assets should be used for. In a recent development the UK Supreme Court has, however, set out a requirement that judicial orders to pay must be proportionate and highlighted some as too high, a development which may well trigger appeals.

In the robust discussion which followed, concerns were expressed that transnational cases must be subject to strong judicial review capacities. The prevalence of informal

arrangements to facilitate swift investigative or prosecutorial action and cooperation was argued to cause significant accountability gaps and deep worry. The challenges of providing for judicial ability to oversee such cases in their entirety and indeed for defence lawyers to even identify such activity were explored.

Conclusions: major challenges for Transnational Investigations

In a final discussion round a number of participants provided a quick overview of what they viewed as the major challenges for transnational investigations. Many of the concerns expressed in other panels were developed further with financial investigators particularly, however, emphasising the progress made and the deficiencies of situations which proceeded it. Whilst there was by no means consensus on many points, the conference as a whole recognised that national criminal justice systems face potent and powerful offenders undertaking serious transnational criminal activities requiring innovation to deal with this. The challenges of tackling such criminal phenomena whilst preserving the rule of law and high standards ensuring justice - and the defence was highlighted as an important feature for ensuring justice is served - were highlighted as multi-faceted but the discussion of our time together as contributing to the finding of solutions.