Coordinating Investigations in a Cross-border Context

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The EuroNEEDS Study

• Interviewed:
  – 132 prosecutors in 17 member states and Croatia
    • 35 definitively identified as experts for crimes against the EU’s financial interests
    • 64 as trans-national crime experts (THB, drug smuggling, corruption)
  – 60 defence lawyers in 15 member states and Croatia
  – 30 practitioners in Europol, Eurojust and OLAF
The EuroNEEDS results allow the identification of four areas in which cross-border cooperation presents particular challenges:

A. Non-binding/informal nature of member states criminal justice agency cooperation.

B. Investigations by member state prosecutors/investigators reduced to nationally relevant aspects.

C. Leading investigations at an international level is problematic.

D. Cross-border evidence gathering and the admissibility of its results.
A: Cooperation between criminal justice agencies of the member states is non-binding/informal.

- Lack of deadlines when requests are made.
- Non-disclosure even that will not respond, e.g. because requested action is not legally possible or request not well-founded.
- Delayed caused by freedom in when to respond to request can mean cases drag on or peter out entirely.
  - This can lead to frustration and unwillingness to consider international dimension altogether.
- Supranational practitioners criticise EU level dependency upon the will of the member states.
Potential Solutions

– EIO
  • “Comply or explain” approach.
  • Lack of conflict solving mechanisms.
  • Problem associated with protocol 36, Treaty of Lisbon – UK, DK no participation.
– Resolution using EU institutions.
  • Eurojust’s potential to solve conflicts.
– Compulsory deadline – would solve problem but unprecedented even in e.g. BRD.
B: Reducing Cases to Nationally Relevant Aspects

The EuroNEEDS studies indicate several reasons for this:

• The national aspects are weightier.
• Fear of delay.
• Conscious decision to limit cases, no matter how serious the cross border aspects.
• National prosecutorial cultures primed close cases efficiently. Delays caused by cross-border aspects run contrary to this.
B. Supra-national Practitioner’s Perspective

- Supranational practitioners confirm there is no cooperation problem if EU and member state investigators have the same aim in prosecution. Otherwise, coordination of investigations becomes difficult.
  - Resource problems in member states, but also e.g. within OLAF.
  - Especially supranational practitioners, point to negative conflicts of jurisdiction.
Discussion

• Impossible to control prosecutorial discretion. Conflict to be expected.

• Discouraging effect of previous frustrating experience, difficult to counter and internalised institutionally.

• Conflicts of jurisdiction – Eurojust decision reform should help. Countering negative conflicts effectively – difficult.
  – Minimum requirements before turning to Eurojust mean these solutions only available for very serious cases.

• Solution only possible via mechanisms which disproportionately ignore sovereignty.
C: Leadership of investigations at international level.

• No standard process by which cross-border investigations can be opened.
  – EJN, Eurojust, Europol, classic MLA.

• Member state investigators generally little knowledge of MLA and EU mechanisms.

• Who leads?
  – JITs complicated.
  – Initiating investigator cannot influence investigation in requested states.
  – Desire to lead investigation comprehensively.
National Prosecutors: preference to become directly involved in collecting evidence in another MS

- No: 20.00%
- Yes: 100.00%
- No answer: 10.00%
National Prosecutors Financial Interests: preference to become directly involved in collecting evidence in another MS
Improving Leadership of European Cases

• Supranational practitioners say linguistic cultural and legal differences are important.
• The more common ground there is, the better.
• Knowledge of EU law and cooperation mechanisms will improve the situation.
• Closer dovetailing of EU institutions’ work with that of member state agencies necessary.
Discussion

• Joint investigation teams appear complicated and in no way guarantee success.
• Member states currently unwilling to surrender sovereignty further. Therefore, JITs the best way.
  – Via Lisbon Treaty, coherence may slowly improve.
  – Possible use of Model Rules.
• Evolution of EIO demonstrates how difficult political reality can be.
  – Success of EIO t.b.c. appears acceptable compromise between the interest of the requesting and requested agency.
• Very serious cases – JIT will be used, or lead investigator can be personally present under MLA rules.
D – Uncoordinated evidence gathering.

Deficits:

– uncertainty whether evidence gathered in several member states can be used at trial in any member state.
– Evidence gathered illegitimately can sometimes be used in other member states.
– Uncertainty in protecting individual rights, but also as to powers of investigators.
– Lack of knowledge.
D - Supranational Practitioners’ Perspective

• Lack of coordination of parallel investigations means results cannot always be used at trial
• Multiple agencies in a single member state responsible for the same procedure - causes cooperation problems when not clear to outsiders.
• OLAF investigations.
  – Administrative agency v. requirements of criminal procedure in the member states.
  – Lengthy investigations.
  – Member state agencies duplicating and updating work.
Discussion

• Problems in 2009 Transfer of Criminal Proceedings led to minimum solution = communication required in *ne bis in idem* cases.

• Efficiency and manageability vs. rule of law guarantees and fundamental rights.
Conclusions

1) Europeanisation vs. Formalisation.
   - European cases currently handled via “indirect competence”. European cases in a grey zone may lead to lack of support for further integration.
   - The average member state investigator does not recognise the difference between current institution, e.g. ENJ and Eurojust.
Conclusions II

Human factor is key.

– Prosecutors, above all, used to disposing of cases efficiently.

– Collective experience (frustration) must be taken seriously.

– User friendliness and coherence require focus. Stockholm programme foresees; political reality difficult.

– Improve help for user, e.g. to improve coordination (limits to involvement of Eurojust for mutual recognition instruments).
Expecting too much.

- How efficient can (potentially competing) multi-level systems become?
Thank you for your attention.

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