Conflicts of Jurisdiction in Criminal Matters in the European Union

Volume II: Rights, Principles and Model Rules
Table of Contents

Table of Cases 14

Chapter 1: Introduction (Böse/Meyer/Schneider) 21
A. Course of the study 21
B. Jurisdiction 22
   I. Concepts of Jurisdiction 22
      1. Jurisdiction to prescribe, to adjudicate and to enforce 22
         a) Jurisdiction to prescribe (substantive law dimension) 23
         b) Jurisdiction to adjudicate and to enforce (procedural dimension) 23
      2. Primary and derivative jurisdiction 24
         a) Primary Jurisdiction 24
         b) Derivative Jurisdiction 25
   II. Types and elements of rules on jurisdiction 26
      1. Multilateral and unilateral rules 26
      2. Connecting factors and subject matter 27
         a) Subject matter 28
         b) Connecting factors 28
C. Criminal Law 29
   I. The structure of criminal law provisions 30
      1. The theory of norms 30
      2. Terminology 31
      3. Conduct-regulating norms 33
      4. Sanctioning norms 34
   II. The Definition of Criminal Sanctions in the EU 34

Part I: Extraterritorial Jurisdiction and Fundamental Rights 41

Chapter 2: Fundamental freedoms of the Union (Böse) 43
A. Fundamental freedoms of market participants or European citizens? 43
B. The principle of non-discrimination (Art. 18 TFEU) 44
   I. The passive personality principle 45
      1. Scope of application 45
      2. (Illegitimate) Discrimination? 52
         a) Protection of nationals by means of criminal law (jurisdiction to prescribe) 53
b) Victims’ participation in criminal proceedings (jurisdiction to enforce) 57

II. The active personality principle 58
1. Scope of application 59
2. Reverse discrimination of nationals (jurisdiction to prescribe) 60
3. Reverse discrimination and justification 63
4. Discrimination of non-nationals (jurisdiction to adjudicate) 69

C. Freedom of movement (Art. 21 TFEU) 72
I. Extraterritorial jurisdiction as a restriction on the right of free movement 73
II. Justification 75
1. Cross-border criminality and effects principle 75
2. The protective principle 83
3. The passive personality principle 87
4. The active personality principle 91
5. Universal jurisdiction 99
6. Principle of representational jurisdiction 103

III. Conclusion 104

Chapter 3: Fundamental Rights of the EU-Charter (Böse) 107
A. Scope of the Charter 107
B. Nullum crimen, nulla poena sine lege (Art. 49 CFR) 109
I. Jurisdictional rules outside the scope of the legality principle? 109
II. Nullum crimen, nulla poena sine lege and extraterritorial jurisdiction 111
1. The effects principle 114
2. The protective principle 115
3. The active personality principle 117
4. The passive personality principle 118
5. Universal jurisdiction 119
6. The principle of representation 120

III. Conclusion 124
C. Nullum iudicium sine lege (Art. 47 para. 2 CFR) 124
I. Convergence of procedural and substantive legality? 124
II. Derivative and concurring jurisdiction and the lawful judge concept 126

D. Ne bis in idem (Art.50 CFR) 129
I. The reservations under Art. 55 CISA 131
II. Discontinuation of the reservations under Art. 55 CISA? 133
1. Integration of the Schengen acquis into EU law 133
2. Derogation by Art. 50 CFR 135
# Table of Contents

III. Conformity of the reservations under Art. 55 CISA with Art. 50 CFR
   1. The requirement of a legal basis 137
   2. The principle of proportionality 139
      a) Art. 55 para. 1 lit. a CISA (territoriality) 140
      b) Art. 55 para. 1 lit. b CISA (protection of essential state interests) 142
      c) Art. 55 para. 1 lit. c CISA (violation of official duties) 145
   IV. Conclusion 146

E. Fundamental Rights and EU legislation 147
   I. The ne bis in idem principle (Art. 50 CFR) 148
   II. The lawful judge guarantee (Art. 47 para. 2 CFR) 151
      1. The transnational dimension of Art. 47 para. 2 CFR 152
      2. The determination of the (international) forum 160
   III. The principle nullum crimen, nulla poena sine lege (Art. 49 para. 1 CFR) 164
   IV. Conclusion 167

Chapter 4: An Area of Freedom, Security and Justice (Meyer) 169
   A. Policies and Tasks 169
   B. The Stockholm Programme and its succession 172
   C. Unfulfilled promises 173
      I. The meaning of freedom, security and justice 174
      II. An originalist view 175
      III. A more constructivist view 177
   D. Dimensions of freedom of movement 179
      I. Restrictive dimension 179
      II. Justifications 183
   E. Beyond mobility! 185
      I. Empowering the citizen 185
      II. Scope of Application of the CFR 187
      III. Dimensions of protection 189
         1. Positive obligations 190
         2. Conclusion 192
   IV. Fundamental Rights 193
      1. Substantive rights 193
         a) Art. 6 CFR 193
         b) Art. 7 CFR 194
         c) Art. 11 CFR 200
      2. Procedural Rights 201
         a) Legality 202
         b) Fair trial 205
            aa) nullum iudicium sine lege 205

---

http://www.nomos-shop.de/23140
Table of Contents

bb) Lawful judge concept 207
F. Conclusions 209
G. Obligations 210

Part II: Private Law Solutions and their Transferability to Criminal Law 215

Chapter 5: The basic approach to jurisdiction in private and criminal law (Schneider) 217
A. Introduction 217
B. The basic principle for treating conflicts of jurisdiction 218
   I. Overview of civil jurisdiction 218
   II. Overview of criminal jurisdiction 220
   III. Comparison 221
C. Admissibility of distinguishing between jurisdiction to prescribe and jurisdiction to adjudicate in criminal law 222
   I. The application of foreign criminal law 223
      1. Sovereignty 224
         a) The adjudicating state 224
         b) The penalising state 226
         c) Dignity of the state 227
      2. The nature of punishment 229
         a) The definition of punishment 230
         b) Justice 233
         c) Legitimacy of punishment 234
         d) Comparison with similar constructions 236
            aa) Representation in conflicts of jurisdiction in criminal matters 236
            bb) Punitive damages 239
      3. The intertwinement of substantive and procedural criminal law 244
      4. Nulla poena sine lege 247
         a) Principle of clarity 248
         b) Democratic legitimacy 250
      5. Practical problems 252
         a) The discovery of foreign criminal law 252
         b) The difference of sanctions 255
      6. Conclusion 258
   II. Lack of jurisdiction to adjudicate when national criminal law applies 258
   III. Conclusion 261
D. Desirability of distinguishing between jurisdiction to prescribe and jurisdiction to adjudicate in criminal law 261
   I. Justice 262
   II. Increased flexibility and legality 262
# Table of Contents

III. Better protection of the interests of the defendant 263  
IV. Expression of mutual recognition 265  
V. Conclusion 265  

Chapter 6: Analysis of connecting factors (Schneider) 267  
A. Connecting factors in procedural law 267  
   I. Civil jurisdiction to adjudicate 267  
      1. The general rule 268  
      2. Special jurisdiction for torts 268  
      3. Violation of personality rights 270  
      4. Adhesive procedures 272  
      5. Prorogation of jurisdiction 273  
      6. Conclusion 274  
   II. Transfer to criminal jurisdiction to adjudicate 274  
      1. Domicile 275  
         a) Of the defendant 275  
         b) Of the victim 276  
      2. Place where the harmful event occurred 278  
      3. Adhesive procedures 282  
      4. Prorogation of jurisdiction 283  
         a) Possible parties to the agreement 284  
         b) Extent of the prorogative agreement 286  
      5. Conclusion 288  
   B. Connecting factors in substantive law 289  
      I. Civil jurisdiction to prescribe – the applicable law 289  
         1. The general rule (Art. 4) 289  
         2. Specific rules (Articles 5-9) 291  
         3. Choice of law (Art. 14) 293  
         4. Rules of safety and conduct (Art. 17) 293  
         5. Conclusion 294  
      II. Transfer to criminal jurisdiction to prescribe 295  
         1. General and specific rules on jurisdiction to prescribe 296  
         2. Place where the damage occurs 297  
         3. Place of action 297  
         4. Place where the damage was foreseeable/intended to occur 299  
         5. Common habitual residence 302  
         6. Manifestly closer connection with another country 303  
         7. Choice of law 304  
         8. Conclusion 304  
   C. Final observations 305
Chapter 7: The relevance of foreign law for interpreting criminal law
(Schneider) 307

A. Introduction 307
B. Elements open for interpretation by foreign law 307
   I. Areas in the literature where the relevance of foreign law is considered 308
   II. The relationship between these areas 310
       1. Blanket clauses 310
       2. Legal standards 313
       3. Normative elements and preliminary questions 314
C. Relevance of foreign law 318
   I. Blanket clauses 319
   II. Legal standards 319
   III. Normative elements and preliminary questions 323
       1. Preliminary questions in conduct-regulating norms 323
       2. Preliminary questions in other norms 327
D. Final observations 329

Part III: Legal Instruments and Model Rules 333

Chapter 8: Models and instruments for solving conflicts of jurisdiction
(Böse) 335

A. The legal framework of the European Union 335
   I. Vertical coordination (Eurojust and the European Public Prosecutor) 335
       1. The role of Eurojust 336
       2. Eurojust guidelines on how to determine the jurisdiction “best placed” for prosecution 337
       3. The European Public Prosecutor 339
       4. The European competition network (ECN) 340
   II. Horizontal Coordination 342
       1. The Greek initiative on the ne bis in idem principle 342
       2. The Commission’s Green Paper on Conflicts of Jurisdiction 344
       3. The Framework Decision on Conflicts of Jurisdiction 346
       4. The proposal for a Framework Decision on the Transfer of Proceedings in Criminal Matters 350
       5. Sectoral approaches to conflicts of jurisdiction 353
   III. Conclusion 356
B. International treaties (Council of Europe) 357
   I. Convention on the Punishment of Road Traffic Offences 358
   II. Draft Convention on Conflicts of Jurisdiction in Criminal Matters 359
Table of Contents

III. Convention on the Transfer of Proceedings in Criminal Matters 361
IV. Conclusion 365

Chapter 9: The legal basis (Art. 82 TFEU) (Böse) 367
A. Scope and limits of Art. 82 TFEU 367
   I. Conflict of criminal laws (jurisdiction to prescribe) 368
   II. The protection of other Member States’ interests (assimilation) 370
B. Alternative legal bases 373
   I. Harmonisation of criminal law (Art. 83 TFEU) 373
   II. The role of Eurojust (Art. 85 TFEU) 373
   III. Facilitating the exercise of the right to free movement (Art. 21 para. 2 TFEU) 375
C. Legal instrument: Regulation vs. Directive 375
D. Main Contents 376

Chapter 10: Model Rules and Explanation (Böse/Meyer/Schneider) 381

Annex: Model Rules 439

Bibliography 447