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MUTUAL RECOGNITION, CHOICE OF FORUM AND LIS PENDENS: A CIVIL LAW THREESOME TRANSPOSED

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Mutual recognition, choice of forum and lis pendens: a civil law threesome transposed

Comments on the ELI Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union

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Submitted for publication in the reports on the project

Introduction

The draft proposals make a bold attempt to address a pressing and controversial issue in international criminal law. The recognition of multiple grounds of jurisdiction – and the recent expansion thereof with regard to specific crimes[1] – creates a situation in which more than one country can legitimately claim jurisdiction over a specific crime or set of acts. Unlike the situation in civil procedure, there is currently no European system to coordinate criminal jurisdiction within the area of freedom of justice, and hence the international grounds of jurisdiction are also applied in full to intra-EU cases.[2] This creates ample possibilities for a positive conflict of jurisdiction in which more than one state may start investigations, prosecution and/or criminal adjudication with regard to a similar or identical set of criminal facts. As the working group rightly stresses this may lead to 'efforts and resources being wasted and potentially to arbitrary outcomes'.

The problem is enhanced by the fact that there is no *lis pendens* rule comparable to the one developed within the field of private international law.[3] There is only a voluntary system of collaboration between authorities. This may lead to double investigation and double prosecution with all the drawbacks this entails for the parties involved. However, as soon as one of the member states involved finally disposes of the case – be it by way of a decision not to prosecute, be it by a judgment finding the suspect guilty – all other member states are bound by that decision through the rule of *ne bis in idem* which the CJEU has developed in the case law building on 'Gözütok and Brügge'.[4] So double prosecution is not stopped at the very start, but at the very end of the national procedure:[5] once a decision is reached, it creates *ne bis in idem*. The *ne bis in idem* effect is granted regardless of the (trial or pre-trial) stage in which the national decision is taken and irrespective of the link of the disposing authority to the facts.[6]

In short: the area of freedom, security and justice, built on the notion of mutual recognition in criminal matters, operates a hard and fast rule of *ne bis in idem*. This rule is supported by a system of voluntary consultation in case of parallel proceedings, but this system is incomplete. There is no common binding procedure for dealing with *lis pendens* and related actions. This is all the more problematic as the

[1] See for example: Council of Europe Convention on cybercrime 2001 Article 22, ETS 185; Council of Europe Convention on the Prevention of Terrorism 2005, Article 14 ETS 196; Council of Europe Convention against Trafficking in Human Organs 2015, Article 10, ETS 216. See also Michiel Luchtman, Choice of Forum and the Prosecution of Cross-Border Crime in the European Union, in: Luchtman (Ed). Choice of Forum in Cooperation Against EU Financial Crime, Pompe Reeks, Eleven International Publishing 2013, p. 5. See in the same volume: John Spencer p. 70-1 and 72 and Martin Böse p. 74.

[2] Some conventions contain provision on mutual consultation in case of overlapping jurisdiction – see eg Article 14(5) of the terrorism convention. These will not be discussed here.

[3] See for example Article 29 ff Brussel I Regulation (recast)

[4] Gozutok and Brugge (CJEU, 11 February 2003, C-187/01, joined cases Gozutok and Brugge; ECLI:EU:C:2003:87)

[5] This is different from the lis pendens rule in civil proceedings, which also operates on a first across the line base, but takes its cue from the moment in which the case becomes 'pending'.

[6] Luchtman l.c. p. 38

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recognition rule is not supported by a preliminary agreement on the distribution of jurisdiction between the Member States in intra EU cases. The policy options described in the proposal address the latter two shortcomings.

In this contribution I will use insights from the field of private international law to comment on the current state of the law and the solutions embedded in the proposals. The Brussels I regulation 1215/2012 (Brussels I recast or Brussels Ibis) will function as the main comparator – though at some point references will be made to the wider body of private international law instruments.[7] The Brussels I bis Regulation contains rules on mutual cooperation in civil and commercial matters, a concept which includes cross-border torts. The concept of 'tort' covers the civil law response to wrongdoings which cause damage to third parties. Of all private international law categories, 'tort' has the closest link to criminal law. The regulation contains rules on jurisdiction as such, the exercise thereof in case of *lis pendens* and related actions and the mutual recognition of judgements. This contribution will discuss all these aspects and compare the solutions in private international law to the current proposal on criminal law. Each topic is self-standing and will lead to separate 'conclusions'.

Mutual recognition as principle or goal.

Similar to the situation in criminal law, the instruments on cooperation in civil matter are built up from the principle of mutual recognition.[8] The Brussels I bis Regulation is no exception. The original EEC Treaty of 1957 contained a provision which obliged the member states to enter into negotiations (as far as necessary) in order to simplify the mutual recognition of court decision and arbitral awards. In the field of arbitration, such mutual recognition would shortly be ensured by the New York Convention of 1958.[9] As to the recognition of civil judgments, the then six Member States did indeed enter into negotiations – which resulted in the Brussels Convention of 1968. Hence, mutual recognition was not reached by way of court interpretation of the Treaties, but by way of common arrangement in which the Member States addressed the major obstacles to mutual recognition. The current system of the Brussels I bis Regulation is still based on the structure of the 1968 Convention. This structure was consequently used as a template for similar instruments on mutual recognition, inter alia in the field of parental responsibility (see for example Regulation Brussels IIa[10]).

Standard requirements for (mutual) recognition of civil judgments.

Instruments on the recognition of civil judgements – be they national, international or European – tend to follow a similar pattern.[11] They describe which type of decisions are covered by the instrument

[7] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) *OJ* L 351/1–32.

[8] For private international law see inter alia Article 81-82 of the TFEU and M. Weller, Mutual trust: in search of the future of European Union private international law, Journal of Private international law, 2015, Vol 11, No 1, p. 64-102, at 67. For criminal law, Michiel Luchtman, Choice of Forum and the Prosecution of Cross-Border Crime in the European Union, in: Luchtman (Ed). Choice of Forum in Cooperation Against EU Financial Crime, Pompe Reeks, Eleven International Publishing 2013, 7 and John Spencer, Mutual Recognition and Choice of Forum in Luchtman o.c. p, 61 ff.

[9] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, http://www.newyorkconvention.org/

[10] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338/1–29.

[11] See for an overview of requirements based on the legal traditions of the American continents: Casad, Civil judgment recognition and the integration of multiple-state associations, Lawrence 1981, p. 18 e.v. See for a discussion of these requirements in multilateral treaties and the law of the US and Australia, A.A.H. van Hoek

(requirements) and when the receiving country may refuse to give effect to a decision which , based on the requirements, would be open for recognition and enforcement (refusal grounds). Requirements may pertain to the type of judgements covered, whether the judgment should be final and on the merits, requirements as to enforceability etc.[12] As a rule the instruments are restricted to judicial decision and don't cover decisions by other officials,[13] an exception being made for decisions on costs made by court officials.[14] Settlements between the parties that are endorsed by a court decision may be covered but are often treated distinctly from judgments proper: in the Brussels I bis Regulation court settlements may be enforceable in other Member States, but do not automatically produce *res judicata effect*. Neither are they covered by the rule on irreconcilable judgments. Given these restrictions it is interesting to note that the *ne bis in idem* rule in EU criminal law covers all (trial and) pre-trial decisions which end the proceedings. This widens the scope of the proposed instrument beyond that of the Brussels I system, which in turn has an impact on the *lis pendens* rule – as will be discussed below.

Standard refusal grounds are lack of jurisdiction of the rendering court, improper notification, violation of fair trial requirements, violation of the public policy of the receiving court and the existence of another judgement which is irreconcilable with the one submitted for recognition and enforcement.[15] Some international conventions also mention procedural fraud as a specific refusal ground.

Most of these refusal grounds express a certain measure of distrust[16] of the foreign justice system: either as to the rules applied there, or as to the application thereof by the court giving judgment. The rendering court may not have been impartial, the trial might have been unfair or the outcome discriminatory or biased against the receiving state's interests. Within the EU the legislator has consistently tried to abolish the refusal grounds, calling on the principle of mutual trust.[17] This has been moderately successful. Some refusal grounds have been restricted in scope (e.g. on notification) and some checks are transferred to the country of origin (e.g. in the case of jurisdiction). In some instruments, even the public policy exception

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Erkenning van vonnissen in het privaatrecht: een studie naar de grenzen van wederzijdse erkenning NIPR 2003-312, p. 337-350 (in Dutch). See also Weller, l.c. footnote 6 at 69.

[12] The terminology is not strictly adhered to: see for example the Hague maintenance convention 1974 (Articles 4 and 5) in which the jurisdiction test is formulated as a requirement rather than a refusal ground.

[13] See for instance the bilateral treaty between The Netherlands and Surinam *Tractatenblad* 1976 Nr. 144;

[14] See amongst (many) others Article 2(a) Regulation Brussels I bis; Article 32 Lugano Convention of 30 October 2007; Article 1(2) of the Dutch-German treaty of 1962 Treaty no 004909 http://wetten.overheid.nl/BWBV0004221/1965-09-15; Article 1(2) of the Dutch/UK treaty *Tractatenblad* 1967-197; Article 15 of The Hague Convention On The Recognition And Enforcement Of Foreign Judgments In Civil And Commercial Matters 1971.

[15] Notification can be an element of jurisdiction but is also closely linked to fair trial. In general due process requirements suggest that anyone who is bound by the judgment, should have had the opportunity to present their case in court. This requirement is not applied across the board, however. See inter alia P. Hay, On merger and Preclusion (Res Iudicata) in U.S. Foreign Judgments Recognition – Unresolved Doctrinal Problems, in: R.A. Schütze (ed.), Einheit und Vielfalt des Rechts, FS Geimer zum 65. Geburtstag, München: Beck, 2002, p. 335. R.J. Weintraub, Commentary on the Conflict of Laws, New York, NY: Foundation Press 2001, p. 701.

[16] For an interesting exposé on the differences between distrust and mistrust, see Stephen Marsh and Mark R. Dibben, Trust, Untrust, Distrust and Mistrust – An Exploration of the Dark(er) Side, https://www.researchgate.net/profile/Stephen_Marsh3/publication/220852752_Trust_Untrust_Distrust_and_Mistrust_-_An_Exploration_of_the_Darker_Side/links/541832730cf2218008bf2c73.pdf (taken from P. Herrmann et al. (Eds.): iTrust 2005, Lecture Notes on Computer Science no 3477, pp. 17–33, Springer-Verlag Berlin Heidelberg 2005)

[17] See on the application of mutual trust in private international law inter alia M. Weller, Mutual Trust: in search of the future of European Union private international law, JPIL 2015, 64-102.

has been deleted.[18] The only refusal ground which is consistently retained is the defense of irreconcilable judgments. This is the one refusal ground which is completely neutral in that it is not based on distrust of the foreign system.

Under the current state of harmonization in the EU multiple courts may validly assume jurisdiction and in doing so may reach different outcomes. So there is nothing wrong with the different judgments as such. Yet, if the outcomes are mutually exclusive, it is not possible to recognize both outcomes at the same time within the same legal order.[19] The problem can be mitigated by harmonization of the rules on applicable law and/or substantive law as this increases decisional harmony – different courts reaching the same outcome. The risk can be reduced by limiting the grounds of jurisdiction and is further addressed by rules on *lis pendens* and related action. However, even these mechanisms can't completely preempt the possibility of irreconcilable judgments.

In all current EU instruments dealing with patrimonial claims – a term which includes tort claims – the earlier judgment wins.[20] This priority rule seems to match the system in criminal law where the first decision which finally disposes of the issue, blocks other decisions (even identical ones). But in criminal law this is the direct effect of *ne bis in idem rule* which is capable of stopping any still pending procedure in its tracks, rather than a principle embedded in the rules on *lis pendens* and mutual recognition.

In short: From a structural perspective it is interesting to note that civil law and criminal law operate from opposite starting positions. In civil law rules on jurisdiction and *lis pendens* have been created in order to facilitate the mutual recognition of judgments. In criminal law, the mutual recognition of decisions is a given; the current proposal only seeks to address the negative side-effects of such automatic recognition by creating rules on *lis pendens* and jurisdiction.

Traité simple, double and mixte

In the civil justice instruments on recognition and enforcement a special position is taken up by the issue of jurisdiction. However this position has changed over time. Both in national law and under the older international instruments, jurisdiction is tested at the recognition stage. A certain measure of distrust also informs the inclusion of jurisdiction in the refusal grounds but here it takes on a specific characteristic. When a judgement from country X is submitted to a court (or other official) in country Y for recognition and/or enforcement, recognition will or may be[21] refused when the jurisdiction of the rendering court is not recognized as proper. In other words: when the rendering court should not have taken jurisdiction over the defendant and/or the case. As a rule the test of jurisdiction is not based on the assessment of whether the court of origin correctly applied its own rules on jurisdiction.[22] The fact that the rendering court assumed jurisdiction is judged against a standard of appropriateness formulated in the law of the recognizing forum or the relevant international or European instrument. But the receiving court will not use the grounds for jurisdiction in its own law as the litmus test for the recognition of foreign judgments either. Rather than checking the jurisdiction of the court of origin against the jurisdictional bases that would have been available to the recognizing court in the mirror situation, the latter court checks whether the competence of the court of origin is based on an *internationally* acceptable ground for jurisdiction.

[18] European Payment Order (Reg 1896/2006, Article 22), European Small Claims Procedure (Reg 861/2007, Article 22), European Executory Title (Reg 805/2004, Article 21). See also Weller, l.c. at 82 ff.

[19] If conflicting legal positions exist in different legal systems, this is referred to as limping legal relationships. A well-known example is the limping marriage which is ended by divorce in one jurisdiction, but still exists in another.

[20] See the instruments mentioned in footnote 10. With regard to dissolution of marriages member states may give precedence to their own judgments, regardless of timing: see Reg 2201/2003, Brussel II bis, Article 22 sub c.

[21] The check may be on request on only or ex officio, depending on the system of recognition in place.

[22] See however the system of full faith and credit under US law – described in Van Hoek lc footnote 8.

This check excludes any 'exorbitant' grounds for jurisdiction which might be available under national law.

Exorbitant grounds for jurisdiction in civil proceedings include the nationality or domicile of the claimant,[23] the presence within the territory of assets not related to the cause of action and mere physical presence of the defendant within the territory at the time of notification (so called 'tag' jurisdiction).[24] These exorbitant grounds for jurisdiction are maintained by national legislators to cater for situations in which the claimant cannot be expected to get an enforceable judgement in a foreign country with a closer connection to the case at hand – for instance because in absence of a treaty such judgments would not be recognized within the forum. In other words: exorbitant fora are needed as fall back provisions to ensure access to justice and effective enforcement. As a rule, the exorbitant grounds of jurisdiction are neither needed nor acceptable in case of mutual recognition of judgments.[25] They are banned by special provision in the Area of Freedom, Security and Justice.[26]

Jurisdiction is a key issue in any system of recognition and enforcement. The way a mutual recognition scheme deals with the issue even determines the character of the instrument. As far as conventions on private international law are concerned a distinction is made between '*traités simples*' and '*traités doubles*'. Most conventions on recognition and enforcement are *traités simples*: they don't change the national rules on jurisdiction, but specify the link the court of origin should have with either the defendant or the dispute in order for the judgment to be open to recognition. The 1968 Brussels Convention however was a *traité double*: an international instrument which also harmonizes the rules on jurisdiction of the contracting states. Within the scope of application of the convention, courts could only base their jurisdiction on the rules contained in the instrument itself. The jurisdiction of the court of origin would as a rule not be tested again at the recognition stage. Accordingly, the check for the proper exercise of jurisdiction was placed on the court of origin and removed from the system of recognition.[27] All Brussels Regulations on recognition and enforcement now follow this model, as do several of the Hague Conventions.[28] But at the time it was revolutionary as it impacted on the authority of the member states to set their own rules on international jurisdiction.

With some exceptions the jurisdiction rules in the Brussels Convention only applied when the defendant was domiciled in the EU.[29] For non-EU defendants, the Member States were free to apply their domestic rules of jurisdiction. So the restriction of sovereignty was limited to cases that came within the scope of

[23] The domicile of the claimant can however be acceptable in case of weaker party protection given to consumers, employees and maintenance creditors. See for a list of exorbitant grounds, the draft Hague Judgment Convention Prel. Doc. No 11 of August 2000 https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf Article 18.

[24] Tag jurisdiction is available in (inter alia) the UK and Ireland. See for a more extensive discussion of exorbitant grounds of jurisdiction the contribution of Ortolani to this volume.

[25] When the Netherlands created a special section on international jurisdiction in the Dutch code of civil procedure, most exorbitant grounds of jurisdiction were abolished. This matches a relative lenient albeit unwritten rule on recognition of foreign judgments – see Supreme Court 26 September 2014, ECLI:NL:HRL2014:2838 (Gazprombank).

[26] See article 5 Brussels I bis jo Pb 2015 C 390/10.

[27] Jurisdiction can still be checked in case of exclusive jurisdiction and weaker party protection.

[28] See for example the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation In Respect of Parental Responsibility and Measures for the Protection of Children 1996.

[29] The convention also applied to non-EU defendants when an EU court had exclusive jurisdiction, in case of a choice of forum in favor of an EU court where one of the parties had residence within the EU. The Regulation extends its scope to some consumer, insurance and labour cases with non-EU defendants. See Article 6 Brussel I bis.

application of the instrument. This has proven to be important for the Member States as it changes the character of the instrument. Rather than claiming or renouncing jurisdiction vis-à-vis the world at large, the instrument largely distributes jurisdiction between the Member States. When the Brussels I Regulation was being revised, the European Commission tried to lift the restriction in scope and develop rules for non-EU cases as well.[30] This largely failed as the Council would not accept the extension and jealously protected the prerogatives of the Member States in this area.

The Brussels Convention was used as a model for the Lugano Convention – which currently binds the EU and several Contracting states of EFTA. However, in the negotiations on a world-wide convention which was started within the ambit of the Hague Conference in 1992, the US rejected full harmonization of jurisdiction and introduced the concept of a '*traité mixte*'. Such a treaty would ban exorbitant grounds for jurisdiction (black list) and explicitly allow or even prescribe certain generally accepted grounds (white list). But it would also leave some freedom to the contracting states to keep additional (non-exorbitant) grounds for jurisdiction (the grey area). Judgments based on these additional grounds would not, however, be enforceable under the convention. They would have to rely on domestic law for their extra-territorial effect.[31]

The distinction between the different models of *traité simple*, *double* and *mixte* is based exclusively on the way in which the check for jurisdiction is integrated in the instruments. Out of the three proposal put forward by the working group only model 3 contains rules on jurisdiction. When comparing this model with the concepts described in the previous paragraphs, the difference between them stands out first. None of the ELI proposals is dealing with recognition as such – mutual recognition is based on the Treaty (as interpreted by the CJEU) and hence outside the scope of the proposals. So the *traité simple* model is irrelevant in this context. Nevertheless, the distinction between the *traité double* and the *traité mixte* may be of interest for a better understanding of Model 3 (the allocation model).

Model 3 does not formulate the rules on jurisdiction as part of the refusal grounds for recognition. It merely states in Article 4 that 'Within the Area of Freedom, Security and Justice, each Member State shall only exercise jurisdiction in respect of offences committed in its own territory as determined by national law.' The explanatory note adds that 'Territoriality is the general rule for the allocation of exercise of jurisdiction in the Area of Freedom, Security and Justice. Extraterritoriality is therefore excluded. The definition of *locus delicti* is left to national law. The same applies for the rules of the location of the conduct of accomplices, instigators and of other participants.' Though the wording of Article 4 suggests we're dealing with direct rules on jurisdiction (as one would expect in a *traité double*) the technique used borrows some important characteristics from the *traité mixte*.[32]

Model 3 contains a direct prohibition on the exercise of extra-territorial jurisdiction – which is deemed exorbitant in intra-EU relations. Accordingly, the personality principle (both active and passive), the protection principle and the principle of universal jurisdiction are put on the black list. This is the harmonizing element of the proposal in which it can be compared to the Brussels I bis Regulation. However, in stark contrast to Brussels I bis – which is based on autonomous interpretation of the concepts used to establish jurisdiction – model 3 does not harmonize the positive grounds for jurisdiction. It merely stipulates that all national rules based on the territoriality principle may be maintained. The concept of

[30] Com(2010) 748 final, p. 8; Article 4.

[31] See the letter of the US to the Secretary General of the Hague Conference: https://www.state.gov/documents/organization/65973.pdf and the response of the SG https://assets.hcch.net/docs/bd6dcaab-b2a4-4255-84ec-eca3b7233588.pdf

[32] However, as is explained in the text, under the *traité mixte* model proposed by the US in 1992 jurisdictional bases in the grey area did not lead to a right to recognition under the treaty. This is different in criminal matters in the EU, as proper jurisdiction is not a prerequisite for creating *ne bis in idem*.

territoriality itself is not defined or further circumscribed. This creates a grey area of jurisdictional bases which may not be present in all Member States but are still allowed under the instrument. A full transition to a *traité double* would require autonomous interpretation of the concept of the *locus delicti* – something that is deliberately not foreseen in the current instrument. In a separate paragraph I will discuss the interpretation of that concept in the case law on tortious liability under Brussels I. Suffice to say here, that even model 3 stops short of harmonizing jurisdiction in criminal matters. It merely does away with the use of exorbitant grounds for jurisdiction over crimes committed within the Area of Freedom, Security and Justice. For extra-EU offences, these jurisdictional bases are maintained – which further (in parallel to the Brussels I regime) limits the impact on the sovereignty of the Member States.[33]

In short: as a result of the limitation in scope model 3 does not attribute jurisdiction to EU criminal courts, but rather distributes it among the member states. And even the distribution is not absolute, as the instrument merely rules out the use of certain 'exorbitant' grounds of jurisdiction in intra-EU cases. The ensuing restriction of sovereignty is limited compared to private international law instruments.

The *locus delicti* in civil justice case law.

Under the Brussels I bis Regulation persons domiciled in a Member State shall, whatever their nationality, be sued in the court of that Member State. However, in certain disputes, the Regulation offers an alternative forum. For the purpose of this comparison, the most interesting alternative is Article 7(2) which stipulates that in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may also be sued in the courts for the place where the harmful event occurred or may occur. This ground for jurisdiction is commonly referred to as the '*locus delicti*'. There is a sizeable body of case law on the interpretation of this concept. Already in 1976 the Court decided that in case the damage is felt in a different location than that in which the act is committed, both the *locus actus* and the *locus damni* qualify as *locus delicti*.[34] This is true for both physical damage (pollution of the river Rhine) and non-tangible damage caused by the publication of defamatory statements.[35] This matches the use of the territoriality principle in criminal law and is sometimes referred to in literature as the ubiquity principle.[36] However, there is no complete parallel between the use of the latter concept in civil law and in criminal law.[37] This is evident when we take a closer look at the further interpretation of terms and the application of the principle to compound torts.

Both the *locus actus* and the *locus damni* are legal concepts which require further interpretation. The CJEU was consulted with regard to such diverse torts as defamation and invasion of privacy on the internet, product liability, participation in a cartel, infringement of IP rights, director's liability etc. A striking feature of this case law is that the court seems to interpret the concepts in close relation to the

[33] See Article 2 for the scope of application.
[34] Bier v. Mines de Potasse d'Alsace Case 21/76 ECLI:EU:C:1976:166.
[35] Shevill Case C-68/93 ECLI:EU:C:1995:61 and eDate Case C-509/09 ECLI:EU:C:2011:685
[36] U. Magnus and P. Mankowksi (eds) European Commentaries on Private International Law, Brussels I Regulation, Munich: Sellier 2012 art 5 para 203 ff; ditto Brussels I bis Regulation, Munich: Sellier 2016 art 7, para 251 ff.
[37] Admittedly, there is no universal interpretation of the concept in criminal law either. See for the Netherlands: H.D. Wolswijk, 'Locus delicti en rechtsmacht' Pompe Reeks deel 24, Willem Pompe Instituut/Gouda Quint, Utrecht/Deventer 1998 p. 91 and 108 ff.

type of delict at stake.[38] The rule for infringement of personality rights does not apply to cases of infringement of IP rights, the damage arising from a misleading prospectus is situated differently from the damage caused by a mistake in a legal opinion. This is supported in the case law and literature by pointing out that each tort has its specific fact pattern, which determines the relevant loci.[39] Again, a parallel can be found here as regards the territoriality principle in criminal law. But whereas the constituent elements of the crime play an important role in the localization thereof, the specific elements of each tort do not seem to play a similar role in localizing the delict.

The basic requirements of tortious liability consist of a tortious act, damage and causation. Causation as such is not used as a connecting factor for establishing jurisdiction, but the act and the damage are. The *locus actus* or *Handlungsort* refers to the place where the alleged perpetrator of the tortious act engaged in the activity (or lack thereof) which is claimed to be a relevant cause of the damage sustained.[40] The concept is less ambiguous as the place of the damage (see below), but does nevertheless raise some questions.[41] One question is whether torts have a single *locus actus* or may have multiple relevant loci. Mankowski maintains that all contributory acts are relevant acts for the assessment of the locus actus. However, in the case law of the CJEU in most cases the court identifies one relevant *locus* for the tort in question – often by selecting the relevant act first. For example: in case of product liability the relevant *locus actus* of the manufacturer is the place of production of the defective goods and not the place where these are put on the market.[42] For directors' liability towards third parties the relevant *locus* is the place where the company that has not been administered properly is established and economically active rather than the place from which the directors actually operate.[43] For unlawful publications and advertising on the internet the relevant place is the place where the publication was conceived, rather than the place of uploading or the targeted audience.[44] Cartels are 'committed' in the place (or places) were the competitors enter into the illegal agreement rather than on the market they distort.[45] When several constitutive or contributory acts are performed by different people, however, the courts will have to distinguish between

[38] U. Magnus/P. Mankowski (eds), European Commentaries on Private International Law: The Brussels I Regulation, 2d revised edition, Munich: Selliers 2012, art. 5 para 222 (p. 248) and para 233 (p. 253). Dito, The Brussels Ibis Regulation, 2016, article 7 para 295 (p. 293).

[39] In the Kolassa case (C-375/13, ECLI: ECLI:EU:C:2015:37, para 47) the CJEU refers to 'the elements that constitute liability'. Magnus/ Mankowski links the location of the tort to the interest protected under law. However, A. Dickinson (The Rome II Regulation OUP 2008, para 4.29, p. 310) emphasizes that 'damage' under Brussels I is an autonomous concept and hence cannot be linked to the interests protected under national law.

[40] Compare the difference between the physical act and the violation of the protected good (rechtsgoedschending) in criminal law: Wolswijk 1998, 99. Article 7(2) also applies to potential future torts. This aspect of the rule will not be discussed here.

[41] In 2012 Mankowski writes that the concept 'has not generated judgments dealing with complicated matters or even stirred a major discussion in legal writing (para 214). This sentence has been omitted from the 2016 edition (para 263). There are several instances of liability – especially in complex corporate settings, in which the court will have to identify the relevant act or acts before being able to decide on its location. See e.g. Case C‑147/12 ÖFAB ECLI:EU:C:2013:490 para 53.

[42] Kainz v Pantherwerke C-45/13, EU:C:2014:7.

[43] Case C‑147/12 ÖFAB ECLI:EU:C:2013:490 – the court is not entirely clear whether this place constitutes the locus actus or the locus damni.

[44] It is further assumed that an infringing publication is conceived in the place of establishment of the user/publisher: Shevill C-68/93 ECLI:EU:C:1995:61 para 24; e-Date C-509/09 EU:C:2011:685; Wintersteiger C-523/10 EU:C:2012:220 para 34 and 37; Pickney C-170/12, Opinion AG JÄÄSKINEN ECLI:EU:C:2013:400 para 57.

[45] CDC Hydrogen Peroxide, C-352/1, ECLI:EU:C:2015:335.

the several defendants: the locus actus of one perpetrator does not create jurisdiction over co-perpetrators or accomplices who have not acted within the same forum.[46]

The place of the damage (*locus damni* or *Erfolgsort*) refers to the place where the direct damage is sustained by the direct victim.[47] The fact that a French mother company-owner of a German subsidiary sustains financial losses when a German bank wrongfully cancels a bank loan which is crucial to the financial viability of the German subsidiary, doesn't create a *locus damni* at the domicile of the mother company. The primary damage was sustained by the subsidiary and is located in Germany. Likewise, a fatal accident in Italy does not cause direct damage to the bereaved family in Romania, even if the bereaved in question have an independent claim against the tortfeasor under national law. All primary damage was already sustained in Italy.[48] Accordingly, not all damages suffered as a result of a tortious act qualify for creating a *locus damni*.

Currently a heated debate is raging as to the relevance and location of pure financial loss for jurisdictional purposes. In the 2015 Kolassa case the CJEU located the loss resulting from prospectus liability with regard to financial products in the bank account which the victim held in his home state. In the earlier Kronhofer case, however, the bank account from which the investor initially transferred money to a foreign investment account was not relevant for jurisdiction purposes – the loss incurred in a call-options transaction was deemed to have fallen at the foreign account. In the 2015 CDC peroxide cartel case, the relevant damage caused by a cartel was deemed to be the surcharge paid by the customers (or any customers further down the chain). This damage is consequently located in the place of establishment of the client companies. In contrast, in the recent Universal Music case, which concerned a mistake with regard to a price calculation in the context of contract negotiations, the place of establishment of the legal entity suffering the damage was deemed to be irrelevant for jurisdiction purposes. The CJEU located the damage in the country where the loss caused by the wrong price calculation became irreversible, rather than the location of the account from which the price was eventually paid. The court explicitly stated that financial loss was in itself insufficient to create jurisdiction in the circumstance of the particular case.

The Kolassa and CDC cases suggest that the place of establishment of the victim might be a relevant factor for determining the location of pure financial loss. At least for certain market related torts. Interestingly enough in both these cases the market affected by the tortious acts was not relevant for jurisdiction purposes: it was neither *locus actus* nor *locus damni*. This stands in stark contrast with public

[46] See Melzer C-170/12, EU:C:2013:305 (fraudulent investment/embezzlement, intermediary in Germany, investment vehicle in England), Hi Hotel C-387/12 EU:C:2014:215 (breach of copyright in Germany resulting from unauthorized handing over of copyrighted materials in France), Coty C-360/12 EU:C:2014:1318 (sale and resale of counterfeit perfumes) 'wechselseitige Handlungsortzurechnung'. Contrary to Magnus/Mankowski 2012 art. 5 para 221 and 2016 art. 7 para 282. It should be noted, however, that the court stipulates that in the cases before it a single claim has been filed against a perpetrator who has not acted within the forum. In case of multiple defendants, the claimant may sue all 'co-perpetrators' in the domicile of one of them. Moreover, when the *locus damni* of all those actions does coincide, this creates another option for the joinder of claims – see Hi Hotel para 33 ff, Coty para 52 ff. Accordingly, the regulation does allow for concentration of proceedings, albeit not in the dispersed places in which the defendants acted. For criminal law jurisdiction over multiple perpetrators, see Wolswijk p. 193 ff, in particular 199, 203-205)

[47] Dumez Case 220/88 ECLI:EU:C:1990:8; Marinari C-364/93 ECLI:EU:C:1995:289; Kronhofer C-168/02 ECLI:EU:C:2004:364

[48] Lazar, C-350/14, ECLI:EU:C:2015:802, judgment given in the context of the Rome I Regulation on applicable law.

law where effects on the market are the main justification for assuming jurisdiction over market behaviour. Moreover, by using a largely financial concept of 'damage' the CJEU seems to ignore the impact on the legal order of the torts concerned as a relevant connecting factor. [49]

A single act may result in widespread damage, e.g. in the case of defamation or copyright infringements through the internet . In case damage is done by one person to one other person in multiple jurisdictions, each court where damage is sustained may assume jurisdiction over the tort, but this jurisdiction covers local damage only – this is referred to as the mosaic principle.[50] If there are multiple victims, as per cartel damage case, the place of the damage has to be assessed for each victim individually.

This very succinct overview of the case law on the *locus delicti* demonstrates that although the term 'locus delicti' suggest a close familiarity to concepts of criminal law, the jurisdictional base operating under that term in the Brussels I bis Regulation is not an adequate starting point for autonomous interpretation of the similar concept in criminal law. Admittedly, both distinguish according to the characteristics of the tort or crime concerned and both apply the ubiquity principle. Also the problems encountered in further defining the *locus delicti* show a remarkable overlap. But this is where the parallel ends. Upon closer scrutiny ubiquity is interpreted much more narrowly in civil law than it is in criminal law.[51] Also in other aspects the jurisdiction given to the *locus delicti* is more narrowly construed.

The narrow interpretation given to the *locus delicti* concept in civil law fits well into the larger framework of the Brussels I Regulation. Jurisdiction under Article 7 Brussels I bis constitutes a deviation from the main rule of Article 4 which grants general jurisdiction to the country of domicile of the defendant. Accordingly, the provisions of Article 7 have to be interpreted restrictively and should not be stretched beyond their purpose. This is in radical opposition to criminal law, in which territorial jurisdiction is the most basic – and under the proposal 3 the only remaining – ground of jurisdiction. All in all this leads to the conclusion that the body of case law on the *locus delicti* in civil law is not a good starting point for the interpretation of the same concept in criminal law.

Moreover, the long road to clarity traveled there might be a warning sign for those who would favour the use of an autonomous concept in model 3. Jurisdiction at the *locus delicti* was introduced in the Brussels Convention of 1968. In 2012 the authors of the commentary on Brussels I edited by Magnus and Mankowski took positions on its interpretation which were based on an extensive review of literature and both European and national case law. Yet on several points their interpretation of the provision has since

[49] For a principled critique of the Kolassa judgement see inter alia M. Lehmann, Prospectus liability and private international law – assessing the landscape after the CJEU's Kolassa ruling (Case C-375/13), Journal of Private International Law 2016, 318-343 http://dx.doi.org/10.1080/17441048.2016.1205869. See for a more market oriented approach to the locus delicti VKI v Henkel, C-167/00, ECLI:EU:C:2002:555 para 42 in which the tort was deemed to consist of the 'undermining of legal stability by the use of unfair terms'. See also VKI v Amazon, C-191/15, ECLI:EU:C:2016:612.

[50] Shevill, C-68/93; a slight variation of this rule is applied in online defamation cases, see e-Date joined cases C-509/09 and C-161/10.

[51] For the criminal law term, see Kai Ambos, Treatise on international criminal law, Volume III: International criminal procedure, 2016 OUP p. 213ff and Wolswijk o.c. footnote 31 p. 90 ff and 'Locus Delicti and Criminal Jurisdiction', Netherlands International Law Review nr. 3, 1999 p. 361-382.

then been falsified by the case law of the CJEU.[52] Differences concern such diverse issues as the localization of the act of deception, the place of damage in case of pure financial loss and the relevance of the localization of contributing acts for determining the *locus delicti*. This basically means that it takes many years and many referrals to the CJEU before the concepts achieve a modicum of clarity. Especially in criminal law, where predictability has a constitutional character,[53] this seems to pose a contra-indication to autonomous interpretation of the concept of territoriality. Unless of course the concept is already far more developed in the text of the instrument itself.

In short: the case law on the *locus delicti* in private international law demonstrates the difficulty of reaching a common understanding of the concept at the European level. Given the different role of the concept in civil procedure – as an alternative only – the interpretation thereof in private international law cannot be transposed to the area of criminal law. The long road to clarity seems a contraindication for autonomous interpretation, unless the concept is far better specified at EU level.

Lis pendens and related actions – dealing with parallel proceedings under Brussels I.

The core of the ELI proposal is its attempt to deal with situations in which authorities in more than one member state are investigating and prosecuting the same or a related set of facts. This is referred to as 'parallel proceedings'. The simultaneous character of these proceedings bring to mind the private international law concept of '*lis pendens* and related action'. The rules on *lis pendens* and related actions are currently laid down in Articles 29 ff of the Brussels I Regulation. Interestingly enough the current rules cover *lis pendens* and related actions in intra-EU cases as well as cases involving both a court of an EU Member State and a court of a third state where it is expected that the court of the third state will give a judgment capable of recognition and enforcement in the EU Member State. The provisions for extra-EU cases were introduced at the time of the recast and demonstrate the close link between mutual recognition and *lis pendens* (preamble 23).

The rules on *lis pendens* and related actions in the Brussels I Regulation serve a double function. They mainly aim to prevent irreconcilable judgements but can also - to some extent - be used to further the proper administration of justice.

The *lis pendens* provisions (Articles 29 and 33) apply when proceedings involving the same cause of action and between the same parties are brought in the courts of different member states. The rule for intra EU cases is a hard and fast one: when *lis pendens* is established the court last seised must stay the proceedings and decline jurisdiction as soon as the jurisdiction of the court first seised is established. There is no discretion for the judge, the order of preference being based on timing only. The advantages of this rule are ease of use and legal certainty. The major drawback is its rigidity: it doesn't allow the courts to take the proper administration of justice into account and transfer the case to the court best suited to deal with it. It also induces a race to the court: parties accused of committing a tort may start proceedings in the court best suited to their strategies[54] and demand a declaration of non-liability, thereby blocking the aggrieved party from effectively filing suit elsewhere. This kind of preemptive strikes are known as 'torpedo actions' and may severely harm the interest of tort-victims. The fear of a race to court may also frustrate mediation attempts and other consensual manners of dispute resolution. And lastly, the

[52] Compare the 2012 revised edition on Brussels I with the 2016 edition on the Brussels I recast and in particular 2012 para 221 versus 2016 para 282; 2012 227a versus 2016 para 308-9.
[53] See on choice of forum as an element of legality Luchtman l.c. p. 21 ff And Bose p. 79-80.
[54] Some courts are chosen simply for being slow in rendering judgement. Even when the court for seized is blatantly not competent to deal with the case, the rule will still operate.

first across the line rule could until recently also frustrate a choice of forum made by the parties themselves. Even when the parties to a contract had given exclusive jurisdiction to the courts of country X a torpedo action in the courts in Y could still be effective as the chosen court would have to wait for the court first seised to decline jurisdiction.[55] This latter rule was reversed in the recast of the Brussels I Regulation: the current rules give precedence to a court designated by the parties over another court seized in contravention thereof, regardless of timing.

The provision on related actions of Article 30 can be used whenever related actions are pending in different member states. The rule on related actions states that any other courts than the court first seized may stay the proceedings and when both proceedings are pending in first instance even refer the case to the first court.[56] Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements. This 'definition' combines *ne bis in idem* arguments with the search for the proper administration of justice.
The provision doesn't specify when or why the other courts should or shouldn't stay proceedings. It does make clear however, that the court first seized may not decline jurisdiction and/or transfer the case.

As already mentioned, the existence of irreconcilable judgements may hamper mutual recognition. In the rules pertaining to recognition of judgments the order is largely determined by the date of the judgment.[57] For the rules on *lis pendens* and related actions the crucial date is the date on which a case is 'pending'. Member states have different national traditions with regard to this concept (is discovery part of the trial or rather a pre-trial action; is the relevant element the notification to the defendant or the registration at the court). This decreased the predictability and clarity of the rule under the convention and the original regulation. The recast addresses the issue by giving some specifications in Article 32, which seeks to combine the different ways of starting civil proceedings that prevail in the Member States.

The new rules on identical and related actions pending in non-EU courts are more flexible than the ones for intra-EU cases. The focus is on the proper administration of justice. When deciding on whether or not to stay or terminate proceedings before them, the EU courts should take account of all the circumstances of the case. This check includes an appraisal of the connections between the facts of the case and the parties and the third State concerned. Special weight is given to claims of exclusivity of the third state's jurisdiction – at least in cases in which EU courts would have exclusive jurisdiction in the reverse situation. [58] Other elements to be taken into consideration are the stage of the proceedings and the likelihood of the foreign court giving judgment within a reasonable time.

In all cases, the decision to stay the proceedings or even decline jurisdiction is taken unilaterally by the court declining jurisdiction. There is no duty to consult or cooperate in any of the provisions of Brussels I bis. The Commission proposal included such duty in the specific circumstance of a case being pending on the merits in one Member State while a provisional measure was being requested in another. However, this provision didn't make it into the adopted text.[59] Another proposal which didn't make it to the final text, was the introduction of a time limit in which the court first seized should decide on its jurisdiction.[60] This effort to counter torpedo actions has lost part of its relevance, but not all, through the rule which gives precedence to the court chosen by the parties.

[55] Gasser, C-116/02, ECR 2003 I-14693, ECLI:EU:C:2003:657.
[56] Only if that court also has jurisdiction over the case to be referred. Referral as such does not create jurisdiction.
[57] In Brussels I bis the decisions of the forum state prevail over foreign judgments.
[58] Preamble 23 and 24.
[59] Com(2010) 748 p. 36, Article 31.
[60] Com(2010) 748 Article 29(2).

Parallel proceedings in civil and criminal law – similarities and differences

Any rule on *lis pendens* brings about the need for a definition of both the identity of the case and the moment it is deemed to be pending. The project rightfully dedicates ample attention to this issue in its provisions. It uses the term 'parallel proceedings' for what in private law would amount to *lis pendens*, whereas the term 'multiple proceedings' is used to designate related actions. It is interesting to note that the concept of multiple proceedings is wider than the private law concept of related actions. Whereas the latter still refers to the need to avoid irreconcilable judgments, the rule on multiple proceedings explicitly applies in cases in which ne bis in idem cannot arise, but concentration is nevertheless advisable for reasons of the proper administration of justice or the interest of the accused.

An important decision in any rule on *lis pendens* is to define the moment in which cases become pending for the application of the rule. In civil law this is the moment the case is brought before a court. This moment is further specified in Article 32 of the Brussel I bis Regulation. As mentioned above, this restriction to the trial stage of a dispute (in combination with the priority rule based on timing) has the disadvantage of creating disincentives for extra-judicial conflicts resolution. For criminal law purposes such a restriction would not do justice to the fact that even in the investigation stage *ne bis in idem* may be created. Accordingly a broader definition is needed there. The legislative proposal includes 'proceedings about to be conducted' in the definition of both parallel and multiple proceedings. This term also covers the investigation stage. However, the proposal largely wants to avoid parallel prosecutions, stipulating that parallel investigations may be useful and needed. This still leads to some unclarity as to the exact duties of the authorities in case of ongoing investigations.

Once a situation of *lis pendens* (or related actions) is established, the rule should specify the effect on the jurisdiction of the courts or authorities involved. Under Brussels I there is an obligation to dismiss in case of *lis pendens* in the EU and an option to desist in cases of related actions or *lis pendens* involving third states. The possibility to decline jurisdiction is an important effect in civil cases as civil courts – as a rule – may not refuse to exercise the international jurisdiction granted to them under the regulation. In criminal law, however, prosecutors may have discretion to prosecute or not. In that case the dominant effect of a binding *lis pendens* rule would be the duty to abstain from (further) acts of prosecution and/or acts creating *ne bis in idem*. This result is however only firmly prescribed in case consensus or some other type of binding decision is reached on the exercise of jurisdiction. The explanatory note to article 8 of model 1 stipulates that 'in case of parallel proceedings, and where appropriate, in case of multiple proceedings, the consensus should be achieved before any of the authorities takes the case to court or takes other measures with the effect of finally disposing of the case. It is, however, not prohibited for both national authorities to go ahead with parallel proceedings even though this may eventually trigger and produce the ne bis in idem principle.' This means that the authorities may still finally dispose of the case before the end of the consultation phase. This shifts the focus of the instrument from the prevention of improper *ne bis in idem* to the prevention of parallel prosecution.

Finally, a *lis pendens* rule needs an order of priority. In the original Brussels Convention priority was based on timing only. This rigid rule led to type of abuse referred to as torpedo actions and induced a race to the courts. The current text of the Brussels I Regulation deviates from this rule in two situations. First, in intra-EU cases, priority is given to the court designated in a choice of forum agreement. This is a strict priority rule, favoring one ground of jurisdiction over all others. The second deviations is to be found in

the rules on *lis pendens* and related actions involving third country courts. In the latter case, the provisions contains a set of considerations to be taken into account in the decision to defer or not – the main arguments being related to the prevention of conflicting judgements, the proper administration of justice and the right to trial within a reasonable time. The ELI proposal largely uses this third model of establishing priority. This avoids the pitfalls of the Brussels I model, but increases the need to consult both the other authorities and the parties involved.

In all cases covered by the Brussels I Regulation the decision to suspend or terminated the procedure is taken unilaterally by the court involved: there is no previous consultation of the court given priority. As the contribution of Ortolani explains, another EU Regulation (Brussels IIbis) does contain a consultation mechanism in which a court seized of an action may refer the case to another court which is better placed to deal with the issue. This *forum non conveniens* rule is not restricted to cases of *lis pendens* and can only be used if one of the parties either requests or consents to the referral. The two courts involved are supposed to work in cooperation to effectuate the transfer. This latter mechanism of coordination and cooperation seems to be the current state of the art in criminal law – a main difference being that in criminal law no consent of the parties is needed. It should be noted, however, that the model used in private international law is less complicated than the one used in criminal law, as the parties involved in the conflict would already be aware of the cases pending.[61] So no information duty has to be introduced here, and any objections to the decision of the court to transfer the case would be a judgment under the relevant rules of appeal.

In short: There are good reasons for not adopting the Brussels I model of *lis pendens*. The Brussel I model is rigid and open to abuse through so called torpedo actions started with the purpose of frustrating litigation elsewhere. Its rigidity may lead to a race to court, thereby frustrating attempts to reach a consensual solution. And the court being granted priority might not be the court best placed to deal with the case.[62] The *ne bis in idem* principle as it is currently applied by the CJEU copies much of the drawbacks of the Brussels I system of *lis pendens*. Though the situation in criminal law is different from the situation in civil law, inter alia because the decision to open a prosecution is often the prerogative of the state, the current proposal is wisely trying to reverse this situation. Interestingly, the model used in criminal law is more akin to the Brussel I rules on parallel proceedings involving third states than to the lis pendens rules for intra-EU cases. The discretion afforded to the authorities in these latter models offer the benefit of justice in the individual case, and the drawback of legal uncertainty for the individuals and authorities concerned.

[61] Save in cases on imperfect notification.

[62] In the recast the general rule was maintained, but an exception was made for lis pendens in the presence of a choice of forum by the parties: in that case the chosen forum is prioritized, independent of the time factor.