Conflicts of Jurisdiction in Criminal Law:
Lessons from European Civil Procedure

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1. **Introduction**

1. One of the main purposes of private international law is the resolution of conflicts of jurisdiction in civil matters. In the European Union (EU), this goal is pursued by an articulate body of Regulations, forming part of what is usually labelled as ‘European procedural law’ or ‘European civil procedure’. In criminal law, by contrast, no such system exists: although Eurojust aims at resolving conflicts of jurisdiction by facilitating the identification of the jurisdiction that should prosecute cross-border crimes,\(^1\) no hard-law instrument regulates this matter in a binding fashion.

2. Having noted this legislative gap, in January 2013 the European Law Institute accepted a project proposal dealing with the prevention and settlement of conflicts of jurisdiction in criminal law. One of the tasks of the Working Group focusing on this project was a comparison between private international law and criminal matters, so as to assess whether and to what extent the solutions adopted in the former field could be successfully transposed to the latter. This Chapter presents some reflections of the topic, triggered by the Working Group’s meetings and discussions.

3. The Chapter proceeds in three parts. The first part preliminarily highlights some fundamental differences between civil and criminal justice, which must be taken

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\(^1\) The author would like to thank the Members of the Working Group for the many fruitful discussions and Marloes van Wijk for her insights on the nature of criminal justice.

\(^1\) See *infra*, para. 2.3.2.
into account. As the Chapter will show, the differences at hand constrain, to a certain extent, the feasibility of a cross-sectoral comparative exercise, but they by no means make it impossible. The second part looks at private international law in general and argues that some of its basic principles should be adopted in the field of conflicts of jurisdiction in criminal law too. Finally, the third part draws some specific lessons from European civil procedure in particular.

2. Scope and Limits of the Comparison: Structural Differences between Civil and Criminal Justice

4. Before attempting a comparison between criminal law and private international law, it is necessary to highlight some fundamental limits to the feasibility of such an exercise. Civil and criminal justice serve largely different purposes and are governed by different procedural architectures. For this reason, the comparison cannot result in abrupt 'legal transplants': it would be simply impossible to transpose the mechanisms for the resolution of conflicts of civil jurisdiction existing in EU civil procedure to the field of criminal justice.

5. Despite the aforementioned limits, a cross-sectoral study of conflicts of jurisdiction can yield interesting results, from at least two points of view. Firstly, as Section 3 of this article will illustrate in detail, the evolution of private international law has been marked by the progressive emergence of some core concepts, concerning the coordination of national judicial authorities in cross-border cases. Private international law, hence, can serve as a useful 'conceptual repository' for criminal lawyers who aim at addressing the same topic in their own field of study and practice. In this respect, while private international law cannot provide ready-made solutions for criminal justice, it can certainly trigger a process of cross-fertilization and thus impact positively the further development of judicial cooperation in criminal matters.

6. A second, fundamental viewpoint for the comparison at hand is the specific setting of European Civil Procedure. This area is characterized by a particularly
articulate and successful variety of mechanisms for the resolution of conflicts of jurisdiction. European Civil Procedure dates back to the 1968 Brussels Convention and today comprises several instruments, whose relevance will be scrutinized in Section 4 of this Chapter. Without ignoring the many differences, thus, it will be possible to draw some direct lessons from the solutions adopted in the field of civil litigation.

7. The first step of our comparative exercise must necessarily be a brief overview of the most relevant differences existing between private and criminal justice, which can have an impact on the topic of jurisdiction conflicts. This synthetic review will serve as a general framework, within which the comparative analysis carried out in the remainder of the Chapter will develop.

8. In principle, a conflict of jurisdiction can be either 'hypothetical' or 'actual'. In the former case, two different States lay claim upon the jurisdiction to adjudicate a certain dispute. In other words, given a dispute with certain features, the courts of two (or more) States have potentially the power to resolve it. In the latter case, instead, this hypothetical conflict materializes: proceedings dealing with the same subject matter are commenced in more than one jurisdiction. The actual conflict must be resolved, in order to avoid the risk of parallel proceedings leading to potentially irreconcilable outcomes.²

9. The existence of a hypothetical conflict of jurisdiction depends exclusively on the contents of the law allocating jurisdiction: if under the applicable law more than one national court is competent to hear a certain case, a hypothetical conflict exists. By contrast, the emergence of actual conflicts hinges on party

² It must be noted that, according to Article 45(1)(c) and (d) of the Brussels I bis Regulation (and analogous provisions in other instruments) the irreconcilability of decisions is a ground for refusal of recognition of judgments. European civil procedure, therefore, tries to prevent the situation where parallel proceedings lead to potentially irreconcilable judgments. On the Brussels I bis Regulation see, in detail, infra, Section 4.
impulse: the conflict can only exist inasmuch as the parties have commenced parallel proceedings in more than one State.

10. Against this background, we can note a first, fundamental difference between civil and criminal justice. On the one hand, in civil justice, the parties are generally both private (natural or legal) persons: they are put on an equal footing and it is up to them to decide whether to commence proceedings or not. On the other hand, criminal cases can only be initiated by certain categories of parties, performing prosecutorial tasks. Therefore, the dynamics whereby an actual conflict of jurisdictions emerges in civil and criminal cases are fundamentally different.

11. Along the same lines, an additional difference between civil and criminal justice is that the latter is characterized by a certain fragmentation of the national laws governing the standing to commence proceedings. In particular, according to some systems of criminal procedure, only certain subjects (such as the Public Prosecutor) have the power to initiate the procedure. By contrast, other systems provide for more extensive standing, allowing e.g. the victim to start the case. Furthermore, some national systems enshrine the principle of prosecutorial discretion, whereby the Public Prosecutor can decide whether or not to commence the proceedings, while other States are based on a mechanism of obligatory prosecution.

12. Such a fragmentation, which obviously cannot be explored in detail in this Chapter, does not exist in the field of civil litigation. In a civil case, each party generally has the power to access the competent court and trigger the start of the proceedings. For this reason, it can be concluded that the way conflicts of jurisdiction materialize is structurally different, in civil and criminal cases.
2.2. Relevance of the Problem of Inactivity

13. As already mentioned, it is up to each party to access courts and initiate civil proceedings. This feature of civil justice has an obvious corollary: if none of the parties commence proceedings, the courts will not be seized of the matter and, hence, will not render a decision. Inasmuch as private rights are concerned, this is normally (but with some exceptions)\(^3\) not perceived as problematic. Let us consider, for instance, a contract concerning commercial rights, concluded by two corporations. If none of the parties bring a claim, this is generally interpreted as a sign that substantive law is operating satisfactorily and no judicial intervention is needed. The same rationale, of course, cannot be transposed to criminal matters.

14. While the inactivity of civil courts is normally not problematic, the passivity of criminal courts raises some obvious concerns. If cross-border criminal activities are not met with any judicial reaction in any of the States concerned, this may create a risk of impunity. Hence, any attempt to implement a mechanism for the resolution of conflicts of jurisdiction in criminal law must confront the problem of prosecutorial inactivity.

15. The issue of prosecutorial inactivity can potentially be tackled in very different fashions. On one end of the spectrum, it could be argued that any system for the allocation of jurisdiction in criminal matters should fight the risk of impunity. Following this line of reasoning, it should be desirable to provide that, in cases where the State having jurisdiction fails to prosecute the crime, proceedings could be commenced in a different State, in a subsidiary fashion (\textit{forum necessitatis}).\(^4\) On the opposite end of the spectrum, it could also be argued

\(^{3}\) In specific areas, private litigation is regarded as an important tool of implementation and enforcement of substantive law and policies. A good example in this respect is competition law: the EU tries to facilitate private enforcement of rights arising out of this field of law, through instruments such as Directive 2014/104, which aims at ensuring the effectiveness of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

\(^{4}\) See \textit{infra}, para. 4.4.2.
that, inasmuch as the competent Public Prosecutor is free to decide not to commence proceedings, this should be accepted by all other States, especially in the light of the principle of mutual trust governing the area of freedom, security and justice (AFSJ).

16. The question above cannot, of course, be answered here. To the contrary, the problem at hand constitutes the perfect illustration of how conflicts of jurisdiction in criminal matters may entail different problems, which are not typically relevant for civil litigation. Those aiming at resolving conflicts of jurisdiction of criminal law, hence, face challenges that do not exist (or, at least, are not as widespread) in the realm of civil procedure.

2.3. Relationship between Jurisdiction and Applicable Law

17. Further differences arise when we consider the consequences of allocating jurisdiction among various State courts. In civil litigation, the circumstance that a given court has jurisdiction entails, normally, no consequence on the substantive law that will be applied to resolve the case. In particular, the problem of applicable law is resolved by another branch of private international law, which sets forth conflict rules determining which national law will apply, irrespective of which national court (if any) will hear the case. As a result, it is entirely possible that the courts of a certain State will resolve a dispute by applying the substantive laws of another State.

18. By way of example, in the European Union, the law applicable to contracts is determined by the Rome I Regulation (Regulation no. 593/2008, replacing the

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5 Overriding mandatory provisions and public policy constitute a rare exception to this general rule: see, e.g., Article 9 of Regulation 593/2008 (Rome I).

6 The parties may submit to the jurisdiction of an arbitral tribunal (v. infra, para. 2.4.). In that case, the law applicable to the arbitration proceedings often sets forth different conflict rules for the identification of the applicable substantive law: see UNCITRAL Model Law on International Commercial Arbitration, Article 28. For an overview of such rules see Tony Cole and Pietro Ortolani, Understanding Arbitration (Routledge 2017) forthcoming, Chapter 2.
1980 Rome Convention). One of the main purposes of the enactment of uniform conflict rules in the EU is exactly avoiding that the allocation of jurisdiction to a given Member State trigger the application of a substantive law that would not be applied by the courts of another Member State, hence generating an unforeseen strategic advantage for one of the parties.\footnote{This rationale was already underlying the 1980 Rome Convention, as highlighted by Mario Giuliano and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations, OJ C 282, 31/10/1980, 5.} The parties also have an important margin of autonomy: in many settings they can enter into a choice-of-law agreement, providing for the application of the substantive law they prefer.

19. In criminal matters, the allocation of jurisdiction has very different consequences, as it generally determines the substantive laws according to which criminal liability will be ascertained. This raises further questions as to the feasibility of a mechanism for the resolution of conflicts of jurisdiction in criminal law, in the absence of a preliminary (and, obviously, debatable) large-scale approximation of substantive criminal law throughout the EU.

\textbf{2.4. The Role of Private Autonomy}

20. We have already mentioned private autonomy, when discussing choice-of-law agreements. In civil matters, however, the possibility for the parties to influence the exertion of jurisdiction on the part of State courts goes even further. In particular, the parties can enter an arbitration or a jurisdiction (or choice-of-court) agreement.

21. By concluding an agreement to arbitrate, the parties submit to the jurisdiction of an arbitral tribunal and conversely waive their right to access State courts. Notably, arbitration is not governed by the Brussels I Regulation,\footnote{Regulation 1215/2012 (Brussels I bis), Art. 1(2)(d).} but by the national law of the State where the arbitral proceedings are seated as well as by a number of international instruments, including the 1958 New York
Convention. For the purposes of this Chapter it is therefore important to stress that, by entering into an arbitration agreement, the parties have the power to displace the mechanism for the allocation of jurisdiction set forth by European procedural law. The same, of course, would not hold true for a similar mechanism in the field of criminal justice.

22. Even when the parties do not exclude the application of the rules for the allocation of jurisdiction in civil matters, private autonomy can have a significant impact. In particular, the parties often have the possibility to enter into a jurisdiction agreement, whereby they submit to the competence of a certain State court. This agreement, hence, has the effect of substituting the fall-back rule enshrined by the applicable regime of private international law with a different, party-created rule for the allocation of jurisdiction. Once again, such a pervasive importance of private autonomy does not seem to be transposable to the field of criminal justice.

2.5. The Influence of Fact-Specificity

23. Finally, an important difference must be stressed with respect to the contents of the proceedings. In civil litigation, the parties do not necessarily disagree on the facts of the case: it is indeed possible that the parties agree on every relevant factual circumstance, but they litigate on the legal qualification of those facts and the legal consequences arising therefrom. For this reason, civil proceedings may reach their final conclusion (the judgment on the merits) without the need for any taking of evidence.

24. Criminal proceedings, by contrast, are typically more fact-specific. In order to ascertain criminal liability, the competent judicial authority must normally establish facts, before turning to their problem of their legal qualification.

25. This difference may affect the rationale underlying the rules allocating jurisdiction among different national courts. In particular, the need to ensure that
jurisdiction is allocated to the courts of the place where the evidence is (primarily) located is likely to be perceived more strongly in criminal justice than in civil cases. Any cross-sectoral comparative analysis, therefore, must necessarily take these specificities into consideration.

3. Lessons from Private International Law in General

3.1. Conflicts of Jurisdiction as Conflicts of Sovereignty

26. According to a long-lasting legal and political doctrine, the power to resolve disputes is one of the attributes of sovereignty. The emergence of self-contained national legal systems, characterizing the Westphalian regime, has been accompanied by the States’ tendency to claim a monopoly over the administration of justice. As a consequence, each State has developed a set of rules determining the scope of the jurisdiction of its courts, i.e. the purview of their power to perform judicial functions.

27. The characterization of jurisdiction in terms of exertion of sovereign powers entails an obvious risk of conflict among States. In other words, if two or more States claim jurisdiction over a certain case, this can be seen as a clash of sovereign prerogatives. While a purely domestic case undoubtedly falls within the sovereign powers of the State where the facts took place, cross-border disputes may potentially result in a clash of sovereignties: it has been correctly highlighted that ‘transnational cases place courts in the awkward position of adjudicating in the interstices of law’.

Private international law’s aim of creating a widely accepted and shared mechanism for the coordination of national jurisdictions, then, serves the fundamental function of preventing and resolving conflicts of sovereignty. For this reason, in its basic and traditional

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9 For an overview of this development see Nicola Picardi, La giurisdizione all'alba del terzo millennio (Giuffrè 2007).

purpose, private international law is best understood not only as a domestic branch of law governing substantive and procedural private law, but also as an international field of law, aimed at ameliorating the relations among States.\textsuperscript{11}

28. There are good reasons to argue that this fundamental rationale of private international law can be transposed to the field of judicial cooperation in criminal matters. In fact, in today’s world, the problem of a potential conflict of national sovereignties is probably more evident in criminal than in civil justice.

29. As for civil matters, the States’ claim to monopoly in the administration of justice is no longer tenable, in the light of the ever-increasing importance of party autonomy. The rise of arbitration and other mechanisms of alternative dispute resolution, as well as the wide-spread use of choice-of-court agreement, have determined the sunset of the conception of jurisdiction as an attribute of sovereignty. In the current reality of private law, jurisdiction is perhaps better understood as a service provided by State courts in a competitive international market, blurring the public/private divide in a quest for efficiency. In criminal matters, by contrast, jurisdiction is still strongly linked to the idea of State power. The repression of criminal activities can still be seen as a State monopoly and, therefore, an epiphenomenon of sovereignty. For this reason, the same basic purpose traditionally underlying private international law is able to inspire the creation of a mechanism for the allocation of jurisdiction in criminal matters. By determining which State has competence to prosecute a crime, such a system undoubtedly has the potential of avoiding conflicts of sovereignty and bettering State-to-State relations.

\textsuperscript{11} At the origins of private international law, for instance, the basic rationale justifying the application of foreign law was the \textit{comitas gentium}: Hessel E Yntema, ‘The Comity Doctrine’ (1966) 65(1) Michigan Law Review 9.
3.2. The Importance of Legal Certainty and Predictability in Private International Law

30. Ensuring better relations among States is not the only basic rationale prompting the development of private international law. Another mainspring of this field of law is the enhancement of legal certainty, in the interest of those who engage in cross-border relations. In a nutshell, private international law has the ambition of enabling the parties to predict which substantive law will govern their rights and which national court(s) will have jurisdiction, should a dispute arise.

31. The quest for certainty and predictability runs deep in the history of private international law, starting from medieval authors’ aversion against the application of different laws to the same facts. Already in the XVII Century, Huber stresses that ensuring predictability in cross-border cases is fundamental, in order to ensure the feasibility of ‘terrestrial and maritime exchanges’. Along the same lines, Savigny highlights the importance of obtaining neutral and uniform results.

32. The transposition of the rationale at hand to the field of criminal justice leads to interesting and somewhat controversial results. Undeniably, the degree of predictability ensured by private international law does not seem to be entirely attainable in criminal cases. The main reason for this conclusion is that one of the aims of private international law is avoiding that, by allocating jurisdiction to a certain national court, this will result in the application of a different substantive law to a given set of facts. In criminal matters, the applicable substantive law will necessarily change, depending on the forum, and may even result in diverging qualification in terms of the legality or criminality of the

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14 Juenger (n 12) 162-163
relevant facts. In light of this, a system for the resolution of conflicts of jurisdiction in criminal matters cannot, realistically, ensure the same degree of uniformity and predictability as private international law does for civil cases.

33. A further fundamental difference between civil and criminal cases must be stressed here. Throughout the history of private international law, the pursuit of legal certainty and predictability aims at facilitating cross-border dealings and transactions. As Section 4 of this Chapter will highlight, in the case of European private international and procedural law, this purpose is particularly important, as it is instrumental to the creation and maintenance of a single market. The same, of course, does not hold true for criminal cases: the creation of a uniform and predictable system of allocation of criminal jurisdiction cannot possibly serve the purpose of encouraging cross-border crime.

34. While the observations above cannot be ignored, they should not be read as entailing that predictability and legal certainty are not desirable in the field of criminal law. To the contrary, several arguments can be put forth, in order to demonstrate that the same rationale underlying private international law may be useful in this area of law too. Firstly, predictability is in the interest of the defendant: a system for the uniform allocation of jurisdiction helps avoiding that the same person have to defend him/herself in multiple fora, facing additional costs and personal inconveniences.

35. Secondly, predictability ensures that like cases be treated alike. Let us consider, for instance, two defendants being accused of committing the same cross-border crime: in the case of defendant A the facts involve States X and Y, while in the case of defendant B the facts involve States Z and K. In the absence of a uniform system for the allocation of jurisdiction, States X and Y may both have jurisdiction and decide to initiate proceedings against A. By contrast, State Z may not have jurisdiction under its laws, and therefore proceedings against defendant B may be initiated solely in State K. Apart from
the aforementioned undesirability of parallel proceedings in the case of defendant A, the scenario at hand is troublesome because it entails an inequality in the treatment of two sets of circumstances (the crimes allegedly committed by A and B) which are factually identical. Ensuring that the same cross-border setting is governed by uniform jurisdictional rule (or, in other terms, that it is covered by an even amount of jurisdiction) seems to be particularly desirable within the AFSJ.

36. Thirdly, predictability could potentially mitigate the already cited problem of prosecutorial inactivity. Namely, the problem of prosecutorial inactivity may derive from the circumstance that, when two States have jurisdiction, the national authorities of each State decides to abstain from commencing proceedings, assuming that the authorities of the other State will take care of the case. Undesirable inactivity could hence be limited, if national authorities entrusted with prosecutorial tasks could rely on uniform rules for the allocation of jurisdiction. In the light of the above arguments, it can be concluded that the same rationale of uniformity and predictability underlying private international law can inspire the development of shared rules on jurisdiction in criminal matters.

3.3. Substance-neutrality as a Cornerstone of Private International Law

3.3.1. Introduction to the Notion of Substance-neutrality

37. While different systems of private international law may to a certain extent disagree on the content of the rules determining the scope of the jurisdiction of national courts, they all agree on the fundamental principle of substance-neutrality. According to this principle, the rules identifying the competent court should not take into account the substance of the dispute between the parties and the outcome thereof. For instance, the principle of substance-neutrality
would be clearly violated by a rule providing that jurisdiction lies with the court where the plaintiff’s claim has the best chances of success.\textsuperscript{15}

38. Neutrality is a fundamental cornerstone of private international law. In order to understand its importance, it is necessary to consider that the purpose of private international law is not the implementation of substantive policies, but the resolution of conflicts of applicable law or jurisdiction. Furthermore, pursuant to the principle of neutrality, all legal and judicial systems are put on an equal footing, irrespective of their peculiarities and relative efficiency. In accordance with its universal aspirations, hence, private international law adheres to a relativist approach, coordinating the regulatory and judicial prerogatives of States without performing value choices.

39. The main exception to the general principle of substance-neutrality is public policy. In different settings, States can invoke the public policy rule to avoid conferring legal effects upon a foreign legal instrument (e.g. a law, or a judgment). The scope of public policy, however, is extremely narrow: the clause can be invoked in exceptional circumstances only, to protect fundamental values and principles of the forum, but it can in no way act as a general shield against the operation of the conflict rules enshrined in private international law.

3.3.2. Application of Substance-neutrality to Criminal Justice

40. The question arises whether a system coordinating jurisdiction in criminal matters should also be substance-neutral. On the one hand, it could be argued that criminal and private law are fundamentally different in nature, inasmuch as

\textsuperscript{15} Conversely, the principle of substance-neutrality is not violated by a jurisdiction rule which neutrally refers to the contents of the applicable substantive law, without assessing its adequateness and potential effects on the merits of the case. By way of example, under Article 7(1)(a) of the Brussels I bis Regulation, in matters relating to contract, jurisdiction is conferred (also) upon the courts for the place of performance of the obligation. While the notion of ‘place of performance’ must be assessed according to the applicable substantive law, the Regulation does not contain any value judgment as to whether the national law governing the notion at hand is adequate and would lead to a satisfactory decision on the merits.
the former serves the function of implementing substantive policies in the public interests, while the latter is often a neutral infrastructure for the expression of private autonomy. Following this line of reasoning, it could be argued that substance should play a role in the determination of the rules for the allocation of jurisdiction. On the other hand, however, there are two fundamental reasons (described below) why the principle of substance-neutrality should be preserved in the realm of criminal justice too.

41. Firstly, if a system for the allocation of jurisdiction is not substance-neutral, it necessarily becomes a tool for the implementation of certain policies. Different States, however, have adopted divergent approaches as to the appropriate degree of reaction against criminal behaviours: punishments may vary significantly from jurisdiction to jurisdiction, and the areas of criminal relevance of conducts are not coextensive across different national systems. Even limiting the scope of our analysis to the European Union, a complete harmonization of this field of law would be impossible and, in any event, likely undesirable.

42. Therefore, in order for a system of jurisdiction rules to be acceptable, it must necessarily be neutral, i.e. it must operate effectively while at the same time respecting the substantive regulatory autonomy of each State participating in the system. Were jurisdiction rules to embrace substantive value choices, they would result in a creeping form of harmonization and, thus, they would not be accepted by those States whose national legal order enshrines divergent policies.

43. Secondly, even if one were to accept the premise that jurisdiction rules in criminal matters may take into account substantive considerations, this would result in a conundrum. Whose interests should the rules favour? One could maybe be tempted to assume that jurisdiction rules should take into account the

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prosecution’s interests, consistently with the goal of repressing criminal activities. However, this approach is not viable in practice, as the interests of the prosecution are likely to change, depending on the nature of each national criminal justice system. In some jurisdictions, for example, the main goal of the prosecution could be the ascertainment of the truth in the public interest; by contrast, in other States, the prosecution could be entrusted with the task of obtaining a conviction, in accordance with the adversarial model. Once again, given the fragmentation of national systems, neutrality seems to be the only possible solution.

44. The problem becomes even more complex if we enlarge the perspective and consider other stakeholders, such as the defendant (who likely has a legitimate interest to prevail on the merits and obtain an acquittal) or the victim (once again, with possible discrepancies, depending on the structure of national criminal procedure). Jurisdiction rules are not fit to determine how these different and potentially conflicting interests should be balanced. The principle of substance-neutrality, hence, should be adopted in the field of criminal justice.

45. One final possible objection against the principle of substance-neutrality concerns prescription/statute of limitations. Were a uniform system for the allocation of jurisdiction in criminal matters to be enacted, competence to prosecute may be conferred upon the authorities of a State where prosecution is time-barred and, thus, no longer possible. This could generate potential risks of impunity. Adhering to a strict interpretation of the principle of substance-neutrality, one could argue that the contents of the applicable statute of limitation fall within the substantive regulatory autonomy of the forum and, therefore, they are not a problem that should be dealt with through jurisdiction rules. However, it also seems possible to adopt a more moderate approach and create a carve-out for the case at hand, while at the same time preserving the central importance of substance-neutrality.
46. In order to create such a carve-out, it would be necessary to investigate the nature of time-limitations in depth. While such analysis cannot be conducted in this Chapter, some basic arguments can be put forth and hopefully pave the way for further research and reflections in this respect. In particular, one may wonder what inferences could be drawn from the legislative decision to qualify the prosecution of a given crime as time-barred. It could be argued that statutes of limitations do not presuppose any substantive policy choice: a time-bar, then, can be seen as an *a priori* surrender of a criminal legal and justice system, limitedly to a specific case. In other words, by declaring that the prosecution of a crime is time-barred, national legal systems operate a simple choice of practical convenience: they abstain from prosecuting a crime in a particular instance for reasons of opportunity, without conceding anything in terms of general substantive policy choices. Prescription, then, could be differentiated from an acquittal on the merits and rather seen as a non-substantive outcome. Were further research to confirm that this hypothesis is plausible, it would then become possible to consider statutes of limitation as a possible criterion for the (non-)allocation of jurisdiction, without breaching substance-neutrality.

47. In conclusion, substance-neutrality should be adopted as a general principle, as far as the allocation of jurisdiction in criminal matters is concerned. The adoption of this principle would require, at the very least, a revision of the Eurojust *Guidelines for Deciding “Which Jurisdiction Should Prosecute?”*, which contain some substance-oriented criteria. According to the Guidelines, prosecutors ‘must identify each jurisdiction where a prosecution is not only possible but also where there is a realistic prospect of successfully securing a conviction’. A neutral system for the allocation of jurisdiction cannot, of course,

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18 Ibid, 61.
be based on the preference for a certain outcome of the merits stage of the proceedings.

48. Furthermore, the Guidelines do not categorically exclude that the relative sentencing powers of courts in different jurisdictions may be taken into account as a criterion for the selection of the appropriate jurisdiction.\textsuperscript{19} Once again, a mechanism for the allocation of jurisdiction should not express value judgments on the contents of the national law applicable to the merits of the case, which falls within the regulatory discretion of each State.

49. The Guidelines also state that ‘(p)rosecutors should (...) ensure that the potential penalties available reflect the seriousness of the criminal conduct which is subject to the prosecution’. This evaluation of adequateness, however, seems to fall within the monopoly of the national lawmakers creating substantive criminal law. A system serving the purpose of allocating jurisdiction should never second-guess the policy choices underlying national substantive law.

4. Lessons from European Civil Procedure in Particular

50. This Section of the Chapter will focus on the instruments of European Procedural Law, with the purpose of identifying rationales and solutions that could potentially be transposed to the field of criminal justice. Examples will be drawn from different fields of civil litigation, such as civil and commercial claims and family matters.

4.1. Reducing Overlaps in Jurisdiction

51. Reducing overlaps in jurisdiction is the basic rationale unifying the different instruments of European civil procedure and, to a certain extent, differentiating them from the common law tradition. In a nutshell, European procedural law

\textsuperscript{19} Ibid, 65: the Guidelines exclusively acknowledge that the relative sentencing powers ‘must not be a primary factor’.
aims at reducing hypothetical\textsuperscript{20} conflicts by setting forth a uniform regime for the allocation of jurisdiction in civil matters.

52. The rules governing jurisdiction in civil and commercial matters in the European Union are set forth by the Brussels I bis Regulation.\textsuperscript{21} The Regulation replaced the Brussels I Regulation\textsuperscript{22} which, in turn, substituted the 1968 Brussels Convention. Despite this succession of different legal instruments, the basic premises and structures governing the allocation of jurisdiction have remained largely the same. For this reason, the Chapter will generally refer to the ‘Brussels regime’, whenever a certain feature of the system has remained constant over time.

53. Before the entry into force of the Brussels Convention, the rules allocating jurisdiction were not harmonized across the Member States. This, of course, generated a high risk of hypothetical conflicts among national courts, but it also raised another problem: many national laws contained criteria (or ‘heads’) for the allocation of jurisdiction that have been labeled as ‘exorbitant’. The adjective ‘exorbitant’ alludes to the circumstance that, although under national law the courts are entitled to exert jurisdiction, the criterion for the attribution of jurisdiction seems to be unreasonable or ‘difficult to justify’.\textsuperscript{23} The following paragraphs will offer some examples of exorbitant heads, which help elucidate the importance of shared and reasonable jurisdiction rules.

54. Pursuant to Article 14 of the French Civil Code, a foreigner, even if not residing in France, can be sued before French courts, if the plaintiff is French. This rule has been rightly criticized, as it confers an unjustified advantage upon French

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\textsuperscript{20} For a definition of hypothetical conflict of jurisdiction see \textit{supra}, Section 2.1.


claimants and may result in disproportionate difficulties for respondents who have no connection with France. By superseding national jurisdiction rules, the Brussels regime avoids that exorbitant heads (such as the one at hand) allocate jurisdiction among Member States.\textsuperscript{24}

55. Another example of exorbitant head of jurisdiction is § 23 of the German code of civil procedure. According to this provision, a defendant who does not reside in Germany can be sued before German courts, if he/she owns assets in Germany. On the basis of a strict interpretation of this rule, a foreigner who has been present on German territory for a very short period of time could be forced to litigate before German courts, should he accidentally leave a personal item (such as an umbrella or an item of clothing) on German territory. Once again, such a head of jurisdiction is clearly undesirable, as its broadness is not justified by a defensible rationale.\textsuperscript{25}

56. In order to exclude the applicability of national jurisdiction rules (and, hence, of any exorbitant rule therein), the Brussels I bis Regulation expressly provides that persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in the Regulation itself, and not by virtue of domestic law.\textsuperscript{26}

57. The current situation of jurisdiction rules in criminal matters is characterized by wide areas of overlap, with broad criteria that can be relied upon by national judicial authorities to invoke jurisdiction. The enactment of a uniform set of jurisdiction rules, analogous to the Brussels regime, could have the beneficial effect of avoiding those cases where jurisdiction is invoked in the absence of

\textsuperscript{24} Hélène Gaudemet-Tallon, \textit{Compétence et exécution des jugements en Europe} (5th edn, LGDJ 2015) 100.

\textsuperscript{25} It should be incidentally noted that German courts mitigated the negative effects of the provision by giving it a restrictive interpretation, requiring a reasonable connection of the defendant with Germany: German Bundesgerichtshof, 2 July 1991 (1992) 3092 Neue Jurischtische Wochenschrift 44

\textsuperscript{26} Article 5(1).
strong links between the relevant facts and the State where the proceedings are commenced.

4.2. **Different Heads of Jurisdiction in the Brussels I System**

58. Having excluded the applicability of exorbitant heads of jurisdiction, the Brussels I system sets forth a harmonized regime by providing for three main types of criteria for the allocation of jurisdiction in civil and commercial matters:

- general jurisdiction;
- specific jurisdiction;
- exclusive jurisdiction.

The following paragraphs will provide a synthetic highlight of some relevant features of the aforementioned criteria.

4.2.1. **General Jurisdiction**

59. The general head of jurisdiction can be generally\(^{27}\) relied upon for all cases falling within the scope of application of Brussels I. In particular, pursuant to Article 4(1) of the Brussels I bis Regulation, ‘persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’. This general rule of jurisdiction is in accordance with the principle *actor sequitur forum rei*, whereby the plaintiff must normally initiate proceedings in the State of the respondent.

60. Article 4(2) is justified by a strong rationale, which seems to be exportable to the field of criminal justice too. In particular, the position of the defendant is privileged because he/she did not choose to initiate the proceedings, but is bound by the legal consequences thereof because of the plaintiff’s decision to

\(^{27}\) See, however, *infra*, para 4.2.6. on the exception of exclusive jurisdiction.
bring a claim. Hence, in order to mitigate the defendant’s costs and inconveniences associated with the need to defend him/herself, the criterion of proximity to his/her domicile is adopted. The implicit assumption behind this regulatory choice is that organizing the defence and participating in the proceedings is easier, if jurisdiction is attributed to the courts of the State where the defendant is domiciled. In criminal cases there is an even stronger rationale suggesting that the defendant’s ease to defend him/herself should be taken into account, especially considering the importance of the subject matter of criminal proceedings and the seriousness of their possible consequences.

61. Another interesting aspect of Article 4 of the Brussels I bis Regulation is its general rejection of the criterion of nationality. What matters, for the establishment of jurisdiction under the provision at hand, is exclusively the domicile, irrespective of whether the defendant is also a national of the State of domicile. Once jurisdiction under Article 4 is established, then, each Member State is left free to determine the internal rules of competence allocating jurisdictional functions to different courts within their territories. However, Article 4(2) specifies that these internal jurisdiction rules cannot differentiate between nationals and foreigners domiciled in the relevant Member State.

4.2.2. Specific Jurisdiction: The Case of Tort

62. Specific heads are additional jurisdiction rules that apply exclusively to particular scenarios, rather than covering the whole scope of application of the Brussels I system. By way of example, Article 7 of the Brussels I bis Regulation contains special rules of jurisdiction, inter alia, for matters relating to a contract and to tort. Specific heads of jurisdiction do not displace the general criterion of Article 4, but rather constitute an alternative: when the claim relates to a matter covered by a specific head, the plaintiff will be able to choose between the courts of the State where the defendant is domiciled and the (potentially but not necessarily different) forum indicated by Article 7.
63. By adding specific heads of jurisdiction to the general head of Article 4, the Brussels I system allows, in certain cases, for possible overlaps of jurisdiction, potentially leading to parallel proceedings. As Section 4.3. will illustrate, the system resolves the problem at hand through the mechanism of *lis pendens*. Before analyzing this aspect in detail, however, it is necessary to scrutinize the contents of some specific heads of jurisdiction, which could help inspire a regime of allocation of jurisdiction in criminal matters.

64. For the purposes of a comparison with criminal justice, the most obviously relevant specific head of jurisdiction is the one concerning torts. Albeit profoundly different in many respects, tort and criminal law are linked by some structural similarities, as implicitly suggested by the etymological root of the word ‘delict’, used in civil law jurisdictions to designate torts. In both tort and criminal cases, the merits of the dispute revolve around an alleged wrongful conduct on the part of the defendant. In some cases, the same behaviour could in fact be relevant from the point of view of both tort and criminal law. For this reason, the following paragraphs will offer an overview of the rules of the Brussels I system on jurisdiction in tortious matters.

65. In principle, the Brussels I system adheres to the principle of territoriality: pursuant to Article 7(2), ‘in matters relating to tort, delict or quasi-delict’, jurisdiction is conferred upon the ‘courts for the place where the harmful event occurred or may occur’. Transposing this rationale to criminal justice, it would seem logical to equate the harmful event with the alleged incriminating conduct. Despite this apparent simplicity, however, two practical complications may arise in practice and must be taken into account here:

   a) the place where the harm is suffered could be different from the place where the events giving rise thereto have taken place;
b) the event itself could be transnational in nature and, for this reason, it may be difficult or even impossible to pinpoint it to the territory of a single State.

The case law of the Court of Justice of the European Union (CJEU) offers interesting insights in both these respects. Let us briefly consider them.

4.2.3. (Cont’d) Differentiation between Place where the Damage Occurred and Place of the Harmful Events

66. The problem of a differentiation between the place of the event and the place where the harmful consequences are suffered came to light for the first time in the case Mines de Potasse d’Alsace.\(^\text{28}\) The case concerned the alleged discharge of polluting waste into the river Rhine on the part of a French company. The claimant initiated proceedings before Dutch courts, arguing that, although the discharge took place in France, its harmful effects were suffered in the Netherlands. The respondents objected to the jurisdiction of Dutch courts. In this case the Court concluded that, given the strong link between the polluting behaviour and its cross-border harmful effects, the expression 'place where the harmful event occurred' should be interpreted as covering both the place of the event and the place of the subsequent damage.

67. In its later case-law, however, the CJEU has often differentiated Mines de Potasse d’Alsace, so as to avoid unnecessary hypothetical conflicts of jurisdiction. In Kainz, for instance, the Court concluded that if a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured, and not the place where the product was commercialized by a third party.\(^\text{29}\)

\(^{28}\) C-21/76, Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace SA, ECLI:EU:C:1976:166.

\(^{29}\) C-45/13, Andreas Kainz v Pantherwerke AG, ECLI:EU:C:2014:7, para 29. However, different jurisdiction rules apply to consumer contracts: see Articles 17-19.
Similarly, in Marinari\textsuperscript{30} and Kronhofer,\textsuperscript{31} the CJEU held that the plaintiff cannot invoke Article 7(2)\textsuperscript{32} by simply alleging that the event caused a patrimonial harm in a different jurisdiction.\textsuperscript{33}

68. In sum, hence, the circumstance that the harm was suffered in a different State seems to be relevant, for the purposes of the Brussels I system, only when there is a particularly close connection between the event and its harmful consequences. By contrast, in all other cases, the difference between the place of the event and the place of the harm should not be invoked for the purposes of the allocation of jurisdiction, only the former being relevant.

4.2.4. (Cont’d) Cross-border Events

69. The case of harmful events that take place across national borders (and cannot thus be pinpointed to one State only) constitutes an interesting parallel for many types of cross-border crimes. As far as tort claims are concerned, a particularly relevant case is the one of events taking place in the press or on the Internet.

70. Torts committed through press were addressed by the CJEU in the famous Shevill case.\textsuperscript{34} The case concerned a claim for defamation via press, brought before English courts by a plaintiff residing in the United Kingdom. The claimant argued that the defendant, a French company, had caused harm by publishing


\textsuperscript{31} C-186/02, Rudolf Kronhofer v Marianne Maier, ECLI:EU:C:2004:364.

\textsuperscript{32} And the corresponding articles of Regulation 44/01 and of the Brussels Convention.

\textsuperscript{33} A different approach was adopted in case C-375/13, Harald Kolassa v Barclays Bank plc, ECLI:EU:C:2015:37. The outcome of this case, however, seems to be strictly linked to the particular nature of the financial transaction giving rise to the dispute: for an analysis of the jurisdictional issues connected to the circulation and holding of intermediated securities see Matteo Gargantini, ‘Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities; the Advocate General’s Opinion in Kolassa v. Barclays’ (2014) 4 Rivista di Diritto Internazionale Privato e Processuale 109.

\textsuperscript{34} C-68/93, Fiona Shevill v Presse Alliance, ECLI:EU:C:1995:61.
a defamatory article on a newspaper. The newspaper in question was distributed not only in France, but also in a number of other States, including the United Kingdom. For this reason, the harm was allegedly caused in more than one jurisdiction. The defendant objected to the jurisdiction of English courts and the case was referred to the CJEU for a preliminary ruling.

71. In *Shevill*, the CJEU concluded that the notion of 'place where the harmful event occurred' should be interpreted as covering both the place where the publisher of the defamatory publication is established, and each Member State where the publication was distributed and the victim claims to have suffered injuries to his/her reputation. However, the CJEU also drew a further distinction: the courts of the State where the publisher is established have jurisdiction concerning the entire harm caused by the publication, while the courts of a different State where the publication was distributed only have jurisdiction to rule in respect of the harm caused in that particular State. For the purposes of a comparison with criminal justice, *Shevill* is relevant inasmuch as it suggests that the State where a certain cross-border conduct has been organized and initiated is best placed to exert jurisdiction over the entire set of facts, including those occurring across national borders.

72. Further complications are entailed by torts committed through the Internet. The CJEU addressed this problem in the *eDate* case, which concerned alleged violations of personality rights arising out of the publication of private information on a website. The court observed that the rationale enshrined in *Shevill* cannot be entirely transposed to the case at hand, as websites (unlike newspapers) generally have an automatic worldwide reach and accessibility. The Court, thus, enlarges the interpretation of the notion of 'place where the harmful event occurred', so as to encompass the State where the centre of the

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35 C-509/09, *eDate Advertising GmbH v X* and C-161/10, Olivier Martinez and Robert Martinez v MGN Limited (Joined cases), ECLI:EU:C:2011:685.
plaintiff’s interests is based. As a result, the plaintiff can bring a claim alternatively in the State where the publisher is established or in the State where the centre of his/her interests is based, and the jurisdiction will cover the entire harm. Furthermore, the plaintiff can sue in any other State where the online content is/was accessible, but exclusively with respect to the harm caused on the territory of that particular State.

73. For the purposes of a comparison with criminal law, the main lesson that can be drawn from eDate is the prevalence of factual criteria over purely technical ones. As subsequently repeated by the CJEU in Wintersteiger, jurisdiction should be allocated on the basis of circumstances of fact, rather than on the basis of the place where the server is located. This principle seems to be exportable to the field of cybercrime, where reliance on technology-based criteria could entail significant complications and/or refer to jurisdictions which, in reality, have no factual links with the alleged crime.

74. It must also be noted that, in the case-law of the CJEU, the criterion of the ‘centre of interests’ is mainly limited to claims relating to personality rights. By contrast, when the case concerns violations of patrimonial rights allegedly committed via the Internet, the ‘place where the harmful event occurred’ is typically identified pursuant to the Shevill criteria. In Pinckney, namely, the CJEU addressed the case of an alleged cross-border violation of intellectual property rights. The dispute concerned the unauthorized reproduction of songs by a French author, on CDs manufactured by an Austrian company and marketed by UK companies on the Internet. In this case, the Court held that the courts of a Member State from where the website is/was accessible have jurisdiction, but only with reference to the damage caused in that State; conversely, the criterion of the ‘centre of interests’ is not mentioned. Along the

37 C-170/12, Peter Pinckney v KDG Mediatech AG, ECLI:EU:C:2013:635.
same lines, in *Pez Hejduk*, the CJEU concluded that the courts of a Member State are competent to hear claims concerning an alleged copyright violation committed via the Internet, if the website was accessible from that State. By contrast, the nature of the generic top-level domain (in the case at hand, .de) was deemed irrelevant.

4.2.5. **Civil Claims Based on an Act Giving Rise to Criminal Proceedings**

75. For the sake of completeness, it is necessary to mention another specific head of jurisdiction, which is related to criminal proceedings. Pursuant to Article 7(3) of the Brussels I bis Regulation, if a civil claim for damages or restitution is based on an act giving rise to criminal proceedings, the court seized of those proceedings has jurisdiction, to the extent that it can entertain civil proceedings under its own laws. This provision ensures coordination between the Brussels I regime and national laws conferring jurisdiction in civil matters upon a court seized of a criminal case arising out of the same facts. Albeit important for a basic understanding of the Brussels I system, however, this rule cannot probably serve as a specific source of inspiration for a mechanism of allocation of jurisdiction in criminal matters.

4.2.6. **Exclusive Jurisdiction**

76. In order to understand how the Brussels I system allocates jurisdiction, it is also important to acknowledge that heads of jurisdiction are organized hierarchically.

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39 Some authors have criticized the accessibility criterion, arguing that some websites are not addressed in practice at an international audience: see, for example, the ‘Geneva Internet Dispute Resolution Policies 1.0’, elaborated at the University of Geneva (<https://geneva-internet-disputes.ch/medias/2016/11/gidrp-1-0-geneva-internet-dispute-resolution-policies-final.pdf> accessed 19 January 2016). A different solution, acknowledging the relevance of the circumstance that the conduct was directed towards a specific Member State, has been adopted in C-173/11, *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG*, ECLI:EU:C:2012:642.
In some cases, the Brussels I bis Regulation provides for the exclusive jurisdiction of the courts of a particular Member State, thus ruling all other Member State courts out. In these cases, of course, hypothetical conflicts of jurisdiction are entirely impossible. This is the case, *inter alia*, with rights *in rem* in immovable property or tenancies of immovable properties: under Article 24(1) of the Brussels I bis Regulation, the courts of the Member State in which the property is located have exclusive jurisdiction. The *rationale* underlying the mechanism of exclusive jurisdiction is that, in certain cases, a Member State court is in a relation of particular proximity with the dispute and therefore must be preferred to all other Member State courts.

77. For the purposes of a comparison with criminal justice, two main lessons can be drawn from the mechanism of exclusive heads of jurisdiction. First of all, for some specific crimes, it could make sense to avoid hypothetical conflicts altogether, when it is possible to identify a particularly strong link between the case and a given State. Secondly, exclusive heads of jurisdiction influence the way the Brussels I system deals with the problem of actual conflicts of jurisdiction (i.e. parallel proceedings). In order to understand this aspect, however, it is first of all necessary to introduce the *lis pendens* mechanism and its context.

4.3. **Putting the Lis Pendens Mechanism in Context**

78. The Brussels I system (and other instruments of European civil procedure)\(^40\) resolve the problem of actual conflicts of jurisdiction through the *lis pendens* mechanism. According to Article 29 of the Brussels I bis Regulation, when proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized must of its own motion stay the proceedings, until the court

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\(^{40}\) See, e.g., Article 19 of the Brussels II bis Regulation (Regulation 2201/2003).
first seized establishes its jurisdiction. Once the jurisdiction of the court first seized is established, all other courts must decline jurisdiction in favour of that court.

79. The *lis pendens* mechanism is, essentially, a *first-come, first-served* rule. On the one hand, its automatic nature ensures a high degree of predictability of outcomes; on the other hand, however, it does not allow for a case-by-case evaluation of appropriateness. By adopting such a solution, European civil procedure rejects the flexible common law approach of *forum non conveniens*, as expressly confirmed by the case-law of the CJEU.\(^{41}\)

80. The main rationale behind the *lis pendens* rule is to be found in the principle of mutual trust, whereby all Member State courts are put on an equal footing and deemed to be equally equipped to adjudicate cases falling within their jurisdiction according to the Regulation.\(^{42}\) The reason why *lis pendens* is based on chronological priority and does not take into account any other factor is that it aims at preventing each Member State court from assessing the functioning and the efficiency of the other Member State courts. The mechanism, thus, is functional to the creation of a European judicial area governed by mutual trust.\(^{43}\)

81. It is not desirable nor, probably, possible to export the automatic *lis pendens* rule to the field of criminal justice. The main difference, in this respect, is to be found in the fact-specificity of criminal cases. In many scenarios, the opportunity to allocate jurisdiction to the courts of a given State may depend on case-specific circumstances, such as the fact that the defendant was arrested in that

\(^{41}\) C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, ECLI:EU:C:2005:120.


\(^{43}\) On the contrary, when considering conflicts of jurisdiction between a Member State court and a non-Member State court, Article 33 of the Brussels I bis Regulation introduces a discretionary mechanism, which is not in any way linked to the allocation of jurisdiction or the circulation of judgments.
State. This, however, does not entail that no lessons at all can be drawn from European civil procedure: as the above analysis demonstrates, the *lis pendens* mechanism is not the only or the main device through which conflicts of jurisdiction are resolved, but rather a particular aspect of a broader legal framework. Within the AFSJ, conflicts of jurisdiction in civil and commercial matters are avoided, first and foremost, through the enactment of uniform rules for the allocation of jurisdiction, which exclude exorbitant heads and limit superfluous overlaps. This basic rationale can surely play an important role in the field of criminal justice as well. Furthermore, as the following paragraphs will illustrate, the operation of the *lis pendens* mechanism is not without limits.

82. As already mentioned, the Brussels I system arranges heads of jurisdiction according to a hierarchical principle. In particular, exclusive heads of jurisdiction normally trump all other criteria. Exclusive jurisdiction exists, *inter alia*, when the parties have concluded a choice-of-court agreement, submitting to the jurisdiction of the courts of a given Member State to the exclusion of all other national courts. In this case, the *first come, first served* rule does not apply: if a court upon which the parties' agreement has conferred exclusive jurisdiction is seized, all other courts must stay the proceedings, even if they were seized first.⁴⁴ Once the court designated in the agreement has established jurisdiction in accordance with the agreement, all other courts must decline jurisdiction.

83. Furthermore, apart from the specific case of choice-of-court agreements, it should also be noted that the violation of the rules conferring exclusive jurisdiction upon a certain Member State court could lead to the denial of recognition and enforcement of the judgment rendered by a different national court.⁴⁵ This peculiarity has an influence on the way the *lis pendens* rule

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⁴⁴ Article 31(1) Brussels I bis Regulation.
⁴⁵ Article 45(1)(e)(ii) Brussels I bis Regulation.
operates: as clarified by the CJEU in Weber,⁴⁶ if the case is covered by an exclusive head of jurisdiction, the court second seized should not immediately stay its proceedings, but must first examine whether, by reason of a failure to take into consideration the exclusive jurisdiction, the decision of the court first seised will be recognised in the other Member States.

84. In conclusion, the *lis pendens* mechanism is best understood when put in context. Although its automatic character cannot be exported to the field of criminal justice, the basic structure of the Brussels I system is nonetheless able to inspire solutions for conflicts of jurisdiction in criminal matters.

4.4. Lessons from Conflicts of Jurisdiction in Family and Succession Matters

4.4.1. Dealing with Fact-Specificity while Safeguarding Certainty

85. As already mentioned, the reason why an automatic *first come, first served* rule cannot be transposed to criminal justice is the higher fact-specificity of criminal cases, as compared to civil and commercial litigation. There are, however, other topics falling within the broad umbrella of private law, such as family and succession matters, which are also characterized by a significant fact-specificity. In these contexts, European private international law adopts interesting solutions, from which some useful lessons can be drawn for criminal justice. Let us scrutinize them in detail.

86. In family law matters, the rules governing jurisdiction must take into account a certain degree of unpredictability, arising out of factual reasons. By way of example, in cases concerning parental responsibility, Article 8(1) of the Brussels II bis Regulation generally confers jurisdiction upon the courts of the Member State where the child is habitually resident. However, it is possible that

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the courts of another Member State are better placed to hear the case, because the child has, on the basis of a case-specific factual analysis, a particular connection with that State. In this case, Article 15 of the Regulation makes it possible for the Member State court having jurisdiction to:

a) stay the case and invite the parties to introduce a request before the court of that other Member State, or

b) request a court of the other Member State to assume jurisdiction.

87. By introducing this exceptional mechanism of referral to a court better placed to hear the case, the Brussels II bis Regulation allows for a certain flexibility, so as to balance the need for legal certainty and predictability with the desirability of taking into account fact-specific circumstances. This, however, should not be read as an espousal of the *forum non conveniens* doctrine, as the Regulation subjects the transfer of the proceedings to an overarching criterion: the best interest of the child. If the transfer is not in the best interest of the child, Article 15 cannot be used to confer jurisdiction upon a different Member State court.47 Unlike *forum non conveniens*, hence, the Brussels I Regulation identifies one clear criterion in the presence of which discretion can be exerted.

88. Another example of exceptional flexibility in European private international law is Article 6 of the Succession Regulation (Regulation 650/2012). The Regulation sets forth a set of jurisdiction rules on succession matters, but it also takes into account the fact that a person may choose as the law to govern his/her succession the law of the State whose nationality he/she possesses at the time of making the choice or at the time of death (Article 22). Article 6, then, provides that, if the law chosen by the deceased is the law of a Member State, the courts

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47 Analogously, pursuant to Article 12(1) of the Brussels II bis Regulation, the courts of a Member State exercising jurisdiction on an application for divorce, legal separation of marriage annulment also has jurisdiction in any connected matter relating to parental responsibility, if at least one spouse has parental responsibility, the jurisdiction has been accepted by the spouses and by the holders of parental responsibility, and is in the superior interests of the child (emphasis added). Along the same lines, Article 12(3) refers (for proceedings other than those referred to in paragraph 1) to the best interests of the child.
of another Member State having jurisdiction may decline to exert it, at the request of one of the parties, if the courts of the Member State whose substantive law has been chosen are better placed to rule on the succession. This possibility to decline jurisdiction, however, is subject to an evaluation of the 'practical circumstances of the succession', including the habitual residence of the parties and the location of the assets.

89. For the purposes of a comparison with criminal justice, an important principle can be drawn from the rules in question: even when it is necessary to allow for flexibility so as to take into account circumstances that cannot be foreseen in general terms, it is desirable to specify \textit{ex ante}, where possible, whether and to what extent those circumstances should play a role in conferring jurisdiction to the courts of a given State.

\textbf{4.4.2. Ordering the Criteria Progressively}

90. The rules for the allocation of jurisdiction in family and succession matters are based on the assumption that it is desirable to take into account different types of factual circumstances, but not all of them have the same importance. The criteria for the allocation of jurisdiction, therefore, are often ordered progressively. By way of example, given two factual circumstances (X and Y), jurisdiction should generally be established on the basis of X. Only if it is impossible to refer to X, circumstance Y becomes relevant and can be taken into account. Let us briefly observe how this mechanism works in practice in the Brussels II bis,\textsuperscript{48} the Maintenance\textsuperscript{49} and the Succession\textsuperscript{50} Regulations.

91. In the Brussels II bis Regulation, cases concerning parental responsibility are generally referred, under Article 8, to the jurisdiction of the courts of the

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Member State where the child is habitually resident.\textsuperscript{51} However, if the child's habitual residence cannot be established,\textsuperscript{52} the criterion of presence becomes relevant: the courts of the Member State where the child is present will have jurisdiction.

92. Article 3 of the Maintenance Regulation confers jurisdiction, alternatively, to

\begin{itemize}
    \item[a)] the court for the place where the defendant is habitually resident;
    \item[b)] the court for the place where the creditor is habitually resident;
    \item[c)] the court competent for matters concerning the status of a person; or
    \item[d)] the court competent for matters concerning parental responsibility.
\end{itemize}

93. If no Member State court has jurisdiction on the basis of the above criteria,\textsuperscript{53} Article 6 of the Regulation confers jurisdiction upon the courts of the Member State of the common nationality of the parties. Finally, if even this criterion is not applicable, it exceptionally becomes possible under Article 7 to confer jurisdiction upon the courts of a Member State with which the dispute has a sufficient connection, if proceedings cannot be reasonably brought or conducted in a third State (\textit{forum necessitatis}).

94. Under Article 4 of the Succession Regulation, the courts of the Member State where the deceased had his/her habitual residence at the time of death have jurisdiction to rule on the succession as a whole. If the habitual residence is not located in a Member State, Article 10 steps in and confers jurisdiction concerning the whole succession to the courts of a Member State where assets of the estate are located, if the deceased had the nationality of that Member State or had had his/her habitual residence there in the previous five years. If these criteria are not met, the courts of the Member State where assets are located have jurisdiction, but exclusively with respect to those assets. Finally, if

\textsuperscript{51} If the child is lawfully moved to another Member State, the conflict of jurisdiction is resolved by Article 9. The case of child abduction is addressed in Article 10 (see \textit{infra}, para. 4.4.3.).

\textsuperscript{52} And if jurisdiction cannot be determined on the basis of Article 12 (\textit{Prorogation of jurisdiction}).

\textsuperscript{53} And if it is not possible to establish jurisdiction otherwise: see Article 6.
it is impossible to establish jurisdiction according to any of the above criteria, it becomes possible to invoke the *forum necessitatis* rule of Article 11, whereby the courts of a Member State with sufficient connection may exert jurisdiction, if the case cannot be heard by the courts of a third State.

95. Apart from their technicalities, the provisions at hand seem to be relevant for the purposes of a comparison with criminal law, mainly because of their underlying rationale. In family and succession litigation, similarly to criminal justice, it may be desirable to ensure that no jurisdictional gaps exist within the AFSJ and that, eventually, it will always possible to identify one competent court. However, by arranging the criteria progressively, the rules described above also acknowledge that not all criteria are equally important: some of them can only be invoked when absolutely indispensable. Since some rules confer jurisdiction only in the cases where some other rules cannot operate, the sequential order of the different heads manages to avoid not only jurisdictional gaps, but also hypothetical conflict of jurisdiction. By exporting the same conceptual framework to criminal cases, it could be possible to take into account fact-specificity while at the same time avoiding superfluous overlaps of jurisdiction.

**4.4.3. Lawful Move and Child Abduction: Is a Comparison with Arrest Possible?**

96. One of the varying factual circumstances that are likely to play a role in an assessment of appropriateness, when allocating jurisdiction in criminal matters to a certain State court, is the fact that the defendant was arrested in that State. In principle, this is perfectly comprehensible, also because the arrest is normally a strong indicator of a particular link between the alleged crime and the territory of a given State. Conferring relevance upon this factor, however, could also entail the risk of abuses. Take the example of two States whose prosecutors have an interest in prosecuting the same crime: in theory, it would be possible
to imagine a situation where (at least) one of the two national authorities tries to obtain an arrest not because this is necessary (pursuant to the criteria of national criminal procedure), but simply in order to establish jurisdiction. Taken in its more extreme form, this scenario could lead to cases of ‘forum shopping’ in criminal matters, which should absolutely be avoided.

97. A possible solution to the problem at hand comes from the Brussels II bis Regulation. The Regulation allocates jurisdiction, *inter alia*, in matters of parental responsibility, using as a criterion the habitual residence of the child (Article 8(1)). Residence, however, is a factual criterion that could change over time, if the child is moved to a different State. In extreme cases, one of the parents could even decide to relocate in order to change the allocation of jurisdiction. The Regulation resolves this problem by setting forth two provisions: Article 9 (dealing with the case of lawful move) and Article 10 (concerning child abduction). Let us consider these rules.

98. If a child moves lawfully to another State and acquires a new habitual residence there, the courts of the State of former habitual residence retain jurisdiction for three months, for the purpose of modifying a judgment on access rights issued in that Member State before the child moved.\(^\text{54}\) Thanks to this provision, the courts of the State of former habitual residence can modify the previous access arrangements and ensure that the holder of access rights continues enjoying them effectively, without the need to commence proceedings in the State of new habitual residence.

99. The case of wrongful removal or retention of the child is even more problematic, as the change of habitual residence is triggered by an unlawful behaviour. By linking jurisdiction to the criterion of habitual residence, hence, there is an implicit risk of ‘legitimizing’ the effects of child abduction. For this reason, Article

\(^{54}\) The provision at hand applies if the holder of access rights continues to have his/her habitual residence in the State of the child’s former habitual residence, and he/she has not accepted the jurisdiction of the courts of the State of the child’s new habitual residence.
10 sets forth a special regime, whereby the courts of the Member State where the child was habitually resident retain jurisdiction for a period of one year, starting from the moment when holder of rights of custody has had or should have had knowledge of the whereabouts of the child, and the child is settled in his/her new environment. If, in the presence of these circumstances, the person/entity having rights of custody has remained inactive, the jurisdiction moves to the courts of the new State of habitual residence.

100. Transposing these rules to the realm of criminal justice, it would be desirable to implement a mechanism whereby the place of arrest, which may generally be one of the relevant criteria for the allocation of jurisdiction, cannot be taken into account in cases where the arrest seems to have been requested for the sole or main purpose of securing jurisdiction.

4.4.4. Exchange of Information: The Role of Central Authorities

101. It is finally important to stress that a system for the allocation of jurisdiction can operate in practice only if information is exchanged effectively. By way of example, actual conflicts of jurisdiction can be resolved only if the relevant mechanism is triggered: to this end, therefore, it is first of all necessary to ensure that national judicial authorities be aware of the existence of parallel proceedings pending in another State. The problem seems to be particularly relevant in the field of criminal justice, where the defendant may sometimes have an interest not to disclose the existence of proceedings being conducted in a different jurisdiction.

102. Exchange of information could be facilitated by the institution of national central authorities, entrusted with the task of assisting with the application of the rules

55 The jurisdiction of the new State of habitual residence, however, is immediately established if each person, institution or other body having rights of custody has acquiesced in the removal or retention.

56 The conditions are laid down in detail in Article 10.
aimed at resolving conflicts of jurisdiction. In this respect, inspiration could be
drawn from the Brussels II bis and the Maintenance Regulation, which specify
the tasks of central authorities respectively in Chapter IV and VII. It should
however also be noted that, if complemented by the institution of central
authorities, a mechanism for the allocation of jurisdiction in criminal matters
may entail additional costs.

5. Conclusions

103. The main argument of this Chapter has been that private international law, and
European civil procedure in particular, can offer useful inspiration towards the
establishment of a regime for the resolution of conflicts of jurisdiction in criminal
matters. The first part of the article has set the scene by highlighting some
structural differences between civil and criminal matters, which limit in some
respects the feasibility of cross-sectoral legal transplants. Subsequently, the
second part has drawn some lessons from private international law as a whole,
namely stressing the importance of predictability and substance-neutrality.
Finally, the third part has offered an overview of some relevant provisions of
European procedural law, highlighting the desirability of a uniform regime of
allocation aimed at minimizing hypothetical conflicts of jurisdiction. Parallels
between specific scenarios of civil litigation and criminal settings have also
been drawn. In light of the above analysis, it can be concluded that, despite the
many differences, many solutions adopted by private international law can be
successfully transposed to criminal proceedings too.