



**INTERIM GUIDELINES ON THE HANDLING OF CASES WHERE THE
JURISDICTION TO PROSECUTE IS SHARED WITH PROSECUTING
AUTHORITIES OVERSEAS**

**RESPONSE TO CONSULTATION ON BEHALF OF THE
CRIMINAL BAR ASSOCIATION**

Introduction

1. The Criminal Bar Association (CBA) represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.
2. This is the response of the CBA to the interim guidelines published by the Crown Prosecution Service (CPS) that are for Crown Prosecutors handling cases where more than one country or jurisdiction is investigating criminal conduct. The guidelines, which take immediate effect, formally set out the factors that are considered when deciding where criminal proceedings should be brought.

3. The publication of these interim guidelines follows the report of the Review of the UK's Extradition Arrangements by the Rt. Hon. Sir Scott Baker, which recommended that the principles followed by prosecutors should be summarised in a single document to increase transparency of the process.
4. The CPS has already consulted with ACPO, HMRC, the Metropolitan Police Service and others while drafting these guidelines. The Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland will also be applying the guidelines in cases of Concurrent Jurisdiction. The full public consultation is open until 31 January 2013.

Summary of response

5. We are of the view that, as a whole, the guidelines are clear and well drafted. However, we feel there are areas which appear to show a lack of consistency between the wording of the Framework Decision on Conflicts of Jurisdiction and these Guidelines. In addition we are concerned that, where there should be specific guidance on points of procedure and that, in some respects, the guidelines, as currently drafted, are too vague. We apprehend that this is likely to cause difficulties for those who are bound by or affected by the guidelines.

Substantive response

6. Paragraph 2 of the interim guidelines sets out what is described as a “step by step approach” to determining issues arising in cases of concurrent jurisdiction.
7. In essence, that approach is as follows:

- (i) There should be early sharing of information between prosecutors with an interest in the case;
 - (ii) Prosecutors should consult on cases and issues arising from concurrent jurisdiction;
 - (iii) In reaching a decision on whether a prosecution should take place in England and Wales, CPS prosecutors should apply the principles set out in these guidelines.
8. The guidelines suggest that, as a matter of principle, any decision on questions arising from cases where there are issues as to concurrent jurisdiction should be seen to be fair and objective. Each case should also be considered on its own facts and merits.

Sharing of information

9. In paragraph 3 of the interim guidelines, it is stated that “Where issues of concurrent jurisdiction arise, investigators and prosecutors in England and Wales should consult closely from the outset of investigations, consistent with the procedures established by the agencies.”
10. We are concerned that the procedures established by the various agencies referred to may well be very different and, potentially, inconsistent. Therefore, difficulties may arise as to the extent to which investigators and prosecutors can consult from the outset of investigations. We consider that this potential difficulty should be addressed by ensuring that the procedures established are broadly consistent with one another. At present it appears to be assumed by the CPS that all investigators and prosecutors will be bound by the same investigatory procedures which, of course, is not the case.
11. In paragraph 4 of the interim guidelines, it is stated that “Where it is possible and appropriate to share information, the information shared between investigators and prosecutors in England and Wales and the investigators and prosecutors in such other

countries as have an interest in prosecuting the case should include the facts of the case, key evidence, representations on jurisdictional issues and, as appropriate, any other consideration which will enable the prosecutors to develop a case strategy and resolve issues arising from concurrent jurisdiction.”

12. We are concerned that the phrase “where it is possible and appropriate to share information” is inherently vague and is therefore likely to create difficulties for the CPS when trying to follow the interim guidelines. We feel that the guidelines, as currently worded, allow investigators and prosecutors (whether in this jurisdiction or another) far too great a degree of latitude in deciding whether or not it is appropriate to share information. It is suggested that the final guidelines should give further guidance as to the general circumstances when it should be “possible and appropriate” to share information.
13. In paragraph 8(1) of the interim guidelines, it is stated that “a prosecution should ordinarily be brought in the jurisdiction where most of the criminality or most of the loss or harm occurred”.
14. The CBA are of the view that there should be consistency between the terminology used in these guidelines and the wording of the Framework Decision on Conflicts of Jurisdiction [2009] OJL 328/42 and Eurojust guidelines. The terms used in the latter are that a prosecution ordinarily should be brought in the jurisdiction where “*the major part of the criminality occurred*” or the place where “*the majority of*” the loss or harm occurred. If these terms are adopted, it would assist if the Guidelines could provide proper guidance as to the meaning of these terms for the purpose of practical application.
15. We are very concerned that this section of the guidelines is very vague, as no proper steer is given as to what the phrase “most” means. It is a general phrase that is

subjective and therefore likely to be interpreted differently by those deciding where a case that raises issues of concurrent jurisdiction should be prosecuted.

16. The location of the accused is included within the “other factors” under para.8(4). One of the key conclusions of the review undertaken by Rt Hon. Sir Scott Baker was the need for these guidelines to address the significance to be accorded to the residence or nationality of a suspect when making a decision to prosecute. The CBA agrees that it is important that this is properly addressed. We consider that the guidelines should be more explicit as to the weight to be added to each of the principles within the subparagraphs in para.8, and the factors within para.8(4). In addition specific reference should be made to the accused’s nationality as well as his location.

17. Paragraph 9 of the interim guidelines reads as follows:

“Decisions in cases of concurrent jurisdiction may need to be reviewed where circumstances change, but circumstances will rarely change to such an extent that a compelling case could be made for proceedings already underway in one jurisdiction to be discontinued and commenced instead in another jurisdiction.”

18. We are very concerned that the potential for changes in circumstances in cases of concurrent jurisdiction has not been addressed in sufficient detail in the interim guidelines. The potential for a change in the general circumstances of such cases is something that should be addressed with more clarity, given the fact that a change of circumstances is likely to be rare and therefore, those affected by such a change are likely to need greater guidance as to the necessary approach.

19. We are of the view that the interim guidelines should include guidance as to what the correct procedure should be for reviewing decisions in concurrent jurisdiction cases if circumstances change. We are also of the view that some guidance, even if it is

general guidance, should also be given as to the circumstances when a compelling case could properly be made for discontinuing proceedings that are already underway in one jurisdiction and commencing them instead in another jurisdiction.

Criminal Bar Association

January 2013