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# Criminal jurisdiction to prescribe and the "place of conduct" in transnational remote hearings

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## Abstract

In this contribution, I examine the problem of criminal jurisdiction to prescribe in transnational remote hearings. To address this issue, I consider the possibility of redefining the notion of the perpetrator's place of conduct, which constitutes a cornerstone of the prevailing territoriality principle. Applying theoretical and dogmatic methods, I first analyse and critically assess the current legal framework. Second, I determine which state's jurisdiction to prescribe would be most appropriate for acts committed by a person being questioned during a transnational remote hearing, taking into account the specific and conventional nature of speech. Finally, I advocate for the introduction of the necessary changes, considering the evolving understanding of the notion of "presence"—not as the place where an individual is physically located, but as the place where, through remote forms of communication, they interact with others.

## Key words

Remote hearings, criminal jurisdiction, international judicial cooperation, speech crimes

## Resumen

En esta contribución, examino el problema de la competencia penal para dictar sentencia en las audiencias transnacionales a distancia. Para abordar esta cuestión, tomo en consideración la posibilidad de redefinir el concepto de «lugar de comisión del delito», que constituye una piedra angular del principio de territorialidad vigente. Aplicando métodos teóricos y dogmáticos, analizo y evalúo críticamente, en primer lugar, el marco jurídico actual; en segundo lugar, determino qué Estado tendría la jurisdicción más adecuada para prescribir los delitos cometidos por una persona interrogada durante una audiencia transnacional a distancia, teniendo en cuenta la naturaleza específica y convencional del discurso. Por último, abogo por la introducción de los cambios necesarios, teniendo en cuenta la evolución de la concepción del concepto

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de «presencia»: no como el lugar donde se encuentra físicamente una persona, sino como el lugar donde, a través de formas de comunicación a distancia, interactúa con los demás.

### Palabras clave

Audiencias a distancia, competencia penal, cooperación judicial internacional, delitos contra la libertad de expresión

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## 1. Introduction

A form of international cooperation in criminal matters that has gained increasing prominence in recent years—particularly among the Member States of the European Union—is the possibility of conducting cross-border remote hearings of a witness or suspect, by means of a videoconference. Although this mechanism was introduced in Europe as early as 2000 in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, it came into broader practical application only during the COVID-19 pandemic when the use of various forms of remote communication became necessary to ensure the continued functioning of the judicial process. (McCann 2020, 226, Rossner 2021, 336, Ferguson 2023, 1463–1465, Mulcahy and Tsalapatanis 2024, 456) Given today's mobility and the shift of human activity from the physical to the virtual sphere, remote hearings in domestic and cross-border cases are likely to become an important component of modern justice systems. As this practice remains relatively new it warrants closer examination. Procedural literature has already identified several concerns, including potential infringements of the principle of immediacy, the adversarial nature of proceedings, and the need to preserve proper courtroom solemnity (McCann 2020, 228–229, Heinsch *et al.* 2021, 15–16, Dorneanu *et al.* 2021, 411, Povylius 2024, 29–33, Hynes 2025, 8). In the transnational context, however, an additional issue arises that has so far received little attention: the problem of jurisdiction to prescribe with regard to the conduct of witnesses or suspects giving testimony. Under which legal norms should such persons be held accountable—for example, for perjury, incitement to hatred, threats, insult, or defamation? Are the existing solutions adequate and consistent with the basic principles of criminal law, or should alternative approaches be considered?

Before further discussing this topic two clarifications are required. First, the term remote hearing can encompass situations in which all participants are in different locations and connected online, as well as cases where only certain individuals—such as a witness or suspect—participate remotely, while others are physically present together in a single location, a court or prosecution office (Rossner 2021, 338, Hynes 2024, 9-10) The following analysis will focus on the latter scenario, which currently appears to be most common and the only one regulated at the international level. Second, given the limited scope of this paper, the discussion will be based on the legal framework of the EU; however, the proposed solutions may also be applied broadly to other contexts in which participants in criminal proceedings communicate remotely.

## 2. The existing legal framework

The possibility of conducting a cross-border remote hearing in criminal matters between EU Member States is currently based primarily on Directive 2014/41/EU regarding the European Investigation Order, Regulation 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and for States that are not bound by the Directive (Denmark and Ireland), on the aforementioned Convention of 29 May 2000.[2] All these instruments are, in principle, limited to procedural aspects. Under the Convention, "the hearing shall be conducted in

[2] However, other instruments of criminal cooperation also allow cross-border hearings, for example in European Arrest Warrant or mutual recognition proceedings.

accordance with the law of the requesting Party, provided that this does not infringe the fundamental principles of law of the requested State." Similarly, the Regulation, provides that the procedure for conducting a hearing by means of videoconferencing is governed by the national law of the requesting Member State. According to the Directive the executing State shall ensure the execution of the EIO "in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State." Furthermore, under both the Convention and the Directive, a witness is entitled to refuse to testify where such a right exists under the law of any of the States involved.

With regard to substantive criminal law, the Convention and the Directive address jurisdiction to prescribe only in a very limited sense. They provide that if a witness refuses to testify when obliged to do so, or gives false testimony, the national law of the requested state applies. They do not offer a general solution for other offences that might be committed during a hearing.

In the absence of any other specific rules in this area, it is therefore necessary to refer to the general principles that define the scope of each state's jurisdiction in criminal matters. Unlike civil law, criminal law lacks international agreements or cross-border regulations that explicitly determine the competent jurisdiction. This is governed solely by each state's domestic legislation, which determines on its own under what circumstances it asserts *ius puniendi*.[3] However, this does not necessarily imply complete discretion (Oehler 1973, 123-125, Ryngaert 2015, 29-30). Domestic solutions are based on jurisdictional principles commonly recognized in international law. The fundamental principle is thereby the territoriality principle, which applies unconditionally and provides the strongest basis for asserting jurisdiction. Unlike other jurisdictional rules, it is not bound to additional requirements such as double criminality or the nationality of the perpetrator (Oehler 1973, 132-133, Ryngaert 2017, 53–56, Svantesson 2017, 13–15). Under this principle, a state applies its criminal law to acts committed within its territory. The place of commission is, at least in European legal systems, interpreted broadly: it includes not only where the perpetrator was physically present when performing the act, but also where its effects occurred, provided those effects are constitutive elements of the given crime (Oehler 1973, 209-228, Ryngahert 2009, 187-189, 197-202, Sieber *et al.* 2017, 13-132, 156-157, 187-188, 206, Hörnle J., 2021, 84, 92). This solution refers to a distinction commonly drawn in criminal law, between offenses that are completed regardless of any effect—so-called conduct (or formal) crimes, and offenses that require the occurrence of a specific harmful effect, the so-called effect (or material) crimes (Geary 2002, 10, Roe 2005, 16, Hörnle, J. 2021, 136-137, Dyson and Meyer 2022, 25). In the case of the former, the place of commission is limited to the location of the perpetrator's conduct. In the case of the latter, the place of commission also includes the location where the result occurs, even if it is in a different state from that in which the perpetrator was situated.

The application of the principle of territoriality to transnational online hearings will therefore produce different outcomes depending on whether the behaviour in question is classified as a conduct crime or an effect crime. In this regard various states obviously

[3] It should be noted that in criminal law, the state with jurisdiction to prescribe also holds the jurisdiction to adjudicate.

adopt various solutions. Firm conclusions would require comprehensive comparative legal research; however, it can reasonably be assumed that there is no unity across European legal systems as to whether a given offense is as a conduct or an effect crime (Decroos 2005, 378–379, Ryngaert 2009). As an example: insult is punishable as a conduct crime under Polish law (Demenko 2021, 137-138), whereas in German law it seems to be now classified as an effect crime (Erb and Schäfer 2025, § 185). In both systems, however, defamation is treated as a conduct crime (Demenko 2021, 79, Erb and Schäfer 2025, § 186).

Consequently, a person testifying in a cross-border remote hearing is always subject to the criminal law of the requested state, as it is the place where they are physically present. Whereas the applicability of the requesting state's laws depends on its domestic regulations and the offense's legal classification within its national legal system.

## 3. Evaluation of the existing solutions.

Can such a solution be considered satisfactory? Clearly not, just as the regulation concerning jurisdiction in cases of perjury can hardly be regarded as adequate, for two fundamental reasons.

First, neither the provisions on perjury nor the general application of the territoriality principle prevents undesirable jurisdictional conflicts. Granting the requested state the authority to punish perjury does not automatically deprive the requesting state of that authority, which it retains if it classifies the act as an effect crime. Similarly, under a broad application of the territoriality principle, in the case of other offences, if the conduct produces a constituent effect in the requesting state, the perpetrator may face multiple proceedings. This creates a clearly disadvantageous situation, both in terms of procedural efficiency and with regard to the rights of the individual, particularly the right to an effective defence (Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, COM (2023) 185 final, 1, Zimmermann 2015, Ambos 2019, 148, Thorhauer 2019). Therefore, even though no mechanism has yet been developed in the EU to prevent jurisdictional overlaps, efforts should be made to eliminate them in the development of new criminal law solutions.

Second—and most importantly—at the individual level, neither the application of the Directive or Convention nor the principle of territoriality provides the person concerned with certainty as to which law will govern the assessment of their conduct. It is unrealistic to expect that an individual will have detailed knowledge of the substantive criminal law of the state conducting the main proceedings, sufficient to determine whether a given act is classified there as a conduct or effect crime. Unlike a situation in which a person physically enters the territory of a state and can reasonably expect to be subject to its laws, remote hearings offer no such clarity. Such situation may be regarded as inconsistent with the fundamental for criminal responsibility principle of culpability and the requirement for predictability of applicable norms and potential penalties (Duff 2020, 314, 321, Simester 2021, 11, Herring 2021, 31, Demenko 2024, 248-251, Ozaki 2025, 9–10, ECtHR: *Camilleri v. Malta*, Appl. no. 42931/10, Judgement of 22 January 2013).

The uncertainty could be mitigated by requiring the authorities to inform the witness which acts they may be held accountable for under which law. However, such a measure would be rather complex. It would demand that authorities either anticipate all potential behaviors of a witness or provide guidance covering a substantial portion of the criminal code. Further complications arise when the character of a particular act is disputed in the jurisprudence and case law of the requesting state, as sometimes occurs.

To simplify the matter and prevent jurisdictional conflicts, it would be desirable to establish a unified approach, independent of national variations, and to introduce a general rule granting the authority to impose penalties to a single state, regardless of how the act is classified under national legal systems.

## 4. Which cooperating state should have the *ius puniendi*?

When determining the appropriate jurisdiction for assessing the conduct of the person being questioned in a transnational online hearing, we should begin with the fundamental premise that the primary function of criminal law is protection. A state exercises its *ius puniendi* to safeguard certain values, particular interests of individuals connected to that state, or general interests of the state's community (Hörnle 2004, 169–176, Duff 2020, 19–26, Ozaki 2025, 11, 16, Coca-Vila 2025, 53–59). If such interests are not affected, the state's use of coercion lacks justification. Therefore, there must be not merely any link, but a substantial link between the act, its consequences, and the state asserting jurisdiction (Ryngaert 2015, 79–80, Svantesson 2017, 62–63).

Furthermore, it is necessary to draw a distinction between two types of conduct for which the applicable legal solutions may differ: namely, speech and physical or natural behavior. This distinction corresponds to the category of speech-related offenses sometimes recognized in criminal law and to the special status accorded to freedom of expression in various international human rights instruments (Greenawalt 1992, Fuhr 2001, Demenko 2025, Article 10 of ECHR; Article 19 of the Universal Declaration of Human Rights).

A detailed analysis of what constitutes speech would go far beyond the scope of this paper, particularly given the absence of universally accepted definitions in legal scholarship, linguistics, or philosophy. However, it can be stated with little doubt that speech is a conventional act (Searle 1970, 37, 45, Austin 1984, 107, 116, Sbisà 2009, 44–45, Collier 2009, 109, 117). Determining that speech has occurred, and that it conveys a specific meaning, requires reference to certain conventions in force at the relevant moment—above all linguistic and cultural conventions. A person's natural behavior becomes speech through the application of context-dependent interpretative rules, which allow us to recognise that for example, someone is not merely waving a hand, but greeting another person (Fish 1980, 332–333, Demenko 2025). Furthermore, conduct that qualifies as speech inherently involves an intention to communicate (Searle 1970, 43, 45, Grice 1989, 92). The speaker behaves in a particular way because they intend their conduct to be understood as conveying their broadly conceived—whether genuine or fictional—inner experiences, attitudes, thoughts, or emotions. Their action is therefore not merely indicative—every human action may indicate something and, according to Gricean terminology, has a natural meaning—but rather expressive, possessing a nonnatural meaning and deliberately intended to communicate a specific content (Grice 1989, 291-294, Demenko 2025).[4]

Natural behavior, by contrast, is also shaped by interpretative processes under the constructivist assumption that reality does not exist independently but is socially constructed (Fish 1980, 270–272, 331). The difference, however, lies in the nature of the interpretative rules applied: in the case of natural behavior, these rules are largely universal, shared, and relatively stable. A nod of the head in an up-and-down motion will consistently be perceived as such, but whether it is interpreted as meaning 'no' (in Bulgaria) or 'yes' (in the rest of Europe) depends on the conventions in force within a particular community bound by certain interpretive rules (Fish 1980, 276–292, 303-320; 1994, 108; Demenko 2025). Moreover, natural behavior is not performed with the intention to express something, but rather to bring about a concrete change in the external world.

Both through natural behavior and speech we "do things", but in different ways. Consequently, the sources of their potential harmfulness also differ. Natural behavior may be harmful primarily because of the tangible changes it produces in the external world, and the connection between a given action and its harmful effects can, in principle, be determined based on the physical laws we understand. The spatial reach of a person's natural behavior is usually quite limited—particularly in the context of the transnational hearings under discussion. A natural behavior of a witness or suspects is likely to produce consequences—negative ones included—primarily within their immediate physical surroundings in the requested state. Therefore, in such cases it is reasonable to grant jurisdiction to that state, as the territorially competent Applying that state's law is predictable for the individual and serves to protect interests tied to that state, individual interests or general, at least such as the maintenance of public order.

The situation is however different when it comes to speech performed during a transnational hearing. Here, we face a long-standing issue of the law applicable for transnational online expression, for which no universally accepted solution has yet been established (Decroos 2005, Kohl 2007, Meehan 2008, Svantesson 2015, 2017, Hörnle J. 2021, Svantesson and Symeonides 2023). In the specific context of a remote hearing, however, the problem is considerably simpler, as essentially only two jurisdictions are involved.

When choosing the appropriate one, we must first consider how speech can produce harmful effects, thereby activating the protective function of criminal law.

The intentional expression by a perpetrator of certain broadly conceived inner experiences can cause harm in two basic ways. First, directly, through "words that wound," causing psychological or emotional harm, as in the case of insults or threats. Second, indirectly: by expressing certain inner thoughts, the speaker may influence the attitudes, beliefs, or knowledge of others and thereby affect their behavior in a negative

[4] Similarly, the conditions for recognizing expressive acts in U.S. and European case law aligne. In *Spence v. Washington*, 418 U.S. 405 (1974), the U.S. Supreme Court held that protection depends on 'an intent to convey a particularized message' and the likelihood that the message would be understood by observers. In a comparable reasoning, the ECtHR in *Murat Vural v. Turkey* (Appl. no. 9540/07) emphasized that assessment must consider both the expressive character of the act from an objective perspective and the purpose or intention of the person performing it.

way, as in cases of incitement to hatred or perjury (Demenko 2025). Crucially, for such effects to arise, the conduct must first be recognized as conveying specific meaning, rather than being perceived merely as natural behavior. What makes in this case the conduct harmful is not how the perpetrator behaved, but what, according to the interpretative rules in force at the time, the perpetrator is recognized as having expressed. In making this assessment, the conventions that must be taken into account are those shared between the speaker and the intended recipients at a given moment. One cannot rely on the interpretations of bystanders who are not part of the exchange (Demenko 2025). When a speaker addresses a specific person or group, they rely on the conventions familiar to those recipients—particularly the language they understand—to ensure that their message is comprehended. Accordingly, it is reasonable, in broad terms, to attribute to the speaker the expression of the content as understood according to the interpretative rules binding the recipients, rather than based on the understanding of third parties.[5]

In a transnational hearing, the authorities of the requesting state and other participants present there will, in most cases, be the direct recipients of the witness's or suspect's speech, even if this speech may indirectly reach individuals in the requested state. Accordingly, for the purposes of legal assessment, what is relevant is how the conduct is interpreted by those in the requesting state. They are ultimately the ones able to apply the appropriate conventions to interpret its content and, consequently, the ones who can be influenced by the speech. Referring to speech-act theory, what matters is the illocutionary and perlocutionary effect the speech produces for the participants in the requesting state—whether a particular expression is perceived as hateful, insulting, or neutral.

Therefore, given the protective role of criminal law and the need for a substantial jurisdictional link, the requesting state has a far greater interest than the requested state in applying its criminal law to speech acts committed by the witness or suspect within the hearing. Regardless of whether these acts are classified as a conduct or effect crimes, it is within the requesting state that they produce consequences directly attributable to the perpetrator.

Adopting a different solution in the 2000 Convention regarding perjury, which attributes competence to the requested state, was justified on the grounds that the obligation to testify at a remote hearing arises under the law of the requested Member State. Accordingly, in cases of non-compliance, the individual should face consequences comparable to those in a purely domestic context. However, this reasoning is unconvincing. The mere existence of an obligation to testify under the law of the requested state does not, by itself, create an independent interest for that state in obtaining the testimony. Its interest is derived from the general duty to cooperate with other countries in criminal matters. The requesting state has a far stronger and genuine stake in ensuring that the testimony is reliable, both to safeguard the proper functioning of its justice system and to protect the rights of individuals whose cases depend on it.

[5] What meanings should be relied upon, if the recipients are not personalized or do not share the same interpretations, see: Demenko 2025.

Beyond these substantive considerations, granting the requested state the competence to prosecute a perpetrator for perjury or other punishable speech during a remote hearing also appears impractical in terms of procedural efficiency. In most cases, it is the requesting state which already possesses the evidence or additional sources necessary to determine whether the witness has committed a crime. For the requested state to acquire this evidence would require proper evidence gathering, transmission, and translation, with a risk that crucial details could be lost in the process.

## 5. How can it be changed?

As outlined above, contrary to what the existing legal framework provides, the requesting state should have exclusive competence to prosecute speech offences committed by a witness or suspect testifying in a transnational remote hearing. The most effective way to introduce a necessary change, enhancing legal certainty and clarity, would be through legislative reform, for example, via intervention by the EU legislator, establishing a uniform solution for hearings conducted under Directive 2014/41/EU. This solution could then serve as a model for analogous situations not directly covered by the Directive. However, given that the EU's competence to establish rules in this area, for example, under Article 82(1)(b) TFEU, is questionable, and in light of the typically lengthy legislative process, rapid changes should not be expected.

Therefore, it is necessary to consider an alternative approach, which seems a reasonable and feasible solution—namely, redefining the concepts of the perpetrator's place of presence and place of conduct in the context of online activities in jurisprudence and legal scholarship. Traditionally, from a spatial perspective, the place of presence and conduct has been understood as the physical space in which the individual is located, and it was long considered obvious that a person cannot be in two places at once (Szigeti 2017, 373). This assumption, however, now appears to be losing its validity. For acts carried out via the Internet, new concepts such as 'digital attendance' or 'mediated co-presence' (Flower 2025, 10, 60) have been introduced, which appear more appropriate from the perspective of legal assessment. A person testifying online is physically present in the requested state, but they are also—and more importantly—effectively present in the room from which the hearing is conducted in the requesting state. It is there that their conduct transforms from natural behavior into speech with specific content through the application of relevant interpretive strategies (Demenko 2025). It is there that they engage in social interactions with other participants which are relevant. The aim of the online connection is to bring them into the room where the main proceedings are taking place (Hynes 2025, 6, who refers to this as 'spatial stretching'). They may be physically located in the requested state, but they are effectively present, acting and speaking with others in the requesting state. A detailed discussion of what constitutes 'presence' and how it may be interpreted in different contexts falls beyond the scope of this paper. Nevertheless, given that legal concepts are frequently teleologically redefined, and that in everyday language the notion of presence acquires new meanings in an online environment, it is reasonable—for the purposes of evaluating the communication between the witness or suspect and the participants in the requesting state during the remote hearing—to consider the place of conduct not as the physical location of the perpetrator, but as the location of their 'digital presence. Such an approach would be consistent both with the fundamental principles of criminal law and with the primacy of the literal method of interpretation in criminal law, which requires that legal provisions be interpreted strictly according to their wording, without going beyond the linguistic meaning of the terms used. It would also align with a teleological perspective, which considers the purpose of granting jurisdiction to the state with a substantial link to the case. Moreover, it would allow to preserve the principle of territoriality as the basis for determining jurisdiction, without introducing additional or novel jurisdictional links.

## 6. Conclusion

The problem of substantively justified criminal jurisdiction to prescribe over the conduct of participants in a transnational remote hearing, particularly the testifying person whose behaviour has a direct cross-border impact, has neither been addressed in legislation nor examined in the literature. Given that the principle of territoriality, as it is currently applied, does not produce satisfactory results in this context, new solutions are required. To minimise jurisdictional conflicts and ensure the predictability of the law, the ius puniendi should rest with a single state. Now, given the protective function of criminal law and the nature of speech, this authority should lie with the requesting state. To safeguard such a solution, legislative intervention would be desirable; however, it is unlikely in the near future. Therefore, alternative approaches must be explored, one of which would be the redefinition of the "place of conduct" in case law and legal scholarship, taking into account the emerging notion of "digital presence." While such a reinterpretation would not resolve all issues—particularly the risk of parallel proceedings—it would at least allow the courts of the requesting state to assert jurisdiction when substantively justified, irrespective of how a given act is classified in its national legislation and without resulting in an impermissibly expansive interpretation of criminal law norms.

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