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To:	Delegations
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Subject:	Council conclusions 'The European arrest warrant and extradition procedures - current challenges and the way forward' - Text as agreed at technical level

Delegations will find attached the above-mentioned draft conclusions as they were agreed among Member States during informal discussions of the members of the COPEN Working Party.

ANNEX

Council conclusions

'The European arrest warrant and extradition procedures - current challenges and the way forward'

THE COUNCIL HAS ADOPTED THE FOLLOWING CONCLUSIONS:

1. The key priority of the Strategic Agenda 2019-2024, adopted by the European Council on 20 June 2019, is protecting citizens and freedoms. Europe must be a place where people feel free and safe. To this end, the fight against terrorism and cross-border crime must be expanded and strengthened. Cooperation in criminal matters and the exchange of information should reflect these ambitions and the application of common instruments must be further improved and developed.

2. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, EAW Framework Decision)[1], which is the key instrument of judicial cooperation in criminal matters, has simplified and accelerated cooperation between Member States. It continues to make an essential contribution to meeting the Union's objective of providing its citizens with an area of freedom, security and justice.

[1] OJ L 190, 18.7.2002, p. 1.

3. Discussions on how to further improve judicial cooperation in criminal matters have been held on various occasions. During this process, certain areas have emerged in which the effectiveness of the EAW surrender mechanism could be further increased. Thus, in 2018, during the Austrian Presidency, the Council adopted conclusions on mutual recognition in criminal matters, entitled 'Promoting mutual recognition by enhancing mutual trust'[2]. In 2019, the Romanian Presidency issued a report entitled 'The way forward in the field of mutual recognition of judicial decisions in criminal matters'[3]. The Commission's latest implementation report of 2 July 2020[4], the ongoing ninth round of mutual evaluations in the Council[5], the draft implementation report of the European Parliament's LIBE Committee of 4 September[6] and the virtual conference held on 24 September 2020 in the context of the German Presidency[7] have given the discussions on the future of the EAW new impetus.

4. 13 June 2022 will be the 20th anniversary of the adoption of the EAW Framework Decision. Member States, the Commission, the European Union Agency for Fundamental Rights (FRA), Eurojust, the European Judicial Network (EJN) and practitioners working on a daily basis on surrender proceedings should strive to find and implement solutions for current challenges in the application of the Framework Decision to celebrate that anniversary.

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2 OJ C 449, 13.12.2018, p. 6.
3 9728/19.
4 COM(2020) 270 final.
5 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty, see 6333/19 for the scope of the evaluation.
6 Draft report on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), 4 September 2020; EPRS, European Implementation Assessment on the European Arrest Warrant, PE 642.839, June 2020.
7 See Presidency paper 11419/20.

5. The Council agrees that there is scope for improvement in the following areas:

   A. Improving national transposition and the practical application of the EAW Framework Decision,

   B. Supporting executing authorities in dealing with fundamental rights evaluations,

   C. Addressing certain aspects of the procedure in the issuing and in the executing Member State,

   D. Handling requests to extradite EU citizens to third countries,

   E. Strengthening EAW surrender procedures in times of crisis.

A. Improving the national transposition and practical application of the EAW Framework Decision

6. The efficiency and effectiveness of the EAW Framework Decision depend mainly on national legislation transposing the requirements of EU law in full. Despite the considerable efforts already made, there is still room for improvement, in particular in view of the evolving case law of the Court of Justice of the European Union (CJEU).

7. The Council calls on the Member States to ensure the correct transposition of the EAW Framework Decision, taking due account of the case law of the CJEU and the recommendations resulting from the fourth and ongoing ninth rounds of mutual evaluations[8], as well as from the Commission's implementation reports of 24 January 2006, 11 July 2007, 11 April 2011 and 2 July 20209. It should be noted that the Commission has started infringement procedures under Article 258 TFEU and, where necessary, will continue initiating such proceedings in the near future.

[8] See final report 8302/4/09 REV 4 and 6333/19.
[9] COM(2006)8 final, COM(2007)407 final, COM(2011)175 final, COM(2020)270 final.

8. The Handbook on how to issue and execute a European arrest warrant[10], last updated in 2017, has proven to be a valuable tool for practitioners. In view of the developments that have taken place in the meantime, in particular with regard to the large number of judgments by the CJEU, the Council invites the Commission to update the Handbook in the near future.

9. The Member States are encouraged to make it easier for practitioners to apply and interpret the national legislation implementing the EAW Framework Decision by laying down non-binding guidelines for the application of the EAW. Such guidelines, which should take into account and be compatible with the EAW Handbook, could assist issuing judicial authorities, in particular as regards the verification of whether the conditions for issuing an EAW are met and whether the principle of proportionality is observed.

10. The Eurojust overview 'Case law by the Court of Justice of the EU on the EAW', last updated in March 2020, has proven to be a useful tool for practitioners. The Council invites Eurojust to update this overview as appropriate, as frequently as possible, and to continue making it electronically available in an appropriate form.

11. The Council encourages the Member States, the Commission and the European Judicial Training Network in their efforts to support and increase continuous training for practitioners involved in EAW surrender procedures and to further promote the exchange of views between practitioners from different Member States. Direct contact between practitioners in different Member States enhances mutual trust and thereby contributes to a better application of the EAW Framework Decision. Possibilities for hosting specific training events for practitioners from two or more Member States with a high mutual caseload should be further explored in order to promote mutual understanding.

[10] OJ C 335, 6.10.2017, p. 1.

12. Eurojust and the European Judicial Network (EJN) play a key role in the practical application of the EAW Framework Decision, as highlighted during the COVID-19 pandemic. The Council encourages Eurojust and the EJN to continue their valuable work and to intensify their efforts both to further improve information exchange, coordination and cooperation between national judicial authorities and to provide the best possible support for cooperation with the European Public Prosecutor's Office (EPPO).

13. In order to further improve the application of the EAW Framework Decision, a centralised portal at Union level should be provided where all relevant information that could make it easier for practitioners to use the EAW is collected and continuously updated. To that end, the EJN, in consultation with the Commission, Eurojust and other relevant stakeholders, is invited to explore the options for expanding and further improving the EJN website, which already provides a broad range of information on the EAW and is therefore a good basis in that regard.

B. Supporting executing authorities in dealing with fundamental rights evaluations

14. The system put in place by the EAW Framework Decision is based on the principle of mutual recognition (recital 6, Article 82(1) TFEU); while execution of the EAW constitutes the rule (Article 1(2)), refusal to execute is the exception. Such refusal, which could increase the risk of impunity and undermine security of citizens and protection of victims, can, in principle, only be envisaged in the circumstances set out in Articles 3, 4 and 4a of the Framework Decision. Although the Framework Decision does not stipulate a ground for refusal in the case of imminent violations of fundamental rights, it does not have the effect of modifying Member States' obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 TEU and in the Charter of Fundamental Rights (Article 1(3), recitals 12 and 13).

15. The CJEU has acknowledged that the executing judicial authority may, in exceptional circumstances and subject to certain conditions, refuse to execute an EAW where there is a real risk that the surrender of the person concerned could lead to inhuman or degrading treatment within the meaning of Article 4 of the Charter[11], owing to the detention conditions in the issuing State, or to a violation of the fundamental right to a fair trial enshrined in Article 47(2) of the Charter[12], due to concerns about the independence of the judiciary in the issuing State. Practitioners have thus been given the challenging task of resolving the tension between mutual recognition and the protection of fundamental rights on a case-by-case basis.

Protection from inhuman or degrading treatment

16. The prohibition of inhuman or degrading treatment or punishment, laid down in Article 4 of the Charter, is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter and one of the fundamental values of the Union and its Member States as set out in Article 2 TEU.[13]

17. The Council emphasises that the challenges relating to detention conditions in the issuing Member State must be addressed in that Member State, and with regard to all detained persons. It highlights the fact that minimum standards and benchmarks on detention conditions, including on pre-trial detention, already exist in the form of recognised soft-law instruments, in particular the Council of Europe's 'European Prison Rules'[14]. The Council encourages Member States to take the measures necessary to ensure compliance with these instruments.

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11 CJEU, 5 April 2016, C-404/15, Aranyosi and Caldararu; CJEU, 25 July 2018, C-220/18 PPU; CJEU, 15 October 2019, C-128/18, Dorobantu.

12 CJEU, 25 July 2018, C-216/18 PPU, LM. See the pending proceedings in joined cases C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie e.a.

13 CJEU, 5 April 2016, C-404/15, Aranyosi and Caldararu, paras. 85, 87.

14 Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules.

18. The Council underlines the importance of providing practitioners with the necessary support and information to carry out the two-step assessment as set out by the CJEU.[15] Practitioners must have access to objective, reliable, specific and properly updated information in order to assess, as a first step, whether there are deficiencies with respect to the detention conditions in the issuing Member State, which may be systemic or generalised, which may affect certain groups of people, or which may affect certain places of detention. For the second step of assessment, practitioners must, pursuant to Article 15(2) of the EAW Framework Decision, receive all necessary information on the conditions in which it is actually intended that the individual concerned will be detained in the issuing Member State, in order to assess whether there are substantial grounds for believing that, if surrendered, that person would run a real risk of being subject to inhuman or degrading treatment.

19. The Council welcomes the fact that, in order to improve access to the information necessary, the European Union Agency for Fundamental Rights (FRA) launched the criminal detention database in 2019, bringing together in one place information from 2015 to 2019 on detention conditions in all EU Member States. The FRA is invited to regularly update this database in order to ensure that the information provided meets the requirements set out by the CJEU and, in the medium term, to assess whether the database meets the needs encountered in practice.

20. The Council invites the Commission, when updating the EAW Handbook, to place particular emphasis on providing guidance for practitioners on how to deal with the question of detention conditions, taking into account the results of the ongoing ninth round of mutual evaluations. In this context, the Commission should also consider the advisability of developing practical solutions, such as a template for requesting supplementary information pursuant to Article 15(2) of the EAW Framework Decision.

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15 CJEU, 5 April 2016, C-404/15, Aranyosi and Caldararu; CJEU, 25 July 2018, C-220/18 PPU, paras. 88-94; CJEU, 15 October 2019, C-128/18, Dorobantu, paras. 52-55.

Safeguarding the right to a fair trial

21. The right to a fair trial, as laid down in Article 47(2) of the Charter, is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[16]

22. The Council reminds Member States of their responsibility to ensure respect for the rule of law in the EU and to safeguard the right to a fair trial and, in particular, access to an independent and impartial tribunal. Member States must take the measures necessary to remedy deficiencies in order to strengthen mutual trust and to avoid the risk of a politicisation of cooperation in criminal matters. The Council calls on the Commission to make use of its function as guardian of the Treaties in this respect.

23. The Council underlines the importance of providing practitioners with the necessary support and information to carry out the two-step assessment required in cases of an alleged risk of breach of Article 47(2) of the Charter as set out by the CJEU[17]. Practitioners must have access to objective, reliable, specific and properly updated material, in order to assess, as a first step, whether there is a real risk, connected with a lack of independence of the courts in the issuing Member State owing to systemic or generalised deficiencies, of the fundamental right to a fair trial being breached. For the second step, practitioners must receive, pursuant to Article 15(2) of the EAW Framework Decision, all necessary information to assess whether there are substantial grounds for believing that the person concerned will run such a risk if he or she is surrendered, having regard to the personal situation of that person, as well as to the nature of the offence and the factual context that form the basis of the EAW.

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16 CJEU, 25 July 2018, C-216/18 PPU, LM, para. 48.

17 CJEU, 25 July 2018, C-216/18 PPU, LM, paras. 61, 68, 79.

24. The Council invites the Commission, when updating the EAW Handbook, to provide guidance for practitioners on how to deal with cases of alleged risk of breach of Article 47(2) of the Charter and, in consultation with the FRA, to consider ways to improve practitioners' access to information and to the sources of information to which practitioners may refer, taking into account the criteria set out by the CJEU.

Assurances

25. In accordance with Article 15(2) of the EAW Framework Decision and the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, the executing authority may request supplementary information and the issuing authority may give assurances that the person concerned, if surrendered, will not suffer a violation of his or her fundamental rights.[18]

26. The Council underlines that the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on those assurances, at least in the absence of any specific indications to the contrary.[19]

[18] CJEU, 25 July 2018, C- 220/18 PPU, ML, paras. 108-110.
[19] CJEU, 25 July 2018, C- 220/18 PPU, ML, para. 112.

C. Addressing certain aspects of the procedure in the issuing and in the executing Member State

Strengthening procedural rights in EAW proceedings

27. Considerable progress has already been made with respect to the procedural rights of suspected or accused persons in criminal proceedings. In implementing the Roadmap for strengthening procedural rights[20] as part of the Stockholm Programme[21], common minimum requirements for criminal proceedings were established by Directive 2010/64/EU (right to interpretation and translation), Directive 2012/13/EU (right to information), Directive 2013/48/EU (right of access to a lawyer), Directive (EU) 2016/343 (presumption of innocence, right to be present at the trial), Directive (EU) 2016/800 (procedural safeguards for children), and Directive (EU) 2016/1919 (legal aid).

28. The Commission's implementation reports, published on 18 December 2018 with respect to Directives 2010/64/EU[22] and 2012/13/EU[23], and on 27 September 2019 with respect to Directive 2013/48/EU[24], show a clear need for improvement in the transposition of these Directives. The Council calls on the Member States concerned to remedy the shortcomings identified in the implementation reports and to ensure full and correct implementation of the Directives. It should be noted that the Commission has started infringement procedures under Article 258 TFEU and, where necessary, will continue to initiate such procedures in the near future.

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20 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceeding, OJ C 295, 4.12.2009, pp. 1–3.

21 The Stockholm Programme — An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, pp. 1-38.

22 COM(2018) 857 final.

23 COM(2018) 858 final.

24 COM(2019) 560 final.

29. The Council emphasises the need to assess the practical effectiveness of procedural rights in proceedings in the issuing and executing Member States under the EAW Framework Decision. The report published by the FRA on 27 September 2019 ('Rights in practice: access to a lawyer and procedural rights in criminal and EAW proceedings'), which covers the situation in eight Member States, is a valuable contribution in this regard. The Council invites the FRA to consider the possibility of continuing the study, extending it to all Member States and putting a special emphasis on the experiences of lawyers acting in surrender proceedings until 2022.

Translations

30. The Council recalls that an EAW must be translated into one of the official or accepted languages of the executing Member State and stresses that an adequate translation is essential for the effective functioning of EAW surrender procedures.

31. The Council invites Member States to consider, with regard to the translation of the EAW, whether they could make greater use than at present of the possibility provided for in Article 8(2) of the EAW Framework Decision, to accept a translation in one or more other official languages of the European Union, in order to simplify and accelerate the procedure.

Transfer of proceedings and conflicts of jurisdiction

32. In order to avoid impunity in a Europe without borders, for example when the execution of an EAW is refused, when there is a conflict of jurisdiction, or in case of parallel proceedings in two or more Member States in relation to the same facts, the question arises, inter alia, of how proceedings can be transferred effectively and how conflicts of jurisdiction can be resolved.

33. The Council Framework Decision of 30 November 2009 on prevention and settlement of conflicts of jurisdiction in criminal proceedings (2009/948/JHA)[25] aims to prevent parallel proceedings in respect of the same facts and infringements of the principle of '*ne bis in idem*', but is limited to establishing provisions on the exchange of information and direct consultations between the competent authorities of the Member States. As is underlined by the Report on 'Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction' of 16 February 2018, difficulties remain, in particular in complex cases and those relating to negative conflicts of jurisdiction.

34. There is currently no common legal framework for the transfer of criminal proceedings between Member States. Only 13 Member States have ratified the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972. The other Member States rely on the use of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, in conjunction with the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, or on bilateral agreements or informal cooperation.

35. In the past, despite considerable efforts, in particular the initiative of 16 Member States for a Council Framework Decision on transfer of proceedings in criminal matters in 2009[26], no consensus regarding an EU instrument could be reached. However, as is highlighted in Eurojust's report of 16 February 2018 and the conclusions on the 52nd Plenary meeting of the EJN in 2019[27], practitioners continue to face legal and practical challenges as a result and therefore tend to support the creation of an EU instrument.

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25 OJ L 328, 15.12.2009, pp. 42-47.
26 OJ C 219, 12.9.2009, pp. 7-17.
27 14501/19.

36. Common rules between Member States on the transfer of proceedings and conflicts of jurisdiction could, in principle, be an important contribution to the fight against cross-border crime by increasing the efficiency of criminal proceedings and improving the proper administration of justice within the area of freedom, security and justice.

37. In its report 'The way forward in the field of mutual recognition of judicial decisions in criminal matters',[28] the Romanian Presidency suggested further exploration of the need to launch a legislative proposal on the transfer of proceedings in criminal matters in a broader context, including assessment of the provisions of Framework Decision 2009/948/JHA on conflicts of jurisdiction. In the light of this report, the Commission financed an academic study on the transfer of proceedings in criminal matters, which will be finalised in the second half of 2021.

38. The Council invites the Commission, as soon as the outcome of the study is available, to discuss with the Member States, Eurojust and the EJN whether a new proposal for an EU instrument on the transfer of proceedings in criminal matters is feasible and would present an added value. In the affirmative, the Commission is invited to prepare an impact assessment and, where appropriate, a legislative proposal.

Promoting alternatives to detention and to the use of an EAW

39. The Council encourages Member States to explore the opportunities to enhance, where appropriate, the use of non-custodial sanctions and measures, as set out in the Council conclusions adopted during the Finnish Presidency regarding the use of non-custodial sanctions and measures in the field of criminal justice.[29]

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28 9728/19.

29 OJ C 422, 16.12.2019, p. 9.

40. When considering the consequences that the execution of an EAW will have on the requested person's liberty, the issuing authority must determine whether, in the light of the particular circumstances of each case, it is proportionate to issue an EAW. This assessment includes, in particular, the question of whether the EAW is the most appropriate instrument or whether other judicial cooperation measures could be used instead (e.g. European investigation orders, European supervision orders, transfer of prisoners).

41. The Council invites the Commission and the Member States to consider whether there is a need to strengthen the use of other judicial cooperation measures, taking into account the results of the ongoing ninth round of mutual evaluations.

D. Handling requests to extradite EU citizens to third countries

42. The Council recalls the exchange on the state of play regarding the handling of extradition requests from third countries concerning EU citizens who are not nationals of the requested Member State at the informal video conference of justice ministers on 4 June 2020.

43. Following the judgments of the CJEU in the *Petruhhin case* and several subsequent rulings[30], in handling such requests Member States are faced with two obligations: on the one hand, the duty to fulfil existing obligations under international law and to combat the risk that the offence concerned will go unpunished and, on the other hand, Member States that do not extradite their nationals are obliged, in accordance with the principles of freedom of movement and non-discrimination on grounds of nationality, to protect citizens from other Member States as effectively as possible from measures that may deprive them of the rights of free movement and residence within the EU. In that regard, the CJEU has clarified that the requested Member State must ascertain whether there is an alternative measure which would be less prejudicial to the exercise of the rights of free movement and which would be equally effective in achieving the objective of preventing impunity[31]. This includes informing the Member State of which the person concerned is a national and, should that Member State so request, surrendering the requested person to that Member State in application of the EAW Framework Decision, provided that said Member State has jurisdiction to prosecute that person for offences committed outside national territory[32].

44. Considerable work has been done to provide an insight into the practical application of the *Petruhhin* principles by Member States.[33] However, the existing case law does not provide a solution when the Member State of nationality cannot issue a EAW in respect of the requested person.

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30 CJEU, 6 September 2016, C-182/15, Petruhhin; CJEU, 10 April 2018, C-191/16, Pisciotti; CJEU, 13 November 2018, C-247/17, Raugevicius; CJEU, 2 April 2020, C-897/19 PPU, Ruska Federacija; see pending case C-398/19, Generalstaatsanwaltschaft Berlin.

31 CJEU, 6 September 2016, C-182/15, Petruhhin, paras. 41, 47-50.

32 CJEU, 6 September 2016, C-182/15, Petruhhin, paras. 41, 47-50.

33 See Council documents 10429/17, 15786/17, 15207/17.

45. The Council welcomes the fact that Eurojust and the EJN have conducted a most useful analysis of how requests for the extradition of Union citizens by third countries are handled in practice. The Council will discuss the results of this analysis in a timely manner and decide on the question of whether any follow-up action should be taken and, if so, in what form.

46. The practical experience of different Member States shows that there are cases where unfounded and abusive requests for extradition are submitted by third countries. The Council invites the Commission to consider the need, in the light of the results of the analysis prepared by Eurojust and the EJN, for further action, such as a suggestion for a common approach in dealing with potentially abusive, including politically motivated, search and extradition requests from third countries. In this context, the best practices of the Member States should be taken into account.

E. Strengthening EAW surrender procedures in times of crisis

47. In order to prevent the spread of COVID-19, Member States have taken a variety of measures, such as closing borders, suspending air traffic and imposing strict contact and social distancing rules. This has also had a significant impact on judicial cooperation in criminal matters, in particular on surrender procedures under the EAW Framework Decision.

48. The Council underlines that ensuring the proper functioning of judicial cooperation in criminal matters in times of crisis is of great importance for the area of freedom, security and justice. COVID-19 has highlighted the importance of the coordinated and swift exchange of information and experience, and the need to further digitalise cooperation between the Member States.

49. With regard to the necessary exchange of information and experience in times of crisis, a coordinated approach by all actors involved is vital in order to avoid duplication of work and to streamline the collection and distribution of information. The use of questionnaires has proven to be a valuable instrument for collecting information, and the regularly updated compilation by Eurojust and the EJN, combining information received by Eurojust, the EJN and the Presidency/General Secretariat of the Council, has proven to be a valuable tool for the coordinated exchange of information and of great assistance to practitioners. In the future, consideration should be given to creating an electronic platform on which, in times of crisis, helpful information could be consulted and updated on a daily basis.

50. The Council underlines that digitalisation plays a central role. The COVID-19 pandemic has clearly illustrated the need for the prompt and comprehensive digitalisation of cross-border judicial cooperation, as highlighted in the Council conclusions 'Access to justice – seizing the opportunities of digitalisation', which were agreed under the German Presidency.[34] In many cases, practical issues can be overcome by means of digital solutions.

51. The Council welcomes the Commission's final report on the study on 'Cross-border Digital Criminal Justice', published on 4 September 2020. The measures adopted as a follow-up to this study should pay particular attention to the following aspects: the creation of secure electronic communication channels between competent authorities, a harmonised approach to the recognition and use of electronic signatures, or at least more flexible use of the existing systems, the creation of a secure means of transmitting large files and a better alignment of video-conferencing systems, in particular with regard to their quality and technical interoperability.

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[34] OJ C 342I, 14.10.2020, pp. 1-7.