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Delegations will find attached the above document.

Encl.: SOC/775 Transfer of proceedings in criminal matters

European Economic and Social Committee

# OPINION

European Economic and Social Committee

## Transfer of proceedings in criminal matters

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Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters
[COM(2023) 185 final - 2023/0093 (COD)]

**SOC/775**

Rapporteur: **Vasco de Mello**

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| Referral | European Commission, 20/09/2023 |
| Legal basis | Article 304 of the Treaty on the Functioning of the European Union |
| Section responsible | Employment, Social Affairs and Citizenship |
| Adopted in section | 05/09/2023 |
| Adopted at plenary | 20/09/2023 |
| Plenary session No | 581 |
| Outcome of vote (for/against/abstentions) | 209/0/6 |

## 1. Conclusions and recommendations

1.1 The aim of this proposal for a Regulation is to bridge gaps in the European arrest warrant system by creating a common regime for the transfer of criminal proceedings between Member States, thereby avoiding the duplication of criminal proceedings in respect of the same acts and involving the same individuals in more than one Member State (the *non bis idem* principle), as well as to prevent and reduce the phenomena of impunity owing to prosecutions not being pursued.

1.2 To this end, a uniform set of rules is established relating to cooperation between Member States on the sending and receiving of criminal proceedings.

1.3 Secondly, the proposal aims to create a common digital structure that allows for the transfer of such procedural documents.

1.4 The European Economic and Social Committee (EESC) welcomes the Commission's initiative on this issue.

1.5 However, with regard to certain aspects of the legislative text, the EESC considers that certain points should be added or corrected.

1.6 Thus, with regard to the fundamental rights of the parties concerned, the EESC believes that there should be an express reference to both the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, as well as to other legislation that seeks to protect fundamental rights.

1.7 The EESC draws attention to the fact that the proposed regime should not be used to enable suspects/accused persons to conveniently obtain access to a more favourable legal regime through the application of procedural rules.

1.8 The EESC welcomes the decision to implement common digital tools in order to speed up the process, and considers that these tools should be set up using European funds.

1.9 However, as already pointed out in previous opinions, the channel of paper-based communication should be maintained, bearing in mind those who, for various reasons, do not have access to IT resources.

1.10 The EESC believes that the entire translation process should be carried out with the utmost rigour, and that the use of artificial intelligence or other mechanical means not involving human intervention should not be permitted.

1.11 The EESC believes that the legislation should provide for the right of parties to appeal to a higher court on the grounds of inadequate translation of procedural documents.

1.12 As stated in previous opinions, the EESC believes that there should be training for all professionals working in this area, as well as for other stakeholders, such as translators.

1.13 The EESC considers that provision should be made for a method for resolving negative conflicts over jurisdiction in the event of this law being applied.

1.14 The EESC highlights the fact that the possibility should be removed whereby the requesting authority, in the event that a transfer is accepted, can send only part of the file and not the whole file.

1.15 This eliminates the possibility of any arbitrariness, which could certainly occur with the partial transfer of cases.

## 2. Background

2.1 The downside of having a single area of free movement of persons, capital, goods and services is that it creates a transnational area in which criminal activities can be carried out.

2.2 Since time immemorial, human societies have delegated the power to punish those who violate the law and commit crimes to the State, in preference to private, retributive justice based on the law of exact retaliation or the principle of "an eye for an eye, a tooth for a tooth".

2.3 The existence of a *ius puniendi*, that is, of the possibility for the State to punish those who, on its territory, infringe its laws and thereby commit crimes, or who, in a foreign territory, commit criminal acts against its nationals, constitutes an innate and central characteristic of the sovereign powers of a State[1].

2.4 This is a sovereign power of such importance for States that most constitutions reserve and confer exclusive competence to legislate in this area upon parliaments.

2.5 However, the exercise of *ius puniendi* by the State, which at its maximum degree of application may lead to the deprival of an individual's liberty, must always be accompanied by a robust body of fundamental citizens' rights, in order to protect citizens from possible abuses or arbitrariness, so characteristic of those who do not respect the notion of the rule of law.

2.6 As stated above, the existence of a single market poses numerous challenges when it comes to enforcing criminal justice.

2.7 The existence of such a transnational area in which persons, capital, goods and services move freely between States could, in the absence of a similarly transnational system for prosecuting criminals, make it possible to carry out criminal activity in different territories without due punishment, or could create genuine sanctuaries for criminals.

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1 It should be noted that the application of foreign law to crimes committed in a given territory has always constituted a clear manifestation of a loss of State sovereignty for the nationals of that territory – a case in point is the situation in China at the end of the 19th century, when Europeans forced the Chinese State to allow the nationals of those States to be tried privately and in accordance with the laws of their countries of origin.

2.8 As European integration progressed, the need for greater cooperation in the area of security and criminal justice became more pressing; this was achieved initially through the conclusion of various treaties between the Member States on extradition and judicial cooperation[2], culminating in the inclusion of this matter in the Treaty on the Functioning of the European Union (TFEU) itself, both as a shared competence between the EU and the Member States, as well as by enshrining the establishment of an area of freedom, security and justice extending throughout the European Union[3].

2.9 It is therefore evolving from a form of intergovernmental cooperation based on judicial cooperation and extradition treaties concluded between States, in which the decision-making power is shared between the executive and the judiciary, into a system of cooperation in which the decision-making power lies with the competent judicial authorities, without any interference from the executive, which, unlike under the extradition procedure, is entirely removed from this process.

2.10 This paradigm shift – which, as already stated, has been enshrined in the TFEU – has as its cornerstone the principle of mutual recognition of judicial decisions in criminal matters[4].

2.11 However, the existence of an area of freedom, security and justice in the European Union will only be possible if there is a balance between the principles of freedom, security and justice, failing which the fundamental rights, freedoms and guarantees of every citizen could be undermined in the name of illusory and totalitarian security and justice.

2.12 In order to have confidence in the application of the principle of mutual recognition, it is necessary that Member States respect the fundamental rights of citizens in an equal or equivalent manner, in order to ensure that the competent authority of the State of recognition has confidence and trust in the enforcement of the recognised judicial decision.

2.13 This principle of mutual recognition was first implemented, in the field of criminal law, in the European arrest warrant[5] and subsequently in other laws of a similar nature, such as the European Investigation Order[6].

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2 In this respect, see the European Convention on Extradition of 1957, the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972, the Convention implementing the Schengen Agreement, and the numerous multilateral and bilateral extradition treaties concluded between the various Member States.

3 See Article 3(2) and Article 4(2)(j) as well as Title V, in particular Articles 67 and 82 TFEU.

4 The principle of mutual recognition of judicial decisions in criminal matters, enshrined in Article 67(3) TFEU, ultimately consists of the recognition of a judicial decision taken by a competent authority in a Member State by another competent authority of another Member State, the effects of which, in the State of recognition, are expected to be equivalent to those produced by a competent national authority (see Manuel Monteiro Guedes, *Do mandado de detenção europeu*, p. 65, Almedina, Coimbra, 2006). The principle of mutual recognition of judicial decisions runs contrary to the principle of double criminality, which is characteristic of extradition treaties, and means that, in order for extradition to take place, the acts of which the suspect or accused person is accused must be classified as a criminal offence under the law either of the requesting State or of the State receiving the request.

5 On the European arrest warrant, see – Council Framework Decision No 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, as amended by Council Framework Decision No 2009/299/JHA of 26 February 2009.

6 On the European Investigation Order, see – Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014.

2.14 While enshrining the principle of mutual recognition, the European arrest warrant system nevertheless respects citizens' rights, freedoms and guarantees[7].

## 3. General comments

3.1 Like the European arrest warrant, this proposal to regulate the way in which criminal proceedings are transferred from one Member State to another is a means of combating crime of a transnational nature, including organised crime, more effectively and expeditiously.

3.2 However, unlike the case of the European arrest warrant system, with this proposal the Commission is seeking to establish a single, directly effective instrument of judicial cooperation for the whole of the European Union.

3.3 This new Regulation seeks to fill gaps in the European arrest warrant system and to improve European criminal justice and make it more effective, for example by avoiding duplication of proceedings in respect of the same acts and involving the same parties in more than one Member State, as well as to prevent and reduce cases of impunity owing to prosecutions not being pursued.

3.4 However, this cannot be achieved without profound respect for fundamental and individual rights throughout the procedure, particularly for the most vulnerable, persons with disabilities and children.

3.5 Secondly, the proposal for a Regulation in question aims to increase the legal certainty for the transfer of judicial proceedings between Member States.

3.6 The EESC considers all initiatives aimed at combating cross-border crime in the Member States, especially organised crime, to be important[8].

3.7 The existence of criminal organisations operating in the territory of the European Union whose activities are extremely harmful to European societies calls for a strong joint response, the absence of which will result in impunity, which is certainly not desirable.

3.8 Although this is a matter of shared competence between the Member States and the European Union[9], the EESC considers the Commission's choice of legislative instrument used in this proposal – i.e. a regulation – to be a bold one, given that this matter is extremely sensitive to the Member States, since it is a competence inherent in the sovereignty of the State, as described above.

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7 This is fully apparent from the list of grounds for refusal of the European arrest warrant that may be relied on by the competent authority of the country of recognition, the limits of application of the warrant itself and, finally, the establishment of procedural rights for the suspect/accused person.

8 In its opinion INT/932 (OJ C 286, 16.7.2021, p. 88), the EESC states that the digitalisation of justice is a crucial tool for ensuring genuine cooperation between Member State authorities in combating criminal practices that severely damage the European area.

9 See Article 4(2)(j) TFEU.

3.9 However, the EESC believes that the option chosen is the right one, as this is the only way to achieve the objective of standardising procedures across all Member States[10].

3.10 As stated in the explanatory memorandum to this draft law, only by having common rules on the transfer of criminal proceedings can cross-border crime be effectively combated.

3.11 The EESC considers that the protection of citizens' fundamental rights, both from the point of view of suspects/the accused and of victims, has been achieved in this proposal for a Regulation, whether it be through the existence of a standard body of grounds for refusal to transfer, or through the suspect's/accused person's and the victim's rights to be heard and to an appeal.

3.12 However, the EESC believes that the proposal for a Regulation should include an explicit reference to both the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, as well as other legislation that seeks to protect fundamental rights[11].

3.13 The EESC draws attention to the fact that the possibility of transferring criminal proceedings from States where the principle of legality[12] applies to States where the principle of expediency[13] applies could be a factor that favours the criminal offender by enabling them to obtain a penalty that is more favourable to them, which could in turn be harmful in the light of the objectives pursued by the law in question[14].

3.14 For the EESC, it is extremely positive that cases are transferred between the judicial authorities of the Member States by means of digital procedures.

3.15 However, the possibility of using the channel of paper-based communication should be safeguarded, and it should be ensured that the information is accessible to all, particularly the most vulnerable[15].

3.16 However, the EESC stresses that, to this end, it is not sufficient to create a common application with common rules. A powerful infrastructure that is common to all Member States and interoperable with the various systems used by the Member States should be created at EU level.

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10 This could lead to a federalisation process, which would have to take care to respect national feelings.

11 It is important to lay down the concepts of fundamental rights that are to be defended, irrespective of the fact that Article 51 of the Charter of Fundamental Rights of the European Union requires the Member States to respect those rights when it comes to the application of "(...) Union law (...)", whether it be primary law or secondary law.

12 Legal doctrine defines the principle of legality in criminal proceedings as the legal obligation imposed on the judicial authority to pursue a prosecution, without the possibility to determine the penalty through negotiation with the suspect/accused person.

13 In contrast to the principle of legality, the principle of expediency allows the judicial authority pursuing the criminal proceedings to be able to negotiate the extent of the penalty to be imposed with the suspect/accused person, the court's role being limited to countersigning the agreement reached.

14 This proposal for a Regulation cannot serve as a tool for enabling suspects/accused persons to "soften" the coercive measures to which they are subject during the investigation phase or the extent of the sentence they may be given.

15 In this connection, see EESC opinion SOC/711 (OJ C 323, 26.8.2022, p. 77).

3.17 As already pointed out in previous opinions[16], the EESC believes that this investment should be financed by funds provided by the EU.

3.18 As already mentioned in other opinions[17], the EESC considers that, for this piece of legislation to be properly applied, training for practitioners is required, both in this area and with regard to the use of the entire digital system that will support the transfer of cases between the Member States.

3.19 Such training should take into account the specificities and needs of suspects/accused persons, witnesses and vulnerable victims.

3.20 While training should be geared towards judges and prosecutors in particular, the EESC believes that it is important to increase the training of other key players in the judicial process, such as lawyers and translators, among others[18].

3.21 The EESC stresses that the translations of all documentation submitted in the file should be as accurate and reliable as possible.

3.22 It is important that the Member States ensure that the translations of documents in each file are reliable.

3.23 The EESC believes that a rule should be laid down in the proposal for a Regulation that prohibits translations from being produced using mechanical or IT-based means or through artificial intelligence.

3.24 Translations produced without human input could lead to erroneous conclusions and, as a result, bad trials and incorrect decisions.

3.25 The EESC draws attention to the fact that the costs incurred in translating the documents forming part of the procedure could lead to the translation being carried out to an inferior standard, resulting in a reduction in the rights and guarantees of those involved in the proceedings.

3.26 The EESC believes that suspects/accused persons, as well as victims, should be given a right to challenge/appeal on questions pertaining to the translation of the case.

3.27 Finally, two concluding notes:

3.28 The proposal for a Regulation does not provide any solution in the event of a negative conflict over jurisdiction.

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16 In this connection, see opinion INT/932 (OJ C 286, 16.7.2021, p. 88) mentioned above.

17 See the opinions cited: SOC/711 (OJ C 323, 26.8.2022, p. 77) and INT/932 (OJ C 286, 16.7.2021, p. 88).

18 In this connection, see "Ensuring justice in the EU — a European judicial training strategy for 2021-2024", COM(2020) 713.

3.28.1 In other words, if the judicial authority of the Member State receiving the request refuses to accept the transfer of the proceedings, we may be faced with the possibility whereby the prosecution will not proceed because the authorities of the two Member States concerned consider that they do not have jurisdiction to pursue the criminal proceedings.

3.28.1.1 In these cases, the EESC believes that provision should be made for a judicial procedure for resolving these conflicts, which could involve giving jurisdiction to the Court of Justice of the European Union to settle such conflicts.

3.28.2 Finally, the EESC considers that, after accepting the transfer of criminal proceedings, the requesting authority should forward the entire original of the case, together with the translation thereof, or a copy thereof.

3.28.2.1 The EESC therefore considers that the reference to the possibility of forwarding only "relevant parts" of the proceedings should be removed, as this jeopardises the rights of defence of suspects/accused persons and the rights of victims.

3.28.2.2 This eliminates the temptation to send, on an arbitrary basis, procedural documents that may be more beneficial to one or other of the parties involved.

Brussels, 20 September 2023

Oliver Röpke
The president of the European Economic and Social Committee