



Council of the
European Union

Brussels, 31 October 2023
(OR. en)

14849/23

LIMITE

COPEN 377
JAI 1402
CODEC 2006

**Interinstitutional File:
2023/0093(COD)**

NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	14052/23
No. Cion doc.:	8231/23 + ADD 1 + ADD 2 + ADD 3
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters - Selected issues following the meeting on 27 October 2023

Introduction

On 27 October 2023, JHA Counsellors (+ Experts) continued the examination of the above-mentioned proposal on the basis of a revised text submitted by the Presidency (14052/23). The Presidency announced that it aims to reach a general approach on the text at the meeting of the Justice and Home Affairs Council on 4 December 2023, so that negotiations with the European Parliament can start on that basis.

During the meeting on 27 October, various Member States provided comments on the text set out in 14052/23. The Presidency announced that Member States could submit written comments on the entire text until Monday 6 November 2023, 12:00, in view of the next full day meeting, which will take place on 15 November 2023.

In order to foster progress on the file, and without prejudice to the discussions on 15 November, the Presidency would like to discuss the selected issues set out below at the meeting of the JHA Counsellors on 7 November 2023 (afternoon).

Selected issues for discussion

1) Article 2(4), Definition of ‘Requested authority’

At the meeting on 27 October, several delegations indicated that they preferred the text for the definition of ‘requested authority’, which had been proposed by one delegation and which was set out in the footnote to Article 2(4):

*“‘requested authority’ means a judge, a court, an investigating judge or a public prosecutor having the competence to take a decision on whether to accept or refuse transfer of criminal proceedings in accordance with Article 12(1) and to take, **where applicable / where the legal system allows**, subsequent measures in accordance with this Regulation or any measure as provided for in its national law;*

Notwithstanding that a decision on whether to accept or refuse a transfer of criminal proceedings must be taken by a judge, a court, an investigating judge or a public prosecutor, the requested State may designate any other competent authority, which in the case concerned, is acting in its capacity as an investigating or prosecuting authority in criminal proceedings with competence to take preparatory or subsequent measures.
(Option 1)

In the light of the discussions at the meeting on 27 October, and in liaison with the Council Legal Service, the Presidency considers that the text could possibly be further improved, as follows:

*“‘requested authority’ means a judge, a court, an investigating judge or a public prosecutor having the competence to take a decision on whether to accept or refuse transfer of criminal proceedings in accordance with Article 12(1) and to take, where **the legal system of the requested State allows**, subsequent measures in accordance with this Regulation or any measure as provided for in its national law;*

Notwithstanding that a decision on whether to accept or refuse a transfer of criminal proceedings under Article 12(1) must be taken by a judge, a court, an investigating judge or a public prosecutor, the requested State may provide that for the purposes of this Regulation ‘requested authority’ may be understood as designate any another competent authority, [which in the case concerned is acting in its capacity as an investigating or prosecuting authority in criminal proceedings], with ~~has~~ competence to take preparatory or subsequent measures.” (Option 2)

In this Option 2, the words in brackets can stay or they can be deleted, as Member States prefer.

The Presidency is flexible on this issue and would like to hear the opinion of Member States.

Q 1: - Member States are invited to indicate whether they can accept Option 1 and/or Option 2.

- In case Member States can accept both Options, they are invited to indicate which text they prefer, Option 1 or Option 2.

- In case Member State can accept/prefer Option 2, they are invited to indicate whether the text in the brackets should stay or should be deleted.

2) Articles 15c and 15d on the legal remedy for suspects and accused persons, and for victims

- *General observations*

Articles 15c and 15d currently read as follows:

“Article 15c

Right to an effective legal remedy for suspects and accused persons

1. *Suspects and accused persons shall have the right to an effective legal remedy in the requested State against a decision to accept the transfer of criminal proceedings¹.*
2. *The right to an effective legal remedy shall be exercised in the requested State in accordance with its law. The decision to accept the transfer of criminal proceedings shall be examined in the light of the criteria provided for in Article 13. As regards Article 13(2)(b), the examination shall be limited to the question whether the authority that made the decision to accept the transfer of criminal proceedings committed a manifest error of assessment.*
3. *The time limit for seeking an effective legal remedy shall be no longer than 20 days from the date of receipt of information about the decision to accept the transfer of criminal proceedings. The final decision on the legal remedy shall be taken without undue delay and, where possible, within 60 days.²*

¹ One delegation suggested adding: “*taken by a requested authority other than a court*”.

² At the meeting on 27 October, some Member States presented comments regarding the time limits set out in this provision.

4. *Where the request for the transfer of criminal proceedings is issued after the indictment of the suspect or accused person, the invocation of an effective legal remedy against a decision to accept the transfer of criminal proceedings shall have suspensive effect.¹*
5. *The requested authority shall inform the requesting authority about the effective legal remedies sought under this Article, and about their final outcome.²*

Article 15d

Right to an effective legal remedy for victims

Victims whose rights are adversely affected by the application of this Regulation shall have the right to legal remedies in the requested State against a decision to accept the transfer of criminal proceedings equivalent to those available in a similar domestic case.”

As regards these Articles 15c and 15d, at the meeting on 7 November the Presidency would like to concentrate the debate on Article 15c(1), (2) and (4), and on Article 15d.

- *Article 15c(1) and (2)*

Various delegations expressed concerns on the scope of these provisions, which would be too wide. In order to further reduce the scope, the Presidency sees three possibilities:

¹ An alternative, which would allow to completely eliminate the delays and which was appreciated by some delegations, reads as follows:

“4. A legal remedy against a decision to accept the transfer of criminal proceedings shall have no suspensive effect. Suspensive effect may be granted when it is justified in a specific case.”

² At the meeting on 27 October, some Member States suggested to expand or clarify the information to be provided under this provision.

A) Limit the grounds for examination

As regards the criteria for examination of the decision to accept the transfer of criminal proceedings, the following is currently provided:

“The decision to accept the transfer of criminal proceedings shall be examined in the light of the criteria provided for in Article 13. As regards Article 13(2)(b), the examination shall be limited to the question whether the authority that made the decision to accept the transfer of criminal proceedings committed a manifest error of assessment.”

Since the “manifest error of assessment” raised concerns with delegations, it could be appropriate to limit the criteria for examination to the mandatory grounds of refusal in Article 13(1) and the optional grounds of refusal in Article 13(2)(a)(c)(d) and (e). The text would then read as follows:

“2. *The right to an effective legal remedy shall be exercised in the requested State in accordance with its law. The decision to accept the transfer of criminal proceedings shall be examined in the light of the criteria provided for in Article 13(1) and Article 13(2)(a)(c)(d) and (e). As regards Article 13(2)(b), the examination shall be limited to the question whether the authority that made the decision to accept the transfer of criminal proceedings committed a manifest error of assessment.” (Option 1)*

A further restriction could be to limit the criteria to the mandatory grounds of refusal in Article 13(1) only, and entirely exclude the examination of the optional grounds of refusal. The text would then read as follows:

“2. *The right to an effective legal remedy shall be exercised in the requested State in accordance with its law. The decision to accept the transfer of criminal proceedings shall be examined in the light of the criteria provided for in Article 13(1). As regards Article 13(2)(b), the examination shall be limited to the question whether the authority that made the decision to accept the transfer of criminal proceedings committed a manifest error of assessment.” (Option 2)*

NB: the Commission considers that the text of this Option 2 would be too restrictive, and would render the provision non-compliant with the requirements of Article 47 of the Charter.

B) Limit the possibilities to those cases where jurisdiction is based on Article 3

The idea was submitted to limit the right to a legal remedy for suspects and accused persons to cases where jurisdiction is based on Article 3. This could e.g. be organised in paragraph 1 of Article 15c:

*“1. **In cases where jurisdiction is based on Article 3,** Ssuspects and accused persons shall have the right to an effective legal remedy in the requested State against a decision to accept the transfer of criminal proceedings.”*

The Presidency notes that this addition would substantially reduce the right to a legal remedy.

NB: According to the Commission, limiting the right to an effective remedy to cases where jurisdiction is based on Article 3 would run counter to Article 47 of the Charter.

C) Omit the criteria, as in the Commission text

A third possibility is to revert to the text of the Commission proposal, but without reference to the Court. In this possibility, no reference is made to any criteria, as a result of which the (limited) criteria of Member States' laws apply. Paragraph 2 of Article 15(c) would then merely read as follows:

“2. The right to a legal remedy shall be exercised in the requested State in accordance with its law.”

The Presidency observes that there is a risk that in the case-law, this general text will be further interpreted and widened in a direction which is not desired by Member States.

Q 2a : Member States are invited to indicate which possibility – A (with Option 1 or 2, or any other option), B or C, or a combination thereof, or any other¹ – is acceptable to them. In case Member States can accept more than one possibility, they are invited to indicate which possibility they prefer.

- Article 15c(4)

This provision concerns the suspensive effect. The current text reads as follows:

“4. Where the request for the transfer of criminal proceedings is issued after the indictment of the suspect or accused person, the invocation of an effective legal remedy against a decision to accept the transfer of criminal proceedings shall have suspensive effect.” (Option 1)

Since suspensive effect may substantially jeopardise the efficient operation of the Regulation, the following alternative text was proposed in a footnote:

¹ **There are other possibilities, but the Presidency considers that they have disadvantages, such as the solution of the EIO:**

Article 14 of the Directive 2014/41/EU regarding the European Investigation Order (EIO) in criminal matters provides as follows:

“Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.”

Article 15d, regarding victims, has been crafted inspired by this provision. The same solution could be taken for suspects and accused persons, possibly merged with Article 15d:

“Suspects and accused persons [and victims] shall have the right to legal remedies in the requested State against a decision to accept the transfer of criminal proceedings equivalent to those available in a similar domestic case.”

Such domestic case could be the transfer of proceedings from one place to another, within the same Member State (e.g., from Madrid to Barcelona), or between two States on the basis of another instrument, e.g. the CoE Convention. Sometimes this may imply that there is a legal remedy available, sometimes it may mean there is no or only a limited legal remedy available.

The Presidency observes that this text risks to be interpreted in the case-law in a direction which is not desired by Member States (compare Gavanozov II).

“4. A legal remedy against a decision to accept the transfer of criminal proceedings shall have no suspensive effect. Suspensive effect may be granted when it is justified in a specific case.” (Option 2)

Some Member States expressed support for this alternative text, but the Presidency did not get a complete overview of the positions of the Member States.

Q 2b : Member States are invited to indicate which text, Option 1 or Option 2, they prefer for Article 15c(4).

- Article 15d

Article 15d, which concerns the right to a legal remedy of victims, has been separated from Article 15c, since the situation of victims is completely different from that of suspects and accused persons. Indeed, where the latter have fundamental rights in criminal proceedings, as recognised by the Charter (right to defence, right to a fair trial ...), this is not the same for victims. As a consequence, the need to have a legal remedy for victims is not as crucial as for suspects and accused persons.

In this light, the Presidency suggested, as regards a decision to accept the transfer of criminal proceedings, to give victims a right to legal remedies in the requested State equivalent to those which are available in a similar domestic case, in line with Article 14 of the Directive on the European Investigation Order.

As said above, such domestic case could be the transfer of proceedings from one place to another within the same Member State (e.g., from Madrid to Barcelona), or between two States on the basis of the CoE Convention. Sometimes this may imply that there is a legal remedy available, sometimes it may mean there is no or only a limited legal remedy available.

Since Member States indicated having problems with the words *“whose rights are adversely affected”*, the Presidency suggests simplifying the text as follows:

“Victims shall have the right to effective legal remedies in the requested State against a decision to accept the transfer of criminal proceedings equivalent to those available in a similar domestic case.”

However, if Member States feel that Article 15d is going too far, the Presidency suggests transferring the text to the recitals, eg. new recital 42b:

“Victims should have the right to effective legal remedies in the requested State against a decision to accept the transfer of criminal proceedings equivalent to those available in a similar domestic case.”

NB: The Commission considers that putting the right to a legal remedy for victims only in a recital would run counter to Article 47 of the Charter.

Q 2c : Member States are invited to indicate what they prefer: keeping Article 15d in the operative part, putting the text in the recitals, or any other solution.

3) Article 19 on effects in the requesting State and Article 20 on effects in the requested State

The Presidency would like to submit two revised Articles – 19 and 20 – to delegations, and invite them to indicate which further changes are necessary for these Articles to be acceptable:

Article 19

Effects in the requesting State

1. *At the latest* Upon receipt of the notification of the acceptance by the requested authority of a transfer of criminal proceedings, **or of the final decision on a legal remedy invoked under Article 15c**, those criminal proceedings shall be suspended or discontinued in the requesting State in accordance with national law, **unless the outcome of the legal remedy is that the case must revert to the requesting State, or the requesting authority has already done so under Article 4.** ~~; unless a legal remedy under Article 8 has been invoked with suspensive effect and until such time when the final decision on the legal remedy is taken.~~

2. *Notwithstanding paragraph 1, the criminal proceedings in the requesting State may remain open in order to allow the requesting authority to: ~~the requesting authority may in accordance with its national law:~~*
- (a) *undertake necessary **urgent** investigative or other procedural measures, including measures to prevent the suspect or accused person from absconding, or **freezing orders**, ~~in order to execute a decision based on Framework Decision 2002/584/JHA or another mutual recognition instrument or to reply to a request for mutual legal assistance;~~*
 - (b) *maintain necessary investigative or other procedural measures, including measures to prevent the suspect or accused person from absconding, previously adopted that are necessary in order to execute a decision ~~based on~~ **the basis of** Framework Decision 2002/584/JHA or another mutual recognition instrument or a request for mutual legal assistance.*
- 2a. *Where the execution of any mutual recognition or mutual legal assistance procedure has been finalised, or where the requested authority has taken the necessary investigative or other procedural measures, and the measures undertaken by the requesting authority under ~~of~~ paragraph 2 are no longer necessary, the criminal proceedings in the requesting state shall be suspended or discontinued.*
3. *The requesting authority may continue or reopen criminal proceedings, if the requested authority informs it of its decision to discontinue criminal proceedings related to the facts underlying the request for **the** transfer of criminal proceedings, unless that decision, under the national law of the requested State, definitively bars further prosecution and therefore prevents further criminal proceedings, in respect of the same acts, in the requested State.*

4. *Paragraph 3 shall not affect the right of victims to initiate or to request **the** reopening of criminal proceedings against the suspect or accused person in the requesting State, ~~where~~ the national law of that State so provides, unless the decision by the requested authority to discontinue criminal proceedings, under the national law of the requested State, definitively bars further prosecution and therefore prevents further criminal proceedings, in respect of the same acts, in the ~~at~~ requested State.*
5. ~~**The request for transfer of proceedings shall have the effect in the requesting State of prolonging the period of limitation by [X] months.**~~

Article 20

Effects in the requested State

1. *The transferred criminal proceedings shall be governed by the national law of the requested State.*
2. *Provided that it is not contrary to the fundamental principles of law of the requested State, any act carried out for the purposes of the criminal proceedings or preparatory inquiries performed by competent authorities in the requesting State ~~or any act interrupting or suspending the period of limitation~~ shall have the same validity in the requested State as if it had been validly performed by its own authorities. **Without prejudice to Article 13(1), point (d), any act that interrupts or suspends the period of limitation validly performed in the requesting State shall have the same effects in the requested State if such act also interrupts or suspends the period of limitations under the law of the requested State.***

- 2a¹ *Where the suspect or accused person is in the requested State, the requested State may, at the request of the requesting State, once it has received the transfer request and the related file, and before the decision to accept the transferred procedure is made, arrest the suspect or accused person, or take any other measure to ensure that the suspect or accused person remains in its territory, or take any other provisional measures such as freezing, pending a decision to accept the transfer of criminal proceedings in accordance with national law.*
3. *Evidence transferred by the requesting authority shall not be denied admission in criminal proceedings in the requested State on the mere ground that the evidence was gathered in another Member State. The evidence gathered in the requesting State may be used in criminal proceedings in the requested State, provided that the admissibility of such evidence is **in accordance with the fundamental principles of national law and practice** of the requested State. **The power of the trial court to freely assess the evidence shall not be affected by this Regulation.***
4. *Provided that a custodial sentence or detention order is issued in the requested State, the latter shall deduct all periods of detention spent in the requesting State, which were imposed in the context of the transferred criminal proceedings, from the total period of detention to be served in the requested State as a result of a custodial sentence or detention order being issued. To that end, the requesting authority shall transmit to the requested authority all information concerning the period of detention spent by the suspect or accused person in the requesting State.*
5. *If criminal proceedings can only be initiated following a complaint in both the requesting and the requested States, the complaint brought in the requesting State shall also have validity in the requested State.*

¹ *The text on provisional arrest is included in a “may” provision, and the Presidency therefore hopes that all Member States can accept this text, which is important for some Member States. If a Member State absolutely cannot accept this, it is invited to precisely indicate where the obstacle lays.*

6. *The sentence applicable to the criminal offence shall be the one prescribed by the law of the requested State unless that law provides otherwise. The requested authority may take into consideration, in accordance with the applicable national law, the maximum sentence set out in the law of the requesting State, ~~where when~~ the criminal offence ~~was has been~~ perpetrated ~~on~~ the territory of the requesting State, and **where this is to the benefit of the accused person**. Where ~~the~~ jurisdiction is exclusively based on Article 3, the sentence imposed in the requested State shall not be more severe than the maximum sentence set out in the law of the requesting State.*

Q 3 : Member States are invited to indicate which further changes are necessary for Articles 19 and 20 to be acceptable.

4) Recitals addressing the specific situation of Ireland

Ireland does not participate in several Union measures and it seems therefore appropriate to make some changes in the recitals, as follows:

- *Recital 20*

Ireland does not participate in Directive 2013/48/EU (right of access to a lawyer), Directive (EU) 2016/343 (presumption of innocence), Directive (EU) 2016/800 (procedural safeguards for children) and Directive (EU) 2016/1919 (legal aid). In order to reflect this, it is suggested to modify recital 20 as follows:

“(20) *This Regulation does not affect procedural rights as enshrined in Union law, such as the Charter, ~~the procedural rights and~~ Directives 2010/64/EU¹, 2012/13/EU², 2013/48/EU³, (EU) 2016/343⁴, (EU) 2016/800⁵ and (EU) 2016/1919 of the European Parliament and of the Council⁶. In particular, the requesting authority should ensure that these rights, as provided for under Union, for the Member States bound by it, and national law are respected when requesting a transfer of criminal proceedings under this Regulation.”*

- Recital 28

Ireland does not participate in Directive 2014/41/EU on the European Investigation Order. It is therefore suggested to modify recital 28 as follows:

“(28) *When requesting a transfer of criminal proceedings, the requesting authority should take into account possibilities of obtaining evidence from other Member States through existing instruments of mutual recognition of judicial decisions, such as, for the Member States bound by it, ~~the~~ Directive 2014/41/EU of the European Parliament and of the Council⁷, and mutual legal assistance, ~~where applicable~~, before considering transfer of criminal proceedings on the sole ground that most of the evidence is located in the requested State.”*

¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

² Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

³ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

⁵ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, p. 1).

⁶ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, p. 1).

⁷ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1).

- *Recital 33*

Ireland participates in Regulation (EU) No 606/2013 (protection measures in civil matters) but not in Directive 2011/99/EU (European protection order). It is therefore suggested to modify recital 33 as follows:

(33) *Whenever there is a need to ensure that the protection provided to the victim in the requesting State is continued in the requested State, competent authorities in the requesting State should consider the issuance of a European protection order in ~~line~~ **accordance** with Regulation (EU) No 606/2013 of the European Parliament and of the Council¹ or, **for the Member States bound by it,** ~~the~~ Directive 2011/99/EU of the European Parliament and of the Council².*

Q 4 : Member States are invited to indicate if they can agree with the changes suggested above in recitals 20, 28 and 33.

5) Certificate

The draft certificate is set out in 8231/23 ADD 1. Member States that have comments on the text can already make them at the meeting on 7 November.

Concluding remarks

The Presidency would like to discuss the selected issues set out above at the meeting of the JHA Counsellors on 7 November 2023 (afternoon), without prejudice to further discussions at the meeting on 15 November.

¹ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, 29.6.2013, p. 4).

² Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L 338, 21.12.2011, p. 2).