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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	ST 14052/23, ST 14849/23
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 - Written comments from Member States following the meetings on 27 October and 7 November 2023

On 27 October 2023, JHA Counsellors (+ Experts) continued the examination of the above-mentioned proposal on the basis of a revised text by the Presidency (14052/23).

On 7 November 2023, JHA Counsellors examined selected issues of this file, on the basis of 14849/23.

During these meetings, various Member States provided comments. Following a call by the Presidency, which was later confirmed in writing, several Member States also provided comments in writing, including on the draft Annex to the Regulation.

The written input so received has been set out in the [Annex](#).¹

¹ If additional comments are provided, a REV doc will be made.

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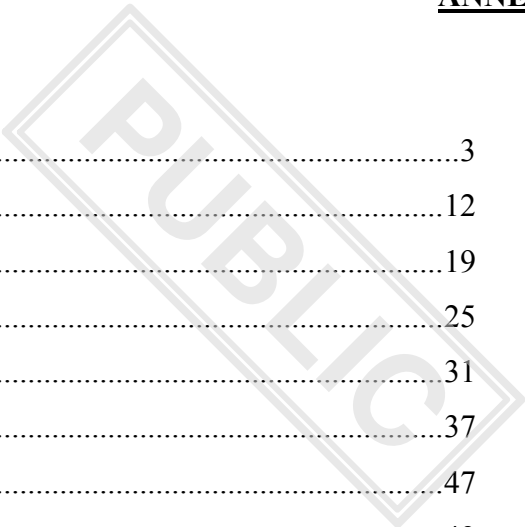
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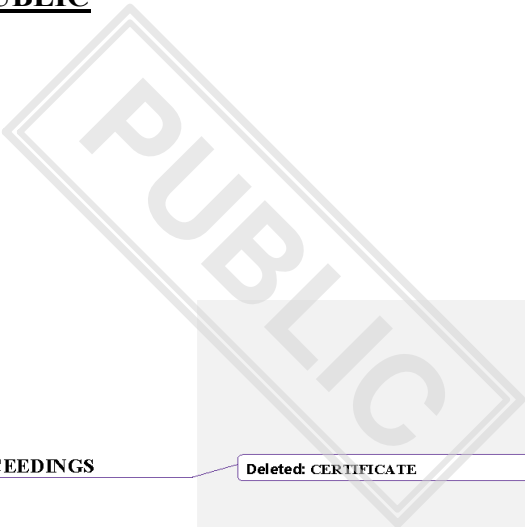
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CZECH REPUBLIC



ANNEX

REQUEST FOR THE TRANSFER OF CRIMINAL PROCEEDINGS

Deleted: CERTIFICATE

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Deleted: The purpose of this certificate is to:
 Consult on a possible transfer of criminal proceedings;
 Request a transfer of criminal proceedings

Deleted: .

Section A
Requesting
State:
Requesting authority:
Requested State:
Requested authority:
Authority in the requested State that has been consulted prior to this request (if applicable):
.....
.....

Deleted:

Deleted: Requested

Deleted: Requesting

Section B: Identity of the suspect or accused person

The suspect or accused person is not identified

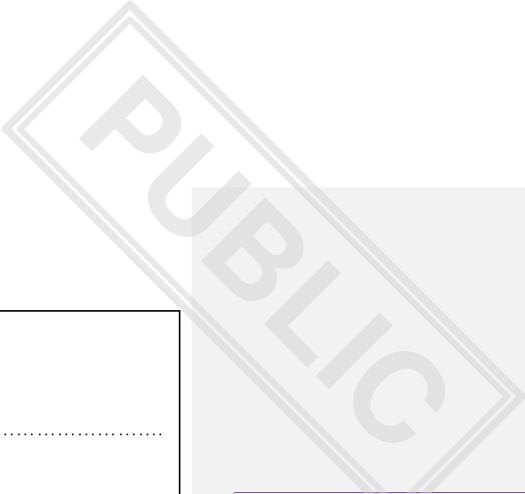
The suspect or accused person is identified

1. State all information, as far as known, regarding the identity of the suspect or accused person. If more than one person is concerned, please provide the information for each person.

(i) In case of natural person(s)

Name:
First name(s):
Other relevant name(s), if applicable:
Aliases, if applicable:
Sex:
Nationality:
Identity number or social security number:
Type and number of the identity document(s) (ID card, passport), if available:
Date of birth:
Place of birth:
Residence and/or known address; if address not known, state the last known address:

Deleted: 1¶



Workplace (including contact details):.....

Other contact details (email, phone No):

Language(s) that the person understands:.....

Other relevant information:

↓

The suspect or accused person has been made aware by the competent authorities that they are suspected or accused of having committed a criminal offence

The suspect or accused person has not been made aware by the competent authorities that they are suspected or accused of having committed a criminal offence

The suspect or accused person has not been deprived of his personal liberty in these criminal proceedings

The suspect or accused person has been deprived of his personal liberty in in these criminal proceedings (period: XX – XX)

(ii) In the case of legal person(s):

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:

Registered seat/office:

Registration number:

Address of the legal person:

Other contact details (email, phone No):

Name of the legal person's representative:

Other relevant information:

↓

The suspect or accused person has been made aware by the competent authorities that they are suspected or accused of having committed a criminal offence

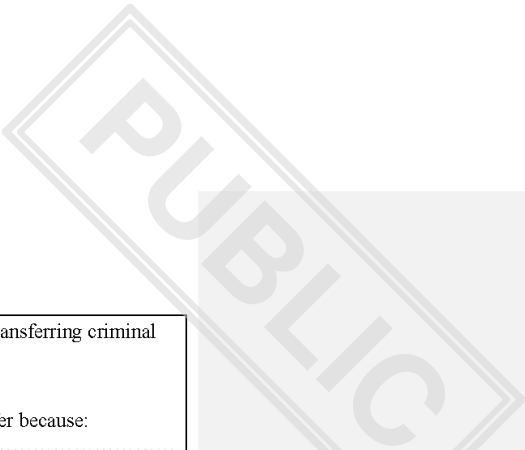
The suspect or accused person has not been made aware by the competent authorities that they are suspected or accused of having committed a criminal offence

2. Opinion of the suspect(s) or accused person(s):

Deleted: Please describe the position the concerned person currently holds in the proceedings: ¶
 Suspect¶
 Accused person.¶

Deleted: Please describe the position the concerned person currently holds in the proceedings:¶
 Suspect¶
 Accused person.¶

Deleted: 2¶



The suspect or accused person requested to initiate the procedure for transferring criminal proceedings.

The suspect or accused person was informed of the intended transfer.

The suspect or accused person was not informed of the intended transfer because:
.....
..

The suspect or accused person presented an opinion on the intended transfer. In summary, it states that:
.....
.....

The opinion is attached to this request.

The suspect or accused person did not presented an opinion on the intended transfer:

Deleted: The opinion is attached to this request.

Commented [A3]: if the statement has to be attached, isn't it unnecessary to list it here again? Given how other certificates are completed (RR 909, EIO) we can be sure that if the judicial authority has the statement in written form, it will just write "see attached statement"

Section C: Identity of the victim

1. State all information, as far as known, regarding the identity of the victim. If more than one person is concerned, please provide the information for each person.

(i) In case of natural person(s)

Name:

First name(s):

Sex:

Nationality:

Identity number or social security number:

Type and number of the identity document(s) (ID card, passport), if available:
.....

Date of birth:

Place of birth:

Residence and/or known address; if address not known, state the last known address:
.....

Workplace (including contact details):

Other contact details (email, phone No):

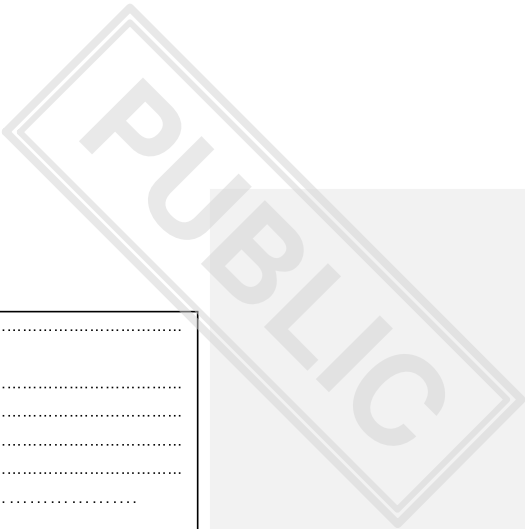
Language(s) which the person understands:

Other relevant information:

(ii) In the case of legal person(s):

Name:

Deleted: 3¶



Form of legal person:
Shortened name, commonly used name or trading name, if applicable:
.....
Registered seat/office:
Registration number:
Address of the legal person:
Other contact details (email, phone No):
Name of the legal person's representative:
Other relevant information:
.....

2. Opinion of the victim(s)

The victim requested to initiate the procedure for transferring criminal proceedings.

The victim was informed of the intended transfer.

The victim was not informed of the intended transfer because:
.....
..

The victim presented an opinion on the intended transfer. In summary, it states that:
.....
.....

[The opinion is attached to this request.](#)

[The suspect or accused person did not presented an opinion on the intended transfer.](#)

Deleted: The opinion is attached to this request.

Section D: Summary of the facts and their legal qualification

1. Description of the conduct giving rise to the criminal offence(s) for which the request is made and a summary of underlying facts:
.....
.....

2. Stage of the proceedings has reached:

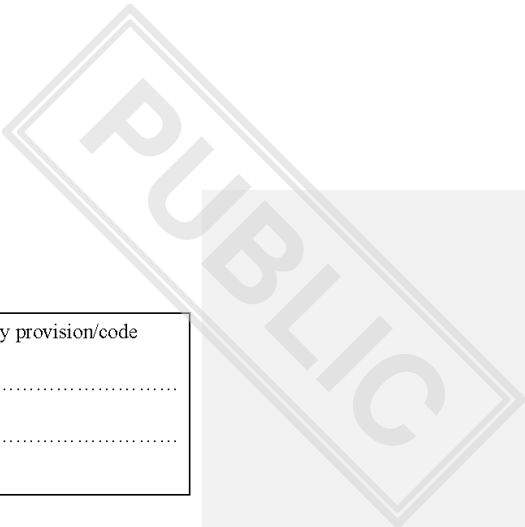
investigation

prosecution

trial

3. Nature and legal classification of the criminal offence(s) for which the request is made:
.....

Deleted: 41



4. Maximum penalty, the statute of limitations and the text of the statutory provision/code including the relevant provisions relating to penalties:

 ...

Section E: Information on the procedure in the requesting State

1. Procedural acts taken by the requesting State:

2. The following materials and documents have been collected within the criminal proceedings in the requesting state

a) ex.
b) ex. protocols for the examination of witnesses
c) ex. expert opinion
d) ex. documentary and physical evidence listed below

The materials/documents referred to in points can not be used as evidence in criminal court proceedings in the requesting state.

The evidence referred to in points may be used as evidence in criminal court proceedings in the requesting state

The material evidence is attached (e.g., screwdriver) to the certified copy of the criminal file.

It is not possible/appropriate to attach the material evidence to the certified copy of the criminal file or to send it by post, as (state why), and it will be handed over to you by arrangement after the criminal proceedings have been taken over

2a. The following was seized in the criminal proceedings for other than evidential purposes

a) (purpose of seizure) b) (purpose of seizure)
 c) (purpose of seizure)

3. List of documents available in the case file

Commented [A4]: This section should contain a summary of all the material/documents collected in the criminal proceedings. It should also indicate for each one whether it can be used as evidence in the criminal court proceedings (these materials should not have more weight in the requested State than in the requesting State).

Various materials may be collected in criminal proceedings (these materials are part of the case file that will be sent to the requested authority), but not all of them can be used as evidence. For examples:

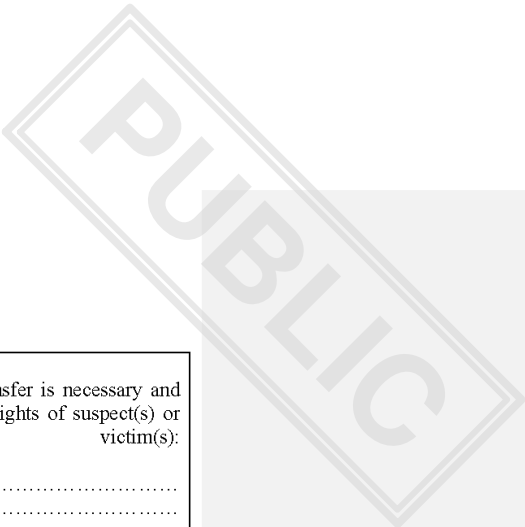
- Official police records are used
 - by the prosecutor in the CZ to consider if the person who gave the explanation will be heard as a witness, and
 - by the court to consider whether to take such evidence. If the person who gave the explanation is later heard as a witness or as an accused, the record may not be read to him or otherwise stated. However, the official record of the explanation given may be read out in evidence in proceedings before a court in the CZ if the prosecutor and the accused agree with its reading.
- Charge against a person lodged with or presented to the police on the commission of crime can not be used in the CZ as evidence in criminal court proceedings

Deleted: Information on evidence collected

Deleted: ¶

Commented [A5]: Is this a list of what's in the criminal file?
 If the points above are completed, it may no longer be necessary to have list of documents

Deleted: 5¶



Section F: Reasons for the request

1. Reasons for the request, including a justification as to why the transfer is necessary and appropriate, and an assessment of the impacts of the transfer on the rights of suspect(s) or accused person(s) and victim(s):

2. Criteria for requesting the transfer of criminal proceedings:

- the criminal offence has been committed wholly or partly in the territory of the requested State, or most of the effects or a substantial part of the damage caused by the criminal offence occurred in the territory of the requested State;
- the suspect or accused person is a national of or resident in the requested State;
- the suspect or accused person is present in the requested State and that State refuses to surrender this person to the requesting State either on the basis of Article 4(2) of the Framework Decision 2002/584/JHA, or of Article 4(3) thereof where such refusal is not based on a final judgement passed upon this person in respect of the same criminal offence which prevents further criminal proceedings, or on the basis of Article 4(7) of that Framework Decision;
- the suspect or accused person is present in the requested State and that State refuses to surrender this person for whom a European arrest warrant has been issued, if it finds that there are, in exceptional situations, substantial grounds to believe, on the basis of specific and objective evidence, that surrender would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in Article 6 of the Treaty on European Union and the Charter;
- most of the evidence relevant to the investigation is located in or the majority of the relevant witnesses are residing in the requested State;
- there are ongoing criminal proceedings in the requested State in respect of the same or other facts against the suspect or accused person;
- there are ongoing criminal proceedings in the requested State in respect of the same or related facts against other persons;
- the suspect or accused person is serving or is to serve a sentence involving deprivation of liberty in the requested State;
- the enforcement of the sentence in the requested State is likely to improve the prospects for social rehabilitation of the person sentenced or there are other reasons for a more appropriate enforcement of the sentence in the requested State; or
- the majority of victims are nationals of or residents in the requested State.

Commented [A6]: Point 2 - it is necessary to adjust the wording according to the current provisions of Article 5

Section G: Additional information and requests (if applicable)

Deleted: 6¶

PUBLIC

1. If relevant, provide information related to an earlier European Arrest Warrant, European Investigation Order or another request for assistance
.....

2. Other additional information, where relevant:
.....
.....

3. Indicate any specific conditions of processing of the transmitted personal data with which the requested authority must comply with (Article 9(3) of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data):
.....
.....

4. List of enclosures:
.....
.....

Deleted: 7¶

|

PUBLIC

SECTION H: Details of the authority that issued the request

1. Name of authority that issued the request:

Name of representative/contact point:

File No:

Address:

Tel. No: (country code) (area/city code)

E-mail address:

Language(s) in which it is possible to communicate with the requesting authority:

2. If different from above, the contact details of the person(s) to contact for additional information or to make practical arrangements for the transfer of evidence:

Name/Title/Organisation:

Address:

E-mail address:

Contact Phone No:

3. Signature of the requesting authority and/or its representative certifying that:

- the content of the request as set out in this form is accurate and correct, and
- this request has been issued by a competent authority.

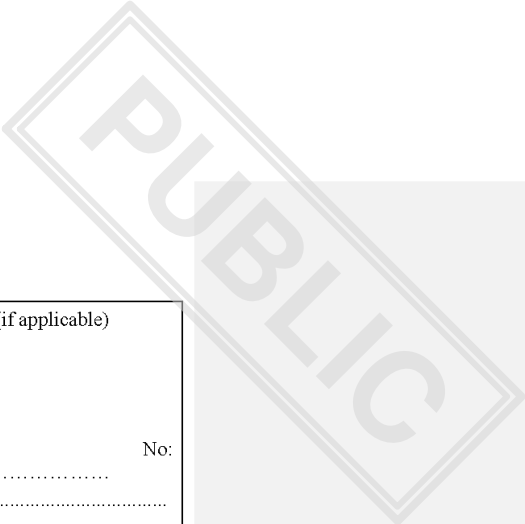
Name:

Post held:

Date:

Official stamp (if available):

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SECTION I: Details of the judicial authority which validated the request (if applicable)

1. Name of the validating authority:
.....
Name of representative/contact point:
.....
File No:
.....
Address:
Tel. No: (country code) (area/city code).....
E-mail address:.....
Language(s) in which it is possible to communicate with the validating authority:
.....

2. Please indicate if the main contact point for the requested State should be the:
 requesting authority
 validating authority

3. Signature of the validating authority and/or its representative certifying that:
- the content of the request as set out in this form is accurate and correct, and
- this request has been issued by a competent authority.

Name:
Post held:
Date:
Official stamp (if available):

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FINLAND



ANNEX

CERTIFICATE FOR THE TRANSFER OF CRIMINAL PROCEEDINGS

The purpose of this certificate is to:

- Consult on a possible transfer of criminal proceedings;
- Request a transfer of criminal proceedings.

Commented [A1]: In terms of personal data to be entered on the form, the order of the data is important from a practical point of view, for example: last name, first name, date of birth, nationality, possible identification document details (type, issuer, period of validity, document number) and contact details (address and other contact details) etc.

Section A

Requesting State:
Requested authority:
Requesting State:
Requested authority:
Authority in the requested State that has been consulted prior to this request (if applicable):

Commented [A2]: Requesting Authority is missing?

Section B: Identity of the suspect or accused person

1. State all information, as far as known, regarding the identity of the suspect or accused person. If more than one person is concerned, please provide the information for each person.

(i) In case of natural person(s)

Name:
First name(s):
Other relevant name(s), if applicable:
Aliases, if applicable:
Sex:
Nationality:
Identity number or social security number:
Type and number of the identity document(s) (ID card, passport), if available:
Date of birth:
Place of birth:
Residence and/or known address; if address not known, state the last known address:
Workplace (including contact details):
Other contact details (email, phone No):
Language(s) that the person understands:
Other relevant information:
Please describe the position the concerned person currently holds in the proceedings:
 Suspect
 Accused person.

Commented [A3]: What about situations where the person is unknown. Where this information would be mentioned?



(ii) In the case of legal person(s):

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:
.....

Registered seat/office:

Registration number:

Address of the legal person:

Other contact details (email, phone No):

Name of the legal person's representative:

Other relevant information:

Please describe the position the concerned person currently holds in the proceedings:

Suspect

Accused person.

2. Opinion of the suspect(s) or accused person(s):

The suspect or accused person requested to initiate the procedure for transferring criminal proceedings.

The suspect or accused person was informed of the intended transfer.

The suspect or accused person was not informed of the intended transfer because:
.....

The suspect or accused person presented an opinion on the intended transfer. The opinion is attached to this request. In summary, it states that:
.....
.....

Section C: Identity of the victim

1. State all information, as far as known, regarding the identity of the victim. If more than one person is concerned, please provide the information for each person.

(i) In case of natural person(s)

Name:

First name(s):

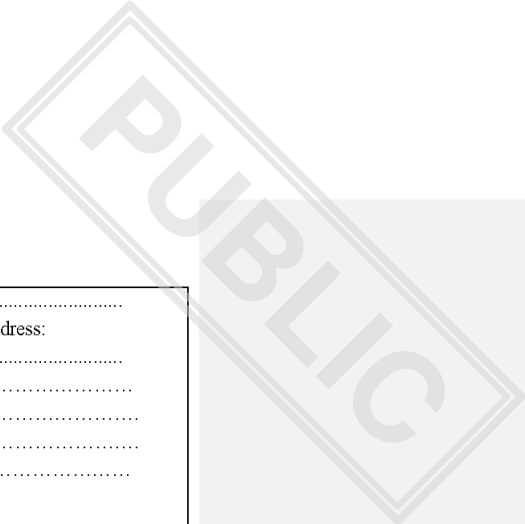
Sex:

Nationality:

Identity number or social security number:

Type and number of the identity document(s) (ID card, passport), if available:
.....

Date of birth:



Place of birth:

Residence and/or known address; if address not known, state the last known address:
.....

Workplace (including contact details):

Other contact details (email, phone No):

Language(s) which the person understands:

Other relevant information:

(ii) In the case of legal person(s):

Name:

Form of legal person:

Shortened name, commonly used name or trading name, if applicable:
.....

Registered seat/office:

Registration number:

Address of the legal person:

Other contact details (email, phone No):

Name of the legal person's representative:

Other relevant information:

2. Opinion of the victim(s)

The victim requested to initiate the procedure for transferring criminal proceedings.

The victim was informed of the intended transfer.

The victim was not informed of the intended transfer because:
.....

The victim presented an opinion on the intended transfer. The opinion is attached to this request. In summary, it states that:
.....

Commented [A4]: Maybe for the sake of clarity this should also be behind the box of natural person so that this box would not be forgotten when the the victim is not a legal person.

Section D: Summary of the facts and their legal qualification

1. Description of the conduct giving rise to the criminal offence(s) for which the request is made and a summary of underlying facts:

.....

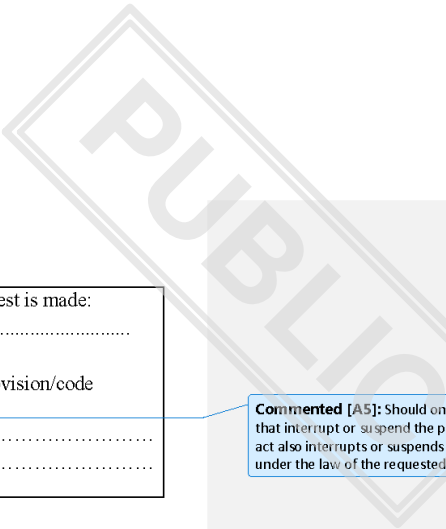
.....

2. Stage of the proceedings has reached:

investigation

prosecution

trial



3. Nature and legal classification of the criminal offence(s) for which the request is made:

 4. Maximum penalty, the statute of limitations and the text of the statutory provision/code including the relevant provisions relating to penalties:

Commented [A5]: Should one mark here also measures that interrupt or suspend the period of limitations (if such act also interrupts or suspends the period of limitations under the law of the requested State)?

Section E: Information on the procedure in the requesting State
 1. Procedural acts taken by the requesting State:

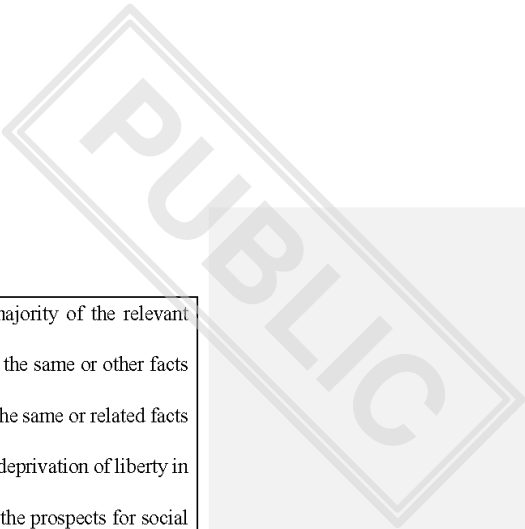
 2. Information on evidence collected:

 3. List of documents available in the case file:.....

Section F: Reasons for the request
 1. Reasons for the request, including a justification as to why the transfer is necessary and appropriate, and an assessment of the impacts of the transfer on the rights of suspect(s) or accused person(s) and victim(s):

 2. Criteria for requesting the transfer of criminal proceedings:
 the criminal offence has been committed wholly or partly in the territory of the requested State, or most of the effects or a substantial part of the damage caused by the criminal offence occurred in the territory of the requested State;
 the suspect or accused person is a national of or resident in the requested State;
 the suspect or accused person is present in the requested State and that State refuses to surrender this person to the requesting State either on the basis of Article 4(2) of the Framework Decision 2002/584/JHA, or of Article 4(3) thereof where such refusal is not based on a final judgement passed upon this person in respect of the same criminal offence which prevents further criminal proceedings, or on the basis of Article 4(7) of that Framework Decision;
 the suspect or accused person is present in the requested State and that State refuses to surrender this person for whom a European arrest warrant has been issued, if it finds that there are, in exceptional situations, substantial grounds to believe, on the basis of specific and objective evidence, that surrender would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in Article 6 of the Treaty on European Union and the Charter;

Commented [A6]: Should there also be a box "other, explain" in order to take into account possible situations that do not necessarily fit exactly the boxes mentioned already?



- most of the evidence relevant to the investigation is located in or the majority of the relevant witnesses are residing in the requested State;
- there are ongoing criminal proceedings in the requested State in respect of the same or other facts against the suspect or accused person;
- there are ongoing criminal proceedings in the requested State in respect of the same or related facts against other persons;
- the suspect or accused person is serving or is to serve a sentence involving deprivation of liberty in the requested State;
- the enforcement of the sentence in the requested State is likely to improve the prospects for social rehabilitation of the person sentenced or there are other reasons for a more appropriate enforcement of the sentence in the requested State; or
- the majority of victims are nationals of or residents in the requested State.

Section G: Additional information and requests (if applicable)

1. If relevant, provide information related to an earlier European Arrest Warrant, European Investigation Order or another request for assistance:.....

2. Other additional information, where relevant:

3. Indicate any specific conditions of processing of the transmitted personal data with which the requested authority must comply with (Article 9(3) of Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data):

4. List of enclosures:



SECTION H: Details of the authority that issued the request

1. Name of authority that issued the request:

Name of representative/contact point:

File No:

Address:

Tel. No: (country code) (area/city code)

E-mail address:

Language(s) in which it is possible to communicate with the requesting authority:
.....

2. If different from above, the contact details of the person(s) to contact for additional information or to make practical arrangements for the transfer of evidence:

Name/Title/Organisation:

Address:

E-mail address:

Contact Phone No:

3. Signature of the requesting authority and/or its representative certifying that:

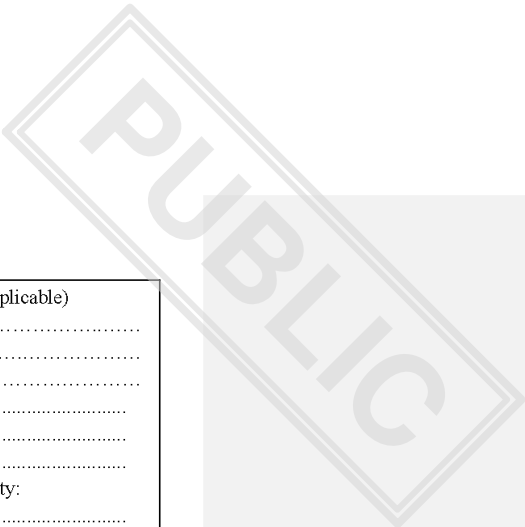
- the content of the request as set out in this form is accurate and correct, and
- this request has been issued by a competent authority.

Name:

Post held:

Date:

Official stamp (if available):



SECTION I: Details of the judicial authority which validated the request (if applicable)

1. Name of the validating authority:

Name of representative/contact point:

File No:

Address:

Tel. No: (country code) (area/city code)

E-mail address:

Language(s) in which it is possible to communicate with the validating authority:
.....

2. Please indicate if the main contact point for the requested State should be the:

requesting authority

validating authority

3. Signature of the validating authority and/or its representative certifying that:

- the content of the request as set out in this form is accurate and correct, and

- this request has been issued by a competent authority.

Name:

Post held:

Date:

Official stamp (if available):

FRANCE

[French text, including courtesy translations in English]

Réf. : ST 14052/23, ST 14849/23 et 8231/23/ADD 1

La présidence espagnole trouvera ci-dessous les commentaires écrits formulés par les autorités françaises dans la continuité de la réunion des Conseillers JAI + experts transmission des procédures pénales du 27 octobre 2023 concernant, i) les questions figurant dans le document de travail publié par la présidence le 31 octobre 2023 ainsi que ii) sur le projet de formulaire standardisé de transmission des procédures pénales entre États membres publié en annexe de cette proposition de règlement le 12 avril 2023 :

S'agissant des questions figurant dans le document de travail publié par la présidence le 31 octobre 2023 :

Sur l'article 2 (4) et la définition « d'autorité requise »

Les autorités françaises soutiennent l'option 2 proposée par la présidence. Elles soulignent toutefois que concernant les autorités compétentes susceptibles d'être désignées par les autorités judiciaires, il leur semblerait opportun d'exclure les autorités administratives et de ne viser que les services d'enquête habituellement compétents dans le cadre des procédures pénales.

Par ailleurs, les autorités françaises estiment nécessaire que la possibilité pour les Etats membres de désigner des autorités compétentes autres que les autorités judiciaires soit restreinte à des situations limitativement énumérées. Elle note ainsi que dans la précédente rédaction du texte, étaient visés les articles 15(a)(1), 15(b)(1), 15(c)(5), 21(1) ce qui semble en effet opportun. D'autres délégations de compétence ne sont en revanche pas souhaitables, telles que les consultations visées à l'article 15, qui devraient exclusivement impliquer un dialogue entre les autorités judiciaires.

Les autorités françaises ne sont en outre pas favorables à la partie de texte entre crochets, qu'elles considèrent comme n'apportant pas de plus-value notable.

Courtesy translation

The French authorities support option 2 proposed by the Presidency. They stress, however, that with regard to the competent authorities that may be designated by the judicial authorities, it would appear appropriate to exclude the administrative authorities and to refer only to the investigation services usually competent in the context of criminal proceedings.

Furthermore, the French authorities believe that the possibility for Member States to designate competent authorities other than the judicial authorities should be restricted to a limited number of situations. It notes that the previous version of the text proposed Articles 15(a)(1), 15(b)(1), 15(c)(5) and 21(1), which seems appropriate. On the other hand, other delegations of jurisdiction are not appropriate, such as the consultations referred to in Article 15, which should exclusively involve dialogue between the judicial authorities.

The French authorities are also not in favor of the part of the text in square brackets, which they do not consider to add any significant value.

Sur l'article 15c concernant le recours juridictionnel pour les suspects et personnes poursuivies

Les autorités françaises rappellent que, si elles ne sont pas opposées au fait qu'il soit prévu la mise en place d'un recours au sein de l'Etat requis, elles considèrent que l'examen de ce recours par l'autorité judiciaire de l'Etat requis ne saurait intervenir que sur le fondement de la seule légalité du transfert, et plus particulièrement sur les critères visés par l'article 13 (paragraphe 1 et, le cas échéant, paragraphe 2 (a), et (d) uniquement). En effet, il ne saurait être envisagé un recours formé par la victime ou le suspect en cours d'enquête, sur des critères visés à l'article 13 paragraphe 2 (b), qui vise la *bonne administration de la justice* ou sur les critères de l'article 13 paragraphe 2 (c) visant le *préjudice causé sur le territoire de l'Etat requis* alors que ces critères échappent à l'appréciation des parties et qu'à ce stade de la procédure, selon les systèmes procéduraires nationaux, la personne ne dispose que de certaines pièces du dossier, et pas de l'entière procédure. Une situation inverse pourrait être à la source de nombreux recours dilatoires et contrevenir à la nécessité d'assurer la confidentialité de certaines enquêtes.

Elles préconisent donc la solution visée au (a), en limitant le recours aux critères de l'article 13 (1) et 13 (2), (a) et (d) ou, dans une volonté de trouver un compromis avec les autres Etats membres, aux seuls critères de l'article 13 (1). Elles observent par ailleurs que le seul renvoi au droit national pour déterminer le cadre du recours serait susceptible de créer une disparité de droits pour les requérants, en fonction de l'Etat auquel sera adressée la procédure les concernant.

Les autorités françaises considèrent en outre que le recours juridictionnel ne devrait pas pouvoir comporter d'effet suspensif ; en effet, cela pourrait nuire au bon déroulement de la procédure et notamment générer un risque de dépérissement des preuves ou porter atteinte à l'intégrité des témoignages.

Courtesy translation

The French authorities point out that, while they are not opposed to the provision of a judicial remedy within the requested State, they consider that the review of this remedy by the judicial authority of the requested State should be based solely on the legality of the transfer, and more specifically on the criteria referred to in Article 13 (paragraph 1 and, where applicable, paragraph 2(a) and (d) only). An appeal by the victim or suspect during the investigation cannot be based on the criteria set out in Article 13(2)(b), which concerns the proper administration of justice, or on the criteria set out in Article 13(2)(c), which concerns damage caused on the territory of the requested State, since these criteria are beyond the control of the parties and, at this stage of the proceedings, depending on the national procedural system, these persons only have access to certain documents in the file, and not to the entire proceedings. The opposite situation could lead to numerous delaying tactics and contravene the need to ensure the confidentiality of certain investigations.

They therefore recommend the solution referred to in (a), limiting recourse to the criteria in Article 13(1) and 13(2)(a) and (d) or, in a desire to reach a compromise with the other Member States, to the criteria in Article 13(1) alone. They also point out that referring solely to national law to determine the scope of the judicial remedy would be likely to create a disparity of rights for claimants, depending on the State to which the proceedings concerning them are addressed.

In addition, the French authorities consider that it should not be possible for the remedy to have suspensive effect, as this could be detrimental to the proper conduct of the proceedings and, in particular, generate a risk of evidence withering away or undermine the integrity of witness statements.

Sur l'article 15d concernant le recours juridictionnel pour les victimes

Les autorités françaises sont favorables au maintien des dispositions de cet article dans la partie opérative du texte et soutiennent la proposition de la présidence. Elles proposent toutefois, pour plus de clarté, d'ajouter en fin de phrase « ***dans un cas similaire de transmission entre deux juridictions nationales*** ».

Courtesy translation

The French authorities are in favor of maintaining the provisions of this article in the operative part of the text and support the Presidency's proposal. However, for the sake of clarity, they propose adding at the end of the sentence "**in a similar case of transmission between two national courts**".

Par ailleurs, les autorités françaises ne sont pas favorables à la nouvelle proposition rédactionnelle formulée par les Pays-Bas.

En effet, les autorités françaises craignent qu'un recours fondé sur le droit d'être entendu, de produire des éléments de preuve ou d'obtenir une décision sur l'indemnisation soit en contradiction avec la base juridique de l'article 82 qui repose sur les principes de reconnaissance et de confiance mutuelles. Les autorités françaises soulignent que la directive relative aux droits des victimes a justement pour objet l'harmonisation des systèmes juridiques des Etats membres en matière de droit des victimes. En outre, les autorités françaises craignent qu'un tel recours, s'il devait être porté devant les juridictions de l'Etat requis, ne manque, en pratique, d'effectivité. Enfin, s'agissant plus particulièrement du paragraphe 2, et en dépit du considérant y afférent les autorités françaises estiment que le critère retenu « unacceptably prejudiced to » est en l'état trop vague et large.

Courtesy translation

Furthermore, the French authorities are not in favor of the Netherlands' new drafting proposal.

Indeed, the French authorities fear that a remedy based on the right to be heard, to produce evidence or to obtain a decision on compensation would contradict the legal basis of Article 82, which is based on the principles of mutual recognition and mutual trust. The French authorities point out that the purpose of the directive on victims' rights is precisely to harmonize the legal systems of the Member States as regards victims' rights. Furthermore, the French authorities fear that such an appeal, if brought before the courts of the requested State, would be ineffective in practice. Finally, with regard to paragraph 2 in particular, and despite the related recital, the French authorities consider that the criterion of "unacceptably prejudiced" is too vague and broad as it stands.

Sur l'article 19 concernant l'effet du transfert dans l'Etat requérant

Les autorités françaises n'ont pas d'opposition à la formulation de cet article.

Courtesy translation

The French authorities have no objection to the wording of this article.

Sur l'article 20 concernant l'effet du transfert dans l'Etat requis,

Au paragraphe 1, les autorités françaises sont défavorables à l'ajout des termes "*if such act also interrupts or suspends the period of limitations under the law of the requested State*". Cette mention appellerait les autorités judiciaires de l'Etat requis à étudier la nature de l'acte ayant entraîné l'interruption ou la suspension de la prescription et à le comparer aux actes existant dans son droit national, ce qui semble constituer une tâche particulièrement complexe.

Au paragraphe 3, les autorités françaises souhaitent la réintroduction du renvoi aux principes fondamentaux de l'Etat requis plutôt qu'une référence à leurs usages, notion qui n'est pas de nature à assurer une sécurité juridique suffisante.

Courtesy translation

In paragraph 1, the French authorities are against adding the words "if such act also interrupts or suspends the period of limitations under the law of the requested State". This reference would require the judicial authorities of the requested State to study the nature of the act that interrupted or suspended the period of limitation and to compare it with existing acts under its national law, which seems to be a particularly complex task.

In paragraph 3, the French authorities would like to see the reference to the fundamental principles of the requested State reintroduced rather than a reference to their usages, a concept which is not likely to ensure sufficient legal certainty.

Sur les considérants relatifs à la situation spécifique de l'Irlande

Les autorités françaises n'ont pas d'observation sur ces considérants.

Courtesy translation

The French authorities have no comments on these recitals.

Sur le certificat

Les autorités françaises poursuivent leur étude de ce certificat. Elles suggèrent qu'à la section A il soit fait référence sur les deux premières lignes à *l'Etat requérant* et *l'autorité requérante*, puis à *l'Etat requis* et *l'autorité requise*. Elles ne comprennent pas l'actuelle rédaction de la section A, qui leur semble relever d'une erreur de plume.

Courtesy translation

The French authorities are continuing their study of this certificate. They suggest that the first two lines of Section A should refer to the requesting State and the requesting authority, and then to the requested State and the requested authority. They do not understand the current wording of Section A, which seems to them to be the result of a clerical error.

GERMANY

Position statement by the Federal Republic of Germany following the COPEN meeting on 27 October and 7 November 2023

Article 1

We are still in favour of applying the regulation also in cases where a suspect is not identified yet.

Article 2 (4)

Like the Presidency we are flexible on this issue. We can accept both options and the second option also with or without the sentence in brackets.

Article 5

We welcome that the reference to proportionality has been deleted again. We can support the references to this principle in recitals 23 and 36.

We do not agree with the addition made in Article 5 (2) (h). As mentioned in the last meetings the possibility of allowing cumulation of sentences in the requested State might be a reason for a transfer. We have no reservations regarding the added criterion in Article 5 (2) (k).

Article 6

We still would prefer to have the sentence about the suspect's age or her or his physical or mental condition only in the recital 33a and not in the text.

In general, we have no reservations regarding the new para (2a). But in our opinion, it should be clarified in the text that direct notification of the suspect/accused person by the requesting authority remains possible. It should also be clarified that a notification should only take place if it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation (similar to Article 6 para (2)).

Article 7

We have no reservations regarding the changes made in Article 7 (2).

Here as well we would prefer to have the sentence about the suspect's age or her or his physical or mental condition only in the recital 33a and not in the text.

Again, we propose inserting “for example” after “where the requesting authority considers it necessary” in the second sentence of para 2. In our opinion the wording should be more open for other situations where victims may have a legal representative (e.g. because of other reasons than because of age or mental condition).

Article 9

For Paragraph 7a we welcome that the time limit of seven days for the acknowledgement of receipt has been reinstalled.

Article 12

The changes made to paragraph 5, 5a are going in the right direction. But in paragraph 5a it should be clarified that also the transmission only of physical evidence without the original case file should be possible. If a certified copy of the file is sufficient for the requested state, the original file can remain in the requesting State.

Article 13

We welcome the new ground of refusal added in Article 13 (2) (e). But the word “therefore” should be added after “requested state”. In our opinion that link between the two parts of the sentence is important. In our opinion this ground for refusal should only apply if the concrete facts of the case can be classified as a criminal offence according to the law of the place where it was committed. Purely procedural obstacles to prosecution (statute of limitations, amnesty or the lack of a complaint by the victim necessary for prosecuting the criminal offence) should not be considered. This clarification regarding the understanding of the provision could be added to recital 40.

Regarding paragraph 3 we think that the consultations at least for the optional grounds for refusal should be mandatory.

Article 15

We are fine with the changes made in Article 15.

Article 15a und 15b

It should be clarified in the text that direct notification of the suspect/accused person or victim remains possible. It should also be clarified that a notification of the suspect or accused person should only take place if it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation.

From our point of view the last sentence in Article 15b (2) is not necessary and can be deleted.

Article 15c

We still have concerns with respect to the regime of legal remedies. Legal remedies can lead to procedural delays, which runs counter to the proposed Regulation's goal of providing for efficient procedures and maximizing legal security. Against this backdrop, we have to be careful to tailor legal remedies so as to adequately reflect the challenges at hand regarding Article 15c (1) and (2), we can therefore only accept possibility B which limits the right to legal remedy to cases where jurisdiction is based on Article 3:"

“1. In cases where jurisdiction is based on Article 3, 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 proceedings.”

If the requested state already has original jurisdiction, there is no need for a legal remedy. Since the requested State could have initiated proceedings of its own accord, it is, from the accused person's perspective, a mere coincidence whether the procedure is initiated in the requested State or whether it is merely being continued there.

Where jurisdiction is based on Article 3 and suspects and accused persons have the right to a legal remedy, the review should refer to the grounds for refusal, and the examination of Article 13 (2) (b) should be based on the question whether there has been a manifest error of assessment.

Regarding Article 15c (4) we support the first sentence of Option 2 (“*A legal remedy against a decision to accept the transfer of criminal proceedings shall have no suspensive effect.*”) However, the legal remedy should not have a suspensive effect (contrary to the second sentence of Option 2 which reads as follows: “*Suspensive effect may be granted when it is justified in a specific case.*”). In our opinion, a suspensive effect would pose too great of a risk of overly delaying the criminal proceedings. This is not in the interest of a swift and proper administration of justice.

We do not agree with the deletion of paragraph 4a. In our opinion a provision that states what happens in the case of a successful legal remedy adds value.

Article 15d

We oppose to move the legal remedy for victims to the recitals. We understood that according to the opinion of the CLS the newly suggested text is meeting the requirements of Article 47 Charter of Fundamental Rights of the EU. If that is the case, we would be able to agree on the new text suggested by the presidency (“*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.*”).

The current wording is only acceptable if Article 47 of the Charter does not require a legal remedy. This must be spelled out explicitly in the recitals

Article 16

We welcome the inclusion of Article 19(2) in Article 16. Nevertheless, the reference to Article 20 is still unclear to us. Article 20 deals with the effects of the transferal in the requested State where Eurojust does not have any assisting competence. We would appreciate further explanation on this point.

Article 17

We suggested to add a third paragraph to Article 17 that corresponds to Article 21 para 3 of the Directive 2014/41/EU regarding the European Investigative Order. Of course, it would be best to discuss questions about translation costs already in consultations before a request is being transmitted. But there should be also rules put in place what happens if the states can't agree on the question who bears exceptionally high costs of translation.

Article 19

We welcome the deletion of para 5 and can agree on the text as it stands now.

Article 20

Regarding Article 20 (2) we welcome the addition and can agree on the text of this paragraph.

We still do not support the introduction of a provision on provisional arrest. But even if a deletion of the provision is not possible, the current wording is not acceptable, because it is not limited to cases where the competence of the requested state is exclusively based on Article 3. If the requested state already has jurisdiction for the case according to its own national law, there is no need for a provision on provisional arrest. In any case it needs to be very clear that the requirements of provisional arrest have to be those of the national law of the requested state.

We want to thank the Presidency for further changes made in Article 20 (3). Now we can agree on the text of this paragraph.

We still ask for the deletion of the second sentence of Article 20 (6). We understand that it is an optional provision. The requesting State is making use of a jurisdiction that already exists in national law, even without the transfer of a proceeding. We don't understand why the requested State should have the opportunity to consider the maximum sentence provided for in the law of the requesting State. For cases of Article 3, where jurisdiction is exclusively based on the Regulation, we have sentence 3.

Article 23

We want to thank the Presidency for aligning the introductory wording in Article 23 (1) with that in the Digitalisation Regulation.

Article 27

The requirement to maintain statistics of the categories of data set out in Article 27 (1a) and (1b) should be restricted to "data available at a central level of the Member State concerned" in line with Article 18 (2) of the PIF Directive. Otherwise, these requirements could not be met in Germany in the short or medium term because of the country's federal structure, as they would place a disproportionate burden on the federal states.

HUNGARY

With reference to the Presidency note (ST 14849 2023 INIT) about the selected issues to be discussed at the JHA Counsellors' meeting to be held on 7 November 2023, please find below our remarks.

Q1

As a specialized governmental agency, the Victim Support Services in Hungary are tasked with the majority of duties concerning victims of crime. Giving information to victims is one of their most important tasks. Thus, they need to have the competence to inform victims about requests and decisions on transfers of criminal proceedings as well. However, these authorities are neither investigating nor prosecuting authorities under Hungarian law – they have an exclusively supporting role –, but they play an invaluable part in victim protection. However, any text which restricts the term 'requested authority' – or 'requesting authority' for that matter – to investigating or prosecuting authorities in criminal proceedings precludes our Victim Support Services to inform the victims. They should be allowed to be designated as requested – or requesting – authorities within their official capacities.

For these reasons Option 2 is more preferable for us, but only if the text in the square brackets is deleted. Option 1 is restrictive as far as our problem is concerned; therefore, we cannot support it as it stands now, but with the deletion of the same text which is in the square brackets in Option 2, the Option 1 could be supported as well.

We have the same issue with the term ‘requesting authority’. Our Victim Support Services have to be able to inform victims not only about accepting decisions but also about refusals – and the information on refusals are communicated by the requesting authority –, therefore we need a wording for Article 2(3) which makes this possible. We need a more flexible approach; therefore, we request a simpler wording for the first sentence of Article 2(3)(b), as follows:

“any other competent authority which is designated as such by the requesting State ~~and which, in the case concerned, is acting in its capacity as an investigating authority in criminal proceedings with competence to request the transfer of criminal proceedings in accordance with national law. ...”~~

As an alternative to all of the above, restituting the previously used term ‘competent authority of the requested State’ instead of ‘requested authority’ in A15b(1) and also bringing back ‘competent authority of the requesting State’ instead of ‘requesting authority’ in Articles 7(2) and 15b(2) would also solve our problem.

Q 2a

Option A1 is only acceptable if a decision to accept the transfer cannot be overturned on the discretionary elements of Article 13(2)(a)(c)(d) and (e). Our proposal is the inclusion of a paragraph (2a) to limit the scope to objective criteria of legality (errors of law or fact) and to properly exclude discretion from the scope. Our proposal is the following:

“2a. A decision to accept the transfer can be overturned based on an error of law or an error of fact which

a) should have resulted in the refusal of the transfer based on Article 13(1);

b) would have resulted in the refusal of the transfer based on Article 13(2)(a), (c), (d), (e).”

Option A2 and B are both acceptable for us. However, the problem of discretionary decisions is present despite the restriction in Option B; therefore, for the sake of legality it should be dealt with in the same manner as in Option A1 or A2. In this sense, the most logical solution would be a mixture of Option A1 or A2 and Option B [Article 15c(1) as in Option B with Article 15c(2) as in Option A2, or Article 15c(2), (2a) as in Option A1].

We cannot agree with the Commission on Options A2 and B being non-compliant with the requirements of Article 47 of the Charter.

Firstly, Article 13(2) is a ‘may’-clause where the authority has discretionary power to accept the transfer or not. There are no objective criteria set out in Article 13(2) as to when the acceptance or the refusal of the transfer is warranted; therefore, the decision is discretionary and in itself it is outside the scope of legality, and thus could not objectively be reviewed.

Secondly, the whole reasoning about the necessity of remedies is very much debatable. We presented our detailed arguments about the cases cited in favour of the remedies (*Gavanazov II* and *Ghezelbash*) at an earlier stage of the negotiations, as we still stand by our previous point of view. Also, the fact that “a case file already exists” in the requesting State does not mean that the case automatically exists –or should exist - in the requested State. The existence of a criminal case is primarily dependent on exercising of ‘*ius puniendi*’ by the state concerned, which is based on state sovereignty. In case of a transfer, this principle does not change; the basis of the proceeding in the requested State is not the already existing in the other State, but the decision to investigate and prosecute an event, which by the way existed as a criminal case in another Member State. Article 13(1)(a) of the proposal is a good example to illustrate this point. According to this provision, the transfer shall be refused in cases where the conduct in connection with which the request was made does not constitute a criminal offence under the law of the requested State. If the assumption of the “already existing case file” were true, Article 13(1)(a) would not be a ground of refusal because the requested State would have to proceed based on a decision of another state. However, there is no such obligation – and there is no ‘mutual recognition of criminal proceedings’ here –, the transferred case is indeed a new case under the law of the requested State, and thus, accepting the transfer is a form of launching a new criminal case against which there is no remedy. The situation is similar in the case of direct consultations under Chapter 4 of Council Framework Decision 2009/948/JHA: there is no remedy.

While we share some of the concerns of the Presidency about the possible interpretations, we still see the text of Option C as a viable option with the following – merely technical – addition:

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

It is not our preference to create a provision on remedies taking after that of the EIO Directive – as the Presidency expressed in the footnote to Q 2a – but we could exercise a certain degree of flexibility if this version found the support of the majority. Additionally, we consider it better to remerge the provisions on remedies for victims and defendants into one single article.

Our order of preference (1 being the best case scenario, 7 being the worst):

1. C
2. mixture of B and A2 [Article 15c(1) as in B with Article 15c(2) as in A2].
3. mixture of B and a modified A1 [Article 15c(1) as in B with Article 15c(2), (2a) as in A1 amended by our suggestion].
4. A2
5. A1 as amended by our suggestion
6. B
7. the text proposed by the Presidency in the footnote, victims and defendants merged (taking after EIO)

Q 2b

We have reservations about Option 2 for Article 15c(4); therefore, we prefer Option 1 but we can approach this issue with a certain degree of flexibility.

Q 2c

It has to be stressed again that it is not our preference to create a provision on remedies taking after that of the EIO Directive, but in case of a majority support, a certain degree of flexibility could be exercised. Irrespectively of the exact legal technique used to provide for remedies, re-emerging Articles 15c and 15d seems like the better option. As for placing remedies in the recital, we cannot see how that would solve any issues.

Q 3

Article 19

We can accept Article 19(1)(2) as it stands now.

The new wording of Article 19(2a) suggests that parallel proceedings have to exist for any MLA procedure to be finished. On the contrary: parallel proceedings exist solely for the purpose of Article 19(2) because there is no need for a more extensive approach. Measures in this sense are either urgent new measures or existing measures in need of maintaining. Urgent new measures are obviously enacted by the requesting authority, and maintaining the existing measures is done on MLA but only within the scope of Article 19(2)(b). Any other MLA procedure is able to –and should – proceed without parallel proceedings. This new text is seriously confusing and it prolongs procedures; therefore, we support the previous one:

“Where the investigative or other procedural measures of paragraph 2 are no longer necessary, the criminal proceedings in the requesting state shall be suspended or discontinued.”

Article 20

We do not support the inclusion of Article 20(2a). This seems to be similar to a new type of MLA-instrument. The question remains: why do we need this when the international frameworks for these measures already exist? Furthermore, the relationship between this new instrument and the already existing ones (EAW, EIO, MLA) has to be further analysed.

Q4

We have no objection to the suggested changes.



IRELAND

6 November 2023

Re: Proposal for a Regulation of the European Parliament and of the Council on the Transfer of Criminal Proceedings in Criminal Matters – IE written comments on revised text 14849/23

Unfortunately, due to national holidays falling at this time in Ireland and the short deadlines involved, we have had limited time to consider the revised text of the Regulation in its entirety in consultation with experts. However, given the JHA Counsellors meeting taking place on the afternoon of 7 November we wish to submit comments on the issues discussed in document 14849/23 in the first instance.

We very much appreciate the work of the Presidency in progressing this file. Given the importance of this proposed instrument in the area of criminal justice matters, we consider it imperative that it be given full and proper consideration in advance of agreement of a General Approach. This is proving challenging given the very ambitious timelines of the Presidency but we remain open to engaging as constructively as we can in the time available.

Article 2 – Definitions

Article 2(4) – ‘requested authority’

Ireland can accept either of the options presented.

However, our preference is for option 2 as proposed in the Presidency paper 14849/23 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 of the requested State so provides**, 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 ~~any~~ 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)

With regards to the text in square brackets, Ireland had originally proposed this formulation for consistency with ‘requesting authority’ and to acknowledge that the competent authorities taking preparatory and subsequent measures in Ireland would be investigating or prosecuting authorities that have a role in the administration of justice. However, we would be happy for this text to either be included or removed as suits the majority of other Member States.

Articles 15c and 15d – legal remedy

The Presidency has put forward Options A (1 and 2), B and C but also notes the Commission’s view that neither Option A nor B would comply with the requirements of Article 47 of the Charter. As such, it may be helpful to receive a view from the Council Legal Service further to the comments made at the most recent COPEN meeting on what would respect the requirements of the Charter.

Given the lack of a uniform understanding of ‘legal remedy’ at EU level, it would not appear appropriate to try to resolve this issue in this instrument.

From Ireland’s perspective, we consider that Option C is the most preferable of the options presented. However, we do not fully understand how this will meet the requirements of Article 47 of the Charter without reference to the court. As noted above, we would appreciate further information from the Presidency or Council Legal Service in this regard.

Article 15c(4) – suspensive effective

Ireland would prefer the second option, Option 2:

“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)

However, we would welcome further discussion and examples of when these circumstances might occur.

Article 15d – legal remedy for victims.

Ireland could accept the text proposed by the Presidency for 15d:

“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.”

Ireland would be happy for this to be included in either the operative text or recitals, but notes the view of the Commission that the latter would not meet the requirements of Article 47 of the Charter.

As with article 15c, the legal questions raised in relation to legal remedy are complex and could potentially have wide-ranging implications. We therefore are of the view that a fuller consideration and a legal view may be required.

Article 19 – Effects in the requesting State

We can accept the revised Article 19 as drafted in the main.

However, as put forward previously by our expert at COPEN and in our written comments we are of the view that there is a need to explicitly highlight the ongoing need for cooperation and compliance with formalities of other Member States, even after the transfer has taken place. As such, we suggest the inclusion of the following text in Article 19 between paragraph 2 and paragraph 2a:

“Notwithstanding paragraph 1, *the requesting authority shall, in accordance with national law, comply with the formalities and procedures expressly indicated by the requested Member State, unless otherwise provided in this Regulation and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requesting Member State. Formalities and procedures may include, but are not limited to.....*”

This is important in an Irish context to respect the evidence procedures that exist in our common law system, where rules of evidence and rules on the burden and standard of proof are important safeguards for defendants at trial stage. Including this ongoing obligation to co-operate in the manner required by the requested State is in the interests of bringing proceedings to a successful conclusion and achieving the aims of the Regulation.

We can be very flexible on the location of text regarding an ongoing obligation to co-operate with the formalities and procedures of the requested State, once it is included in the operative part of the text. We consider this inclusion essential to enable proper operation of the Regulation between civil and common law systems.

Article 20 – Effects in the requested State

Provisional arrest – 20(2a)

As outlined in writing previously and highlighted at the COPEN meeting last week, in Ireland there is a constitutional presumption in favour of bail for accused persons, who are presumed innocent until proven guilty. The burden rests with An Garda Síochána (police force) to rebut the presumption in favour of bail by adducing evidence, to a judge, that there are sufficient grounds to refuse bail under the Constitution and the Bail Act 1997, as amended.

In light of the above, we do not consider that there is sufficient justification to include an article allowing for provisional arrest pending a decision on transfer, particularly bearing in mind presumption of innocence and the fact that the Regulation is not limited to serious crimes.

However, we wish to be as flexible as possible. As such, in a spirit of compromise we could be flexible in accepting this 'may' provision.

Nevertheless, we wish to flag what we see as a potential unintended consequence of its inclusion relating to the articles on legal remedy. Should the article on legal remedy fall to be interpreted by the CJEU, as seems likely, it may consider the incursion on Member States' procedural autonomy regarding legal remedy in the context of the extent of rights engaged by this instrument. We consider that providing for the possibility of provisional arrest based on this instrument and the issuing of a request for transfer of proceedings is very significant in this regard.

Recitals addressing the specific situation of Ireland

We acknowledge that the Presidency has modified recitals 20, 28 and 33 as required to take account of Protocol 21.

Certificate

We note that this needs significant updating (not least its title from 'certificate' to 'request form' in line with the Regulation, and a number of typographical errors e.g. at Section A).

We look forward to the continuing negotiation of this text at tomorrow's JHA Counsellors and the upcoming JHA Counsellors + experts meeting on 15 November. We will submit further written comments as soon as possible this week in relation to the rest of the revised text.

8 November 2023

Re: Proposal for a Regulation of the European Parliament and of the Council on the Transfer of Proceedings in Criminal Matters – IE written comments on revised text 14052/23 and 14849/23

With apologies for the delay in sending, please find below further comments in relation to the revised text of the ToCP Regulation at documents 14052/23 and 14849/23.

Article 2 – Definitions

Ireland wishes to thank the Presidency and other Member States for their flexibility in accepting amended text regarding the definition of ‘requested authority’ at Article 2(4) 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 **exclusively** 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 another 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 2)*

This will allow the Regulation to be operationalised in Ireland’s common law system.

Article 5 – Criteria for requesting a transfer

As expressed previously in our written comments, we do not agree with the inclusion of Article 5(2)(i) in the list of criteria for requesting a transfer of criminal proceedings. We suggest that it be deleted as this is not the appropriate instrument to consider social rehabilitation or transfers of sentenced persons. It also presupposes an outcome to proceedings, as flagged in our previous written comments. Furthermore, Article 6(3) already provides for the requesting authority to take into account the opinion of the suspects or accused persons referred to in 6(2) when deciding whether to request the transfer of criminal proceedings. We consider this sufficient.

Article 6(2) and Article 7(2) – Rights of the suspect or accused and victims

We wish to flag one minor textual amendment required in Article 7(2), line 6 as follows:

*“of the intended **request for** transfer of criminal proceedings”*

This is required so as not to presuppose a decision to accept the transfer of criminal proceedings on the part of the requested authority.

We wish to emphasise again that the introduction of mandatory consultation at Article 15(2) between requesting and requested States in advance of a request for transfer being issued will be key in determining whether informing suspects/accused persons/victims would undermine the confidentiality of or prejudice an investigation, as set out in Articles 6(2) and 7(2). This is not a determination that can be made unilaterally by the requesting State without consulting the requested State that may ultimately progress criminal proceedings.

Mandatory consultation would also appear to be required if Article 6(2a) is to be retained, though Ireland would favour its deletion. It seems illogical that the burden of seeking the opinion of suspects or accused persons on a request for transfer would fall to the requested authority, prior to any consultation having occurred between the requesting and requested authority. In any event, it may be helpful to clarify that the requesting authority can issue these standardised forms directly to suspects and accused persons if possible, but can also request the assistance of the requested authority where required. The form will also need to contain an option for ‘no response received’ as it is a shall provision that the requested authority will “send the form back to the requesting authority”. However, there may be instances where the person cannot be reached or no response is received. The current draft of the Regulation does not specify any timeline for seeking an opinion but it seems that a timeframe for the suspect to provide a response would need to be agreed upon between Member States.

With regards to Articles 6(2) and 7(2), we consider it unusual to differentiate between the level of information provided to a suspect or accused person or victim who has proposed a request for transfer versus one who hasn’t. Nevertheless, we can accept the text as drafted (subject to the views previously expressed regarding the requirement for mandatory consultation).

Article 13 – Grounds for refusal

We note that Article 12(1) sets out that

“The requested authority shall take a reasoned decision on whether to accept or refuse the transfer of criminal proceedings and shall decide, in accordance with its national law, on the measures to be taken.”

However, Article 13(1) sets out the possibility that the requested authority shall refuse the transfer of criminal proceedings “in whole or in part”. The text needs to be made consistent throughout the Regulation in order to be easily understood and operationalised.

Article 14 – Time limits

Ireland considers that providing for mandatory consultation at Article 15(2) would facilitate meeting the time limits set out in Article 14.

Article 15 – Mandatory consultation

As indicated at the last COPEN meeting and in our written comments prior, we are strongly in favour of mandatory consultation in advance of issuing a request for transfer. As such, we consider that Article 15(2) should be amended as follows:

*Consultations between the requesting and requested authorities ~~may~~ **shall** also take place before the request for the transfer of criminal proceedings is issued, in particular with a view to determining whether the transfer would serve the interests of the efficient and proper administration of justice and be proportionate.*

Mandatory consultation in advance of a request for transfer will facilitate direct contact with the same competent national authorities that will ultimately progress the criminal proceedings by conducting the investigation/prosecution subsequent to transfer (subject to a decision to accept). It will contribute to building the positive working relationship from the outset that will be required for the operation of this Regulation and achievement of its objectives.

Article 15c – legal remedy for suspects and accused persons

We wish to reiterate that legal remedy should be exercised in accordance with the national law of the requested State in a way that respects the requirements of Article 47 of the Charter.

In our view the first two paragraphs of Article 8 of the Commission’s original proposal achieve this aim:

“1. Suspects, accused persons, and victims shall have the right to effective legal remedies in the requested State against a decision to accept the transfer of criminal proceedings.

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

However, we note the further discussion at JHA Counsellors on 7 November and that the Presidency may propose an amended version of Option A1 set out in document 14849/23 for consideration. We will look forward to seeing this text or any suggestions put forward by other Member States and will aim to be as flexible as possible on this issue.

On Article 15c(4) on suspensive effect, Ireland is in favour of legal remedy not having suspensive effect but that it may be granted in a specific case (Option 2 from document 14849/23).

At Article 15d(3), Ireland is strongly in favour of retaining the words “where possible” before “within 60 days”.

Article 15d – legal remedy for victims

We refer to our previous comments of 6 November 2023.

Articles 19 and 20

We have previously provided comments and suggested text in relation to providing for an ongoing obligation to co-operate between requesting and requested States, and admissibility of evidence. We look forward to discussing further with the Presidency and Member States as required.

We look forward to continuing with the negotiation of this text at the next meeting on 15 November.

Recital 20

Subject to confirmation by legal experts we are happy to accept a slightly revised version of Recital 20 to clarify that Ireland is bound by the Charter, as follows (footnotes removed for ease):

“(20) This Regulation does not affect procedural rights as enshrined in the Charter and in other instruments of Union law, such as Directives 2010/64/EU, 2012/13/EU, and Directives 2013/48/EU, (EU) 2016/343, (EU) 2016/800 and (EU) 2016/1919 of the European Parliament and of the Council, for the Member States bound by them. In particular, the requesting authority should ensure that these rights, as provided for under Union and national law, are respected when requesting a transfer of criminal proceedings under this Regulation.”

LATVIA

Latvia still does not agree with the proposed form of legal act - a regulation. The goal of the regulation, that is, a uniform transfer procedure in criminal cases to prevent persons from evading punishment and to prevent violations of the principle of ne bis in idem (inadmissibility of double punishment), can also be achieved with another legal instrument. In Latvia's view, the goal can also be achieved with the implementation of the directive, thus providing the opportunity for the member state to evaluate each case individually. This is also confirmed by Article 4(1)(j) of the TFEU, which gives member states the right to regulate the transfer of criminal proceedings in accordance with their national acts. In Latvia's opinion, the directive would set uniform rules in the European Union, while taking into account the national regulations of each member state. The Directive imposes obligations on Member States regarding the result to be achieved, but allows national authorities to determine the forms and methods of their implementation.

Latvia previously stated that Article 5(2)(h) of the regulation is rather narrow in scope, indicating the fact that the suspect or accused person is serving a sentence involving deprivation of liberty in the requested state. Latvia proposes to set the criterion "if it is not possible to ensure the presence of the accused in criminal proceedings" in sub-paragraph h), which would cover the conditions of the proposed wording also for the penalty of deprivation of liberty.

The newly created paragraph 2a of Article 6 contributes to the administrative burden, for the requesting authority to fill in a newly created standardized form to be sent separately to the receiving authority. Also, how long does the receiving authority have to give this form to the suspect/accused person and wait for their response? In Latvia's opinion, the opinion should be ascertained only from persons who are in the country of the proceedings, as they are affected by the transfer of the criminal proceedings to another country. Similar considerations to Article 15a(2) and Article 15b(1a).

Latvia reiterates that it is necessary to consider the possibility to also provide for the requesting country to withdraw the decision on taking over the criminal proceedings at any time if it sees reasons that exclude the taking over of the criminal proceedings. In such a case, the regulatory framework of Latvia stipulates that the institution receiving the request sends all the materials of the criminal case back to the requesting country, and the revocation of the takeover of the criminal proceedings is also one of the grounds for the renewal of the criminal proceedings in Latvia.

Latvia supports deleting the reference to residents from Article 15c. Latvia still emphasizes that it can support the right to effective legal remedies against the review of the decision to take over criminal proceedings only if the criteria are limited to the mandatory reasons for refusal mentioned in Article 13, paragraph 1, and the examination of the optional reasons for refusal is completely excluded.

Latvia cannot support Article 19, paragraph 2. Latvia points out that if the receiving state agrees to take over the criminal proceedings, then the requesting state would no longer have the right to perform any procedural actions, as this could affect the admissibility of evidence. Such a provision on urgent investigative actions should be applicable only to cases where the requesting country has sent a request for taking over the criminal proceedings, but the acceptance for taking over the proceedings from the other country has not yet been received.

Regarding Article 20 of the regulation, in Latvia's view, it is not necessary to provide a separate basis for the application of arrest or any other provisional measures such as freezing in the regulation, because the regulation does not exclude the country's national regulation, in this case it will supplement it. The application of temporary detention should be left to the national regulation of the member states.

NETHERLANDS

Comments on the draft Regulation on the Transfer of Criminal Proceedings

NL would like to submit comments after the meeting held on **October 27**, in addition to the remarks made during the meeting. Changes to the text revised by the Presidency (document 14052/23) have been marked by **bold and underlined characters** (for additions) and by ~~bold strike through~~ (for deletions).

Comments on Articles 2(4), 15c, 15d, 19, and 20 are not included in this document, since these articles will be discussed separately on November 7. Given that there is an ongoing discussion about these articles, we did not include any comments on recitals that relate to these issues either.

Comments concerning the articles

Article 5, paragraph 2(h)

Answering the question posed by the Presidency in relation to this article, the NL would prefer to delete the text between brackets, as a transfer of proceedings might be desirable also on other grounds than securing the presence of the suspect at the proceedings.

Article 12, paragraph 5a

We support the inclusion of this provision, and also the addition about the request of the requested authority. However, we still see a lack of flexibility where the word 'shall' is used, as in some cases, there might be reasons why the requesting State cannot hand over certain evidence. Examples might be cases where the evidence is also relevant in another case. Apart from that, also the rights of third persons should be taken into account. It is therefore important to ensure that the documents will be returned to the requesting State upon request by the requesting authority, and that there is a possibility to refuse the transfer of physical evidence.

The easiest way to provide more flexibility would be to either change ‘shall’ into ‘may’ or to insert ‘make every effort to’ after ‘shall’ so that it would read ‘shall make every effort’¹ and to add the following sentence: ‘The requesting State may require that the file or physical evidence be returned to the requesting State once it is no longer required in the requested State or at the end of the proceedings in the requested State at the latest.’

Paragraph 5a would then read as follows:

*Upon request of the requested authority, the requesting authority ~~shall~~may / shall make every effort to transmit the original case file, including physical evidence, to the requested authority without undue delay once the national proceedings are discontinued in accordance with Article 19. **The requesting State may require that the file or physical evidence be returned to the requesting State once it is no longer required in the requested State or at the end of the proceedings in the requested State at the latest.***

Another option would be to add a ground for refusal to paragraph 5a, so it would read:

*Upon request of the requested authority, the requesting authority shall transmit the original case file, including physical evidence, to the requested authority without undue delay once the national proceedings are discontinued in accordance with Article 19. **Transmission may be refused if the file or physical evidence is also relevant for other proceedings or if the transmission would harm the rights of third persons. The requesting State may require that the file or physical evidence be returned to the requesting State once it is no longer required in the requested State or at the end of the proceedings in the requested State at the latest.***

Although NL would have a preference for the more flexible approach of ‘may’ or ‘shall make every effort’, we could work with this alternative as well.

¹ Wording used in article 3(3) of the 1959 CoE-convention.

Article 13, paragraph 2(e)

NL supports the inclusion of this ground for refusal, with a proposal for a minor technical change, which is to insert the word ‘original’ before jurisdiction. By expressing that the Member State has no ‘*original* jurisdiction’, the provision expresses more clearly that also Member States who can only establish jurisdiction in their national law, and who therefore will implement the grounds for jurisdiction in Article 3 in their national law, can invoke this optional ground for refusal.

Comments concerning the recitals

Recital 18

We would suggest that the wording is brought in line with Article 4, according to which *the proceedings* are waived. The current text of recital 19 mentions twice that the requesting state would be able to waive *its jurisdiction*.

Recital 30

In our earlier written comments, we have asked about the implications of the last sentence. We do not understand how this relates to the obligations in other provisions, such as Article 15a. Unless clarification can be given, we suggest to delete the last sentence.

Recital 40a

NL would like to ask for its text proposal for a new recital 40a to be taken into consideration once again (see document 13262/2/23 REV 2). It is important that the optional ground for refusal mentioned in article 13, paragraph 2(c) can not be interpreted as a limitation of the application of the one in paragraph 2(b).

Comments on the draft Regulation on the Transfer of Criminal Proceedings

NL would like to submit comments after the meeting held on **November 7**, in addition to the remarks made during the meeting. Changes to the text revised by the Presidency (document 14849/23) have been marked by **bold and underlined characters** (for additions) and by **~~bold strike through~~** (for deletions).

Q1:

As indicated during the meeting, NL can be flexible, but has a preference for option 2. We have no objections to the suggestion to insert “exclusively” before “by a judge, a court or a public prosecutor”.

Q2a:

As indicated during the meeting, the NL has a strong preference for the text of article 15c as it reads in the October 27-version (document 14052/23).

For NL it is important that the (judicial) authority deciding on the legal remedy is able to assess whether the fundamental rights of the suspect were respected.² We think article 47 of the Charter requires this. Article 15c in the October 27-version allows for this.

If the 27 Oct-version does not work for other delegations, NL could accept a solution in line with the option mentioned under A1 if a review of whether fundamental rights were respected would be included in the text. The text could 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), and [as far as Article 13(2)(b) goes] in the light of the requested States obligations in accordance with Article 6 TEU and the Charter.***
(Option 1)

² For example, the right to be present at the trial might in an individual case be implicated if the proceedings are transferred to another Member State because a suspect has a medical condition that prevents him from travelling.

Q2b:

During the meeting, NL has indicated a preference for option 1. If no common ground can be found, the Netherlands can also accept the suggestion made by one Member State during the meeting to leave it up to the national law of the Member States.

Q2c:

As indicated during the meeting, NL believes it is important that an article about a legal remedy for victims is included in the operative part of the Regulation.

As indicated, the formulation “available in a similar domestic case” does not work for NL, as there is no domestic equivalent to this type of interstate cooperation in NL. Next to that NL believes, with a view to its direct applicability, this Regulation must clearly indicate who is entitled to a remedy and what is the basis for the assessment.

We refer to our proposal for an alternative text for article 15d as included in document WK 14419/23.

For NL placing victims back in article 15c would also be in option, if paragraph 2 of that article would read the same as in the October 27-version or if – in option A1 – also a reference to the right of the victim to be heard, to provide evidence or to a decision on compensation would be included.

Q3:

The NL would like to emphasize that article 20(2a) is of great importance to us. NL reads no obligation in this paragraph to provide for these possibilities in the national law, given the reference to national law at the end of this paragraph NL. If it would be helpful to other Member States, NL has no objections to further clarifying this, either in the provision or in a recital. For example, paragraph 2a could be amended in the following way:

2a. 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, **as could be applied under its own law if the offence in respect of which proceedings are requested had been committed in its territory**, pending a decision to accept the transfer of criminal proceedings in accordance with national law.

SWEDEN

Written Comments from Sweden on the Revised Text in ST 14052/23 and document ST 14849/23

We would like to thank the Presidency for the opportunity to provide written comments. Changes compared to the text in ST 14052/23 have been marked by ***bold italic underlined*** characters for additions and ***~~bold italic strike through~~*** for deletions.

Article 13.2 (e)

We are pleased that this new optional ground for refusal has been included in the text. As mentioned during the meeting 27 October the wording could be slightly changed to better align with similar provisions in other instruments such as the EAW and the EIO. We suggest the following text.

(e) the alleged criminal offence is not punishable an offence at the place where it was committed, and the requested state has no jurisdiction according to its national law to prosecute the offence.

15c Right to an effective legal remedy for suspects and accused persons

Although the previous paragraph 4a, on the outcome of a legal remedy, has been deleted, we still believe that it's important to clarify what the result of a legal remedy would be. As mentioned at the meeting yesterday, this can be achieved by specifying that what should be reviewed is whether the decision to accept the transfer shall be confirmed. Regarding the question about minor errors that was discussed in connection to the former paragraph 4a, the now proposed text allows the court to consider such minor errors in its assessment, but also leaves room for the court to confirm the decision to accept a transfer, if the court concludes that the minor errors should not affect the transfer. We therefore suggest the following text in paragraph 2.

2. The right to an **effective** legal remedy shall be exercised before an independent judicial authority other than the authority which took the decision to accept the transfer court in the requested State in accordance with its law. ~~The decision~~ *Whether the decision* to accept the transfer of criminal proceedings shall be confirmed shall be examined in the light of on the basis 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.

We could also be open for a combination with the text in option A 1 in document ST14849/23 The text would then read as follows.

2. The right to an **effective** legal remedy shall be exercised before an independent judicial authority other than the authority which took the decision to accept the transfer court in the requested State in accordance with its law. ~~The decision~~ *Whether the decision* to accept the transfer of criminal proceedings shall be confirmed shall be examined in the light of on the basis 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.

15d Right to an effective legal remedy for victims

As mentioned during the meeting yesterday, we can support a text on the victims right to a legal remedy in the operative part. However, we cannot support the text put forward by a Member State in document WK 14419/23 which is no longer connected to the grounds for refusal in article 13. We also oppose the comparison with similar domestic cases now made in the text. The transfer of proceedings is different from issuing an EIO. Regarding an EIO, it is logic that equivalent legal remedies apply for a decision to seize property whether the property is seized in Sweden or in another Member State. However, the same comparison cannot be made when it comes to transferring proceedings between two national courts or transferring proceedings to another Member State.

Those situations are completely different. Rather than such a comparison we suggest to just refer to national law. It will then be up to Member States to put in place legal remedies in relation to this instrument without any obligation to arrange for similar legal remedies in purely national cases. We therefore suggest the following text:

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.~~ in accordance with its law.
