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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters - Continuation of the examination of the amendments of the European Parliament

With reference to point 12), on page 19 of 6267/24 INIT, regarding the (optional) grounds for refusal (Article 13(2)(e) – Line 167a), delegations will find attached a drafting suggestion by the German delegation for additional clarifying text in recital 40, as well as an explanation with a concrete example.

New optional ground for refusal in Article 13(2)(e)

Suggestions and information from Germany

1) Possible additional explicative text in the recital 40:

Changes to the text of the general approach have been marked by **bold and underlined characters**.

- (40) Transfer of criminal proceedings should not be refused on grounds other than those provided for in this Regulation. To be able to accept the transfer of criminal proceedings, prosecution of the facts underlying the criminal proceedings that are subject to the transfer should be possible in the requested State. The requested authority should not accept the transfer of criminal proceedings when the conduct for which transfer is sought is not a criminal offence in the requested State, or when the requested State does not have jurisdiction over that criminal offence, unless it exercises jurisdiction provided under this Regulation. **The requested authority should also not accept the transfer of criminal proceedings if the conditions for prosecuting the criminal offence in the requested State are not fulfilled. This could be the case, for example, if a complaint by the victim, which is necessary for prosecuting the criminal offence in the requested State, has not been filed in time, or where, because of death or insanity of the suspect or accused person, prosecution has become impossible pursuant to the law of the requested State.** Furthermore, the transfer of criminal proceedings should not be accepted in case of other impediments to prosecution in the requested State. The requested authority should also be able to refuse a transfer of criminal proceedings, if the suspect or accused person benefits from an **privilege or** immunity in accordance with the law of the requested State, **for example** in relation to certain categories of persons (such as diplomats) or specifically protected relationships (such as lawyer-client privilege), or if the requested authority believes that such transfer is not justified by the interests of efficient and proper administration of justice, for instance because none of the criteria for requesting a transfer of criminal proceedings are met, or if the **request form** certificate for a request for transfer is incomplete or **manifestly incorrect and has not been completed or corrected** by the requesting authority, thus not enabling the requested authority to have the necessary information to assess the request for transfer of criminal proceedings. **The requested authority should also be able to refuse the request if the conduct is not an offence at the place where it was committed, and the requested state has no original jurisdiction to investigate and prosecute such offence. This ground for refusal aims to ensure that the requested State is not compelled to violate the principle of non-intervention under international law unless one of the recognised exceptions to that principle (e.g. universal jurisdiction) applies.** For the purposes of this Regulation, ‘original jurisdiction’ means jurisdiction which is already provided for by national law, and which does not derive from this Regulation.

2) Explanation of the proposed changes:

The (international law) principle of non-intervention generally prohibits the extension of a state's own criminal jurisdiction to crimes committed in another state's territory. This principle thus protects the sovereignty of states to determine what conduct should be punishable. Exceptions may arise from the nationality of the perpetrators or victims, or may be justified in the case of serious crimes (principle of universal jurisdiction in the case of genocide, etc.). Without the ground for refusal provided for in the general approach in Article 13(2)(e), there is a risk that the criminal law of the requested State will be extended to cases in which the offence is not punishable at the place where it was committed and for which there is no connecting factor linking the offence with the requested State (e.g. non-national for conduct carried out overseas and not attracting universal jurisdiction). According to Article 3 of the draft Regulation, for jurisdiction to be established under the Regulation, it may be sufficient that the suspect is already subject to other proceedings in the requested State and that he lives in the requested State. These connecting factors alone are unlikely to justify the jurisdiction of the requested state, if the offence is not punishable at the place where it was committed. Without the above-mentioned ground for refusal, an offence which is not punishable in a third State (including cases where the conduct is only an administrative offence under national law) and which for that reason would not be punishable under the law of the requested State could become punishable simply because the proceedings are transferred from the requesting State to the requested State. This is not only a considerable encroachment on the right of the requested State to apply its criminal law, but may also force it to violate the (international) principle of non-intervention in relation to third countries.

The following purely fictional examples might help to illustrate our position:

“Mr. O. lives in Member State A and Mr. T. lives in Member State B. Both go on vacation to third country X, independently of each other. During a walk along the promenade, Mr. A loses his unique ring, which was specially made for him. A little later, Mr. T. comes along the path and finds the ring, which he happily picks up and takes home to B. When Mr. O. accidentally becomes aware on the internet that Mr. T. is offering the ring for sale, he reports it to the authorities in Member State A, who want to transfer the proceedings to Member State B, as Mr. T. lives there and there are other witnesses living in Member State B who can confirm that Mr. T. found the ring while on vacation in X. In third country X theft by finding is not a criminal offence. The law of Member State B does not provide for jurisdiction for such an act if it does not constitute a criminal offence at the place where it was committed.

In our view, Mr T should not be prosecuted solely because of the transfer for an action which does not constitute an offence at the place where it has been committed in X and for which he therefore could not be prosecuted under Member State B law without the transfer.”