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## NOTE

From:	Presidency/General Secretariat of the Council
To:	Delegations
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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

## Introduction

At the meeting on 6 February, the JHA Counsellors examined selected amendments from the European Parliament on the draft Regulation on the transfer of proceedings in criminal matters, on the basis of 6012/24.

On 8 February, the first trilogue took place, in Strasbourg. The parties exchanged points of view on the following topics:

- a) Proportionality (Article 5, Article 15)
- b) Right to an effective legal remedy: scope of examination, suspensive effect, access to documents (Article 15c)
- c) Other issues related to judicial review (Articles 19 par.3 and 20 par.3a)
- d) Detention periods (Article 20 par.4)
- e) Information of the suspect, accused person and victim (Articles 6 par.4, 7 par.4, 15a, 15b)
- f) Requested authority (Article 2 point 4)

On points d) and e), the Presidency stated that it could not say anything, since the relevant EP amendments had not yet been discussed in the Council.

The parties also confirmed the 4CT and delegated work to the technical level.

Immediately after the trilogue, as well as on Friday morning 9 February, an informal technical meeting took place. Articles 1-19 were discussed. An updated four column table is set out in WK 1488/2/24 REV 2.

In view of the COPEN meeting on Thursday 15 February, delegations will find below some questions and comments for Member States. Three sections are provided:

- A: Substantive questions that were already touched upon at the meeting on 6 February
- B: New substantive questions
- C: Technical issues

Where possible, delegations are invited to consider the suggestions of the EP in a spirit of compromise.

“Nothing is agreed until everything is agreed”.

### **Questions / comments for Member States**

**A: Substantive questions that were already touched upon at the meeting on 6 February** (in the order as discussed at that meeting)

#### **1) Effective legal remedy (Article 15c) – Lines 178j to 178p**

At the trilogue and the ITM’s, this provision was intensively discussed. The Presidency explained that the text of the Council general approach constitutes a fine balance between the positions of the Member States, and that it should therefore be maintained as far as possible. However, in order to reach an agreement with the European Parliament, it may be necessary to make some concessions.

At the meeting on 6 February, it appeared to the Presidency that Member States might have some flexibility, e.g. on the issue of access to documents.

Following the ITM's, the Commission proposed the following compromise text for Article 15c:

1. *Suspects, accused persons, and victims shall have the right to a[n] effective legal remedy[ies]<sup>1</sup> in the requested State against a decision to accept the transfer of criminal proceedings.*
2. *The right to an effective legal remedy shall be exercised [before a court/tribunal] in the requested State in accordance with its national law.*
3. *Where the legal remedy sought challenges the validity of the decision to accept the transfer of criminal proceedings on the basis of the criteria provided for in Article 13(1) and (2), the time limit for seeking an effective legal remedy shall be no longer than [20][14] days from the date of receipt of the reasoned decision to accept the transfer of criminal proceedings. The requested authority shall inform the requesting authority about the legal remedy sought without undue delay.*

*In so far as discretion was exercised, the review of the decision to accept the transfer of criminal proceedings shall be limited to assessing whether the requested authority has manifestly exceeded the limits of its discretion.*

*A final decision on that remedy shall be taken without undue delay and at the latest within 60 days from the date the legal remedy is sought.*

*[Where the request for transfer of criminal proceedings is issued after the suspect's or accused person's indictment, the invocation of such a remedy shall have suspensive effect.]  
or [Any suspensive effect of a legal remedy against a decision to accept the transfer of criminal proceedings, shall be governed by national law.]*

*In case the legal remedy sought is successful, the requested authority shall inform the requesting authority about the final outcome, in which case the criminal proceedings will revert to the requesting State, unless the competent court in the requested State decides otherwise.*

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<sup>1</sup> The EP would prefer "effective legal remedies" (plural) instead of "effective legal remedy" (singular) but is currently reflecting.

- 3a. *Legal remedies for the violation of any relevant/procedural provision of this Regulation, other than those covered in paragraph 3 of this Article, shall be governed by national law, including in terms of the form, procedure, time-limits and consequences of a successful challenge, and shall be without prejudice to the possibility of raising it in the form of objection in the course of the criminal trial.*
4. *Member States shall ensure that suspects, accused persons, and victims have the right of access to all documents that formed the basis for the decision to accept a transfer under this Regulation. Such access may be limited where it would undermine the confidentiality of an investigation, or otherwise prejudice the investigation. Member States shall also comply with any other procedural obligations which are necessary to effectively exercise right of the suspects, accused persons and victims to an effective remedy.*

In the light of this Commission compromise proposal, the Presidency would like to discuss with Member States the following points:

**a) Scope of the review**

At the meeting on 6 February, the Commission had already explained that in its view, the scope of review cannot be restricted to an examination of the grounds for refusal mentioned in Articles 13(1) and 13(2). In accordance with Article 47 of the Charter, it should be possible that the legal remedy also concerns the violation of any other relevant/procedural provision of the Regulation. “When there is a right, there should be remedy”. For this reason, the Commission has inserted a new paragraph 3a, precisising though that the review of such other relevant/procedural provisions shall be entirely governed by national law.

The Presidency would like to know the opinion of Member States on this suggestion.

**Q 1a: Member States are invited to indicate what they think about the Commission proposal for paragraph 3a, regarding legal remedies for the violation of any relevant/procedural provision other than Article 13(1) and (2).**

**b) Time limit for seeking an effective legal remedy**

There are two questions under this heading:

i) Following the original Commission proposal, the Council had agreed that the time limit for seeking an effective legal remedy should not be longer than 20 days.

The European Parliament proposes that this time limit shall not be longer than 14 days.

The Presidency would like to know the preference of the Member States:

**Q 1b-i): Which time-limit would Member States prefer, 20 or 14 days? Could Member States accept the time limit of 14 days, as proposed by the EP?**

ii) In the Council general approach, the following addition was made:

*Nevertheless, where the suspect, accused person or victim is not identified at the time of transfer, and the reasoned decision could therefore not be communicated to such persons at that time, the time limit shall run from the date of acceptance of the transfer by the requested authority.*

At the time of the general approach, this addition was felt important by some Member States, since otherwise, in cases where the suspect, accused person or victim could not be identified at the time of transfer and the reasoned decision could therefore not be communicated to such persons, the legal remedy could in principle be introduced months or even years after the decision on the transfer was taken.

This addition has not been taken on board by the Commission in its compromise suggestion, and the Presidency would like to know if it should be maintained.

**Q 1b-ii): Member States are invited to indicate whether it is necessary to maintain the above-mentioned addition on time limits contained in the general approach.**

**c) Consequence of a successful legal remedy**

The Commission proposes to provide:

*In case the legal remedy sought is successful, the requested authority shall inform the requesting authority about the final outcome, in which case the criminal proceedings will revert to the requesting State, unless the competent court in the requested State decides otherwise.*

Member States will recall that this issue of the consequence of a successful legal remedy was discussed during the negotiations for a general approach, but that in the end only a reference was maintained in Article 19(1).

**Q 1c: Could Member States accept the text proposed by the Commission on the consequence of a successful legal remedy?**

**d) Access to documents**

***Option 1***

Following a suggestion from the European Parliament, the Commission proposes to provide:

*4. Member States shall ensure that suspects, accused persons, and victims have the right of access to all documents that formed the basis for the decision to accept a transfer under this Regulation.*

***Option 2***

In line with the discussion at the meeting on 6 February, the Presidency considers that such wording could be acceptable, provided that a reference is added to national law. The text could therefore read as follows:

*4. Member States shall ensure that suspects, accused persons, and victims have the right of access, **in accordance with national law**, to all documents that formed the basis for the decision to accept a transfer under this Regulation.*

### Option 3

The Presidency would also like to discuss the following option:

*4. Member States shall ensure that suspects, accused persons, and victims have the right of access, in accordance with national law, to all documents related to the transfer of criminal proceedings that formed the basis for the decision to accept a transfer under this Regulation and that are necessary to exercise their right to an effective legal remedy.*

**Q 1d: Member States are invited to indicate which of these three options they prefer.**

#### **e) Compliance with other procedural obligations**

In paragraph 4 of its compromise text, the Commission proposes the following addition:

*Member States shall also comply with any other procedural obligations which are necessary to effectively exercise right of the suspects, accused persons and victims to an effective remedy.*

The Commission explained that it finds it important to cover also other procedural rights, such as the right to interpretation and translation (Directive 2010/64/EU).

The Presidency understands where the Commission is coming from, but it considers that these obligations should be respected anyway, like all other applicable law. A reference in the recitals – see recital 20 in the general approach<sup>2</sup> – seems sufficient. This being said, the Presidency would like to hear the views of the Member States.

**Q 1e: Member States are invited to indicate if they can accept the addition on compliance with other procedural obligations.**

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<sup>2</sup> Recital 20 in the Council general approach:

(20) This Regulation does not affect procedural rights as enshrined in the Charter or in other Union legal acts, such as Directives 2010/64/EU, 2012/13/EU, 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.

**f) Before a court/tribunal**

At the meeting on 6 February, the issue of whether “before a court/tribunal” should be inserted in paragraph 2 was discussed. The Commission indicated that in its view, in the light of Article 47 of the Charter, the legal remedy should in any case be exercised before a court (or tribunal), whether it be expressly provided or not. Therefore, in the view of the Commission, it would be preferable to insert these words, in order to make the text clearer.

The Presidency has noted that while several Member States could show flexibility, for others it is crucial that the insertion is not made. The Presidency therefore suggests to continue defending in the negotiations the text as it stands in the general approach:

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

**Q 1f: Unless any Member State wants to add anything on this issue, the Presidency will proceed as indicated.**

**g) Suspensive effect**

At the meeting on 6 February, the issue of suspensive effect was already discussed. The Presidency noted that a large majority prefers the text of the general approach, which leaves this issue completely to national law:

- “4. *Any suspensive effect of a legal remedy against a decision to accept the transfer of criminal proceedings shall be governed by national law.*”

The EP indicated that suspensive effect is one of the points to which it is most attached, since it fears that the Council approach could create a fragmentation between national laws.

This being said, in light of the positions of the Member States, the Presidency suggests to continue defending the general approach text in the negotiations.

**Q 1g: Unless any Member State wants to add anything on this issue, the Presidency will proceed as indicated.**



## 2) Issues related to judicial review in Articles 19 and 20

In light of the useful input provided by Member States at the meeting on 6 February on the issues of judicial review in Articles 19(4) and 20(3a), the Presidency has informed the EP that these newly suggested provisions are not acceptable to the Council.

The judicial review seems to be one of the strong points of the EP, who stated that it would reflect.

## 3) Proportionality (recitals 23 and 36, Articles 5(1) and 15(2)) – Lines 100 and 176

As discussed at the meeting on 6 February, the European Parliament would like to add the criterion of “proportionality” for making a request for transfer of criminal proceedings. The text proposed by the European Parliament for Article 5(1) is as follows:

*1. A request for transfer of criminal proceedings may only be issued where the requesting authority deems that the objective of an efficient and proper administration of justice would be better served by conducting the relevant criminal proceedings in another Member State and that it is proportionate to do so.*

At the same meeting, the Member States, showed some openness to work on this issue, which was identified as one of the issues where a concession to the EP could be made.

After the ITM on 9 February, the Commission proposed the following compromise texts:

### Article 5(1):

*A request for transfer of criminal proceedings may only be issued where the requesting authority deems that the objective of an efficient and proper administration of justice, **including proportionality**, would be better served by conducting the relevant criminal proceedings in another Member State.*

Corresponding recital 23 – text of the Council general approach is maintained.

## Article 15(2):

*2. Consultations between the requesting and requested authorities may 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, including whether it is proportionate. In order to propose that criminal proceedings from the requesting State be transferred, the requested authority may also consult the requesting authority as to whether it would be possible to issue a request for the transfer of criminal proceedings.*

Corresponding recital 36 – text of the Council general approach is maintained.

The Presidency takes a positive view on these compromise suggestions, which basically transfer recital language to the operative part without any risk of a contrario interpretation.

**Q 3: Member States are invited to confirm that they can accept the Commission compromise suggestions for Articles 5(1) and 15(2) on the issue of “proportionality”.**

### **4) Requested authority (Article 2(4)) – Lines 85 and 85a**

The issue of the definition of “requested authority” has led to intensive debates in the trilogue and ITM’s. While the EP has qualified this issue as a “yellow issue” (outstanding, but not difficult), the Commission continues to have great concerns with the provision in the version as set out in the Council general approach. As indicated before, the Commission cannot accept the definition as it stands, since it fears abuse of the provision, in the sense that Member States could interpret the notion of preparatory measures too widely, so basically “emptying” the functions of the judicial authority (judge, court, investigating judge or a public prosecutor), and as not being in line with the legal basis of the proposal.

The Presidency noted that at the meeting on 6 February, one Member State underlined that the text as it stands in the general approach is a red line for it, and that many delegations supported that Member State in its position.

During the negotiations, the Presidency defended the text of the general approach, while offering to explain the operational need for some flexibility and while offering to consider presenting an explicative recital. Following a request by the EP, the Presidency also submitted some explicative notes to the EP, reproduced in the Annex.

The Commission presented three alternative drafting suggestions for Article 2(4). Before possibly submitting any of these suggestions to the Member States, the Presidency wants to consult the Member States concerned.

If there is any more information, the Presidency will communicate this to the delegations without delay.

## **B: New substantive questions**

### **5) Criteria for requesting a transfer – Article 5(2), point (jc) – Line 111c**

The European Parliament proposes a new criterion to be taken into account by the requesting authority when considering making a request for transfer of criminal proceedings:

*“(jb) whether the transfer of proceedings would contribute to the achievement of restorative justice objectives.”*

The European Parliament provided the following explanation:

*“The concept of restorative justice has gained ground in the last years. It refers to 'any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party' (definition provided in Article 2 lit.b of Directive 2012/29/EU).*

*Restorative justice may be used at any stage of the criminal proceedings, including during police investigations, prosecution, court proceedings or post sentencing stages (see UNODC overview here).*

*Restorative justice has a voluntary character, just as the transfer of judicial proceedings, that is:*

- affected persons cannot be forced to undergo restorative justice, it remains only an option at their disposal;*
- an authority cannot be forced to request for the transfer of a case, it is only a possibility that the current regulation under negotiation would stipulate.*

*The aim of introducing restorative justice as one of the criteria for transfer would be to have a ground that simultaneously takes into account the interests of all parties involved, with a focus on the reparation of material and immaterial damages. Such process is characterised by voluntariness, participation, confidentiality, avoidance of revictimisation, reintegration of offenders, impartiality of the third party, reducing the risk of stigmatisation.*

*This should be seen just as one additional criterion for transfer at the disposal of competent authorities. One may see that not all criteria in Article 5 have the potential of being used on a regular basis in practice, but we could assume that the criterion of restorative justice could be used in practice more often than, for example, the criterion in lit.c(iii) [refusal of EAW issued under Article 4, point (3) of Framework Decision 2002/584/JHA].”*

The EP underlined that this criterion is entirely optional and could be helpful in certain situations on a case-by-case basis.

**Q 5: Member States are invited to indicate if they could accept this new criterion relating to “restorative justice”. If Member States cannot accept it as a part of a global compromise, they are kindly invited to indicate the reasons therefore.**

**6) The rights of the suspect or accused person – Time limit for providing an opinion – Article 6(2) and 6(3) – Lines 115 and 116**

As set out in line 116, the EP suggests stating that where the suspect or accused person decides to give an opinion, such opinion should be delivered no later than ten days after the suspect or accused person has been informed of the intended transfer and given the opportunity to state their opinion.

The Commission is positive to this amendment, and the Presidency also takes a positive stand. Possible wording, drafted by the Presidency and not yet checked with the EP, could be as follows:

Article 6(2), line 115 (basis: Council general approach):

*2. Provided that it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation, the requesting authority shall inform the suspect or accused person of the intended request for transfer of criminal proceedings, in accordance with the applicable national law and in a language which they understand, and shall provide them with an opportunity to state their opinion, unless that person cannot be located or reached despite reasonable efforts being made by the requesting authority. **The opinion shall be delivered no later than ten days after the suspect or accused person has been informed of the intended transfer and has been given the opportunity to state their opinion.** Where the request for the transfer of criminal proceedings follows a proposal from the suspect or accused person under Article 5(3), such information to the suspect or accused person who made the proposal is not required.*

Article 6(3), line 116 (basis: Council general approach):

*3. If the suspect or accused person is in the requested State, the requesting authority may, when applying paragraph 2 of this Article, transmit a completed standardised form to be adopted under Article 28(2) to the requested authority. In such cases, the requested authority shall seek the opinion of the suspect or accused person and send the form back to the requesting authority. **The suspect or accused shall deliver their opinion no later than ten days after they have been informed of the intended transfer and given the opportunity to state their opinion.** The opinion of the suspects or accused persons referred to in paragraph 2 of this Article shall be taken into account by the requesting authority when deciding whether to request the transfer of criminal proceedings.*

**Q 6: Member States are invited to indicate if they could accept this new idea of a time-limit, and if so, whether the text is agreeable.<sup>3</sup> If Member States cannot accept it, they are invited to indicate the reasons therefore.**

**7) The rights of the suspect or accused person – Registration/recording of the opinion – Article 6(3) – Line 116**

The Parliament would like that the opinion of the suspect or accused person is registered, as a (further) protection of suspects and accused persons:

***Such opinion** shall be taken into account **and be registered** by the requesting authority when deciding whether to request the transfer of criminal proceedings.*

The Presidency considers that this suggestion that could possibly be accepted, provided that the opinion is “recorded” instead of “registered” – compare the procedural rights Directives, e.g. Directive 2013/48 on the right of access to a lawyer, Article 8(2) – and that reference is made national law. Inserted in the wording of the Council general approach, the text could read as follows:

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<sup>3</sup> In case this addition is accepted, it makes sense to put this also in line 120 (Article 7.2) for victims:

*2. Provided that it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation, the requesting authority shall inform the victim who resides or, in case of a legal person, is established in the requesting State and who has requested to receive information on the criminal proceedings in accordance with Article 6(1) of Directive 2012/29/EU or, in case of a legal person, in accordance with national law, of the intended request for transfer of criminal proceedings, in accordance with the applicable national law, in a language which they understand, and shall provide them with an opportunity to state their opinion. **The opinion shall be delivered no later than ten days after of the suspect or accused person has been informed of the intended transfer and given the opportunity to state their opinion.** Where the request for the transfer of criminal proceedings follows a proposal from a victim in accordance with Article 5(3) of this Regulation, the requesting authority is not required to provide the above information to such victim.*

*The opinion of the suspects or accused persons referred to in paragraph 2 of this Article **shall be recorded using the recording procedure in accordance with the law of the Member State concerned and** shall be taken into account by the requesting authority when deciding whether to request the transfer of criminal proceedings.*

**Q 7: Member States are invited to indicate if they could accept the suggestion of the EP, as refined by the Presidency.<sup>4</sup>**

**8) The rights of the suspect or accused person – Information to be provided – Article 6(4) –  
Line 117**

As regards the information to be provided to suspects or accused persons, the Commission and the Council consider that there should be two instances where suspects or accused persons should be informed:

- i) where the requesting authority intends to issue a request for transfer of criminal proceedings, see Article 6(2));
- ii) where the requested authority has taken a reasoned decision in accordance with Article 12(1) to accept the transfer of proceedings, see Article 6(4).

The European Parliament considers that there should be three instances where suspects or accused persons should be informed:

- i) where the requesting authority intends to issue a request for transfer of criminal proceedings, see Article 6(2));
- ii) where the requesting authority has issued the request for transfer of criminal proceedings (see EP amendment in line 117);

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<sup>4</sup> In case this addition is accepted, it makes sense to put similar wording in line 121 (Article 7.3) for victims.

iii) where the requested authority has taken a reasoned decision in accordance with Article 12(1) to accept the transfer of proceedings, see Article 6(4).

The Parliament explained that it considers it very important that suspects and accused persons are informed in the best possible way. The Presidency expressed concerns, since this could constitute a considerable additional administrative burden for national authorities, but it would like to hear from Member States.

**Q 8: Member States are invited to indicate if they have flexibility to follow the suggestion of the EP to provide information to suspects and accused persons at three stages, including at the stage where the requesting authority has issued the request for transfer of criminal proceedings.<sup>5</sup>**

#### **9) The rights of the victim – Article 7(3) – Line 121**

The texts of the Council and of the EP are close but the Presidency would like to verify with Member States whether the EP version would also be acceptable:

Council text :

*2. Provided that it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation, the requesting authority shall inform the victim who resides or, in case of a legal person, is established in the requesting State and **who has requested to receive information on the criminal proceedings** in accordance with Article 6(1) of Directive 2012/29/EU or, in case of a legal person, in accordance with national law, of the intended request for transfer of criminal proceedings, in accordance with the applicable national law, in a language which they understand, and shall provide them with an opportunity to state their opinion.*

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<sup>5</sup> In case this suggestion is accepted, a similar change should be made as regards victims.



EP text:

*2. Provided that it would not undermine the confidentiality of an investigation or otherwise prejudice the investigation, [or hamper the proper administration of justice or affect the rights of other victims<sup>6</sup>], victims who reside in the requesting State, and **who receive the information specified in Article 6(1), point (a), of Directive 2012/29/EU**, as implemented by national law, shall in accordance with applicable national law, be informed of the intended transfer of criminal proceedings, in a language which they understand, and shall be given an opportunity to state their opinion orally or in writing.*

The Presidency would like to concentrate on the underlined and bold words. The difference lays notably in the word “victims who requested to receive information”, which the Council has vs. “victims who receive” in the EP position. It seems better and clearer, but is it really necessary in the light of Article 6(1) of Directive 2012/29/EU?

Article 6 of Directive 2012/29/EU provides as follows:

*Article 6 - Right to receive information about their case*

*1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the **victim and that, upon request, they receive such information:***

*(a) any decision not to proceed with or to end an investigation or not to prosecute the offender;*

*(b) the time and place of the trial, and the nature of the charges against the offender.*

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<sup>6</sup> EP is reconsidering these words.

Under the Victims' Rights Directive, there seems to be no provision for automatic communication. The only exception is Article 6.4, which provides:

*4. The wish of victims as to whether or not to receive information shall bind the competent authority, unless that information must be provided due to the entitlement of the victim to active participation in the criminal proceedings. Member States shall allow victims to modify their wish at any moment, and shall take such modification into account.*

**Q 9: Member States are invited to express their opinion on this issue. Is there any flexibility to take the EP text on this issue?**

**10) Procedure for requesting the transfer – Time limits for acknowledgement of receipt – Article 9(7)(a) – Line 143b**

While explaining the text of the Council general approach in line 143b, the Presidency realised that this text may be a bit confusing. It now reads as follows:

*7a. Without undue delay after receipt of a request form, the requested authority shall send to the requesting authority an acknowledgement of receipt as soon as possible and in any event within seven days of receipt.*

The adding-up of “without undue delay”, “as soon as possible” and “in any event within seven days of receipt” appears a bit much. The Presidency suggests deleting “as soon as possible”, so that the text reads as follows:

*7a. Without undue delay after receipt of a request form, the requested authority shall send to the requesting authority an acknowledgement of receipt ~~as soon as possible~~ and in any event within seven days of receipt.*

**Q 10: Member States are invited to confirm that “as soon as possible” can be deleted.**

## 11) Decision of the requested authority – Article 12(3) – Line 152

As regards the information to be provided by the requested authority to the requesting authority in case of refusal to transfer, the Council in its general approach has added the words “upon request of the requesting authority”:

*3. If the requested authority decides to refuse the transfer of criminal proceedings in accordance with Article 13, the requested authority shall, upon request of the requesting authority, inform the latter of the reasons for such refusal.*

The European Parliament considers that it would make sense that reasons are always provided, since the requesting authority has the right to know why the request – for which he has done efforts – is refused, and also because of politeness.

The Presidency considers that the Parliament may have a point. At least, it should be explained to the EP why this is necessary.

**Q 11: Member States are invited to indicate whether the words “upon request of the requesting authority” can be deleted. If Member States oppose such deletion, they are invited to indicate the reasons therefore.**

## 12) Grounds for refusal – Article 13(2)(e) – Line 167a

The European Parliament has had troubles understanding the new optional ground for refusal added by the Council in Article 13(2)(e):

*(e) the conduct in connection with which the request was made is not a criminal offence at the place where it was committed, and the requested State has no original jurisdiction under its national law to prosecute the offence.*

The Presidency provided the following explanation to the EP, which had been drafted with the help of a Member State:

*„From our point of view there should be an optional ground for refusal for cases where the alleged offence is not 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. This is most important for cases where the alleged offence was committed in a third country and the jurisdiction of the requested state is exclusively established by the regulation. For example, someone who does something in Switzerland that is allowed there cannot be prosecuted for it in Germany. The fact that the proceedings in that case were transferred from another Member State to Germany should not change this.“*

The EP indicated that it would appreciate receiving some concrete examples and including some explanatory words in the recital (recital 40 in line 49 is very general, and basically only copies the text in the operative part). The Presidency is currently looking into this and might provide some wording in advance of the meeting on 15 February.

### **13) Detention periods – Article 20(4) – Line 198**

The European Parliament has provided additional wording in line 198 regarding detention periods:

*4. Provided that a custodial sentence or detention order is issued in the requested State, the latter shall deduct all periods of detention spent in the requesting State, which were imposed in the context of the transferred criminal proceedings, from the total period of detention to be served in the requested State as a result of a custodial sentence or detention order being issued. To that end, the requesting authority shall transmit to the requested authority all information concerning the period of detention spent by the suspect or accused person in the requesting State. Equally, where the person is detained pending proceedings in the requested State, all periods of detention spent in the requesting State shall be taken into account in order to determine any maximum periods of detention applicable to such detention, in order to assess the proportionality of that measure in the requested State, unless the competent authority in the requested State decides that all or part of that detention period shall be omitted, according to the national law, if it is not justified in the light of the conduct of the convicted person following the offence.*

**Q 13: Could Member States show flexibility on this suggestion from the EP?**

**C: Technical issues**

**14) Title of Article 4 - Line 96**

In its amendment in line 96, the EP suggested putting the following title:

*“Waiver, suspension or discontinuation of criminal proceedings by the requested State”*

Apparently, this was a clerical error, “requested State” should be read as “requesting State”:

*“Waiver, suspension or discontinuation of criminal proceedings by the requesting State”*

With this modification, the revised title seems agreeable to the Presidency.

**Q 14: Member States are invited to confirm that this revised title is acceptable.**

**15) Criteria for requesting a transfer – Article 5(2), point (ja/jb) – Lines 111a and 111b**

The Council and the EP have similar texts, but they are not identical:

Council: (k) the competent authorities of Member States have reached consensus on the concentration of the proceedings in one Member State.

EP: (ja) the consultations of Member States’ competent authorities under Framework Decision 2009/958/JHA have resulted in an agreement on the concentration of the parallel proceedings in one Member State.

The Commission proposed the following compromise text:

*“(ja) the competent authorities of the Member States have reached consensus under Framework Decision 2009/958/JHA, or otherwise, on the concentration of the proceedings in one Member State.”*

The text in the corresponding recital 27, as in the Council general approach, will be maintained.

**Q 15: Member States are invited to confirm that this text is agreeable.**

**16) Criteria for requesting a transfer – Article 5(3) – Lines 112**

The Commission supports the Council text on this point, subject to two modifications, which seems OK to the Presidency:

*3. The suspect or accused person, or a victim, may, in accordance with procedures in national law, propose the competent authorities of the requesting State or of the requested State that criminal proceedings be transferred under the conditions of this Regulation. If the proposal is made to the competent authority in the requested State, ~~that~~ the requested authority may consult the requesting ~~competent authority in the requesting State~~ in accordance with Article 15(2). Proposals made under this paragraph shall not create an obligation for the requesting State to request or transfer criminal proceedings to the requested State.*

NB: In corresponding recital 27, the addition proposed by the Council on concentration of proceedings would be maintained.

**Q 16: Member States are invited to confirm that these modifications are agreeable.**

**17) Information to be given after the transmission of the request – Article 10 – Line 146a**

The Commission considers that the text of the second part of Article 10 should be refined as follows:

*The **information and** essential parts of the ~~information and~~ relevant documents, referred to in the first paragraph shall be translated by the requesting authority into an official language of the requested State or any other language that the requested State will accept in accordance with Article 30(1), point (c).*

The Presidency considers that this suggestion could make sense, since the information should always be translated, while it is only necessary to translate the essential parts of the relevant documents.

**Q 17: Member States are invited to confirm that the suggested modification is agreeable.**

**Concluding remarks**

The Presidency wishes to thank Member States in advance for scrutinising this paper and for their active input at the COPEN meeting on 15 February 2024.

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*(paper submitted to the EP)*

## **Proposal for Regulation on the transfer of proceedings in criminal matters**

### **Some explanations of the Council position on Article 2(4)**

**9 February 2024**

#### **Introductory comments**

- A fundamental principle underpinning the European area of freedom, security and justice is respect for the different legal systems and traditions of the Member States (Art. 67 TFEU).
- In order to be effective and achieve their aims, legal instruments which facilitate international cooperation in the detection, investigation and prosecution of crime must be flexible enough to incorporate also the common law system, including that of Ireland.

#### **Article 2(4) of the draft ToP Regulation in an Irish context**

- Article 2(4) sets out that a ‘requested authority’ means a judge, a court, an investigating judge or a public prosecutor. In Ireland:
  - There is no such thing as an investigating judge – it simply does not exist;
  - Public prosecutors have an extraordinarily limited role, if any, in relation to investigations and only become involved at a very late stage in proceedings. This is usually once an investigation has concluded and a decision must be made on whether or not there is sufficient evidence and if it is in the public interest to prosecute a criminal offence;
  - Judges sit exclusively within the courts system. For this reason, ‘a judge, a court’ is essentially the same thing in an Irish context.



- The scope of this Regulation deals with transfers of proceedings from early investigation stage right through to end-stage prosecutions.
- However, it can be seen from the above that Ireland’s options for a ‘requested authority’ are much more limited given its common law system when compared to most other Member States, which have both investigating and prosecuting judges and extensive judicial involvement in early stage investigations. This is not the case in Ireland.
- The amended Article 2(4) is carefully balanced to respect the various EU legal systems, is legally sound and is in line with the proposal’s legal base – as confirmed by the Council Legal Service – and does not negatively impact the other EU Member States.

### **Content of amended Article 2(4)**

#### Decision making

- The decision on whether to accept or refuse a transfer of proceedings – Article 12(1) – will always be taken by a judicial authority as set out in the original text. That is, by “*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*”. The word “exclusively” is crucial in this regard.
- Therefore, it is important to stress that the amended Article 2(4) does not involve any change to who takes the decision on whether to accept or refuse transfer.

#### Decoupling of decision making from taking of subsequent measures

- Given that it is a judge/court taking a decision on transfers of proceedings in Ireland, it is absolutely essential that the taking of a decision on a transfer is decoupled from the taking of subsequent measures as it would be legally impermissible within the common law tradition for a judge/court to direct an investigation.
- The decoupling of decision-making and the taking of subsequent measures in the definition of requesting authority is necessary to reflect the separation of powers in the Irish criminal justice system. In Ireland, the courts carry out an independent, impartial function and do not have competence to take preparatory or subsequent measures.

### Preparatory measures

- The amended text allows for a competent authority acting in its capacity as an investigating or prosecuting authority to take preparatory measures.
- By way of example:
  - Request any additional information as it deems necessary;
  - Consult before the request for the transfer of criminal proceedings is issued. (In an Irish context, there isn't a means of consulting directly with judges or courts and it would, furthermore, be legally impermissible in our system having regard to the constitutional independence of the judiciary);
  - Acknowledge receipt of requests (along with central authority);
  - Where necessary, assist the requesting authority in obtaining the opinion of the suspect or accused person if present in the requested state.
- Aside from the legal necessity for this possibility, this approach has further advantages in that it facilitates direct contact both in advance of and subsequent to the decision on whether to accept a transfer being taken. This is in line with the principle of direct contact between competent authorities, as set out at Recital 13.
- Without this involvement in preparatory measures, the judicial decision is being taken in a vacuum and the criminal proceedings cannot be integrated into the Irish investigative/prosecutorial system.

### **Conclusion**

- It is submitted that the amended text of Article 2(4) as included in the General Approach fully respects the legal base of Article 82(1), second subparagraph, points (b) and (d) TFEU and is legally sound.