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COMMISSION STAFF WORKING DOCUMENT

Analytical Supporting Document

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council

on the transfer of proceedings in criminal matters

{COM(2023) 185 final} - {SWD(2023) 78 final}

1. INTRODUCTION: POLITICAL AND LEGAL CONTEXT

This document accompanies the Commission proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters - as adopted by the Commission.

As set out in the explanatory memorandum of the initiative, no impact assessment was carried out mainly due to lack of realistic options[1] and limited impacts on citizens and businesses[2]. Instead, this document serves to explain the problem, the objectives of the proposal, the chosen policy approach and the consultation activities carried out. It also analyses the proposed solution in the light of its impacts on effectiveness, efficiency, fundamental rights and coherence with other EU cross-border judicial cooperation instruments.

Transfer of criminal proceedings is an important tool of cross-border cooperation aiming at improving the efficient and proper administration of justice. A transfer of proceedings allows the authorities of one Member State to transfer a specific criminal case to the competent authorities of another Member State and request prosecution of the suspect(s) or accused person(s) in that Member State. It can prove to be necessary in different situations.

In particular, a transfer of criminal proceedings may be necessary and appropriate where parallel proceedings in different Member States concerning the same facts and the same person occur. The increase in cross-border crime has led to an increasing number of cases in which several Member States have, under their domestic legislation, jurisdiction to investigate and bring to trial the same or related criminal offences[3]. Overlapping jurisdictions could for example occur in situations where the offence has been committed in the territory of several Member States, or where the effects of an offence occurred on the territory of several Member States[4]. This is especially true for crimes perpetrated by organised criminal groups, such as drug trafficking, migrant smuggling, trafficking in human beings, firearms trafficking, environmental crime, cybercrime or money laundering. Many countries also assume jurisdiction over acts performed outside their own territory, such as based on the active[5] or passive[6] personality principles.

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1 See further section 5.

2 See further section 6.

3 Results of the targeted consultations with Member States' authorities have shown that organised crime, trafficking and cybercrime are the most common offences that lead to parallel proceedings and subsequently to transfer of proceedings, however, fraud, money laundering and drug related offences were often frequently mentioned.

4 Eurojust issued a recommendation to accept that one Member State was in a better position to handle the proceedings in a swindling case, where cars rented in Italy and Spain were exported to other Member States. Consequently, a transfer of proceedings took place, p. 51: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_2016_annual_report_en.pdf. Similarly, Eurojust issued recommendations in a drug trafficking case, p. 46: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_2017_annual_report_en.pdf.

5 Jurisdiction exercised by the State over its own nationals or persons domiciled in its territory, without regard to the place of the offence.

Multiple prosecutions of the same cases pose challenges not only in terms of coordination and effectiveness of criminal prosecutions, but can also be detrimental to the rights and interests of individuals and can lead to duplication of activities. Defendants, victims and witnesses may have to be summoned for hearings in several countries. Most notably, repeated proceedings entail a multiplication of restrictions on their rights and interests, such as of free movement. Within the European area of justice it is appropriate to avoid, where possible, such detrimental effects, and to ensure that criminal proceedings are conducted in the best-placed Member State. Transfer of criminal proceedings could help to prevent unnecessary parallel proceedings in different Member State and could help to prevent possible infringement of the *ne bis in idem* principle [7]. It could also reduce the number of multiple proceedings in respect of the same facts or in respect of the same person being conducted in different Member States. Furthermore, in order to avoid the risk of impunity that may result from some situations when surrender of a person for criminal prosecution under a European Arrest Warrant[8] ('EAW') is delayed or refused, authorities of the Member State postponing or refusing the surrender could consider taking over the criminal proceedings in which the surrender was sought.

While the transfer of proceedings may prove to be necessary in situations such as those described above, the existing instruments at EU level do not regulate this form of cross-border judicial cooperation.

In particular, there are tools aiming at promoting early identification of parallel proceedings and at coordinating actions when deciding which Member State is to prosecute when jurisdictional conflicts arise, however, they do not regulate the procedure for the transfer of criminal proceedings. Eurojust, in particular, plays a key role in facilitating preliminary contacts and consultations and resolving jurisdiction issues. Eurojust may ask the competent authorities of the Member States concerned to accept that one of them may be in a better position to undertake an investigation or to prosecute specific offences. The competent national authorities are also obliged to inform Eurojust of cases in which conflicts of jurisdiction have arisen or are likely to arise. Eurojust has published Guidelines on 'Which jurisdiction should prosecute?'[9]. By suggesting factors to be taken into consideration in multi-jurisdictional cases, these guidelines have been helping competent national authorities to determine the jurisdiction best placed to prosecute in cross-border cases.

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6 Jurisdiction exercised by the State for the protection of its nationals in respect of offences of which they may have been the victims abroad.

7 The principle that nobody can be tried or punished twice in criminal proceedings for the same criminal offence.

8 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). This Framework Decision sets out a legal framework for the execution of a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

9 https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_jurisdiction_guidelines_2016_en.pdf

Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings[10] sets out a procedure for the exchange of information and for direct consultations between competent authorities to achieve an effective solution and avoid any adverse consequences arising from parallel proceedings. Similarly, other EU laws concerning criminal matters, particularly for specific types of crime, such as combatting terrorism (the Directive (EU) 2017/541 of the European Parliament and of the Council, Council Framework Decision 2002/475/JHA) and organised crime (Council Framework Decision 2008/841/JHA), set out factors to be taken into account to centralise proceedings in a single Member State when more than one Member State can validly prosecute on the basis of the same facts. However, these legal acts do not regulate the procedure for the transfer of criminal proceedings, which may be a necessary solution in such cases.

An agreement between the EU Member States on the transfer of proceedings in criminal matters was signed in 1990[11], but never entered into force due to a lack of ratifications.

In July 2009, the Swedish Presidency introduced an initiative on behalf of 16 Member States[12] for a Council Framework Decision on transfer of proceedings in criminal matters[13]. Member States decided to discontinue negotiations when the Lisbon Treaty entered into force on 1 December 2009 due to a change brought in the decision-making procedure with the expectation expressed by the Presidency of the Council that a new instrument would be tabled under the Lisbon Treaty[14].

In the absence of a specific EU legal act, Member States currently transfer criminal proceedings between themselves using a variety of different legal instruments with no uniform legal framework across the EU[15]. The most comprehensive international legal framework on the transfer of criminal proceedings - the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 ('1972 Transfer Convention') – has only been ratified and applied by 13 Member States.[16] Most Member States use Article 21[17] of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 ('1959 MLA Convention') as a mechanism to request prosecution of a suspect in another party to the Convention. For this form of cooperation, however, the procedure for transfer is largely unregulated. Other legal bases of cooperation in this area include national laws, bilateral or

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10 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

11 https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=1990106&DocLanguage=en

12 BE, BG, CZ, DK, EE, EL, ES, FR, LT, LV, HU, NL, RO, SI, SK and SE.

13 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009IG0912%2801%29#ntc3-C_2009219EN.01000701-E0003

14 Council doc. 16437/09 and 16826/2/09.

15 See further Annex 3.

16 https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=073

17 Sometimes, in conjunction with Article 6 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.

multilateral agreements or the principle of reciprocity, depending on the two Member States involved.

In its report on the way forward in the field of mutual recognition of judicial decisions in criminal matters of May 2019[18], the Romanian Presidency suggested to further explore the need for a legislative proposal on the transfer of criminal proceedings. In December 2020, the Council, in its conclusions on the European Arrest Warrant[19], invited the Commission to consider whether a new proposal for an EU instrument on the transfer of proceedings would be feasible and would add value. Eurojust and the European Judicial Network have also raised a number of legal and practical difficulties that authorities face in the absence of clear common rules and procedures, and have called for an EU instrument in this area[20]. To address the problems currently affecting transfers of criminal proceedings (see section 2), the Commission decided to propose a new instrument. This initiative is included in the Commission's 2022 work programme[21].

This analytical document has been prepared in order to support and accompany the legal proposal on the transfer of proceedings in criminal matters. The data contained in this document has been mainly obtained from (i) public feedback to the call for evidence; (ii) an open public consultation; (iii) targeted consultations with Member States' authorities, Eurojust, the European Judicial Network in criminal matters (EJN), the European Public Prosecutor's Office (EPPO), Europol, the European Union Agency for Fundamental Rights (FRA); (iv) a meeting with experts of the Member States' authorities, (v) a meeting with the Commission's Criminal Law Expert Group, (vi) reports from Eurojust and the European Judicial Network[22] and (vii) a research project on transfer of criminal proceedings in the EU[23] which was co-funded by the European Commission from the Justice programme, including two conferences organised in the context of the project.

2. PROBLEM DEFINITION

2.1. Problems

In the absence of a common legal framework on the transfer of criminal proceedings and due to differences among Member States' national criminal justice systems (see section 2.4.), transfers

18 https://data.consilium.europa.eu/doc/document/ST-9728-2019-INIT/en/pdf

19 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XG1204(02)

20 Eurojust report on the transfer of proceedings in the EU published in 2023, 'Report on Eurojust Written Recommendations on Jurisdiction' published in 2021, the 'Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction' published in 2018, and the 'Report of the strategic seminar on conflicts of jurisdiction, transfer of proceedings and ne bis in idem', organised by Eurojust in 2015. Conclusions of the 52nd EJN Plenary meeting on the role of the EJN in fostering the practical application of the EU mutual recognition instruments published in 2019.

21 https://ec.europa.eu/info/sites/default/files/com2021_645_en.pdf

22 Supra, at 20.

23 https://www.eur.nl/en/esl/research/our-research/eu-and-nwo-funded-research-projects/transfer-criminal-proceedings

of criminal proceedings have been facing several legal and practical issues preventing authorities from fully applying this cross-border judicial cooperation tool, which consequently affects criminal investigations and prosecutions across the EU.

This initiative aims to tackle two main problems affecting transfers of criminal proceedings that were identified in the stakeholder consultation process, and that are further described below:

1) inefficient transfers of criminal proceedings; and
2) lack of effective prosecution (transfers of proceedings do not take place where they would be in the interest of justice).

According to estimates provided by the Member States, the number of outgoing requests for transfers of proceedings in the period of 2016-2022[24] has remained at a similar level. Due to the absence of a harmonised statistical framework, the gaps in the data do not allow to make conclusions on the trends in this type of cooperation. It is unlikely, however, that the need for transfers of criminal proceedings would decrease in the nearest future, rather it could remain the same, or could even increase. Therefore, without action at EU level the likely consequences are that the identified problems will continue to persist.

2.2. Inefficient transfers of criminal proceedings

In the stakeholder consultation process it has been repeatedly pointed out that a more efficient cross-border cooperation is needed and that authorities face a number of issues in the current legal set up, which stem from a lack of clear common rules and procedures. Such issues include in particular:

- lack of communication between competent authorities: specifically, practitioners pointed to the lack of prior consultation by the requesting authority, as well as the lack of information by the requested authority which concerns, in the first instance, the decision to accept or refuse the transfer of proceedings, and secondly, the outcome of criminal proceedings after the transfer. The absence of information on the final outcome of proceedings in the requested State might prevent authorities from being able to formally close the proceedings following their transfer, which in particular might concern Member States subject to the legality principle (see section 2.4 (b)).
- lengthy procedures: the transfer of proceedings is often time-consuming, and in the absence of mandatory time limits a decision to accept or refuse the transfer might often be taken after a long delay. According to estimates provided by the Member States, the average timeframe in which a decision on the transfer is taken by their authorities is between 30-90 days, but in some cases it has been reported to take up to 12 months[25].

[24] A total of 3548 requests were issued in 2016 (replies by 11 Member States); 3979 requests were issued in 2017 (replies by 13 Member States); 3573 requests were issued in 2018 (replies by 14 Member States); 3482 requests were issued in 2019 (replies by 14 Member States); 4160 requests were issued in 2020 (replies by 13 Member States).

[25] Eurojust report on the Transfer of Proceedings in the EU, p. 17.

Eurojust has also reported cases where it's support was sought since there was no reply from the requested State months after submitting the request. In addition, a similar amount of time might be necessary for the actual transfer of a case following the decision to accept the transfer. The length of the procedure depends also on the complexity of the case, on whether there is a need for translation of the documents or a need to obtain additional information.

- unjustified transfer requests: a number of practitioners identified this as a problem, explaining that sometimes little or no justification was provided in the transfer request. They also attributed this issue to the lack of a factual link to the requested State, e.g. in some situations the request for transfer of proceedings was only based on the location of a bank account or of an IP address in cases concerning fraud. In practice, this has led to refusals to take over a case.
- costs related to the translation of the entire file, in particular, causing frustration when the entire case file is requested to be sent at the moment when the request for transfer is submitted, that is at a stage where it is not even certain whether the transfer will actually be accepted. Overall, translations and the related costs were seen as an important issue, since under the current framework it is often unclear which entity is responsible for translating documents or to what extent (which documents).

A number of other issues affecting transfers of criminal proceedings have also been reported, including the overall complexity of the procedure, lack of legal certainty and of transparency, non-admissibility of already collected evidence once a transfer takes place, as well as difficulties linked to coordination of provisional measures such as pre-trial arrest warrants and freezing orders on assets adopted in the requesting State.

2.3. Lack of effective prosecution (transfers of proceedings do not take place where they would be in the interest of justice).

The consultations have revealed problems related to the lack of effective prosecution, namely, due to situations where transfers of proceedings do not take place where they would be in the interest of justice. There are circumstances where it would be more efficient in the interest of justice for the criminal proceedings to take place in another Member State, taking into account all circumstances of the individual case, e.g. where the suspect is residing in the requested State or where most of the evidence relevant to the investigation is located in the requested State.

Some of these problems can be attributed to the fact that transfers often take place in the absence of common rules on the applicable criteria for when the case can be transferred and on the specific procedure to be followed, which are therefore left to national laws and give a wide discretion to the authorities of the requested State whether to accept or refuse the transfer, as further explained in section 2.4. Some Member States have also reported that in relation to certain other Member States, there is no legal basis enabling a transfer of criminal proceedings, consequently leading to transfers not taking place at all even where they would make sense.

Furthermore, the requested authority may accept the transfer of proceedings only, if it has jurisdiction to prosecute the offence. However, there are cases, where the requested State has no jurisdiction to prosecute a person due to non-existent connecting factors to establish jurisdiction (such as where the offence was committed outside the territory of the requested State and there is no other relevant ground for establishing jurisdiction). In such situations, beyond the fact, that a transfer of proceedings cannot take place, in some cases a risk of impunity might arise, such as in some situations when the surrender of a person, for whom an EAW was issued, is delayed or refused.

Namely, execution of an EAW could be refused, among other grounds, based on the fact that the person who is the subject of the EAW is being prosecuted in the executing Member State for the same act as that on which the EAW is based (Art. 4(2) of the Council Framework Decision 2002/584/JHA). It can also be refused where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings (Art. 4(3) of the Council Framework Decision 2002/584/JHA). It is also possible to refuse an EAW where the offence to which the EAW relates has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory (Art. 4(7)(b) of the Council Framework Decision 2002/584/JHA). Moreover, the Court of Justice of the European Union has decided that an executing judicial authority may, in exceptional circumstances and subject to certain conditions, refuse to execute an EAW where the person, if surrendered, will suffer a real risk of a serious breach of fundamental rights in the following situations:

- where there is a real risk that the surrender of the person concerned because of the detention conditions in the issuing State could lead to inhuman or degrading treatment within the meaning of Article 4[26] of the Charter of Fundamental Rights of the European Union ('Charter')[27];
- where, so far as concerns the independence of the judiciary in the issuing State, there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47[28] of the Charter[29].

Statistics show that since 2016 execution of an EAW has been delayed or refused on grounds of real risk of breach of fundamental rights in more than 400 cases. In 2020, fundamental rights issues led to a total of 108 refusals reported by 10 out of the 22 replying Member States[30].

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26 Article 4 'Prohibition of torture and inhuman or degrading treatment or punishment'.

27 Judgment of the Court of Justice of 5 April 2016, C-404/15, *Aranyosi and Caldararu*, ECLI:EU:C:2016:198; judgment of 25 July 2018, C-220/18 PPU, *ML*, paragraphs 88-94; judgment of the Court of Justice of 15 October 2019, C-128/18, *Dorobantu*, ECLI:EU:C:2019:857, paragraphs 52-55.

28 Article 47 'Right to an effective remedy and to a fair trial'

29 Judgment of 25 July 2018, C-216/18, *LM*, ECLI:EU:C:2018:586 and judgment of 17 December 2020 in Joined Cases C-354/20, *L* and C-412/20, *P*, ECLI:EU:C:2020:1033.

30 Commission Staff Working Document 'Statistics on the practical operation of the European arrest warrant – 2020':

In such situations when surrender is refused, it often happens that a requested State does not have jurisdiction to prosecute a requested person itself since, after the arrest of such a person on its territory pursuant to an EAW, no connecting factor for jurisdiction could be established (such as nationality or residence of the requested person). Some Member States provide for the *aut dedere aut judicare* principle to apply in such situations, meaning that a requested person is prosecuted in cases of no surrender, however the scope of the *aut dedere aut judicare* principle is often limited in scope (e.g. mainly limited to own nationals). Certain Union legal acts require Member States to take necessary measures to establish jurisdiction in cases where the surrender of a person is refused, however, these cover only some particular offences. For example, the Directive (EU) 2017/541 on combatting terrorism[31] requires Member States to establish jurisdiction over certain offences related to terrorist activities in cases of no surrender of persons suspected or convicted of such an offence to another Member State. Similarly, Directive 2014/62 on the protection of the euro[32] requires to establish jurisdiction over the offences related to the counterfeiting of the euro and other currencies which are committed outside its territory and where the offender is in the territory of that Member State and is not extradited.

The above-mentioned problems, namely transfers not taking place where they would be in the interest of justice and inneficiencies in transfer procedures, where they do take place, can result, in particular, in:

- inefficient use and duplication of resources of public authorities and risks of conflicting or counterproductive decisions (e.g. on taking evidence and investigation strategies), such as where multiple prosecutions of the same case are taking place in two or more Member States;
- disproportionate burdens on the persons involved, who become subject to a duplication of procedures and face multiple restrictions on their rights and interests due to different arrest warrants, searches and interrogations being carried out when conducting parallel prosecutions in two or more Member States, as well as risks of violating the fundamental right of the person concerned not to be tried or punished twice for the same offence (*ne bis in idem* principle);
- delays in criminal proceedings, caused by lengthy transfer procedures;
- a risk of impunity should the surrender of a person reprimanded under an EAW in order to conduct a criminal prosecution be refused and the State, which refused the surrender, would lack jurisdiction to prosecute this person.

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https://commission.europa.eu/system/files/2022-12/swd_2022_417_1_en_document_travail_service_part1_v2.pdf

[31] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6.

[32] Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, OJ L 151, 21.5.2014, p. 1.

2.4. Problem drivers

a. Absence of a common legal framework for transfers of proceedings among Member States

The most comprehensive international legal framework on the transfer of proceedings, the 1972 Transfer Convention, offers a complete step-by-step procedure for transfers of proceedings. However, practice shows that due to a limited number of ratifications of this instrument in the Member States, other, more general multilateral instruments are commonly used as a basis for transfer of proceedings, such as Article 21 of the 1959 MLA Convention ("Laying of information in connection with proceedings"). Article 21 of the 1959 MLA Convention enables a Party to request another Party to institute proceedings against an individual. The latter form of cooperation is, however, voluntary in nature. Where the 1972 Transfer Convention creates reciprocal obligations to transmit a proper request for the transfer of proceedings and the actual 'acceptance' to proceed if all conventional conditions are met, the laying of information relies merely on the 'goodwill' of the requested party[33]. Article 21 specifies the channel of communication for the transmission of the information (request) and obliges the requested State to notify the requesting State of any action taken on the request (and to forward a copy of the verdict pronounced). Except where a Contracting Party has made a declaration that the requests and documents addressed to it shall be accompanied by a translation into a specific language, the translation of requests and annexed documents is not required. The other elements of the procedure (such as the criteria for transfers, content of requests, or consequences of a transfer) are unregulated, leading to a number of problems mentioned above.

b. Differences among Member States' national criminal justice systems

In addition to the absence of a common legal framework, some of the rules on transfer of proceedings are significantly influenced by the fundamental principle governing prosecution in each national system, namely the principle of legality (where prosecution is mandatory) or the principle of opportunity (where prosecutor has discretion not to prosecute where the public interest does not demand it). This may lead to different expectations and legal requirements in the context of transfers of proceedings and in some cases to a lack of legal certainty both for the authorities, as well as for the suspects or accused persons and for victims.

Furthermore, in some Member States certain other procedural or substantive conditions apply[34], such as not being able to request a transfer of proceedings during certain stages of criminal procedure, or when the suspect is still unknown, or not allowing to transfer proceedings in relation to its own national.

Moreover, a transfer of proceedings to another Member State has far-reaching effects on the position of suspects, accused persons and victims beyond the mere location of the criminal proceedings, in terms of both their procedural rights and the substantive criminal law applicable

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33 Article 21 MLA Convention (1959) guidelines: https://rm.coe.int/168058da8d.

34 See further Eurojust report on Transfer of proceedings in criminal matters.

to the offence. Nevertheless, different rules exist throughout the Member States on the involvement of suspects, accused persons and victims in the transfer procedure. In a majority of Member States there is no requirement to inform a suspect, accused person or a victim of the transfer of proceedings and to ask for their opinion. Only few Member States specify that a legal remedy would be available for a suspect or accused person or a victim against the decision on the transfer of proceedings. In those Member States, where the involvement of either the suspect, accused person or the victim is foreseen, their opinion in most cases does not bind the authorities.

3. WHY SHOULD THE EU ACT?

3.1. Legal basis

The legal basis for EU action is Articles 82(1)(b) and (d) of the Treaty on the Functioning of the European Union (TFEU). This Article sets out the Union's competence to establish measures, that facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and prevent and settle conflicts of jurisdiction between Member States.

In line with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union (TEU) and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

In line with Articles 1 to 3 of Protocol No 21 on the position of Ireland, annexed to the TEU and to the TFEU, Ireland may notify the President of the Council in writing that it wishes to take part in the adoption and application of any such proposed measure, where it will be entitled to do so. The notice must be submitted within 3 months of the proposal's or initiative's presentation to the Council under Title V, Part 3 TFEU.

3.2. Subsidiarity: Necessity and added value of EU action

Under Article 4(1)(j) TFEU, the competence to adopt measures in the area of freedom, security and justice is shared between the Union and the Member States. Therefore, Member States may act alone to regulate transfer of proceedings.

However, a legal framework on transfer of criminal proceedings cannot be sufficiently and optimally achieved by Member States acting alone since it is a cross-border matter. This is evidenced by the current fragmented legal framework, which poses legal and practical challenges. Bilateral agreements between Member States would also not address the problems, as agreements of this kind would eventually be needed between all Member States.

The replies to the public and targeted consultations confirm that EU action in this area is likely to deliver better outcomes than Member States action.

Both the Council and the European Parliament have recognised that these challenges require action beyond the national level. The December 2020 Council Conclusions[29] invited the Commission to consider a new proposal, and the December 2021 European Parliament Resolution[30] also called for the Commission to put forward a legislative proposal.

Given the cross-border dimension of the problems addressed, the proposal needs to be adopted at EU level in order to achieve the objectives.

4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

Objectives	
General objectives	1) Improve the efficient and proper administration of justice in the EU. 2) Improve the respect of fundamental rights in the process of transfer of criminal proceedings.
Specific objectives	1) Improve efficiency and legal certainty of transfers of criminal proceedings. 2) Enable transfers of criminal proceedings, where they are in the interest of justice, but currently not possible between Member States, and reduce the phenomenon of impunity.

5. WHAT IS THE CHOSEN POLICY OPTION?

In order to address the problems defined in section 2 and to achieve the objectives listed in section 4, a legislative proposal setting out a cross-border cooperation procedure for transfers of criminal proceedings is proposed.

Since the main objective of the initiative is to increase the efficiency and legal certainty of transfers of proceedings and enable them where they are currently not possible, this would be achieved by establishing common rules regulating the conditions under which criminal proceedings initiated in one Member State may be transferred to another Member State. By having a uniform procedure in place in the EU, this proposal would facilitate judicial cooperation and could help to prevent conflicts of jurisdiction that could result in an infringement of the *ne bis in idem* principle. It would ensure that criminal proceedings take place in the Member State best-placed to prosecute an offence and would consequently improve the proper functioning of the European area of justice. It would also take into account the current level of integration between Member States and better align with other instruments, such as the EAW. The only realistic option is proposing a new legal instrument for cooperation as none of the alternative options considered[35] are adequate to address the problems identified.

[35] Non-legislative options (such as a recommendation addressed to Member States on the handling of different stages of the transfer of proceedings) have been discarded as they would lack binding nature and could not provide a legal basis to transfer proceedings and would therefore, not be able to address the problems encountered. Additionally, a recommendation encouraging Member States to sign and ratify the

In particular, the proposal sets out a procedure for an authority in one Member State to request an authority in another Member State to take over criminal proceedings and for the requested authority to accept or refuse these proceedings. The proposal is limited to the requests issued in the framework of criminal proceedings, it does not cover other types of proceedings or infringements (such as administrative proceedings for infringements of the rules of law that are covered by the Directive on the European Investigation Order). Requests can be issued for any criminal offence that may be prosecuted in the requesting State. The instrument on transfer of criminal proceedings would complement the system of surrender of persons under a European Arrest Warrant and would provide an alternative measure where issuing an EAW would be disproportionate or not possible because the penalty thresholds would not be met.

Under the proposal, a transfer could take place if it would improve the efficient and proper administration of justice and provided that established criteria are respected. It does not impose any obligation to request a transfer of proceedings.

The proposal includes, among others, the following elements:

- Specific grounds for jurisdiction in order to ensure that for criminal proceedings to be transferred the requested State can exercise jurisdiction for the offences to which the law of the requesting State is applicable in certain cases, where it would not necessarily have jurisdiction under its domestic law. Such grounds would be limited to what is necessary to ensure that criminal proceedings could be transferred under the proposal. Wide grounds for subsidiary jurisdiction are included in the 1972 Transfer Convention, but not in the 1959 MLA Convention.
- A list of criteria under which a transfer of criminal proceedings could be requested. A list of criteria for the transfer of proceedings is also available under the 1972 Transfer Convention, but not under 1959 MLA Convention.
- Certain rights for suspects and accused persons, as well as for victims (such as a right to request the competent authorities to initiate a transfer procedure, or to be informed of the intended transfer and to give an opinion, provided this does not prejudice the confidentiality of investigation). Under the 1972 Transfer Convention, a requirement to inform the suspect of the request for transfer of proceedings with a view to allowing him to present his views applies only when jurisdiction of the requested State is exclusively grounded on this Convention (subsidiary jurisdiction). No specific rights for suspects,

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1972 Transfer Convention has been discarded since non-participating Member States have not shown any interest in joining this Convention (the latest entry into force of the Convention in the EU was in 2004). Other drawbacks of cooperation under this instrument are the lack of mandatory time limits for taking a decision on whether to accept or refuse the transfer of proceedings and the fact that communication takes place between central authorities rather than direct communication between the judicial authorities involved. Furthermore, bilateral agreements between Member States would not address adequately the problems within the EU, given that each Member States would need to have such agreements with all other Member States, which is unlikely, and it would also result in fragmentation of applicable rules.

accessed persons or victims are included in the 1959 MLA Convention under Article 21 thereof.

- A procedure for requesting transfer of criminal proceedings, including (a) a requirement for direct communication between the requesting and requested authorities with a possibility to involve a central authority for administrative transmission and receipt of requests, (b) a template for requests to transfer criminal proceedings, and (c) rules on translation requirements for case files. Communication under the 1972 Transfer Convention is conducted through Ministries of Justice, unless special mutual arrangements are made for direct transmission. Similarly, under the 1959 MLA Convention, information shall be transmitted between Ministries of Justice unless a Contracting Party made a declaration that it accepts other channels of communication. A non-binding model request form, along with the guidelines on practical measures to improve co-operation in respect of transfer of proceedings, was adopted by the Committee of experts on the operation of the European conventions on co-operation in criminal matters of the Council of Europe[36]. Both under the 1972 Transfer Convention and the 1959 MLA Convention, translation of requests and annexed documents is not required unless a Contracting Party has made a declaration that requests and documents addressed to it shall be accompanied by a translation into a specific language.
- Rules on taking a decision on whether to accept or refuse transfer of criminal proceedings, including (a) a mandatory time limit to take this decision and (b) an exhaustive list of grounds under which a transfer may be refused. Article 22 of the 1972 Transfer Convention provides for an extension of the time limit by six months for prosecution in the requesting State as a result of a request for transfer of proceedings, which according to the Explanatory Report to the Convention entails at least a moral obligation for the requested State to decide within that period. The 1959 MLA Convention does not contain any time limits to respond to requests for transfer of proceedings. The 1972 Transfer Convention contains a list of grounds for refusal, but the 1959 MLA Convention does not.
- Rules on the effect of transferred criminal proceedings in the requesting and requested States, including (a) on the law governing the proceedings (and the sentencing) after a transfer, (b) on the validity in the requested State of legal acts which were performed in the requesting State, and (c) under which conditions the requesting authority could reopen proceedings. Such rules are included in the 1972 Transfer Convention, but are not provided under the 1959 MLA Convention.
- An obligation on the requested authority to provide information to the requesting authority on the outcome of the transferred proceedings. Such obligation applies both under the 1972 Transfer Convention and the 1959 MLA Convention.

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[36] Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048bce8

- The use of the decentralised IT system for communication between the requesting and requested authorities, which will enable swift, secure and reliable cross-border exchange of information. Secure means of electronic communication in relation to transfers of criminal proceedings have so far not been available EU-wide.

Traditional judicial cooperation or mutual recognition

One of the problems identified when the transfer of proceedings takes place under the traditional mutual legal assistance conventions is the lack of obligation for the requested State to accept a transfer. Stakeholder consultations, however, have also demonstrated that the nature of transfer of criminal proceedings differs from those forms of cross-border judicial cooperation in the EU, which are based on the principle of mutual recognition. A transfer of criminal proceedings requires the requested authority to take over criminal proceedings as a whole (leading to further steps with respect to the criminal offence under the national law of the requested State, such as investigation or prosecution) rather than recognising and executing a single judicial decision of another Member State. Recognition of judicial decisions takes place without an examination of the substantive reasons behind the decision taken in the other Member State, and the responsibility for the criminal proceedings in which such a decision was issued remains with the Member State conducting those proceedings. However, when taking a decision on whether to accept or refuse a transfer of criminal proceedings, the requested authority should be able to take the merits of the case of the requesting authority into consideration and should also have more flexibility when deciding whether to take over those proceedings. If a certain degree of flexibility is not provided, this may lead to requested authorities frequently discontinuing the transferred proceedings, which is neither in the interest of the requesting authority, nor in the interest of justice. Therefore, the proposal creates a judicial cooperation instrument rather than a mutual recognition instrument, and it also allows the requested authority to refuse a transfer of criminal proceedings when it considers that such a transfer is not in the interests of an efficient and proper administration of justice. Overall, the proposal aims to ensure a balance between effectiveness, legal clarity and flexibility.

Differences in the national criminal justice systems (principles of legality and opportunity)

As mentioned already in the Section 2.4(b), some of the rules on transfer of proceedings are significantly influenced by the fundamental principle governing prosecution in each national criminal justice system, namely the principle of legality and the principle of opportunity. The proposal takes into account these differences. In particular, the proposal gives the requested authority sufficient discretion to refuse a request, where it considers that the transfer would not be in the interest of an efficient and proper administration of justice. Such a ground for refusal does not undermine the global efficiency of the tool, but rather ensures the necessary freedom for the requested authority to assess the merits of the case. Further, the proposal does not impose any obligation on the requested authority to investigate or prosecute a criminal offence. The action to be taken by the requested authority should be in accordance with its national law. The proposal also requires that the criminal proceedings related to the request shall be suspended or discontinued in the requesting State following the acceptance of the transfer of proceedings,

which is essential for the Member States with a principle of legality to be able to discharge their duty to prosecute. Finally, the proposal also ensures that sufficient information is given by the requested authority about the decision delivered at the end of the proceedings.

Jurisdiction

This Regulation provides for jurisdiction in specific cases. It allows the requested State to exercise jurisdiction over the case upon acceptance of the transfer of proceedings, if that Member State would otherwise not have jurisdiction under its domestic law to prosecute the case. The grounds for jurisdiction are limited to an exhaustive list of situations and can be exercised when the interests of efficient and proper administration of justice so require. That list in particular includes some situations where the requested State refuses to surrender a suspect or accused person for whom a European arrest warrant has been issued and who is present in the requested State and is a national of or a resident in that State. It also covers other cases where there is a close link with the requested State, such as situations when criminal proceedings are already ongoing in that State against the same suspect or accused person in respect of other facts and that suspect or accused person is a national of or resident in the requested State.

The requested State would not be able to exercise such jurisdiction unless prosecution was requested by a Member State having original jurisdiction. Provisions on jurisdiction would bring significant added value to the proposal with the aim to avoid that a person remains unpunished. Overall, grounds for jurisdiction are expected to improve the efficiency of the procedure for transfers.

6. EXPECTED IMPACTS

The preferred option is discussed and assessed hereunder against the following criteria:

- effectiveness;
- efficiency;
- fundamental rights;
- coherence with other EU cross-border judicial cooperation instruments;
- proportionality.

6.1. Effectiveness

Overall, the proposal would significantly increase the effectiveness of transfer of criminal proceedings in different ways, as it would:

- enhance security through capacity to investigate, prosecute and sanction crime;
- reduce delays in the transfer procedure;
- enable transfers of criminal proceedings where they are currently missing;
- bring increased legal certainty.

A comprehensive legal framework setting out the entire procedure for transfers of proceedings and covering all the elements mentioned in section 5 would provide greater legal certainty for all

stakeholders concerned and reduce the level of fragmentation. In particular, it would enable transfers of criminal proceedings where they are currently missing. Both authorities and civil society welcomed this option in the consultation and highlighted the need for a clear and certain framework.

By establishing a complete procedure for requesting and taking a decision on the transfer of criminal proceedings with a common list of criteria for such transfers, an exhaustive list of grounds for refusal and clear obligations to respond, the proposal is expected to increase the number of successfully transferred criminal proceedings. It could also reduce the number of unjustified requests for transfers of proceedings since requests would have to be based on specific criteria and would have to give reasons, including a justification why the transfer would necessary and appropriate. Moreover, authorities could conduct prior consultations with a view to determining whether the transfer would serve the interests of efficient and proper administration of justice. Mandatory deadlines for response will accelerate the process.

The establishment of the decentralised IT system is expected to render communication between authorities more efficient and effective. Communication through this electronic tool is intended to save time and cost for the authorities. The decentralised IT system would allow speeding up the flow of information among its users, increase security of the exchanged data as well as enhance transparency. The use of the digital channel can also be expected to have a positive environmental impact due to the use of less paper and postage. In addition, positive impacts on simplification and administrative burdens are anticipated.

Furthermore, positive impacts of successful transfer procedures are expected on the functioning of other EU judicial cooperation instruments, in particular the EAW. Consequently, a more efficient functioning of transfers of criminal proceedings would improve the overall cooperation between Member States in investigating and prosecuting cross-border crime.

6.2. Efficiency

This section provides a qualitative assessment of the expected costs and benefits/savings for the public administrations and for the citizens. A precise assessment of the economic impact, resulting from the proposed regulation, however, is difficult due to a lack of available statistics in the Member States on the number of criminal proceedings, which are actually transferred and those that are hampered due to a lack of common rules. There is also a lack of figures on the actual cost of transfer of proceedings and the cost of failure to transfer them.

Under the preferred policy option, public authorities may incur one-off administrative costs to adjust to the new rules of the Regulation, in particular costs arising from the need to train judges, prosecutors and other competent authorities on the new rules. The proposal would not require Member States to create any new public authorities or bodies. In this regard, it is reasonable to assume that these compliance costs would be comparable to those for other EU's judicial cooperation instruments in criminal matters.

Additional adjustment costs can be expected for digitalisation. In line with the "digital by default" principle and the EU's policies for the digitalisation of justice, the Regulation would provide for specific provisions on digitalisation of those procedures that are introduced by the Regulation.

The proposal for a Regulation on the digitalisation of judicial cooperation ('Digitalisation proposal')[37] already envisages the creation of a decentralised IT system and aims to effectively digitalise procedures in various areas of cross-border judicial cooperation in criminal matters. The existing reference implementation software developed by the Commission for the use by Member States and used for other legislations - the e-Evidence Digital Exchange System (eEDES) - could be readily expanded to the transfers of proceedings. Authorities already connected to the decentralised IT system could also deal with matters related to the transfers of proceedings. Whether any other new authorities would have to be additionally connected to the decentralised IT system would depend on Member States, as the Regulation would leave it to them to decide, in line with their internal organisation. The costs for these possible new IT deployments were however assessed as one-off and moderate[38], in particular given the cost savings arising from possible economies of scale. In any case, these costs would be a fraction of the overall costs for setting up the whole decentralised IT system under the Digitalisation proposal.

Furthermore, each Member State would have to bear the costs for the operation and maintenance of its access points that enable digital communication. These costs would however be shared with other legislations operating under the same decentralised IT system and is thus not expected to be significant. Member States would also be able to apply for grants to finance these costs under the relevant Union financial programmes, in particular the cohesion policy funds and the Justice Programme. At the same time, the use of the decentralised IT system itself would have a positive impact on simplification and administrative burden, including on reduction of costs for authorities (such as costs of communication through postal channels).

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37 Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM/2021/759 final. Once adopted the Regulation will establish a legal framework for electronic communication between competent authorities in judicial cooperation procedures in criminal matters in the application of legal acts listed in its Annexes. For this purpose, a decentralised IT system, based on e-CODEX, will be established which will be used for communication and exchange of information, data and documents between courts and other competent authorities, and where relevant with JHA agencies and EU bodies. In addition, Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726 establishes a legal framework for the 'e-CODEX system' (e-Justice Communication via Online Data Exchange system) which means a decentralised and interoperable system for cross-border communication for the purpose of facilitating the electronic exchange of data, which includes any content transmissible in electronic form, in a swift, secure and reliable manner in the area of judicial cooperation in civil and criminal matters.

38 See further Commission Staff Working Document Impact Assessment Report accompanying the digitalisation proposal, SWD/2021/392 final.

Main recurrent costs for the public authorities are expected as a result of translation of the documents from the case files[39]. To minimize the negative effects of costs resulting from the translation of case files, national authorities can consult and, if possible, agree to translate only the essential documents or parts thereof. The proposal also foresees a possibility for the requesting authority to propose to the requested authority that large or exceptional costs could be shared. Finally, if a Joint Investigation Team (JIT) was set up, and if all requirements were met, translation costs could be covered by the JIT funding provided by Eurojust, thereby relieving the Member States from this financial burden (see Eurojust report on the transfer of proceedings in the EU).

In addition, the proposal is expected to generate cost reductions for public authorities as the processes become more efficient through a clear legal framework and public authorities being able to transfer proceedings more effectively. A number of existing problems with the transfer procedures would be mitigated and costs reduced. For example, by establishing a common template for requests for transfers of proceedings and minimum requirements for information to be provided in such requests by the requesting authority, the proposal would improve the quality of requests and their treatment, and would therefore generate efficiency savings for competent authorities. It would also speed up the process. The number of unjustified requests would likely decrease, since each transfer would be well substantiated. The fact that the proposal would cover all forms of crime and not be limited to serious forms of crime would also give great benefits in terms of the efficiency of the instrument. Furthermore, uniform rules introduced in the Regulation would also increase mutual trust between Member States and legal certainty for public authorities.

The initiative is not expected to increase costs or administrative burdens for businesses and citizens. In a situation where individuals or legal persons would be parties in criminal proceedings, be it as suspects, accused persons or as victims, a common legal framework would contribute to ensuring the proximity of proceedings, as often the proceedings would be transferred to the Member State of their nationality/residence, if possible. While this will not apply in all cases, as this will depend on the circumstances of each case (e.g. suspects and victims residing in different Member States), there will overall be a positive impact for them.

In particular, as regards victims, it is in their best interest to have the proceedings taking place in the best placed Member State to ensure a successful outcome of proceedings. Under the proposal, the interests of victims would also have to be taken into account when taking a decision on the transfer, including the possibility for victims to testify during trial in a Member State other than the one where they reside and to obtain and provide evidence. In addition, under

[39] To give an example of high costs incurred by the authorities in one case, which involved Eurojust support, 2041 pages of documents from the case file had to be translated amounting to the cost of approximately 30 000 EUR.

Article 14 of the Directive 2012/29/EU on Victim's Rights[40], victims have a right to reimbursement of expenses incurred as a result of their active participation in criminal proceedings in all Member States, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed are determined by national laws of Member States.

As regards suspects and accused persons, the existence of minimum standards of procedural rights at Union level ensures that whenever transferred, suspects and accused persons are guaranteed, as a minimum, equivalent levels of protection. In particular, Directive (EU) 2016/1919 on legal aid for suspects and accused persons[41] requires Member States to ensure that suspects and accused persons have the right to legal aid when they lack sufficient resources to pay for the assistance of a lawyer (means test) and/or when the interests of justice so require (merits test).

In addition to protecting their individual rights in the transfer of proceedings, an EU legal framework would also create more legal certainty for suspects, accused persons and victims of crime.

6.3. Fundamental rights

The impact for citizens is expected to be positive. In a situation where individuals would be parties in criminal proceedings, be it as suspects or as victims, a common legal framework would contribute to ensuring the proximity of proceedings, to take place in the Member State of their nationality/residence, if possible. While this will not apply in all cases, as it will depend on the circumstances of each case (e.g. multiple suspects or victims from different Member States), an overall positive impact for them is expected.

Situations where several Member States are conducting criminal investigations in respect of the same crime against the same person, as well as where criminal proceedings are being conducted in a Member State that is not best placed to prosecute, can have a significant effect on suspects, accused persons and victims. By facilitating transfers of criminal proceedings between Member States, the proposal in particular aims at preventing detrimental effects on the rights and interests of individuals, including possible violations of the *ne bis in idem* principle in the EU area of freedom, security and justice, in line with Article 50 of the Charter and Article 54 of the Convention Implementing the Schengen Agreement[42]. The increasing number of preliminary

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40 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57.

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

42 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

references to the Court of Justice of the European Union in the past years, seeking clarifications on the interpretation of the *ne bis in idem* principle under EU law proves that violations are likely to occur in practice, and are often of difficult solution. This is also reflected in Eurojust's casework[43], where it is observed that very often, when national authorities become aware of the existence of parallel proceedings concerning the same facts and against the same individual in another Member State, the transfer of proceedings is the necessary solution to avoid violations of the *ne bis in idem* principle.

The proposal also includes a number of guarantees for the individuals involved in the proceedings. In particular, the intervention of a judicial authority when the transfer is requested both in the requesting and requested State ensures that the legality of the measure has been checked and that the request does not unduly impinge on fundamental rights. The requesting authority is required to ensure in the individual case the applicability of the criteria for transferring criminal proceedings, and in this assessment the legitimate interests of the individuals concerned, suspects or victims, must be duly taken into consideration. Moreover, the suspect or accused person must be consulted on the intended transfer and must be given an opportunity to state their opinion in a language they understand. Victims must also be consulted on the intended transfer, in cases where the victim resides in the requesting State, and must be given an opportunity to state their opinion. Suspects and accused persons, as well as victims residing in the requesting State, are informed of the decision whether to accept or refuse the transfer of criminal proceedings, as well as of the remedies available to challenge the decision to accept the transfer of proceedings. Exceptions may apply both to the consultation obligation and the obligation to provide information about the decision taken where this might prejudice the confidentiality of investigation. The proposal specifically provides for the right to an effective remedy for suspects, accused persons and victims against the decision to accept the transfer of proceedings, in order for them to challenge the legality of the procedure and any other violation of their rights. The review by a judicial authority serves as a further safeguard here. Moreover, it is provided that, when an offence was perpetrated in the territory of the requesting State, the requested authority may take into consideration the maximum penalty applicable in the requesting State whenever this is to the benefit of the accused person, in order to comply with the principle of legal certainty and foreseeability of the applicable law.

Finally, since the proposal regulates the transfer of criminal proceedings, all criminal law procedural safeguards apply to those criminal proceedings. This includes in particular the right to a fair trial and the rights of defence, as enshrined in Article 6 European Convention on Human Rights and Articles 47 and 48 of the Charter. It also includes the relevant legislation at EU level on procedural rights for suspects and accused persons in criminal proceedings, namely Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, 2016/343, 2016/800 and 2016/1919.

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43 https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-report-on-the-transfer-of-proceedings-in-the-eu.pdf

6.4. Coherence with other EU cross-border judicial cooperation instruments

Existing Union instruments in the area of cross-border judicial cooperation in criminal matters govern the recognition of judgements and judicial decisions for the purpose of: (a) enforcement of sentences[44], (b) surrender of requested persons under a European Arrest Warrant, (c) non-custodial supervision measure to be transferred to the Member State where the suspect is normally resident[45], and (d) gathering of evidence through a European Investigation Order ('EIO')[46], as well as the procedures for mutual legal assistance, in particular, the spontaneous exchanges of information in criminal matters[47], and the carrying out of criminal investigations through a Joint Investigation Team ('JITS')[48].

The adoption of common rules on the transfer of criminal proceedings would complement EU tools of cross-border judicial cooperation, for example, by preventing the risk of impunity that may result from situations when surrender of a person under an EAW is refused (see Art. 3 of the Regulation). Requests under this Regulation can be issued for any criminal offence and, therefore, the transfer of criminal proceedings may also provide a useful alternative measure to an EAW, where issuing the latter would be disproportionate or not possible, such as when the penalty thresholds are not met[49]. Where following the creation of a new legal framework, authorities would recourse more to the transfer of proceedings, this could lead to the decrease in the use of EAW procedures, as well as of the European Supervision Order.

Furthermore, in cases involving provisional measures adopted in the requesting State, the requested State should be made aware of the provisional measures in place and, where this is

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44 Such as Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

45 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p. 20. This Framework Decision enables a non-custodial supervision (e.g. an obligation to remain at a specified place or an obligation to report at specified times to a specific authority) to be transferred from the Member State where the non-resident is suspected of having committed an offence to the Member State where he is normally resident. It allows a suspected person to be subject to a supervision measure in his home Member State until the trial takes place in another Member State, instead of being placed into pre-trial detention.

46 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1. The Directive replaced the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol, which set out the conditions for mutual legal assistance. The Mutual Assistance Convention remains applicable, among others, for spontaneous exchange of information under its Article 7. It's also being used in combination with the 1972 Transfer Convention as a basis to communicate directly between judicial authorities of two Member States instead sending requests through the Ministries of Justice (Art. 6). 25 Member States are parties to the Mutual Assistance Convention.

47 Such as on the basis of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.

48 On the basis of the Council Framework Decision of 13 June 2002 on joint investigation teams or of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.

49 See also Eurojust report on the Transfer of Proceedings in the EU, p. 12.

necessary, authorities should coordinate the transfer of proceedings with the execution of additional judicial cooperation instruments, such as EAWs and/or freezing certificates[50], to ensure that provisional measures are kept in place without interruption[51].

This Regulation would also create a useful complement to the European Investigation Order. The EIO is used to obtain necessary evidence in criminal matters from another Member State. At an early stage of investigation, sending an EIO to the requested State helps to receive necessary evidence, if any is available, and may also help identify a connection or an overlap with other investigations. Requests to transfer criminal proceedings could follow, where the requesting authority considers, taking into account the particular circumstances of the case, that it could serve the interests of a proper administration of justice. A transfer of proceedings could in some cases be an alternative to issuing several EIOs where most of the evidence is located in the requested State. In some cases, following the transfer of proceedings, an EIO to the Member State, which transferred them, or to another Member State might nevertheless be necessary. However, in general, authorities might want to ensure that all necessary investigative measures that should have been taken in the requesting State have been executed before the transfer of proceedings to prevent further EIOs being necessary after the transfer and to ensure the admissibility of evidence already gathered. Finally, practice has also revealed that in some cases[52] before the actual transfer of proceedings authorities might need to recourse to an EIO to transfer evidence from the Member State where proceedings are conducted to the Member State which will take them over, and that there also have been cases[53] where proceedings did not need to be formally transferred, when authorities of one Member State had already obtained all necessary evidence via an EIO from another Member State. Such examples demonstrate the close interconnection between the EIO system and the transfer of criminal proceedings.

Joint Investigation Teams are an instrument of judicial cooperation whose primary purpose is the carrying out of criminal investigations and gathering of evidence within a team involving members of several Member States. Similarly as with the EIO, sharing of evidence in a JIT may be a prior step to a subsequent transfer of criminal proceedings. Setting up of a JIT may also allow national authorities to apply for JIT funding from Eurojust, which can be used to cover the costs of translation and/or of the physical transfer of the case file[54].

The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union[55] in accordance with its Art. 7 permits the competent authorities of Member States, without the need for a mutual assistance request, to exchange information relating to criminal offences or administrative infringements covered by Article 3. This provision does not place obligations on Member States and provides that the relevant exchanges are to be carried

50 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

51 See further Eurojust report on the Transfer of Proceedings in the EU, p. 25.

52 See further Eurojust report on the Transfer of Proceedings in the EU, p. 26.

53 Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction, p. 13. Eurojust report on the Transfer of Proceedings in the EU, p. 28.

54 See Eurojust report on the Transfer of Proceedings in the EU, p. 31.

55 Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union.

out within the limits of the national law of Member States. Spontaneous exchange of information might be sufficient to allow to concentrate parallel proceedings in one Member State without a formal transfer of proceedings from one Member State to another (although that might not be possible for Member States with a strict principle of legality which do not have a legal basis to close or suspend its investigation and must recur to a formal transfer of proceedings as a way to discharge their duty to prosecute). It appears to be often used in cases concerning to exchange information about minor offences in border regions at the beginning of the investigation or even before any investigation has been initiated[56]. The Regulation will not replace this form of cooperation which the authorities will be able to continue using whenever appropriate.

In addition, Council Framework Decision on prevention and settlement of conflicts of jurisdiction[57] establishes a procedure for exchange of information and direct consultations between competent authorities to achieve an effective solution and avoid any adverse consequences arising from parallel proceedings. Similarly, other legal instruments in the area of criminal matters, particularly those related to specific crime types, such as the Directive (EU) 2017/541 of the European Parliament and of the Council, Council Framework Decision 2002/475/JHA and Council Framework Decision 2008/841/JHA, include provisions referring to the factors to be taken into account with the aim of centralising proceedings in a single Member State when more than one Member State can validly prosecute on the basis of the same facts. However, these legal acts do not regulate the procedure for the transfer of criminal proceedings, which may be a necessary solution in such cases. This Regulation would therefore provide the missing link for situations where transfer of criminal proceedings is necessary to solve the conflict of jurisdiction that could result in an infringement of the *ne bis in idem* principle.

Eurojust plays a key role in facilitating preliminary contacts and consultations and resolving jurisdiction issues. In accordance with the Regulation (EU) 2018/1727[58], Eurojust may request national authorities to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts and, in cases of disagreement between the Member States, it shall issue a written opinion on the case. Competent national authorities are also under obligation to inform Eurojust of cases in which conflicts of jurisdiction have arisen or are likely to arise. The advisory role of Eurojust is also mentioned in Framework Decision on the prevention and settlement of conflicts of jurisdiction, which invites Member States to involve Eurojust in the direct consultations and to refer the case to Eurojust when it was not possible to reach consensus.

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56 See further Final report of the project 'TROP - Transfer of Proceedings in criminal matters: an exploration of the current practice in the EU and of possible ways for improvement, based on practitioners views'. The project was funded by the European Union's Justice Programme (2014-2020).

57 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

58 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).

6.5. Proportionality

The proposal lays down rules under which a competent authority in the Union may request to take over criminal proceedings, if that would improve the efficient and proper administration of justice and provided that established criteria are respected. Throughout the proposed text, the options chosen are the least intrusive for the national criminal justice systems of the Member States, taking into account in particular the differences of the national criminal justice systems (see section 2.4.(b)).

The proposal is limited to requests issued in criminal proceedings. Requests can be issued for any criminal offence and therefore the transfer of criminal proceedings would complement the system of surrender of persons under an EAW and may provide a useful alternative measure to an EAW, where issuing the latter would be disproportionate or not possible such as when the penalty thresholds are not met. The proposal also gives the requested authority sufficient discretion to refuse a request, in particular if it considers that the transfer is not in the interest of an efficient and proper administration of justice. Moreover, it does not impose any obligation on the requested authority to prosecute a criminal offence.

It sets out a rule that evidence transferred from the requesting State must not be denied admission in criminal proceedings in the requested State on the mere ground that such evidence was gathered in another Member State, but the power of the trial court to freely assess the evidence is not affected by this Regulation.

This Regulation provides for jurisdiction in specific cases in order to ensure that for proceedings to be transferred in accordance with the Regulation the requested State can exercise jurisdiction for the offences to which the law of the requesting State is applicable. This jurisdiction can be exercised only upon the request for transfer of proceedings when the interests of efficient and proper administration of justice so require.

The proposal, therefore, does not go beyond the minimum required in order to achieve the stated objective at EU level and what is necessary for that purpose.

7. IMPACT MONITORING

The Regulation will be evaluated and the Commission will submit a report to the European Parliament and the Council at the latest five years after the Regulation becomes applicable. The evaluation would be done on the basis of, among others, input received from the Member States' authorities and other relevant stakeholders. In particular, Member States' expert meetings, organised by the Commission, will take place to discuss problems arising in the context of transfers of criminal proceedings. Eurojust and EJN play an important role in the implementation and application of the relevant instruments. These forums, as well as other professional networks can be used to obtain feedback from practitioners on the application of the Regulation and identify practical problems.

An indicator of success of the Regulation would be the fact that the initiative meets its objectives and thus facilitates cooperation between Member States' judicial authorities in relation to transfers of proceedings in criminal matters. However, as this would likely not be empirically measurable as such, a combination of the indicators mentioned below could be used instead to assess the success rate of the Regulation.

Figure 1: Examples of potential evaluation indicators

Assessment criterion	Examples of potential indicators
To improve efficiency and legal certainty of transfers of criminal proceedings. To enable transfers of criminal proceedings, where they are in the interest of justice, but currently not possible between Member States. To improve the respect of fundamental rights in the process of transfer of criminal proceedings.	The practical application of the Regulation: • The number of requests for transfer of criminal proceedings issued, including the criteria for requesting the transfer (source – Member States, yearly); • Percentage of accepted and of refused requests for transfer of criminal proceedings, including the grounds for refusal (source – Member States, yearly); • Percentage of investigations and prosecutions that were not pursued following the acceptance of a transfer of criminal proceedings (source – Member States, yearly); • The length of time to transmit information on the decision whether to accept the transfer of criminal proceedings (source – Member States, yearly); • Percentage of legal remedies sought against the decision to accept the transfer, including whether by a suspect, accused person or a victim, and the number of successfully challenged decisions (source – Member States, yearly); • Case law concerning the Regulation, possible preliminary ruling requests to the CJEU concerning the interpretation of the Regulation. The perception of the Regulation by civil society, legal practitioners, academia and public authorities of Member States: – Commission's survey of public authorities, relevant EU agencies, bodies and networks, lawyers' associations; – The number of petitions and citizen letters complaining about the problems with the transfers of criminal proceedings received by the EU institutions; – The views of the Regulation in academic literature and in reports by individuals, organisations and international organisations. Costs of implementing and operating the decentralised IT system (source – Commission and Member States).

Annex 1: Procedural information

1. LEAD DG, DECIDE PLANNING/CWP REFERENCES

Lead DG: The Directorates-General for Justice and Consumers (JUST) is the DG responsible for the preparation of this initiative.

Decide reference: PLAN/2021/11423.

CWP reference: this initiative appears in CWP 2022 under action 30 'A new push for European Democracy': Initiative on transfer of criminal proceedings.

2. EVIDENCE AND SOURCES

On 30 March 2022, the Vice-President's Šefčovič Cabinet granted the derogation from the requirement to carry out an impact assessment for this initiative mainly due to lack of realistic options and limited impacts on citizens and businesses. To overcome the absence of an impact assesment, this analytical Commission staff working document was prepared.

This analytical document accompanying the initiative compiles the evaluative evidence. Evidence has been gathered through several consultation activities. In addition, the proposal draws on the reports[59] from Eurojust and the European Judicial Network and takes into account the results of a research project on transfer of criminal proceedings in the EU[60] which was co-funded by the European Commission from the Justice programme.

The problem definition, the preferred policy option and the impacts reflect the views of the relevant stakeholders that participated in the consultation activities detailed in Annex 2.

59 Supra, at 20.
60 Supra, at 23.

Annex 2: Stakeholder consultation

This annex provides a summary of all stakeholder consultation activities undertaken in the context of the Commission's initiative on transfer of proceedings in criminal matters.

1. Consultation strategy

The consultation activities aimed at ensuring that all interested parties and stakeholders will have the opportunity to provide feedback on possible policy options and their likely impacts. In that context, the Commission reached out to a broad range of stakeholders, including Member States' national authorities, non-governmental organisations, EU agencies and bodies, academia and individual citizens.

In order to ensure that the Commission's proposal adequately takes into account the views of all interested stakeholders, the consultation strategy supporting this initiative has been built on the following components:

I. Surveys:

- **Call for Evidence**

- Published on the "Have your Say" website of the EU Commission on 16 November 2021. Submissions were possible until 14 December 2021.
- Included a link to a document describing the political context, the objectives, policy options as well as likely impacts.
- Targeted audience were professionals, who deal with judicial cooperation and transfer of proceedings, parties of criminal proceedings affected by the initiative, as well as academia and researchers.

- **Open public consultation:**

- Survey open to feedback from any interested party.
- Open for three months, from 7 December 2021 to 4 March 2022.

- **Targeted consultations:**

- Consultation of Member States' public authorities through a targeted questionnaire on the current situation and a potential future legal framework. The questionnaire was sent on 17 December 2021 with a deadline of 31 January 2022.
- Consultation of relevant stakeholders, namely Eurojust, EJN, the EPPO, Europol, and FRA, through targeted questionnaires.

II. Meetings:

- **Group expert meetings:**

- Expert meeting organised by the Commission on 15 February 2022, which included experts of each Member State as well as representatives of FRA, Eurojust, EJN and the EPPO.

- Criminal Law Expert Group on 11 February 2022 organized by the Commission, which focused on transfers of criminal proceedings.

The results of each component are presented below.

2. Results of the consultation

The following sections present a summary of the main results of the consultation activities.

I. Call for Evidence

Eight replies were gathered through the call for evidence. Three respondents identified as EU citizens, two as non-governmental organizations, and three as governmental agencies. Overall, stakeholders supported the need for a new EU legislative initiative and outlined the main elements that the future proposal should cover, such as a detailed procedure and criteria for transfers, including rules on effects of the transfer and the necessary guarantees for the individuals involved in the proceedings.

II. Open public consultation

In total, 22 responses were received; however, one contributor only answered one specific question and did not reply to the entire questionnaire. The most frequent replies were from EU citizens, followed by public authorities. The largest group of replies came from Germany, followed by the Czech Republic. Respondents were asked in what capacity they give their contribution. Most respondents identified as an 'EU citizen' (38.1%), while public authorities comprised the second biggest group (23.81%).

Feedback by stakeholder type

Stakeholder type	**Number of replies**
EU citizen	8
Public authority	6
Non-governmental organisation (NGO)	2
Other	6

Feedback by country of origin

Country	**Number of replies**	**Country**	**Number of replies**
Austria	2	Italy	1
Belgium	1	Netherlands	2
Czech Republic	4	Poland	1
Germany	5	Portugal	1
Spain	1	Sweden	1

France	2	Slovenia	1

1. ANALYSIS OF RESPONSES TO GENERAL QUESTIONS

Four general questions addressed the overall need for the EU to act on the area of transfer of criminal proceedings and the benefits of a potential EU legal framework on transfer of proceedings.

i. Question 1: In principle, do you think that there is a need for a new EU legal framework on transfer of proceedings?

A majority of respondents (71.43 %) identified a need for a new EU legal framework in principle. Only one respondent opposed, while five participants either didn't know or had no opinion on this matter.

Table 1: Number and percentage of replies to question 1

Option	Count	%
Yes	15	71.43
No	1	4.76
I don't know/I have no opinion	5	23.81

ii. Question 2: Is the EU best placed to regulate transfers of proceedings?

The majority of respondents (61.9%) viewed the EU as best placed to regulate transfers of proceedings. Those that supported EU action saw the benefits of such action in:

- providing a uniform framework for transfer of proceedings across the EU (as opposed to case-by-case solutions currently being used), while also complementing the current EU legal framework on taking of evidence and surrender of persons in criminal proceedings;
- filling in gaps of the existing legal framework on transfer of proceedings, in particular, where as a legal basis for transfer Article 21 of the 1959 European Convention on mutual assistance in criminal matters is used and lacks certain necessary common rules; and
- enhancing cooperation within the EU, such as providing for direct contacts between judicial authorities, simplifying and speeding up cooperation, and ensuring the rights of the victims are taken into account.

At the same time, these respondents noted the need to ensure that the new legal framework would facilitate and not hamper cooperation, such as by introducing exceptions to double criminality, by not allowing to diverge from the common set of criteria for the transfer of proceedings in individual cases, or by not allowing for regional cooperation which goes further than a possible EU instrument.

Roughly, one in every five respondents (19.05 %) did not consider that the EU is best placed to regulate transfer of proceedings. As for the reasons mentioned to support such answer, the respondents indicated that the current legal framework seems to be functional and that the problem encountered in practice are addressed with the help of relevant EU bodies (European Judicial Network in criminal matters and Eurojust).

Option	**Count**	**%**
Yes	13	61.9
No	4	19.05
I don't know/I have no opinion	4	19.05
No Answer	0	0

iii. **Question 3: What would be, in your view, the main benefits of a new EU legal framework on transfer of proceedings?**

Concerning the main benefits of a new EU legal framework, multiple replies were possible. Three out of four respondents (76.19 %) saw a potential improvement of legal clarity as a main benefit, closely followed by an improvement of efficiency (66.67 %). Improving the effectiveness, as in the capability of producing a desired result, was seen as a main benefit by 42.86 %, while 38.1 % of respondents saw the main benefit in the further promotion of the interests of justice.

While specifying their answers further, one respondent indicated, that in their view the benefits of EU action lie in uniform application of law and consequently, in the increase of legal certainty. In addition, an increase in transfers of criminal proceedings could lead to prosecution that is more effective. Another respondent noted as a benefit faster implementation of the defendants' rights when it is in their interest to transfer the proceedings to their home country. A couple of respondents saw as an advantage that the procedure for transfers would be simplified and improved. Other two respondents saw as a benefit that the legitimate interests of victims would be taken into account.

Table 3: Number and percentage of replies to question 3

Option	**Answers**	**Ratio in %**
Improving efficiency (the capability to do something without wasting resources and time)	14	66.67
Improving effectiveness (the capability of producing a desired result)	9	42.86
Improving legal certainty	16	76.19
Further promoting the interests of justice	8	38.1

I don't know/I have no opinion	2	9.52
No Answer	1	4.76

iv. **Question 4: Do you agree that European Union should aim for criminal proceedings to take place in the Member State best placed to prosecute a case?**

Question 4 posed a more general question on the coordination of criminal prosecution within the EU. Three out of four respondents (76.19 %) agreed with the notion that the European Union should aim for criminal proceedings to take place in the Member State best placed to prosecute a case, while only three respondents (14.29 %) disagreed.

Table 4: Number and percentage of replies to question 4

Option	**Count**	**%**
Yes	16	76.19
No	3	14.29
I don't know/I have no opinion	2	9.52
No Answer	0	0

2. **ANALYSIS OF RESPONSES TO QUESTIONS ON THE CURRENT SITUATION**

i. **Question 5: What are, in your view, the main issues currently affecting transfers of proceedings between EU Member States?**

On this question, respondents could contribute multiple answers.

Transfers of criminal proceedings seem to be perceived as facing a wide variety of issues given that all the points listed as possible answers were noted. The issue identified by most of the participants (61.9 %) was language barriers. Most of respondents (57.14 %) saw complexity, lack of legal certainty and transparency as well as lack of mutual trust among the competent authorities and the lack of coordination as an issue. 47.62% of respondents brought up the length of proceedings to take a decision, due to lack of mandatory time limits, and costs as an issue. One third (33.33 %) of respondents saw the lack of common minimum standards and the non-admissibility of already gathered evidence as problematic, while the different minimum standards of rights for suspects/accused persons and/or victims in the receiving State were seen as problematic by 28.57 %. The principle of legality was seen as problematic by the least amount of respondents (23.81 %).

Apart from the listed issues, respondents mentioned several others. Namely, one reply noted the wide discretion of the authorities to decide on the transfer and suggested that criteria for transfer should be laid down in which the defendant's interest is also taken into account. Another reply raised the issue of unjustified transfers and one more reply

noted the lack of an overview of the investigative material from the transferring country. Lack of double criminality and proportionality of transfers (cases of internet fraud) were mentioned among the existing issues by one respondent.

Table 5: Number and percentage of replies to question 5

Option	**Answers**	**Ratio in %**
Complexity, lack of legal certainty and transparency (e.g. due to different rules)	12	57.14
Lack of mutual trust among the competent authorities (e.g. whether a criminal proceeding would be successfully completed in another Member State; or misgivings whether a custodial sentence that could be ultimately imposed would be appropriate)	12	57.14
Lack of cooperation (e.g. no response received from authorities of a potentially receiving State)	12	57.14
Lack of common minimum standards for transfers (e.g. minimum information to be provided)	7	33.33
The principle of legality (an obligation to prosecute)	5	23.81
Length of proceedings to take a decision, due to lack of mandatory time limits	10	47.62
Language barriers	13	61.9
Costs (in particular high costs of translations)	10	47.62
Different minimum standards of rights for suspects/accused persons and/or victims in the receiving State	6	28.57
Non-admissibility of already collected evidence	7	33.33
I don't know/I have no opinion	0	0
No Answer	1	4.76

ii. **Question 6: To your knowledge, in which situations/based on which criteria are proceedings most frequently transferred?**

The objective of Question 6 was to gather knowledge about grounds for transfers under the current legal framework. To accomplish this objective, grounds for transfers were listed. Respondents were able to submit multiple answers.

Respondents identified a number of frequently used grounds for a transfer and only the interest of the receiving Member State was not named as a frequent ground for transfers. The majority of respondents named as most frequent grounds for a transfer - the offence being committed wholly or partly in the territory of another Member State and the nationality/residence of a suspect/accused person of/in the other Member State (57.14 %). Similarly, the location of substantial parts of the most important evidence in the other Member State was named as a ground for transfers by over one third of the respondents (38.1 %). The transfer being in the interest of the ongoing proceedings was named to be a frequent ground for a transfer by 38.1 % respectively. Six respondents (28.57 %) named ongoing proceedings in the receiving Member State as a frequent ground for transfer as well as it being more suitable and/or easier for the other Member State to conduct the investigation and criminal proceedings. Only three respondents (14.29%) named nationality/residence of a victim of/in the other Member State as the ground for a transfer and only one respondent (4.76 %) replied with the interest of a victim for proceedings to take place in the other Member State. Similarly, the interest of the suspect were seen to be rarely taken into account when making a decision on a transfer. Accordingly, it being in the interest of the suspect/accused person for proceedings to take place in the other Member State and the suspect/accused person serving or having to serve a sentence involving deprivation of liberty in the other Member State was replied by only one respondent (4.76 %) each. Preventing impunity was named as a frequent ground for a transfer by two respondents (9.52 %).

One respondent gave additional explanations, specifying in particular, that in many cases more than one criteria will be applicable.

Table 6: Number and percentage of replies to question 6

Option	**Answers**	**Ratio in %**
The offence has been committed wholly or partly in the territory of another Member State, or most of the effects or a substantial part of the damage caused by the offence was sustained in the territory of the other Member State	12	57.14
Substantial parts of the most important evidence are located in the other Member State (e.g. availability of evidence or witnesses)	8	38.1

It is in the interest of the ongoing investigations (e.g. there are ongoing proceedings in respect of the same or related facts involving other persons, in particular in respect of the same criminal organisation, in the other Member State)	8	38.1
Nationality/residence of a suspect/accused person of/in the other Member State	12	57.14
Nationality/residence of a victim of/in the other Member State	3	14.29
It is in the interest of the suspect/accused person for proceedings to take place in the other Member State (e.g. his social integration: enforcement of the sentence in the other Member State is likely to improve the prospects for social rehabilitation of the person sentenced)	1	4.76
A suspect/accused person is serving or is to serve a sentence involving deprivation of liberty in the other Member State	1	4.76
There are ongoing proceedings against the suspect/accused person in the other Member State	6	28.57
It is in the interest of a victim for proceedings to take place in the other Member State	1	4.76
It is in the interest of the other Member State (e.g. security interest of another Member State)	0	0
It is more suitable and/or easier for the other Member State to conduct the investigation and criminal proceedings	6	28.57
To prevent impunity (e.g. when a European arrest warrant is refused due to poor detention conditions in the issuing Member State)	2	9.52
I don't know/I have no opinion	4	19.05
No Answer	1	4.76

Is there a hierarchy of these criteria in your State?

On this sub-question, a significant amount of respondents didn't know an answer or had no opinion on this matter (28.57 %). Of the respondents who provided a concrete answer, the vast majority (78.57 %) suggested there is no hierarchy of such criteria in their country (52.38 % in total). Only three participants in total (14.29 %) answered that such a hierarchy existed in their country. Those respondents named PL, DE and IT as their country of origin.

Table 7: Number and percentage of replies to the sub question

Option	**Count**	**%**
Yes	3	14.29
No	11	52.38
I don't know/I have no opinion	6	28.57
No Answer	1	4.76

iii. **Question 7: To your knowledge, on which basis do you/your authorities most frequently refuse a transfer of proceedings when requested?**

Respondents could provide multiple answers to the question on the grounds for refusal under the current legal framework. Respondents identified the lack of jurisdiction as the most common ground for refusal of a transfer (61.9 %). Some of the grounds for refusal related to the impossibility of further investigations were among the most common; the *ne bis in idem* principle was named as a ground for refusal by 47.62 % and the criminal prosecution being statute-barred by 42.86 %. In contrast, age of criminal responsibility, amnesty (both 9.52 %) and privileges and immunities (4.76 %) were among the least mentioned grounds for refusal. No double criminality was named as a ground for refusal by 33.33 % of respondents. One of the respondents named fundamental rights as a common ground for refusal.

Additionally, two respondents indicated as reasons situations when requested State was not best placed to conduct criminal proceedings, and one other respondent referred to lack of evidence and suspect not being in the requested country.

Table 8: Number and percentage of replies to question 7

Option	**Answers**	**Ratio in %**
Ne bis in idem (Right not to be tried or punished twice in criminal proceedings for the same criminal offence)	10	47.62
Age of criminal responsibility	2	9.52
Amnesty	2	9.52
Lack of jurisdiction	13	61.9

No double criminality	7	33.33
Privileges and immunities (such as legal privilege, or medical privilege)	1	4.76
The criminal prosecution is statute-barred	9	42.86
Fundamental rights	0	0
I don't know/I have no opinion	4	19.05
No Answer	1	4.76

iv. **Question 8: To your knowledge, according to applicable national provisions, is a suspect/accused person informed and/or asked to provide his/her opinion concerning a transfer of a criminal proceeding?**

Between respondents who provided a 'yes' or 'no' answer, results were split (28.57 % each). In addition, one respondent from Germany specified that while there is no legal obligation to inform the accused, there is a right to have access to the file. Respondents from the Czech Republic noted in particular, that while the suspect or accused is not informed in advance of the intended transfer of criminal proceedings, they are informed of the transfer subsequently, as they are served with an order temporarily waiving certain acts of the criminal proceedings, which is issued in connection with the transfer of criminal proceedings to a foreign State. Another respondent from Sweden indicated that suspect's opinion will be sought when the suspect is in Sweden and the transfer is requested under the 1972 European Convention on the transfer of proceedings in criminal matters, but no such requirement existed for transfers outside this Convention.

Table 9: Number and percentage of replies to Question 9

Option	**Count**	**%**
Yes	6	28.57
No	6	28.57
I don't know/I have no opinion	5	23.81
No Answer	4	19.05

If yes, to your knowledge, could you please quantify, as a percentage, in how many cases have suspects/accused persons agreed to transfer of proceedings.

In response to the sub question, only one respondent from Slovenia gave an indication – 5.

v. **Question 9: To your knowledge, according to applicable national provisions, is a victim informed and/or asked to provide his/her opinion concerning a transfer of a criminal proceeding?**

Of the respondents who provided a 'yes' or 'no' answer, the majority (33.33% in total) didn't know of such an involvement of the victim in the proceeding. 23.81 % of respondents knew of such an involvement.

In addition, one respondent from Germany specified that while there is no legal obligation to inform victim of a crime, there is a right to information on the state of proceedings. Similarly to the answers given in reply the previous question, respondents from the Czech Republic noted that victims of the crime are informed of the transfer subsequently, as they are served with an order temporarily waiving certain acts of the criminal proceedings.

Table 10: Number and percentage of replies to Question 9

Option	**Count**	**%**
Yes	5	23.81
No	7	33.33
I don't know/I have no opinion	6	28.57
No Answer	3	14.29

If yes, could you please quantify, as a percentage, in how many cases have victims agreed to transfers of proceedings

In response to the sub question, only one respondent from Slovenia gave an indication – 20.

vi. **Question 10: To your knowledge, does your national system provide a legal remedy for a suspect/accused person (e.g. an appeal proceeding) against a decision to transfer a criminal proceeding from one Member State to another?**

On the question, whether the national system provides for a legal remedy against the transfer of the proceeding, 38.1 % of the respondents answered with "Yes". Those respondents named ES, PT, SI, PL, FR, CZ and IT as their state of origin. Meanwhile 33.33 % of respondents noted there was no legal remedy in their national legal system. These respondents named DE, CZ and SE as their Member State of origin.

In addition, a respondent from Sweden has clarified, that a suspect/accused person could ask for a review of a decision to transfer a criminal proceeding to another Member State, when transfer is done under the 1959 European Convention on mutual assistance in criminal matters. Another responded from Germany specified, that appeal possibilities would depend on whether the accused is heard before the decision is taken, this

presupposes that they have been informed of the planned transfer or of the criminal proceedings. Whether this is the case, depends on the stage of criminal proceedings.

Table 11: Number and percentage of replies to Question 11

Option	**Count**	**%**
Yes	8	38.1
No	7	33.33
I don't know/I have no opinion	6	28.57
No Answer	1	4.76

vii. **Question 11: To your knowledge, does your national system provide a legal remedy for a victim (e.g. an appeal proceeding) against a decision to transfer a criminal proceeding from one Member State to another?**

The majority of respondents (52.38 %) didn't know of a legal remedy for a victim against a decision to transfer a criminal proceeding. These respondents named PT, PL, DE, CZ, SE and AT as their country of origin. In contrast, only one in every ten respondent knew of such a remedy for the victim (9.52 %). These respondents named ES and SI as their country of origin.

Similarly to the reply to the previous question, one respondent from Sweden has clarified, that a victim could ask for a review of a decision to transfer a criminal proceeding to another Member State, when transfer is done under the 1959 European Convention on mutual assistance in criminal matters.

Table 12: Number and percentage of replies to Question 11

Option	**Count**	**%**
Yes	2	9.52
No	11	52.38
I don't know/I have no opinion	7	33.33
No Answer	1	4.76

3. **ANALYSIS OF RESPONSES TO QUESTIONS ON REQUIREMENTS AND CONSEQUENCES**

viii. **Question 12: To your knowledge, according to your national law, does a transfer require that proceedings have already been instituted and that the presumed suspect is known?**

Almost half of the respondents (47.62 %) did not know of such a requirement under their national law. These respondents named ES, PT, FR, DE, CZ, SE and AT as the country of their origin. Six respondents (28.57 %), who named SI, DE and IT as their country of

origin, replied that their national law required the proceeding to be instituted and the suspect to be known to initiate the transfer. Additionally, one respondent from Sweden clarified, that the requirement to know the presumed suspect would apply in cases of transfers under the 1972 European Convention on the transfer of proceedings in criminal matters, but not outside such framework.

Table 13: Number and percentage of replies to Question 12

Option	**Count**	**%**
Yes	6	28.57
No (according to your national law, in some instances a transfer of proceedings is initiated immediately after the detection of an offence)	10	47.62
I don't know	4	19.05
No Answer	1	4.76

ix. **Question 13: To your knowledge, according to your national law, is a transfer precluded at a certain point (e.g. when a proceeding is almost finalised)?**

Of those respondents, who provided a 'yes' or 'no' answer, majority did not consider that a transfer could be precluded at a certain point. These respondents named PT, SI, PL, DE, CZ and SE as their country of origin. Only 9.52 % of respondents, who named ES and IT as their country of origin, provided the opposite answer.

Table 14: Number and percentage of replies to Question 13

Option	**Count**	**%**
Yes	2	9.52
No	10	47.62
I don't know	8	38.1
No Answer	1	4.76

x. **Question 14: To your knowledge, have you/the authorities of your Member State when acting as a receiving Member State encountered any issues in court proceedings concerning admissibility of evidence collected by authorities of the transferring state?**

As to issues in court proceedings concerning the admissibility of evidence collected by authorities of the transferring state, nine respondents (42.86 %) replied that they had no knowledge of such issues. In contrast, only 3 respondents (14.29 %) had knowledge of such issues. These respondents named PT, SI and CZ as their state of origin.

None of the respondents replied to the sub-question, in case of a 'yes' answer, which asked to specify the percentage of cases where this has occurred. One respondent from the Czech Republic, however, indicated that in cases of witness statements made in the requesting State, these could not, in principle, be used in the Czech Republic as requested State after taking over the proceedings because a lawyer was not present in the Czech Republic in such criminal proceedings.

Table 15: Number and percentage of replies to Question 14

Option	**Count**	**%**
Yes	3	14.29
No	9	42.86
I don't know	8	38.1
No Answer	1	4.76

xi. **Question 15: Please indicate if you/the authorities of your Member State transfer proceedings only conditionally, meaning that proceedings could be reverted to the transferring Member State.**

Answers on question 15 were split: while 28.57 % of respondents (countries of origin: SI, CZ and DE) replied that transfers are only conducted conditionally by the authorities of their Member State, 33.33 % of respondents (countries of origin ES, PL, FR, DE, SE and IT) replied that their authorities also conduct definite transfers.

Table 16: Number and percentage of replies to Question 15

Option	**Count**	**%**
Yes	6	28.57
No (not possible)	7	33.33
I don't know	6	28.57
No Answer	2	9.52

To your knowledge, what is the approximate percentage of cases that have been reverted to the transferring authority in your Member State?

In response to this sub question, only one respondent from Slovenia gave an indication – 15.

xii. **Question 16: To your knowledge, in cases of a possibility of reverting, how is the *ne bis in idem* requirement (right not to be tried or punished twice in criminal proceedings for the same criminal offence) regulated in order to ensure that two proceedings do not formally run in parallel?**

Question 16 was an open question, and a large majority of respondents (76,19 %) did not provide an answer to it. Those respondents who did reply stated, that there was no direct legal provision on this issue (4,76%) and that therefore the transfer in itself did not constitute a procedural obstacle (4,76%). Other respondents replied that, before sending a request on the transfer to a foreign State, a temporary waiver shall be made (4,76%), or listed the sources from which information concerning a pending criminal procedure in another Member State can be ascertained (4,76%). Furthermore, another respondent suggested the establishment of a European foreclosure procedure to ensure that a person cannot be charged twice for one offence (4,76 %).

4. ANALYSIS OF RESPONSES TO QUESTIONS ADDRESSED ONLY TO DEFENCE LAWYERS

xiii. Question 17: What are the main issues encountered in transfers of criminal proceedings from the perspective of a defence lawyer?

Question 17 was an open question and as a result the majority of the respondents (90,48%) did not provide an answer. One respondent referred to additional costs for the client. Another respondent named as a main issue the fact that the right to request a transfer did not exist, even in cases in which significant reasons (such as the nationality of the accused, a confession of the accused) would argue in favour of a transfer. As a result, even a defendant who had already confessed to the crime had no means to ensure a transfer of proceedings. Furthermore, no effective appeal existed against a decision of a foreign state not to transfer to the home State of the accused person. Overall, the respondent deemed the accused person to have too little rights in the transfer procedure.

5. ANALYSIS OF RESPONSES TO QUESTIONS ON THE POSSIBLE FUTURE LEGAL FRAMEWORK

xiv. Question 18: In which situations should a transfer of proceedings be possible?

Respondents could provide multiple answers on Question 18. Similar to Question 6 on the possible grounds for a transfer, respondents favoured situations where there is a strong factual link to the potential receiving Member State. This is shown by 80.96% of respondents naming the offence being committed wholly or partly in the territory of the other Member State as a situation for a transfer. Additionally, 71.43% of respondents named substantial parts of the most important evidence being located in the other Member State and 61.9% the suspect/ accused person being a national/resident of the other Member State as potential situations for a transfer.

Preventing conflicts with the *ne bis in idem* principle was also seen as a valid ground for transferring the proceeding, as 15 respondents (71.43%) named ongoing proceedings in respect to the same facts involving other persons, in particular of the same criminal organisation, in the other Member State as a potential ground for a transfer.

A wide ground for transfer as in preventing impunity, in case none of the other grounds apply, was supported by 13 respondents (61,9%). A minority of the respondents agreed that the victim's nationality/country of residence/other valid interest should be a deciding

factor (42,68%). Only 8 respondents (38,1%) thought it important that the suspect/accused person was serving or was to serve a sentence involving deprivation of liberty in the other Member State, while mere 7 respondents (33,3%) were of the opinion that social rehabilitation prospects of the accused person should be taken into account.

Additionally, one respondent considered that the more advanced stage of the criminal procedure, the less rational will be the transfer to another jurisdiction. Another respondent cautioned that circumstances of the individual case need to be taken into account.

Table 17: Number and percentage of replies to question 18

Option	Answers	Ratio in %
The offence has been committed wholly or partly in the territory of the other Member State, or most of the effects or a substantial part of the damage caused by the offence was sustained in the territory of the other Member State	17	80.95
The suspect/accused person is a national /resident of the other Member State	13	61.9
Substantial parts of the most important evidence are located in the other Member State	15	71.43
There are ongoing proceedings against the suspect/accused person in the other Member State	10	47.62
There are ongoing proceedings in respect of the same or related facts involving other persons, in particular in respect of the same criminal organisation, in the other Member State	15	71.43
The suspect/accused person is serving or is to serve a sentence involving deprivation of liberty in the other Member State	8	38.1
Enforcement of the sentence in the other Member 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 other Member State	7	33.33
The victim is a national/resident of the other Member State or the victim has another	9	42.86

significant interest in having the proceedings transferred		
To prevent impunity (when none of the above criteria apply)	13	61,9
No Answer	1	4.76

xv. **Question 19: Which Member State is best placed to take over the proceedings when suspects/accused persons and victims from different Member States are involved (e.g. a criminal organisation with numerous suspects and victims)?**

Multiple answers were possible in reply to this question. A clear majority of respondents (76,19%) opted that the Member State where substantial evidence was located was best placed to take over the proceedings. An equal number of respondents (47,62%) identified the Member State of nationality/residence of the majority of victims and the Member State of nationality/residence of the majority of suspects/accused persons as most suitable. Nine respondents (42,86%) replied that the Member State with a specific interest in prosecuting (e.g. offence affecting national security) should take over the proceedings.

The majority of respondents (61,9%) opted against a non-binding hierarchy of criteria for such cases. Only 6 respondents (28,57%) favoured a non-binding hierarchy of criteria. One respondent has specified, that the interests of victims should come first, followed by the interests of Member States and location of substantial evidence, while another respondent noted that the hierarchy of criteria should not negatively affect the victim's right to achieve justice in a safe manner. One respondent argued that establishing a rigid hierarchy of factors is not feasible since it would not allow competent authorities to take into account circumstances of a specific case when taking a decision.

Table 18: Number and percentage of replies to question 19

Option	Answers	Ratio in %
The Member State with a specific interest in prosecuting (e.g. offence affecting national security)	9	42.86
The Member State of nationality/residence of the majority of victims	10	47.62
The Member State of nationality/residence of the majority of suspects/accused persons	10	47.62
The Member State where the substantial evidence is located	16	76.19
No Answer	0	0

2.1. Should there be a (non-binding) hierarchy of criteria for such cases?

Table 19: Number and percentage of replies to sub question 1 to question 19

Option	Count	%
Yes	6	28.57
No	13	61.9
I don't know/I have no opinion	1	4.76
No Answer	1	4.76

xvi. **Question 20: Should a transfer of criminal proceedings establish a jurisdiction in the Member State to which the proceedings are being transferred, if that Member State would otherwise not have jurisdiction (= subsidiary jurisdiction)?**

A majority of respondents (52,38% in total) favoured the establishment of a jurisdiction, either in all or in specific cases, in the Member State to which the proceedings are being transferred, if the Member State would otherwise have no jurisdiction. In comparison, only 6 respondents (28,57%) opposed the establishment of a jurisdiction in such cases.

Table 20: Number and percentage of replies question 20

Option	Count	%
Yes, in all cases	4	19.05
Yes, only in specific cases	7	33.33
No	6	28.57
I have no opinion	3	14.29
No Answer	1	4.76

Please elaborate on the advantages/disadvantages of subsidiary jurisdiction and describe possible situations when subsidiary jurisdiction could apply.

In response to this sub-question, some respondents argued, that there is no need to establish subsidiary jurisdiction, and noted that such jurisdiction would not fit with the criminal justice system of the requested State. On the other hand, other respondents suggested for instance that subsidiary jurisdiction would provide for greater flexibility in the conduct of criminal proceedings; that it would be useful in cases where a Member State refuses surrender of a person takes over criminal proceedings; that rules on subsidiary jurisdiction are already provided for under the 1972 European Convention on the transfer of criminal proceedings and should therefore be upheld in a possible new legal framework. One respondent noted that victims' access to justice should be ensured and measures could be established mitigating any loss of rights resulting from the transfer in such context.

xvii. **Question 21: In which situations should the authority requested to take over the proceedings be able to refuse the transfer?**

Multiple answers were possible in reply to this question. All of the grounds for refusal were supported by the respondents, with the majority of the answers (80,95%) pointing to the lack of double criminality as an important reason to refuse the transfer.

Table 21: Number and percentage of replies to question 21

Option	Answers	Ratio in %
Lack of double criminality (if the act does not constitute an offence under the law of that Member State)	17	80.95
If taking proceedings would be contrary to the *ne bis in idem* principle (right not to be tried or punished twice in criminal proceedings for the same criminal offence)	15	71.43
If the suspect cannot be held criminally liable for the offence due to his or her age	14	66.67
If there is an immunity or privilege under the law of that Member State which makes it impossible to take action	16	76.19
Where the criminal prosecution is statute barred in accordance with the law of that Member State	15	71.43
If the offence is covered by amnesty in accordance with the law of that Member State	11	52.38
A ground for a transfer does not exist	10	47.62
Fundamental rights in accordance with Article 6 of the Treaty on the European Union and the Charter of Fundamental Rights of the European Union	10	47.62
No Answer	2	9.52

xviii. **Question 22: Do you agree that the following persons should be consulted, if feasible or appropriate, when a transfer of proceedings is envisaged?**

38,1% of respondents agreed that both the victim and the suspect(s)/accused person(s) should be consulted in cases of envisaged transfer of proceedings. 33,33% of respondents replied that only the victim(s) of a crime should be consulted, while 19,05% of respondents thought that solely the suspect(s)/accused person(s) should be consulted. 28.57% of respondents did not agree that such consultation should take place. Among

those that replied in a negative, few respondents have specified that informing a suspect in early stage of criminal proceedings could undermine the purpose of such proceedings and suggested that information should only be provided when the requested State has decided to take over the criminal proceedings.

Table 22: Number and percentage of replies question 22

Option	**Count**	**%**
The suspect(s) or accused person(s)	4	19.05
The victim(s)	7	33.33
Both	8	38.1
None of the above	6	28.57
I have no opinion	1	4.76
No Answer	2	9.52

xix. **Question 23: Besides consulting them, are there other ways the rights of suspects/accused persons and those of victims should be strengthened in the transfer of proceedings?**

Among the other ways to strengthen different rights, respondents indicated the right for the defendant to request a transfer, the right to be heard, to have a possibility to raise objections and appeal against a decision on the transfer; additionally a right to free legal aid was mentioned, as well as different victims' support measures.

Table 23: Number and percentage of replies to Question 23

Option	**Count**	**%**
Yes	7	33.33
No	7	33.33
I have no opinion	6	28.57
No Answer	1	4.76

xx. **Question 24: Should a new instrument provide for cooperation between lawyers in both Member States (the transferring Member State and the receiving Member State) to assist the suspect/accused person?**

A majority of respondents (52,38%) favoured new rules on cooperation between lawyers in both Member States to assist the suspect/accused person. Almost a third of respondents opposed. Additionally, one respondent mentioned the importance of legal support and representation for victims of crime, and another respondent considered that appropriate lawyers' remuneration is provided in case of mandatory defence.

Table 24: Number and percentage of replies to Question 24

Option	Count	%
Yes	11	52.38
No	6	28.57
I have no opinion	2	9.52
No Answer	2	9.52

xxi. **Question 25: Should the future instrument provide for strict time limits for consultations and for taking a decision whether to accept a transfer of proceeding?**

A majority of respondents (57,14%) favoured a strict time limits for consultations/taking a decision whether to accept a transfer of proceedings. Close to a third of respondents opposed. Among the time limits suggested, deadlines varied between 4 weeks and 90 days for taking a decision on the transfer.

Table 25: Number and percentage of replies to Question 25

Option	Count	%
Yes	12	57.14
No	6	28.57
I have no opinion	2	9.52
No Answer	1	4.76

xxii. **Question 26: As a minimum, what should be the consequences of a transfer?**

Almost three quarters of respondents (71,43%) agreed that there should be an obligation to investigate for the receiving Member State. In comparison, only one respondent (4,76%) went so far as to opt for an obligation to prosecute.

Table 26: Number and percentage of replies to Question 26

Option	Count	%
An obligation to investigate	15	71.43
An obligation to prosecute	1	4.76
I have no opinion	2	9.52
No Answer	3	14.29

xxiii. **Question 27: To what extent should procedural acts executed in the transferring Member State, including the collection of evidence, be legally valid in the receiving Member State?**

The majority of respondents (66,67%) favoured limitations to the legal validity of procedural acts in the receiving Member State. In comparison, roughly a fifth of respondents (23,81%) favoured an unlimited legal validity. Additionally, two respondents specified, that should the rule of equivalence apply, it could lead to conflicting assessments, in cases where certain investigative measures were not possible in own proceedings, but evidence from such measures would be used in transferred proceedings. Another respondent considered it important to ensure that practical measures are in place to reduce the number of times the victim has to re-live the trauma and limit the number of superfluous interactions with competent authorities, which enhance the risk of secondary victimisation.

Table 27: Number and percentage of replies to Question 27

Option	**Count**	**%**
With no limitations (rule of equivalence)	5	23.81
With limitations (e.g. only as far as it is compatible with the law of the receiving State)	14	66.67
I have no opinion	1	4.76
No Answer	1	4.76

xxiv. **Question 28: Once a transfer takes place, the law of the receiving Member State should apply:**

A majority of respondents (61,9%) favoured that, once a transfer takes place, the law of the receiving Member State should apply without any restrictions. Roughly a quarter of respondents (23,81%) opted for exceptions to the applicability of the law of the receiving Member State.

Table 28: Number and percentage of replies to Question 28

Option	**Count**	**%**
Without any exceptions	13	61.9
With exceptions, meaning that the law of the transferring Member State could still apply to certain aspects	5	23.81
I have no opinion	2	9.52
No Answer	1	4.76

xxv. **Question 29: Which law should apply to sentencing following a transfer of proceedings?**

A majority of respondents (57,14%) gave the opinion that the law of the receiving Member State should apply to sentencing following a transfer of proceedings. An equal number of respondents (14,29%) favoured either a limitation to the maximum sentence of the two Member States involved or the taking into account the advice or sentencing practise of the transferring Member State.

Table 29: Number and percentage of replies to Question 29

Option	**Count**	**%**
To protect the suspect/accused person: the maximum sentence to be imposed should be the one which is the lowest of the two Member States involved (*lex mitior*)	3	14.29
The law of the receiving Member State	12	57.14
The law of the receiving Member State, but taking into account the advice or sentencing practice of the transferring Member State	3	14.29
No Answer	4	19.05

xxvi. **Question 30: Competence reverting back to the transferring Member State: Should the transferring Member State have a possibility to (re-)open proceedings if the receiving Member State informs it of its decision to discontinue the proceedings?**

Two thirds of respondents favoured the possibility of the transferring Member State to reopen proceedings (66,67% in total – 23,81% subject to exceptions). Roughly a fifth of respondents (19,05%) objected. A few respondents have further specified that re-opening of proceedings should be possible where the *ne bis in idem* principle does not prevent further prosecution.

Table 30: Number and percentage of replies to Question 30

Option	**Count**	**%**
Yes	9	42.86
Yes, subject to exceptions	5	23.81
No	4	19.05
I have no opinion	1	4.76
No Answer	2	9.52

xxvii. **Question 31: Should the future EU instrument provide a role for Eurojust and/or the European Judicial Network (EJN)?**

Two thirds of respondents (66,67%) agreed that the future EU instrument should provide a role for Eurojust and/or the European Judicial Network (EJN). 28,57% of respondents objected. In particular, Eurojust's assistance in holding coordination meetings and in other forms of cooperation (such as Joint Investigation Teams) was mentioned, as well as EJN's support in identifying competent authorities and speeding up the transmission of information between them.

Table 31: Number and percentage of replies to Question 31

Option	**Count**	**%**
Yes	14	66.67
No	6	28.57
I have no opinion	1	4.76
No Answer	0	0

III. Targeted consultations

The targeted consultations gathered views on the current situation concerning transfers of criminal proceedings as well as on the possible future instrument, including on the rights of suspects, accused persons and victims, affected by the transfer procedure and on the role of Eurojust and EJN. Replies from 26 Member States, Eurojust, EJN, the EPPO, Europol and FRA were received.

Issues currently affecting transfers of proceedings

As the **main issues currently affecting transfers of proceedings**, most stakeholders noted the costs arising from transfers, lack of communication, long duration of the procedure, as well as a number of other issues, including complexity, lack of legal certainty and transparency. A total of 15 Member States considered that the current situation is not satisfactory, while 10 Member States found the situation satisfactory or at least partially satisfactory.

Possible future legal framework

On the question whether there is **a need for a new EU legal framework**, 18 Member States replied positively and only 3 Member States considered that it is not necessary. One of those Member States however noted that while a new EU legal framework is not necessary, it could potentially simplify and improve the procedure of transfer of criminal proceedings. Another Member State pointed out that all Member States should join the 1972 Transfer Convention. There were some other Member States, which either did not take a specific view on this question, or noted that the current situation is for them satisfactory but that they were open to discuss the

possibility of a new legal framework and listed several advantages thereof. Both Eurojust and EJN acknowledge the need for a dedicated EU legal framework. As concerns the **main benefits of a future framework**, a majority of replies pointed to the increase in legal certainty (20 MS) and in effectiveness (19 MS), as well as the improvement of efficiency (15 MS) and promotion of the interests of justice (15 MS). Replies also indicated other benefits, such as improvement of the quality of requests, as well as avoidance of impunity.

In reply to the question, **in which situations should a transfer of proceedings be possible** (criteria for a transfer), - a number of different criteria were considered possible and viewed as almost equally important[61]. The situation which received least support (only 8 Member States considered it applicable) was where the enforcement of the sentence would improve prospects for social rehabilitation of the person sentenced or where there are other reasons for a more appropriate enforcement of the sentence. Both Eurojust and EJN expressed preference for a non-exhaustive list of criteria while FRA saw as the most important criteria – transfer to a place where the crime was committed and where the most victims and witnesses reside and most evidence is located.

In reply to the question, whether there **should be a general obligation to accept a transfer**, 8 Member States considered that there should not be such an obligation, 11 Member States considered that there should be an obligation with restrictions, and two Member States suggested that there should be an obligation without restrictions. One Member State noted that it would appear difficult to impose a general obligation to take over the proceedings. Member States which replied 'yes, with restrictions' noted a number of different criteria that would have to be met for such an obligation to apply. Many of those criteria seemed to be given equal importance[62]. The situations concerning a suspect who is already serving a sentence received less positive replies. EJN was of the view that there should be no obligation to take over the proceedings with some exceptions (such as in case of refusal to surrender a person) and Eurojust suggested that a request for transfer should have a mandatory nature where it is based on the criteria for transfers.

On the question, **if an obligation to accept a transfer, even if only in limited cases, would create an issue for the legal system of a particular Member State**, 7 Member States indicated different reasons why such an obligation would be problematic, in particular because of the principle of opportunity, and issues related to the lack of jurisdiction, as well as the difference in the level of proof required to start the proceedings in different national systems, or because in some cases the transfer may be ineffective. 6 Member States indicated that such an obligation

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61 In particular, the first five situations listed in the questionnaire - when either the offence was committed in the territory of another Member State, or when the suspect is a national/resident of the other Member State, or when the substantial parts of the most important evidence are located in another Member State, or where there are ongoing proceedings in another Member States (either parallel ones or others in respect of the same suspect).

62 In particular, the first five situations listed in the questionnaire - when either the offence was committed in the territory of another Member State, or when the suspect is ordinarily resident in the other Member State, or when the substantial parts of the most important evidence are located in another Member State, or where there are ongoing proceedings in another Member State (either parallel ones or others in respect of the same suspect).

does not create an issue. Three MS noted that it would depend on the possible future scope, the criteria for the transfer and the grounds for refusal.

As to the question **which grounds for refusal should be possible**, Member States attached similar importance to all of the grounds listed in the questionnaire (ranking from the lack of double criminality, which 24 Member States consider important, to the lack of the interests of justice, which 13 Member States consider relevant). Additional grounds were suggested by some Member States, specifically a situation when the transfer would deprive the victim of the possibility to claim her/his rights; also a situation when a Member State has no jurisdiction. EJN was of the view that it should be possible to refuse a transfer if, according to the national law, the investigation and prosecution for certain reasons would become ultimately impossible. Eurojust also noted that the proposal should include a possibility to refuse a transfer where it would not be in the interests of justice, however, that it should not cover considerations linked to the requested State's criminal policy priorities or costs.

On the question, **should a transfer establish a subsidiary jurisdiction**, 14 Member States replied positively (either for all or specific cases), 8 Member States replied negatively, 1 Member State considered that it depends on the scope of the instrument. As to the cases when subsidiary jurisdiction could apply, there was no common answer[63]. While some Member States considered that subsidiary jurisdiction would beneficial to avoid a risk transfer of proceedings could not take place due to a lack of jurisdiction even if transfer is justified, some others considered that grounds for jurisdiction are already broad or that subsidiary jurisdiction could cause legal issues because it would be established without a specific link to the receiving Member State. A few Member States indicated that their law already provides for the creation of subsidiary jurisdiction, either in cases of transfer of proceedings, or that in some cases their authorities would have jurisdiction over a crime committed by a person whose extradition or surrender was refused. EJN supported the need for rules on subsidiary jurisdiction, while Eurojust did not express an opinion on the matter.

On the question, **whether the suspect/accused person or a victim should be consulted** on the possible transfer, 14 Member States considered that both suspects/accused persons and victims should be consulted, one Member State considered that only suspects/accused persons should be consulted, one other Member State suggested that only victims should be consulted. 9 Member States considered that none of these persons should be consulted. Some Member States pointed out that consultation should not bind the final decision of the authorities whether to initiate the transfer. It was also suggested that consultation could be encouraged but not made mandatory. Some replies indicated a need to inform the suspects/accused persons and victims after the transfer in cases where there was no consultation. Both Eurojust and EJN considered that in most cases consultation with suspects/accused persons or victims is neither feasible nor appropriate because transfer often take place at an early stage of investigation, where the proceedings are still confidential. Instead, they suggested that authorities should consideration to the interests of

[63] Among the examples mentioned: cases when the surrender of a persons under the European Arrest Warrant was refused; when suspect or victim is resident in receiving Member State; or when any of the criteria listed in Article 8 of the 1972 Transfer Convention are applicable.

suspects/accused persons and victims. According to FRA, victims of crime should always be consulted, while suspects/accused persons should be able to present their statement.

On the related question, **if there are other ways to strengthen the rights of suspect and victims in the transfer of proceedings**, some Member States noted that the transfer should not deprive the victims of the possibility to claim their rights, a couple of Member States noted that secondary victimisation should be avoided (e.g. by hearing the victim in the transferring State before the transfer), and the possibility of remote hearing (or absence of it) should be taken into account. EJN proposed the inclusion of a possibility for the victim to bring charges forward if the prosecutor decides not to. Eurojust considered that suspects and victims should have a right to request the competent authorities to consider transfer of proceedings without a binding effect on authorities. FRA noted that for victims most important is that proceedings are not transferred to a distant country where they could not be able to participate in proceedings; victims should also be entitled to support, legal advice and representation and support in communication. As concerns the suspect/accused person, FRA noted the importance of the right to a fair trial, need to ensure that a transfer does not prevent the suspect/accused person from enjoying their family and private life and where deprivation of liberty is involved, that it does not lead to situations where a person is detained under conditions that could lead to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

On the question, **if a new instrument should facilitate cooperation between lawyers in two Member States**, 9 Member States and EJN considered that it should, while 14 Member States and Eurojust noted that it should not.

A majority of Member States (17) were supportive of **indicative time limits** for consultations and for taking a decision on the request for transfer, while 7 Member States would accept strict time limits. Among the Member States which supported strict time limits, the deadlines varied between 30 to 90 days with a possibility to extend. Member States which supported indicative time limits suggested timelines between 30 days and 1 year. Both Eurojust and EJN agreed that at the consultation stage time limits could be indicative, while at the stage of taking a decision on the request they could be mandatory.

Majority of Member States (16) supported that the future instrument should regulate **provisional measures**, while 7 Member States opposed. 5 Member States considered that **non-judicial authorities** (such as Ministries of Justice) should be able to agree on a transfer of criminal proceedings, while a majority of Member States (20) considered that only judicial authorities should be able to take such decisions. All Member States considered that a transferring authority should have a possibility to **withdraw a request** before the receiving authority has made a final decision on the transfer.

As to **what minimum information should be provided by the transferring authority when starting consultations**, a majority of Member States considered that it is equally important to provide information in a standard form (certificate), as well as include relevant provisions of national legislation and state of play concerning procedural acts or measures taken. 6 Member States noted that a complete criminal file should be provided. 2 Member States considered that

there should be a right for the requested State to request a full file, if it is necessary to take a decision. 1 Member State specified that a report with an excerpt from the file with the essential evidence might be optimal. Eurojust and EJN also listed specific elements which should be included in a standard form.

A majority of Member States and EJN noted that **translation** of the certificate, as well as of the relevant parts of the criminal file and of other documents, if requested by the receiving authority would be needed. Additionally, one Member State mentioned translation of the relevant provisions of national legislation, and another one, translation of the complete file. Eurojust suggested that a translation of certificate should be sufficient at the stage of preliminary consultation.

In reply to the question, **at what time should the transferring authority suspend or terminate its own proceedings**, a large majority (19) of Member States and EJN considered that this should be done upon receiving a notification that the receiving authority has accepted the transfer (similarly, Eurojust was of the view that it should be done following acceptance and when the receiving State receives the case file). Three Member States believed this should be done when a formal agreement on transfer of proceedings is reached, three Member States considered that this should be done when the decision is taken to transfer the file or before the request for transfer is sent out and one other Member State noted that it should be up to the national legislation.

As to the **consequences of a transfer**, 14 Member States considered that a transfer should create an obligation to consider investigation or prosecution, 8 Member States and EJN believed that the transfer should imply an obligation to investigate, one Member State noted that it should create an obligation to prosecute. Another Member State and Eurojust specified that it would depend on the stage of the proceedings in their view - if an indictment was already issued, an obligation to prosecute would be preferred, otherwise, an obligation to investigate and a consideration to prosecute would be sufficient. Additionally, one Member State noted that in case it is evident that no charges will be brought in the receiving State, the transfer should not be accepted. One reply indicated that an obligation to inform the transferring authority about the decision taken, and, periodically, about the advances in the investigation, needs to be established.

On the question **to what extent should procedural acts, including collected evidence, performed in the transferring Member State be legally valid in the receiving Member State**, 7 Member States considered that there should be no limitations (rule of equivalence would apply). 14 Member States believed that there should be limitations, e.g. a requirement that such evidence could also have been collected under the law of the receiving State, or that it is not contrary to the fundamental principles of the law of the receiving State (the latter condition also supported by EJN and Eurojust), or an exception where the evidence was gathered in the State of the transferring authority irregularly. One Member State considered it should be a matter of national law of the receiving State, another Member State underlined that it is always up to the court of the receiving State to consider the probative value of the evidence on the basis of its national legislation.

In reply to a question, **should the receiving authority have a possibility to revert a proceeding back to a transferring Member State**, 20 Member States and Eurojust replied positively, two Member States and EJN negatively. Member States gave different examples in which cases this possibility should apply, such as if circumstances change during the investigation in the receiving State and new facts show that the transferring MS has better conditions to investigate and prosecute the case, e.g. when the suspect/accused person moves back to the transferring State or when new victims, witnesses or evidence appears. Two Member States underlined the possibility to revert a proceeding back should limited, while one Member State referred more broadly to cases when it is in the interest of proper administration of justice. One reply noted that such an action by the receiving authority should be well motivated.

All Member States, which replied to the question, except one, as well as EJN and Eurojust considered that the **transferring Member State should have a possibility to re-open proceedings, if the receiving Member State informs of its decision to discontinue the proceedings**. Certain exceptions were however mentioned, most prominently, the need to respect the *ne bis in idem* principle. One reply suggested an obligation for the transferring authority to transmit new evidence, which is found in the transferring State and useful for the purpose of proceedings in the receiving State.

After the transfer takes place, a majority of Member States (17), EJN and Eurojust considered that **the law of the receiving State should apply without any exceptions**. 4 Member States considered that exceptions should be possible.

Similarly, a majority of Member States (19), EJN and Eurojust believed that **law of the receiving State should apply to the sentencing** that follows the transfer. One Member State specified that this rule should apply only in situations when the receiving State has jurisdiction. Three other Member States however are of the view that the maximum sentence to be imposed should be the one which is the lowest of the two Member States involved, and another State thinks this should be the case when the offence was committed in the transferring State. Similarly, another reply indicated that in accordance with the national law of that Member State, when the offence was committed abroad the maximum penalty prescribed in the law of the place of commission of the crime could not be exceeded. Two other Member States considered that the advice or sentencing practice of the transferring Member State should be taken into account.

Majority of Member States (21 and 18 respectively) saw the need to provide a role for **Eurojust** and **EJN** in the transfer procedure. Eurojust itself pointed to its key role in identifying parallel proceedings, in facilitating preliminary contacts and consultations between the authorities involved, resolving jurisdiction issues, deciding on the best place to prosecute. Eurojust suggested that Member States could involve it to facilitate preliminary consultations, in line with its mandate under the Eurojust Regulation. Additionally, the involvement of Eurojust could be suggested also in cases of delays in receiving the decision from the requested authority. According to the EJN itself, it should have the role of facilitating the practical application of transfer of proceedings as it does in the context of all other instruments on judicial cooperation in criminal matters. This should include – amongst other things – consultations in view of

requesting the transfer; where to send the request; assisting in handling the request; supporting in cases of delays.

On the question of **costs**, most Member States (13) shared the view that each State should bear its own costs. Five Member States believed that the transferring Member States should bear the total costs of the transfer and one Member State noted that costs should be shared evenly. Two Member States were of the view that costs should be shared evenly and no Member State agreed that the receiving Member State should bear the total cost of the transfer. The question of exceptional costs was also raised with the suggestion to foresee a consultation and possible sharing of such costs.

IV. Meetings

- **Expert meeting organised by the Commission on 15 February 2022.**

The aim of the meeting was to discuss the findings of the targeted questionnaire on the transfer of criminal proceedings, and questions related to the possible future legal framework. A report with the minutes of the meeting was published[64].

- **Criminal Law Expert Group on 11 February 2022 organised by the Commission, which focused on transfers of criminal proceedings.**

On 11 February 2022, the Commission organised a meeting with the Expert Group on EU Criminal Policy. Members of this Expert Group are academics and practitioners with considerable expertise in national and European criminal law. The participants discussed the feasibility and possible design of a possible new instrument. Overall, the experts welcomed the initiative at hand since they overwhelmingly acknowledged the need to adopt a new legislative instrument on the transfer of criminal proceedings at the EU level.

They mentioned several issues that currently affect the transfer of criminal proceedings under the existing legal instruments, including the lack of communication between Member States' authorities, high costs for translations, legal uncertainty following the transfer of proceedings, and inadmissibility of evidence.

The question of whether the transfer of proceedings should be regulated by a mutual recognition instrument (as such mandatory for the requesting State) was discussed at length. The majority of the experts favoured an instrument that would not build on the principle of mutual recognition but would rather enhance consultation and agreement among national authorities.

Most experts raised concerns about the introduction of an obligation for the Member States to take over criminal proceedings. If such an obligation were to be provided for by the new

64 https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=41334&fromExpertGroups=false

instrument, it should be accompanied by sufficiently flexible grounds for refusal. No consensus emerged on whether, once transferred to the requested Member State, criminal proceedings can be transferred back to the requesting Member State.

Some experts warned that the topic should be examined in a broader context. In particular, they claimed it could not be properly addressed without prior regulation of the *ne bis in idem* principle and without a solution for conflicts of jurisdiction in the Union.

The majority of the experts agreed on the need to protect the interests of all individuals involved in criminal proceedings, notably suspects, accused persons and victims. The participants noted that rules on the suspect's or accused person's participation in the process of agreeing on the transfer of criminal proceedings, judicial review and mandatory legal assistance should be included in the forthcoming legal instrument.

Annex 3: List of international instruments for transfer of proceedings in criminal matters

This annex presents a list of main international instruments regulating transfer of criminal proceedings:

1. Multilateral agreements:
   a. European Convention on the Transfer of Proceedings in Criminal Matters. This instrument provides a comprehensive international legal framework on the transfer of proceedings. The Convention is detailed and its underlying concept is simple: when a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings. 13 Member States are Parties to this Convention.
   b. European Convention on Mutual Assistance in Criminal Matters. Article 21 of the Convention sets out a procedure for one Contracting Party to lay information with a view to proceedings in the courts of another Party. All Member States are Parties to this Convention. Moreover, Second Additional Protocol to this Convention provides for spontaneous exchange of information (Art. 11). 26 Member States are Parties to this Protocol.
   c. United Nations Convention against Transnational Organized Crime. In accordance with Article 21, States parties must consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution. The provision is not mandatory, meaning that State parties are not obliged to implement it but they are obliged to consider the possibility. All Member States are Parties to this Convention.
   d. United Nations Convention against Corruption. In accordance with Article 47, States Parties must consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution. All Member States are Parties to this Convention.
   e. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In accordance with Article 8, Parties must consider the possibility of transferring to one another proceedings for criminal prosecution of offences established under that Convention, in cases where such transfer is considered to be in the interests of proper administration of justice. All Member States are Parties to this Convention.
   f. European Convention on extradition. In accordance with Article 6 (‘Extradition of national’), if the requested Party does not extradite its national, it must at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence must be transmitted without charge. The requesting

Party must be informed of the result of its request. All Member States are Parties to this Convention.

2. Bilateral agreements between EU Member States: a few Member States (AT, RO, IT, HU, BG, FI, LT, PL, SI, SK, CZ, HR, EE, EL, DE, SE) reported that they have concluded some bilateral agreements with other Member States on mutual legal assistance which govern either the transfer of criminal proceedings or spontaneous exchange of information. Some of those Member States have mentioned that either (some of) those agreements were not frequently used, or that they do not contain detailed regulation of the procedures for the transfer. A few Member States have specified that they may use a bilateral agreement in combination with another international convention on the matter. In some cases, often between neighbouring Member States more frequent transfers have been noticed due to bilateral agreements providing for simplified or clearer procedures, more convenient arrangements for costs and translation of documents, and due to well-established contacts between such Member States which facilitate the exchange of information[65].

[65] See further Final report of the project 'TROP - Transfer of Proceedings in criminal matters: an exploration of the current practice in the EU and of possible ways for improvement, based on practitioners views'. The project was funded by the European Union's Justice Programme (2014-2020).