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WK 3519/2024 INIT

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CONSULTATION

From:	General Secretariat of the Council
To:	Working Party on Judicial Cooperation in Criminal Matters (COPEN) (Transfer of criminal proceedings)
N° prev. doc.:	WK 3326/24 + ADD 1 + ADD 2 + ADD 3
N° Cion doc.:	ST 8231/23 + ADD 1 + ADD 2 + ADD 3
Subject:	Proposal for a Regulation from the European Parliament and of the Council on the transfer of proceedings in criminal matters - Outcome of the JHA Counsellors + Experts meeting on Monday 4 March 2024 - Questions for Member States - Deadline Tuesday 5 March 2024, 16:00

Delegations will find attached an outcome of the JHA Counsellors + Experts meeting on Monday 4 March 2024. The document contains several questions in view of the trilogue on 6 March.

Deadline for reply: **Tuesday 5 March, 16:00** (the Presidency has decided to put a longer deadline than originally foreseen, given that the document contains more questions than initially expected).

WK 3519/2024 INIT

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Proposal for a Regulation on the transfer of proceedings in criminal matters

Outcome of the JHA Counsellors + Experts meeting

on Monday 4 March 2024

Delegations will find attached the outcome of the main elements discussed at the COPEN (JHA Counsellors + Experts meeting) on 4 March 2024, as drawn up by the Presidency. The texts also take account of an informal VTC meeting with the European Parliament and the Commission which was held on 4 March in the evening.

Unless Member States indicate otherwise, it will be assumed that they can accept the texts as set out in this document.

Please note that the document also contains some questions, **in points 2, 3, 8, 10, 13, 14.**

Member States are kindly invited to provide any input by **Tuesday 5 March, 16:00**, by writing to the following addresses:

Presidency:

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████████████████████

GSC:

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Many thanks in advance for your wonderful cooperation!

A. The two most difficult red issues: Articles 2(4) and 15c

1) Definition of requested authority – Article 2(4) – Lines 85, 85a

The Presidency is examining this issue further, together with the Commission and the delegations most concerned. It will probably consult the Member States on this issue at a later stage.

2) Effective legal remedy (Article 15c) – Lines 178j to 178p

Text as it currently stands:

Article 15c - Effective legal remedy

1. *Suspects, accused persons and victims shall have the right to an effective legal remedy in the requested State against a decision to accept the transfer of criminal proceedings.*
2. *The right to an effective legal remedy shall be exercised before a court or tribunal in the requested State in accordance with its national law.*
3. *The decision to accept the transfer of criminal proceedings shall be examined in accordance with national law on the basis of the criteria provided for in Article 13(1) and (2). In so far as discretion was exercised, the review shall be limited to assessing whether the requested authority has manifestly exceeded the limits of its discretion.*

The time limit for seeking an effective legal remedy shall be no longer than 15 days from the date of receipt of the reasoned decision to accept the transfer.

Where the request for transfer of criminal proceedings is issued after the criminal investigation has been completed, and the suspect and accused person has been charged or indicted, the invocation of a legal remedy against a decision to accept the transfer of criminal proceedings shall have suspensive effect. Such suspensive effect shall not affect the possibility for the requested State to maintain provisional measures taken to prevent the suspect or accused person from absconding or to freeze assets.

The final decision on the legal remedy shall be taken without undue delay and, where possible, within 60 days.

The requested authority shall inform the requesting authority about the final outcome of the remedy sought. In case the outcome of the legal remedy is the annulment of the decision accepting the transfer, the criminal proceedings will revert to the requesting authority.

This paragraph is without prejudice to any further legal remedies that are available in accordance with national law.

4. ***The requested State*** shall ensure that suspects, accused persons and victims have the right of access to all documents related to the transfer of criminal proceedings that formed the basis for the decision to accept a transfer under this Regulation and that are necessary to effectively exercise their right to a legal remedy. The right of access to such documents shall be exercised in accordance with procedures in the law of the requested State. Such access may be limited, ***subject to national law, in particular*** where it would undermine the confidentiality of an investigation, or otherwise prejudice the investigation or harm the safety of persons.

Accompanying recital 42a, ex 34):

“The requested State should ensure access to effective legal remedies for suspects and accused persons, as well as for victims, against the decision to accept the transfer of criminal proceedings in accordance with Article 47 of the Charter and the procedures applicable under national law, whenever their rights are adversely affected in the application of this Regulation. Review of the decision concerning the transfer of proceedings should be based exclusively on the criteria foreseen in the grounds for refusal mentioned in this Regulation. The assessment of whether the criminal proceedings should be transferred should involve a consideration of all circumstances which are relevant for the examination of those criteria. That assessment could often involve not only balancing the interests or rights of individuals whose rights may be affected, but also a consideration of the specificities and practical aspects of the operation of the criminal justice system.”

Accompanying recital 42 b):

~~*“When assessing the legal remedy, the court in the requested State should have the possibility to ask the requesting authority, either directly or indirectly, for additional information. The outcome of the legal remedy could be that the decision to accept the transfer of criminal proceedings is upheld or squashed in whole or in part. In principle, in case of a successful remedy, the criminal proceedings will be reverted to the requesting State. However, in some situations the court can also decide, **in accordance with its national law**, that the decision to accept the transfer can be upheld provided that certain conditions or additional formalities are complied with, e.g., the condition that some missing elements of the request form are completed, or that additional measures are taken for the execution of the transfer, for instance, continuing witness protection.”*~~

Accompanying recital 42 d):

*“With a view to guarantee that the right to a legal remedy can be exercised effectively, the **requested State** should ensure that suspects, accused persons, and victims have the right of access to all documents related to the transfer of criminal proceeding that formed the basis for the decision to accept a transfer under this Regulation, and that are necessary to effectively challenge the decision accepting the transfer. The right of access to such documents should be exercised in accordance with procedures in the law of the requested State **and might be limited**. ~~Limitations to the access to such documents may be envisaged in accordance with national law, in particular~~ where it would undermine the confidentiality of an investigation, or otherwise prejudice the investigation **or harm the safety of persons**. Any refusal of such access must be weighed against the rights of the concerned persons, taking into account the different stages of the criminal proceedings. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under ~~the ECHR and the Charter~~.”*

Accompanying recital 42 e):

*“(42e) The time limit for the suspect, the accused person or the victim seeking an effective legal remedy should not be longer than 15 days from the date of receipt by the person concerned of the reasoned decision to accept the transfer. **The situations where the suspect, accused person or victim is not identified at the time of the transfer of the criminal proceedings, and where for that reason the reasoned decision could not be communicated to such person at that time, should be subject to national law.**”*

On suspensive effect, there are two options:

Option 1: *Where the request for transfer of criminal proceedings is issued after the criminal investigation has been completed, **and** the suspect and accused person has been charged or indicted, the invocation of a legal remedy against a decision to accept the transfer of criminal proceedings shall have suspensive effect. Such suspensive effect shall not affect the possibility for the requested State to maintain provisional measures taken to prevent the suspect or accused person from absconding or to freeze assets.*

Option 2: *Where the request for transfer of criminal proceedings is issued after the criminal investigation has been completed, **or where** the suspect and accused person has been charged or indicted, the invocation of a legal remedy against a decision to accept the transfer of criminal proceedings shall have suspensive effect. Such suspensive effect shall not affect the possibility for the requested State to maintain provisional measures taken to prevent the suspect or accused person from absconding or to freeze assets.*

Q 2a: Unless Member States indicate any flexibility for the new option 2, the Presidency will assume that the Member States can accept option 1 as discussed during the JHA Counsellors + experts meeting on 4 March.

On **access to documents**, in paragraph 4, the EP objects to the words “in particular”, which would make the exceptions very wide.

Q 2b: Member States are invited to indicate if the words “in particular” are really necessary. In case of silence, it will be assumed that these words are not essential and could be deleted.

B. Other issues

3) Criteria for requesting a transfer – Issue of the use of the word “proposals” – Article 5(3), Line 112 + recital 29, Line 38

The European Parliament has indicated that it could accept the use of the word “proposals”, on condition that the proposals will be recorded. The same provision was introduced in Articles 6(3) and 7(3). The text could read as follows:

*“3. The suspect or accused person, or a victim, may, in accordance with procedures in national law, propose the competent authorities of the requesting State or of the requested State that criminal proceedings be transferred under the conditions of this Regulation. **Such proposals shall be recorded using the recording procedure in accordance with the law of the Member State concerned.** If the proposal is made to the competent authority in the requested State, the requested authority may consult the requesting authority. Proposals made under this paragraph shall not create an obligation for the requesting State to request or transfer criminal proceedings to the requested State, or for the requesting or requested authority to engage in consultations with each other.”*

Q 3: Unless Member States indicate otherwise, it be assumed that they can accept this text.

4) Information to be provided to suspects or accused persons – Three stages, two stages – Article 6(4) and Article 11 – Lines 117 and 148

a) Three stages (Line 117)

b) Two stages (Withdrawal of the request – Article 11 – Line 148)

The Presidency has understood that Member States have flexibility on this issue in the context of a global compromise agreement, depending on a satisfactory outcome on the other points.

**5) Restorative justice and technical changes proposed by the EP – Articles 6(2) and 7(2) –
Lines 115 and 120**

Member States have already indicated that they can accept inserting references to “restorative justice” in Articles 6(1) and 7(1). The Presidency has understood that Member States have flexibility to also insert references to restorative justice in Articles 6(2) and 7(2), in the context of a global compromise agreement and depending on a satisfactory outcome on the other points.

NB: The Presidency informed the EP that in paragraph 2 of both Articles 6 and 7, it would be best to insert “prior to the request”, to make the text consistent.

6) The rights of the victim – Article 7(2) – Lines 120 + 42a

The Presidency informed the EP that the Council can accept the following text for Article 7(2):

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

Accompanying recital 33a (Line 42a):

“(33a) Once the requesting authority intends to request a transfer of criminal proceedings, it should as soon as possible inform the victims who reside or, in case of legal persons, which are established in the requesting State ~~provided they~~ and who ~~have requested to~~ receive information on the criminal proceedings in accordance with Article 6(1), point a) of Directive 2012/29/EU, as implemented in national law, or, in case of legal persons, who requested to receive information in accordance with national law. The requesting authority should provide for the possibility for such persons to express their opinion, in accordance with applicable national law, to enable the authorities to take into account their legitimate interests before issuing a request for transfer. Such information should be provided in writing. The information may also be provided orally on condition that the fact that the information has been provided is noted in accordance with the recording procedure under national law. The information may be provided using standard forms or, in case of exceptionally large numbers of victims to be informed, via other means of general information to the public, such as in specific online publication instruments available to judicial authorities under national law. Where the requesting authority considers it necessary, for example in view of the age, physical or mental condition of the victim concerned, the opportunity to state their opinion should be given to their legal representative, where available. When assessing the legitimate interest of victims to be informed about the intended request for transfer, the requesting authority should take into account the need to ensure confidentiality of an investigation and the risk of prejudicing the criminal proceedings, for instance in cases where such information

could prejudice ongoing covert investigations or seriously harm the national security of the Member State in which the criminal proceedings are instituted.”

7) Article 12 – Decision of the requested authority – Lines 154a and 154b

The Presidency informed the EP that the Council can accept the texts on Article 12(5a) and (5b) as in the 4CT.

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

The Presidency proposes the following text for recital 40:

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

Q 8: Unless Member States indicate otherwise, it will be assumed that they can accept this text.

9) Effects in the requesting State – Article 19 – Lines 186-193

The EP confirmed that they will withdraw their requests for additional possibilities of judicial review in lines 192 and 193.

10) Effects in the requested State – Article 20 – Lines 196b and 197

The Presidency tentatively suggests the following text for line 196b, based on observations from Member States at the meeting:

a) Paragraph 2a (line 196b)

“2a. Member States may provide in their national law that, in cases where jurisdiction is based on Article 3, and where they act as requested State and the suspect or accused person is in that State, a competent judicial authority in the requested State may, [at the request of a competent judicial authority in the requesting State,] once it has received the transfer request and the related file, and before the decision to accept the transfer is made, decide ~~to take the necessary measures,~~ in accordance with national law, to arrest the suspect or accused person, or ~~to ensure that the suspect or accused person remains in its territory, or~~ take other provisional measures such as freezing, pending a decision to accept the transfer of criminal proceedings.

2b. The decision to put the suspect or accused person in detention may be taken by the requested judicial authority, in accordance with paragraph 2a, shall be subject to safeguards applicable to such measures under national law, including the time-limits for pre-trial detention.”

a) At the request

In the margins of the meeting, it was suggested that the words “[at the request of a competent judicial authority in the requesting State,]” could better be deleted, since it would restrict too much the competence of the competent authority in the requested State. Before being able to take action, the competent judicial authority in the requested State needs to get a request from the competent judicial authority in the requesting State.

Q 10 a : Member States are invited to indicate if they want to keep or delete the words “at the request of a competent judicial authority in the requesting State”.

b) Overall appreciation

Q 10 b: Unless Member States indicate otherwise, it will be assumed that they can accept this text.

c) Paragraphs 3 and 3a (lines 197, 197a, juncto 56a)

The Presidency informed the EP that the Council could accept the recital inspired by the EPPO text, on condition that the provisions on judicial review are deleted.

11) Consultations between the requested authority and the requesting authority – Article 13(3) and 15(2) – Lines 168 and 176

The Presidency informed the EP, that the Council in Article 13(3) can accept replacing ‘shall’ by ‘shall, where appropriate, (...)’, so that the text would read as follows:

*“3. In any of the situations referred to in paragraphs 1 and 2, before deciding to refuse the transfer of criminal proceedings, either in whole or in part, the requested authority **shall, where appropriate,** consult the requesting authority and, where necessary, shall request that it provides any necessary information without undue delay.”*

.... on condition that the EP accepts the EP accepts “may” in the general rule in Article 15(2):

*2. Consultations between the requesting and requested authorities **may** also take place before the request for the transfer of criminal proceedings is issued, in particular with a view to determining whether the transfer would serve the interests of the efficient and proper administration of justice. In order to propose that criminal proceedings from the requesting State be transferred, the requested authority **may** also consult the requesting authority as to whether it would be possible to issue a request for the transfer of criminal proceedings.*

12) Information to be provided to the suspects/accused person/victim– Article 15a and Article 15b – Lines 178b-178i

The Presidency has indicated to the EP that the Council can accept the texts for 15a and 15b as in the 4CT, with a small change in 15a (1):

Article 15a

1. *Where the requested authority has taken a decision in accordance with Article 12(1) **to accept the transfer of proceedings, the requested**, the requesting authority shall, provided that **it that transfer** would not undermine the confidentiality of an investigation, **or otherwise prejudice the investigation**, inform the suspect or accused person **without undue delay**, in a language **that suspect or accused person understands, about the** acceptance of the transfer by the requested authority, unless that person cannot be located **or reached** despite reasonable efforts being made by the **requested** authority. The requested authority **shall provide the suspect or accused person with a copy of the reasoned decision accepting** the transfer of **proceedings and inform** the suspect or accused person about their right to **an effective** legal remedy in the requested State, including the time limits for such a remedy. **Where appropriate, the requested authority may seek the assistance of the requesting authority in order to carry out the tasks referred to in this paragraph.***

13) Reference implementation (Article 24(3a)) – Line 220a

This provision reads as follows:

- 3a. *The reference implementation software shall offer a common interface for communication with other national IT systems.*

The Commission proposed the following accompanying recital:

*“The Council suggests that the Commission makes an explicative recital. (58) This Regulation should create the legal basis for the exchange of the personal data between the Member States for the purposes of the transfer of criminal proceedings in ~~the~~ **accordance** with Article 8 and Article ~~10(a) of the~~ **10, point (a), of** Directive (EU) 2016/680. However, as regards any other aspect, such as the time period for the retention of personal data received by the requesting authority, the processing of personal data by the requesting and requested authorities should be subject to the national laws of Member States adopted pursuant to the Directive (EU) 2016/680. The requesting and requested authority should be considered as controllers with respect ~~of to~~ **to** the processing ~~of the~~ **of** the personal data under that Directive. The central authorities **could** provide administrative support to the requesting and requested authorities and, to the extent they are processing personal data on behalf of those controllers, they should be considered as processors of the respective controller. As regards the processing of personal data by Eurojust, Regulation (EU) 2018/1725 ~~of the European Parliament and of the Council~~ should apply in the context of this Regulation without prejudice to the specific data protection rules of ~~the~~ **the** Regulation (EU) 2018/1727 ~~of the~~ **of** the*

~~European Parliament and of the Council¹. Nothing in this Regulation should be interpreted as further extending access rights to other Union information systems under the Union legal acts establishing those systems.~~

Q 13: Unless Member States indicate otherwise, it will be assumed that they can accept this text.

14) Statistics (Article 27) – Lines 230 to 238a

On the basis of the proceedings today, the Presidency tentatively submits the following compromise text:

Article 27 – Statistics (COM compromise text)

- “1. *Member States shall regularly collect comprehensive statistics in order for the Commission to monitor the application of this Regulation. The competent authorities of the Member States shall maintain those statistics and shall send them to the Commission each year. They may process personal data necessary for the production of the statistics.*
- 1a. *The statistics referred to in paragraph 1 shall include, [if available at a central level in the Member State concerned]:*
- (a) *the number of requests for the transfer of criminal proceedings issued, including the criteria for requesting the transfer, by the requesting State;*
 - (b) *the number of accepted and refused transfers of criminal proceedings, including the grounds for refusal, by the requested State;*
 - (c) *the length of time to transmit information on the decision whether to accept or refuse the transfer of criminal proceedings;*
- 1b. *The statistics referred to in paragraph 1 shall also include, if available at a central level in the Member State concerned:*
- (a) *the number of investigations and prosecutions that were not pursued following the acceptance of a transfer of criminal proceedings;*
 - (b) *the number of legal remedies sought against the decisions to accept the transfer of criminal proceedings, including whether by a suspect, accused person or a victim, and the number of successfully challenged decisions;*
 - (c) *as of four years after the date of entry into force of the implementing acts referred to in Article 23(1), the costs incurred under Article 25(2).*

2. *The reference implementation software and, where equipped to do so, the national back-end system shall programmatically collect the data referred to in paragraph 1a, points (a), (b) and (c), and transmit them to the Commission on an annual basis.*
- 2a. *The statistics referred to in paragraph 1a and 1b of this Article shall be transmitted as of two years after the date of entry into force of the Regulation.*
- 2b. *The statistics referred to in paragraph 1a shall be collected through the decentralised IT system established by Regulation (EU) 2023/2844, and in accordance with Article 23 of this Regulation, **starting** ~~within~~ two years after the adoption of the implementing acts referred to in Article 23(3).*

Q 14 a: Member States are invited to indicate if they really need the words “if available at a central level in the Member State concerned” in paragraph 1a, given that the data-collection under this paragraph all goes automatically when the decentralized IT system is operational.

Q 14 b: Unless Member States indicate otherwise, it will be assumed that they can accept the text as set out above.

15) Committee procedure – Article 29a – Line 247d

The Presidency has understood it that two delegations have objections to delete the text in this line:

“2a. Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.”

It seems however not a red line. If it is necessary to sacrifice this provision in order to reach a satisfactory global compromise agreement, the Presidency assumes that it has the liberty to do so.