



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 1 September 2009

12385/09

COPEN 144

NOTE

from : General Secretariat
to : Working Party on Cooperation in Criminal Matters

No. prev. doc. : 11119/09 COPEN 115

Subject : **Proposal for a Council Framework Decision on the transfer of proceedings in criminal matters**

1. By letters received by the General Secretariat in June and July 2009, the Kingdom of Belgium, Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Republic of Greece, the Kingdom of Spain, the French Republic, the Republic of Lithuania, Republic of Latvia, Republic of Hungary, the Kingdom of the Netherlands, the Republic of Romania, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden presented an Initiative for a Council Framework Decision on transfer of proceedings in criminal matters.
2. By the letter of 28 July 2009 Coreper invited the European Parliament to deliver its opinion on the proposal by 15 December 2009.
3. FR, PL, IE, SE and DK entered parliamentary scrutiny reservations on the proposal.
4. The Working Party on Cooperation in Criminal Matters discussed the proposal during its meetings in July (on 2, 14 and 23-24 July) on the basis of 1119/09 COPEN 115, 11406/09 COPEN 119 and 1101/1/09 REV 1 COPEN 114. The amended text resulting from these discussions is set out in the Annex to this note. Specific observations made by the delegations are reflected in the footnotes to the relevant Articles.

DRAFT COUNCIL FRAMEWORK DECISION 2009/.../JHA

of

on the transfer of proceedings in criminal matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(1)(a) and Article 34(2)(b) thereof,

Having regard to the initiative of ...,

Having regard to the opinion of the European Parliament¹,

Whereas:

- (1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice.
- (2) The Hague Programme for strengthening freedom, security and justice in the European Union² requires Member States to consider possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State, with a view to increasing the efficiency of prosecutions while guaranteeing the proper administration of justice.
- (3) Eurojust was created to stimulate and improve the coordination of investigations and prosecutions between competent authorities of the Member States.

¹ Opinion of ...

² OJ C 53, 3.3.2005, p. 1.

- (4) The Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings¹ addresses the adverse consequences of several Member States having criminal jurisdiction to conduct criminal proceedings ("proceedings") in respect of the same facts relating to the same person. That Framework Decision establishes a procedure for exchange of information and direct consultations, aimed at preventing infringements of the *ne bis in idem* principle.
- (5) Further development of judicial cooperation between Member States is needed to increase the efficiency of investigations and prosecutions. Common rules between the Member States regarding the transfer of proceedings are essential in order to address cross-border crimes. Such common rules help to prevent infringements of the *ne bis in idem* principle and support the work of Eurojust. Furthermore, in an area of freedom, security and justice there should be a common legal framework for the transfer of proceedings between Member States.
- (6) Thirteen Member States have ratified and applied the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972. The other Member States have not ratified that Convention. Some of them have relied, for the purpose of enabling other Member States to bring proceedings, on the mechanism of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, in conjunction with the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union² of 29 May 2000. Others have used bilateral agreements or informal cooperation.
- (7) An agreement between the Member States of the European Communities on the transfer of proceedings in criminal matters was signed in 1990. That agreement has, however, not entered into force due to a lack of ratifications.
- (8) Consequently, no uniform procedure has been applied to cooperation between Member States regarding transfer of proceedings.

¹ 8535/09.

² OJ C 197, 12.7.2000, p. 3.

- (9) This Framework Decision should establish a common legal framework for the transfer of criminal proceedings between the Member States. The measures provided for in the Framework Decision should be aimed at extending cooperation between competent authorities of the Member States with an instrument which increases efficiency in criminal proceedings and improves the proper administration of justice, by establishing common rules regulating the conditions under which criminal proceedings initiated in one Member State may be transferred to another Member State.
- (10) Member States should designate the competent authorities in a way that promotes the principle of direct contacts between those authorities.
- (11) For the purpose of applying this Framework Decision, a Member State could acquire competence where that competence is conferred upon the Member State by another Member State.
- (12) Several Council Framework Decisions have been adopted on the application of the principle of mutual recognition to judgments in criminal matters for enforcement of sentences in other Member States, in particular Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties¹, 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 Union² and Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions³. This Framework Decision should supplement the provisions of those Framework Decisions and should not be interpreted as precluding their application.

¹ OJ L 76, 22.3.2005, p. 16.

² OJ L 327, 5.12.2008, p. 27.

³ OJ L 337, 16.12.2008, p. 102.

- (13) The legitimate interests of suspects and victims should be taken into account in applying this Framework Decision. Nothing in this Framework Decision should, however, be interpreted as undermining the prerogative of the competent judicial authorities to determine whether proceedings will be transferred.
- (13bis) When acting pursuant to this Framework Decision the transferring and receiving authorities shall ensure that victims of the offence are able to exercise the rights set forth in Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.
- (14) Nothing in this Framework Decision should be interpreted as affecting any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction if such a right exists under national law.
- (15) The competent authorities should be encouraged to consult each other before a transfer of proceedings is requested and whenever it is felt appropriate to facilitate the smooth and efficient application of this Framework Decision.
- (16) When proceedings have been transferred in accordance with this Framework Decision, the receiving authority should apply its national law and procedures.
- (17) This Framework Decision does not constitute a legal basis for arresting persons with a view to their physical transfer to another Member State so that the latter can bring proceedings against the person.
- (18) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting a refusal to cooperate when there are objective reasons to believe that proceedings have been initiated for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds,

HAS ADOPTED THIS FRAMEWORK DECISION:

CHAPTER 1

GENERAL PROVISIONS

Article 1

Objective and scope

The purpose of this Framework Decision is to increase efficiency in criminal proceedings and to improve the proper administration of justice, including the legitimate interests of victims and suspected or accused persons, within the area of freedom, security and justice by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States (...).

Article 2

Fundamental rights

This Framework Decision shall not have the effect of modifying the obligations to respect the fundamental rights and principles recognised by Article 6 of the Treaty on European Union.

Article 3

Definitions

For the purposes of this Framework Decision:

- (a) "offence" shall mean an act constituting an offence pursuant to national criminal law;
- (b) "transferring authority" shall mean an authority which is competent to request transfer of proceedings and to take all other measures provided for under this Framework Decision;

- (c) "receiving authority" shall mean an authority which is competent to receive a request for transfer of proceedings and determine whether it will be accepted, as well as to take any other measure provided for under this Framework Decision.

Article 4

Designation of (...) transferring and receiving authorities

1. Each Member State shall (...) designate which judicial authorities, under its national law, are competent to act as transferring authority and receiving authority (...) pursuant to this Framework Decision.
2. Member States may designate non-judicial authorities as (...) transferring and receiving authorities for taking decisions under this Framework Decision, provided that such authorities under their national law and procedures have competence for taking equivalent decisions in domestic proceedings (...).
3. Each Member State may, if necessary due to the organisation of its internal system, designate one or more central authorities to assist the (...) transferring or receiving authorities with the administrative transmission and reception of the requests. (...)
4. Each Member State shall inform the General Secretariat of the Council of the designated authorities in accordance with paragraphs 1-3. The General Secretariat of the Council shall make the information received available to all Member States and the Commission.

Article 5

Competence

1. For the purpose of applying this Framework Decision, any Member State shall have competence to prosecute, under its national law, any offence to which the law of another Member State is applicable.

2. The competence conferred on a Member State exclusively by virtue of paragraph 1 may be exercised only pursuant to a request for transfer of proceedings.¹

Article 6

Waiver of proceedings

Any Member State having competence under its national law to prosecute an offence may, for the purposes of applying this Framework Decision, waive or desist from proceedings against a suspected person, in order to allow for the transfer of proceedings in respect of that offence to another Member State.²

CHAPTER 2

TRANSFER OF PROCEEDINGS

Article 7

Criteria for requesting transfer of proceedings

When a person is suspected or accused of having committed an offence under the law of a Member State, the transferring authority of that Member State may request the receiving authority in another Member State to take over the proceedings if that would improve the efficient and proper administration of justice, and if at least one of the following criteria is met:

- (a) 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;
- (b) the suspected person is ordinarily resident in the other Member State;

¹ BE suggested to change the wording into “pursuant to *the acceptance of* the transfer of proceedings”.

² AT suggested to add wording along the lines: The decision to waive or desist from proceedings against a suspected person shall be provisional pending the final decision being made in the receiving Member State.

- (c) substantial parts of the most important evidence are located in the other Member State;
- (d) there are ongoing proceedings against the suspected person in the other Member State;
- (e) 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;
- (f) the suspected person is serving or is to serve a sentence involving deprivation of liberty in the other Member State;
- (g)¹ [deleted]
- (h) the victim is ordinarily resident in the other Member State or (...) a transfer of proceedings would serve other interests of the victim.

Article 8

Informing the suspected or accused² person

Before a request for transfer is made, the transferring authority shall, where appropriate and in accordance with procedures in national law, inform the (...) suspected or accused person of the offence of the intended transfer. If that (...) person presents an opinion on the transfer, the transferring authority shall inform the receiving authority thereof.

¹ Several Member States opposed inclusion of this point and they indicated that only once the sentence is passed the relevant assessment may be made.

² A majority of MS was in favour of including this wording in order to cover all stages of proceedings. IT opposed this addition.

Article 9¹
The rights of the victim²

Before a request for transfer is made, the transferring authority shall, if possible and in accordance with procedures in national law inform the victim of the offence of the intended transfer. (...)

Article 10
Procedure for requesting transfer of proceedings

1. Before the transferring authority makes a request for transfer of proceedings in accordance with Article 7, it may³ inform and consult with the receiving authority, in particular as regards whether the receiving authority is likely to invoke one of the grounds for refusal referred to in Article 12.
2. (...) A request for transfer shall be made in writing, using the standard form set out in the Annex, and shall be accompanied by any relevant information. The request shall be forwarded by the transferring authority directly to the receiving authority by any means that leave a written record under conditions that allow the receiving authority to establish its authenticity. All other official communications shall also be made directly between those authorities.
3. (...) Where and whenever it is felt appropriate the receiving authority may request any additional information it deems necessary for deciding on the request. The transferring authority shall comply with the request without undue delay.
4. (...) When the receiving authority has accepted the request the transferring authority shall without delay forward (...) the original or a certified copy of the criminal file, relevant parts thereof or equivalent documentation⁴, (...) and any other relevant documents. (...)

¹ Several MS suggested that a reference be made to the rights of victim in the heading of Article 7. The Presidency proposes a reference to the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in the preamble (13bis).

² The rights of victims are also addressed in Article 16.4.

³ COM, UK, BE, LU prefer mandatory consultation.

⁴ Wording proposed by the Presidency to address situations where there is no written criminal file.

5. (...)
6. (...)
7. If the receiving authority is not known to the transferring authority, the latter shall make all necessary inquiries, including through the contact points of the European Judicial Network, in order to obtain the contact details of the receiving authority.
8. If the authority which receives the request is not the competent authority under Article 4, it shall transmit the request *ex officio* to the competent authority and shall without delay inform the transferring authority accordingly.

Article 10bis

Information to be given by the transferring authority

The transferring authority shall inform the receiving authority of any procedural acts or measures with a bearing on the proceedings that have been undertaken in the Member State of the transferring authority after the transmission of the request. This communication shall be accompanied by all relevant documents.

Article 10ter

Withdrawal of the request

The transferring authority may withdraw the request for transfer at any time prior to the receiving authority's decision under Article 13(1) to accept transfer.

Article 11

Double criminality

A request for transfer of proceedings can be complied with only if the act underlying the request for transfer constitutes an offence under the law of the Member State of the receiving authority.

Article 12
Grounds for refusal

1. The receiving authority of a Member State (...) shall refuse transfer if proceedings, under the national law of that Member State, cannot be brought against the suspected or accused person in relation to the facts underlying the request, in particular:
 - (a) if the act does not constitute an offence under the law of that Member State in accordance with Article 11;
 - (b) if taking proceedings would be contrary to the *ne bis in idem* principle;
 - (c) if the suspect cannot be held criminally liable for the offence due to his or her age;
 - (d) if there is an immunity or privilege under the law of that Member State which makes it impossible to take action;
 - (e) where the criminal prosecution is statute-barred in accordance with the law of that Member State; or
 - (f) if the offence is covered by amnesty in accordance with the law of that Member State.

- 1 bis. The receiving authority may also refuse transfer if the conditions under Article 7 are not considered met, notably if a transfer (...) is not considered to improve the efficient and proper administration of justice.

- 2 [deleted]

3. In the cases referred to in paragraph 1 bis, before deciding to refuse transfer, the receiving authority shall communicate, by appropriate means, with the transferring authority and, where necessary, ask it to supply without delay all additional information required.

Article 13

Decision of the receiving authority

1. When a request for transfer of proceedings has been received, the receiving authority shall within the deadline indicated by the transferring authority, or, if no deadline has been indicated, without undue delay¹ determine whether a transfer of proceedings will be accepted and shall, unless it decides to invoke one of the grounds for refusal in Article 12, take all necessary measures to comply with the request under its national law.
- 1bis. If the receiving authority cannot take a decision within the deadline set by the transferring authority, it shall promptly inform the transferring authority of the reasons thereof and indicate the deadline within which it shall take the decision.
2. The receiving authority shall without delay inform the transferring authority, by any means that leave a written record, of its decision. If the receiving authority decides to refuse transfer, it shall inform the transferring authority of the reasons for its decision.

Article 14

Consultations between the transferring and receiving authorities

Without prejudice to Articles 10(1) and 12(3) the transferring and receiving authorities may, where and whenever it is felt appropriate, consult each other with a view to facilitating the smooth and efficient application of this Framework Decision.

Article 15

Cooperation with Eurojust and the European Judicial Network

The transferring and receiving (...) authorities may, at any stage of the procedure, request the assistance of Eurojust or the European Judicial Network.

¹ COM and FI suggested to include a specific deadline within which the decision shall be taken in order to address cases where the person is kept in custody.

CHAPTER 3

EFFECTS OF THE TRANSFER

Article 16

Effects in the Member State of the transferring authority

1. At the latest¹ upon receipt of the notification of the acceptance by the receiving authority of a transfer of proceedings, the proceedings related to the facts underlying the request for transfer shall, in accordance with national law, be suspended or discontinued in the Member State of the transferring authority, except for any necessary investigations, (...) in order to provide legal assistance to the receiving authority.
2. The transferring authority may open or reopen proceedings if the receiving authority informs it of its decision to discontinue the proceedings related to the facts underlying the request.²
3. The transferring authority may not open or reopen proceedings when it has been informed by the receiving authority of a decision delivered at the end of the proceedings in the Member State of the receiving authority, if opening or reopening proceedings (...) would constitute an infringement of the principle of "ne bis in idem".
4. This Framework Decision is without prejudice to the right of victims to initiate criminal proceedings against the offender, when so provided for by national law.

¹ Despite the opinion of AT, IT, NL to delete [at the latest] this wording was maintained in order to allow for the sufficient flexibility.

² DK suggests ending the sentence after "the proceedings" and was supported by NL.

Article 17

Effects in the Member State of the receiving authority

1. The proceedings transferred shall be governed by the law of the Member State to which transfer has been effected.
2. Where compatible with the law of the Member State of the receiving authority¹, any act for the purpose of proceedings or preparatory inquiries performed in the Member State of the transferring authority or any act interrupting or suspending the period of limitation shall have the same validity in the other Member State as if it had been validly performed in or by the authorities of that Member State.
3. When the receiving authority has decided to accept a transfer of proceedings, it may apply any (...) provisional² measures permitted under its national law.
4. If proceedings are dependent on a complaint in both Member States, the complaint brought in the Member State of the transferring authority shall also have validity in the member State to which the proceedings have been transferred³(...).
5. Where only the law of the Member State of the receiving authority requires that a complaint be lodged or another means of initiating proceedings be employed, those formalities shall be carried out within the time limits laid down by the law of that Member State. The other Member State shall be informed thereof. The time limit shall start to run on the date on which the receiving authority decides to accept a transfer of proceedings⁴.

¹ AT supported by COM suggested to delete the first part of the sentence.

² Suggestion by NL.

³ AT suggestion.

⁴ COM suggested to add words: "and notifies the transferring authority thereof" at the end of the paragraph. Majority of the MS opposed this addition.

6.¹ In the Member State of the receiving authority the sanction applicable to the offence shall be that prescribed by its own law unless that law provides otherwise. Where the competence is exclusively grounded on Article 5, the sanction pronounced in the Member State to which the proceedings have been transferred shall not be more severe than that provided for in the law of the (...) Member State of the transferring authority.

CHAPTER 4

FINAL PROVISIONS

Article 18

Information to be given by the receiving authority

The receiving authority shall inform the transferring authority in writing of the discontinuation of proceedings or of any decision delivered at the end of the proceedings, including whether that decision presents an obstacle to further proceedings under the law of the Member State of the receiving authority, or of other information of substantial value. Where possible, it shall forward a copy of the written decision.

¹ DE and UK were of the opinion that this provision may lead to the discriminatory treatment of the persons prosecuted in the receiving Member State depending on whether the proceedings were opened primarily in that state or on the basis of a request for transfer.

Article 19
Languages

1. The form set out in the Annex and (...) any other written information accompanying the request shall be translated into the official language or one of the official languages of the Member State to which they are forwarded, including any additional information forwarded to the receiving authority in accordance with Article 10.3 and 10.4.
2. Any Member State may, upon the adoption of this Framework Decision or later, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation into one or more other official languages of the institutions of the European Union. The General Secretariat shall make that information available to the other Member States and the Commission.

Article 20
Costs

Costs resulting from the application of this Framework Decision shall be borne by the Member State of the receiving authority, except for costs arising exclusively in the territory of the other Member State.

Article 21
Relationship with other agreements and arrangements

1. In relations between Member States that are bound by the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972, the provisions of this Framework Decision shall apply instead of the corresponding provisions of that Convention from the date referred to in Article 22(1).
2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force, in so far as they allow the objectives of this Framework Decision to be extended or help to further simplify or facilitate the transfer of proceedings.

3. Member States may conclude bilateral or multilateral agreements or arrangements after the entry into force of this Framework Decision in so far as such agreements or arrangements allow the provisions of this Framework Decision to be extended and help to simplify or facilitate further the transfer of proceedings.
4. Member States shall notify the Council and the Commission by [...] of the agreements and arrangements referred to in paragraph 2 which they wish to continue applying. Member States shall also notify the Council and the Commission of any agreement or arrangement referred to in paragraph 3, within three months of signing it.

Article 22

Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...].
2. Member States shall transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

Article 22bis

Review

1. By XXXX, the Commission shall draw up a report on the basis of the information received from the Member States under Article 22(2).

2. On the basis of this report, the Council shall assess:

(a) the extent to which the Member States have taken necessary measures in order to comply with this Framework Decision; and

(b) the application of this Framework Decision.

Article 23
Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at,

For the Council
The President

ANNEX

FORM FOR TRANSFER OF CRIMINAL PROCEEDINGS (referred to in Article 10 of Framework Decision 2009/.../JHA)

This form is used as:

a means to inform and consult regarding a possible transfer of proceedings

a request for transfer of proceedings

Member State of the transferring authority:

Member State of the receiving authority:

Transferring authority (or other authority referred to in Article 4) – contact details:

Name:

Address:

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

Fax no.: (country code) (area/city code)

Details of the person(s) to be contacted

Name:

Position (title/grade):

File reference:

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

Fax no.: (country code) (area/city code)

E-mail (if any):

The receiving authority which has been consulted:

Name:

Address:

No consultation has been made.

Details of the person(s) contacted, if the receiving authority has been consulted:

Name:

Position (title/grade):

File reference (if known):

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

Fax no.: (country code) (area/city code)

E-mail (if any):

Details of the suspected person(s):

Name:

Nationality:

Date of birth:

Place of birth:

Identity number or social security number (if any):

Address:

Language(s) understood (if known):

The suspected person has been informed about the intended transfer.

The suspected person has presented an opinion on the intended transfer. The opinion of the suspected person:

Description of facts of the alleged offence(s) (including where, when and how it was committed):

Nature and legal classification of the alleged offence(s):

The criminal file or its certified copy is enclosed.

Relevant parts of the criminal file or their certified copies are enclosed.

A copy of the relevant legislation is enclosed.

A copy of the relevant legislation is not enclosed. A statement of applicable legislation:

Criteria for requesting transfer of proceedings:

the offence has been committed wholly or partly in the territory of the Member State of the receiving authority;

most of the effects or substantial part of the damage caused by the offence was sustained in the territory of the Member State of the receiving authority;

the suspected person is ordinarily resident in the Member State of the receiving authority;

substantial parts of the most important evidence are located in the Member State of the receiving authority;

there are ongoing proceedings against the suspected person in the Member State of the receiving authority;

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 Member State of the receiving authority;

the suspected person is serving or is to serve a sentence involving deprivation of liberty in the Member State of the receiving authority;

enforcement of the sentence in the Member State of the receiving authority is likely to improve the prospects for social rehabilitation of the person sentenced;

there are other reasons for a more appropriate enforcement of the sentence in the Member State of the receiving authority.

Please indicate the reasons:

the victim is ordinarily resident in the Member State of the receiving authority;

the victim has another significant interest in having the proceedings transferred.

Please indicate the reason:

Stage of the proceedings that has been reached, including any procedural acts taken in the Member State of the transferring authority:

Information about evidence collected so far:

Details of the victim(s) (if applicable):

Name:

Nationality:

Date of birth:

Place of birth:

Identity number or social security number (if any):

Address:

Language(s) understood (if known):

Other details of interest:

The victim has been informed about the intended transfer.

Additional information:

Other relevant documents have been enclosed, namely:

Signature, date and official stamp: