



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

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| from : | Presidency |
| to : | Article 36 Committee |
| No Prev. doc : | 13504/09 COPEN 173 + COR 1 |
| Subject : | Proposal for a Council Framework Decision on the transfer of proceedings in criminal matters |

I. INTRODUCTION

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 letter of 28 July 2009 Coreper invited the European Parliament to deliver its opinion on the proposal by 17 December 2009.
3. DK, IE, FR, MT, NL, PL, SE and UK have a parliamentary scrutiny reservation and UK also has a general scrutiny reservation.

Work carried out by the Working Party

1. The Working Party on Cooperation in Criminal Matters discussed the proposal during its meetings in July and September 2009. On the 2 July the Working Party had a general discussion on some key issues of the proposal. The great majority of Member States, the Commission and Eurojust welcomed the initiative. They expressed support for the objectives of the initiative and stated that they could accept the general principles thereof.
2. In July and September the Working Party on Cooperation in Criminal Matters examined in the first and second reading the text of the proposal. On the 28–29 September the Working Party began a third examination of the text on the basis of 13504/09 COPEN 173. Taking account of the discussions held during these meetings, the Presidency drafted suggestions for refinement of the text, with regard to the overall procedure for transferring proceedings, i.e. the following provisions: the definitions (Article 3), designation of transferring and receiving authorities (Article 4), procedure for requesting transfer of proceedings (Article 10 and 10bis), decision of the receiving authority (Article 13), consultations between the authorities (Article 14), cooperation with Eurojust and the European Judicial Network (Article 15), information to be given by the receiving authority (Article 18) and languages (Article 19).
3. Specific issues, which the Article 36 Committee is requested to discuss, are set out under II below. The text of Articles 3, 4, 10, 10bis, 13, 14, 15, 18 and 19, which are the basis for discussion at the Article 36 Committee meeting, are set out in the Annex to this note and outstanding issues relating to those Articles are also highlighted under II below.
4. It is apparent from the discussions of the proposal in the Working Party that the scope of the provision on competence (Article 5) in relation to the criteria for requesting transfer of proceedings (Article 7), the conditions for acceptance of transfer (Article 11) and the grounds for refusal (Article 12) are complex and will require further discussions in the Working Party.

II. ISSUES REFERRED TO THE ARTICLE 36 COMMITTEE

1. Notwithstanding further discussions in the Working Party regarding, in particular, Articles 5, 7, 11 and 12, the Article 36 Committee is invited to **confirm** :
 - the general support for setting up a common legal framework for the transfer of criminal proceedings between Member States, in order to increase efficiency in criminal proceedings and improve the proper administration of justice in an area of freedom, security and justice.
2. The Article 36 Committee is also invited to
 - **examine** the text of Articles 3-4, 10, 10bis, 13-15 and 18-19, set out in the Annex, as indicated under A-E below, and
 - **submit** the text of those Articles to COREPER/Council for confirmation of the agreement that has been reached, regarding the procedure for transferring proceedings, in the Council preparatory bodies.

A. Definitions and designation of transferring and receiving authorities (Articles 3 and 4)

A vast majority of Member States agreed on the definitions of “offence”, “transferring authority” and “receiving authority” provided for in Article 3. The overall structure of Article 4, on designation of transferring and receiving authorities, was generally accepted by Member States. The wording of paragraph 2 was however subject to some debate. The positions of Member States are set out in footnotes relating to these articles. The original proposal for Article 4 paragraph 2 derives from previous Framework Decisions, e.g. the Framework Decision on the European supervision order. Some amendments have been made to the text to make it more acceptable to everyone in this specific context. The Presidency is of the opinion that the text set out in the Annex, should constitute a basis for compromise and invites delegations to accept it.

The Article 36 Committee is invited to endorse the text of Articles 3 and 4 as set out in the Annex to this note.

B. Procedure for requesting transfer of proceedings, including translations (Articles 10, 10bis, 14 and 19)

In Article 10 the procedure for requesting transfer of proceedings is laid out. Paragraph 1 of the Article as well as Article 14 deal with consultations between the authorities. During the first examination of the text it was agreed that a flexible approach should be adopted. The majority of delegations agreed that consultations between the authorities should be encouraged, but not mandatory, and the actual procedure for requesting transfer should be limited to filling out a standard form and forwarding it, possibly together with other documents needed in the particular case, leaving the forwarding of the criminal file to a later stage, when the receiving authority has accepted that a transfer will be made.

Amendments to the text were made in order to reflect this approach. The specific positions of Member States in the discussions so far are set out in footnotes relating to Articles 10 and 10bis.

The majority of delegations accepted the current wording of Article 19. In accordance with this provision, once the transfer has been accepted, translation of the criminal file and other relevant documents shall be provided for by the transferring authority in all cases. To the contrary one delegation suggested that, upon acceptance of the transfer, the translation of the criminal file and other relevant documents shall be provided by the transferring authority only at the request of the receiving authority.

A number of delegations considered that the criminal file would be of no use to the receiving authority, unless translated into a language that the receiving authority understands. Therefore, the change suggested by one delegation implies a change in the structure of Article 10, i.e. to make forwarding of the criminal file dependent on a request by the receiving authority, instead of automatically forwarding the criminal file upon acceptance of transfer.

The Presidency is of the opinion that the text set out in Articles 10, 10bis, 14 and 19 in the Annex, reflects a balanced solution, giving the authorities the greatest possible flexibility in requesting transfer, and that the Member States therefore should be able to accept it as proposed in the Annex to this note.

The Article 36 Committee is requested to endorse the text of Articles 10, 10bis, 14 and 19, as proposed by the Presidency.

C. Decision of the receiving authority (Article 13)

Following observations made by some delegations, a time limit for taking the decision on whether a transfer should be accepted was introduced by the Presidency in paragraphs 1 and 1bis in Article 13. The positions of Member States are set out in footnotes relating to this Article.

The text introducing a deadline derives from the Framework Decision on conflicts of jurisdiction. Thus, delegations have previously accepted the wording in an instrument closely linked to the present proposal.

The Article 36 Committee is invited to accept the text as proposed in the Annex to this note.

D. Cooperation with Eurojust and the European Judicial Network (Article 15)

The provision on cooperation with Eurojust and the European Judicial Network (EJN), in Article 15, was welcomed by Member States.

The Article 36 Committee is invited to accept the text as proposed in the Annex to this note.

E. Information by the receiving authority (Article 18)

An information obligation for the receiving authority is established in Article 18, stating that information on the discontinuation of proceedings or of other decisions delivered at the end of proceedings shall be given to the transferring authority.

The Article 36 Committee is invited to confirm agreement on the wording of Article 18.

Article 3¹
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.
- 2². Member States may designate non-judicial authorities (...) as transferring and receiving authorities, provided that such authorities under their national law and procedures have competence for taking equivalent decisions in domestic criminal proceedings.

¹ FI proposed the following additional definitions in Article 3: "*Transferring state*" means the Member State issuing the request for transfer; "*Receiving state*" means the Member State to which the request for transfer is issued".

² A majority of MS supported the current wording of the paragraph. FR proposed the following wording for this paragraph: "*Member States may designate non-judicial authorities to act as transferring and receiving authorities for taking decisions under this Framework decision, provided that such authorities under their national law and procedures have competence to initiate criminal prosecution.*" ES/BE supported this proposal, while IE/MT/UK strongly opposed it.

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 10¹

Procedure for requesting transfer of proceedings²

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.

¹ Scrutiny reservation on the entire article entered by CZ in relation to the discussions on Article 19.

² RO proposed to add a paragraph making it possible for the receiving authority to ask for additional documentation after a transfer of proceedings has been accepted. Such requests could, however, be argued to fall outside the scope of the Framework Decision. The Presidency is of the opinion that there is no need for such a provision, since it can be dealt with through mutual legal assistance.

³ COM, UK, BE and LU prefer mandatory consultation. NL suggested insertion of “where appropriate”.

4. When the receiving authority has accepted the transfer of proceedings the transferring authority shall without delay forward the original or a certified copy of the criminal file, relevant parts thereof or equivalent documentation, and any other relevant documents.
5. [deleted]
6. [deleted]
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 13

Decision of the receiving authority

1. When a request for transfer of proceedings has been received, the receiving authority shall within the deadline¹ indicated by the transferring authority, or, if no deadline has been indicated, without undue delay determine whether a transfer of proceedings will be accepted and shall take all necessary measures to comply with the request under its national law. When the transferring authority indicates a deadline it shall provide the reasons for the deadline².
- 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 not to accept transfer, in accordance with Article 11, or to refuse transfer, in accordance with Article 12, 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(1bis) 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.

¹ A majority of delegations and the COM supported the current wording, which derives from the "FD on conflicts of jurisdiction". CZ suggested to insert the following wording: "the transferring authority may indicate a deadline for that purpose provided that special circumstances of a particular case so require". LV/AT/SK supported this proposal. DE/NL opposed this proposal.

² Proposal by NL supported by DE/RO/UK and Eurojust. The Form will be amended to that effect.

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 Network¹.

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.

Article 19²

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 10.4³.

¹ EE suggested to modify the wording in order to enhance the role of Eurojust and EJM in the process. The delegation suggested to replace "may" by "shall, if appropriate". Some delegations opposed this proposal.

² Scrutiny reservation by DE/PT.

³ A majority of MS supported the current wording of this Article. FR, supported by ES/AT, suggested to delete the reference to Article 10.4 and add the following text: "*When the receiving authority has decided to accept a transfer, it may request the translation of the criminal file and of all other relevant documents into one of its official languages.*" NL/CZ/SK strongly opposed this proposal.

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.
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