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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Working Party on Cooperation in Criminal Matters

No. prev. doc. : 13504/09 COPEN 173 + COR 1

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

GENERAL

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 Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Lithuania, Republic of Latvia, Republic of Hungary, the Kingdom of the Netherlands, 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 17 December 2009.
3. DK, IE, FR, MT, NL, PL, SE and UK entered parliamentary scrutiny reservations on the proposal and UK/IE also has a general scrutiny reservation on the text and LV a linguistic reservation.

4. During its meeting on 13-14 October the Working Party concluded a third examination and proceeded to a fourth examination of the proposal. Articles 3, 4, 10, 10bis, 13, 14, 15, 18 and 19 are subject to the preliminary agreement confirmed by the JHA Council on 23 October 2009, on the basis of 14308/1/09 REV 1 COPEN 194.

JURISDICTION IN SITUATIONS OF TRANSFER OF PROCEEDINGS

5. The point of departure is that the receiving authority may accept a request for transfer of proceedings only if that Member State has jurisdiction to prosecute the offence. The issue of jurisdiction is therefore at the centre of discussions related to the transfer of proceedings. Against this background, the draft Framework Decision includes in Article 5 a mechanism establishing subsidiary jurisdiction. When applicable, Article 5 addresses the issue of competence of the authorities in the receiving state to prosecute, in accordance with the criminal law of that state, the offence which is subject to the request for transfer. The consequence of such a provision is the extension of the field of application of the national law. If a Member State has primary jurisdiction, Article 5 will not apply.
6. In the initial draft proposal, the model of the 1972 European Convention on transfer of proceedings in criminal matters was used to address the issue of subsidiary jurisdiction. Article 2 of that Convention provides that a Contracting State shall have competence to prosecute any offence to which the law of another Contracting State is applicable, which in theory means a principle of universality. However, the right to exercise this subsidiary jurisdiction is dependent on a request for transfer of proceedings. In Article 8 of that Convention there is also a limited list of in which situations a request could be made. However, if a request is made in accordance with Article 8, the receiving State will have jurisdiction, be it primary or, according to Article 2, subsidiary.

During the discussions of the Framework Decision, some delegations expressed concerns regarding the scope of the provision on jurisdiction (Article 5) and its relation to the criteria for requesting transfer of proceedings (Article 7). A few delegations called for a deletion of Article 5. However, a great majority of delegations were in favour of keeping the provision.

In order to keep the added value of Article 5 and to meet the concerns from some Member States, the draft was modified, and the Presidency proposed to limit the scope of Article 5 by including cross references between Articles 5 and 7. This proposal did not gain wide support. The Presidency then proposed to include in Article 5 a limited list of circumstances in which the Member State of the receiving authority should ensure jurisdiction. The amendments in Articles 5 and 7 were combined with a restructuring of Articles 11 and 12, dealing with impediments to transfer and grounds for refusal.

Some further proposals for modifications have been put forward by other delegations. DE proposed two different solutions: the first being a very limited list in Article 5 and the second an opt-in solution for Article 5 in relation to four situations, namely the fact that there are ongoing criminal proceedings against the suspect/accused in the receiving state or against other persons but in respect of the same facts, the active personality principle and the passive personality principle. NL proposed to adopt a "two tier" approach, making it possible for those Member States who have acceded to the Council of Europe Convention to cooperate on the basis of the original wording of Article 5 in the Framework Decision, while other Member States could opt for a more basic level of cooperation, based on the DE proposal.

7. Further to the extensive discussions which took place at the Working Party level, the Presidency is of the opinion that for the purpose of this proposal there are essentially two main models aimed at setting up the mechanisms creating subsidiary jurisdiction.

The first model refers to the approach which has been chosen for the 1972 Council of Europe Convention. In such scenario, Article 5 would provide for applicability of the criminal law of each Member State to any offence to which the law of another Member State is applicable, on condition that the exercise of jurisdiction is limited to the cases in which the request for transfer of proceedings was made. The conditions for requesting transfer are set out in Article 7. This implies that the receiving authority prosecutes in accordance with the national law of that Member State any offence for which the other Member State had jurisdiction at the time the act was committed. The scope of the provision as presented above shapes the jurisdiction of the receiving Member State towards the universality principle. Such mechanism, conferring

jurisdiction on all Member States by virtue of their role when receiving requests for transfer of proceedings, influences the national law in a twofold way: it extends the jurisdiction to all cases for which the jurisdiction of any other Member State exists, yet at the same time it does not in any way limit jurisdiction conferred on the Member States under their national law. However, where Member States already have the necessary jurisdiction under national law to prosecute the cases for which the request has been made, this provision would not need to be applied.

The second model builds upon the concept of extending the jurisdiction of the receiving Member States to all cases where the transferring Member State has jurisdiction while at the same time allowing for its limitation to specifically listed situations. In addition, as in the first model, the exercise of jurisdiction is conditioned upon the receiving of a request for transfer of proceedings. Accordingly, as a minimum, every Member State should have jurisdiction to prosecute any offence which could be prosecuted in any other Member State in at least all of the listed situations.

Whereas the basic assumption of the mechanism just described is similar to the 1972 Convention model, namely the universal character of jurisdiction, this solution allows for more flexibility by limiting the universal character of jurisdiction to a list of cases. However, the longer the list the closer to the principle of universality the scope of jurisdiction would be. In addition, where the facts underlying a request fall under any of the listed situations, the scope of application of this provision would be the same as in the first model above.

8. Despite the complexity of the issue, the Presidency considers that it should be possible to maintain in the text of the proposed Framework Decision a mechanism creating subsidiary jurisdiction. In view of the Presidency and of a number of delegations, Article 5 creates an added value to the mechanisms already provided for by the Framework Decision. In this respect it should be possible for every Member State to consider extending the scope of jurisdiction set out in its national law to at least some extent.

Following the observations made by delegations on the various drafts of the proposal, the Presidency concludes that a majority of Member States support the first model of creating subsidiary jurisdiction, the model which is based on the 1972 Council of Europe Convention. However, it is apparent that some Member States are not in a position to accept such a solution. The Presidency therefore suggests to adopt a third model for creating subsidiary jurisdiction, a compromise between the two models outlined above. According to this third model, the original version of the provision is reinserted in accordance with the Council of Europe mechanism for creating subsidiary jurisdiction, although with some modifications. At the same time Member States, who are unable to accept such a mechanism due to fundamental principles of national law, are given the possibility to limit the application of the provision, by way of declaration, to specifically listed situations along the lines of the second model of creating subsidiary jurisdiction. The Presidency considers that this third model should be the basis for further discussions.

9. The amended text 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 exercise 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.
- (9bis) For the purpose of applying this Framework Decision, criminal proceedings should be understood in accordance with Member States' national laws and procedures, which implies that a transfer may take place at various stages (...), pre-trial as well as trial stage.
- (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.

- (12bis) The transferring authority should take into account possibilities of obtaining evidence from other Member States via mutual recognition of judicial decisions and mutual legal assistance, before considering transfer of proceedings on the ground that the most important evidence is located in the other Member State.
- (12ter) When considering whether a transfer of proceedings should be requested, on the ground that a transfer would serve significant interests of the victim, the transferring authority may, in particular, take into account situations where the victim, although not residing in the other Member State, is temporarily staying there, e.g. due to the victim being moved there as a victim of a trafficking offence; or situations where the victim has objective reasons not to travel to the Member State of the transferring authority, e.g. due to the victim being part of a witness protection program.
- (13) The legitimate interests of suspected or accused persons, as well as those of 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.
- (13a)¹ When assessing the legitimate interest of the suspected or accused person to be informed about the intended transfer account should be taken to the risk of prejudicing criminal proceedings against that person.
- (13bis) The rights of victims, referred to in Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, should be taken into account in applying this Framework Decision.
- (13ter) This Framework Decision should not be interpreted as preventing Member States from granting victims more extensive rights under national law.
- (14)² 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.

¹ Recital to address CZ concerns regarding Article 8. Following objections put forward by a number of delegations the text has been amended.

² UK suggested to move this recital to Article 8.

- (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.
- (15bis) When considering a request for transfer the transferring authority should consult with the receiving authority in all cases where this is deemed useful. In cases where the request for transfer results from consultations carried out in accordance with the Framework Decision on Conflicts of Jurisdiction, further consultations should not be deemed necessary, unless new circumstances point to the contrary.
- (16) When proceedings have been transferred in accordance with this Framework Decision, the receiving authority should apply its national law and procedures.
- (16bis) The application of the principle of "ne bis in idem", as set out in Article 54–58 of the 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, and as interpreted by the European Court of Justice, should be adhered to in the transfer of proceedings between Member States in accordance with this Framework Decision.
- (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.
- (17bis) This Framework Decision respects the principle of subsidiarity provided for by Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community in so far as it aims to approximate the laws and regulations of the Member States, which cannot be done adequately by the Member States acting unilaterally and requires concerted action in the European Union. In accordance with the principle of proportionality, as set out in Article 5 of the Treaty establishing the European Community, this Framework Decision does not go beyond what is necessary in order to achieve that objective¹.

¹ This recital derives from Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

- (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, provided that such authorities under their national law and procedures have competence for taking equivalent decisions in domestic criminal 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 5¹

Jurisdiction

1. ²For the purpose of applying this Framework Decision, any Member State shall ensure that it has jurisdiction to prosecute, under its national law, any offence to which the law of another Member State³ is applicable (...).

¹ AT/CY/FI entered scrutiny reservations. PL/DE wants a deletion of the Article. DE/FI/IE considers the scope of the provision to be too wide. IE questioned the legal basis of the provision. However, the CLS considers the legal basis to be clear and without reproach.

² FR, supported by FI, proposed to modify the wording of this paragraph as follows: "*Member States shall ensure that their competent authorities have jurisdiction to prosecute under their national law any offence for which the proceedings have been transferred in accordance with this Framework Decision.*" As a compromise proposal The Presidency suggests reinserting the provision of the original proposal, modifying the wording along the lines of a proposal from DE, while at the same time adding a new paragraph, giving Member States an opportunity to limit the application of paragraph 1 where it is incompatible with fundamental principles of national law.

³ DE proposed to limit the scope of applicable criminal law to the Member State requesting transfer.

- 1bis If the application of paragraph 1 is incompatible with fundamental principles of the national law of a Member State, that Member State shall, nonetheless, for the purpose of applying this Framework Decision, ensure that it has jurisdiction to prosecute, under its national law, any offence to which the law of another Member State is applicable, if 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 of the offence or a substantial part of the damage caused by the offence was sustained in the territory of the other Member State;
 - (b) the suspected or accused person is a national of or ordinarily resident in the other Member State;
 - (c) the victim is a national of or ordinarily resident in the other Member State (...).
2. The jurisdiction established by a Member State exclusively by virtue of paragraph 1 or 1bis may be exercised only pursuant to a request for transfer of proceedings.¹
3. Each Member State may, at the time of adoption of this Framework Decision, declare that it will make use of the possibility in paragraph 1bis. Such declarations shall be made by notification to the General Secretariat of the Council. Any such declaration may be withdrawn at any time. The said declarations and withdrawals shall be published in the Official Journal of the European Union.
- 4.² Declarations referred to in paragraph 3 shall be valid for five years from the day of entry into force of this Framework Decision. However, such declarations may be renewed for successive periods of the same duration.

¹ BE/DE/FI/RO proposed to change the timing for when jurisdiction may be exercised to “*the acceptance of the transfer of proceedings*”, the Presidency proposes to keep the reference to “the request”. The Presidency is of the opinion that a change in timing may give rise to a gap in competence for the receiving authority, in between receiving the request and taking the decision to accept transfer, which might prove problematic in relation to potential provisional measures.

² Paragraphs 4 and 5 derive from Article 7 of the Council Act of 27 September 1996 drawing up the Convention relating to extradition between the Member States of the European Union. These paragraphs, as well as paragraph 6, could be moved to Article 22 on Implementation.

5. No later than three months before the expiry of each five-year period, Member States having made declarations as referred to in paragraph 3 shall notify the General Secretariat of the Council either that it is upholding its declaration or that it is withdrawing it. In the absence of a notification, the General Secretariat of the Council shall inform the Member State concerned that its declaration is considered to have been extended automatically for a period of six months, before the expiry of which the Member State must give notification. On expiry of that period, failure to notify shall cause the declaration to lapse.
6. The General Secretariat of the Council shall notify the Member States and the Commission of the declarations and notifications made pursuant to paragraph 3 and 5.

Article 6

Enabling transfer of proceedings

Any Member State having jurisdiction under its national law to prosecute an offence may, for the purposes of applying this Framework Decision, waive, suspend or discontinue proceedings against a suspected or accused person¹, in order to allow for the transfer of proceedings in respect of that offence to another Member State.

CHAPTER 2

TRANSFER OF PROCEEDINGS

Article 7²

Conditions 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, in particular in one or more of the following situations:

¹ AT suggested to add wording along the lines : "The decision to waive or desist from proceedings against a suspected or accused person shall be provisional pending the final decision being made in the receiving Member State".

² Scrutiny reservation entered by CZ/DE/ES/IT/LV/MT/PT/SK/UK.

- (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 or accused person is a national living in ¹ or is ordinarily resident in the other Member State;
 - (c)² substantial parts of the most important evidence are located in the other Member State;
 - (d)³ there are ongoing proceedings against the suspected or accused 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)⁴ the suspected or accused person is serving or is to serve a sentence involving deprivation of liberty in the other Member State;
 - (g) [deleted]
 - (h) the victim is a national (...) ⁵ living in or is ordinarily resident in the other Member State or a transfer of proceedings would serve other significant interests of the victim⁶.
2. [deleted]

¹ NL suggested to further qualify the criteria of nationality by adding "living in... the other Member State" and was supported by EE and EL. The wording derives from Article 4.1(a) in the FD on transfer of enforcement of sentences. ES and UK opposed. CLS suggested to change the wording into "residing in".

² Following a proposal by NL, supported by several Member States, a recital (12bis) has been added, stating that the possibility of obtaining evidence through mutual assistance should be taken into account.

³ IT suggested deletion of this paragraph.

⁴ IT suggested deletion of this paragraph.

⁵ NL proposal. See footnote to paragraph (b).

⁶ Following observations of several Member States a recital (12ter) has been added to clarify the concept "other significant interests of the victim".

Article 8

Informing the suspected or accused 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.¹ If that person presents an opinion on the transfer, the transferring authority shall inform the receiving authority thereof.

Article 9

The rights of the victim

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. If that person presents an opinion on the transfer, the transferring authority shall inform the receiving authority thereof.

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 shall, where appropriate² inform and consult with the receiving authority, in particular as regards whether the receiving authority is likely to invoke (...) the ground 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 DE entered a scrutiny reservation and suggested to reinforce the obligation to inform, making it mandatory insofar as it does not interfere with the ongoing investigation. To meet CZ concerns a recital has been added (13a).

² A recital clarifying when consultation is appropriate has been inserted into the preamble (15bis).

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 10ter¹

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.

¹ Scrutiny reservation entered by CZ. In room document DS 533/09 HU proposed a consultation mechanism in Article 16(2) and 16(3) to address situations where the receiving authority decides to discontinue proceedings after having accepted transfer. The Presidency is of the opinion that the objective of the RO proposal is covered by the general consultation mechanism in Article 14.

Article 11
*Impediments to transfer (...)*¹

1. A request for transfer of proceedings shall not be accepted if the act underlying the request for transfer does not constitute an offence under the law of the Member State of the receiving authority.
- 2². In addition, a request for transfer of proceedings shall not be accepted if criminal 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 (...) the following cases:
 - (a) if taking proceedings would lead to the infringement of the *ne bis in idem* principle;
 - (b) if the suspect cannot be held criminally liable for the offence due to his or her age;
 - (c) if there is an immunity or privilege under the law of that Member State which makes it impossible to take action;
 - (d) if the criminal prosecution is statute-barred in accordance with the law of that Member State; (...)
 - (e) if the offence is covered by amnesty in accordance with the law of that Member State; or
 - (f) if the national law of the Member State of the receiving authority does not permit proceedings in an equivalent national case due to other legal impediments.

¹ A majority of delegations supported the current structure of Articles 11 and 12. Following a proposal from NL the headline of Article 11 has been changed to better reflect the content.

² A majority of delegations considered that the list of conditions set out in paragraph 2 should be an open list. BE/EE/FR/ES/NL/PT/SI wanted to go back to a closed list. As a compromise, FR proposed to add a new paragraph, subparagraph (f), and go back to a closed list. The compromise was accepted by the other delegations.

Article 12¹
Ground for refusal

1. [deleted]
- 1 bis. The receiving authority may, if a transfer is not considered to improve the efficient and proper administration of justice in accordance with Article 7 (...) ² refuse transfer.
2. [deleted]
3. In the cases referred to in paragraph 1 bis, before deciding to refuse transfer, the receiving authority shall, where appropriate, consult with the transferring authority.

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 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 deadline.
- 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.

¹ Scrutiny reservation entered by AT, DE and PT.

² A number of delegations were of the opinion that the consultations should be facultative. The Presidency suggests to use the same wording as has been agreed upon in Article 10.1 and proposes to reinsert paragraph 3 to this end. UK entered a scrutiny reservation.

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.

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.

Article 16

Effects in the Member State of the transferring authority¹

- 1.² At the latest upon receipt of the notification of the acceptance by the receiving authority of a transfer of proceedings, the proceedings related to the facts (...) subject to the request for transfer shall, in accordance with national law, be suspended or discontinued in the Member State of the transferring authority (...).

¹ RO entered a scrutiny reservation. CZ preferred wording along the lines of Article 21 of the 1972 Convention. NL would like to add a provision on mutual assistance in accordance with Article 5 of the EPC Agreement.

² The change in wording has been done following observations by NL/DE/PT, who considered that the reference made to "proceedings related to the facts underlying the request" was too broad. NL suggested the following wording for this paragraph: "*At the latest upon receipt of the notification of the acceptance by the receiving authority of a transfer of proceedings, the transferring authority may not prosecute the suspected or accused person for the facts underlying the request for transfer. For that reason the proceedings shall in accordance with the national law of the Member State of the transferring authority be suspended or discontinued.*"

1bis. Notwithstanding paragraph 1, the Member State of the transferring authority may, if in accordance with national law, undertake necessary investigations and maintain provisional measures previously adopted in that Member State, in order to facilitate the application of mutual recognition agreements or to provide mutual legal assistance.¹

2. ²If the receiving authority decides to discontinue the proceedings related to the facts (...) subject to the request, the transferring authority may open or reopen proceedings.

3. [deleted]³.

4⁴. (...) The previous paragraphs are without prejudice to the right of victims to initiate criminal proceedings against the offender in the Member State of the transferring authority, when (...) the national law of that Member State so provides.

¹ A new paragraph has been created further to observations made by some delegations regarding a proposal made by ES to enable the Member State of the transferring authority to uphold any provisional measures in view of securing a “transfer”. The Presidency suggests to amend wording proposed by the UK and add to the form an obligation for the transferring authority to inform the receiving authority of any provisional measures taken. Furthermore, the Presidency suggests to add a recital, stating the applicability of other Framework Decisions when it comes to provisional measures taken in connection with a transfer of proceedings.

² NL proposed the following wording for this paragraph: ” *However, if the receiving authority informs the transferring authority in conformity with article 18 that he has decided to discontinue the prosecution of the suspected or accused person for the facts underlying the request for transfer the transferring authority may open or reopen proceedings.*” As regards the change in wording as proposed by the Presidency see footnote to paragraph 1. UK proposed to add ” *unless doing so would contravene the ne bis in idem principle.*” at the end, as a consequence of deleting paragraph 3.

³ Following a suggestion by the Presidency this paragraph has been deleted and replaced with a recital (16bis) referring to Articles 54–58 of the Schengen Convention. HU proposed alternative wording of paragraphs 2 and 3 as set out in meeting document DS 533/09. NL opposed.

⁴ In the Form set out in the Annex I an additional point will be made in the box regarding details about the victim. The transferring authority should indicate whether the victim has been informed about the transfer and whether the law in the Member State of the transferring authority allows the victim to initiate criminal proceedings. A number of Member States supported this proposal. Amended wording proposed by NL. AT suggested to add an obligation for the transferring authority to inform the receiving authority in cases the victim initiates proceedings. The Presidency is of the opinion that such an obligation might already be covered by the provision in Article 10bis.

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 of the receiving authority.
- 2¹. Where compatible with the law of the Member State of the receiving authority, 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 limitation² 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 State³.
3. [deleted]
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 transferred.⁴

¹ Scrutiny reservation entered by DE/IT.

² DE wanted a deletion of “or any act interrupting or suspending the period of limitation” because it might be inconsistent with article 11.2 and in contradiction with the prohibition of retroactive criminal law. However, the Presidency questions the need for a deletion, in view of the optional nature of the provision. The acts need only have the same validity “where compatible with the law of the Member State of the receiving authority”. UK proposed to replace the words “shall have the same validity in the other Member State” with “*may be treated by the Member State of the receiving authority as having the same validity in that Member State*” to further clarify the fact that this part of the provision is also noncompulsory. The current wording was, however, considered to be clearer and gained wider support among delegations.

³ ES suggested the following wording of this paragraph; “*Any evidence or acts 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, provided that those acts or evidence were not incompatible with fundamental legal principles of the Member State of the receiving authority.*” This suggestion was supported by BE but was opposed by DE.

⁴ DE, supported by IT, considers that this provision may give rise to the situation where the time limit for initiating the proceedings which have lapsed in the receiving state may be started again in the receiving MS by the sole fact of transfer of proceedings. It can be argued that a complaint brought in the Member State of the transferring authority is covered by “any act for the purpose of proceedings or preparatory inquiries performed in the Member State of the transferring authority” in paragraph 2, which would imply deletion of this paragraph (compare with Article 8 of the EPC-agreement). However, the Presidency is of the opinion that this provision will bring added value. To meet some of the Member States’ concerns, the

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 (...) transferring authority and, where possible, the victim of the offence, shall be informed thereof. (...) ¹
- 6.² 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 jurisdiction is exclusively based 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.

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.

Presidency suggests to add "*where compatible with fundamental legal principles of that Member State.*" at the end of the provision.

¹ RO, referring to Member State obligations under the 2001 Framework Decision on the standing of victims, proposed that the time limits for lodging of a complaint should start running from the date when the victim is informed about the formalities of lodging the complaint in the receiving MS. According to the Framework Decision on the standing of victims Member States have an obligation to ensure access to information for victims and to take appropriate measures to minimise the difficulties faced where the victim is a resident of a state other than the one where the offence has occurred. The Presidency therefore proposes to amend the provision, in such a way as to make the information on the formalities of lodging a complaint available to the victim himself/herself, where possible. This information includes any time limit laid down by the law of the receiving Member State, which makes the last sentence redundant.

² Scrutiny reservation entered by: CY/DE/EE/EL/IT/PT. DE/EL/LU/NL/PL/PT/SK suggested deletion of this provision.

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 20¹

Costs

(...) Member States may not claim from each other the refund of costs resulting from application of this Framework Decision.

¹ DE and NL have scrutiny reservations on this article. The wording has been changed to better reflect the general position that costs resulting from *the procedure of transferring* proceedings, e.g. translations, should be borne by the Member State in which the cost arose. UK proposed the following alternative wording as an addition to the previous wording: “*For the purposes of this Article the costs of translation referred to in Article 19 should be considered to arise exclusively in the territory of the other Member State.*”.

CHAPTER 4

FINAL PROVISIONS

Article 21

Relationship with other agreements and arrangements¹

- 1.² 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).
- 2.³ 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.

¹ AT entered a scrutiny reservation.

² SK questioned what will happen with provisions of the 1972 Convention which don't have corresponding provisions in the Framework Decision. The CLS concluded that Convention provisions that go further than the Framework Decision can be applied in accordance with paragraph 2, whereas provisions which contradict the Framework Decision will have to be dropped.

³ UK questioned whether agreements with states outside of the EU was affected by this provision. The CLS noted that similar wording has been frequently used before and that the Framework Decision in itself is only applicable between Member States and not in relation to other states.

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: