



**Draft Council Framework Decision
on the transfer of proceedings
in criminal matters**

**Briefing
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Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.
2. The Draft Council Framework Decision on the transfer of proceedings in criminal matters, Article 1¹ provides:

The purpose of this Framework Decision is to increase efficiency in criminal proceedings and to improve the proper administration of justice 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, taking into account the legitimate interests of suspects and victims.

3. The Explanatory Report² suggests that Member States are increasingly confronted with situations where two or more Member States have jurisdiction to investigate and prosecute an offence. Equally, it explains that, notwithstanding only one Member State having jurisdiction, there may be circumstances where it would be more appropriate for proceedings to take place in another Member State. Examples given are where there is difficulty obtaining evidence, or the suspect is serving a criminal sentence in the executing Member State. It could also be used as an alternative to the European Arrest Warrant (EAW) in appropriate cases. The current instruments that govern cooperation in this area are listed: The Council of Europe Convention on the Transfer of Proceedings in criminal matters was adopted 1972 (“the 1972 Convention”),³ 1959 Council of Europe Convention on Mutual Legal Assistance in Criminal Matters, in connection with the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union from 2000, the Member States of the European Communities agreement on the transfer of

¹ 11119/09, COPEN 115, 3 July 2009

² 11119/09, COPEN 115 +ADD 1, 3 July 2009

³ Convention of 15.5.1972, ETS 073.

proceedings in criminal matters, signed in 1990 (“the 1990 EPC Agreement”) as well as bilateral and informal arrangements. These instruments are problematic as they have not been ratified by all Member States. Indeed the EC instrument has not entered into force for this reason. Thus, a uniform instrument binding on all Member States under the Third Pillar is suggested.

4. The instrument follows the Proposal for a Council Framework Decision on conflicts of jurisdiction in criminal proceedings, currently awaiting a second report from Parliament, which the Explanatory Report suggests creates a mechanism for exchange of information , to avoid or resolve conflicts of jurisdiction. It establishes a comprehensive procedural framework for information exchange and direct consultations, aiming to prevent infringements of the principle of *ne bis in idem*, although our reading of the text of the proposed instrument would suggest that it sets out a mechanism through which the Member States are obliged to inform each other when they are investigating an offence which may effect another Member State, and proceed to negotiate as to who will conduct the investigation. It would seem that the purpose of this instrument is to provide a mechanism for transfer once that dialogue has taken place.
5. This briefing provides JUSTICE’s observations as to the merits and deficiencies of the initial draft. Where we have not commented upon a certain provision that should not be taken as an endorsement of its contents. In particular we consider that:
 - **The Draft and/or the Explanatory Report fail to show the need for an instrument on transfer of proceedings rather than the continuing use of Conventions and bi-lateral agreements;**
 - **The parameters of the term ‘criminal proceedings’ need to be clearly defined;**
 - **Judicial order for the request for transfer and acceptance of proceedings is required;**
 - **The intention of Article 5 should be clarified;**
 - **The suspect must be given an absolute right to be informed of an intention to transfer, the opportunity to make representations prior to the decision to transfer and an appeal from that decision;**
 - **Consequences for the suspect as a result of transfer and the application of the EAW scheme should be made clear;**

- **A timescale for consultation should be provided and urgent procedure for decision making where the suspect is remanded in custody;**
- **Documentation provided by the requesting Member State upon transfer must confirm the rules as to how evidence should be obtained and its actual seizure in the particular case;**
- **A hearing should be provided for in the receiving Member State upon transfer to consider admissibility of evidence;**
- **Domestic limitation periods should apply irrespective of whether a complaint has been issued in the requesting Member State in addition to the requested Member State.**

Need for the framework decision

6. Whilst the Explanatory Report suggests increasing multiple jurisdiction in criminal matters, no statistics have been provided to indicate the actual level of need to produce a comprehensive instrument. These statistics would be helpful in order to assess the actual need. It concerns us that a justification for activity in this area has been identified in the Explanatory Report that a difficulty in obtaining evidence in one Member State can give rise to a transfer of the proceedings. Evidentiary rules which restrict seizure or admissibility in order to ensure a fair trial under the jurisprudence of one Member State should not be circumvented by approaching a Member State with lesser standards.
7. Equally, we note the multitude of instruments already available in this area. We query whether attention should not focus on the Member States agreeing to ratify these instruments, given the similarity in language (particularly with the 1972 Convention), rather than creating yet another mutual recognition instrument which will require monitoring and oblige Member States' compliance.

Article 2 – Fundamental Rights

8. We welcome the positive assertion of the suspected person's fundamental rights within the body of the Draft which should have a bearing upon the subsequent provisions, in particular Article 8, and the implications for the suspect receiving a fair

trial in accordance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Article 3 - Definitions

9. No definition has been provided as to the parameters of the term 'proceedings' in the Draft. The proposal needs to make clear the stage in the proceedings at which the framework decision becomes applicable; Is this instrument designed to be used at the investigative stage of proceedings (or is it envisaged that the Framework Decision on Conflicts of Jurisdiction will govern that part of the process?) If it is designed to govern what the common law terms 'post-charge' proceedings, does it envisage the full prosecution stage of preparation for trial? Or just trial?

Article 4 – Designation of competent authorities

10. Article 4(1) states that 'judicial authorities' should be designated as competent authorities. However, Article 4(2) affords designation of non-judicial authorities provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures. This is in contrast to the Framework Decision on the European Arrest Warrant⁴ (EAW) which makes clear in Article 6 that the issuing and executing authorities 'shall' be judicial authorities. The Framework Decision on the EAW creates a two stage structure in which firstly, the central authority takes administrative responsibility for requesting surrender and receipt of requests (see Recital (9) thereof). Secondly the judicial authority approves the warrant requesting surrender and scrutinizes receipt of a warrant from another Member State through a surrender hearing. Judicial rather than executive control of proceedings is at the heart of the EAW scheme. Recital (8) states that '*decisions on the execution of the EAW must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender*'.

11. We consider judicial control equally important in this instrument and a similar scheme needs to be put in place for the purposes of requesting and accepting a transfer of proceedings. The assistance of a central authority is already envisaged in Article 4(3).

⁴ Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.7.2002.

Judicial approval must be secured before a request for transfer is sent in order to ensure that the evidence and grounds are in accordance with domestic law and the framework decision, and upon receipt in the receiving state a judge must decide whether there are grounds for refusal. The Draft is currently unclear as to the role of a judge in the proceedings. Consideration could be given to including a further provision such as that in Article 3(3) of the Council Framework Decision on supervision of probation decisions and alternative sanctions:⁵

If a decision under Article 14(1)(b) or (c) is taken by a competent authority other than a court, the Member States shall ensure that, upon request of the person concerned, such decision may be reviewed by a court or by another independent court-like body.

12. At both stages there must be an opportunity for the suspect or defendant to make representations at a hearing before the judge. The process for obtaining the suspect's opinion is discussed below.

Article 5 – Competence

13. The UK House of Commons EU Scrutiny Committee has considered the Draft in its 27th Report.⁶ At page 36 the Committee considers Article 5 with concern that it is a novel and far reaching provision, which may conflict with national law. The Parliamentary Under-Secretary of State at the Ministry of Justice, Lord Bach, expressed concern in relation to the jurisdictional reach of the provision, given the limited application of the territoriality principle in the UK. The Explanatory Report states:

In order for proceedings to be transferred, wherever the interests of a proper administration of justice so require, it is therefore essential to confer competence on the Member State of the receiving authority in cases where that Member State would not otherwise have competence.

⁵ Council 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 sanctions, OJ L 337/102, 16.12.2008.

⁶ European Scrutiny Committee, 27th Report, Session 2008–09, <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19-xxv/19xxv.pdf>

Competence can be conferred by giving a request for proceedings an automatic effect of making the criminal law of the Member State of the receiving authority applicable. In order to avoid conflict with the principle of nulla poena sine lege another method has been chosen, in conformity with the corresponding provision of the 1972 Convention. Article 5(1) thus provides for applicability of the criminal law of each Member State to any offence to which the criminal law of another Member State is applicable. This implies that the Member State in question was already competent at the time the act was committed.

14. Read in conjunction with the rest of the Draft, which at Article 11 retains the double criminality requirement (to which we are relieved to see no incursion by the framework list), and at Articles 12 and 17 confirms that the national law of the requested Member State shall apply, we understand the reach of Article 5 to be concerned with *jurisdiction* alone, rather than the *substantive ingredients* of an offence. It does not attempt to impose the definition of the crime in the requesting Member State upon the receiving State, but to avoid any legislative limitation as to the facts, such as where the offence took place, where the investigation began, where the evidence was obtained and charge laid, and whether a Member State can as such exercise jurisdiction in those circumstances. For 'competence' we therefore understand there should be read 'jurisdiction'.
15. The Article could be drafted with more clarity to confirm the reach envisaged, notwithstanding its allusion to the 1972 Convention. Equally, where the territoriality principle applies, such as in UK law, the Article should afford a discretion (perhaps by the addition of a territoriality ground of refusal within Article 12) to a Member State to refuse on this basis.

Article 8 – Informing the suspected person

16. The proposal in its current form gives the requesting state a discretion whether or not to inform a suspected person of a request for a transfer and allow him an opportunity to present an opinion. Article 8 provides:

Before a request for transfer is made, the transferring authority shall, where appropriate and in accordance with national law, inform the person suspected of the offence of the intended transfer.

17. This conflicts with Recital 14, which states that:

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.

18. No indication is given as to when it would be 'appropriate' to inform the person of the proposed transfer. JUSTICE considers that the right to be informed about a possible transfer of proceedings must be absolute, given the implications for the suspect. There may be important individual considerations in a case that affect the suspect's ECHR and EC/EU Treaty rights, and necessitate a particular course, which would not be known without allowing consultation with the suspect.
19. Equally, it is insufficient to simply inform the suspect without creating a mechanism through which they can respond to that information. The Article should afford the suspect the opportunity to make representations, and an appeal from a decision to transfer proceedings. Recital 14 is meaningless unless a mechanism is created through which the suspect may assert their right to argue about where their prosecution takes place.
20. Such a procedure was adopted in Article 6(3) of the Council Framework Decision on the mutual recognition of judgments:⁷

In all cases where the sentenced person is still in the issuing State, he or she shall be given an opportunity to state his or her opinion orally or in writing. Where the issuing State considers it necessary in view of the sentenced person's age or his or her physical or mental condition, that opportunity shall be given to his or her legal representative. The opinion of the sentenced person shall be taken into account when deciding the issue of forwarding the judgement together with the certificate. Where the person has availed him or her self of the opportunity provided in this paragraph, the opinion of the sentenced person shall be forwarded to the executing State,

⁷ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27 5.12.2008.

in particular with a view to Article 4(4). If the sentenced person stated his or her opinion orally, the issuing State shall ensure that the written record of such statement is available to executing State.

Recital 17 – Effect upon the suspect

21. Recital (17) provides:

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.

The Framework Decision does not make clear what process is to take place once the receiving state has accepted the transfer of proceedings to its jurisdiction. Presumably where the defendant is not in the receiving state's jurisdiction, that judicial authority would have to issue an EAW for the matter to be tried. Clarification of the stage in the proceedings at which this instrument becomes applicable will be important at this stage since the suspect should be afforded the opportunity to become engaged in his defence of the transferred proceedings as soon as possible. The provisions of the Member State's legislation implementing the Framework Decision on the EAW would then be engaged and those procedures followed. We consider that it would be helpful for the Recital to clearly spell out that the EAW scheme would be applicable at this stage.

Article 10 – procedure for requesting transfer of proceedings

22. Article 10(1) provides the opportunity for Member States to consult about the possibility of transferring proceedings. There is no timescale provided for this consultation period. We consider this to be necessary so as to ensure that proceedings are not unduly lengthy, in accordance with the objective of increased efficiency, particularly since there is an obligation to inform the suspect, and account is to be taken of the position of victims and witnesses. The Article should provide that the transferring authority must decide whether to make a request for transfer without undue delay. This would mirror the obligation of the receiving state under Article 13 to determine whether to accept a transfer of proceedings without undue delay. Furthermore, both Articles 10 and 13 should reflect that in cases where the suspect is

held in provisional detention or custody, the transferring authority shall make a decision whether or not to make the request as a matter of urgency. This would accord with Article 6 of the Proposal on Conflicts of Jurisdiction.

23. Article 10(4) sets out the information that must be sent at the time of a request for transfer:

A request for transfer shall be accompanied by the original or by a certified copy of the criminal file or relevant parts thereof, by any other relevant documents and by a copy of the relevant legislation, or, where this is not possible, by a statement of the relevant law.

24. The terms 'criminal file' and 'relevant documents' require definition since these will not always be the same across the Member States. It is equally unclear whether the 'relevant legislation' will extend to details of the procedures that were followed by the police and prosecuting authorities in obtaining evidence, both the applicable rules and practical application in the particular case, since rules are not always wholly adhered to.

25. Article 17(1) on effects in the Member State of the receiving authority, provides that the law governing the proceedings will be that of the receiving state, which must logically include rules of evidence. Evidence is only admissible in accordance with national law and consequently the receiving state must be able to review whether the evidence sent by the requesting state is so admissible. This is implicit from Article 17(2):

***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 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.*

26. However, we consider that Article 10 must explicitly include an obligation on the transferring state to supply details of the procedures that were carried out for obtaining evidence to ensure that Article 17(2) can be fully observed.

27. It follows that the Framework Decision needs to provide a system for review of the admissibility of evidence in accordance with national law. Once the matter is before the receiving state the suspected person must be informed of the transfer, at which point they should be entitled to disclosure. Article 17 should assert the obligation upon the Member States to provide an admissibility hearing where the suspect will have an opportunity to challenge the admissibility of the evidence to be relied upon.

Article 17 - Effects in the Member State of the receiving authority

28. Article 17(5) provides for a time limit on bringing proceedings in accordance with domestic law, where it is only that Member State and not the requesting Member State which issues a complaint. The time limit starts to run upon acceptance of a request. This provision is welcomed since it provides certainty. Yet no explanation is given as to why this limitation period is not reflected in Article 17(4) which states:

If proceedings are dependent on a complaint in both Member States, the complaint brought in the Member State of the transferring authority shall have equal validity with that brought in the other Member State.

We consider that the limitation period of the requested Member State should apply irrespective of whether the requesting Member State is required to issue a complaint. Should it have such a procedure this cannot place a fetter upon the suspect's right to legal certainty under the domestic law of the accepting Member State. Indeed, any other route would conflict with Article 12(e) refusal ground which provides '*where the criminal prosecution is statute-barred in accordance with the law of that Member State.*'

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