

## III

(Preparatory acts)

## COUNCIL

**Initiative of the Kingdom of Belgium, the 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 Latvia, the Republic of Lithuania, the Republic of Hungary, the Kingdom of the Netherlands, Romania, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden for a Council Framework Decision 2009/.../JHA of ... on transfer of proceedings in criminal matters**

(2009/C 219/03)

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 Parliament <sup>(1)</sup>,

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 Union <sup>(2)</sup> 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.
- (4) The Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings <sup>(3)</sup> 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 Union <sup>(4)</sup> 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.

<sup>(1)</sup> Opinion of ...

<sup>(2)</sup> OJ C 53, 3.3.2005, p. 1.

<sup>(3)</sup> 8535/09.

<sup>(4)</sup> OJ C 197, 12.7.2000, p. 3.

- (8) Consequently, no uniform procedure has been applied to cooperation between Member States regarding transfer of proceedings.
- (9) This Framework Decision should establish a common legal framework for the transfer of criminal proceedings between the Member States. The measures provided for in the Framework Decision should be aimed at extending cooperation between competent authorities of the Member States with an instrument which increases efficiency in criminal proceedings and improves the proper administration of justice, by establishing common rules regulating the conditions under which criminal proceedings initiated in one Member State may be transferred to another Member State.
- (10) Member States should designate the competent authorities in a way that promotes the principle of direct contacts between those authorities.
- (11) For the purpose of applying this Framework Decision, a Member State could acquire competence where that competence is conferred upon the Member State by another Member State.
- (12) Several Council Framework Decisions have been adopted on the application of the principle of mutual recognition to judgments in criminal matters for enforcement of sentences in other Member States, in particular Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties<sup>(1)</sup>, 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<sup>(2)</sup> 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 sanctions<sup>(3)</sup>. This Framework Decision should supplement the provisions of those Framework Decisions and should not be interpreted as precluding their application.
- (13) The legitimate interests of suspects and victims should be taken into account in applying this Framework Decision. Nothing in this Framework Decision should, however, be interpreted as undermining the prerogative of the competent judicial authorities to determine whether proceedings will be transferred.
- (14) Nothing in this Framework Decision should be interpreted as affecting any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction if such a right exists under national law.
- (15) The competent authorities should be encouraged to consult each other before a transfer of proceedings is requested and whenever it is felt appropriate to facilitate the smooth and efficient application of this Framework Decision.
- (16) When proceedings have been transferred in accordance with this Framework Decision, the receiving authority should apply its national law and procedures.
- (17) This Framework Decision does not constitute a legal basis for arresting persons with a view to their physical transfer to another Member State so that the latter can bring proceedings against the person.
- (18) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting a refusal to cooperate when there are objective reasons to believe that proceedings have been initiated for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds,

HAS ADOPTED THIS FRAMEWORK DECISION:

## CHAPTER 1

### GENERAL PROVISIONS

#### *Article 1*

#### **Objective and scope**

The purpose of this Framework Decision is to increase efficiency in criminal proceedings and to improve the proper administration of justice 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.

#### *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.

<sup>(1)</sup> OJ L 76, 22.3.2005, p. 16.

<sup>(2)</sup> OJ L 327, 5.12.2008, p. 27.

<sup>(3)</sup> OJ L 337, 16.12.2008, p. 102.

*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;
- (c) 'receiving authority' shall mean an authority which is competent to receive a request for transfer of proceedings.

*Article 4***Designation of competent authorities**

1. Each Member State shall inform the General Secretariat of the Council which judicial authorities, under its national law, are competent to act as transferring authority and receiving authority (competent authorities) pursuant to this Framework Decision.

2. Member States may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.

3. Each Member State may, if necessary due to the organisation of its internal system, designate one or more central authorities to assist the competent authorities with the administrative transmission and reception of the requests. It shall inform the General Secretariat of the Council thereof.

4. The General Secretariat of the Council shall make the information received available to all Member States and the Commission.

*Article 5***Competence**

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

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

*Article 6***Waiver of proceedings**

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

## CHAPTER 2

**TRANSFER OF PROCEEDINGS***Article 7***Criteria for requesting transfer of proceedings**

When a person is suspected 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 the proceedings if that would improve the efficient and proper administration of justice, and if at least one of the following criteria is met:

- (a) the offence has been committed wholly or partly in the territory of the other Member State, or most of the effects or a substantial part of the damage caused by the offence was sustained in the territory of the other Member State;
- (b) the suspected person is ordinarily resident in the other Member State;
- (c) substantial parts of the most important evidence are located in the other Member State;
- (d) there are ongoing proceedings against the suspected person in the other Member State;
- (e) there are ongoing proceedings in respect of the same or related facts involving other persons, in particular in respect of the same criminal organisation, in the other Member State;
- (f) the suspected person is serving or is to serve a sentence involving deprivation of liberty in the other Member State;
- (g) enforcement of the sentence in the other Member State is likely to improve the prospects for social rehabilitation of the person sentenced or there are other reasons for a more appropriate enforcement of the sentence in the other Member State; or
- (h) the victim is ordinarily resident in the other Member State or the victim has another significant interest in having the proceedings transferred.

*Article 8***Informing the suspected person**

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. If the suspected 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 give due consideration to the interests of the victim of the offence and see to it that their rights under national law are fully respected. This includes, in particular, a right for the victim to be informed of the intended transfer.

*Article 10***Procedure for requesting transfer of proceedings**

1. Before the transferring authority makes a request for transfer of proceedings in accordance with Article 7, it may 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. To consult with the receiving authority in accordance with paragraph 1, the transferring authority shall make information regarding the proceedings available to the receiving authority and may provide it in writing, using a standard form set out in the Annex.

3. The form referred to in paragraph 2 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.

4. 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. If consultation has not taken place in accordance with the procedure referred to in paragraph 3, the request for transfer shall be made in writing, using the standard form set out in the Annex, in accordance with the procedure referred to in paragraph 3.

5. 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.

6. 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.

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 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 11***Double criminality**

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

*Article 12***Grounds for refusal**

1. The receiving authority of a Member State may refuse transfer only:

- (a) if the act does not constitute an offence under the law of that Member State in accordance with Article 11;
- (b) if taking proceedings would be contrary to the *ne bis in idem* principle;
- (c) if the suspect cannot be held criminally liable for the offence due to his or her age;
- (d) if there is an immunity or privilege under the law of that Member State which makes it impossible to take action;
- (e) where the criminal prosecution is statute-barred in accordance with the law of that Member State;
- (f) if the offence is covered by amnesty in accordance with the law of that Member State;
- (g) if the criteria on which the request is based under Article 7 points (a) to (h) are not considered met.

2. If the competence of the Member State which received the request is exclusively grounded on Article 5, the receiving authority may, in addition to the grounds for refusal in paragraph 1, refuse transfer if it is not considered to improve the efficient and proper administration of justice.

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

#### Article 13

##### **Decision of the receiving authority**

1. When a request for transfer of proceedings has been received, the receiving authority shall without undue delay determine whether a transfer of proceedings will be accepted and shall, unless it decides to invoke one of the grounds for refusal in Article 12, take all necessary measures to comply with the request under its national law.

2. The receiving authority shall without delay inform the transferring authority, by any means that leave a written record, of its decision. If the receiving authority decides to refuse transfer, it shall inform the transferring authority of the reasons for its decision.

#### Article 14

##### **Consultations between the transferring and receiving authorities**

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**

Any competent authority may, at any stage of the procedure, request the assistance of Eurojust or the European Judicial Network.

### CHAPTER 3

#### **EFFECTS OF THE TRANSFER**

#### Article 16

##### **Effects in the Member State of the transferring authority**

1. 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 underlying the request for transfer shall, in accordance with national law, be suspended or discontinued in the Member State of the transferring authority, except for any necessary investigations, including judicial assistance to the receiving authority.

2. The transferring authority may open or reopen proceedings if the receiving authority informs it of its decision to discontinue the proceedings related to the facts underlying the request.

3. The transferring authority may not open or reopen proceedings if it has been informed by the receiving authority of a decision delivered at the end of the proceedings in the Member State of the receiving authority, if that decision presents an obstacle to further proceedings under the law of that Member State.

4. This Framework Decision is without prejudice to the right of victims to initiate criminal proceedings against the offender, when so provided for by national law.

#### Article 17

##### **Effects in the Member State of the receiving authority**

1. The proceedings transferred shall be governed by the law of the Member State to which transfer has been effected.

2. Where compatible with the law of the Member State of the receiving 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.

3. When the receiving authority has decided to accept a transfer of proceedings, it may apply any procedural measures permitted under its national law.

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

5. Where only the law of the Member State of the receiving authority requires that a complaint be lodged or another means of initiating proceedings be employed, those formalities shall be carried out within the time limits laid down by the law of that Member State. The other Member State shall be informed thereof. The time limit shall start to run on the date on which the receiving authority decides to accept a transfer of proceedings.

6. In the Member State of the receiving authority the sanction applicable to the offence shall be that prescribed by its own law unless that law provides otherwise. Where the competence is exclusively grounded on Article 5, the sanction pronounced in that Member State shall not be more severe than that provided for in the law of the other Member State.

#### CHAPTER 4

### FINAL PROVISIONS

#### Article 18

##### Information to be given by the receiving authority

The receiving authority shall inform the transferring authority 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. It shall forward a copy of the written decision.

#### Article 19

##### Languages

1. The form set out in the Annex and the relevant parts of the criminal file shall be translated into the official language or one of the official languages of the Member State to which they are forwarded.

2. Any Member State may, upon the adoption of this Framework Decision or later, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation into one or more other official languages of the institutions of the European Union. The General Secretariat shall make that information available to the other Member States and the Commission.

#### Article 20

##### Costs

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

#### Article 21

##### Relationship with other agreements and arrangements

1. In relations between Member States that are bound by the European Convention on the Transfer of Proceedings in

Criminal Matters of 15 May 1972, the provisions of this Framework Decision shall apply instead of the corresponding provisions of that Convention from the date referred to in Article 22(1).

2. Member States may continue to apply bilateral or multi-lateral agreements or arrangements in force, insofar 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 insofar as such agreements or arrangements allow the provisions of this Framework Decision to be extended and help to simplify or facilitate further the transfer of proceedings.

4. Member States shall notify the Council and the Commission by [...] of the agreements and arrangements referred to in paragraph 2 which they wish to continue applying. Member States shall also notify the Council and the Commission of any agreement or arrangement referred to in paragraph 3, within three months of signing it.

#### Article 22

##### Implementation

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by [...].

2. Member States shall transmit to the General Secretariat of the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

#### Article 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. (country code) (area/city code): .....

Fax (country code) (area/city code):.....

Details of the person(s) to be contacted:

Name: .....

Position (title/grade): .....

File reference: .....

Tel. (country code) (area/city code): .....

Fax (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. (country code) (area/city code): .....

Fax (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: