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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council

on the transfer of proceedings in criminal matters

{COM(2023) 185 final} - {SWD(2023) 77 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative? The proposal has four objectives, namely to: (1) improve the efficient and proper administration of justice in the EU; (2) improve the respect of fundamental rights in the process of transfer of criminal proceedings; (3) improve efficiency and legal certainty of transfers of criminal proceedings; and (4) enable transfers of criminal proceedings, where they are in the interest of justice, but currently not possible between Member States, and reduce the phenomenon of impunity. These objectives are to be achieved through the harmonisation of Member States' rules on the transfer of criminal proceedings between Member States. The legal basis for EU action is Article 82(1)(b) and (d) of the Treaty on the Functioning of the European Union (TFEU). This Article sets out the EU's competence to establish measures, that facilitate cooperation between judicial or equivalent authorities of the Member States on proceedings in criminal matters and prevent and settle conflicts of jurisdiction between Member States.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature? In the case of the proposed Regulation on the transfer of proceedings in criminal matters, the Union's competence is shared.
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2¹: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
Yes. In preparing the proposal, the Commission conducted extensive consultations in 2021 and 2022. The consultations targeted a wide range of stakeholders representing citizens, public authorities, academics and other relevant interest groups. The consultations consisted of (i) public feedback to the call for evidence; (ii) an open public consultation; (iii) targeted consultations with Member States' authorities, Eurojust, European Judicial Network, the European Public Prosecutor's Office, Europol, the European Union Agency for Fundamental Rights; (iv) a meeting with experts of the Member States' authorities and (v) a meeting with the Commission's Criminal Law Expert Group. The feedback received informed the preparation of the proposal and the accompanying staff working document. A detailed summary of the outcome of the Commission's consultations is included in the analytical staff working document accompanying the proposal. Aside from the above-mentioned stakeholder consultations, the Commission collected and used expertise from other sources. In particular, the proposal draws on the reports from Eurojust and the European Judicial Network. The proposal also takes into account the results of a research project on transfer of criminal proceedings in the EU which was co-funded by the European Commission from the Justice programme.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

Second, in preparing the proposal, the Commission assessed the subsidiarity of the measures to be adopted at Union level both in the explanatory memorandum of the proposal and in the staff working document (Section 3.2 of the staff working document).

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Yes, both the explanatory memorandum and the analytical staff working document accompanying the proposal include justifications regarding the compliance of the proposal with the subsidiarity principle. The explanatory memorandum states that:

Under Article 4(1)(j) TFEU, the competence to adopt measures in the area of freedom, security and justice is shared between the EU and the Member States. Therefore, Member States may act alone to regulate transfer of criminal proceedings.

However, a legal framework on transfer of criminal proceedings cannot be sufficiently and optimally achieved by Member States acting alone since it is a cross-border matter. This is evidenced by the current fragmented legal framework, which poses legal and practical challenges. Bilateral agreements between Member States would also not address the problems, as agreements of this kind would eventually be needed between all Member States.

The replies to the public and targeted consultations confirm that EU action in this area is likely to deliver better outcomes than Member States action.

Both the Council and the European Parliament have recognised that these challenges require action beyond the national level. The December 2020 Council Conclusions invited the Commission to consider a new proposal, and the December 2021 European Parliament Resolution also called for the Commission to put forward a legislative proposal.

Given the cross-border aspect of the problems outlined above, the proposal needs to be adopted at EU level in order to achieve the objectives.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

A legal framework on transfer of criminal proceedings cannot be sufficiently and optimally achieved by Member States acting alone since it is a cross-border matter. This is evidenced by the current fragmented legal framework, which poses legal and practical challenges. Bilateral agreements between Member States would also not address the problems, as agreements of this kind would eventually be needed between all Member States. The replies to the public and targeted consultations confirm that EU action in this area is likely to deliver better outcomes than Member States action.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

Yes. The problems with the transfers of criminal proceedings have a cross-border dimension by their nature, as a transfer of proceedings requires the involvement of two Member States. A precise quantification of the problem is difficult due to a lack of available statistics in the Member States on the number of criminal proceedings, which are actually transferred and those that are hampered due

to a lack of common rules.
(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty ² or significantly damage the interests of other Member States?
The absence of action at Union level would conflict with the core objectives of the Treaty. This is because the lack of transfers of criminal proceedings where they would be in the interest of justice has adverse consequences on the rights and interests of individuals. This in particular concerns cases of parallel proceedings ongoing in different Member States concerning the same facts and the same person which entail a multiplication of restrictions on the rights and interests of such persons. Parallel proceedings could also result in an infringement of the fundamental principle of criminal law, that a person may not be prosecuted or punished twice for the same offence (<i>ne bis in idem</i> principle). Within the European area of justice it is appropriate to avoid, where possible, such detrimental effects, and to ensure that criminal proceedings are conducted in the best-placed Member State.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
The proposal aims to contribute to the efficient and proper administration of criminal justice in the Member States by ensuring that the best-placed Member State investigates or prosecutes a criminal offence. A legal framework on transfer of criminal proceedings cannot be sufficiently and optimally achieved by Member States acting alone since it is a cross-border matter. This is evidenced by the current fragmented legal framework, which poses legal and practical challenges. Bilateral agreements between Member States would also not address the problems, as agreements of this kind would eventually be needed between all Member States.
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
The current problems stem from the (i) absence of a common legal framework for transfer of criminal proceedings between Member States; and (ii) differences in Member States national criminal justice systems (in particular, the fundamental principle governing prosecution in each national system, namely the principle of legality (where prosecution is mandatory) and the principle of opportunity (where prosecutor has discretion not to prosecute where the public interest does not demand it)).
(e) Is the problem widespread across the EU or limited to a few Member States?
See section 2.3 (d).
(f) Are Member States overstretched in achieving the objectives of the planned measure?
No.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
In preparing the proposal, the Commission conducted extensive consultations, including those with experts from Member State public authorities. Overall, there was a broad consensus that the EU should address the current problems with transfers of criminal proceedings by adopting a new legislative instrument. It has been repeatedly pointed out that a more efficient cross-border

² https://europa.eu/european-union/about-eu/eu-in-brief_en

procedure is needed and that authorities face a number of issues in the current legal set-up that stem from a lack of clear common procedures, such as lack of communication, undue delays in transfer procedures, high costs of translation of documents and unjustified transfer requests.

The feedback received informed the preparation of the proposal and the staff working document accompanying the proposal. A detailed summary of the outcome of the Commission's consultations is included in the staff working document.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

Yes, as the adoption and uniform application of common rules on the transfer of criminal proceedings between Member States cannot be achieved by Member States acting individually. For reasons of scale and effects, the objectives of the proposal would be best achieved at Union level in accordance with the principle of subsidiarity.

(a) Are there clear benefits from EU level action?

Yes. The adoption of uniform rules facilitating transfers of criminal proceedings between Member States can be best achieved at Union level.

The proposal would contribute to the efficient and proper administration of criminal justice in the Member States as it would ensure that the best-placed Member State investigates or prosecutes a criminal offence. Common rules on the transfer of criminal proceedings, in particular, are necessary to prevent unnecessary parallel proceedings in different Member States concerning the same facts and the same person, that could result in an infringement of the *ne bis in idem* principle. The proposal would also ensure that transfer of criminal proceedings can take place when the surrender of a person for criminal prosecution under a European Arrest Warrant ('EAW') is delayed or refused for reasons such as those that parallel proceedings for the same criminal offence are ongoing in the other Member State. This is because, the transfer of criminal proceedings would enable the person being prosecuted to avoid impunity.

By establishing a complete procedure for requesting and taking a decision on the transfer of criminal proceedings the proposal is expected to increase the number of successfully transferred criminal proceedings. A comprehensive legal framework would provide greater legal certainty for all stakeholders concerned and reduce the level of fragmentation.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

One of the aims of the proposal is to enable transfers of criminal proceedings in order to prevent unnecessary parallel proceedings in different Member States concerning the same facts and the same person. Multiple prosecutions of the same cases pose challenges not only in terms of coordination and effectiveness of criminal prosecutions, but can also be detrimental to the rights and interests of individuals and can lead to duplication of activities. Parallel proceedings could also result in an infringement of the *ne bis in idem* principle. In view of this, the quantitative size of the problem should not be considered as the basis to assess the need for Union to take action to address the problem. In addition, while efficiency gains and costs savings are expected for Member State national authorities and citizens, a precise assessment of the economic impact, resulting from the proposal is difficult due to a lack of available statistics in the Member States on the number of criminal proceedings, which are actually transferred and those that are hampered due to a lack of common

rules.
Given its nature, the proposal would not have a direct impact on the functioning of the internal market.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
The proposal would contribute to the efficient and proper administration of criminal justice in the Member States as it would ensure that the best-placed Member State investigates or prosecutes a criminal offence. Common rules on the transfer of criminal proceedings, in particular, are necessary to prevent unnecessary parallel proceedings in different Member States concerning the same facts and the same person, that could result in an infringement of the <i>ne bis in idem</i> principle. The proposal would also ensure that transfer of criminal proceedings can take place when the surrender of a person for criminal prosecution under an EAW is delayed or refused for reasons such as those that parallel proceedings for the same criminal offence are ongoing in the other Member State. This is because, the transfer of criminal proceedings would enable the person being prosecuted to avoid impunity. As specified in the explanatory memorandum and the accompanying analytical staff working document, consultations with a wide range of stakeholders have demonstrated that a new EU legislative instrument is needed to address the problems that authorities face in the current legal set-up. Such problems stem from a lack of clear common procedures, and in particular result in the transfer procedure being inefficient, and transfers of proceedings not taking place where it would be in the interest of justice to do so.
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?
Yes, the proposal only proposes uniform rules to facilitate transfers of criminal proceedings between Member States. It does not impose any obligation on the requesting State to request a transfer of criminal proceedings, and while it sets out a common list of criteria for transfers of proceedings, it leaves possibilities to request transfers based also on other appropriate criteria. It also leaves sufficient discretion for the requested State to refuse the transfer of criminal proceedings and does not interfere with any prosecutorial discretion provided for in national law and does not oblige to prosecute a case that has been transferred. Member States would continue to decide how criminal proceedings should be conducted, in particular as the proposal takes into account the differences among Member States' national criminal justice systems.
(e) Will there be improved legal clarity for those having to implement the legislation?
Yes, one of the objectives of the proposal is to improve legal certainty of transfers of criminal proceedings. A comprehensive legal framework on transfer of criminal proceedings would provide greater legal certainty for all stakeholders concerned and reduce the level of fragmentation.
3. Proportionality: How the EU should act
3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

Yes, both the explanatory memorandum and the analytical staff working document accompanying the proposal include a justification regarding the proportionality of the proposal.

The proposal lays down rules under which a competent authority in one Member State may request the competent authority in another Member State to take over criminal proceedings. Throughout the proposed text, the options chosen are those that are least intrusive for the national criminal justice systems of the Member States, taking into account in particular that under some of the legal systems prosecution is mandatory and under others the prosecutor has discretion not to prosecute where it is not in the public interest.

The proposal is limited to requests issued in criminal proceedings. Requests can be issued for any criminal offence and therefore the transfer of criminal proceedings would complement the system of surrender of individuals under a EAW and may provide a useful alternative to the issuance of an EAW if that proves disproportionate or impossible, for example because the penalty thresholds are not met. The proposal also gives the requested authority sufficient discretion to refuse a request, in particular if it considers that the transfer is not in the interest of an efficient and proper administration of justice. Moreover, it does not impose any obligation on the requested authority to prosecute a criminal offence.

It sets out a rule that evidence transferred from the requesting State must not be denied admission in criminal proceedings in the requested State on the mere ground that such evidence was gathered in another Member State, but the power of the trial court to freely assess the evidence is not affected by this proposal. To this effect, the proposal follows rules already laid down in Council Regulation (EU) 2017/1939³.

This proposal provides for jurisdiction in specific cases in order to ensure that for criminal proceedings to be transferred in accordance with this proposal the requested State can exercise jurisdiction for the offences to which the law of the requesting State is applicable. This jurisdiction can be exercised only upon the request for transfer of criminal proceedings when the interests of efficient and proper administration of justice so require.

The proposal, therefore, does not go beyond the minimum required in order to achieve the stated objective at EU level and what is necessary for that purpose.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

Yes, to achieve the objectives of the proposal (see Section 1.1) it is necessary to set out common rules on the transfer of criminal proceedings between Member States.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes. The proposal only contains common rules to the extent necessary to ensure the transfer of criminal proceedings between Member States.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives

³ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1.

pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?
Yes. As the proposal concerns cross-border cooperation procedures, where uniform rules are required, it is appropriate that this is achieved through a Regulation as it ensures a fully consistent interpretation and application of the rules (in contrast with a Directive), thus preventing legal fragmentation and other issues currently affecting the transfer of criminal proceedings, and only a binding instrument ensures that all Member States will apply the common rules (in contrast with a Recommendation).
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
Yes, the proposal only contains common rules to the extent necessary to ensure the transfer of criminal proceedings between Member States. The proposal does not impose any obligation on the requesting State to request a transfer of criminal proceedings, and while it sets out a common list of criteria for transfers of proceedings, it leaves possibilities to request transfers based also on other appropriate criteria. It also leaves sufficient discretion for the requested State to refuse the transfer of criminal proceedings and does not interfere with any prosecutorial discretion provided for in national law and does not oblige to prosecute a case that has been transferred. The proposal also allows the authorities of the State taking over the proceedings to consult with the authorities of the State conducting those proceedings whether a transfer of proceedings would be appropriate, however, it does not impose any obligation on the State conducting the proceedings to transfer them to another State. The proposal sets out a rule that evidence transferred from the requesting State must not be denied admission in criminal proceedings in the requested State on the mere ground that such evidence was gathered in another Member State, but the power of the trial court to freely assess the evidence is not affected by this proposal. While the proposal sets out grounds for jurisdiction, these are limited to an exhaustive list of situations, that are specific and targeted. That list in particular includes some situations where the requested State refuses to surrender a suspect or accused person for whom a European arrest warrant was issued and who is present in the requested State and is a national of or a resident in that State. This is with the aim to avoid that a person who committed a crime remains unpunished. Provision on jurisdiction is expected to improve the efficiency of the procedure for transfer of proceedings. The proposal creates a standardised certificate for the transfer of criminal proceedings, which is expected to facilitate cross-border cooperation and exchange of information between the requesting and requested authorities, allowing them to take a decision on the request for transfer of proceedings more quickly and effectively. It should also reduce translation costs and contribute to higher quality of requests.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
Member States may incur one-off costs to adjust to the new rules of the proposed Regulation, in particular costs arising from the need to train judges, prosecutors and other competent authorities on the new rules. The main recurrent costs are expected to be the translation costs of the case-file

documents. However, these costs are expected to be somewhat outweighed by the efficiency gains and cost savings brought about by the proposed Regulation.

The proposal's provisions on electronic communication through the decentralised IT system in accordance with the Regulation (EU) ... [the Digitalisation Regulation]⁴ would also have an impact on the EU budget. These costs, to be covered by the Justice programme budget, would be minor because the decentralised IT system would not need to be developed from scratch, but would be developed for many EU tools for judicial cooperation in criminal matters under [the Digitalisation Regulation], with only small adjustments needed for the procedure put forward by this proposal.

Member States would also incur some costs to install and maintain the decentralised IT system's access points located on their territory and to adjust their national IT systems to make them interoperable with the access points. However, as noted, the bulk of these financial investments would have already been made in the context of the digitalisation of other EU instruments on judicial cooperation in criminal matters. In addition, Member States would be able to apply for grants to finance these costs under the relevant EU financial programmes, in particular the cohesion policy funds and the Justice programme.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

The rules in the proposal are designed to establish a common procedure for transfer of criminal proceedings from one Member State to another. In setting out this procedure, the proposal takes into account the differences among Member States' national criminal justice systems (namely, the principles of legality and opportunity).

⁴ Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM/2021/759 final.