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EXPLANATORY REPORT

Subject: DRAFT COUNCIL FRAMEWORK DECISION on the transfer of
proceedings in criminal matters

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Council Framework Decision on transfer of proceedings in criminal matters

Background

The Member States of the European Union ("EU") are increasingly confronted with situations where two or more Member States have jurisdiction to investigate and bring to trial the same or related criminal offences. Overlapping jurisdictions could be the case in situations where the offence has been committed in the territory of several Member States, e.g. trafficking in human beings, or the effects of an offence are sustained in the territory of several Member States, e.g. cyber attacks. Another example could be when the competence in one Member State is based on the principle of territoriality and in another on the principle of personality. In these cases, criminal proceedings for the same or related offences are sometimes conducted in two or more Member States. In the light of the general aim of the E U to create a common area of freedom, security and justice and in the interests of proper administration of justice it would in many situations be more appropriate to concentrate proceedings to one Member State. This would be consistent with traditional administration of proceedings at national level.

Furthermore, in situations where only one Member State exercises its competence or has established jurisdiction there could be several reasons for which the proceedings would be more effectively carried out in another Member State, and should thus be transferred, e.g. difficulties in securing evidence in the first Member State or when the suspect is already undergoing a custodial sentence in the other Member State. Transfer of proceedings could also, in clearly determined cases, be used instead of a European Arrest Warrant.

Presently, several international instruments as well as bilateral and multilateral agreements concern transfer and coordination of criminal proceedings between the Member States.

The Council of Europe Convention on the Transfer of Proceedings in criminal matters was adopted 1972 (“the 1972 Convention”)¹. Yet, only thirteen Member States have ratified that Convention. A number of other Member States rely, for the purposes of enabling other Member States to bring proceedings, on the mechanism of the 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. Yet, others use bilateral agreements or informal cooperation.

Between the Member States of the European Communities an agreement on the transfer of proceedings in criminal matters was signed in 1990 (“the 1990 EPC Agreement”). The agreement has, however, not entered into force due to lack of ratifications.

Moreover, the Council Decision on Eurojust² aims, *inter alia*, to resolve conflicts of jurisdiction and coordination of criminal proceedings. According to this instrument, Eurojust may ask the competent authorities of the Member States to undertake an investigation or to accept that one of them may be in a better position to undertake an investigation. Eurojust may also issue a written opinion on how a conflict of jurisdiction could be solved. However, these opinions are non-binding.

¹ Convention of 15.5.1972, ETS 073.

² Decision on strengthening Eurojust XX/2008/JHA amending Council Decision 2002/187/JHA of 28 February 2002

Furthermore, in several legal instruments adopted by the Member States on substantive criminal law there are provisions on coordination of proceedings.

The Framework Decision on conflicts of jurisdiction in criminal proceedings addresses situations where several Member States have criminal jurisdiction to conduct criminal proceedings regarding the commission of criminal offences based on the same facts and in respect of the same person. That Framework Decision 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*.

Consequently, there are several legal instruments on transfer and coordination of proceedings applicable in relations between the Member States. There is, however, no common legal framework on the procedure of transfer of proceedings with, e.g., criteria for requesting transfer, a procedure following a request, reasons for refusing a request and effects of a transfer. In line with the aim of creating a common European area of freedom, security and justice, it thus becomes necessary to take action so as to eliminate the deficits of the existing legal framework. The proposed action aims to achieve the better determination of the place of the criminal proceedings and the increased transparency and greater objectivity in the way in which the place for the trial is chosen.

Legal basis/Subsidiarity

This proposal is being presented with a view to legislative action on the basis of, *inter alia*, Article 31(1)(a) and (c) of the Treaty on European Union ("TEU"). According to these provisions cooperation between competent ministries and judicial or equivalent

authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions should be facilitated and accelerated, and compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation should be ensured. The proposal also has the objective of preventing conflicts of jurisdiction between Member States, in accordance with Article 31(1)(d). The proposal has the form of a Framework Decision based on Article 34(2) (b) TEU.

This proposal is designed to give effect to objectives declared in the Hague Programme for strengthening freedom, security and justice in the EU (thereafter "Hague Programme") which was approved by the European Council at its meeting on 5 November 2004. In particular, it follows point 3.3 which stated that "with a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State".

The fact that this Framework Decision is framed as a more traditional instrument on judicial cooperation is due to the particularities of the cooperation in question and is without prejudice to the programme of measures to implement the principle of mutual recognition.

There is no other instrument that appears sufficient to regulate EU-wide, cross-border cooperation in the area of transfer of proceedings than a Framework Decision. In particular, the Member States cannot each establish rules of their own that will both be individually appropriate and mutually compatible. Uniformity would be more readily achievable by common action in the form of a Council Framework Decision. This Framework Decision does not go beyond what is necessary to achieve that objective. It is also without prejudice to Article 33 TEU.

Summary of the present proposal and explanations of the specific provisions

The proposed Framework Decision establishes a procedural framework for transfer of criminal proceedings between the Member States. The measures provided for in the Framework Decision aim at extending the cooperation between competent authorities in the Member States with an instrument that increases efficiency in criminal proceedings and improves 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.

The formulation of this Framework Decision has to some extent been influenced by corresponding provisions in the 1972 Convention and the 1990 EPC Agreement.

CHAPTER 1 – GENERAL PROVISIONS

Article 1 and 2 defines the proposal's objective and scope of application. Article 1 states that the objective of the instrument is to increase efficiency in criminal proceedings and improve the proper administration of justice. These objectives will be accomplished by establishing rules on transfer of criminal proceedings between authorities of Member States. Article 2 refers to the obligations arising from Article 6 of the Treaty on European Union and is consistent with previous Framework Decisions.

Article 3 contains a definition of terms frequently used in the Framework Decision. The definition of the term "offence" in subparagraph (a) is based on the 1990 EPC Agreement on the Transfer of Proceedings in Criminal Matters, although a definition of "administrative offences" has not been included. Definitions of "transferring" and "receiving" authorities have been included in subparagraphs (b) and (c).

Article 4 deals with the determination of competent authorities of Member States and is largely consistent with Article 5 of the Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. According to this provision, the Member States shall designate “judicial authorities” as transferring and receiving authorities. Non-judicial authorities may, however, be designated as the competent authorities under paragraph (2), provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures.

In alignment with legal instruments on mutual recognition, the principle is direct contact between the judicial authorities. In accordance with Article 4(3) the Member States may, however, if it’s necessary as a result of the organisation of their internal systems, designate one or more central authorities to assist the competent authorities for the administrative transmission and reception of the requests. This provision is coherent with Article 4(3) of the Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

Article 5 deals with the issue of competence to prosecute when proceedings are transferred between Member States. The receiving authority may accept a request for transfer of proceedings only if that Member State have competence to try the offence. 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.

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.

The above mentioned extension of competence should, for obvious reasons, remain limited to what is necessary for the purposes of the transfer. Consequently, the Member States have competence only for the purposes of applying the Framework Decision and the exercise of competence has in Article 5(2) been limited to cases in which a request for proceedings has been presented by the transferring authority of another Member State.

This provision, conferring competence on all Member States by virtue of their role in receiving requests for transfer of proceedings, is independent of national law and does not influence, or in any way limit, competence conferred on the Member States under their national law. Thus, where Member States already have the necessary jurisdiction under national law this provision would not apply. The competence conferred in accordance with this provision is subsidiary in application and can be exercised only if the Member State having original jurisdiction is unable to exercise it or waives its right to do so.

The purpose of Article 6 aims to give a legal basis for the Member State having original jurisdiction to institute proceedings to waive or discontinue the proceedings in favour of a Member State identified as being in a better position to prosecute. The provision is devised for Member States which have legal systems based on the “principle of legality” of proceedings, i.e. the obligation to prosecute an offender. Without the provision these Member States may be bound by their national law to initiate their own proceedings.

CHAPTER 2 – TRANSFER OF PROCEEDINGS

Article 7 gives a Member State, which is competent to prosecute an offence, the right to ask another Member State to institute proceedings against the presumed perpetrator of the offence, whether the latter Member State has jurisdiction under its national law or by virtue of Article 5 of the Framework Decision. There is no obligation for a Member State to request a transfer of proceedings. It's a mere possibility for the transferring authority to make a request.

The provision stipulates, as an overriding requirement, that a request may be done only if transferring proceedings would lead to an improvement of an efficient and proper administration of justice. In addition, the Article indicates the cases in which a request for transfer may be made, in a list of criteria in paragraphs (a)–(h). The criteria are linked to Article 12 which sets out the cases in which the receiving authority may refuse the request. The criteria listed in paragraphs (a)–(h) are in the nature of alternatives and are not cumulative. The list is exhaustive. The criteria are not listed in order of importance and none has overriding importance for the aims of the Framework Decision. They are all intended to achieve the overriding objective, that of a better administration of justice. In addition, the criteria call for the following comments.

Paragraphs (a), (c) and (h): These provisions relate to situations where an appreciation of the facts by the transferring authority leads to the conclusion that the ends of justice would be more effectively and more easily achieved by proceedings conducted in another Member State. This conclusion may be influenced by e.g. the existence of evidence in the latter Member State, the presence there of essential witnesses, the greater accessibility to or availability of the relevant documents, the need to visit the scene or the presence there of the victim.

Paragraph (b): The presence of the suspect in the other Member State is another fact that might lead to the conclusion that the ends of justice would be more effectively and more easily achieved by transferring proceedings. Furthermore, this criterium is in line with the aims of modern criminal law: to enforce the sanction, in the event of conviction, with an eye to the social rehabilitation of the person concerned. Rehabilitation is greatly facilitated if the convicted person is permitted, while undergoing his sentence, to live in national and cultural surroundings which are familiar to him and to remain in contact with his family.

Paragraphs (d) and (e): These criteria aim at avoiding two proceedings being carried out in different Member States for the same or related offences and at combining into one, proceedings for several offences. Paragraph (d) relates to proceedings regarding the same suspect and paragraph (e) deals with situations where the proceedings concern other persons than the suspected person, in particular when the persons are part of the same criminal organisation.

Paragraph (f): With a view to facilitating rehabilitation, this criterium provides for the enforcement of successive sanctions. If the accused is already imprisoned or is to be imprisoned in the Member State of the receiving authority, it may be considered advisable in the interests of a proper administration of justice and of the effectiveness of the treatment to transfer the proceedings. A carefully planned course of treatment followed through in a single Member State is likely to produce more promising results than two separate non-coordinated courses of treatment carried out in two different Member States.

Paragraph (g): Still with a view to facilitating rehabilitation, this criterium, along with paragraph (b), aims to enable the convicted person to live in national and cultural surroundings which are familiar to him and to remain in contact with his family while undergoing his sentence. The Member States have adopted several Framework Decisions regarding 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, 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 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. The application of the criterium in this paragraph is intended to supplement the provisions of those adopted Framework Decisions. This criterium enables a transfer of proceedings, as an alternative to transferring the sentence, if it is clear already at an early stage of the proceedings that the enforcement of an envisaged sentence would be more appropriate in the other Member State. If a transfer of the sentence would be more appropriate in the specific case, this paragraph should, however, not be interpreted as precluding application of another Framework Decision.

Article 8 is not intended as a requirement of consent from the suspect. The intention is only that the suspected person, where appropriate, shall be entitled to present its opinion, or at least be informed about an intended transfer, before a decision is taken. The objective is to confirm the individual's right to defend himself, since the decision could affect the outcome of the criminal proceedings.

Article 9 deals with the interests of victims. The competent authorities shall give due consideration to victims' rights, in particular to the right to be informed about an intended transfer.

Article 10 concerns the procedure for making a request and indicates which documents must accompany the request. Paragraph (1) provides a possibility for the competent authorities to consult before a request is made. This is intended to resolve any uncertainties before a request is being made, in order to prevent requests being made when a transfer is not likely to be achieved. The consultation may, in particular, concern whether there is a ground for refusal which potentially could be invoked by the receiving authority.

Paragraph (2) gives flexibility when it comes to the procedure for consultation. If appropriate, the transferring authority may use a standard form for providing the information necessary. If the form is used, paragraph (3) stipulates, in conformity with instruments on mutual recognition, the principle of direct transmission of the form, as well as other information in writing, by the transferring authority to the receiving authority by any means which leaves a written record and under conditions allowing the receiving authority to establish authenticity.

Paragraph (4) deals with the actual request for transfer, stipulating the use of the form in cases where it has not already been used during the consultation procedure. In order for the receiving authority to make a thorough assessment of the case, in determining whether a transfer of proceedings will be accepted in accordance with Article 13, relevant parts of the criminal file shall accompany the request for transfer, as well as any other relevant documents. Ultimately, it is for the receiving authority to judge which

information is necessary in each particular case and, where appropriate, ask the transferring authority for the additional information needed. A copy of relevant legislation, or at least a statement of relevant law, should also accompany the request.

This is motivated by the double criminality requirement in Article 11.

Paragraph (5) should be read in conjunction with Article 16(1) which implies that, until notification by the receiving authority of its decision on the request for transfer, the transferring authority shall retain its right to take all necessary steps in respect of the investigation/proceedings. It results from paragraph (6) that the right of prosecution will revert to the transferring authority if it withdraws the request at any time before the receiving authority has informed it of a decision to accept transfer of proceedings. Paragraphs (7) and (8) refers to the transmission of a request and correspond to similar rules in instruments on mutual recognition.

One of the main conditions for the transfer of proceedings is that deriving from the principle of double criminality which is contained in Article 11. In the field of international cooperation in criminal matters, this principle may be regarded either *in abstracto* or *in concretu*. For the purposes of this Framework Decision, the principle *in abstracto* has been chosen, in conformity with other EU instruments. This means that the act underlying the request for transfer has to fit the definitions of the requirements of an offence in both Member States. The provision should, however, be read in conjunction with the grounds for refusal in Article 12.

The reasons for which a transfer may be refused are listed in Article 12, and are to some extent consistent with the grounds for refusal already familiar from other Framework Decisions. Subparagraph 1(g) entitles the receiving authority to dispute the factual or legal reasons given by the transferring authority to justify its request for transfer. This

provision relates to the criteria listed in paragraphs (a)–(h) in Article 7. Before deciding to refuse transfer on this ground the receiving authority shall, however, in accordance with paragraph (3), consult with the transferring authority.

In order to give the receiving authority more flexibility in refusing transfer of proceedings in cases where the competence is exclusively based on the Framework Decision, paragraph (2) of Article 12 entitles the receiving authority to refuse transfer also when it disputes the assessment of the overriding requirement in Article 7, that a transfer would improve an efficient and proper administration of justice. However, this ground for refusal is only applicable when the competence of the Member State which received the request is exclusively based on Article 5 of the Framework Decision.

Article 13 stipulates that the receiving authority shall examine the request for transfer and determine whether a transfer will be accepted. It will be noted that the receiving authority is only obliged to decide whether a transfer will be accepted or not and there is no obligation concerning what further action should be taken by the competent authority. The examination entails an assessment of the grounds for refusal, to rule on the possibility of a refusal in the limited circumstances laid down in Article 12. Even when the receiving authority has decided to accept transfer it remains at liberty to decide which steps should be taken in respect of the offence underlying the request. In complying with the request the receiving authority shall act under the rules set out in its national law. The reference to national law is explained above all by the wish not to interfere with the principle of opportunity as applicable to criminal proceedings when this principle is recognized in law. Nothing in the Framework Decision should be interpreted as interfering with any prosecutorial discretion provided for in national law and there is no obligation to prosecute in a case that has been transferred. In paragraph (2) the receiving authority is obligated to inform the transferring authority of its decision.

Article 14 provides an opportunity for the competent authorities to consult each other in order to facilitate the application of the Framework Decision and Article 15 contains information on the possibility to request assistance by Eurojust or by the European Judicial Network. The competent authorities should be encouraged to make use of the already existing mechanisms of Eurojust and the European Judicial Network. However, this provision is without prejudice to the Eurojust Decision.

CHAPTER 3 – EFFECTS OF THE TRANSFER

Articles 16 and 17 deal with the effects of a transfer.

Article 16(1) stipulates that the proceedings in the Member State of the transferring authority shall be suspended or discontinued, at the latest upon notification of the receiving authority's decision to accept transfer, all in accordance with national law of that Member State. This provision aims to prevent parallel proceedings. Nonetheless, the provision enables necessary steps of investigation to be taken in the Member State of the transferring authority. This exception to the general rule is intended, in particular, to serve as a legal basis for rendering judicial assistance to the Member State of the receiving authority. Victims' rights to initiate criminal proceedings in accordance with national law are unaffected, in accordance with Article 16(4).

Article 16(2) restores to the transferring authority all the rights of instituting proceedings if the receiving authority informs it of its decision not to proceed with proceedings related to the facts underlying the request for transfer. On the contrary, any right for the transferring authority to instigate proceedings are precluded by a decision delivered at the end of the proceedings in the Member State of the receiving authority, granted that the

decision has a precluding effect on further proceedings according to the law of that Member State (Article 16(3)). Information regarding decisions on discontinuance of proceedings and decisions delivered at the end of the proceedings shall be provided by the receiving authority to the transferring authority in accordance with Article 18, under Final Provisions.

Article 17(1) makes it clear that the law of the Member State to which the proceedings have been transferred is to be applied once the proceedings have been transferred, which includes what action is to be taken in a case that has been transferred (see also Article 13). All procedural measures permitted by the national law of that Member State are, according to Article 17(3), applicable when a transfer has been accepted. Article 17(2) lays down the rule of the equivalence of steps by specifying that procedural steps lawfully taken in the Member State which made the request for transfer have the same validity in the Member State to which the proceedings have been transferred, provided that it is compatible with the law of the latter Member State. The same effect is awarded to acts interrupting or suspending the period of limitation.

Article 17(4) makes clear that a complaint legally filed in the Member State which made the request for transfer has the same validity as a lawful complaint in the Member State to which the proceedings have been transferred, even if the rules differ between the Member States. Complaints refer to authorization to bring proceedings. However, private prosecutions are excluded from the scope of the Framework Decision (see also Article 16(4)). Article 17(5) refers to the case where a complaint, or another means of initiating proceedings, is necessary only in the Member State to which the proceedings have been transferred. In accordance with the principle, that the law of the Member State to which the proceedings have been transferred should be applied when proceedings have been transferred, the formalities for filing the complaint should be established by that Member State.

Article 17(6) deals with the law applicable for the purposes of determining the sanction regarding an offence underlying a request for transfer. The sanction shall be determined by the law of the Member State to which the proceedings have been transferred if the competence is already grounded on its national law. The law of another Member State shall only be taken account of if the law of the Member State to which the proceedings have been transferred expressly so provides. If, however, the competence is grounded exclusively on this Framework Decision, the *lex mitior* of the Member State which made the request for transfer shall be taken into consideration. In this case the Member State to which the proceedings have been transferred does not exercise original jurisdiction but only a subsidiary jurisdiction. Under these conditions, it would not be justifiable to empower the Member State to which the proceedings have been transferred to impose a more severe sanction than that provided for in the law of the Member State which made the request.

CHAPTER 4 – FINAL PROVISIONS

Article 19 stipulates the obligation for the transferring authority to provide a translation of the form and the relevant parts of the criminal file, which is in conformity with other Framework Decisions.

Article 20 is also consistent with other Framework Decisions.

Article 21 governs the relationship with the Council of Europe Convention of 1972 (paragraph (1)) and, with regard to existing or future Conventions or agreements, clarifies that the Member States may apply and/or agree upon instruments which go beyond the goals of the proposal (paragraphs (2) and (3)).

Articles 22 and 23 contain provisions on the implementation and entry into force of the Framework Decision.

Budgetary implication

It is expected that the implementation of the proposed Framework Decision will entail no significant additional operational expenditure to be charged to the budgets of the Member States or to the budget of the European Union. Moreover, in the long run costs are expected to be saved as in many cases it is assumed that the costs of conducting the proceedings in several Member States will be prevented.