

CM2311

COMMENT ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS

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The European Commission's proposal on the transfer of proceedings in criminal matters (COM(2023) 185 final) represents an important step towards strengthening judicial cooperation in combating cross-border crimes within the borderless Area of Freedom, Security, and Justice. Nonetheless, several aspects of the proposal require further scrutiny.

In this comment, the Meijers Committee raises, in response, a number of questions and concerns stemming from the proposal, including, among others, the legal basis of the legislative proposal, the choice of a regulation instead of a directive and the lack of clear and precise wording of some draft provisions. In light of the above, the Meijers Committee calls upon the EU legislator to further address these points in future versions of the proposal.

 **Meijers
Committee**

Standing committee of experts on international
immigration, refugee and criminal law

Comment on the proposal for a regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters

The Meijers Committee herewith responds to the legislative proposal presented by the European Commission on the transfer of criminal proceedings (COM(2023) 185 final). We acknowledge that in an Area of Freedom, Security and Justice (AFSJ) in which internal borders are erased, the fight against cross-border crimes requires close judicial cooperation in criminal matters. The proposed regulation further contributes to such close cooperation and, hence, to the establishment and maintenance of the AFSJ, i.e. by complementing the existing judicial cooperation mechanisms. This has clear benefits. Firstly, the addition of the newly proposed instrument is likely to strengthen protection against double prosecutions. Secondly, it has the potential to contribute to the obligation laid down in Article 82(1)(b) TFEU, namely to adopt measures which solve or prevent conflicts of jurisdiction. Besides, would European Arrest Warrant procedures fail, transferring criminal proceedings could prevent suspects from escaping prosecution.

Nonetheless, on a more detailed level, several aspects of the proposal require further scrutiny. This note therefore raises a number of questions and concerns that follow from the proposal, and which according to the Meijers Committee have to be addressed in future versions of the proposal. To that end, the following provides for several recommendations.

1. The legal basis

Article 82(1) TFEU states that judicial cooperation in the AFSJ is to be based on the principle of mutual recognition. However, even though the proposed regulation is based on Article 82(1) subsections (b) and (d) TFEU, the proposed procedure is not based on mutual recognition. One important reason for this deviation from the main rule is that the procedure constitutes a form of primary cooperation.¹ However, since other forms of primary cooperation, such as the transfer of the execution of custodial sanctions² are also based on mutual recognition this argument is not convincing. In addition, the decision not to base this form of cooperation on the principle of mutual recognition raises the question whether this has particular consequences for the duty to cooperate.

In light of the above, the Meijers Committee underscores the need to present a stronger justification and explanation for the decision not to base this horizontal cooperation procedure on the principle of mutual recognition.

¹ Commission Staff Working Document, SWD(2023) 77 final, p. 14.

² 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.

2. Unconvincing arguments for choosing a regulation instead of a directive

The Meijers Committee is not convinced by the European Commission's reasons for choosing a regulation instead of a directive. According to the Commission, a regulation prevents different interpretations by Member States, which can result in fragmentation, and in that light a regulation contributes to legal certainty.³ However, this proposed regulation does not regulate each element of the procedure exhaustively, meaning that it will most likely require national legislators to amend national laws and/or to adopt complementary national rules.⁴ For instance, the Member States need to appoint their competent authorities for the purpose of this procedure and national legislators may choose to adopt rules on how to balance the criteria in Article 5(2). Furthermore, the rights of suspects (Article 6) and the rights of victims (Article 7) remain to a large extent only defined in national law. Additionally, there is no guarantee that this regulation avoids different interpretations by national authorities. For example, Article 5(2) provides a non-exhaustive list of criteria which the requesting authority needs to take into account when making the decision. Hence, the requesting authority decides how to balance these criteria and whether other criteria should be added.⁵ So, in light of the fact that national laws will most likely be affected by the regulation and the fact that different interpretations are not completely avoided, the Meijers Committee would like to know why this subject matter should be regulated in a regulation .

The Meijers Committee underscores the need for a more elaborate and convincing substantiation for the Commission's decision to use a regulation .

3. The precise position of competent requesting and requested authorities should be clarified

To guarantee respect for fundamental rights in the transfer procedure, the explanatory memorandum (p. 9) refers to the intervention of a 'judicial authority' in both the requesting and requested state when a request for transfer is being issued. However, the term 'judicial authority' does not return in the draft legislative provisions. Consequently, it is not crystal clear whether or not Article 2, for instance, intends to require that requesting and/or requested authorities would be 'judicial authorities' in the meaning of the term as it has been used in other judicial cooperation mechanisms and/or as interpreted in CJEU case law.

Because clarity on this issue must be considered essential for the effective functioning of the proposed instrument and for proper safeguarding of rights, the Meijers Committee urges to provide for clarity with regard to whether the requesting and/or

³ The explanatory memorandum also states that a regulation guarantees that the rules enter into force at the same time. However, a directive also has implementation deadlines which Member States need to meet.

⁴ Many Member States have adopted implementation acts for 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.

⁵ Unless the national legislator restricts this power.

requested authorities need to be ‘judicial authorities’ and, if so, how this requirement should be defined.

4. The proposed rules on jurisdiction deserve more legal precision

Article 3 currently envisages that the requested state has jurisdiction in a number of well-defined situations, whereas it is not entitled to exercise jurisdiction in such situations if it merely exists pursuant to Article 3(1). The language that is used in this draft provisions is unnecessarily complex. Why would states be obliged to establish jurisdiction in situations in which having jurisdiction without any request for transfer would be a powerless tool?

According to the Meijers Committee, it would be beneficial to use clearer language. In that respect, it is recommended to either follow the wording of Article 2 of the European Convention on the Transfer of Proceedings in Criminal Matters (which uses the term competence instead of jurisdiction), or to specify that in the situations described in Article 3(1) of the proposed regulation at hand, the requested state acquires jurisdiction on the basis of a request for transfer.

5. The victim-related criterion under Article 5(2)(j) deserves a less narrow wording

Article 5 enumerates a number of criteria that must be taken into account when considering issuing a request for transfer. All of these criteria make perfect sense content-wise. However, according to the Meijers Committee, the criterion under subsection (j) has been worded quite narrowly without any explanation provided or thinkable. Under subsection (j) the requesting authority is required to take into account that ‘the majority of victims are nationals of or residents in the requested State’, thereby suggesting that the interests of victims are only to be taken into account if there is more than one victim of the alleged crime(s).

The Meijers Committee suggests – regardless of whether such narrow interpretation is intended – to provide for a broader wording, demanding that the requesting authority also considers that the requested state is the state of nationality or residence of the sole victim of the alleged crimes (following the example of subsection (b), which in relation to the suspect or accused person’ requires that he is a national of or resident in the requested State’).

6. A legal remedy should also be available against a refusal to transfer proceedings

Article 8 grants suspects, accused persons and victims the right to effective legal remedies in the requested State against decisions to transfer criminal proceedings. The Meijers Committee is of the opinion that this provision constitutes a positive contribution to the protection of these individuals, but it wonders why this right is limited to the situation in which the transfer of criminal proceedings will have been accepted. In light of the regulation’s objective to contribute to the proper administration of justice in which the interests of suspects, accused persons and victims are also represented, the question arises why no legal remedy is made available against the decision not to accept the requested transfer of criminal proceedings. A

decision to transfer the criminal proceedings may after all also be preferred by one of the individuals mentioned in Article 8. Additionally, contrary to other cooperation instruments,⁶ the draft regulation does not offer the accused or the victim the right to request the transfer of criminal proceedings.

The Meijers Committee recommends to substantiate why the right to request the transfer of criminal proceedings and the right to a response have not been included in the proposal.

7. Before what point in the criminal proceedings should a request be issued?

Under Article 1(2), the transfer of criminal proceedings may be requested from the moment a person has been identified as a suspect. However, the proposed regulation does not mention a specific moment in the proceedings after which the transfer of criminal proceedings is precluded. Such a moment could for instance be the referral of the case to the national court. The absence of a ‘deadline’ raises questions, especially because on the basis of the currently proposed rules authorities may assume that they would be competent to issue a request for transfer of criminal proceedings while the case is already before the national court. Is that option indeed available and if so, should it be available at all? We would answer the latter question in the negative, if only because the possibility to have cases removed and transferred to another country at any possible time during criminal proceedings seems very hard to reconcile with the important value of legal certainty.

The Meijers Committee recommends, in order to avoid any confusion in this regard, to create clarity on the permitted timing of requests for transfer of criminal proceedings.⁷

8. The rule on the admissibility of evidence in Article 20(3) is an improvement, but further harmonisation is recommended

The first sentence of Article 20(3) contains a similar rule on the admissibility of foreign evidence as provided for in Article 37(1) of the EPPO regulation . Nonetheless, according to the Meijers Committee, the second sentence of Article 20(3), which is absent in the EPPO regulation, constitutes an important addition, since the requested state may not admit evidence gathered in the requesting state when its use would clash with fundamental principles of law. Hence, this part of the provision improves the legal protection of the accused. With regard to the meaning of ‘fundamental principles of law’, we assume that they (primarily) include the right to a fair trial, but that Member States could also rely on other (national) fundamental principles of law. Consequently, Member States may offer different levels of legal protection.

⁶ 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, art. 4(5).

⁷ This point has also been raised in relation to the EPPO. See Ana Laura Claes, Anne Werding and Vanessa Franssen, ‘The Belgian Juge d’Instruction and the EPPO regulation : (Ir)reconcilable?’ (2021) 6 European Papers.

In this light and considering the fact that divergent rules on the admissibility of foreign evidence can hamper judicial cooperation in criminal matters, the Meijers Committee is of the opinion that the harmonisation of the rules on the admissibility of foreign evidence should be considered.

9. The formulation of Article 11 should be improved

Article 11 allows the requesting authority to withdraw the request after the requested authority has made a decision, but before its receipt by the requesting authority. According to the Meijers Committee, the power to withdraw the request is more clearly demarcated when Article 11 prohibits its use until the moment that the requested authority takes a decision. This amendment would place the deciding authority in a position to take a (possible) request for withdrawal into account, and thereby refrain from making a decision.

The Meijers Committee therefore recommends that the timeframe within which a withdrawal of the request to transfer the proceedings is possible will be amended in that manner.

10. Does this proposal meet its objective?

A more general question is to what extent the proposed regulation is able to achieve some of its objectives. Two of the main goals are the avoidance of parallel criminal proceedings which can affect the rights of individuals and, more generally, improving the efficient and proper administration of justice in the AFSJ, meaning that a criminal case is allocated to the Member State that is in the 'best' position to conduct the criminal proceedings. In light of these objectives the proposed regulation states that the requesting authority is competent to issue a request for the transfer of criminal proceedings when it is convinced that the efficient and proper administration of justice would be better served if the criminal proceedings are conducted in the requested state. This decision needs to be made on the basis of the non-exhaustive list of criteria in Article 5, subsection 2. However, these rules are not sufficient to ensure that in each case the efficient and proper administration of justice is served. This is because the proposal does not oblige Member States to issue a request for the transfer of criminal proceedings. Hence, despite the fact that the proper administration of justice may be better served if the criminal proceedings are conducted in another Member State, the proposal does not oblige Member States to act. Additionally, this proposal focuses on the transfer of criminal proceedings between two Member States, whereas more than two Member States may in fact be competent to conduct criminal proceedings against the same suspect for the same act. Hence, the proposed procedure does not guarantee that a particular conflict of jurisdictions is fully resolved or that all unnecessary parallel proceedings are avoided. This is particularly worrisome since the legislation that is currently in place to prevent and settle conflicts of jurisdiction, Framework Decision 2009/948/JHA, leaves it entirely up to the involved Member States to decide which of them is in the best place to prosecute. While it does oblige Member State authorities to inform each other about parallel proceedings in other Member

States, it does not provide any certainty to the parties involved. The proposed regulation on the transfer of proceedings therefore is an excellent opportunity to improve the existing situation that is lacking direction and clarity.

According to the Meijers Committee, the regulation's objective is better achieved by a procedure which ensures that the criminal proceedings are (at one point) concentrated in one Member State.