

# CCBE position paper on the proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters

30/06/2023

## EXECUTIVE SUMMARY

While the CCBE greatly supports the objectives of the proposal and the decision to ensure uniform application of the measures by all the Member States through a Regulation, there are several concerns which the CCBE wishes to raise. In particular, the CCBE would like to ensure that the Regulation truly facilitates an efficient administration of justice, not simply processing of criminal litigation, as well as to ensure that the rights of suspects are adequately represented and accessible to them and their lawyers.

To this end, the CCBE has prepared some points and suggested amendments to the proposed Regulation, which we hope are taken into consideration, as they are crucial in addressing the impacts on ordinary citizens and the administration of justice.

## 1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 46 countries, and through them, more than 1 million European lawyers.

The CCBE represents European Bars and Law Societies in their common interests before European and other international institutions. It regularly acts as a liaison between its members and the European institutions, international organisations, and other legal organisations around the world. Access to justice, the regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE.

The CCBE is pleased to have the opportunity to comment on the [European Commission proposal](#) (and [annex](#)) for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters.

The CCBE believes that this is a particularly important opportunity to make submissions in the light of the fact that it is acknowledged by the European Commission that *“no impact assessment was carried out for this initiative mainly due to lack of realistic options and limited impacts on citizens and businesses”*.

The CCBE believes its comments will illustrate the impact of the proposed measure on ordinary citizens, whether suspects or victims, and on the administration of justice generally.

At the outset, we would wish to confirm that we support each of the four objectives identified in the proposal, 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.*

As practitioners, we are acutely aware of the shortcomings in the various existing legal instruments and the many undesirable outcomes in individual cases because of the lack of adequate legal machinery to deal with the type of prosecutions being addressed in the proposed legislation. Our aim is to ensure that an efficient administration of justice is, in fact, administration of *justice*, and not simply processing of criminal litigation. We are especially anxious to ensure that the rights of suspects are adequately represented in the Regulation and that those rights are accessible to suspects and their lawyers in a meaningful way, and not merely notional, unworkable and impractical.

Moreover, the CCBE believes that the policy decision to proceed by Regulation is the correct one and provides the best prospect for uniform application of the measures by all Member States.

## 2. General comments

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Before turning to make specific points on the proposed Articles, we wish to raise a general point in regard to training.

### **Training**

The first is that there is reference to the provision of training; however, it does not expressly address the training of defence lawyers, although that might be implied. The CCBE does not see any good reason why training should be deferred until after the adoption of the Regulation and, as a matter of fact, see a significant benefit in persons, whether judges, prosecutors or defence lawyers, being trained in all aspects of the judicial system, before being asked to administer new law.

## 3. CCBE comments on specific Articles

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### **Article 2 - Definitions**

The CCBE believes that the definition of “*requesting authority*” might usefully be expanded to include a reference to a suspect or their legal advisor exercising the rights conferred under Article 5(3).

### **Article 3 – Jurisdiction**

The CCBE considers that in all issues touching on the jurisdiction of the requested State over a particular criminal matter, the suspect has a right to be heard and their submissions considered judicially, and the Article should be amended in that respect.

### **Article 4 - Waiver, suspension or discontinuation of criminal proceedings**

The Article would benefit from an amendment to the effect that any decision to revive suspended proceedings is subject to judicial review in order to ensure that there is an independent assessment of whether a violation of the *ne bis in idem* principle arises. This is so fundamental that provision should be provided for reference to the Court of Justice of the European Union (CJEU) to ensure that there are uniform outcomes.

### **Article 5 - Criteria for requesting a transfer of criminal proceedings**

The right of a suspected person to seek the transfer of proceedings conferred by Article 5(3) is meaningless in its present form. The entitlement should be enhanced with an indication that a request for transfer should in principle be consented to and that consent should not be unreasonably withheld.

### **Article 6 - The rights of the suspect or accused person**

The CCBE believes that this should be reworded. Among other concerns with this Article is the implicit suggestion that some persons do not require the benefit of legal representation. That is contrary to reason, practice and European Union procedural safeguards law. The Article should be reworded to clarify that, in all dealings on the issue of possible transfer, a suspect is entitled to the benefit of legal assistance and that that legal assistance should be available, both in the requesting State and at the requested State, and should be provided to the suspect at public expense.

### **Article 8 - Right to a legal remedy**

Article 8(2) appears to imply that there will only be the opportunity of a legal remedy in the national court. The CCBE considers that there should be the possibility of an Article 267 TFEU reference to the CJEU on issues of European Union law, including the interpretation of this Regulation, thereby ensuring that European Union law is applied in an appropriate uniform fashion throughout the Union.

### **Article 9 - Procedure for requesting transfer of criminal proceedings**

This Article is not adequately robust to protect the rights of suspected persons. Many of the matters to be taken into account in making a decision to seek the transfer would receive more informed consideration if submissions from the representatives of the suspected persons were required. The Article should be amended to provide that, in addition to the limited rights provided under Article 5(3), there is a specific entitlement for the making of submissions and for those submissions to be the subject of a reasoned and reviewable decision in accepting or rejecting them.

### **Article 10 - Information to be given by the requesting authority**

This Article should be amended to include a reference to the suspected person and their legal advisors being kept informed of developments in relation to any request.

### **Article 11 - Withdrawal of the request**

Any decision by a *requesting authority* to withdraw a request for the transfer of criminal proceedings potentially impacts adversely on the rights of the suspect. Such a decision to withdraw should be amenable to judicial review, and the Article should be amended accordingly.

### **Article 12 - Decision of the requested authority**

The reasoned decision of the requested authority should be expressly subject to judicial review in the national court and the CJEU at the behest of the suspect. The suspect should be legally aided in bringing such proceedings.

### **Article 13 - Grounds for refusal**

Both the mandatory and optional grounds for refusal should similarly be amenable to judicial review in the national court and the CJEU.

Article 13(3) should be expanded to include a reference to the suspect being informed of developments and consulted with a view to further information being provided where appropriate.

### **Article 15 - Consultations between the requesting and requested authorities**

Article 15(2) envisages a consultation process before the request for transfer is issued. At present, the Article does not provide for the participation of the suspect in this exercise which potentially impacts their lives greatly. The CCBE considers that the Article should be amended in that respect.

In addition, the consultation with the suspect should be a fully informed one and Article 15(3) should be amended in order to reflect this.

### **Article 16 - Cooperation with Eurojust and the European Judicial Network**

It is unfortunate that there is no similar support in place with respect to suspects and their lawyers, both in the requesting and requested States, and such supports will be necessary particularly where the suspects are vulnerable.

### **Article 17 - Costs of transfers of criminal proceedings**

The explanatory note introducing the proposal acknowledges the significant cost of the transfer proposal. However, the CCBE is concerned that no provision is made to deal with the defence costs,

both in the requesting and requested State, and a provision providing legal aid in that regard should be introduced. Otherwise, the absence of such would be a serious omission.

### **Article 19 - Effects in the requesting State**

The explanatory note introducing the proposal acknowledges that defending proceedings in multiple jurisdictions can be onerous: *“Parallel proceedings ongoing in different Member States in respect of the same crime are not only difficult to coordinate and prosecute effectively, but also create disproportionate burdens on the persons involved, who become subject to a duplication of procedures and face multiple restrictions on their rights and interests due to different arrest warrants, searches and interrogations being carried out in two or more Member States. They also risk violating the fundamental principle of criminal law that a person may not be prosecuted and punished twice for the same offence”*.

Article 19, however, appears to maintain a position where there can be a duplication of restrictive measures applied, notwithstanding that a transfer of proceedings has been sought. The language permitting the reopening of proceedings under Article 19(3) should be amended to clarify that such a decision is amenable to judicial review, particularly on the critical issue of *ne bis in idem*. For the legal significance of decisions made in the requested State to be properly understood in the requesting State, this will require suspects to have representation from both States and potentially to have any conflict of law issue addressed before the CJEU.

### **Article 20 (3) - Effects in the requested State**

The CCBE believes that as presently formulated, this Article would permit evidence that was obtained in the requesting State, but is not admissible because it is contrary to the fundamental principles of law in the requesting State, to nonetheless be used in the requested State provided it does not conflict with the fundamental principles of law in that State. This gives rise to a classic temptation to *“forum shop”*, which is a practice that should be prevented. The evidence should be admissible in both relevant States if it is to be admissible at all. Furthermore, the issue of admissibility should be amenable to judicial review in both the requesting and requested States.

### **Article 21 - Information to be given by the requested authority**

The Article should be amended to provide that the suspect is kept informed of these developments.

### **Article 22 - Means of communication**

Novel means of communication are being envisaged in support of the transfer process. The CCBE wishes to highlight that no provision has been made for access to the same communication means for the suspect and their legal advisors in each relevant State, and a provision in that regard should be included.

### **Article 23 - Establishment of a decentralised IT system**

The CCBE believes that if there is to be a dedicated IT system, it should be available for use by the suspect as well.

### **Article 30(2) - Notifications**

The information that is to be collated in respect of this Article is potentially of significance to the suspects and their legal advisors to ensure equality of arms. To this end, a provision should be included for the information to be available to them.

## 4. Conclusion

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The CCBE hopes its comments are of assistance and would be happy to elaborate on any aspect of the above.

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