

ECBA
Opinion on
Proposal for a Regulation on the transfer of proceedings
COM (2023) 185 final - 2023/0093 (COD)
as well as
Key points on the transfer/takeover of criminal proceedings (Art. 82, 85
TFEU) regarding remedies and the right to request transfer

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I. Overview

On April 5 2023, the Commission submitted a proposal for a Regulation on the transfer of proceedings in criminal matters COM(2023) 185 final (hereinafter referred to as COM-proposal). While it does not tackle the underlying problem of positive conflicts of jurisdiction,¹ it would at least create an instrument to achieve improvements where potential conflicts of jurisdiction may arise, both in the interest of a functioning administration of criminal justice and in the interest of the citizens and legal entities concerned.

In December 2023, the Council agreed on its general approach on the Draft Regulation,² and, in January 2024, the European Parliament (EP) adopted the report issued by its Committee on Civil Liberties, Justice and Home Affairs (LIBE).³

¹ Cf. Art. 82(1)(2)(b) and Art. 85(1)(c) TFEU.

² <https://data.consilium.europa.eu/doc/document/ST-15657-2023-INIT/en/pdf>.

³ https://www.europarl.europa.eu/doceo/document/A-9-2024-0008_EN.pdf

In light of these reports and the ongoing trilogue negotiations, the present statement focuses on two aspects:

- (1) The right to an effective remedy.
- (2) The right of the suspect or accused persons to request a transfer of proceedings.

The ECBA urges the negotiators to take into account the following considerations in the upcoming discussions about this legislative instrument.

I. Right to an effective remedy

The right to an effective legal remedy is a fundamental right enshrined in Art. 47 of the Charter of Fundamental Rights (ChFR), in Art. 13 European Convention on Human Rights (ECHR) and other international human rights instruments such as Art. 2(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the Universal Declaration of Human Rights, as well as the constitutions of a number of Member States.⁴

The Court of Justice (CJEU) recognised the right to an effective legal remedy as a general principle of Union law in its judgment of 15 May 1986 (Case 222/84 Johnston [1986] ECR 1651).⁵ According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law.

This right has also been recognised explicitly in the Treaties.⁶ Art. 47 ChFR, requires a remedy before a court, not any judicial authority.

Transposed to the context of the transfer of criminal proceedings, this implies that remedies against a decision to transfer must be decided by one or more judges. This is a consequence of the fact that a decision to transfer criminal proceedings is a

⁴ E.g. Art. 19(4) German Constitution, Art. 24 Spanish Constitution, Article 24 Italian Constitution, Art 78 Polish Constitution, and Art 20(1) Portuguese Constitution.

⁵ See also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313.

⁶ Eg. Art. 19 TEU and Art. 263(4) TFEU.

decision that will have a significant impact on the position of those affected, as it brings about a change in the applicable substantive and procedural criminal laws. In many cases, it also affects the liberty of the person concerned, in which case a remedy before a judge or court would also be a requirement of Art. 6 ChFR and Art. 5(4) ECHR.

The Proposal leaves considerable discretion to the authorities involved as to whether a case should be transferred, or not. It is therefore all the more important that the legal protection of the suspect or accused persons is at least guaranteed by an effective possibility of review in both the requesting and the requested Member State.

In respect of the question of legal remedies, additional precise legal provisions are needed, as demanded by the EP-Report (cf. Art. 15c), in order to guarantee an effective possibility of review in accordance with the requirements of European law, namely Art. 13 ECHR and 47 ChFR. The prerequisites to effectively make use of such remedy are

- the right to inspect the case files, in order to make an informed decision on whether to apply for remedies and on what grounds, and
- a mandatory hearing before the competent judge, in order to ensure that the arguments brought before the judge are heard and considered in the subsequent court decision.

An EU-wide uniform right to inspect the case files is of fundamental importance for the right to an effective defence and a basic prerequisite for the assertion of all rights under Article 6 of the Draft Regulation.

The ECBA therefore strongly supports the proposed Article 15c para. 3 in the EP-Report where it states as follows: “Member States shall ensure that suspects, accused persons, and victims [...] have the right of access to all documents that formed the basis for the decision to accept a transfer under this Regulation”.

This is also in line with Directive 2012/13/EU. The right to inspect case files is only effective if comprehensive access to the files, including, but not limited to the transfer

papers, is granted.⁷ Inspection of the case file must be permitted before any decision on transfer is taken. It is also essential that inspection of the case file takes place prior to the lodging of an application for a remedy, and that it is not undermined by short time limits for making such an application. This can be achieved by ensuring the time limits to lodge an application for such a remedy start to run only after the case file has been received by the person concerned or their legal representative.

The suspensive effect of the request for transfer after the issuing of an indictment, as proposed by the Commission, is welcomed. If this matter were left to national law, as proposed by the Council, this would make the remedy completely ineffective in those countries that do not provide a suspensive effect. In fact, the suspensive effect must not only be provided after the issuing of an indictment, but also before. Otherwise ongoing appeal proceedings will be *de facto* fully ineffective, as the transfer of the criminal proceedings to another Member State would take place in the meantime. This would mean that legal protection in these cases would simply not exist in practice.

II. Right of suspects or accused persons to request transfer of proceedings

The ECBA welcomes that the European legislator is striving for improvements in the field of criminal justice. The opportunity to set "good" legislation on the transfer of criminal proceedings should be used, but this requires compliance with European human rights standards to ensure the effectiveness of the principle in practice.

One of these rights is the equality of arms. Not only the interests of administration of justice, but also those of the persons concerned must be considered. It should be pointed out that the persons concerned have not been convicted and therefore enjoy the presumption of innocence (Art. 6 (2) ECHR). Therefore, they must be granted the same right to initiate transfers of proceedings should this be in their interest. This would also promote the administration of justice as they are likely to be more cooperative if

⁷ If consultations have taken place between the requesting and the requested state prior to lodging a request for a transfer, those must be part of the documents made available to the person concerned.

the case is handled in a jurisdiction with which they are familiar. In the event of conviction, enforcement of the sentence in the appropriate jurisdiction will improve the prospects for social rehabilitation of the person concerned.

The Commission's proposal and the EP's report provided for such a right in Art. 5(3). However, this right was diminished by the subsequent sentence "*Requests made under this paragraph shall not create an obligation for the requesting or the requested State to request or transfer criminal proceedings to the requested State.*"

While this sentence is not wrong as such, it is legally unnecessary as requests generally do not create any obligations other than for the requested authority to decide upon the request within reasonable time. It is a common rule of law principle that requests by concerned parties must be decided within a reasonable time.

Consequently, a request for transfer by the person concerned naturally obliges the requested authority to provide a reasoned decision whether to follow the request, or not, within such reasonable time. Replacing the right to initiate a transfer with a mere right to "propose" a transfer is a serious breach of the principle of equality of arms and must therefore be rejected.

Amsterdam, 1 March 2024

On behalf of the ECBA

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