"The best way to predict your future is to create it"

- Peter Drucker -

CrossBES

Cross Border Execution of Sentences

Better to light a candle than curse the darkness
Closing the enforcement gap

Observations and recommendations

september 2019

Contents

PREFACE

The focus of cross-border cooperation in criminal matters has predominantly been on the investigation phase until now. However, cooperation in the cross-border execution of sanctions is never a central theme. Nonetheless, investigation and execution are both equally important aspects of criminal law enforcement, especially in the fight against organised crime and terrorism. Experiences have shown that sentenced persons use/abuse the borders to hinder the correct, adequate and timely execution of their sentences. The absence of a swift and clear response, in particular across borders, results in impunity, a sense of insecurity and injustice.

You are reading one of the three final products of the Cross Border Execution of Sentences (CrossBES) project, a project co-financed with EU funds with the aim of improving the cross-border execution of sentences/sanctions. The project also encompassed a comparative law study on the cross-border aspects of the execution of judgments in the Netherlands, Belgium and Germany.

The CrossBES project was substantively drafted, prepared and organised by the BES Bureau, the Bureau of Euregional Criminal Cooperation (Bureau voor Euregionale Strafrechtelijke Samenwerking). The composition of this Bureau is trinational and it forms part of the Limburg public prosecutor's office of the Public Prosecution Service. The BES Bureau focuses on improving cooperation in the field of joint cross-border investigation, prosecution and enforcement in the Euregios of Maas-Rhine and Rhine-Maas-North.

The CrossBES project could be carried out thanks to the financial support provided by the European Commission, Federale Overheidsdienst Justitie of Belgium, Justizministerium des Landes Nord-Rhein-Westfalen, Maastricht University, KU Leuven and the Limburg public prosecutor's office.

For the execution and completion of the various deliverables of the project, we relied on the cooperation, knowledge, expertise and perseverance of Professor Dirk van Daele and Mr Sven Bollens, faculty member, both associated with KU Leuven, Professor André Klip, Professor Hans Nelen, Professor Joep Simmelink, Johannes Keiler and Robin Hofmann, both faculty members, all five of them associated with Maastricht University.

Furthermore, several execution experts from the three countries involved were willing to make their knowledge and expertise available to make the project a success. We thank them for their cooperation.

The present document contains the findings and recommendations ensuing from the CrossBES project.

This document describes the problems that practitioners encounter in the daily practice of cross-border criminal cooperation in the sentence enforcement phase. Recommendations for solutions or prevention are explained in detail.

This makes it a unique document. It is not a nationally driven product, but rather a trinational appeal from the Euregional shop floor to the policy makers and legislators of the European Union and the national governments of Belgium, the Netherlands and North Rhine-Westphalia. It is an appeal to give those who work with the subject matter on a daily basis better tools to add further detail to the cooperation and the joint fight against cross-border crime in a better, more efficient and more effective way.

It is the express wish and hope of this group of experts by experience that the responsible national and international authorities will adopt the recommendations and implement them as soon as possible.

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1 Cross Border Execution of Sentences (CrossBES)

On 4 May 2015, the Ministers of Justice, or of Justice and Security, of Belgium, the Netherlands and North Rhine-Westphalia met for the third time in a row to exchange ideas on the progress made on cross-border judicial cooperation in criminal matters.

During this annual meeting – which has been held every year since 2013 – the Ministers are informed of the steps that are taken in the context of cross-border judicial cooperation in the Maas-Rhine Euregio and within the Bureau of Euregional Criminal Cooperation (the BES Bureau) and proposals are tabled to obtain the necessary trinational support in order to implement them in the field.

One of the topics discussed was the report of recommendations drawn up by the BES Bureau entitled "A Practitioners View on Judicial Cooperation in Criminal Matters in EU Border Regions", a report that ensued from the trinational education project called 'BES-Practice: Euregio's Legal Training', organised between 2012 and 2014 with financial support from the European Commission.

The report identified a lack of knowledge and information in the area of cross-border sentence enforcement at three levels, i.e.

- in the area of the knowledge regarding the statutory options that the various European Union Member States offer with regard to the performance of investigative acts in the sentence enforcement phase. Is it possible to apply special investigation methods in that phase? Is it possible to listen in on private conversations?

- a lack of knowledge concerning the possibilities that international treaties and recent European Framework Decisions offer. And, finally,

- the need for information and exchange in specific files. This holds particularly true for the tracing of convicts and/or their assets.

The Ministers recognised and confirmed these issues on 4 May 2015, which was the reason for instructing the BES Bureau to develop and carry out a project with the aim of promoting the cross-border enforcement of criminal judgments.

Based on a project proposal, meetings were held with the Catholic University of Leuven (KU Leuven) and Maastricht University to ultimately arrive at the submission of a joint application for funding in the context of the European Commission's JUSTICE programme.

The project was named CrossBES and is based on four pillars:

- Conducting a comparative law study in the area of sentence enforcement in relation to the relevant applicable EU Framework Decisions, such as those on EAWs, confiscation, financial penalties, probation decisions, etc.
  This also includes zooming in on the legal embodiment and possible use of means of investigation in the enforcement of sentences in Belgium, the Netherlands and Germany. The comparative law study will be carried out under the guidance of Professors D. van Daele (KU Leuven) and A. Klip (Maastricht University);

- Organising three two-day training courses for a select group of 50 representatives of the Public Prosecution Service and/or other relevant parts of government charged with the concrete sentence enforcement. All this will be based on the idea of 'teaching the teacher';

- Drafting a readily comprehensible diagram/step-by-step plan that clarifies in a simple manner which legal or other steps must be taken to successfully enforce judgments abroad;

- Making recommendations in order to improve sentence enforcement and cross-border cooperation on this point. These recommendations will subsequently be offered to the European Commission and to the national authorities of Justice and the Public Prosecution Service.

The partnership that the European Commission requires is made up of KU Leuven, Maastricht University, Federale Overheidsdienst Justitie, Justizministerium Nordrhein-Westfalen (NRW) and the Limburg public prosecutor's office.

The substantive part of the project was concluded on 21 and 22 May 2019 with a two-day meeting attended by a select group of over 50 participants, including members of the Public Prosecution Service and representatives of the Ministries of Justice of the three countries, and by points of contact of the European Judicial Network. The participants had been selected based on their experience with and involvement in cross-border cooperation, and sentence enforcement in particular.

The purpose of the seminar was to arrive at recommendations – from the field/practice – to enhance cooperation in the area of cross-border sentence enforcement. Wishes, ideas, and problems and obstacles encountered by participants were collected at a brainstorming session during the two-day meeting.

In the next few days, the results of the free brainstorming session were discussed at length, explored in depth and discussed in working groups, which were guided and led by experts. Their reasoning would always start from possibilities rather than impossibilities.

In particular because of the very active involvement and input of participants, this approach resulted in a series of ideas, wishes and proposals for solutions to improve and strengthen cooperation in the area of cross-border enforcement.

The written report on these options for improvement is included in Chapter 2 of this document.

Furthermore, with a view to drawing up the step-by-step plan/roadmap (the 3rd pillar of the project), first a process evaluation was performed of the sentence enforcement structures and procedures/processes in the cross-border enforcement of sentences. The analysis could then be used to draw a number of conclusions, accompanied by recommendations to improve cooperation.

The recommendations are included in Chapter 3 of this document.

2 Recommendations ensuing from the seminar of 21 & 22 May 2019

WISHES FROM AND FOR PRACTICE

2.1 Awareness

Surely, one of the most neglected aspects of international cooperation must be sentence enforcement. Cross-border cooperation in criminal matters predominantly focuses on investigation and prosecution. Cooperation in the sentence enforcement phase is all but absent.

This is slightly surprising, given that practice teaches us that convicts use/abuse the borders to impede the correct, adequate and timely enforcement of both sentences involving deprivation of liberty and pecuniary penalties.

The lack of efficient and effective sentence enforcement, in particular across borders, results in impunity, a sense of insecurity and injustice. The culmination of the administration of criminal justice thus becomes an empty box.

The reasons for this are diverse and range from a lack of information and expertise and gaps in regulations to shortages of capacity and insufficient language skills. A number of these reasons will be discussed in more detail.

In order to overcome this problem, more attention and resources should be devoted to cross-border sentence enforcement both nationally and internationally. Cross-border sentence enforcement should be given a prominent place on the agenda, both nationally and at EU level. This is the only way to make successful cross-border sentence enforcement a reality, to promote the reintegration of convicts into society, to increase the sense of justice and to reduce impunity.

It was established during the project that practitioners

- have insufficient knowledge of and insight into the existing EU instruments and how these have been implemented in the national legislation of the relevant countries;
- have a lack of insight into the national possibilities and limitations during the sentence enforcement phase. What is the threshold for conditional release in Belgium? Are wiretapping measures or cross-border surveillance permitted in the sentence enforcement phase in order to trace convicted persons?
- believe that training courses and study programmes focus too much on theoretical knowledge and pay insufficient attention to skills (e.g., how do I complete a 909 certificate?);
- rarely use some instruments, as a result of which no knowledge or expertise is built up. Practice has shown that people must familiarise themselves with the subject matter time and again.

That is why the practitioners passionately call for

- **investments in training and expanding and refreshing knowledge and expertise**

If practitioners are not aware of the options and limitations concerning international cooperation in the sentence enforcement phase, this obviously does not promote the application, or the correct application, of the various cooperation instruments. Training courses and study programmes on international cooperation (prosecution and sentence enforcement) must be a fixed part of the curriculum for magistrates and legal assistants.

National training institutes should pay more attention to the topic throughout people's careers and by means of training at various levels.
This may include basic training for all magistrates and support staff (proper sentence enforcement is rooted in the investigation phase), a specialist training course for magistrates and legal assistants specifically working in this domain, and an international/multilateral training programme (cfr. BES initiatives/EJTN) where experts/national points of contact/reference magistrates meet and exchange knowledge and experiences.

The focus should not merely be on knowledge transfer, but also on skills and operational tips & tricks.

At EU level, more resources should be freed up to support such multilateral training courses. Another option is to continue the support for certain training initiatives for a longer period of time (e.g., five years) to replace the current two-year subsidy periods. After all, this results in training courses being organised in rapid succession, but the workload does not permit people to attend all courses they would like to attend.

- **the roll-out of national and European networks of expertise**

Networks of national experts who raise awareness by drawing up guidelines, scenarios and models, in which best practices are shared and promoted and that form a network of points of contact to assist practitioners in individual cases.

At a European level, for instance, an EJN website specifically tailored to sentence enforcement could be developed (see also section 2.2.2).

- **more awareness within organisations**

Efficient and effective sentence enforcement starts during the investigation phase, but an organisation must also free up time, space and resources to enable sentence enforcement abroad.
Organisations should allow employees to enrol in study programmes and training courses, but should also see to it that the knowledge gained is shared, and is safeguarded in particular! It is established all too often that knowledge and experience built up over the years are lost due to staff turnover. This results in a brain drain, but also creates a gap in the international network.

Recommendation:

Raise awareness in respect of adequate cross-border enforcement by
- investing in training and expanding and refreshing knowledge and expertise;
- rolling out national and European networks of expertise;
- making the organisation more aware of the need for a complete criminal law chain without gaps.

2.2 Information exchange

It goes without saying that a rapid and adequate cross-border exchange of information is indispensable to the efficient and effective fight against cross-border crime. A wide range of instruments and legislative frameworks are provided for in the investigation phase to enable that exchange of information across borders. But in the sentence enforcement phase...

The lack of information exchange in the sentence enforcement phase has become apparent on several occasions in the course of the project. For instance, it has turned out that practitioners do not have adequate information to take a reasoned and well-considered decision about whether to enforce a sentence involving deprivation of liberty or a pecuniary penalty abroad.

One of the main challenges in the next few years is to give foreign authorities access to information that is relevant to sentence enforcement.

A gap in the information exchange can be identified at two levels, i.e. the regulatory level and the case-specific level.

2.2.1 The regulatory level

The legislative framework always guides the conduct of the Public Prosecution Service. National and international rules determine how it must act.
However, just like in the investigation phase, cross-border actions in the sentence enforcement phase are also determined – if not limited – by the statutory possibilities and impossibilities in other Member States.

A well-considered decision that respects the rights of society, the victim and the accused also requires an understanding of the possibilities, limitations and impossibilities in the various Member States whose cooperation is sought. What are the periods and conditions for conditional release? What about compensating victims when a sentence is transferred? What rights do they have? Are wiretapping measures or cross-border surveillance permitted in the sentence enforcement phase in order to trace convicted persons? May assets be seized in advance, pending the enforcement of a confiscation order?

As stated above, a crucial role seems to be reserved for the European Judicial Network (EJN). The EU should invest in a portal/website where practitioners find not only the relevant EU regulations, but also the various national regulations governing the various instruments, information (in a structured way) about the various sentences, the sentence enforcement options in every country, competent authorities, 'nice-to-know' information, etc.

The benefit of placing such a portal/database with the EJN is that a network of contacts can be relied on. These contacts may be asked to provide further information and clarification if this should be necessary.

Furthermore, there is a need for identification of the information that is useful for sentence enforcement. What information (bank details, tax details, moveable and immoveable property, etc.) can be provided by which Member State, under what conditions (where is this information stored, how can it be accessed and who may access it, etc.), and which authorities may be contacted in this respect? This does not involve information concerning the case itself, but the legal options that every country offers to collect and provide information (e.g., may tax information be shared?).

In line with this, this subject matter could well be scrutinised at EU level in order to identify the current statutory options regarding information exchange in the sentence enforcement phase, as well as to identify and subsequently close gaps. One of the suggestions made was that there is an urgent need for a common set of rules imposed by the European Commission, which allows, for instance, the use of information from tax authorities in criminal proceedings.

2.2.2 The case-specific level

This level encompasses the concrete file-specific information that a magistrate/file manager needs to actually enforce a court decision.

The central theme here is the question: how do I get insight into the convict's whereabouts, assets abroad or social, family and economic ties with one country or another?

Getting an adequate answer to these questions is important when deciding to issue a European arrest warrant, a confiscation order, a 909 certificate, a 947 certificate, etc.

However, it is easier to ask the question than to answer it, all the more so because the exchange of information in the sentence enforcement phase is far from being as prompt and smooth as in the investigation phase. Furthermore, the availability of information depends too much on questions and answers, where some information may also be disseminated within the EU by means of push notifications ('need to know' rather than 'nice to know').

All this is clarified in an example. Suppose that you have a judgment entailing a sentence to four years' imprisonment and the confiscation of 1,000,000 euros. The convict has no interests in the country of conviction.
Most people will respond to the sentence involving deprivation of liberty by drawing up a European arrest warrant. An alert for the person concerned is entered in SIS II (Schengen Information System II) in the hope that they will be caught out somewhere and will be surrendered to serve their sentence involving deprivation of liberty. However, if you could establish in advance where the person concerned lives and if this person has built a long-lasting bond with that country by now, could a 909 certificate be a better option with a view to rehabilitation?
A similar problem exists for pecuniary penalties. Your first response might be to prepare a confiscation order. But to which Member State would you address it? Perhaps the Asset Recovery Offices (a collaborative arrangement of the police and judicial authorities within the EU between national agencies that are charged with operational information exchange and with sharing best practices) could help? These agencies allow you to gain insight into a person's assets on the other side of the border. But this information exchange is limited, too. For instance, some AROs may inform you whether the convict currently has a bank account, but they cannot tell you how much money effectively is available in that bank account.
However, it would be interesting to know the balance in the account, if only because it would save a lot of work and resources in both the requesting and the executing State when enforcing a confiscation order if it ultimately turns out that the balance is just 100 euros.

It may be concluded from the example above that proper access to information is essential in the sentence enforcement phase, too.

Recommendation:

Develop a portal/database within the EJN regarding EU and national enforcement (including cross-border enforcement) regulations and regarding EU and national options for collecting and providing procedural and case-specific information.

Several ways to improve access to information were brought up and discussed during the seminar, ranging from strengthening existing initiatives or structures to implementing new ideas and tools.

2.2.2.1 Strengthening the Fugitive Active Search Team (FAST)

The various FASTs are charged with tracing fugitives. Practitioners would also like to see the FAST actively searching for a convict's assets, to enable the enforcement of pecuniary penalties by having recourse against those assets. This may be realised by creating two departments within every FAST – given the specific knowledge required to trace assets or a fugitive – which do, however, work closely together.

It was also established that the composition of FASTs differs from country to country. The Belgian FAST, for instance, consists fully of police officers, whereas the FAST in the Netherlands is composed of both police and judicial authorities. A multidisciplinary team is recommended in light of the new points of focus, as well as a best practice that may be discussed in more detail within ENFAST (FAST's European network).

Recommendation:

Expand the FASTs' duties with the tracing of convicts' assets. Examine whether it is desirable to create EU-uniform multidisciplinary teams.

2.2.2.2 Expansion of FIU.net

FIU.net is a decentralised and advanced computer network that the Financial Intelligence Units within the European Union currently use in their fight against money laundering and terrorism financing. It allows FIUs to identify at a glance the EU Member State that has information available concerning an individual or legal entity. In other words,

rather than asking all 27 EU Member States whether any information is available, in a split second the computer gives you an overview of the Member States you may contact. This means that you may adopt a focused approach rather than throw your bottle into the ocean, in a manner of speaking. Incidentally, the system is an example of privacy by design, with any privacy-sensitive issues having been settled in advance.

A problem with this highly efficient instrument is that its scope of application is limited to the fight against money laundering and terrorism financing and that it can only be accessed through the FIUs.

However, such a system would also have great added value to practitioners in the enforcement of pecuniary penalties imposed. That is why there is a desire to expand FIU.net to other domains and make it accessible to national authorities that are competent to enforce sentences, or to create a similar system specifically for investigation and sentence enforcement.

Recommendation:

Expand the FIU network to domains other than just money laundering and terrorism financing. Also make the FIU network accessible to national authorities competent to enforce sentences.

2.2.2.3 Cross-border iCOV

iCOV stands for *infobox Crimineel en Onverklaarbaar Vermogen* (National Infobox for Criminal and Unaccountable Assets). It is a Dutch collaborative arrangement of various public-sector organisations (including the Tax and Customs Administration, the Police, the Public Prosecution Service, the Fiscal Intelligence and Investigation Service, etc.) and regulatory bodies (including the Dutch Central Bank, the Authority for Consumers & Markets, etc.) that compiles data-driven reports. These reports help the partners to trace criminal money, fight money laundering, combat tax evasion, etc.

Since the various partners combine information, make it available centrally and systematically retrieve it, new connections can be discerned that allow for more than just taking money away. It also produces an overview of the structures and networks that criminals and those facilitating them use to conceal assets.

Such a system is not available in Belgium or Germany, but there is a need for it. That is why the practitioners propose that iCOVs be set up in Belgium and Germany (and, by extension, within the EU) and that it subsequently be considered how these systems may be linked across borders (cfr. ECRIS, Prüm DNA, PIU/PNR, etc.).

Recommendation:

Conduct a study of iCOVs and develop an iCOV, or a European iCOV, by following the Dutch example.

2.2.2.4 The option of identifying confiscation orders in SIS II

A search for assets abroad may also include a query in the Schengen Information System, the system that is presently used to identify stolen property, persons (with a view to arrest and localisation), etc. This is because a confiscation order is often accompanied by a court decision ordering a sentence involving deprivation of liberty. If it is possible to search for the convict, is it also possible to search for the convict's assets?

In connection with the expansion of the FAST's focus to the tracing of assets, the SIS could also be used to enter confiscation orders or at least report somewhere in the SIS that a confiscation order is outstanding against the person concerned. In that case, a confiscation order may also be drawn up and submitted. The State where the assets were traced could effect prejudgment seizure in anticipation of such an order.

Recommendation:

Expand the scope of application of the SIS (Schengen Information System).

The purpose of each of the above recommendations is to enhance the magistrate/file manager's access to information. It is not a matter of 'either-or' but a matter of 'and-and'.

In addition to these two levels, a need was expressed to have a better general overview of sentences imposed on a country's own nationals/residents that are outstan-

ding abroad. After all, in the fight against undermining crime, it should not be possible for criminals convicted abroad to show off illegally obtained assets in their own country while sentences involving deprivation of liberty or pecuniary penalties imposed on them are still outstanding in another EU Member State. Systems such as ECRIS and SIS II are insufficient for this purpose. The practitioners suggested getting an overview of sentences outstanding in the EU by means of a 'hit/no-hit' system. The software on which FIU.net is based – Ma3tch – would be a good starting point for comparisons.

Recommendation:

Develop a European identification tool based on a hit/no-hit system for sentences involving deprivation of liberty and pecuniary penalties.

2.3 Cross-border investigation in the sentence enforcement phase

2.3.1 The European Execution Order (EEO)

However, the proper exchange of information is not always sufficient. Investigative acts are also needed in the sentence enforcement phase to discover a convict's hideout (wiretapping measure, cross-border surveillance, etc.) or to trace assets that a convict has caused to disappear (through a bank investigation (including at third parties), a house search, etc.).

Although it has become apparent during the project that each of the three countries has a range of options at its disposal, investigation for the purpose of enforcement is not a core task. Little attention is paid to this in national legislation, which means that not all investigation options available for the investigation of punishable offences are also available when tracing convicts and assets.
What is more, differences exist between the countries concerning the investigative acts that are available. For instance, a house search may be conducted during a criminal enforcement investigation (SUO) in Belgium, whereas this is ruled out in the Netherlands in the phase of a criminal enforcement investigation (SEO).

The main obstacle, however, is that an international basis is lacking for applying the national investigation options across borders in the sentence enforcement phase. The

existing mutual assistance conventions, framework decisions and directives have a scope of application that is limited to the investigation and prosecution phases.

There is an urgent need for an international framework that enables cross-border cooperation on this point. This may be done by declaring that the field of application of all European regulations on mutual legal assistance in criminal matters also covers legal assistance that is necessary for enforcement or by creating a new instrument by analogy with the European Investigation Order (EIO), i.e. the **European Execution Order (EEO)**. The advantage of this is that it is a single coherent instrument that may be applied for sentences involving deprivation of liberty, suspended sentences and pecuniary penalties.

An EEO would enable the performance of investigative acts in another Member State in the sentence enforcement phase (subject to exhaustively listed grounds for refusal) with regard to the tracing of assets and convicts, the collection of DNA, the hearing of victims in the context of an assessment of conditional release, etc.

Let us go back to the example given above. In this new situation, it would be sufficient – for the purpose of collecting the 1,000,000 euros subject to confiscation – to ask through FIU.net in which EU Member States potentially relevant information/assets might be available. You would prepare an EEO through the digital exchange platform (see below) to get an overview of the balances in the convict's bank accounts in the relevant States and to have any credit balances seized at the same time. You would then transfer a confiscation order through the same platform in the blink of an eye. The time and resources that this new method would save would be tremendous. To criminals, it would immediately be less easy to conceal unlawfully obtained gains on the other side of the border.

Recommendation:

Develop an EEO (European Execution Order) focusing on cross-border enforcement by analogy with the EIO (European Investigation Order).

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2.3.2 The Joint Enforcement Team (JET)

The practitioners also considered the option of setting up a **Joint Enforcement Team (JET)** with one or more other countries after conviction, by analogy with a Joint Investigation Team (JIT), where the emphasis would be on tracing and arresting convicts and on tracing and seizing their confiscated unlawfully obtained gains. Just like in a JIT, a JET might involve the free exchange of information among its members, orders for investigative acts, and the sharing of creamed-off profits among the participating parties by means of asset sharing.

Recommendation:

Develop regulations that enable international cooperation in the enforcement phase by analogy with the regulations governing the JIT (Joint Investigation Team, limited to the investigation phase). The JET (Joint Enforcement Team)

2.4 Technology & IT

The judicial authorities and computerisation have had a strained relationship for a long time. The possibilities that new technologies may offer are in fact considered attractive, but the judicial authorities are hesitant to implement them. Furthermore, what is regarded as obvious at a national level is lacking at an international level. For instance, one may wonder whether a sound explanation can be given for the fact that competent judicial authorities in various countries are still unable to email one another through a secure network. Requests for legal assistance, European investigation orders, European arrest warrants, records, requests for information in ongoing investigations, etc. are still shared through the open internet.

Further digitisation in the context of international cooperation is called for. In the last few decades, international cooperation in the fight against cross-border crime has grown from a niche into one of the most important scenes of action for judicial authorities and the police. If further steps are to be taken in the area of international cooperation, IT support is an aspect to be examined.

2.4.1 Expansion of the Digital Exchange Platform (e-Codex) with other instruments

The Digital Exchange Platform, developed by the European Commission, is currently being rolled out with a view to the transmission of European Investigation Orders (EIOs). As soon as the testing phase has been completed and the system has been implemented, it should be expanded with other certificates, including the European arrest warrant, confiscation order, certificate on financial penalties, 909 certificate, 947 certificate, etc.

The e-Codex infrastructure could/should also allow for secure emailing between judicial authorities.

Recommendation:

Expand the scope of application of the DEP (Digital Exchange Platform) as soon as possible.

2.4.2 Linking population registers and linking the prison/detention systems

Knowing where an accused or convict is located is of the essence in the sentence enforcement phase. Court decisions, judgments, payment orders, etc. must be correctly served if they are to have any effect. It is recommended here that one should not rely exclusively on information collected during the investigation phase, since practice has shown all too often that documents were not served or were not correctly served because the person concerned had since moved.
That is why judicial documents are served in one of the following ways:

- judicial documents are served in accordance with applicable mutual assistance conventions, i.e. a request for legal assistance is used to ask a foreign authority to serve the documents in person;
- an attempt is made to discover the current place of residence through police or judicial contacts to ensure that the documents can then be sent directly to the person concerned by post.

Both ways of service are time-consuming, labour-intensive and costly. If the population registers (and, by extension, the detention registers) are linked, it will be immediately clear to the competent judicial authority where the person concerned resides. This information is useful to sentence enforcement, but also adds great value in the investigation phase (service of documents, issuing a summons, etc.). The direct link ensures that the information in the judicial database is always up to date and enables further automation of administrative procedures, which have always been laborious.

Furthermore, the ability to rapidly and easily check a convict's place of residence contributes to a proper consideration in the assessment of whether a 909 certificate, a 947 certificate, a confiscation order, etc. will be prepared for one Member State or another.

In line with this, the practitioners asked whether, in today's digital society, service of judicial documents through an electronic address (e.g., an email address/dropbox) should be considered.
For instance, a virtual place of residence selected by the person concerned could be used, where judicial authorities may serve judicial documents. Or perhaps some sort of European administrative window in a secure environment to which the person concerned may log in to consult the documents sent to them in their own language could provide a solution?

Recommendation:

Link up the national population registers and detention registers; Member States are expected to have these registers.

2.4.3 Sentence execution app

Judicial and police authorities cannot lag behind in today's digital and information-driven society. It should be possible to consult and/or access information immediately, rapidly and easily, both behind one's desk and in the field.

That is why, during the seminar, the practitioners reflected on making information accessible through apps on – secure – smartphones and tablets. These apps should give access to legal information (cfr. the EJN website recommendation above), but should also enable, for instance, verification in the context of a check or investigation in the

field as to whether any sentences are outstanding against the person concerned, both domestically and abroad. This would allow seizure of a vehicle, capital, etc. pending a confiscation order.

Recommendation:

Develop an execution app.

2.5 Improving existing instruments

The various instruments of cross-border cooperation in the sentence enforcement phase were closely examined during the seminar. The practitioners focused on further optimising these instruments in daily practice.

2.5.1 Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant (EAW) and the surrender procedures between Member States

In accordance with Article 2(1) of this Framework Decision, a European arrest warrant may be issued where a sentence has been passed or a detention order has been made of at least four months. The sentence actually ordered must be more than four months, which means that the remaining sentence – i.e. the part that the person concerned must still serve – may be less than four months.

However, the question is what should be done with sentences of less than four months that are ordered/imposed? Do these criminals escape punishment?
Having recourse to Framework Decision 2008/909/JHA does not provide any solution either, since Article 9 provides that enforcement may be refused if less than six months of the sentence remain to be served (this means that the remaining sentence is decisive here).

The Dutch participants gave two suggestions during the seminar:
- lower the limit to 90 days (three months);
- passport alerts.
  People with an outstanding prison sentence or fine cannot apply for a new passport until they have served or paid the sentences imposed on them.

The problem was recognised to a lesser extent in Belgium and Germany. Nevertheless, a solution should be found for less severe sentences, too. This is because they are court decisions; if they are not executed, impunity will prevail.

Furthermore, when negotiating directives and regulations, account should be taken of the possible overlap between instruments and a certain degree of uniformity should be sought.

Recommendation:

- Include rules in Framework Decision 2002/584/JHA on the EAW concerning sentences of less than four months.
- Uniformise the various directives and regulations where overlap is found.

2.5.2 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

The Framework Decision provides that the full term of the sentence must be stated in days at I.2.1 of the certificate. However, practice has shown that not every Member State applies the same method for converting a sentence into days. The result is that a difference arises in the calculation made by the issuing State and the calculation made by the executing State.

Suppose that a convict was sentenced to 30 months' imprisonment, 12 months of which are a suspended sentence, in a judgment passed by a French court.

According to the French method of calculation, the person concerned must effectively serve 545 days (30 months = 2 years and 6 months = (2 x 365) + (6 x 30) = 910 – 365 (= 1 year) = 545).
Under Belgian regulations, the person concerned must serve 540 days (30 months = 30 x 30 = 900, of which 18 months effectively (18 x 30 = 540)).
That is a difference of five days.

It is highly likely that differences also exist in the calculation of the date of provisional release.

Such differences of interpretation and rules complicate the mutual recognition and enforcement of criminal judgments. Future EU regulations should aim for some sort of minimum harmonisation in the enforcement of court decisions in order to remove practical differences.

Recommendation:

Clearly describe periods of time in future regulations. Take a month, for instance; does that mean the number of days in a calendar month or a fixed number of days of 30?

2.5.3 Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

A confiscation order allows the execution of confiscation abroad and the sharing of monies recovered by means of asset sharing. However, quite some time may pass between the drafting and the execution of a certificate, especially if all legal means are being exhausted. What is more, the convict is notified of the existence of the confiscation order before the recognition is final, which gives the convict plenty of time to sell assets or move them to another country.

That is why an appeal is made to permit seizure before the confiscation order is enforced. This possibility already exists in the Netherlands and Germany, but it does not in Belgium and other countries.

Recommendation:

Adapt national regulations such that seizure is possible before a confiscation order is enforced.

2.6 Gaps

2.6.1 Victims

Under Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, various rights are assigned to victims during the criminal proceedings (recognition, the right to be heard, the right to be present, the right to be informed), including in a cross-border context.
In the sentence enforcement phase, by contrast, the rights of victims are safeguarded to a far lesser extent.

One may wonder why victims have fewer rights in the sentence enforcement phase.

Article 2 of the Directive defines a victim as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence. The definition does not state an end date, since victimhood does not end upon a conviction! A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted (recital 19 of Directive 2012/29/EU).

A victim should then also have the right to be informed or heard during the sentence enforcement phase, for instance in the assessment of conditional release.

At a national level, the countries have all regulated a victim's rights to a greater or lesser extent, including in the sentence enforcement phase. However, enforcing these rights turns out to be considerably more complicated across borders.
This is partly due to a lack of knowledge and the absence of an international regulatory framework, but it is also due to a lack of information. Even if there is a clear desire to achieve this, this is no easy task.
Let us take Framework Decision 2008/909 as an example. This Framework Decision does not mention victims, nor does the certificate contain a section about possible victims. This lack of information about possible victims makes it difficult for a judicial authority to hear or inform the victim in the context of its assessment of the convict's conditional release.

That is why the practitioners call for action in terms of safeguarding the rights of victims in the sentence enforcement phase in a cross-border context.

Recommendation:

Safeguard the rights of victims in the enforcement phase in future regulations.

2.6.2 Convicts with a mental disorder

The problems in this area are substantial. This is due not only to the large number of disorders that cause people to be criminally prosecuted, but also to the sanctions and measures that Member States may apply to protect these people and society. In a cross-border context, these are the very ingredients for slow cooperation. There is no lack of will, but the legal systems simply do not match. Member States have different views on whether the imposition of obligations on convicts having a psychological problem (whether or not combined with an addiction) constitutes a sentence (Belgium), a measure (the Netherlands) or healthcare (Germany). For each of the countries, any treatment whatsoever has more chance of success in the country of origin. It is concluded that very few transfers between the three countries are effected at this time. This means that dangerous people are not adequately treated (if at all), return to society at an earlier stage (possibly without having received treatment), or are in fact detained for a longer period than necessary.

The are two needs on this point. Firstly, an overview of the systems in the various countries would be a useful tool for identifying the options available in each country. This information could be made available and also kept up to date through the EJN website!
Secondly, there is an urgent need for a legal framework for cooperation in respect of convicts with psychological problems. Thinking outside the box is an option here, for instance by enabling the exchange of care providers, psychiatrists, etc. if certain expertise is not available.

Recommendation:

Explore the possibilities of implementing further regulations in respect of cross-border care and enforcement for convicts with mental disorders.

2.6.3 Driving bans

At the European level, several Directives (80/1263, 91/439, 2006/126) have been adopted over the years, which focused on free movement and the recognition of driving licences without formalities.

However, a driving licence may also be withdrawn on account of a road traffic offence. The options differ from country to country. However, there is no mutual recognition of driving bans at this time. If a driver who holds a Dutch driving licence commits a minor offence in Belgium that results in the withdrawal of their driving licence, this disqualification from driving only applies in Belgium. The person concerned would be permitted to drive a vehicle in the Netherlands or another Member State – at least in theory.
This reasoning is slightly surprising. The person concerned is not considered fit to drive a vehicle in country A, for example because a driving ban was imposed on them for life, but is perfectly able to drive a vehicle a few kilometres further away, in country B?

Recognition of driving bans within the European Union is called for. There is also a need for the exchange of information concerning driving bans ordered/imposed and traffic violations in general.

2.6.4 Professional disqualifications

As is the case for driving bans, no mutual recognition is possible for professional disqualifications. Nevertheless, practice has shown that persons subjected to a professional disqualification happily continue their activities on the other side of the border, especially in border regions. This allows them to victimise even more people. That is why recognition of professional disqualifications and the exchange of information in this regard across borders is recommended.

Recommendation:

Include in the regulations that driving bans and professional disqualifications imposed have European effect. Explore the option of central registration and the possible information exchange in that regard between the Member States.

2.6.5 DNA collection after conviction of particular criminal offences

Belgian and Dutch law provide that in the event of a conviction of a criminal offence specifically defined in the law (certain violent offences or sexual offences), the convict's DNA profile must be included in the DNA database.

However, these national regulations do not take account of the cross-border context. If a convict resides abroad and is not found in the country of conviction, the chance that their DNA will be included in the DNA database is almost non-existent. This seriously impedes the future investigation and solving of criminal offences.

Attempts have been made in the past to resolve this problem – reasoning from the principle of granting one another legal assistance in the broadest sense – by collecting DNA after the person concerned had given permission (on a voluntary basis). This is because collection under duress is ruled out with a view to the cross-border provision of the DNA profile. This method has proven little successful in practice.

In order to fill the gap, there is an urgent need for a basis in treaty law and the national legislation should be adapted to permit the collection of DNA material under duress in such situations, too.

Recommendation:

Adapt existing treaties and regulations such that the collection of DNA of convicts residing abroad is permitted.

2.7 Language

It is not for the first time that it is concluded that a lack of language skills is a great obstacle to cross-border cooperation. Proper knowledge of one or more other languages promotes cooperation, which leads to the recommendation that practitioners have a good – at least passive – command of the neighbouring country's language.
However, language also includes the translation of judicial documents. A correct and fast translation is of the essence in legal proceedings, all the more so because legal terms may differ from country to country and are therefore liable to interpretation or misinterpretation. However, practice has shown that translations of judicial documents

often leave much to be desired, which makes it difficult to estimate the precise scope and purport of the requests made. This ultimately results in delayed execution.
Machine translations will overcome this problem in the future, but until that time one should dare to wonder whether a common language – English, for instance – would be far more beneficial in the context of international criminal cooperation.
This intention may conflict with prevailing legislation on language as applicable in the various EU Member States, but a first step in the right direction might be to agree at an international level that every Member State accepts the instruments of international cooperation in English, in addition to its own national language(s).

Recommendation:

Explore whether it is desirable to apply a single European, uniform language, in any event where written documents are used.

2.8 Capacity

Essentially, all three countries experience a shortage of capacity to a greater or lesser extent, and both within the judicial authorities and within the police. Each of those authorities must do more work than they are able to do and, as a result, choices must be made.
This problem is aggravated by a faulty or inadequate IT infrastructure.

3 Recommendation ensuing from the process evaluation in Belgium, the Netherlands and North Rhine-Westphalia

Professor Hans Nelen and research fellow Robin Hofmann have identified a number of problems based on the process evaluation – a study of the structures and processes/ procedures applied in cross-border sentence enforcement – of Belgium, the Netherlands and North Rhine-Westphalia. These problems/issues may be subdivided into four themes, i.e. institutional, individual, practical and organisational. Recommendations have also been provided for each problem.

3.1 Institutional level

The institutional level includes measures that relate to the wider context of EU policies in the realm of cross-border cooperation. These policies are strongly related to or directly affected by the principle of mutual legal recognition and mutual trust. Hence, challenges and problems require a high degree of cooperative practices as well as harmonization measures.

3.1.1 Measure: Reliable and Consistent Assessment of Prison Conditions

Deteriorating prison conditions are a significant problem among a number of EU Member states. Particularly prison overcrowding is a serious issue in BE. While our research in Belgium has shown that the problem seems to be locally concentrated in only a small number of prisons it has led to some member states (including NL) to reevaluate their transfer practices to the neighbouring country. Hence, degrading prison conditions have the potential to seriously undermine the EU rules on prisoner transfer, as it could potentially lead to a violation of the provisions of both the European Convention on Human Rights (ECHR) and the EU Charter on Fundamental Rights. A crucial problem for practitioners is to achieve reliable information on prison conditions on which an assessment can be made.

Recommendation:

The three case countries should share information on conditions in their own prisons based on clear and consistent criteria. Moreover, information should be shared on how other MS are assessed. A good example of how such an assessment may look like is the procedure in NL:

1. Step 1: an in abstracto test is conducted, where the general detention conditions in the issuing state are assessed. For this purpose, the Dutch authorities rely on information that must be objective specific and updated. Several sources of information are used, such as reports of independent organization, ECtHR decisions, and even decision of foreign courts (e.g. a German court). No strict hierarchy between different sources has been identified.

2. Step 2: The second step consist of an in concreto test, which concerns the specific situation of the requested person, both in terms of detention facilities and conditions. In this regard, information on where the person will serve its sentence plays a crucial role: if it is unclear in which prison he will be placed after the surrender, the Dutch authorities may conclude that there is a high chance of violation. If this twofold test leads to the identification of a real risk of violation of Art 3 ECHR, the Dutch court can postpone the decision. This is a temporary situation in which the issuing authority has the possibility to provide more information to exclude the concrete risk of danger in a reasonable time. What is reasonable is decided on a case by case basis and the Dutch court did not identify a firm threshold. It is important to keep in mind, that the burden of proof lies with the requested person: she/he can use different kind of information to prove that a real risk of a flagrant violation of art 3 exists in the issuing state.

3.1.2 Measure: Varying Sentence and Execution Modalities

The variety of Member States' legal systems particularly with regards to sentence execution modalities and variations in provisions of early and conditional release have proven problematic in cross-border execution of sentences. The interviewed experts expressed a need for information and clarity of communication on the applicable

conditional release provisions in the executing Member State before issuing a certificate. It is of vital interest for practitioners (and for the transferred person) to have a clear understanding of what can be expected from the execution of the sentence in another MS.

Recommendation:

Information on early and conditional release should be provided in a clear and concise language. A database containing this information that can be accessed before a transfer is initiated can be helpful. However, it has to be taken into account that legal provisions and an actual conditional release may differ. A variety of factors may influence the time and circumstances under which a prisoner is released. Moreover, since the discretion of the responsible authorities may play a role as well, a reliable prognosis is sometimes hard to make in advance. It is vital to encourage direct communication about these issues between authorities before a transfer of a judgement or prisoner is initiated.

3.1.3 Measure: Decentralization vs. Centralization

The transfer systems in the three case countries can be divided into a centralized (NL) and a decentralized approach (DE, BE). This may lead to frictions in the daily practice of legal cooperation in sentencing. Whereas NL has established a central authority for all prisoner and judgement transfers in BE and DE the local prosecution offices are responsible. Both approaches have their advantages and disadvantages. When it comes to transfers the practitioners from NL and BE complained especially about the fact that sometimes it can be complicated to find the responsible counterpart in Germany. In addition, the federal structure of the state in DE and BE adds to this problem.

Recommendation:

It is of major importance that DE and BE provide information on how to contact the responsible authorities. A central hub like the BES Bureau is a helpful institution as well.

3.1.4 Measure: The Principle of Mutual Trust and Recognition

The transfer-system heavily relies on mutual trust and recognition, the cornerstones of judicial co-operation in criminal matters among EU Member States. But reservations towards this principle still exist, resulting in a discrepancy between a legal and an empirical reality where trust in other EU national legal systems is not felt and lived by the actors. The reasons for this mistrust are complex and cannot be easily explained. It is, however, worth mentioning that during our research mistrust towards legal systems of the neighbouring country was a minor yet existing issue. Examples are the reservations towards Belgian prison conditions by practitioners from GE and NL or reservation towards the Dutch taakstraf-system by German and Belgian practitioners.

Recommendation:

To reduce reservations is not an easy task and certainly not a goal that can be achieved in a short period of time. Common events and training bringing together practitioners from all three countries and establishing permanent communication channels are good steps to foster understanding and appreciation of other legal systems.

3.2 Individual level

The individual LEVEL of cross-border cooperation in the execution of sentences deals with the person being transferred, the risks related to the violation of human and procedural rights and the undermining of social rehabilitation prospects.

3.2.1 Measure: Risks of Instrumentalization for Deportation Purposes

In the scientific literature and among legal experts the prisoner transfer system came under the critique of being used as an instrument for deporting unwanted foreigners to their countries of origin. Concerns regarding the potential use of transfers for deportation purposes were voiced soon after the adoption of the Framework Decision. The suspicion was raised of a hidden agenda farming out prisoner to serve their sentence in foreign countries, not because of their individual circumstances but due to national governmental policymaking and the goal of reducing prison populations. Although, our empirical research has shown that these allegations are widely unfounded with a view to NL, BE and DE these concerns must be taken seriously. After all, the

misuse of prisoners for deportation purposes may potentially undermine and discredit the entire EU transfer system in the long run.

Recommendation:

To avoid the impression of instrumentalizing the transfer system awareness for these risks should be raised among practitioners. During training, it should be emphasized that the goal of social rehabilitation remains the most important criteria for a transfer.

3.2.2 Measure: Achieving Consent of the Transferred Person

The question of consent of the transferred person is one of the most discussed among practitioners and legal scholars. While FD 2008/947 rather avoids the issue of consent in its text FD 2008/909 Article 6 declares consent as a requirement only in exceptional cases. However, in all cases where the sentenced person is still in the issuing state, he/she must be provided with the opportunity to state his/her opinion concerning a transfer (Article 6.3). This opinion is an important indicator of whether the transfer benefits his/her rehabilitation or not and will be taken into account when deciding if a transfer will proceed. The FD leaves it within the discretion of the responsible authorities on how to deal with this opinion. A crucial problem remains the question of how the transferred person can reach an informed opinion. In many cases, he/she will not be able to overlook the consequences of a transfer to the executing state.

Recommendation:

Essential information concerning the enforcement mechanism in the executing state has to be provided to the sentenced person in an easily understandable way to ensure an informed opinion. This counts particularly for explanations concerning the applicable conditional release. Moreover, legal representation if he/she objects to the transfer may help to safeguard the prisoners' rights.

Clear criteria should be established regulating if consent has to be given in front of a judge, the prison authorities or in simple writing. Communicating clearly with the competent prison authorities or directly with the prisoner at an early stage of the transfer process is crucial. A common problem we encountered during our research

is that prisoners do not reply when confronted with the prospect of a transfer. Here, again, clear criteria and procedures should be established on how to deal with such cases.

3.2.3 Measure: The Question of Social Rehabilitation

Crime prevention, the reduction of recidivism, but also individual well-being are primary goals of social rehabilitation. Strong social, professional and family ties have a positive effect on rehabilitation. Nevertheless, achieving successful rehabilitation remains one of the biggest challenges for penal practice. This is particularly true for foreign prisoners, who experience numerous problems in prisons, relating to culture, communication, access to services, such as work, medical, and legal services, and contact with families. The FD 2008/909 (recital 9) determines that 'the competent authority of the issuing State should consider such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.' Although the ratio legis of both framework decisions is to promote social rehabilitation, there are no clarifications or criteria on what this actually entails. Presumably, this leads to different interpretations of the meaning of 'social rehabilitation' and how it can be accomplished depending on national laws of the Member States. Moreover, mechanisms of feedback and control are lacking assessing if the purpose of social rehabilitation is fulfilled by transferring the prisoner. However, there is not much doubt that measures taken against the expressed will of a prisoner, especially when as significant as the transfer to another country, may negatively impact the prospects for reintegration in society. This, however, works the other way as well: A prisoner may voice his interest in being transferred to his country of residence, but authorities are not obliged to act upon this request.

Recommendation:

A harmonized strategy should be developed on what social rehabilitation entails, best practices on how to achieve it as well as clear criteria for evaluation. Although our research has shown that concepts of rehabilitation are generally quite similar the strategy must take into account legal and cultural aspects in the three countries. Information on social rehabilitation in specific transfer cases may be exchanged between the competent authorities in the three countries.

3.2.4 Measure: Determination of 'Living' Place of a Sentenced Person

A crucial issue for the transfer under FD 2008/909 and 2008/947 is the question of where the convicted person lives. In contrary to FD 2008/947, which only refers to a 'lawful ordinary residence', the term 'lives' in FD 2008/909 recital 17 indicates the place to which the person 'is attached, based on habitual residence and on elements such as family, social or professional ties'. Since clear criteria are missing a case-by-case evaluation on where a person is living or has his or her habitual residence becomes necessary.

For example, in the Netherlands, different criteria, such as the actual place of residence, the time the convict has lived there, the workplace and the place of residence of the family, are assessed. In addition, the questions of economic ties and the possibility to set up a resocialization program during the execution of the custodial sentence may play a role. Whereas in the Netherlands and Belgium the immigration offices are involved as a provider of information on the offender, this is to a lesser extent the case in Germany. Here, the official residency register is a main source of information, but this register has proven to be sometimes unreliable. Therefore, in addition to the register, the habitual residence is mainly based on the self-reporting of the convicted person in the opening stage of his sentencing hearing.

Recommendation:

In order to reach an informed decision ideally the authorities of both, the issuing and the executing countries, consult before a transfer procedure is initiated. Information about the prisoner's background can be acquired by requesting data from the executing state's prison and/or probation service. However, time constraints and data protection issues play a role in that matter so that the possibility of requesting information from authorities is limited. Self-reporting of the sentenced person remains a crucial criterium, although authorities increasingly attempt to rely on more objective information.

3.3 PRACTICAL LEVEL

The practical level of cross-border cooperation in the execution of sentences comprises specific issues that influence the daily work of legal practitioners and hence, have a significant impact on how or if a judgement or prisoner transfer is conducted.

3.3.1 Measure: Translation of Judgments and Certificates

Translation issues related to certificates and judgements are a merely technical yet important problem in the daily practice of prisoner transfers. According to Article 23 of the FD 2008/909, the certificate shall be translated into the official language or one of the official languages of the executing state including other declared languages. For NL this includes Dutch and English, for BE Dutch, English, French and German while DE only accepts German. A translation of the judgment is not required in all three case countries (Article 23.3). In legal practice, however, the executing state may deem it necessary to translate the underlying judgment anyways for example when the issued certificate is not filled in correctly or the translation is flawed. This practice has the potential to delay the transfer process significantly and is in addition costly and time-consuming.

Recommendation:

In complex transfer cases or in cases where there are distinct differences in sentencing policies it seems that the inclusion of a full translation of the judgement (although going beyond the requirements in the FD) may be the safe choice and expedite the transfer procedure. In the long run, one might consider accepting English as a universal language for the three case countries. Up to date only in Germany, this is officially not the case yet, while our research showed that also in some parts of Belgium a certificate in English may lead to problems.

3.3.2 Measure: Swift Transfer Procedures

Research has shown that many foreign prisoners refrain from requesting a transfer since transfer procedures are perceived as being too lengthy. The same counts for prosecutors who would only consider initiating transfer procedures when the prisoner is sentenced to prison stay of at least 8 months as otherwise the effort is perceived

as outweighing the outcome. Dutch authorities estimate an average duration of 1.5 years for a prisoner transfer from the request of a prisoner to the actual transfer to another Member States. The bottleneck is the local prosecution offices where the certificates have to be filled in but where often the expertise and the motivation for an expedient procedure are lacking. Swift transfer procedures are therefore of great importance to raise the number of transfers. According to Article 12 of FD 2008/909, the competent authority in the executing state shall decide as quickly as possible whether to recognize the judgment and to enforce the sentence. It should then inform the issuing state thereof, including any decision to adapt the sentence (Article 12.1). According to Article 12.2, the final decision on the recognition of the judgment and the enforcement of the sentence should be taken within a period of 90 days of receipt of the judgment and the certificate. A 30-day timescale is provided to arrange a transfer once an agreement is given. These time limits are often considered too tight and are in practice overstepped.

Recommendation:

Routine and specialisation are crucial factors to expedite transfer procedures. Rising case numbers eventually foster routine over time. Specialized practitioners, units or information hubs at prosecution offices that focus on transfers of judgements and prisoner may have a positive effect as well (this counts especially for the decentralized systems in DE and BE).

3.3.3 Measure: The Adaption of Sentences

The adaption of alternative sanctions is difficult in cross-border legal cooperation between the three case countries. For example, the so-called taakstraf or community service is a main sentence in the Netherlands and widely used in sentencing. The German penal system basically knows (for adults) custodial sentences and financial penalties, while community service is a conditional sentence, meaning, that it cannot be executed independently from the main sentence. Consequently, when a judgement is transferred from NL to DE the community service is often converted into a monetary fine, depending on the duration of the community sentence. A related problem pertains to a specific case constellation where for example a Belgian citizen is convicted in Germany and whose consent is the prerequisite for a transfer. If he/she agrees to serve the sentence in Belgium but has prior convictions in Belgium, the question ari-

ses if the consent implicitly includes these other sentences as well. The FD 2008/909 does not provide clear guidance in these cases. In consequence, it could lead to the situation that the executing state is not able to execute prior convictions of its own citizens on its own territory if consent is missing. In practice, Dutch authorities execute all prior convictions under the precondition that the consent for transfer is given.

Recommendation:

This adaption remains problematic since no clear standards exist so far. Several of our interview partners considered it as one of the main challenges for the future to establish guidelines to adjust and convert alternative sanctions into equivalent measures within the different penal systems.

3.4 ORGANISATIONAL LEVEL

The execution of sentences is based on three key elements. Public prosecutors and other law enforcement officials have to know the relevant legal provisions, have the means available to execute sentences and, last but not least, must be willing to do so. The elements are strongly connected to one another. We will briefly outline the challenges in relation to the three key elements below.

3.4.1 Knowledge and expertise

The execution of sentences – in particular confiscation orders and financial sanctions – requires specific expertise. However, in all three countries, generally speaking, the knowledge and expertise within both the police and the public prosecution departments on the criminal law provisions that are applicable on confiscation orders, financial matters and related civil law issues, are not widespread. There are also differences between the three countries and they reflect the differences between a more centralized and de-centralized approach.

Recommendation:

Regardless the preference for a specific type of organization, some form of clustering of expertise within public prosecution offices and the police on cross border execution-related issues is required.

3.4.2 Resources and administrative support

Particularly in Belgium and Germany, public prosecutors experience a lack of administrative support within their organisations. Next to a large number of ongoing cases, they have to keep an eye on the execution of a large number of sentences. This may cause problems in the execution stage, especially when accuracy is needed in safeguarding procedural terms. In relation to confiscation orders, much attention should be paid to the registration of assets that were frozen at the request of other authorities, in order to prevent that these assets have to be returned to the convicted individual, due to procedural deficits. In all three countries, the registration, administration and management of seized objects can and must be improved.

One of the main challenges in all three countries is that public prosecutors are dependent on law enforcement agencies, the police in particular, when extra steps have to be taken to detect hidden assets and confiscate these assets. As the comparative legal research has shown, legal procedural differences between the three countries may impede the use of specific tools in the execution stage – such as searches, wire taps, requesting bank information, and so on. However, more importantly, the expertise, manpower, and willingness, required to conduct investigations in the execution stage, is often lacking within the police units. This deficit is strongly related to the element of priority (see recommendation below).

3.4.3 Priority

The successful cross border execution of confiscation orders and financial penalties is highly dependent on the willingness of the participants involved. However, in all three countries, this activity still has a rather low priority among the list of daily tasks. This applies all across the board, from investigating officers to public prosecutors, judges and lawyers. The interview material indicates that a strong tendency exists to give more priority to the execution of regular criminal court cases than to the execution of confiscation orders. Confiscation is primarily seen as a cumbersome by-product of a criminal court case, rather than a key issue in law enforcement and the criminal justice process. As long as this reluctance prevails, the proceeds-of-crime- approach can never live up to the expectations of the policy makers.

Recommendation:

A main challenge for the upcoming years is to convince law enforcement officials in the three countries (and Europe at large), that financial policing and the proceeds-of-crime-approach are necessary – and if applied correctly – rewarding elements of their daily work. The exchange of best practices may help them to realise that a financial investigation is much more than a necessary condition for the confiscation of assets.

3.5 Issues for further research

These are issues we came across during our empirical research merely as theoretical problems since no actual cases were these issues were relevant have been recorded so far. However, these issues are potentially problematic and require solutions in compliance with fundamental and procedural rights.

3.5.1 Transfers on Basis of Absentia Proceedings

The German criminal procedural code does not allow for proceedings and judgements in absentia (§230 CPC) based on the rights of defence and the right to be heard. In NL and BE judgements in absentia are legally permitted and quite common. This may lead to the problem that a person convicted in absentia (e.g. a German national) in NL or BE is not eligible for a transfer since the underlying judgement in the certificate is not recognized by German authorities. This, however, may lead to problems when prospects for social rehabilitation are considered better in DE but a transfer cannot be conducted on these formal grounds.

3.5.2 Relation of Victim's Rights to Prisoner Transfers

Victim's rights have become of growing importance as an EU issue over the past few years (see e.g. the victim's rights Directive 2012/29/EU). Victim's rights, however, play no role in FD 2008/909. Victims and their improved protection are mentioned in FD 2008/947 (Article1 lit 1) but a detailed explanation of how this is achieved is lacking. The reason for that seems to be quite simple: transferring the judgement or the sentenced perpetrator out of the country where he committed the crime and thereby putting more space between him/her and the victim may be generally considered in the victim's interest. Nevertheless, in some instances, the victim may have a

reasonable interest of being informed about a transfer or even object to a transfer. This is for example the case when provisions for early release are more lenient in the executing state with regards to FD 2008/909 and the time spent in prison is shorter than expected. With a view to FD 2008/947 it even more problematic if the victim has own social ties or even lives in the executing state and may run into the convicted person while he/she is on probation.

3.5.3 Transfers of Minors and Persons with Mental Disorders

The criminal justice systems of EU member states vary in the way they treat minors and persons with mental disorders. This is to a certain extent also true for the criminal justice systems of NL, BE and DE. FD 2008/909 (Article 9) contains two provisions applicable to situations where minors and persons with mental disorders and/or addictions are involved. In essence, the competent authority of the executing state may refuse to recognize the judgment and enforce the sentence if:

i) the sentence has been imposed on a person who, under the law of the executing state, owing to his/ her age, could not have been criminally liable for the acts in respect of which the judgment was issued; or if

ii) the sentence imposed includes a measure of psychiatric or healthcare or another measure involving deprivation of liberty, which, notwithstanding the possibility to adapt the sentence, cannot be executed by the executing state in accordance with its legal or health system.

While both provisions are designed to protect minors and persons with mental disorders and/or addictions by providing the executing state with a right to refuse this may in practice be more problematic. The FD does not specify how an adaption of the sentence or adequate healthcare provisions for people with mental disorders should be implemented. In fact, these may vary significantly without the executing or the issuing state being aware of it. This lack of information may result in a situation where no proper treatment for these groups of people can be guaranteed.

4 List of recommendations

1. Raise awareness in respect of adequate cross-border enforcement by
   - investing in training and expanding and refreshing knowledge and expertise;
   - rolling out national and European networks of expertise;
   - making the organisation more aware of the need for a complete criminal law chain without gaps.

2. Expand the FASTs' duties with the tracing of convicts' assets. Examine whether it is desirable to create EU-uniform multidisciplinary teams.

3. Expand the FIU network to domains other than just money laundering and terrorism financing. Also make the FIU network accessible to national authorities competent to enforce sentences.

4. Conduct a study of iCOVs and develop an iCOV, or a European iCOV, by following the Dutch example.

5. Expand the scope of application of the SIS (Schengen Information System).

6. Develop a European identification tool based on a hit/no-hit system for sentences involving deprivation of liberty and pecuniary penalties.

7. Develop an EEO (European Execution Order) focusing on cross-border enforcement by analogy with the EIO (European Investigation Order).

8. Develop regulations that enable international cooperation in the enforcement phase by analogy with the regulations governing the JIT (Joint Investigation Team, limited to the investigation phase). The JET (Joint Enforcement Team)

9. Expand the scope of application of the DEP (Digital Exchange Platform) as soon as possible.

10. Link up the national population registers and detention registers; Member States are expected to have these registers.

11. Develop an execution app.

12. Include rules in Framework Decision 2002/584/JHA on the EAW concerning sentences of less than four months and uniformise the various Framework Decisions where overlap is found.

13. Clearly describe periods of time in future regulations. Take a month, for instance; does that mean the number of days in a calendar month or a fixed number of days of 30?

14. Adapt national regulations such that seizure is possible before a confiscation order is enforced.

15. Safeguard the rights of victims in the enforcement phase in future regulations.

16. Explore the possibilities of implementing further regulations in respect of cross-border care and enforcement for convicts with mental disorders.

17. Include in the regulations that driving bans and professional disqualifications imposed have European effect. Explore the option of central registration and the possible information exchange in that regard between the Member States.

18. Explore whether it is desirable to apply a single European, uniform language, in any event where written documents are used.

19. Adapt existing treaties and regulations such that the collection of DNA of convicts residing abroad is permitted.

20. Develop regulations governing the exchange of information between (the) Member States regarding the conditions in national prisons/penitentiaries.

21. Develop regulations governing the exchange of information between (the) Member States regarding early and conditional release. A database accessible to Member States is desirable.

22. A recommendation to DE and BE to develop a method for providing information on the way in which the responsible authorities may be contacted.

23. Create an understanding and appreciation of the various legal systems by having common events and training courses organised to optimise mutual legal assistance.

24. Emphasise during the transfer procedure that social rehabilitation is the main criterion for transfer.

25. Provide sentenced persons with complete and easy-to-understand information about the relevant type of enforcement. Consider seeking legal assistance during a transfer procedure to which the sentenced person objects.
Draft clear criteria with regard to consent to transfer.

26. Develop a harmonised strategy with regard to the definition of the term 'social rehabilitation'.

27. In order to arrive at a good decision on transfer, the issuing State and the executing State should consult in advance.

28. In order to prevent delays in the transfer procedure, providing a complete translation of the judgment is recommended in complex criminal cases or in cases where clear differences exist between Member States in terms of sentencing.

29. Appointing specialist employees or units of employees who focus on the transfer of judgments and prisoners within the public prosecutor's offices of the Member States is recommended. Routine and specialisation are crucial factors in transfer procedures.

30. Explore the need and options for uniform guidelines with regard to alternative sanctions.

31. Pool expertise within the Public Prosecution Service and the police in the area of cross-border execution issues.

32. Emphasise the importance of financial investigations in criminal proceedings; this is much more than just a prerequisite for the confiscation of assets.

5 Conclusions

The wishes and recommendations stated in detail above ensue from the CrossBES (Cross Border Execution of Sentences) project, which was organised by the BES Bureau (Bureau voor Euregionale Strafrechtelijke Samenwerking) and co-financed by the European Commission.

The recommendations are diverse and are addressed to the respective authorities at the European level and to policy makers and legislators in Belgium, the Netherlands and North Rhine-Westphalia. Some recommendations require policy adjustments, whereas other recommendations require an adjustment or harmonisation of working methods, and other recommendations – perhaps the most far-reaching ones – call for the surrender of a negligible part of each country's sovereignty to adapt treaties and national legislation.

The lack of effective enforcement of sentences and measures is a national problem that is even more poignant if the enforcement includes a cross-border component. Since it is to be expected that free movement within the European Union will only increase, it is equally to be expected that the shortages concerning enforcement in cross-border cases will increase.
The Member States still regard sentence enforcement too much as a national matter, while it has grown into a common European problem in the European law-enforcement area. The legal framework, resources and institutions must still be adapted to this.

However, the importance of effective enforcement can hardly be overestimated. This brings us to a more existential question of law enforcement. The more sentences imposed are not enforced, the more this undermines the legitimacy of the rule of law.

In line with this, the question may be asked whether it can be justified in any way that energy and resources are invested in the investigation and prosecution of criminal offences if the efforts and investments made are subsequently undone because there is no enforcement?

This document containing recommendations is an appeal to policy makers and legislators at the European and national levels to resolve the bottlenecks that have been found.

It is recommended that the structures be included and that it be explored whether there is support for any uniformisation at the European level. The various countries seem to have similar structures or instruments at first glance, but their statutory options and embedding in the national structures differs and, as a result, impedes smooth and efficient cooperation. The European Union has defined the mutual recognition of court decisions by means of several Framework Decisions and Directives in the past few years, but it did not make the underlying structures uniform.
Now is the time to provide cross-border enforcement with a systematically proper basis for the years ahead.

6 Follow-up

So how to move forward, now that the CrossBES project ended on 30 September 2019?

As promised in the application for European funding, the recommendations will be communicated to the European Commission and the relevant national governments of Belgium, the Netherlands and North Rhine-Westphalia.

When the recommendations are implemented, it may be wise to launch pilot projects in border areas with a view to testing legislation and to developing best practices. Because of their location and intensive cross-border networks and cooperation, such border areas are an ideal testing ground for discovering and studying new methods and ways of working.

Mindful of the Euregio as a testing ground, the BES Bureau will also attempt to implement some of the recommendations. For instance, it will attempt to launch projects and further explore and develop certain recommendations together with the relevant partners within the frameworks of prevailing treaty rules and laws.
Furthermore, attention will permanently be paid to networking, education and training and to the development, elaboration and implementation of new ideas for the purpose of facilitating, improving and/or streamlining cross-border cooperation in criminal matters.

Finally, we passionately call on everyone reading these recommendations to do everything within their power and to take every decision they are authorised to take in order to put these recommendations into practice and implement them. As the title page says, the best way to predict your future is to create it.

Those who say, 'it can't be done,'
are usually interrupted by others doing it.
- Joel A. Barker -

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