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ET DES GRÂCES



# THE FRENCH TRANSFER PROCESS

## FD 2008/909/JHA

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*EUROPRIS - September 2018*



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There exists various international transfer tools: France is part, in this matter, of:

- **CoE Convention n° 112** of March 21st, 1983  
+ its Additional protocol 167 of December 18th, 1997  
+ thinking in progress to sign the amendment protocole of November 2017
- Convention implementing the **Schengen Agreements** of June 19<sup>th</sup>, 1990  
(art. 67 to 69)
- **26 bilateral treaties** (last one: Peru)
- **Inside EU: FD 2008/909/JHA**



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# I- Modalities of transposition of FD 909 in the French law

Law of August 5<sup>th</sup>, 2013, entered into force the day after  
Articles 728-10 and following of the French CPC.



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## I-1 Main differences with the previous process (under 112/167 CoE conventions)

→ Conditions relating to the sentenced person:

- From citizens (exclusively) to **national or residents** (whatever the nationality)
  - French specificity -
- No more required consent  
(except if the sentenced person is a resident without the nationality)

→ Conditions relating to the sentence:

Control of the **dual criminality** maintained (≠ EAW). No declaration from France about Art. 7§4 FD.



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→ A totally revised procedure:

- from an intergovernmental procedure to a **fully judicialized procedure** (prosecution services): France declared that
  - As issuing State, the public prosecutor of the sentencing court is competent;
  - As executing State, the public prosecutor of the court of residence is competent.
- a standardized procedure on the model produced by the EU
- a procedure framed by the deadlines imposed by the FD 909
- limited criteria of appreciation in law (end of sovereign decisions)

→ Differences in matter of application of the foreign sentences:

The sentence **adjustment procedure**, if necessary, is no more decided after the transfer but BEFORE the final recognition decision, so that the executing State may assess the advisability of cancelling the procedure 909 (respect of safety periods, reduction of the sentence to the legal maximum incurred...).



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## I-2 Other declarations and specificities

### Important declarations:

- About **transitional provisions** (art 28§2 FD): France didn't declare anything about that: FD 909 provisions immediately applicable to all the files sent from August 6th, 2013 (whatever the date of judgment);
- About the **language** of communication (art 23§1 FD): France declared that only French language is accepted - certificate and judgment – .

### French specificities:

- **Practical arrangements** for the handing over of the sentenced persons: the French Prison Central Administration is in charge of it (≠ staff of INTERPOL).



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- **Legal remedies:** FD 909 doesn't impose specific appeals but it evokes them in §22 of its introduction. In France, decisions taken within this framework can be subjects to judicial or administrative appeals:
  - As issuing / sentencing State: the choice of transmitting the certificate to initiate the procedure may be subject to appeal before the administrative court;
  - As executing State (articles 728-48 and f. CPC): the sentenced person has 10 days after notification of the final decision to contest it before the correctional chamber of the court of appeal, the decision of which may itself be the subject of a remedy before the cassation court within 5 days.



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- Specificities in matter of **execution of foreign sentences: *ab initio* reduction credit and additional reductions of sentences**

In application of articles 721 and f. CPC, a convicted receives *ab-initio* a credit of reduction of sentence calculated on the whole duration of the sentence pronounced (3 months the first year and 2 months the years after) + benefits from additional reductions of sentence after each year carried out (3 months max per year).

→ These rules apply only to the duration of the foreign sentence remaining to execute on the national territory on the day of the transfer (article 728-4 CPC).

→ In the other way, **what about these reductions once the sentenced person is transferred in another EU MS?** We'd like to establish synthetic notes for each MS reporting their practice in the execution of foreign sentences and in particular the French ones with that special matter of sentence reductions.

## I-3 Articulation of 584/909 procedures

EAW and transfer procedures enter sometimes in competition. To a certain extent, the FD proposes solutions to hinge on each other.

- EAW aiming the prosecution of a fugitive: process of the « return guarantee » defined at 695-32 CPC; in practice: the prosecutors of the issuing courts deliver the RG. Be aware that it is considered in France as a commitment to proceed a 909 file after the sentence has become final without guaranteeing a favourable outcome.
- EAW aiming the execution of a sentence: art. 4.6 FD EAW has been transposed at article 695-24, 2° CPC in the following way:

*"The execution of a European arrest warrant may be refused if the person sought for the execution of a sentence or a custodial measure is or a French national or has been lawfully resident for at least five years in the national territory and that the sentence order is enforceable in France under the provisions of FD 909".*

*which it totally complies with the **ECJ's Poplawski case law of June 29<sup>th</sup> 2017** .*



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### In practice (EAW for execution of a sentence):

- ✓ If an active EAW is not executed yet: we stop the spread of the EAW and favour the implementation of 909 paying attention to the speciality principle.
- ✓ If the active EAW is already executed (final decision of the foreign competent authority with postponed delivery): negotiations are held with the execution State in order to implement a 909 procedure.
- ✓ If a passive EAW is not executed yet : we propose to the foreign competent authority to stop the circulation of the EAW and to send us the 909 certificate OR we refuse the execution of the EAW on the 4.3 FD EAW basis.
- ✓ If a passive EAW is already executed: negotiations are held between both competent authorities.



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## II- The French use of FD 909



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## II-1 Difficulties identified by the jurisdictions in the use

- identify the foreign competent authority;
- get a quick answer from the foreign authorities;
- respect a heavy formalism: certificate not adapted to the French judicial procedure; notification procedures requiring the moving of the Court or detainee extractions;
- costly end time-consuming translations / interpreting services;
- Respect very short deadlines which do not respond to judicial time.



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## II-2 Current central authority answers to assist

- To facilitate the identification and the communication with the foreign competent authority:
  - **hotline** held by the Office for mutual legal assistance in criminal matters;
  - a **table**, available on its Intranet site, summarizing the declarations of the MS and in particular those relating to the competent authorities;
  - **EJN contact points**;
  - **network of liaison magistrates**.
- To lighten formalism: **reflex notes, schemes and templates** have been developed
- To familiarize with the procedure: **trainings** have been set up in the National schools for judges (ENM) and prison staff (ENAP).



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## II-3 Solutions in the making

An internal working group within the Ministry of Justice has been created this year to implement **detection and information circuits** for convicted prisoners meeting the criteria of FD 909 and create **practical tools** for standardizing the use of the procedure and developing it.

### Examples

- For the detainee: poster in detention; questionnaire on the social, family and professional situation to be distributed in detention after regular detection of profiles;
- For the prosecutors: online uniform templates with translation into several languages for all stages of the proceedings + guide of help with the drafting of the certificate;
- For all actors, including the convicted: “country sheets” listing the declarations of each MS and its peculiarities in the application and execution of foreign sentences (and especially French with the problem of reductions of sentence) WITH YOUR HELP + the set-up of a national phone platform for translation assistance.



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## CONCLUSION

Available statistics show a progressive appropriation of 909 procedure by the French courts but a differential between incoming and outgoing flows still very important.

The balance may eventually be restored by:

- the work in progress in the central authority;
- the work of institutions like EuroPris;
- the learning effect of the procedure, especially since the jurisdictions work mostly with the same states (cf. Cayenne – Netherlands).



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**Thank you for your attention!**

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