



# **REPORT**

## **FD 909 Expert Group Meeting**

**Online**

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**PROMOTING  
PROFESSIONAL  
PRISON  
PRACTICE**

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## **Introduction**

The EuroPris expert group on the transfer of foreign national prisoners was established in 2012 to assist members with the implementation of European Council Framework Decision 2008/909/JHA and examine lessons that could be learned through shared exchange of information. Over the years, the expert group has convened in different formations and sought to share the recommendations of best practice amongst other EuroPris members and European Union Member States.

Due to the importance of this measure to Member States and its impact on the rehabilitation of prisoners, the European Commission provided additional funding to EuroPris to invite all 28 EU Member States to attend the expert group meetings from 2015.

EuroPris was founded with the purpose to promote professional prison practice across Europe and the expert group meets that objective by discussing practical issues and solutions, to support Member States in using the Framework Decision and transferring prisoners to their countries of nationality or residence.

The 2020 expert group meeting was held via Zoom on 23 September 2020 due to COVID-19 restrictions. Experts were representatives of the authority responsible for the transfer of foreign national prisoners which include national prison services, Ministry of Justice, Judges and Prosecutors.

The meeting was jointly chaired by Graham Wilkinson (in a private capacity) and Kirsten Hawlitschek (EuroPris). This report, prepared by Nalini Hussain, presents a summary of the discussions.

## Attendees

| Name                   | Organisation                               | Country          |
|------------------------|--|------------------|
| Christine Goedl        | Austrian Federal Ministry of Justice       | Austria          |
| Sava Petrov            | Supreme Cassation Prosecutors Office       | Bulgaria         |
| Andreas Kyriakides     | Ministry of Justice and Public Order       | Cyprus           |
| Jitka Formankova       | Prison Service of the Czech Republic       | Czech Republic   |
| Karen Brogger          | Ministry of Justice                        | Denmark          |
| Olivier Courche        | Ministry of Justice                        | France           |
| Solveig Volquardsen    | Federal Ministry of Justice                | Germany          |
| Georg Schafer          | Federal Ministry of Justice                | Germany          |
| Jūlija Muraru-Kļučica  | Ministry of Justice                        | Latvia           |
| Andrada Bavejan        | Ministry of Justice                        | Lithuania        |
| Angele Vella           | Office of the Attorney General             | Malta            |
| Amadessa Schipper      | Dutch Custodial Institutions Agency        | Netherlands      |
| Joana Gomes Ferreira   | Attorney General's Office                  | Portugal         |
| Emanuela Mirita        | National Administration of Penitentiaries  | Romania          |
| Lucian Dobrogeanu      | National Administration of Penitentiaries  | Romania          |
| Nina Chlapečková       | General Directorate of the Corps of Prison | Slovakia         |
| Maximo Martinez Bernal | Directorate General of Prison Services     | Catalonia, Spain |
| Asa Gustafsson         | Swedish Prison and Probation Service       | Sweden           |
| Lisa Gezelius          | Swedish Prison and Probation Service       | Sweden           |
| Kirsten Hawlitschek    | EuroPris (Chair)                           |                  |
| Nalini Hussain         | EuroPris                                   |                  |
| Ele-Marit Eomois       | European Judicial Network Secretariat      |                  |

| Name              | Organisation                          | Country |
|-------------------|---------------------------------------|---------|
| Ianina Lipara     | European Judicial Network Secretariat |         |
| Dr. Robin Hofmann | Maastricht University                 |         |
| Graham Wilkinson  | Co-Chair (private capacity)           |         |

## **Presentation: Maastricht University – Prisoner Transfers between the Netherlands, Germany and Belgium – EU Research Project CrossBES**

Dr Robin Hofmann, Assistant Professor in Criminal Law and Criminology at Maastricht University, gave an overview of the empirical results from the above research project. The objective of the project was to obtain a comparative analysis of cross-border cooperation between the Netherlands, Belgium and Germany, with a focus on the implementation of the relevant EU Framework Decisions in daily legal practice.

The main observations made from the project in relation to FD909 were:

The law does not require consent from the prisoner but in reality, a prisoner is always asked whether he/she consents to transfer.

The principle of mutual trust and recognition – whilst the reasons for mistrust are complex and cannot easily be explained, it was found that the issue was a minor yet existing one. The study recommended MS could enhance mutual recognition by enhancing mutual trust for example by holding common events/training with MS and establishing permanent communication channels.

Reliable and consistent assessment of prison conditions – deteriorating prison conditions are a significant problem among a number of MS. It was mentioned that the Council of Europe had made some progress to address these issues.

Varying sentence and execution modalities – prosecutors would complain about variations in early/conditional release provisions in different MS and found that sentencing information was unclear or not available even for neighbouring countries.

There was no clear standards on the adaption of sentences.

The basis of sentence calculations is a problem. Not every MS applies the same method for converting a sentence into days which results in a different calculation made by the issuing State and calculations made by the executing State. The variety of calculations posed significant problems in determining the amount of time to be spent in custody and the calculation of provisional release dates.

A copy of Dr Hofmann's presentation and accompanying leaflet can be found here:

<https://www.euopris.org/file/crossbes-project/>

The co-Chair thanked Dr Hofmann for his presentation and added that a number of issues raised by the project, e.g. the issue of consent and differences in release arrangements, had been regularly debated by the FD909 expert group over the years. Also, transfers on the basis of absentia proceedings continue to be an issue however there seems to be no solution to this complicated problem.

A representative from the EJM congratulated Dr Hofmann on the research findings and asked how the statistical data provided in the presentation had been gathered. Dr Hofmann advised the data had been provided by the relevant Ministry of Justice albeit, these numbers had not been published by the Ministries themselves.

### **Group discussion: COVID-19 - Arranging surrenders under EAWs and managing prisoner expectations**

The group firstly discussed the challenges in arranging surrenders under EAWs. A MS advised that there had been limited prisoner transfers during the pandemic due to the lack of flights. However, surrenders had taken place from neighbouring countries as the journeys had been facilitated by road across the borders. An attempt had been made to surrender a prisoner from another MS but as this required transit via two other MS, even by road, this had not been possible.

Another MS commented that scheduled transfers had been cancelled as prisoner transfers were not considered 'essential travel' during lockdown.

A representative from the EJM commented most extradition surrenders had been postponed but confirmed surrenders between bordering countries were still taking place. There were very few surrenders taking place by air and if there was a second wave of COVID-19, there was a possibility that surrenders would be limited again.

The co-Chair commented that if surrenders became difficult again due to COVID, there would be an increase in applications from MS requesting States to take-over enforcement of sentences.

The group moved onto issues relating specifically to COVID. A MS state advised they had been badly affected by COVID and only 7 prisoner transfers had been completed in 6 months although all 7 transfers had been completed in July and August 2020 when travel restrictions had eased. The MS had worked hard to make transfers possible by carrying out COVID tests and quarantining prisoners prior to his/her transfer date. Interestingly, prisoners within the MS were of the opinion that they were safer in custody as precautions against COVID had been taken. Also, family visits had stopped in April 2020.

One MS commented that all visits had ceased within their prisons. All incoming prisoners were placed in isolation for 14 days and if they showed no COVID symptoms, were moved into the general prison population.

Another MS commented that incoming prisoners also spent 14 days in isolation and visits had been limited to just one person being able to visit a prisoner. The MS asked how other MS dealt with the isolation issue in their own prisons.

One MS replied there were a number of prisons in their country which took prisoners directly from court. These prisons had 'reverse cohort units' available whereby all new prisoners were housed in these units before being released into the general prison population.

## **Use of FD909 by the UK in relation to BREXIT**

The co-Chair confirmed that the BREXIT transition period was ending on 31 December 2020. In the absence of an alternative prisoner transfer agreement being negotiated between the UK and the EU, from 1 January 2021, new transfer requests to and from the UK would be under the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons.

The co-Chair also asked the MS to note that under Article 62(1)(f) of the Withdrawal Agreement between the UK and EU, any certificates issued before the 31 December 2020 will continue to be determined under FD909.

A MS commented that their Courts may have a different view on the above and there was a possibility that they would not consider any certificates in 2021 even if the certificates were submitted to the MS before the 31 December 2020.

## **Group discussion: Consideration of victims, prisoner social ties and prison conditions in relation to transfer**

This discussion was led by Amadessa Schipper from the Dutch Custodial Institutions Agency.

### **Victim issues**

Amadessa advised many prisoners were transferred to the Netherlands and public prosecutors were being asked if victims had been informed of a prisoner's transfer. Also, the rights of victims in the Netherlands are increasing and there had been a discussion on whether there should be a section included in the certificate regarding whether victims had been informed. Amadessa stated that it was difficult to contact or find victims in order to get their opinion and asked if any of the MS had the same issues.

A MS commented that the last five prisoners transferred to the Netherlands had been convicted of drug offences and as such, there were no victims. However, there had been an issue with a murder case which was delayed by 10 months as the prosecutor was unable to get hold of the family.

Another MS commented that in their country, there was a special law for victims whereby if the victim requests any information on the prisoner, the victim must be informed, e.g. if the prisoner is released or escapes custody.

Another MS stated that they were obliged to inform a victim of a decision to transfer a prisoner however, the opinions of victims are not sought in general.

The co-Chair commented that in the UK, victims are entitled to register with the Victim Contact Scheme. The victim is then informed of any matters relating to a prisoner's release, either temporarily or permanently or, if a prisoner is transferred to a different prison. In relation to FD909, victims' views are sought and whilst a victim has no veto over transfer, consideration will be given to their views. In instances where the victim's opinions are very strong, a decision on transfer will be taken by the Minister for Justice.

The co-Chair commented that victims generally fell into two categories when it came to prisoner transfers - those that want the prisoner transferred and those who are of the opinion that a prisoner should remain in the sentencing State because he/she would have an easier time in prison in the executing State. The latter generally ask about release conditions in the executing State. The co-Chair also commented that FD909 was 'quiet' on victim's views but it is important to pass on concerns of the victim to the foreign jurisdiction. It was suggested that the European Commission should be looking at incorporating victims' views into FD909.

### **Social ties**

Amadessa continued the group discussion in relation to social ties of the prisoner. In the Netherlands, consideration of a person's nationality, whether he/she resided in the Netherlands five years prior to arrest and whether there is a deportation order in place for the prisoner is taken. However, in the instance where the prisoner has emigrated from the Netherlands, consideration of the transfer can only be on the basis of nationality. As rehabilitation is one of the main objectives of FD909, the prisoner has to have social ties in the Netherlands.

A MS commented that in their country all transfer applications for their nationals are considered irrespective of whether the person emigrated from the MS.

Another MS commented that a sentenced person is interviewed to establish any social ties. Also, during consideration of an application, the prison is asked to provide details of the prisoner's visitors.

### **Prison conditions**

Amadessa commented that the Netherlands consider prison conditions in relation to extradition and gave an example of a MS the Netherlands would not extradite a person to.

One MS commented that consideration of prison conditions is also taken but they also ask for guarantees from other jurisdictions. Also, a decision to send a certificate is taken by the Court who can refuse the forwarding of a certificate if they deem the prison conditions in the other jurisdiction to be unsatisfactory.

The co-Chair commented that in the UK, extradition is a matter for the Courts whilst prisoner transfer is a matter for the Minister of State and is therefore not a judicial decision. However, collaboration with extradition colleagues does take place to ascertain whether there are issues with prison conditions in particular MS. If so, the UK will seek assurances from that MS before sending a certificate. In addition, prisoners will often raise the issue of prison conditions in the executing State and therefore assurances will be sought in respect of that individual prisoner. The UK will not proceed with transfer if assurances are not given or are unsatisfactory.

Another MS commented that in relation to seeking assurances, the principle of mutual trust is important. It is unfair to target a whole country when prison conditions might be poor in only one establishment and we should be careful when offering criticism.

Another MS commented that if a prisoner does not want to be transferred due to prison conditions, they ask the executing State for concrete assurances regarding prison conditions as well as taking into account the ECHR jurisprudence and other sources.

One MS asked how one evaluates prison conditions. The co-Chair advised the Committee for the Prevention of Torture (CPT) reports are a good source of prison conditions across Europe.

## **Update from the European Judicial Network**

Ele-Marit Eomois thanked EuroPris for inviting her to the meeting and apologised that she was unable to attend last year. An update was given on recent EJM discussions in relation to COVID-19 as well as a presentation on EJM conclusions on Mutual Recognition instruments 2018/19.

A summary of discussions from the EJM videoconference on COVID-19 measures and the presentation on EJM conclusions can be found here:

<https://www.europris.org/file/ejm-presentation-on-covid-19/>

The main points from the EJM conclusions on Mutual Recognition instruments were:

- There were difficulties in identifying the correct competent authority to send certificates to and therefore the continuous update of the EJM atlas tool was important.
- National intranet pages should share EU/national guidelines, best practice/handbooks.
- EJM practitioners should be involved during the EU legislation process.
- The EJM proposed that MS raise awareness of FD909 amongst their defence lawyers
- Imprisonment in lieu of a fine is unable to be enforced by some MS under the application of FD2005/214/JHA on financial penalties.
- Minor custodial sentences with a maximum of 6 months imprisonment is refused as enforcement cannot take place.

The co-chair thanked Ele-Marit and commented that it was good to hear that some of the issues raised by the EJM have been previously discussed in the FD909 forums. Comments to some of the points raised by Ele-Marit are as follows:

- The issues in relation to minor sentences was a problem as in reality, the prisoner could not be transferred due to the time it takes for an application to be determined.
- Also, FD909 states 6 months of a sentence has to remain in order for transfer to take place.
- The group should look at training elements at a local/national level regarding defence lawyers in relation to FD909. Many were unaware of the ability to 'take over' sentences under FD909.

It was also commented that the EJN expertise in relation to FD909 should be utilised by all MS.

## **Conclusion**

The Chair passed on apologies from Kris Van Opdenbosch (Belgium) and Eniko Felfoldi (European Commission) who were unable to attend the meeting due to technical problems. A reminder was given to the group to check the EuroPris website for the latest information. The Chair added that if any of the MS had any pressing issues, another Zoom meeting could be arranged.

The co-Chair commented that the benefit of the expert group is there is a lot of experience with regards to FD909 and we should use each other's expertise and make the most of the group during the year rather than waiting for the next annual meeting. Given the current climate with regards to COVID, the co-Chair encouraged the MS to have meetings via Zoom (for example) with other MS if particular difficulties were encountered with prisoner transfers.

Thanks was given on behalf of EuroPris and all the attendees.

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