



REPORT

FD 909 Expert Group Meeting

**Online
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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 2021 expert group meeting was held via Zoom on 28 September 2021 due to COVID-19 restrictions. Experts were representatives of the authority responsible for the transfer of foreign national prisoners which include national prison services, Ministries of Justice, Judges and Prosecutors.

The meeting was chaired by Kris Van Opdenbosch (Belgium). This report, prepared by Nalini Hussain, presents a summary of the discussions.

Attendees

Christine Goedl	Austrian Federal Ministry of Justice	Austria
Kris Van Opdenbosch	Federal Public Justice Service	Belgium
Sava Petrov	Supreme Cassation Prosecutors Office	Bulgaria
Andreas Kyriakides	Ministry of Justice and Public Order	Cyprus
Constantina Sophocleous	Ministry of Justice and Public Order	Cyprus
Jitka Formankova	Prison Service of the Czech Republic	Czech Republic
Charlotte Holm	Danish Prison and Probation Service	Denmark
Natasia Nielsen	Danish Prison and Probation Service	Denmark
Andrea Bjork Paulson	Danish Prison and Probation Service	Denmark
Carina Bull	Ministry of Justice	Denmark
Mia Sandberg	Criminal Sanctions Agency	Finland
Maria Kulmala	Criminal Sanctions Agency	Finland
Olivier Courche	Ministry of Justice	France
Teresa Steiger	Federal Ministry of Justice	Germany
Georg Schafer	Federal Ministry of Justice	Germany
Gabor Balasko	Ministry of Justice	Hungary
Cristina Lucchini	Ministry of Justice	Italy
Jūlija Muraru-Kļučica	Ministry of Justice	Latvia
Andrada Bavejan	Ministry of Justice	Lithuania
Angele Vella	Office of the Attorney General	Malta
Jan-Peter Bodengraven	Dutch Custodial Institutions Agency	Netherlands
Chris Beuze	Dutch Custodial Institutions Agency	Netherlands
Fieke van Kuijk	Dutch Custodial Institutions Agency	Netherlands
Emanuela Mirita	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 Brask Gustafsson	Swedish Prison and Probation Service	Sweden
Lisa Gezelius	Swedish Prison and Probation Service	Sweden
Gustav Tallving	EuroPris	
Nalini Hussain	EuroPris	
Anton Arabadzhiev	EuroPris	
Ele-Marit Eomois	European Judicial Network Secretariat	
Maija Andrijauska	European Judicial Network Secretariat	
Eniko Felfoldi	European Commission	
Sveva Franco	European Commission	
Adriano Martufi	Leiden University	

Update from the European Judicial Network (EJN)

Ele-Marit Eomois, legal specialist from the EJN Secretariat, thanked EuroPris for inviting her to the meeting and for their continued cooperation. She gave an overview of the EJN structure and highlighted issues in relation to mutual recognition instruments and specifically, FD909.

Ele-Marit happily noted that there were several EJN contact points in attendance at the meeting. She explained that the EJN was a network of over 300 contact points nominated across the EU MS. The high number of contact points was because MS do not just nominate one person, but as many as necessary, taking into account the judicial system in that particular country. Contact points are made up of prosecutors, Judges and Ministries of Justice and the EJN also have contact points in non-EU countries. The main function of the EJN is to facilitate and act as an intermediary between MS to speed up processes and cases. As experts in international judicial systems, the EJN also provides practical and legal information to colleagues and practitioners in the MS.

One of tools the EJN have for contact points are the EJN meetings. These meetings help contact points get to know each other and exchange expertise. The meetings also act as a forum for discussions on practical and legal problems encountered in the daily work of the MS. Discussions are had on different Framework Decisions including FD 909, how to use it in practice and how to apply best practice.

A presentation was shared, which illustrated amongst other things, the use of different mutual recognition instruments across the EU MS (of which FD909 was the most popular) and a breakdown of crimes across the different instruments. This data was obtained from EJN contact points and not from practitioners.

General observations made by EJN contact points in previous meetings were that although FD909 was very much used, it should still be a topic raised in different forums and that training needs to continue both at a national and EU level, with involvement from both the EJN and European Judicial Training Network. Also addressed was the difficulty in finding the correct contact details of central authorities to address certificates to. The solution to the latter was for the EJN Atlas tool to be properly maintained and continually updated to be of use to MS.

EJN contact points also proposed that national intranet pages were used as a tool to share EU guidelines, best practice, handbooks etc. Another importation conclusion made at the EJN meetings was that it would be effective to involve practitioners, not just for FD909, but for other instruments during the legislative process, as practitioners had the practical experience of using these instruments.

Other problems noted in relation to FD909 were that the adaption of sentences was a challenge due to the way MS calculate sentences for the crime in question; imprisonment in lieu of a fine could not be enforced by MS and, enforcement of minor custodial sentences was also problematic.

Ele-Marit also advised that the EJN website was being updated by the end of the year.

The Chair thanked Ele-Marit for her presentation. As an EJN contact point himself, the Chair stated that he used the EJN tool on a daily basis not just for FD909 but for legal assistance requests, European Investigation Orders and European Arrest Warrants.

A copy of the EJN presentation can be found here:

Group Discussion: How do MS find contact details for competent authorities?

This discussion was led by Natasia Nielsen from the Danish Prison and Probation Services (DPPS). She explained that they would soon become the case-working authority for Denmark on FD909 and had tried to map out how to process cases and had considered if there was a way to expand the cooperation between MS. Accordingly, it could benefit everyone in the forum to have a contact list for all the competent authorities which would be of use to all.

She was aware of the EJM Atlas, but it appeared that this was not fully updated with details of all MS. It would be beneficial to have direct phone numbers and email addresses for the competent authorities rather than generic email addresses. Natasia noted that the presentation from the EJM mentioned the Atlas tool however being new to FD909, the DPPS wanted to bring this up as an agenda point.

The Chair commented that from the Belgian perspective, he had found the EJM Atlas a good tool to find relevant contact details. The Chair used an example of when transfers by air restarted during the pandemic. As Belgium's national airline did not fly to a lot of destinations, it was necessary to transit many prisoners through a third country. The Atlas tool was of use in finding the correct contacts for those jurisdictions.

A MS stated that they used the EJM Atlas regularly but found that contact details for some MS were either not updated or did not exist. In some cases, where an email address was provided, no response was received. The MS stated that their Ministry of Justice had a generic email address for the unit and all emails were checked on a daily basis and forwarded to the competent prosecutor or Judge.

Update from the European Commission

Eniko Felföldi, on behalf of the Commission, thanked EuroPris for their work and congratulated Gustav Tallving on his appointment as EuroPris' new Executive Director. She was also happy to see so many experts in attendance at the meeting.

Eniko provided recent updates in relation to FD909 and to Commission policy developments in the field, specifically;

1. The Court of Justice rendered a judgment on 15 April 2021 in relation to case number C221/19. In this case, a Polish national brought an application seeking an aggregate of two criminal decisions from two different Member States, namely Germany and Poland. The sentence had been recognised for the purpose of enforcement in Poland. The Court of appeal was asked whether under FD909, it is possible to transfer an aggregate sentence which includes a sentence imposed by a MS which was taken over for execution by another MS with the conviction handed down in the latter state.

The Court of Justice replied that aggregated sentences can be transferred on the basis of FD909 but with limits under the Framework in relation to the following:

Article 8, paragraphs 2 and 4 - an aggregation of sentence should not lead to an adaptation in nature or duration of the sentences;

Article 17, paragraph 2 - such aggregation should not breach the obligation of the executing State to deduct the full period of deprivation of liberty already served;

and ,

Article 19 paragraph 2 - such a takeover of sentence should not lead to review of the judgment imposing the sentence to be enforced.

Eniko stated that the judgment would have an effect on the practical handling of cases. A copy of the judgment can be found here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CJ0221&from=ET>

2. Case 919/19 – whilst there was no judgment yet, the opinion of Advocate General Bobek was delivered on 3 June 2021 regarding a case between Slovakia and the Czech Republic on the concept of social rehabilitation of the sentenced person and the execution of the sentence in the Member State of which the person is a national.

The opinion of the Advocate General can be found here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CC0919&from=IT>

Other Commission work mentioned was as follows:

- The EC has finished the study of the transposition of national laws to which MS have contributed.
- All Member States have transposed FD909 apart from Ireland. The EC took the necessary steps and launched non-communication infringement procedures in January 2019 with a formal notice. No satisfactory response was received from Ireland, so the EC moved to a reasoned opinion in July 2019 but there was still insufficient progress from Ireland. The final stage of the infringement procedure was referred to the Court in December 2020 – case C125/21 refers. This matter remains outstanding.
- Ninth round of mutual evaluations: Due to COVID19, meetings were carried out on-line however, there are still 17 MS still to be verified. The EC plans to have the evaluations finalised by mid-2022.
- Detention conditions: The EC completed investigations with the MS to look at alternative ways to improve detention conditions within the EU. There will be high level talks with the Ministers of Justice in coming months and it was hoped that policy papers would be in place by the end of 2022.

The Chair thanked Eniko for her contribution to the meeting.

Research project: The cross-border dimension of punishment in the EU. An integrated approach: criminal law, penology and crimmigration

Adriano Martufi, Assistant Professor of Criminal Law at Leiden University, extended his gratitude to EuroPris for allowing him to share his research project with the expert group.

Adriano explained that although much of his time was devoted to teaching, he also conducted research and had been awarded a grant to conduct research in the context of transfer proceedings within the EU and particularly the transfer of custodial sentences between the MS.

In the first part of his research project, Adriano advised that he would be focussing on FD909. The starting point for his research was the fact that FD909 is a complex instrument because it contains different set of priorities and to some extent, it shows a contradiction between its goals. For this reason and, for reasons already highlighted in academic literature and by practitioners and was wise to look at FD909 from a multi-disciplinary perspective and the research project will try to combine different insights. Adriano has a background in comparative and European criminal law, but he also specialises in matters of penology (the study of the goals of punishment and sentencing) and looking at criminal/EU law should be complemented with an insight of the penological goals of FD909 to fully understand it's function. Adriano also stated that we should look at what academics call 'crimmigration' – a combination of criminal law and immigration control. FD909 stands in the intersection between the enforcement of sentences and immigration control, in particular, but not exclusively, in relation to the movement of EU citizens.

The initial goal of the research project at this meeting was to understand the decision-making which leads to the issuing of a certificate. Article 4 (1) of FD909 mentions social rehabilitation as the underlying rationale to issue a certificate. However, if you look at the functioning of the FD909, Article 4(1)(b) (convicted persons subject to a DO/expulsion order) has greatly to do with fulfilment of immigration control techniques. Some scholars have argued that FD909 may also be used for managerial purposes, namely as a way to reduce prison population and prison overcrowding.

Adriano also wanted to discuss with the expert group the interpretation of the EU charter on fundamental rights in relation to, but not exclusively to, prison conditions and EU priorities on punishment under Article 83 of the Treaty on the Functioning of the European Union. He also commented that regard must be given to the interaction of FD909 with the national laws of the MS which regulate sentence enforcement.

Prior to the meeting, a vignette was sent to all participants of the FD909 meeting. The vignette provided information on a fictional scenario relating to an outgoing prisoner transfer and read as follows:

VIGNETTE: Marco S. has been sentenced to 10 years of imprisonment in your Member State. He has been convicted for burglary, theft (as was stopped driving a stolen car) and cannabis possession without intent of supply. Marco S. is a national of the Member State X and he has moved to your country 5 years ago as a EU citizen to look for a job. During the first period in your country, he was employed irregularly and had different jobs. Finally, for the last two years, he worked for a carwash with a regular contract, before losing his job after being arrested and brought to trial. At the time of his final conviction he had no official registration as a resident in your country. While working in your country he had a stable relationship with a woman, from whom he had two daughters. After serving approximately half of the sentence (upon deduction of the period spent in pre-trial detention) he is informed about the possibility of a transfer to Member State X. He expresses orally his preference for serving the sentence in your country, referring to the presence of his family there and to realistic prospects of employment once released from prison. This stance is also confirmed by the fact that, from documents available to you, it appears that during his time in prison Marco S. performed some work as part of his sentence plan. From a preliminary consultation with the issuing state it however appears that only the sentences imposed for burglary and theft can be recognised and enforced in the executing state, due to the lack of double criminality for the offence of cannabis possession without intent of supply. In addition, in the Member State X the prisoner will be soon become eligible for early release thereby serving only 1 year and 6 months of imprisonment in the executing country.

Participants were asked to familiarise themselves with the vignette prior to the meeting but were also given the opportunity to read it during the meeting. There was a section within the vignette where participants were asked to indicate how they would handle the case on the law regulating outgoing transfers in their jurisdiction, indicating any intermediary steps taken if any, for example, consultation with the executing State or questions to prison authorities.

Participants were also asked to provide limited personal information, i.e., their names, country of origin and whether they were involved with the transfer of prisoners as an issuing or executing authority or both. The information would only be used as part of today's exercise and would be confidential and GDPR compliant and would not be used without the consent of the individuals concerned.

Adriano commented that as experts, the group should be familiar with the scenario posed in the vignette. The Chair responded that despite them all being experts, transfer cases were increasingly becoming more complicated. The Chair also asked how long it would be before the results of the research project were known. Adriano advised that if all participants consented to their details being used, a working paper with provisional findings would be produced as soon as possible but it would also depend on how many people completed the vignette.

After reading the vignette, participants were divided into virtual break-out rooms and each 'room' were given time to discuss the case study. A previously agreed focus group were recorded with their permission. Following break-out room discussions, participants returned to the plenary and a spokesperson from each group shared the main points from their room's discussion, and specifically, whether a certificate would be issued on the information provided.

The main areas of agreement from all the break-out rooms were:

- There was a reluctance to send out a certificate in this particular case.
- It was clear that the sentenced person had close ties, work prospects and residency in the issuing State and therefore this was a clear argument against not issuing a certificate.
- Rehabilitation was a key factor in this case.
- No expulsion order had been sought against the sentenced person by the issuing State.
- It was recognised that different MS have more flexible/inflexible policy approach to this type of case.

Other comments made, in relation to the vignette, were as follows:

- One MS stated that in their country, residency of the sentenced person is considered regardless of whether or not that person was a national of the issuing State. As long as the prisoner has resided in the issuing State for more than 5 years, this would be considered when deciding whether to issue a certificate.
- One MS said it was difficult to make a decision from his country's perspective as they primarily dealt with incoming transfers of their own nationals and not outgoing transfers. However, it was clear in this case that rehabilitation was a main factor and that a certificate would not be issued.
- The same MS stated that another possible obstacle was the early release of the prisoner in the executing State. The MS advised that in his country, early release is not guaranteed. In relation to the vignette, the prisoner would not have been in custody long enough in the MS jurisdiction for his behaviour to be evaluated to decide whether he could be released early.
- The same MS also commented that another possible complication was the necessity to discuss partial recognition of the sentence if the certificate was issued. One of the crimes did not meet the requirements of dual criminality and this was another reason not to issue a certificate.
- Another MS stated that the fundamental rights of the prisoner going forward, would be affected if transferred, for example, no right to probation measures or conditional release.
- The same MS stated that in his country, the prisoner is informed at every step of the way about the transfer process. From day one, even if the individual has not been sentenced yet, the transfer process is explained. The prisoner's family situation, educational needs, employment prospects and language skills are evaluated. Once the sentence becomes final, a meeting with the prisoner takes place and options for transfer are discussed as well as the issue of consent.
- The same MS commented that criminal and immigration policy makers also affect the effectiveness of FD909. In his break-out room, two MS agreed to issue a certificate and two did not. This was not based on the principle of legal matters as the views on this were the

same. The two MS who would issue a certificate would have been compelled to do so due to their policy on this particular case.

- One MS commented that in their country, the time to serve and the opinion of the sentenced person is taken into consideration.
- MS preferred to use FD909 rather than just expel a prisoner from the issuing State.
- One MS said they would not send out a certificate without the consent of the prisoner.

The Chair was the spokesperson for the focus group and advised that the group had mainly discussed compulsory transfers. He commented that in Belgium, the Central Authority can screen, through the prison database, for those prisoners who are eligible for transfer on a compulsory basis, that is, where the sentence is final, the length of sentence is more than 3 years and where a deportation order is in place. The Chair also said that in Belgium the Central authority were privileged to have access to the Belgian national registry so they could check directly if a prisoner had an official address or relatives living in Belgium. This was not something that other MS had access to. The Chair also advised that they were in contact with prisons on a daily basis to gather information on sentenced prisoners.

The general view from the focus group was that there was a distinction between a case where there was no deportation order and therefore the case clearly fell into the category of Article 4(1)(a) where a full assessment on the social rehabilitation of the sentenced person could take place, as opposed to where a deportation order was issued or pending, and therefore that case would fall under Article 4 (1)(b) where rehabilitation prospects are assessed in a different way.

The focus group concluded that it was better to transfer a prisoner under FD909 so the prisoner receives some guidance in terms of rehabilitation in prison rather than waiting until the end of the sentence for the person to be deported where he/she would have no real guidance or follow-up upon release.

The Chair made a general comment that in Belgium, studies had revealed that it cost €175 a day to keep a prisoner in custody and in the case of mentally disordered offenders, nearly €400 a day. The Belgian Government had commented on the high costs, and this had an effect on their policy making.

One MS advised that when FD909 was implemented into their national law, policy makers in the Ministry were eager to push the Framework forward as a way to have less people in prison in their country. A more flexible approach was however taken and now less than 5% of cases were transferred once the social rehabilitation of the prisoner had been considered.

Concluding remarks from Adriano were that there was a mismatch between declared objectives from policy makers and how FD909 works in practice which might not align perfectly with the objectives of the policy makers.

Adriano also circulated a questionnaire to the group regarding their opinion on social rehabilitation in the context of FD909. He asked the group to complete this when they were able to, in order for

Adriano to assess and understand how MS practices' on FD909 align or do not align with the declared objectives of the EU legal framework. The feedback from the questionnaire would also help his research project.

Adriano mentioned the case of C919/19, which had been discussed earlier by the EJM, where the Advocate General gave a strict view of how social rehabilitation should be viewed under FD909. Amongst other things, the opinion of the Advocate General gave executing States the power to refuse a certificate based on the lack of social rehabilitation.

Adriano's personal view, as a non-practitioner, was that if the Advocate General's opinion is endorsed by the Court of Justice, it will have a transformative impact on both issuing and executing authorities. It would therefore be interesting to know how the MS interpret the statements asked in the questionnaire.

Adriano thanked EuroPris for allowing him the opportunity to talk about his research project and thanked the participants for their time. He advised that he may get in touch with some participants to ask follow-up questions and that he looked forward to collaborating with the expert group in the future

The Chair thanked Adriano for his interesting presentation and commented that he hoped for further cooperation in the future. Thanks were also given to Anton Arabadzhiev (EuroPris) for his technological support which allowed for the break-out rooms to be facilitated via Zoom.

Translation of judgments

This discussion was led by Lisa Gezelius from the Swedish Prison and Probation Service. She commented that this had been discussed before in meetings however Sweden would like the views from the other MS on whether they need the judgments translated or whether the information provided in the certificate is enough.

The Chair advised that FD909 states that the whole judgment does not need to be translated however, Belgium provide translations as they have the budget to do so, and the provision of translations makes it easier for the executing State to manage an application. Therefore, they translate all documents provided with a certificate, not just the judgment.

A MS advised that they included pertinent facts of the case in the certificate and that these facts were copied from the judgment although the judgment itself, was also provided. The MS also found that some MS requested that judgments were translated in total and when asked why (as the pertinent facts are on the certificate), the executing State have said that they will recognise the judgment and not the certificate.

Another MS advised that they provide a translated certificate only. If the executing State requests more information, the MS will translate the relevant part of the judgment or provide the facts on a separate document.

The Chair commented that it is necessary to provide a decision in the language that the sentenced person understands. Also, translations are beneficial to the penitentiaries themselves as prison staff need to know what paperwork they are serving.

Another MS stated that it is part of their legal proceedings for their Courts to translate a decision into the language of the prisoner.

Conclusion

The Chair thanked everyone for participating in the meeting and hoped that everyone found it interesting. He also thanked the EuroPris Secretariat for organising the event and that he hoped to see everyone in person next year.

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