

Meeting with EU Member States' experts on the implementation of the Framework Decisions 2008/909/JHA (Transfer of Prisoners), 2008/947/JHA (Probation and Alternative Sanctions) and 2009/829/JHA (European Supervision Order)

Brussels, 13 November 2013

The meeting was chaired by **Olivier Tell (European Commission)**. His key points in an opening address were:

- The Commission (COM) is working with EU Member States (MS) towards the timely implementation of the three Framework Decisions (FDs).
- In June 2011, COM issued a Green Paper on how to strengthen mutual trust in the field of detention. It is clear from replies by MS to this Green Paper that the FDs need to be implemented before new legislation in the field of detention at EU level should be considered.
- The deadline for implementation passed in 2011 and 2012 and yet many MS have not met their obligations. 16 MS have implemented the FD on Transfer of Prisoners, 12 have implemented the FD on Probation and Alternative Sanctions and 10 have implemented the European Supervision Order.
- While COM recognises that some have implemented the FD, the overall level of implementation is far from satisfactory.
- COM advises citizens that, as from 2014, the full jurisdiction of the Court of Justice of the European Union will apply such that COM could then launch infringements for non-transposition.
- COM will publish an implementation report in 2014.
- The three FDs and the European Arrest Warrant (EAW) should be seen as package of complementary legislation and one cannot be implemented without the other.
- There are links with the EPO in criminal matters and the Victims Directive.
- There are opportunities for training legal practitioners in EU funding programmes.
- It is important to build up a network – hence the importance of these meetings.
- MS are recommended to work with bodies such as the European Judicial Network (EJN), Eurojust and Europris. They have an important role in the practical implementation of these instruments.

Framework Decision 2008/909/JHA (Transfer of Prisoners)

Presentation of conclusions of Europris expert group on FD 2008/909/JHA by Graham Wilkinson from the National Offender Management Service, UK Ministry of Justice (reporting on behalf of Europris)

Europris is an association of the national prison authorities of the EU, registered in 2011, which brings together practitioners to promote ethical rights in imprisonment, exchange information and provide expert assistance.

A working group on the practicalities of FD 909 has produced two reports, with the first, in 2012, focussing on the implementation of transposition of the FD and the second, in 2013, focussing on the practical experience of prisoner transfer as executing or issuing State.

The numbers of prisoners transferred remains small but the working group considered common problems and suggested solutions.

The FD can change how prisoner transfer is undertaken and will speed up and simplify the transfer process and contribute to the social rehabilitation of offenders.

It is important to have access to accurate and up to date information.

The working group looked at the provision of information and suggested the following:

A database with key information for those considering whether to issue a certificate or not (e.g. a list of declarations by MS, information on early and conditional release arrangements).

The prisoner should be given enough information on the release to make an informed decision.

COM produces implementation updates, which are available on the Europris website.

A central database could be used – the information here needs to be simple and understandable (e.g. talking about the effect of conditional release arrangements). For it to work MS need to take responsibility to update this information.

Factsheets for staff (basic information and not too long) with information on who to contact, languages spoken, easily understandable conditional release schemes, prison regime, declarations (including double criminality) and practical arrangements (e.g. the Central Authority may not always be responsible – it could be the police, prosecutor or other – knowing who to contact would be a big benefit).

Factsheets for prisoners (basic information and not too long) providing a short description on the process of transfer (including who makes decisions and the appeal possibilities).

Factsheets can be onerous at the beginning but then simply require updating.

A transfer form for the transfer of the prisoner from the issuing State to executing State should be devised. Finland has such a document and this could be used as a basis for other countries. This could avoid problems such as when the UK received a prisoner from another MS in a wheelchair when the other MS had not mentioned it before. The transport sent by the UK was not therefore suitable and the prison was not wheelchair-friendly. This caused distress to the prisoner and difficulties for the UK.

There are copies of Finland's factsheet to accompany the prisoner's transfer (pointing out issues such as medication).

Extent of use of FDs: it would be useful to monitor the use of the FD and if prisoners are transferring under voluntary or compulsory transfer arrangements. COM could record that kind of information.

Face to face meetings are key: workshops can discuss issues of concern and share best practice.

FD 2008/909/JHA (Transfer of Prisoners): Discussion of implementation problems and practical problems

NL: The Netherlands began with the FD in 2012 and has received 55 certificates so far (almost half from Belgium). It has experience with the UK, Italy, Finland, Denmark and Austria.

It has been difficult for some countries to fill in the certificate, which is a key document for recognition in the State to which the prisoner is transferred, properly.

It is important to fill in the number of days, as the certificate asks. In some countries, a month can be 31 days or 30 days or 28 days. If everyone counts the number of days in their own system, then it will be easier.

UK: The UK implemented the FD in 2011. It has transferred a relatively small number of prisoners and most on a voluntary basis. It has taken over enforcement of a small number of sentences of prisoners already in the UK.

For voluntary transfers, the UK is discovering that no one wants to go. Where prisoners are given a chance to give their opinion, they are all objecting to transfer. For a significant number, this is due to prison conditions (i.e. that rights to humane treatment would be breached).

There is a case before immigration courts right now where a prisoner is challenging the basis for deportation from the UK. His argument is that imprisonment in that country would be a breach of his human rights as per Article 3 of the European Convention of Human Rights (ECHR). The case is due to be heard in the next month or so. If the UK loses that case, prisoners from that country will use the same defence. This Article 3 issue has the potential to cause significant difficulties for some transfers.

The transfers done have gone relatively smoothly.

For compulsory transfers, there have been no issues with prisoners taking physical action not to go. However, there will be a point when someone will be forcibly put on a plane to go and this is something that we need to monitor as the FD progresses.

COM: Would it be useful to put translations of the certificates in all languages on the Europris and EJM websites?

Netherlands: That would be helpful and we can see if it will improve the filling in of the certificate.

RO: Romania's implementing law will come into force in a matter of weeks. It has had a large number of transfer cases. It has concluded a convention with Norway, where the provisions of the FD applied. It has had experience with Norway in filling in certificates as per FD 909.

When transposing the FD, it is essential to establish more executing authorities. Romania used to have one recognising a decision but then it was difficult to ensure that deadlines were respected.

Simplifying national procedures was another challenge to ensure that deadlines were met.

It is important to ensure the right of the convicted person to appeal the decision.

After transposition, Romania will prepare and send a large number of factsheets to courts. It has a network of prosecutors and judges who will disseminate them at the national level.

With regard to received certificates, the correct calculation and determination of the sentence was a problem.

Under the Council of Europe regime, Romania prepared a factsheet for prisoners and used this for years. This factsheet – for Romanian inmates in foreign countries – proved very useful. They read it and gave their informed consent. A factsheet is a very good idea.

AT: The UK is asking for a central database but having a separate solution in the framework of Europris is not very convincing for Austria. All the information should be on the EJM website. The information on the EJM website is not satisfactory and complete and should be improved. Having a piecemeal approach with information on one FD elsewhere is not very useful.

It has not seen the Croatian translation of the certificate.

Austria implemented the FD in January 2012. In 2012, it had requests for little more than 100 regarding the FD and more than 200 on the basis of the Council of Europe Convention. That percentage of success for the Council of Europe Convention is striking.

Many requests were withdrawn because the procedures were lengthy.

In 2013, it had closed up to 200 Council of Europe cases and 80 FD cases.

Austria has sent a paper to COM on experiences in practice.

Austria can usually send a certificate and a conviction. A number of MS would also like to receive the deportation order itself. This is not in line with the text of the certificate, which indicates that only a reference number of the deportation order needs to be given.

Austria sees a demand for the original judgement or a notarised copy of it – this could lead to delay as it needs to be done by a court.

Sometimes, MS refuse the certificate, as they do not see a possibility for social rehabilitation. This is not in line with the FD, because in some cases the consent of the executing State is not required.

Austria is looking at problems regarding the length of the procedure and meeting time limits for transfer.

It is difficult to agree on when the transfer of the prisoner should take place.

COM: COM is working on inputting information on e-Justice and is considering doing this for all the FDs. There may be a need for a table of declarations on this website and possibly a database on conditions for early release plus the contact details of authorities.

COM is considering creating the option for MS to send certificates directly to a competent authority via the e-Justice Portal.

For the moment, all the information is put on the Europris website. For now, the EJNI is not the perfect way to find the information. The idea is to include the EJNI website on the e-Justice Portal to create a one-stop shop for all the information on the FDs.

With respect to Probation and Alternative Sanctions, lots of information has been gathered via the ISTEP project and this might be put on this website too.

There may be a need to develop templates of standard letters (e.g. the Finnish one).

Information on national legislation might be put on the website in the English, but COM will not provide translations, MS would have to provide this themselves.

HU: Hungary has implemented the FD as from 1 January 2013 and has some practical experience.

If a person is imprisoned in Hungary, Hungary tends to transfer on the basis of the Council of Europe Convention. If the person has left Hungary and is in another MS, it is complicated to handle this via a European Arrest Warrant and in cases like this the FD can be a useful tool.

Hungarian judges tend to ask for a deportation order. It is explained to them that this is not foreseen in the FD and that they can ask for it but that it is not obligatory.

As for the translation of the certificate, Hungary has collected all the translations of MS certificates in Word and sent them to the translation office. For a new certificate, the judge

puts it in Hungarian. The translation service uses the Word format of the certificate of the other country and fills it in.

With regard to the EJM, e-Justice Portal and Europris websites, judges and prosecutors are used to using the EJM website. This is their first port of call if they have a European case. It took years to teach them to use the EJM website. If the information is moved, it will take the judges longer to find it.

COM: The idea is not to change the EJM website but to integrate it into a broader portal (i.e. the e-Justice Portal). The basic features of the EJM website will not change. It will continue to be within the competence of the EJM. The Council group agreed on integration as it will mean more financial means being available to develop the system.

LV: Latvia transposed the FD on 1 July 2012. So it does not have much experience. Since transposition, it has received eight requests, of which seven were related to someone with their place of living in Latvia. In three cases, the judgment was recognised and enforced. In one, it was not because the person wanted to stay in the sentencing State. Four cases are still pending. Six requests were from the UK, one from Denmark and one from Austria.

The timeframe is as per Article 12 – a final decision is reached within two months of receiving the certificate. This can be brought down to one month if the certificate and judgment comes with the translation.

IT: Italy has implemented the FD on time. Its judicial authorities have issued around 37 certificates and received around 27. The authorities with which it has exchanged certificates are the Netherlands, Austria and the UK.

There are lots of judicial authorities using this tool. Around 150 judicial officers are authorised to issue a certificate. It involves all first and second level prosecutors. There could be about 1,000 people who are authorised to issue a certificate.

The central authority has an important role because it sends out notices and instructions for use for this tool. Italy has sent out some circulars and set up a working group to respond to requests for opinions and information from Italian legal authorities.

Many problems are the same as for other mutual recognition tools (e.g. having to get translated certificates).

Bilateral contacts between the central authorities in MS are important.

Based on a 2012 law, documents translated into all the languages of prisoners held in Italy are sent out. There is a charter of rights for prisoners held in Italy, which sets out all the information on conditions of detention and the rights of foreign prisoners in Italy.

The ministry approves an official document with information on options for transfer. This will be sent out to all Italian prisoners abroad and will contain important information regarding the transfer.

Italy has been invited by the UK to take part in a project to look at the implementation of FD 909 and FD 947, to ensure further exchanges with other partner countries and to train judges in how to use these tools.

COM: A guide for prisoners is useful. One of the objectives of today's meeting is to look in the medium and long term at what practices to promote.

PL: Poland has implemented the FD on time. It has made a declaration saying that it only covers final judgments issued after 2011 such that older judgements are dealt with under the Council of Europe Convention.

Many judgments issued contain a sentence below six months of deprivation of liberty and its therefore not necessary to transfer them to Poland for execution.

It obtained a derogation clause under Article 6(5) on the consent of a sentenced person. For five years after implementation, the consent of a sentenced person is still necessary to transfer a judgment under this scheme.

It has had positive experience with bilateral contacts with MS where it has been able to explain certain specificities of implementation.

A key issue highlighted by national courts in Poland concerns the condition of consent which does not apply in the case of deportation. Some courts have complained that they have doubts about the legality of deportation from some MS. Deportation has been decided in relatively trivial cases where there is no real threat to national security even though this is required under the Directive on free movement of persons (Directive 2004/38/EC). In the case of deportation, the condition of consent does not apply. There are concerns from national courts that the condition of consent could be circumvented in this way.

In connection with the UK's point that, under compulsory transfer a number of transferred persons have not given their consent or said 'no', it needs to be kept in mind that the FD should serve the purpose of the social rehabilitation of the person. This is difficult to achieve if a person is transferred in spite of his/her negative opinion (e.g. where they have an established family or links with the country where the sentence passed and where that country is not the country of their nationality).

Article 3 of the European Convention of Human Rights (ECHR) is not a new problem. The national courts of MS have rejected claims and not found the claim grounded or credible.

As for information on websites, the information on the Council of Europe can be found on one website whereas the information on the EU cannot be found on one website. Poland also argued that the EJM has a website that is widely used by and appreciated by practitioners and that this should be used.

HR: Croatia's certificates are not available on the EJM website and it will check why. The certificates are available and Croatia can send them via the EJM contact points. In case of emergency, certificates can be sent in English on condition of reciprocity.

Croatia acceded to the EU on 1 July 2013. An act on judicial cooperation came into force on the same day. It has implemented ten FDs, one Council decision and one directive. It is still preparing training for practitioners on the FDs and does not therefore have much experience of it so far.

LV: The Ministry of Justice is now the competent authority to receive all requests and documents for the transfer of sentenced persons (this was the prosecutor general until 1 July).

COM: A list of contact points in MS for the implementation of these instruments would solve such issues.

AT: As for deportation and the European Court of Justice, there is a strict interpretation of national security in this connection. The question is if it is appropriate to question when to apply this FD if the decision on deportation was correct. Then the person concerned would need to take a legal remedy against the deportation order.

Framework Decision 2008/947/JHA (Probation and Alternative Sanctions) and 2009/829/JHA (European Supervision Order)

Presentation by Robert Canton, Board Member ISTEP and Professor at De Montfort University, UK

The FDs:

- Acknowledge and encourage freedom of movement in the EU
- Promote mutual trust and confidence among MS
- Encourage the mutual recognition of final decisions in criminal matters

FD 947:

- The FD does not distinguish between social rehabilitation and integration.
- The FD says less about things like accommodation and employment, which are key parts of social rehabilitation, stopping offending and staying out of trouble.

Legislative issues

There is wide diversity here: differences in age limits (for a particular sanction), in maximum sentences, enforcement (the consequences may be different), consent (sometimes consent is needed and sometimes not, depending on the country plus there are several layers of consent); there is the important notion of informed consent too – the person needs to know

the kind of unpaid work that they will be doing, how, where and if there are other types of support there.

Lawfully and ordinarily resident

Different countries may have different understandings of this concept.

It is not the state of nationality.

It requires a stable period of presence and a connection with that country.

How long should one live somewhere to be considered as ‘lawfully and ordinarily resident’? What if someone lives in different countries and if he/she has seasonal work and what if he/she has no settled residence?

Subsequent decisions

When someone is transferred to an executing State, all action should be taken as if they made the original order themselves.

But the issuing State may make a declaration to retain responsibility (Article 14(3)).

Practical issues

The value of having a database is being discussed. This could provide information about legal powers and practical arrangements.

An understanding of what information is shared in particular cases is undeveloped. The fact that a prisoner being transferred is in a wheelchair is an example of crucial information that, in one example, was not passed from the issuing State to the executing State. There needs to be a lot of collective thought on the kind of information that needs to be exchanged (including the language, information so that people know where to go for their first contact in the executing State, costs – sometimes there are provisions expecting individuals to contribute and sometimes the State pays – and informed consent).

There are some countries that have not transposed the FDs but in which the practicalities may have come first.

FD 909 is much greater priority in most countries. FD 947 has been a secondary priority.

There is no substitute for communication (by email/phone) to discuss how go about things. Face to face discussion is also important as are personal relations.

ISTEP project

On the ISTEP website, users can click on countries if they want general information about jurisdictions and can compare sanctions between countries too.

So, for example, a judge can choose an ‘order for unpaid work’ as an option, pick his/her own country and the country of the executing State and see how they match. For FD 947, this is likely to be an invaluable resource.

It would be easier if there is a central reference point – i.e. a ‘one stop shop’. Integrating it all into a wider portal one day is an aspiration.

ISTEP has now ended. It is up to MS to keep the information up to date. Legislation changes quickly. People in the competent authority of the MS are the only ones able to make sure that the database is properly populated and up to date. An out of date website can be dangerous.

Under FD 829, there are some countries who, by default, remand people in custody rather than having supervision. The FD emphasises public protection.

Pre-trial decisions

If someone is sent to prison and is in pre-trial detention, it is harder to prepare a case and they are more likely to plead guilty and receive a custodial sentence. This leads to huge costs for the family and in terms of the finances.

One graph shows the number of pre-trial detainees as a percentage of the prison population. Italy has a high proportion of its prison population awaiting trial. England and Wales has a big prison population but a small proportion of it are pre-trial detainees.

FD 2008/947/JHA and 2009/829/JHA: Discussion of implementation problems and practical problems

COM: It costs around 3,000 euro per month to hold someone in prison. The costs of transfer and who pays is an issue with regard to the probation decision.

PL: Poland asked UK to explain its opt-out of police and judicial cooperation in criminal matters as of 2014 and especially its intention not to opt back in to the probation FD.

UK: The UK accepted, during its preliminary decision-making on the opt-out, that mutual recognition is a good principle. It is planning to rejoin the prisoner transfer and financial penalties measures. It has already been operating them for some time and so knows that they are workable.

Prison terms and fines are relatively easy to transfer to another country but probation seems far harder to make operable in practice. Community orders are a lot more variable in MS. It has concerns on breach arrangements. It is not impossible that the UK could join the instrument at some time in the future but it has serious concerns about whether the difficulties can be overcome.

DE: Germany understands that, under Article 14(3), the executing state can refuse to take on the procedure.

Germany thinks that there is a need for a centralised database and website rather than lots of different ones so that things can be linked up and streamlined so that they are practical to use. If MS are obliged to keep databases updated, they will not be able to do that on an on-going basis if they are all spread out in different places. MS need to know how everything is structured before feeding in the data. For example, sharing medical information needs to be considered.

With regard to the FD on supervision, in Germany, according to case law, someone cannot be kept in custody because they are foreign.

Robert Canton: As per Article 14(3), the decision does lie with the executing State.

As for information sharing, some information is considered confidential (e.g. medical information). Different countries have different data protection regimes. This is a difficulty that needs to be taken into account.

It is unlikely that any court would send someone to prison because they are not a national of that country but they might send someone to custody awaiting trial because they are not satisfied that they can be adequately supervised in the meantime. This is a form of indirect discrimination. The effect would be that non-nationals are more likely to be sent to prison pending their trial.

AT: Legally speaking, the UK request to opt in will only be possible from December 2014 but that does prevent an informal debate from being started in the coming weeks. The issue of the UK wanting to opt in to 11 out of 12 FDs will be a subject of debate for MS.

Austria has implemented the FDs from August 2013 and therefore does not have any practical experience. The complexity of rules for both FDs is quite high and Austria is not sure how far they are accepted by practitioners.

FI: Finland has one central authority (a prison and probation service called the Criminal Sanctions Agency) for FD 909 and FD 947.

Finland has no practical implementation experience of FD 947.

It is interested in knowing which countries have already implemented the three FDs.

COM: the countries that have implemented the FDs are on the Europris website.

Austria, Belgium, Bulgaria, Czech Republic (from January 2014), Denmark, Finland, Croatia, Hungary, Latvia, the Netherlands, Poland and Slovakia have implemented FD 947. That makes 12 countries in total.

Robert Canton: Transposition into national law is a necessary condition but not a sufficient one. There could be countries that have made legal arrangements but that are not sure how to put them into effect if they are approached by another country. It would be useful for all MS to look at which countries they might expect to be dealing with and pick up the phone and

talk to people from one competent authority to the other. They could discuss how to make sure that it works properly according to the spirit of the FD.

AT: Where a MS has transposed an FD into law, it must make a declaration to the Council and COM. The Council has a table of all MS with a short description of what the MS have transposed and the declarations made.

The most recent list regarding the FD on probation came out at the end of October. A new list for FD 829 is pending.

Austria puts on the Ministry of Justice's intranet all the declarations and this list plus all the certificates of all the countries in their languages in Word documents for practitioners.

COM: The three levels of information that are important here are whether the MS has implemented the FD or not; what languages are used and if they apply double criminality; and which are the competent authorities. In the years to come, COM will try to streamline the information process and ensure that it is in a place where practitioners in MS can find the information when they need to issue a certificate.

DE: Germany has not yet implemented the FD and has discussed the need for bilateral communication. German and Dutch probation officers have met to discuss practical situations as have Polish and German probation officers.

NL: The reason why there is not a problem for the transfer of probation services is because there is a lot of contact between Germany and the Netherlands. This is the reality for a lot of border regions. People know each other and so there is trust. One of challenges of putting the FD into practice is whether it leaves enough space for existing practices, e.g. in border regions.

COM: The rule in the FD is that MS can continue to use bilateral conventions if these do not have a negative effect on transfers. It is important to notify the Council of existing arrangements so that other MS know they exist.

DE: Germany does not have a bilateral agreement with the Netherlands but discusses practical points.

LU: Luxembourg has a draft of a law relating to FD 947 but it has a brand new government and does not therefore know when it will be in place.

MT: Malta has transposed the FD regarding the probation order and the supervision order but not the part covering parole. That is why Malta is listed as not having transposed the FD.

It has received no requests for transfers so far.

Workshop on FD 2008/909/JHA (Transfer of Prisoners)

This workshop was jointly chaired by Graham Wilkinson, National Offender Management Service, (NOMS) UK and Olivier Tell of DG Justice (COM).

The workshop started with a short introduction by Tricia Harkin of DG Justice, who elaborated on the links between Article 25 FD 909 and the European Arrest Warrant. It was pointed out that there were strong links between the three Detention Directives (FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA) and the European Arrest Warrant; it is important to identify these links and strive for as much coherence between the different instruments as possible.

Currently, the LIBE group in the EP is working on a legislative report on the working of the EAW. It appears from a recent hearing in the EP that LIBE will also take a broad approach in the report incorporating, inter alia, an assessment of the links between the three FDs and the EAW.

The following questions were posed to the participants regarding art 25 FD: did MS explicitly implement article 25 FD 909? If so, how did they implement the link with articles 4(6) and 5(3) FD EAW? Does this implementation mean that FD 909 is now the mechanism to use in transfer of prisoners, or do MS still use the Convention on the Transfer of Sentenced Persons of the Council of Europe additionally? If they did not explicitly implement Article 25 and/or the referral to articles 4(6) and 5(3), why not? In the light of the replacement of previous conventions in Article 26 of the FD, what other legal mechanism could be used for transfer if the FD is not used?

Article 26 FD 909 contains basically an obligation to choose the FD over other instruments. The use of the FD instead of the Council of Europe Convention has consequences for the transfer in Article 4(6) and 5(3) EAW cases. The FD is more far-reaching than the Convention and in particular requires continued enforcement rather than adaptation of a sentence. It is therefore crucial to have a common understanding of different elements of the FD, as well as of the relation between the different FDs.

The following questions were posed to the participants regarding Article 4(6) FD-EAW how does the implementation of this provision work in practice? How has practice changed, if a MS used to operate through the Convention, but uses the FD now? Is the transfer an automatic or 2-step mechanism? Are MS in a position to undertake a sentence? If the transfer is a 2-step mechanism, which conditions are attached to the 2nd part of the mechanism and how do these conditions work out in practice? Finally, MS were asked about the implementation of time-limits, and how those work out in practice.

The MS contributed the following in their interventions:

DK: According to Denmark's extradition act, Article 25 FD-Transfer was explicitly transposed and now transfer of prisoners or sentences in the context of EAW Article 4(6) cases has to go through 909. This requirement can be problematic, for instance in the case of Germany (which is one of the countries DK extradites to mostly), which has not implemented

909 FD. In order for the operation to go smoothly, DK needs information provided for in the certificates. DK has not decided yet whether its transfer system operates through a 1- or 2-step mechanism. In some instances DK applies a preliminary ruling that the conditions for extradition are in principle fulfilled. DK would then inform the issuing State that it is thinking about refusal of the extradition so that the MS can come up with another solution. E.g. withdraw the EAW and use the transfer mechanism (FD or Convention). This is only possible because DK has excellent bilateral relations with e.g. DE and SE.

UK: The UK has not implemented Article 4(6) and 5(3) as the UK has never had a tradition of refusing extradition on the basis of nationality i.e. they have always extradited their own citizens. The UK generally provides an assurance that nationals can return to their countries of origin after completion of the trial, when these nationals' MS so request. The UK has experience with requesting certificates that are issued under the FD. At the moment, an EAW is often issued for when a MS want a person to serve his sentence in that particular country. The UK would like to see FD 909 take over that role.

FI: Finland used to issue EAWs to make persons serve their sentence in FI. Now they tend to use 909, but FI still has some questions regarding the relation between FD 909 and the EAW. Can a sentence be taken over if an EAW was also issued? The transfers that were conducted under FD 909 in FI generally went well. At the moment, FI has one case with the NL where a person wants to serve his sentence in FI. NL has asked FI for a provisional arrest. FI decided that it would refuse this request as a mere obligation for this person to report weekly at a police station would suffice. NL agreed and FI is now taking over the sentence from NL. FI finds it very important that in these sorts of cases, enough information on the contact details of competent authorities, languages etc. is made available. Good bilateral relations are essential.

NL: NL confirms its positive experiences in the FI-NL cooperation. In NL, when a person from NL is requested on the basis of an EAW to serve his sentence abroad, this will be refused by the judge. If the other country is then quick enough to request a provisional arrest, this will generally (depending on the type of case) be granted. In 'dangerous' cases, a 909 procedure will then be initiated; in trivial cases, the person will remain free in NL.

HU: In Hungary, one court (Budapest) is the competent court for EAW, Council of Europe Convention and 909 cases. As it is mostly the same judge that will decide, this will generally help in the process of choosing the right mechanism. Nonetheless, delays occur as the decision on which mechanism to use takes time.

HR: When an EAW is issued for the purpose of serving a sentence, and the requested person is a citizen/resident and gave consent, the Croatian Court will postpone a decision on the EAW execution and contact the competent authority of the issuing MS in order to obtain the necessary documentation for transfer under 909. Once the Court has received this documentation, it will refuse to execute the EAW and transfer under 909. When another MS has not implemented 909, HR uses the Council of Europe Convention.

PL: Poland uses Articles 4(6) and 5(3) to ensure protection of Polish nationals and citizens. However, some matters are not governed by the EAW-scheme, for instance maximum penalties. The Polish legislation does explicitly transpose Article 25 to the effect that FD 909 should apply in EAW cases.

AT: Austria drafted a specific provision to implement article 25 FD 909, which also applies to Articles 4 (6) and 5(3) EAW. The implementing law gives a precise list of those situations that do not apply for this provision, because they do not fit the situation of transfer.

CZ: The Czech Republic has no experience with the FD as its implementing legislation will only come into force as of 1st January 2014. The implementing law contains special consideration to the relation between FD 909 and the EAW. When the transfer concerns a CZ national, the Court will ask for a certificate and the original decision before sending a person to that MS. When other MS have not implemented the FD, CZ uses the Council of Europe Convention. CZ uses the same implementing clause in this respect as France.

IT: Italy did not create a specific provision for Article 25. However in practice if an Italian is arrested on the basis of an EAW for the purpose of serving a sentence, the Italian authorities will contact the other MS directly. This procedure is part of the Italian implementation law for FD-EAW. A person can then be transferred on the basis of consent; when consent is lacking and the non-consent circumstances of 909 apply the authorities will need a certificate.

DE: Germany reacted on the Italian procedure. It asks whether the consent of the other State is also required. DE asks whether it is possible to take over the execution of a sentence without the consent of the other MS. Can you still apply 909 in these cases, e.g. in relation to the possibility to lower a sentence? IT responds that it is possible to refuse the execution of an EAW if a person wants to serve his sentence in IT. The rest of the question, IT was unable to answer in that context.

The next topic to be discussed was the opinion of the suspect. How is the opinion of a suspect taken into account? Do national implementation laws provide for a hearing or a written procedure? And what counts as informed consent? How do countries assure that this requirement is met? Is there a need for factsheets on detention conditions and release arrangements in MS?

UK: The UK has no explicit implementing legislation on this point. It mainly uses the Repatriation of Prisoners Act. Prisoners have a right to seek the assistance of a defence lawyer in these cases. It concerns an entirely written procedure. The Ministry of Justice is the authority that will assess the representations. If the MoJ refuses a request, this decision is open to judicial review. When asked about how the consent of a prisoner is assessed, the UK admitted that legislation at this point is lacking. There are no factsheets or other information provided by the government on e.g. prison conditions or provisional release arrangements.

NL: For the Netherlands, the main issue in this context is the requirement to accept each other's sentences. If the NL does not agree to a converted sentence, it is possible to appeal

this decision to a judge. There are also many practical aspects surrounding this issue: can prisoners start/continue in rehabilitation programs; what are reasonable provisional release arrangements? Finally, the Netherlands brought up the relation between transfer/an EAW and Article 8 ECHR. Is it reasonable to take someone away from their family/social circle, to serve a sentence in another country?

RO: In Romania, a prisoner has a right to be transferred. RO acknowledged that it is difficult to provide a prisoner with sufficient information on this right. In RO, a delegated judge is responsible for transfer procedures. He has the possibility to consult competent authorities of another MS. A prisoner has the right to appeal against a decision on transfer. RO has experience with transfers to the UK and NL. RO would inform these countries that a person wanted to be transferred. After a request for transfer has been made, the person concerned receives a factsheet on what he can expect (prison conditions, provisional release arrangements, rules on labour/work etc.). The prisoner has a right to change his mind after reading these factsheets. If he then still does not oppose to transfer, the prisoner is regarded as having given his consent.

HU: the requested authority can contact a competent authority in another MS (in HU, this can also be the MoJ). HU has experience with a case of a deportation order in which the person did not consent to deportation to HU as he feared his rights under Article 3 ECHR would be violated. However, the authorities found that he has in fact family and social contact in HU. This aspect weighed heavier than a person's refusal to consent and in the end he was deported.

PL: In PL, a person can express his opinion on possible transfer both in writing and orally. In case of an actual transfer, the consent must be formalised (hence in writing). The assessment of concluding whether a suspect's opinion is informed is still subject to a case-by-case analysis. No real practice exists at this point.

COM then asked Poland about its experiences with art 6(5) FD 909, which contains a derogation clause for Poland in the implementation.

PL: Indeed Poland is not affected by the FD 909 for transfers into Poland. PL explained that after its accession in the EU, PL experienced a large emigration wave of Polish citizens leaving PL permanently to reside in another MS. Therefore, in most cases of Polish prisoners, their interest lay not in Poland, but in their 'new' countries when it comes to serving a sentence, despite the fact that they have the Polish nationality. Therefore, Poland did not opt for an 'automatic' transfer to Poland as this would not always be in the interest of Polish nationals. PL remarks that FD 909 refers to 'family circumstances' in its recitals as a very reason to apply this FD. It is therefore difficult to see a tension with Article 8 ECHR. The Polish conclusion is that it is still very uncertain for many Polish citizens what their preferred country of residence will be. Therefore, it is still unclear where in which country their interests lay when it comes to serve a sentence. Poland is therefore still content with the derogation clause. However, PL also notes that the possibility of issuing a deportation order

"pollutes" this derogation possibility/context. The 'circumvention' of Article 6(5) through a deportation order should, in PL's opinion, only be possible in the case of serious crimes.

UK: in relation to PL's intervention, the UK comments that the question whether someone objects to a transfer is a matter that should be dealt with under the law of the issuing State. The possibility to appeal should also fall under the responsibility of the issuing State. This is not appropriate for the executing State to question a decision for a request for deportation that was taken in the issuing State. It should not be possible for an executing State to refuse a request for deportation on the basis that you think the decision for this deportation order is incorrect. This would undermine the principle of mutual trust in each other's legal systems. The UK also commented on the Article 8 ECHR aspect of this discussion. The UK has had cases where it was clear that a person would be deported after serving his sentence. In the view of the UK, the Article 8 argument puts less weight in the scale in these cases, as one will be separated from his family in due time anyway.

PL notes that the relation between the Directive on the Free Movement of Persons and Article 4(b) would be a good subject to put in a preliminary question to the ECJ after December '14. This question should probably be posed by a court in an issuing State.

The next topic to be debated was the expectations of a prisoner in relation to provisional release arrangements. How should time/work/rights acquired prior to transfer be converted or dealt with in the issuing State before or upon transfer?

RO: In RO it is quite common for prisoners to work a lot during their sentence. The domestic law of countries should be respected and prisoners coming to RO should therefore be aware of this practice in RO. Arrangements regarding provisional releases, programmes in prison etc. should be decided in the executing State and after transfer. RO poses the question whether it is in principle possible to decide upon these matters (e.g. the exact date of the provisional release) prior to the transfer. According to RO, it is just important to know that previous work etc. will be taken into account, also after transfer.

UK: The UK poses the question whether it would not be feasible to have a system where the amount of the reduction of the sentence will already be calculated/known prior to the transfer. This could then be put in the certificate.

DE: Germany experienced some difficulties in this respect with French cases. In France, if a person has already earned some months of work, this should be reduced from the sentence, but in DE the moment someone is eligible for provisional release is calculated differently than in France. DE has drafted a proposal in which the law of the executing State (where the prisoner already required a right to reduction) will be applied in the calculation when someone will be eligible for provisional release. E.g. if a French prisoner is transferred to DE, he will become eligible for provisional release after serving half his sentence (FR rule) as opposed to 2/3 (DE). DE will, however, not take into account additional reductions that he may have acquired by e.g. following courses in a French prison prior to transfer. The DE Parliament is currently studying this proposal.

IE: IE informed the working group that a judgment will come up at the end of this month before an Irish court about the interpretation of a prisoner's 'consent'. The case concerns a complaint of a prisoner who was transferred and then discovered he would be released at a later moment than if he would have remained in IE. The prisoner claims that he would not have consented to the transfer if he would have been properly informed about this circumstance.

IE also poses a question in relation to insanity of a prisoner. What if a person was found not guilty of a crime because of reasons of insanity? In these cases, no “conviction” has been handed down. However the word “conviction” is used in Article 6(2)(c) FD in relation to circumstances where a person’s consent is not needed when they have “fled” following a “conviction”. Does this imply that this section does not apply in cases of deprivation of liberty following a finding of not guilty by reason of insanity and therefore consent will always be needed in these cases?

UK : The UK has been studying this situation and finds it extremely difficult to come up with a good precedent or policy of how the UK should/would have handled these cases. It is unclear whether the UK can even keep these people detained, or will be obliged to put them in a day-care programme. The UK figures that it will come down to a case-by-case approach in these instances.

COM: it also comes down to the interpretation of the word 'conviction'. What wording is used in implementing law? "Conviction", "prison sentence" or "deprivation of liberty"?

PL: PL notes that during the negotiations it was decided that this issue is explicitly not covered by FD 909 as the mental health laws of the different MS are too divergent. Furthermore, PL finds it legally unjustifiable to put this issue in relation to the question of 'consent' as referred to in Article 6(2). This would give the transfer even more a character of 'automacity' and this would be harmful for vulnerable persons, like those falling under the mental health acts.

RO: The FD refers to a decision and not to a provision on the deprivation of liberty. However, everywhere in the FD persons are referred to as sentenced. RO also recalls that it had a case where a person was acquitted/convicted for insanity and wanted to return to RO. Before this return, RO authorities and the authorities of the other MS consulted each other on this matter.

UK: The UK reiterates that it thinks that the FD could be applied in cases of insanity/mental health as it is in accordance with the spirit of the FD and the fact that there is a refusal ground in Article 9(1)(k) in relation to psychiatric or health-care measures.

IE: IE points to the definition of sentence, which includes any measure involving deprivation of liberty and recital 20 and notes that transfer of psychiatric care is very difficult to implement in practice.

Workshop on FD 2008/947/JHA (Probation and Alternative Sanctions)

This workshop was jointly chaired by Robert Canton, Board Member ISTEP and Professor at De Montfort University, UK and Jesca Bener of DG Justice (COM).

The Workshop started with a presentation by Sara Chrzanowska of DG Justice's Victims Unit on the interaction between the European Protection Order (Directive 2012/99/EU) and FD 947.

A protection measure under EU legislation is an order stating that an offender must not enter a place, approach a victim or contact a victim.

It could be an autonomous measure independent of criminal proceedings or part of a judgment (post or pre-trial measure).

If a victim wants to go to another MS, he/she can take any of these protection measures with them. The protection measure follows the victim.

The same instruction not to enter a place can travel around the EU with the offender when a measure is transferred to another MS.

Both the EPO and FD authorities should comply with the obligation to provide information. Then one can reflect if it is possible to have an additional mechanism where the EPO authorities are informed by the competent authorities on the FD that the protection measure in the original judgment has been altered. The EPO authorities must react to the alteration to the measure.

PL: The EPO follows the victim. The FD follows the perpetrator. An EPO can go to a country where no legal proceedings are going on. The EPO is unique as it is the first instrument to follow the victim.

This presentation was followed by a presentation by Denisa Fikarova of the Victims Unit about the Victims Directive (Directive 2012/29/EU). The 2012 Victims Directive was adopted last October. It is not a mutual recognition instrument but a horizontal one. It is about the procedural rights of the victim, including the right of the victim to information.

Article 4 is about the right to receive information from the competent authority.

Article 6 is about the right to receive information about the case.

The Victims Directive puts victims at the core of the system. Questions include how working group members see the role of the victim when the victim is put in the middle of the process of decision-taking of probation and supervision measures and how they see the different responsibilities of the issuing state and the executing state.

COM: How are victims involved in the decision to transfer an offender? Will the person be punished properly? Are there structures in MS to inform victims of a transfer of a sentence

that will take place? Is this the obligation of the issuing State or executing State? What happens in practice as the FD is silent on this point.

Most participants answered that victims are involved and informed after the decision on transfer has been taken.

LU: Upon the request of the victim, LU would provide information on release [of the prisoner]. There is a provision in the FD (Article 6 (4)) whereby, if the MS sees a danger from the perpetrator (i.e. not only on request from the victim) then it can give information that that person will be released.

Robert Canton: As for protection of the victims, who does this, how and by whom? This needs sensitivity and the victim needs to know what options are available. The idea is for MS to learn from each other.

The next topic that was discussed was the fact that MS have to provide for at least the probation measures and alternative sanctions as mentioned in Article 4(1) of the FD even if the executing State would not impose this measure in this specific situation. Article 4(1) mentions 11 obligatory measures. Next to these measures, MS can notify additional measures they are prepared to supervise. . One of COM's tasks is to see if MS have implemented all these measures. If not, it might give rise to discussions and even infringements.

COM: How far do alternative measures already exist in MS? It is not clear how far these measures are now available (e.g. unpaid work).

IT: the fact that these measures have to be provided for, might be one of the reasons for a delay in transposition. In IT not all measures do yet exist or judges do not have much practical experience in imposing alternative sanctions instead of prison sentences.

Other MS indicate that these measures cannot always be imposed independently, but can only be imposed in the context of a suspended prison sentence, so legislative changes are needed to provide for this possibility.

Another discussion point was the sentences imposed by the public prosecutor under the FD (e.g. conditional discharge) which are not eligible for transfer under the FD. That is not clear for some MS.

LU: They intend to include these kinds of decisions by the public prosecutor but want to provide for the possibility that the court agrees to these.

COM: In principle this should be possible if these kind of probation decisions are taken on the basis of a judgment, i.e. a final decision or order of a court (see Article 2(1) and (5)).

The next topic discussed was Article 14(3) of the FD which provides for the possibility for an executing State to declare that it will not take responsibility for subsequent decisions. Which MS intend to use this possibility? MS who accepted competence for subsequent decisions, do they see any problem in imposing a custodial sentence as they have not undertaken original

prosecution and conviction? If the executing State has not accepted responsibility to impose a prison sentence in case of breach of the conditions of the probation measures or alternative sanctions, what happens to the sentenced person? Does the person need to be transferred back to the issuing State which State will then impose a prison sentence? Can we use videoconference and will the prison sentence then be transferred under FD 909 (Transfer of Prisoners)?

PL: if a prison sentence imposed by the issuing State because of breach of the conditions of the probation sentence, PL will continue to execute this prison sentence under the regime of FD 947.

COM and some MS see a problem with this as under FD 947 no legal basis exists to execute a prison sentence. Once a prison sentence is imposed by another MS, the applicable rules such as on adaptation, time limits, grounds for refusal are the rules set out in FD 909 on Transfer of Prisoners. For such a transfer a certificate under FD 909 will therefore be needed.

The next topic discussed was the informed consent of the person which should be required under this FD. Article 5 of the FD indicates that the FD may apply in cases "where the person has returned or intends to return". This wording differs from the wording used in Framework Decision 2008/829/JHA (European Supervision Order) which uses the wording "consents to return to that State".

COM briefly explained the reasons behind this difference and how it should be implemented by the MS. FD deals with the transfer of post-trial measures, i.e. when a final judgment has already been given by a court. This means that a court hearing of the sentenced person has already taken place in the issuing State in the course of the criminal proceedings. On the contrary, the European Supervision Order deals with the pre-trial stage. The person is still presumed innocent and the proceedings before the court have not yet started neither has the person been convicted by a court, as opposed to decisions under FD 947 which always contain a conviction. The aforementioned considerations will therefore render it practically impossible to apply the European Supervision Order "where the person has already returned". This would require a court in the issuing State to impose a supervision order without having heard that person or without having had the opportunity to make a risk assessment whether a supervision order would be an appropriate sentence or if a measure of pre-trial detention needs to be imposed instead.

Pre-sentence reports were briefly discussed. Most MS agreed that the executing State should draw up this report. As to timing of the transfer it was agreed that the person does not need to wait to go back to his home country until the transfer is confirmed under the FD (which might take up to 60 days). The person should be considered a free person and has the right to move freely to another MS. This might be particularly relevant when he would otherwise risk losing his job in his home country. Consultations between competent authorities are however important in this respect.

Conclusions of the two workshops by the two rapporteurs

Workshop on FD 909 and the European Arrest Warrant (EAW) (rapporteur: Graham Wilkinson)

- The working group discussed how MS have combined FD 909 and Articles 4(6) and 5(3) of FD EAW in law and practice- i.e. whether MS have explicitly provided in their law that FD 909 must be used to effect a transfer arising from Articles 4(6) and 5(3) EAW and how this happens in practice. Most respondents indicated that FD 909 is now used in the EAW cases and in practice can be used as an alternative, when it is agreed that an EAW can effectively be replaced by an FD 909 request where a sentence will be carried out in the executing State. This depends on good bi-lateral cooperation between the MS involved.
- The working group discussed the consent of the prisoner. There was discussion about the type of information the prisoner has access to in order to give informed consent. Romania has a good system providing lots of information to the prisoner.
- The working group discussed the information that prisoners need regarding release arrangements and how should time/work/rights acquired prior to transfer be converted or dealt with in the issuing State before or upon transfer. If a country does not have that information, then it can phone the other country to ask for release arrangements. There was a suggestion that it might be feasible to have a system where the amount of the reduction of the sentence will already be calculated/known *prior* to the transfer. This could then be put in the certificate. It comes down to good communications between the issuing and executing State. If the FD is to work properly, it will be founded on those relationships.
- It is not always clear where a person's social rehabilitation will be best facilitated and in this context the nexus between rights under Article 8 ECHR and the FD was raised. It was pointed out that as FD 909 refers to 'family circumstances' in its recitals as a very reason to apply this FD there should not in practice be a tension with Article 8 ECHR. The nexus between the right to free movement and the fact that consent is not required in deportation cases was also briefly raised. It was posited that decision on deportation is for the issuing State only and should be respected by the executing State.
- The working group discussed how the FD deals with prisoners detained under mental health provisions (especially where the prisoner is found not guilty because of insanity and there is no conviction given the reference in Article 6 to a "conviction"). Does the FD enable a country to transfer a prisoner without his/her consent in those circumstances? The working group agreed that it is difficult to fit this kind of case with the FD. There was discussion as to whether the FD was intended to provide a mechanism through which those cases can be transferred.

- A person detained under mental health provisions has been deprived of their liberty. So there needs to be significant consultation between the parties involved, including prisoners' representatives, with a view to reaching a decision on a case by case basis.

Workshop on FD 2008/947/JHA (Probation and Alternative Sanctions) (rapporteur: Jesca Beneder)

- The discussion began with a presentation by Sara Chrzanowska, from the European Commission's Victims Unit, who explained the links between probation and the European Protection Order (EPO). The idea was to make MS aware of problems that might arise when the two instruments interact. The main aim of the EPO is to protect the victim. Once the victim moves to another MS, they take the protection order with them. The problem arises when the victim moves while the offender (who has a probation sentence with the condition not to enter the area where the victim is living) moves to another MS. In two scenarios, the two instruments interact and in one they do not. The conclusion was that it is mainly about the obligation to inform and that the competent authority for the EPO should inform the competent authority responsible for the FD. This is not necessarily the same competent authority. It would be helpful if people applying FD 947 have data on the competent authorities under the EPO.
- There was also a presentation about the interaction between FD 947 and the Victims Directive. It is mainly about Articles 4 and 6 of the Directive on informing the victim. There was discussion on who will contact the victim (the authority in the executing or issuing State?), at what moment the victim is contacted (before or after the transfer?). Practices in MS are quite different. MS should start reflecting about the interactions between the different instruments.
- The article in the FD on obligatory measures for MS was discussed. During negotiations, it was quite clear that the objective was that all MS at least implement the measures in Article 4, which is quite far-reaching. MS might have to create alternative measures that do not already exist. Some MS said that this was an issue, also because it is not possible for MS to impose these kinds of sanctions independently (they are always linked to a suspended sentence).
- Sentences imposed by the public prosecutor under the FD were discussed (e.g. conditional discharge, which is not eligible for transfer under the FD). That is not clear for some MS. One of the MS said that they intend to include these kinds of decisions by the public prosecutor but want to provide for the possibility that the court agrees to these. The answer that the working group came up with was that only judicial decisions (by courts) are eligible for transfer. The measures can be in the FD if the court makes a decision.
- The possibility of making a declaration not to take responsibility to take subsequent decisions under Article 14(3) was discussed. This relates to the fact that MS do not want to take the responsibility to impose a prison sentence if x conditions are

breached. The reason is that they were not involved in the initial proceedings and so it is difficult to impose a custodial sentence. Only the executing State can say that they will not take responsibility. The issue of what happens when the executing State has not assumed responsibility to take subsequent decisions. If the jurisdiction is then transferred back to the issuing State that imposes a custodial sentence, does this sentence then need to be transferred back to the executing State under FD 909? MS had differing opinions on this.