



EU rules on transfer of sentenced persons

SUMMARY *In a globalised world, transfers of convicted criminals to complete their sentences in their home countries are becoming more and more common. The international framework developed to facilitate such transfers requires the consent of both states involved as well as of the sentenced person. This has been seen as a major disadvantage, including of the 1983 Council of Europe Convention on transfers.*

The Schengen agreement introduced the first international arrangements under which, in some cases, forced transfers were possible without the individual's consent.

A 2008 Council Framework Decision defined a new legally binding framework within the EU for the transfer of sentenced persons. In particular, the need for consent of both Member States involved has become less strict.

To facilitate transfers and to preserve a high level of protection of fundamental rights, the EU's Stockholm Programme includes the objective of agreeing guidelines on detention conditions. In 2011 a Commission Green Paper on detention defined the framework for financial and operational support of this objective by the EU.

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Context

A globalised world has increased international mobility and migration. Judicial cooperation is becoming increasingly essential to manage issues linked to the pursuit and conviction of foreign citizens, as well as their extradition before or after a criminal sentence. In the case of non-nationals convicted of a crime and sentenced, it has become common practice to transfer them to their home countries, if their sentence is recognised there. The transfer contributes to the rehabilitation of the sentenced person. In this perspective, the transfer of sentenced persons has a strong basis in international human rights law¹.

In addition, transfers also assist in public protection and serve to reduce the cost of implementing sentences as states would not have to provide additional facilities specifically for the foreigners in their prisons.

International agreements and practices

A range of international agreements on transfer of sentenced persons have been concluded – on both bilateral and multilateral bases – for a variety of political reasons, including:

- alleviation of the hardships faced by those serving sentences in foreign countries;
- reduced costs of providing consular services to nationals imprisoned



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overseas, and of housing foreigners in national prison systems;

- promotion of community safety by ensuring released prisoners can be effectively supervised and monitored;
- recognition of good international relations between states; and
- the need to meet public expectations that a government can bring nationals imprisoned abroad home.

Mutual trust as prerequisite

These agreements set out the framework of principles on which states agree, on a case-by-case basis, to transfer a prisoner. Procedural rights in criminal proceedings are central to ensuring mutual confidence between states.

In the EU, mutual trust in other Member States' (MS) legal systems is a prerequisite to the recognition in one MS of a decision taken by the judicial authorities of another MS. It forms the basis for the development of stronger arrangements for transfers.

International initiatives

At United Nations level, it has not been possible to define a general binding convention on this issue. The UN Conventions against [transnational organised crime](#) and against [corruption](#) both foresee that states parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty. A UN Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners² was agreed in 1985.

The Council of Europe (CoE) created the first legally binding framework for the international execution of sanctions in the 1960s. Its [European Convention on the Supervision of conditionally sentenced or conditionally released offenders](#) of 30 November 1964 has been ratified by 19

countries. This Convention allows for conditionally sentenced or released offenders to be transferred, to serve their sentence or other sanction in their home country. It does not deal directly with sentenced prisoners, but does provide for the original prison sentence to be carried out in the state to which the sentenced person has been transferred (foreseen by Articles 16-21).

Twenty states, including 11 MS, have ratified the [European Convention on the International Validity of Criminal Judgments](#) of 28 May 1970. However, it has not entered into force.

The legal instrument closest to universal acceptance is the 1983 [European Convention on the transfer of sentenced persons](#) concluded in the CoE framework, together with its [1997 additional protocol](#). The Convention has been ratified by all 47 CoE Member States as well as by 19 non-European States (including the USA), and entered into force on July 1985.

In particular, the Convention gives foreigners convicted of a criminal offence the possibility of serving their sentences in their home countries. According to the Convention, the repatriation of a sentenced person is not only in the interest of the governments concerned, but should also be in the interest of the prisoner. They could overcome difficulties such as language barriers to communication, alienation from local culture and customs, and the absence of contacts with their relatives. The consent of both countries involved as well as of the person concerned is an integral element of the 1983 Convention.

Schengen Convention

The need for consent for each transfer by both states and the person concerned led to difficulties in implementation of the 1983 Convention. To overcome this issue, Schengen members decided to supplement the 1983 CoE Convention through adding the possibility of "forced transfer". According to Articles 67 to 69 of the 1990 [Convention](#)

[implementing the Schengen Agreement \(CISA\)](#), the consent of the individual to serve a sentence in their country of nationality is not necessary, if they have avoided the enforcement of a penalty or detention order by fleeing to that country.

This innovation in the CISA Convention was mirrored in the 1997 additional protocol to the 1983 CoE Convention. Consent is no longer necessary if the person has deliberately sought to frustrate the judicial process by fleeing from justice, or in cases where the judgment in their case includes expulsion or deportation once their sentence is completed.

The CISA Convention was concluded outside the Community legal framework³. This situation changed with the entry into force of the Amsterdam Treaty, when the Schengen *acquis* was integrated into the EU supranational framework. Within this framework, the objective of a European Area of freedom security and justice is built on mutual confidence in MS' legal systems.

Since 1999, the principle of "mutual recognition" has become the cornerstone of judicial cooperation in criminal matters within the EU. MS accept the outcomes of each others' judicial processes. They do not question them further as long as EU law has been complied with and fundamental rights respected.

In this perspective, the mutual recognition principle has greater impact on MS' autonomy in the EU legal order than within the CoE conventions (where the consent of both states is still required). Moreover, in the framework of the Schengen Agreement – and even more so within the EU system now – EU law should be applied no matter the attitude taken by the other MS. Therefore the principle of "reciprocity", standard in international law, cannot be invoked⁴: MS must interpret their national law consistent with EU law, with fundamental rights protected by the EU legal order, as well as with other general principles of EU law⁵.

The most significant example of the principle of mutual recognition in criminal matters is the [2002 Framework Decision on the European Arrest Warrant](#) (EAW). It has replaced extradition between MS with a system of surrender, between judicial authorities, of suspects for the purpose of undergoing criminal proceedings, and of convicted persons for the purpose of enforcing judgments⁶.

Framework Decision 2008/909

The EU regime on transfer of sentenced persons between EU Member States is defined in [Council Framework Decision 2008/909/JHA](#). This Framework Decision (FD) replaced (as regards transfers between EU Member States):

- The CoE European Conventions of 1970 and 1983 and the 1997 protocol;
- the CISA provisions; and
- the 1991 Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences.

As with the CoE Conventions, the purpose of the FD is the social rehabilitation of sentenced persons. For an international transfer to take place, the sentenced person to be transferred must have a link to the state to which they are to be transferred.

The FD refers to nationality and permanent residence, as well as to elements such as a prisoner's family, social or professional ties to justify the transfer.

The FD provides for a process different from that of earlier multilateral instruments. Procedurally, rather than submitting a formal request, the sentencing state forwards the judgment to the Member State to which it wishes to transfer the sentenced person. To expedite the process, the judgment is accompanied by a standard certificate, which includes the information necessary for the transfer (see model in Annex I of the FD). The states involved should however try to consult about the

proposed transfer before the judgment and certificate are forwarded. This consultation, which in some instances is compulsory, should address whether the transfer would facilitate the prisoner's social rehabilitation (Article 4(2)-(4)).

Restrictions to consent

Building on the Schengen *acquis*, Article 6 of the 2008 FD restricts the discretion of both the state which would receive them (executing state), and of the sentenced person themselves, to oppose the transfer.

The FD takes the exclusion of the requirement for consent even further than the Schengen rules and the CoE 1997 Protocol. It is not required when:

- the person is a national of the executing state and also lives there;
- the person would be deported to the executing state on completion of their sentence; or
- the person has fled or otherwise returned there in response to the criminal proceedings.

In all cases where the sentenced person is still in the issuing state, they shall be given the opportunity to state their opinion orally or in writing. Article 6 of the FD states the other cases in which the sentenced person's consent to the transfer is still required before a judgment and request (certificate) can be forwarded.

Dual criminality and "specialty" rule

In the 2008 FD, the "dual criminality" requirement (i.e. that the criminal offence is punishable in both contracting states) is less onerous than in the CoE conventions. Mirroring the 2002 European Arrest Warrant FD, Article 7 contains a list of 32 offences to which dual criminality does not apply. The FD also sets time limits: a limit of 90 days is set for a potential executing state to decide whether it will recognise a judgment of the sentencing state.

Article 10 of the FD allows for partial recognition and enforcement of a sentence, and Article 11 for the postponement of

recognition of the judgment, where certain technical issues arise.

Under Article 8(2) and (3), the executing state also has the discretion to adapt the sentence in cases where the sentence is incompatible with its law, in terms of duration or nature.

Sentenced persons, who have been transferred, must not be prosecuted, sentenced or otherwise deprived of their liberty for an offence committed before their transfer other than that for which they were transferred (Article 18, the "specialty rule").

The deadline for implementation by Member States was December 2011⁷. The FD is binding only between EU MS. However, MS can still conclude and use bilateral (or other multilateral) agreements if they can contribute to the smoother transfer of prisoners. The Commission is due to submit an implementation report in 2013.

Grounds for non-recognition

Possible grounds for non-recognition of sentenced persons are set out in Article 9 of the Framework Decision (as amended by [Framework Decision 2009/299/JHA](#) on decisions rendered in the absence of the person concerned at the trial).

Other than for procedural reasons, there are a number of cases in which the executing state may refuse to recognise the judgment and enforce the sentence:

- enforcement of the sentence would be contrary to the principle of *ne bis in idem* (i.e. they should not be sentenced twice for the same crime);
- judgment relates to acts which would not constitute an offence under the law of the executing state;
- enforcement of the sentence is statute-barred according to the law of the executing state;
- there is immunity under the law of the executing state, which makes it impossible to enforce the sentence;

- sentence has been imposed on a person who, under the law of the executing state, owing to his or her age, could not have been held criminally liable for the acts in respect of which the judgment was issued;
- less than six months of the sentence remain to be served;
- sentence imposed includes a measure of psychiatric or healthcare or another measure involving deprivation of liberty, which, notwithstanding Article 8(3), cannot be delivered by the executing state in accordance with its legal or healthcare system;
- the judgment relates to criminal offences, which under the law of the executing state, are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory.

After the Lisbon Treaty

Whether refusal to enforce a judgment can be justified (under Article 9) by an analysis of the situation of the prison system and of protection of prisoners' fundamental rights in the executing Member State has become a major question. This issue has been addressed recently by the Court of Justice of the EU (CJEU) in the [N.S. and M.E.](#) cases (joined cases C-411/10 and C-493/10). In this case, MS were condemned for having transferred an asylum-seeker to Greece even though the reception conditions were far below the standards required by EU law (the [Dublin Regulation](#)).

Convicted persons who do not wish to be transferred could seek to argue that the transfer would lead to their being subjected to inhuman or degrading treatment in violation of Article 19(2) of the EU Charter of Fundamental Rights. To counter this possibility, the [Stockholm Programme](#) declared that detention conditions (in both pre-trial and post-trial phases) are a relevant aspect of the rights that must be

safeguarded in order to promote mutual trust and ensuring the smooth functioning of mutual recognition, such as under FD 2008/909/JHA.

EC Green Paper on Detention

Following up this objective, the Commission submitted a [Green Paper](#) in 2011, which considers that greater access to information on prison conditions and criminal justice systems will enable issuing states to take all relevant factors into account before initiating transfer. In order to overcome diversities between MS' laws on the enforcement of custodial sentences, the CoE has developed standards through the [European Prison Rules](#). The latter, although non-binding, have been widely endorsed by CoE member states. Moreover, the Commission considers that there is no need for the creation of an additional EU network to monitor prisons.

National implementing authorities

Member States have to define under Article 2 of the FD the national authorities in charge of its implementation. In some cases these tasks have been conferred on the Ministry of Justice while in other Member States they have been entrusted to judicial or quasi-judicial bodies.

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Endnotes

- ¹ Article 10, paragraph 3, of the International Covenant on Civil and Political Rights (which has been ratified or acceded to by 167 states) specifies that the essential aim of a penitentiary system is the reformation and social rehabilitation of prisoners.
- ² For the model agreement, see Annex 1 (p 63) of the [UN Handbook on the International Transfer of Sentenced Persons](#)
- ³ However after the Amsterdam Treaty, the Schengen acquis has been partially incorporated under the first pillar regime (borders and migration) and partially under the third pillar regime (police and judicial cooperation in criminal matters). The Schengen information system (SIS) was considered part of the third pillar regime.
- ⁴ According to this principle, a contracting party is not obliged to fulfil its obligation when the other contracting party has not complied with the agreement. This sort of "self-defence principle" is not applicable in the EU system, where common procedures and institutions are provided to enforce the EU legal order. In that regard, it is the Court's settled case law that it is not open to one Member State to justify a failure to give effect to EU law by pointing to alleged failures on the part of another Member State to implement the same or similar obligations. In particular, see to that effect, inter alia, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9).
- ⁵ To that effect, see Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28.
- ⁶ See Case [C-303/05 *Advocaten voor de Wereld* \[2007\] ECR I-3633](#), paragraph 28; and Case [C-66/08 *Kozłowski* \[2008\] ECR I-6041](#), paragraphs 31 and 43; *Wolzenburg*, paragraph 56; and Case C-261/09 *Mantello* [2010] ECR I-11477, paragraph 35.
- ⁷ Poland has a temporary derogation for a maximum of five years from 6 December 2011. A state of play of MS' implementing measures has been compiled by Statewatch (July 2012).