

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

<http://www.coe.int/tcj>

Strasbourg, 31 August 2016
[PC-OC/Docs 2016/ PC-OC (2000)22 Addendum]

PC-OC (2000)22 Addendum
Or.lang.only

EUROPEAN COMMITTEE ON CRIME PROBLEMS
COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS

COMITE D'EXPERTS
SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPEENNES
DANS LE DOMAINE PENAL
(PC-OC)

THE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS
UNDUE DELAYS

Report presented by
Mr. Johan Berg
Adviser, Norway

COMMENTS FROM BULGARIA / NETHERLANDS / SLOVAKIA / SWEDEN /
SWITZERLAND
OBSERVATIONS DE BULGARIE / PAYS-BAS / SLOVAQUIE / SUEDE / SUISSE

Contents

BULGARIA	3
THE NETHERLANDS.....	6
SLOVAKIA.....	10
SWEDEN.....	13
SUISSE.....	14

BULGARIA

Re: report of Mr. Johan Berg, advisor in Ministry of Justice of Norway, regarding "Undue delays in transfers of sentenced persons" which are made under the Convention on the Transfer of Sentenced Persons, done in Strasbourg in 1983

1. Delays in the initial phase of the procedures

We support the suggestion made to encourage prison staff to give possibly the most complete information to the prisoners – foreign citizens about their right of transfer to their own country. Difficulties arise due to the fact that they are citizens of different countries. Some of these countries are not parties of the Convention on the Transfer of Sentenced Persons. Furthermore, even when the countries are parties to the Convention, they have national legislation standards, which differ in respect of punishment execution. It is known that after the transfer the execution is entirely subject to the national legislation of the administering state (art. 9/3/of the Convention). Some states do not provide for provisional pre-term release, others stipulate different conditions in applying it, and others provide for decrease of the term of punishment when inmates work and have exemplary conduct, etc.

All this is to be explained to the prison inmates- foreign citizens by the prison administration.

2. The request and its contents

It refers to the request made by the sentencing state according to art. 4 /2,3/ of the Convention. Usually information concerning art. 4/3/ is contained in the sentence and in the penal proceedings and it is described in the request of the sentencing state for transfer of the sentenced person, made under art. 2/3/ of the Convention. Apart from this information documents under art. 6/2/ are sent. This practice facilitates and shortens the period of transfers, limiting double correspondence as well.

3. Translation

We support the suggestion that transfer documents are to be sent in the language of the state with which the correspondence is conducted. For example, Belgium sends us the documents in Bulgarian and we send them in French. This will accelerate the procedure in terms of several weeks. When execution is under way the court always requires a translation in Bulgarian.

If a common practice does not arise concerning that matter, Bulgaria may make additional declaration with reservations on art. 17/3/ of the Convention.

4. Sending the request to the Administering state

Manners of correspondence are provided for in art. 5/2/ of the Convention. There are states like Bulgaria where the authority competent to take decision on transfer is the Supreme public prosecutor, which shortens the procedure. The court exequatur is done after the transfer and taking into charge of the sentenced person.

5. Federal states in particular

The question concerning the difficulties, which arise in respect of federal states is set correctly. When the federal state is the requesting state contacts are made easier. When it is the requested state contacts are more difficult when addressing the competent authority. Perhaps it will be appropriate if

the federal ministries give instructions to the states, and inform the rest parties of the Conventions, about their federal structure and the competent authority.

6. Use of electronic communication, for example fax or e-mail

It is correctly indicated that that issue is to be discussed in view of technical difficulties and national legislation of the states, parties of the Convention.

7. Handling of incoming requests

It is a rule for the requests to be sent to Ministry of Justice of Republic of Bulgaria. /art.5/2/ of the Convention, which forwards them to the Supreme public prosecutor of Republic of Bulgaria.

When there is a request from the sentencing state for transfer of Bulgarian citizens the Ministry of Justice through "International legal assistance and international legal cooperation" department has to verify that they are complete and contain the data on art.4/3/ and documents under art. 6/2/. of the Convention. In case there are missing documents or information it is to require their provision and only afterwards sends them to the Supreme public prosecutor. This will shorten the procedure and reduce the unnecessary correspondence.

8. Discrepancy in the time to be served if a transfer takes place or not.

We have had problems with Greece only. It refused to transfer two Bulgarian citizens with reason that Bulgarian law does not provide for life imprisonment for crimes related to drugs and they were sentenced the same by the Greek court. It is also clear from the report given to us that this matter is discussional.

9. Delays in the actual transfer.

On reaching a mutual agreement for transfer between the competent authorities of the two states the actual transfer and taking into charge of the sentenced person are carried out by NCB "Interpol" and Department of "National police service". Interpol's authorities in Bulgaria contact those from the other state and arrange for the place and time of transfer and taking into charge. This is one of the most direct means of transfer and it accelerates the procedure.

Our country has declared that it will apply art 9 /1a/ and art. 10 of the Convention, which means continuation of execution. The above mentioned procedure accelerates the actual transfer of the sentenced person.

10. Additional question.

Our country is not a party to the Convention on the International Validity of Criminal Judgments and therefore priority of this Convention regarding the Convention of Sentenced Persons does not represent a problem, at least for now.

The suggestions related to acceleration of the procedures of transfer of sentenced persons should be formulated in accordance with the above stated. Some of them concern the national legislation and practice, too, for example par.1 and par. 7. Suggestions should be related to encouraging prison administration to give complete information to the sentenced persons –foreign citizens on the opportunities for transfer to their own countries, including information about the rules on serving the punishment; to encourage the practice of translating the documents in the language of the requested

state; to give information to the states, parties of the Convention, about the federal structure and the competent authority of the federal states; stimulate completion of actual transfer and taking into charge of the sentenced person through the International police organization "Interpol".

THE NETHERLANDS

Comments submitted by Mr Marc Knaapen (Netherlands)

Delays in the initial phase of the procedures:

In his piece Mr. Berg proposes that the collection of the required information be started before the sentence will be declared irrevocable. However, most of the information that is to be sent is only known after the sentence has become irrevocable. Only the medical reports and such like are available before the sentence becomes irrevocable. However, collecting this information does not take long and consequently generally does not cause much delay in the Netherlands.

Mr. Berg's proposal does not provide a solution to the problem. Supplying adequate information to sentenced persons could speed up the procedure.

In the Netherlands detainees are informed by means of leaflets which explain the possibility of transfer to their country of origin. These leaflets are available in various languages. New leaflets are being worked on at the moment. These leaflets will be distributed this year.

The request and its contents:

Requests are additionally delayed if request documents are missing. These documents first have to be retrieved before the request can be dealt with further.

Extension of the 'Forms for request for co-operation' does not speed up the procedure in my opinion. Not every state needs the same documents for dealing with a request. However, a checklist on which states can indicate which documents they always need for dealing with a request could speed up matters.

In requests directed to the Netherlands one or more of the following documents are regularly missing:

- Certified copy of the sentence
Pursuant to article 6, paragraph 2, sub a of the Convention, the request should include a certified copy of the sentence. The Netherlands attaches great value to this certified copy, as the verdict is the foundation for the execution of the sentence.
- Statement of the procedure to be followed.
Not all requests state which procedure, the continuation procedure or the conversion procedure, the requesting state wishes to follow. The Netherlands must know this before the Netherlands can launch a procedure.
- Mentioning of the sentence's irrevocability
- Original statement of agreement of the sentenced person.

In the initial phase of the procedure a lot of information is exchanged back and forth. However, this information exchange is not necessary if both states have had contact with each other more often and are generally aware of the information in article 6, paragraph 1. The handling would be sped up considerably if it could be agreed that letter exchange within the scope of article 6 only took place in case of concrete questions.

In Recommendation No. R (88) 13, states are recommended to interpret the concept nationals broadly.

The Netherlands also consider as nationals integrated foreigners who have a residence permit in the Netherlands that will not be withdrawn due to the conviction. It would be useful to have an overview of the definitions that countries give to the concept national.

According to the Convention, the sentence may not be increased due to the transfer. Many requests include several dates at which the sentenced persons could be eligible for conditional release. The Netherlands requests the sentencing state to indicate the date at which the person involved would most likely be released in the sentencing country. In the Netherlands the sentenced person will not spend any time in detention after this date. This prevents the person involved from actually spending more time in detention due to the transfer.

Mr. Berg is of the opinion that both states could agree definitely with the transfer at the start of the procedure if the sentenced person is aware of all consequences from the beginning. In conformance with article 3, paragraph 1, sub d the sentenced person must agree with his or her transfer. During the procedure circumstances may occur due to which the sentenced person no longer wishes to agree with the transfer. Definitive agreement at the start of the procedure is therefore not possible in my opinion. However, if the sentenced person is aware of all consequences of his or her transfer at the start of the procedure he or she will retract his or her agreement less quickly in the last phase of the procedure, which means the states have done a lot of work for nothing. An information leaflet for detainees as Mr. Berg suggests is a good way of informing the detainees about the consequences of transfer.

If the procedures are sped up considerably the sentenced person will not retract his or her permission as quickly since there will then be much less time between the agreement and the actual transfer.

Translation:

If the Minister of Justice agrees with the transfer the documents are translated. It often takes several weeks before the translation is received. As Mr. Berg indicates in his piece, this translation is indispensable since requests without translation are incomprehensible for most approached countries.

Requests directed at the Netherlands must be drawn up in Dutch, French, English or German. If the requests are sent in a different language they must be translated in the Netherlands, which causes the request to be delayed. If a request is urgent, however, the Netherlands will also accept a partial translation for a first evaluation of the proposal. A comprehensive translation in Dutch, French, English or German is required for further consideration by the Dutch judicial authorities.

Requests are generally dealt with more quickly if they have been translated into the language of the approached country, irrespective of whether this state demands a translation.

Sending the request to the Administering State:

Continual update of the address list is of great importance. As well as Macedonia, the addresses for Scotland and Northern Ireland are missing. Requests can be sent directly to both countries.

Mr. Berg's proposal to publish the list with correct addresses on the Internet will improve accessibility and ensure they are as current as possible.

Use of electronic communication, for example fax or e-mail:

Communication in the Netherlands with the United States of America and the United Kingdom regularly takes place by fax. However, the official requests are always sent by normal mail. E-mail is hardly ever used.

Use of electronic means of communication could speed up the handling considerably. Especially in the information exchange phase the use of electronic communication means is useful. Recommendation No R (84) 11 also recommends use of the fax.

Handling of incoming request:

If the requesting state opts for the conversion procedure the Dutch Public Prosecution Department is asked for advice in accordance with Dutch legislation. The Public Prosecution Department assesses whether the offences for which the person involved has been sentenced are also liable to punishment in the Netherlands. If the Public Prosecution Department does not see any problems, the transfer is arranged. Once the person involved is in the Netherlands the case is brought before a Dutch court, who converts the sentence to a Dutch sentence.

The Netherlands prefer this procedure. An additional advantage of this procedure is that it speeds up the procedure, since the sentenced person is first transferred before he or she has to appear before the court.

If the requesting state opts for the continued procedure, advice is asked from the Court of Appeal in Arnhem in conformance with the Dutch act on sentence enforcement transfer. For most requests it takes several months before the Minister has received the Court of Appeal's advice. It is not possible to give advice sooner due to the amount of work at the Court of Appeal.

At the time the act on sentence enforcement transfer came into effect the Dutch Minister of Justice indicated that the duration of the custodial sanction should not be fully excessive in relation to what would be considered suitable according to Dutch standards in terms of deprivation of liberty for the offence committed abroad.

If the Court of Appeal considers the punishment to be excessively high according to Dutch standards it will advise negatively, unless there are special circumstances. If the Court of Appeal advises negatively the Minister will consider him or herself committed to the advice. However, the Minister can request the Court of Appeal for a reconsideration if the Court of Appeal has not weighed all the circumstances or if other special circumstances came to light later.

If the Court of Appeal advises positively the Minister will agree with the transfer. The requesting country is then informed of the agreement and the Dutch Public Prosecution Department is requested to arrange the transfer. Once the person involved is in the Netherlands the foreign sentence is enforced here. If the sentence exceeds the Dutch sentence maximum, the sentence is adjusted by means of an administrative decision.

Foreign countries do not always agree with the transfer if they hear that the person involved will be released earlier due to the Dutch Conditional Release Regulation or due to conformance to the Dutch maximum sentence.

An overview of the procedures per country is being worked on in the Netherlands at the moment. The differences per country are looked at and the areas where improvements or acceleration may be possible.

Since the national procedures take up most time when dealing with requests it is useful for every state to look into the possibilities of speeding up these procedures. The Netherlands are working on such research.

Delays in the actual transfer:

In his piece Mr. Berg indicates that following the continuation procedure in Norway prevents delays, since the request no longer has to be submitted to a court. However, following the continuation procedure in the Netherlands causes a delay. In continuation procedures in the Netherlands the request must be sent to the Court of Appeal in Arnhem before the person involved is transferred. If the conversion procedure is followed, the person involved is transferred to the Netherlands before the case comes before a court of law.

SLOVAKIA

Comments submitted by Mr Milos Hatapka (Slovakia)

Delays in the initial phase of the procedures

I agree that there should be no reason why *not* to start the process of gathering information and/or documents even before the judgement has become final (in particular before the decision on appeal). If the Slovak Ministry of Justice receives a request by the sentenced to be transferred and his judgement is not final yet, we start gathering information, but, of course, wait for the outcome of the appeal, to be able to send the formal request abroad.

I have no objection to the suggestion made by Mr. Berg, my only worry (based on experience) is that this process might become a process of “friendly persuasion” of foreign inmates to request transfer home. The sentenced should be fully aware of the possibility of transfer, but the initiative should always lie with him!

Request and its content

I agree that it is important to know what a certain country may require as “additional information” when receiving a request for transfer. But I do not agree that this should be a matter for a “Form” of some kind. It is up to each State to specify what they might need and others – who usually do not require all kinds of additional information – should not be “bound” by a form to provide/request certain information. Therefore, a “Form” would be counterproductive.

What *could* be done is that each country (or at least those who traditionally require additional information) should update their info in the Guide to the Procedures to include there what additional information they *always* require when dealing with a request. That might help the requesting countries to conform with it before making the request and that should avoid delays.

I am not sure about the need for an overhaul of the Information Sheet for inmates. We should make distinction between the information needed by the administering State itself and the information “needed” by the sentenced. My experience shows the more information you provide to the sentenced, the less likely they read (or understand the complexities of) it.

What *is* important, however, is to – once again – invite **all** States to provide the inmate information sheet in their languages. We find it impossible to provide really pertinent information about the Convention and its repercussions to an inmate from a country which did not provide such “national” information sheet. The only thing which we *can* provide in such a situation is the text of the Convention itself, but that – as we all know – does not contain useful information about the actual situation in the administering state.

This is also an important factor in the issue of the withdrawal of the consent: if the inmate received proper information it is less likely that he might withdraw his consent when he *does find out* what to expect.

The idea to discuss the issue of the possibility not to allow withdrawal by the sentenced at a later stage is interesting and – despite the fact that we allow such withdrawal up to the actual transfer – I find the idea useful, but I consider it very much linked with the previous issue (the inmate information sheet availability).

Translation

I can only agree that we should all take notice of the language declarations AND we should all take into account also the logical fact that once – even if there is NO declaration – we do not provide the request and judgement with a relevant translation, the proceedings in the administering state will take longer, because of the need to arrange for translation. So sentencing states, especially if they have a special interest to remove the person from their territory, should be encouraged to provide translations *even if* the administering state did not make a language declaration.

On a slightly different note: I was a little puzzled by the reference to “transfer is needed urgently” in Mr. Berg’s paper. There is something inherently wrong with that notion. I cannot think of a situation (unless we speak about the “changed” circumstances under the Additional Protocol) when a transfer is urgent! This is not extradition nor Article 11 of the EC MLAT....

Sending the request

I can only agree with the suggestion of Mr Berg. Perhaps we should “rethink” the List of officials (PC-OC /INF 6) and make it more informative and more “Convention specific” .

Federal States

We do not have enough experience (or encountered problems) with federal States, so I cannot comment on the problem.

Use of electronic communication

I think this is a more general problem, not only one which is constrained to the application of this Convention. In fact, in relation to other conventions I find it even more topical! I think PC-OC should discuss the issue in general.

Specifically in the context of this Convention, Slovakia could not accept the actual judgements, in the least, *not* being sent in original (i.e. only by electronic means) as long as some kind of authentication mechanism cannot be generally agreed upon.

Handling of incoming request

I think this is really up to each State to evaluate. The procedures seem to be so different in each country and the Convention itself sets the base for such diversity by allowing either transformation of the sentence or its continuation. These are rather sensitive issues and I do not think it proper that the PC-OC should take a stand on what procedure each country adopts. We could, at the utmost, say that each country should develop rapid procedures.....!

Discrepancy in the time to be served.....

This is not a consideration which the Slovak republic takes into account either when requesting transfer or being requested transfer. So it is difficult to take a stand on the issue. But I am not opposed to the possibility of discussing Mr. Berg’s suggestion.

Delays in the actual transfer

I see a slightly different problem in the delays area here. Each country deals with these issues differently and as a consequence there is sometimes the problem of “partners in communication”. In Slovakia, the Ministry of Justice is involved – at least on the “supervising” level – in the surrender arrangements. But in some countries the Ministry - after taking its decision - figuratively washes its hands from further involvement and refers to some other authorities. But these authorities are no partners for the foreign Ministry of Justice. So an imbalance is created in communication which almost always leads to actual delays.

The other problems I see is connected with transfers through a third country (Article 16 of the Convention). It is not clear from the Convention whether it is up to the administering or the sentencing state to request transfer (although we maintain that it is up to the sentencing State – by way of Article 17 par. 5 of the Convention), this might cause delays again when the sentencing country is “surprised” that they have to arrange for consent of a third party to transfer.

I find these two problems more relevant for causing delays than the ones described by Mr Berg.

Additional question

Since Slovakia is not Party to the International Validity Convention, we lack practice to comment on the problem.

SWEDEN

Transfer of Sentenced Persons (undue delays) - Comments on document PC-OC (2000) 22 submitted by Norway

With reference to the document PC-OC (2000) 22 submitted by Norway, Sweden would like to make the following comments:

Delays in the initial phase of the procedures: Sweden shares the view expressed by Norway that the gathering of information such as what is mentioned in Article 6 of the Convention could be initiated even before the judgment is final, provided that the person concerned has expressed an interest in being transferred should he be found guilty. This is also reflected in Article 6 paragraph 3. We think that in so doing we would both be able to speed up the procedure regarding if a request for transfer should be made and, once it has been so decided, shorten the transfer procedure.

The request and its contents: Sweden would like to suggest that PC-OC reflect on whether some sort of standard form could be elaborated. An attempt should be made to try to bring down the redundancy of documents that would have to be translated. One thing that perhaps may be contemplated, is to what extent it is necessary to translate the whole judgment.

Use of electronic communication: Sweden agrees with Norway that the idea of using electronic mail should be exploited. At least some initial steps to find out whether it would be worthwhile to go any further could in our opinion well be taken by means of electronic communication.

Consent: It is of great importance that the sentenced person gives his consent voluntarily and with full knowledge of the legal consequences thereof. That would include e.g. information about the rules on parole etc. It would in our view hardly be possible to make the consent irrevocable.

Central authority: In order to speed up the whole transfer procedure a complete list with names, addresses etc. of the persons at the central authority handling the incoming and outgoing requests should be made available.

Choice of conventions: According to Article 22 paragraph 4, the requesting State shall, when making its request for transfer, indicate on which instrument the request is made. Given the fact that so few countries have ratified the Convention on the International Validity of Criminal Judgments, Sweden is no longer using that Convention in transfer cases. If the sentenced person has absconded to his native country, Sweden would make use of the Additional Protocol to the Convention to have the person concerned serve out the prison sentence imposed upon him by a Swedish court.

SUISSE

Observations de la Suisse relatives aux suggestions de M. Berg du 12.9.2000 concernant le transfèrement des personnes condamnées

Dans l'ensemble, nous soutenons les propositions de M. Berg, en tenant à apporter les précisions suivantes.

- Le **retard dans les procédures de transfèrement** est souvent dû au fait que le volume de travail ne permet pas toujours aux autorités compétentes de traiter les affaires de transfèrement avec célérité. Il s'agit là d'un problème d'organisation que les Etats doivent résoudre sur le plan interne.
- Avant d'envisager l'élaboration de **nouveaux formulaires** ou de notes d'informations, il conviendrait d'abord d'évaluer les documents existants. En effet, les problèmes liés à la procédure de transfèrement ont déjà fait l'objet de plusieurs documents (recommandations, notes d'information, manuels, liste des personnes compétentes, etc). Il importe que chaque Etat partie à la Convention veille à ce que ses autorités compétentes disposent de tous ces instruments de travail et s'efforce de les tenir à jour.
- En ce qui concerne le **consentement de la personne condamnée**, il nous paraît important que la personne donne son accord au transfèrement en pleine connaissance de cause avant que les Etats concernées entreprennent des démarches concrètes en vue d'un transfèrement. S'agissant de savoir si le consentement est susceptible d'être révoqué, la Convention est muette à ce sujet. A notre avis, aucune disposition de la Convention ne se prononce en défaveur d'une révocation du consentement ou d'une limitation de la possibilité de révoquer le consentement. Il est concevable de prévoir une révocation du consentement et de fixer les modalités d'une telle révocation. A ce propos, nous renvoyons à la déclaration de la Suisse à l'article 7, paragraphe 1 de la Convention.
- Une **traduction** des demandes de transfèrement et des documents dans la langue du pays auquel ils sont adressés contribuerait à accélérer la procédure (cf. déclaration de la Suisse à l'article 17, paragraphe 3 de la Convention). Des aide-mémoire traduits et des listes d'adresses complètes et actualisées pourraient également faciliter la procédure.
- Dans un **Etat fédéral** comme la Suisse, l'exécution des peines ressort de la compétence des autorités des cantons. Conformément à cette répartition des compétences, l'autorité centrale en Suisse, à savoir l'Office fédéral de la justice à Berne, n'est pas en mesure d'imposer aux cantons des délais pour le traitement des demandes de transfèrement. L'Office fédéral de la justice peut uniquement demander aux autorités cantonales de prendre rapidement position sur une demande de transfèrement ou de fournir les documents nécessaires dans les meilleurs délais.
- Quant à la **communication par voie électronique**, la Suisse ne dispose pas de base légale qui permettrait d'envoyer ou de recevoir des demandes de transfèrement par ce moyen. De plus, des problèmes de sécurité risquent de faire obstacle à l'utilisation du e-mail dans ce domaine sensible.