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Cross-Border Cooperation in Sentencing

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Cross-BES Report

Cross-Border Cooperation in Sentencing: A process evaluation of the execution of sentences in The Netherlands, Belgium, and Germany

Hans Nelen and Robin Hofmann

15.06.2019

Maastricht University

Content

1 Introduction

This study contains a comparative analysis of cross-border cooperation in sentencing between The Netherlands, Belgium, and Germany. The focus will be on five specific EU policy instruments:

1. Council Framework Decision 2008/909/JHA (FD 2008/909) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

2. Council Framework Decision 2008/947/JHA (FD 2008/947) on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

3. Council Framework Decision 2002/584/JHA (FD 584) on the European arrest warrant and the surrender procedures between Member States.

4. Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.

5. Council Framework Decision 2005/214/JHA on the application of mutual recognition to financial penalties pursuant to EU Framework Decision.

The first two FDs are designed to ensure that non-residential EU citizens who are subject to criminal proceedings are not treated differently from residents. According to the European Commission, both FDs have the potential to lead to a reduction in prison sentences imposed to non-residential EU citizens that could reduce prison overcrowding, improve detention conditions and, in consequence, allow for considerable savings for the budgets spent by the Member States on prisons (European Commission 2014).
Apart from imprisonment, a wide range of criminal sanctions exists in the Member States' criminal systems. Regarding imprisonment, even if the same penalty is set for an offense, there are major divergences between the general rules of criminal law in the Member States, which generate a difference between the sentence that is passed and the penalty that is served. The last two FDs focus on financial sanctions. These FDs reflect the emphasis that has been put in

Europe and beyond to introduce instruments to find, freeze and confiscate assets with a criminal origin.

In this study we evaluate how, and if at all, the FDs manage to reach those goals by analyzing the challenges in daily practice of cross-border cooperation in sentencing between The Netherlands, Belgium, and Germany. A mixed methods approach is used comprised of a comparative legal and institutional analysis and data collection through single expert interviews and focus group interviews with experts and practitioners from all three countries.

1.1 Objective

This study explores the European system of transferring sentenced persons to their countries of origin and the execution of financial penalties and confiscation orders, exemplified on practices between The Netherlands, Belgium, and Germany. Since pragmatism and informality are powerful factors within the cross-border legal cooperation (this is especially the case in the field of law enforcement), our research focuses on the very practical dimensions of crossborder-cooperation. We will demonstrate that although the judicial cooperation between the three neighboring countries has come a long way over the years:

a. There still exists significant differences in the approaches mostly due to the different legal cultures.

b. There is still potential for improvement in the cooperative procedures.

Recently, there have been a number of studies published on cross-border cooperation in general and the FDs 2008/909 and FD 2008/947 in particular. Where appropriate, we have based this study on the collected data. However, what differentiates our approach from others is the comparative perspective of our legal research. Our focus of interest is not only on national regulations and practices, but on the similarities and differences in the implementation that define cross-border cooperation between the three case countries. To emphasize this unique focus, we have introduced grey boxes that specifically feature comparative examples of practices from the case countries.

1.2 Methodology

1.2.1 Comparative Penology and Institutional Analysis

The focus of this study is on three member states: The Netherlands, Belgium, and Germany. Although the three countries have been frequently subjected to comparative legal studies (e.g. Vermeulen et al 2011, Broeders 2010, Beyens et al. 2014) this can be considered one of the few in-depth comparative penological studies. One of many reasons for this may be that comparative penology, although with notable contributions (Sparks 2001, Brodeur 2007, Oleinik 2006, Cavadino and Dignan 2006, Weiss and South 1999), must still be regarded as an underdeveloped field (Pakes and Holt 2015, Farrington 2015). This study used a mixed methods research design, combining the strength of different methodological approaches.

1.2.2 Comparative Legal Analysis

In the first phase of our research, a comparative legal analysis was conducted containing an in-depth examination of relevant Dutch, Belgian and German laws, academic literature and policy documents. A review on cooperation in legal matters respectively in sentencing show, that there are significant variations between jurisdictions but little research on the everyday practice of cross-border cooperation in legal matters. This study sets out to fill this gap by implementing empirical and comparative legal research fully aware of the pitfalls of such an approach: research often has more to tell us about what practitioners say they do, and less what they actually do (Robinson & Svensson 2015). Moreover, international comparative research is often understood as comparisons of policies in different nations and other big issues. But having a closer look at the daily practices of cross-border cooperation in sentencing shows, that it is a very local issue, not only formed by laws, regulations, and procedures but by professional and personal networks, aspects of legal cultures, a certain degree of discretion and sometimes even individual idiosyncrasies.

Another question that arose in the realm of comparative legal research is the one of comparison, more precisely on how to go about it? Farrington (2015) suggests two approaches to conduct cross-national comparisons between, laws, legal processes, criminal justice systems and other conditions: firstly the 'safari' method and secondly through collaboration. In the safari method, a researcher visits another country, talks to key persons, and tries to understand and grasp the laws and legal culture. The collaborative method, however, involves cooperation between at least one knowledgeable researcher from each country. Whichever method one might prefer, both inhibit the risk of misunderstanding (Farrington 2015, Robinson & Svensson 2015). This

study combines elements of both approaches. To minimize the risks of misunderstandings, we included researchers as well as practitioners from all three countries.

A closely related challenge was that of different languages and translations to describe the different legal and penal systems, processes, and procedures. Maguire et al (2015) pinpoint this as the core problem of all comparative legal research and ask the question: How do we know we are talking about the same things? Language is not only an issue of nationalities but also an issue of roles, traditions, cultures, contexts, etc. (Robinson & Svensson 2015). The challenge within the collaborative approach is to use one common language to precisely describe the meaning of a concept and the phenomena itself that is in question. To tackle this challenge in the best possible way a legal matrix was created for each case country. The matrix contained all relevant legal provisions in the field of sentencing and cross-border cooperation in the original language as well as in English. A comprehensive glossary of legal terminology in Dutch, German, French, and English was created in addition to minimize frictions in translation.

1.2.3 Semi-Structured Interviews and Vignette Methodology

Based on the preliminary results of this legal analysis question guidelines for semi-structured interviews were developed. To ensure the best possible comparability of research results vignettes were used during interviews. These are short descriptions of a hypothetical incident, event or situation that is presented to informants in order to elicit their views, opinions, and reactions (Schoenberg and Ravdal, 2000). They are typically accompanied by questions asking participants to respond to the scenario, either by giving their opinion regarding the course of action that should be taken, or by explaining what they would do in the situation presented (Hughes, 1998). Vignettes are relatively well established as a means of exploring decision making, particularly in the context of sentencing decisions (Davies et al., 2014) or processes of breach in the pre-trial, sentencing or release phase (Maguire et al., 2015). Most applications of the method tend to be quantitative in nature (Anderson et al., 1999; Austin and Williams, 1977; Doob and Beaulieu, 1992; MacDonald et al., 1999; Palys and Divorski, 1986; Tufts and Roberts, 2002) but in recent years more qualitative approaches were implemented (Beyens, 2000; Davies et al., 2004; Maguire, 2015, 2018). Vignettes are particularly suitable for exploring levels of consistency between decision-makers: by asking decision-makers to respond to a common scenario they allow a comparison of decision-makers' responses to the same stimulus. Moreover, they allow to include contextual factors between different jurisdictions in the scope of research and examine how these contextual factors may impact decision making. Vignettes can be considered suitable tools for studying decision making

comparatively as they provide a common scenario as a starting point to explore decision making in different contexts. But they also allow us to gain insight into the similarities and differences between decision makers, as well as those that are associated with differences in context, culture and the specific idiosyncrasies of different systems (Maguire et al 2015).

One of the many advantages of the vignette methodology for this study was that Vignettes can be used quantitatively as well as qualitatively in form of single interviews and focus group interviews (see Davies et al. 2004). When used within a qualitative research design vignettes are usually accompanied by open-ended questions and are particularly useful for encouraging discussion and thus illuminating participants' beliefs, perceptions, and feelings on the situation or process described in the vignette. Qualitative applications of the vignette method are also particularly pertinent to studying processes comparatively as they allow greater freedom to probe research participants' understanding of the specific contextual factors that make their systems and processes unique.

However, a look at the previous research shows, that vignettes were mostly used for the analysis and comparison of decisions based on value assessments (e.g. the length of prison sentences). This study employed a more process-based focus and institutional analysis. A number of specific challenges were related to this. Designing and adjusting the vignette scenarios so that they make sense in each jurisdiction and also across jurisdictions. This is especially the case when we consider the great array of different types of systems, processes, and procedures involved. Moreover, finding a common scenario that makes sense but also respects jurisdictional differences is crucial. This leads to the questions of how detailed or general should the vignettes be? If the common scenario is too generic it will be difficult to compare the nuances of each system. Lastly, as in all comparative legal research, the common language/terminology to describe systems, processes, and procedures pose a problem. (Maguir et al. 2015)

The vignettes were used during nine semi-structured interviews with legal experts and practitioners in cross-border sentencing from Belgium, Germany, and The Netherlands. This relatively small number of interview partners was due to the fact, that cross-border cooperation in sentencing plays a relatively minor part in legal cooperation between member states. The reasons for that will be discussed in detail below. Experts in this legal field that can draw from a sufficient amount of experience were therefore hard to find. During nearly all interviews, the vignettes were the basis with each interview partner giving specific insights and experiences from his country of origin. The vignettes were accompanied by further questions whenever a certain topic had to be elaborated on. During the interviews, statistical data mainly on caseloads

was retrieved. Most of this data is neither part of official judicial statistics nor publicly available so that it has to be handled with caution.

In addition, four focus group interviews were conducted during a workshop on cross-border cooperation in sentencing with mixed groups of ten to fifteen Dutch, Belgian and German practitioners adding up to 56 participants in sum (21 from the Netherlands, 20 from Belgium, 15 from Germany). The majority of the participants were prosecutors from a variety of ranks. As the experience of the participants with the cross-border execution of sentences varied, some of the participants participated more actively than others. This variation in contributions is an important yet inevitable limitation of focus groups interviews (Van der Woude and Van der Leun 2017, Krueger and Casey 2009). During focus group discussions the vignettes were not used but for practical reasons, open questions pertaining to the main challenges in the daily practice in cross-border cooperation were asked. Key points were noted and the main arguments and issues were collected for further analysis. As the community of practitioners dealing specifically with cross-border sentencing is small, we are confident that a significant number of the relevant individuals in this particular field of law were present in the focus groups.

2 Legal-Cultural and Institutional Aspects of Cross-Border Cooperation

For the purpose of this study, legal culture is of interest on at least two levels:

a. the penal policy level that shapes the punitiveness of a country impacting the sentencing and the penal system
b. the institutional level that shape cooperative practices in criminal legal matters with other member states, the degree of mutual trust and the way things are done in general.

Both levels are interrelated and influence the outcome of the other. One could easily add more levels to the analysis and focus more on the individual and mutual interactions. Scott (2005), for example, suggests an analytical framework for inter-agency cooperation with five different levels namely inter-organizational, intra-organisational, inter-professional, interpersonal, and intra-personal. This approach has been proven particularly useful for cross-border cooperation in policing as demonstrated by Peters et al. (2015). Given the narrow focus of our study, the analysis will focus on the two generalized categories of policies and institution.

Cross-border cooperation in legal matters, as in other fields, is influenced by cultural factors persisting in the countries involved. This becomes especially apparent in border regions where many visible and non-visible barriers shape, for example, the implementation of a new tier of shared governance. It comes as no surprise, that the EU Commission speaks of border regions or Euro-regions as the laboratories of European integration (De Sousa 2013: 684).

One of these regions is the Meuse-Rhine Euroregion composed of the Provinces of Limburg and Liege, Eupen, Malmedy, the Aachen Region including Heinsberg, Düren, and Euskirchen. Within the European Union, it is one of the most urbanized regions, with a large population divided by three national borders (Spapens 2008). Not surprisingly, cross-border criminality and security problems related to a wide range of crime phenomena respectively organized crimes in all its varieties (like drugs, VAT fraud, car thefts and ATM bombings) occur in a concentrated manner. Moreover, Belgium, Germany and the Netherlands, having different languages and legal cultures makes the Euregion an interesting case example for police, judicial and legal cooperation (Peters et al. 2015). As a result, over the years numerous studies have been conducted on various regional issues including criminality, transnational policing and legal cooperation (e.g. Van Daele and Vangeebergen 2010, Spapens 2008, Fijnaut and Spapens 2005, Bruinsma 2010, Nelen et al. 2013, Peters et al. 2015, Hassnik et al. 1995, Knippenberg 2004).

Here, cooperation is shaped by initiatives of practitioners seeking solutions for their everyday practical needs to overcome obstacles such as institutional diversity and lack of financial autonomy (Block 2011). Moreover, cross-border cooperation is an ad-hoc activity where official procedures sometimes play a minor role but a variety of different (often informal) cooperation networks across borders are developed (Soeters et al. 1995). Sometimes formal structures based on contractual legal obligations evolve into informal cooperation based on behavioral norms if perceived as reciprocal and advantageous. Although only some kilometres apart police and judicial administrations in the countries may have different norms, values, and preferences due to the varying national cultures, which in turn affect their behavior towards the environment and their work (Pitschas 2001; Lappi-Seppälä 2008). Language barriers inevitably come into play but also more subtle differences such as intercultural misunderstandings, varying interpretations, and violations of other expectations. To get a better understanding of the underlying dynamics of cross-border cooperation between The Netherlands, Germany, and Belgium it is useful to shed some light on cultural dimensions that might play a role in the daily practice and institutions.

2.1 The Netherlands

The Dutch legal system is based on Germanic and Roman law traditions with the transference of French and German law. The material law in the Netherlands is similar to the law in Germany due to the shared Germanic tradition in the area (Blankenburg 1998). For most of the postwar period, the Netherlands were portrayed as having sensible criminal justice policies, tolerant social attitudes and pragmatic and lenient Drug policies (Tonry and Bijleveld 2007). By the end of the twentieth century, criminal justice policies hardened although this did not impact the prison rates and even led to a reversed punitive turn (Van Swaaningen 2013). The organizational structure of prosecution offices in the Netherlands is similar to the systems in Germany and Belgium with various regional offices affiliated with the different courts. The main difference, however, is the strong tendency to centralization when it comes to cross-border cooperation. Incoming and outgoing requests for prison transfers or EAW are centrally organized either with specialized prosecution offices (e.g. the Fugitive active research team in Haarlem) or at the Court of Amsterdam.

The Dutch professional culture is marked by cooperation and positive attitude towards colleagues resulting in regular meetings (Soeters et al. 1995: 9). Compromise trumps hierarchy and cases are handled with a high degree of pragmatism and efficiency. The expediency principle provides Dutch prosecutors with a high degree of discretion whether to prosecute or

not based on either reason of policy (e.g. a person is a first time offender and/or the case is of insufficient weight) or on technical reasons such as insufficient evidence (Peters 2013: Soeters et al. 1995). A case management system is implemented to weigh individual cases in so-called 'Weegploegen' or assessment teams. Peters et al. (2013) describe the process as follows: 'In short, police management, i.e. the chief of police, the mayor of the relevant municipalities and the chief prosecutor, establish policy guidelines giving priority to certain (types of) cases. Individual cases are screened and contrasted against a list of eligibility criteria: the policy guidelines, the possible success in the case, the severity of the crime, and the existence of aggravating circumstances. Furthermore, weekly or monthly, high-ranking police officers and the public prosecution department discuss the current cases, the division of available capacity among prioritized cases, resulting in projects and the application of (invasive) investigatory measures.'

In the practice of cross-border cooperation in criminal legal matters, this decision-making process may lead to frictions as it is sometimes perceived as intransparent by law enforcement offices in the neighboring countries and may impact cooperation negatively. One of our respondents gave the example of ATM-bombings, a severe problem in German border towns. The alleged perpetrators are organized criminals from the Netherlands who use high motorized vehicles to flee the crime scenes in Germany and cross the Dutch border to safety. But since ATM bombings are not a specific crime issue in the Netherlands (at least not anymore), the fight against it is not prioritized which in turn may impact the cross-border cooperation with German authorities.

2.2 Germany

German law, much like the Dutch law got its impulses from the French Code Civil due to the Napoleonian occupation. Both law traditions have developed numerous commonalities, and, in both systems, the French influence superseded a practice of rather decentralized local legal cultures. (Blankenburg 1998: 3). In Germany, the prosecution offices are organized by the Länder and to every regional court (Landgericht) a prosecutor's office is affiliated that is also responsible at the lower district courts (Amtsgericht). In NRW there exist 19 Prosecution Offices while the office in Aachen is responsible for the Euregio (Van Daele and Vangeebergen 2010). The German prosecutor's office is hierarchically organized with an organizational structure very clearly dividing the competences (Hund 1994). Prosecutors are strictly bound by the authority of the leading senior Prosecutor (Leitender Oberstaatsanwalt) who gives directives

that in practice mostly take the form of general guidelines. Bound by the legality principle and strict hierarchies, German prosecutors do not enjoy the discretionary power or independence like e.g. judges do. In contrast to their Dutch counterparts, German prosecutors are bound by the principle of legality that obliges law enforcement to open an investigation if a criminal act is brought to their attention. This principle, however, does not mean that every investigated case will actually be prosecuted: In 2015 of all cases that could have been charged by the prosecutor, in adult penal cases 60 percent and in juvenile cases 76 percent (in big cities even more) were dismissed, most of them without any further intervention (Boers et al. 2017: 664).

In the past years, the field of international legal cooperation that was strictly in the hands of the ministry of justice had been reformed resulting in a gradual decentralization. Questions of international relevance such as European Arrest Warrants (EAWs), the transfers of prisoners or judgments have been placed in the hand of the local prosecution offices with some of them (respectively the larger offices in Düsseldorf, Cologne and Aachen) having established specialized departments for legal cooperation. In the smaller prosecution offices where international cases are less frequent, sometimes this consulting role is taken over by one specialized prosecutor. However, our research has shown that the individual case remains in the hand of the responsible prosecutor and the specialized departments have a mere consulting role. The decision-making process, for example, if an EAW or a certificate to transfer pursuant to FD 2008/909 or FD 2008/947 is issued, remains within the responsibility of the prosecutor. The intent of the decentralization was a de-politicization of legal cooperation and to place all relevant decisions in the hand of the prosecutor that is familiar with the individual case. One effect, however, is that due to the rather small caseload with a cross-border relevance sometimes the expertise of how to properly proceed these cases is lacking.

2.3 Belgium

When it comes to penal policies Belgium, as other francophone countries, can be characterized as relatively stable over time in its mild punitiveness, with the Walloons however, appearing of being less punitive than the Dutch-speaking Flemish (Tonry 2007, Snacken 2007). Belgium (much like The Netherlands) was never strongly influenced by law-and-order politics, and penal policies have not become significantly harsher.

Nevertheless, what differentiates Belgium from the other two case countries is the severe judicial crises of legitimacy since the 80s. According to Snacken (2007: 154) parliamentary inquiries repeatedly found overwhelming evidence of the inefficiency of the police and the judiciary, and especially of lack of cooperation and coordination among the different police

forces and the judiciary. Countermeasures to stop the decline of trust in state institutions among citizens included initiatives to strengthen democratic liberties, transparency, effectiveness, and a reform of the three major police forces. For the penal system, these reforms led to an emphasis on the protection of human rights and fundamental freedoms and the introduction of more alternative sanctions. Severe Prison overcrowding was tackled by reductionist penal policy addressing the problem mainly through social policies and alternative sanctions.

It is somehow doubtful that Belgium today has overcome these issues entirely. The current problem of prison overcrowding shows that some problems still exist. Current strategies to alleviate the situation such as the deliberate non-enforcement of short prison sentences, the extensive use of release rules and the comprehensive application of electronic monitoring may have a negative effect on the trust in the judiciary institutions in the long run. Prosecutors have voiced their concerns over this lenient approach demanding for higher sanctions in order to assure that at least a part of the punishment is enforced (Beyens et al. 2010) Daems et al. (2013) consider this current release policy, as well as the prison system in general, as being in a state of constant crisis.

In Belgium, 14 Prosecution offices of the first instance (parketten van eerste aanleg) exist. The prosecution offices Limburg (with the departments Hasselt and Tongeren), Lüttich (with the departments Huy, Lüttich and Verviers), and Eupen function as so-called Eurogional prosecution offices of the first instance (Euregionale parketten van eerste aanleg). All prosecution offices are under the supervision of a procurer of the king (procureur des konings), who is supported by the first prosecutors who in turn are responsible for specific areas of the criminal prosecutions.

It is safe to say that the degree of centralization in Belgium lies somewhere in between the German and the Dutch system. While prisoner transfers pursuant to FD 2008/909 are centrally organized by the Ministry of Justice in Brussels, the transfer of judgments pursuant to FD 2008/947 remains within the discretion of the individual prosecutor.

2.4 Different legal cultures - different sentencing

Nowhere is the cultural gap so obvious when it comes to the style of sanctioning and severity of sentencing. The Treaty on the Functioning of the European Union (TFEU) states in Art. 67 (1): “The Union shall constitute an area of freedom, security, and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.”

There are not many areas where different legal traditions and national identities are reflected in the same degree as in sentencing. Asp (2013: 58) states, that "sentencing reflects values held by the community very directly and it does not only—as the criminal law system in general—reflect the division between what is acceptable and what is not, but also the way different values relate to each other and how one reaches a compromise between different interests."

A simple example is the lifelong prison sentence: In Germany, lifelong means a minimum of 15 years imprisonment, whereas in the Netherlands this can amount to lifelong time spent in prison. In Belgium, however, as the maximum sentence is 30 years as well under special circumstances, a life sentence may result in 10 years imprisonment (European Commission 2004).

Sentencing defines the relationship between the legislative and the judiciary expressing itself in the tension between legal provisions and judicial discretion. The responsibility and discretion of sentencing constitutes an essential part of the profession of a judge and is strongly linked to the independence of the judiciary (Asp 2013). In Germany the so-called 'Spielraumtheorie' gives the judge a margin within which he or she can freely determine the sentence.

But not only the sentencing decision defines the actual outcome of penal measure, its severity and impact on the individual. Here, the rules on the execution of sentences come into play as well, such as the rules on conditional release, the possibility of day-release or electronic surveillance.

Provisions for early release are implemented in all Member States of the EU, but eligibility conditions and implementation rules vary greatly. In Belgium, for example, early release is theoretically possible after one-third of the sentence has been served while in Germany after two thirds. While in Belgium a three years prison sentence can be executed under electronic surveillance, the German penal system does not offer this opportunity at all. In contrary, it dictates, that every sentence of more than two years imprisonment cannot be suspended initially. Dutch courts, in turn, are known for making extensive use of community service, the taakstraf, a measure that does not exist in Germany as a primary sentence (except in juvenile cases). These variations of the probation rules not only affect the actual time an individual spends in prison but may also cause a certain reservation of issuing states to transfer a prisoner due to the uncertainty of how long the executed prison sentence will actually be. A respondent (R8) from Belgium reported, that German prosecutors withdrew certificates on several occasions since they were not in agreement with the Belgian conditions of provisional release.

Not only probation rules vary, but also the very ways sentencing decisions are reached. An example we came across during our research is related to drug trafficking, a fairly common act of crime in the German-Dutch border region. While German courts use as a thumb rule that one kilo of trafficked substance (e.g. cocaine, heroin) adds up to approx. one year in prison, drug trafficking is handled more lenient by the Dutch authorities. However, when it comes to the calculation of the quantity of trafficked drugs these differences may even out: While German courts base their calculation on the measured substance alone, Dutch authorities calculate the quantity by weighing the Narcotics as seized. The outcome can be significantly different, given that most drugs for sale on the black market are regularly laced (sometimes up to 90%) with other substances, resulting in high quantities with low quality.

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2.5 Punitiveness and prison populations

Cross-border cooperation in sentencing is not only influenced by legal cultural aspects, but also by the institutional goals and policies directly related to the prison systems. In its reasoning of why prisoner transfers are for the benefit of the Member States, the EC named a reduction of prison overcrowding, the improvement and of prison conditions as main reasons. (European Commission 2014). To better understand the dynamics of cross-border cooperation in sentencing it is, therefore, useful to cast a light on some of the central developments that shape prison populations in the three countries namely punitiveness and the ratio of (EU) foreigners in prison. Especially the latter is a considered a growing concern as the number of foreign prisoners is rising despite the fact that prison populations overall are shrinking. The reasons for this development are complex and reach from changing demographics, over the extensive use of pre-trial detention for foreigners, longer sentences to deportation detention (Mulgrew 2017, Melossi 2013, Morgenstern 2013, Van Kalmthout et al. 2007).

When assessing the punitiveness of European countries one has to take into account the so-called punitive turn, a phenomenon experienced until the early 2000s in many European countries leading to a considerable rise in prison populations. A variety of concepts to explain this turn were offered (Aebi et al. 2015a: 589) reaching from populist punitiveness (Bottoms 1995) penal populism (Roberts et al., 2002), the culture of control (Garland 2001), new public managerialism (Stenson and Edwards 2004), governing through crime (Simon 2007), punishing the poor (Wacquant 2009) or the exclusive society (Young 1999). However, the 1990s had brought law reforms which increased the minimum sentence for violent and sex offenders significantly leading to an overrepresentation in prisons and even an overcrowding in some

European countries (Dünkel 2017: 633). However, this punitive trend proved to be not sustainable and affected the EU Member states in diverse ways (Aebi et al. 2015b). Today, particularly with a view to prison populations in The Netherlands and Germany one is inclined to speak of reversed development with declining numbers of people incarcerated (Van Swaaningen 2013, Dünkel 2017). One of the view European exceptions, however, is Belgium that is still experiencing an expanding prison population.

For the assessment of the punitiveness of a penal system, prison population rates are a useful yet complex and polysemous indicator (Aebi et al. 2015: 581). They are a construct of the number of inmates on a given day by 100,000 inhabitants and by that combining the number of entries and the length of stay in prison. This, however, leaves room for interpretation. Dünkel exemplifies this problem by using the example of Germany and Sweden. The German prison population rate of 76 prisoners per 100.000 inhabitants is composed of 117 entries per 100,000 inhabitants and an average stay of 8.4 months. In Sweden, about four times as many offenders enter prisons (393), but due to a relatively short average stay of 1.8 months, the prison population rate (53) settles lower than Germany. A similar yet not as dramatic dynamic can be observed in the Netherlands where 237 entries are registered per 100,000 inhabitants but for an average stay of 3.3 months leading to a population rate of 53. In Belgium, the corresponding data shows that 166 entries per 100,000 inhabitants and an average of time of 7,6 months spent in prison equates to a relatively high rate of 98.

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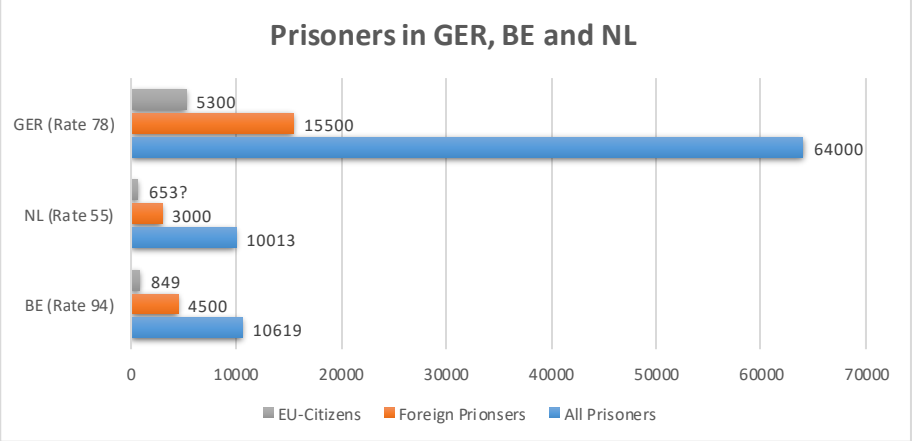
The interpretation of this data shows the shortcomings of the concept of punitiveness. The example of Sweden with the highest amount in Europe of people going to prison for minor crimes such as traffic offenses but one of the lowest imprisonment rates demonstrates the problem of punitiveness: Is the Swedish system relatively punitive (for incarcerating so many people) or actually less punitive (for leaving offenders in average only 1,8 months in prison)? How to enter the non-custodial sentences in that equation such as community services that have been increasingly implemented in The Netherlands (taakstraf) or electronic monitoring in Belgium?

The problem of punitiveness can be exemplified by alternative and community sanctions such as community service whose popularity especially in Western European countries is apparent. For example, in Belgium France, and The Netherlands it led to a ratio of roughly three probationers per prisoner in 2010 (Aebi et a. 2015). In Belgium, since community service became an autonomous sentence in 2002, it led to an increase from 882 persons serving community service in 1997 to 10,530 in 2010 (McIvor et al. 2010). But not only alternative

sanctions play a role but also other penal measures such as monetary fines have to be included in the picture. In Germany, more than 80 percent of all convictions for adults end up in monetary fines, less than 14 percent in probation and only 5–6 percent in unconditional prison sentences (Boers et al. 2017).

Recently, some doubts have been voiced that the promotion of community sanctions as replacements for imprisonment have a reductive effect on the prison population. Aebi et al. (2015) demonstrate in a comparative study that in 20 years of community sanctions and measures in Europe no visible reductive effect on prison populations can be observed. This led to the assumption, that community sanctions do not necessarily reduce the number of prisoners but are instead embedded in a net-widening dynamic to increase rather than to decrease the number of interventions directed at groups of deviants in the penal system (Cohen 1979). Evidence for this net-widening effect was found in In the Netherlands: Spaans (1998) demonstrates that since the introduction of community service in 1981 with the aim to reduce short-term imprisonment, this alternative punishment was widely employed as an alternative to non-incarcerative sentences as well.



3 FDs 2008/909 and 2008/947: Background, Rationales, and Procedures

Over the past decades, several instruments allowed for the transfer of sentenced persons in Europe. According to De Wree et al. (2009) the Council of Europe was the main forum for mutual agreements between its member states and several conventions such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964) or the European Convention on the International Validity of Criminal Judgments (1970) were established. The most important convention, however, before the rules of FDs 909 and 947 came into effect, was the Convention on the Transfer of Sentenced Persons (1983) ratified by 61 countries, including all Member States of the European Union and non-member states such as Canada and the United States (De Wree et al. 2009: 112). Parallel to this convention the EU Member States ratified the Agreement on the Application between the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons (1987) allowing to equate 'persons who have a permanent residence in a country' with nationals of that country in the application of the COE convention of 1983.

Hence, in its endeavor to facilitate mutual recognition of judicial decisions in criminal matters the EU's role in the field of prisoner transfer increased. The first important instrument in that respect was the establishment of the EAW. The EAW, usually allowing for the surrender of an individual for the purpose of prosecution, under certain circumstances also allows for the transfer of a sentenced person. This, for example, is possible if a Member State bases the surrender on the condition that the person is returned to the executing Member State in order to serve there the custodial sentence or detention order in the issuing Member State (art. 5). This guarantee functions as a safeguard to the sovereignty of the executing State over its nationals and residents and serves the purpose of resocialization (Pleić 2018).

The EAW was followed in 2008 by the FDs 909 and 947, both based on an initiative from Austria, Finland, and Sweden. FD 2008/909 replaced the old system of prisoner transfers and introduced some major innovations such as the abolishing of the consent requirement of the sentenced person and the principle of mutual recognition. Pursuant to art. 29 (1) FD 2008/947 should have been implemented by 5 December 2011, but only five MSs had transposed it into national legislation by that date (Pleić 2018). In The Netherlands and Belgium, the FD 2008/909 came into force in 2012 while Germany was not able to implement it before 2015. FD 2008/947

was due on 6 December 2011 and implemented in the Netherlands in 2012, in Belgium 2013 and in Germany in 2015.

The FDs 2008/909 and 2008/947 belong to the same 'family' of criminal justice framework decisions. While FD 2008/909 is designed to establish a system for the transfer of prisoners to the EU Member State of nationality, habitual residence or where they have close ties, FD 2008/947 effectively does the same with probation decisions and alternative sanctions (although the notion of the 'transfer' of a judgment is misleading as the decision is based on mutual recognition). Both FDs have fundamentally in common that a sentence is issued by one Member State and executed in another. Both place the social rehabilitation of the sentenced person at the very core of their rationale, assuming that reintegration is best achieved where social, family and professional ties exist. Moreover, both have in common that the initiative to transfer lies with the sentencing state which places the procedure in the realm of deportation.

These are the main differences to the EAW: here a person is surrendered to another Member state for the purpose of sentencing. And it is the executing Member State that is requesting the surrender. The EAW and FD 2008/909 are often analyzed in the same context since the occurring problems related to detention are of similar nature.

There exits, however, a number of significant differences in the procedural executions between FD 2008/909 and 2008/947. FD 2008/909 does not require the sentenced person to consent to its transfer (EC 2011:6). Argumentum e contrario this means that a prisoner can be transferred to his country of origin or habitual residence even against his expressed will. This is not the case with regards to FD 2008/947: The probation decision or alternative sanction can be executed in any other member state than the sentencing one as long as the sentenced person has consented (EC 2011). In practice, however, this consent is often assumed as long as the person concerned did not proactively veto to it (see more details below).

Both Framework Decisions have their origin in the circumstance that the number of non-nationals in EU prisons has been continuously on the rise for years. Both FDs are designed to reduce these numbers FD 2008/909 directly, FD 2008/947 more indirectly. While FD 2008/909 works quite straightforward by transferring prisoners to their country of origin or habitual residence, FD 2008/947 is subtler: By providing an easy way to execute probation measures and alternative sanctions in other member states it should give an incentive to courts to treat non-nationals as nationals and therefore be more inclined to use custody as a last resort (Durnescu 2017: 357). According to the European Commission, the FD has the potential to lead to a reduction in prison sentences imposed to non-residential EU citizens. This is based on the empirically well-established fact that non-nationals are more likely to receive a custodial

sentence (including pre-trial detention) since judges fear that other sanctions are easily circumvented or sabotaged by leaving the country.

3.1 Mutual Trust and Recognition

The principle of mutual recognition and its underlying corollary concept of mutual trust must be considered the cornerstones of judicial co-operation in criminal matters among EU Member States (Banach-Gutierrez 2013, Klip 2016, Neveu 2013). The principle of mutual recognition formulated at the Council meeting of Tampere in 1999 and reaffirmed by The Hague Programme in 2004 has since been implemented in different subjects pertaining to criminal matters such as the EAW, execution of confiscation orders, execution of custodial sentences, supervision of probation measures and alternative sanctions and supervision measures as an alternative to provisional detention. Although the principle applies to different legal fields it is safe to state that it finds it the most advanced and challenging form in criminal matters (Neveu 2013). The reasons for that are the diversity of approaches to criminal law within the EU respectively when it comes to sentencing and probation measures. Ultimately mutual trust means legality and legitimacy are presupposed to exist ipso iure and questions concerning the legal quality of the judicial decision are not asked (Vervaele 2005). It requires not only trust in the adequacy of the other Member States rules and their correct application but to a certain extent the presumption that fundamental rights are respected fully and by all Member States across Europe (Mitsilegas 2016:126). Hence, mutual recognition and trust presuppose as much as they contribute to the endeavor of creating a common European legal area despite the different legal systems ultimately constituting a genuine European Area of Justice (EU Council 2004). In legal practice, this proves to be often challenging and difficult as this study will show. But it should be kept in mind that the principle of mutual recognition has no absolute character, is limited and a number of yet relatively narrow exceptions apply that will be discussed in detail later (Martufi 2018).

For the application of the FDs 2008/909 and 2008/947 the principles of mutual trust and recognition play a significant role. The executing state takes over a sentence without any possibility of assessing the underlying judgment. The issuing state gives a sentenced person out of his hand without having any influence on the terms and conditions under which the sentence is executed. In the Netherlands, for example, the principle of mutual recognition is codified in the Surrender Act (Overleveringswet, OLW) and Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act (Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties, WETS).

Particularly in relation to fundamental rights defenses the District Court of Amsterdam in his jurisprudence on the EAW has repeatedly underlined the relevance of these principles (Graat et al. 2018: 3). However, a qualitative study conducted by Graat et al. found out that legal actors in practice struggle with the principle of mutual trust when an individual is transferred for the execution of a custodial sentence or detention order for example with regards to the question if prison conditions in the issuing country are up to (Dutch interpretations of) fundamental human rights. A prominent example is the limited personal space of less than 3 square meters in prison cells which if no compensating factors are provided results in a violation of article 3 ECHR.[1] Other examples are hearings being constantly postponed, no interpreter being available or nor legal aid accessible. The question of the size of prison cells has been subject to a number of court decisions in Germany as well. Here a variety of circumstances have to be taken into account when assessing cell space (such as the availability of a separated restroom or the possibility of leaving the cell for a certain amount of time). Recently Belgian prisons have been criticized for deteriorating prison conditions leading to a reevaluation of the possibility of transfers to the country. In view of these examples Graat et al. (2018: 4) identify a discrepancy between legal reality and empirical reality and conclude that 'mutual trust is a legal reality, that may play havoc with the actual trust individual actors in the Dutch legal order have'.

3.2 Social Rehabilitation and Reintegration

FD 2008/909 and FD 2008/947 both have social rehabilitation as their very core rationale. Social Rehabilitation and reintegration (for this context both are used interchangeably) have since the 70s been empirically and theoretically well-researched topics in the field of penology. Crime prevention and the reduction of recidivism are primary goals of social rehabilitation. It fosters the view of prison sentences as a subsidiary and consequently counterproductive while instead, individual treatment as well as alternative sanctions and measures should be prioritized (De Wree 2009). Rehabilitation is most effective when dynamic factors that are directly related to offending are targeted, such as social attitudes or drug misuse. Moreover, interventions are best made in communities and the length of the treatment must be adapted to the needs of the offender (Bourgon and Armstrong 2005). Finally having a partner and family relationship as well as being in employment reduce criminal behavior (Hepburn and Griffin 2004).

Social rehabilitation although a well-established concept in research, remains one of the biggest challenges for the penal practice. This is particularly true for foreign prisoners who experience

[1] Rb. Amsterdam 22 October 2010, ECLI:NL:RBAMS:2010:BO1448.

numerous problems in prisons, relating to culture, communication, access to services such as work, medical and legal services and contact with families. Transferring prisoners to their countries of living appear to be an effective solution to these specific problems (Simon and Atkins 1995).

Nevertheless, some authors have since pointed to elements of the FDs that might, in fact, be counterproductive or even undermine the goal of rehabilitation (De Wree 2009, Pleić 2018, Vermeulen 2007). Although the ratio legis of both FDs promote social rehabilitation, the clarification of what this precisely entails remains vague and no general definition is provided. This may lead to different interpretations depending on national laws of the member states. The same vagueness counts for the type of assessment the issuing authorities are supposed to undertake (Martufi 2018: 50). FD 2008/909 (recitals 8 and 9) determines, that 'the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.' But these links alone are not sufficient to reduce reoffending and might even work in an anti-social direction (Garcia 2015, Robinson and Crow 2009). In addition, a mechanism of control is lacking if the purpose of social rehabilitation is actually fulfilled by transferring the prisoner. If the executing state has concerns whether a transfer serves the purpose of social rehabilitation or is in contrast counterproductive, these can be voiced in during consultations but explicitly do not constitute grounds for refusal (recital 10). It is solely up to the issuing state to withdraw the certificate if convinced that the purpose of social rehabilitation is not fulfilled (Pleić 2018, 380).

A high potential for undermining the goal of social rehabilitation is woven into the possibility of transferring a prisoner without his consent (see below). There is not much doubt that measures taken against the expressed will of a prisoner, especially when as significant as the transfer to another country, may negatively impact the prospects for reintegration in society. This, however, works the other way as well: A prisoner may voice his interest of being transferred to his country of residence, but states are not obliged to act upon this request and initiate a transfer. For whatever reason, a state can decide to execute the sentence on its own, as for example the penal system in the country of the prisoner's residence is perceived as being too lenient and by keeping the prisoner, a harsh sentence is ensured. This, however, would make sentences for foreign prisoners more repressive and be inconsistent with the aims of rehabilitation that prescribe to aim for the least severe sanction (De Wree 2009: 119).

It is crucial for a successful reintegration to establish where an offender can and will start his life after the end of his sentence. Decisions on expulsion and deportation before or after the

serving of the sentence are therefore closely linked to questions of transfer and rehabilitation. Besides the transfer of a prisoner to the state he lives in, Art 4(1)b of FD909 establishes an additional principle for the choice of the issuing state: the sentence may be forwarded to the state of nationality to which the person will be transferred after release on the basis of a previous deportation order, regardless of his or her attachment to that state. The simple ratio here is that there is not much room for rehabilitation considerations if the sentenced prisoner is subject to deportation after his release. In practice, this 'second track' of transferring prisoners has become of increasing importance such as in the UK, where a deportation order is routinely attached to criminal convictions promoting the risk of instrumentalizing the transfer procedure for migration policies (Martufi 2018, Bosworth 2011, De Wree 2007). It is this nexus of sentencing practices and migration policies that scholars increasingly refer to as 'crimmigration' and has led to growing concerns of instrumentalizing criminal laws for the purpose of migration controls, deterrence of foreign criminals, tough on crime policies and a shift from reintegration to issues of protection and exclusion (Vermeulen 2007, De Wree 2009).

Our research has shown that crimmigration dynamics are only partly reflected in the transfer practice. All three case countries have regulations in place that allow for an expulsion in relation to a sentencing decision (see below). In Germany, for example, a person will be eligible for expulsion under § 456a of the criminal procedural law according to which a foreign prisoner can be deported to his country of residence after having served only half of his sentence (instead of serving the usual two-thirds of his prison sentence). He is, however, prohibited to reenter the country. A similar rule exists in the Netherlands. Here, a consultation with migration services is conducted before a decision on an incoming certificate is made.

The effect of migration issues on prisoner transfers is complex. One of our interview partners (R2) stated, that German prosecutors prefer the expulsion rule over a transfer and even consider it as a certain win-win-situation: the sentenced person is permanently expelled from the state with no possibilities of reoffending while the offender benefits from a shorter time spent in prison. According to another interview partner from Germany, this has led to a situation, where foreign inmates in German prisons prefer the expulsion over a transfer since the time spent behind bars is ultimately shorter. In turn, this has led to a practice in some German prosecution offices to leave the expulsion rule unapplied when the prisoner is eligible for a transfer. A recent empirical study conducted by Durnescu et al. (2017) corroborates these findings. According to this study, prisoners attribute less importance to factors like prison conditions or proximity to families. Instead, their willingness to be transferred is motivated to the perceived length of the transfer procedure and, most importantly, to the prospects of an early release.

3.3 Empirical Data on the Implementation of FDs 2008/909 and 2008/947

To assess the framework decisions, it is helpful to have an overview of how many persons benefited from these instruments, under which circumstances and with which countries involved in the exchange (Durnescu 2017). Gathering and analyzing data on both FDs is considered as being difficult compared to, for example, the EAW where data is centrally collected and published in EU Commission Reports. A centralized system with regards to the FDs is lacking and the variety of authorities involved makes the processing and reliability of the data questionable (Europris 2013).

Moreover, a reliable assessment of the instruments has to keep the bigger picture in mind meaning, that with a view to the FD 2008/909 demographics of the prison population in the case country play a role. It can be hypothesized, that the number of EU foreigner in prisons will be related to the number of transfers to other EU Member States. Nevertheless, this relation is more complicated when one takes into account the fact, that transfers pursuant to FD 2008/909 or FD 2008/947 are based on the possibilities for social rehabilitation and less on nationality. This may, for example, mean that an Italian citizen living and working in the Netherlands for a fair amount of time but convicted in Germany to a prison sentence might be eligible for a transfer to the Netherlands rather than to his country of origin.

Overall, data on the transfer of prisoners is scarce. This is even more true for data on transfers of judgments pursuant to FD 2008/947. Here, only The Netherlands collects data centrally while in Germany and Belgium local prosecutors don't report their case work to a central authority. However, our interview partners provided us, where available, with data on their casework. This information gives a good overview of the empirical dimension of cross-border cooperation in sentencing despite the fact that it is no officially collected and published judicial data.

3.3.1 The Netherlands

The Netherlands has reduced the numbers of inmates in Dutch prisons over the past years significantly (Pakes and Holt 2017). Official statistics from the Dienst Justitiele Inrichtingen (2017) calculate the prison rate in 2017 with 51.4 per 100 000 inhabitants which is one of the lowest in the EU and only matched by Finland with a rate of 50.9. This downward trend is mirrored in the total number of inmates: in 2005, 14.468 inmates were registered in Dutch prisons. This number decreased by 43% to 8245 in 2015 and to 8019 in 2016.[2] The introduction of more narrowly defined prison rates alleviates this decrease but this punitive turn in its

[2] Note that these numbers deviate from the numbers that are for example used by SPACE due to the inclusion of different categories as a basis for calculation.

dimension remains a unique development compared to other EU countries (Pakes and Holt 2017). The resulting empty prison space was for rented out to other countries. For example, in the city of Tilburg, a few hundred inmates convicted in neighboring Belgium were hosted (Boone and Beyens 2012). A similar deal was agreed upon in 2014 with Norway leading to the incarceration of Norwegian inmates in Norgerhaven in the Northern village of Veenhuizen. Both deals were terminated in 2017.

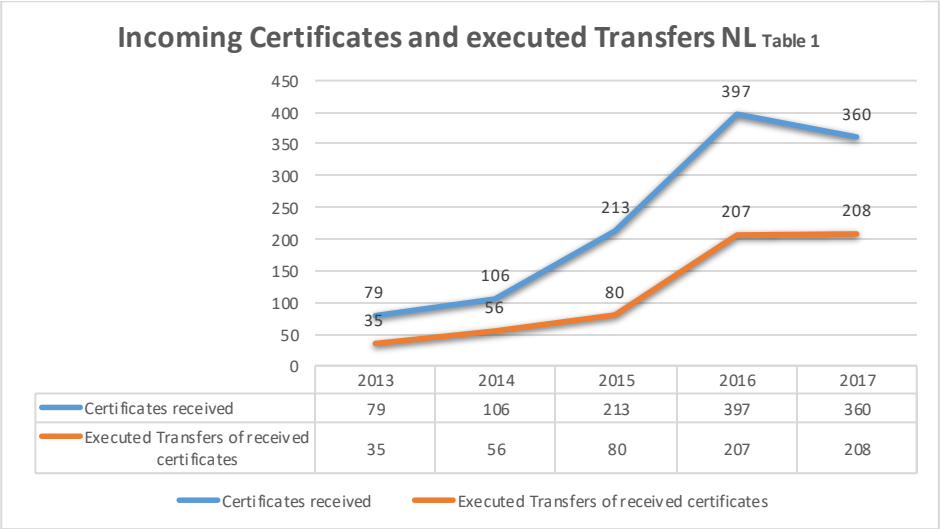
The reasons for this drop in prison rates are manifold and where explained with a variety of reasons such as a drop in serious crime, the increased use of community penalties and the introduction of a master plan by the Dutch government promoting a process of de-carceration (Van Dijk 2011, Pakes and Holt 2017). This dynamic of decrease does not apply to all prisoners and did not include 'dangerous populations', such as irregular migrants and ethnic minority youngsters (Van Swaaningen 2013). Downes and Van Swaaningen already in 2007 stated, that the percentage of foreign-born detainees in Dutch prisons has remained stable at around 50 percent since the 80s. Their conclusion that the 'overwhelming "color" of the detainees is dark' does not say much about the ethnical composition of inmates since people are registered only on the basis of their country of birth (Downes and Van Swaaningen 2007).

For the question of prison transfers, the data on incarcerated non-Dutch EU citizens is of high interest. According to the Council of Europe, the numbers of foreigners in Dutch prisons amount to 21% of the total prison population in 2016 including pre-trial detainees. Excluding the latter, the ratio of foreigners dropped to 16% of all prisoners. Of all foreign prisoners including pre-trial detainees, there were 653 EU citizens registered making up for 7.5% of the entire prison population (Aebi 2016).

3.3.1.1 FD 2008/909 Transfers

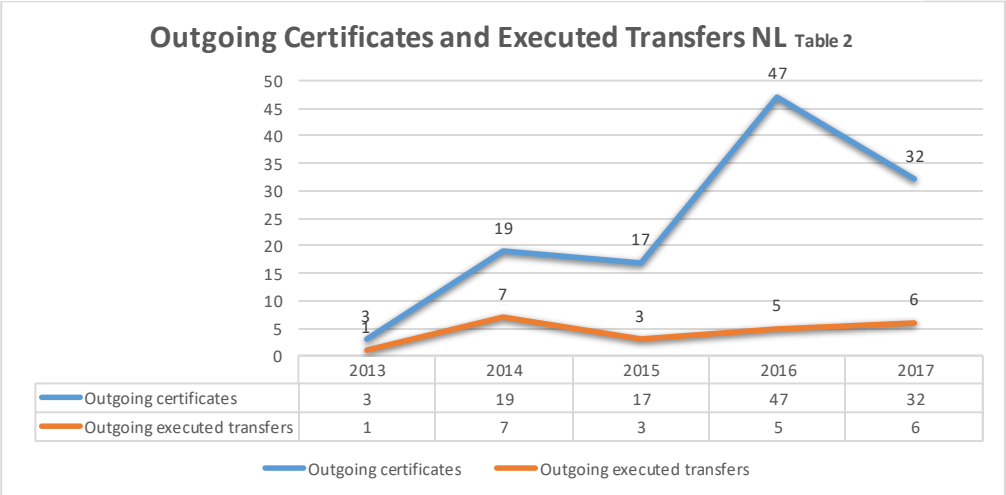
In terms of prisoner transfers pursuant to FD 2008/909, surprisingly The Netherlands is an import or receiving nation with a ratio of outgoing to incoming transfers of 1:10.[3] Between 2013 and 2017, a total of 1155 certificates were received by the responsible Dutch authorities namely the IOS (Internationale Overdracht Strafvonnissen) at the Ministry of Security and Justice in The Hague. Table 1 shows that while the number of received certificates peaked in 2016 with 397 in 2017 a slight decrease could be observed.

[3] Most of the data in this chapter is retrieved from the report published by the Dutsch Ministry of Justice written by Nauta et al. (2018) Evaluatie Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Wets).

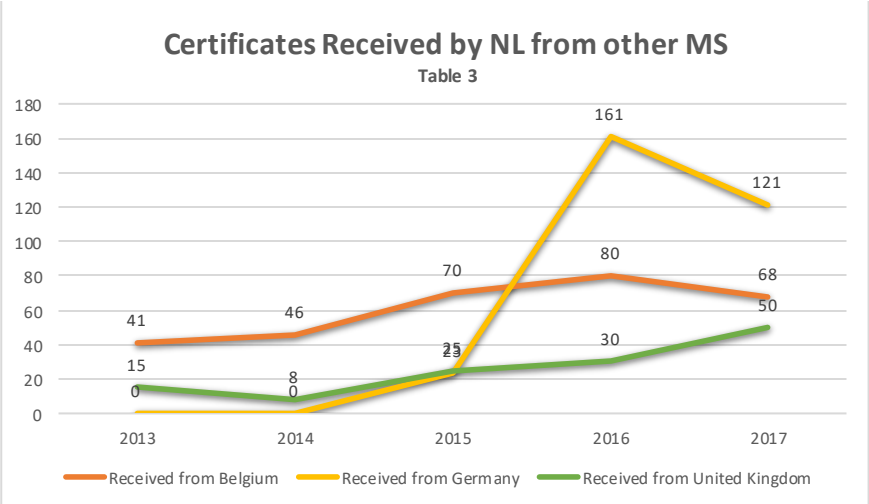


The table shows that the reception of a certificate does not automatically mean that a transfer is conducted. In fact, in 2015 only 38% of the incoming certificates (80 in total numbers) led to an actual transfer. By 2017 this execution quota had risen to 58%.

Table 2 shows the number of outgoing certificates and transfers from The Netherlands to other EU countries. Compared to the incoming certificates and transfers the total numbers are significantly lower. For example, at the peak in 2016 a total of 47 certificates were sent out to other EU member states but only 5 transfers were actually executed. When comparing table 1 and 2 with each other it shows, that while 208 prisoners were transferred to The Netherlands in 2017 only 6 prisoners were sent from the Netherlands to other countries. When comparing both table 1 and 2 one can draw two conclusions: first of all, the relation between received certificates and actually conducted transfers varies but has never been higher than 55%. This means that almost half of the received certificates were denied or for other reasons never resulted in a transfer. Second of all, The Netherlands import by far more prisoners than they transfer out.

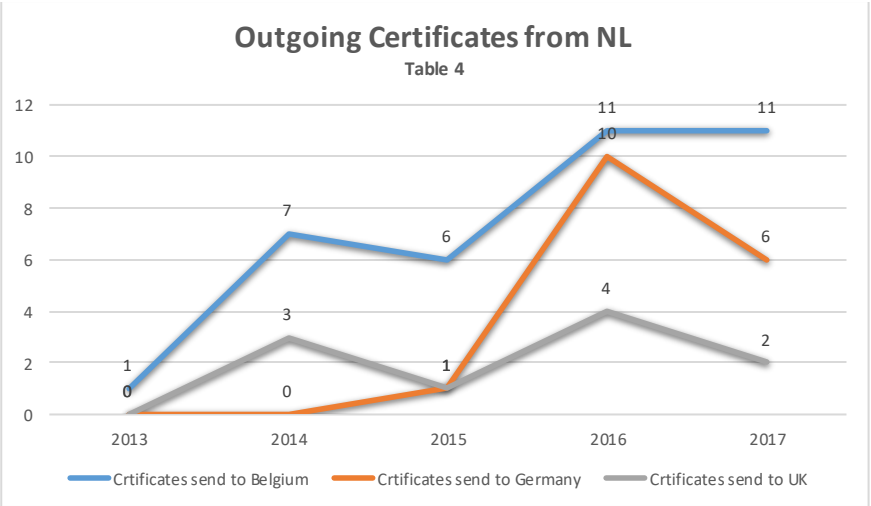


A look at the Member States shows that in sum and since 2013, most of the certificates were sent to The Netherlands from Belgium (305) Germany (304) and Great Britain (128). While the numbers from Germany and Belgium and Germany peaked in 2016 with 80 respectively 161 in 2017 a slight decrease can be observed.

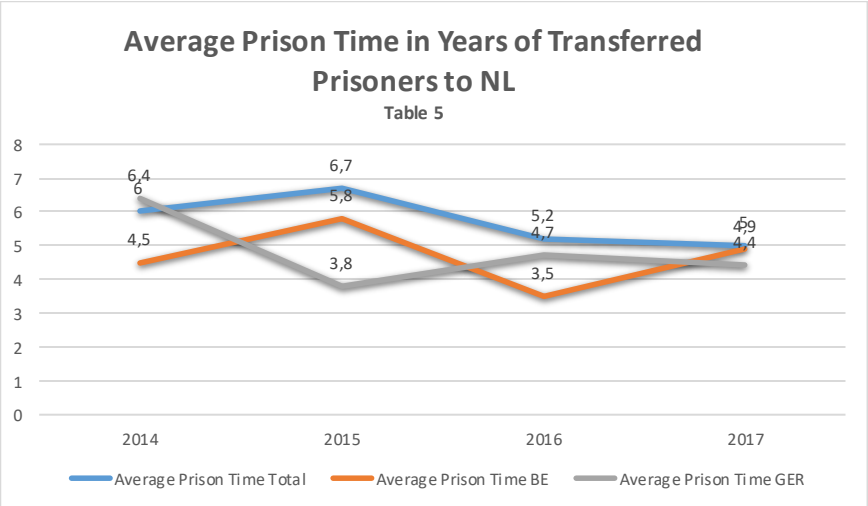


However, not all certificates were accepted by the IOS that evaluates reasons for dismissal and afterward refer the certificate to the court at Arnhem-Leeuwarden (ressortsparket). Table 4 shows the number of certificates sent from The Netherlands to Germany, Belgium and the UK.

As expected, the numbers of outgoing certificates are significantly lower than the numbers incoming certificates while the trend for UK and Germany was even downwards in 2017.



A view at the demographics of the transferred prisoners shows, that over 80% of the transferred prisoners to the Netherlands had the Dutch nationality, followed by Polish (5%), Belgians (4,7%) and Moroccans (4,1%). The nationalities of outgoing transfers were mainly Dutch (26%), Belgian (16%), Polish (14%) and German (9%). The delict types for which a transfer was requested were in most cases drug-related crimes. An interesting insight provides the average duration of prison sentences for the transferred persons.



The data in Table 5 shows that the average time transferred persons from Belgium and Germany had to spent in prison in the Netherlands where 4,9 years (average time all member states 5,9 years). The values remained relatively stable over the years for Belgium and Germany although minor spikes can be observed. The data shows that due to the relatively complex and lengthy procedure prisoner transfers are mainly conducted with prisoners that have to spend a significant amount of time behind bars.

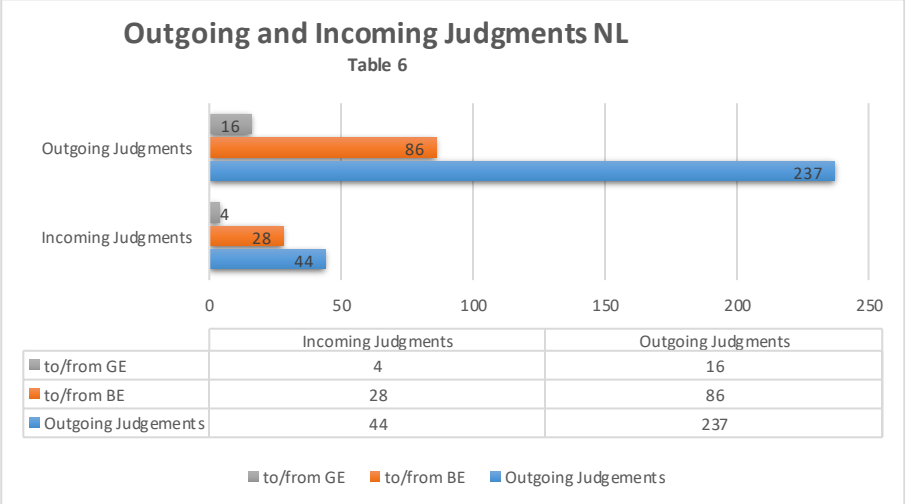
The average time to process a certificate by Dutch authorities (from the day of receiving to the day of a decision in the matter) took 104 days 2016 and 121 days in 2017. This led to the situation where only about half of incoming certificates are dealt with the in FD 2008/909 requested duration of fewer than 90 days. From the decision to transfer to the actual transfer on average 57 days go by.

All in all, as one of our interview partners conceded, the Netherlands be more active with regards to the transfer of prisoners to other EU states. Until now, the lack of capacity and manpower have been a hindrance in that matter but also a lack of necessity might have played a role. However, a rise in the number of cases have been on the political agenda and one will see how this will develop over the next years.

3.3.1.2 FD 2008/947 Transfers

In The Netherlands, all cases in relation to FD 2008/947 are centrally dealt with at the IRC Noord-Holland, afd. WETS-ETM Centrale Autoriteit. With regards to FD 2008/947 and the

recognition of alternative sanctions, the data shows that the Netherlands had in 2016 136 outgoing cases where probation measures or alternative sanctions 'traveled' to another EU country. During the same time period, 17 cases were registered with sanctions or probation measures imposed by authorities of another EU Member State being executed in The Netherlands. For 2017 these numbers remained relatively stable with a smaller amount of outgoing cases (101) but a heightened number of incoming cases (27). The most judgments where sent to Belgium (86) followed by Poland (21) and to Germany (16). From the 17 received certificates in 2016 The Netherlands executed 11 amounting to an execution rate of 65%. From the 27 received certificates in 2017, 20 were executed in The Netherlands (Execution rate 74%)



	Incoming Judgments	Outgoing Judgments
to/from GE	4	16
to/from BE	28	86
Outgoing Judgements	44	237

The main sanctions of the incoming judgments are special sanctions (bijzondere voorwaarden) and community service (taakstraf). Most outgoing cases are based on soft drugs and cases of abuse for which mainly community services were imposed. The average duration to process an incoming certificate was 41 days in 2016 and nearly only half the amount (22 days) in 2017. In sum, 82 % in 2016 and 95% in 2017 of all incoming certificates pertaining to FD 2008/947 were processed within or under the required 60 days time. It can be assumed that the increase in caseload by simultaneously reducing the processing time is due to the establishment of a certain routine.

3.3.2 Germany

The prison populations in Germany have been decreasing significantly over the past decade. Dünkel (2017: 634) goes so far to speak of Germany (and the Netherlands) as now belonging to the group of countries that in the past were characterized as 'exceptionalist'. He refers to a concept that originally was used with regards to the Nordic countries and describes a penal philosophy with a profound emphasis on normalization and rehabilitation, with prisoners remaining part of the society in which they will return (Pratt 2008, Pratt and McLean 2015). The reasons for the decline in the German prison population (over 22% from 2003) remains partly unclear but is generally attributed to procedural law reforms and a decline in violent and sexual offenses (Dünkel 2017).

The total prison population in Germany amounted to 64 193 inmates on 31 March 2017 excluding pre-trial detainees (Statistisches Bundesamt, 2017b: 5). According to calculations of the Institute for Criminal Policy Research[4] the prison population rate remains at 76 per 100 000 inhabitants on a relatively low level compared to other EU countries. Statistics on prisoner demographics vary depending on the data collection method but it can be estimated that approx. 30% of prisoners are non-German nationals (Statistisches Bundesamt 2017a: 25). The number of EU citizens in German prisons amounts to approx. 10% with the top nationalities being Polish (1325) Romanian (1114) and Italian (527) nationals. Belgian and Dutch citizens only make up for a rather small part.

The number of potential candidates for a prison transfer amounts (depending on the statistics) to over 5000 prisoners that fulfill the formal requirement of an EU citizenship. But EU-citizenship alone is not the only eligibility criteria for a transfer. FD 2008/909 refers not solely to nationality but rather to the habitual residence and on elements such as family, social or professional ties (FD 2008/909 (17)). For a significant number of foreigners in German prisons, the country of living or attachment may be Germany rather than their country of origin or nationality. Nevertheless, setting the complexity of criteria aside, the statistical data on prisoner demographics give a rough idea of the potential for transfers.

As for our focus on the Euregion, the look at the Bundesland of North-Rhine Westfalia (NRW) is of higher value. With nearly 18 million inhabitants and a foreigner rate of 11.8 %, NRW is the largest German Bundesland in terms of inhabitants.[5] According to official prison statistics,

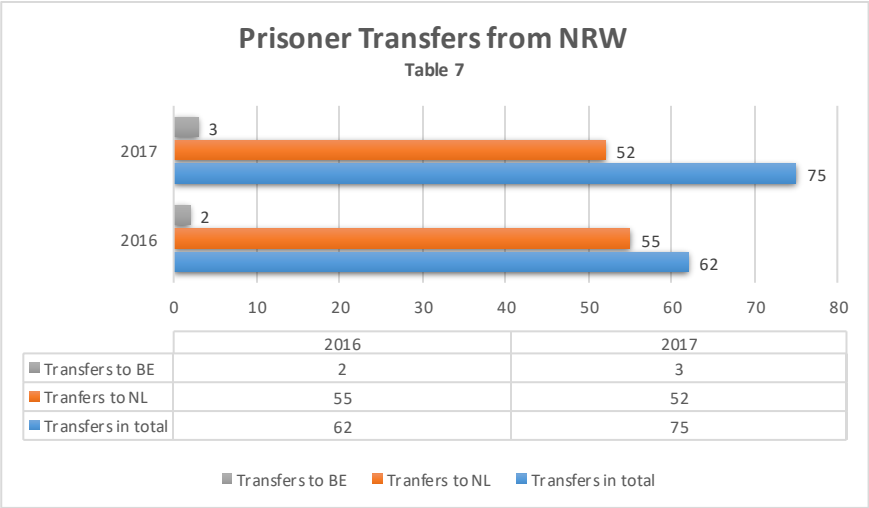
[4] *Source*: Institute for Criminal Policy Research, World Prison Brief. URL (accessed 2. July 2018): http://www.prisonstudies.org/info/worldbrief/

[5] These numbers must be taken with caution as they stem from 31.12.2015 henceforth before the migration of a significant amount of people during what is since known as the 'refugee crisis'. Statisitsiche Bundesamt Bevölkerungsstatistik URL: https://www.statistikportal.de/de/bevoelkerung/auslaendische-bevoelkerung

the number of inmates amounted in March 2017 to 15 862 distributed to 37 of 183 German prisons (Dünkel and Morgenstern 2018). This makes the by far biggest prison population in Germany (nearly one fourth or 24,4 % of all German prisoner) followed by Bavaria with approx. 11 253 inmates (Statistisches Bundesamt 2017b).

3.3.2.1 FD 2008/909 Transfers

The numbers of prison transfers pursuant to FD 2008/909 for NRW are the following: In 2016 in sum 62 prisoners were transferred from NRW to another EU country whereas 13 prisoners came to Germany. In that year 55 prisoners were transferred from NRW to the Netherlands while only 3 were transferred from The Netherlands to NRW. One case of prisoner transfer from NRW to Belgium was counted. In 2017 the numbers rose slightly to 75 prisoners transferred from NRW to another EU country, 52 of them to The Netherlands and 3 to Belgium. There were 24 incoming cases, 3 from the Netherlands and 2 from Belgium to NRW.



The relatively high amount of transfers to the Netherlands can be explained by one simple factor: the direct flight connection between Duesseldorf Airport and Curacao had led to a high number of drug-related arrests and convictions of Dutch citizens in Duesseldorf. Curacao is a former Dutch colony and still part of the Dutch kingdom, with the autonomous status comparable to a municipality. During one of our focus groups discussions, a prosecutor from Duesseldorf estimated, that nearly half of the transfers were due to this drug smuggling route.

The direct flight connection was canceled in 2017 and taken over by Amsterdam Airport. It is therefore likely that for the upcoming years the transfers from NRW to the Netherlands may decrease.

3.3.2.2 FD 2008/947 Transfers

With a view to transfers pursuant to FD 2008/947, the caseload in NRW is significantly lower. Since 2015 until May 2018 the number of incoming requests from other EU countries for taking over probation measures and alternative sanctions amounted to 19 cases. Approximately two-thirds of all requests were issued by the Netherlands. Surprisingly the number of outgoing cases meaning the instances in which NRW requested another EU Country to take over a probation measure or alternative sanction amounted to exactly one case. The reasons for this reluctance may be the fact that since FD 2008/947 is relatively new and has only recently been implemented not too many prosecutors have knowledge of this possibility.

The small number of cases does however not mean, that foreign EU-nationals are forced to spend their probation time in Germany or even worse, go to jail to circumvent an escape. The opposite might even be the case. One of our German respondents reported, that judges tend to sentence foreigners with residence within the EU to probation time under the sole condition to abstain from reoffending and no reporting obligations towards a probation officer. This way the sentenced person is free to leave for their home countries and the judge avoids a complicated transfer procedure.

3.3.3 Belgium

According to the Council of Europe, Belgium had 8220 prisoners excluding pre-trial detainees in 2016 of which 2917 (35%) were foreigners (Aebi 2016). The total number of EU citizens including pre-trial detainees amounted in at 31.12.2017 to 628 prisoners, a percentage of 5.4 provided that the prison population had not changed in one year.[6] With 126 inmates Romanians are the largest EU foreign group followed by 111 from the Netherlands and 98 from France. Germans are with 10 one of the smaller groups. In 2015 more than 130 different nationalities were represented among inmates in Belgian prisons, the largest group being Moroccans followed by Algerians (Croux 2018).

A number of issues have been discussed in the past years in relation to the Belgium penal system. Particularly criticised was the high detention rate, the overcrowding of prisons and

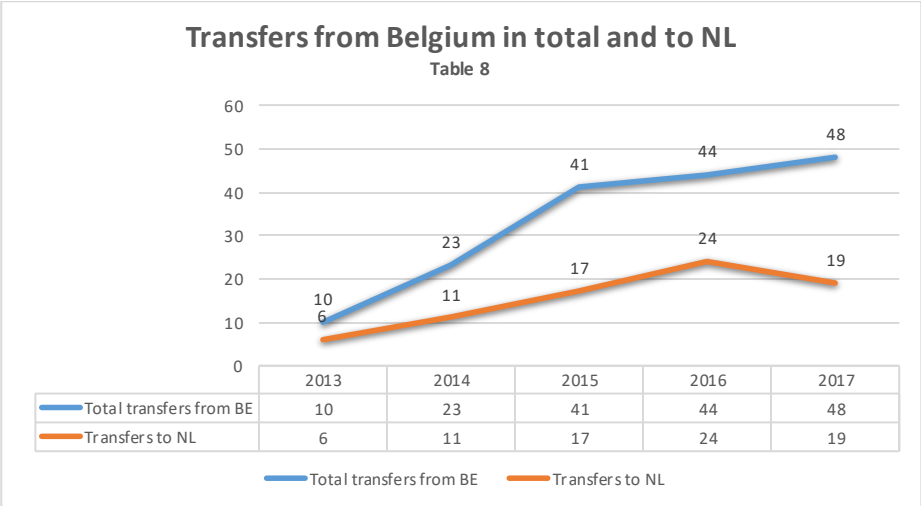
[6] The number concerning EU citizens in Belgian prisons were provided by the Belgian Ministry of Justice and cannot be found in the officially published statistics.

related to the latter the prison conditions. As a result of an increase in pre-trial confinement and long prison sentences since the 1990s, the detention rate in Belgium has increased from 65 per 100,000 inhabitants in the 1980s to 95 per 100,000 in 2005 (Snacken 2007). In 2016 this rate had risen to 102.7. It, therefore, comes with not much of a surprise that the prison capacities are succeeded (Aebi 2016). One strategy to tackle the problem of overcrowding is the increased use of electronic monitoring (Beyens and Roosen 2017, Maes et al. 2012).

According to our research, it is a widespread practice in Belgium that persons convicted to imprisonment of 3 years or less are monitored via electronic surveillance rather than actually being incarcerated. Beyens and Roosen (2017: 20) state that via the increased use of electronic monitoring the active rehabilitation policy of supervision has been transformed to a passive one by simply offering the opportunity to serve a prison sentence in the community with minor supervision. Particularly among German prosecutors (in Germany electronic monitoring has still not overcome the trial phase) this practice was mentioned as a hindrance to transfer prisoners to Belgium (R2).

3.3.3.1 FD 2008/909 Transfers

With a view to the transfers of prisoners pursuant to FD 2008/909 the Belgian Ministry of Justice has registered 253 cases of transfers between 2013 and the end of June 2018. This included transfers to Kosovo, Georgia, Morocco, and Turkey. Taken into consideration solely EU countries, the case number drops to 229 in the same period of time. The number of EU-transfers has constantly risen over the years since 2013 starting with 27 cases in 2013, 43 cases in 2015, 51 in 2017 and already 31 transfers by the half of the year 2018. The three main transfer countries since 2013 have been The Netherlands (98 transfers), France (51 transfers) and Romania (43 transfers). Surprisingly, until June 2018, only one single person was transferred to Germany.



3.3.3.2 FD 2008/947 Transfers

Unfortunately, no data on transfers pursuant to FD 2008/947 from and to Belgium is available.

3.4 Challenges for the Implementation of FD 2008/909 and FD 2008/947

The statistical data FD 2008/909 and FD 2008/947 transfers show a relatively inconsistent picture between the three countries. Respectively with a view to NRW, it becomes clear that the number of actual transfers under both FDs is much lower than the potential would suggest. The same is true for NL and BE, although to a lesser extent.

In the legal analysis, some of the reasons for this underperformance have been identified. Particularly frictions created by the three different legal and penal systems that are only partly compatible pose a problem. But legal issues remain only one side of the coin, the very practical dimension of daily cooperation being the other. It has been well established that in cross-border cooperation in criminal investigations informal networks and practices play a significant role (Peters et al. 2015). The same counts, although to a lesser extent, for legal cooperation in sentencing, as interviews with practitioners have shown. A number of problems directly related to the implementation of the FDs have been identified that slowdown their application in practice.

3.4.1 Procedural Challenges

3.4.1.1 The Complexity of Certificates

Both FDs are based on certificates that are to be forwarded from the issuing state to the executing state. The certificates are forms that contain crucial information on the issued sentence (FD 2008/909) or probation/supervision measures (FD 2008/947). Each certificate has to be translated in the official language of the receiving state and be accompanied by the underlying judgment in the original. German authorities accept the certificate only in German while authorities in the Netherlands accept Dutch and English and Belgian authorities officially accept Dutch, German, French, and English. A number of respondents considered the certificates of being too complicated and too long (both comprise 6 pages). One respondent from Belgium (R8) stated that this had led to a practice by selectively sending only the relevant pages of the certificate, which in turn may lead to confusion. The same respondent also reported that sometimes crucial information in the certificates is missing, leaving him no choice than to translate the underlying judgment to gain a better understanding of the sentence.

3.4.1.2 The Calculation of Prison Time

A crucial aspect that exemplifies the lack of vital information in the certificate is the calculation of the (remaining) time of the sentencing decision. This is, for example, the case for the calculation or days to be spent in prison especially when more than one prison sentences are at stake or when days spent in pre-trial detention have to be subtracted. Often, the cumulation and calculation of the remaining sentence pose significant problems for the executing state. Besides the lack of information in certain instances the basis of calculation itself poses a problem as this example from Belgium and France demonstrates:[7]

Calculation of part of the sentence that still is to be executed

Example: judgment 30 months, of which 12 execution suspended

France: 30 m = 2 y 6 m = 2 x 365 + 6 x 30 = 910 of which 550 eff and 365 susp

Belgium: 30 m = 30 x 30 = 900 of which 18 x 30 = 540 eff and 12 x 30 = 360 susp

Difference: 10 days

[7] Example from Merckx Presentation in Trier.

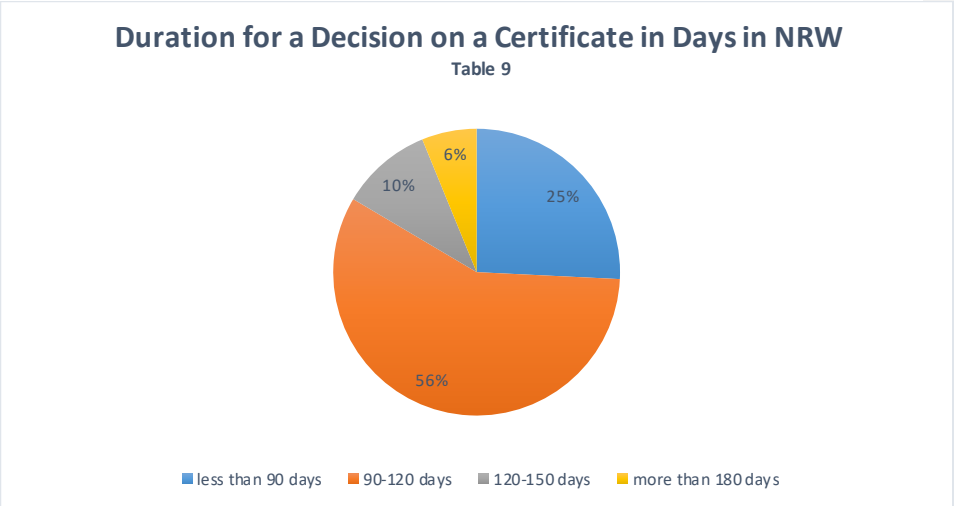
Closely related to these problems of calculation are difficulties arising from the different legal systems and, in relation to FD 2008/947 from the variety of alternative sanctions.

The so-called 'taakstraf' or community service is a main sentence in the Netherlands, which poses a problem when transferred to Germany. The German penal system basically knows (for adults) custodial sentences and financial penalties while community service is a conditional sentence meaning, that it cannot be executed independently from the main sentence. Since community service has become a very common form of sentencing in the Netherlands, problems of recognition arise for German authorities in case of transfers. In practice, the community service is often converted into a monetary fine depending on the duration of the community sentence. But problems remain as the basis for calculation is widely unclear and standardized solutions for cases where the sentence is revoked are still lacking. This bears the risk of a reformatio in peius for example when the 'taakstraf' executed in Germany, is converted into a prison sentence. One of our respondents (R1) considered it as one of the main challenges for the future to establish guidelines to adjust and convert alternative sanctions into equivalent measures within the German penal system.

3.4.1.3 Reaction Time and Requests 'Stalled on the Window Sill'

A crucial issue within all fields of legal cooperation is the timely reaction to transfer requests. Nearly all interview partners mentioned delays in the reaction to requests as a significant challenge to effective cooperation. Both FDs indicate time periods until when the issuing state may expect a decision on its request. For FD 2008/909 this period is 90 days starting with the receipt of the judgment and the certificate (Art 12 II). FD 2008/947 request the executing state to decide within 60 days upon receipt of the judgment or the probation decision and the certificate (Art 12 I). However, in practice, these timeframes are rarely adhered to and often there is the impression that incoming requests are 'stalled on the windowsill' and other more pressing case files are prioritized.

An internal statistic for FD 2008/909 procedures of the Ministry of Justice NRW corroborates this impression: only 25% of the incoming requests are handled within 90 days or less. The majority of 56% of request takes between 90 - 120 days while 10% 120-150 days and only 6% more than 180 days.



The Available Data for The Netherlands paint a similar picture. The average time in days for a decision on an incoming certificate pursuant to FD 2008/909 in 2016 were 104 days, while in 2017 this number rose to 121 days. About 50% of the decisions were made within the timeframe of 90 days. Between the decision and the transfer of the prisoner an average of 57 days passed in The Netherlands. For FD 2008/947 these values amount to 82 % of the decision in 2016 made within the timeframe of 60 days while in 2017 it was even 95%. However, one must keep in mind that the caseload of incoming judgments pursuant to FD 2008/947 was considerably lower (in sum 28 cases in two years).

When looking at the data how other Member States process certificates it shows a mixed picture from the Dutch perspective. While for prisoner transfers in 2016 an average of 126 days had to be calculated this number dropped to 83 days in 2017. Concerning the transfers of judgments pursuant to FD 2008/947 from the Netherlands to other Member States, it took an average of 132 days in 2016 to reach a decision. This number nearly doubled in 2017 to an average of 261 days. All in all, Dutch authorities estimate an average duration of 1.5 years for a prisoner transfer from the request of a prisoner to the actual transfer to another Member States. The bottleneck, however, is the local prosecution offices where the certificates have to be filled in but where often the expertise and the motivation for an expedient procedure are lacking (Nauta et al. 2018: 82). German prosecutors, therefore, estimate a minimum sentence of six to seven months to initiate an outgoing transfer procedure at all.

3.4.2 Factual Challenges

3.4.2.1 The Assessment of Where a Person 'Lives'

A crucial issue for the transfer under FD 2008/909 and 947 is the question of where the convicted person 'lives'. In contrary to FD 2008/947 that only refers to a 'lawful ordinary residence' the term 'lives' in FD 2008/909 indicates the place to which the person 'is attached based on habitual residence and on elements such as family, social or professional ties' (FD 2008/909 (17)). This notion of living is based on the presumption, that foreign prisoners have better chances of reintegration. This, however, has sparked some debate and so has the rather imprecise criteria of habitual residence that FD 2008/909 provides (Martufi 2018: 56, Marguery et al. 2018, De Bondt and Quackelbeen 2015). Since clear guidance and case law is lacking, a case-by-case evaluation is necessary of where a person is living or has its habitual residence and must be strictly separated from a formal residence permit. In the Netherlands, the question whether the convicted person has a demonstrable and sufficient connection to the Netherlands and whether the transfer will contribute to the resocialization chances of the convicted person influences the transfer decision significantly. In the light of this question factors such as the actual place of residence of the convicted person, the time he has lived there, the place where he works and the place of residence of his family are important. In addition, the questions of economic ties and the possibility to set up a resocialization program during the execution of the custodial sentence might play a role (Graat et al. 2018)

The following example provided by one of our interview partners from Belgium illustrates why a careful evaluation is of such an importance: If a convicted Dutch citizen has his family and social ties in Belgium where he is convicted but transferred to the Netherlands, it is very likely that he will return to Belgium after his release. Depending on the judgment this may have the consequence, that the Dutch citizen is illegally reentering Belgium taking the risk of being sentenced once more to prison time. In consequence, a person with strong ties to the issuing state should not be sent to his state of origin as this would undermine prospects of rehabilitation, jeopardize the right of free movement and erode the safeguards incorporated by EU citizenship (Martufi 2018).

Ideally, the transfer procedure manages to balance between the need for effective enforcement of sentences across borders and the aim of social rehabilitation. Martufi (2018: 60) especially criticizes, that consultations between issuing and executing state on the question of habitual residence often take place only after the sentence has been forwarded and a decision on the transfer has been reached. He recommends, to schedule this consultation before the transfer and in addition acquire information about the prisoner's social background by interviewing the

prisoner's family and requesting a pre/post-sentence report by the executing state's prison and/or probation service. In addition, a reasoned motivation for the transfer should be provided by the competent authority and a mandatory judicial hearing of the prisoner should take place. In practice, however, this gathering and exchange of relevant information concerning the habitual residence, family, professional and social ties is a very complex and difficult endeavor.

Our research has shown that limited resources, time constraints and lack of access to information make an in-depth evaluation of habitual residence difficult. It comes as no surprise that in view of these factual obstacles the assessments of habitual residence are conducted in the three countries quite differently. Whereas in the Netherlands and Belgium the Immigration offices are involved as a provider of information on the offender this is to a lesser extent the case in Germany. Here the official residency register is a main source of information but has proven as unreliable since nearly no control mechanisms are in place. Therefore, in addition to the register, the habitual residence is mainly based on the self-reporting of the convicted person in the opening stage of his sentencing hearing. In addition, before a transfer is initiated, a hearing with a judge is required. If, however, the prosecution deems it necessary it can request more data on the actual residency, but it remains unclear if and how often this possibility is used. The same counts for the question if and to what extent data exchange between the three countries takes place in relation to residency information.

3.4.2.2 The Question of Consent

Transferring a prisoner to another country is no small matter and it, therefore, seems fundamental that the preferences and concerns of the prisoner are considered. The will of the offender may be taken into account through different options such as the right to take initiative the right to be heard and the right to veto a transfer (De Wree 2009: 118). Nevertheless, several member states reported that it seems to be a common practice with a high proportion of transfers in the past being made despite the person concerned did not provide any consent (Tomkin et al. 2017).

As FD 2008/909 normally requires the consent of the prisoner to his transfer, Article 6 sets out the circumstances when this consent is not required stating the three criteria:

- the person is a national of the country 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.

Even when the consent of a sentenced prisoner is not required, the opinion of that prisoner should still be sought and taken into account prior to a certificate being issued (Elliott 2017). This, in turn, requires the authorities to inform the prisoner about the consequences he faces when transferred to his country of origin so that he'll be able to make an informed decision. Often prisoners are well aware of the prison system they are to be transferred to, for example in terms of conditional release, access to prison benefits, their rights (e.g. visits, leave, correspondence, intimate visits) access to work and the length of the transfer procedure (Garcia et al. 2015). Ideally, this information is available in their native language. A recent study by Durnescu et al. (2017) with Romanian prisoners in Spain and Italy showed that the 'release effect' is one of the main factors for prisoners to consider a transfer. A transfer procedure is viewed as beneficial when it contributes to a reduction of the time spent behind bars. Conditions for an early release, therefore, play a significant role for the motivation of a prisoner to consent to a transfer. Interestingly, in addition, the length and time required for the transfer procedure and the uncertainty of the outcome have a demotivating effect, although one could assume that time constraints play a lesser role in prison (Durnescu et al. 2017: 461). One of our respondents from Belgium (R9) corroborated this fact by stating, that respectively Romanian, Dutch and French prisoners in Belgium proactively request a transfer to their countries of origin.

The prisoner statement should then be issued with the certificate as it is of importance for the executing state to have an idea of the demeanor of the transferred prisoner: a person that is transferred against his will may arrive in a stressed condition and special precautions may be required. For this statement, all countries survey the persons that are eligible for a transfer to have an indication of the will of the convict.

The procedures in the case countries regarding the assessment of consent differ from each other. According to our research in The Netherlands and Belgium, a transfer procedure is proactively initiated independently by the consent of the respective person. For the Netherlands, this is also the case for transfers according to FD 2008/947, which rather avoids the issue of consent in its text (Durnescu et al. 2017: 362). According to one of our Dutch interview partners (R10) if the person does not consent to the probation measure being executed in its country of residence a transfer will not take place (so-called instemmingsvereiste, also see Graat et al. 2018: 44). However, if the convicted person agrees to the probation measure it will be automatically assumed that he also agrees to serve the measure in his country of residence. A form is used beforehand where the convicted person can voice its concerns respectively its wish of not being transferred which would then be respected by the authorities. Graat et al. (2018) point to the

fact that there are no safeguards for the convicted person in Dutch legislation to ensure that its consent for a transfer was acquired. The same is the case for the provision of information on the possibility of a transfer and details concerning the procedure by the prosecutor to the convicted person. However, often the underlying judgments refer to this possibility of serving the probation measure in the country of residence.

In Germany, the majority of prosecutors seem to consider consent as a prerequisite for a transfer instead. This goes so far, that if the convicted is not proactively asking for a transfer the German authorities remain inactive. One of our interview partners (R2) stated that a positive statement of the prisoner is considered an initial starting point to assess if further steps can be taken. Even if the prisoner is wishing proactively for a transfer before the procedure is initiated a hearing before a judge is required.

A factor that is likely to affect the willingness of prisoners to transfer from Germany is § 456a of the criminal procedural law (Strafprozessordnung) according to which a foreign prisoner can be released after having served half of his sentence. The release comes with a deportation order that forces the person to leave Germany and prohibits to reenter the country as otherwise the original sentence would come back into force and the remaining sentencing time must be served (a similar rule exists in The Netherlands). One of our interview partners from Germany (R2) suspected that this favorable rule was a major reason for foreign prisoners to prefer a prison stay in Germany. However, it should be kept in mind that the application of this early release rule is not obligatory (in contrast to the equivalent procedure in The Netherlands), but rather lies within the discretion of the responsible prosecutor. A participant of our focus group study stated, that it is a current practice at the prosecution office in Duesseldorf to leave the early release rule pursuant to §456a unapplied if the prisoner had previously wished for to serve his sentence in Germany. In consequence, pursuant to the general rule the prisoner serves at least two-thirds of his sentence while expulsion afterward is still possible. It remains unclear if other German prosecution offices follow this practice as well. The empirical data (see above), especially the relatively low number of transfer cases pursuant to FD 2008/909 and even more so pursuant to 947 seem to confirm this. It is, however, a good example of how the discretion of prosecutors influences the procedures within the German penal system.

3.4.2.3 The Specialty Principle

This problem of specialty pertains to a specific case constellation that is has been reported as being quite relevant in practice. One of our interview partners gave the example of a Belgian

citizen who is convicted in Germany and whose consent is a prerequisite for a transfer. If he agrees to serve his sentence in Belgium but has prior convictions in Belgium, the question arises if he implicitly agreed to serve these sentences in Belgium as well. The FD 2008/909 does not provide clear guidance in these cases. In consequence, it could lead to the situation that the executing state is not able to execute prior convictions of its own citizens on its own territory as he had not consented to it. One of our respondents from The Netherlands (R10) stated, that this scenario of prior convictions is indeed quite common. In practice, Dutch authorities execute all prior convictions under the precondition that the consent for transfer is given.

3.4.2.4 Prison Conditions

An important factor for the transfer of a prisoner pursuant to FD 2008/909 are the prison conditions in the executing state. Whereas this has been a constant issue affecting transfers particularly to eastern European countries (Albrecht 2012) it is only recently that this has also emerged as a problematic issue for transfers to Belgium. In a public statement by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the European Council from 2017 the committee voiced strong concerns with regards to conditions in Belgian prisons. In view of reoccurring strikes of the prison personnel the CPT (2017: 2) stated that: '*the continuous confinement of inmates in cells in conditions already deemed intolerable, serious disruption in the distribution of their meals, a dramatic deterioration of their personal hygiene conditions and conditions in cells, frequent cancellation of daily outdoor exercise, serious restrictions on their access to health care and a virtual halt to their contacts with the outside world (including with lawyers).*' Although it is not quite clear whether the CPT only refers to one or more Belgian prisons, the Dutch authorities are in a consideration process of halting prisoner transfers to Belgium. According to one of the Belgian interview partners (R8) especially EAW procedures to Belgium were blocked by Dutch authorities based on the prison conditions in the neighboring country.

Prison conditions have been an issue of constant discussion among scholars and practitioners over the past years, especially in relation with surrenders pursuant to the EAW. Based on the criteria that were established by the CJEU in the Aranyosi and Căldăraru case, a transfer cannot take place if a real risk of inhuman or degrading treatment in the executing Member states exists. These criteria initially referring to grounds for the non-execution of an EAW are applicable to transfers under FD 2008/909as well. However, one should keep in mind that the issuing state is not obliged to transfer the prisoner minimizing the potential for conflicts (Pleić 2018). This is a fundamental difference to cases involving the EAW and a constant source of

tension between Member States. On the one hand, they are bound to comply by the principle of mutual recognition and, on the other hand, obliged to ensure that fundamental rights of the individual are respected (Marguery et al. 2018: 22).

Inadequate prison conditions can potentially undermine mutual trust between the member states and violate fundamental human rights guaranteed in Art. 4 CFREU and Art. 3 ECHR, i.e. the prohibition of torture, and inhuman and degrading treatment (Pleić 2018). Since the FD 2008/909 has removed the requirement of consent of the sentenced person, even more attention must be paid by the issuing state to possible post-transfer infringements of human rights. Problematic prison conditions are often a symptom of prison overcrowding. The European Commission was well aware of the risk that transfers may be used to ease overcrowding in one Member State but potentially exacerbating overcrowding in another one (European Commission 2011:6). That this is not only a theoretical problem can be exemplified by Poland: Due to their increased mobility, Polish citizens are strongly represented in prisons around the EU. To alleviate the effect of a sudden rise in transfers to Poland resulting in capacity problems, FD 2008/909 grants a five years temporary derogation of limited scope to the country to solve practical and material consequences of the transfers.

A crucial issue for practitioners is the question of how to retrieve reliable information on prison conditions in the Member States. FD 2008/909 entails no comment on this problem and the EC simply states that '*greater access to information on prison conditions and criminal justice systems in other States will enable issuing States to take all relevant factors into account before initiating transfer'* (European Commission 2011:6). How and where this information can be retrieved is not enclosed.

In The Netherlands, Amsterdam Court decisions that deal with prison conditions have referred to CPT reports, reports from the European Prison Observatory, the National Ombudsman and to judgments and decisions of the ECtHR and foreign courts including from Germany (Graat et al. 2018: 29 with further sources). A hierarchy between or reliability assessment of these source has not been established by the courts. Typically, all available information (with the exception of newspaper articles and media reports that are not considered objective) is weighed and assessed whether they are up to date. Graat et al. give the example of an Amsterdam Court decision[8] from 2016 that considered a recent judgment of the Oberlandesgericht Bremen concerning prison conditions in Latvia partly based on ECtHR case law from 2005 as not properly updated. According to the jurisprudence, Dutch authorities can be obliged to request

[8] Rb. Amsterdam 13 September 2016, ECLI:NL:RBAMS:2016:6014.

further information concerning the detention conditions in the executing state and the executing state has the obligation to provide information.

The criteria of what constitutes a human rights violation when it comes to prison conditions vary between the three case countries. An example is the minimum space a prisoner is entitled to: The European Court of Human Rights established 4 square meters per prisoner as the minimum space to avoid a breach of Art. 3 ECHR, i.e. the prohibition of torture. Courts in Germany, however, have raised this bar and require the available space for each inmate to be at least 6 square meters. Otherwise, a violation of the human dignity (Art. 1 GG) might be at stake.

4 FD 2006/783 and FD2005/214; confiscation orders and financial penalties

4.1 Introduction

This chapter addresses a number of issues in relation to the Framework Decisions 2006/783/JHA and 2005/214/JHA both dealing with the execution of financial sentences, by putting a strong emphasis on confiscation orders and follow-the money strategies. During the last decades, these strategies have been developed as part of the fight against organised crime and terrorism. Most democratic countries have developed systems for the disclosure of suspicious financial transactions and have adopted legislation to find, freeze and confiscate assets believed to be owned or controlled by criminals or terrorists. One of the methods that is believed to be very effective in fighting and preventing criminal and terrorist activities, consists of depriving the actors involved of their illicit earnings. By dismantling their organisations financially, criminals must be hit at their supposedly most vulnerable spot: their assets. Such an approach is expected to have more impact on the activities of a criminal organisation than the imposition of long terms of imprisonment to some of its members (Nelen, 2004).

However, despite the optimism of policy makers and politicians and various changes in national and international legal frameworks to increase the use of financial instruments and penalties (including FD 2006/783), the financial results of proceeds-of-crime approaches in most European countries are rather disappointing. Although reliable data on freezing and confiscation activities is missing in most countries, there seems to be consensus amongst scholars that only a tiny fraction of illegally obtained earnings can be deprived (Nelen, 2004; Kruisbergen, 2016). Table 4.1 gives an overview of the volume of executed confiscation orders in the Netherlands in the period 1994-2016.

Table 4.1 Volume (in Euros) of executed confiscation orders in the Netherlands 1994-2016 (Source: Annual reports of Public Prosecution Office)

Period	Amount of money actually confiscated
1994-2000	4 million a year on average
2001-2010	20 million a year on average
2011	45 million
2012	50 million
2013	90 million

2014	136 million
2015	144 million
2016	417 million

Table 4.1 shows a steady increase of confiscated assets over the years in the Netherlands. However, taking into account that according to the most recent estimations 16 *billion* euros were laundered in the Netherlands in 2014 only (Unger et al., 2018), the proceeds-of-crime approach seems to have little impact on money laundering activities in this country. The total amount of 16 billion euros consists of domestic criminal money that was laundered in the Netherlands (6.9 billion) and the influx of money laundering from other countries (9.1 billion) (Unger et al., 2018).

The gap between the estimated volume of money laundering and the volume of executed confiscation orders is partly due to the fact that criminals can easily send their profits around the world and abuse several legitimate means and corporate structures to conceal the criminal origin of their wealth. As a result, money laundering in the contemporary globalized economy is a very complex crime to investigate (and detect in the first place). At the same time, law enforcement efforts and activities and cross border co-operation also show major deficits. In the international literature, reference is made to a number of impediments in this respect. In this chapter, the most important challenges for a successful execution of proceeds-of-crime approach will be discussed. The focus of the analysis will be, similar to previous chapters, on the situation in Belgium, Germany, and the Netherlands.

The execution of sentences is based on three key elements. Public prosecutors and other law enforcement officials have to know the relevant legal provisions, have the means available to execute sentences and, last but not least, must be willing to do so. The elements are strongly connected to one another. Many studies reveal, however, that the aspect of willingness is often the decisive factor. The implementation of international and national legislation is destined to fail when general interests do not run in alignment with the interests and beliefs of law enforcement agencies and the interests of individual officials (Nelen, 2004). We will briefly outline the challenges in relation to the three key elements below.

4.2 Challenges

4.2.1 Knowledge and expertise

The interviews that were conducted as part of this research underline the fact that for the execution of financial sanctions specific expertise is necessary. However, in all three countries, generally speaking, the knowledge and expertise within both the police and the public prosecution departments on the criminal law provisions that are applicable on confiscation orders, financial matters and related civil law issues, are not widespread. With regard to the latter, the interviews reveal that law enforcement officials are primarily trained to apply the Criminal Code properly, but have little, if any, knowledge and experience in the area of company law, banking regulations and other laws that are relevant in order to understand the mechanisms in the financial world. Overall, insufficient attention is being paid within the training programs to financial and legal issues that are relevant to the deprivation of criminal assets.

There are differences, though, between the three countries and they reflect the differences between a more centralized and de-centralized approach. In the Netherlands, the execution of financial sanctions and confiscation orders is the primary responsibility of the CJIB. In this organization, as well as the *Functioneel Parket* of the public prosecution department, the knowledge and expertise on financial sanctions, including the international dimensions, are clustered. The National Police in the Netherlands also has special units for financial policing. They co-operate regularly with the Fiscal Information and Law Enforcement Agency (FIOD) of the Ministry of Finance. In Belgium, the CWIOV operates as the central unit for the administration of assets that have been frozen and confiscated, but apart from this asset management office, there are no specific facilities at a central level for public prosecutors or law enforcement officials. The same goes for Germany, where the level of knowledge and expertise on financial matters varies amongst local prosecutors. However, in NRW with the creation of ZOV (Zentrale Organisationsstelle für Vermögensabschöpfung) in 2017 at the General Prosecution Office in Hamm, efforts have been made to process confiscations in a more centralized manner.

4.2.2 Means

In order to be able to execute sanctions – regardless of their nature – a number of organisational and logistic requirements have to be fulfilled. The actors responsible need sufficient resources and administrative support within their own organisations, sufficient back-up in terms of law enforcements officials who can conduct additional investigative activities in the execution stage, secure means of communication tools to communicate with their counterparts, and they should be able to rely upon accurate and reliable information/data bases. Our research shows that challenges can be found in relation to all these requirements.

4.2.2.1 Resources and administrative support

The interviews reveal that, particularly in Belgium and Germany, public prosecutors experience a lack of administrative support within their organisations. Next to a large number of ongoing cases, they have to keep an eye on the execution of a large number of sentences. This may cause problems in the execution stage, especially when accuracy is needed in safeguarding procedural terms. In relation to confiscation orders, much attention should be paid to the registration of assets that were frozen at the request of other authorities, in order to prevent that these assets have to be returned to the convicted individual, due to procedural deficits. In all three countries, respondents indicate that the registration, administration and management of seized objects can and must be improved.

One of the main challenges in all three countries is that public prosecutors are dependent on law enforcement agencies, the police in particular, when extra steps have to be taken to detect hidden assets and confiscate these assets. As the comparative legal research has shown, legal procedural differences between the three countries may impede the use of specific tools in the execution stage – such as searches, wire taps, requesting bank information, and so on. However, more importantly, the expertise and manpower, required to conduct investigations in the execution stage, is often lacking within the police units. The majority of police officers do not regard the deprivation of assets as an important and rewarding element of their job. The proceeds-of-crime-approach is primarily regarded as an activity that is complex, not very exciting and, above all, generates poor results (Nelen, 2004). The concept of financial policing is not in line with their perceptions of what real policing should be about. As Reiner (1985) states, the mission of policing is not regarded as irksome. Policing should be fun, challenging, exciting, a game of wits and skill. Following a paper trail hardly fits any of these standards of the police culture. The starting point that all law enforcement officers should develop some

basic financial instinct has not been materialized in any country. As a result, the proceeds-of crime-approach is still a matter of specialists. A special source of anxiety concerns the "brain drain" within law enforcement. Many talented law enforcement officials have left the governmental institutions in order to prolong their career within the context of private policing.

4.2.2.2 Communication and information

An intriguing paradox is that public prosecutors and law enforcement officials have ample opportunities to exchange information cross-border during the investigative stage, but that these opportunities diminish as soon as the verdict becomes irrevocable. Mutual assistance between countries can be provided during the investigation on the basis of a European Investigation Order, but such an instrument is lacking in the execution stage. With regard to confiscation orders, this situation is even more complex, as in many cases the assets are well hidden by criminals and during the execution stage, new information is relevant to detect these assets in the first place. Moreover, as soon as the assets are traced, it should be possible to freeze these assets as soon as possible, because criminals do not wait for the authorities to arrive and will take extra precautionary measures to prevent or complicate confiscation. In the current situation, an incoming request for confiscation will only be taken in consideration, once the official requirements, in terms of certificates, are met, but in many situations, these procedures take too long. In order to successfully deprive criminals of their assets, early interventions – ideally even during the investigative stage - are necessary.

Another key issue in terms of a successful execution of sentences is the presence of reliable and up-to-date data. We are living in an era, in which concepts as big data and data-intelligence play a pivotal role, and the interviews that were conducted as part of this project confirm that a major challenge for the upcoming years is to make relevant data for the execution of sentences accessible to foreign partners as well, without breaching privacy rules and regulations. For instance, the Netherlands have an interesting database, called the *Infobox Crimineel & Onverklaarbaar Vermogen* (ICOV; in English: Infobox on Criminal & Unaccountable Assets). In this database data are uploaded by various instances, including the police, CJIB, tax authorities and the Dutch financial intelligence unit (FIU). It would be interesting if other countries develop similar databases and that possibilities are created for foreign law enforcement officials to somehow use these data as well. Especially in cross-border regions like the EU-region Meuse-Rhine, such a coordinated approach of data sharing is of added value. That having said, our research shows that especially Germany still has some catching-up to do

with regard to the development of digital databases. Much information is still available on paper only, and this is a complicating factor when it comes down to cross-border efforts to analyse relevant financial data and to execute confiscation orders.[9] Another point of concern that was raised in a number of interviews is that an international database in which all confiscation orders (both settled and unsolved ones) are registered, is missing. The Schengen Information System (SIS) contains several alerts on lost identity documents and wanted individuals, but specific information on financial-related issues is not available in this database.

With regard to communication, language is essential. The research makes clear that language on the one hand can foster cooperation, e.g. in situations where officials speak multiple languages and can address their counter parts in their mother tongue. On the other hand, language can also provide a barrier to cooperation. Uncertainties in relation to own language skills may lead to reluctance to approach foreign partners in the first place. However, when it comes down to communication processes within informal networks – like EJN, BES, ARO, and so on – many studies indicate that language issues will be of less importance, once there is sufficient willingness to cooperate (Nelen et al. 2013a). On top of that, informal networks flourish when participants are convinced that the means of communication are sufficiently accessible and secure. There are some concerns in this respect in relation to the communication with German public prosecution offices. Digital tools like email and skype are no common communication channels in the German context, and in many situations, contacts still have to be established by means of telephone or sending a letter.

Of course, language issues play a pivotal role in the official legal documents that are used for the cross border execution of sentences. As the comparative legal study shows, the terminology in different jurisdictions might differ and may easily lead to misinterpretation. It goes without saying that in such a context, the correct translation of official documents is extremely urgent, but according to many respondents, translations are sometimes sloppy and inaccurate, and as a result, requests have to be returned to the sender to clarify and correct issues.

[9] In Germany, a large project for creating a completely paperless digital workplace for criminal justice is underway. The aim is to create a single digital place for prosecutors, judges and court staff to build and work on case files. This system should be implemented in 2026.

4.2.3 Priority

The successful cross border execution of confiscation orders and financial penalties is highly dependent on the willingness of the participants involved. However, in all three countries, this activity still has a rather low priority among the list of daily tasks. This applies all across the board, from investigating officers to public prosecutors, judges and lawyers. The interview material indicates that a strong tendency exists to give more priority to the execution of regular criminal court cases than to the execution of confiscation orders. Confiscation is primarily seen as a cumbersome by-product of a criminal court case, rather than a key issue in law enforcement and the criminal justice process. As long as this reluctance prevails, the proceeds-of-crime-approach can never live up to the expectations of the policy makers.

A main challenge for the upcoming years is to convince law enforcement officials in the three countries (and Europe at large), that financial policing and the proceeds-of-crime-approach are necessary – and if applied correctly – rewarding elements of their daily work. The exchange of best practices may help them to realise that a financial investigation is much more than a necessary condition for the confiscation of assets. It may also lead to the identification of new suspects, provide information on suspects' movements, and give new insights into the role of different suspects (Kruisbergen, 2016: 143; Brown et al., 2012: 5-9; Levi, 2013). When a financial investigation succeeds in discovering money flows, it may also help to prove an offender's involvement in the crime that generated the money. This increase of awareness can be achieved by means of training and by providing a feedback loop to the law enforcement officials on the final results of their efforts and activities. The interviews confirm the notion that, nowadays, most of them don't have a clue what results have been realized in the execution stage.

In some of the interviews, respondents also suggested to reconsider the distribution of the revenues. According to these interviewees, this might be another incentive to encourage law enforcement officials to contribute more actively to the proceeds-of-crime-approach. So far, the revenues mostly end up in central government funds of one of the countries involved. Neither in Germany, Belgium, nor the Netherlands, law enforcement agencies profit in any way directly or indirectly from the proceeds-of-crime-approach. If law enforcement agencies would be financially rewarded for their efforts and results in the field of financial policing, this might trigger more initiatives and involvement, according to these respondents.

5 Conclusion

This report has analyzed and compared the practice of cross-border cooperation in sentencing between The Netherlands, Germany and Belgium. Since the implementation of the framework decisions FD 2005/214, FD 2006/783, FD 2008/909 and FD 2008/947, cooperation in sentencing between the three countries has definitely improved, but there is still room for progress. On numerous levels, cooperation can be improved.

Legal-cultural level: From a legal-cultural perspective the principle of mutual trust is a driving factor to facilitate cross-border cooperation in sentencing. Although our research did not detect a widespread 'distrust' or 'doubt' towards each other in the daily practice (see Graat et. al. 2018), there still seems to be a certain skepticism present. This skepticism has different roots, the two main ones being prison conditions (in the case of Belgium) and the provisions of conditional release. While prison conditions in Belgium so far have been only an issue for Dutch prosecutors, the latter was especially an issue for German authorities.

Institutional level: From an institutional perspective, the discussion revolves around the concepts of centralized vs. decentralized systems of cross-border cooperation. While the Netherlands has opted for a strictly centralized approach, Germany finds itself on the other side of the spectrum by having deliberately decentralized its system over the past years. Belgium can be placed somewhere in the middle of both approaches with a tendency towards centralization. Both approaches have their advantages and disadvantages. While a centralized system tends to work more efficiently through the bundling of expertise, channeling of communications and higher flexibility, it might develop a tendency to lose sight of the circumstances of the individual case. In a sensitive area like prisoner transfers and confiscation orders with potential implications for human rights, this might prove problematic if no effective mechanisms for monitoring and error indications are installed.

The advantage of a decentralized approach of transfers is the close proximity of the responsible prosecutor to the individual case. It basically means that each convicted person is attended by the same prosecutor from the indictment over the sentencing-, execution- and transfer-phase. However, a strong argument against this approach is the almost inevitable lack of expertise of the individual prosecutor. With a view to the small number of transfer cases, it is unlikely that each prosecutor will deal with more than on transfer case per year (if at all). But transfers are complex and require a high degree of expertise and experience. In consequence, this may even

lead to a certain reluctance of initiating a transfer procedure at all, probably one explanation for the rather low number of transfers pursuant to FD 2008/909 and, even more so, for transfers pursuant to FD 2008/947 from Germany to other Member States. For the Dutch and Belgian counterparts, this may lead to the very practical problem of how to identify and contact the responsible prosecutor for a certain transfer-case. In relation to confiscation orders and financial penalties, it is clear that for the execution of these sanctions specific expertise is necessary. In all three countries, the knowledge and expertise within both the police and the public prosecution departments on the criminal law provisions that are applicable on confiscation orders, financial matters and related civil law issues, should be improved.

Legal level: One of the main legal factors causing frictions for cross-border cooperation in sentencing are diverging legal provisions concerning conditional release. In the long run, this problem can only be efficiently resolved by harmonizing the penal systems, which will not be an easy endeavor. Asp (2013: 59) points to the fact that the penal law in the Member States is woven into a normative system, which, like all normative systems, are sensitive to foreign elements as these run the risk to disturb the internal order. Consequently, he is sceptical that much can be won by the harmonization of sentencing rules. However, sentencing is strongly based on cultural and legal aspects and who says that these cannot be subject to change over time? After all, the history of the EU has been the attempt of finding and stressing the commonalities rather than the differences between the Member States and there are no good reasons why sentencing or criminal law in general, should be excluded from these developments. In an area of justice and law, it becomes difficult to explain why a crime committed in one Member State is severely punished with a long prison sentence while some kilometers across the border the same crime is punished by a fine or an alternative sanction. The predictability of legal decisions and legal security are important values and deviations may have a negative effect on the perceived legitimacy of penal systems.

Practical level: This study has given numerous examples from the daily practice of cross-border cooperation between the three case countries. Many of them demonstrated the frictions created by the complexity of the certificates, the sometimes overly bureaucratic approach, the lack of expertise and capacities, the lack of resources and administrative support, problems to get access to relevant information, the difficulty of communications and the calculation of sentencing time, to name only a view. However, it goes without saying that a process evaluation like this carries a certain bias by focussing on the frictions and problems while ignoring things

that actually work well. For example, communication between Belgian and Dutch authorities with regards to prison transfers were regarded, from both sides, as well functioning. Certificates are exchanged via email in a swift manner mostly adhering to the timeframe stipulated by FD 2008/909. However, German prosecutors, due to strict data protection laws are prohibited to send certificates electronically. It has been reported to us (without verification) that this goes so far that some of the German prosecutors have no work email address and all correspondence is conducted via postal mail. This example demonstrates how minor differences in the daily practice may impact the efficiency of cooperation.

Political level: The political level of cross-border cooperation in sentencing is closely related to the willingness of engaging in prisoner transfers. Here, prison capacities may play a role but also demographics of the prison population. The moderate numbers of outgoing transfers from Germany respectively NRW and The Netherlands may have their root in the fact that both countries are not suffering from a lack of space in their prisons. This is different in Belgium where prison capacities are maxed out. The political dimension also influences other parts of cooperation such as the creation of capacities, the motivation to closer cooperation, the implementation of the FDs or the harmonization of laws. Here also the punitive turn or dynamics of crimmigration may come into play where transfers are suspected of being used as legal mechanisms to facilitate deportations. This study could not corroborate these concerns. On the contrary: it almost seems that the reluctance to widely use the transfer instruments is at least partly motivated by caution and liberal migration policies. Our research showed that in all countries significant effort is taken to establish the place of actual residency to increase chances for a successful social rehabilitation, an indicator that the instrument of transfers is not used light-heartedly.

The successful cross border execution of confiscation orders and financial penalties is highly dependent on the willingness of the participants involved as well. However, in all three countries, this activity still has a rather low priority among the list of daily tasks. The execution of regular criminal court cases is considered more important than the execution of confiscation orders and financial penalties. As long as this attitude prevails, the proceeds-of-crime- approach can never live up to the expectations of the policy makers. A main challenge for the upcoming years is to convince law enforcement officials in the three countries (and Europe at large), that financial policing and the proceeds-of-crime-approach are necessary, valuable, and rewarding elements of their daily work.

6 Annex

List of Interview Partners

(R1)	Ministry of Justice, NRW	20.4.2018
(R2)	Prosecutor, Bonn	9.5.2018
(R3)	Prosecutor, Haarlem	18.5.2018
(R4)	Prosecutor, Zwolle	3.5.2018
(R5)	Prosecutor, Zwolle	3.5.2018
(R6)	Prosecutor, Leuven	22.5.2018
(R7)	Prosecutor, Leuven	22.5.2018
(R8)	Prosecutor, Brussels	27.6.2018
(R9)	Prosecutor, Brussels	27.6.2018
(R10)	Ministry of Justice, Den Haag	15.8.2018

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