



# Transfer of sentenced persons

## 1. Definition

The European Convention on the Transfer of Sentenced Persons allows a person serving a custodial sentence (sanction or punishment) outside their home state to return to their home state to serve that sentence, subject to the fulfilment of certain conditions. This is intended to serve their reintegration into society. However, the Convention *does not oblige* member states to approve a request for transfer. To date, in addition to every member of the Council of Europe, the Convention has also been ratified by around 20 non-European states.

Switzerland acceded to the Convention in 1988, and to the Additional Protocol in 2004. It has also signed bilateral transfer treaties with Cuba, Kosovo, Morocco, Paraguay, Peru and Thailand, as well as a Guarantee of Reciprocity with Barbados.

## 2. Conditions of transfer

A transfer requires the following conditions, in particular, to be met:

- The judgment must be final and enforceable.
- At least six months of the sentence must still have to be served when the request for transfer is received.
- The criminal offence must be punishable not only in the sentencing state (the state in which the judgment was handed down and where the sentenced person is serving their sentence), but also in the administering state (the home state of the sentenced person, to which they are to be transferred to continue serving their sentence).
- The competent authorities in the sentencing and administering states, as well as the sentenced person, must give their consent to the transfer.
- The sentenced person holds citizenship of the administering state. The Convention is not applicable if the person holds only a short or long-term residence permit. Some states, such as the Netherlands, deviate from this principle by also accepting sentenced persons who are not Dutch citizens, provided certain conditions are met.

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### 3. Effects of transfer

The Convention provides for two possible methods of determining the length of sentence that the sentenced person still has to serve: continued enforcement, or the conversion of the original judgment into a judgment issued by the administering state.

Switzerland has opted for *continued enforcement*, in which the foreign sanction is essentially taken over unchanged. The remaining sentence that must be served in Switzerland following the transfer thus corresponds to the sentence period that would still have to be served in the sentencing state. However, if the sanction imposed by the sentencing state is incompatible with Swiss law, the sentence is adjusted to the maximum penalty which may be imposed for the offence in question under Swiss law. Once the transfer has taken place, the enforcement of the sanction is governed by Swiss law (conditions of parole, etc.).

### 4. Transfer procedure (in accordance with the Convention)

- The sentenced person communicates their wish to be transferred to the competent authorities in the sentencing or administering state.
- The sentencing and administering states exchange the necessary documentation (personal data, judgment, information on the sentence served to date in the sentencing state, and any further sentence to be served in the administering state).
- The authorities of the two states take a decision on the request for transfer on the basis of this information. In Switzerland, responsibility for the decision on transfer lies with the Federal Office of Justice FOJ (Extraditions Unit), in cooperation with the relevant cantonal authorities. In the case of a transfer to Switzerland, the competent cantonal court will issue an exequatur decision. In doing so, it will examine whether or not the foreign judgment can be executed under Swiss law, and whether the length of sentence set abroad may have to be reduced to the maximum penalty provided for under Swiss law. The sentenced person has a right of appeal against this decision. The Convention does not oblige member states to approve a request for transfer, neither does it provide for the sentenced person to have a right of appeal if their transfer is refused.
- If both states have consented to the transfer, thus making it enforceable, they will discuss the details of its execution, i.e. the place and date of transfer.

The transfer process often involves time-consuming enquiries and clarifications, and may therefore prove lengthy. Experience indicates that the process can be expected to last for

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well over six months.

### **5. Transfer without the consent of the sentenced person**

In the interests of international collaboration on a broader scale, the Additional Protocol to the Transfer Convention provides for a sentence to be executed in the country of origin without the consent of or against the will of the sentenced person in two cases.

- If a legally valid expulsion order exists against the sentenced person in the sentencing state, the sentenced person may be handed over to their country of origin to serve out the remainder of their sentence.
- If the sentenced person flees from the sentencing state to their country of origin, thereby seeking to avoid serving their sentence, the country of origin may execute the sentence in place of the sentencing state (please refer also to the "Sentence execution on behalf of another state" factsheet).

Like the Convention, the Additional Protocol does not oblige member states to approve a request for transfer.

### **6. Transfer procedure (in accordance with the Additional Protocol)**

#### **Transfer from Switzerland to a foreign state**

- The cantonal authority responsible for the execution of sentences and measures (executive authority) asks the FOJ to begin transfer proceedings. It encloses a copy of the enforceable judgment, as well as the final and absolute expulsion order, with its request.
- The request is submitted after the sentenced person has been granted a legal hearing. They must be given the opportunity to respond to the executive authority's transfer request.
- The FOJ checks that the cantonal request is complete and permissible, and may make further enquiries. Where necessary, these may extend to the sentenced person's country of origin.
- The FOJ rules that the country of origin will be asked to take over the enforcement of the remainder of the sentenced person's sentence and that, if the request is approved, the sentenced person will be handed over to their country of origin. The sentenced person has 30 days in which to lodge an appeal against this ruling before the Federal Criminal Court. Both the sentenced person and the FOJ may appeal against the Federal Criminal Court decision before the Federal Supreme Court. An appeal

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does not have any suspensive effect on the submission of the transfer request to the country of origin.

- The FOJ sends the transfer request to the country of origin. Specifically, it will request a binding response as to whether or not the future enforcement of the sentence will be taken over. The FOJ also asks for information on the length and severity of sentence that remains to be served following transfer, as well as details of continued sentence enforcement, specifically the timing of parole.
- The FOJ examines the response of the country of origin, and asks the cantonal executive authority if it continues to support the transfer. If this is the case, steps will be taken to execute the transfer. The Swiss authorities reserve the right not to pursue the transfer after receiving the response from the country of origin, especially if the sentence would be too lenient or too short following any necessary conversion or adjustment.

## **Transfer from a foreign state to Switzerland**

- The foreign authority submits the transfer request to the FOJ.
- The FOJ checks that the request is complete and permissible. If this is the case, it forwards the request to the competent cantonal executive authority for the latter's response.
- Based on the cantonal response, the FOJ decides whether to approve or to refuse the foreign request.
- If it decides to approve the request, the FOJ applies to begin exequatur proceedings: the cantonal court must establish whether or not the foreign judgement can be executed in Switzerland and, if necessary, must adjust the sentence to the maximum penalty provided for under Swiss law. An appeal against the court's decision may be lodged with the cantonal court of appeal.
- If the transfer of the sentenced person to Switzerland is approved, the cantonal authorities forward the corresponding documents to the FOJ, along with the court's ruling that the sentence may be enforced in Switzerland.
- The FOJ notifies the foreign authority of the final agreement of the Swiss authorities. As soon as the foreign authority has communicated its consent to the transfer, steps are taken to execute it.

Transfer proceedings against the will of the sentenced person generally take at least a year. Transfer under the terms of the Additional Protocol may thus be considered only in the case of longer custodial sentences, usually of at least two years.

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### Links

Council of Europe Convention on the Transfer of Sentenced Persons:

<http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm>

List of member states:

<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?CL=ENG&CM=&NT=112&DF=14/01/2014&VL=>

Additional Protocol to the Convention on the Transfer of Sentenced Persons

<http://conventions.coe.int/Treaty/en/Treaties/Html/167.htm>

List of member states:

<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?CL=ENG&CM=&NT=167&DF=14/01/2014&VL=>

Bilateral transfer treaties (German only):

[http://www.rhf.admin.ch/rhf/de/home/straf/recht/bilateral.html#Überstellung verurteilter Personen](http://www.rhf.admin.ch/rhf/de/home/straf/recht/bilateral.html#Überstellung%20verurteilter%20Personen)