PRETRIAD
Alternative pre-trial detention measures

D3.2 Recommendation paper on the application of the Council Framework Decision 2009/829/JHA at EU level

PRE-TRIAD Project
Alternative pre-trial detention measures

Project Number 881834
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Alternative PRE-TRIAl Detention measures: Judicial awareness and cooperation towards the realisation of common standards

Project Number: ***881834***
JUST-JCOO-AG-2019

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1. Change Control

1.1. Document Properties

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1.2. Revision History

Version	Date	Comments
1.0	03.12.2021	ESC produced the first draft and shared it with partners for internal review.
1.1	16.12.2021	Partners reviewed the document and shared their feedback.
1.2	22.12.2021	ESC shared the final version with the partners

2. Contents

3. Acronyms and abbreviations

CJEU – Court of Justice of the European Union

EAW – European Arrest Warrant

EC – European Commission

EJN – European Judicial Network

ES – Executing State

ESO – European Supervision Order

EU – European Union

FD – Framework Decision

FDs – Framework Decisions

IS – Issuing State

MS – Member State

MSs – Member States

PTD – Pre-trial detention

4. Executive summary

Deliverable 3.2 is part of Work Package 3 (Recommendations on PTD European (and national) legislation and application) of the PRE-TRIAD project. This paper aims at summarising the findings of three lines of investigation regarding the use of the Framework Decision (FD) 2009/829, namely the European Supervision Order (ESO):

- Previous European Union (EU) projects focusing on pre-trial detention (PTD) and its alternatives;
- In-depth interviews with two competent authorities in Romania and one in Germany dealing with this FD;
- Interview with one senior officer of the European Commission (EC) responsible for monitoring the use of FD 2009/829;
- One focus group with European experts.

The paper takes on a problem-solving approach whereby the focus is on defining the problem (obstacles and difficulties in the implementation of this FD) and generating solutions for a correct and more frequent application of the FD.

The problem is defined at different levels. One general observation is that alternatives to PTD are not used as widely as possible at the national level. If not used on the national level, it is not much of a surprise that alternatives are even less used in trans-border cases. Some previous studies and experts stress that judiciary in Europe are often reluctant to use alternatives to PTD and are more prone to detention-focused solutions, especially when dealing with some special groups, such as foreign offenders. Because of the often-given fact that they do not prove strong social bonds with the country, they are often considered high risk of flight and a significant risk for good trial management.

Consequently, foreigners are more often placed on PTD. In many cases, the judiciary may think that it is better to have the suspect on the territory of the Issuing State (IS) to avoid any risk for the procedure. These 'procedural economics' were mentioned by many sources: it is much simpler and less risky to keep the suspect as close as possible to the deciding authority. In this view, the massive infringement of personal rights tends not to be considered sufficient.

Many experts agree that the ESO is a valuable tool, nevertheless up to now it is hardly applied. To apply alternatives to PTD in the case of foreigners and then transfer supervision to another Member State is perceived by many competent authorities as too complex, too bureaucratic, too time-consuming, and risky.

Often, the judiciary is not aware of the possibilities provided by the FD. Competent authorities, especially at the local level, are not trained enough to understand how the procedure works. More concretely, how to fill out the forms, find the competent authority in the Executing State (ES), adapt a supervision measure, and so on.

Lawyers are least informed about the FD's potential and therefore fail to advise their clients to request a transfer. Sometimes, they may not even see the benefits for their clients in using this FD and therefore head for different defence strategies such as speeding up the trial.

Not having enough information about the FD or about the alternatives available in the other Member States feeds the reluctance to apply the ESO and call on the competent authorities in other Member States, possibly it even nurtures distrust. In some cases, this distrust is confirmed by bad practices such as delays or not responding to the requests formulated by other Member States. As the ESO involves 'successive obligations' (transfer of supervision does not involve one single action, like the other FDs, but an obligation of the MS to cooperate and communicate in a longer run), hiccups in communication could create anxieties on the future communication (Neira-Pena, 2020). Language barriers also play an important role in preventing competent authorities from cooperating with each other. Sometimes the transposition laws introduce confusion or distorted mechanisms of implementation. For instance, not having fast mechanisms to react in case of breach may make some competent authorities reluctant to recognise and supervise ESO.

Solutions to enhance the correct use of the FD can be structured on two levels: the European level and the national level. Needless to say, that there is no clear cut between these two levels as they should work in close cooperation.

At the European level, it is suggested that the EC, after ending the ninth mutual evaluation exercise, come up with a comprehensive package to promote the use of the FD. It was also suggested that the text of the FD could be amended to allow competent authorities in the ES to take some urgent measures in case of a breach. A better distribution of powers between the IS and the ES may promote better cooperation. For example, allowing the ES to take some emergency measures in case of breach of supervision measures could encourage the use of the FD.

More could be done to facilitate competent authorities to get to know each other and break the trust barriers, including cross-national training sessions. Joint training can also contribute to creating some common understanding of when the FD can be used or in generating a common understanding of proportionality and some minimum standards of practice. The experience of the European Judicial Network (EJN) should be used as an example of how mutual cooperation can be strengthened. Other actions, such as publishing handbooks, the use of templates or forms for different actions and so on, were also suggested as solutions to be promoted by the EC. Good practices and statistics reflecting the good use of the FD are also important. The EC – directly or indirectly (via the EJN, for example) could set up a system for voluntary collections of statistical data that can be presented periodically in a meaningful way to the European public.

Based on the information collected in this micro-study, it appears that national authorities could make more use of the competent central authorities. Where they exist, they can be empowered to provide information and guidance in the correct use of the FD. EJN contact points can also be more active in providing the same services. Information collected by EJN could be better disseminated to the Member States regarding the use of FD. Moreover, transposition laws should be reviewed in order to ensure the correct application in line with the text of the FD.

In the same direction, the use of 'modern technologies' can be better transposed in the national legislation to ease the communication costs.

Awareness-raising and training for the competent authorities – especially at the local level – should be ensured by the national authorities together with other types of practical support: more human resources, more translation and

interpretation budget, time allocation for training and professional development and so on. Lawyers, court clerks, and police officers should also be involved in the training as they play a critical role in the criminal procedure or in the implementation. Training curricula and manuals have been produced already in different projects, including online courses. They can be used at the European and national level for training the competent authorities.

Language courses are also useful to encourage the competent authorities to communicate with each other and to support mutual understanding. Direct communication and consultation may break the circle of distrust and also prevent situations when the suspect never arrives in the IS or is gone missing.

Information about the procedure should be available in an accessible language to all foreign offenders who could benefit from the FD provisions. Information Fiche, like the one developed in Romania, can serve as a good example of such brochures.

All these actions should be accompanied by a more systematic and comprehensive shift in judicial practice. As it stands, it seems that the European default position among judges and prosecutors is detention. This position should be replaced with freedom as the default position, and detention should be really used as the last resort.

To conclude, it seems that the FD 2009/829 has an important potential, but its use is still very poor. This can be explained by the existence of multiple obstacles and difficulties but also by the fact that this FD is one of the newest one among the detention FDs. It may be a matter of time until the new procedure will settle in the mainstream judicial procedure. Time is still an significant obstacle for a wide application of the FD. Even if the procedures are shortened or optimised, it will take days or weeks until the ESO will be transferred from one Member State to another. This is likely to impact on the use of this FD as time is a critical aspect of the criminal procedure, especially in the investigation phase. However, this project and others alike can speed up the process so more suspects and defendants will benefit from it sooner rather than later.

The summary of the recommendations included in Annex 1 may be instrumental in this sense.

5. Recommendations on PTD and its alternatives - European legislation and application

This paper is an attempt to collect relevant insights from previous EU projects and some competent authorities on the implementation of FD 2009/829. One EC senior civil servant was also interviewed to capture the policy-making perspective on the use of FD 2000/829.

The recommendations collected in this way were debated with several European experts on the topic to produce a comprehensive list of recommendations that will enhance the correct and more frequent application of it.

- In Section 6 and 7, the paper will summarise the outcomes of previous EU projects dealing with this FD focusing on the identified obstacles and solutions;
- Section 8 will describe the collected answers of the central competent authorities in Romania and Germany on the use of FD 2009/829;
- Section 9 will present the EC current perspective on using this FD and also some possible plans for the future;
- Last but not least, part 10 will describe how all previous recommendations and suggestions for enhancing the use of the FD 2009/829 were commented on by leading experts from Europe.

We hope that this 360-degree analysis will support the elaboration of a comprehensive list of recommendations for the enhancement of the use of the FD 2009/829 on the ESO.

6. Recommendations drawn from previous EU projects

PTD and its alternatives were subjected to several EU funded projects. Some of them build on each other's findings, while others have developed in isolation.

It is the intention of this desk review to take stock of the current knowledge in order to make sure that the PRE-TRIAD project avoids duplication and advances the understanding of how and why alternatives are not used in different jurisdictions.

To do so, the project team has collected the relevant reports from the previous EU funded projects focusing on those recommendations around the use of the ESO (FD 2009/829).

In general, two types of EU projects were funded in relation to the ESO:

1. Research projects and;
2. Training and development projects.

The first ones were more concerned with understanding the pre-trial practices and regulations while the latter was more focused on problem-solving: e.g., provide awareness, training for an effective use of ESO, and so on.

6.1 Research projects

6.1.1 Fair Trials – *A measure of Last Resort? The practice of pre-trial detention making in the EU*

The aim of the project was to better understand the practice around the use of PTD and its use in ten EU Member States. More concretely: England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania and Spain. The research was based on legal and statistical analysis, case-file review, surveys, interviews with the judiciary and monitoring hearings. Alternatives to PTD were also discussed in each jurisdiction. (Fair Trials, 2016).

The findings emphasise the systematic failure across these countries to comply with the minimum standards in terms of the use of PTD as a last resort, the presumption of release, equality of arms, proportionality, access to adequate legal

assistance, poor review procedures, the use of unlawful grounds for imposing PTD and so on.

Moreover, the judges seem to be often reluctant to use alternatives mainly due to their novelty but also to the lack of reliable pre-trial information (e.g., lack of pre-trial risk assessments, access to bail information services).

As far as the ESO goes, the project reckons that, although it stands some chances of affecting PTD, it is virtually unused and is not fit for purpose in reducing the over-reliance on PTD.

6.1.2. Institut für Rechts- und Kriminalsoziologie (IRKS) – *DETOUR – Towards Pre-Trail Detention as Ultima Ratio*

The project aimed at exploring and analysing the PTD practice and ways of reducing its use in seven EU jurisdictions: Austria, Germany, Romania, Belgium, Lithuania, Ireland and the Netherlands. (Hammerschick, et al., 2017). The project looked at the position of the defendants while also considering the views and the needs of judges and prosecutors who are key in the pre-trial practice. One objective of the project was also to enhance mutual knowledge and trust among Member States especially in relation to the use of FD 2009/829.

Besides the obstacles for a just application of the pre-trial alternatives in each jurisdiction, the project put forward various observations and recommendations that are directly linked to the implementation of the ESO. The first and most important observation is that there are groups of suspects for whom it is difficult to find suitable solutions for avoiding PTD. Foreign offenders – including EU citizens – are often perceived as lacking social ties in the country of procedure, and therefore more likely to be placed under PTD. Another difficulty in the use of the ESO is the lack of trust between judicial authorities from different EU jurisdictions. Lack of awareness and training in the use of ESO was also one of the most cited difficulties in the application of ESO.

Several recommendations were put forward to avoid the over-use of PTD for foreign offenders:

- Develop social work options to avoid PTD – e.g., provisional accommodation for foreign nationals;

- Enhance the mutual trust between EU judicial authorities by facilitating practitioners to meet colleagues from other countries, to exchange and learn about each other and also to start developing some common standards;
- Support practitioners and human resources departments to overcome the barriers in EU cooperation: e.g., provide interpretation services where needed; find most convenient times for practitioners to meet; assist practitioners in dealing effectively with workload and time pressure;
- Provide training and seminars at the national and European level;
- Create a database that can collect data about ESO cases. These cases may be used in training and seminars;
- Offer practitioners support in using the mutual trust instruments, including specialised advice and guidance.

6.1.3. University of Torino - Mutual trust and social rehabilitation into practice – RePers

The project aimed at providing a better understanding of the current loopholes in the implementation of the detention Framework Decisions: 909, 947 and 829. In relation to the FD 2009/829 the project focused on identifying the causes of the poor application of it and on possible ways forward. Many obstacles and solutions related to the application of the FD 2009/829 were included in the special issue of the European Forum Insight (Mutual Trust and Social Rehabilitation into Practice, 2019). In this respect, the article of Ana Maria Neira-Pena is of particular relevance[1]. The relationship between the ESO and the European Arrest Warrant (EAW) and how the ESO could support a more effective use of the EAW can be found in Ryan's paper[2] (2020). Both papers seem to suggest that the lack of

[1] For more information, please visit: https://www.europeanpapers.eu/it/europeanforum/reasons-behind-failure-european-supervision-order-defeat-liberty-versus-security

[2] For more information, please visit: https://www.europeanpapers.eu/it/europeanforum/interplay-between-european-supervision-order-european-arrest-warrant

awareness regarding the way the instrument works and the lack of trust between MSs are the most important obstacles in the application of FD 2009/829.

6.2. Training and development activities

Apart from the research projects, the EU has also funded training and development projects related to the use of the FD 2009/829, such as:

- ERA – Academy of European Law – Improving Conditions Related to Detention;
- ERA – Academy of European Law – Towards a more Comprehensive and Coherent Approach in Understanding and Improving Conditions Related to detention;
- ERA – Academy of European Law – Improving Conditions and Finding Alternatives to Detention;
- ERA – Academy of European Law – Detention and MLA: Enhancing Cross-border Mutual Legal Assistance and Recognition of Decisions within the Context of Detention;
- Probation Observatory – Network and Training (PONT);
- EuRehabilitation – Trust and Action.

These will be discussed below.

6.2.1. ERA – Improving conditions related to detention

The project consisted of three seminars dedicated to different aspects of detention and its alternatives. Each seminar targeted the following professionals: judges, prosecutors, lawyers, officials from ministries, prison administrators, probation staff and monitoring bodies (totaling 50 participants each).

The training covered detention issues, especially detention conditions and the alternatives to imprisonment. The European Court of Human Rights case law enhanced mutual understanding between participants.

Alternatives to detention were discussed also in the context of the new mutual trust instruments – FDs 2008/947 and 2009/829.

6.2.2. ERA – Towards a more comprehensive and coherent approach in improving conditions related to detention

This was a follow-up project continuing the previous one with another three seminars targeting the same profile of participants. This time, the seminars were offered in wider partnership, including EUROPRIS, EJTN and others. (ERA, 2015).

6.2.3. ERA – Improving conditions and finding alternatives to detention

This project started in 2016 and was one of the first ones which aimed explicitly to support 'the correct application of the relevant EU FDs in relation to detention'. The project consisted of five seminars targeting the same group as the previous ones, each seminar lasting for one day and a half. (ERA, 2016).

6.2.4. ERA – Detention and MLA. Enhancing cross-border mutual legal assistance and recognition of decisions within the context of detention

This project started in 2020 and is still ongoing. The intention is to deliver five seminars that aim at 'enhancing cross-border mutual legal assistance and recognition of decisions within the context of detention'. (ERA, 2020)

As mentioned in the project's description, the general objective of these seminars is to 'debate and assess how European legislation, standards and forms of cooperation are applied in the field of detention.' ESO is one of the FDs examined in greater detail.

6.2.5. University of Bucharest – Probation Observatory. Network and Training (PONT) - https://probationobservatory.eu/

The project aimed to offer training to the competent authorities on FDs 2008/947 and 2009/829 and to create an informal network of experts in this field.

Before delivering the training, a thorough training needs assessment was conducted involving the competent authorities. The main obstacles identified in relation to the implementation of FD 2009/829 were:

- Not knowing the legal options in the ES;
- Not being familiar with the procedure;
- Not receiving the documents in an accessible language.

Based on these findings, the project team has developed a comprehensive training e-manual, delivered four online and offline training sessions and designed an online training where all competent authorities, probation staff and lawyers from EU can register.

6.2.6. University of Torino – Trust and Action

The aim of the project was to strengthen the national authorities and practitioners' knowledge and awareness on the FDs 2008/947 and 2009/829, focusing on Spain, Italy and Romania. (University of Torino, 2021).

In doing so, the project consortium produced a comparative table with the sanctioning system in each of the three jurisdictions.

7. Conclusions from the previous EU projects

Most previous studies seem to suggest that PTD and its alternatives are organically inter-linked. In order to reduce PTD and decrease prison overcrowding, minimum pre-trial standards should be considered both in terms of substantive and procedural law. Once PTD is restricted to the last resort, alternatives will play a much more significant role.

More should be done to promote these minimum standards at the national and European level. One reason for the under-use of ESO may be that alternatives to PTD are under-used at the national level. Therefore, there is not much to be transferred from one jurisdiction to another.

In this respect, MSs should be more creative in finding solutions for making alternatives to PTD accessible to foreign offenders. The DETOUR project (2014) put forward some possible solutions in this respect (e.g., social work type of interventions that would create stable addresses for foreigners).

More joint training should be delivered at the national and European level, including to competent authorities and lawyers from different EU jurisdictions. By doing so, more mutual standards could be developed regarding the use of ESO.

MSs can also do more to support the judiciary to work effectively at the European level, with more language courses, interpretation services, making time available to meet and debate European issues etc.

8. In-depth interviews with competent authorities

Two competent authorities from Romania were interviewed regarding the implementation of FD 2009/829. One of them represented the Ministry of Justice, as a national central authority, while the other represented the Prosecution Service as the central authority for the pre-trial stage. One representative of the central competent authority in Germany was also interviewed. The aim of the interviews was to drill down the perception of the competent authorities on how the FD 2009/829 is used and what can be the ways to enhance its use in the future.

8.1. Obstacles

The general perception seems to be that the '*practice around 829 varies, is relatively inconsistent and [...] very little*', compared with its potential (one prosecutor – Central authority Prosecution Office/Romania). The same observation is shared by the German central authority: '*In general terms, there is no practice*'.

This reality comes against the general opinion that the tool is very useful in the current European context: '*The tool is in principle very good, especially in the mobility context*' (Central authority MoJ/Romania).

The tool is instrumental in this context and has multiple uses: it can facilitate mobility, it can assist good management of the penal trial, helps enhance the Human Rights for the suspects and defendants, reduces the use of PTD, reduces costs etc. However, despite its potential, the implementation of this tool meets some critical obstacles that were structured at two levels by the interviewees:

- National issues;
- Trans-border issues.

There is no clear cut between these two levels as they interact with each other. Nevertheless, for practical reasons, they can be described like this.

The main **national obstacle** identified by the respondents were located in the transposition law, which creates some confusion. In Romania, for example, the law provides that, for the investigation phase, the competent authority is the Prosecution Office by the High Court of Cassation and Justice. However, the structure is divided into different specialised branches that are relatively autonomous. One branch deals with high profile cases and organised crime. Another one focuses on corruption cases, while a third one deals with ordinary crimes. Each of them has departments for international cooperation. At first, it was unclear what branch would deal with what type of cases. In Germany, the transposition law is part of a more comprehensive piece of legislation from 1992 that is not easy to read and understand by the judiciary:

'*We are in the middle of the process of reforming that law so people not working with that law daily will find it more accessible*' (Central competent authority/ Germany).

Similar national issues may also be found in other jurisdictions. It is important that they are known and reviewed at the national level, so they do not come to hinder the EU mutual cooperation.

The second type of national obstacles is related to the lack of awareness and training at the local level: '*The instrument is not very well known by the judiciary*' (Central authority MoJ, Romania).

Or '*We need a better training on 829. We tend to cover this FD very shortly as it is not used in practice, but maybe we need to change that*' (Central competent authority/Germany).

The ultimate decision about recognition and supervision is taken in Romania by the Prosecution Office by the tribunals (county courts). The prosecutors at this level are usually less trained to deal with international cases and international procedures. More training and better communication between them and EJN contact points and the central authorities could facilitate a better practice.

As the tool is relatively new in the judicial repertoire, both the suspects and the judiciary are quite hesitant. The suspects are usually not aware of this possibility or are hesitant because they are not sure if the procedure is predictable and clear, while the judiciary may worry that the supervision measures will not be properly observed by the authorities in the ES. This worry can go as far as the lack of trust and confidence that the trial will be managed properly with the suspect being supervised by a foreign authority.

As anticipated, the participants also mentioned some difficulties that arise from the **European cooperation**. For example, there are no common standards to evaluate the proportionality of the preventive measure. Consequently, different prosecutors or judges may have different opinions regarding the feasibility of different measures.

The second obstacle of this kind is that the IS has no guarantee that the defendant will travel to the ES or not. More concretely, the judiciary from the IS has no guarantee that the person will leave the issuing country's territory. The respondents mentioned several cases where they were requested to recognise a supervision order, however, the suspects or the defendants have never arrived in the ES. Other cases illustrate another possibility where suspects or defendants were allowed to return to the ES, but the certificate arrived in the ES after six months. During all this time, there was no supervision or monitoring.

On top of these worries, some judges and prosecutors are also afraid that the defendant will not return to stand trial. In this case, they would have to issue an EAW, which makes all the procedure too complicated. Not to mention that in case of small crimes, EAW could not even be issued.

The recent case law from the Court of Justice of the European Union (CJEU) makes the EAW more difficult to use in some countries that have serious problems

regarding detention conditions. These difficulties impact the mutual trust between the MSs: '*If you can's surrender people to Bulgaria, it makes cooperation more difficult*' (Central competent authority/Germany)

Language barriers and the lack of information were also mentioned as major obstacles in the implementation of FD 2009/829.

'*Not knowing if the authorities in the Executing State will recognize your measures prevent many prosecutors or judges to use FD 829. Not knowing what is possible in another jurisdiction leads to some void or lack of con*fidence' (Prosecutor – Central authority Prosecution Office/ Romania).

The lack of courage to try new procedures combined with the lack of language competencies make international cooperation quite difficult. Unfortunately, most countries declared that they would use only their national language for European cooperation. This involves translation costs and sometimes a long period time for translation.

Incomplete or inaccurate completion of the certificate was also mentioned in some cases. In one case, the prosecutors have received even an unsigned certificate. E.g., '*We have only received six pages with some information but with no signature. We asked for completion, but we never heard back*.' (Prosecutor – Central authority Prosecution Office/Romania).

In the case of subsequent decisions, the narrative is even more complex. As one of the respondents stressed: '*If the Issuing State does not even respond to the requests for more information, how can we expect that it will immediately react in case of breaching the supervision measures?*' (Prosecutor - Central authority Prosecution Office/Romania).

The same difficulties also appear in case of review. For example, the Romanian authorities may supervise the measures for 60 days. After 60 days the measures must be reviewed.

- What happens in case the IS does not review the supervision measures and prolongs them?
- Can the Romanian authorities cease the supervision process knowing that the person may be dangerous for the public?

These are only a few of the worries expressed by the prosecutor in Romania.

8.2. Solutions suggested by the national competent authorities

Some solutions may impact both categories of difficulties – national and European cooperation – (such as language training).

Others may be easily implemented in the **national context**. One good example can be that central authorities and EJN contact points are allowed and encouraged to provide legal advice upon request to their peers regarding the implementation of the FDs. In this case, each jurisdiction may have its centre of knowledge and consultation, which may help overcome different national or European issues. A formal helpdesk can answer this need of expertise, as well. Short academic and non-academic papers published in popular journals among the judiciary can also enhance the application of the FD 2009/829.

Specialising judges and prosecutors at all levels of jurisdiction in dealing with European cases can also be a solution to be explored. However, care should be exercised in this matter as nobody wants to create a special practice for foreign offenders that can be discriminatory.

National institutes of magistracy should provide more training on the mutual trust instruments and EU law. Judiciary should be trained not only on the technical aspects (substantive law or procedural regulations), but also on the general approach of international cooperation. As a result, judiciary members could learn to think and act more in a European way and not only in the national framework, since the rigid application of national regulations can, sometimes, hinder the European cooperation.

Training should target not only judiciary but also auxiliary staff (e.g., clerks) which is sometimes tasked to fill out the certificate or complete other relevant procedures. Lawyers could also be trained on the mutual trust instruments as they can advise their clients upon their rights and possibilities. Paying better the *ex officio* lawyers was also brought up several times in the interviews as a possible solution to motivate them further.

Police could also be involved in the training as it is its responsibility to supervise the ESO in many EU MSs: '*If you want to build up trust, you have to take them on board*' (Central competent authority/Germany).

A good practice can be considered the one developed in Romania where all foreign suspects and defendants receive a list of their rights, including the right to transfer supervision of pre-trial measures to another jurisdiction (*ro. Fisa de informatii*).

Adjusting the text of the FD 2009/829 to allow, in some cases, the competent authorities in the ES to take subsequent decisions in case of breach was also mentioned as a possible solution for promoting the use of FD 2009/829. By allowing the judiciary in the ES to have fast reactions, would enable it to protect the public in the ES. The authorities in the ES are primarily interested in protecting the public order and safety on its territory. Therefore, they should have the instruments to react fast in some cases.

To facilitate consultations between the competent authorities before and after the recognition decision, the Commission could also propose some forms or templates that can be used for different actions: e.g., request for supplementary information; informing about the breach of a supervision measure; request for decision review etc. Different colour codes can be used to mark the urgency of different decisions. One participant in the interviews suggested that it may be a good idea to encourage countries to use English in EU communications. This could simplify the communication and decrease the translation costs. As he puts it: '*it is much easier and cheaper to find an interpreter for English than for Hungarian*'. (Central competent authority/Germany).

EJN contact points proved to be very useful in urgent cases. They were sometimes able to provide more information about the competent authorities in their own country or inform the IS about the supervision measures available in the ES. EJN contact points could be trained to provide more assistance to the judiciary when needed in relation to FD 2009/829. Despite their availability, EJN contact points are sometimes underused, as one of the respondents has suggested:

'*We – EJN contact points – feel sometimes underused. We can provide a lot of information, but nobody is* asking' (Central authority MoJ/Romania).

As suggested, EJN contact points may also be involved in cases of non-reply. In these cases, they can investigate formally or informally the situation.

One comprehensive solution would be to revise the text of the FD under a European Regulation or Directive on European judicial cooperation where all these cooperation issues could be dealt with.

Training together so competent authorities from different jurisdictions may get to know each other and provide informal opportunities for consultation and cooperation. Germany organised such training with Austria and proved to be a success. EUROJUST experience is a good example of such initiatives. Language training also seems very useful to facilitate communication between judicial authorities (see the discussion about the use of English). European Commission could also support the collection of data regarding the use of FD 2009/829. The EJN can receive more support to deliver on this task.

The EC and the national jurisdictions should put more effort into promoting this FD. There is a good context for this action as Commission and countries are increasingly concerned with Human Rights and other pre-trial issues.

9. Interview with the EC high official

In order to capture the position of one senior official of the EC regarding the use of the FD 2009/829, PRE-TRIAD has run an online interview that lasted about an hour, focusing on the general perceptions, obstacles solutions and future perspectives.

The interview took place while the EC was participating as an observer in the mutual evaluation exercise whereby MSs evaluate the implementation of the FDs between each other (a third pillar instrument).

As mentioned by the interviewee, the application of the FD 2009/829 is '*rather poor*'. The preliminary observation from the mutual evaluation is that MSs are aware of the potential to improve the application. One issue in this respect is that MSs are not collecting systematic information about the use of this FD. The EC has no legal framework to request such statistics and. MSs can do that, but this is only on a voluntary basis. This data could be useful not only as total numbers but as

breakdown numbers by the offence type when this FD is used. It could also be helpful to compare the use of this FD with the application of the EAW.

The analysis could also consider the internal immigration trends in the EU. Are they affecting the use of this FD?

From the interim observations, the participant notes that there seems to be a lack of interest or trust among MSs when using this FD, as the judiciary tends to wish to have the suspects on its territory. In general, the authorities consider that it is simpler to deal with the case when the suspect is on the territory of the IS. This can also be a matter of '*procedural economics*'.

- What happens if the person does not return to trial on its own volition?;
- What would be the impact on the trial?;

Another difficulty is the FD's complexity. Compared with the other FDs, this FD seems more complex in practice. This adds to the '*procedural economics*'. Lack of trust is sometimes confirmed by some bad practices such as not answering to information requests or responding after massive delays.

The lack of awareness is also mentioned as another difficulty in practice. Locating the competent authority in the ES is often cited by the MSs as one obstacle.

The use of modern technologies (telephone and videoconferencing) appears to be quite cumbersome for some MSs. Although the FD allows for these modern technologies to be used for both the transfer procedure and for supervision, some MSs are reluctant to use them in practice. In some cases, the national transposition law is not in compliance with the text of the FD.

As mentioned above, by this interview, the EC was in the middle of the ninth round of mutual evaluation. Therefore, solutions and perspectives were not very clear at the time ('*we do not have the full picture yet*'). However, some possibilities were discussed. Encouraging MSs to nominate and use more the central competent authorities was one of them. Handbooks, training, awareness training, and so on were also mentioned as contributing to dealing with the current obstacles. MSs should be fully on board with these measures. For example, it is up to the MSs to provide training and awareness. Involving lawyers in the training programmes can

also help the promotion of the FD. Cross-national training programmes could also help with breaking down the trust barriers. The use of templates could also facilitate the practice with this FD.

The tool was agreed by all MSs at the time of adoption and is considered very useful at least in some cases by the national authorities. It is therefore a matter of time and preparation for an effective use of it.

10. Focus group with European experts

In order to test and expand on the recommendations arisen from the previous sections, a focus group with European experts was organised. The focus group involved the following experts:

Christine Morgenstern – University of Berlin

Laure Beudrihaye – Gerard – Fair Trial International

Matylda Pogorzelska – Fundamental Rights Academy

Adriano Martufi – University of Leiden

Stefano Montaldo – University of Torino

Walter Hammerschick and Ioan Durnescu were the moderators of this focus group.

Prior to the interview, all participants received a copy of the previous sections of the report and also the list of possible questions. The discussion lasted for about one hour, and it was transcribed verbatim to ease the analysis. All participants agreed for their names to be mentioned in this report.

One of the first observations of the participants was that for the ESO to work at the European level, the PTD alternatives should be more used at the national level. Because of the absence of minimum standards, in far too many situations, law enforcement can and prefer to use detention as a preventive measure:

'*So, we do not have minimum things like that, we still have gravity of crime as one of the reasons why a person can be put in detention. We have very low standards still missing from national legislations, so I think common standards on the very basics,*

like clearly articulating the need in every single case to assess proportionality. So minimal standards of what we need to do in first time placement in detention and review of continued detention is simply not there.'

Simple and practical limits should be in place to reduce the over-use of PTD. England and Ireland were mentioned as good examples to follow in this respect:

'*We found out again that 6 years ago, that for example in Ireland and UK the bail, so the non-custodial measure, is the default and only if certain conditions are not met, they go for detention. In most of Europe is the other way around and we talk about that is required to change this way of thinking, the culture*.'

However, the existence of the standards is not always a guarantee of good practice. For example: there are standards on the defendant hearing or the involvement of a lawyer. How effective these standards are if the hearing lasts 5-7 minutes or the lawyer receives access to the file some minutes before the hearing?

The principle of proportionality is another example of this sort. It seems that although it is observed in most of the cases by the judiciary, it is somehow overlooked when foreign offenders are involved. This should not be possible, and the legislation should not allow this course of action.

In order to push for minimum standards in the use of PTD, the participants oscillated between encouraging the Commission to adopt minimum standards and promote more soft-law approaches, such as guidelines, green papers, recommendations, etc. It seems that the Commission's competence in criminal matters is still too slim to allow for a bolder positioning.

The discussions related to the obstacles for implementing the FD 2009/829 supported the previous findings: the lack of awareness among judiciary and lawyers, not knowing the possibilities in the IS, language barriers, and so on.

Besides the difficulties mentioned above, the participants have also stressed the impossibility of replacing EAW with ESO in the ES in case of lack of proportionality. As they suggested, this can be a matter to be brought up to the CJEU.

They also 26mphasized the complexity of the FD, which involves not only more stages but also more actors. Besides judicial authorities, the ESO involves non-

judicial authorities, such as probation officers, police officers, doctors and so on. The problem may be that it is unclear for the judiciary how these actors will cooperate.

Referring to the solutions, some participants suggested that we can start to learn from some successful cases:

'*I think that we need examples of how things work and that would be the optimistic outlook. If we manage to have good examples, and lawyers could tell their colleagues that someone knows how to do it and that the judge was ok. We need those stories and I think that is the only change that it could work. I know that in the Netherlands there are some good examples so that they get the feeling that it would work.'*

Linked to this suggestion is the collection of meaningful statistics. Changing the organisational or political culture at the national level is another long-term solution put forward by the participants.

Making the procedure easier and showing the judiciary the concrete advantages of the FD could also push for its increase use. An analysis of the extent to which the EAW contributes to the prison overcrowding in Europe could be a good start to suggest that the ESO is a more practical, cheaper and humane alternative.

Organisational issues, such as specialisation, could also support the use of the FD if well designed.

11. Annexe 1 - Recommendations for enhancing the use of FD 2009/829

European level

1. Design a comprehensive strategy to promote the mutual trust instruments at the EU level.
2. Revise the text of the FD in order to provide a better 'power balance' between Issuing State and the Executing State.
3. Organize trans-national training sessions on the use of FD.
4. Enhance the role of European Judicial Network to collect data and disseminate good practices and expertise.
5. Support a systematic collection of statistical data and good practices.
6. Publish handbooks or guidelines on how to use the FD.
7. Adopt and promote different templates or forms that can ease the communication between Member States.

National level

1. Encourage the use of alternatives to pre-trial detention at the national level, especially in cases involving foreign offenders.
2. Empower central authorities – where they exist – to provide information and guidance.
3. Involve EJN contact points in providing guidance.
4. Revise the transposition law if necessary to be in line with the FD text. Pay special attention to the use of 'modern technologies' in the communication process.
5. Organize awareness raising campaigns to inform competent authorities, lawyers, clerks, probation officers and police officers about the FD possibilities.
6. Provide national or regional training to the front-line practitioners involved directly in the application of the FD.
7. Use the existing training curricula developed by ERA or different projects, such as PONT.

8. Provide language courses to encourage competent authorities communicate among each other.
9. Inform foreign offenders about the FD in an accessible language (e.g. information fiche).
10. Provide competent authorities with time, human resources, interpretation and translation budget and other material resources that they need to ensure a proper application of the FD.

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PRETRIAD

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