



Sentence execution on behalf of another state

1. Definition

Many states do not extradite their own nationals. To avoid individuals who are the subject of a final judgment avoiding their sentence (punishment or measure) by fleeing or returning to their home country, in certain cases responsibility for executing that sentence may be transferred to their home country. A formal request must be submitted to this end. The Additional Protocol to the European Convention on the Transfer of Sentenced Persons and the Convention Implementing the Schengen Agreement both provide for sentences to be executed on behalf of another state, providing certain conditions are met.

In Switzerland, the relevant conditions and the rules of procedure for assuming and transferring sentence execution are laid down in the Federal Act on International Mutual Legal Assistance in Criminal Matters (IMAC). The Federal Office of Justice (FOJ, Extraditions Unit) is responsible for receiving and submitting the corresponding requests. Only a small number of other states (specifically Germany and Austria) have made provision in law for similar channels of international cooperation in this area. Many states limit themselves to the forms of cooperation laid down in the two international conventions. Thus, in reality, the transfer of sentence execution internationally is possible only in a very few cases.

2. Conditions under international conventions

The Additional Protocol to the European Convention on the Transfer of Sentenced Persons (Art. 2) and the Convention Implementing the Schengen Agreement (Art. 68) contain the following conditions:

- The judgment must be final and enforceable.
- Prior to or while serving their sentence, the sentenced person must have fled the sentencing state to their own state to avoid the execution of all or part of that sentence. A sentenced person who returns to their home state by legal means, for example after being released from remand, is not deemed to have fled in the sense of the two con-

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ventions.

- The offence must be punishable in both the sentencing and executing states.
- The two states must have exchanged the necessary documentation: the requesting state hands over the personal details of the sentenced person, the final judgment, the criminal law provisions that apply, and information about how the sentence has been served to date. The requested state notifies the requesting state about how it will assume execution of the foreign judgment and to what extent, as well as the criminal law provisions that apply in the requested state.
- Both states must agree on the transfer of sentence execution. The consent of the person who has fled the country is not required, however. The sentencing state may ask the executing state to take provisional action, such as confiscating the person's ID documents or detaining them, so that they are unable to leave the executing state before a decision on whether or not to transfer the execution of their sentence has been made.
- At least six months of the sentence must still have to be served when the request is received.

Even if all of these conditions are met, the member states of the two conventions are not under any obligation to approve the execution transfer request.

In the future, the amendment to the Additional Protocol which was submitted for signature on 22 November 2017 will permit sentence execution to be transferred even if the sentenced person has returned to their home country by legal means. Following ratification, this amendment will enter into force in all member states. It may be applied before this point on a provisional basis between those states who make a declaration to this effect upon ratification. To date, the amendment to the Additional Protocol has been signed by nine states and ratified by one (as at 5 February 2019).

3. Conditions for assuming sentence execution under Swiss law

A final and enforceable criminal judgment handed down by a foreign state may be executed in Switzerland on that state's request even if the sentenced person is not deemed to have fled in the sense of the two international conventions, or if Switzerland does not have a treaty relationship with the state in question under these conventions. Under the terms of the IMAC, a foreign sentence may be executed if:

- The convicted person is habitually resident in Switzerland, or has to face charges here for a serious offence.
- The offence committed abroad would also have been punishable had it been committed

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ted in Switzerland (Art. 94).

- The foreign state grants reciprocity (Art. 8).
- Furthermore, Art. 85 specifically determines the conditions that: extradition is not permitted (e.g. because the convicted person is a Swiss national, or because the offence is not extraditable), and it must be guaranteed that the requesting state will not prosecute the person concerned for the same offence after they have been acquitted or completed a sentence in Switzerland. If the convicted person is a foreign national, assuming the execution of their sentence must seem appropriate with regard to their personal situation and social rehabilitation.

The FOJ decides in consultation with the competent executing cantonal authority whether or not to approve the foreign sentence execution request. In the event of approval, the FOJ will send the file and its petition to the executing cantonal authority, and will notify the requesting state. The executing authority (generally the cantonal authority responsible for executing sentences and measures, or the public prosecutor's office, depending on the canton), will then petition the competent cantonal court to conduct exequatur proceedings.

In exequatur proceedings, the court decides whether or not the foreign judgment can be executed in Switzerland, and what sentence must be served. Sentences handed down abroad may be enforced in Switzerland only to the extent that they do not exceed the highest penalty for the offence in question that is provided for in Swiss law. Arts. 95 and 96 IMAC set out the grounds on which enforcement may be deemed inadmissible, or refused. The exequatur ruling may be challenged before the competent cantonal appeal court. An appeal against the decision of the cantonal court of final instance can then be lodged with the Federal Supreme Court.

4. Conditions for transferring sentence execution to a foreign state under Swiss law

The execution of a sentence cannot be transferred to a foreign state without a final, legally enforceable judgment from a Swiss court. The executing cantonal authorities may ask the FOJ to submit a request for sentence execution to be transferred to a foreign state, if:

- The foreign state is certain to respect the binding force of the Swiss judgment.
- The transfer of enforcement is likely to improve the prospects of the social rehabilitation of the convicted person, or Switzerland is unable to obtain their extradition.

The general provisions of the IMAC, in particular, must be observed with regard to any limitations on cooperation, as well as to procedural issues. It is particularly important to note that

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an execution transfer request may be made to a foreign state only if Switzerland would be able to grant the corresponding foreign request (Art. 30 IMAC).

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