



Increasing the cooperation between judiciary and NPMs: An opportunity to strengthen fundamental rights in the implementation of EU law

General fundamental rights challenges within the context of the EAW and other Framework Decisions relating to detention

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Framework Decisions & Mutual recognition. Brief reminder

■ Tampere (1999)

- Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights (Milestone 33)
- MR presupposes mutual trust between MS on their criminal justice systems & judicial decisions
- Based on a shared commitment to ...”respect for human rights, fundamental freedoms and the rule of law”

■ MR Implementation Programme (2000)

- “Mutual recognition is designed to strengthen cooperation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders. Moreover, by ensuring that a ruling delivered in one Member State is not open to challenge in another, the mutual recognition of decisions contributes to legal certainty in the European Union.”

Framework Decisions Related to detention

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Pre-trial:

- FD 584 (European Arrest Warrant): (mainly) pre-trial detention
- FD 829 (Supervision): alternatives to pre-trial detention

Post-trial:

- FD 909 (detention sentences/measures depriving liberty): post-trial detention
- FD 947 (Probation/Alternative): alternatives to post-trial detention

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584 - 829 – 947 – 909: State of play

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Implementation of the Framework Decisions:

[Update Commission Report 2014 State of Play: European Judicial Network, Judicial Library (13/04/2016)]

Implementation status:

- FD 584 (EAW): 28 MS
- FD 829 (Supervision): 23 MS
- FD 947 (Probation): 27(1/2) MS
- FD 909 (detention): 26 MS

Usage (Europris/European Commission expert groups, previous ERA conf.):

- FD 584: very – overly - popular
- FD 829: Practically non-existent (ERA Trier, 16 October 2015: One case pending)
- FD 947: Very Limited, but increasing (following priority to FD 909)
- FD 909 : Steady and increasing usage (Europris Expert Groups 909)

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829 – 947 – 909: State of play

- **FD 829 (supervision)**: Alternative to provisional detention (art.1) ⇔ EAW procedures. ‘Ultimum remedium’ of detention (see ECtHR Litwa v. Poland, 2000)
- But ultimately unwanted & unused
- Future: Uncertain, also in light of European Investigation Order (ERA Trier 16 October 2015)
- **FD 947 (probation)**: Alternative to post-trial detention with a view of facilitating social rehabilitation (art. 1) ⇔ FD 909
- **Relation FD 909’s ‘measures involving the deprivation of liberty’ & FD 947’s ‘alternative sanctions’**: FD 947 Articles 1.3(a) and 2.4: not applicable for the execution of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty which fall within the scope of FD 909 + definition of an alternative sanction is limited to a sanction, other than a custodial sentence, a measure involving deprivation of liberty or a financial penalty, imposing an obligation or instruction.
- **However**: When failed to comply with the obligations and/or conditions imposed following a probation measure or alternative sanction, and the IMS imposes a detention sentence on the individual, with a view of its execution in the EMS: FD 909 is needed. Under FD 947 no legal basis exists to execute a (foreign) prison sentence.

FD EAW & FD 909: issues related to FR

Issues common to both instruments:

- Material detention conditions in EU MS
- Implementation of FD's in National legislation
- Implementation and interpretation of FR threshold
- Information gap

Topical issues:

EAW

- FR in pre-trial phase (detention conditions, length of pre-trial detention, right to legal representation) => especially bearing in mind the presumption of innocence
- Proportionality and necessity of both issuing and executing of EAW

FD 909

- Post-trial Detention (and measures involving deprivation of liberty) in substandard conditions
- Triviality of consent/ vacuous nature of informed opinion of sentenced person
- Social rehabilitation crux

Example 1: Belgium and the systemic deficiency threshold?

- Belgium: 22 ECtHR convictions regarding the treatment of mentally ill offenders in detention conditions (art. 3 & 5 ECHR).
- 20 Convictions since 2013 (L.B. v. Belgium, definitive ruling) alone.
- ECtHR: clear and continuous reference to structural, long standing and severe issues regarding Belgian internment.
- Vander Velde v. Belgium & the Netherlands: Breach of art. 5 ECHR due to surrender of Belgian internee following Belgian EAW (Belgian Violation).
- FD 909 applicable? “Any judgment, following a criminal proceeding on account of a criminal offence, and resulting in a deprivation of liberty, may be forwarded under the Framework Decision.” (art. 1 (a) & (b))
- ECtHR: M.S.S. v. Belgium & Greece (2011), Tarakhel v. Switzerland (2014).
- CJEU: C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department & CJEU: C-394/12, Shamsi Abdullahi v. Bundesasylamt

“Systemic deficiencies doctrine”

Implementation/interpretation/application issues

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- Equivocal implementation/application/interpretation issues:
 - => **Sentence Adaptation** (“Some Member States widened the possibilities of adaptation by adding additional conditions. This opens the possibility for the executing State to assess whether the sentence imposed in the issuing State corresponds to the sentence that would normally have been imposed for this offence in the executing State. This is contrary to the aims and spirit of the Framework Decisions.” **Com (2014) 57 final, part 4.2, 2nd §**)
 - => **Refusal grounds** (“Some Member States have not implemented all grounds for refusal as indicated in the Framework Decisions, others have added additional grounds,...,Implementing additional grounds for refusal and making them mandatory seem to be both contrary to the letter and spirit of the Framework Decisions” *Ibid.* part 4.4, 2nd & 3rd §§)
 - => **Consent** (“From a preliminary analysis of the Member States’ implementing legislation, it appears that it is not always expressly provided for that the person should be notified and that he should be given an opportunity to state his opinion, which needs to be taken into account.” *Ibid.*, part 4.1, 3rd §)
 - => **Translation & certificate issues** (Europris 2015) (Article 23. 2)

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Example2: Belgium & the Netherlands implementation laws.

- Belgium: *Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie* (15 May 2012)
- The Netherlands: *Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties* (12 July 2012)
- Both implementation laws have turned the optional refusal ground for the recognition and execution of a judicial decision when this judgment covers a measure of psychiatric and/or healthcare nature (**art. 9, 1, (k) FD 909**) into a mandatory refusal ground (**art. 12, 7° & art. 2:13**)

Example 3: Social rehabilitation and information crux

Aforementioned knowledge & information crux

- MS failure to correctly interpret/apply the social rehabilitation purpose: “33% of the respondents indicated that they assumed that serving a sentence in the prisoner’s home state would automatically facilitate their social rehabilitation, rather than making this assessment on a case by case basis.” (IRCP Study 2011)
- **Information gap:** prison context, available social rehab./reint. Programmes, health care programmes, etc.
- **EC 2014:** Consent trivial, issues with social rehabilitation purpose.
- **FD 909 ambiguous:** Issuing State should satisfy itself that the facilitation of the person’s social rehabilitation will be achieved: Should take into account the person’s attachment to the executing State, whether he or she considers it the place of linguistic, cultural, social or economic and other links to the executing State (**Recital 9**). This attachment is based on the sentenced person’s habitual residence and on elements such as family, social or professional ties (**recital 17**). (Kozłowski C-66/08 & Wolzenburg C-123/08)
- **NO further clarification in the instrument** (and only preamble).

Social rehabilitation: the ins and outs in brief

Art. 4.2 requires that the forwarding of the judgment and the certificate may take place where the competent authority of the IMS— where appropriate after consultation with the competent authority of the EMS – is satisfied that the transfer and enforcement of the sentence by the EMS would serve the purpose of facilitating the social rehabilitation of the sentenced person.

Art. 4.4 states that the competent authority of the EMS may present a reasoned opinion to the competent authority of the IMS that the enforcement of the sentence would *not* serve the purpose of facilitating the social rehabilitation of the sentenced person.

EMS retains this option even in a situation where no consultation took place between the competent authorities. **Art. 4.4** determines that such an opinion may be presented without delay after the transmission of the judgment and the certificate.

Recital 10 preamble stipulates that such a reasoned opinion in itself does not constitute a ground for refusal based on social rehabilitation.

Art. 3 and 4.2: IMS has to examine the appropriateness of the sought transfer and satisfy itself that it facilitates social rehabilitation. Therefore, when confronted with the opinion that the enforcement of the sentence would fail to achieve this purpose, the competent authority of the IMS will have to consider this opinion and, should it wish to continue the proceedings, satisfy itself that, notwithstanding the arguments included in the opinion concerned, rehabilitation will be facilitated or enhanced after all, **which implies a convincing (counter) argumentation.**

Recital 10 also applies to the provisions of **Article 6.3** (consent) The opinion of the sentenced person cannot constitute a ground for refusal on social rehabilitation. BUT the opinion needs to be taken into account when assessing the facilitation of the social rehabilitation and the appropriateness of the transfer sought. Moreover, when the sentenced person has availed him or herself of the opportunity to state this opinion, a written record of this opinion shall be forwarded to the EMS so that it may be incorporated in the latter's own reasoned opinion regarding the rehabilitation purpose.

Different regime under **Art. 4.3 and 4.6.** (third member state)= mandatory consultation AND adoption of measures with the purpose to improve social rehabilitation => **ONLY in TMS situation (?)**

An important component of a person's social rehabilitation is the specificity of the sentence (or measure involving the deprivation of liberty) that has been imposed on him or her by the issuing State. Therefore, both under the regimes of optional and mandatory consultation, it is worthwhile to pay attention to the sentence adaptation (**art. 8**) and enforcement modalities (**art. 17**) that may arise under FD 909.

Core issue

- Various substandard practices and conditions in MS
- Issues with proportionality and necessity of FD usage
- Indistinct approach of FD's (MR) towards FR concerns, proportionality and necessity matters
- Nugatory position of individual
- MS hesitance to implement, apply alternatives provided
- MS implementation diversity
- Information gap, and uncertainty on information value/validity

What with Tampere ideal?

Recommendations (selected)

Clearcut FR refusal ground?

- Dir. EIO Art. 1, 4. & Art. 11, 1 (f).
- Not feasible to be introduced in existing FD's (European Commission)

Necessity of creating a motivational duty for the issuing MS:

- Based on the issuing state's initiative and consecutive responsibility
- **'duty to investigate' (IMS/EMS)**
- **Issuing state's 'duty to motivate'**: proportionality and necessity, FR compliance, social rehabilitation, alternatives, ultimum remedium?

Feasible?

- **Parallel 'relatively easy' to make for fundamental rights**
=> ECtHR applicable, little debate on difference between accommodation (standards) in area of asylum & migration and transfer of measures depriving liberty
- **More difficult for, f.i. social rehabilitation**
=> How do you define (proper) social rehabilitation (non binding legislative framework, limited case law, no international consensus)
=> And how do you measure an 'enhancement' (discussion between scholars, etc. on what rehabilitation should be and what it should achieve)

Less intrusive measure option?

- Dir. EIO: Art. 10, 3.
- Allow MS to take recourse to less intrusive measure

Thank you

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