

# The position of mentally disordered suspects and offenders across Europe and the implications for European cooperation in criminal matters

XXXIVth International Congress on Law and Mental Health

Vienna, July 14th , 2015

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# Research focus and scope

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## Basic premise:

- Individuals trapped in criminal proceedings whilst affected by a mental illness cannot be assimilated with regular defendants.
- They consist of a specific, vulnerable population and deserve adequate safeguards to guarantee their (procedural) rights.
- Various norms, standards, (legal) provisions,... underpinning this premise are identified

## Research:

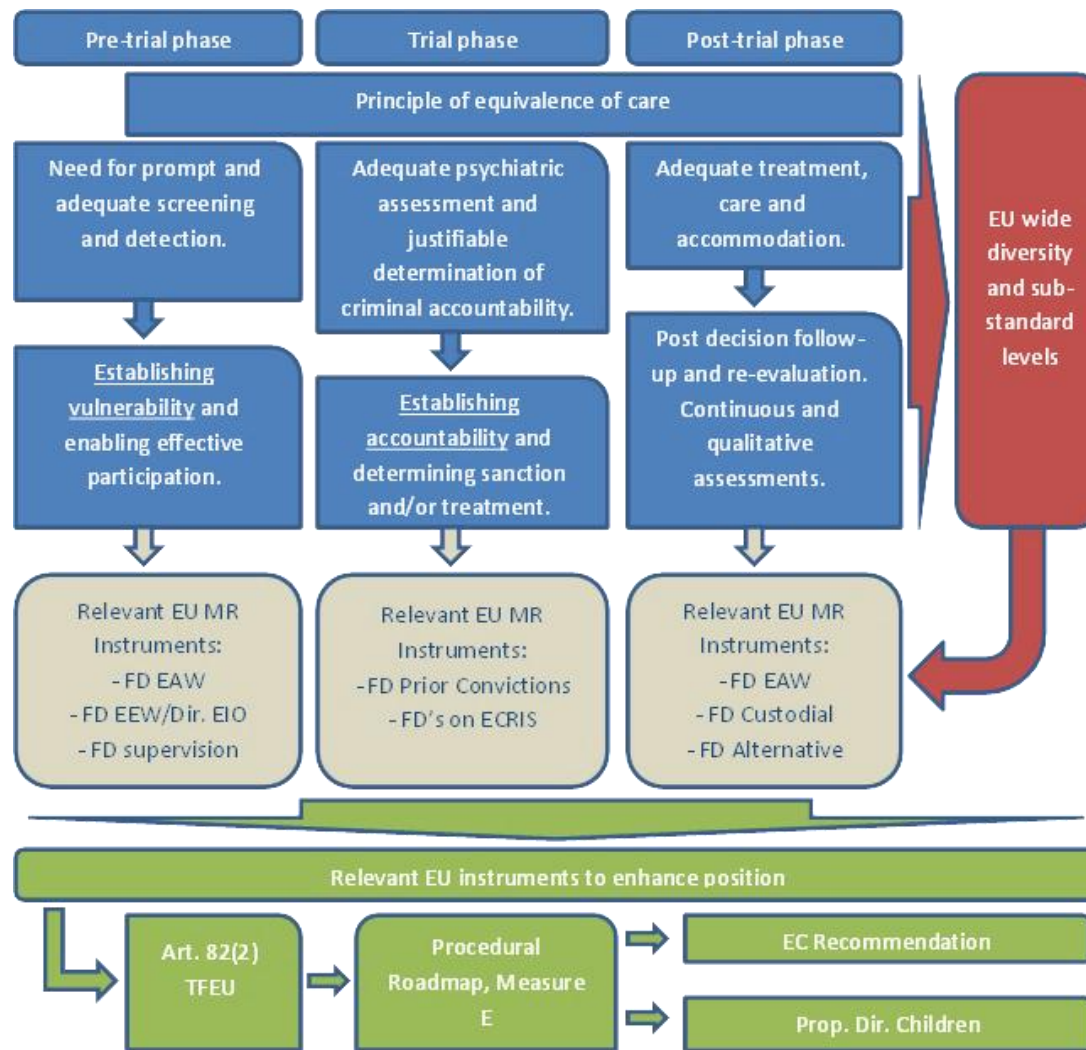
- Research focuses on this specific population in a well-defined European context: The (cross-border) cooperation in criminal matters in the AFSJ
- Research matches the various findings (literature, case-law, legal systems) regarding this position against the AFSJ's mutual recognition instruments to identify shortcomings, flaws and merits
- Research incorporates the EU's developments in (procedural) rights: Procedural Roadmap, subsequent Directives and specific focus on Measure E (vulnerable defendants)

# Research lines

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- **Research line 1**: Guaranteeing and safeguarding the rights of mentally disordered suspects in criminal proceedings by effectuating adequate screening and detection at the earliest stage possible: enabling the right to effective participation  
=> Primordially pre-trial phase.
- **Research line 2**: The normalization principle. Guaranteeing the equivalence of care for individuals involved in criminal proceedings assessed as vulnerable.  
=> Post-detection of vulnerability, this principle covers pre- to post-trial phase.
- **Research line 3**: European diversity in the attribution of criminal accountability to mentally disordered individuals  
=> Relevance both in a pre-trial (evidence, psychiatric assessments), trial (prior convictions, attribution of accountability) and post-trial (retribution v. treatment and care) phase

# Research schematically



# Short EU context introduction:

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## Area of Freedom, Security and Justice (AFSJ) in the EU (Tampere Milestones, 1999)

### Two-way track for cooperation in criminal matters:

- **Mutual recognition (MR) “cornerstone” (united through diversity):**
  - Based on a shared commitment to “Respect for human rights, fundamental freedoms and the rule of law” (Programme of Measures, Preamble para. 6, 2000)
  - Mutual recognition has purpose to “facilitate cooperation and enhance the protection of individual rights” (Tampere Milestones, Conclusion 33, 1999)
  - Many issues regarding additional safeguards, fundamental rights, and effective cooperation
- **Harmonisation (harmonizing minimum standards in MS legal systems):**
  - Entry into force Lisbon Reform Treaty (2009)
  - Council Procedural Roadmap 2009: Step by step approach, different measures, various Directives
  - Measure E Vulnerable defendants (minors, physical and mentally impaired)
  - European Commission Recommendation 2013: Additional Safeguards for vulnerable defendants

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## Early screening & detection and effective participation in pre-trial and trial phase

1. Lack of (binding) international norms and standards.

Currently, no binding European and International norms and standards specifically address screening and detection procedures upon questioning and arrest (See, f.i. Articles 2 & 13 CRPD)

2. Substandard (implementation of) detection mechanisms in EU.

Various studies have found great inconsistencies in the European legal systems vis-à-vis qualitative screenings + various indications of the substandard character of these detection mechanisms. This diversity may hinder predictability and swift cooperation in the AFSJ, but the lack of common quality standards may induce breaches in fundamental rights.

**Both these obstacles induce potential repercussions for mentally disordered suspects, as they face (legal) uncertainty concerning the applied standards and procedures as well as the risk of being the subject of substandard detection and follow-up which could be detrimental for their medico-legal possibilities.**

3. The effective participation principle and ECHR (Art. 6).

ECtHR case law (since *Stanford v. UK*, 1994): defendants' right to participate effectively in criminal proceedings from the earliest stage on (*Panovits v. Cyprus*, 2008: starting from when person is informed of being suspected of having committed an offence).

Various guarantees/safeguards: no self-incrimination (*Funke v. France*, 1993; *Saunders v. UK*, 1996) extra (legal) assistance both in pre- and trial phase (*T. v. UK*, 1999; *V. v. UK*, 1999), safeguards for correct understanding on criminal procedure (*S.C. v. UK*, 2004; *Liebreich v. Germany*, 2009; *G. v. France*, 2012).

**Case-law of the ECtHR identifies the need for additional adequate safeguards in order to effectively participate in criminal proceedings. In connection to mentally disordered suspects, it is clear that the current safeguards are insufficient in various MS to guarantee the effective participation of this specific vulnerable category.**

# EU implications and response

## EU Implications:

- Gross under-detection of mental disorders & EU-wide quantitative and qualitative diversity vis-à-vis screening and detection (Salize & Dressing, 2005; Meysman, 2014)
- Unmonitored, unmapped, and largely unknown population of mentally disordered suspects and offenders in cross-border situations (Meysman 2014)
- Conceivable situation => ECtHR, Vander Velde et Soussi v. Belgium 2015 (violation art. 5 ECHR); ECtHR, Lankester v. Belgium 2014 (violation artt. 3 & 5 ECHR) both in cross-border situation.
- Little or no safeguards in EU AFSJ mutual recognition instruments

## EU Response:

Procedural Roadmap (2009), Measure E and the Commission Recommendation (2013) on vulnerable defendants:

- Presumption of vulnerability, acknowledging the possible hindrance for them to understand and effectively participate in the proceedings (section 3).
- Identification and detection should be insured + all competent authorities have recourse to a medical examination by an independent expert (section 2).
- Apart from (adapted) rights to information and legal assistance, specific training for authorities (section 3, 17)
- EAW: vulnerable persons subject of EAW proceedings have the specific rights referred to in the Rec. upon arrest
- Regarding detention during EAW procedures: Deprivation of liberty is a measure of last resort. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty (Article 14).

**Admirable, but ultimately a mere suggestive instrument.**

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# Guaranteeing normalization principle and the quality of detention, care & treatment for mentally ill offenders in the EU

## Identifying current European situation:

- Various ECtHR case-law (starting point analysis of 22 ECtHR convictions of Belgium + recent Article 3 ECHR convictions across EU vis-à-vis detention of mentally disordered) pointing towards serious flaws across the EU.
- Lawful detention of mentally ill offenders under Art. 5 ECHR: Only when it takes place in hospital, clinic or any other appropriate institution
- Additional literature study and legislation analysis to identify (under)detected additional issues across the EU (CPT reports, NPM reports, studies, f.i.: Blaauw et al, 2000; Salize & Dressing, 2005; EUPRIS, 2007)

## EU dimension :

- FD transfer sentenced persons (FD 909). FD 909 applies the principle of MR to judgments imposing custodial sentences or measures involving the deprivation of liberty
- Purpose: Enhanced cooperation and facilitation of social rehabilitation of the sentenced person (art. 3, 1.)
- Moreover: FD 909 shall not have the effect of modifying the obligation to respect fundamental rights (art. 3, 4.)
- Art. 1: (a) Measures involving the deprivation of liberty, (b) imposed for a limited or unlimited period of time (c) on account of a criminal offence on (d) the basis of criminal proceedings (Art. 1 (a)) => Applicable for mentally ill offenders.
- But: Art. 9.1 (k): optional refusal ground when the sentence imposed includes a measure of psychiatric or health care impracticable within legal/health care system. Moreover: MS have implemented this as a mandatory refusal ground (Ex. Belgium, the Netherlands)
- Asylum parallel: ECtHR and CJEU case-law: Transfer illegitimate when real risk of violation of fundamental rights (ECtHR, MSS v. Belgium and Greece; CJEU N.S. v. Secretary of State for the Home Department; CJEU, Shamso Abdullahi v. Bundesasylamt )
- But: CJEU vision on MR and mutual trust (Radu c-396/11, Melloni c-399/11, Opinion 2/13 ECHR accession) contradicts.

**Problematic for AFSJ and MR: MS may/should refuse cooperation in criminal matters if it would jeopardize the fundamental rights of the suspect/offender involved (conceivable: Belgium itself has refused surrender under EAW procedure to Spain because of hazardous detention situation).**



## European diversity in the attribution of criminal accountability to mentally disordered individuals

### Identifying current European situation:

- EU-wide variety regarding the MS legal systems on the attribution of criminal accountability: Dichotomous (e.g. Belgium), graded (e.g. The Netherlands), diversion (e.g. England & Wales)
- Eu-wide variety regarding psychiatric assessments ( ex. Salize & Dressing, 2007; Nedopil, 2009; Gordon & P. Lindqvist, 2007)

### EU dimension:

- FD Prior Convictions (art. 2) and ECRIS function from a decreed verdict of guilt assumption. This collides with the varying guilt doctrines across Europe, blurring effectiveness for cooperation and creating discrimination for individual offenders.
- The provision that ‘there is no obligation to take into account previous convictions where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed’ does not adequately settle this collision, due to its vagueness (the ‘act’ considered in its entirety - i.e. actus reus & mens rea - as an offence or the ‘act’ merely considered as ‘actus reus’) and optional nature.
- FD 909: Variety of sentences based on different attribution (f.i.: TBS in the Netherlands and internment in Belgium) may hinder cooperation and/or deteriorate position of sentenced person. Adaptation of the sentence by executing MS where incompatible in terms of duration and/or nature when irreconcilable with National law (8.2 & 8.3) is foreseen, but remains to be assessed (Art. 8.4 on ‘aggravation’).
- Moreover, aforementioned optional refusal ground for psychiatric measures.
- Significant variations in MS’ sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions: Law governing enforcement: executing MS (17.1) but issuing state has withdrawal option (17.3)
- Dir. EIO: Gathering and cross-border admissibility of evidence in a context of European quantitative and qualitative diversity regarding psychiatric assessments and (aforementioned) under-detection of mental disorders.

**EU harmonisation could potentially resolve certain issues, but MR instruments remain mostly *blind* of diversity issues**

# Recommendations

## Screening, detection and effective participation issues:

- Need for effective – binding – instrument instead of laudable, but inane Recommendation (similar to Children Directive)
- Information exchange on best practices on EU level (Justice Programme 2014-2020 REGULATION (EU) No 1382/2013)
- Shared training and experiences from/for forensic psychiatric experts (ex. Ghent Group.eu) and monitoring differences and similarities on an EU level
- Detection, appropriate response and additional safeguards from an evidence (admissibility) perspective: Dir. EIO response

## Normalisation and detention issues:

- Rethinking normalisation principle (Lines, 2006)
- Minimum conditions for detention/treatment is bridge too far (Art. 82, 2 TFEU competence) but additional incentives (OPCAT/NPM, CPT-monitoring)
- Enhancing knowledge and (access to) information (monitoring, health-care records, etc.) => Steps2 prison information exchange
- Rethink motivational duty in cross-border (FD909) proceedings (asylum parallel)
- Improving prisoners' procedural rights in cross-border proceedings (legal review, informed opinion) => Offender information brochure

## Accountability and diversity:

- National legal doctrine is MS prerogative, but MR instruments in need of adaptation hereto (feasible=> EAW revision on its way, despite initial dogma of 'opening pandora's box')

# Literature

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# Thank you

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