

**ERA – Improving conditions related to detention**

The role of the ECHR, the Strasbourg court and national courts

# **Council Framework Decisions 2009/829/JHA, 2008/909/JHA and 2008/947/JHA and their implementation: state of play and overcoming legal and practical problems**

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# 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 (11/02/2016)]

### Implementation status:

- FD 829 (Supervision): 22 MS
  - FD 947 (Probation): 25 MS
  - FD 909 (prisoners): 26 MS
- } Various belated implementations by the MS

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

- FD 829: Little to none (ERA Trier, 16 October 2015: One case pending)
- FD 947: 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

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- **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.

# Case study: FD 909

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## FD 909: Post-trial detention and measures depriving liberty

Application of mutual recognition to sentences depriving liberty in the EU, various issues:

- Material detention conditions
- Sentence compatibility
- Sentence execution modalities
- Consent
- Implementation modalities
- Social rehabilitation

IRCP Study 2011  
+ EC 2014  
+ ECtHR/CJEU case law  
+ follow up (Europris, Handbook)

## Mutual recognition. Brief reminder

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### ■ 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 vis-à-vis their criminal justice systems
- 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.”

# Transferring sentenced persons in Europe: predecessors and FD 909

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- Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983
  - => Voluntary (art. 3, 1, f.) exequatur, consent
- Additional Protocol to this Convention of 18 December 1997
  - => Consent no longer necessary when transfer was sought to a State to which the person had fled (art. 2.3) or
  - => when the sentenced person was subject to an expulsion or deportation order to the requested State (art. 3.1)
- Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 909)
  - => Since its entry into force, this Framework Decision replaces the CoE Convention and its Additional Protocol, but does not replace multilateral and bilateral agreements where they allow for an enhanced transfer of prisoners or facilitation of the enforcement of sentences (art. 26)

# FD 909: Key Concepts

- **Voluntary to obligatory:** The right to refuse or agree to a transfer is greatly diminished by prescribing only limited grounds for non-recognition that may be invoked by the executing State when the latter is the Member State of nationality of the sentenced person (**art. 9**).
- **Optional refusal grounds:** All refusal grounds under (**art. 9**) are optional ( $\Leftrightarrow$  EAW)
- **Triviality of consent:** FD 909 (further) reduces the requisite of consent of the sentenced person. Already under the Additional Protocol this consent was no longer necessary when transfer was sought to a State to which the person had fled, or when the sentenced person was subject to an expulsion or deportation order to the requested State. Now, a third exemption is provided where the transfer is sought to the Member State of nationality in which the sentenced person lives (**art. 6.2(a)**)
- **Double criminality:** The traditional double criminality requirement is omitted for a(n) (expandable) list of 32 offences (**art. 7**)
- **Continued enforcement:** Restricted adaptation options for the executing State (**art. 8**) while allowing the issuing State the final say regarding adaption and the sentence execution modalities (**art. 12, 13 & 17**)
- **Taut timeframe:** Finally, the instrument prescribes a clear and taut timeframe for the entire procedure (**art. 12**)
- **Purpose:** The instrument explicitly declares (**Article 3.1**) that the purpose of the transfer should be the facilitation of the social rehabilitation of the sentenced person. Therefore, no transfer may proceed unconditionally and it is the continued obligation of the Member States to ensure that the transfer, recognition and enforcement of the sentence will facilitate the social rehabilitation of the sentenced person.
- **Moreover:** Framework Decision respects fundamental rights, observes the principles recognized by Article 6 of the Treaty on the European Union (TEU) and reflected by the Charter of Fundamental Rights of the European Union (**Recital 13**). Nothing in the Framework Decision shall have the effect of modifying the obligation to respect these fundamental rights and fundamental legal principles (**art. 3, 4**)

# IRCP EU-wide Study 2011

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## Study results. Identified problems:

- Various and often substandard material detention conditions (I)
- Significant variations in MS sentence adaptation
- Significant variation in sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions (II)
- Poor procedural status (consent, legal representation & legal review) in transfer procedures (III)
- Knowledge and (access to) information for MS *and* prisoner regarding:
  - FD Custodial
  - Foreign material detention conditions
  - Foreign law and practices

In case there is a vast variety between MS' correctional and sentence execution systems as well as material detention conditions, the question should be raised whether or not a pure form of MR could and should work in everyday practice, especially in light of the importance attached to the social rehabilitation of the offender.



# Material detention conditions: Belgium and the systemic deficiency threshold?

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- 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.
- 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”

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# Example material detention conditions: Belgium and the systemic deficiency threshold?

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- Research parallel with asylum procedures (MSS., Tarakhel, N.s., Shamso)
- Non-consenting asylum seeking person to be returned (Dublin) = non-consenting sentenced person to be transferred (909)?
- Why? Because of current wantage of *defining* CJEU ruling vis-à-vis MR & FR (cfr. Radu case) => Awaiting result in CJEU Aranyosi (Hungary C-404/15) **Hearing 15/02/2016: joined cases with Caldararu (Romania c-659/15).**
- What will the Court do?
  - MR/mutual trust (Melloni, Akerberg Fransson, Opinion 2/13)or
  - Striking a fair balance (hearing 15/02, Commission)

# Identified problems: MS legal systems variety

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- Sentence incompatibility
  - Basic principle based on mutual recognition: No adaptation of the sentence/sanction (art. 8.1)  
=> **“Continued enforcement”**
  - However: Adaptation of the sentence by executing MS where incompatible in terms of duration and/or nature when irreconcilable with National law (art. 8.2 & 8.3)
  - Safety threshold: adapted sentence may not aggravate o.s. (art. 8.4) (**assessment?**)
  - Information exchange vis-à-vis sentence adaptation (art. 12.1) and IMS withdrawal option (art. 13)
  
- Significant variations in MS’ sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions
  - => Law governing enforcement: executing MS (art. 17.1)
  - => However: Issuing state has withdrawal option (art. 17.3) BUT before execution has commenced.
  - => Ambiguity/uncertainty regarding the information exchange (art. 13 & 17.3)

# Identified Problems: Compulsory procedure

## A. Poor procedural status of sentenced person

- Triviality of consent (**update: Commission Report 2014**)
- Consent not required in art. 6.2 (a-c)
- However, MS equivocal stance regarding sentenced person's opinion
- **Article 6.3 deserves specific attention:** when the sentenced person is still in the issuing State, her or she must be given the opportunity to state his or her opinion orally or in writing.  
 => This is of utmost importance, as this opinion needs to be taken into account by the competent authorities when assessing the facilitation of the social rehabilitation of the sentenced person, a substantial requirement under Art. 3,1. FD 909.
- Uninformed opinion  
 => Acces and organisation of legal representation (beyond 6.3)  
 => Access to information regarding adaptation and execution modalities
- Ambiguity regarding the right to legal review  
 => Follow-up EUROPRIS Expert Groups: Confirmed

## B. Knowledge & information gap

- FD knowledge & info (Europris Expert Groups) => **Improving.**
- Knowledge & info on foreign law, practices & material detention conditions

# 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, 2<sup>nd</sup> §)
  - => **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, 2<sup>nd</sup> & 3<sup>rd</sup> §§)
  - => **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, 3<sup>rd</sup> §)
  - => **Translation & certificate issues** (Europris 2015) (Article 23. 2)

# Example: Belgium & the Netherlands implementation laws.

## Refusal grounds

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- 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**)

# Identified problems: Social rehabilitation core problem

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## 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)
- 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

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**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.



# Recommendations (selected)

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## Assuring social rehabilitation & individual rights

### Necessity of creating a motivational duty for the issuing MS:

- Based on the issuing state's initiative and consecutive responsibility
- **Issuing state's 'duty to investigate':**
- Research parallel with asylum procedures (ECtHR MSS. v. Belgium & Greece/CJEU NS. Case law)  
=> Non-consenting asylum seeking person to be returned (Dublin) = non-consenting sentenced person to be transferred (909)?  
=> Why? Because of current wantage of *defining* CJEU ruling vis-à-vis MR & FR (cfr. Radu case)  
=> But: 2015 preliminary question: C-404/15. Awaiting CJEU's judgment.
- **Issuing state's 'duty to motivate':** acilitated social rehabilitation not *a per se* assessment.

### Feasible?

- **Parallel 'relatively easy' to make for fundamental rights**  
=> ECtHR applicable, little debate on difference between accomodation (standards) in area of asylum & migration and transfer of measures depriving liberty => Awaiting CJEU.
- **More difficult for 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)

research

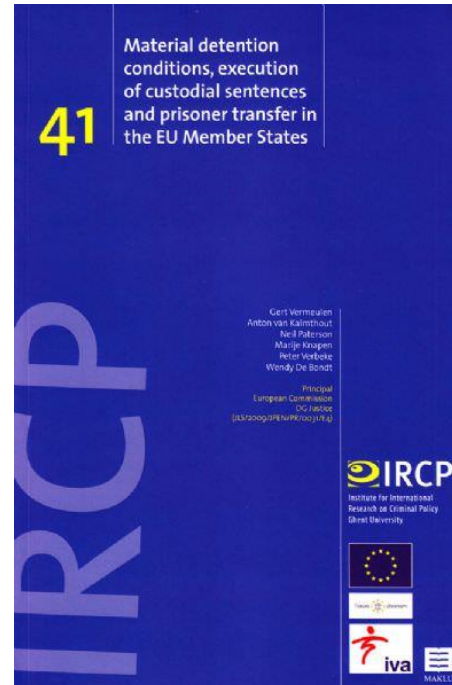
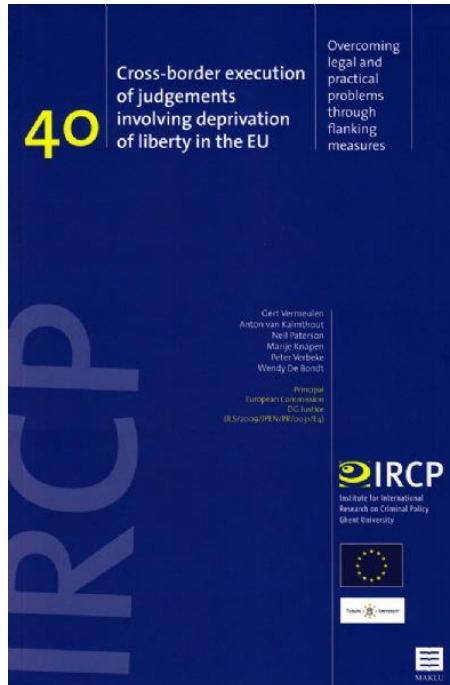
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# Further information



**European Commission:**  
Handbook on the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

(Planned)

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# Thank you

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