

ERA – Improving measures related to detention conditions at EU level

Best practice, legislation and the European Commission's green paper

Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States an IRCP Study

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Mutual recognition. Short history

- Tampere (1999)
 - Mutual Recognition (MR)
 - 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

Study results. Identified problems:

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

Question:

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.

Identified problems (I): Material detention conditions

Various and substandard detention conditions in the MS

“Highlights”

- Overcrowding: cell sharing, cell size and cell capacity
- sanitation facilities, clothing, bedding and nutrition: privacy, screening and appropriate clothing
- health care: injury detection, women’s health care, forced feeding and hunger strikers, monitoring prisoners at risk of suicide, medical examination (upon arrival), **accommodation of vulnerable prisoners**
- other: special cells, recording, staff contact, monitoring, security assessments, protection status and strip searches

Example: Belgium and the systemic deficiency threshold?

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- ECtHR: M.S.S. v. Belgium and Greece, 21 January 2011 (30696/09).
- CJEU: C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department & CJEU: C-394/12, Shamso Abdullahi v. Bundesasylamt

“Systemic deficiencies doctrine”

- Belgium: 22 ECtHR convictions regarding the treatment of mentally ill offenders in detention conditions (art. 3 & 5 ECHR).
- 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.

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Identified problems (II) MS legal systems variety

- **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)
 - => Moreover: ambiguity regarding the information exchange (art. 13 & 17.3)

Identified Problems (III) 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, 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 2013: Confirmed

B. Knowledge & information gap

- FD knowledge & info
- Knowledge & info on foreign law, practices & material detention conditions

Identified problems IV: Social rehabilitation core problem

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.”
- FD 909: 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).

Official rationale vs. Practical policy option

Means to solve domestic prison overcrowding?

Export of foreign prisoners?

FD 909: Current state of play

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- Implementation by 26 MS
- (Only) 5 timely implementations
- Equivocal implementation/application issues:

=> 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 §)

=> Social rehabilitation (automatic assumption of social rehabilitation, circular reasoning)

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Example: Belgium & the Netherlands implementation laws

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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**)

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Recommendations

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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.

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 deprivating liberty.
- **Difficult for social rehabilitation**
 - => How do you define (proper) social rehabilitation (non binding legislative framework, limited case law)
 - => And how do you measure an 'enhancement' (discussion between scholars, etc. on what rehabilitation should be and what it should achieve)

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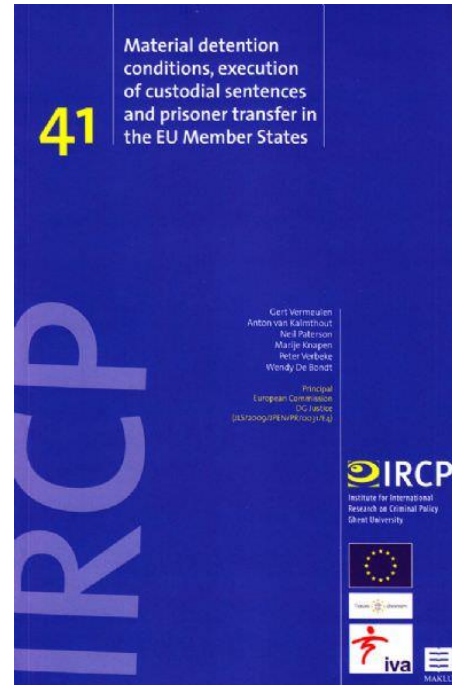
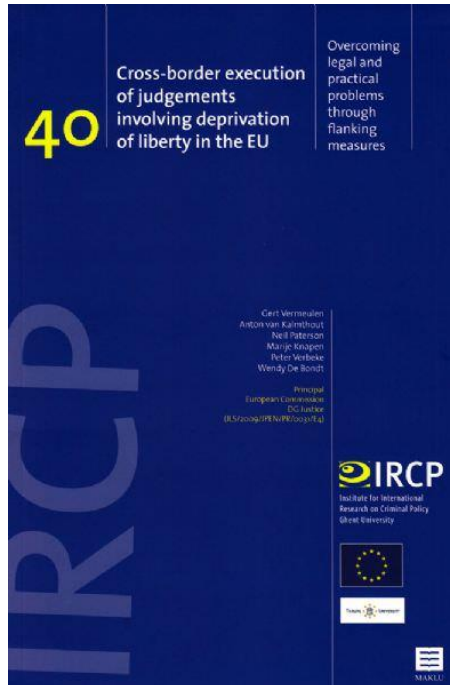
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Further information



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.

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