

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 (key features).

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# Handbook FD 909: Main focus points

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- Purpose & format of the handbook
- Fundamental Rights threshold (in light of recent case-law)
- Social rehabilitation purpose
- Position of the sentenced person (consent & informed opinion)
- Information and consultation between MS (throughout)
- Motivational duty

# Purpose and format of the handbook

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- Elaborating through topical approach (pursuant to FD 909's layout)
- With a view of clarifying the instrument in clear-cut, comprehensible language
- Specific focus on identified issues (based on identified case-law, doctrine, legislation and the IRCP's 2011 studies on detention)
- Re-establishing the instrument's purpose and function
- Focus on accessibility and comprehensibility (practitioner proof)
- Accompanying flowchart for visual support

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# FD 909: Fundamental Rights threshold

- **Recital 13 preamble:** “This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced on any one of those grounds.”
- **Article 3, 4.:** This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.
- **FD 909 based on principle of mutual recognition:** Mutual trust in Member State compliance (Tampere 1999, MRIP 2000)
- **Asylum case law (CEAS):** ECtHR => Ex. M.S.S. v. Belgium & Greece (2009), Tarakhel v. Switzerland (2012)  
CJEU => N.S. v. United Kingdom (2011), Shamso Abdullahi v. Bundesasylamt (2012)  
=> Systemic deficiencies doctrine to refute presupposed mutual trust  
=> Analogy between non-consenting asylum seeking person and non-consenting sentenced person (a.o. IRCP members’ research)
- **Mutual Recognition case law: CJEU Joint Cases of Aranyosi(C-404/15) | Căldăraru (C-659/15) (2016).**  
=> Interpretation of Articles 1 ( sections 3 & 5) and 6 ( section 1) of FD EAW (2002/584/JBZ)  
=> Potential to refuse cooperation when confronted with detention conditions contrary to ECHR, CFREU.  
=> Necessary for EMS to consult (diligently) + option for postponement to request additional information + option to refuse when information is not (timely) provided or when no additional guarantees are provided
- **Link with handbook (and application FD 909):** “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” EC Report 2014 part 4.4, 2<sup>nd</sup> & 3<sup>rd</sup> §§.
- “both the issuing and executing State – and especially in situations where the transfer of the sentence is sought without the consent of the sentenced person – must ensure that the transfer, recognition and execution of the sentence will not compromise the basic fundamental rights of the sentenced person” (p. 12).  
=> Analogous application of Aranyosi | Caldaru Judgment to (post-trial) sentenced persons under FD 909 procedures  
=> Link with: Additional motivational duty (see infra) for Issuing Member State: IMS as instigator of transfers under FD 909.

# FD 909: Social rehabilitation crux

- **Article 3, 1. FD 909:** “The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.”
- **BUT:** 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 Report:** 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).
- **Following slide:** IRCP exercise to establish and elaborate Social Rehabilitation purpose in the instrument + consultation between MS

# Social rehabilitation: the ins and outs

**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.

# FD 909: Sentenced Person Position

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- **Article 6.2 FD 909:** “consent is not required for the transfer of a sentenced person to a Member State to where they have fled or returned and equally so when the sentenced person stands to be deported or expelled following a deportation or expulsion order included in the judgment. Finally, and most importantly, is that under Article 6.2(a) the consent of the sentenced person is no longer required when the transfer is sought to the Member State of nationality in which the sentenced person lives.”
- **However:** “Even though the Framework Decision limits the sentenced person’s consent, it still requires under **Article 6.3** that, when the sentenced person is still in the issuing State, **he 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 Article 3 of the instrument.” (p. 13).
- **BUT:** “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.” EC Report 2014, part 4.1, 3<sup>rd</sup> §)
- **Need for informed opinion?** FD 909 unclear on interpretation hereof. Sentenced person often unaware of specific detention regime & conditions, MS’ sentence-execution modalities, social rehabilitation programmes, etc.
- Need for transparency: Information directed towards sentenced person (ex. Letter of information) => Hindrance for cooperation? Not necessarily: Opinion cannot prohibit transfer, but needs to be taken into account in order to assess social rehab. Purpose + taken into account for MS consultation

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# Information and consultation between MS

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- Throughout FD 909: Various indications of both optional and mandatory consultation
- In reality: MS primordially operate through standard certificate
- Various studies: MS lack appropriate information
- In light of Aranyosi | Caldararu judgment: ‘Duty’ to consult and exchange information?
- CJEU refers to variety of sources (including NPM’s) to obtain info
- Combination of elaborated social rehabilitation approach + CJEU ruling: necessity to establish proper consultation practice between MS in FD 909 procedures



# Motivational duty

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## Following CJEU/ECtHR case law: Clearcut FR refusal ground?

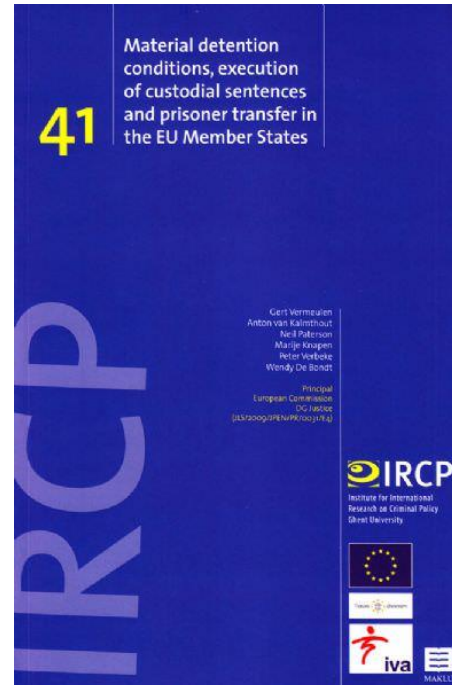
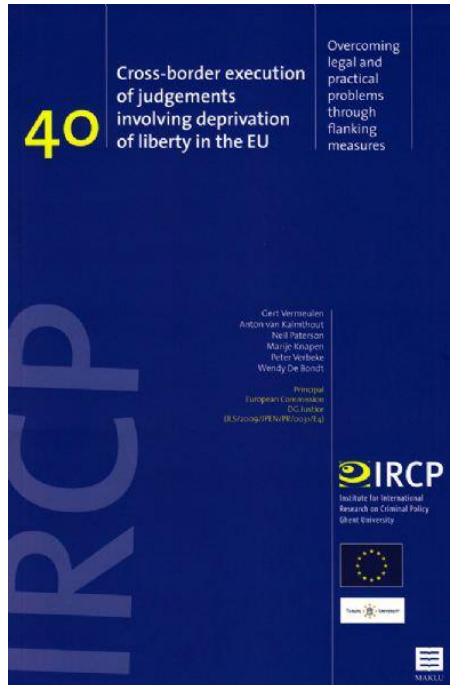
- No. Still dependent on MS implementation + ‘classic’ ruling on *non-refoulement* in case of – potential - Art. 3 ECHR violation
- New MR (Dir. EIO Art. 1, 4. & Art. 11, 1 (f) ) => Introduced
- But not feasible to be introduced in existing FD’s (European Commission)
- Relevance: Investigative prerogatives of MS: Requests of information and consultation on detention conditions (Aranyosi | Caldararu Judgment)

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

- Based on the issuing state’s initiative and consecutive responsibility= IMS ‘instigates’
- Already proposed by IRCP 2011 Study
- Inverse Aranyosi | Caldararu => IMS wants to send out, not bring in individual (↔ EAW)
- **‘duty to investigate’? (IMS/EMS) => Not just FR in terms of detention conditions, but also social rehabilitation purpose**
- **Issuing state’s ‘duty to motivate’**: proportionality and necessity, FR compliance, social rehabilitation, alternatives, ultimum remedium?
- Especially when EMS has legitimate concerns both in terms of FR compliance and social rehabilitation purpose
- Also taking into account opinion of sentenced person
- Not just request for additional info, but specific duty to motivate social rehabilitation

# Extra info

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**European Commission:**  
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