



# EU Framework Decisions related to Detention Issues

**Will they work effectively to enhance cooperation within the EU?**

Improving Conditions related to Detention  
Strasbourg, France  
20-21 June 2013

# EU Legislation in the field of detention

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW) had to be implemented by 31 December 2003

The EAW requires the surrender between Member States of persons wanted both for trial (prosecution) and to serve sentences in respect of convictions (execution) and is therefore relevant for both pre-trial and post-trial detention.

**Example:** John is a national of Member State A. On holidays, he allegedly commits a crime in Member State B and returns to Member State A. Member State B can issue and transmit an EAW for surrender of John to Member State B for the purpose of prosecution of the alleged offence. An EAW can also be used by Member State B where John is being sought to serve a sentence.

# EU legislation in the field of detention

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners) had to be implemented by 5 December 2011

Transfer of prison sentences: conditional release falls under Probation and Alternative Sanctions

**Example:** Peter is a national of Member State A. He is convicted of an offence in Member State B where he habitually lives and is sentenced to 2 years in prison. The authorities of Member State B may return him to Member State A to serve the sentence without seeking his consent.

# EU legislation in the field of detention

Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions **(Probation and Alternative Sanctions)** had to be implemented by 5 December 2011

**Example:** Anna is a national of Member State A but is on holiday in Member State B. She is convicted of an offence in Member State B and sentenced to carry out community service in lieu of a custodial sentence. She can return to her home Member State and the authorities of that Member State are obliged to recognise the community sentence and to supervise Anna's execution of it.

## EU legislation in the field of detention

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (**European Supervision Order**) had to be implemented by 1 December 2012

**Example:** Hans, who is a resident of Member State A is arrested and charged with an offence in Member State B. His trial will not start for 6 months. If he was a resident of Member State A, the judge would be inclined to release him on bail, with a condition of reporting to the police station, but the judge is reluctant to do so because Hans lives in another Member State and will return there pending trial. The judge fears that Hans will not return and may even flee. Under the ESO, the judge can allow Hans to return home can impose a reporting condition, and can ask the authorities in Member State A to ensure that Hans does report to the police station in accordance with the order of the court in Member State B.

# Table on State of Play implementation Framework Decisions

FD 909 (Transfer of Prisoners)	FD 947 (Probation and Alternative Sanctions)	FD 829 (European Supervision Order)
13 Member States	8 Member States	5 Member States
AT, BE, DK, FI, HU, IT, LU, LV, MT, NL, PL, SK, UK  HR	BG, DK, FI, HU, LV, NL, PL, SK  HR	DK, FI, HU, LV, PL

## State of Play

- Implementation deadline passed in December 2011 (FD 909 and 947) and December 2012 (FD 829)
- Green Paper on Detention June 2011, 81 replies
- Summary of the replies on:  
<http://ec.europa.eu/justice/newsroom/criminal/opinion>
- No majority support for new legislative action
- Concentrate on existing legal instruments
- Implementation report Mid-2013
- Experts' meetings in March and November 2012 and Autumn 2013

# Background

- Initiatives of Member States
- Counter balance to EAW
- In line with other procedural rights instruments
- Existing Council of Europe Conventions not very efficient and limited application



# General characteristics of the FDs

- System of certificates
- System of Competent Authorities (CAs)
- Obligation to accept a transfer, unless grounds for refusal apply
- No double criminality check for list of 32 offences
- At the request of the concerned person or one of the Member States involved
- However, no obligation to transfer for the issuing State (no right to a transfer)

# General characteristics of the FDs

- Strict time limits: 90 days (+ 30 days for the actual transfer of the prisoner), 60 days and 20 (+20 days in case of legal remedy)
- Mutual recognition: not to re-examine the decision of the IS
- Adaptation of the sentence is only possible if the nature or duration of the sentence is incompatible with national law (e.g. a maximum penalty)
- Social rehabilitation should always be assessed

# Legal and practical obstacles

## Competent authorities (CAs)

- Judicial or administrative
- Not necessarily one CA, but at least one "clearing house" for incoming requests
- Developing knowledge and expertise, especially in adaptation of sentence
- Central contact point, both national and international
- Helpdesk function advising CAs

# Legal and practical obstacles

## Consent

- Differences between the FDs
- To the measure or to the transfer?
- Feasible to make an informed decision?

## Different sanction modalities

- Problems with conversion and determining sentencing equivalence, e.g. electronic monitoring
- No aggravation of the sentence allowed

# Legal and practical obstacles

## Pre-sentence reports

- Containing information on the person or social background
- Very important for non-resident offenders both for the moment of sentencing by the judge and supervision and follow-up/after care by probation and prison officers

## Languages

- Certificate always needs to be translated, sometimes also the judgment
- What about other documents?

# Legal and practical obstacles

## Definition of "social rehabilitation"

- ECJ Cases C-66/08 (*Kozłowski*), C-123/08 (*Wolzenburg*) and C-42/11 (*Lopes Da Silva Jorge*)
- "Social reintegration": to assess social rehabilitation the place of lawful and ordinary residence is often decisive

## Definition of "lawful and ordinary residence"

- Case by case analysis
- Centre of main interests

# Legal and practical obstacles

## Grounds for refusal

- Optional or mandatory
- *Ratio legis* of grounds for refusal under the FDs

## Double criminality

- Possibility for Member States to always require double criminality also for listed offences

# Legal and practical obstacles

## Regime of subsequent decisions

- General rule : executing State is responsible for subsequent decisions
- FD 909 (*Transfer of Prisoners*): grounds for early and conditional release
- FD 947 (*Probation and Alternative Sanctions*): notably in relation to non-compliance, but the executing State may make a declaration not to assume responsibility, e.g. on the imposition of a custodial sentence
- FD 829 (*European Supervision Order*): power to take subsequent decisions will remain in the hands of the issuing State



# Legal and practical obstacles

## Legal remedies/time limits

- Up to national law
- Member States have to respect Article 47 Charter and ECHR

## Material detention conditions

- Large differences between Member States
- 2011 Study on material detention conditions (IRCP, University of Tilburg)

## Victims

- What is their role in the transfer process and when should they be informed?

## Possible solutions

- Increase knowledge of other Member States legal systems

FD 909 (*Transfer of Prisoners*) : Europris: [www.europris.org](http://www.europris.org)

FD 947 (*Probation and Alternative Sanctions*):

Belgian project 2010: [www.euprobationproject.eu](http://www.euprobationproject.eu)

ISTEP (Implementation Support for European Probation Sentences): [www.probation-transfers.eu](http://www.probation-transfers.eu)

CEP (European Organisation for Probation): [www.cep-probation.org](http://www.cep-probation.org)

- Communication is key
- Training of judges, public prosecutors, defense lawyers
- Changing mindsets of judges
- Early warning system
- Member States to identify likely partners

# Importance of timely implementation

- Infringement actions from December 2014
- Mutual recognition: Member States are dependant upon each other
- Indirect effect of FDs : ECJ Case C-105/03 (*Pupino*) and C-42/11 (*Lopes Da Silva Jorge*)

# Importance of timely implementation

- Very often, criminal courts order the detention of non-residents because of risk of absconding
- Substitution of prison sentences by transferable non-custodial sentences (e.g. 1-4 months imprisonment to community service)
- Petty crimes committed by non-residents no longer left unpunished

# Importance of timely implementation

- FDs and EAW have to be seen as a package of coherent and complementary legislation
- ESO will allow suspects who have been surrendered following a EAW to return to their home country pending trial
- Article 25 *Transfer of Prisoners* allows a Member State to refuse to surrender a person under an EAW if that Member State undertakes to recognize and enforce the prison sentence in accordance with *Transfer of Prisoners*

# Importance of timely implementation

- Potential to lead to a reduction in pre-trial detention of non-resident offenders, reduce overcrowding and reduce costs on prison budgets
- Positive side-effect: promotion and approximation of alternative sanctions
- Figures on practical application of *Transfer of Prisoners* are hopeful



## **Contact/Info:**

**European Commission**

DG Justice

Procedural Criminal Law

**Jesca Benerder**

**Legal Officer**

**Tel.: +32-2 29 67530**

**E-mail: [jesca.beneder@ec.europa.eu](mailto:jesca.beneder@ec.europa.eu)**