

Pre-trial detention, custodial sentences, supervision of probation measures and alternative sanctions

Summer Course on European Criminal Justice
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Prof. Dr. Gert Vermeulen

t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

Context and approach

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context: MR of sentences/sanctions in criminal matters

- except
 - confiscations (tomorrow's programme) and financial penalties
 - disqualifications (before break)
- NB: FD 2009/299/JHA on trials in absentia
 - introducing enhanced guarantees in FD's EAW, MR financial penalties, MR confiscation, MR custodial sentences

approach: antecedents, EU instruments and problems

- pre-trial detention and alternatives
- custodial sentences (focus)
 - including 'transfer back' & '*aut dedere aut exequi*' scenario's EAW
 - (this morning's programme?)
- probation measures & alternative sanctions (indirectly covered only)

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Ghent University

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Prof. Dr. Gert Vermeulen
+32 9 264 69 43
Gert.Vermeulen@UGent.be

Pre-trial detention & alternatives

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2002 FD on the EAW and the surrender of persons

FD 2009/829/JHA on supervision order (status April 2015: applies in 15 MS)

- MR of decisions on supervision decisions as an alternative to provisional detention
- goal good but lack of clarity about scenario's (one or two)
- 1st: person concerned in forum state
 - transfer to home state unregulated
 - back transfer through EAW guaranteed
 - even for offences to which EAW does not apply
- 2nd: person already in home state
 - no explicit mention of scenario in FD
 - whereas chief alternative to disproportionate use EAW

assessment: MR improves previous situation

- no solid arguments for MR flanking measures

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Custodial sentences & alternatives

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2002 FD on the EAW and the surrender of persons

FD 2008/909/JHA on MR custodial sentences & deprivation of liberty

- revisiting EAW for 'transfer back' and '*aut dedere aut exequi*' scenario's
- + new autonomous transfer of prisoner mechanism
- buzzwords/official rationale: social rehabilitation & succesful reintegration
- however position prisoner/executing MS radically changed
- antecedents:
 - 1983 CoE transfer of prisoner Convention + 1997 Protocol
 - humanitarian (1983) + escape/expulsion scenarios (1997)
- assessment: MR creates new problems (infra)
- flanking measures to be considered (infra)

FD 2008/947/JHA on probation orders & alternative sanctions

- antecedents: 1964 CoE convention | status April 2015: applies in 20 MS
- general assessment: good: new possibilities favouring mobility
- similar new problems, but less problematic (person has freely returned or wants to return to MS where he/she is lawfully and ordinarily residing)

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2008 FD on MR custodial sentences | intro

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comparable problems as for pre-trial detention, be it more relevant

- detention Green Paper COM (also post-trial)

IRCP study on detention in the EU 27 as lead-up to EC initiative

- announced in Commission Action Plan Stockholm Programme
- underlying hypothesis
 - mutual trust required lacks trust basis, because of
 - too significant differences between
 - material detention conditions
 - laws governing the execution of sentences
- results launched in parallel with consultation on GP
 - 2 books, open access
 - http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm
- Handbook drafted for European Commission (2015, not released yet)
- Flowchart

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The introduction in 2008 of the Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union sparked discussions as to whether the practical operation of the instrument would be compatible with its very objective, being the enhancement of detained persons' social rehabilitation prospects.

Transferring detained people back to their respective Member State of residence and/or nationality within the mutual recognition framework is somewhat precarious in light of the often substantial variety of Member States' legal and prison systems. In this context, and following a call for tender by the European Commission, the authors conducted the biggest study to date on Member States' material detention conditions, early/conditional release provisions and sentence execution modalities. In addition to exploring the diversity of legal frameworks, the study also assessed practitioners' views on cross-border execution of custodial sentences in the EU.

This book contains both the EU level legal and practitioners' analyses as well as the high level final report to the study, confirming preliminary concerns that flanking measures are urgently needed for a proper operation of the Framework Decision.

This is essential reading for EU policy makers, judicial and law enforcement authorities and for defence lawyers throughout the Union. Undoubtedly, this book will be an asset to everyone who is involved in or taking an interest in detention issues and cross-border execution of judgements involving deprivation of liberty in the EU.

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40 Cross-border execution of judgements involving deprivation of liberty in the EU

Overcoming
legal and
practical
problems
through
flanking
measures

Gert Vermeulen
Anton van Kalmthout
Neil Paterson
Marije Knapen
Peter Verbeke
Wendy De Bondt

Principal
European Commission
DG Justice
(JLS/2009/JPEN/PR/0031/E4)



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Research on Criminal Policy
Ghent University



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



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Gert Vermeulen
Anton van Kalmthout
Neil Paterson
Marije Knapen
Peter Verbeke

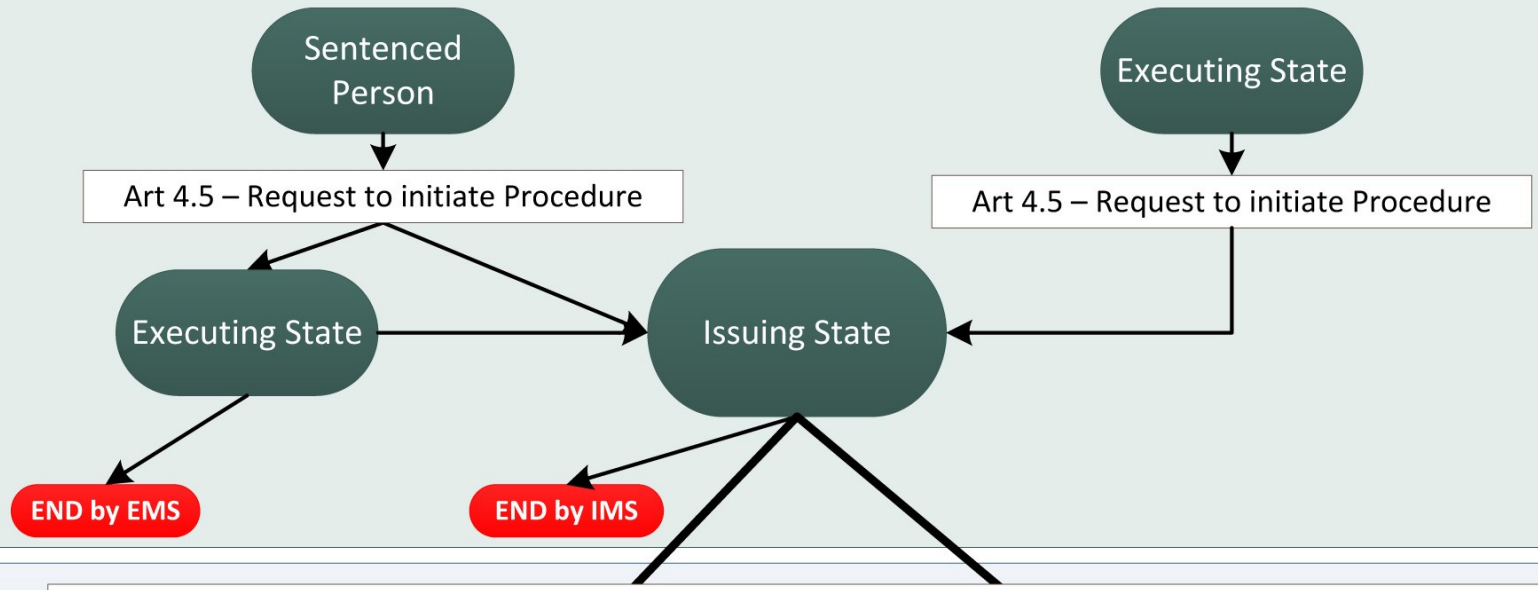
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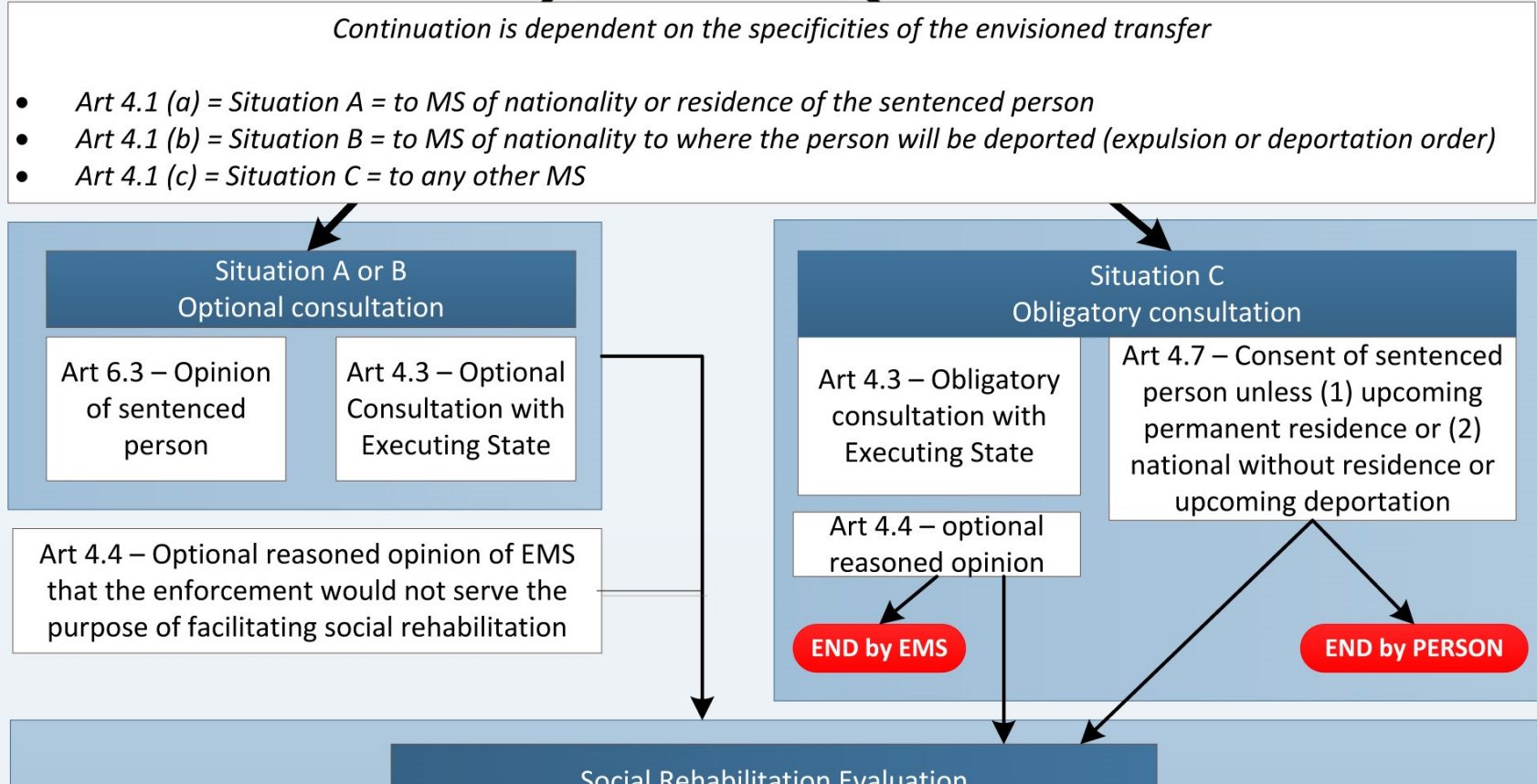
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INITIATION



CONSULTATION & FORWARDING



2008 FD on MR custodial sentences

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applicable in 23 MS by now (status: April 2015)

revisiting 2002 FD on the EAW for 'transfer back home' and *aut dedere aut exequi* scenario's

+ new autonomous compulsory transfer of prisoner mechanism to MS of nationality and residence

buzzwords (official rationale)

- social rehabilitation and succesful reintegration

however position prisoner/executing MS radically changed antecedents

- 1983 CoE transfer of prisoner Convention + 1997 Protocol
- humanitarian (1983) + escape/expulsion scenarios (1997)

assessment (IRCP study – methodology)

- MR creates new problems
- flanking measures to be considered

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Methodology

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EU-level and MS legal analysis

- European/int'l norms & standards relating to detention conditions, sentence execution and prisoner transfer
- UN, CoE (EPR-centered + CPT/ECtHR) and EU
- full national perspectives + uploads
- through SPOC-network & online questionnaires

practitioner's survey (cross-border analysis)

- implementation seminars + online questionnaires
- defence lawyers – judges – prison administrators

additional int'l/European stakeholder consultation

validation workshop

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MS overall compliance

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MS	Y %	N %	MS	Y %	N %
Finland	100	0	Latvia	67	34
Slovakia	98	3	Czech Republic	66	35
Estonia	97	4	Austria	65	36
Hungary	93	8	France	65	36
Germany	84	17	Romania	65	36
Belgium	82	19	Greece	62	39
Malta	78	23	Netherlands	60	41
Denmark	74	27	Lithuania	55	46
Slovenia	74	27	UK	55	46
Spain	74	27	Bulgaria	53	48
Italy	72	29	Poland	51	49
Cyprus	69	32	Ireland	32	69

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Problems (1)

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social rehabilitation (cornerstone)

- info on material detention conditions
- standards relating to the progression principle, to ties with friends and family and to educational, recreational, work/training and welfare programmes

knowledge of the FD and (access to) info foreign law & practices

compulsory nature FD & poor procedural status

competent authorities

- judge or penitentiary administration - automatism

position of the victim?

dual criminality issues (32 list + opt-out possibility)

'conversion' issues resulting from significant variations in MS' sentence

execution modalities & early/conditional release, earned remission and suspension of sentence provisions (infra)

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Problems (2) | Conversion issues

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executing MS can adapt, refuse to recognise or enforce a sentence if containing aspects which cannot be executed in accordance with legal system – Articles 8.2/8.3 & 9.1 (k)

- incompatibilities concerning duration and nature
 - adaption according to sanction for similar offences
 - difficult in case of lack of dual criminality 😊
 - should not result in aggravation
 - but: no obligatory *lex mitior* rule, considerable discretion – no agreed severity ranking
 - psychiatric/health care, home detention, electronic monitoring, etc
- possible withdrawal certificate if law executing MS on early or conditional release unsatisfactory to issuing MS

wholly forgotten: conversion problems with execution modalities

- electronic monitoring, house or weekend arrest, etc

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Problems (3)

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free movement of persons?

subordinate material detention conditions (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

de facto discrimination on basis nationality? - variably assessed in context of EAW (pre-trial detention own nationals) and FD 2008

- partial distrust shifting, i.e. for transfer in context of EAW! = illogical
 - MR precisely improved pretrial detention in surrender context

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Flanking measures (1)

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enhancing knowledge and (access to) information

- implementation handbook, training and monitoring
- access to information

protection of prisoners' (fundamental) rights by improving material detention conditions

- training and best practice promotion
- increasing the frequency of CPT inspections
- introducing binding European minimum standards
 - need – EU competence – political feasibility

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Flanking measures (2)

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maintaining the double criminality requirement (+ EULOCS)
safeguarding sentencing equivalence & supporting sentence execution through

- approximation: 2 generic severity rankings
- dual lex mitior + no unreasonable aggravation (review)

improving prisoners' procedural rights

- introducing a motivational duty for issuing states
 - including re sufficiently high material conditions
- right to an 'informed' opinion + to legal assistance
- competent authorities necessarily judicial bodies?
- no, but right to a judicial review

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Conclusion

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EU decision-making level

change FD? | Commission initiative upcoming to do practical standard-setting in line with our main recommendation (motivational duty)

domestic legislative level

- implementing legislation: varies enormously (example)
 - Belgium: plain and strict transposition of FD
 - The Netherlands: at least followed recommendations partially: dual criminality requirement reintroduced; judicial review possibility including entitlement to legal counsel
- COM action: handbook upcoming

active/lobbyist defence and legal representation

- lobby at EU level
 - urgent need to move beyond roadmap
- ECtHR and CJEU (prejudicial) procedures (even if much overinterpreted)

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Contact

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t. +32 9 264 69 43

f. +32 9 264 84 94

Gert.Vermeulen@UGent.be

[in <http://www.linkedin.com/pub/gert-vermeulen/68/0/42b>](http://www.linkedin.com/pub/gert-vermeulen/68/0/42b)

IRCP

Ghent University
Universiteitstraat 4
B – 9000 Ghent