Measures for pre-trial detention, custodial sentences, supervision of probation measures and alternative sanctions

Summer Course on European Criminal Justice
ERA | Trier | 21 June 2016

Context and approach

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)
**Pre-trial detention & alternatives**

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

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 & successful reintegration
- however position prisoner/executing MS radically changed
- antecedents:
  - 1983 CoE transfer of prisoner Convention + 1997 Protocol
- 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)

**Custodial sentences & alternatives**

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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
Sentenced Person

Art 4.5 – Request to initiate Procedure

Executing State

Issuing State

Art 6.3 – Opinion of sentenced person

Art 4.3 – Optional Consultation with Executing State

Art 4.4 – Optional reasoned opinion of EMs that the enforcement would not serve the purpose of facilitating social rehabilitation

END by EMS

END by EMS

Continuation is dependent on the specificities of the envisioned transfer

- Art 4.1 (a) = Situation A = to MS of nationality or residence of the sentenced person
- Art 4.1 (b) = Situation B = to MS of nationality, to where the person will be deported (expulsion or deportation order)
- Art 4.1 (c) = Situation C = to any other MS

Situation A or B

Optional consultation

END by EMs

Situation C

Obligatory consultation

Art 4.3 – Obligatory consultation with Executing State

Art 4.4 – Consent of sentenced person unless (1) incoming permanent residence or (2) rational without resistance or upcoming deportation

END by EMs

END by PERSON
2008 FD on MR custodial sentences

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 successful reintegration
however position prisoner/executing MS radically changed
antecedents
  • 1983 CoE transfer of prisoner Convention + 1997 Protocol
assessment (IRCP study – methodology)
  • MR creates new problems
  • flanking measures to be considered

Methodology

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)
  • implemenation seminars + online questionnaires
  • defence lawyers – judges – prison administrators
additional int’l/European stakeholder consultation
validation workshop
MS overall compliance

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Problems (1)

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)
Problems (2) | Conversion issues

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

Problems (3)

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
Flanking measures (1)

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

Flanking measures (2)

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
Conclusion

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 (IRCP draft)

active/lobbyist defence and legal representation
• lobby at EU level
  • urgent need to move beyond roadmap
• ECHR and CJEU (prejudicial) procedures (even if much overinterpreted)
  • MSS, NS, Aranyosi & Câldăraru