

***Non-Custodial
Sanctions and Measures.
Principles and Rules
in the Framework of EU legislation***

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I. General Aspects

- the EU level: the approach in the field of non-custodial sanctions and measures - *a consequence of prison overcrowding*;
- transfer of prisoners: hampered by prison conditions that are considered to be degrading punishment (see V. Reding: “*what judicial authority would authorize the transfer of a detainee to a place where he or she would face a substantial risk of being ill-treated?*”)

I. General Aspects

☐ **Prevention of overcrowding :**

- use of non-custodial sanctions and measures, shortening the length of imprisonment and enhancing the possibilities for early release;
- embedding these appropriate measures within a coherent and national crime policy towards the prevention of crime and criminal behaviour.

II. STRATEGIES

FRONT DOOR STRATEGIES

- Definition: – *prison population is kept low by making a selection of offenders to imprison and by keeping the door closed for others, in other words, by limiting the input of offenders;*
- Strategies: decriminalization; adopting certain prosecution policies and sentencing policies; legally limiting the length of prison sentences; an effective replacement of custodial sanctions with non-custodial sanctions and measures.

II. STRATEGIES

FRONT DOOR STRATEGIES

- imprisonment: should be used as a “last resort”, as “ultimum remedium”;
- imprisonment: is not used as a threat in cases of noncompliance with alternative measures;
- using front door in ***pre-trial phase***: by reducing pre-trial detention to a minimum.

II. STRATEGIES

BACK DOOR STRATEGIES

- Definition: *aim at reducing prison overcrowding by releasing prisoners as soon as possible, in other words, to keep prison sentences as short as possible;*
- Strategies: *– offender supervision, community supervision, alternative sanctions, intermediate sanctions, community sanctions, community corrections*

II. STRATEGIES

- *a penal subfield with rather vague boundaries which is described and labelled differently in different places or by different actors*
- **Council of Europe Rec (1992) – 16:** - *sanctions and measures which maintain the offender in community and involve some restrictions of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. (reference to court or judge and before or instead of a decision)*

II. STRATEGIES

Alternatives to pre-trial detention:

- verbal sanctions, conditional discharge, status penalties, economic sanctions and monetary penalties, confiscation or an expropriation order, restitution to the victim or a compensation order, suspended or deferred sentence, probation and judicial supervision, community service order, referral to an attendance centre, house arrest, any other mode of non-institutional treatment, some combination of the measures listed above.

II. STRATEGIES

Alternative to post-trial level:

fully or partial suspended custodial sentence with or without probation, conditional pardon or conditional discharge (with probation), community service, electronic monitoring, home arrest, semi-liberty (including weekend imprisonment and imprisonment on separate days), treatment (outside prison), conditional release/ parole with probation, furlough and halfway houses, work or education release, various other forms of parole, remission, pardon, mixed order and others

III. EU LEVEL STRATEGIES

□ Pre-trial:

Council Framework Decision 2009/829/JHA on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention – **European Supervision Order (ESO)**

III. EU LEVEL STRATEGIES

- **Article 8(1) ESO:** *an obligation to inform the competent authorities, an obligation not to enter certain localities, an obligation to remain at a specific place, an obligation containing limitations on leaving the territory, an obligation to report at specified times, an obligation to avoid contact.*
- **Article 8(2) ESO:** *an obligation not to engage in certain activities, an obligation not to drive a vehicle, an obligation to deposit a certain sum of money, an obligation to undergo therapeutic treatment or treatment for addiction, an obligation to avoid contact with certain object.*

III. EU LEVEL STRATEGIES

□ Post-trial:

Council Framework Decision 2008/947/JHA 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 (**FD non-custodial**)

III. EU LEVEL STRATEGIES

- **Article 2 FD non custodial:**
conditional release, suspended sentence, conditional sentence, alternative sanctions (other than custodial sanctions, financial penalties, confiscation orders)

- **Article 4:** types of probation measures and alternative sanctions

IV. DOCUMENTS

- ❑ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - **EAW**
- ❑ Statements made by certain Member States on the adoption of the Framework Decision (2002/584/JHA)
- ❑ *Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*

IV. DOCUMENTS

- ❑ *Joint Action 98/669/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime;*
- ❑ *Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime;*
- ❑ *Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence;*

IV. DOCUMENTS

- ❑ *Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property;*
- ❑ *Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;*
- ❑ *Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.*

IV. DOCUMENTS

- ❑ Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (**FD financial penalties**);
- ❑ Council Framework Decision 2008/909/JHA on the application 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 custodial**)
- ❑ *Subsidiary legislation 9.17 – Custodial sentences or measures involving deprivation of liberty orders (execution in the European Union) Regulations, 3rd February, 2012*

IV. DOCUMENTS

- Council Framework Decision 2008/947/JHA 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 (**FD non-custodial**);
- Framework Decision 2009/829/JHA – **European Supervision Order (ESO)**;
- Directive 2011/99/EU on the European protection order (**EPO**);

IV. DOCUMENTS

- ❑ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/222/JHA;
- ❑ The Charter of Fundamental Rights of the European Union (**EU Charter**).

IV. DOCUMENTS

- **Green Paper** – Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Com (2011);
- **Report** from the Commission on the implementation of the **EAW** – COM (2011);

IV. DOCUMENTS

Other relevant documents:

- ❑ **The Stockholm Programme** – An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010].
- ❑ The European Parliament resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen (2009)
- ❑ European Parliament's February 2011 Written Declaration on infringement of the fundamental rights of detainees in the European Union
- ❑ the Directives starting 2010 regarding the rights of the suspect or accused.

V. PRINCIPLES AND RULES

- ☐ **Green Paper: - the promote mutual trust, to strengthen procedural rights by way of minimum rules for suspects or accused**
- ☐ ***Objective, rules, principles***
- ☐ **Premises: European Rules on community sanctions and measures – Council of Europe, Rec. R92(16) and comparative law principles**

V. PRINCIPLES AND RULES

1. RESPECT OF FUNDAMENTAL RIGHTS

- *the general obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU*
- **Preamble** - EAW, FD financial penalties, FD custodial, FD non-custodial
- **EAW** – Article 1(3) special reference to Article 4 EU Charter and Article 3 ECHR
- **FD custodial** - Article 3(4), especially after removing the requirement that the sentenced person must consent to the transfer, a greater attention must be paid to the possible infringement of fundamental rights post-transfer (see also: right to information about the time actually needed to be serve in the executing state (decision from the ECHR))

V. PRINCIPLES AND RULES

2. FAIR TRIAL (RIGHT TO AN EXPEDITIOUS TRIAL)

- *a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented*

- ❑ **EU Charter** Article 47
- ❑ **EAW** – Article 17 time limits for the decision; Article 23 – time limits for the surrender; Article 19 – hearing of the persons by a judicial authority
- ❑ **FD custodial** – Preamble, pct. (6) – principle of fairness
- ❑ **FD non-custodial**, Article 12 – time limit (the procedure takes maxim 60 days)

V. PRINCIPLES AND RULES

3. RIGHT TO LIBERTY

- ❑ **EU Charter** - Article 48
- ❑ **EAW** - Article 12: - the person may be released provisionally at any time – and alternatives methods
- ❑ **ESO** – the whole objective is preserving the liberty
- ❑ Includes the regular review of pre-trial detention (**ESO**, Preamble- renewing of supervision measures)

V. PRINCIPLES AND RULES

4. LEGALITY AND PROPORTIONALITY

- *A penalty can be imposed if it was applicable at the time the criminal offence was committed. The severity of penalties must not be disproportionate to the criminal offence*
- ❑ Definitions, measures, adoption, conditions – all laid down in law
- ❑ Discussions on the applicable law
- ❑ **ESO** - Article 16: monitoring: executing state; Article 18: authority from issuing State shall have jurisdiction to take all subsequent decisions relating to a decision on supervision measures; in case of less serious offences
- ❑ **FD financial penalties; FD custodial** - Article 17(1): executing state
- ❑ **FD non-custodial** - Article 13: governing law – executing State (regarding all subsequent decisions – although the executing State may declare it will refuse to assume some responsibilities, in specific cases – in these cases, the jurisdiction will be transferred back to the issuing State in case of non-compliance)

V. PRINCIPLES AND RULES

5. SOCIAL INCLUSION (REINTEGRATION). SOCIAL REHABILITATION

- a requirement of social justice and a key guiding principle in probation practice;
- social inclusion or reintegration is easier in the executing State (person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing state (**FD custodial**);
- enhancing the prospect of the sentenced person's being reintegrated into society a view to social rehabilitation permits forwarding a judgment other than the state of residence, nationality etc. (**FD non custodial**).

V. PRINCIPLES AND RULES

6. ADAPTATION PRINCIPLE

- *specific to transnational level, due to different legislations*
- *Consequence of the applicable law (executing State)*
- **ESO** - Article 13: adaptation of the supervision measures
- **FD custodial** - Article 8
- **FD non custodial** - Article 9

V. PRINCIPLES AND RULES

7. CONSENT

- ❑ **FD custodial** – Preamble, pct. 10 – opinion of the sentenced person is the rule; Article 6 – the consent of the sentenced person, except some cases;
- ❑ **FD non- custodial** - no consent provided, still Article 5 – forwarding a judgment if the sentenced person has returned or wants to return to that State;
- ❑ **EAW** – ground for optional non-execution;

V. PRINCIPLES AND RULES

8. PRINCIPLE OF NON-DISCRIMINATION (OF FOREIGNERS)

- *Any discrimination shall be prohibited* (Article 21 **EU Charter**)
- **ESO** – Preamble pct. 5 - risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not
- **FD financial penalties**
- **FD custodial** - Preamble pct. 6 - principle of equality
- **FD non custodial** – Preamble, pct. (5) – all criteria regarding discrimination are forbidden

V. PRINCIPLES AND RULES

9. SPECIAL RULES FOR JUVENILES

- *e.g.: age of criminal responsibility: 8 in Scotland, 16 in Portugal*

- **EAW** – Article 3(3): age as mandatory non-execution of the EAW
- **Directive 29** – Article 24, special provisions regarding child victims

V. PRINCIPLES AND RULES

10. COSTS and LANGUAGE

- **Costs:** - general rule the executing state (EAW, ESO, EPO, FD custodial and non custodial);
- **Language:** - official language of the executing State or an official language of the institutions of the EU (if the Member State stated in a declaration deposited with the General Secretariat of the Council)

V. PRINCIPLES AND RULES

11. PROTECTION OF PERSONAL DATA

- *Everyone has the right to the protection of personal data concerning him or her (Article 8 **EU Charter**)*
- More specific – Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters

V. PRINCIPLES AND RULES

12. ROLE OF THE VICTIM. PROTECTION OF THE VICTIM

- *special information on the victims' place in the implementation of community sanctions (**Directive on victim protection**)*
- *improve the protection of victims and the general public – **ESO**, Article 2(1) c);*
- **EPO** – *primarily objective: practical support measures for the protection of victims.*

VI. CONCLUSIONS

Community sanctions: disadvantages and risks

- ❑ to what extent and under what circumstances succeed in reducing prison overcrowding
- ❑ - the possibility and existence of non-custodial sentences do not necessarily imply that they are actually applied by judges (cases when a custodial sentence cannot be avoided, since the sentence has to 'cover' the pre-trial detention time)
- ❑ - cases when community sanctions are not imposed as an alternative to imprisonment but as an alternative to other community sanctions.