Prison overcrowding and alternatives to detention: a state of art. Working paper*

SUMMARY: Introduction – 1. General principles applicable to alternative sanctions and measures. – 1.1. Facilitating re-socialisation and social adjustment. – 1.2. Effects on prison population and possible range of beneficiaries. – 1.3. Proportionality and punitive character of the measure. – 2. The imposition of alternative sanctions and measures. – 2.1. Decision to impose non custodial sanctions: legal choices and judicial discretion. – 2.2. Judicial assessment on the eligibility and the role of probation service. – 2.3. Agreement of the offender: a condition for rehabilitation? – 3. The enforcement of alternative sanctions and measures. – 3.1. Legal conditions and obligations imposed with the sanction or measure. – 3.2. Control and supervision on the compliance with conditions and obligations. – 3.3. Revocation and consequences in case of breach.

Introduction

During the first year the research has achieved some major goals. In the first semester (May-November) an in-depth analysis of the factors contributing to prison overcrowding and prison population inflation was carried out. Data concerning prison rates and prison capacity have been gathered, showing significant discrepancies between the selected Member States.

At the first sight, the outcomes of such examination might even appear paradoxical: according to the national data and CoE-Space I 2013 survey, for instance, prison population in Italy in 2012 exceeded by the 48% prison capacity, being the worst among the penitentiary systems scrutinized.

In striking contrast to its prison density, however, Italy revealed the lowest incarceration rate per capita among the selected Member States. Poland on the other hand had the highest incarceration rate among the selected systems but was the only one in which prison overcrowding was not detected[2].

During the second semester of the research (December-May) national units have indeed focused on information and statistics concerning alternative sanctions and measures. Encompassing the instruments applicable, respectively, to the pre-sentencing, sentencing and post-sentencing phase, the analysis drew attention to the existence of a wide array of sanctions and measures available to prosecutors and judges in the selected Member States.

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[2] Incarceration rates: Poland (205.2), Romania (167.7), Spain (143.6), France (118.3), Belgium, (115.5), Italy (102.9) – M.F. AEBI, N. DEL GRANDE, SPACE I, Council of Europe Annual Penal Statistics: Prison Populations. Survey 2012, Strasbourg, Conseil de l'Europe. Some discrepancies between these data and figures gathered by national survey have been pointed out during the first year of the research. See, for Italy, M. LOMBARDI STOCCHETTI, *Pubblicati i nuovi rapporti del Consiglio d'Europa su carcere e misure alternative alla detenzione (con un focus sui detenuti stranieri e sulla mediazione in materia penale, e una sovrastima del sovraffollamento in Italia)* in *Diritto penale contemporaneo*, 11 marzo 2015.

Statistical data again showed that an increase in the use of alternatives to detention does not correspond to a decrease of the prison population rate. Surveys indeed demonstrated that in some Member States an augmentation of prison population can be noticed despite the increasing recourse to sanctions and measures executed in the community[3], raising questions on the risk that a process of "net-widening" may take place[4].

This shows how the mere correlation of data may not be sufficient to assess the real impact of non custodial sanctions and measures on prison conditions.

This is why, in the last working group held in Cluj-Napoca, consensus has emerged around the idea that the time has come to depart from a simple analysis of data and address a principle-based evaluation of alternative sanctions and measures as they operate in practice. It is essential to take into account the limits which might reduce or hinder the *recourse* to or the *impact* of non custodial sanctions, by analysing in depth both their legal basis and enforcement in practice.

This methodology will enable the researchers to point out, among other things, the shortcomings hampering the effective implementation of alternative measures, the counter-productive effects of their malfunctioning and the risks triggered by a lack of assistance, supervision and control in the execution of the latter.

A valuable benchmark to carry out such evaluation are the standards set out in the Recommendations enacted by the Parliamentary Assembly of the Council of Europe, drafted by the European Committee on Crime Problems (CDPC), the Council for the Penological Cooperation (CP-PC) and other *ad hoc* working groups of experts[5]. Such a methodology will also help disseminating appropriate information to the public on the functioning of alternative sanctions and measures[6] and lay down the basis for the elaboration of a set of guidelines at a EU level. European Committee on Crime Problems

What is more an in-depth evaluation of European soft law in the field of alternative sanctions is essential to build common standards that will ease the functioning of instruments of judicial cooperation in this field, such as the Framework Decision on probation and alternative sanctions whose effectiveness may be threatened by the differences between the various national systems of probation and by a lack of mutual trust among practitioners[7].

Ideally the guidelines resulting from this third phase of the research will consist in a series of research-based recommendations aimed at enhancing a wider and safer recourse to non custodial sanctions and measures.

This working paper thus tries to engage with a number of ethical and practical issues that – the research thus far conducted reveals – are common to all selected member States and can therefore be valuably tackled on a European level. Firstly, certain general principles are examined with a view to underpin the common theoretical framework in which the implementation of non

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[3] M.F. AEBI, J. CHOPIN, SPACE II – Council of Europe Annual Penal Statistics : Prison Populations. Survey 2013, Strasbourg, Conseil de l'Europe.

[4] See, on the socio-criminological concept of "net-widening", D. GARLAND, *Penalty and the penal state*, in *Criminology,* 2013, p. 475.

[5] For a complete overview of the decision-making process leading to the adoption of Council of Europe recommendations in criminal matters see P. PONCELA, R. ROTH, *La fabrique des sanctions pénales en Europe*, Paris, 2006, p. 55-58

[6] R (92) on the European Rules on community sanctions and measures, rule 44 "Appropriate information about the nature and content of community sanctions and measures as well as the various ways in which they are implemented shall be disseminated so that the general public, including private individuals and private and public organisations and services involved in the implementation of these sanctions and measures, can understand them and perceive them as adequate and credible reactions to criminal behaviour".

[7] S. NEVEU, *Probation measures and alternative sanctions in Europe*, in *New Journal of European Criminal law,* 2013(2), 135-153; D. FLORE, S. BOSLY, A. HONHON, J. MAGGIO (eds.), *Probation measures and alternative sanctions in the European Union*, 2012, Cambridge-Antwerp-Portland, p. 3. The differences in the law regulating the enforcement of custodial sentences may also affect the functioning of the Framework Decision 909/2008/JHA as the law governing the enforcement is the one of the executing, including those applicable to a possible early or conditional release (see art. 17 Framework Decision 909/2008/JHA).

custodial sanctions and measure has to take place (§1). Secondly, some issues arising in the decision-making process leading to the imposition of a non custodial sanction or measure are analysed (§2). Thirdly, the paper highlights some obstacles and shortcomings appearing during the enforcement of a non custodial sanction or measure that may hinder its effectiveness (§3).

1. General principles applicable to alternative sanctions and measures.

1.1. Facilitating re-socialisation and social adjustment.

Although in several Member States most of community sanctions and measures perform purposes of social rehabilitation[8], the general sentencing aims of the latter still remain theoretically unclear, giving rise to ambiguities in their imposition and implementation[9].

Nonetheless, an overwhelming consensus exists in Europe with regard to the de-socialising effects of short-term prison sentences[10], confirmed by the widespread trend towards the introduction of an extensive range of non custodial sanctions in all Member States. Indeed, alternative sanctions replacing short prison sentences have been laid down in national legislation with the view to enabling judges to pursue aims of rehabilitation by ordering a non custodial measure where the imposition of a prison term may have counterproductive effects.

Similarly, the rehabilitation ideal constitutes in several Member States the overarching principle of the post-sentencing phase, underlying national rules on early release of sentenced prisoners and implementation of alternative forms of enforcement of prison sentences[11].

In this context, it comes as no surprise that European law places particular emphasis on the need for social reintegration: the recommendations adopted by the Committee of Ministers of the Council of Europe, in particular, stress the aim of contributing to personal and social development of the offender[12] in order to restore his status of law-abiding person[13].

More specifically, not only alternative sanctions and measures have to imply, *in abstracto*, activities designed to bring about social reintegration[14], but they also have to be implemented, *in concreto*, in a way that is relevant for the offender's adjustment in society[15].

This means that methods of supervision and control on the person benefiting from a non custodial sanction shall be fulfilled consistently and shall include a systematic assessment of the individual case and the elaboration of a specific rehabilitative programme.

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[8] However for the ambiguities underlying the use of terms such as reintergration, rehabilitation and resocialization in a European perspective see C. MORGENSTERN, E. LARRAURI, *European norms, policy and practice*, in F. MC NEILL, K. BEYENS (eds.) *Offender supervision in Europe*, 2013.

[9] See A. M. VAN KALMTHOUT, *Alternative sanctions in Europe: their counterproductive effects and their impact on prison conditions*, in *Tilbourg Foreign Law Review,* 1994, n. 3, p. 335.

[10] See T. PADOVANI, *L'utopia punitiva*, Milano, 1981, p. 42-71, p. 237-243; E. DOLCINI, C.E. PALIERO, *Il carcere ha alternative*, Milano, 1989, p. 13-156.

[11] See, *inter alia*, the seminal work of H. MÜLLER-DIETZ, *Methoden und Ziele der heutigen Strafvollzugswissenschaft* in *ZStW*, 1967, p. 330.

[12] Recommendations, Rec (2006) 2 on the European Prison Rules; Rec (2003) 22 on conditional release rule 3 and rule 13; R (92) 16; R (82) 16 on prison leave; R (92) on the European Rules on community sanctions and measures, rule 55.

[13] See Rec (2010) 1 on the European Probation Rules, glossary.

[14] See for instance, rule 57 of the Rec (2010) 1 on the European Probation Rules: "when electronic monitoring is used as part of probation supervision, it shall be combined with interventions designed to bring about rehabilitation and support desistance". Rec CM/Rec (2014) 4 on Electronic Monitoring rule 8 "Electronic monitoring may be used as a stand-alone measure in order to ensure supervision and reduce crime over the specific period of its execution. In order to seek longer term desistance from crime it should be combined with other professional interventions and supportive measures aimed at the social reintegration of offenders".

[15] Recommendation R (92) 16 on the European Rules on community sanctions and measures, rule 55; Rec (2010) 1 on the European Probation Rules, rule 76: "interventions shall aim at rehabilitation and desistance".

This is true, in the first place, for the measures applied in the post-sentencing phase, although the need for an individualised treatment and programme also applies, in several Member States, as part of the sanction imposed in the sentence. The national reports may therefore evaluate how the interventions put in place by judicial and probation agencies fulfil these purposes, ensuring that the measures restricting person's rights and freedoms are accompanied by interventions and activities (involving supervision and assistance) that aim at the social inclusion of the offender (see also § 3.2).

Attention can also be placed on national rules preventing (or restricting) some categories of offenders to be eligible for a non custodial enforcement due to legal presumptions of dangerousness (see for instance Italy and partially Spain) which might thwart offender's right to individualised treatment towards reintegration into community[16]. Similarly the room is narrow for an individualised treatment when the period of supervision following a conditional release is fixed and the judge is only allowed a limited discretionary power to evaluate the response of the offender to the conditions or obligations imposed (see article 78 of the penal code in Spain)[17].

The content of the activities entrusted to probation authorities in charge of the practical implementation of non custodial measures is also relevant to evaluate the attitude of alternative measures to achieve aims of social rehabilitation (see § 3.2.), as the latter may be frustrated when probation authorities are only committed to manage supervision tasks without any pedagogical assistance (see the Belgium case)[18].

A suspended sentence deprived of rehabilitative content (French *sursis simple*, Italian *sospensione condizionale*) or forms of house arrest not implying rehabilitative treatment (Italian *detenzione domiciliare*) may also raise concerns.

1.2. Effects on prison population and possible range of beneficiaries.

The ideal that criminal law must tend to a progressive reduction lies at the core of European prison law and policy and it is shared by the scholarship and the jurisprudence of several EU member State[19]. Among its corollaries is the purpose to reduce progressively the area of criminal law, advocating the use of imprisonment as a measure of last resort. The strategies to attain this objective, however, vary significantly from one State to another inasmuch as the factors that influence the fluctuations of prison rates and prison population usually depend upon national specificities.

Along with a growth of the prison capacity (Spain, Poland), the strategies to reduce prison population include both a front-door policy (reducing the entry of new prisoners) and a back-door policy (diminishing the length of the stay in prison). Similarly, in recent years, growing emphasis has been placed on the need for a decriminalisation of certain categories of offences and on the need to reduce the recourse to pre-trial detention.

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[16] Italy article 4-bis of Penitentiary law; in Spain article 72.5 par. 6.

[17] Recommendation R (2003) 22, rule 9: "In principle, conditional release should also be accompanied by supervision consisting of help and control measures. The nature, duration and intensity of supervision should be adapted to each individual case. Adjustments should be possible throughout the period of conditional release".

[18] T. SLINGENEYER, *Rôles des services psychosociaux et des assistants de justice dans le cadre de la libération conditionnelle en Belgique: l'hypothèse d'une colonisation sécuritaire*, in P. MBANZOULOU, *Les métiers pénitentiaires: enjeux et évolutions,* Agen, 141-158 ; ID. *Gouvernementalité et libération conditionnelle. sLes pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, Saarbrücken, 2014.

[19] D. VAN ZYL SMIT, S. SNACKEN, *Principles of European prison law and policy*, Oxford, 2009, p. 86-99; J. CID, *La polìtica criminal europea en materia de sanciones alternativas a la prisiòn y la realidad española,* in *Estudios penales y criminologicos*, 2010, p. 55-83.

The tenets of reductionist policy are fully endorsed on a European level and can be found in several recommendations of the Council of Europe[20] and the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[21]. The soft law of the Council of Europe stigmatises prison overcrowding as a threat for human rights, given its attitude to imply inhuman and degrading treatments for prisoners.

In the perspective of Strasbourg bodies prison population inflation is mainly due to the increase of entries in the penitentiary system (especially due to the growing use of remand in custody) as well as to the extension of the length of the detention period. As a consequence, European recommendations go as far as stating that pre-trial detention shall be used only when strictly necessary[22]. In order to reduce the length of the period of detention, the Council of Europe strongly recommends to strengthen the use of conditional release (parole)[23].

It is therefore suggested that national reports take in due account their legislation and practice in order to evaluate whether existing alternative measures actually contribute to a decrease of prison population. Surveys indeed show that, despite the growing number of beneficiaries of alternative sanctions and measures, there is no corresponding decrease of prison population in some selected member States. Thus, in order to evaluate the impact of non custodial measures, particular attention should be paid to sentencing practices and criteria followed by judges and prosecutors in the application of alternative or substitutive sanctions.

With reference to the *pre-sentencing* phase reports have shown reluctance in the use of alternatives to remand in custody. The reasons underlying this attitude might be evaluated taking into consideration: the conditions for the applicability of pre-trial detention, including the presumption of dangerousness that prevent the application of alternatives to pre-trial detention[24]; the selection criteria; the practical obstacles to a greater use of non custodial precautionary measures[25]. The real impact of pre-trial detention on the penitentiary system may be highlighted as far as a deduction of the time spent in pre-trial detention in provided (Italy)[26]. The use of simplified procedures and out-of-court settlements as alternatives to prosecution in suitable cases[27] in order to avoid full criminal proceedings should be evaluated positively (Belgium).

Concerning the *sentencing* phase, particular attention should be given to sentencing practices and criteria followed by judges and prosecutors in the application of alternative or substitutive sanctions. European soft law encourages the legislature to review rationales for sentencing with a view to reduce imprisonment to the more serious cases, improve the resort to community sanctions (see also § 2.1.) and strengthen the use of means such as mediation or compensation of the victim in

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[20] See R(2006)2 on the European Prison Rules, R(92) 16 on the European Rules on community sanctions and measures, R(99)22 concerning prison overcrowding and prison population inflation.

[21] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2nd General Report, CPT/Inf (92) 3; 11th General Report on the CPT's activities, CPT/Inf (2001) 16, Strasbourg, September 2001.

[22] Rec (2006) 13 on the use of remand in custody rule 3: "in view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm".

[23] Rec (2003) 22 concerning conditional release; Rec (2003) 23 on the management of life-sentence and other long-term prisoners. On the Council of Europe commitment for early release (and conditional release in particular) see D. VAN ZYL SMIT, J. SPENCER, *The European dimension to the release of sentenced prisoners*, in N. PADFIELD, D. VAN ZYL SMIT F. DÜNKEL (eds.) *Release from Prison: European Policy and Practice*, Cullompton-Portland, 2010, p. 9-48.

[24] Such presumptions may be reviewed critically as Rec (2006) 13 on the use of remand in custody, rule 9 lays down that the determination of every risk justifying the remand in custody must be based on "the individual circumstances of the case".

[25] In some of the selected Member States a legal obligation to issue pre-trial detention was provided under certain conditions (see Italy and Poland), leading to a major growth of prison population.

[26] See in Italy, article 657 par. 1 of the code of criminal procedure: "In determining the term of imprisonment to be enforced, the Public Prosecutor shall take account of the period of time spent in pre-trial custody for this or some other offence even if custody is still in progress".

[27] Recommendation R (87) 18 concerning the simplification of criminal justice which also encourages the States to resort to the principle of discretionary prosecution.

the place of traditional retributive punishment[28]. A proactive role of prosecutor and judges is also supported in order to responsibly adapt sentencing structures and planned sentencing policies to the evolution of the prison population[29]. The compliance of national sentencing systems with these principles may be evaluated by national reports.

As for the *post-sentencing* phase, legal presumptions (e.g. in case of re-offending)[30] and other restrictive conditions relating to certain categories of offences (terrorism, organised crime, sex crimes)[31] may also be called into question since they restrict the range of beneficiaries of certain alternative measures in contrast to what is suggested by Recommendation R (99) 22[32]. Measures aiming to reduce the length of the stay in prison such as parole or conditional release, shall not be available only after a fixed period that would render impossible to achieve the aim of social adjustment pursued by the early release from prison (see Recommendation R (2003) 22, rule 6) (Belgium, Spain)[33].

Moreover, the use of general early release measures that would only place emphasis on the reduction of the length of imprisonment without considering the individual conditions of the offender may be reviewed critically. The individualisation of treatment shall indeed be regarded as a condition for social adjustment. This explains the relevance given by European soft law to conditional release: "the development of measures should be promoted which reduce the actual length of the sentence served, by giving preference to individualised measures, such as early conditional release (parole), over collective measures for the management of prison overcrowding (amnesties, collective pardons)" [34].

In the perspective of European soft law "conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community". As a consequence, the offender should be subject to post-release conditions and supervision that promote the social rehabilitation of the offender, contribute to public safety and the reduction of crime in the community[35]. The aim of reducing prison population and the purpose of limiting the risk of re-offending also by means of rehabilitative treatment must be balanced.

The implementation of alternative sanctions and measures with the view to reduce prison inflation is also endorsed by the case law of the European Court of Human rights. Where a structural problem concerning prison conditions is detected (infringing article 3 ECHR) the Court may put forward general solutions for the development of a more effective correctional policy by the respondent State. When dealing with breaches article 3 ECHR related to the prison population

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[28] Recommendation R (99) 22 concerning Prison overcrowding and Prison Population Inflation, rule 18; Recommendation R (92) 17 concerning consistency in sentencing.

[29] Recommendation R (99) 22 concerning Prison overcrowding and Prison Population Inflation, rule 18.

[30] J. CID, *La polìtica criminal europea en materia de sanciones alternativas a la prisiòn y la realidad española,* in *Estudios penales y criminologicos*, 2010, p. 67 stigmatises the prohibition, under Spanish penal code, to grant probation in case of re-offending.

[31] In Italy article 4-bis of Penitentiary law; in Spain article 72.5 par. 6 of the penal code.

[32] Recommendation R (99) 22 concerning Prison overcrowding and Prison Population Inflation, rule 9: "Specific modalities for the enforcement of custodial sentences, such as semi-liberty, open regimes, prison leave or extra-mural placements, should be used as much as possible with a view to contributing to the treatment and resettlement of prisoners, to maintaining their family and other community ties and to reducing the tension in penal institutions". See also Recommendation Rec (2000) 22, to member states on improving the implementation of the European rules on community sanctions and measures, rule 3.

[33] See the situation in Belgium and Spain (art. 78 of the penal code: "if, due to the limitations established in Section 1 of Article 76 [maximum period for serving an accumulation of penalties], the punishment to be served were to be lower than half the aggregate sum of those imposed, the Judge or Court of Law sentencing may order that penitentiary benefits, term-release permits, pre-release classification and calculation of the time to be served prior to probation [sic] shall refer to the total penalties imposed in the sentences").

[34] R (99) 22 concerning Prison overcrowding and Prison Population Inflation, rule 22; see also rule 23. See P. V. TOURNIER, *La politique pénale du Conseil de l'Europe. De la prison en première ligne à la prison comme alternative de dernier recours aux sanctions et mesures appliquées dans la communauté,* in *Archives de politique criminelles*, 2013, p. 91-103.

[35] Recommendation R (2003) 22, rule 3, rule 13

inflation, guidelines for the State to implement Court's decision pursuing to article 46 ECHR increasingly make reference to Council of Europe Recommendations in the field of non custodial sanctions[36].

1.3. Proportionality and punitive character of the measure.

Despite some persisting criticisms, it is now common understanding that alternative sanctions can have a punitive content, involving substantial deprivations and restrictions to rights and liberties of the offender[37]. This explains why the main international and European soft law instruments explicitly enshrine the principle of proportionality[38].

European rules on community sanctions and measures, in particular, lay down the proportionality principle as first factor in the selection by the legislature and the judge of the appropriate community-based sanctions. Limits to non custodial sanction's severity are imposed by making reference both to "seriousness of the offence for which an offender has been sentenced" and to "his personal circumstances". This means, among other things, that conditions imposed on the offender shall not exceed the degree of severity that is proportional to the act committed and the personal circumstances of the offender[39]. This latter requirement shall include socio-economic conditions of the offender in the case of financial penalties.

Admittedly, the right not to be subjected to a disproportionate sentence is expressed in broader terms by both the European Court of Human Rights and the EU Charter of fundamental rights (article 49)[40]. It is therefore suggested that national reports take into due account legislative provisions and sentencing practice in order to assess the respect of the principle of proportionality.

Firstly, the proportionality principle can be both referred to the length of the probation period and to its supervision. It may thus be questionable that in some selected Member States, the period of supervision and control may out-top the length of custodial sentence originally inflicted and subsequently substituted or suspended[41].

Secondly, the proportionality principle can also be referred to the controlling activities carried out for the implementation of the sanction, which should be limited to a minimum intervention and should not be disproportionate to the measure and its aims[42].

Finally, the prohibition of disproportionate sentences does not only encompass the content of the measure itself, but also the consequences stemming from the failure to respect the conditions imposed on the offender, which should not amount to a grossly disproportionate treatment

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[36] P. VOYATSIS, *Alternative measures to detention in the case-law of the ECtHR*, in *EuCLR*, 2014, p. 169.

[37] A. M. VAN KALMTHOUT, *Alternative sanctions in Europe: their counterproductive effects and their impact on prison conditions*, in *Tilbourg Foreign Law Review,* 1994, p. 335; D. VAN ZYL SMIT, *Degrees of freedom,* in *Criminal Justice and Ethics*, 1994, p. 31-38.

[38] D. VAN ZYL SMIT, *Legal standards and the limits of community sanctions,* in *European Journal of crime, criminal law and criminal justice*, 1993, p. 309-325.

[39] See with specific reference to Electronic Monitoring Rec CM/Rec (2014) 4 on Electronic Monitoring rule 4 "The type and modalities of execution of electronic monitoring shall be proportionate in terms of duration and intrusiveness to the seriousness of the offence alleged or committed, shall take into account the individual circumstances of the suspect or offender and shall be regularly reviewed".

[40] D. VAN ZYL SMIT, A. ASHWORTH, *Disproportionate Sentences as Human Rights Violations*, in *Modern Law Review*, 2004, 541-560.

[41] This seems to be the case of Belgium, where the *délai d'épreuve* for the convicted benefiting of a conditional release is one the longest in Europe, reports show.

[42] Recommendation R (10) 1 on European probation rules, rule 76. It may also be disputable that the assessment of proportionality includes the perceived risk related to offender's dangerousness, as the purpose of control and supervision for dangerous offender should be pursued between the limits set on the basis of seriousness of the fact and the degree of culpability. C. MORGENSTERN, *European initiatives for harmonisation and minimum standards in the field of community sanctions and measures,* in *European Journal of Probation*, 2009, p. 128-141.

compared to the offence[43].

Accordingly, it may be interesting that national reports confront with the possible lack of punitive character of non custodial sanctions, as this may lead judges to doubt of the measure's ability to cope with the seriousness of crime[44], bearing in mind that a measure displaying a very low level of punitiveness, besides being disproportionate, may increase scepticism in the public opinion concerning the overall effectiveness of a non custodial correctional policy.

In some cases this may be due to the absence of explicit provisions regulating a minimal punitive content of the measure or to sentencing criteria not taking into account the socio-economic condition of the offender (especially in the case of financial penalties). In other cases the lack of punitive character reflects the tasks entrusted to probation and social service whose mission may only be to engage with the social disadvantage of the offender rather than ensuring a strict enforcement of non custodial measures (see also § 3.2.)[45]. Finally, a standard set of conditions established by the law or by the sentencing practice may not fit the "needs" of certain categories of offenders (e.g. white-collar criminals) displaying a lack punitive substance thereby.

2. The imposition of alternative sanctions and measures.

2.1. Decision to impose non custodial sanctions: legal choices and judicial discretion.

A first model allowing to reduce the use of imprisonment consists in the introduction of non custodial sanctions as a reference punishment (*peine principale*) for certain minor offences. This legislative option may be accompanied by some legal limitations on the recourse to prison sentences and tends to restrict the discretionary power of the judge in sentencing by binding it to a certain type of non custodial punishment (e.g. fine, confiscation, community service, electronic monitoring) when imprisonment is not adequate or proportionate to the seriousness of the offence.

This strategy is endorsed by European soft law as it suggests that "the legislator should consider indicating a non-custodial sanction or measure instead of imprisonment as a reference sanction for certain offences"[46]. With the view to ensure the proportionality of the measure applied *in concreto* the law should also be able to provide for a wide array of non custodial sanctions, enabling the Courts to select an appropriate sanction depending upon the seriousness that the offence has in general terms.

In this perspective judicial discretion is limited, as the judge can only choose among the alternatives to a non custodial sanction[47].

A second model identifies non custodial punishments as alternatives to prison sentences (*peine alternative*). The choice between custodial and community sanctions is therefore entrusted to the judiciary, which takes into due account offender's personal circumstances as well as the

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[43] Recommendation R (92) on the European rules on community sanctions and measures, rule 86: "The decision to revoke a community sanction or measure shall not necessarily lead to a decision to impose imprisonment".

[44] This was *inter alia* the case of community service in Belgium when qualified as a condition of probation according to K. BEYENS, *From community service to autonomous work penalty*, in *European Journal of Probation*, 2006, p. 4-21.

[45] Recommendation R (10) 1 on European probation rules however suggests that national probation authorities shall also take action to ensure supervision and control on the fulfilment of the obligations and the conditions imposed on the offender.

[46] Recommendation N° R (92) 17 concerning consistency in sentencing, rule B5 par. c; Recommendation Rec (2000) 22, to member states on improving the implementation of the European rules on community sanctions and measures, rule 2.

[47] Recommendation N° R (92) 17 concerning consistency in sentencing, rule B6: "Consideration should be given to grading the available non-custodial sentences in terms of relative severity, taking account not only of the different forms of sanction (for example suspended sentence, fine) but also the varying degrees of harshness (for example high or low fines, long or short community orders); such grading would enable courts to select the non-custodial sentence appropriate for the offender and, subject possibly to the offender's consent, from among a group of sentences which also reflect the relative seriousness of the offence".

seriousness of the offence to select the more appropriate response. This approach is used in several selected Member States where the greatest discretion is given to the judge in order to pick up an appropriate and individualised treatment for the offender; in France for instance in the *matière correctionnelle* the judiciary disposes of a wide range of non custodial penalties, variously labelled as *peines alternative* or *complementaire*[48].

The discretionary power of judge may nevertheless be limited by a certain number of legal obligations. Not only the choice can be restricted by the rationale for sentencing (retributive, preventive, rehabilitative purposes, etc.), but obligations may also concern the need for reasoned decisions (*motivation*) where the court imposes an unconditional prison sentence (France).

A third model consists in the substitution of prison sentence before its enforcement (*peine de substitution*). Similarly, the penalty of imprisonment may be suspended, under certain conditions that can include obligations and restrictions for the offender. The failure to comply with the conditions usually results in the execution of the custodial sentence originally imposed and later substituted or suspended[49]. Despite the possibility to impose a non custodial punishment, imprisonment is provided by default. It is also common that the law provides for alternative forms of enforcement of the custodial sentence *ab initio,* i.e. already imposed before the offender is sent to prison (France, Italy)[50].

The positive impact of this model on prison population is – at least in principle – lower than the two previous ones. As figures reveal, in particular, significant augmentation in the number of prisoners can be detected in some selected member States as a consequence of the non compliance with conditions imposed with the substitution or suspension of prison sentence (Poland).

It would be of great importance to establish how frequently judges impose unconditional prison sentences when a non custodial term is also available; this evaluation shall take into account the different techniques used by national legislators to qualify non custodial measures, especially in the sentencing phase (autonomous sanction, alternative to imprisonment, substitute to default imprisonment, see *supra*).

Valuable insights may also be provided on how frequently non custodial sanctions are imposed not instead of a prison sentence but in addition to that (in some selected Member States the figures are unclear, especially for fines). Where the judge has the discretionary power to combine a non custodial sanction with a prison term in case of failure to comply with obligations (see article 131-9 of French penal code) it may be useful to know how frequently this option is used.

Moreover, when both a suspended sentence and an alternative or substitute punishment are applicable *in abstracto*, it would be convenient to know which option is normally preferred by the judges.

Conclusively, when the law establishes an obligation for the judge to give a reasoned decision on whether or not applying a non custodial sanction it may be interesting to know if this requirement has proved useful to reduce the recourse to imprisonment.

2.2. Judicial assessment on the eligibility and the role of probation service.

When the custodial sanctions are applicable as an alternative or substitute of a prison term, a positive judgement is often required in order to admit the offender to rehabilitation programmes and

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[48] The latter, although in principle applicable in addition to a *peine principale*, can be applied autonomously according to the discretion of the sentencing judge, see art. 131-11 of the French Penal Code: "Lorsqu'un délit est puni d'une ou de plusieurs des peines complémentaires mentionnées à l'article 131-10, la juridiction peut ne prononcer que la peine complémentaire ou l'une ou plusieurs des peines complémentaires encourues à titre de peine principale ».

[49] However in the case of mere suspension the lenght of the probation period does not correspond to the extent of the custodial sentence, whilst in the case of substitution the a correspondance exists as the custodial sentence is converted into a non custodial punishment; see E. DOLCINI, C.E. PALIERO, *Il carcere ha alternative*, Milano, 1989, p. 175-176

[50] But once again the non compliance to the obligations attached to the alternative form of enforcement leads to an imprisonment and plus the social inquiry that ground these may be lacking (see point 2.2.)

activities implied by the measure. Where a community sentence is being considered that would involve probation supervision it is important to know from the outset the feasibility of the offender's co-operation (see § 2.3) and the likelihood of a successful completion of the rehabilitation programme, their presumed dangerousness to the public and/or to the staff responsible for the programme or intervention and the personal or social factors which are linked to the likelihood of re-offending[51].

As European probation rules recommend: "probation agencies may prepare pre-sentence reports on individual alleged offenders in order to assist, where applicable, the judicial authorities in deciding whether to prosecute or what would be the appropriate sanctions or measures"[52]. The question arises as on which ground such prediction should be based, especially when non custodial measures are to be applied in the sentence or when alternative forms of enforcement are imposed *ab initio*, i.e. before the start of the enforcement of prison sentence.

Probation staffs are also asked to prepare other reports, especially in connection with proposals for early release from prison or other forms of detention (electronic monitoring, home detention), working in cooperation with prison authorities. Nevertheless, some mandatory schemes apply that may improve the use of early release. In some EU member States an automatic system of conditional release operate, at least for short prison sentences: this is due to the mistrust on the possibility to identify reliable standards on which the assessment is based as well as on the inequalities to which such approach may lead[53].

Similarly an obligation may be provided that imposes the judge to evaluate the dossier on a prisoner to assess the opportunity of an early release. The obligation for the judge to take into account reports presented by the probation service, evaluating the possibilities to allow an early release, may result in a larger number of inmates benefiting from the community measure (see the case of Belgium).

The pieces of information that must be taken into account by reports may include personal circumstances of the offender; desistance and reparation of damages; familiar and social context; employment status etc. It is of the outmost importance that an inquiry is not confined to an analysis of familiar and social context, since it may have detrimental effects for more socially marginalised offender (e.g. foreigners). Risk of re-offending and the risk of harm posed to the public and to staff employed by probation service may also be assessed.

Drawing on these elements an individual assessment is made in the report to identify the intervention and programme that is more suitable to the offender. As Europe probation rules state: "when required before and during supervision, an assessment of offenders shall be made involving a systematic and thorough consideration of the individual case, including risks, positive factors and needs, the interventions required to address these needs and the offenders' responsiveness to these interventions"[54].

It is suggested that national reports evaluate whether or not judicial authorities may use information provided by probation services in order to assess the eligibility to an alternative sanction or measure.

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[51] See in these terms Recommendation (2000) 22, improving the implementation on the European rules on community sanctions and measures, rule 22.

[52] Recommendation R (10) 1 on European probation rules, rule 42. In the context of a procedure to transfer supervision on a non custodial measure under Framework Decision 2008/947/JHA it is recommended that pre-sentence reports available in the issuing State are transferred to the executing State, to prevent that diversity of approaches to support the preparation of decision-making could hamper the transfer of decisions among Member States, Probation Measure and Alternative sanctions in the European Union, p. 565

[53] P. V. TOURNIER, *La politique pénale du Conseil de l'Europe. De la prison en première ligne à la prison comme alternative de dernier recours aux sanctions et mesures appliquées dans la communauté,* in *Archives de politique criminelles*, 2013, p. 98-101

[54] Recommendation R (10) 1 on European probation rules, rule 66. See, however, the critical insight on the so-called "risk-need-responsivity" model of D. VAN ZYL SMIT, S. SNACKEN, D. HAYES, *One cannot legislate on kindness. Ambiguities in European Legal Instruments on non-custodial sanctions*, in *Punishment and Society*, 2015(1), 3-26.

If this possibility exists, it would be interesting to know what type of information are usually referred to (personal circumstances of the offender; familiar and social context; employment of the offender) to meet the requirements for eligibility to non custodial treatment and whether these reports are mandatory. If this option doesn't apply, it may be useful to ascertain what are the types of inquiries or evidences on which Court's decision may rest upon to allow a non custodial sanction or measure. Among other things, it would be important to know whether national judicial authorities can be provided with information concerning the place in which non custodial measures are to be enforced (workplace; place of residence)[55].

At any rate, it would be of outmost importance to know if the judge and the probation service have to take into account the risk of re-offending and if any methodology has been developed in practice to predict it.

Conclusively an assessment can be made on how the lack of information may hinder the effectiveness and the credibility of alternative sanctions and measures, leading for instance to the allowance of the measure to dangerous/non eligible offenders.

2.3. Agreement of the offender: a condition for rehabilitation?

There is actually no consensus around the idea that a community sanction shall be applied without the agreement of the offender. It is however often stated that in case of sanctions to be applied in the community there will be little point in imposing them when consent is lacking, given that their basic purposes of social adjustment will be thus frustrated[56].

The same approach is shared by European soft law, as it states that "a community sanction or measure shall only be imposed when it is known what conditions or obligations might be appropriate and whether the offender is prepared to co-operate and comply with them"[57]. Unlike other international soft law standards, however, the European rules on community sanctions and measures do not go as far as completely preventing a Court, which knows that the offender will not consent, from imposing a community sanction[58]. However one may agree with the point of view according to which the least that it is required, under this provision, is a thorough examination of whether the offender is willing to co-operate or not[59].

The aim is to reduce the number of unwilling offender that take part in rehabilitation programmes.

Nevertheless, other and more binding grounds exist that require offender's agreement when specific community sanctions such as referral to an institution for therapeutic treatment and community service are concerned[60]. In the latter case a prohibition of forced labour applies which is

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[55] Not only when a home arrest or curfew is concerned but also in all the cases in which, among the conditions imposed on the offender, limitations concerning residence apply.

[56] R. ROTH, *Le consensualisme dans l'exécution de la sanction: la dernière chance de la réhabilitation?*, in F. TULKENS, Y. CARTUYVELS AND C. GUILLAIN (eds.), *La peine dans tous ses états. Hommage à Michel van de Kerchove*, Brussels, 2011, p. 115-124.

[57] Recommendation R (92) on the European rules on community sanctions and measures, rule 31.

[58] See, for instance, rule 3.4. of the so-called Tokyo Rule "Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require an offender's consent".

[59] C. MORGENSTERN, *European initiatives for harmonisation and minimum standards in the field of community sanctions and measures,* in *European Journal of Probation*, 2009, p. 128-141; for an analysis of the views expressed during the decision-making process of Recommendation R (92) P. PONCELA, R. ROTH, *La fabrique des sanctions pénales en Europe*, Paris, 2006, p. 55-58.

[60] In the former case a prohibition of forced labour applies which is enshrined by article 4 par. 3 ECHR. This article is interpreted mainly in a way that, at least when community sanction is a punishment in its own right, its application without consent will infringe the prohibition. As for the prohibition of forced psychological therapy the latter is in some Member States (for instance Germany and Italy) directly imposed by the Constitution. C. MORGENSTERN, *European initiatives for harmonisation and minimum standards in the field of community sanctions and measures,* in *European Journal of Probation*, 2009, p. 128-141

enshrined by article 4 par. 3 ECHR. This article is interpreted mainly in a way that, at least when community sanction is a punishment in its own right, its application without consent will infringe the prohibition of forced labour.

Reports may highlight which tools are employed by national authorities to carry out appropriate inquiries on the offender's will to take part in a rehabilitation programme. In case of existing shortcomings, it may be stressed how they hamper the recourse to non custodial forms of treatment when the agreement is required.

It is also suggested that the consequences stemming from the failure to acquire offender's consent (prison or non custodial sanction) are evaluated. In this perspective, the question of how voluntary the consent may be under the "sword of Damocles" of a custodial sentence can be further developed.

In the light of the instruments of cross-border judicial cooperation (Council of Europe conventions on the transfer of the detainees and on probation, EU Framework Decisions 2008/909/JHA, 2008/947/JHA) that might involve the enforcement of non custodial measures abroad, is of the utmost importance that the transfer procedure of a convicted person doesn't have the effect to circumvent offender's consent.

A right to information as to the consequences of the enforcement of the penalty in another State as well as an active role of the convicted person in the procedure are required in order to ensure that the transfer of supervision will help his social reintegration[61].

The transposition of the Framework Decisions 2008/909/JHA, 2008/947/JHA may also be assessed with the view to ascertain whether or not national provisions implementing EU law grants an appropriate role to the sentenced person in the procedure of transfer. The existence of a preliminary communication, in the practice or pursuing to the law, on the consequences of the transfer may also be examined.

3. The enforcement of the alternative sanctions and measures.

3.1. Legal conditions and obligations imposed with the sanction or measure.

Attention should be given to conditions and obligations imposed with the sanction or measure. Community sanctions and measures cover a wide range of possible restrictions and limitations of rights and liberties that must be adapted to the seriousness of the offence and to the personality of the offender, in compliance with the principle of proportionality (see § 1.3.).

Further limits however exist that prevent judges and legislature to impose sanctions or measures that will infringe fundamental rights.

Thus Rule 21 of the European Rules on Community Sanction and Measures makes clear that "[n]o community sanction or measure restricting the civil and political rights of an offender shall be created or imposed if it is contrary to the norms accepted by the international community concerning human rights and fundamental freedoms" and Rule 22 adds that '[t]he nature of all community sanctions […] shall be in line with any internationally guaranteed human rights of the offender"[62]. However, as the official commentary to Rule 22 notes, these are general, hold-all

[61] Despite the ambiguity of the text the Report by the European Commission on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 5.2.2014, COM(2014) 57 final, p. 8 makes clear that the consent of the sentenced person is always required, unless the person has returned to the executing State, when his consent is implied.

[62] Recommendation CM/Rec (2014) 4: "Electronic monitoring shall not be executed in a manner restricting the rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it".

provisions which do not indicate which rights may under no circumstances be infringed by a sanction[63].

Few are the details provided by Council of Europe Recommendations as to the content of conditions to comply with under specific sanctions and measures[64]. It is therefore uncertain whether European soft law describes a minimum and compulsory content. More references can however be provided by other European human rights instruments and standard settings in this area, such as developed by the European Court of Human Rights and the European Committee for the Prevention of Torture.

According to the CPT, in particular, the goal of lowering re-offending rates must be balanced by considerations linked to the fundamental rights of the offender. It therefore stigmatises the practice of imposing treatment such as the surgical castration of sex offenders, believed to be in contrast with the prohibition of inhuman and degrading treatment under article 3 ECHR as well as with article 8 ECHR which protects the right to family life[65].

In the light of the instruments of cross-border judicial cooperation it is essential that a common standard of human rights protection is ensured between European countries with reference to the conditions imposed on the offender. A transfer to a State where non custodial punishments infringing fundamental rights exist would also involve the responsibility of the issuing State both under article 3 ECHR[66] and under article 4 of the EU Charter of fundamental rights[67].

3.2. Control and supervision on the compliance with obligations and conditions imposed.

The effective implementation of alternative sanctions and measures is challenged by the intensity and the length of the control and supervision to which the offender is subjected. Supervision aims at ensuring compliance with the conditions and obligations in order to achieve the aim of the measure (social adjustment, incapacitation and even retribution) and guarantee the public safety from the risk of reoffending.

Rule 55 of European Rules on Community Sanctions and Measures lays down that community sanctions and measures shall seek to contribute to adjustment in society and that methods of supervision and control shall serve this aim[68]. Thus, for instance, supervision with electronic monitoring should always be combined with personal or social assistance[69].

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[63] D. VAN ZYL SMIT, *Legal standards and the limits of community sanctions,* in *European Journal of crime, criminal law and criminal justice*, 1993, p. 309-325.

[64] See however Recommendation R (10) 1 on European probation rules, rule 47 on community service: "Community service shall not be of a stigmatising nature and probation agencies shall seek to identify and use working tasks which support the development of skills and the social inclusion of offenders".

[65] C. MORGENSTERN, E. LARRAURI, *European norms, policy and practice*, in F. MC NEILL, K. BEYENS (eds.) *Offender supervision in Europe*, 2013.

[66] See, for an illustration of this principle, ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011 where Belgium was found in breach of article 3 ECHR for transferring under article 3 of Dublin II Regulation an asylum-seeker to Greece, despite the certified degrading conditions of its asylum procedure involving detention.

[67] Article 4 of the EU Charter reaffirms Article 3 ECHR: "No one shall be subjected to torture or to inhuman and degrading treatment". See EU Court of Justice, joined cases, C-441/10 C-493/10, *NS*.

[68] Recommendation R (92) on the European rules on community sanctions and measures, rule 55: "Community sanctions and measures shall be implemented in such a way that they are made as meaningful as possible to the offender and shall seek to contribute to personal and social development of relevance for adjustment in society. Methods of supervision and control shall serve these aims".

[69] N. BISHOP, U. SCHNEIDER, *Improving the implementation of the European Rules on Community Sanctions and Measures. Introduction to a new Council of Europe Recommendation*, in *European Journal of Crime, Criminal law and Criminal Justice*, 2000, p. 186: "European Rules requires that the monitored supervision should never harass offenders or their families. Rule 55 lays down that community sanctions and measures shall seek to contribute to adjustment in society and that methods of supervision and control shall serve this aim. Consequently, supervision with electronic monitoring should always be combined with personal or social assistance. In addition, electronic monitoring without

Furthermore, European soft law makes clear that the process of supervision should not only imply controlling tasks, meaning activities intended to ascertain or ensure that a conditions or obligations imposed by a sanction or measure are ensured. Quite the contrary, it should also be seen as a means of assisting and motivating the offender in his process of resettlement[70], while controlling activities should only be undertaken as long as they are necessary according to the principle of minimum intervention[71].

In some of the selected Member States it is however apparent that supervision is – at least for some categories of measures and offenders – almost entirely reduced to a controlling activity (see Belgium), as non custodial sanctions and measures tend to focus more on risk-management and incapacitation. This is mainly due to a definition of probation's service task as one of "verification", which seems to imply a mere control on the implementation of the measure rather than a broader supervision on the achievement of the purposed aimed by the latter[72].

On the other hand, in some other Member States the lack of clarity in the provisions concerning the tasks of the probation service and the police may result in overstating the necessary coercive nature of non custodial sanctions and measures (Italy, Poland). Especially in the case of post-sentencing measures not implying a deprivation of liberty (such as the Italian *affidamento in prova al servizio sociale*) controlling tasks are entirely handed over to the probation service, the staff of which is mainly composed by social workers unfit to ensure an effective monitoring on the compliance with the duties and obligations imposed on the offender[73].

Indeed, in the case of Maiorano and others v. Italy[74], the European Court of Human Rights made it clear that the State had an obligation to protect its citizens from dangerous offenders. Not only have national authorities the primary obligation to ensure the right to life by putting in place specific penal legislation, but also in certain well defined circumstances, Article 2 ECHR may require a State to take positive preventive measures aimed at protecting a person whose life is threatened by the criminal activity of others.

National reports may therefore endeavour to identify best practices (e.g. control methodology, training of the probation staff and police etc.) that would strike a balance between the purpose of

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such assistance would be a breach of the Rule 30 that requires the sanction or measure to seek to develop the offender's sense of responsibility to the community and the victim".

[70] Recommendation R (10) 1 on European probation rules, rule 55: "Supervision shall not be seen as a purely controlling task, but also as a means of advising, assisting and motivating offenders. It shall be combined, where relevant, with other interventions which may be delivered by probation or other agencies, such as training, skills development, employment opportunities and treatment"

[71] Recommendation R (92) on the European rules on community sanctions and measures, rule 74: "Controlling activities shall only be undertaken to the extent that they are necessary for the proper implementation of the sanction or measure imposed and shall be based upon the principle of minimum intervention. They shall be in proportion to the sanction or measure and limited by its aims".

[72] T. SLINGENEYER, *La nouvelle pénologie, une grille d'analyse des transformations des discours, des techniques et des objectifs dans la pénalité*, Champ pénal, 15 October 2007, http://champpenal.revues.org/document2853.html.

[73] S. CARNEVALE, *Contributo* a *Carceri: materiali per la riforma. Working paper*, in *Diritto penale contemporaneo*, 17 June 2015, p. 119.

[74] ECtHR, *Maiorano c. Italy*, 15 December 2009 where the Court find the respondent State in breach of artcile 2 ECHR for murder committed by Antonio Izzo while he was placed under the was placed the regime of semi-liberty. The Court held that criminal behaviour both before the imposition and during the serving of his original sentence had not been adequately taken into account, while . Moreover, the prosecutor had not correctly assessed concrete information on the offender's activities while he was in semi-liberty, which indicated that he was likely to commit a crime in the near future, failing to communicate these pieces of information to competent judicial authority. In ECtHR *Choreftakis and Choreftaki v. Greece*, 17 January 2012, however, the fact that murder of the applicants' son committed his crime a few days after his conditional release was not held in contrast with art. 2 ECHR, although in Greece this measure is granted almost automatically upon completion of serving three fifths of the sentence. According to the dissenting opinion of Judges Sicilianos, Steiner and Lazarova-Trajkovska, however, Greek law was problematic since it did not provide for specific criteria based on which the administrative and judicial authorities could assess the offender's dangerousness when granting conditional release.

implementing rehabilitative activities inherent with the measure and the need to safeguard the afflictive nature of the latter as well as the protection of public safety.

3.3. Revocation and consequences in case of breach.

Conclusively, it is essential to elaborate upon the revocation of the sanction and measure (in case of non compliance with conditions and instructions or in case of commission of a new criminal offence) as well as the consequences stemming from this decision.

Raw figures gathered during the first year of the research can be interpreted differently when attempting to demonstrate the failure or the effectiveness of each instrument, in the light of its content and supervision.

On the one hand, a low revocation rate may be read as a confirmation of the assessment made at outset by the judge concerning the eligibility for the measure, with specific reference to offender's attitude to rehabilitation and his dangerousness. On the other hand, a high revocation rate can be the outcome of an effective, strict and systematic control, whilst a low percentage may also be the apparent result of a totally ineffective system of control (see § 3.2.).

What is more, the frequency of revocation may be due to a lack of discretionary power allowed to the judge or the supervising authority, which under certain circumstances may be obliged to revoke the non custodial treatment each time an infringement is detected. The consequences threatened in case of non compliance with the conditions attached to the sanctions or measures can also partly explain low revocation rate as long as the sanctioning mechanism applicable in case of non-compliance is dissuasive.

However, pursuing to European recommendations, the simple failure to comply with conditions or obligations attached to the sanction or measure – which may lead to the modification or partial or total revocation of the sanction or measure – shall not in itself constitute an offence[75].

According to the principle of minimum intervention, European recommendations also lay down that minor infringements – not leading to a revocation – shall be dealt with by the probation service using discretional means or administrative procedures[76]. Indeed, even when a revocation is being considered, Council of Europe soft law mandates that due account shall be given to the way in which instructions and obligations have not been complied with by the offender[77].

The decision to revoke a non custodial sanction shall thus be individualised and shall not necessarily lead to a decision to impose imprisonment[78]. As some figures reveal significant augmentation in the number of prisoners can be detected in some selected member States as a consequence of the non compliance with conditions imposed with the substitution or suspension of prison sentence (Poland)[79].

In particular, where there is a failure to comply with the requirements of a non-custodial order (other than by the commission of a subsequent offence), the offender should not be sent to prison unless the judge has verified that all other legally prescribed methods have been used or are inappropriate, and that the offender has had the ability to comply with the order[80]. This is particularly true when a financial penalty is imposed as states should explore means of enforcing the payment of fines other than imprisonment.

In order to investigate how the revocation mechanism affects the functioning of non custodial measures, their impact on prison population as well as their contribution to reduce the role of

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[75] Recommendation R (92) on the European rules on community sanctions and measures, rule 84.
[76] Recommendation R (92) on the European rules on community sanctions and measures, rule 78.
[77] Recommendation R (92) on the European rules on community sanctions and measures, rule 85.
[78] Recommendation R (92) on the European rules on community sanctions and measures, rule 86.
[79] Reference is made in particular to unpaid financial penalties which – as it is the case in other selected Member States – can be converted into a prison sentence.
[80] Recommendation N° R (92) 17 concerning consistency in sentencing, rule B7.

custodial penalties, it is suggested that national reports take into account relevant aspects such as: the possibility to be sent to prison in case of breach of the conditions or obligations imposed with the sanction or measure; the existence of non custodial alternatives to the sanction subject to revocation; the discretionary power of the courts in establishing seriousness of the infringement of the conditions with the view to establish the revocation of the measure[81].

In particular one may place emphasis on the possible deduction from the custodial sentence applicable in case of revocation of the period completed enforcing an alternative sanction. The possibility to deduct the period enforced may depend upon the choice to qualify non custodial sanction as a substitution or suspension of the prison sentence. In the former case the period implemented is usually to be deducted, whilst in the latter case the custodial term revives and must be enforced completely (see the case of the conditional release in Spain)[82]. In other Member States the power to deduct the period spent under supervision has been granted drawing on the need to ensure an individualised treatment even in case of revocation[83] .

When the period of execution of a non custodial sanction or measure must be deducted from the prison sentence to be served for non compliance, the rationale or criteria of conversion may be taken into account (e.g. 1 day of community service corresponds to 1 day of imprisonment). One must bear in mind the need to ensure that the sanction imposed (non custodial and custodial) remains proportionate to the seriousness of the offence and to the personality of the offender (see § 1.3.).

[81] Italian constitutional Court made clear that the commission of an intentional crime shall not automatically lead to the revocation of the reduction of the period of imprisonment granted to benefit offender's active participation to rehabilitation treatment (*liberazione anticipata*); judgement of the Italian Constitutional Court, n.186/1995. See also Italian Constitutional Court n. 418/1998 on the automatic revocation of the conditional release in case of commission of a new offence.

[82] See the Spanish regulation for conditional release as modified LO 7/2003, 30 June 2003.

[83] See for an application of this principle, the judgement of the Italian Constitutional Court, n. 282/1989 on the revocation of conditional release.