



# NON-CUSTODIAL SANCTIONS AND MEASURES IN THE MEMBER STATES OF THE EUROPEAN UNION

## COMPARATIVE REPORT

Anabela Miranda Rodrigues · Maria João Antunes  
Sónia Fidalgo · Inês Horta Pinto · Karla Tayumi Ishiy





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Promoting Non-Discriminatory  
Alternatives to Imprisonment across Europe

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# Introductory Note

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## Background

This comparative report is part of the project Promoting non-discriminatory alternatives to imprisonment across Europe (PRI Alt Eur), developed in partnership between Penal Reform International (PRI), the University of Coimbra, Portugal (UC) and the Hungarian Helsinki Committee (HHC) and funded by the European Union (JUST-JCOO-AG-2020). The project started in January 2021 and will be developed until March 2023.

Guided by the ‘Council Conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice’, of December 2019, the EU-funded project aims to contribute to the knowledge on and the promotion of the use of alternative sentences within the EU, through several activities, including a comparative study, training activities for criminal justice professionals, pilot projects, and the development of proposals for improvement of the criminal sanctions systems.

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The project was complemented by another project, *Addressing gaps in the implementation and management of alternatives to imprisonment and post-release support during the COVID-19 global pandemic*, funded by the International Penal and Penitentiary Foundation (IPPF), implemented from March to December 2021. This project focused on the particular impacts of the COVID-19 pandemic on the use and implementation of non-custodial sentences in four countries (Georgia, Hungary, Kyrgyzstan and Portugal) and included a comparative study encompassing the Member States of the European Union. A summary comparative report, titled «The impact of the COVID-19 pandemic on non-custodial sanctions and measures» was published in English and French.

More information on the projects can be found at: <http://www.prialteur.pt>.

## **Comparative Study**

The PRI Alt Eur project encompassed a comparative study on the use and implementation of alternatives to imprisonment in the Member States of the European Union. The comparative study was coordinated by the research team of the Institute for Legal Research of the Law School of the University of Coimbra, Portugal.

## **Methodology**

The comparative study was based on national reports, provided by experts from EU Member States invited by the research team. For this purpose, the UC team provided the guidelines and outline for the reports, with a view to ensuring, to the best extent possible, the standardisation and comparability of the information. The outline consisted of a questionnaire, divided into four parts:

- I. Legal framework;
- II. Non-custodial sanctions/measures in practice;
- III. Impact of the Covid-19 pandemic on the imposition and implementation of non-custodial sanctions and measures;
- IV. Prospects for the future of alternatives to imprisonment.



Each part comprised a set of questions, each followed by sub-questions, meant to specify the topics that should be addressed under the question. Besides providing information on the law and practice of the subject, experts were also asked to mention any other relevant information, as well as references to academic debate and their own views on the matter.

In the course of the project, a virtual meeting was convened between the project partners and the national experts which allowed participants to exchange views and establish a collaborative network.

The study encompasses 22 EU Member States: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania and Sweden. The research team received national reports from 19 national experts (the Portugal report being prepared by the UC team);<sup>6</sup> in two further countries, where the research team could not obtain national reports, semi-structured interviews were conducted with representatives of the prison and probation services.<sup>7</sup> When necessary to confirm or supplement information, criminal codes or other national statutes were directly consulted. Also, the information contained in the reports was occasionally complemented by data obtained from other published sources.<sup>8</sup>

The structure of this report reproduces the outline of the questionnaire, with minor adjustments where appropriate. As such, considering the focus of the project on vulnerable and minority groups, it was decided to devote an autonomous Part to the subject of sanctions or measures applicable to vulnerable persons and minority groups.

The study focuses only on non-custodial criminal sanctions, which means that pre-trial measures, prison sentences, security measures applicable to those held not criminally responsible due to insanity and juvenile justice measures are excluded from its scope.

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<sup>6</sup> The list of contributing experts can be found in the Acknowledgments section. Although the research team invited experts in all 27 Member States to participate in the study, it was not possible to receive contributions from all of them within the time limit for delivering this report.

<sup>7</sup> This was the case with Latvia and Denmark (interviews held online, which also followed the questionnaire which served as outline for the national reports).

<sup>8</sup> In those cases, sources are duly referenced. Where no reference is provided, the source is the corresponding national report.

Although the EU Member States share common principles and values, each Member State has its own criminal law, penal system and rules of criminal procedure. Moreover, not all national reports addressed all questionnaire items and not all reports provided the same level of detail, which sometimes limited the comparability of the information.

This comparative report will be published and disseminated in English, French and Hungarian. All versions of the report will be available on [www.prialteur.pt](http://www.prialteur.pt) and the websites of the project partners.

# Part I

## LEGAL FRAMEWORK

### **1. General framework of the national systems of penal sanctions**

This section focuses on the general features of the penal sanctions systems of the Member States studied. It covers the types of sanctions prescribed in the legal provisions of criminal offences, the limits of the terms of imprisonment, the way non-custodial sanctions are designed as alternatives to imprisonment, and the maximum limit of imprisonment that allows replacement by a non-custodial sentence. It also addresses the possibility of not imposing a sentence (waiver of punishment).

#### **1.1 Purposes of punishment**

Not all jurisdictions have the purposes of punishment established in the law or other instruments such as sentencing guidelines.

When explicitly stated, purposes of punishment range from general prevention (reaffirming the validity of the norm violated by the offence, thus satisfying the expectations of the community about the validity of the violated rule), deterrence, individual prevention, rehabilitation/social reintegration, to retribution and expression of social disapproval – normally a combination of the above-mentioned purposes. The Nordic countries, alongside a strong focus on social reintegration, traditionally adopt the general prevention goal, in its positive dimension of reinforcing trust in the justice system.

In the following jurisdictions, the purposes of punishment are explicitly stated in the Criminal Code: Bulgaria, Croatia, France, Hungary, Latvia, Lithuania, Poland, and Portugal. Jurisdictions where

purposes of punishment are not explicitly stated in law include Belgium, Cyprus, the Czech Republic, Ireland (where purposes of punishment are mostly developed by case law), Italy, and Romania. A proposal for a new Criminal Code in Belgium contains a list of purposes of punishment that shall be pursued when sentencing; however it has not been approved so far.

Where the purposes of punishment are not stated in law, courts enjoy significant discretion in sentencing, including when there are explicit legal criteria for the choice and length of the sentences. As these criteria are normally connected to the sentence achieving the purposes of punishment, the individual perspective of judges on the purpose of sentences influences their interpretation of those criteria.

## 1.2 Imprisonment

Life imprisonment is provided for in almost every penal system of the EU, the only exceptions being Portugal and Croatia.<sup>9</sup> In Spain, which until recently was the only other EU Member State with no life sentences, life imprisonment was reintroduced in 2015 in the form of *prisión permanente revisable*.<sup>10</sup> Slovenia also only introduced life imprisonment recently, in 2008. In most cases, life sentences carry the possibility of release on parole.

Regarding temporary imprisonment, maximum limits for its length vary significantly, ranging from 12 years in Finland to 40 years in Belgium or even 50 in Croatia in case of concurrent offences.

In more detail, the maximum limit is 12 years in Finland (or 15 years in case of concurrent offences), 15 years in Germany and Greece, 20 years in Denmark (exceptional limit; otherwise, 16 years), Estonia and Latvia, 24 years in Italy (or 30 years in case of concurrent offences), 25 years in Hungary (exceptional limit; otherwise 20 years), Lithuania (exceptional limit; otherwise 10 years), Poland (exceptional limit; otherwise, 20 or 15 years) and Portugal (exceptional limit; otherwise, 20 years), 30 years in Bulgaria (exceptionally; otherwise, 20 years),

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<sup>9</sup> Norway is the only other European country without the sentence of life imprisonment, but it is not part of the EU, thus not encompassed in this study.

<sup>10</sup> ORGANIC LAW 1/2015, of 30 March. Available at: <https://www.boe.es/eli/es/lo/2015/03/30/1>.

the Czech Republic (exceptionally; otherwise, 20 years), the Netherlands (exceptionally; otherwise, 18 years) and Romania, and 40 years in Belgium and Croatia (in the latter, 50 years in case of concurrent offences).

Minimum limits of imprisonment range from days to months: 1 day (Belgium – although only for infringements; for crimes, it is 5 years – the Netherlands), 14 days (Finland, Sweden), 15 days (Italy, Romania), 1 month (Estonia, Germany, Poland, Portugal), 2 months (France, for *délits*), 3 months (Bulgaria, Croatia, Hungary, Lithuania).

### 1.3 Non-custodial sanctions

Reference sanctions<sup>11</sup> include prison and fines in all jurisdictions except Hungary (where only custodial sanctions are prescribed in the legal provisions of specific criminal offences).

Non-custodial sanctions can be designed as main sanctions,<sup>12</sup> replacement sanctions,<sup>13</sup> ancillary sanctions,<sup>14</sup> or part of a probation sentence.

In attempting to reduce the scope of imprisonment, some jurisdictions chose to introduce non-custodial sanctions as reference or main sanctions, allowing the judge to impose them directly, without having to determine a prison sentence first, while others tend to maintain imprisonment and fines as the main sanctions and introduce new non-custodial sanctions as replacement sanctions or even forms of implementation of the sentence.

Examples of non-custodial sanctions provided as reference or main sanctions are community service (in Belgium, Greece, Latvia, Lithuania, Netherlands, France – for some offences – and Poland),

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<sup>11</sup> For the purpose of this study, “reference sanctions” means the penal sanctions prescribed in the legal provisions of criminal offences. We adopted the wording “reference sanction”/“sanction de référence” in the sense of Council of Europe Recommendations No. (92) 17 concerning consistency in sentencing (rule B 5 *c*) and No. (2000) 22 on improving the implementation of the European Rules on community sanctions and measures (Rule 2).

<sup>12</sup> The wording “main sanctions” is used to refer to sanctions that the judge imposes directly, without having to determine a prison sentence first.

<sup>13</sup> I.e., sanctions replacing a previously determined main sentence.

<sup>14</sup> I.e., sanctions that can, or must, be imposed in addition to a main sentence.

probation or some kind of supervision in the community (in Belgium, Bulgaria, Finland, Latvia – where it became a new form of main sanction in 2022 – and Lithuania) and home detention with electronic monitoring (Belgium).

Non-custodial sanctions can also be used as part of a sentence of probation, as is the case in Bulgaria, France (where community service can be a part of a suspended sentence with probation) and Sweden.

In some jurisdictions (e.g. Denmark), a sentence of imprisonment can be either “unconditional” or “conditional” – in the latter case being replaceable by a non-custodial alternative.

The possibility of combining main sanctions or imposing main sanctions cumulatively for a single offence is excluded in Belgium, Lithuania and Portugal, but is not possible in other Member States. This is the case in Croatia, Germany, Greece, Hungary (where imprisonment can be imposed together with a fine), Cyprus (where, for domestic violence offences, imprisonment up to 6 months may be combined with a restraining order/prohibition to enter the family home, to be enforced after release), Denmark (where a combination of imprisonment with a non-custodial sentence can be imposed; also, both community service and supervision can be applied in combination with parole), Finland (where, if conditional imprisonment – a form of suspended sentence, with or without probation – is deemed insufficient, it can be combined with a fine or with community service) and Sweden (where probation and conditional sentences can be given in combination with community service and a personal treatment plan; there can be also a combination of imprisonment up to 3 months with probation).

The “partly-suspended sentence” provided for in Ireland (where the court decides to suspend the execution of a custodial sentence in part, subject to conditions) can lead to a combination of a custodial penalty and a probation measure; however, cumulative penalties are not common practice. Also in Ireland, the “integrated community service order”, introduced in 2016 following a recommendation of the Penal Policy Review Group, allows for a probation officer to permit an offender to spend up to one-third of community service hours on an education, training or treatment programme.

In Finland, for high-risk recidivists, a recent reform allowed for a combination of imprisonment followed by a period of supervision with electronic monitoring for one year.

In Poland, though the general rule is to impose only one type of penalty per offence, it is possible, for offences punishable only with imprisonment as a reference sanction, to sentence the offender to a combination of imprisonment up to 3 or 6 months and restriction of liberty (a form of punishment involving community service or the deduction of a part of the salary for a social purpose) for up to 2 years, imprisonment being implemented first. Also, when the crime was committed in order to obtain financial gain, the court may impose a fine in addition to imprisonment. A suspended sentence with probation may be combined with a fine or with a “penal measure” (restriction of rights).

In Hungary, non-custodial sanctions may be combined with each other and they can be imposed either instead or in addition to deprivation of liberty.

The maximum limit of imprisonment that allows replacement by a non-custodial sentence is also significantly variable: 8 months (Finland – although a sentence up to 2 years can be “conditional”, i.e. a suspended sentence), 1 year (Poland), 2 years (Germany; Italy – although a suspended sentence may apply for prison sentences up to 3 years in case of particularly vulnerable categories of offenders, and following the recent “Cartabia reform” the scope of non-custodial sanctions will be extended to prison sentences up to 4 years), 3 years (Croatia, Greece, Romania), 4 years (Bulgaria), 5 years (Latvia, Portugal), 6 years (Lithuania), 7 years (Malta), and even 20 years (Belgium). A limit is not specified in some jurisdictions (Cyprus, Denmark, Sweden).

In Denmark, a prison sentence might be conditional or unconditional; conditional imprisonment may always be replaced by an alternative sanction, a maximum limit not being provided.

In Hungary, a non-custodial sentence may be imposed when the minimum limit of the penalty frame for the offence does not reach one year of imprisonment, or when *confinement* – a more lenient form of imprisonment ranging from 5 to 90 days – is applicable. However, it is interesting to note that a reprimand (a moral condemnation when there is no need or justification for the imposition of even the lowest penalty because the offender no longer poses a threat to society) is applicable regardless of the type of offence or the applicable penalty.

## 1.4 Waiver of punishment

In most jurisdictions, there is the possibility of declaring the defendant guilty, but not imposing a sentence (waiver of punishment).

This possibility exists in the Belgian, Bulgarian (only for juveniles and older persons), Czech, Estonian (here with the difference that it is the enforcement of the sentence of prison or fine that is waived), Finnish, French, Irish, Dutch, Greek, Italian, Maltese, Polish, Portuguese, and Romanian penal systems. This decision will normally still appear on the offender's criminal record (e.g., Belgium, France, Portugal); in France, however, the judge may decide it shall not appear in the criminal record.

Normally this is provided for less serious cases only, e.g. low seriousness of the offence, low culpability of the offender, mitigating circumstances, reparation of the damage caused by the offence, no significant need for prevention of further crimes or if it is deemed inappropriate or unnecessary to impose a sentence in the case.

In Belgium, it is also used in cases where a long period of time has elapsed between the crime and the sentence. In Finland, it is also favoured for young offenders. In France, the court can also decide to postpone the decision on whether to impose a sentence when it deems that the conditions for a waiver of sentence are likely to be met in the near future; the postponement may involve the imposition of injunctions. In Greece, besides the discretionary waiver of sentence for cases where the court deems the imposition of a sentence unnecessary, there is a mandatory waiver in cases where a restorative justice procedure has been completed successfully. In Italy, there is a wide variety of mechanisms, of a diverse nature, including a “conditional suspension of the sentence” (whereby the implementation of the penalty – custodial or non-custodial – is suspended, subject to a period of probation, after which the offender is exempted from its enforcement); “*oblazione*” (which allows for the exemption from punishment subject to the payment of a pecuniary sum to the State); extinction of the offence or exemption from punishment in case the damage has been repaired. In Estonia, a waiver of the enforcement of a sentence may be granted when the convicted person is to be extradited or expelled to another country.

A waiver of sentence can also be granted, when so prescribed by law, for attempted offences, if the offender prevented the offence from



being completed (France), or if the offender contributed significantly to the investigation of some offences (Poland, Portugal).

Some jurisdictions do not provide for this possibility (e.g. Croatia), although there are other mechanisms directed at dealing with less serious crimes (e.g. mitigating circumstances, diversion mechanisms,<sup>15</sup> withdrawal of charges based on a principle of opportunity). In Lithuania, there is the mechanism of “release from criminal liability” that has a mixed nature of a diversion measure and a waiver of punishment, as it can be applied both at pre-trial or at trial stage. The person is not convicted and penalties are not imposed, but injunctions may be imposed that are meant to achieve the purposes of punishment.

In some jurisdictions, the court can also suspend the sentencing decision. E.g. in Belgium, the court declares the defendant guilty but does not determine a sentence; however, unlike the waiver of sentence, this decision is not final – it is conditional on the offender not committing further crimes, or fulfilling certain duties, for a certain period; the use of this mechanism will not appear in the criminal record. Similarly, in the Czech Republic, two forms of waiver of punishment exist: one unconditional and one conditional, the latter involving a period of probation with supervision and compliance with duties and/or obligations.

It is interesting to notice the different nature a suspended sentence (or the suspension of sentencing itself) may have in different jurisdictions. It can be considered a form of waiver of punishment (as in the Belgian and Czech examples just mentioned), but also an autonomous sentence (either as a main sanction or as a replacement for a sentence of imprisonment). E.g., in Portugal, it is a sentence on its own, normally implying the fulfilment of duties or even a rehabilitation plan – comparable to autonomous sanctions of probation. Even in Belgium, there is also an autonomous sentence of probation as a main sentence.

Such mechanisms show that, whereas there can be no punishment without culpability, there can be culpability without punishment, if

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<sup>15</sup> Diversion mechanisms, because of their pre-trial nature, are outside the scope of this study. However, their role in avoiding the use of prison – and of criminal punishment in general – is to be noted. In jurisdictions such as Germany or the Netherlands, the use of diversion mechanisms in the early stages of the proceedings, based on opportunity reasons or on the petty nature of the offences, allows for a very significant selection of the conducts that proceed to formal trial and sentencing.

the latter is not demanded by the purposes of punishment. This is a corollary to the *principle of necessity* that shall bind the intervention of the penal system.

## 2. Non-custodial sanctions

This section addresses the types of non-custodial sanctions available in the criminal justice systems studied, their length or number, and the legal requirements for their imposition. It also describes the way non-custodial sanctions relate to imprisonment, e.g., if they may be directly imposed by the judge or if a prison sentence is necessarily imposed first, then replaced by a non-custodial sentence. It identifies circumstances – of the offence and/or the offender – which constitute obstacles to the option for a non-custodial sentence.

### 2.1 Types and limits of non-custodial sanctions

The majority of Member States provide for the non-custodial sanctions of fines, probation or suspended/conditional sentences, and community work.

#### 2.1.1 Fines

In almost all jurisdictions, a fine is provided for as a main sentence. It can also replace a sentence of imprisonment (e.g., Italy, Portugal). In some countries, it is also available as an ancillary penalty (Belgium, Croatia, Estonia, France, Latvia).

In countries adopting the day-fine system (*see below, section 3*), the law stipulates both a minimum and maximum of days and a minimum and maximum amount per day (Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Poland, Portugal, Romania).

#### 2.1.2 Probation or suspended/conditional sentence

Despite the variety of designations and legal categorisation, all jurisdictions studied provide for some form of probation – either the common law tradition of “probation” involving the supervision of the probation service instead of imposing a sentence or the continental

Europe form of probation (in French, *sursis*), where normally a fixed term of imprisonment is determined and then its enforcement is suspended, subject to the fulfilment of conditions, with or without supervision by the probation service, when the court finds that this will serve as sufficient warning to the convicted person against the further commission of crimes.

There are also forms of probation of a pre-sentence nature (e.g. in Ireland or Hungary, where the court, after finding the facts proved, may issue a probation order placing the offender under the supervision of a probation officer for a period of up to 3 years; if this period expires successfully, sentencing does not take place). Because these are not forms of punishment, they are not encompassed in this study.

It may apply for sentences of imprisonment of up to 1 year (Croatia, Poland), 2 years (Hungary, Germany, Malta, Netherlands, Sweden), 3 years (Czech Republic, Greece, Romania), 5 years (Estonia, France, Latvia, Portugal), or 6 years (Lithuania – for crimes of negligence; otherwise, 4 years).

In Italy, sentences of imprisonment of up to 1 year may be replaced by “supervised liberty”, a penalty involving limitation of personal freedom and the restriction of movement.

In Bulgaria and Lithuania, the penalties of probation and “restriction of liberty” – whereby the person must comply with obligations or prohibitions and may be subject to electronic monitoring – respectively, are available as reference sentences.

In some countries (Croatia, Greece, Ireland, France, Lithuania, Netherlands) there is also the possibility of a “partially suspended” or “partially conditional” sentence, where a part of the sentence of imprisonment is replaced by a suspended sentence from the outset, and the offender has only to serve the unsuspended part of the sentence of imprisonment.

Regarding the length of the period of suspension/probation, it can in most cases extend to 3 or 5 years.

In some jurisdictions, a suspended sentence can be either simple or with probation, with the court specifying conditions to be observed by the offender and supervised by the probation service (e.g. Czech Republic, Estonia, Finland, France, Greece, Hungary, Malta, Netherlands, Portugal). In Finland, probation only applies if the mere conditional imprisonment is not deemed sufficient.

There is an ample variety of conditions imposed on those sentenced to probation/suspended sentences. Conditions commonly include supervision by the probation service, not committing further offences, giving notice of changes of address or absences, community service, attending training sessions or programmes, employment, and complying with duties, obligations, or prohibitions.

In some countries, electronic monitoring may be applied as a supervision mechanism during the probation period (e.g. Estonia, Lithuania, Netherlands).

There are also, although rare, cases of conditional suspension of sentences of a fine, e.g. in Germany, where the enforcement of a fine up to 180 day-fine units can be suspended, subject to the fulfilment of conditions. In Italy, the possibility of applying conditional suspension to non-custodial sentences is to be abandoned, following the recent “Cartabia reform”, for the reason that it was deemed to contribute to the ineffectiveness of those sentences.

### 2.1.3 Community service

Community service can be designed as a main sanction (Belgium, Lithuania, Malta, Netherlands), a replacement sanction (Croatia, Estonia, Finland, Portugal), part of a sentence of probation (Bulgaria, Cyprus, Malta, Romania) or even an ancillary penalty (e.g. in Latvia, where it can be both a main sanction or an ancillary sanction).

In Greece, it can be both a main sentence (for minor offences) or a replacement sentence (replacing prison sentences of up to 3 years). In France, it can be a main sentence for minor offences, a replacement sentence, an ancillary penalty or even part of a suspended sentence with probation. In Poland, a sentence of “restriction of liberty” involves either unpaid work for social purposes or the deduction of 10% to 25% of the monthly salary for a social purpose indicated by the court; this can be both a reference sentence or a replacement sentence. In Italy, it may be a replacement sanction for imprisonment, a main sentence for offences falling within the jurisdiction of the justice of peace, a condition connected to the conditional suspension of the sentence or even applied in case of inability to pay a fine. In Malta, a “combination order” combines a probation order with community service.

In Hungary, there are two forms of community service: “reparation work” is imposed in the context of the postponement of the

imposition of a penalty for the period of one year, applicable if the offence is punishable by up to 3 years of imprisonment (the offender may choose the institution which will benefit from the unpaid work); whereas “community service” is a sanction applicable instead of imprisonment. The imposition of community service may be combined with the imposition of other non-custodial penalties.

In the Netherlands, it can be imposed for crimes punishable with imprisonment or a fine and for misdemeanours that are punishable with detention. Exclusions apply, such as crimes punishable with imprisonment of 6 years or more and which seriously affect the physical integrity of the victim; sexual offences; and recidivism within five years after the imposition of community service, if the new offence is of the same nature as the previous one.

Community work can also be a replacement sanction for a sentence of a fine (Croatia, Lithuania), a form of execution of a sentence of a fine (Portugal, Romania) or an order imposed in lieu of an unpaid fine (Ireland).

Germany is one of the few countries not providing community service as a sentence on its own: it is only provided for as a mechanism in case of non-payment of a fine.

When it is designed as a replacement sentence, it can replace a prison sentence of up to 8 months (Finland), 1 year (Croatia, Ireland, Sweden) or 2 years (Estonia, Portugal).

As to its length, normally fixed in a number of hours, maximum limits range from 120 to 730 hours. In more detail, maximum limits are 120 hours in Romania, 240 hours in Ireland and the Netherlands, 300 hours in Belgium and Denmark, 312 hours in Hungary, 320 hours in Bulgaria, 400 hours in France, 480 hours in Malta, Lithuania and Portugal, 720 hours in Greece (if it is applied as a main sentence; or up to 1,500 hours, to be served within 3 years, in case of replacement of imprisonment), and 730 hours in Croatia and Estonia. In Poland, 20 to 40 hours/month can be imposed, to be served within a period between 1 month and 2 years. In Cyprus, community work, as part of a probation order, is to be served within a period of 1 to 3 years.

#### **2.1.4 Home detention**

Home detention is provided for in some Member States, either as an autonomous sentence (Belgium, Czech Republic) or as a form of

implementing a sentence of imprisonment (this is the case of Croatia, Denmark, Finland, France, Poland, Portugal and Sweden). In other Member States, home detention is not available as a form of punishment, only as a pre-trial coercive measure (Bulgaria). It may be also available as a “back-door” measure – a form of executing the last part of a prison sentence (Denmark – up to the last 6 months of the prison sentence; Finland – electronic monitoring can be employed to supervise early release; Hungary – “reintegration custody”, early release with electronic monitoring; Portugal – “adaptation to parole”, which can be granted up to 12 months before being eligible for parole, and also as a form of implementation of the remaining two years of imprisonment in case of recall to prison following revocation of a non-custodial sentence). It may also be a form of implementation of prison sentences (from the outset or at a later stage) for persons in a situation of vulnerability, such as in Greece and Portugal (*for more details, see Part III on sentences and measures applicable to persons in vulnerable situations*).

Its maximum length varies between 6 months and 2 years (6 months in Denmark, France, Finland and Sweden; 12 months in Estonia; 18 months in Poland; 2 years in Portugal and the Czech Republic).

It is normally imposed by the trial court, but in Denmark – in line with the more administrative/less judicial system that is found in the Nordic countries – it’s the probation service that is competent to decide, based on an application from the person sentenced. In case of refusal, there can be an appeal to the court. In Poland, it is the penitentiary court, at the stage of implementation, that grants permission to serve the sentence outside prison with electronic monitoring.

It is commonly supervised by the means of electronic monitoring. It usually allows for leaving the house to work or study. In Denmark and Finland, it is actually mandatory that the person has an occupation (there are programmes available which the probation service can liaise with). It is interesting to note that in Denmark the home detention regime evolved to allow for more opportunities to leave the house (e.g. for a walk) as authorities realised that some individuals chose not to request to serve their sentence in home detention because serving the sentence in an open prison allowed for frequent weekend leaves.

Some circumstances may prevent the possibility of serving the sentence at home, e.g., not having a permanent residence (e.g., Czech Republic, Denmark, Finland – *see Part III, on the issue of homelessness*), or

there being a context of violence between family members (e.g., Czech Republic, Finland). Generally, not only the consent of the offender but also the consent of other persons living in the house is required.

In countries providing some form of electronic monitoring, its maximum length ranges from 6 months in Finland to 1 year in Belgium, Bulgaria and Estonia, 18 in Poland and 2 years in Portugal.

In Germany, the use of electronic monitoring is restricted to “preventive detention”, a form of prorogation of the control of dangerous offenders after serving their sentence.

### 2.1.5 Other non-custodial sanctions

#### *Restrictions of rights*

Restrictions of rights or prohibitions are also often used as penal sanctions (either as main or ancillary sanctions). Examples are the prohibition to possess a weapon, professional disqualifications, disqualification from parental responsibilities, prohibition of possessing and breeding animals, prohibition of residence at a certain location, prohibition of entry to sporting, cultural and other social events, or deportation.

In France, restriction or deprivation of rights were originally provided for as ancillary sanctions, but it became possible to impose them as main sentences. The same happened with the obligation to attend a programme or a training course or the duty to repair damages, which are also available both as ancillary and main sentences.

In Poland, “penal measures” consisting mostly of restrictions of rights are meant to be imposed together with a main sentence, but the court may also impose them as the only penal sanction; however, this possible sentence is rarely used.

In Ireland, if the court considers that it is appropriate to impose a sentence of imprisonment for a term of 3 months or more for certain listed offences, it may, as an alternative to such a sentence, issue a “restriction on movement order”. The order specifies the concrete restrictions, which may involve requiring the offender to be in a specified place for such periods in each day or week, or not to be in such place or places, or class of places, at such time or during such periods. Its maximum duration is six months and the order cannot require the offender to be in a place for a period of more than 12 hours on any one day.

The law contains enabling provisions for the introduction of electronic monitoring to supervise this order, but those were not commenced.

In Cyprus, for cases of domestic violence, a restraining order/prohibition to enter the family home may be applied cumulatively with imprisonment or instead of imprisonment or another penalty.

In the Czech Republic, sanctions involving prohibitions, restriction of rights and forfeiture of property may be imposed cumulatively with the main sentence or as autonomous sentences, where, according to the circumstances of the case and the offender, the imposition of another punishment is unnecessary.

In Hungary, disqualification from a profession or from driving vehicles and a ban on entering specific premises or sports events constitute alternative sanctions, either as a single punishment or in combination with other sanctions.

In Portugal, the prohibition of the exercise of a profession, function or activity, either public or private, where the offence was committed within the exercise of that function, may replace a sentence of imprisonment of up to 3 years.

In some jurisdictions, it is also possible to impose an obligation to attend training sessions or programmes (e.g. citizenship courses, driving awareness programmes) or to undergo treatment (e.g., in Malta, subject to the consent of the individual).

### *Admonition/reprimand*

A warning, admonition or reprimand is also sometimes provided for as a form of punishment for less serious offences.

In Hungary, a reprimand shall be applied if, at the time of the conviction, the offender poses no longer a danger to society. The court establishes the criminal liability of the offender but considers that there is no justification for the imposition of a penalty. The reprimand consists of moral condemnation, expressing disapproval of the conduct and warning against committing further crimes. It is worth noting that a reprimand is applicable regardless of the type of offence or the applicable penalty. In Malta, a reprimand is applicable when the trial court deems it to be punishment enough. The conviction will still appear on the criminal record. In Portugal, the admonition is applicable as a “replacement penalty” for sentences of a fine up to 240 days. It consists of a solemn oral reprimand to the offender made at a public court



hearing. It is applicable only if the damage has been compensated and the court finds that the purposes of punishment are sufficiently and adequately fulfilled by those means. The conviction will still appear on the criminal record.

Some “replacement penalties” of a custodial nature, such as *week-end detention*, have tended to be abandoned, due to their inefficacy in practice, as was the case in Portugal (2017). In Italy, sentences of imprisonment of up to 2 years may be replaced by *semidetenzione*, which allows for spending part of the day outside prison.

## 2.2 Imposition of non-custodial sentences

Where non-custodial sanctions are provided for as main sanctions,<sup>16</sup> the judge imposes them directly. Otherwise, the judge first determines the main sentence (usually a term of imprisonment) and then decides on the possibility of replacing it with a non-custodial alternative.

There are also cases where non-custodial sanctions are not explicitly provided for as reference sanctions for the type of crime, but, whenever their general requirements are met, the court may apply them directly. This is the case in the Czech Republic (where non-custodial sanctions may be imposed, generally, for offences punishable with imprisonment up to 5 years, if the nature and seriousness of the offence and the circumstances of the offender do not demand a prison sentence) and Hungary (where non-custodial sanctions may be imposed when the minimum limit of applicable imprisonment does not reach 1 year; only in the case of suspended sentence is the imprisonment determined first). In the Netherlands, community service can be imposed for crimes punishable with imprisonment or a fine and for misdemeanours that are punishable with detention, with specific exclusions applying. In Greece – where offences are categorized in a five-tier system – minor misdemeanours are punishable only with non-custodial sanctions (community service and fine), misdemeanours are punishable with a fine or imprisonment up to 3 years, and felonies are divided into three categories, punishable with imprisonment of 3 to 5 years, 5 to 10 years, or 5 to 15 years, respectively.

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<sup>16</sup> See above (1) regarding the provision of non-custodial sanctions as main sanctions.

In Finland, replacement sanctions (community service and monitoring sentence/home detention) come into consideration only after the court has decided to impose an unconditional prison term. This is seen by legal scholars in Finland as a system that can prevent the net-widening effect from taking place.

### 2.2.1 Legal requirements for the imposition of non-custodial sanctions

Circumstances which allow for the imposition of a non-custodial sentence are based either on the length of the main sentence of imprisonment legally applicable (Czech Republic, Hungary) or concretely imposed (Estonia, Finland, Italy, Malta, Portugal) or on the category of offence (e.g., Greece, on the basis of the five-tier system explained above; Belgium, where non-custodial sanctions are applicable for misdemeanours and infringements, or crimes in case of mitigation).

Consent is generally required for home detention – not only that of the offender but also that of the family – and for community service. In Malta, consent is required where supervision is part of the sentence (e.g., supervision order within a suspended sentence, probation order, community service, treatment order). In Italy, community service is the only penal sanction which requires consent.

Sometimes consent is required only for some types of non-custodial sanctions (e.g. Croatia, where it is required for community service but not for suspended sentence; Cyprus, where it is required for suspended sentence when it involves community work or attendance of training). In Bulgaria and Hungary, consent is not required. In Greece, consent for community service is only required when it replaces a sentence of imprisonment, but not when it is applied as a main sentence (in the latter case, the court determines a pecuniary penalty for the case of non-compliance with the community service).

There are often circumstances of the offence and/or the offender for which a non-custodial sentence cannot be imposed.

Besides the length of the penalty of imprisonment applicable to the offence, other exclusions may apply, relating to:

- specific offences (e.g., Belgium – murder, some sexual offences; Cyprus – murder, treason; Latvia – violent sex offences; Malta – arson or drug trafficking; Poland – terrorism and crimes committed within an organized group);

- prior convictions (e.g., Latvia – a suspended sentence cannot be passed for an intentional offence if the person has been previously convicted with deprivation of liberty and the criminal record thereof has not been extinguished; Poland – a suspended sentence cannot be applied if the offender has already been sentenced to imprisonment; and non-custodial sentences may not be applied to multiple repeat offenders or offenders who resourced to crime as a permanent source of income; Hungary – violent multiple recidivists are not eligible for a non-custodial sanction; Greece – previous convictions to prison sentences exceeding 3 years preclude the use of a suspended sentence);
- a past imposition of a non-custodial sentence which has been revoked and converted to a prison sentence (e.g., Czech Republic – in the case of community service revoked in the previous 3 years).

This does not mean that, indirectly, circumstances such as being a foreign national or being unemployed might not negatively influence the court's decision, when considering "the need to prevent future crimes". Also, for persons with no fixed abode/homeless, the home detention regime might not be applicable.

Prior convictions do not preclude the imposition of a non-custodial sentence in Belgium, Bulgaria, Cyprus, Czech Republic, Ireland, Malta or Portugal. In other jurisdictions, they can preclude it in some cases (e.g., Croatia, where community service cannot be imposed if the offender has already been sentenced to imprisonment for more than 6 months; France, where a suspended sentence cannot be granted, in its simple form, to offenders sentenced to imprisonment in the previous five years, and, in its probation form, to recidivists having previously been granted suspended sentence twice for offences of a similar nature; Italy, where non-custodial sentences are not applicable if the offender has been sentenced to imprisonment over 3 years in the previous five years; Poland, where a suspended sentence cannot not be applied if the offender has already been sentenced to imprisonment; and non-custodial sentences may not be applied to multiple repeat offenders).

In those jurisdictions where prior convictions do not automatically exclude the offender from being eligible for a non-custodial sentence, the criminal record of the offender can be taken into account when considering the substantive appropriateness of a non-custodial

sentence in the case. E.g., prior convictions may lead the court to find that the imposition of imprisonment is required by the need to prevent the commission of future crimes.

### **2.3 Ancillary penalties**

Ancillary penalties are penalties that can, or must, be imposed in addition to the main sentence. Their aim is in general related to reinforcing the preventive effects of the sentence.

The vast majority of jurisdictions provide for a wide range of ancillary penalties.

Examples of such penalties are loss of civil and political rights/disfranchisement, confiscation, placement at the disposal of the sentence implementation court, public announcement of the sentence, professional or activity bans, disqualification from exercising parental responsibilities, imposition of duties or obligations (e.g., to compensate the damage, to make a payment to a charitable institution, to attend a rehabilitation programme), a ban on driving, a ban on seeing specific persons or going to specific places, a ban on carrying weapons, a ban on keeping animals, expulsion with the prohibition of re-entry for a certain period, or even community service (France, Latvia). In some countries, also the sentence of a fine can be both a main or an ancillary penalty (Belgium, Croatia, Latvia, Estonia, France).

There are jurisdictions where the enumerated types of sanctions can be either ancillary – i.e., imposed cumulatively with the main sentence – or imposed as autonomous sentences (e.g. Czech Republic, France, Hungary, Poland).

In the Netherlands, the courts can decide that the ancillary penalty will not be enforced, subject to the offender complying with determined conditions.

## **3. Rationale for sentencing: determining the type and term of a non-custodial sentence**

This section describes the differing sentencing systems of the Member States studied, to understand how the type and length of

non-custodial sanctions are determined. As such, it encompasses the following aspects: the existence of a sentencing phase in the criminal procedure, autonomous from the guilt-finding phase; the legal criteria that the court must consider in the choice of the penalty to be imposed and in the determination of its length; the role of the purposes of punishment and of the degree of culpability in the determination of the sentence; the concrete circumstances of the case or the offender to be considered by the court when applying those criteria; the competent authority to impose non-custodial sanctions; the provision of a duty to impose non-custodial sentences if the conditions are met; the duty to give reasons for the choice and the length of the sentence; the existence of “sentencing guidelines”; and the right of appeal from the decision on the type and length of the sentence imposed.

### 3.1 Sentencing phase

In most cases, there is no separate sentencing stage, i.e., after the trial hearing, the court, in its deliberation, begins by deciding on the guilt of the accused and, on a finding of guilty, it deals with the question of determining the sentence. This does not mean that there is not an autonomous sentencing operation – but it is not done in a separate phase.

In some jurisdictions, although generally there is not an autonomous sentencing phase, sentencing may take place at a later date after the trial when the court considers it relevant to produce a pre-sentencing report or specific evidence relevant for the purpose of sentencing (Cyprus, France, Malta, Portugal). However, this possibility seems to be seldom used.

In Portugal, there is also the possibility of reopening the hearing for the retroactive application of a more favourable penal law. Based on the principle according to which new penal laws that punish an offence less severely, or that may somehow be more favourable, is to be applied retroactively (“retroactivity *in melius*”), this mechanism ensures that, if a subsequent penal law comes into force – even after the conviction has become final and if the sentence is already being implemented – the convicted person may request the reopening of the court hearing for the new law to be applied, which may lead to a new sentence.

### 3.2 Criteria for the determination of the sentence

In general, sentencing systems involve a division of tasks between the legislature and the judiciary. The legislature prescribes the penal “frame” for each type of offence, establishes the “modifying circumstances” (aggravating or mitigating circumstances that may modify the minimum and/or maximum limit of the sentence) and provides the criteria for the determination of the type and length of sentences.

In most cases, the law prescribes a “frame”, i.e. a minimum and a maximum limit, for the applicable sentence. Then, it is up to the court to determine the sentence within that frame. The criteria are normally established in the Penal Code, although they can be quite vague to a greater or lesser degree, in the latter case the courts enjoying significant discretion.

When explicitly stated, criteria for sentencing often encompass the circumstances of the offence and the personality of the offender, and they relate to the purposes of punishment. E.g., Croatia (degree of culpability and the purpose of punishment); Czech Republic (nature and seriousness of the offence and offender’s personal circumstances); Finland (just proportion to the harmfulness of the offence, the motives of the act and the culpability of the offender); Estonia (mitigating and aggravating circumstances, individual prevention, protection of public order); France (circumstances of the offence and personality of the offender, as well as his/her material, family and social situation, in conformity with the purposes of punishment); Greece (seriousness of the offence and culpability of the offender); Hungary (the purposes of punishment, the seriousness of the offence, the degree of guilt, the danger posed to society, and any mitigating or aggravating circumstances); Italy (seriousness of the offence and capacity of the offender to commit further crimes); Latvia (for the type of punishment, the nature of and harm caused by the criminal offence committed, as well as the personality of the offender; for the amount or length, the circumstances mitigating or aggravating the liability), Lithuania (circumstances related to the offence and the offender; for the length there is the criterion of departing from the average length, calculated between the minimum and maximum limits that can be imposed for the offence); Poland and Portugal (the length of the sentence is based on the requirements of general prevention and individual prevention;

the culpability of the offender acts as a limit to punishment that cannot be exceeded); Romania (seriousness of the offence; threat posed by the offender).

In Hungary and Lithuania, the concrete measure of a sanction is determined departing from an average length (the median value calculated between the minimum and maximum statutory limits for the offence), taking then into account mitigating and aggravating circumstances in order to achieve a more severe or more lenient sentence respect to the average. This system, although guided by a purpose of achieving uniformity in the sentencing praxis, is subject to criticism, because it may conflict with the *ultima ratio* principle and lead to more severe punishment.

According to the culpability principle, the degree of culpability serves as a *limit* to the severity of punishment (Croatia, Poland, Portugal).

Whereas in some countries there are specific criteria for the choice of the *type* of sentence (e.g., Italy – from the available non-custodial sanctions, the judge shall choose the one deemed most suitable for the social reintegration of the offender; Poland – the court shall pursue the purposes of punishment with the least severe possible penalty provided for the offence; Portugal – the Penal Code states that if a custodial sentence and a non-custodial sentence are applicable, the court shall give preference to the latter whenever it fulfils the purpose of the punishment adequately and sufficiently), in others there are no specific criteria for the choice, beyond the legal/formal requirements for applying each type of sentence. This is the case in Belgium; Cyprus (according to case law, the nature and seriousness of the offence and the individual circumstances of the offender); Ireland (courts have a high degree of discretion, guided by precedent; the case-law of higher courts have developed general principles of sentencing for specific offences; judicial criteria define a balance between the purposes of punishment; judges must ensure proportionality to the gravity of the offence and mitigate or aggravate the sentence when required by the circumstances of the offender); Netherlands (the circumstances influencing the choice and length of the sentence are not prescribed by the law, courts having discretion).

However, even where no specific substantial criteria are provided to guide the judge in the choice of the penalty, both constitutional

principles (such as humanity, proportionality, necessity, and equality) and the purposes of punishment (whether explicit or implicit) will guide the sentencing decision or limit the court's discretion.

Some jurisdictions also explicitly state a subsidiarity (*ultima ratio*) principle, whereby if a less severe sentence adequately and sufficiently serves the purposes of punishment or the concrete needs of the case, a more severe sentence (especially, imprisonment) shall not be imposed (Czech Republic, Latvia, Poland, Portugal). In Lithuania, the court will generally impose a non-custodial sentence upon a person prosecuted for the first time for a crime of negligence or less serious crime; if it imposes a custodial sentence, the court must give grounds for its decision.

Difficulties may also occur when several purposes of punishment concur or conflict, and the law does not provide for a hierarchy.

There are some specificities according to the type of sanction.

For the sentence of home detention with electronic monitoring, its length normally is the same as the length of the prison sentence imposed or that would otherwise have been imposed (Belgium, Denmark, Finland, France, Poland, Portugal).

As regards community service, whereas in some jurisdictions there is an autonomous determination of its length (e.g. Lithuania, Poland), in others the law establishes an automatic correspondence with the prison sentence it replaced (e.g. Estonia, Finland, Portugal: 1 day imprisonment equals 1 hour of community service).

For the sentence of a fine, normally the financial situation of the offender is taken into account.

Where some jurisdictions simply provide for a minimum and maximum amount of the fine (either amounts in local currency, a number of minimum monthly wages, or specific units), to be specifically determined by the court, many Member States have adopted the day-fine system. This system, originating in the Scandinavian countries, allows for the consideration of both the circumstances of the offence and the financial conditions of the offender. In a first step, the number of days is determined according to culpability and prevention (as described above). In a second step, a daily amount is determined based on the offender's financial conditions and obligations. By the means of the "day-fine system", fines impose an equal relative burden on all offenders regardless of their income and wealth. This system is meant to ensure respect for the principles of culpability, equality and proportionality.



The number of day-fines is based on the seriousness of the offence, and the amount of a single day-fine depends on the daily income of the offender. The day-fine system is in place in Croatia, Czech Republic, Estonia, Finland, France (although co-existing with the fine for an amount determined between a minimum and a maximum limit), Germany, Greece, Hungary, Poland, Portugal, and Romania. In Italy, a fine as a main sentence provides for a minimum and a maximum limit, whereas the day-fine system is used for fines as a replacement sanction for imprisonment sentences of up to 6 months.

Regarding the concrete factors that the courts shall consider when determining the sentence, in most jurisdictions the Penal Code lists, not exhaustively, the factors that the court shall weigh, either in favour of or against the offender.

Those factors include the seriousness of the offence, the damage or peril caused, the motives for committing the offence, the manner in which it was committed, the offender's personal and financial circumstances, previous life and conduct after the offence, including efforts to compensate for the damage.

Differently, in jurisdictions such as Cyprus, Ireland and the Netherlands, the circumstances influencing the choice and length of the sentence are not prescribed by the law. Courts have significant discretion and they normally base the sentencing decision on the circumstances of the case and the personality of the offender (e.g. seriousness of the offence, damage caused, personal circumstances of the offender or the victim).

### **3.3 Competent authority to impose non-custodial sanctions**

In the majority of cases, the type and length of the sentence are determined by the trial judge/court.

In the Netherlands, though, penal sanctions may also be imposed by the public prosecutor by means of a penal order (*strafbeschikking*). The public prosecutor may impose sanctions and measures for misdemeanours and crimes punishable by a prison sentence of up to 6 years. The public prosecutor can only impose some types of non-custodial sanctions (community service of up to 180 hours; a fine; forfeiture; compensation for the victim; disqualification from driving motor

vehicles for a maximum of 6 months); the decision may also contain injunctions. However, only a court may impose a custodial sanction.

Where home detention with electronic monitoring is conceived as a form of implementation of a prison sentence, it may also be granted at the implementation stage, by the probation service (Denmark) or by the court responsible for the implementation of prison sentences (Poland).

France presents a system that allows both the trial court and the court responsible for the implementation of sentences to replace short sentences of imprisonment with an alternative or a more flexible form of implementation (*aménagement*). For sentences of imprisonment of up to 1 year, the trial court *ab initio*, i. e. when pronouncing the sentence, or a judge responsible for the implementation (*juge d'application des peines*) may decide not to carry out the prison sentence and impose an alternative sentence (e.g., home detention under electronic surveillance, *semi-liberté*, *placement à l'extérieur*, sentence splitting or conditional release).

Similarly, in Italy, non-custodial sanctions can either be imposed at the trial/sentencing stage (by the trial court, as main sentences or replacement sentences; or by the justice of peace in cases following within its jurisdiction) or after the sentence becomes final, before its implementation (by the judge/court responsible for the implementation of sentences – *magistrato/tribunale di sorveglianza*). The justice of peace is an honorary magistrate who exercises jurisdiction for some offences and is only entitled to impose sanctions of a non-custodial nature. Justices of peace may impose the following sanctions: a fine, home detention on weekends for up to 45 days, and community work for up to 6 months. Regarding non-custodial measures imposed at the implementation stage by the judges/courts responsible for the implementation of sentences, they have been provided for in Italian penitentiary law since 1975, with several amendments aiming at extending their scope. The nature of these measures has also evolved. According to the original approach, the main function of these measures was to ensure the flexibility of the implementation of the prison phase of the sentence, differentiating its content through the admission of prisoners to forms of implementation in the community. To achieve this, the judges and courts responsible for the implementation of sentences were entrusted with the power to modify the quality and quantity of

the sentence based on a judgement relating to the personality of the offender. Following subsequent amendments, these measures can now be granted *ab initio*, i.e. after the judgment becomes final but before the enforcement of the prison sentence. These measures can be non-custodial (such as *affidamento in prova al servizio sociale*, similar to probation, and *detenzione domiciliare* – home detention) or custodial (e.g., *semilibertà*, which allows the person sentenced to leave prison during the day, and *liberazione anticipata*, a form of early release).

### 3.4 Duty to impose non-custodial sanctions

Besides the cases where specific offences only carry non-custodial sanctions as reference sanctions, there are some examples of a mandatory or almost mandatory imposition of non-custodial sentences.

In Belgium, prison sentences of up to 3 years are in practice always served in the form of home detention with electronic monitoring. In Croatia, when the court imposes imprisonment for up to 6 months, replacing it with community service is mandatory unless it would not serve the purposes of punishment. In France, for the least serious category of offence (*contravention*, which could be translated as a misdemeanour), the reference sanction is the fine, with the possibility of depriving or restricting rights (e. g. confiscation of a weapon, suspension of a driver's license) or reparation sanction. Also in France, the judge is required to give specific reasons if a sentence of imprisonment of up to 1 year is not replaced. Additionally, for sentences (or the remainder of sentences) up to 6 months, they can be served under the form of home detention with electronic monitoring, *semi-liberté* or *placement à l'extérieur* (measures that allow for individuals to spend the night in prison but work or conduct other activities outside prison during the day), unless his/her personality or situation excludes this possibility. Also, the Criminal Code states that, for offences of intermediate seriousness (*délits*), the decision not to apply a suspended sentence can only be pronounced as the last resort, if the seriousness of the offence or the personality of the offender renders any other sanction insufficient or inadequate. Similarly, in Greece, for the least serious category of offence (minor misdemeanours), only non-custodial sanctions (community service and fine) are provided for as main sentences. Also,

for crimes punishable with imprisonment, when a suspended sentence is not granted, the court must specify the reasons why a custodial sentence is necessary to prevent the commission of further crimes. In Lithuania, the court must give reasons if it imposes a custodial sentence for a first-time offender for a negligent or less serious crime. In Italy, only non-custodial sanctions are applicable in cases falling within the jurisdiction of the justices of peace.

Although it is rare to find cases where a non-custodial sentence is actually mandatory, there are several examples of provisions establishing some kind of subsidiarity (*ultima ratio*) of imprisonment. The Czech Criminal Code states that for offences punishable with up to 5 years of imprisonment, an unconditional prison sentence may be imposed only if no other punishment would serve the need for individual prevention. In Latvia, Poland and Portugal, it is also stated that if a less severe sentence serves adequately and sufficiently the purposes of punishment or the concrete needs of the case, imprisonment shall not be imposed. In Finland, for prison sentences not exceeding 2 years, conditional imprisonment (a form of suspended sentence) shall be imposed, unless the seriousness of the offence, the culpability of the offender or his/her prior criminal records require unconditional imprisonment. In Estonia, it is stated that imprisonment may be imposed only if the aims of punishment cannot be achieved by a less serious punishment. In Ireland, when an offender is punished for an offence for which a custodial sentence of up to 12 months would be appropriate, the sentencing judge is obliged to consider imposing community service. In Germany, where there is a century-old tradition of replacing short-term prison sentences with fines, the Penal Code states that a term of imprisonment of less than 6 months shall only be imposed where special circumstances, either of the offence or the offender's character, require the imposition of imprisonment in order to have an influence on the offender or to defend the legal order; the rule is to impose a fine instead.

There are also subsidiarity requirements between non-custodial sentences: e.g. in Finland, electronic monitoring is only imposed if community service was excluded; in Sweden, probation may be imposed if a fine is considered insufficient; in Greece, a prison sentence of up to 3 years shall only be replaced with community service when a suspended sentence has been excluded.

### 3.5 Duty to give reasons for the choice of the sentence

The judge or court must give reasons for the choice and length of the sentence.

In some jurisdictions, this includes providing reasons for the non-application of a non-custodial sentence if the formal requirements are met (e.g., Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Greece, Germany, Lithuania, Poland, Portugal). In Estonia, if a non-custodial sanction is prescribed, together with imprisonment, as reference sanction for an offence, the court must provide the reasons for the imposition of imprisonment. In Lithuania, the court must give reasons if it imposes a custodial sentence for a first-time offender for a negligent or less serious crime. In Malta, although there is a duty to give reasons for the sentence, there is no duty to justify the non-imposition of a non-custodial sentence.

The provision of this obligation “in books” does not always mean a detailed explanation in practice. As such, in Italy, the explicit obligation to provide specific reasons for the determination of the sentence, stated in the Penal Code, is generally ignored by the courts, who usually limit themselves to generic formulas (such as “it is estimated to be fair the penalty of...”), without actually justifying how the penalty imposed was reached in the light of the applicable criteria. This is often criticized by the legal writers.

### 3.6 Sentencing guidelines

The majority of Member States encompassed in the study do not adopt “sentencing guidelines”, apart from the legal criteria set out in the Penal Code.

As such, there are no sentencing guidelines in Belgium, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Malta, Poland, Portugal, Romania, or Sweden.

However, in Finland, courts must consider existing practices in similar or comparable cases to ensure consistency; this has been formulated into a decision-making model called “normal punishment”, which means the penal sanction that is imposed most frequently in similar cases.

In the Netherlands, the court may, at the time of sentencing, take into account the sentencing guidelines of the public prosecutors (*vervolgingsrichtlijnen*) and/or the “starting points” of the judiciary (*oriëntatiepunten*). These guidelines and starting points apply to various offences and are not legally binding.

In Romania, practical guides for courts and prosecutors were made available at the time of transition to the new Penal and Criminal Procedure Codes, but those do not constitute sentencing guidelines.

Also, in Italy, where there are also no sentencing guidelines, some local authorities or judicial offices have adopted guidelines aimed at standardising the application of certain types of alternative sanctions. Examples include the Guidelines adopted by the Court of Bergamo or the Protocol issued by the Court of Rovigo on the *sospensione del processo con messa alla prova* for adults (a mechanism of diversion or waiver of sentence after a period of probation); and the Guidelines of the Umbria Region for the integrated management of alternative programmes to prison sentences for alcohol and drug addicts.

Sentencing guidelines are being drafted in Ireland (as mandated by the Judicial Council Act 2019, which established a *Sentencing Guidelines and Information Committee*, under the aegis of the Judicial Council, responsible for collecting and disseminating sentencing information and for drafting formal sentencing guidelines). Currently, the sentencing courts have a high level of discretion when sentencing, subject to the constitutional principle of proportionality.

### 3.7 Right to appeal

In most cases, there can be an appeal concerning the type and length of the sentence imposed.

In Greece, even though the law does not specify that the appeal can be based solely on the type and length of the sentence, these can be modified at the appeal stage. In Italy, though there is no specific provision for an appeal concerning the type and length of the sentence, the decisions of the courts responsible for the implementation of sentences (including the decisions to apply or not to apply a non-custodial alternative) are subject to appeal to the Supreme Court, based on legality issues. In the Netherlands, appeals of criminal judgments concern the

entire judgment; appealing the type and length of the sentence alone is not possible. In Belgium, when the *cour d'assises* (with trial by jury) was competent for the trial, only an appeal based on errors of law (*cassation*) is possible. In Denmark – where the decision of whether to grant the request to serve a prison sentence at home lies with the probation service – individuals may appeal to the court in case of refusal.

Both the defendant and the prosecution may appeal. In some jurisdictions, such as the Czech Republic, Germany and Portugal, the public prosecutor can also appeal in favour of the defendant.

In Croatia and the Czech Republic, close family members may also appeal. There are also cases where the victim may appeal (e.g., Portugal, if the victim enjoys a special status in the proceedings).

## **4. Implementation of non-custodial sanctions and consequences of non-compliance**

This section concerns the implementation stage of non-custodial sentences. It deals with questions such as the competent authority to supervise the implementation and take decisions in case of non-compliance with the requirements of the sentence. It also looks at the consequences of non-compliance and whether recall to prison is mandatory.

### **4.1 Competent authority for the supervision**

While in general the supervision and support of those serving community sentences are entrusted to a probation service (see below, II.2), in most jurisdictions there is also some kind of judicial supervision of the implementation of the sentence.

In some countries, there is a specialized court or judge responsible for supervising the implementation and/or taking the relevant decisions (Belgium, Estonia, France, Hungary, Italy and Romania).

Where a specialized court is not in place, it is a court – normally the trial/sentencing judge – who is also in charge of decisions concerning implementation and non-compliance.

In Portugal, although there is a specialized court responsible for the implementation of sentences, its competence encompasses only

the implementation of prison sentences and home detention (which is a form of implementation thereof). Regarding home detention, this court is competent for approving the offender's social rehabilitation plan and its modifications, granting leaves, modifying any conditions imposed and revoking the measure in case of non-compliance. For non-custodial sentences, the sentencing court remains competent for decisions concerning their implementation.

In Greece, despite a legislative provision for the creation of judges responsible for the implementation of sentences, they were never appointed, their role being entrusted to public prosecutors, who supervise the implementation of community sentences. The probation service reports to the public prosecutor. However, in case of non-compliance with the sentence, the prosecutor refers the case to the sentencing court.

## 4.2 Consequences of non-compliance

In cases where the person sentenced does not comply with the conditions attached to the sentence, the consequence may be to serve imprisonment. However, this is not always automatic. There are often other options and a judicial decision is required.

In Belgium, a jurisdiction where most non-custodial sanctions are designed as main sentences, the judge establishes a surrogate penalty, which can be a fine or imprisonment, for cases of non-compliance. The decision to revoke the sentence belongs to the Public Prosecutor's Office, through a motivated decision.

In the jurisdictions where non-custodial sentences are designed as replacement sentences (replacing a concrete sentence of imprisonment), the consequence for non-complying is the execution of that prison sentence. Reasons for revocation usually consist of breaching the duties attached to the sentence or committing another offence for which the offender is convicted.

However, in general, revocation or conversion of the sentence into imprisonment is not automatic. Rather, it normally depends on a case-by-case evaluation by the competent authority, which can lead to other options – the most common being a warning, modification of conditions, or extension of the probationary period.



In Greece and Poland, non-compliance with a suspended sentence may also lead to its conversion into community service. In Malta, the consequence for non-compliance with probation orders, treatment orders, community service and combination orders is the imposition of a fine, although there are other options for the court, such as restarting the count of the supervision period or the work hours.

There are, however, examples of mandatory revocation (e.g., in case of commission of another crime punished with imprisonment, or with imprisonment of a certain severity – as in Bulgaria, Croatia, Greece and Poland).

The competent authority to decide on the consequences of non-compliance is usually a judge/court. A few exceptions are situations like electronic monitoring in Denmark: consistent with the authority of the probation service to grant the request to serve a prison sentence under electronic monitoring, it is also the probation service that decides on its revocation. Also, in Sweden, the probation service has a considerable margin of autonomy: it may change or cancel a community service provision; it can also shorten the supervision period of a probation order; concerning non-compliance, in case of breach of conditions, the probation service may issue a provision for the supervised person to follow, or issue a warning. In more serious cases, where the service deems that the measures at its disposal would not be sufficient, it may refer the case to the prosecutor, who brings an action before the court in order to revoke probation.

As to fines, there are usually a variety of options for the case of non-payment, which include its conversion into community work (normally involving a request or the consent of the offender), enforcement of payment from assets, or its conversion into imprisonment (either the original prison sentence imposed – in the case of a fine as a replacement penalty; or applying some correspondence between the number of daily units with a number of days in prison – as is the case in Croatia, Hungary and Portugal). In Hungary, there is no coercive payment of a fine: if it is not voluntarily paid or replaced by community work, the sentence is converted into imprisonment. In the Netherlands, the government currently is considering the option of imposing an alternative community service order in the event of non-payment of fines instead of converting the original sentence to detention (a proposal from the Dutch Probation Service).

In Italy, in case of non-payment of the fine as a replacement sentence, besides the possibility of the person requesting to serve work instead, the fine may be converted into a form of probation (*libertà controllata*). A similar solution was recently introduced in Lithuania. Also, in Portugal, if the offender proves an inability to pay the fine, the execution of imprisonment may be suspended for a period of 1 to 3 years, subject to the fulfilment of obligations of a non-financial nature.

In Germany, there is a rather complex system to deal with fine default: the consequence is imposing fine default imprisonment, but the latter may be replaced by community work.

In Greece, when community service (which, as explained above, is a main sentence) is imposed, the court establishes a monetary penalty for the event of non-compliance. The possibility of converting community service into imprisonment was abolished in 2021. Also, in Lithuania, in case of non-compliance with community service, the court may replace it with a fine or restriction of liberty (a form of probation, usually under electronic monitoring and subject to injunctions).

In Portugal, a 2017 reform provided for the possibility of prison sentences up to two years, to be implemented following revocation of a non-custodial replacement sentence, being served in the form of home detention with electronic monitoring, thus avoiding entering into prison.

### 4.3 Modification of the sentence during implementation

In some jurisdictions, there are some equivalents to “early release” for community sentences.

Also, during the implementation of sentences involving some kind of probation, it is in general possible to modify the conditions or obligations attached to the sentence, either at the request of the probationer or following a situation of non-compliance. As stated above, many jurisdictions also allow for an extension of the probationary period as a consequence of non-compliance with the conditions of a suspended sentence or a sentence involving probation, as a means to avoid the implementation of imprisonment.

For example, in Belgium, those serving a sentence of probation can request the suspension or modification of the conditions; and those serving electronic monitoring can ask for a suspension of its execution

after serving one-third of the time, subject to a trial period for the remaining time. In the Czech Republic, the probationer may request the removal of some duties or restrictions after serving one-third and a minimum of six months. In Poland, the court may postpone, suspend or reduce the number of hours of community work; it can also consider the sentence fully served after half of the sentence has been served and the court deems that the goals of the sentence have been achieved. In Portugal, community service sentences of 72 hours or longer can be terminated earlier, provided that two-thirds of the sentence have been served, if the court finds that the offender is complying in a satisfactory manner).

In Malta, the length of a community sanction can be either increased or decreased in the course of its implementation. In situations of breach of conditions, the court may decide to restart the operational period of supervision or the work hours; the increase can also occur by proposal from the probation service. However, the extension may not be greater than the maximum period allowed by the law for the sentence. Conversely, both the probation service and the offender can ask the court to shorten the period of supervision (which is rarely done), or discharge the order and ask the court to deal with the offender as if the order hadn't been granted in the first place.

Also, as already mentioned above, in many jurisdictions those sentenced to a fine can request that they serve the sentence in instalments or by means of public interest work.

## **5. Early release**

This section focuses on forms of early release from prison (including parole or other forms of modifying or replacing imprisonment during its implementation). It looks at the formal and substantial requirements, including time frames for granting early release, the competent authority for granting release and for monitoring its implementation, and whether there are cases of mandatory conditional release. It also deals with the type of conditions that can be imposed and the consequences of non-compliance.

In all jurisdictions included in the study, there are forms of early release from prison, with parole (or conditional release) being the

most common mechanism. The granting of parole, however, is not automatic and depends on the fulfilment of formal and substantial requirements.

## 5.1 Formal requirements

The formal requirements for granting parole are mainly based on time frames and can be of three types.

Firstly, some countries set a minimum length of the prison sentence imposed. In Malta, parole applies only for prison sentences of 1 year or longer; in Cyprus and Germany, for prison sentences longer than 2 years; in Italy, for prison sentences longer than 30 months; and in Belgium, of more than 3 years.

Secondly, some countries require a minimum length of imprisonment actually served, which can be 14 days (Finland), 30 days (Sweden), 2 months (Germany, if conditional release is granted after two-thirds of the sentence), 3 months (Croatia and Hungary), 4 months (Estonia), 6 months (Portugal and Germany, in the latter if granted after serving half of the sentence) or 30 months (Italy).

Thirdly, there are time frames for its application, which refer to the *quantum* of the sentence served and are expressly stated in law, except in Ireland, where the Parole Board will consider the period of the sentence served but there is no formally prescribed time frame. The time frames for granting conditional release vary from a minimum of one-third of the sentence (Belgium, Czech Republic, Estonia, Lithuania, Malta) to a maximum of four-fifths (Greece).

The minimum time frame of one-third of the sentence for granting parole is applied especially in less serious cases and for shorter prison sentences. This is the case in Belgium, the Czech Republic (if the person was not convicted of a particularly serious crime and has not been imprisoned before), Estonia (with electronic surveillance, if convicted of an offence punishable by up to 5 years of imprisonment or a negligent offence punishable by more than 5 years of imprisonment) and Lithuania (if the sentence imposed does not exceed 4 years or, for negligent offences, if the sentence imposed does not exceed 6 years). In Malta, parole can be granted for individuals serving a sentence of imprisonment for a term of 1 year and not exceeding 2 years, after serving 33% of prison.

In Greece, the rule is that inmates are eligible for traditional conditional release (without electronic monitoring) after having served two-fifths of their sentence.

In other countries, the minimum time frame for granting parole is half of the sentence, which is the case for Bulgaria, Croatia, Cyprus, Denmark (exceptionally, only for individuals under 18 years old or adults for good behaviour), Finland (if the person has not served a prison sentence during the last five years), France, Germany (for those serving a prison sentence for the first time), Hungary (exceptionally, in cases deserving special consideration, such as deterioration in the defendant's health, advanced age, or other circumstances which are humanly acceptable, if the prison sentence does not exceed 5 years), Poland, Portugal and Italy (provided that the person is not a recidivist).

Serving half of the sentence is an intermediate threshold for granting conditional release in Estonia (for offences punishable by up to 5 years of imprisonment or negligently committed offences punishable by more than 5 years of imprisonment), Lithuania (for prison sentences of more than 4 years and less than 10 years) and Malta (for individuals serving a prison sentence for a term of more than 2 and not exceeding 7 years). In turn, in the Czech Republic, persons who have not been released at one-third may be conditionally released at half of the sentence.

After serving two-thirds of the sentence, fewer conditions are required for granting conditional release in Belgium, Bulgaria, Denmark, Estonia, Finland, Germany (when it is not the first instance of incarceration), Hungary (for non-recidivists), Lithuania (for prison sentences between 10 and 25 years), Netherlands, Poland (for recidivists), Portugal (with fewer substantial requirements than at half of the sentence), Romania (for prison sentences of up to 10 years) and Sweden. In Estonia, after serving two-thirds of the sentence, *remission* can be granted for good behaviour, in which no supervision is involved, and the prison sentence is considered served.

Finally, for more serious cases and recidivists, a few countries provide for conditional release only after serving three-quarters of the prison sentence, which is the case of Hungary, Italy, Lithuania, Poland and Romania. In Malta, individuals sentenced to more than 7 years imprisonment can be early released after serving 58%, and in Greece, in case of drug trafficking and trafficking of human beings, criminal

organization, terrorism, robbery and extortion, the time frame for parole is four-fifths of the sentence. In Poland, individuals sentenced to 25 years imprisonment can be released after serving 15 years.

In the case of life imprisonment, conditional release might be granted after serving a minimum term of the sentence, which can be 12 years (Cyprus, Denmark, Finland), 15 years (Germany), 18 years (France – or 22 years for recidivists), 20 years (Bulgaria, Greece, Romania), 25 years (Hungary, Poland), 26 years (Italy), or 27 years (Netherlands).

When the prison sentence is implemented under the home detention regime, release on parole can be granted in Hungary and Finland under the same conditions, but is not applicable in Portugal.

Conditional release normally requires the consent of the person sentenced, as is the case in Croatia, France, or Portugal.

## 5.2 Substantial requirements

The fulfilment of the formal requirements is not sufficient on its own to be granted parole, as substantial requirements also apply in all Member States included in this study. Three types of substantial requirements are found: individual prevention requirements, general prevention requirements and reparation of damage.

The criteria of individual (or special) prevention are provided as requirements for granting parole in all legislations. In that sense, conditional release may be granted only if there are prospects of social rehabilitation and a positive prognosis regarding the risk of re-offending, which is assessed by the competent authority based on conduct during the enforcement of the prison sentence (Croatia, Czech Republic, Hungary, Portugal, Netherlands, Poland), the participation in intramural activities and reintegration programmes (Bulgaria, Netherlands), the results of the application of alternative measures granted before early release (Italy), the circumstances of the case, the personality and earlier life of the offender (Croatia, Portugal), or their attitude towards the criminal offence and the victim (Croatia).

The need for a positive prognosis on the social rehabilitation and the risk of re-offending is criticised by a few national experts because, in case of doubt or lack of evidence of social reintegration, the decision

may be against granting conditional release. Accordingly, some scholars suggest that conditional release should be made the rule and the denial thereof the exception, to be based on facts that demonstrate a concrete risk of serious crimes after the release.

In addition to the special prevention requirements, in a few countries, the fulfilment of the civil obligations arising from the offence is also required to benefit from parole (Belgium, Hungary, Italy, Romania), unless the person proves that he/she was unable to do so (Romania).

Finally, in Portugal, after half of the sentence served, conditional release may be granted only if the judge finds that, in addition to the special prevention criteria, release is also compatible with general prevention requirements (the defence of legal order and social peace). In turn, after completing two-thirds of the sentence, only individual prevention requirements are considered, as the legislator assumes that at this stage the general prevention requirements have been met sufficiently.

### **5.3 Anticipation of early release**

In some countries, legislation provides for the possibility of anticipating early release on the condition that the remaining part of the sentence until regular conditional release is served under home detention, supervised by electronic monitoring. This measure is specially designed to reduce the risk of re-offending and to facilitate the individual's integration into the community after incarceration. Depending on the country's legislation, this anticipation of early release can be granted six months (Belgium, Finland and Lithuania) or one year (Portugal) before the date of eligibility for conditional release; after serving one-fifth of the sentence, or two-fifths depending on the severity of the offence (Greece); or after serving half of the sentence, but at least 3 months (Sweden).

In Sweden, after serving at least half of the sentence, there is also the possibility of placing a person in need of supervision or special support in a half-way house, which is a house under the control of the Swedish Prison and Probation Service designed to supervise and give special support to individuals released from prison.

## 5.4 Mandatory conditional release / Mandatory exclusions

The Portuguese legislation is the only one encompassed in the study that provides for mandatory conditional release. Granting parole is mandatory once five-sixths of the sentence have been served, and if the person consents. This ‘mandatory conditional release’ was established for sentences longer than six years, considering that it is precisely for longer sentences that the mechanism of parole – ensuring a supervised transition to life in freedom within society – is most important. In the case of mandatory parole, there are no substantial requirements for release.

In contrast, in Hungary and Lithuania, there are mandatory grounds for the exclusion of parole.

In Hungary, there are categories of sentenced persons who cannot be released on parole, and there are groups of cases that are left to the discretion of the court to exclude the possibility of parole. The following categories of persons cannot be released on parole: a) repeat offenders, if their term of imprisonment is to be carried out in a penitentiary; b) repeat offenders with a history of violence; c) persons sentenced for offences committed in the framework of a criminal organization; d) any person who has been sentenced to imprisonment for an intentional offence committed after being previously sentenced for a term of imprisonment, before that term has been served in full or before the day when it ceases to be enforceable. On the other hand, the groups of cases that can be excluded from parole by the courts include violent offences against a person, punishable by imprisonment for 8 years or longer, committed against a relative; or sex offences against children punishable by imprisonment for 8 years or longer. In such cases, as a general rule, conditional release will be excluded, except if there are circumstances deserving special consideration by the court.

In Lithuania, the following categories of individuals are excluded from release on parole: a) persons who have been sentenced for crimes against the independence, the territorial integrity and the Constitution of the Republic of Lithuania; b) persons sentenced for sexual offences against children; c) persons who serve life imprisonment (this exclusion was mitigated to comply with the jurisprudence of the European Court of Human Rights); d) persons sentenced for intentional crimes



committed inside the prison; e) persons serving the partially suspended fix-term custodial sentence.

### **5.5 Competent authority for granting and monitoring conditional release**

The competent authority to grant parole varies from one country to another and can be the courts (Bulgaria, Croatia, Czech Republic, Estonia, France, Hungary, Poland, Portugal, Romania), the public prosecutor (Netherlands), the Prison and Probation Service (Denmark) or the Parole Board (Cyprus, Ireland, Lithuania, Malta). The decision on whether or not to grant parole must be reasoned and can be challenged in court (Bulgaria, Denmark, Netherlands, Portugal).

The court responsible for deciding on parole can be the county court in whose jurisdiction the prison is located (Croatia) or the judge/court responsible for the implementation of sentences (France, Portugal, Poland). In France, the competence is divided between the (single) judge and the court responsible for the enforcement of sentences. The former is competent to decide on sentences of up to 10 years or where the remaining period of imprisonment is less than 3 years, while the latter is competent in all other cases. In Hungary, the judge competent to deliver the sentence either excludes the possibility of release on parole at the outset or specifies the earliest date thereof in the context of the sentence of imprisonment. If the possibility of conditional release has not been excluded in the sentence, the final decision on release on parole will be adopted by the penitentiary judge.

In the Netherlands, a specialized office within the public prosecutor's office is competent for granting, denying, postponing or revoking early release.

The supervision of parolees is usually carried out by the probation service. In Portugal, for example, other entities, such as the police, may cooperate in monitoring the compliance with the conditions and must report to the court periodically or when a relevant circumstance occurs. In Greece, in turn, supervision is performed by the police and rarely by the probation service, while in Poland, the penitentiary court may place a conditionally released individual under the supervision of a probation officer, a trustworthy person, association, organisation or

institution whose activities are related to the rehabilitation of convicted individuals.

## 5.6 Conditions

In all jurisdictions, conditional release is granted under the general condition of not re-offending and, when it is deemed necessary, the competent authority may place the person under the supervision of the probation service (or other entities) and order special conditions, obligations and probation measures aimed at reducing the risk of committing new offences or contributing to social reintegration.

In Poland, where supervision during the probationary period is optional, there are categories of persons who must be supervised, such as those convicted of specific sex offences, young adults convicted of intentional crimes, repeat offenders, individuals who have made a permanent source of income from committing crimes, those convicted for crimes committed within an organised group or terrorist offences and those sentenced to life imprisonment.

The conditions and special obligations that can be attached to conditional release are very diverse, and their imposition depends on an assessment of the person's individual needs. They can include:

- a) the obligation to report to the police (Greece) or the probation service at regular intervals or specific dates (e.g. Bulgaria, Hungary, Malta, Portugal, Romania), to give notice of change of domicile, job or any travel longer than 5 days (Romania) and to provide information and documents when requested (Hungary, Romania);
- b) the restriction of free movement (Bulgaria), the prohibition from staying in specific locations or places (Cyprus, Ireland, Poland, Portugal, Romania), leaving the country (Greece, Romania) or attending certain events or public gatherings (Portugal, Romania), and the obligation to reside in a specific location (Greece, Ireland, Malta, Portugal) or to stay in one's residence (Czech Republic);
- c) the prohibition on contact with the victim or the victim's family (Malta, Poland, Romania), the accomplices (Romania), persons of a certain age, occupation or category (Cyprus), or any

- person established by the competent authority (Cyprus, Ireland, Romania);
- d) electronic surveillance (Estonia, Netherlands);
  - e) the attendance on programmes (therapeutic, educational, vocational or others), treatment for the rehabilitation from addiction, training or other activities aimed at favouring social reintegration;
  - f) refraining from alcohol or other intoxicants (Poland);
  - g) performing community work (Czech Republic, Malta);
  - h) depositing a specified sum of money to the account of the court in order to help victims of crime (Czech Republic);
  - i) apologising to the aggrieved party and compensating for the damage done (Poland);
  - j) refraining from driving (Romania).

## 5.7 Length of the probationary period

In most countries, the probationary period is equal to the remaining unserved part of the prison sentence. However, some countries set a minimum period of one year (Hungary, Netherlands, Romania), two years (Poland) or three years in case of multiple repeat offenders or particularly serious offences (Poland). Others set a maximum probationary period of three years (Finland) or five years (Poland, Portugal). In the case of life imprisonment, the probationary period may vary between five years (Italy), ten years (Poland) and fifteen years (Hungary).

In the Czech Republic, the court sets a probationary period of up to three years for persons convicted of an offence, and from one year to seven years for those convicted of a crime. The length of the obligation to stay in one's residence, when imposed, may not exceed one year, even in the event of a longer probationary period.

In the Netherlands, the judge may extend the probationary period by up to two years, at the request of the public prosecutor.

## 5.8 Consequences of non-compliance

If during the probationary period the parolee does not comply with the supervision measures, fails to perform the obligations imposed or

commits a crime for which he/she is convicted, conditional release may be revoked, and the person has to serve the prison sentence. The conditions for revocation, however, may differ among countries.

In most countries, conditional release may be revoked following conviction for any offence committed during the probationary period. In Croatia, the judge will revoke the conditional release if the person commits one or more criminal offences for which they are sentenced to imprisonment of 1 year or longer. In Bulgaria, if the person commits an intentional crime, for which a punishment of imprisonment is envisaged, he/she must serve the unserved part of the prison sentence, while in case of negligent offences, the court may order that the prison sentence not be served or be served in whole or in part.

In Italy and the Netherlands, depending on the seriousness of the behaviour which led to the revocation of the measure and the period spent on parole, the competent authority may order the execution of all or part of the unserved sentence.

In Hungary and Poland, there are cases where revocation is mandatory and cases where it depends on the appreciation of the court. In Hungary, the court will terminate parole if the offender is sentenced to imprisonment for a criminal offence committed during the period of parole. The decision on the termination of parole is discretionary if the person is sentenced to a non-custodial sanction. In Poland, the penitentiary court is obliged to revoke conditional release if, during the probationary period, the person committed an intentional crime for which a penalty of imprisonment was imposed without conditional suspension of its execution, if the person has been convicted of a crime committed with violence or other serious offences, or if the person grossly violates the legal order during the probationary period. In addition, the penitentiary court may revoke conditional release if during the probationary period the person grossly violates the legal order or evades supervision. However, if these events occur after the sentenced person has been provided with a written reminder by the probation officer, the penitentiary court is obliged to revoke conditional release, unless there are special reasons that advise against it.

In other countries, there are no cases of mandatory revocation. When the parolee fails to perform the obligations imposed or commits a crime during the probationary period, the decision to revoke conditional release is at the discretion of the competent authority (Greece,

Portugal). In Portugal, for example, to decide on the revocation of conditional release, the judge has to assess whether the infringement of the rules has been gross or repeated, and in the case of the commission of a crime, whether such practice reveals that the purposes of the conditional release have not been achieved.

Apart from recall to prison, other solutions are provided in the event of non-compliance. In Estonia, if the parolee fails to comply with the conditions, the probation officer may issue a written notice, or the court may impose additional obligations or extend the term of supervision of conduct up to the end of the period of probation. In Portugal, if the conditions for revocation are not met, the court may either issue a warning, require guarantees of compliance with the obligations, impose new conditions or change the requirements of the reintegration plan.

In the event of revocation, the time spent on conditional release is not usually counted as prison time (Estonia, Greece, Hungary, Malta, Poland, Romania), except in Cyprus. In Ireland, the legislation is unclear about this issue, and in Portugal, the topic is controversial, with legal scholars advocating that the period during which the person was on parole should be considered as time served, while there is case law sustaining otherwise.

## 5.9 Other types of early release

In addition to parole, some legislation provides for other early release mechanisms, as well as forms of early release for persons in situations of vulnerability (see below, Part III).

In France, there is a mechanism for release under constraint when two-thirds of the sentence has been served and the remaining sentence does not exceed 5 years. Release under constraint may take the form of parole, home detention under electronic surveillance, external placement or day parole.

In Italy, *liberazione anticipata* is an alternative measure to imprisonment, which allows the deduction of 45 days for each 6-month period in which the individual has shown that he/she actively participates in his/her rehabilitation. In addition to reducing the length of the sentence to be served, such an institute can bring forward the time at

which parole is granted. In Cyprus, also, the sentence may be reduced if the person shows good behaviour and diligence, except if sentenced to life imprisonment.

In the Netherlands, towards the end of the term of the sentence, the inmate can be allowed to participate in a penitentiary programme, consisting of participation in extra-mural activities (e.g. work, education, vocational training) under supervision of the probation service, with or without electronic surveillance. A penitentiary programme takes one to two months, depending on the prison term to be served yet. The Minister of Legal Protection can grant participation to individuals with a prison term of minimum 6 months up to 1 year. Provided the programme is carried out correctly, the programme ends with the end of the prison term; if not, the participant is recalled to serve the rest of this term.

## Part II

# NON-CUSTODIAL SANCTIONS AND MEASURES IN PRACTICE

### **1. How non-custodial sanctions and measures work in practice**

It follows from the previous Part that within the EU Member States included in this study there are several non-custodial sanctions and measures available in the criminal justice systems to avoid a convicted person from being imprisoned, including fines, suspended sentences, community service, electronic monitoring, probation, among others. However, the availability of a diversity of alternatives to imprisonment does not necessarily indicate their practical use and effectiveness. In this section, how the use and implementation of non-custodial sanctions and measures work in practice will be assessed, along with how significant their use is and whether they are effective in achieving the purposes of punishment and reducing the use of imprisonment.

#### **1.1 Data on the application and implementation of non-custodial sanctions and measures**

To assess the use of non-custodial sanctions and measures in practice, two indicators were used.

Firstly, the data on the sentences imposed by the courts that were provided by the national reports from Bulgaria, Croatia, the Czech Republic, Cyprus, Finland, Germany, Hungary, Lithuania, Malta, the Netherlands, Poland and Portugal (Figure 1). The data refer to 2019, except for those from Poland and Cyprus (2018) and Germany (2017). These data refer to the proportion of the sentences imposed by the courts among all *convictions*, except for the data from the Nether-

lands, which also included 12% of acquittal, discharge from prosecution and conviction without sentencing (referred to as *other* in Figure 1), and from Finland, which included 0.7% of waiver of punishment.

The second indicator refers to the data on non-custodial sentences under the supervision of the probation service, but the method of collecting and reporting data on this subject is not uniform among the EU Member States. While some national reports provided data on the “stock” number of cases under the supervision of probation service, others provided data on the annual flow or the number of cases that started during the year. Therefore, it was not possible to compare the data on the same basis, but it was possible to provide an overview of the practice of probation services. It should be noted, however, that these data only refer to sentences involving supervision and do not serve as a quantitative reference for the total number of sentences being served. These data were provided by the national reports from Belgium, Denmark, Finland, France, Latvia, Lithuania, Netherlands, Romania, Portugal and Sweden.

In this study, both indicators were used and interpreted together with other relevant data on the prison and probation systems, which were mainly collected from the SPACE I and II reports of the Council of Europe.

## 1.2 Imprisonment

Among the countries from which information on sentences given by the courts was available, non-custodial sanctions are much more widely used than imprisonment.

According to the 2017-2019 statistics, unconditional custodial sentences accounted for 33% of all convictions imposed by the courts in Lithuania,<sup>17</sup> 20% in Poland, 18.2% in Croatia, 16.6% in the Netherlands, 16% in the Czech Republic,<sup>18</sup> 15.9% in Hungary,<sup>19</sup>

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<sup>17</sup> The data from Lithuania refer to 15.6% of arrest and 17.4% of fixed-term custodial sentence.

<sup>18</sup> The Czech Republic data for 2019 were collected from: CZECH REPUBLIC, Ministry of Justice, Statistical Yearbook of the Czech Republic - 2019. Available at: <https://www.czso.cz/csu/czso/29-justice-crime-accidents-vhzcl6qbmh>.

<sup>19</sup> The data from Hungary refer to 12% of imprisonment and 3.9% of confinement.

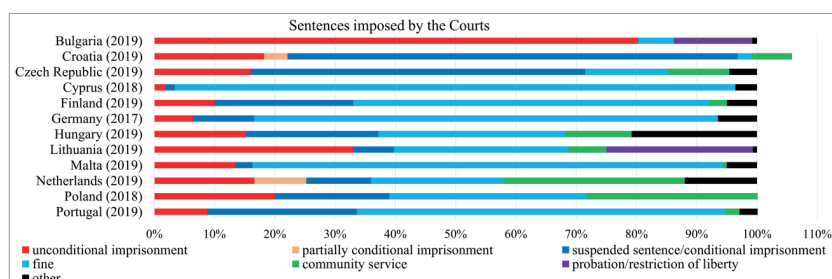


around 13% in Malta, 10% in Finland, 8.8% in Portugal, 6.4% in Germany and only 1.8% in Cyprus. As for the partially conditional imprisonment which is provided for in some legal systems, it represented 8.6% of the convictions in the Netherlands and 3.9% in Croatia.

In Belgium, Estonia and Romania, unconditional imprisonment also represents only a minor part of the sentences imposed by the courts. In Sweden, among all the sanctions and measures under the supervision of prison and probation service that started in 2020, prison sentences represented 35%.

Bulgaria was the only country that accounted for a higher proportion of imprisonment applied by the courts, 80.3% of all the sentences in 2019. However, considering that the Bulgarian National Statistical Institute does not publish data on *probationary sentences*, it is likely that a large proportion of that 80.3% of prison sentences were conditionally suspended, considering also that 97.5% of those did not exceed 3 years, the time-frame eligible for the application of a *probationary sentence*.<sup>20</sup>

**FIGURE 1** - Sentences imposed by the courts in EU Member States



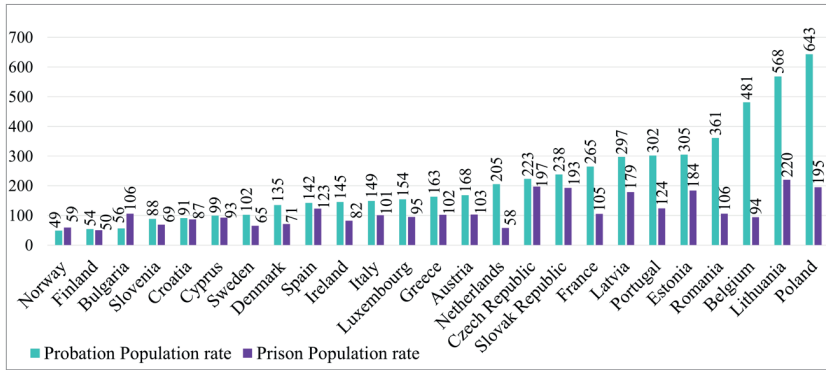
**Source:** EU Member States National Reports. Available at: <http://www.prialteur.pt>.

**Note:** For Croatia, the data exceeds 100%, since the percentage of imprisonment and fines includes those sentences replaced by community service. For Bulgaria, the data does not include suspended sentence, which is probably integrated under the unconditional imprisonment rates. For Poland, the penalty of *restriction of liberty* is included in this chart as community work.

The widespread use of non-custodial sentences in EU Member States can also be perceived by the probation population rates (per 100,000 inhabitants), which are higher than the prison population rates, except in Bulgaria.

<sup>20</sup> BULGARIA, National Statistical Institute. Available at: [https://infostat.nsi.bg/infostat/pages/reports/query.jsf?x\\_2=560](https://infostat.nsi.bg/infostat/pages/reports/query.jsf?x_2=560).

**FIGURE 2** - EU Member States probation and prison population rates on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO; Mélanie M. TIAGO, *Probation and Prisons in Europe, 2020: Key Findings of the SPACE reports*. Strasbourg: Council of Europe, 2021, 5.

**Note:** While most States count the number of *persons*, Belgium, Denmark, Luxembourg and Slovak Republic count the number of *cases* under supervision, and Romania *partially* uses the person as the counting unit.

Figure 2 shows that the highest probation population rates (over 300) are found in the same countries where the prison population rates are also high (over 200) or relatively high (over 100), which is the case of Lithuania (568.1 and 219.7, respectively) and Poland (643.3 and 195.3), for example. In the opposite end, the lowest probation and prison population rates combined can be found in Finland (53.5 and 49.9, respectively), Slovenia (87.8 and 69.1) and Croatia (90.6 and 87.1).

According to the authors of the SPACE reports, when both indicators are very high (which is mostly the case in Lithuania and Poland) there is a probability that non-custodial sanctions and measures are not used as alternatives to imprisonment but rather as supplementary sanctions, while in countries where both indicators are low (under 100) prison and probation sanctions are used more parsimoniously.<sup>21</sup>

<sup>21</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO; Mélanie M. TIAGO, *Probation and Prisons in Europe, 2020*, 8.

### 1.3 Non-custodial sanctions and measures

The available data clearly show that in the EU Member States the importance of non-custodial sanctions and measures, in practice, has been systematically increasing in recent years.

In Belgium, for example, there was an increase of 68% in the number of probationers between 2009 and 2015, and the number of individuals who need to serve an alternative sanction is in fact three times as high as the number of individuals who have to serve a prison sentence. In Lithuania, the number of probationers increased 74% in the period between 2011 and 2020 (from 18,641 probationers to 32,441) and, in Portugal, the number of non-custodial sentences and measures in execution on 31 December increased 148.3% (from 13,340 to 33,128) from 2007 to 2019.

The information provided on court practice (Figure 1) reveals that among the non-custodial sentences, suspended sentences and fines are the most frequently applied, accounting for 94.6% of all convictions in Cyprus, 87.1% in Germany, 86% in Portugal, 82% in Finland, 80.9% in Malta, 77% in Croatia, 69.2% in the Czech Republic and 51.8% in Poland. Also, in Estonia, the majority of sentences imposed by the courts are fines and suspended imprisonment. The exceptions are the Netherlands and Lithuania, where community service and imprisonment, respectively, are the main penalties applied by the courts. On the other hand, the application rates of other non-custodial sanctions are very low, almost insignificant in some countries.

#### 1.3.1 Fines

Within EU Member States, fines have developed as one of the most important alternatives to imprisonment, provided as a reference sanction in all countries included in this study except Hungary. In court practice, a fine is the most commonly used sentence in Cyprus (93% of all convictions), Malta (78%), Germany (76.9%) Portugal (61.2%), Finland (59%) and Poland (32.8%). In Italy, in 2012, 99% of the sentences by the justices of peace applied a pecuniary penalty.

In contrast, in Croatia and Bulgaria, a fine was applied in less than 10% of convictions in 2019 (2.3% and 5.9%, respectively). According to the Croatian national expert, it can be assumed that fines are

rarely imposed due to the relatively poor financial situation of most convicted individuals.

In Hungary, a fine represented 31% of all the sanctions imposed by the courts in 2019<sup>22</sup>, but despite its wide application, in many cases, it cannot be effectively implemented in practice due to the financial situation of the defendant, and often it is not actually paid by the convict but by someone else, meaning a financial burden for the family.

In Germany, since the recording of criminal court statistics, in 1882, fines have risen from 22% of all convictions to 84%, in 2015, and it is considered a successful alternative to short-term imprisonment. In Poland, since 2013, the application of fines has been steadily increasing, which has been very positively assessed in the legal writings, but it was found that the average amount of the fine has also increased: from between 801 and 1,000 PLN, in the period 2015-2017, to 2,001 and 5,000 PLN, in 2018.

### 1.3.2 Probation and suspended/conditional sentences

The suspended sentence (also termed conditional imprisonment) is, along with the fine, the most important means of legal reaction in the criminal policy of the courts and constitutes the most widely applied penalty in Croatia (74.7%, 2019), the Czech Republic (55.5%, 2019) and Romania. In France, among the penalties and measures under the supervision of probation service in 2020, suspended sentences with probation accounted for nearly 70% of the sanctions carried out in an open environment (of a total of 175,367). In Romania, the suspended sentence under supervision accounted for 64.9%, and the postponement of penalty enforcement accounted for 29.5% of the stock number of probationers in 2020 (of a total of 67,700).

The high application rate of suspended sentences in Italy, according to the Italian experts, is explained by the tendency of “automatic application” based only on objective requirements laid down by law, without any assessment of the individual’s personality, thus ignoring the prognostic assessment of non-recidivism that should characterize the application of the penalty. In 2012, 43% (or 80,760 cases) of all the sentences imposed by ordinary judges were suspended, which

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<sup>22</sup> These data account for the total number of measures imposed by the court, including penalties and measures applied in combination with another type of sanction.

represented half of all prison sentences imposed (49.8%) and one-third of the financial sentences (36%). It was also observed that, in 98% of the cases, suspended sentence is not accompanied by the imposition of any kind of obligation beyond the prohibition against reoffending.

Lithuania and Malta<sup>23</sup> are the only countries where the suspended sentence was applied in less than 10% of the convictions (6.8% and 3%, respectively, 2019), and in Sweden conditional sentence with community supervision represented only 10.3% of the sentences under the supervision of probation service that started in 2020.

In Germany, the scope of suspended sentences was expanded considerably in the 1970s and 1980s, and over the years the probation service has successfully learned to work with more serious crimes and recidivist individuals. This has been recognised by the courts and thereby increased in the rate of suspended prison sentences involving probation from 30%, in 1954, to 70% of all prison sentences, in 2015. The legislative changes to ease the legal prerequisites for suspending prison sentences of between one and two years were a major success, and the ratio of suspended prison sentences among those increased from 10%, in 1975, to 74%, in 2015.

In Hungary, Lithuania and Poland, the application of suspended sentences has decreased in recent years – in Hungary, from 22% to 15% of sanctions imposed between 2013 and 2019; in Lithuania, from 21.2% to 6.8% of all penalties applied, from 2003 to 2020; and in Poland, from 51% of all penalties imposed, in 2015, to 19%, in 2018. In the same period, the application of fines and restriction of liberty, in Lithuania, increased from 17% and 8.8%, to 28.9% and 24.3%, respectively. For that reason, it is likely that in Lithuania the spread of other non-custodial sentences has become an alternative to suspended sentences rather than to imprisonment.

In jurisdictions where probation is provided for as a *reference* sanction, it is frequently applied by the Courts, accounting for 13% of the convictions in Bulgaria and 24.3% in Lithuania (where it is termed restriction of liberty). In Belgium, where the *alternative sentence of autonomous probation* was introduced in 2016, it represented only

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<sup>23</sup> As noted by the Maltese expert, the data on suspended sentences needs to be interpreted with caution, as part of this information was obtained from a search on the e-sentences online and might not represent all the sentences imposed in 2019.

1.7% of the probationers under the supervision of probation service on 31 January 2020.<sup>24</sup> In Sweden, the sentence of probation represented 23.3% of all the non-custodial sentences under supervision that started to be implemented in 2020 (16.5% probation, 4.4% probation with community supervision and 2.5% probation with a special treatment plan).

### 1.3.3 Community service

Community service is a multifaceted measure common to all EU Member States' legal systems, and, as was mentioned before, it can be provided for as a reference sanction, a replacement sanction, a probation measure, an ancillary penalty or even a substitutive penalty in case of fine default.

According to the provided data (Figure 1), community service was the most applied penalty in the Netherlands (30% of all court decisions in 2019) and the second most common sentence in Poland (28.3% of the convictions in 2018 applied the *restriction of liberty* which consists of community work but can also be imposed as a deduction of a part of the salary for social purposes). Also, in Belgium, community service was the most used non-custodial sentence in the period 2016-2019, applied every year to approximately 10,000 individuals. In all three countries, community service is provided as a main penalty, and in Lithuania it is also a reference sanction (i.e., a penal sanction prescribed in the legal provisions of criminal offences).

In the other countries, community service is not applied as much by the courts, accounting for, in 2019, 11% of all the sanctions imposed in Hungary<sup>25</sup> and 10.2% of all the convictions in the Czech Republic, 6.7% in Croatia, 6.3% in Lithuania, 3% in Finland, 2.3% in Portugal and around 0.7% in Malta. In Italy, the justices of peace have applied *lavoro di pubblica utilità* in only 0.2% of cases, in 2012, and the penalty of community service for drug addicts was applied only 100 times, in 2015, and 253 times between 1 January and 15 August 2021.

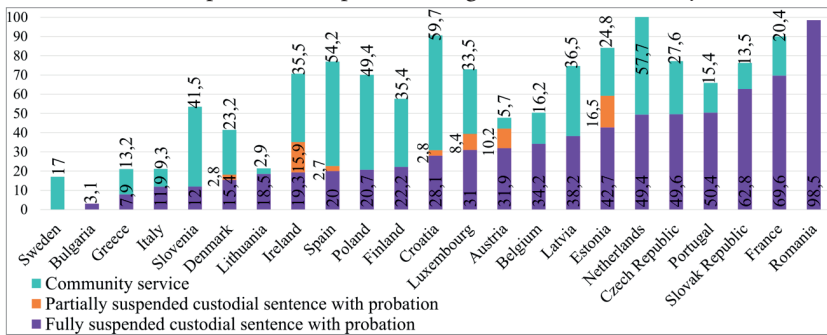
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<sup>24</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020 - Council of Europe Annual Penal Statistics: Persons under the supervision of Probation Agencies*. Strasbourg: Council of Europe, 2021, 32.

<sup>25</sup> This data accounts for the total number of measures imposed by the court (and not the total number of convictions), including penalties and measures applied in combination with another type of sanction.

According to the Italian experts, the very marginal role played by community service is partially explained by the fact that its application is subject to the request of the person sentenced, who may prefer other penalties. The exception is the community work in road traffic offences, which was applied to 13,355 individuals in 2015, and to 8,241 in 2021 (until 15 August). The high rate of application in road traffic offences is due to the fact that the positive performance of work is required for the restitution of the confiscated vehicle.

**FIGURE 3** - Percentage of suspended sentence and community service under the supervision of probation agencies on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 32-33.

**Notes:** (i) These data include also forms of supervision before the sentence;

- (ii) The counting unit is the *person* (except for Denmark where counting unit is *cases*), but persons can be counted in more than one subcategory, which explain why in some countries the total percentage is over 100%;
- (iii) In Belgium, the database does not allow the distinction between fully and partially suspended sentence with probation;
- (iv) In Finland, other 4.1% of probationers (not mentioned on the chart) were serving mixed sanctions or measures that consisted on conditional prison sentence combined with community service;
- (v) No data available on Cyprus, Germany, Hungary and Malta.

In 2020, most of the probationers under the supervision of probation agencies were serving suspended sentences or community service, which represented together more than 90% of the probationers in Romania, France, the Netherlands and Croatia, and more than 40% in most other countries, except for Sweden, Bulgaria, Greece, Italy and Lithuania (Figure 3).

For some experts (e.g., Greece and Hungary), community service is the most appropriate and promising community sanction for the prevention of reoffending and the promotion of social inclusion, as it contributes to the rehabilitative, retributive and restorative aims of punishment). In Poland, within the framework of community work,

over 60,000 hours of work in cleaning, maintenance, repair and construction are performed every year, which is considered by the Polish expert as a benefit to the institutions and the local community.

#### 1.3.4 Electronic monitoring

In most EU Member States, electronic monitoring is a relatively recent penal measure that can be provided as an autonomous measure or a surveillance instrument for another non-custodial sanction or measure.

Its application rate is very low in Portugal (1.1% of the convictions, applied in the form of *home detention with electronic monitoring*), Belgium (applied in 41 convictions in 2019, and 51 in 2018) and Finland (the enforcement of only 180 monitoring sentences started in 2020). In contrast, in Denmark, approximately 2,500 persons per year get permission to serve electronic monitoring at home, and in Sweden, the implementation of 1,622 sentences of intensive supervision with electronic monitoring started in 2020.

According to the Finnish expert, in the Nordic countries where the competent authority to grant electronic monitoring is the prison administration (as is the case in Denmark and Sweden), this measure is more widely applied.

In Belgium, an explanation for the low use of electronic monitoring may be the relatively high cost of technological equipment and the equally high need for supervision. Also, in Italy, the alternative measure of home detention by means of electronic devices is used in a very limited number of cases, probably due to the administrative difficulties encountered in providing the tools and, more generally, the difficulties of the Italian criminal justice system in adapting to the use of modern technological tools. The lack of equipment in Italy was one of the main barriers to the wider application of the special form of home detention with electronic monitoring introduced in March 2020, aimed at reducing the prison population during the COVID-19 pandemic.

However, despite the low application rates, compared to other non-custodial sanctions, electronic monitoring has increased the most over the past years, in Belgium and Portugal. Between 2016 and 2017, it increased 7% in Belgium (including electronic monitoring in the context of provisional and conditional release, and alternative to pre-trial detention). In Portugal, since the legislative changes of 2017,



the number of electronic monitoring in execution on 31 December increased by 123.5%, from 1,088, in 2017, to 2,432, in 2020.

According to the SPACE II report, on 31 January 2020, individuals under electronic monitoring accounted for less than 10% of probationers in all the EU Member States that provided data.<sup>26</sup>

### 1.3.5 Other non-custodial sentences

Apart from fines, probation, suspended/conditional sentence, community service and electronic monitoring, the other non-custodial sentences are proportionally irrelevant, accounting altogether for less than 10% of the convictions in most countries (0.8% in Bulgaria, 3% in Portugal, 4.6% in the Czech Republic, 5% in Finland and Malta and 6.5% in Germany). These data include, for example, in Malta, 3.7% of probation orders and 1.2% of treatment orders; in the Czech Republic, 1.5% of deportation and 0.7% of prohibition of activities. In Germany, the warning with deferment of sentence accounted for only 1% of all convictions in 2015.

In Italy, supervised release (*libertà controllata*), semi-detention (*semidetenzione*) and home detention are almost irrelevant. In 2015, the latter two were applied 15 and 262 times, respectively (out of a total of 50,209 non-custodial sanctions and measures), and 3 and 268 times from 1 January to 15 August 2021. On 15 August 2021, there was 1 person on semi-detention and 97 on supervised release, compared to 8,252 convicts on substitution work in road traffic offences. In 2012, the justices of peace applied home detention in only 0.8% of cases.

### 1.3.6 Early release

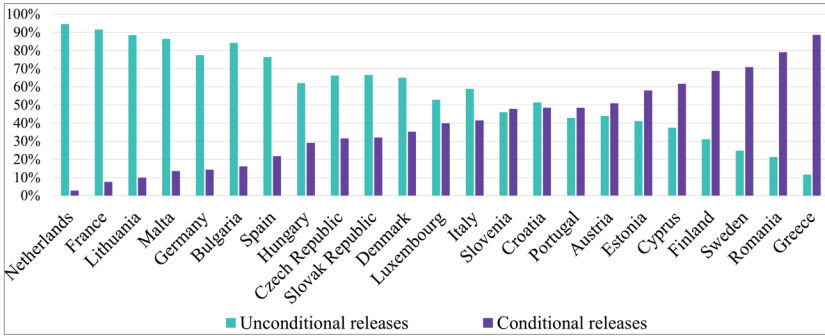
In practice, the application of conditional release of sentenced individuals differs considerably among EU Member States.

Overall, according to 2020 SPACE I and II reports, it can be stated that most sentenced individuals in prison are released at the end of the custodial sentence (Figure 4) and, in most States, parolees represent only a minor portion of the individuals under the supervision of probation services (less than 20%) – except in Greece, Finland, Sweden, Austria and the Czech Republic (Figure 5).

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<sup>26</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 32-33.

**FIGURE 4** - Releases of sentenced individuals from penal institutions in 2019



**Source:** Marcelo F. AEBI; Mélanie M. TIAGO, *SPACE I - 2020 - Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe, 2021, 105-106.

**FIGURE 5** - Percentage of persons on conditional release among probationers on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 32-33.

In Greece, where the time frame for parole is, as a rule, after two-fifths of the sentence, one of the lowest in the EU, conditional release is currently widely used in practice and, according to SPACE I, it represented approximately 88.5% of all releases of sentenced individuals (Figure 4). Among probationers subjected to various forms of penal measures in the community (including, though, pretrial measures and measures for juveniles), 44% were on conditional release (Figure 5), but only exceptionally they are supervised by the probation services - according to the probation officers interviewed for the Greek national report, the number of parolees they supervise ranges from zero to two.<sup>27</sup>

<sup>27</sup> For the purpose of the Greek report on non-custodial sanctions and measures, nine probation officers from seven different probation areas, two big urban centres and five regional services, were interviewed by the Greek researchers in September and October 2021.

Also, in Finland, conditional release is highly applied, representing 68.6% of all releases of convicted individuals in 2019 (Figure 4). Based on the significant use of supervised probationary freedom (granted by probation service) and the low application of monitoring sentences (granted by the courts), the Finnish expert observed that, in practice, the prison administration grants more non-custodial measures than the courts.

In the Portuguese prisons, until 2017, most convicted individuals were released after full completion of the prison sentence. From 2018, conditional release became the main cause of releases among convicted inmates, even though more than 40% of releases were still due to the full completion of the sentence.

On the other hand, in some Member States, conditional release is not very commonly used, as is the case of Hungary, Lithuania, Malta, the Netherlands and Poland, for example. However, the reasons for that differ from one country to another.

In Lithuania, there is a continuous decrease in the application rates of early release (from 36.5% of all releases, in 2012, to 22%, in 2019), since the courts tend to deny early release often due to the severity of the crime, general prevention or punitivist considerations. In Poland, 40.3% of the applications for conditional release were granted in 2007, while in 2020 only 26.3%. The amount of conditionally released individuals from prison also dropped from 26% of all releases of convicted individuals, in 2014, to 16%, in 2018.<sup>28</sup>

In Hungary, empirical research conducted in 2016 revealed that there was a dominant opinion among the 31 interviewed penitentiary judges that courts started to apply stricter rules themselves based on their own assessment and to grant release on parole less often than before. Since then, the legislative framework applicable to release on parole has also become significantly stricter, and data from SPACE I shows the decrease in conditional release from 41.5% (of all releases of convicted individuals), in 2015, to 29%, in 2019.

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<sup>28</sup> Marcelo F. AEBI; Mélanie M. TIAGO; Christine BURKHARDT, *SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2015*, Strasbourg: Council of Europe, 2016, 101-102; Marcelo F. AEBI, et al., *SPACE I - Council of Europe Annual Penal Statistics: Prison populations. Survey 2016*, Strasbourg: Council of Europe, 2017, 101-102; Marcelo F. AEBI; Mélanie M. TIAGO, *SPACE I - 2019 - Council of Europe Annual Penal Statistics: Prison populations*, Strasbourg: Council of Europe, 2021, 102-103.

In contrast, in the Netherlands, around 90% of the cases eligible for conditional release are granted. The very low rates of application (approximately 2% of all releases of convicted individuals) are due to the fact that only unconditional prison sentences longer than one year are eligible for conditional release, and 85% of all inmates serve sentences of less than six months.

In Malta, in turn, very few individuals apply for parole – in 2019, there were only 79 applications, and a number of these dropped their applications. Amongst practitioners, the sense is that most individuals in prison tend to prefer to wait to be released via *remission* rather than apply for parole, since *remission* is applied after serving two-thirds of the sentence, in the form of a pardon of one-third of the prison sentence without any supervision involved.

#### **1.4 Lack of statistical data**

In some Member States, the lack of data on the criminal justice system in general or specifically on non-custodial sanctions and measures was found to be an obstacle to assessing how sanctions work in practice. In Belgium, for example, little to no official data regarding the implementation of non-custodial sanctions in practice are available. In Bulgaria, the most reliable source (the National Statistics Institute) offers only partial information on penalties. In Estonia, there are no published data on the use of alternative sanctions, only narrow overviews of sentencing practice regarding a few criminal offences. Germany lacks statistical data on the use of early release, although a reform of the statistical database will make more data available. In Greece, the experts stated that statistical data from probation are not collected regularly and systematically, although probation services keep detailed records that contributed to the research.

In Cyprus, the absence of statistics from the criminal justice system is considered an obstacle to the effective implementation of measures and policies to tackle criminal behaviour. The Cypriot Ministry of Justice's Action Plan for the Prevention and Treatment of Crime 2019-2024 acknowledges this problem and states that detailed statistics and data on crime should be collected, processed and utilized across a range of public services to create a holistic framework which incorporates ex-

isting fragmented structures into anti-crime policies and human rights strategies. In accordance with the recommendations of international organizations, the Ministry's goal is to collect and record complaints and grievances by gender, age and other indicators (such as ethnicity, sexual orientation, gender identity, disability, etc.).

## **2. Supervision of the implementation of non-custodial sanctions and measures**

From a historical perspective, probation systems have different origins and backgrounds in each country, resulting in probation agencies with a wide variety of features and organisational structures. While some countries have a long tradition of the rehabilitation of convicted individuals, others have initiated reforms to set up agencies aimed at the social inclusion of convicted individuals only in the 21st century.

In the Netherlands, for example, probation has a history of almost 200 years, starting with the foundation of the Dutch Society for Moral Reform of Prisoners in 1823. In Portugal, the autonomous entity dedicated to promoting the reintegration of offenders (former Institute for Social Reintegration) was created in 1979, but the General Administration and Inspection of Prison Services created in 1919 was already responsible for the rehabilitation of inmates, following the correctionalist orientation adopted by the 1936 penitentiary law.

In the 1950s, probation services existed in countries such as Cyprus (1952), Malta (1957) and, for juveniles, Greece (for adults, it was introduced in 1991). Only more recently, probation agencies were also created in Estonia (1998), the Czech Republic (2001), Romania (2001-2002), Latvia (2003) and Croatia (2009-2010).

Depending on the country, the probation agency may be an autonomous entity (Czech Republic, Greece, Latvia, Malta), a service merged with the prison service (Croatia, Estonia, Portugal, Sweden) or subordinated to it (Lithuania), which is usually within the Ministry of Justice (Bulgaria, Latvia, Greece, Croatia, Portugal, Czech Republic, Finland, Greece, Lithuania), with exceptions such as in Cyprus, where the *Social Welfare Services* are part of the Ministry of Labour and Social Insurance, and in Malta, where it falls under the Ministry for Home Affairs and National Security. In Greece, since 2019, the probation

service has been under the Ministry of Justice, while the prison service operates within the Ministry for Citizens' Protection, which in the view of the Greek experts causes communication and coordination problems, not only reflecting in services' functions and operation but also influencing negatively their work with individuals subject to custodial and non-custodial forms of penal control.

With a peculiar structure, the Dutch probation service comprises three private organizations: Dutch Probation Agency, Salvation Army (probation branch) and Addiction Care – almost 100% funded by the Ministry of Justice and Security and for a small part by private donations. Though in name a private organisation, the probation service forms part of the criminal justice system and cooperates intensively with the police, Public Prosecution Service, prison system, Child Care and Protection Board, Victim Support and forensic psychiatry.

The great diversity of features of the probation service systems in the European Union makes it very difficult to describe all their tasks, activities and organisational structures within a single definition. However, the increasing exchange of ideas and good practices between European States and the efforts of the Council of Europe to harmonise laws on the matters of probation (through the Recommendation CM/Rec(2010)1, for example) have brought the European probation systems more in line with each other, allowing us to start from the definition of *probation agency* as: any body designated by law to implement the activities and interventions related to community sanctions and measures, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety.<sup>29</sup> As it is mentioned in the European Probation Rules, the work of a probation agency may also include providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions (Czech Republic, Latvia); and offering assistance to victims of crime (Belgium, Czech Republic).

The community sentences that are not combined with probationary supervision may not be under the responsibility of the probation

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<sup>29</sup> Appendix I to the Council of Europe's Recommendation CM/Rec (2010)1.

service (e.g. suspended sentence without supervision, in Germany), and the execution of fines is usually outside of the scope of probation agencies (Germany, Poland, Portugal).

In performing its functions, the probation service may have discretion and autonomy of decision to a greater or lesser degree. While in most EU countries the court is the only competent authority to grant, revoke or change the conditions of non-custodial sanctions and measures, in others the probation service has greater autonomy to decide on those issues. The Swedish prison and probation service, for example, may change or cancel a community service provision, if there are grounds to do so; decide that probation imposed by the court ceases earlier, provided that the supervision period is not less than one year; decide on the conditions of early release and whether electronic monitoring of parolees should be ordered. The Danish probation service decides on the granting and conditions of home detention with electronic monitoring and, usually, parole. In Latvia, the probation service has a wide margin of discretion regarding the implementation of community sentences, both concerning the content of the sanction and the obligations imposed (e.g. obligation to stay at home at certain hours).

## 2.1 Workload

The workload of a probation officer varies greatly from country to country, and within regions of the same country. Among the countries that provided data, Bulgaria was found to have the lowest workload, with an average of 15 convicted persons for each probation officer, although in some probation units the workload can reach 70 convicted per staff. In Portugal, there is a ratio of about 70 cases per officer, but in some situations, there are officers responsible for 140 cases. In France and Poland, probation officers work with an average of 120 cases, and in Romania, 185 cases.

In the Netherlands, a full-time probation officer with no other tasks than making reports is expected to make ten reports a month; a full-time probation officer with no other tasks than supervision has 15-20 individuals in the caseload; and a full-time probation officer with no other tasks than community service, has 100-110 individuals in his/her caseload.

In Greece, the regional differences are striking. While some probation officers have no offenders to supervise or are dealing with a more or less manageable number of cases (ranging from 20 to 50), other probation officers have workloads approximating or surpassing 100 cases.

## 2.2 Pre-sentence reports

Within the task of providing information to courts, pre-sentence reports are elaborated by probation services in all 27 EU Member States<sup>30</sup>, and play an important role (at least in theory) to support the judge (and sometimes the public prosecutor) in considering the appropriate penalty and deciding to what extent it would be appropriate to impose a non-custodial sentence, and what type of condition or supervision would be more effective. While in some countries probation officers may suggest to the court the appropriate measures and sanctions (e.g., Czech Republic, Hungary), in others the pre-sentence report does not recommend any type of penalty to be applied, leaving this matter to the discretion of the court (e.g., Poland).

To prepare a pre-sentence report, probation officers take into account the relevant aspect of the case and the person concerned, such as the risk and needs assessment (Czech Republic), the personality and living situation of the defendant (Belgium, Estonia, Poland), the use of intoxicating substances, the need for supervision and support in leading a life without crime (Finland), the criminal, social and family history (Malta) and the possible vulnerability of the individual and/or victims (Malta, Netherlands).

In some Member States, there is practical evidence that these reports are effective in promoting non-custodial sanctions (Belgium, Romania). In Finland, 58% of the pre-sentence reports issued in 2020 were in favour of imposing monitoring sentences. Even though the court is not bound by the statement of the probation officers, in practice they usually follow the report's advice when choosing the sanction (Finland). In the Netherlands, the pre-sentence report is a very characteristic and central element in the system of probation, and it is generally assumed that the number of prisoners is low due to the high

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<sup>30</sup> In addition to the national reports, see Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 125-126.



number of pre-sentence reports and the frequent use of community sanctions and measures. In Latvia, the pre-sentence report is also useful at the implementation stage for the probation service itself.

The request for pre-sentence reports by the courts is not mandatory, except in few cases such as for minors (Estonia, Latvia, Portugal), sex offences (Latvia) or for the imposition of community service orders (Malta). In some countries, pre-sentence reports are requested mostly when a suspect is charged with an offence that is likely to result in the imposition of a community sanction (Denmark, Finland, Netherlands). In other countries, the full potential of the pre-sentence report in promoting alternative sanctions is not exploited and, in practice, it is rarely requested by judges or prosecutors (Belgium, Bulgaria, Greece, Hungary). In Greece, for example, research for the years 2009-2013 concluded that just five cases of pre-sentence reports were registered among 11 probation services operating in the country (of the total of 14 probation services). In 2021, some of the Greek probation officers interviewed for this research mentioned that they have never been assigned to write a pre-sentence report.

In Hungary, according to the opinion of some probation officers, due to the lack of requests for the advisory support of the probation service, sentences imposing community service and fines are often not suitable for the personal circumstances and situation of the convicted individual, contributing for the significant number of non-compliance of those sentences.

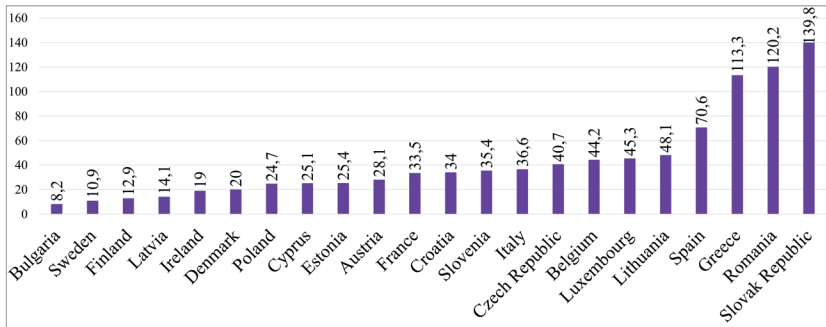
In the view of some Portuguese probation officers interviewed, it would be best if pre-sentence reports were requested after the decision on the defendant's guilt. However, this would imply a system of *césure*, where the hearing would have to be interrupted and then reopened for the sentencing phase. This is possible in some jurisdictions, such as Malta and Portugal, where the court can stay the procedures to ask the probation service to prepare a pre-sentence report after an accused is found guilty.

### 2.3 Staff

According to SPACE II report, on 31 January 2020, the ratio of probationers per staff in the EU ranged from 8.2 in Bulgaria to 139.8

in the Slovak Republic. However, these data do not refer to the case-load of the probation officers, as it considers the total number of staff, and not only the ones that work in direct contact with probationers. In Greece and Italy, for example, 47.4% and 61.9% of the staff, respectively, were in direct contact with the clients.<sup>31</sup>

**FIGURE 6** - Ratio of probationers per (one) staff member on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 116-117.

In most countries, disaggregated data on probation staff in terms of gender, ethnicity, nationality or representation of vulnerable or minority groups are not available, with few exceptions. In Belgium, Greece, Malta and Portugal, the majority of probation officers are women. In Malta, there are no foreign probation staff, likely as fluency in the Maltese language is a prerequisite to entering the service. In Denmark, Greece and Italy, probation officers are mainly social workers.

In Belgium, there is very little diversity among probation officers, and most of them were described as white female staff. On the one hand, most officers interviewed by the Belgian experts considered that more diversity would be desirable, not because it would influence the individual assessment in criminal cases, but because it could increase the legitimacy of justice and promote the general integration of vulnerable groups. However, a majority of the respondents also indicated that having received an appropriate education is more important than ethnicity, nationality, gender or other personal characteristics.

<sup>31</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 116-117.

## 2.4 Approach

In all countries included in this study, probationers are offered an individualised approach for rehabilitative purposes, with activities aimed at addressing needs and root causes of offending and at promoting reintegration, but this individual approach can be achieved to a greater or lesser extent. In the Dutch report, for instance, the probation work was termed as “highly individualised”, and just as in many countries the probation service was described as clearly oriented toward rehabilitation purposes (e.g., Czech Republic, Estonia, Portugal, Sweden). In Lithuania, in turn, the probation work was described as oriented more to monitoring and control than to rehabilitation, and in Poland the activities of probation officers related to the sanction of restriction of liberty were described as typically controlling in nature.

The probation supervision entails control and monitoring as well as personal support, and the aim of the probation service is to achieve a balance between care and control. In the Netherlands, the intensity and duration of the supervision depend on the risk of recidivism, so if the risk of re-offending decreases during supervision, the focus on supervision and control can be reduced, but guidance and assistance continue. The probation officers interviewed by the Greek experts stated that the proportion of care and control depends on several factors, including the offender’s personal and social circumstances, criminal record, reoffending, etc.

In Portugal, Romania and Sweden, for example, the probation services follow the principles of risk, needs and responsivity (the RNR model), according to which the level of treatment service provided to the offender should be proportional to the risk level and the criminogenic needs of the person. For high-risk individuals, intensive interventions are likely necessary to induce change (risk principle); the interventions should also target the individual needs of the offender for best results (need principle); and, finally, behavioural and cognitive-behavioural interventions are used in the treatment of offenders (responsivity principle), since these interventions are considered the most effective in reducing recidivism.

In many countries, an individual plan for the implementation of the sentence is elaborated by the probation service from the start of the execution of the sentence, with the collaboration of the client. Based

on the person's risk and criminogenic needs, on the circumstances of the crime and sometimes also on the victim's interests, the individual plan establishes the interventions of the probation service, the actions that the person must undertake in order to overcome his/her needs (e.g. attendance at treatment programmes), the aspects that he/she must work on to reduce the risk of re-offending, and the probation service's support and monitoring activities (e.g. Bulgaria, Czech Republic, Lithuania, Malta, Portugal, Sweden).

If determined in the judicial decision or the individual probation plan, the probationer may be subject to performing some activities or attending rehabilitation programmes, specially designed to address specific needs, that might be carried out in groups or individually (e.g. Bulgaria, Estonia, Portugal, Sweden). In Latvia, for example, there are behaviour treatment programmes (analysing causes and consequences of conduct, reducing risk factors), social rehabilitation programmes (aimed at reducing the risk of social exclusion and reoffending) and others, such as programmes for sex-offenders. In Portugal, there are currently programmes for driving offences and for domestic violence available for persons serving sentences in the community, and two pilot programmes are being developed, one for those sentenced for arson and the other for sex offences against children. In Sweden, high-risk clients are usually provided with treatment programmes based on Cognitive Behaviour Therapy (CBT program) as well as activities promoting reintegration into society.

Besides the various programmes that have been developed in Belgium to tackle specific criminal causes and promote reintegration, other successful examples in that country are the transition houses, aimed at preparing detainees for their reintegration into society.

In order to identify the individual's intervention needs, in some countries, a specialized assessment of those convicted is carried out by the probation service, by means of specific instruments and risk assessment tools. In the Netherlands, the majority of people who come into contact with the probation service undergo a so-called 'RISC analysis' to identify their risk and needs and what should be done to reduce the risk of reoffending and promote their reintegration. In Portugal, the assessment, planning and implementation procedures are based on internal guiding instruments based on the RNR model, which ensure technical intervention substantiation and standardization. In

Romania, where the probation service did not have a risk assessment tool, in 2014, an 8-year partnership with the Correctional Service of Canada was established to develop an offender risk assessment tool similar to those administered in Canada (called SERN - Scale for the Evaluation of Risk Needs), but specifically designed for the Romanian population.<sup>32</sup>

## 2.5 Participation of the community

In order to achieve its mission, the probation service may cooperate with other public or private institutions, NGOs and various entities in the community that can contribute to the process of social integration and crime prevention. The role played by the community in the implementation of non-custodial sentences is considered to be very relevant in most EU Member States, except for Lithuania, where NGOs and volunteers are not involved in the implementation of non-custodial sanctions, with rare exceptions.

In some cases, the probation office sets up a contract, protocol or agreement with public authorities, institutions and other legal entities whose activities are related to the probation services goals (Estonia, Italy, Portugal); in others, the network with the community depends on the initiative of each probation officer or service, and there is no centrally planned and guided strategy in place, which is mentioned by the probation officers as an obstacle to their work (Greece).

Such cooperation with civil society can be for providing community service places (Croatia, Czech Republic, Finland, Italy, Malta, the Netherlands, Poland, Portugal, Romania, Sweden), for carrying out specialized programmes or treatments for offenders (e.g., drug and alcohol treatment, in the Czech Republic, Greece, Malta and Portugal; psychological support, in Romania), for training and qualification (Bulgaria),

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<sup>32</sup> For more information about the development and delivery of a Scale for the Evaluation of Risk-Needs (SERN) in Romanian Probation Services, see: Larry MOTIUK, *Research report: The development and delivery of a scale for the evaluation of risk-needs (SERN) in Romanian Probation Services*, Canada: Correctional Service of Canada, 2017. Available at: <http://probatiune.just.ro/wp-content/uploads/2021/09/The-Development-and-Delivery-of-a-Scale-for-the-Evaluation-of-Risk-Needs-SERN-in-Romania.pdf>.

for the empowerment of prison and probation officers (Croatia), for providing support for victims (Czech Republic), for preparing detainees for release (the Netherlands), etc.

In some countries, probation officers also work with the collaboration of volunteers (e.g. Estonia). In this regard, the Portuguese probation service is part of the European partnership of the Project “CoP-Per - Cooperation to Promote volunteer participation and community awareness in the rehabilitation of offenders under the supervision of the probation service”, which aims at enhancing the participation of volunteers (which is already well-developed in the prison system) in the implementation of alternative sanctions and measures. In the Netherlands, there is an aspiration to create a network of volunteers in each probation region by 2023, for counselling and support of probationers.

## 2.6 Technology

Electronic monitoring is the main, and sometimes the only technological device used in most EU Member States in the implementation and supervising of non-custodial sanctions and measures. Malta is the only country where no technological tools, other than phone and computer, are being used by the probation service.

The supervision of electronically monitored individuals is usually the responsibility of the probation service, except in Greece, where the implementation of electronic monitoring is at a pilot stage, limited in specific areas of the country, and the supervision is carried out by a private security company.

In Croatia, the probation service ran a pilot project, in 2016, in cooperation with the Kingdom of Spain and the German Foundation for International Legal Cooperation (IRZ), with the aim of introducing electronic monitoring, among others. The pilot project was considered a success, and the application of electronic monitoring was set to begin in 2022, for three target groups: pre-trial detainees, convicts with short prison sentences of up to one year and convicts on conditional release.

In addition to the limited use of technological tools, in some countries the probation service also experiences a lack of appropriate equipment. In Greece, for example, some probation officers mentioned that

the electronic equipment available is insufficient and obsolete, adding that they are not even given mobile phones and sometimes they have to use their personal devices to perform their duties, paying the cost themselves. During the first wave of the COVID-19 pandemic, probation officers in France had to use their own devices to work, as there were not enough computers and equipment.

The Netherlands is the only country included in this study where technological instruments for the implementation of non-custodial sanctions and measures, other than electronic monitoring, have been developed. The Dutch probation service aims to organize its work more smartly and enable probationers to consult information (such as hours of community service and advisory reports) quickly and easily through better digital facilitation. For that purpose, four probation apps are already in use: *My Life*, *My Risks*, *My Contacts* and *Step by Step*. There is also a client portal by which each offender has access to his/her file. At every office of the probation service, the offender's identity can be checked by finger scan devices. In the future, developments are also to be aimed at virtual reality and artificial intelligence.

For the future, the use of technology by the probation service has the potential to play an important role in the implementation of non-custodial sanctions and measures and will certainly be more commonplace after the COVID-19 pandemic. The positive results of the use of online tools on a daily basis during the pandemic opened possibilities for considering their application in the development of new projects, activities and rehabilitation programmes (see Part IV).

### **3. Effectiveness of non-custodial sanctions in achieving the purposes of punishment and reducing the use of imprisonment**

Non-custodial sanctions have developed widely in recent years, especially with the aim of reducing the use of imprisonment and achieving the purposes of sentencing, such as social reintegration and reduction of recidivism. In general, the national experts and justice professionals questioned in the framework of this research showed confidence and optimism in the possibility of non-custodial sentences being adequate alternatives to imprisonment to fulfil the purposes of

punishment. In addition, the available offer of non-custodial sanctions in most countries seems sufficiently broad to allow, to a greater or lesser extent, an individualised approach suitable for social reintegration.

However, the available research and data in the EU Member States are not clear enough as to the effectiveness of non-custodial sanctions in achieving those goals in practice. Most countries have very limited or no statistical data on recidivism, either for imprisonment and for non-custodial sanctions. Besides, there are many difficulties in evaluating and measuring the effective social inclusion of individuals as a result of non-custodial sentences, due to the lack of indicators defined for this analysis, lack of resources for the task and lack of empirical research on the subject.

Considering these observations and the scarcity of information on this subject, for the purpose of this research the effectiveness of non-custodial sanctions will be assessed only in the light of recidivism rates, revocation rates and the impact on the use of imprisonment - without ignoring, however, that the effectiveness of sanctions should be assessed beyond recidivism reduction and taking into consideration other indicators of social and personal rehabilitation.

### **3.1 Recidivism rates**

Among nine countries that provided information concerning recidivism, eight indicated that recidivism rates were lower among individuals who served non-custodial sentences than among individuals who were in prison (Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands and Poland), while in the Czech Republic recidivism rates after imprisonment were slightly lower. The data provided, however, are not sufficient to draw clear conclusions, as some of them do not specify recidivism rates, the reference dates, the period of analysis or the number of cases analysed.

In Belgium, research showed that the recidivism rate after release from prison was 70.1%, and that individuals under electronic monitoring were less likely to reoffend up to 5 years after the measure than individuals who have served a prison sentence. In Denmark, data from 2016 revealed that the recidivism rates among prisoners were 30%, while among probationers were lower than 20%.



Although without precise data, other countries have also reported on recidivism rates. In Finland, statistical analyses from 2019 have shown lower recidivism rates of offenders who have served non-custodial sanctions, compared to prisoners. In France, recidivism rates after serving community service were found to be lower than after a short stay in prison. In Germany, the national report observed that replacing short-term imprisonment with fines resulted in a slight decrease in recidivism rates.

In Italy, a survey conducted in 2012 showed that individuals who had spent a longer period in an open prison presented lower recidivism rates than those who had spent a longer time in prison, with a difference of 9%. More recently, according to a study carried out in 2018, out of the 3,100 people serving alternative measures in the Emilia-Romagna region, there was a recidivism rate of 4.25%, while among those who have served their sentence in prison the recidivism rate reached 70%.

In the Netherlands, a study comparing only those sentenced to community service and those sentenced to short-term imprisonment (less than nine months), has shown that community service led to a reduction in recidivism of 46.8% measured over five years compared to rates of recidivism after short-term imprisonment.<sup>33</sup> Also, the *Recidivism Monitor*, a report of the Research and Documentation Centre of the Ministry of Justice and Security, concluded that the recidivism rate for convicted individuals who were placed under probation supervision is lower than that of individuals who were placed in prison.<sup>34</sup>

In Poland, different studies showed that recidivism rates were lower after the execution of the penalties of fines (28%, within five years after the execution of the penalty - data from 2008), restriction of liberty (25.15%, during the period of 5 years after the execution - data from 2010) and suspended sentence (between 22% and 33% - data from 2008) than after imprisonment (58.2%, within 3 years of release from prison - data from 2004, supplemented in 2008).

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<sup>33</sup> Hilde T. WERMINK, et al., «Comparing the effects of community service and short-term imprisonment on recidivism: a matched samples approach», *Journal of Experimental Criminology*, 6/3, 325-349.

<sup>34</sup> *Recidivism among offenders in the Netherlands: Report on the period 2006-2018*. Available at: [https://repository.wodc.nl/bitstream/handle/20.500.12832/228/Cahier\\_2019-10\\_Volledige\\_tekst\\_tcm28-396007.pdf?sequence=2&isAllowed=y](https://repository.wodc.nl/bitstream/handle/20.500.12832/228/Cahier_2019-10_Volledige_tekst_tcm28-396007.pdf?sequence=2&isAllowed=y).

In the Czech Republic, research conducted by the Institute of Criminology and Social Prevention on recidivism concluded that the largest share of people with a new entry in the register was among those sentenced conditionally with supervision (49.4%) and persons who have been sentenced to community service (48.8%), with the lower values reached by imprisonment (45%) and house arrest (46%). However, according to the Czech probation service, these differences were not statistically significant, and the type of sanction imposed does not have a significant impact on the recidivism.

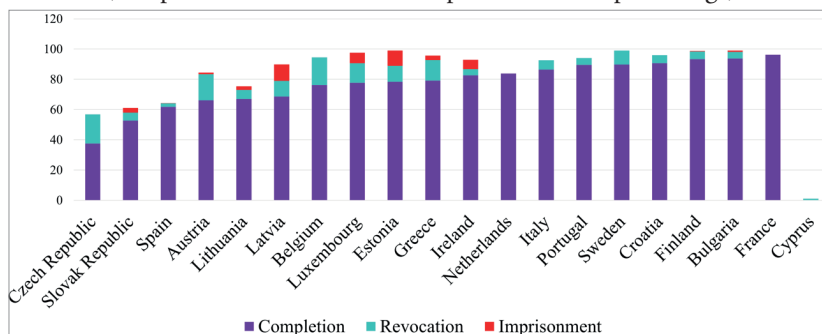
A comparison between recidivism rates in the case of imprisonment and in the case of non-custodial sentences, or even between different types of non-custodial sanctions, is very challenging and should always be read and interpreted with great caution. The different units of measurement, definitions of recidivism, research samples and follow-up periods, among other issues, make it very difficult to undertake a reliable comparison between imprisonment and alternative sanctions. Furthermore, as was mentioned by several experts, individuals who benefit from non-custodial sanctions are more likely to have committed less serious crimes than the ones in prison, and to have a different social and criminal profile (e.g., they are usually not recidivists), which means that the risk of recidivism is already lower from the outset – independently of the theoretical effectiveness of the imposed sanction.

### **3.2 Revocation rates**

The statistics from SPACE II on the flow of probationers that ceased to be under the supervision of probation agencies during the year 2019 show that, in most cases, non-custodial sentences are completed successfully.

In Figure 7, “revocation” refers to sanctions or measures that are revoked due to a violation of the conditions imposed, while “imprisonment” refers to the number of persons under supervision that are incarcerated following the commission of a new offence; when the incarceration is the consequence of the revocation of the sanction or measure for which the person is under probation, it is counted under “revocation”. The low revocation rates as opposed to the high rates of completion of the sentence in most countries are generally interpreted as a positive result of non-custodial sanctions.

**FIGURE 7** - Flow of probationers exiting probation during the year 2019 (completion, revocation and imprisonment, in percentage)



Source: Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 71.

### 3.3 The impact on the use of imprisonment

As was mentioned before, non-custodial sentences and measures have become increasingly more commonly used than custodial ones, and it is generally assumed that the application of non-custodial sanctions and measures resulted in a decrease in the use of imprisonment, or at least prevented the growth of the prison population. For example, the German experience demonstrates that fines and suspended sentences have contributed to a moderate sentencing practice with only a small number of unconditional sentences being imposed.

In the Netherlands, it is noted that the number of persons in prison is low due to the frequent use of community sanctions and measures implemented by the probation service. In 2008, the Dutch government started a programme to “optimize the use of conditional sentences” by improving the communication between the chain partners and aligning their work processes; by improving the quality of pre-sentence reports; by an immediate start of the implementation once the sentence is imposed; and by a swifter information of breaches by probation organisations to the prosecution service. Partly as a consequence of this programme, more community service sanctions and conditional sentences were applied, and the number of prison sentences decreased.

However, even when the use of non-custodial sanctions has a verifiable impact on the use of imprisonment, the net-widening phenomenon is not entirely excluded and, in some countries, the statistics show

that the increase in the number of probationers is not accompanied by a decrease in the prison population (e.g., Belgium, Italy, Portugal). In the first place, it must be observed that non-custodial sanctions and measures do not always replace imprisonment but also other non-custodial sanctions, and in many cases, they are imposed on individuals who would not end up in prison anyway (e.g. conditionally suspended sentences in Greece, electronic monitoring in Belgium that is mainly used for low-risk offenders, or restriction of liberty in Lithuania that is mainly applied as an alternative to suspended sentence). Secondly, the increase in the use of non-custodial sanctions might be related to an extension of the formal social control rather than to the replacement of imprisonment. In Lithuania, for example, the 2011 Law on the protection against domestic violence and the criminalization of driving under the influence of alcohol had a major impact on the increase of the population under probationary supervision. Finally, a negative side effect of the widening of alternative sentences was mentioned by some experts, which is the risk of judges applying harsher sentences based on the fact that early release is likely to apply (France) or increasing the length of the prison sentences, in their effort to assure that perpetrators of some crimes would not be eligible for suspension or conversion of their sentences (Greece).

In opposition to the net-widening trend, one could mention the Italian experience between 2010 and 2015, when some measures aimed at the release of individuals from prison were adopted after the declaration of a state of national emergency for prison overcrowding by the Government in 2010, and the *Torreggiani* pilot judgment of the European Court of Human Rights in 2013. In that period, the increase in the number of alternative measures was effectively followed by a decrease in the number of people in prison. However, from 2015 onwards, the net-widening trend began to reassert itself and the period between 2010 and 2015, according to the Italian experts, represented only a parenthesis within a general process of penal expansionism.

In Finland, as an attempt to prevent the net-widening phenomenon, the legislation states that community service and monitoring sentences can only be considered after the court has decided to impose an unconditional prison term.

### 3.4 Barriers to a wider use of alternatives to imprisonment

Each country faces specific problems and obstacles in the imposition and implementation of alternatives to imprisonment.

For example, in Germany, the increasing number of fine defaulters has become a big challenge for the criminal sanction system. In Greece, due to insufficient guidance and training of the judiciary on the subject of sentencing, the sentencing practice varies greatly from one probation area to another. The result is that some probation officers have no offenders to supervise while others have unbearable workloads surpassing one hundred cases per officer. In Malta, the fact that the law does not permit the replacement of a fine with an alternative was mentioned as the main barrier to a wider use of non-custodial sanctions. In Sweden, according to the prison and probation service, raising the current upper limit of 6 months of imprisonment as an eligibility requirement for intensive supervision with electronic monitoring would allow more people to serve their sentence outside prison.

Moreover, some common barriers among EU Member States have also been identified. The lack of awareness of the population in general, but also by the judges, prosecutors and politicians, was mentioned by many experts as an obstacle to a wider application of alternatives to imprisonment. Non-custodial sentences are often seen as “soft” penalties (Malta) and there is a certain perception of impunity when they are applied (Belgium). Besides, the need to raise awareness of the advantages of non-custodial sanctions and the disadvantages of imprisonment is felt mostly in countries where community-based sanctions do not have a long-standing tradition in the criminal justice system (e.g. Greece, Lithuania, Poland). The absence of research and data on recidivism and effectiveness of non-custodial sentences also contributes to the lack of social support and recognition of the importance of alternatives to custody.

The limited capacity of supervision by the probation service caused by insufficient resources and staff was also mentioned as a barrier to the widening of non-custodial sentences. The ratio between probation officers and persons under their supervision (that reaches 185 measures/sentences per officer, in Romania) is not suitable for an individualised support and does not allow for the probation service to support more individuals. Furthermore, the long waiting lists to serve non-custodial

sentences might prevent the judges from imposing alternative sanctions (Belgium).

Cooperation between probation services and different sectors of society could be improved in many different ways to promote non-custodial sentences. The lack of workplaces available for community service could be overcome by involving more organisations in providing work for individuals serving such a sentence (Belgium, Poland). The cooperation between prison and probation services could lead to a more successful reintegration of inmates into society (Sweden). Strengthening the articulation with civil society organisations and different sectors of public services would contribute to addressing the different needs of the clients (such as housing or employment), which are outside the scope of probation services (Portugal, Sweden).

In the view of the Hungarian experts, the imposition of community service is hindered by the fact that there is only a small range of organisations providing work and the municipalities that cooperate lack the necessary resources to provide individualised support. A further difficulty in the application of community service, also mentioned by the Hungarian experts, is the low number of requests by the courts for an opinion, report or risk assessment from the probation service, which may lead to ineffective measures, such as ordering community service to be performed by individuals who are unfit for the given job.

Considering also national statistics, it is clear that each country needs to address different barriers in order to promote the use of non-custodial sentences in a way that reduces the use of imprisonment. For instance, in Lithuania, Portugal and the Netherlands, the available data show remarkably different situations, requiring different solutions. In Lithuania, the increase in probation population rates by 176.3% (from 205.6, in 2009,<sup>35</sup> to 568.1, in 2020) was not followed by a relevant decrease in prison population rates, that only reduced 11.3% (from 247.6, in 2009,<sup>36</sup> to 219.7, in 2020). That is probably because the increase in the application of non-custodial sentences

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<sup>35</sup> Marcelo F. AEBI; Natalia DELGRANDE; Yann MARGUET, *SPACE II - Council of Europe Annual Penal Statistics - Non-Custodial Sanctions and Measures Served in 2009*, Strasbourg: Council of Europe, 2011, 13.

<sup>36</sup> Marcelo F. AEBI; Natalia DELGRANDE, *SPACE I - Council of Europe Annual Penal Statistics - 2009 Survey on Prison Populations*, Strasbourg: Council of Europe, 2011, 26.

was caused by the net-widening of the punitive system rather than by the replacement of imprisonment. Considering that the 2019 average length of imprisonment in Lithuania (9.2) is lower than the European average (11.0) and very close to the European median (8.5),<sup>37</sup> the main obstacle to overcoming the high prison population rate is not the length of the prison sentences but might be the high proportion of unconditional imprisonment applied by the courts - that represented 33% of all convictions in 2019, the highest rate among the countries that provided data -, and/or the low rates of conditional releases (in 2019, approximately 88% of sentenced individuals in prison were released at the end of the custodial sentence - Figure 4).

In Portugal, differently, unconditional prison sentence was imposed in only 8.8% of convictions in 2019, which may partially explain why the lowest rate of admissions in the EU is found in Portugal (49.4).<sup>38</sup> However, the prison population rate is relatively high (124.3), as is the prison density (98.9), compared with other EU Member States, which might be explained by the high average length of imprisonment (30.2), the highest in the EU and the second highest in Europe.<sup>39</sup> As such, in Portugal, the main obstacle is certainly not the lack of application of non-custodial penalties by the courts but rather the length of the prison sentences applied and the limited rates of early release (Figure 4).

Finally, in the Netherlands, the high probation population rate (204.9), combined with the second lowest prison population rate in the EU (58.5), show that non-custodial sentences are indeed used as alternatives to imprisonment, especially considering that prison rates decreased from around 98.8, in 2009,<sup>40</sup> to 58.5, in 2020. Furthermore, the low average length of imprisonment (3.9 in 2019)<sup>41</sup> also explains why the prison population rate is very low even though unconditional and partially conditional imprisonment accounted for 25.2% of all the sentences in 2019 - almost three times higher than the Portuguese rate - and early release is rarely applied.

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<sup>37</sup> Marcelo F. AEBI; Mélanie M. TIAGO, *Prisons and Prisoners in Europe 2020: Key Findings of the SPACE I report*, Strasbourg: Council of Europe, 2021, 13.

<sup>38</sup> Marcelo F. AEBI; Mélanie M. TIAGO, *Prisons and Prisoners in Europe 2020*, 12.

<sup>39</sup> Marcelo F. AEBI; Mélanie M. TIAGO, *Prisons and Prisoners in Europe 2020*, 2-13.

<sup>40</sup> Marcelo F. AEBI; Mélanie M. TIAGO, *SPACE I - 2019*, 40.

<sup>41</sup> Marcelo F. AEBI; Mélanie M. TIAGO, *Prisons and Prisoners in Europe 2020*, 13.

Regarding the wide range of non-custodial sanctions and measures available in the criminal justice systems of EU Member States, it is possible to state that the penalties provided as reference or main sanctions are generally more widely used than others (e.g., fines, in most countries included in this study; community service, in Belgium, Netherlands and Lithuania; probation, in Bulgaria; restriction of liberty, in Lithuania). However, the provision of non-custodial sanctions as reference sanctions does not necessarily indicate that they will be applied in a way that reduces incarceration, as the case of Lithuania seems to demonstrate.



## Part III

# APPLICATION OF NON-CUSTODIAL SANCTIONS AND MEASURES TO PERSONS IN SITUATIONS OF VULNERABILITY OR BELONGING TO MINORITY GROUPS

### **1. Non-custodial sanctions and measures applicable to persons in situations of vulnerability or belonging to minority groups**

This section looks at the availability of non-custodial sanctions, or adaptations thereof, specifically designed for particularly vulnerable persons (young adults, older persons, women, foreign nationals, persons with disabilities, including mental health conditions, ethnic minorities, Roma, LGBTIQ+ or other), or different requirements for giving a non-custodial alternative to those categories, or a preference for non-custodial sanctions regarding vulnerable groups and/or minorities. It also seeks to identify any legal barriers to vulnerable persons or minority groups accessing non-custodial sanctions.

The equality and non-discrimination principle enshrined in articles 20 and 21 of the Charter of Fundamental Rights of the European Union states that everyone is equal before the law and any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Thus, in all EU Member States, there is a legal obligation that the law must be equally and fairly applied to all.

In that sense, in general terms, the criminal law and criminal procedure legislation of EU countries does not discriminate against people

on the basis of individual attributes or characteristics, and there are no legal obstacles to the application of alternative measures for persons in vulnerable situations or belonging to minority groups.

In practice, however, available data concerning specific groups is very limited, which makes it difficult to ascertain whether non-custodial sanctions and measures are equally and fairly applied to all persons, regardless of their condition. On the one hand, in some countries, the collection of data related to race or ethnicity is not allowed (Portugal, Hungary). On the other hand, some probation services share the view that they should be more oriented toward a consideration of the individual needs and circumstances, in relation to the crime committed, rather than towards categories of special vulnerabilities. For that reason, data regarding vulnerable groups and/or minorities are not always considered important or useful. Furthermore, in most EU countries, there are no special non-custodial sanctions, specific programmes as part of a non-custodial sanction or adaptations of the existing ones designed for persons of specific minority groups, such as Roma, indigenous peoples, LGBTIQ+ persons or others.

Overall, despite the scarcity of data, it is possible to state that most EU countries' legal systems are responsive to some situations of vulnerability, in particular, of young adults, older persons, pregnant women, parents or guardians of children, and persons with health conditions. Taking into account the fact that those individuals may experience the negative effects of imprisonment in an aggravated way, and also the difficulty of offering the necessary care in the prison context, many legislations provide for special adaptations in the application and execution of sentences, in order to avoid imprisonment, mitigate the sentence, shorten prison time or adapt the implementation of community sanctions and measures.

### **1.1 Young adults**

In many countries, in addition to the special treatment provided for children and juveniles<sup>42</sup>, the vulnerable situation of young adults is

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<sup>42</sup> Considering that this comparative study is focused on non-custodial sanctions and measures provided for adults, information on children and juveniles was not included. However, some information about juvenile justice in the countries studied can be found in the national reports from Croatia, Cyprus, Czech Republic, Estonia, Hungary, Poland and Sweden.

also recognised by the criminal justice system, and specific provisions and sanctions are adapted to address their needs. However, the age of a person to be considered a young adult for these purposes differs from country to country (e.g., between 18-20 years old in Germany, 16-21 in Portugal, 17-18 in Poland).

Thus, the principle of last resort according to which a custodial sentence should not be imposed unless no other penalty or sanction is sufficient to fulfil the purposes of punishment is particularly applicable in the case of young adults.

Moreover, in some countries, age can also be considered a mitigating factor in the determination of the sentence.

In Portugal, it is expressly recognised by law that in the case of young persons (16-21 years old), the implementation of a prison sentence must in particular further social reintegration and foster a sense of responsibility through the development of specific activities and programmes in the areas of education, vocational guidance and training, acquisition of personal and social skills, and prevention and treatment of addictive behaviours.

In some jurisdictions (e.g., Germany, Hungary, Poland, Portugal, Sweden), the law provides for the possibility of applying the measures for juveniles to young adults. In Germany, for example, 18 to 20 years-old young adults can, and often are, sanctioned according to the Juvenile Criminal Law, if their crime is a typical juvenile offence or if their personal development is more equal to under-18 juveniles. In Poland (where the age of criminal majority is 17), if a person is convicted of an offence committed after reaching 17, but before the age of 18, the court can impose educational, therapeutic or corrective measures provided for juveniles instead of a criminal penalty, if the circumstances of the case and the personal conditions are favourable. In Sweden, a person under 21 years old may be sentenced to youth care, youth community service or youth supervision.

In other countries, some specific rehabilitation programmes can be delivered as part of the implementation of non-custodial sanctions and measures (Bulgaria, Portugal). In Portugal, the probation service developed a social reintegration response for young adults (named “ser. pro”), aimed at promoting a change of attitudes and beliefs associated with specific offences (theft, insults, resistance and coercion of officials and disobedience) and at promoting problem-solving skills. This

programme is applied to individuals aged 16 to 25, under a diversion measure (conditional suspension of proceedings), but there is the possibility of extending it to the stage of the implementation of sanctions. In Ireland, the Probation Service has a working group taking a holistic approach to young persons under probation supervision.

The supervision of sentenced young adults by the probation service is particularly valued. In the case of suspended sentences (Portugal, Poland) or other non-custodial sanctions and measures (e.g. conditional release, in Hungary), probationary supervision may be mandatory for young adults. In Poland, the probation period for young adults during the suspended sentence is from two to five years, longer than the standard period, which is from one to three years.

## 1.2 Older persons

Regarding older persons and considering their vulnerable situation, alternative measures and special forms of early release are provided in some countries, to avoid their imprisonment or reduce their time in prison.

In Portugal, the Code governing the implementation of prison sentences states that implementation must respect the specific needs of persons of 65 years of age or older and their state of health and autonomy, by guaranteeing all necessary assistance in the activities of daily life, as well as by ensuring accommodation, security, activities and programmes that are especially suitable.

For individuals over 70 years old serving imprisonment, the implementation of the custodial sentence can be modified to be served at home or a health care institution, with or without electronic monitoring, regardless of the length of the sentence to be served (Cyprus, Greece, Italy and Portugal). This measure can be applied for the remaining time of the prison sentence (anticipating the release), or at the time of sentencing (avoiding imprisonment).

In some cases, there are additional requirements for granting home detention, apart from advanced age. In Cyprus, it is not applicable for sex crimes or drug trafficking; in Italy, it cannot be applied if the person has been declared a habitual or professional criminal or convicted as a recidivist; in Portugal, their state of physical or mental health or

degree of autonomy has to be incompatible with living in a prison or affect their ability to understand the meaning of the sentence.

In Greece, home detention is also combined with probation supervision and/or therapeutic programmes. In Denmark and Portugal, inmates of advanced age can also be placed in health or social care facilities.

In France, parole can be granted for inmates over 70 years old, regardless of the time of the sentence served in prison, provided that the person is reintegrated, in particular if he/she receives appropriate care or accommodation outside the prison, except in the event of a serious risk of re-offending or if such release is likely to cause a serious disturbance of public order. In Romania, for inmates 60 years old or over, conditional release may be granted after serving half (instead of two-thirds) of the sentence in case of sentences up to 10 years, or after two-thirds (instead of three-quarters) in case of imprisonment over ten years.

### **1.3 Parents or pregnant women**

In order to protect the best interest of the child and the health of pregnant women, there are some special measures providing for more favourable treatment for parents, guardians of children and pregnant women.

In Cyprus, mothers are not subject to imprisonment or detention except in special circumstances, when the offence is committed with violence and the person poses an immediate and continuing danger to society. However, the law does not benefit fathers or guardians in general, only mothers.

In France, when the parents of a child under 10 years old are released early, a probationary period is not required. However, other requirements apply: the sentence imposed or remaining to be served must be up to 4 years, and the convicted person must not be considered dangerous to children. Conditional release is thus excluded in the case of persons convicted of offences against children. Finally, the convicted person must exercise parental authority over the child, and cohabitation with the child before incarceration is also required.

In other countries, the execution of the custodial sentence imposed on women who are child carriers (Greece) or mothers with children

under 10 years old (Italy) can be modified to be served at home detention, with or without electronic monitoring. While in Greece this measure can be applied regardless of the remaining period of the sentence to be served, in Italy it can be granted only after one-third of the sentence has been served (or fifteen years in the case of a life sentence), and if there is no real danger of further offences being committed and it is possible to restore cohabitation with the children.

In Ireland, the Probation Service has a working group taking a holistic response to women offenders.

Finally, deferment of the execution of the sentence may be ordered, in Estonia, for pregnant women and mothers of children under three years old. In Italy, the deferment of the sentence may be applied to mothers of children under three years old, but it is obligatory, for pregnant women and women with children under one year old.

#### **1.4 Persons with health conditions**

In most European countries, taking into consideration the fact that imprisonment can aggravate the health condition of those imprisoned, and that prison facilities usually do not provide the most adequate health care, special provisions are specifically designed for the application and implementation of sentences imposed on persons with health conditions (either physical or mental, or drug addiction), to ensure their adequate care and treatment or to avoid imprisonment.

The only non-custodial sanction specifically provided for persons in a situation of vulnerability was found in Italy and refers to community service for drug-addicted individuals who have been convicted of the possession and distribution of small quantities of drugs. Furthermore, there are many alternative measures and adaptations to the implementation of sanctions aimed at persons with health conditions.

The suspension or deferment of the execution of the custodial sentences is provided in several jurisdictions: in Estonia, if the convicted person suffers from a serious illness and it is impossible to provide medical treatment in the prison; in France, for convicted persons having a life-threatening pathology, persons whose health condition is permanently incompatible with continued detention and persons with

psychiatric disorders (except those subjected to compulsory psychiatric care), irrespective of the nature of the sentence or the duration of the remaining sentence to be served; in Italy, followed by the imposition of home detention, to persons suffering from AIDS or a particularly serious illness as a result of which their state of health is incompatible with imprisonment; and in Portugal, if a convicted individual is diagnosed with a mental health illness after the commission of the crime and if the mental condition does not render him/her criminally dangerous. In Portugal, the person remains under the supervision of the probation service and the suspension shall include the imposition of injunctions necessary to prevent the danger of committing further crimes, as well as the duty to undergo appropriate outpatient treatment.

The alternative measure of probation (*affidamento in prova al servizio sociale*) is also provided in Italy for persons suffering from AIDS or serious immunodeficiency, as well as for drug and alcohol addicts.

Home detention can be granted to replace the execution of the custodial sentence in the case of sick persons or persons with disabilities (in Greece); persons suffering from AIDS or serious immunodeficiency, provided that they are in, or intend to enter into, a programme of treatment and care in appropriate operational units (in Italy); and persons who are bedridden or seriously ill (Cyprus). In Greece, particular conditions are applicable, such as probation supervision, electronic monitoring or therapeutic programmes. In Portugal, inmates with a serious and irreversible disease, or with a serious and permanent disability may request the judge to serve the rest of the sentence at home or in a health or social facility, with or without electronic surveillance.

As part of the implementation of non-custodial sanctions, specific programmes developed for persons with disabilities, mental health conditions (Bulgaria) and drug addiction (Greece) are applied by the probation service.

As for persons with mental health conditions, this group was pointed out by the Portuguese probation service as particularly vulnerable and as one of the most challenging groups when implementing community sanctions and measures. Therefore, a pilot project, in the scope of the “PRI Alt Eur” project, was specially designed to promote effective access to local mental health services for probationers in need of mental health care, through shared and concerted intervention

between probation service and mental health services. This pilot project will be implemented from April to November 2022.<sup>43</sup>

In the Netherlands, persons with mild intellectual disability serving non-custodial sentences are currently receiving special attention from the probation service and the whole criminal justice system. This category comprises people who have an IQ between 50 and 85, limited social adaptive behaviour in different areas of life, and whose disability arose before the age of 18. Guidelines have been developed on how best to adapt the existing instruments and skills to the specificities of this group.

Finally, special forms of early release are provided for situations of illness or family care (Denmark) and for drug addicted persons (Cyprus). In Cyprus, a person who is in an open prison and enrolled on a drug rehabilitation programme may be released under conditions determined by an evaluation and care committee, under electronic surveillance, for the period necessary to complete the rehabilitation programme.

## **2. How non-custodial sanctions and measures work in practice for persons in vulnerable situations or belonging to minority groups**

This section gathers statistical data on the use of non-custodial sanctions or adaptations thereof to vulnerable and/or minority groups. It also seeks to identify potential or actual bias in adjudicating cases for vulnerable persons or minority groups which affects their access to non-custodial sanctions.

### **2.1 Data on the application of non-custodial sanctions and measures**

As regards individuals in situations of special vulnerability, Council of Europe SPACE I and II reports provide data concerning minors/adults, women/men and foreigners/nationals. On 31 January 2020,

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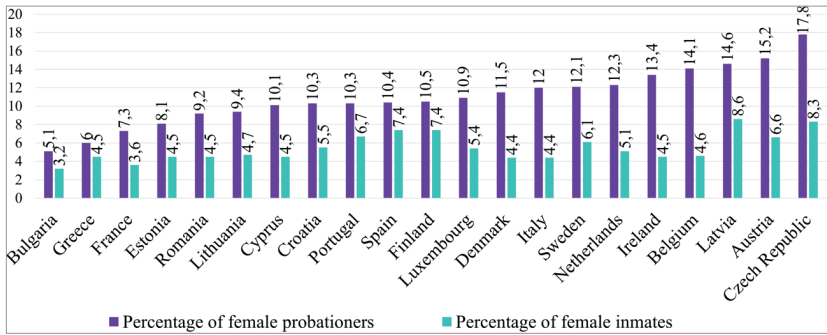
<sup>43</sup> For more information on the pilot project: <https://prialteur.pt/index.php/home/activities/pilot-project>.



the number of minors among individuals under the supervision of probation agencies represented only a small share of less than 6% in most EU countries that provided data, except in Cyprus (15.1%), the Netherlands (17.3%) and Austria (17.4%).<sup>44</sup>

Also according to SPACE, on 31 January 2020, the number of women among probationers was proportionally higher than women in prison (Figure 8), while the number of foreign nationals was proportionally higher among inmates than among probationers (Figure 9) - a pattern that is also found in previous years. The SPACE II report

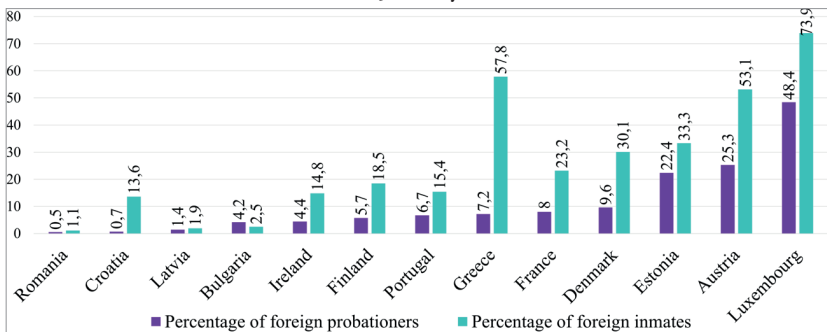
**FIGURE 8.** Percentage of female probationers and inmates on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 103-104.

**Note:** Probation agencies in Romania, Luxembourg, Denmark and Belgium do not use the person as the counting unit.

**FIGURE 9.** Percentage of foreign probationers and inmates on 31 January 2020



**Source:** Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 103-104.

<sup>44</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO, *SPACE II - 2020*, 103-104.

suggested that this discrepancy could be explained by the fact that probation is used for less serious offences and women are - in general - under-represented among offenders convicted for serious offences (namely violent offences), or by the fact that women remain the primary caregivers of children, receiving differential treatment for that reason<sup>45</sup>. On the other hand, as described below, foreign nationals may face increased obstacles to benefiting from non-custodial sentences.

Considering gender issues, the Irish Probation Service stated that all probation officers are trained in “gender-informed” practices and that there is a recognition of the specific challenges faced by women. To that end, the probation service uses a “holistic/coordinated and multi-agency response” to support women engaging with the service.

As regards individuals in other situations of special vulnerability (persons with disabilities, ethnic minorities, homeless persons, LGBTIQ+), most countries reported that no disaggregated data on the application of non-custodial sanctions and measures for specific vulnerable or minority groups are available (Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Poland, Sweden, Netherlands, France, Greece, Malta, Portugal and Romania). One reason for the absence of data on vulnerable individuals might be that some probation services (e.g., Portugal and Belgium) have the view that those groups of vulnerabilities mentioned do not or should not play a role in the granting of alternative sanctions and measures, due to the principles of non-discrimination and equality. Instead, the approach of the probation service is more oriented towards a consideration of the *individual needs* of each offender rather than towards categories of vulnerabilities.

The only country report that provided data related to ethnicity was Ireland, where the Irish-majority group comprised 66.9% of the individuals engaged with the probation service, followed by the Irish Travelling community (11.3%) and those “from any other white background” (6.7%). There was no ethnicity data available for 12.7% of probationers. Additionally, in the absence of published ethnicity data from the Irish Prison Service, it is difficult to ascertain whether certain minority ethnic groups are more or less likely to receive custodial or non-custodial sanctions.

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<sup>45</sup> Marcelo F. AEBI; Yuji Z. HASHIMOTO; Mélanie M. TIAGO, *Probation and Prisons in Europe*, 2020, 10.

In Greece, the probation officers interviewed stated that supervised individuals are often Roma people or individuals with drug-related issues, in need of tailored interventions, taking into account cultural particularities and rehabilitation needs. In Finland, it was reported that less than half of offenders serving community sanctions are employed.

Concerning alternative measures aimed at vulnerable categories in Italy (drug and alcohol addicts, parents of children, persons suffering from serious pathologies), the available data show that the indices of application of the *affidamento in prova al servizio sociale* reserved for those individuals are less than a quarter of the total applications of all the forms of the measure.

## **2.2 Barriers to persons in vulnerable situations or belonging to minority groups accessing non-custodial sanctions and measures**

At the legislative level, no legal obstacles to the application of alternative sanctions and measures for vulnerable or minority groups have been identified within the EU Member States' legal systems. In judicial practice, the scarcity of data on non-custodial sentences concerning individuals in situations of vulnerability does not allow a conclusion on a potential or actual bias on the part of sentencing authorities in adjudicating cases for vulnerable persons or minority groups which affects their access to non-custodial sanctions. Furthermore, most national reports did not provide information on this issue considering very few or no discussions on this matter (e.g. Greece, Malta, Netherlands, Poland, Romania).

However, even when there are no legal barriers, some legal conditions or requirements can hinder the possibility of application of non-custodial sanctions and measures for certain individuals in specific situations. For example, in some countries (e.g. Belgium, Czech Republic, Denmark, Finland, Portugal) one of the conditions for being granted home detention or electronic monitoring is having a permanent place of residence, which is not always possible to comply with for certain vulnerable groups such as persons in a situation of homelessness or unemployment, Roma people or foreign nationals. Research in Belgium has indicated that electronic monitoring is less

likely to be imposed on Roma persons because judges assume that they will not comply with the conditions.

For those with physical disabilities or older persons, there are obstacles to the implementation of community service as there may be difficulties in performing the available work positions.

The Portuguese report suggests that there might be barriers to foreign nationals in accessing non-custodial sanctions and measures, namely the lack of valid documents, irregular immigration status, difficulty in obtaining relevant information for the pre-sentencing report, etc. In Belgium, it was noted that the existing non-custodial sanctions are adapted to people who do not speak one of the national languages in too limited a way, and in Malta, concerns have been raised about the possibility of non-resident foreign nationals not being able to benefit from community sentences, but more commonly being sentenced to imprisonment or alternatives that do not require supervision, such as fine.

In Sweden, there is evidence pointing to persons who do not speak Swedish being sentenced to prison more often compared to Swedish-speaking clients. Moreover, the treatment programmes used in prison and probation are conducted in Swedish and sometimes in English, therefore, clients who neither speak Swedish nor English are hard to reach with treatment programs aimed at reducing recidivism.

Greek probation officers interviewed for the purpose of this research reported that some persons in vulnerable situations are further marginalized in the criminal justice system and that criminal justice authorities are hesitant to order community service for foreign nationals, due to the perceived difficulty in locating them or communicating with them. They also mentioned selective and negative discriminatory practices against Roma individuals by agencies where community service is offered or, in other cases, difficulties in matching community service activities with their interests and cultural particularities. Moreover, they stated that persons with health conditions and older persons are not given the proper community sanction or measures (e.g. they are ordered to do community service instead of an alternative such as home detention). According to the Greek experts, the problem is not that some individuals are excluded from community sanctions and measures, but that existing and imposed ones are not always suitable for them, and courts fail to individualise available options to individuals' needs.

## Part IV

# IMPACT OF THE COVID-19 PANDEMIC ON THE IMPOSITION AND IMPLEMENTATION OF NON-CUSTODIAL SANCTIONS AND MEASURES

The content of Part IV was the subject of a separate report, “The impact of the COVID-19 pandemic on non-custodial sanctions and measures”, prepared by the UC research team in the framework of the complementary project *Addressing gaps in the implementation and management of alternatives to imprisonment and post-release support during the COVID-19 global pandemic*, funded by the International Penal and Penitentiary Foundation (IPPF), implemented between March and December 2021, which focused on the particular impacts of the COVID-19 pandemic on the use and implementation of non-custodial sentences.

In the Member States covered by the study, the research sought to identify common problems and difficulties faced in the context of the COVID-19 pandemic and non-custodial sanctions and measures, compare the measures taken to deal with them and highlight examples of good practices. The report draws conclusions from the countries’ experiences, anticipates what lessons will be drawn from the measures and policies introduced during the pandemic and identifies recommendations for building on the lessons learned and making penal systems more resilient to future crises.

Among the main findings of the study, the following are highlighted:

- With regard to the work of probation services, EU Member States experts participating in the study conveyed that face-to-face intervention is vital to rehabilitation activities, and so

personal contact cannot be fully replaced. However, it can be beneficial to complement it by digital means of communication, as long as it does not eliminate or replace human contact and respects personal data protection regulations. Virtual communication can be used, for instance, when the client is sick or abroad; to increase contact of detainees with the outside world; to increase opportunities for distance learning for those who live in places where specific courses or programmes are not available.

- Also, the experience of remote working revealed that some tasks can be performed from home, sometimes more efficiently. In some countries, efforts are currently being made to keep remote working, but in the form of a mixed regime.
- The potential of new technologies to play an important role in the criminal justice system imposes the pressing need for adequate equipment and training of staff. The research revealed the lack of adequate equipment in some States and the need for probation staff to increase their knowledge and skills in working with individuals online.
- The pandemic brought to light underlying problems and deficiencies of prison and probation systems, such as overcrowding, a lack of preparation of individuals for release, insufficient probation staff and resources, waiting lists for the implementation of non-custodial sentences, socio-economic vulnerabilities of most persons in contact with the criminal justice system and the lack of sufficient responses to support them.
- Among non-custodial sentences, community service was the most impacted by the pandemic due to the impossibility to continue work for many different reasons. Diverse solutions were provided, such as the interruption of the execution of the sentence; the modification of the workplace or adaptation of the original tasks; the reduction of hours to be served; or the replacement of work with other obligations.
- With regard to persons in vulnerable situations, the research concluded that persons with health conditions and individuals in situations of socio-economic vulnerability, especially those unemployed or in a situation of homelessness, suffered in an increased manner the negative impacts of the pandemic on probation services.

- Concerning the prison population, while most Member States have adopted measures to avoid physical contact with the outside world by suspending visits, transfers, leaves, work and other activities, some Member States also decided to reduce the prison population by suspending the implementation of sentences of imprisonment or by releasing individuals through non-custodial alternatives, early release or pardon.
- One of the main lessons of the pandemic was that emergency laws in many countries allowed a significant reduction in prison populations without causing an outbreak of delinquency. The release of individuals from prison had positive impacts and showed that many persons could be serving their sentence in the community instead of in a prison.
- The possibility of serving prison sentences outside prison under electronic monitoring systems, the measures aimed at avoiding short prison sentences, and the development of non-custodial sanctions were highlighted as good practices of the pandemic that should be promoted also afterwards.
- A more detailed data collection by prison and probation services would be instrumental for improving knowledge and for measuring the impact of changes in law and practice of criminal sanctions.

The full report is available, in English and French, at: <http://www.prialteur.pt/index.php/home/impact-covid19>.

## Part V

# CONCLUSIONS AND PROSPECTS FOR THE FUTURE

This overview of the use and implementation of non-custodial sanctions and measures in 22 EU Member States has shown that alternatives to imprisonment have developed greatly in recent years, being provided for, depending on the jurisdiction, as main sanctions, replacement sanctions, ancillary sanctions or part of a probation sentence, and becoming more used in practice than imprisonment.

In summary, it is possible to conclude that all criminal sanctions systems of the Member States studied provide for a reasonable variety of alternatives to imprisonment, among which fines and suspended sentences (or conditional imprisonment) are the most frequently applied by courts, while suspended sentences and community service are the most common among the cases under the supervision of probation agencies.

As was described in the course of the study, each jurisdiction faces specific barriers in imposing and implementing non-custodial sanctions and measures, but it was possible to identify common problems in the EU context, such as the net-widening phenomenon; the lack of awareness of alternative sentences among the population in general, but also among judges, prosecutors and politicians; the long waiting lists to serve a community sentence and the limited capacity of supervision and support by the probation service due to insufficient resources and staff; and the shortage of workplaces available for community service.

In addition, the complexity of many legal systems of sentencing may add difficulties to their application and render the use of alternatives less effective.

Regarding individuals in situations of vulnerability or belonging to minorities, the lack of data on the specific problems they face when



erving community sentences is a problem shared by all the countries included in this study. Nevertheless, it was possible to verify that even when there are no legal barriers to the application of alternative sanctions or measures for specific persons, some legal conditions, requirements or practical matters can hinder the possibility of their application for individuals in specific situations, such as persons in a situation of homelessness or unemployment, Roma persons or foreign nationals. Also, the implementation of non-custodial sentences for persons in need of mental health care faces particular obstacles. Moreover, in most EU countries there are no special non-custodial sanctions, specific programmes as part of a non-custodial sanction or adaptations of the existing ones designed for persons belonging to specific minority groups.

The pandemic brought to light underlying problems and deficiencies of prison and probation systems, such as lack of sufficient preparation of individuals for liberty, insufficient probation staff and resources, waiting lists for implementing non-custodial sentences, socio-economic vulnerabilities of persons in contact with the criminal justice system and a lack of sufficient responses to support them. One of the main lessons of the pandemic was that emergency laws in many countries allowed for a significant reduction of prison populations without causing an outbreak of delinquency, indicating that many persons could be serving their sentence in the community instead of in a prison.

With a view to the future, this section focuses on examples of innovative initiatives, pilot projects or legal reforms under development in European Union Member States and concludes with some contributions to the future development of non-discriminatory alternatives to imprisonment, capable of promoting an effective reduction in the use of imprisonment.

## **1. Examples of ongoing innovative initiatives regarding alternatives to deprivation of liberty**

There are many examples of ongoing or recently developed innovative pilot projects regarding alternatives to imprisonment in the EU Member States, aimed at widening the possibilities of serving a sen-

tence in the community (either by creating new alternatives to imprisonment or by broadening the possibilities for the application of the existing ones), improving the implementation of community sanctions and measures, and the development of restorative justice.

Concerning the broadening of alternatives to imprisonment, an innovative measure currently being introduced in pilot projects is the electronic monitoring of conditionally released individuals (Greece), or of persons allowed to leave prison on prison leave (Malta) - *innovative* in the sense that they did not exist before in those countries. In Croatia, a pilot project of electronic monitoring was implemented in 2017, and due to the positive results, the application of electronic monitoring, targeted at pre-trial house arrest, short prison sentences of up to 1 year and conditional release, is set to begin in 2022 after all the necessary technical equipment is available.

In Germany, there were pilot projects to evaluate the proposal to use community service as a primary substitute (or surrogate) sanction in case of fine default (such as the Mecklenburg–Western Pomeranian project *Ausweg*). The results revealed that a considerable quantity of substitute prison terms could be avoided through optimising the organisational structure of rendering work facilities suitable for community service – involving the support of the aftercare services, during the period of work – and that community service can be successfully completed if workplaces are carefully selected according to the capacity of the clients and if intensive mentoring is provided. In that sense, a recent Dutch study carried out at the request of the government recommended imposing a community service order instead of substitutive detention in case of non-payment of fines (in 2019 and 2020, approximately 47,154 days of substitute detention for fine default were served in the Netherlands). In Cyprus, the National Plan for the Prevention and Combating of Crime 2019-2024 includes measures such as expanding and improving the community service programme, decriminalising offences and improving criminal justice statistics.

Regarding the improvement of the implementation of community sanctions and measures, there are innovative projects in some countries focusing on developing cooperation between agencies or with civil society.

In Croatia, the introduction of periodic meetings with probation and prison officers at the national and other levels, along with joint

training and the implementation of a pilot project for exchanges between probation and prison staff are being planned to further develop cooperation between the two services, especially in connection with preparation for conditional release and supervision of persons on conditional release. In Ireland, the probation service, in cooperation with the national police service and the prison service, developed a multi-agency approach to managing convicted individuals for targeted support and intervention to reduce crime in the relevant community, the so-called Joint Agency Response to Crime (JARC). Evaluation of JARC is positive in terms of reducing reoffending and the severity of re-offences, and the proposed recommendations for future direction include expansion, procedures for ongoing evaluation and extra resourcing. The Dutch experience of improving the communication between the chain partners and aligning their work processes, in 2008, was considered successful and, partly as a consequence of this programme, more community service sanctions and conditional sentences were applied.

In Portugal, the prison and probation service participates in a European project that aims at enhancing the participation of volunteers in the implementation of alternative sanctions and measures (*Project CoPPer - Cooperation to Promote volunteer participation and community awareness in the rehabilitation of offenders under the supervision of the probation service*), which is pending evaluation.

On the other hand, a wide variety of programmes are being developed to improve the responses of probation services provided to specific target groups, such as programmes aimed at young individuals (Malta), women (Malta), persons with mental health conditions (Ireland, the Netherlands, Portugal), persons with drug addiction (Greece) and persons serving sentences or measures in the community for arson and for sex offences against children (Portugal).

The probation service in Ireland and Portugal identified a significant number of clients with mental health conditions and the need for a multi-agency and multidisciplinary approach during the implementation of community sentences. In Ireland, this is taking place in the context of the establishment of a new cross-departmental task force on mental health which is due to publish a high-level implementation plan. In Portugal, a pilot project for dealing with individuals with mental health conditions serving non-custodial sentences and measures is

being developed, aimed at promoting effective access to local mental health services for probationers and promoting a shared and concerted intervention between probation services and mental health services. The pilot project is being developed under the framework of the PRI Alt Eur project and is expected to run from April to November 2022.

In the Czech Republic, the Probation and Mediation Service started the *Back to Life* project in 2020, intending to develop and increase the accessibility of standardized programmes by launching and operating the Programme Centres and the Probation Houses. The establishment of four Programme Centres will provide access to a range of rehabilitation programmes to individuals serving alternative sentences and conditional release, and the programmes will target essential areas of their lives. The Probation Houses will provide a resocialisation residential programme for persons conditionally released, enabling intensive work with them through officers specialized in probation, including securing compliance with obligations and restrictions imposed by the court. The first Probation House is due to start operating in 2022.

Restorative approaches are being introduced in some countries. In Bulgaria, a new project entitled “Promoting the development of restorative justice practices in criminal proceedings”, under the European Operational Program “Good Governance”, started in May 2021. In Greece, some restorative practices have been introduced in recent years for domestic violence cases, and they are expected to enrich the options of the penal system. In the Netherlands, existing pilots on restorative justice/mediation in all phases of the criminal procedure are being charted and evaluated by the Ministry of Justice. In the Czech Republic, the Probation and Mediation Service works with offenders as well as victims, adopting a restorative approach, aimed at repairing relationships disrupted by the offence.

As for legislative reforms regarding alternatives to imprisonment, the Italian criminal justice system will undergo important changes as a result of the “Cartabia reform”, approved by the Italian Parliament in September 2021. Among the many innovations, the reform includes a delegation to the Government – to be exercised within one year – to redesign the system of non-custodial sanctions with the aims of making prison sentences effectively the last resort, strengthening the mechanisms that replace prison sentences at the trial stage, and extending the scope of alternative sanctions to prison sentences not exceeding

4 years. The typology of alternative sanctions was also changed: *semidetenzione* and *libertà controllata* – which consistently had very low rates of application – have been abolished and *detenzione domiciliare* (home detention), *semilibertà* (the possibility of spending the day outside the prison to work or study), *lavoro di pubblica utilità* (community service) and financial penalties have been introduced with different application criteria. For sentences of up to 1 year, all four alternative sanctions may be applied; for sentences of 1 to 3 years, all those but the fine may apply; and for sentences of 3 to 4 years, only *detenzione domiciliare* and *semilibertà* may be applied. Unlike the current framework, the possibility of applying a suspended sentence to alternative sanctions was excluded, as this was evaluated as having contributed to the ineffectiveness of alternative sanctions.

## **2. The way forward – Prospects for the development of sanctions and measures in a way that promotes an effective reduction in the use of imprisonment**

Punishment of crimes is a matter particularly sensitive to populism, demands for more imprisonment and severe punishment.

In some European Member States, such as Poland, politicians tend to adopt a tough-on-crime approach to gain popularity. In Greece, a reform of the Penal Code of 2019 aimed at introducing a consistent, coherent and proportional system of sanctions (which included: abolition of obsolete crimes; decriminalisation of infractions, to be dealt with by administrative sanctions; introduction of community service as a main sentence; the expansion of pecuniary penalties based on the model of day-fine; abolition of recidivism sentencing rules due to their disproportionate results; and moderation of penal sanctions, aiming to restore the balance between their severity and the gravity of the offence) was, according to the Greek experts participating in the study, discredited immediately in a context of politically and mass media amplified claims for increased punishment. Consequently, a few months after it entered into force, it was amended in order to strengthen its supposedly deterrent potential, increasing the “real time” of some custodial sentences, restricting the use of community sentences, introducing mandatory life imprisonment for some crimes,

and creating more formal preconditions for conditional release eligibility.

This can only be responded to through non-custodial sentences that prove to be effective – and information about their effectiveness, in order to build public confidence.

The data stemming from the comparative study, together with the views provided by the participating experts in their national reports, offer valuable contributions for a perspective on the way forward to improve alternatives to deprivation of liberty.

## 2.1 The legal framework of the sanctions systems

In countries where short prison sentences still carry a relevant weight, the *ultima ratio* character of imprisonment should be strengthened, enhancing alternatives to short-term imprisonment. This may be achieved through the decriminalisation of minor offences, diversion mechanisms, provision of non-custodial sanctions as the main penalties for less serious offences, preference for serving the sentence in home detention whenever the conditions are met, and consequences for non-compliance other than conversion into imprisonment.

In jurisdictions with a predominance of medium-term prison sentences and countries with a high average duration of deprivation of liberty, the following possibilities should be considered: promoting the use of non-custodial sentences for criminal phenomena which predominantly give rise to such convictions; taking measures that, on the one hand, ensure that the sentences handed down by the courts are shorter and, on the other, guarantee a shorter period of time spent in deprivation of liberty. Possible courses of action could be: reviewing the minimum and maximum limits of the penal frames for specific offences; strengthening the effectiveness of prison treatment (so that the courts and the community can trust that the aims of the punishment can be sufficiently achieved in a shorter time of deprivation of liberty); enhancing the use of conditional release; considering the possibility of combined forms of punishment (although caution is needed on net-widening - it should not lead to imprisonment being applied when it would not otherwise be applied); the determination of a single joint punishment for concurrent offences; and mechanisms to ensure

that the serving of several prison sentences does not have a disproportionate and unnecessary total duration.

Also, in many jurisdictions, as penal systems evolve to gradually broaden the range of alternatives to imprisonment – creating new types of sanctions, widening the scope of existing sanctions – they also become complex. The complexity of many penal systems (e.g., where non-custodial sentences are prescribed some as reference sanctions, others as replacement and others as ancillary punishments; or some are replacement sentences and others are forms of execution of imprisonment; some can be imposed by the trial court and others can also be imposed by the judge responsible for the implementation of sentences; different requirements applying to each type of sentence) may constitute obstacles to their use and render them less effective. Once a sufficient variety of sanctions is provided, an attempt at systematization and simplification would be recommended.

#### *Decriminalisation and diversion*

- Decriminalisation of minor offences and enhancement of diversion mechanisms (including restorative justice mechanisms), with the involvement of civil society organisations and alternative conflict resolution entities, should be considered.

#### *Non-custodial sanctions in law*

The prevalence of imprisonment as a reference sanction and the way non-custodial sanctions are provided in law should be reconsidered. Some possibilities to consider would be:

- The provision of non-custodial sanctions as main sanctions
- The provision of non-custodial sanctions as reference sanctions for less serious offences
- Simplifying the legal requirements for the use of non-custodial sanctions (e.g., through a generic provision of the applicability of non-custodial sanctions for conducts punishable or punished with up to a certain length of imprisonment, or provided the required circumstances are met)
- A model for determining and implementing the penalty of a fine that ensures the effective capacity of the sentenced persons to comply, avoiding non-compliance (and consequent practi-

cal ineffectiveness of this penalty and lack of confidence in its ability to fulfil the purposes of the punishment) and conversion into imprisonment

- Enhancing the use of ancillary penalties (mainly penalties depriving of some rights or activities), as well as the confiscation of the proceeds of crime, as means to reduce the need for imprisonment
- The issue of alternatives to imprisonment for most serious crimes appears to remain a challenge. In most countries, alternatives to imprisonment are not provided for in the case of serious crimes. Jurisdictions that allow replacement of prison sentences longer than 5 years are only Lithuania (where the maximum limit that allows replacement is 6 years), the Netherlands (where imprisonment longer than 6 years cannot be replaced by community service if the offence resulted in serious damage to the victim's physical integrity), Malta (where it is 7 years), and Belgium (where in theory sentences up to 20 years are replaceable); a limit is not specified in some jurisdictions (Cyprus, Denmark, Sweden). In the Netherlands, despite the community service prohibition for serious crimes, in practice courts do impose community sentences in these cases, depending on the circumstances of the case, by combining this punishment with days of imprisonment, or imposing a fine instead of community service. This is a matter worthy of academic and criminal policy discussion. The forfeiture of property and assets could be considered for financial and other for-profit crimes. The combination of various types of sentences for an offence may also be a solution to be explored.

### *Conditional release*

- Conditional release, as a form of transition to liberty with supervision and support, should be always available in the case of medium and long prison sentences.
- Granting parole should not be regarded as an exceptional measure; it should be granted once legal requirements are met.
- Predictability of the moment of conditional release, through adequate planning of the implementation of the prison sentence and a good working relationship between prison and probation



services and the courts, would contribute to better preparation for release.

### *Consequences of breach of conditions*

- Non-compliance with the conditions of a non-custodial sentence or parole should not automatically lead to imprisonment. Other options should be available and decided on a case-by-case basis assessment of the significance of the non-compliance for the achievement of the purposes of the punishment.

## **2.2 Practical and organizational measures**

### *Training*

The following measures would be beneficial:

- Promoting the specialization of all professionals involved in sentencing, through training, knowledge-sharing and opportunities to bring together different professionals – judges, prosecutors, attorneys, probation officers, academics, health professionals, etc. – to harmonise concepts and procedures and to better understand each other's roles and needs.
- A close dialogue between courts and probation services would notably allow for more efficiency in requesting and preparing pre-sentence reports (ensuring they are made at the most appropriate procedural stage and that they gather the information adjusted to the needs of the case), a better choice of the type of sentence and a better adjustment of the rehabilitation programmes to individual needs.

### *Human resources*

- Ensuring an adequate ratio between probation officers and persons under their supervision could guarantee individualised support aiming at rehabilitation.

### *Availability of programmes*

- Structured programmes aimed at specific needs for those serving sentences in the community (in particular, suspended prison

- sentences and home detention), appropriate to the diversity of criminogenic factors and the various criminal phenomena, should be available;
- The development of rehabilitation programmes for individuals serving home detention, rather than mere imposition of the obligation to remain at home with electronic monitoring, could contribute to the effectiveness of the sentence but also its future wider application.

#### *Involvement of civil society organizations*

- Co-operative working between probation services and civil society organisations to provide support to persons serving non-custodial sentences and workplaces for the implementation of community service should be reinforced.

#### *Data collection and research*

- Empirical research on the effectiveness and practical operation of non-custodial sanctions would constitute important instruments for their improvement and to enhance the knowledge and confidence of the community and the courts in their ability to achieve the aims of punishment.
- Research could include surveys among persons having served non-custodial sanctions, to assess whether the support provided, as well as the programmes and activities offered during the implementation of the sentence, were suited to their needs, as well as the main difficulties experienced, and the effects of the sentence on their lives.
- Collecting and analysing data on the punishment of persons belonging to minorities or in situations of vulnerability would allow for the detection of any obstacles to the use of community sentences that cause a disproportionate application of imprisonment to those categories.

#### *Pre-sentence report*

- It is important to raise awareness of judges, prosecutors and probation officers on the importance of pre-sentence reports for the application of sentences suitable for personal needs and circumstances, thus avoiding non-compliance.

### *Sentencing guidelines*

Considering that the jurisdictions encompassed in the study do not adopt “sentencing guidelines”, apart from the legal criteria set out in the Penal Code, it is not possible to draw conclusions on their advantages or best practices.

## **2.3 Persons in vulnerable situations or belonging to minorities**

- The study found limited empirical data regarding persons belonging to minorities or disadvantaged groups serving non-custodial sanctions. However, experts agree that circumstances such as homelessness, unemployment or being a foreign national may in practice constitute barriers to the choice for a non-custodial penalty. An evidence-based approach would contribute to tackling possible discrimination.
- There seems to be no consensus regarding the design of specific measures for certain groups, as many probation services are reluctant to adopt this view, for reasons of equal treatment and individualization of intervention (which should consider the specific needs of each individual regardless of the “category” one belongs to). Whatever the perspective adopted, intervention should be adjusted to the needs and characteristics of each individual, there should be tools to deal with specific difficulties (such as cultural and language barriers) and resources for categories with special needs (such as people with mental health conditions). Collaboration with other entities, either public services or civil society organizations, with experience or expertise in dealing with certain social groups, to ensure the necessary responses, can be a useful resource. Training and awareness-raising initiatives for criminal justice professionals would also be important.

## **2.4 The role of technology**

- Technology has the potential to play an important role in the future of alternative sentences. It may enhance opportunities for

rehabilitation, such as distance learning when courses are not locally available, or participation in programmes or activities which are not available in the area or, for any reason, cannot be attended in person. In addition, communication technologies could be used to provide closer and more regular support from the probation officers. They could also contribute to modernising the way the justice system communicates with its clients.

- Sentences monitored by electronic surveillance (such as home detention) should not consist of mere control but should be oriented towards rehabilitation, through effective support and adequate programmes. Their regime should comply with the principles and rules set out by Recommendation (2014)<sup>4</sup> of the Committee of Ministers to Member States on Electronic Monitoring.
- The possibility of extending to 2 years the option of serving imprisonment under home detention with electronic monitoring should be considered. Currently, its maximum length varies between 6 months and 2 years in the Member States studied.
- Technology is to be used as a form of supplementing, not reducing or replacing, human support, which is a fundamental dimension of the social reintegration process.
- To ensure the appropriate use of new technologies in the improvement of non-custodial sentences, it would be useful to conduct research on the effectiveness of structured programmes carried out remotely or in a mixed regime.
- The use of electronic communication (e.g., e-mail, conference calls) within the probation service, between probation officers and clients, and between the probation service and the courts should be developed, as in many countries it proved to be very useful during the pandemic. It allows to save time, reduce bureaucracy, and enhance knowledge-sharing between colleagues. It is important to ensure that probation officers receive appropriate training for remote and online work with probationers while ensuring respect for their privacy.

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