

**AMBULANT SANCTIONS  
AS AN ALTERNATIVE TO  
IMPRISONMENT IN THE  
EUROPEAN UNION?**

The objective of the present study is to examine the scope of application of penalties without deprivation of liberty as compared to imprisonment as well as to identify promising practices of alternative criminal sanctioning in Belgium, Bulgaria, Germany, Spain and Lithuania. This study is a part of the “Re-Socialisation of Offenders in the European Union: Enhancing the Role of the Civil Society” project, implemented with the support of the European Commission, Directorate-General Justice.

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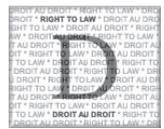
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## RESUME

To identify promising practices or practices in need of improvement with respect to alternative criminal sanctioning in the participating countries has turned out to be too difficult, especially when the intention is to go beyond the description of singular practices in one of the countries. At least some aspects in need of closer reflection could be identified. One important area for further research is to analyse the application of common human rights standards to different legal systems and legal cultures. Particularly when executing a conviction by one member state in another member state, the comparability of human rights is an issue of priority but remains no less difficult to achieve.

A precondition to this approach is the oftentimes still lacking acceptance of the fact that receiving ambulant sanctions is not just a privilege not to be sentenced to a custodial sanction, but implies interferences with the affected individuals' human rights. The lack of acknowledgement with respect to this fact is often connected to the continuously prevailing perception of ambulant sanctions as alternatives to imprisonment. As a matter of course, it is possible to substitute imprisonment by ambulant alternatives. It is also required to do so against the backdrop of international research results on sanctioning. With their results being more or less comparable with respect to recidivism, the principles of proportionality and of *primum non nocere* have to be taken into account. They demand for the implementation of the least intrusive intervention in case of comparable effects according to the existing state of knowledge under the circumstances of uncertainty.

To determine what exactly has to be considered a less intrusive sanction (than the other) may sometimes be difficult and the perception of professionals may differ from the perception of the affected individual. The latter, however, deserves much more attention, by means of research as well as by an enforcement of provisions on the necessity of consent of the individual under supervision as a pre-requisite for the sanction's application.

The constantly dominating disregard of these aspects is connected to the ignorance about the net-widening effect of sanctions. The latter is due to the fact that ambulant sanctions are still mostly regarded as "alternative sanctions", that is to say sanctions that are implemented in cases in which the deciding bodies might have opted for imprisonment otherwise. All of the existing research leads to the conclusion that this is not the case. Ambulant sanctions may be used as an alternative to

imprisonment as well, but certainly their wide application contributes to a climate of increasing punitivity and extending perceptions of (former) offenders as a risk to society. What is more, the popularity of risk-need assessments instead of an orientation towards a rehabilitative ideal like the Good Lives Model should be subject to a close examination by researchers. Concentrating on personal fulfilment and reintegration into society as a two-sided concept, like in the case of the latter, would be a method to enhance the role of civil society in the field of sanctioning. In order to do so, further research is needed to work out appropriate models like circles of support and accountability and restorative justice conferencing. With respect to such promising practices, it is even more important though what also applies to the more traditional forms of sanctioning: to carefully monitor the compliance with human right standards. While the consent of the affected individuals is inevitable, it has to be ensured that consent is not a mere expression of urge or the – oftentimes unjustified – hope to avoid a more intrusive sanction. As a first step to achieving that, procedural safeguards have to be created and the possibility of revocation needs to be abolished. Revocation adds imprisonment to the partly completed ambulant sanction which – in turn – leads to an even more intense sanctioning effect in the end. While the hope of the offenders and also of professionals to substitute imprisonment by ambulant sanctions may not be exploited to enforce net-widening, the perspective of replacement still has to be followed as a result from human rights standards as well as proper research. Both perspectives demand not only for alternatives to imprisonment but also for the introduction of alternatives to sanctioning as such. What is more, experiments with non-intervention should take place whenever possible.

# INTRODUCTION

The issue of imprisonment vs. alternative penalties has been debated in various European countries during the last decades, and ambulant sanctions have been heavily on the rise. Community sentences and other alternatives to imprisonment are regarded as modern instruments for the rehabilitation of offenders. They are considered to solve the problem of overcrowding, which many prisons are constantly confronted with, and to fulfil the purposes of sanctioning in a more humane and oftentimes more cost-saving way. Against this backdrop, it seems evident to look for promising ambulant alternatives in one country and recommend transferring them to others.

However, apart from methodological problems of comparison, when discussing ambulant sanctions as an alternative to imprisonment, it leaps to the eye that during the last decades the number of offenders under supervision has become many times higher than the number of prisoners in Europe and beyond. In this connection, Fergus McNeill refers to the example of Germany where the number of offenders under any kind of criminal justice supervision reached around triple that of prisoners in 2008 (225,000 as opposed to 73,000), and he found similar proportions in England and Wales in 2010 (241,500 as opposed to 83,500)<sup>1</sup> and in 2012/2013 (224,823 as opposed to 83,769).<sup>2</sup>

The numbers mentioned – as well the numbers used by the project at hand – are somehow problematic since they reflect only a certain part of the probation system and the system of criminal justice-related supervision. As a result, it is nearly impossible to prove any connection between the number of probationees and the number of prisoners. In Germany, only probationees under the supervision of a professional probation officer are included in the statistics. In 2004, however, in no more than approximately 30 per cent of all cases of a suspended sentence, a professional probation officer was appointed, and this applied only to about 70 per cent of all parolees.<sup>3</sup> Additionally, the number of orders of supervision of conduct, which has been massively on the rise during the last years (2008: 24,818 and 2012:

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<sup>1</sup> F. McNeill (2013), *Community Sanctions and European Penology*, in: T. Daems, D. van Zyl Smit & S. Snacken (eds.), *European Penology?*, Oxford and Portland (Oregon), pp. 170-192 (171).

<sup>2</sup> F. McNeill & K. Beyens (2013), *Introduction. Studying Mass Supervision*, in: F. McNeill & K. Beyens (eds.), *Offender Supervision in Europe*, pp. 1-18 (1).

<sup>3</sup> C. Morgenstern & A. Hecht (2011): *Rechtstatsachen zur Führungsaufsicht im kriminalpolitischen Kontext*, in: *Bewährungshilfe* Vol. 58, No. 2, pp. 177-195 (188).

33,381 – increase of about 35 percent),<sup>4</sup> is not taken into account in the statistics.<sup>5</sup> At the same time, the (declining) number of prisoners does not include the (growing) number of those in a forensic psychiatric hospital or forensic rehabilitation clinic (1999: 5,495; 2008: 8,943; 2012: 10,276).<sup>6</sup> As a result, apart from these remarks, it can still be established that in Germany, the number of parolees is – to a significant extent – higher than the number of prisoners.

With respect to the countries included in our project, this development is also well-illustrated by the case of Belgium where the prison rates experienced a slight increase in the years 2010 to 2012 while the number of offenders under probation or community service order were three to four times higher than the number of prisoners in those years.<sup>7</sup>

In the case of Bulgaria, the relation between the development of probation and the number of prisoners is less clear. The numbers given by the General Directorate “Execution of Penalties” (2011: 15,433 probationees) differ from those in Space II (2011: 12,055 probationees). First of all, it has to be noted that probation was introduced in Bulgaria in 2005 and thus, rising numbers of probationees are influenced by the duration of probation of three to five years (e.g. the probation period of the first probationees ended in 2008 at the earliest). By now, the number of probationees seems to be stagnant (SPACE II) or even still rising (taking into account the numbers by the General Directorate). Comparing the number of prisoners from 2004 (prior to the introduction of probation) with more recent data (2011: 11,137), it can be seen that the number of prisoners did not decline but appears to be stable. Hence, the number of prison cells may have more influence on the number of prisoners than the number of persons under probation. Lithuania, with more prisoners than probationees (both numbers rising at the same time), is an example in contradiction to the trend stated by McNeill. Thus, a change of the ratio of probationees to prisoners in favour of offenders under probation does not take place in all parts of Europe.

<sup>4</sup> P. Reckling (DBH-Fachverband), [www.dbh-online.de/fa/Zahlen-Laender\\_2012\\_DBH.pdf](http://www.dbh-online.de/fa/Zahlen-Laender_2012_DBH.pdf) (retrieved on 29 Sep 2014). There are no official published statistics on this in Germany.

<sup>5</sup> A special regulation in Germany is the so-called supervision of conduct (Führungsaufsicht). According to Section 68f Criminal Code, it is applied in the case of offenders who fully served a prison sentence of at least two years (or one year after the committal of a sexual offence) without parole. A further field of application are measures of betterment and security (Maßregeln der Besserung und Sicherung), where supervision of conduct is e.g. used by act of law in case the court orders the suspension of the measure's execution on probation or after the release of preventive detainees. Around 60 per cent of the supervision orders rest on Section 68f Criminal Code (fully served prison term), the remaining ones are connected with measures of betterment and security (K.H. Groß 2012, 'Vorbemerkung zu den §§ 68 ff.', in: von Heintschel-Heinegg, B. & Joecks, W. (eds.) *Münchener Kommentar zum Strafgesetzbuch*, Vol. 2, 2nd edition, Munich, marg. no. 6).

<sup>6</sup> Statistisches Bundesamt (2012), Fachserie 10 Reihe 4.1: Strafvollzug, Wiesbaden.

<sup>7</sup> Cf. Appendix I Table 1.

But even though matters are obviously more complicated than they may seem at first glance, the observation that ambulant supervision exceedingly outnumbers imprisonment in many European countries is nevertheless true. With respect to the considered countries, this can especially be confirmed for Belgium and Germany, while Bulgaria and Lithuania still have more people in prison than under ambulant supervision. But this is obviously not due to these countries' comparatively low rates of imprisonment. The contrary is the case, as can be shown at the example of Lithuania.

In Lithuania, imprisonment as the most frequent form of criminal punishment comprises approximately 30 per cent of all imposed penalties. As a result, Lithuanian penitentiaries daily accounted for 8,000 inmates since 2003. Since 2010, this number exceeded even 9,000 inmates. That amounts to 326 prisoners per 100,000 inhabitants. The prison population rate in Lithuania is 2 or 3 times higher compared to the average in the Western European states. At this moment, this number places Lithuania among three European states with the highest number of prisoners, following the Russian Federation – 470 (at the beginning of February 2014) and Belarus – 335 (at the beginning of October 2012).

The above-mentioned shows that some differences in trends do still exist with respect to the use of imprisonment and alternative sanctions. But in Europe as a whole, around two million people, for instance, have been incarcerated in 2007 while at the same time 3.5 million were subjected to some form of community supervision.<sup>8</sup> Even this very rough overview of data may raise doubts about the perspective of ambulant sanctions being used as a mere substitute for imprisonment.

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<sup>8</sup> McNeill & Beyens 2013, p. 2, following the survey by A. M. van Kalmthout & I. Durnescu (2008), *Probation in Europe*, Nijmegen.



# 1. AMBULANT OR NON-CUSTODIAL SANCTIONS

First of all, it is important to give a definition of what is meant by “ambulant sanctions”. The definition has to take two aspects into account: one is to make clear what is understood by a “sanction” in the framework of the study and the second is to draw a distinction between “ambulant” sanctions and sanctions with a deprivation of liberty. The terms “non-custodial” and “ambulant” will be used synonymously in the following.

## 1.1. Connection to the definition of criminality and criminal proceedings

At first sight, penal sanctions are primarily characterised by the fact that they represent state-ordered reactions to violations of penal norms. Such a definition<sup>9</sup> would possibly also cover measures that are not taken in the course of criminal proceedings, but are only linked to the commission of criminal offences or to a conviction due to the commission of such offences. In Germany, the expulsion<sup>10</sup> of third-country nationals<sup>11</sup> on grounds of delinquency serves as a practically significant example of the latter. It has been argued that expulsion acts as a penal sanction of its own which affects third-country nationals in addition to the penal law regulations that also apply to Germans and EU citizens.<sup>12</sup> However, the prevailing opinion in jurisprudence – in conformity with German court rulings and the case-law of the ECtHR – still regards expulsion as a purely preventive measure for the protection against threats to public safety, clearly distinguishable from a penal sanction. In order to avoid such problems, it could seem helpful to introduce a provision stipulating that only measures imposed in the course of criminal proceedings are included when speaking about sanctions. But when restricting the definition of sanctions in such a way, one has to keep in mind that measures used

<sup>9</sup> See e.g. Morgenstern 2002, p. 18.

<sup>10</sup> Sections 53 et seqq. of the Residence Act.

<sup>11</sup> For citizens of the EU, the regulations on expulsion are only applicable after it has been established that their right to free movement within the European Community does not exist anymore.

<sup>12</sup> C. Graebisch (1998), Ausweisung als Strafe oder: Das geteilte Dealerbild des Rechts, in: B. Paul & Henning Schmidt-Semisch (eds.), Drogendealer: Ansichten eines verrufenen Gewerbes, Freiburg im Breisgau, S. 109-123; B. Stephan (2001), Ausweisungsschutz und Verfassung, Berlin; C. Graebisch (2011), Ausweisung – Doppelbestrafung für Ausländer, in: Müller-Heidelberg et al. (eds.), Grundrechte-Report 2011, Berlin, pp. 201-205.

as an instrument of enforcing criminal law are left aside despite the fact that a similar measure may be regarded as a sanction in another member state and will fall within the scope of the definition.

If the definition at hand is supposed to go beyond a merely formal differentiation, as offered e.g. by the Framework Decisions on sanctions, it should contain criminological categories that relate to comparable legal instruments in one way or the other. The latter, however, brings along a multitude of other problems that naturally arise when comparing different legal systems and legal cultures.

First of all, there is no uniform European idea of the point at which a certain behaviour crosses the threshold of criminal liability and therefore entails penal sanctions as the *ultima ratio* of state action. What is more, all European countries handle the exclusion of minor offences (e.g. cases of minor theft) from criminal liability and (factual) prosecution quite differently.

In Lithuania, for example, the latter is enabled by the introduction of offences that merely constitute administrative transgressions (“administrative offences”). According to Lithuanian law, minor offences are not covered by penal law from the outset and therefore, they do not result in criminal sanctions of any sort.<sup>13</sup>

By contrast, German law considers theft as a criminal offence in any case, regardless of the value of the stolen goods or other general conditions. Nevertheless, the *German Criminal Code* provides for special circumstances (“Theft from relatives or persons living in the same home”) under which an offence will only be prosecuted upon request of the victim or if the prosecution service considers that prosecution is required because of special public interest (in cases of theft and unlawful appropriation of objects of minor value). Here, the decisive question is whether criminal prosecution takes place at all. If it does, the sanction system is fully available. Apart from that, German criminal law also knows the possibility of diversion in less serious cases of theft, that is to say a suspension of the criminal proceedings with or without certain conditions by either the prosecution service or the court.<sup>14</sup> Diversion is often applied in cases of first offenders but its applicability is by no means limited to them.

If the definition of sanctions was narrowed down by the criminal relevance of human actions, on the basis of which the state applies its measures, certain measures would therefore either have to be included in or excluded from the category of penal sanctions in the respective European country. However, the existing differences with regard to the criminalisation or decriminalisation of certain behaviour may not be disregarded as they are highly meaningful for the question

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<sup>13</sup> It should be noted that administrative transgressions include huge amount of offences. Many of them are established as crimes in other countries, for example, minor fraud without aggravating circumstances, minor hooliganism, minor offences against environment, minor traffic offences, etc. Administrative transgressions result in administrative sanctions and some of them can be quite severe (close to criminal sanctions), for example, administrative arrest.

<sup>14</sup> Sect. 153 ff. Code of Criminal Procedure.

of alternatives to liberty-depriving sanctions. If one does not take care of these aspects, sanctions or measures would simply be excluded from the analysis in different ways for the different states. This especially applies to the detection of cases in which ambulant sanctions are provided for in one Member State while they are not even covered by penal law in another Member State.

Moreover, decriminalising formerly punishable behaviour represents an approach to implement alternatives to imprisonment (but also to penal sanctioning in general) the effect of which should not be underestimated. Hence, commissions of two German federal states made specific suggestions for decriminalisation over two decades ago but they have not been realised yet. Since the 1980s, German criminal law has seen the introduction of a considerable number of facts constituting a criminal offence whereas substantive decriminalisation was quite common until the late 1970s. Nowadays, decriminalisation rather takes place on the procedural level, especially in the form of the suspension of criminal proceedings, and quite often rests on the agreement of the involved parties in the sense of plea bargaining. There is a certain tendency to choose such legally questionable approaches instead of real decriminalisation. The Federal Constitutional Court, however, regards these procedural methods as admissible, e.g. with regard to the possession of small amounts of cannabis.<sup>15</sup>

Taking another problematic path, the *German Code of Criminal Procedure* provides for so-called “procedures for penal orders” which dispense with the principle of orality and publicity – that has to be observed in regular criminal proceedings – and take place in the form of a judgement that is delivered by mail. In the case of a penal order, the defendant has to lodge an appeal within two weeks in order to initiate regular criminal proceedings. Especially those sections of the population which already suffer from marginalisation frequently fail to do so and thus end up with legally binding convictions. In this connection, only a proper substantive decriminalisation, e.g. in case of obtaining services by deception (fare evasion), would create a real alternative to imprisonment. The latter is particularly obvious in Germany where minor offences like fare evasion still lead to imprisonment in a considerable number of cases (mostly imprisonment in default of payment of fine).<sup>16</sup>

In the case of merely administrative consequences, as taking place after the process of decriminalisation, it is oftentimes difficult to clearly distinguish this kind of consequences from criminal sanctions and these distinctions also tend to be non-comparable in different legal systems and cultures. Thus, contrary to the intentional use of public transport without a ticket, a parking violation does not represent a criminal offence in Germany, but only an administrative offence (*Ordnungswidrigkeit*).

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<sup>15</sup> Federal Constitutional Court, decision of 9 March 1994 – 2 BvL 43/92 (amongst others).

<sup>16</sup> Example: In Hamburg, 4,721 persons newly entered the prison system in 2009. In this year, 623 persons in Hamburg were imprisoned for fare dodging, the vast majority of them were imprisoned because they were unable to pay a fine to which they were sentenced originally (Statistisches Bundesamt (2014), Bestand der Gefangenen und Verwahrten, Wiesbaden, p. 54, and Hamburg Parliament, Document 19/5418 (26-02-2010, p.2)).

The latter is punished with a monetary fine that seems quite similar to the fine described in the *Criminal Code* at first sight. Although default of payment may not be substituted by imprisonment like in the case of the penal fine, the *German Act on Regulatory Offences* (Gesetz über Ordnungswidrigkeiten) stipulates that coercive detention may be ordered if the regulatory fine or the assessed instalment thereof has not been paid. As a result, the only difference between these two forms of deprivation of liberty is their legal purpose: while imprisonment in default of paying a fine is meant to replace the payment, coercive detention is intended to enforce the payment. In Lithuania administrative transgressions result in administrative sanctions and some of them can be quite severe (close to criminal sanctions), for example, administrative arrest.

In spite of these commonalities, there are significant differences between penal law and the law on administrative offences, especially with regard to entries in the Federal Central Register (Bundeszentralregister<sup>17</sup>) which do not take place in case of administrative offences. Such an entry is disadvantageous to the convicted person, particularly in view of the fact that a court or the prosecution may hold it against the defendant in cases of repetition. Aside from that, listed convictions (except for one-time petty offences) appear in the police clearance certificate (Führungszeugnis) which may be required when applying for professional occupations. As illustrated by this example, it makes a noteworthy difference if certain offences fall under the category of penal law or the law on administrative offences, even though subsequent sanctions may be quite alike.

## 1.2. Ambulant sanctions as an alternative to imprisonment

### 1.2.1. Alternative sanctions

To describe alternatives to imprisonment in different countries, first means to clarify what is understood by these alternatives and how this description is supposed to be structured. This does not only apply to the definition of ‘ambulant sanctions’ but also to a common understanding what they are supposed to be an alternative for. If we speak about alternatives to imprisonment we imply a limitation to measures which are due to the accusation of having committed a crime. Thus, we exclude, for example, detention pending deportation and alternatives to this kind of detention, because it is not connected to criminal law. Included in this definition are alternatives to detention in a forensic psychiatric institution. But this could also be a matter of debate because in Germany, for instance, such a measure<sup>18</sup> may also be imposed after an acquittal if the latter is due to a lack of criminal

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<sup>17</sup> The Federal Central Register is a public register, managed by the Federal Office of Justice in Bonn, that lists penal convictions and resulting legal consequences, certain decisions of public administrations and courts, remarks on criminal incapacity, court observations on drug addiction and the prohibition to pursue a trade, and subsequent decisions on the change of (supplementary) penalties.

<sup>18</sup> According to sect. 63 Criminal Code.

responsibility. Even though alternatives to pre-trial-detention are a very important instrument for a reduction of imprisonment rates and it is often used as a quasi-sanction despite its legal purpose, we did not include remand detention in our project but were dealing with sanctions in the narrower sense only.

When speaking about sanctions, the establishment of guilt and a corresponding retributive purpose should not be decisive factors. The German measures of betterment and security (*Maßregeln der Besserung und Sicherung*), for example, represent penal sanctions although they are also applied in cases of criminal incapacity, solely fulfil preventive purposes and lack the retributive component. In order to include such legal instruments, the European Rules on “community sanctions and measures” also contain the latter as part of their definition of sanctions.

There is a broad overlapping of the term “community sanctions and measures”, as used by the Council of Europe in their respective rules, and the term “ambulant sanctions”. Community sanctions and measures aim at maintaining the offender in the community and involve some restrictions of liberty through the imposition of conditions and/or obligations<sup>19</sup> but no deprivation of liberty. In this definition, measures taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison are included. Monetary sanctions do not fall under the definition but any supervisory or controlling activity undertaken to secure their implementation does.<sup>20</sup> As opposed to this definition, we also had a look at fines, etc. because they are obviously a possible alternative to imprisonment. On the other hand, imprisonment is used as an alternative to a day fine if the money is uncollectable e.g. in Germany.

In the *Framework Decision* on the mutual recognition of – amongst others – probation decisions, “alternative measures” are explicitly mentioned and understood as sanctions other than a custodial sentence, a measure involving the deprivation of liberty or a financial penalty, imposing an obligation or instruction.<sup>21</sup> Alternative sanctions – in this sense – have been introduced in all EU Member States. However, experiences in terms of pre-conditions for their imposition, responsibilities of the convicts, scope of application etc. vary from country to country.

To call such sanctions “alternative”, solely because they are penal sanctions that do without the deprivation of liberty, would mean to perpetuate the predominance of liberty-depriving sanctions. They would still be considered to be ordered as a rule, whereas alternative sanctions would still be regarded as an exception. It is therefore more preferable to speak of “ambulant sanctions”. This is also important because of the existence of sanctions that are ordered in addition or subsequent to a prison

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<sup>19</sup> Appendix Recommendation No. R (92) 16 of the Committee of Ministers to member states on the European Rules on community sanctions and measures, in: Council of Europe (2002): *Improving the Implementation of the European Rules on Community Sanctions and Measures*, p. 86.

<sup>20</sup> Appendix Recommendation No. R (92) 16, p. 86.

<sup>21</sup> Council Framework Decision 2008/947/JHA of 27.11.2008, Art. 2 No. 4.

term that also fall under the scope of the definition of the above-mentioned Framework Decision. Alternative sanctions in this sense totally lack alternativity of any sort. A well-illustrating example of the latter is the supervision of conduct (Führungsaufsicht) following a fully served prison term according to Section 68 f of the *German Criminal Code*. Instead of being an alternative, this kind of sanction can even enhance the use of imprisonment as a violation of concomitant conditions is considered to be a crime of its own and is punishable with imprisonment according to German penal law.<sup>22</sup>

Hence, truly “alternative” sanctions may only be assumed as such if they actually replace the deprivation of liberty. While this may appear to be the case with all ambulant sanctions at first sight, this assumption proves to be incorrect upon closer examination. In a specific case, an ambulant sanction may very likely be ordered instead of another ambulant or even instead of no sanction at all, and not necessarily in lieu of imprisonment. If such an effect takes place in a large number of cases, it can be referred to as “net widening”. The latter may even occur if the legislator actually intended the sanction’s introduction to serve as a reduction of liberty-depriving penalties. In such cases, it is the legal practice that actively defies the legislative will.

### **1.2.2. Differentiating divergent ambulant sanctions**

Alternatives to imprisonment are often ambulant sanctions, i.e. the order of a sanction other than imprisonment or the change of a conviction to a prison term into something else than imprisonment. However, there are also ways to find an alternative to imprisonment by circumventing not just prison but also the criminal proceeding as a whole or in part (as in the case of diversion).

One important distinction when describing alternatives to imprisonment is the question at which stage of the criminal proceeding they are imposed. “Front-door” alternatives can thus be differentiated from “back-door” measures, the former literally taking place before the convicted person enters the prison to serve a sentence, the latter after release. Typical examples of front-door measures are probation or (day) fines. Parole, on the other hand, represents an exemplary type of back-door measures, i.e. release from prison prior to the formal end of the prison term as originally imposed by the court.

But there are also alternatives coming into effect during a prison term which may either comprise the transfer to a different location outside prison like the transfer to a psychiatric institution or therapy centre of any kind, or may mean to serve the prison term under a special prison regime inside the penitentiary, like an open prison regime, a therapy unit, etc. In this case, the alternative to imprisonment would be no ambulant sanction but the transfer to another stationary institution. Including the transfer to closed institutions other than prison into an analysis of “alternative

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<sup>22</sup> Sect. 145, Criminal Code.

sanctions”, it has to be examined very closely whether the latter actually represents an alternative to imprisonment, at least in the sense of a less severe interference with the individual’s rights. The mere possibility to undergo therapy of any kind that is not available inside prison certainly does not justify such a conclusion.

In some countries, an intermittent incarceration (e.g. going to prison only during the weekend) may be described by the law as a kind of sanction different from the prison term and thus as an alternative in the narrower sense, whereas other countries may rather define such a measure as a prison term under special conditions (e.g. open prison regime) like the possibility to work outside prison during day time and come back only for the nights. As this example may show, an ambulant sanction, such as intensive probation, is not necessarily less burdensome than a relaxed version of imprisonment. What is perceived as more or less lenient would be a question of researching the perception of the individuals under supervision.

### **1.2.3. The intensity of interference of ambulant sanctions**

The first impression of a naive observer of criminal law might be that if ambulant sanctions are on the rise, this must be a signal of a less intrusive criminal policy, a proof of a process of civilisation (Norbert Elias), exhibiting a development from harsher punishments to more lenient ones. As we were moving forward from corporal punishment to imprisonment and – from there – to ambulant supervision, the course of history could be considered a gradual liberalisation of the sanction system.<sup>23</sup> However, this perspective would ignore the possibility of a net-widening effect, resulting in a growing number of people under supervision. Thus, one has to take into account the possibility that ambulant sanctions are not used as an alternative but as an asset to imprisonment supervising people different from those who usually end up in prison or the same people at a different time. Even though this (empirical) question is difficult to answer, even where research on it may exist, it is very important to take it into consideration when speaking about “alternatives to imprisonment”. Thus, in case of an existing net-widening effect, the concerned ambulant sanction may initially give the impression to be an alternative to imprisonment but eventually prove to be the opposite. In view of the growing number of individuals under supervision in Europe, it is also important to have a look at supervision measures which are back-door in the narrowest sense and thus cannot be said to be alternatives to imprisonment. As mentioned above, in Germany, for instance, this is the case with supervision of conduct which is applied as a measure after the offender has fully served a prison term and as a consequence of having done so, while in the case of early release, the same offender with the same sentence would not have been put under supervision of conduct as a rule. When reaching the conclusion that such a kind of back-door measures is on the

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<sup>23</sup> J. J. van Dijk (1989), Strafsanktionen und Zivilisationsprozeß, in: *Monatsschrift für Kriminologie und Strafrechtsreform* 72, pp. 437-450.

rise, this can be seen as an indication of a growing number of supervision orders despite their proclaimed use as an alternative to imprisonment.

#### **1.2.4. Ambulant sanctions from the offender's perspective**

Another important, but often overlooked, aspect in the research on sanctions is the question how alternative sanctions are perceived by the individuals under control. Alternatives to imprisonment are, as mentioned above, oftentimes associated with sanctions more lenient than imprisonment. Even apart from the already mentioned example of capital punishment, this is not as clear as it may seem. With regard to boot camps, for instance, it is at least a matter of debate whether this alternative (that can also occur in different kinds of implementation) is more lenient or not. It will probably be shorter than imprisonment, but it may also be much more intensive. To one person it may seem more bearable to suffer from a longer sanction that is less intensive, for another it may be the contrary. Although comparative sanction severity is at the core of retributive theory and rational choice theory, it has attracted little attention by empirical research.<sup>24</sup> Comparative severity should also be considered as important when promoting alternatives to imprisonment from a human rights' perspective.

Besides, the intensity of the sanction will often depend on the personal circumstances of the concerned individual. A prisoner who is particularly vulnerable and, for instance, often becomes a victim of violence in prison will perceive prison as a harsher punishment than someone who has the personal power to control the life of other prisoners to his or her own benefit while, at the same time, gaining street credibility for the future due to serving a prison term. While it seems convincing, almost natural, to include the perspective of the concerned individual in the evaluation of a sanction's impact or assessment of its severity, this perspective has regularly been neglected in research, nevertheless. An overview of research on the perception of supervision by offenders, victims, those responsible for imposing or executing a sanction, the media and the public, revealed only very small numbers of relevant studies all over Europe.<sup>25</sup>

In the first place, the question can be asked who – with respect to certain groups of the population – is experiencing supervision in terms of probation and similar measures. The socio-demographic profile of offenders under supervision in Europe turns out to be “mostly young, mostly male and overwhelmingly socially disadvantaged”.<sup>26</sup> What is also known from the few existing studies is that probationees in England and Wales, Belgium and Germany described their experience of probation as rather helpful. It was characterised as a good opportunity to

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<sup>24</sup> D. C. May & P. B. Wood (2010), *Ranking Correctional Punishments. View from Offenders, Practitioners and the Public*, Durham/North Carolina, p. 6 ff.

<sup>25</sup> I. Durnescu, C. Enengl & C. Graf (2013), *Experiencing Supervision*, in: *Offender Supervision in Europe*, Eds.: Fergus McNeill/Kristel Beyens, pp. 19-50.

<sup>26</sup> Durnescu, Enengl & Graf 2013, p. 24 citing figures from different European countries.

reconstruct their lives and to avoid imprisonment. This positive perception appeared to be related to an approach of supporting the probationee with respect to matters of finances, employment and housing. Another precursor for valuing probation as beneficial perceives the probation officer as fair, open, trustworthy, flexible, etc. At the same time there is always a group of probationees regularly appearing to be a minority stating to be dissatisfied with supervision.<sup>27</sup>

A compilation of studies about the experience of supervision was collected within the framework of the COST (European Cooperation in Science and Technology) Action "Offender Supervision in Europe"<sup>28</sup> by one of the working groups.<sup>29</sup> One of the countries with a least a small number of studies on perceptions by the concerned individuals has been Germany. Since the authors of this compilation have been the same as the authors of this text, the compilation is attached as an appendix offering the translation of abstracts about the research results into English (See Annex II). Most of the studies include low numbers of research subjects with Biekers study<sup>30</sup> interviewing 228 probationees in the 1980s and Cornel following his approach of researching the 'addressee's perspective' in 2000 with a survey including 1,740 young probationees, being exceptions. While the results of these studies tend to draw a rather positive picture of experiencing probation,<sup>31</sup> the results may be distorted by the close affiliation to the probation service. These studies may be used as a starting point for a more standardised and pan-European survey on probationees' attitudes towards supervision.<sup>32</sup> However, the problem how to access probationees without at least producing the imagination of a connection between the study and the probation officer or, even worse, his or her reports about the probationee, would have to be solved. The study by Jumpertz<sup>33</sup> deals with only one case using a qualitative approach. It deals with a supervisee of an also very small but no less interesting group being supervised 24/7 by police as part of a programme for sex offenders after release and under supervision of conduct. As a result, rehabilitation efforts turn out to be consumed by the effort of trying to repair damaging impact of the intensive supervision. This was drawn from interviews with the supervisee and professionals dealing with the case. Studies on the perception of supervision by third parties, like family members, neighbours, employers, victims, media etc. would also be relevant but are almost non-existing all over Europe.<sup>34</sup>

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<sup>27</sup> Durnescu, Enengl & Graf 2013, p. 26.

<sup>28</sup> Action IS1106, <http://www.offendersupervision.eu>.

<sup>29</sup> Summarized by Durnescu, Enengl & Graf 2013.

<sup>30</sup> R. Bieker (1984), (1984): *Bewährungshilfe im Spiegelbild ihrer Adressaten. Ergebnisse einer empirischen Untersuchung*, *Bewährungshilfe: Soziales, Strafrecht, Kriminalpolitik*, No. 4, pp. 299-313. R. Bieker (1989), 'Bewährungshilfe aus der Adressatenperspektive', Bonn.

<sup>31</sup> Cf. Details the summary in Appendix II, p. 7 ff.

<sup>32</sup> As proposed by Durnescu, Enengl & Graf 2013, p. 27.

<sup>33</sup> S. Jumpertz (2012), *KURS in die Freiheit. Zum Umgang mit entlassenen Sexualstraft tern anhand eines Fallbeispiels.*, Masterthesis Master of Criminology, University of Hamburg, unpublished manuscript.

<sup>34</sup> Durnescu, Enengl & Graf 2013, p. 31 ff.

It is clearly not advisable to take results from research in the United States as a substitute for corresponding studies in Europe. This being said, a study from the USA reveals interesting results that may at least lead to some caution when comparing sanctions in Europe. The study by May and Wood<sup>35</sup> questions the widespread belief that imprisonment will always be perceived as the harsher punishment in comparison to any ambulant sanction by the affected individuals. As a matter of course, imprisonment in the United States and imprisonment in Europe are not comparable and neither are the existing ambulant sanctions. But still, having a look at the results of the study may pose the question whether similar results would be found in Europe as well.

In the US Study, more than 20 per cent of the prisoners refused to enrol in any amount of an alternative for avoiding 4 months of imprisonment.<sup>36</sup> The only sanction unambiguously evaluated as less intrusive than a prison term of 12 months was (simple) probation. Similar results could be expected e.g. in Germany where simple probation in terms of supervision means nothing but the duty to inform the court in case of moving. Not even a probation officer would have to be contacted. As opposed to this, probation is officially regarded to be to the most severe kind of sanction following imprisonment in Bulgaria.<sup>37</sup> Such differences are especially due to completely different (but named alike) arrangements of, for instance, legal instruments like 'probation' in different legal systems and cultures. Bulgaria is sure to have implemented a version of probation that – from the perspective of a country like Germany – could only be perceived as very intrusive. On the other hand, when comparing the harshness of ambulant sanctions to imprisonment, the differences in prison conditions could also matter. Thus, there is no simple way of applying research results from one state to the sanctioning system of another.

In their study, May and Wood examine how offenders, criminal justice professionals, and members of the public in the United States rank the severity of punishments. The authors' intention was to test the conceptualisation of a punishment continuum by Morris and Tonry<sup>38</sup> in which they have ranked probation as the least intrusive and prison as the most intrusive instrument of the spectrum of sanctions. Between 1995 and 2002, May and Wood conducted a series of studies to test this assumption of a punishment continuum that also underlies many efforts of criminal policy in Europe. Using different samples (including interviews with more than 700 inmates, 1,271 members of the public, 72 judges), they raised the question of 'exchange rates' for 12 months of imprisonment in a medium-security facility. This happened by asking their interviewees to tell them how long the respective alternative to imprisonment had to be conducted to be perceived as an equivalent substitute. They asked, amongst others, about probation, intensive supervision probation, electronic monitoring, boot camps, etc. In a first step, they discussed the

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<sup>35</sup> May & Wood 2010.

<sup>36</sup> May & Wood 2010, p. 26 f.

<sup>37</sup> Flore et al. 2012, p. 31.

<sup>38</sup> N. Morris & M. Tonry (1990), *Between Prison and Probation*, New York.

understanding of the respective sanction with each participant in order to reveal the different existing associations. Afterwards, the researchers asked their interviewees how many months of each alternative they would be willing to accept in order to avoid 12 months of actual prison time.

The results show that offenders, criminal justice professionals (judges, probation and parole officers) and the public do not rank prison as the most severe form of punishment. The expectation that the prisoners would decide for an amount of time of regularly more than twelve months because of the ambulant sanction being more lenient was disappointed. County Jail and boot camps were ranked as most severe, followed by prison, and then by various other alternative sanctions. The results show that interviewees did not necessarily fear the ambulant sanction as such but they were rather afraid of a revocation and – what should raise concern – they oftentimes had no trust in the fairness of the process but expected arbitrary revocations to happen. Ethnic minorities did so to a larger degree. The researchers resume that the rational ranking of sanctions with the usual approach of assuming an escalation from non-custodial to custodial sanctions would not be consented by the offenders in the same way.

Another interesting result of the study is the differential experiences of correctional sanctions when different groups of prisoners were separated in the analysis. Black prisoners rated alternatives as to be harsher than whites' did and males more than females. Blacks even perceived electronic monitoring as more punitive than imprisonment, while whites did not.<sup>39</sup> Around 1/3 of blacks and around 20 % of whites feared hard treatment by officers during ambulant sanctions. The most important reason for objecting alternatives was the fear of ending up in prison. Ambulant alternatives may have been perceived as risky gambling.<sup>40</sup>

May and Wood also revealed that offenders routinely rated alternatives as more punitive than judges, officers and the general public did, with the exception of community service. Exchange rates by offenders were concentrated in a much narrower range of duration than those generated by professionals and the public with the perception of the public being closer to the practitioners' than offenders' views.<sup>41</sup> As a consequence which is applicable to the situation in Europe, it can be deduced from this study that judging a sanction as more or less lenient than the other has to be done very carefully since the perception of the individual under supervision may well differ from the one that may appear logical to a professional observer. This problem has to be solved starting from two sides: First, more research is needed with respect to the perception of sanctioning by those who are directly affected by them; secondly, consent of the concerned individual has to be requested in a growing number of constellations. It would not be enough to approach the problem from one of these two sides alone. When doing research on the perspective

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<sup>39</sup> May & Wood 2010, p. 48 ff.

<sup>40</sup> May & Wood 2010, p. 59.

<sup>41</sup> May & Wood 2010, p. 94 ff.

of offenders under supervision, this will only result in general comparisons and will never say anything about the perception of a certain individual subjected to a sanction. Formal consent, on the other hand, will in the context of criminal sanctioning always be nothing more than an indicator for the existence of a less lenient sanction with respect to a certain individual at a certain time. The criminal justice system poses many threats and uncertainties to the subject under supervision which may lead to agreeing on something that appeared to be preferable in a certain situation for reasons not or only in part identical with the perception of lesser lenience. An empathetic human rights' perspective, as opposed to a top-down approach has to consider these aspects.

## 2. HUMAN RIGHTS STANDARDS AS PERSPECTIVE FOR COMPARING NON-CUSTODIAL SANCTIONS IN THE EUROPEAN UNION

### 2.1. Human Rights Standards by the Council of Europe

Comparisons between different legal systems – and especially different legal cultures – are too difficult to be done in a small-scale study. It would have also been impossible to compare “ambulant sanctions in the European Union”. At best it might have made sense to compare one single – but still not decontextualised – aspect of sanctioning. In this research, we took the approach of clarifying aspects that are important when comparing sanctions instead. It has to be asked which criteria are to be taken into account for comparing sanctions if comparisons are done as far as they seem to be possible. One of the core questions concerning such comparisons is the point of reference: Which considerations have to be included when different sanctions are put in comparison? This point of reference facilitates the answer to the question which sanction practices are worth-mentioning in this paper – may it be in a negative or positive manner or just because they appear unusual. Thusly developed criteria, however, have to find consensus within the member states of the European Union. Such consensus is given in the case of human rights standards which find expression, for example, in the *European Convention on Human Rights* (ECHR).

Although the ECHR is not a legal document produced by the European Union but a convention of the Council of Europe, all EU Member States are legally bound by it. All of the EU Member States are also part of the Council of Europe and the EU itself will join it according to Art. 6 sect. 2 of the *Treaty of Lisbon*. With respect to this, representatives of the 47 Council Member States and of the European Union initiated negotiations and finalised a draft accession agreement.<sup>42</sup> In the form of the steering action of the Committee of Ministers, the judicial review of the European Court of Human Rights (ECtHR) and by monitoring activities of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Council of Europe constantly pays attention to fundamental rights of persons deprived of their liberty or subjected to supervision measures. It requests the EU

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<sup>42</sup> [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp)

and its Member States to implement common requirements for the recognition and protection of human rights.

Even though this human rights perspective is highly significant with regard to liberty-depriving sanctions – especially in view of the severity of their interference and the closedness of (total)<sup>43</sup> institutions – it must also be applied in case of non-custodial sanctions – which are meant to act as a substitute for liberty-depriving ones. This may be illustrated by the simple fact that death penalty also represents an alternative to the deprivation of liberty (although it is oftentimes preceded by long prison terms, e.g. in the USA). As this example clearly elucidates, non-custodial sanctions are not *per se* less intrusive and therefore, closely examining them for possible human rights violations does not become superfluous.

First of all, applying human rights standards to ambulant sanctions means to accept that ambulant sanctions represent legal interferences that may not be solely justified by the fact that the concerned person is lucky not to be imprisoned instead. Ambulant sanctions may be considered successful if they are less intrusive than liberty-depriving measures. Nonetheless, if this is the case – which is less natural than it seems at first sight – it may not lead to the assumption that the applied ambulant sanction does not entail any noteworthy legal intrusions. Bearing that in mind, a comparative perspective necessarily has to be orientated towards international minimum standards of human rights and has to seek the best way to safeguard them.

## 2.2. The mutual recognition of sanctions within the European Union

In 1964, the *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders* required that parties agree to assist each other in the social rehabilitation of offenders after allowing an offender to leave the territory of the state where his or her sentence was pronounced, or where the enforcement of a sentence has been conditionally suspended, and to establish their ordinary residence in another state being party of this *Convention* under the supervision of its authorities. Albeit, only one Member State of the scope of the study, that is Belgium, has ratified this document of the European Council.

The – by now – existing mutual recognition of sanction orders by the member states of the EU, as agreed upon in the *Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* of 27 November 2008, underlines the importance of a human rights perspective. After all, this framework decision stipulates that ambulant sanctions imposed by one Member State may be executed in any other Member State of the European Union. This situation, apart from methodological questions concerning comparability, sets – as a

<sup>43</sup> Following the concept of E. Goffman (1961), *Asylums: Essays on the Social Situation of Mental Patients and other Inmates*, Garden City, NY.

matter of fact –the standard of applicability of a sentence from one Member State in another. The latter requires not only a basic understanding of the respective sanction system but also – at least – the guarantee of common human rights minimum standards in the sanctioning practice and system of all member states.

According to a further framework decision, the same applies to the area of remand detention and its ambulant alternatives.<sup>44</sup> From the European Commission's point of view, the mentioned framework decisions, in combination with the one on mutual recognition of judgements imposing custodial sentences that allows the transfer of prisoners,<sup>45</sup> represent a coherent and connected set of rules. The three framework decisions aim at reducing the use of custodial measures restricting personal freedom. As the Commission has pointed out in the past, prison overcrowding and deteriorating conditions of detention may undermine the mutual trust between the Member States and thus impair the essential prerequisite for judicial cooperation in the aspired area of freedom, security and justice.<sup>46</sup> According to the Commission, these framework decisions are a reaction to the fact that each year, tens of thousands of EU citizens are prosecuted for alleged crimes or convicted in another Member State of the European Union and are – as non-residents – very often sent to remand detention by criminal courts due to a fear of absconding. Meanwhile, a suspect who is resident in the country responsible for prosecution would in a similar situation often benefit from a less coercive supervision measure, such as reporting to the police or a travel prohibition. Thus, according to the Commission, the Framework Decisions have to be seen as “a package of coherent and complementary legislation that addresses the issue of detention of EU citizens in other member states and has the potential to lead to a reduction in pre-trial detention or to facilitate social rehabilitation of prisoners in a cross border context”.<sup>47</sup> In so far as the *European Supervision Order* also aims at the substitution of detention by non-custodial measures, it is important to the perspective of our study, even though we did not directly deal with remand detention. But interestingly, the Commission also perceives a certain link between the Framework Decisions on the *European Supervision Order* and the *Framework Decision on Probation and Alternative Sanctions*: if alternatives to

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<sup>44</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 (OJ L 294/20 11.11.2009, p. 20–40) on the application, between Member States of the European Union, of the principle of mutual recognition, to decisions on supervision measures as an alternative to provisional detention (European Supervision Order).

<sup>45</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 (OJ L 327, 5.12.2008, p. 27) on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners).

<sup>46</sup> Green Paper on the application of EU legislation in the field of detention, 14 June 2011.

<sup>47</sup> Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention COM(2014) 57 final of 5 February 2014 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0057&rid=1>) (Report on the Implementation of Framework Decisions COM(2014) 57).

imprisonment could be implemented in the pre-trial stage, their implementation would also become more likely in the case (and stage) of conviction. Once the accused person has already been sent back under the *European Supervision Order* in the pre-trial phase and has shown that he or she complies with imposed conditions in this stage, courts will probably be more inclined to impose a sanction that is an alternative to imprisonment and which can be executed abroad for the post-trial stage.<sup>48</sup> There is a lack of empirical evidence with respect to the weight of pre-trial decisions, especially on the question whether the order of remand detention is a factor bearing influence on the sentencing decision afterwards.<sup>49</sup> However, the relevance of pre-trial decisions for sentencing does not only result from practical experience but also from fundamental legal requirements, that is to say the principle of proportionality. An offender who has proved to comply with conditions and directives in the pre-trial stage may therefore not be subjected to custodial sanctions due to the expectation that he or she will not conform to ambulant sanctions that were implemented in another member state. Considering this example, the necessity for a perspective orientated at legal minimum standards becomes clear once again.

Framework Decisions are not directly binding but need to be transposed into the national law of the Member States. Nevertheless, they may have some influence even before their transposition due to the member states' obligation to take appropriate measures ensuring the implementation of EU law in a Member State.<sup>50</sup> This happens by means of interpreting the existing law of this state in conformity with EU law.<sup>51</sup> Despite the deadlines for transposition of the three Framework Decisions on 5 December 2011 (Transfer of Prisoners), on 6 December 2011 (Probation and Alternative Sanctions) and on 1 December 2012 (European Supervision Order), just 18 Member States have hitherto implemented the *Framework Decision on the Transfer of Prisoners*; 14 member states have implemented the one on *Probation and Alternative Sanctions*; 12 member states have implemented the one relating to the *European Supervision Order*. With reference to the researched countries, national transition laws have yet been notified to the Commission only by Belgium and only with respect to the *Transfer of Prisoners and Probation and Alternative Sanctions* but not with respect to the *European Supervision Order*. This is especially conspicuous in the case of Germany<sup>52</sup> which has, together with France, initiated the adoption of the *Framework Decision on Probation and*

<sup>48</sup> Report on the Implementation of Framework Decisions COM(2014) 57, p. 5.

<sup>49</sup> M. Boone & M. Herzog-Evans (2013), Decision-Making and Offender Supervision, in: McNeill & Beyens, p. 77.

<sup>50</sup> European Court of Justice (C-105/03 Pupino 16 June 2005).

<sup>51</sup> This principle has been applied in Germany by the Higher Court of Oldenburg, 3 Sept 2013, 1 Ausl 132/12.

<sup>52</sup> Now, there is a first draft law by the Ministry of Justice of 15 July 2014 (Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Gesetzes zur Verbesserung der internationalen Rechtshilfe bei der Vollstreckung von freiheitsentziehenden Sanktionen und bei der Überwachung von Bewährungsmaßnahmen).

*Alternative Sanctions.*<sup>53</sup> Belonging to the EU *acquis communautaire*, Framework Decisions have to be implemented by the Member States and they are binding with respect to the results to be achieved, but the member states are free to choose the form and method of implementation. On 5 February 2014, a report of the Commission on the implementation of the decisions of the framework has been disclosed, pointing to the power of the Commission to start infringement procedures as of 1 December 2014. According to Article 258 of the *Treaty on the Functioning of the European Union*, it is possible to bring the matter before the Court of Justice of the European Union after asking the Member States to deliver a reasoned opinion on the matter. With respect to the Framework Decisions at hand, the Member States may, however, refer to the fact that they came into force before the *Treaty of Lisbon* and may exercise their right to opt out of earlier decisions.<sup>54</sup>

Apart from the transposition into the national law of a Member State, the question of factual implementation is just as important. A preliminary evaluation, comprising limited figures from only three Member States, showed that transfers of prisoners had already taken place while no exchange had happened with respect to ambulant sanctions. The Commission regards this as problematic for two reasons: on the one hand, Member States that have transposed the Framework Decisions into national law in due time cannot make use of their rules in a specific case as long as the counterpart has not done so.<sup>55</sup> On the other hand, the missing harmonisation leads to failure with respect to the aim of reducing incarceration in cross-border cases. As long as it is possible to send an offender to another country in case of a custodial sanction, but not for the execution of ambulant sanctions, the aim of substituting imprisonment by ambulant sanctions obviously cannot be reached.

The preliminary evaluation of the few Member States that duly implemented the Framework Decisions on sanctions also shows shortcomings with respect to the role of the affected person. From a human rights perspective, it is already objectionable to allow the transfer of a prisoner to another Member State without his or her consent. This is especially the case with respect to decisions connected to deportation. Thus, it is even more striking that, according to the Commission, the first transposition laws lack clarification about the three limited circumstances as indicated in Article 6 CFD *Transfer of Prisoners* under which it is only possible to initiate a transfer without the consent of the concerned individual, with (planned) deportation being one of them. But if transposition laws lack clear descriptions of these exceptions, it is likely that the general necessity of consent by the prisoner will be ignored in the legal practice of the respective Member States.

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<sup>53</sup> H. H. Herrfeld, Federal Ministry of Justice, Germany (2010): Presentation of the Framework Decision on the supervision of probation measures and alternative sanctions, Durbuy 7.-9. July, <http://www.euprobationproject.eu/images/annexe4.pdf>

<sup>54</sup> Morgenstern & Larrauri 2013, p. 131, footnote 8.

<sup>55</sup> Report on the Implementation of Framework Decisions COM(2014) 57, p. 6 et seq.

The Commission also demands – at least – for provisions on the state’s duty to take into account the sentenced persons’ opinion. The person should be notified and given an opportunity to state his or her opinion which needs to be taken into consideration for the decision. The Commission emphasises that under the *CFD Probation and Alternative Sanctions* consent of the sentenced person is always required. Even though no explicit consent is needed if the person has returned to the executing state, his or her consent is perceived to be implied in the return to the country of origin. The observation of the concerned person’s will, therefore, has to be included in the transposition laws. The existing transposition laws, however, have not adequately allowed for these considerations yet. In view of this example, it becomes even clearer how important the clarification, implementation and comparative evaluation of human rights standards are.

According to the *CFD Probation and Alternative Sanctions*, Member States must at least provide for those probation measures and alternative sanctions mentioned in Article 4(1) of the respective Framework Decision. In this connection, the Commission hopes for the promotion and approximation of alternatives to detention in the different member states as a positive side effect of this regulation. But the preliminary assessment of the legislations shows that some of the Member States, *inter alia* Bulgaria, have not implemented all mandatory measures yet.<sup>56</sup> This again poses obstacles to the achievement of the aim of encouraging the use of ambulant sanctions instead of imprisonment. As a further example, it highlights the need to have a close look at human rights standards for comparing national laws on ambulant sanctions, because even with the existence of a common understanding within the Member States of the EU, as it is expressed by the Framework Decision, there is no guarantee that the human rights of the concerned individuals will be fully respected.

### 2.3. Minimum human rights standards for ambulant sanctions

As shown above, ambulant sanctions have to be judged by international human rights standards. While international standards for prisons have already been well-established and are increasingly attempted to be enforced by diverse control mechanisms, the existing standards for the execution of ambulant sanction are little known outside of highly specialised expert circles.<sup>57</sup> What is more, they were called into being much later than corresponding standards for prisons. While the United Nations developed *Standard Minimum Rules* for prisons back in 1955, the *United Nations Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules) were not adopted until 1990. The same applies to the European context: While the European Council passed the *European Prison Rules* in 1973, following those standards developed by the UN, the *European Rules on Community Sanctions and Measures* were created as

<sup>56</sup> Report on the Implementation of Framework Decisions COM(2014) 57, p. 7 f.

<sup>57</sup> For Germany, see the extensive presentation of international standards for ambulant sanctions and measures, including diverse examples of application on a global scale, in Morgenstern 2002.

late as 1992. Measured by the degree of familiarity of the minimum standards on ambulant sanctions, however, the passed time since their adoption seems quite long. In 2010, they were supplemented by the *Council of Europe Probation Rules*.<sup>58</sup>

Taking a look at these sets of rules reveals that – aside from extending ambulant sanctions in order to reduce the use of custodial sanctions – it is necessary to develop minimum standards for the rights of those subjected to ambulant sanctions as well. Even though these regulations solely represent soft law, the (generally increasing) significance of such standards makes clear that governments can be obliged to report on their implementation and that they might find their way into both national legislation and case-law. In Germany, for example, the *European Prison Rules* were directly addressed by the Federal Constitutional Court in its case-law on the conditions of German prisons. The *European Prison Rules* (EPR), initially passed by the Committee of Ministers in 1973 and renewed in 2006, play a noticeable role in German prison law nowadays. Similar to other international rules and guidelines, the Federal Constitutional Court attributes an indicative effect to the *European Prison Rules* as well.<sup>59</sup> Due to the court's decision of 2006, the regional parliaments took the *EPR* into account while designing their different state prison acts.<sup>60</sup> However, they did so in referring to them rather in general, without special influence of the *EPR* to be recognisable.<sup>61</sup> Nevertheless, the growing reception of the *EPR* in Germany is being regarded as an expression of an increased awareness of human rights in the penitentiary system by some experts.<sup>62</sup>

In Belgium, the federal government passed a law concerning the internal legal position of detainees on 12 January 2005: the *Act on Principles of Prison Administration and Prisoners' Legal Status* (commonly referred to as the “Dupont Act” 15).<sup>63</sup> This law is considered to be a “milestone” in the way sentences are executed in Belgian prisons. Until the adoption of this law, most aspects of life in detention, including prisons, were left to the discretion of the prison authorities. The fundamental principles and the detailed provisions of this law determine the rights and duties of the detainees and lay down rules governing prison administration. The law was echoing the recommendations of the *CPT* and written in the spirit of the *European Prison Rules*.

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<sup>58</sup> CM Rec (2010)1

<sup>59</sup> Federal Constitutional Court, decisions of 31 May 2006, – 2 BvR 1673/04 and 2 BvR 2402/04 and of 17 October 2012, 2 BvR 736/11.

<sup>60</sup> Feest/Lesting 2012, Vor § 1, marg. no. 10.

<sup>61</sup> N. Nestler (2012): Der Musterentwurf für ein Landesstrafvollzugsgesetz als Konsequenz des Phlegmas um die Europäischen Strafvollzugsgrundsätze?, in: *Neue Kriminalpolitik* 87-91.

<sup>62</sup> F. Dünkel (2010), Die Europäischen Strafvollzugsgrundsätze von 2006, in: H. Preusker, B. Maelicke & C. Flügge (eds.): *Das Gefängnis als Risiko-Unternehmen*, Baden-Baden, pp. 202-215 (202).

<sup>63</sup> Loi de principes du 12 janvier 2005 concernant l'administration pénitentiaire ainsi que le statut juridique des détenus. [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2005011239&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2005011239&table_name=loi)

Corresponding examples with respect to the *European Rules on Community Sanctions and Measures or Probation Rules* cannot be found. But these rules legally bind the EU Member States in the same way the *European Prison Rules* do. The need to bring these rules to light in all of the Member States can be met by using them as an underlying concept for comparisons between the law and legal practice of these states in and independent of a connection with the *Framework Decisions* and respective transposition laws.

Minimum standards for ambulant sanctions result from a human rights perspective that – in turn – has to rest on both the highlighted common core beliefs of the European Union and the basic principles formulated in international regulations. In connection with the given subject of sanctions, the respect for human dignity plays a decisive role. The latter calls for a humane and fair treatment of those subjected to penal sanctions and the safeguarding of their (social) human rights, including the right to social inclusion and rehabilitation.<sup>64</sup> There are various human rights guarantees from the *European Convention on Human Rights* that might be interfered with here.<sup>65</sup> To begin with, Art. 8 *ECHR*, the right to respect for private and family life, may be violated by electronic monitoring or by the duty to get listed in a register for sexual offenders. Art. 6, the right to a fair trial, may be infringed by the revocation of the suspension of a prison term or other measures on grounds of the establishment of violations against instructions. The right to freedom, as mentioned in Art. 5, may also be breached by such a revocation or by the state's refusal to grant ambulant alternatives. Art. 4 of the *ECHR* furthermore provides for the prohibition of forced labour which is inadmissibly disregarded in cases where punishment is combined with the duty to work. Even the prohibition of torture and degrading or inhuman treatment and punishment, as formulated in Art. 3 of the *ECHR*, could be relevant in the case of ambulant sanctions. Although the number of court rulings on ambulant sanctions by the European Court of Human Rights is still limited<sup>66</sup> – the same applies to decisions on conditions of imprisonment<sup>67</sup> which are rather of recent date. But the ECtHR has shown a tendency to increasingly deal with such issues.<sup>68</sup>

Moreover, the *European Rules on Community Sanctions and Measures* (ERCSM) are particularly significant in view of existing international human rights standards for ambulant sanctions.<sup>69</sup> Concluded by the Council of Europe, the *ERCSM* are meant to be taken as a central starting point in order to create legal safeguards for individuals subjected to ambulant sanctions and to promote guidelines for best practices (in this sense), thereby taking the same line as this project. Even though

<sup>64</sup> Morgenstern/Larrauri 2013, p. 126.

<sup>65</sup> Exemplary enumeration in allusion to Morgenstern/Larrauri 2013, p. 128.

<sup>66</sup> For examples see Morgenstern/Larrauri 2013, p. 128, Fn. 1.

<sup>67</sup> See ECtHR, Hellig v. Germany, no. 20999/05, 7 July 2011 (prisoner kept naked in a security cell); ECtHR, Rangelov v. Germany, no. 5123/07, 22 March 2012 (resocialisation for foreign prisoners).

<sup>68</sup> Coming to the same conclusion: Morgenstern/Larrauri 2013, p. 128.

<sup>69</sup> Committee of Ministers of the Council of Europe: Recommendation R (92) 16.

the *European Probation Rules* deal in part with the same subject, they were not intended to substitute the *ERSM*, but to be an addition to them. In the light of the enforcement of civil society commitment in the field of alternative sanctions, as aimed for by this study, the *ERCSM* play an important role. They have not only been agreed upon by all Member States of the Council but have been actively promoted by civil society actors. It were non-governmental organisations – active in the field of ambulant sanctions – that inspired and supported the development of these standards, amongst others the European Probation Organisation (CEP). On the basis of this example, it has been discussed whether an involvement of such multinational advisory bodies leads to an increased legitimacy of rules which are adopted in this way.<sup>70</sup>

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<sup>70</sup> For further references see Morgenstern & Larrauri 2013, p. 129.



### 3. RESEARCH ON EFFECTS OF CUSTODIAL VERSUS NON-CUSTODIAL SENTENCES ON RECIDIVISM

#### 3.1. Comparing effects of different sanctions and the problem of causality

In addition to the problem of comparing sanctions in different cultural and legal contexts, comparisons between sanctions are also very difficult when it comes to their effectiveness with respect to e.g. recidivism. Reducing recidivism is by far not the only possible criterion for success in view of penal sanctions. But it is the variable that research focusses on most often. This is not merely due to the narrow-mindedness of researchers, but appears perfectly sensible with the rationale of the law on sanctioning. If it is justifiable for a state to encroach on the freedom of the person or other fundamental rights, there has to be a solid justification for that. This would only be the case if there was reason enough to presume that the sanction will serve a legitimate purpose the achievement of which will likely happen. To impose sanctions on people despite of knowing they are not effective with respect to their officially stated aims would be a violation of the principle of proportionality. Thus, it is important to evaluate the effect of sanctions with respect to their aim to reduce recidivism via deterrence, incapacitation, rehabilitation, etc.

Rules 89 and 90 of the *European Rules on Community Sanctions and Measures* require evaluation efforts with respect to the contribution of ambulant sanctions to a reduction in the rates of imprisonment, with respect to the question whether offence-related needs of offenders are met, the cost-effectiveness and the contribution of these sanctions to the reduction of crime in the community. In 2000, the Committee of Ministers set out recommendations to the member states on improving the implementation of the *European Rules on Community Sanctions and Measures*. Principle 24 of the guiding principles for achieving a wider and more effective use of community sanctions and measures recommends to, inter alia, evaluate the outcomes, Principle 27 recommends the comparison of different programmes with respect to their effectiveness, and Principle 26, points, amongst others, to the need of examining the views of offenders on the implementation of community sanctions and measures. While the important question how sanctions

or measures are perceived by the individuals under supervision has been discussed above already, the outcome evaluations with respect to the effectiveness of different sanctions will be subject of this paragraph. With respect to the latter, the Committee of Ministers recommends rigorous evaluations for an evidence-based implementation of sanctions and measures. Experimental studies with a random allocation of offenders to trial and control groups or quasi-experimental studies are perceived as powerful research designs. According to the Committee, experimental studies should be conducted with due regard to ethical considerations. While there is no explanation or reference to an explanation (if and) how the demands of research can be reconciled with the demands of law and ethics in the field of sanctioning in criminal law, this is an unsolved question.<sup>71</sup> It is due to these problems as well as the high costs of experimental studies that – in spite of increasing numbers during the last decades – there are still not many rigorous studies in this area. Another reason for this may be the doubts of some, especially qualitatively oriented, researchers, about their methodological superiority that has been, on the other hand, massively promoted by others.

Within the international (Western) scientific community of (quantitative) criminological research, the Campbell Collaboration has been founded at the turn of the millennium with the aim to promote and analyse experimental research within, *inter alia*, the field of criminal justice.<sup>72</sup> With systematic reviews of research results including meta-analysis of data from experimental and quasi-experimental studies, published as well as unpublished ones, a rational criminal policy is aspired via implementation of the results. In 2006, Villettaz et al. published a Campbell Systematic Review on the effects of custodial versus non-custodial sentences on re-offending.<sup>73</sup> While they could find an overwhelming number of studies (more than 3,000 abstracts) in which re-offending was assessed as an outcome of different kinds of sanctions, only 23 studies met the inclusion criteria for a Campbell review, with only 5 studies based on a randomised or natural (quasi-)experimental design. 27 possible comparisons between recidivism rates for offenders sentenced to imprisonment were found for different non-custodial interventions. 13 comparisons yielded significant results, 11 of them in favour of non-custodial sanctions and 2 in favour of custodial sentences. However, 14 comparisons showed no statistically significant differences with respect to this question. They also conducted a meta-analysis, only using the four randomised studies' and the natural experiments' data as a basis. The researchers conclude that, according to the results, non-custodial sanctions did not turn out to be beneficial in terms of lower rates of re-offending beyond random effects. Pursuant to them, results showing the contrary were likely due to pre-existing differences between the

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<sup>71</sup> Cf. C. Graebisch (2000), Legal Issues of Randomized Experiments on Sanctioning, in: *Crime and Delinquency*, Volume 46, No. 2, April, pp. 271-282.

<sup>72</sup> [www.campbellcollaboration.org](http://www.campbellcollaboration.org)

<sup>73</sup> P. Villettaz, M. Killias & I. Zoder (2006), The Effects of Custodial vs. Non-Custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge, Campbell Systematic Review, p. 13, <http://www.campbellcollaboration.org/lib/project/22/> .

group of offenders that has been subjected to a custodial sentence as opposed to those who have been subjected to a non-custodial one. The studies lack methodological control of such pre-existing differences.<sup>74</sup>

The Systematic Review as well as the evidence-based branch of experimental research have pointed to a problem that shall be presented on the basis of results of the German recidivism statistics which have been published on behalf of the Federal Ministry of Justice since 2003, using data starting from the year 1994.<sup>75</sup> Subsequent penal decisions against persons who had previously been subjected to liberty-depriving sanctions, with or without probation, or an ambulant sanction, or whose proceedings had been suspended according to *Juvenile Penal Law* can be compared. It is striking that those who were subjected to a custodial sanction (imprisonment, youth penalty and youth detention) compared much more unfavourably with those who had received a non-custodial sentence. This may lead to the conclusion that custodial sentences carry an increase in numbers or intensity of recidivism leading to harsher subsequent sanctions. In case of custodial sanctions, subsequent penal decisions were much more restrictive than those in cases of ambulant sanctions. Ambulant sanctions, according to these results, do not increase the likelihood of recidivism and a corresponding severe subsequent penal sanction compared to sanctions that deprive the offender of his or her liberty. Regarding this, suspended liberty-depriving sanctions do better than those without a suspension. In spite of all that, it cannot be concluded from the data that ambulant sanctions are more successful than those including the deprivation of liberty with respect to the prevention of recidivism, since the groups of individuals who receive the respective sanctions may not be comparable in view of the variables which possibly influence re-offending. There is rather every indication that available sanctions are applied by diverse decision-makers to target groups in a different manner. German penal law provides for the execution of a prison term to be suspended on probation if the defendant is expected to stop committing crimes without the directly applied imprisonment or if other special circumstances with reference to the committed offence or the character of the offender can be found to exist.<sup>76</sup> Albeit, it can neither be concluded that courts actually take a bearing on these criteria, nor does it say anything about further criteria that play a significant role for probation decisions in legal reality.<sup>77</sup> Moreover, the above-mentioned legal regulation does not entail any certainty that criminal courts give accurate prognoses on the defendants'

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<sup>74</sup> Villettaz, Killias & Zoder.

<sup>75</sup> [http://www.bmjjv.de/DE/Ministerium/Abteilungen/Strafrecht/KriminologieKriminalpraevention/\\_doc/Rueckf\\_allstatistik\\_doc.html;jsessionid=A690F67A94AAEC6BB46A896937F199FE.1\\_cid324?nn=3433226](http://www.bmjjv.de/DE/Ministerium/Abteilungen/Strafrecht/KriminologieKriminalpraevention/_doc/Rueckf_allstatistik_doc.html;jsessionid=A690F67A94AAEC6BB46A896937F199FE.1_cid324?nn=3433226)

<sup>76</sup> Section 56 of the *German Criminal Code*.

<sup>77</sup> For such unintended influences on the decision-making of legal entities, with reference to the impact of previous recommendations for sanction decisions produced by throwing of dice, see: B. Englich, T. Mussweiler & F. Strack (2006), *Playing Dice With Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision*, in: *Personality and Social Psychology Bulletin* 32, 188-200.

future behaviour in terms of the commission of criminal offences. Assuming, however, that the different degrees of recidivism do not at all depend on the selection of the different target groups would be presumptuous. To make such an assumption would mean to equate court orders with random decisions, and there is no basis of research to do this. As opposed to this, it is quite likely that courts apply criteria for decisions on penal sanctions that actually influence the probability of re-offending. Thus, a lower degree of recidivism after the application of ambulant sanctions does not allow the conclusion that they have a higher effectiveness compared to custodial sentences.<sup>78</sup> Such a deduction would be wrong to the same extent as the decision of the courts was right.

Experimental research is designed to approach this problem of causality by random assignment of individuals to experimental and control groups that are perceived as approximately comparable. Taking into account the body of research originating from the 'what works?' movement may, apart from further problems discussed below, only be a very initial step when moving towards an "interdisciplinary, culturally sensitive and critical mode of analysis" necessary for understanding offender supervision in Europe.<sup>79</sup>

### 3.2. Randomised controlled trials from outside of Europe

One of the four randomised controlled trials compared an intensive supervision programme for male juveniles in Detroit (Michigan) to institutional placement. After a two-year follow-up period, there were mixed results, but the overall conclusion was that the experimental group under intensive supervision did not perform worse in terms of recidivism than the control group of institutionalised juveniles. For the second experimental study that was included in the systematic review, second-felony offenders in Oakland County (Michigan) were randomly assigned to a probation programme or to prison with the prison group showing a failure rate of 33 per cent as opposed to 14 per cent in case of those assigned to extensive community treatment. Another study assigned juvenile offenders in Boise (Idaho) to either restitution or traditional correction (probation or detention). The restitution group turned out to have lower rates of incidence, as well as prevalence, but the difference was not statistically significant.

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<sup>78</sup> It needs to be noticed that doing this would be questionable for further reasons, too: Thus, one may not simply infer a higher frequency or an increased intensity of the commission of crimes from a later conviction that brought along a more intrusive penal sanction. It is furthermore not a matter of course that one or another form of sanction could prove superior to others, even if the comparison is limited to ambulant and custodial sentences in general. In fact, there is every indication that this could be different for diverging individuals and criminal offences.

<sup>79</sup> McNeill & Beyens 2013, p. 9.

### **3.3. A natural experiment from the Netherlands: prison versus suspended sentence**

Another study included in the meta-analysis of the Campbell Review by Villettaz et al. was a natural experiment from the Netherlands.<sup>80</sup> Instead of random assignment, the researchers made use of a situation resulting from a royal pardon, comparing a group of convicts receiving a suspended sentence as a consequence of the pardoning with a group of prisoners serving their sentence of up to 14 days in prison right before the amnesty. Differences between these two groups were solely expected with respect to the date they committed the crime leading to the sentence. In any other aspect they were considered to be similar. As a result, the recidivism rate of both groups appeared to be similar for traffic and property offences after a follow-up period of 6 years. With respect to violent offenders, those who had received a suspended sentence re-offended significantly less often than those who had to serve the prison sentence. Thus, the prison sentence turned out to be even harmful with respect to re-offending for violent offenders, while the suspension of the sentence did not produce any harmful consequences for any of the groups.

### **3.4. A randomised controlled trial from Switzerland: Community service versus (very) short-term imprisonment**

Since results from the United States are of very limited value for the European context, an example of a randomised experiment from Switzerland may be more instructive – despite the fact that the comparability of different European countries, and even between regions within one state, is debatable as well. Between 1993 and 1995, community service was used as an alternative for unsuspended short-term imprisonment in the Swiss Canton of Vaud. Short-term imprisonment could last up to 14 days, a period of time that would be unlikely or even impossible in many other European states as there is a widespread belief that short-term imprisonment is damaging. The latter follows the thinking of Franz von Liszt at the turn to the 19<sup>th</sup> century perceiving short term imprisonment as long enough to interfere with the job-life stability, social relations and private life of the convicted person but, at the same time, too short to make the opportunities of re-socialisation work that were attributed to imprisonment. As opposed to this, in Switzerland short-term sentences are very popular. By the time of the experiment, 42 per cent of all custodial sentences provided for an incarceration of 14 days or less in 1996, for instance. Furthermore, one day of imprisonment was equalled to 8 hours of work in the community while, for instance, in Germany, the amount of working hours replacing one day of imprisonment (after conviction to a fine that could not be

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<sup>80</sup> C. van der Werff (1979), *Speciale Preventie*, Den Haag (NL): WODC, summarised by Villettaz, Killias & Zoder 2006, p. 15.

paid) usually varies between three and six hours. The Swiss study found the prevalence of re-arrest by the police to be slightly higher for the control group of prisoners but no significant differences between prisoners and those assigned to community service could be found in terms of re-offending as well as with respect to later employment and social as well as private life circumstances.

These results should not mislead to the conclusion, though, that imprisonment in general does not cause damages with respect to labour careers, social inclusion and family or other private life. During a (very) short prison term, an employed person will often manage to keep a job which is completely different in case of more long-lasting imprisonment. One has to keep in mind the fact that the period of imprisonment in the experiment was so short that it could be done during vacation time or even during weekends. Community service mostly operated as an alternative to 'half-way incarceration'. In Switzerland, half-way incarceration gives inmates the possibility to leave during daytime for work and obliges them to spend only the night-time and weekends in prison. Those assigned to imprisonment in the study, seem to have served a full-time prison term but it was possible to opt out of the experiment before being included in the random assignment and this was made use of in the hope to receive half-way incarceration. The fact that imprisonment did not cause any more negative impact on later employment than community service may be less remarkable when considering that convicts with strong ties to their job were left out of the study. It may well be that negative effects of incarceration on job opportunities and life circumstances are connected to a more than minimal duration of a prison term and that "the century-long debate on the 'harmful' effects of short prison sentences has wrongly diverted attention away from undesirable effects of longer sentences."<sup>81</sup> It may also well be, though, that the Swiss experiment covers periods of imprisonment so short that they would only reach small parts of what would still be considered as "short-term" imprisonment in many other European countries – up to six months according to German law,<sup>82</sup> for instance. The latter shall, however, not discount the assumption that they will result in negative impact (as well as long-term imprisonment).

There was also another result of the study that allowed the conclusion of community service being preferable to imprisonment. The two groups of the experiment developed in different ways during the course of observation by the researchers. While the experimental group improved significantly during the period of two years with respect to incidence rates, the group of prisoners deteriorated in between. With respect to the important issue of comparing the effects of custodial to those of non-custodial sanctions, the experiment (that was one of only five studies included in the meta-analysis) was restricted to a very limited comparison, contrasting rather similar sanctions with each other. The difference between imprisonment and

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<sup>81</sup> M. Killias, M. Aebi & D. Ribeaud (2000), Does Community Service Rehabilitate Better than Short-Term Imprisonment? Results of a Controlled Experiment, in *Howard Journal* 39: 40-57 (48).

<sup>82</sup> Section 47, *Criminal Code*.

probation, for instance, is – in many respects – more ostensible than the difference between only a few days of imprisonment as opposed to a few days of community service. When referring to the need for research on the impact of imprisonment, on recidivism as well as on the life of the prisoner, one would usually think about a time frame of decidedly more than up to 14 days.

Another deduction the authors made from their study is that both types of punishment reduced delinquency by about 40 per cent with respect to the average incidence rates and about one half, on average, if prevalence was considered. Thus, they consider the allegation that punishment ‘does not work’ as unjustifiably pessimistic. But this conclusion may not be justified by the methodological design and the results of the study and what is more, especially researchers associated with strong attentiveness to problems of causality should not feel tempted to deductions like this. As long as the experimental design lacks a control group of non-intervention, the possibility of natural maturation affecting both of the groups cannot be excluded, and thus it is not known whether there is any casual impact of the sanction and whether the individuals would have performed even better with respect to recidivism, professional career and personal circumstances without any sanction at all.

The researchers also observed differences in attitudes between the groups after the termination of their sentence, with all former prisoners going into the direction of more unfavourable attitudes. They showed frustration about their assignment to imprisonment and more negative attitudes towards their own offence, the sentence and those seen as ‘responsible’ for it. Thus, while the researchers found short-term imprisonment not to affect recidivism and life opportunities in a statistically significant negative manner, it appeared to change attitudes towards punishment. Having served a (very short) prison sentence rather than community work is strongly associated with the view that the sentence was ‘unfair’. While the authors though reduce this result to a ‘thinking error’, which consisted in the lack of acceptance of one’s fault and a projection to the authorities, it is important from a human rights’ perspective because treating individuals in a way that is perceived to be fair by the concerned individuals is an important issue of its own, apart from the question of recidivism rates. It has been argued that the better improvement of incident rates after community service could be due to the fact that this group had a choice and felt lucky to be included in the randomisation process. If an effect of randomisation like this turned out to be true, better results of alternative sanction as opposed to imprisonment in randomised studies could – at least to some extent – be seen as an artefact of research. This is what the authors of the Systematic Review suggest. But instead of trying to neutralise this kind of (possible) mistake, another conclusion could be drawn: the necessity to enhance the principle of fairness in the application of sanctioning as well as the possibility of the concerned individual to consent or to have a saying, or even a choice, in the selection of the sanction. This will be discussed below in some more detail referring to what the authors of the Systematic Review call a Hawthorne or placebo effect.

### 3.5. Comparing randomised to matched-pair design studies and sanctions to non-intervention

According to the strict paradigm of evidence-based crime prevention and experimental research, matched-pair design studies are generally seen as suboptimal with respect to the question of interventions being causal for measured outcomes. While using comparison groups and assigning individuals ascertained to be similar in certain factors that are expected to influence the delinquency to different research groups, one can never know whether there are further variables influencing delinquency that are not evenly distributed among those groups because they were unknown and could not be considered in the matching procedure. Due to the low number of randomised studies and natural experiments comparing prison sentences to alternative sanctions, the authors of the Campbell Review nevertheless included 18 quasi-experimental studies using a matched pair design. For their inclusion the studies had to contain at least a number of three or more independent variables that had been controlled for. Due to several outcome measures of re-offending in some of the studies, 27 comparisons resulted from 23 studies (4 randomised experiments, 1 natural experiment and 18 matched-pair design studies). 11 out of these 27 comparisons show results significantly favouring non-custodial sanctions, only two studies show significantly lower re-offending rates after custodial sanctions and 14 comparisons showed no significant differences at all. However, the results of the latter were in favour of non-custodial sanctions below the level of statistical significance. In order to avoid such a simplistic approach of “vote counting”, the authors conducted their meta-analysis of those five studies they considered to be of high quality. They perceive the advantage of non-custodial sanctions that resulted from the “vote counts” of studies – as mentioned above – as almost vanishing in the meta-analysis. But still, although differences between the effect of custodial versus non-custodial sentences on re-offending, measured by police records or reconviction rates, are modest, the effects still slightly favour non-custodial sanctions. But as it has already been said for the Swiss experiment, the majority of studies are limited to very short time frames with respect to the custodial sentences included, as well as the time of imprisonment that is substituted by ambulant sanctions. This is a particularly typical problem of randomised studies since major ethical problems would arise if researchers tried to compare sanctions of completely different lenience because this would counteract the principle of equal treatment, especially if similar cases were assigned to very different sanctions by throwing the dice. Nonetheless, questions like this, comparing e.g. imprisonment to probation and to a non-intervention, appear to be the most important ones for research and a rational criminal policy.<sup>83</sup> No. 104 of the *European Probation Rules* stipulates that probation policy and practice should be evidence-based as far as possible and rigorous research should be financed, thus especially pointing to the need for experimental research designs as a basis for informing policy on probation. No. 105

<sup>83</sup> Cf. Graebisch 2000.

states that the revision of existing laws, policy and practices, based on sound scientific knowledge and research that meets internationally recognised standards, has to be provided for.

An important aspect of a research-orientated – and, at the same time, human rights-focussed – policy under conditions of uncertainty would be the principle of *primum non nocere*: first do no harm. This can be derived from medicine (as randomised trials are) and it is much more important in case of sanctioning decisions, bearing in mind that the latter are regularly imposed against the will of the individual while medical treatment is – as a rule – taking place on a voluntary basis. The principle of *primum non nocere* has to be implemented in criminal law as a principle similar to the principle *in dubio pro reo*. As long as a more intensive interference with affected individuals' rights is not proven to be effective with respect to preventing recidivism, it thus may not be imposed. As long as different sanctions prove to have a comparable outcome in experimental studies, the least intrusive one has to be chosen. Obviously, current criminal policy is far from having adopted this principle as a standard. Keeping the fact in mind that especially the results of methodologically rigorous studies, as shown above, exhibit the interchangeability of different kinds of sanctions with respect to their measurable outcomes, following this principle and consequently lowering the level of intrusion by sanctions seems to be unavoidable. The latter particularly applies to cases in which promised impacts on the prevention of recidivism have not even been proven yet.

When taking the Campbell Review on custodial versus non-custodial sanctions as a basis for informing criminal policy, which has been the aim of this kind of review, this also expresses the intensity of the current state of uncertainty. Randomised studies may be of a high, though still debatable, methodological quality. As long as most of them – and there are yet not many – stem from the United States, with their sanctioning system being quite different to the systems in European countries, these studies may not be perceived as of a very high quality for informing criminal policy in Europe. They are at best able to point out questions that could and should be asked in Europe as well and they appeal to take into account the problem of causality when doing research. They also – again and again – point to the fact of different sanctions being more or less interchangeable. Especially experimental research has regularly pointed to the possibility of well-intended interventions having detrimental effects. The latter could be overlooked because of confounding variables when non-rigorous research designs are being used. Thus, a conclusion from the above-mentioned studies cannot comprise more than establishing that research results from rigorous studies call for caution when applying sanctions and assessing their presumed effect. For criminal policy this would mean to reconsider the principle of *ultima ratio* and proportionality in sanctioning informed by empirical research. The implementation of sanctions in case they are not even proven to have better effect than a more lenient sanction has to be denied. But what may sound little at first, would – if consistently realised – prove to be a giant stride in

introducing a criminal policy on sanctioning that is informed by both research and human rights.

Considering the above-mentioned concerns about a naive approach towards comparisons between different European systems and legal cultures, it may also have become clear that one randomised study from Switzerland, even regardless of the questions about the results raised above, could never serve as a sufficient basis for conclusions on the effects of sanctions all over Europe. What have to be taken into account are rather the different specific legal and cultural circumstances of the respective country. However, the Swiss results can be regarded as a first indicator that it would not be an improvement of criminal policy to substitute community service by short-term imprisonment. But this conclusion could certainly have been drawn without the experimental study according to the imperative to substitute imprisonment by ambulant alternatives as stated by the *European Rules on Community Sanctions and Measures*. To do it the other way round would be a step backwards. As long as there is no proof for community service being perceived as more burdensome than short-term imprisonment by the affected individuals, community service has to be the means of choice. In case of doubts with respect to the perceived severity – but research results so far give no reason for such – the possibility of choice by the affected individuals could be implemented.

Additionally, if (very) short-time imprisonment, as it has been tested in the Swiss study, turned out to have effects (beyond statistical significance) comparable to those of community service in other countries, this would, as a matter of course, still say nothing about longer and more intrusive forms of imprisonment. Moreover, it is plausible to assume long-term imprisonment to result in stronger effects of prisonisation than short-term imprisonment. And the longer imprisonment lasts, the more important it is from a human right's perspective to think about possible alternatives. The authors of the Campbell Review point to the study of Smith, Goggin and Gendreau comparing recidivism by length of confinement. This meta-analysis included 117 studies with 504 correlations. Smith et al. concluded that the longer the prison term, the higher is the probability of re-offending. They compared recidivism rates in relation to the length of incarceration as well as serving an institutional sentence versus receiving a community-based sanction. When comparing incarceration to non-custodial sanctions the results ranged from equity towards slight increase of recidivism after imprisonment, depending on the weight that has been given to different effect sizes.

Villettaz et al. criticise the study of Smith et al. for failing to sufficiently consider pre-existing differences between groups of offenders sentenced to custodial vs. non-custodial sanctions and therefore did not include most of the studies the latter had taken as a basis in their own review. This discrepancy well-illustrates that there is no unchallenged consensus within the international researchers' community about the most important criteria for inclusion into a meta-analysis or review on research. As the Campbell Collaboration promotes the exclusiveness of experimental studies

for evaluation, it has to be conceded that they are superior in focusing the problem of causality. However, as long as experimental studies deal with the assignment of and by human beings, randomisation will always be distorted to a certain extent. Quasi-experimental designs, especially natural experiments, may be less reliable with respect to understanding variables of still unknown influence. But they may be superior with respect to flaws during the procedure of assignment because it is not actively carried out by researchers. They analyse pre-existing groups instead. The absence of active and real assignment of sanctions by researchers or by decisions following criteria of research also solves the ethical and legal problem with the principle of equality. When Smith et al. included a wide range of studies in their review, they neglected the aspect of causality to some extent (which is a problem), but when Vallettaz et al. included as few as five studies in their meta-analysis, they passed on the range and diversity of studies. As a result, both reviews are – for different reasons – of rather minimal validity with respect to the (significant) question of comparing custodial to non-custodial sanctions. Nevertheless, both reviews have the common result of non-custodial sanctions being at least not inferior to custodial sanctions with respect to recidivism. And this may serve a basis to answer the next important question about which kind of sanction is perceived as least intrusive. The continuing uncertainties due to insufficient research results may not be used as an excuse to ignore the fact that due to the existing state of knowledge, non-custodial sanctions are no less effective but probably less burdensome to the individuals affected. As Smith et al. put it: “[...] ‘get tough’ aficionados might cavil about the research design quality of the prison studies but the reality is that proponents of such sanctions have long rested their case on far less substantive foundations; common sense arguments and narrative reviews”. They also point to the fact that there is absolutely no theoretical basis in the behaviour modification literature that criminal sanctions would influence recidivism by means of threat, deterrence (as the often underlying thesis of promoting imprisonment) or in any other way. This argument prefigures the need of (quasi-)experimental studies including a non-intervention control group in the comparisons.

If the similarity of effects, as it often results from comparing different sanctions, turned out to appear even in case of a non-intervention, the approach of the sanction system would have to be questioned even more radically. That studies would yield such kind of results is not as unlikely as it may seem. This can be illustrated by the systematic review of Petrosino et al. The review comprises 29 experimental studies with 7,304 juveniles and concludes that juvenile system processing does not appear to have a crime-control effect. As opposed to this, almost all of the results turned out to be negative in direction, as measured by prevalence, incidence, severity, and self-reported outcomes. Studies that compared processing through the regular judicial system to a diversion programme reported much larger negative effect sizes than those that compared it to “doing nothing”. This means that non-intervention appeared to be inferior to measures taken in a diversion programme for juveniles but a non-intervention was still superior to taking

the regular road of criminal justice. This should be accepted as proof for the need of examining the effect of non-intervention in comparison to sanctions wherever possible since, from a human rights' perspective, non-intervention would always be preferable to coercive measures and if it turned out to produce comparable results, it would have to be chosen necessarily.

### 3.6. Hawthorne and placebo: Only in the eye of the observer?

In 2002, the Committee of Ministers stated that the use of community sanctions and measures could be justified because of being more humane and less expensive than the deprivation of liberty in the past. As to the future, the Committee considered their improved effectiveness in terms of reducing reoffending as an additional justification.<sup>84</sup> The authors of the Campbell Review strongly point to the possibility of non-custodial sanctions showing better results than custodial sanctions because those individuals receiving an ambulant sanction felt more fairly treated than those being assigned to imprisonment. Actually, it was shown e.g. in the Swiss experiment on Community Service that – on average – individuals had such a perception. Thus, Vallettaz et al. describe the better results of non-custodial sanctions as a possible placebo or Hawthorne effect – that is to say as an effect of observing the result of an intervention rather than of the intervention itself. They are not able though to draw this conclusion referring to the high methodological quality of randomised research designs. As opposed to this, they just make an assumption about the possible influence of observer effects and, at the same time, regret the impossibility of double-blind studies in criminal justice in contrast to medical trials. With respect to sanctioning, it is impossible to administer different sanctions if neither the decision maker, nor the affected individual knows what kind of sanction they receive. Apart from very sophisticated and rather small differences in e.g. treatment approaches, the individual will always know what kind of sanction he or she received, especially they will know whether they are imprisoned or received a non-custodial sanction. The regret of the Campbell reviewers about this impossibility may be perceived as one of several indicators for the fact that research on criminal justice sanctions is not comparable to medical research and thus needs a different approach. Randomised controlled blind trials may be the gold standard of medical research but they still do not have to be the best, let alone the only acceptable research method for criminal justice research. One reason for this is the fact that solutions for methodological problems with randomised trials that have been found in medicine are not or at least not completely applicable to criminology. In an effort to approximate them to medical research, experimental studies sometimes miss out on the still existing differences between medical and criminological research, in case of the latter especially when taking place in the field of sanctioning. In their opinion, double-blind studies explore the “real” – physiological – impact of an intervention as compared to mere psychological effects.

<sup>84</sup> Council of Europe 2002, p. 52, margin 114.

They allow themselves to draw the conclusion: "If, however, innovative «alternatives» – irrespective of what they are or what they imply – consistently produce better outcomes than more traditional sanctions, it may be fair interpreting such outcomes as a Hawthorn (or placebo) effect."<sup>85</sup> They obviously interpret the results they found in their review as an overestimation of the impact of ambulant sanctions due to such kind of effects. This perception is, however, a consequence of an excessive application of the medical model of research in the field of criminal justice. When applying this model, one has – at least – to take into account the differences between both areas of research. The most important difference is that medical research usually tests interventions that will later be taken voluntarily by individuals. Their aim is to cure a disease, but individuals decide or at least may decide in an act of self-determination whether to take a medication at all and which kind of medication they prefer to take. Criminological research, on the other hand, deals with sanctions that will typically be imposed against the will of the individual. There are some – and maybe even a growing number of – non-custodial sanctions which require the consent of the individual but especially when compared to imprisonment, interventions regularly happen in the context of coercion (if the individual will not agree to the non-custodial sanction, a custodial sanction would be the compulsory consequence). If it turns out from research, and the authors of the Campbell Review point to a number of studies confirming this perception, that sanctions which are conceived of as fair enhance the willingness to cooperate while sanctions perceived to be unfair destroy the willingness of cooperation, this is by no means an irrelevant artefact of research. Fairness in criminal justice administration is far from representing nothing but a confounding variable when measuring effectiveness. It is a human rights' principle to be followed, independent from questions of effective sanctioning. But if it is shown that sanctions prove to be both, effective and fairer, in the perception of the affected individuals, this is an important argument for moving towards the implementation of the kind of sanctions that are considered as more fair. Killias and Vallettaz further assume that "fairness" with respect to the randomised studies on sanctioning will more or less be a variable for "better than expected". If this was the case, it could also show the direction for the development of the sanctioning processes. Hitherto, it is often assumed that getting tough on crime is necessary in order to avoid the feeling on the offenders' side that they have "gotten away" with their crime when receiving rather lenient sanctions. But according to the findings of Killias and Vallettaz, as opposed to this, receiving a sanction that is better than expected creates a perception that could be even helpful in terms of effectiveness. This could for example be explained Charles Tittle's Control Balance Theory. He argues that the relation of the amount of control a person is subjected to and the extent of control this individual can exercise influences the probability

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<sup>85</sup> M. Killias & P. Villetaz (2008), The effects of custodial vs non-custodial sanctions on reoffending: Lessons from a systematic review, in: *Psicothema* Vol. 20, No. 1, pp. 29-34 (33).

of (certain kinds of) deviance.<sup>86</sup> The result that sanctions seeming more appropriate for the offender are more likely to be effective in terms of re-offending also goes together with recent developments in criminology with respect to the treatment of offenders, especially with the Good Lives Model.

Although the differences between medical treatment and sanctions are not to be ignored, even in medicine it has been acknowledged that placebo effects are not simply a factor disturbing the chain of causal effects but an element of care in its own right. With respect to sanctioning, this is even more true, a fact that can be highlighted when looking at the original understanding of the so-called Hawthorne effect. While the placebo effect originated from medical research, the Hawthorne effect was first described in the 1950s by Henry A. Landsberger after analysing experiments conducted during the 1920s and 1930s at the Hawthorne Works electric company on possible relations between productivity and work environment, e.g. the influence of good lighting for factories. It turned out that workers were more productive in the course of the study as opposed to before, no matter whether they worked with the same or an improved light system. This effect was ascribed to the attention given to the workers. If the aim of research is to find out whether or not the installation of better lighting improved productivity, the attention given to the workers may be a variable confounding the results. If, as it is the case in the field of sanctioning and offender supervision (sic!), the aim of a study is to establish a necessary minimum of intervention and supervision, the situation is quite different. Supervision is, in this case, an important element of the subject under research as well as fairness is with respect to the law and ethics of sanctioning. If it turns out that fairness and attention increase effectiveness, this may not be perceived as a sufficient reason to implement more care instead of – or in addition to – improved lighting in a factory but this is different with respect to sanctions, especially in view of human rights standards and the principle of proportionality. The permitted intrusiveness of sanctions is limited, *inter alia*, by the inevitability of an intervention compulsorily imposed on an individual. The latter is due to the fact that the interference with rights, particularly with rights like the one to personal freedom, may only be chosen as *ultima ratio*, as a last resort, after less intrusive interventions have failed to prove effective.<sup>87</sup> Thus, effects of attention and fairness, referred to as Hawthorne or placebo today, have to be regarded as important elements of future research on sanctioning.

Of course, it is impossible to conduct double-blind studies in this area since the observed individuals will realise very quickly whether they had received a custodial sanction or not. However, to study such effects in the sense described above would not even afford double-blind assignment of sanctions. It would be helpful enough to use something like non-intervention control groups. Obviously, it will be difficult –

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<sup>86</sup> Cf. a test of these assumptions A. R. Piquero & M. Hickman (1999), (1999): An Empirical Test of Tittles Control Balance Theory, in: *Criminology* Vol. 37, No. 2, pp. 319-342.

<sup>87</sup> Cf. Council of Europe Committee of Ministers Recommendation No. R 99 (22), basic principle 1.

or even impossible – to have a real non-intervention group in the field of sanctioning because there will always be the investigation of the crime, aiming at the assessment of both the crime and the offender, that can already be perceived as an intervention (and the same may apply to medical examination before the test of the treatment). But if the prosecution was stopped by means of diversion without any conditions or instructions instead of a sanction, this would come very close to a non-intervention and very close to placebo-type-effects.

It is a matter of debate whether different kinds of sanctions may be tested in an experimental research design intentionally assigning similar cases to different conditions, such as imprisonment or a non-custodial sentence. But if it is legal and ethical to violate the equality before the law for the sake of research results for informing future law and practice, and if this allows assigning individuals randomly to either imprisonment or non-custodial sanctions, it should also be possible to assign a further group to a non-intervention. Then, it could – if at all – be argued that imprisonment and non-intervention are too far away from each other to be justifiable as groups in a single study, especially for the reason of protecting potential victims in cases of severe crimes. In this case, the conduct of two studies could be thought of, one comparing imprisonment to an ambulant sanction and, if in the first study the ambulant sanction turns out to have at least no worse results, another study comparing the ambulant sanction to a non-intervention. In a study conceptualised like this, one may still see a disadvantage in the fact that the assigned individuals will realise what kind of treatment they receive or, in case of the non-intervention-group, they could escape from. But the implied need to assign treatments in a double-blind manner is probably due to the understanding that observer effects could only be researched if the individual who received a placebo or non-intervention does not know about this fact but believes to have received a “real” treatment. This perception would be a misunderstanding and an underestimation of such kind of effects. As it is long known from medical research, placebo medication can well have an effect, even if the individuals know they were receiving placebo.<sup>88</sup> Or to rephrase the saying that is ascribed to Martinson in just changing its pronunciation: from “nothing *works* in crime prevention” to acknowledging the possibility that *nothing* works in crime prevention.

Comparing non-custodial sanctions to non-intervention and not just to custodial sanctions is even more important when focusing on the problem of net-widening that will be discussed below. The more ambulant sanctions raise suspicion to be used as a substitute for non-intervention instead of substituting custodial sanctions, the more research has to deal with comparisons of sanctions with non-intervention.

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<sup>88</sup> L. C. Park & U. Kovi (1965), Nonblind Placebo Trial. An Exploration of Neurotic Patients’ Responses to Placebo When Its Inert Content Is Disclosed, in: *Archives of General Psychiatry* April, Vol. 12, pp. 336-345.

### 3.7. Natural Experiment: Random Judge Assignment

Following ethical objections against random assignment of sanctions including non-intervention, another possibility for tracking down the placebo problem are natural experiments. The known differences in sentencing with respect to comparable cases, due to e.g. different personality of deciding judges, have been used as an important argument for the ethics of random assignment in sanctioning for the purpose of research. It has been argued that differences of the same intensity – as already existent for reasons different from research – may serve as starting point for comparisons. Differences within this same spectrum should be assigned randomly for the construction of comparable groups and information of later policy which of the different intervention is preferable due to the (exact) research results found.<sup>89</sup> This argument could, at best, be deemed acceptable if the existing differences were reduced after the experiment was conducted, thus facilitating coherent decisions which take the results of the study into account. At the same time, there are no ethical objections against using the divergent results of sanctioning decisions by different judges as a starting point for analysis within the methodological framework of a natural experiment. This especially suggests itself in jurisdictions where defendants are assigned randomly to judges and varying sentencing tendencies are expected. It is surprising that this obvious approach of research has been pursued so rarely.

One example is the study by Green and Winik.<sup>90</sup> They tracked down 1,003 defendants charged with drug-related felonies, especially distribution and possession for the purpose of distribution, who had been assigned randomly to nine judges over a period of four years. The decisions of the judges varied substantially in terms of prison and probation time. The least punitive group of judges sentenced 23 per cent of the defendants to imprisonment whereas the most punitive group of judges did so in 65 per cent of the cases. The authors found no systematic relationship between the criminal background of the defendants and the judicial calendar they were assigned to. Thus, it was possible to draw conclusions about the effectiveness of imprisonment versus probation for a group of around 40 per cent of convicts, to the extent to which they have been treated differently. In other words, it became possible to examine the effect of randomly doubling, or almost tripling, the imprisonment rate for this kind of offenders. As a result from their study, neither imprisonment nor probation proved to be a statistically significant deterrent for recidivism during the following four years measured by re-arrests. The authors concluded: "*Ceteris paribus*, the median defendant who experiences both incarceration and probation is expected to recidivate at approximately the same rate as a defendant released without punishment or supervision."<sup>91</sup>

<sup>89</sup> Federal Judicial Center (1981): Experimentation in the law. Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law, Washington.

<sup>90</sup> D. P. Green & D. Winik (2010), Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders, in: *Criminology* Vol. 48, No 2, pp. 357-387.

<sup>91</sup> Green & Winik 2010, p. 375.

## 4. NET-WIDENING BY AMBULANT SANCTIONS

As mentioned in the beginning, the intensive use of ambulant sanctions may certainly not be misunderstood as an automatic indicator of substituting imprisonment by non-custodial alternatives. Thus, it is important to examine the effects of the implementation and use of ambulant sanctions in order to detect aberrations from the aim of enforcing alternatives to incarceration.

### 4.1. Net-Widening

Looking at the situation in the United States where ambulant sanctions have been promoted as an alternative to mass incarceration, the problem becomes quite clear. Phelps<sup>92</sup> shows that the U.S. initiated a rapid expansion of criminal justice control instead of decarceration, including both incarceration and ambulant supervision. Mass probation was added to mass incarceration instead of substituting it. Even though – or may be even because – the supervision rate in the United States is almost seven times higher than in Europe,<sup>93</sup> the analysis of these developments may teach Europe something as well. As early as 1981, Austin and Krisberg<sup>94</sup> analysed how criminal justice movements originally aiming at decarceration, diversion and decriminalisation resulted in widening the net of social control instead. In 1985, Stanley Cohen,<sup>95</sup> as an author not restricted to an American perspective, described probation as an extension of control by the criminal justice system. According to Cohen, it is often applied to people who would not have been sent to prison without the existence of ambulant measures but would have stayed clear of any supervision instead. Another important step in the discussion was marked by Simon's work<sup>96</sup> on the transformation of California's parole system during the 20th century. According to his study, the disciplinary model of parole was converted to a clinical

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<sup>92</sup> M. S. Phelps (2015), (2015): The Curious Disappearance of Sociological Research on Probation Supervision, *Criminal Justice and Law Enforcement Annual: Global Perspectives*, no. 2 (April 2015) forthcoming.

<sup>93</sup> 1,560 per 100,000 in the population vs. 210 per 100,000 according to Phelps 2015, p.3 using data from Space II.

<sup>94</sup> J. Austin & B. Krisberg (1981), *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, in: *Journal of Research in Crime and Delinquency* 18, No. 1, pp. 165–196.

<sup>95</sup> S. Cohen (1985), *Visions of Social Control: Crime Punishment and Classification*, Cambridge.

<sup>96</sup> J. Simon (1994), *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*, Chicago.

model at first. While the former aimed at normalising the individual by involving the community, the latter was centred on a professional parole officer with a clinical approach towards rehabilitation. At the end of the 20<sup>th</sup> century, the managerial version of control emerged which helped to apply control to a growing number of unemployed and poor people (due to economic changes) by using actuarial models and by means of risk prediction. With increasing numbers of revocation,<sup>97</sup> the system of parole led to growing rates of prisoners instead of offering an alternative to detention. This “waste management model” of parole does not preclude that lip service is paid to the rehabilitative ideal while, at the same time, resources are allocated for different purposes.<sup>98</sup> An example of this is the offer of employment training that usually does not help the trainees to get a job while non-appearance is sanctioned nonetheless. If individuals do not make use of – the very few – offers of counselling, mechanisms of self-responsibilisation step in. The prevailing notion is that the individuals just need to change their attitude and make the right choices. If they do not, it is still possible to make use of the law-enforcement instruments that are, as opposed to scarce rehabilitative resources, always available.<sup>99</sup>

Unfortunately, the *European Probation Rules* of 2010 are also developed in the spirit of a risk-need assessment as it is used in the Risk-Responsivity Model,<sup>100</sup> e.g. reading as follows: “When required before and during supervision, an assessment of offenders shall be made involving a systematic and thorough consideration of the individual case, including risks, positive factors and needs, the interventions required to address these needs and the offenders’ responsiveness to these interventions.”<sup>101</sup> While to meet the needs of the supervisee may seem like something to be endorsed from any perspective of rehabilitation, it is important to notice that the needs, as framed in this concept, are connected to the concept of risk. Risk refers to the possibility that harmful consequences may happen, and risk assessment within the meaning of criminal justice processes describes the process of determining an individual’s potential for harmful behaviour<sup>102</sup> – instead of first enhancing personal fulfilment as it is proposed by the Good Lives Model.<sup>103</sup> It would be a fruitful perspective of research to analyse differences in the intensity of using risk-assessment and its effect on net-widening.

<sup>97</sup> N. Padfield & S. Maruna (2006), *The revolving door at the prison gate*.

<sup>98</sup> M. Lynch (2000), *Rehabilitation as Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practices*, in: *Punishment & Society* Vol. 2, No. 1, pp. 40–65.

<sup>99</sup> Cf. examples the study of Lynch 2000.

<sup>100</sup> D.A. Andrews & J. Bonta (2010), *The Psychology of Criminal Conduct*, fifth edition, Ohio: Anderson.

<sup>101</sup> Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules Nr. 66.

<sup>102</sup> T. Ward & S. Maruna (2007), *Rehabilitation*, New York, p. 44 f.

<sup>103</sup> Ward & Maruna 2007, 107 ff.

## 4.2. An European perspective on net-widening from the Netherlands and Germany

Research on net-widening effect has also been done in Europe, for instance, in a study by Spaans on the introduction of community service in the Netherlands.<sup>104</sup> In 1981 community service had been adopted in the Netherlands with the explicit aim to reduce incarceration. To avoid the use of community service for cases that otherwise would not have been sanctioned with imprisonment, rules were established allowing the use of community service only in cases that otherwise would have led to a partially unconditional prison sentence of six months or less. The study shows that during a period of ten years (until 1994), there was an almost steady increase of the application of community service but without any visible influence on rates of (short-term) imprisonment. While the percentage of sentences with community service raised from 4 per cent in 1985 to 15 per cent in 1994, the share of unconditional short-term imprisonment remained the same with about 18 per cent. It has further been concluded from interviews with judges that community service was appreciated as an alternative to a fine or a suspended prison sentence. Research with the intention to compare recidivism rates for a group of unconditionally imprisoned offenders, a group sentenced to community service and a group of offenders who had received a suspended sentence resulted – as expected – in lower re-offending rates by the group doing community service and the group with suspended sentences as opposed to the incarcerated group. As it turned out, however, these groups were not comparable, even though they had been matched *a priori* according to age, sex and type of offence. The group of prisoners showed a number of previous police records much higher than the other two groups. Thus, as it turned out, judges had used community service as an alternative to a suspended sentence – and not to imprisonment – since the two groups of non-imprisoned exhibited comparable rates of previous and subsequent police records. While the conclusion that recidivism rates are lower after community service than after release from prison could not be drawn due to the incomparability of the groups, the author concluded instead that community service had been used in a net-widening manner by the judges. Seriousness scores with respect to the offence were determined and then used to estimate the proportion of cases in which community service actually did substitute an unconditional prison sentence. Spaans deduced from this data that community service played only a modest role in the reduction of unconditional short imprisonment. Based on comparisons of the seriousness of the offenses sentenced with the different sanctions, only 30 to 50 per cent of community service orders replaced unconditional imprisonment while in 26 to 44 per cent of the cases, a net-widening effect was recognised. These results are in line with similar studies from other (English-speaking) countries with a long history of community service practice. In these studies, Spaans detected a

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<sup>104</sup> E.C. Spaans (1998): Community Service in the Netherlands. Its Effects on Recidivism and Net-Widening, in: International Criminal Justice Review Vol. 8, pp. 1-14.

net-widening effect amounting to approximately 50 per cent and comparable results are found for other kinds of “alternative” sanctions.<sup>105</sup>

A randomised experiment from Germany<sup>106</sup> also points exactly into the direction of net-widening. The evaluation of a pilot project in the state of Baden-Württemberg using electronic monitoring for early release and work release/day parole showed that electronic monitoring was applied to those who had been low-risk offenders anyway and thus would not have needed special supervision. Also, the individuals chosen to be included were not representative for the prison population in general, e.g. many of them were road traffic offenders. Instead of the 75 persons the project was meant to include within one year, it was only made use of in 46 cases. One important objective of the project had been to include prisoners who originally received a fine as a sanction from the court, but have been imprisoned later for default of paying the fine. These are clear cases for applying the principle of proportionality, because even the initial intention of the trial court, when deciding for a fine, has been to choose a sanction less intrusive than a custodial sentence. Only one (!) case of this kind had been included in the model project, which led to the political decision to cancel the project.<sup>107</sup> Obviously, decision-makers tend not to perceive electronic monitoring as comparatively effective as imprisonment. Implementing it in this context would almost inevitably lead to a net-widening effect, because the new intervention would be used in cases which otherwise would have been spared from imprisonment.

Summarising these findings, it becomes clear how important research on the net-widening effect is because it may – in no way – be taken for granted that ambulant sanctions replace incarceration to a full extent.

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<sup>105</sup> Spaans 1998, p. 12 f. with further references.

<sup>106</sup> G. Wößner & A. Schwedler, What do we gain from early release preparation under electronic monitoring? 68th Annual Meeting of the American Society of Criminology, Chicago, 15.11.2012, [http://www.mpicc.de/ww/de/pub/forschung/forschungsarbeit/kriminologie/elektronische\\_aufsicht\\_im\\_voll.htm](http://www.mpicc.de/ww/de/pub/forschung/forschungsarbeit/kriminologie/elektronische_aufsicht_im_voll.htm).

<sup>107</sup> Stuttgarter Nachrichten 22.05.2013: Elektronische Fußfessel. Modellversuch ist gescheitert <http://www.stuttgarter-nachrichten.de/inhalt.elektronische-fussfessel-modellversuch-ist-gescheitert.a4a52944-ecd1-4105-b39d-e4c92f5c6629.presentation.print.v2.html>.

## 5. RE-SOCIALISATION AND AMBULANT SANCTIONS

The term “re-socialisation” is a matter of debate in all Member States as well as in the international criminological discussion. It may be substituted by several similar terms like rehabilitation, reintegration, education or individual crime prevention while the choice of the respective expression depends on the emphasis of the national perspective and the preference of a certain author. Thus, we needed to clarify in which sense and with which connotation the term is used throughout the project, re-socialisation being one of the latter’s core terms.

In the law (e.g. in Section 2 *Federal Prison Act of Germany*), re-socialisation is oftentimes understood as individual crime prevention. It is thought to be a positive form of special prevention as opposed to negative special prevention, with the latter being regarded as selective incapacitation of individuals which are assumed to be dangerous. Re-socialisation according to German law, for instance, is defined as the process of learning to lead a life without crime and in social responsibility. In this perspective, reoffending is used as the most important – if not the only – variable in measuring the effectiveness of any kind of sanctions imposed with the purpose of crime prevention, such as imprisonment or alternatives to imprisonment. This perspective on re-socialisation<sup>108</sup> is also connected to evaluation efforts which have been strengthened under the “what works” or “evidence-based policy” perspective and terminology during the last fifteen years, promoting experimental research. This narrow approach of the concept of re-socialisation or rehabilitation – the latter term is preferred in the Anglo-American discussions – has recently been criticised by a number of authors because it meant reducing the offender to a conglomeration of risk and need factors.<sup>109</sup> According to the alternative “Good Lives Model”, developed by Tony Ward and his colleagues and already mentioned above, the (former) offender is perceived rather as a subject than an object of re-socialisation, supporting his or her own preferences and suggestions on what will help and work for him or her to lead a better life which – at least for the reason of the risk of imprisonment – will usually include a life without crime. It can be derived from this model that measures, whenever possible, should not be imposed against the

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<sup>108</sup> Becoming famous based on the concept of D.A. Andrews & J. Bonta, *The Psychology of Criminal Conduct*, Cincinnati, 5th edition 2010.

<sup>109</sup> T. Ward & S. Maruna (2007), *Rehabilitation. Beyond the Risk Paradigm*, London and New York.

will of the offender but in line with his or her own needs and wishes. When applying this concept, the question whether a measure does work or not, with respect to preventing reoffending, becomes less important for justifying it with respect to the constitutional rights of the offender. An important implication for research on different types of sanctions is to focus on the perspective of the individual who is subjected to a sanction and how he or she perceives this sanction, not just on effects on his or her behaviour. Hence, research methods will rather be surveys and observational research instead of randomised trials.

When discussing re-socialisation with the special focus of enhancing the role of the civil society in the process of re-socialisation of offenders, it should also be clear that a mere concentration on the question of reoffending would be too narrow to be sufficient. Thus, bearing this objective in mind, a common definition of re-socialisation should take into account the role of civil society in the process of re-socialisation. With respect to this, two aspects are important: one is an understanding of re-socialisation including the “repair” of the de-socialising aspects of imprisonment or ambulant sanctions. The other is to perceive re-socialisation as a two-sided interactive effort between ex-offender and society which could also be described as reintegration.

Imprisonment is connected with several deprivations resulting from deprivation of liberty or adding to the deprivation of liberty. Once in prison, prisoners mostly lose their jobs, housing and family ties, as well as close relationships become fragile. Because of the high costs of criminal proceedings, the obligation to make reparations to victims and low wages in prison, if the prisoner is employed there at all, financial problems and debts are growing. The danger of suicide is higher than outside prison and during the time of imprisonment the health situation of the majority of prisoners worsens. Due to this situation and to the stigma of having been imprisoned, it is difficult to resettle in society after release. From this perspective, re-socialisation has – in the first place – to be an attempt to attenuate the negative impact imprisonment has on the socialisation of the prisoner. This concept also found its way into law as, for instance, visible in Section 3 para. 2 of the *Federal Prison Act of Germany*, which states that the prison has to counteract harms caused by imprisonment as part of the re-socialisation effort. Damaging consequences of ambulant sanctions may be less known, but it clearly does not go without saying that there are none. This should be plausible when thinking of e.g. electronic monitoring affecting the individual under supervision as well as the family and others in close relation.

Understanding re-socialisation as a two-sided process bringing the civil society back in stresses the necessity of society to conceiving of the prisoner during imprisonment – and afterwards – as an individual on his or her way back into society. Without such a societal attitude, the concept of re-socialisation is impossible to be realised.

Within this meaning, as formulated, for instance, by Alessandro Baratta<sup>110</sup> stressing the two-sided process, re-socialisation is called “reintegration”.

All these aspects are crucial to an understanding of re-socialisation as more than the mere absence of reoffending but rather as increasing the chances for the offender to lead a good life again, or even for the first time, with its meaning being defined by the individuals themselves. Such an interpretation also entails the active support of the offender in overcoming the negative impact of imprisonment by society, without one-sidedly expecting efforts from the prisoner, the released individual or the offender under supervision.

The aspect of social rehabilitation underpins all three mentioned Framework Decisions. They require the transfer to enhance the prospects of social rehabilitation.<sup>111</sup> It is acknowledged that this will often be the case in connection with an explicit request of the accused or sentenced person.

According to the „waste management model“ as described by Simon and Lynch, the persistent rhetoric of rehabilitation may serve a public and political discourse that still holds up the idea of the reform of offenders. However, at least a dedication to the individuals’ capacity to change and desist from crime would be necessary for bringing forward a concurrent development as described in Simon’s enrichment model. But this is denied according to these authors, let alone societal and economical changes diminishing poverty. It is a matter of debate in how far these American models apply to the situation of Europe but clearly at least similar tendencies cannot be precluded to exist.

The *European Probation Rules* still mention the aim of rehabilitation despite their orientation towards risk and need. Since they are binding regulations, it should be out of question that they just pay lip service to rehabilitation as it was described for the United States by Lynch.

Rehabilitation in the *European Probation Rules* is described as “a broad concept which denotes a wide variety of interventions aimed at promoting desistance and at the restoration of an offender to the status of a law-abiding person.” This may cause the apprehension that rehabilitation is understood in the narrowest way as described above. But this may partly be attributed to the use of different terminology rather than content. In addition to “rehabilitation”, the *European Probation Rules* also demand for “resettlement”. Resettlement is the process of a prisoner’s reintegration back into the community. But then here again the narrow concept of re-socialisation seems to be applied, because “resettlement” is meant to refer to the period of supervision after the offender has left prison but is still subject to certain statutory obligations – for example, a period of parole. In

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<sup>110</sup> A. Baratta (2010), Resozialisierung oder soziale Kontrolle? Für ein kritisches Verständnis der sozialen “Reintegration”. In: G. Bitz et al. e(Eds.), Grundfragen staatlichen Strafens: Festschrift für Heinz Müller-Dietz zum 70. Geburtstag. München, pp. 1-17.

<sup>111</sup> Report on the Implementation of Framework Decisions COM(2014) 57, p. 9.

addition to rehabilitation and resettlement, the *European Probation Rules* also demand for “aftercare”. By this they mean the process of reintegrating an offender, on a voluntary basis and after final release from detention, back into the community in a constructive, planned and supervised manner.<sup>112</sup> This may include some elements of the kind of wider rehabilitation concept as proposed above. But it is open to debate whether this can be sufficient.

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<sup>112</sup> Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe.

## 6. ENHANCING THE ROLE OF THE CIVIL SOCIETY IN AMBULANT SANCTIONS

During the last decades, civil society has oftentimes played a role that was detrimental to the aim of reintegrating former offenders. Especially with respect to former sex offenders, they, for instance, tried to avoid the residence of released prisoners in their neighbourhoods. Against this backdrop, it is important to pose the question how attitudes and reactions in favour of reintegration could be supported. This would be important for rehabilitation in the wider sense as it has been described above, but even for re-socialisation in the narrow sense of preventing reoffending.

### 6.1. Restorative Justice

With regard to this, the Circles of Support and Accountability represent a highly significant concept. But of those included in the project Belgium has been the only country that introduced COSA already and so far only as a pilot initiative.<sup>113</sup> Like other approaches based on restorative justice COSA can be a model of enhancing the role of the civil society, including lay people as well as e.g. university students. Another kind of restorative justice programs, face-to-face Restorative Justice Conferences, have also been subject to a Campbell Review.<sup>114</sup> RJC's bring together offenders, victims and their respective communities. The meta-analysis of ten randomised experiments showed results modestly but clearly favouring RJC's to traditional approaches with cases being referred from various stages of the criminal justice process, from the stage of diversion from prosecution until RJC's applied post-sentencing in prison and probation. When the authors strongly emphasise the lower cost of RJC's in comparison to traditional approaches, this should also result in caution. Instead, models have to be developed and monitored on how to secure the procedural rights of offenders in restorative justice procedures. While they are

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<sup>113</sup> S. Sivri & M. Taeymans (2014), Procesevaluatie proefproject COSA Antwerpen, De eerste ervaringen met COSA in België, Dienst voor het Strafrechtelijk Beleid, FOD Justitie, January 2014, [http://www.dsb-spc.be/doc/pdf/EVALUATIE\\_COSA\\_NL%28lightversie%29.pdf](http://www.dsb-spc.be/doc/pdf/EVALUATIE_COSA_NL%28lightversie%29.pdf)

<sup>114</sup> H. Strang, L. W. Sherman, E. Mayo-Wilson, D.I Woods & B. Ariel (2013), Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review, <http://www.campbellcollaboration.org/lib/project/63/> .

advisable with respect to the involvement of civil society, it is not sufficient to rely on the fact that offenders may receive an alternative to traditional sanctioning. Another aspect advising caution when dealing with this kind of studies is the fact that they serve the tendency to restrict rehabilitation to the absence or reduction of re-offending. This is especially questionable with respect to programmes of restorative justice aiming at a much broader and deeper involvement of the community. While these approaches imply the intention to deal with problems and conflicts and not directly with offenses, offenders and victims, they may not be reduced to an instrument of mere crime prevention.

## 6.2. Civic monitoring

Another possibility to enhance the role of the civil society and the observation of human rights standards for sanction at the same time is the implementation of civic monitoring. Basic principle number 15 of the *Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules* states that “probation agencies shall be subject to regular government inspection and/or independent monitoring”. Therefore, the rules are exactly the same as for prisons as stated in No. 9 basic principles of the *European Prison Rules*. The introduction of an Ombudsman or of human rights defendants are among the ways in which this may be achieved.<sup>115</sup> The involvement of NGOs would at the same time strengthen the connection to the civil society. Given the fact that the „business of supervised punishment [...] plays out daily in probation or parole offices, and in supervisees’ homes, rather than in custodial institutions”,<sup>116</sup> it seems a bit outdated to restrict the effort of the developing monitoring systems to deprivation of liberty (in institutions) anyway. The United Nations Subcommittee responsible for observing the implementation of the *Optional Protocol* to the UN-Convention against Torture recently visited the national preventive mechanism in Germany. In their report<sup>117</sup> on this visit, they criticise the German preventive mechanism monitoring institutions with deprivation of liberty for their narrow approach of just visiting institutions. They recommend to also keeping the legislation under review. Another advice was to cooperate with NGOs and universities to improve monitoring. For the implementation of an independent monitoring mechanism for ambulant sanctions by civil society actors, which has to do without the possibility to visit the place where they are executed, these experiences can be used as a basis.

<sup>115</sup> Ministers’ Deputies CM Documents CM(2009)187 add3, p. 5.

<sup>116</sup> Robinson/McNeill/Maruna 2013 cited in McNeill/Beyens 2013, 2.

<sup>117</sup> Subcommittee on Prevention of Torture Or Other Cruel and Inhumane or Degrading Treatment or Punishment (2013): Report on the visit made by the Subcommittee on Prevention of Torture Or Other Cruel and Inhumane or Degrading Treatment or Punishment on the purpose of advisory assistance to the national preventive mechanism of the Federal Republic of Germany, CAT/OP/DEU/R.2 [http://www.nationale-stelle.de/uploads/media/Germany\\_Report\\_NPM-final\\_01.pdf](http://www.nationale-stelle.de/uploads/media/Germany_Report_NPM-final_01.pdf).

## 7. ALTERNATIVE MEASURES: VIEWS FROM THE PROJECT COUNTRIES AND SOME REMARKABLE PRACTICES

### 7.1. Measures alternative to imprisonment in the participating countries

In the working progress, examples of alternative measures and/or ambulant sanctions<sup>118</sup> were described, and country experts were asked to add sanctions that were not on the list. It should be kept in mind that the definitions of the measures vary from country to country, even though the authors tried to narrow them down by using the following definitions. Similar measures, still, are applied differently, with a different purpose and to a different group of offences or offenders, without this being visible.

This report focuses on measures applied with adults; juveniles are only dealt with as an exception.

**TABLE 1: ALTERNATIVE MEASURES TO IMPRISONMENT**

Alternative Measures <sup>119</sup>	Belgium	Bulgaria	Germany	Lithuania	Spain	Catalonia
a) Diversion to nothing	√	-	√	-	-	-
b) Postponing the decision on sanctions	-	-	(√)	-	-	-
c) Suspended sentence	√	√	√	√	√	√
d) Probation	√	√	√	√	√	√

<sup>118</sup> The description of different types of ambulant sanction partly relies on May/Wood 2010, pp. 146 ff.; in the end this list is similar to the approach taken in Space II, pp. 14-16; but is open to measures defined as being within the prison system.

**TABLE 1: ALTERNATIVE MEASURES TO IMPRISONMENT  
(CONTINUED)**

Alternative Measures <sup>119</sup>	Belgium	Bulgaria	Germany	Lithuania	Spain	Catalonia
e) Intensive supervision probation		-		√		
f) Community service	√ + d)	d) + (√)	d)	d)	√ + d)	√ + d)
g) Fine	√	√	√	√	√	√
h) Day fine	-	-	√	-	√	√
i) Day reporting	-	-	-	-	-	-
j) Curfews	-	(√)	(√)	√	√	√
k) Electronic Monitoring (GPS)	√	√	√	√	√	√
l) Drug treatment	√	(√)	√	(√)	√	√
m) Therapy	-	-	(√)	-	-	-
n) Boot Camps	-	-	-	-	-	-
o) Restitution	(√)	-	(√)	-	(√)	(√)
p) Victim Offender Mediation	√	-	√	-	-	√
q) Family group conferences	-	-	-	-	-	-
r) Circles of support	√	-	-	-	-	-
s) Expulsion order		√	√		√	√
t) Deportation		√	√		√	√
u) Intermittent imprisonment	(√)	-	(√)	√	(√)	(√)
v) Further Examples						

**a. Diversion to nothing. Termination of criminal proceedings without further measures or conditions. Alternative not just to imprisonment but possible in any stage of the proceeding.**

<sup>119</sup> See below for a definition.

All countries know of reactions to minor forms of deviance without any criminal sanction following. In some countries some actions are not defined as a crime but, for example, as an administrative offence only. This approach is taken in **Bulgaria** and **Lithuania** towards minor offences, which are not defined as a crime, and thus, they do not appear in the criminal records. In **Germany** this is the case with many traffic offences. This has been discussed in detail above. Diversion, as opposed to this, is applied in case criminal proceedings have already been initiated and will be terminated at some point in time during the penal procedure.

In **Germany**, the criminal proceedings can be terminated in all cases of misdemeanours (“Vergehen”) where the guilt of the suspect would be regarded as minor (in case of a conviction) and if there is no public interest in the prosecution. Another scope of application for the termination of proceedings without any attached measures is the situation where another sentence is expected and the sentence of the given case would hardly make a difference in view of the whole amount of punishment. Under the same conditions, but with an “amount of guilt” on a higher (but still comparatively low) level, the proceedings can be ceased after the fulfilment of certain conditions (e.g. restitution, paying money to a charity or the state, or to undergo some training). In **Belgium**, the police applies pre-trial diversion in cases of minor drug consumption.

Amnesties are an approach different to diversion, restricted to a specified number of cases, but the results are similar to those of diversion to nothing. In **Bulgaria** an amnesty was applied by parliament concerning crimes against the communist regime (prior to 1990), negligent crimes prior to 1 July 2008 punishable by up to five years of imprisonment (excluding cases where the perpetrator had used excessive quantity of alcohol, or had caused serious bodily injury or death), and several kinds of drug crimes.

Looking at these national approaches as alternatives to imprisonment raises the question whether the acts would otherwise fall within the scope of a sanction of imprisonment. At least from the German perspective, it can be seen that defining minor offences as mere administrative (and not criminal) offences is even an alternative to imprisonment, since there is quite a number of prisoners who committed minor crimes (e.g. fare evasion) which are comparable with administrative offences.

- b. Postponing the decision on sanctions. Person found guilty of a crime, but the decision about whether a sanction will be imposed is left open for a certain time. The sanctioning process will depend upon the behaviour in the time in between.**

With respect to the participating countries, this approach can only be found in **Germany**. It is applied in cases of juvenile offenders (up to 21 years of age, Section 27, *German Youth Court Act*) in which it is not clear whether a term of imprisonment has to be applied or other measures may be sufficient. With adults a similar

provision exists in relation to fines (Sec. 59, *Criminal Code*), but this takes place quite rarely. The other countries did not report this kind of measure.

- c. Postponing the imposition of a (certain) sanction/suspended sentence. Person is found guilty to a certain sanction, but the actual application of the found sanction will depend on no reoffending in the future, without further measures to be applied (this might be a form of probation in the national law).**

It is not certain whether all countries allow for a suspended sentence without measures – except for the condition of no reoffending. The common way of suspension seems to go along with probation measures, but available statistics do not allow to allocate the number of suspended sentences without further measures attached – e.g. in **Germany**, only the number of probation cases with a professional probation officer are reproduced in published official statistics, even though most suspended sentences/probations are without a probation officer and further measures.<sup>120</sup>

- d. Probation: The convicted person is under supervision outside prison. What supervision means can be very different. The probationee will usually will be obliged to see a probation officer, to fulfil further requirements, maybe undergo certain kinds of control (e.g. urinalyses) and will be subjected to certain restrictions (e.g. with respect to freedom of movement and choice of employment).**

Probation is a measure existing in all participating countries. However, the amount and the concomitant extent of restrictions by attached measures, as well as the way the compliance is controlled, are not statistically measured, and they are quite different.

Even the parameters under which probation is generally applicable vary to some extent, let alone the question to what kind of offences and offenders it may be applied. Thus, it may be used in different legal cultures in cases or ways that are by no means comparable, without this being recognisable.

As to the preconditions under which probation is applicable:

- In **Belgium**, two basic categories exist: Suspension of the sentence and postponement of its execution. A suspension of the sentence is possible in cases of a sentence of up to five years of imprisonment and if there has not been a previous conviction of more than six months. This measure will not be included in the criminal record if completed successfully; the postponement of the execution is possible with convictions up to five years of imprisonment; no pre-conviction of more than twelve months. Probation is excluded for certain groups of crime, e.g. sexual offences involving minors, hostage taking and rape. Consent by the probationee is needed in both cases.

<sup>120</sup> Morgenstern/Hecht 2011, p. 185.

- In **Bulgaria**, probation is a penalty on its own and possible with convictions for up to three years of imprisonment for offenders with a 'low degree of public danger'. Additionally, it can be applied in cases of a suspended sentence and no pre-conviction of imprisonment. Probation was introduced in 2005 and there were about 9,000 to 11,500 probationees newly given probation in each of the last years.<sup>121</sup> About 30 per cent of all convicted persons were sentenced to probation.
- In **Germany**, probation is possible with convictions of up to two years of imprisonment, and there is no exclusion due to pre-convictions. Parole is a backdoor measure supervised by the probation service as well.
- In **Lithuania**, probation is possible with convictions of up to four years of imprisonment for one or several minor or less premeditated crimes, and in case of convictions of up to six years of imprisonment for negligent crimes.<sup>122</sup>
- Under **Spanish** law, probation is not defined. For the purpose of this study, two related possible measures were taken into account: suspension of a sentence and substitution of a sentence. Both can be accompanied by a variety of measures, the substitution solely by either a (day) fine or community service. In cases of gender violence substitution can, however, be applied with community service only. Both measures are possible with convictions of up to two years of imprisonment if it was the first offence. In cases of crimes due to a drug addiction, sentences up to five years are included, and they are not restricted to first offences, but participation in a therapy or a detoxification programme has to be proven. Concerning convictions of persons with an incurable disease there is no maximum with respect to the sentence excluding the possibility of probation. At the same time, community service and fines (as well as permanent location) are defined as (soft) penalties of their own.

**Consent to probation** is necessary in **Belgium**. In **Germany** consent is necessary not for probation as such but only for an attached measure to undergo medical treatment or an addiction therapy, or to reside in a suitable home or institution; for granting parole, the prisoner's consent is necessary. In some countries consent is necessary for community service as a probation measure (see below: community service).

The duration of probation varies in the participating countries. In **Belgium**, the duration is between one and five years (1-3 years with minor offences); in **Bulgaria** – three to five years; in **Germany** – two to five years; in **Lithuania** – one to three years; and in **Spain** – two to five years (less serious cases: 3-12 months; drug related offences: 3-5 years).

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<sup>121</sup> Source: General Directorate 'Execution of Penalties'.

<sup>122</sup> According to the *Lithuanian Probation Law* probation is a conditional alternative to custodial sentences, suspended sentences and conditional release when supervision of the convict is implemented.

The measures possible under probation and their actual application vary to a large extent – from different educational programmes to measure of mere control. Summing them up would not lead to a vivid picture. This has already been done in a complex project, and can be retrieved via the internet.<sup>123</sup>

Probation, a suspended sentence, etc. will or can be revoked under certain conditions:

- In **Belgium**, suspension of a sentence will be revoked if the probationee commits a new crime that results in a sentence of at least one month; the postponement of the execution of a sentence is automatically revoked when committing a new crime which results in a sentence of more than six months; the revocation is discretionary if the sentence is between one and six months.
- **Bulgaria**: If the probationee, without a good reason, commits another crime of general nature (a crime prosecuted *ex officio*) before the expiry of the probationary period and is again sentenced to imprisonment, s/he must serve both the suspended sentence and the new one. If the probationee commits a negligent crime, the court may order the suspended sentence not to be served in whole or in part. If the probationee, without good reason, discontinues his/her treatment, which has been imposed by the court, the court shall rule the serving of the entire suspended prison sentence.
- In **Germany**, the court of first instance shall order the suspended sentence to take effect if the convicted person: “1. commits an offence during the operational period showing that the expectation on which the suspension was based, has been disappointed; 2. grossly or persistently violates directives or persistently evades the supervision and guidance of the probation officer, thereby causing reason for fear that he will re-offend; or 3. grossly or persistently violates conditions.” Instead of a revocation it is possible to prolong the probation term or to alter conditions and directives.
- In **Spain**, according to Article 84 of the *Penal Code*, if the offender commits another crime during the period specified by the judge, the suspension of the sentence will be revoked and the offender will be forced to complete the time remaining from the full sentence. In case of non-compliance with the obligations and conditions the Judge declared, s/he could impose an extension of the suspension (up to five years), the replacement for another measure, or decide to revoke the suspension.

As a backdoor measure, parole exists under comparable conditions and within the same structural framework given with probation in the participating countries. So far as it was mentioned by the project partners, the suspension of the prison term can take place, at the earliest stage:

<sup>123</sup> D. Flore, S. Bosly, A. Hohnhon & J. Maggio (eds)(2012), *Probation Measures and Alternative Sanctions in the European Union*, Cambridge; <http://www.euprobationproject.eu>.

- after the completion of one third of the sentence (Belgium: first time offenders; Bulgaria: juveniles);<sup>124</sup> Lithuania: negligent crimes up to six years imprisonment, intentional crimes up to three years imprisonment, juveniles);
- after one half of the sentence (Bulgaria: first time offenders; Germany: first time prisoners with sentences of up to two years, or special circumstances; Lithuania: negligent crimes exceeding six years, other convicts whose imposed sentence exceeds three years, but not more than ten years);
- after two thirds of the sentence (Belgium and Bulgaria: repeated offence; Germany: the regular time to decide upon release; Lithuania: 10-15 years; Spain: open prison regime and good behaviour);<sup>125</sup>
- three quarters of the sentence (Lithuania: 15 to 25 years of imprisonment; Spain: regular cases).

In Belgium, prisoners serving a life sentence can be released conditionally after ten years or, when convicted for a repeated offence after fourteen years; in Germany the minimum time a “lifer” has to serve is 15 years of imprisonment.<sup>126</sup>

The times describe the minimum duration a prisoner has to spend in prison, still other conditions have to be fulfilled.

**e. Intensive Supervision Probation. Much stricter than regular probation with a probation officer controlling the convicted person very often, even on a daily basis, constant observation of all parts of life.**

Only **Lithuania** reported on a system of Intensive Supervision Probation is reported, which is explicitly governed by law. Intensive Probation is enforced by electronic monitoring. It is also a possibility in parole cases if the parolee is released six months earlier than the set date.

In **Bulgaria**, there is only one form of probation. However, some of the attached measures would be defined as intensive probation in other countries. One of the usual measures is to personally register with the probation service at least twice a week. After having served at least one fourth of the probation period, these registration duties can be loosened, and a ban to leave one’s home after 10pm and on weekends can be lifted.

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<sup>124</sup> Prisoners who were juveniles at the date the crime was committed, but are adults at the date of the decision will be dealt with as adults.

<sup>125</sup> The person concerned should have good behaviour and should be ready to adapt to social life in freedom, that is, be prepared for his/her reintegration into society; s/he has participated in cultural, labour and occupational activities; that his/her prison record lacks disciplinary summaries; sentence should not be for organised crime or terrorism (unless abjured terrorism and cooperated with the authorities); in Catalonia housing etc. Is not seen as a precondition but a work in progress.

<sup>126</sup> The minimum time of imprisonment can be higher if the court of first instance ruled that the guilt’s weight is extremely heavy.

**f. Community Service: work for a non-profit organisation or government agency without payment.**

In **Belgium** at least three forms of Community Service exist. The prosecution service can dismiss a criminal case after a measure of Community Service has been fulfilled. This measure can include a maximum of 120 hours of work a month for a period of up to four months. It can be applied as part of a mediation process and if the prosecution service deems a penalty of no more than two years to be necessary. Mitigating circumstances can be considered in this decision. Community Service is also a directive under probation. Additionally, there is a work penalty that may comprise 20 to 300 hours of work within six or 12 months. Only very serious cases are excluded. The work penalty will not appear in the criminal record.

In **Bulgaria** three different forms of Community Service exist. It is a directive under probation for 100 to 320 hours per year, with a maximum of three years, that is to say 960 hours in total. Another form of Community Service, "Corrective Labour", means working at ones original workplace, with a deduction of the salary of 10 to 25 percent (paid to the state) for a period between three months and two years – with that time not counted for pensions as well. A heritage from communist times, it is still in the law, but no more in practice. The third form is voluntary work within the prison, with two working days substituting three days in prison.

SPACE II and other instruments say nothing about Community Service in **Germany**, or tell the reader that this point is not applicable. This is because it does not exist as a sanction of its own. However, Community Service, as described above, exists in various forms. Community Service is possible on the front-door level as a probation directive and a condition for ceasing criminal proceedings without a conviction. In cases of diversion, with the effect of ceasing the proceedings, it is decided upon by the court, together with the prosecution service and on the basis of the consent of the accused. Another form is community service where the person is sentenced to pay a fine. In this case, community service is possible to avoid prison for being unable to pay the fine. There are regional differences between the time equaling a day fine, varying between 4 and 6 hours (in individual cases between 3 and 4 hours). A positive exception on the in-door level is a scheme in some prisons, e.g. in Bremen, under which persons serving a prison sentence for being unable to pay a fine do community work during their prison stay, thereby serving two days in one. While the latter is an example of cutting the number of prison days by half at least, there is still a severe lack of alternatives to imprisonment after default of paying a fine and thus in cases in which the offender was supposed to be outside (not inside) prison from the very beginning.

In **Lithuania**, Community Service is a penalty on its own.<sup>127</sup> The sentenced person has to consent in writing. The duration is between one month and a year, and in

<sup>127</sup> The literal translation of the Lithuanian term for this penalty is 'work to the benefit of the society'.

the case of non-compliance it can be replaced by a fine or arrest. Work, but not community work, can also be a directive when suspending a sentence.

In **Spain**, Community Service can be a substitution of a sentence (See above: Probation) or act as a sentence on its own. A working day can be of up to 8 hours. Consent is necessary. In gender violence cases, Community Service is the only substitute for imprisonment available, a fine is not possible. Gender violence crimes entail an additional mandatory training programme.

**g. Fine: certain amount of money has to be paid to the state.**

In all countries, the imposition of a fine is possible. A fine can be an alternative to imprisonment, but it may also result in originally unintended imprisonment for default of paying. In **Germany**, the inability to pay a (penal) fine leads to imprisonment, one day unit is substituted by one day of imprisonment. Additionally, schemes exist in all of the Länder to work in such cases in order to avoid imprisonment. In the last decade, nearly 4,000 prisoners (stock) were in prison for default of payment at a given time. Since the sentences are usually rather short, the number of people where a fine is substituted by imprisonment is much higher.<sup>128</sup>

**h. Day Fine: the amount of the fine is based on what is earned by the convicted person per day.**

A day fine system exists in **Germany** and **Spain**.

**i. Day Reporting: the convicted person stays at home during the night time and non-activity hours, during daytimes s/he is obliged to involve in activities like work, counselling, job training, education programs, looking for a job, or unpaid work in the community.**

In none of the participating countries such a measure exists. However, some of the probation measures in Bulgaria are very similar to this one.

**j. Curfews, controlled by electronic monitoring: the convicted person may stay at home but must wear an electronic device connected to the telephone.**

In **Bulgaria**, curfews seem to be a common part of probation. Electronic monitoring can be applied on persons sentenced to probation in order to facilitate the probation measures of compulsory registration by current address and the restriction of free movement. Compulsory registration in such cases is controlled

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<sup>128</sup> The number of prison entries because of sentences for the default of paying a fine was within the official statistics until 2002; more recent are no more publically available. In 2002 about 56,000 persons entered a prison with such a sentence to be served, including persons with more than one sentence, and prisoners being removed from one prison to another and thereby entering a new prison etc., cf. Federal Ministry of the Interior & Federal Ministry of Justice (2006): Zweiter Periodischer Sicherheitsbericht, Berlin, p 620; the number of prisoners serving such sentence (stock) was 3,748 in March 2003 (Statistisches Bundesamt (2014), Bestand der Gefangenen und Verwahrten, Wiesbaden.)

by voice recognition software over the telephone. The offender's location is confirmed by surveillance software, which tracks down the convict's presence at the location at the time set by the court. According to media reports, so far a total of 10 persons sentenced to probation have been placed under electronic monitoring.<sup>129</sup>

In **Lithuania** this is called intensive supervision.

In **Germany**, this form of electronic monitoring is only applied in the state of Hesse as a front-door measure – and in theory as a back-door measure as well: parole or pardon. In practice it is used front-door instead of pre-trial detention (25 per cent of the cases) and as a measure advancing probation (75 per cent). The application of electronic monitoring in these cases is decided upon by the court. The participants take part on a voluntary basis and need to have accommodation with a telephone line and an occupation (not necessarily paid) of about 20 hours per week. They have to follow a time table (times at home, at work and elsewhere), but only the times at home are controlled electronically. Time under electronic monitoring is not credited against the prison time served, which means that where EM is applied instead of pre-trial detention it will not count as time already served in case of a later conviction<sup>130</sup> (Fünfsinn 2009), as opposed to times of pre-trial detention. Thus, as a result, EM will only turn out to be an alternative to imprisonment in these cases if the trial ends with something else than imprisonment, especially with an acquittal. Pre-trial detention in Germany is usually applied only if a conviction to a prison term is expected. If the convicted person is expected to be sentenced to a fine, there is the risk that EM will be used for cases in which otherwise no pre-trial detention would have been imposed.

In **Spain**, such a measure seems to be the Permanent Location Penalty, at least if controlled by electronic means. The reform of the *Penal Code* (by OL 15/2003) replaced the penalty of weekend penitentiary arrest by penalty of permanent location. In Article 35 of the Penal Code, this penalty is regulated as a “deprivation of liberty” that must be served at the home of the offender or the place that the judge determined. Although the reform of 2010 extended its duration from 12 days to 6 months, it recovers its penitentiary character because it opens the possibility of being fulfilled in prison. This measure may or may not involve the use of electronic means for control. The control is usually done through biometric voice control with random calls to the residence and voice authentication using a centralised computer.

<sup>129</sup> 180 правонарушители ще са обект на е-мониторинг до 2 години [180 offenders will be subject to e-monitoring in the next two years]. Computerworld, 18 March 2014, available at: [http://computerworld.bg/45725\\_180\\_pravonarushiteli\\_shte\\_sa\\_obekt\\_na\\_emonitoring\\_do\\_2\\_godini](http://computerworld.bg/45725_180_pravonarushiteli_shte_sa_obekt_na_emonitoring_do_2_godini)

<sup>130</sup> H. Fünfsinn (2009), Elektronische Fußfessel und Prävention – ein Widerspruch?, in: Müller, HE/Sander, GM/ Valkova, H (eds), Festschrift für Ulrich Eisenberg zum 70. Geburtstag, Munich 2009, p. 691.

**k. GPS Electronic Monitoring: the convicted person must wear an electronic device and his/her position will be monitored via GPS, at least if s/he will enter certain forbidden areas or leave mandatory areas.**

All countries reported on GPS Electronic monitoring, with Belgium having the most practical experience.

In **Belgium**, electronically monitored house arrest (EM) has been introduced in 1998 as a local pilot scheme and it has been implemented nationwide since 2000<sup>131</sup> with the establishment of a National Centre for Electronic Monitoring (NCEM).<sup>132</sup> Since its introduction, EM has been promoted as a cost-efficient solution for prison overcrowding by the subsequent Ministers of Justice. This form of the execution of the sentence may run from the pronouncement of the judgment or be granted between a prison sentence and parole. For prisoners sentenced to up to three years of imprisonment, EM is used as a front-door strategy. Although the offender is initially sentenced to imprisonment by a sentencing judge, many of the prisoners actually do not have to serve one day in prison. In the search for more virtual prison capacity, EM is applied almost automatically to the group of offenders with prison terms of up to three years. The prison governor plays a central role in the assignment procedure.<sup>133</sup> S/he takes the first initiative to place the prisoner under EM, which includes providing information about EM and asking for the prisoner's consent to the measure. If s/he agrees, the prison governor sets a date, together with the NCEM, to install the EM device at the home of the supervisee. When the person is not a resident of the place where the EM will be executed, the prison governor consults the other residents for their consent. In case of refusal by the prisoner or the other residents, the person is detained. For inmates sentenced to **three years or more** of imprisonment, the procedure is more individualised and the Sentence Implementation Tribunal is the authority that decides if they can be placed under EM. Six months before the prisoner is eligible for conditional release, s/he can be placed under EM, which means that in these cases EM is used as a transitional measure between imprisonment and conditional release. For this category, EM thus serves as a back-door strategy. The

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<sup>131</sup> A first step to introduce EM in Belgium was taken in 1996 by the then Minister of Justice, Stefaan De Clerck, who stated in his White Paper On Penal Policy and Prison Policy that EM was an option to be explored (Note d'orientation "Politique pénale et Politique pénitentiaire", juin 1996).

<sup>132</sup> For several years, EM was only regulated through Ministerial Circular Letters. It was not until 2006 (*Act of 17 May 2006 on the external legal position of convicts with a custodial sentence and the rights awarded to the victim in the framework of sentence enforcement*) that EM got a fully fledged legal basis.

<sup>133</sup> Although the prison governor plays a crucial role in the EM procedure, exceptions exist. Convicted offenders without residence permit are not taken into consideration for the termination of sentence. In cases of a conviction for sexual offences, the Detention Management Service of the Central Prison Administration takes the granting decision for EM and pre-specified individual conditions are set, based on a social inquiry report. For example, in cases with offenders who are facing a substance abuse problem, the prison governor may advise drug or alcohol treatment. The procedure for this (very small) group is stricter than for the group of other prisoners sentenced to a prison sentence of up to three years, where no social inquiry report is required and additional conditions are not set, unless the prison governor decides otherwise.

possibility of electronic monitoring as an autonomous sanction is also currently debated and its application as an alternative to pre-trial detention (with GPS tracking devices) has been in force since the beginning of 2014.<sup>134</sup> Although the succeeding Ministers of Justice invoked EM to solve the crisis of prison overcrowding, no structural decline in the prison population has taken place since the expansion of EM.<sup>135</sup> On the contrary: with prison overcrowding reaching 16.4 per cent in 2000, when EM was implemented nationwide, thirteen years later, the prison population rockets up to 11.769 as of March 2014, resulting in an overcrowding ratio of 22 per cent.

**Bulgarian** legislation allows for the use of electronic monitoring but its practical implementation is still at the pilot stage. It only applies to offenders sentenced to probation. Some interpretations of the *Law on Execution of Penal Sanctions and Detention in Custody* lead to the conclusion that electronic monitoring could also be applied in cases of early conditional release from prison, but the relevant Ordinance speaks only about offenders sentenced to probation. According to the Ordinance, electronic monitoring cannot be applied to juveniles under 16 years of age and to offenders with mental disorders. The technical implementation of the monitoring has to be outsourced to a subcontractor whose obligations include the provision of the necessary electronic devices, the maintenance of their operation and the running of a control centre reporting to the Directorate General 'Execution of Penalties'. The convicted person is responsible for the tracking device and in case of damage, he/she has to reimburse it. Electronic monitoring can be applied on persons sentenced to probation in order to facilitate two of the probation measures: the compulsory registration by current address and the restriction of free movement. In 2010, the Bulgarian and the British ministries of justice jointly implemented a six-month pilot project for electronic monitoring. After an evaluation of the results, it was supposed to be expanded to all 28 probation offices in the country. After the conclusion of the pilot project the initiative was not further developed without publicly announcing the reasons thereof. In 2014, the Ministry of Justice announced another project entitled 'Strengthening the application of probation measures in accordance with European standards and a system for electronic monitoring'. The Ministry of Justice subcontracted the technical implementation of the project to the same company which provided the electronic devices in 2010. In the next two years, the Ministry of Justice plans to include 180 offenders convicted to probation or conditionally released from the prison in the programme.

<sup>134</sup> Les bracelets électroniques avec GPS peuvent désormais être utilisés, RTBF, 2 janvier 2014. See also: C. De Man, E. Maes (promotor), B. Mine & R. Van Brakel (2009) *Possibilités d'application de la surveillance électronique dans le cadre de la détention préventive*, Rapport de recherche nr. 23, Nationaal Instituut voor Criminalistiek en Criminologie, Operationele Directie Criminologie, Brussels. [http://nicc.fgov.be/upload/files/ODcriminologie/prononceetapplicationdespeineset-mesures/condamnationspenales/EINDRAPPORT\\_ET\\_VH\\_def%28rapport%29.pdf](http://nicc.fgov.be/upload/files/ODcriminologie/prononceetapplicationdespeineset-mesures/condamnationspenales/EINDRAPPORT_ET_VH_def%28rapport%29.pdf)

<sup>135</sup> Between 2012 and 2013, the number of prisoners under EM has seen an increase of 42 percent. In 2013, 5,061 were placed under EM, as opposed to 3,561 in 2012. As of 1 March 2014, 1,807 inmates were already benefiting from this measure, including 1,660 men and 147 women. Around 80 percent of these EM mandates concern convicts which have been sentenced to less than three years of imprisonment.

In **Germany**, since 2011 GPS-EM has been applicable as a back-door measure for offenders who have fully served a prison sentence of at least three years and who are still considered high-risk offenders of violent or sexual offences, or after release from a forensic psychiatric clinic, forensic withdrawal clinic or from preventive detention. Under this measure it is possible to define some forbidden (or obligatory) sectors, or just to record the whereabouts. At the end of 2012, 25 persons were under GPS-EM. Especially in the case of those persons who have completed their prison sentence, it is obvious that this measure has a net widening effect, since these persons would have been released under all circumstances.<sup>136</sup> So far, two persons under GPS EM re-offended, without the monitoring being of any benefit to prevent or solve the crime. The first person was subject to the prohibition to come close to an area where a possible victim lived, but the crime was committed against a different person elsewhere. The second person got rid of the device – which was reported by the device – but did not prevent the person from arson. The council of this person stated (prior to re-offending) that the release situation was prepared poorly.<sup>137</sup>

In **Lithuania**, electronic monitoring is part of the probation. An electronic device must be worn by a probationee on whom intensive supervision is imposed. We have no further information on the application in practice.

In **Spain**, the *Penal Code* reform of 2010 introduced the possibility of a post-penitentiary “supervised freedom” through a GPS system in the case of persons considered especially dangerous (terrorism, sexual crime).

### **I. Drug Treatment (clinic or ambulant).**

Drug treatment as an alternative to imprisonment has to be distinguished from drug treatment as an alternative way of imprisonment, and from it to be a purely additional measure. Moreover, the different national approaches already vary with respect to the question which drug cases fall within the scope of criminal prosecution, either by excluding the possession of certain amounts of drugs for personal consumption from constituting a crime, by ceasing proceedings regularly, or by including so called soft and/ or hard drugs within such schemes.

In **Bulgaria** and **Lithuania** drug treatment seems to be an additional measure only, with the possibility to be applied under probation.<sup>138</sup>

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<sup>136</sup> For criminological and technical obstacles cf. Expert hearing at the Brandenburg Parliament on 19-09-2012, especially Burkhardt; Fünfsinn; and Amthor (<http://www.landtag.brandenburg.de/sixcms/media.php/5701/037.%20Sitzung%20HA%20vom%2019.09.2012%20%28Protokoll%205-0037-1%29.pdf>).

<sup>137</sup> [www.strafvollzugsarchiv.de/index.php?action=archiv\\_beitrag&thema\\_id=20&beitrag\\_id=650&gelesen=650](http://www.strafvollzugsarchiv.de/index.php?action=archiv_beitrag&thema_id=20&beitrag_id=650&gelesen=650).

<sup>138</sup> In Bulgaria, Ms. Tankova, the head of the regional service “Execution of Penalties”, recommended to use compulsory treatment more often within the framework of probation, М. Танкова (2012), Проблемът наркотици, като рефлексия при осъдените на пробация [М. Tankova (2012), The Problem of Drugs as a Reflection in Persons Sentenced to Probation]. Burgas.

In **Spain**, undergoing a drug treatment programme (or at least detoxification) offers a greater variety to allow for the suspension of a sentence, the sentence can be up to five years (instead of up to two) of imprisonment. Whether or not a successful completion of the therapy is an obligation to benefit from this possibility is not clear.

In **Belgium**, drug addiction and its treatment are taken into account within the criminal procedure at different levels, either as a factor within mediation, or as a reason to suspend a sentence. In order to benefit from the latter, the drug user is supposed to agree to change his/her behaviour (not to use any drug, not to refuse urine test, to look for a job, to have active leisure time, to get treatment aiming to definitely stop using drugs with a provision of its proof, etc.). At the prosecution level, the judicial file is destroyed after 6 months if the offender completes the treatment. Looking at the set of conditions, it is hardly imaginable that a longtime drug user can fulfill all of these conditions, because this might mean a total different life model. In Ghent, a Drug Treatment Court has been established to bring together different stakeholders, that is to say judges, prosecutors and a liaison from the drug rehabilitation services with special knowledge on drugs.

In **Germany**, there are various approaches towards (the willingness to undergo) drug treatment being applied as an alternative to imprisonment.<sup>139</sup> It can be taken into account in the decision upon the termination of the proceedings, as a measure under probation, it may be used as a substitute for a sentence of up to two years of imprisonment, or for a served prison sentences with a rest of up to two years to be served. Not only drug offences are dealt with, but also offences under the influence or in connection with the withdrawal of drugs, or other offences related to them (e.g. theft). The time spent in therapy will be accounted for as prison time, irrespective of the therapy's success.<sup>140</sup>

#### **m. Therapy of a different kind.**

Even though other kinds of therapy were mentioned in the country reports, none of these were seen as direct alternatives to imprisonment. In **Germany**, for instance, other forms of therapy, e.g. psychotherapy in cases of sexual offences or gambling therapy, can be taken into account in a decision to cease the proceedings or can be used as a directive under probation.

#### **n. Boot camps: Usually shorter than imprisonment, but may be more strict. Comparable to basic training in the army, regular drill instructions, participation in an education program with physical activity is required.**

In none of the participating countries boot camps exist as a sanction.

<sup>139</sup> There is a sentence to undergo a drug therapy, but this is only a different kind of imprisonment – even though, every day under this measure is accounted for as time served, but only up to two thirds of the prison term.

<sup>140</sup> Further information under “Remarkable Practices”.

**o. Restitution: The obligation to pay material or immaterial damages to the victim.**

In **Belgium**, restitution can be part of the mediation process (below). In **Germany**, among others, a probationee may be obliged to make restitution – to the best of his or her ability – for the harm caused by the offence. This form of reparation represents the primary probation condition<sup>141</sup> and it is only admissible if it is for the benefit of the actual victim of the crime. The demanded restitution may not exceed the offender's financial capacity in an inappropriate manner. Additionally, it can be a condition on the front-door level for ceasing criminal proceedings. On the back-door level, it might be a condition with granting parole, and in cases the detainee does not participate in locating the gains from a crime this may be a legal argument against granting parole, even if all other criteria are met. On the indoor level, the draft for the *North Rhine Westphalian Prison Act* plans to provide for the decision on relaxations of the prison conditions taking into account restitution efforts of the prisoner. At the same time, it should be easier for prisoners to use the (work) salary in prison for purposes of restitution. In **Spain**, repairing the damage is regulated as a factor mitigating criminal responsibility (Article 21.5, *Penal Code*), as a circumstance to be considered for the advancement of the computations about the date for parole (Article 91.2, *Penal Code*), or as a requirement for the substitution of the sentence (Article 88, *Penal Code*). The latter examples of back-door measures are not showing the use of restitution as an alternative to imprisonment, but rather the lack of restitution as a reason for not making use of alternatives to imprisonment.

**p. Victim-offender mediation: Mediation by a neutral person/professional between the victim and the offender, may be even before a court has decided who is to be perceived as offender and who as a victim.**

In **Belgium**, the public prosecutor can formally dismiss a case and public action will be officially stopped if the suspect accepts the proposal and fulfils the conditions of a mediation process. This is possible with offences for which the prosecutor deems a maximum penalty of up to two years to be adequate. This refers to the sentence the prosecutor would request in practice, i.e. mitigating circumstances are applicable. Thus, offences that are, in theory, punishable with longer sentences of imprisonment may, in principle, still qualify for mediation. In order to qualify for mediation, the offender must be over 18 years of age and has to accept responsibility for the crime and has to be willing to cooperate. Any statements made by the offender in mediation would not generally be admissible if the matter goes to court. There are certain conditions to be met: (1) reparation of the damages or harm caused to the victim or restitution of certain goods; in this case, the prosecutor may convoke a mediation process for the victim and the offender to settle the case through compensation or reimbursement; (2) undergo medical treatment or a suitable therapy of a maximum of six months if the offender attributes the offence

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<sup>141</sup> According to Section 56b para. 2 s. 2, *Criminal Code*, the court may only impose other conditions if restitution to the victim is not a viable option.

to a disease or to an alcohol or drug addiction; (3) follow a training programme of up to 120 hours;<sup>142</sup> (4) perform community service (work in the public interest) of up to a maximum of 120 hours.<sup>143</sup>

While a mediation assistant does most preparatory and mediation work, the mediation magistrate leads the formal session which concludes the procedure. Both the offender and the victim have the right to be assisted by a lawyer, and the victim can be represented. The stipulations of the reached agreement or conditions are laid down in an official report (a *procès-verbal*). When the offender fulfils the conditions, a second *procès-verbal* is drawn up, stating that the public action is extinguished. If he/she does not fulfil the agreement, the mediation magistrate can summon the offender to appear in court but s/he has no legal obligation to do so. The responsibility for penal mediation lies with the prosecutor's office and has developed quite fast in a quantitative way. However, concerns are raised (most of which have been formulated by the mediation advisers or justice assistants) regarding the competing and heterogeneous objectives and rationalities underlying the law and its application in practice: that is to say to demonstrate a visible reaction to minor offences, to help victims, and to restore the confidence of the public in the criminal justice system. Furthermore, a constant point of discussion is the risk of "net widening".<sup>144</sup> Despite its objectives formally stated to offer an alternative to prosecution, there are indications that penal mediation is primarily applied as an alternative to an unconditional waiver, and not as an alternative to prosecution. Cases that would previously have been dropped are now the subject of a social response by means of mediation. Since 2001, mediation has also been carried out in prison. Any mediation that occurs needs to be voluntarily agreed to by all parties. These mediations, although funded by the government, are overseen and facilitated by two private, non-profit organisations (Suggnome and Mediante) and supervised by a federal Commission on Mediation. There are no specific regulations on how and when the mediation should take place. The law does allow the participation of other affected persons, such as partners or friends of the offender or of the victim who have been impacted by the offense. This mediation is intended to take place parallel to, but separately from, the criminal process itself. The information may or may not be shared with the prosecutor or the justice system after a mediation, depending on what the parties agree to.

In **Bulgaria**, mediation does not exist in the criminal procedure, there have been discussions in the professional as well as the academic community on introducing

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<sup>142</sup> E.g. social skills training, courses for managing aggression or alcohol addiction, training for police traffic offenders.

<sup>143</sup> The maximum time to carry out the proposed conditions is six months for measures 2, 3 and 4, and undetermined for measure 1.

<sup>144</sup> Cf. D. Burssens (2012), Penal mediation in Belgium. Insights on the basis of registered data, Paper presented at the ESC Conference, 13th of September 2012, Bilbao (Spain).

mediation to the framework of probation, to be applicable throughout the entire process of criminal proceedings.<sup>145</sup>

As part of the concept of 'restorative justice',<sup>146</sup> Victim-Offender Mediation (VOM) in **Germany** is regulated in Section 46a of the *Criminal Code* and represents an extrajudicial procedure that serves as a ground for mitigation of a sentence<sup>147</sup> or the establishment of a case of less severity.<sup>148</sup> Thanks to the latter, VOM may be considered as a proper alternative to imprisonment. VOM is meant to lend more weight to the victim's interests and involves him or her more actively in the establishment of the offender's legal responsibility and the latter's consequences than a formalised court trial could do. On the other hand, it is intended to motivate the offender to accept full responsibility for his or her wrongdoing as well as to engage in voluntary compensation.<sup>149</sup> Despite the precondition of (the initiation of) a communicative relation between the victim and the offender, German criminal law does not require the involvement of an actual mediator.<sup>150</sup> Nevertheless, Victim-Offender Mediation is oftentimes embedded in professional programmes and thus, more than 350 projects have evolved in Germany since the first pilot programmes were established in 1985, one third of them working with both adult and young offenders.<sup>151</sup> Section 46a of the *Criminal Code* differentiates between the reconciliation with the victim and financial restitution. While there are multifarious forms of reconciliation that come into question according to Section 46a no. 1 of the *Criminal Code*, particularly the confession to the offence, an excuse to the victim, the payment of damages or other material or immaterial acts like services, labour or presents,<sup>152</sup> no. 2 solely aims at financial restitution. In order to achieve a mitigation of the sentence pursuant to no. 1, the offender must have made full restitution – or the

<sup>145</sup> By the at that time director of the Directorate General 'Execution of Penalties' of the Ministry of Justice P. Vasilev (2003), *Приложимост на пробацията в България* [Applicability of Probation in Bulgaria]. Available at: <http://www.arspbg.org/docl/docl1.htm>; S. Evtimov (2007), *Правни възможности за утвърждаване на медиацията в пробационните служби* [Legal Options for the Introduction of Mediation in Probation Offices]. In: *Затворно дело* [Prison Activities], No 4/2007, pp. 45-57; E. Madzharov (2007), *Възможности за прилагане на медиацията в затворите и пробационните служби (български практики)* [Possibilities for the Implementation of Mediation in Prisons and Probation Offices (Bulgarian Practices)], in: *Затворно дело* [Prison Activities], No 4/2007, pp. 3-32.

<sup>146</sup> For a detailed account on Victim-Offender Mediation as an implementation of restorative justice from the German perspective see N. Bals (2010), *Der Täter-Opfer-Ausgleich bei häuslicher Gewalt. Vermittlung und Wiedergutmachung auf dem Prüfstand*, Baden-Baden, pp. 81 et seqq.

<sup>147</sup> The court may even completely exempt the offender from punishment if it envisions a prison sentence of up to one year or a fine of up to 360 three hundred and sixty daily units.

<sup>148</sup> M. Schmuck (2013), § 46 a StGB – *Grundlagen und Verteidigungsansätze*, *Straßenverkehrsrecht*, No. 7, pp. 253-255.

<sup>149</sup> Bals 2010, p. 85.

<sup>150</sup> A. Hartmann, A. (2013): 'Täter-Opfer-Ausgleich – aktuelle Perspektiven', in: D. Dölling & J.-M. Jehle (eds), *Täter – Taten – Opfer: Grundlagenfragen und aktuelle Probleme der Kriminalität und ihrer Kontrolle*, Mönchengladbach, pp. 254et seq.

<sup>151</sup> T. Trenczek & S. Loode (2012): 'Mediation "made in Germany" – a quality product', *Australasian Dispute Resolution Journal*, No. 23, pp. 67 et seq.

<sup>152</sup> B.-D. Meier (2009), *Strafrechtliche Sanktionen*. 3rd ed., Berlin, p. 340.

major part thereof – for his offence or have shown earnest efforts to do so. In case of no. 2, financial restitution must require substantial personal services or sacrifice on the offender's part and the latter must have made full compensation – or for the major part thereof – to the victim. VOM may be initiated at any time during the criminal procedure but it is typically suggested by the prosecution before the indictment and referred to the local VOM programme.<sup>153</sup> The latter usually approaches the offender and informs him/her about the possibility of reconciliation, the victim gets notice once – and only if – the offender has agreed to VOM. In spite of the prosecution's role as an initiator, the court, the offender or his/her lawyer can suggest a VOM procedure as well. The latter may even use VOM as a defence strategy.<sup>154</sup> In practice, more than 80 per cent of the VOM cases are initiated in the stage of pre-trial proceedings before an indictment and in around 75 per cent of cases it is proposed by the prosecution. In more than half of the cases, having dealt with an offence of assault, more than 40 per cent of victims and offenders had known each other well before. Around 15 per cent of the contacted victims and around 30 per cent of the contacted offenders refused to take part. More than 80 per cent of the encounters finally found a consensual completion.<sup>155</sup> This data stems from a statistic including around 5,000 cases of VOM per year. This is not just an indication for the still prevailing fact that VOM is nothing but a marginal instrument within the German criminal justice system. Another reason for the low numbers is the voluntary participation of organisation in this statistic. It is still probably the worldwide only statistical documentation of restorative justice cases.<sup>156</sup>

For the period of 2012 – 2016, apart from the previous goal, the Government of **Lithuania** has planned to promote the development of a mediation system.<sup>157</sup> However, the *Criminal Code* of Lithuania already provides for the chance to be released from criminal liability upon reconciliation between the offender and the victim (Art. 38). A person who commits a misdemeanour, a negligent crime or a minor or less serious premeditated crime may be released by a court from criminal liability only if all the following conditions are filled: 1) he/she has confessed to commission of the criminal act, and 2) voluntarily compensated for or eliminated the damage incurred to a natural or legal person or agreed on the compensation for or elimination of this damage, and 3) reconciles with the victim or a representative of a legal person or a state institution, and 4) there is a basis for believing that he/she will not commit new criminal acts.

<sup>153</sup> Bals 2010

<sup>154</sup> Schmuck 2013.

<sup>155</sup> A. Hartmann et al. (2014), Täter-Opfer-Ausgleich in Deutschland – Auswertung der bundesweiten Täter-Opfer-Ausgleichs-Statistik für die Jahrgänge 2011 und 2012, [http://www.toa-servicebuero.de/sites/toa-servicebuero.de/files/bibliothek/14-03-26\\_toa\\_deutschland\\_2011-2012.pdf](http://www.toa-servicebuero.de/sites/toa-servicebuero.de/files/bibliothek/14-03-26_toa_deutschland_2011-2012.pdf), p. 67 ff. with their study referring to the years 2011 and 2012.

<sup>156</sup> Hartmann et al. 2014, pp. 1-2.

<sup>157</sup> The Decree on the Programme of the Government of the Republic of Lithuania for 2012-2016. 2012-12-13, No. XII-51.

Excluded are repeat offenders and persons who had already been released from criminal liability on the basis of reconciliation with a victim in the previous four years. If a person released from criminal liability commits a misdemeanour or a negligent crime within the period of one year or fails, without valid reasons, to comply with an agreement approved by a court on the terms, and conditions of – and procedure for – compensating for the damage, the court may revoke its decision on the release from criminal liability and decide to prosecute the person for all the committed criminal acts. If a person released from criminal liability commits a new premeditated crime within the period of one year, the previous decision releasing him/her from criminal liability shall become invalid. In this case, a decision shall be adopted on the prosecution of the person for all the criminal acts committed.

In **Spain**, there is no model of “alternative justice” or “alternative forms of conflict resolution”.<sup>158</sup> By contrast, the **Catalan** system has conducted pilot tests since the late 1990s that ultimately resulted in the regulation of the first Adults Penal Mediation service in 2000.<sup>159</sup> Currently, the system is regulated under the name of “Mediation and Penal Reparation.” The system is defined by the responsible authority as: “a service provided by the Directorate General of Criminal Enforcement to the Community and Juvenile Justice (DGCECJ) in which, through a confidential process of dialogue and communication conducted by an impartial mediator, the accused and the victim voluntarily participate with the primary aim of achieving adequate compensation for the damages suffered and the solution of the conflict from a fair and balanced perspective to the interests of both parties”.<sup>160</sup> Mediation is conducted by Mediation and Penal Reparation Teams consisting of specialists from different disciplines (psychology, social work, law) with a specialised training in mediation and penal reparation. In Catalonia, there are 5 of these teams that depend on the Area of Reparation and Victim Assistance. According to the same DGCECJ, these procedures are designed to provide: (a) to the parties: the possibility to resolve conflicts according to their interests and needs allowing each party can hear and be heard and feel responsible and involved; the possibility to repair the damage (monetary compensation, moral, in an activity, personal, etc.), promoting personal responsibility and awareness of the consequences suffered, and encouraging future commitments; the possibility of

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<sup>158</sup> However, some movements and studies with special emphasis on the Basque Country are pushing towards the mechanisms of restorative justice, in which, as O. Gezuraga, Ixusko (2012): “Penal Mediation the jurisdictional alternative that works”. XVII Congreso de Estudios Vascos. Donostia, p. 1942, points out, it does not matter so much whether the object of mediation is a misdemeanour or felony, as it is conceived of as a dispute or conflict to be resolved as a way to move away from the criminal law terminology.

<sup>159</sup> J. Martín, P. Dapena, “Justícia reparadora: mediació penal per adults i juvenil”, en P. Casanovas, J. Magre & M.E. Lauroba, *Llibre blanc de la mediació a Catalunya*; Migreurop “CIE. Derechos vulnerados. Informe sobre los Centros de Internamiento de extranjeros en España”. España. 2011, 599; for an empirical study of its implementation during the first 5 years, see “Mediación Penal adulta y Reincidencia”, (CEJFE, 2007) and for a recent study see Tamarit 2013.

<sup>160</sup> <http://www20.gencat.cat/portal/site/Justicia/menuitem.51bb51de98b3c1b6bd6b6410b0c0e1a0/?vgnextoid=6803f31f87203110VgnVCM1000008d0c1e0aRCRD&vgnnextchannel=6803f31f87203110VgnVCM1000008d0c1e0aRCRD&vgnnextfmt=default>

seeing the damage suffered repaired and recover personal tranquillity. (b) To the community: the restoration of social peace; bringing the field of justice back to the community. (c) To the courts and the administration of justice: the procedural savings; savings in criminal proceedings.<sup>161</sup>

The request to initiate a mediation process can be lodged by different parties: by the victim or the offender (which in no case can occur if it comes to gender violence crimes), by their attorneys, the prosecutor, the judge, treatment boards of prisons, etc. And it is possible to be applied at any stage of the proceedings: before, during or after the trial, or during the execution of the sentence. The service is public and free. Once a request reaches an assigned mediator and it is feasible to initiate the procedure, s/he will conduct interviews with the stakeholders by establishing a process of direct or indirect mediation. If the procedure ends with an agreement between the parties, a report is sent to the judge for evaluation.

Recently, the Catalan prison administration published a study on the mediation programme which highlights that "[v]ictims participating in the study made a positive evaluation of the mediation process. The main benefits they talk about are: to be paid or restored of their belongings, to receive an apology from the offender, to be able of explaining their experience and to feel heard, and to participate in the final resolution of the conflict".<sup>162</sup>

**q. Family group conferences: mediation, but not just including the victim and offender but also family members or even more people who define themselves as effected by the event as well as professionals moderating**

No partner reported on Family group conferences as part of the sanctioning system. In **Germany**, Family Group Conferences for juveniles were introduced as a model project in Elmshorn, Schleswig-Holstein, called *Gemeinschaftskonferenzen* (GMK).<sup>163</sup> In **Belgium**, there was a respective practice established for juveniles having committed more severe offences.<sup>164</sup>

<sup>161</sup> *ibidem*.

<sup>162</sup> J.M. Tamarit (2013), "Avaluació del programa de mediació penal d'adults del Departament de Justícia de Catalunya", CEJFE. The report is accessible in Spanish and Catalan at: <http://www20.gencat.cat/portal/site/Justicia/menuitem.6a30b1b2421bb1b6bd6b6410b0c0e1a0/?vgnnextoid=9018f81145495410VgnVCM2000009b0c1e0aRCRD&vgnnextchannel=9018f81145495410VgnVCM2000009b0c1e0aRCRD&vgnnextfmt=default>.

<sup>163</sup> O. Hagemann (2009), "Gemeinschaftskonferenzen" in Elmshorn – the First German Family Group Conferencing Project in Criminal Matters in: P. Schäfer/S. Schmidt (eds.), *Victimology, Victim Assistance and Criminal Justice Perspectives shared by international Experts at the Inter-University Centre of Dubrovnik*. Mönchengladbach.

<sup>164</sup> I. Vanfraechem & L. Walgrave (2005), *Conferencing Serious Juvenile Delinquents in Belgium*. <http://www.restorativejustice.org/editions/2005/March/belgium>; I. Vanfraechem (2002), *Implementing Conferencing in a Legalistic Country*, Paper to be presented at the Third International Conference on Conferencing, Circles and other Restorative Practices, "Dreaming of a New Reality", Minneapolis, [http://www.iirp.edu/pdf/mn02\\_vanfraechem.pdf](http://www.iirp.edu/pdf/mn02_vanfraechem.pdf).

**r. Circles of support and accountability: volunteers supporting (sex) offenders with respect to reintegration into society after their release from incarceration with professional supervision.**

In 2011, a pilot project supported by the European Commission (Daphne III funding), COSA was introduced in **Belgium**. It involves the participation of Justitiehuis Antwerpen (Antwerp House of Justice) which has developed a partnership with a welfare organisation specialised in sex offender treatment,<sup>165</sup> to provide co-ordinating staff, and the University of Antwerp to carry out risk assessment. A national media campaign was carried out in order to recruit and train twenty volunteers. COSA are intended for convicted sex-offenders who pose a medium- or high-level risk of reoffending and are released after their detention and/or after treatment. This is a wholly new approach in Belgium for the support and monitoring of this specific category of offenders.<sup>166</sup> So far, three COSA were established, and evaluated by the Department of criminal policy of the Belgian Ministry of Justice<sup>167</sup>. On the basis of the results, it is planned to decide about a possible extension of its implementation in the whole region of Flanders as well as at national level.

In **Bulgaria**, COSA are not regulated by law, but they could still be implemented informally by NGOs. However, there would be no obligation to participate.

**s. Expulsion order: decision to revoke the permission of residence for a foreign national who is convicted or indicted or even only suspected to have committed a crime;**

and

**t. Deportation: physically sending a foreign national out of the country in connection with conviction or suspicion of a crime with or without issuing an expulsion order before.**

Expulsion is not an alternative to imprisonment, since taking away the permission to stay in a specific country has no direct influence on imprisonment. However, the expulsion is often the step before actually deporting a prisoner. In the case of actually leaving the country, this can be an alternative to imprisonment when

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<sup>165</sup> <http://www.cawantwerpen.be/cosa-cirkels-voor-ondersteuning-samenwerking-en-aanspreekbaarheid>

<sup>166</sup> It should be noted that, since in Belgium there is no specific sex-offender therapy in prison, and the number of treatment facilities for interned sex offenders is very limited, treatment therefore often only starts after the (conditional) release. In recent years, more and more sex offenders chose to serve their term until the end instead of applying for early release in order to avoid mandatory treatment and long-term supervision. In Belgium, the most relevant agencies that are involved in the managing of sex offenders during their re-socialisation process are: the Houses of Justice, the ambulant treatment facilities for interned sex offenders, the specialised forensic teams for the treatment of sex offenders within mental health institutions and public welfare institutions, the police force and the federal prosecution office.

<sup>167</sup> S. Sivri, M. Taeymans (2013), *Procesevaluatie proefproject COSA Antwerpen, De eerste ervaringen met COSA in België*, Dienst voor het Strafrechtelijk Beleid, FOD Justitie. URL: [http://www.dsb-spc.be/doc/pdf/EVALUATIE\\_COSA\\_NL%28lightversie%29.pdf](http://www.dsb-spc.be/doc/pdf/EVALUATIE_COSA_NL%28lightversie%29.pdf)

implemented before the regular end of the prison term. Obviously, the questions of human rights arise in many ways here, especially if the person did not want to leave the country.

In **Bulgaria**, an expulsion can take place if a foreign offender is convicted in Bulgaria and the court decides that upon serving his/her sentence this person cannot stay in the country. The Ministry of Interior runs special facilities for temporary accommodation of foreigners who have been issued a deportation or expulsion order. Foreigners with expulsion orders or awaiting deportation, who could not be identified by the authorities, who obstruct the authorities' work, or in whose cases there is a risk of absconding, can be detained in these special facilities. The accommodation in such a facility can last until the conditions for detention disappear but should not exceed six months. In exceptional cases, such as a delay with respect to the expulsion/deportation documents, the duration of the stay can be prolonged by a maximum of six more months (reaching a maximum duration of 12 months). Foreign nationals cannot be deported to countries where their life or freedom is endangered, or where they are threatened by persecution, torture or inhuman or degrading treatment. That fact can be established by a court decision, but there are no special rules indicating the competent court and the applicable procedures. Such persons have to visit a police station once a week and receive a permit to access the local labour market until a safe third country is found for them to be deported to. If there are objective reasons preventing the expulsion (such as legal or technical difficulties, or a health problem), expulsion is postponed until these reasons disappear.

Under **German** law, according to Sections 53 *et seqq.* of the *Residence Act* (Aufenthaltsgesetz), a foreigner may be expelled if he or she commits criminal offences and thereby poses a danger to public security and order. For the issuance of a mandatory expulsion order, the foreign national must have been sentenced to a prison term of at least three years (or cumulative prison terms of three years in total within a five-year period), to a prison sentence without probation for an offence under the *Narcotics Act*, or a breach of the peace, or must have received a custodial sentence for smuggling of foreigners. Section 54 of the *Residence Act* provides for a number of cases in which a foreigner shall be expelled as a rule. Among these are a prison sentence of at least two years without probation, drug dealing, concerted violence against persons or property, support of organisations that promote terrorism and other state-endangering offences. As it comes to the discretionary expulsion, diverse wrongdoings come into question as a basis. In general, the responsible foreigners' authority is entitled to expel a foreigner if his or her stay is detrimental to public safety and law and order or to other substantial interests of the Federal Republic of Germany. The actual preconditions, however, depend on the previous status of residence and one's rootedness in the country. Resulting from an expulsion order, the existing residence title expires and he or she becomes obliged to leave the country within a certain period of time. This duty is accompanied by a timely-limited re-entry ban that prevents the foreigner

from legally entering Germany within a fixed period. If he or she ignores the duty to leave the country, the foreign national becomes subject to a deportation procedure. In case of a planned deportation, however, the foreigners' office is obliged to ask the prosecution for permission, with the latter having to weigh the state's interest in the expulsion against its interest in criminal prosecution and incarceration.

The time after an expulsion but prior deportation, has negative effects on the prison regime, i.e. the granting of relaxations (e.g. leaving the prison for some hours) is less likely or even impossible in practice.

If an expelled foreign national, whose deportation is pending, has been imprisoned already, Section 456a of the *German Code of Criminal Procedure* offers a possibility to suspend the execution of the prison sentence and deport the prisoner to his/her home country. The prosecution service is responsible for a decision according to Section 456a and it has to consider, for example, the especially detrimental effect of imprisonment on socially and culturally non-integrated prisoners who do not have a good command of the German language.<sup>168</sup> In this context, it has to be noted that Section 456a only provides for the interruption of the prison term's execution. If the foreigner returns to Germany, the execution may take place subsequently. The decision can be enforced without the consent of the prisoner.

In **Spain** an administrative decision can intercede before the final resolution of the judicial proceeding takes place, interrupting its normal course. This is possible when a sentence of up to six years of imprisonment or penalties of different nature – for a misdemeanour or felony – appear within an administrative process (Article 57.7 *Organic Law for Foreigners* (OLF)). The expulsion can be executed by the government authority, with a previous authorisation of the judge. This means, the substitution takes place within the penal process, and is not strictly a substitution of the penalty itself. As a decision taken afterwards, the OLF and the PC both provide for the expulsion as a substitution of penalties. In Article 57.2, the OLF establishes the expulsion in case a foreigner was already condemned for an infraction, either in Spain or abroad, to a sentence that on the national territory means one year of imprisonment, unless his/her criminal records have been removed. The PC endorses that prison sentences of less than 6 years imposed on a foreigner without a legal residence, his/her expulsion from the Spanish territory to the home country (Article 89)<sup>169</sup> is possible without judicial authorisation. In this way, the execution decision is officially considered as a substitution of the sentence and understood as an alternative penal measure, even though expulsion is not legally considered as a penalty according to the catalogue of penalties (Article 33 PC).

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<sup>168</sup> C. Graebisch, Anh § 175 StVollzG', in: J. Feest & W. Lesting (eds), StVollzG, Kommentar zum Strafvollzugsgesetz (AK-StVollzG), 6th edition, Cologne, marg. no. 34

<sup>169</sup> Some exceptions apply with sentences related to illegal trade of migrant workers (article 312) or fraudulent migration (article 313); this regime shall be exceptional to European citizens (URL: [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF))

Additionally, to deport a person who has already started serving a prison term (the new rules of the PC allow the judge to order the expulsion after judgment with consent of the prisoner) means that there is a double punishment (to which a third one must be added, that is the prohibition of entry into the country for a period of 5 to 10 years). The existence of the double penalty and the criticism regarding its contradiction to the purpose of rehabilitation has even been recognised by the Supreme Court in several judgments (e.g. No 125/2008 of February 20 or No 617/2010 of 22 June).

#### u. Intermittent imprisonment/open prison

In **Bulgaria**, open prison dormitories exist, but they merely are prisons with a lighter security regime.

In **Belgium**, so called “limited detention” allows the prisoner to leave the prison during the day (for not more than 12 hours) in order to attend a training programme, to work, or to see his or her family. S/he spends the evening and night in jail. Limited detention may be granted only six months before the date of a possible parole. The prisoner should submit, through the prison administration, a written request to the Sentences Implementation Court (*Tribunal de l'exécution des peines*). When limited detention is granted, the court may impose conditions on the offender to be complied with.

Since open prisons in **Germany** have only a lower security status than other prisons, they are not really to be considered as an alternative to but rather a form of imprisonment. As opposed to this, especially with forensic psychiatric or withdrawal clinics, there is a possibility to live in a therapeutic flat share or in an individual flat while still being officially incarcerated. A similar regulation exists in the law for juveniles, allowing them to formally be in prison while actually living in an institution of a youth welfare agency (sec. 91 para. 3, *Juvenile Court Act*).

In **Lithuania**, there is one “open prison colony”. Prisoners may be obliged to serve their term in the open prison colony, if they were sentenced for a negligent crime or a minor intentional crime. Convicts who served their punishment in a correction house and whose possible parole is coming up in less than a year, taking into account the risk of their criminal behaviour, the behaviour during the execution of the prison term and other circumstances, may also be transferred to an open prison colony in order to serve the rest of their punishment there. Convicts in open prison colony: 1) are supervised, but without guards; 2) are free to walk in the defined area from waking up till going to sleep; 3) may possess money and valuable items, use money without limitations; 4) may be visited, get mail and packages, small press packages, send and receive mails, make phone calls without limitations; 5) subject to housing opportunities, may live near the open prison colony with their families; 6) may, with the permission of the colony administration, go outside the colony without the guards (but only within the Republic of Lithuania) if this is related to their job, health or studies; 7) may go home once a week for up to two days but

not during the work time, depending on the actual penalty; 8) may go home during annual vacation, depending on the actual penalty.<sup>170</sup>

The Socialisation Center is a secondary school which implements child's average care.<sup>171</sup> Considering the criminal cases the average care may be imposed on children who committed a crime or misdemeanour but cannot be prosecuted for reasons of age and release from criminal liability, or if they were subjected to an educational measure, that is to say to the placement in a special reformatory facility.<sup>172</sup>

In 2005, the **Spanish** prison administration, facing the unstoppable growth of the prison population (the construction of new prison types for 1,000 or 2,000 prisoners were not able to "absorb" this growth), developed a plan to extend the open regime, envisioning the construction of 32 Social Integration Centres and three Mothers Units. In these centres offenders may serve sentences in an open regime (that is not an alternative penal measure) but they also have a monitoring function for observing people under alternative penal measures. In any case, due to the economic recession, the plan was not implemented in its entirety.

#### **v. Further examples**

In addition to the remarkable practices, perceived as rather positive, set out in the next section the partner reported further examples:

The Reports on **Belgium** and **Germany** mentioned back-door supervision measures. In Belgium: "supervised release at the disposal of the government", and in Germany: "supervision of conduct". The latter is mainly applied after the prisoner has served a complete sentence of at least two years of imprisonment or one year in case of sexual offences and after release from a measure of betterment and security as well as in some further special cases. This is enforced by institutions of the Länder, usually in cooperation with the probation services (2012: over 33,000 cases with rising numbers). Supervision of conduct can last from two to five years or even without limitation if the person does not consent to a directive to undergo a medical treatment or a drug therapy, or does not undergo such measure s/he originally agreed to. In **Belgium**, the provision may be imposed on offenders: a) who have been convicted several times (recidivists); b) or who have committed sexual offences. This additional penalty may be imposed for a period of at least 5 years and at most 20 years. Both instruments are clearly no alternatives to imprisonment, since they usually apply to cases after the person has served the whole sentence, and, in addition, there is no "early release".

**Lithuania** sustains further measures as well:

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<sup>170</sup> Code of Execution of Penalties of the Republic of Lithuania, Art. 90, 91.

<sup>171</sup> Average care is the obligation applied to a child by which a child is educated and supervised; the educational assistance and other services are provided for him or her in the socialisation center.

<sup>172</sup> Law on Child's Minimum and Average Care, Art. 8.

- **Release from Criminal Liability on Bail.** A person who commits a misdemeanour, a negligent crime or a minor or less serious intentional crime, may be released by a court from criminal liability subject to a request by a person worthy of the court's trust to take over responsibility for the offender on bail. Bail may be set with or without a surety. A person may be released from criminal liability by a court on bail if: 1) he/she commits the criminal act for the first time; 2) he/she fully confesses his/her guilt and regrets having committed the criminal act; 3) at least partly compensates for or eliminates the damage incurred or undertakes to compensate for such where it has been incurred; and 4) there is a basis for believing that he/she will fully compensate for or eliminate the damage incurred, will comply with laws and will not commit new criminal acts. All above-mentioned conditions must be met. The bailsmen/bailswoman may be one of the parents of the offender, close relatives or other persons worthy of the court's trust. When taking such a decision, the court shall take into account the bails(wo)man's personal traits or nature of activities and their ability to exert a positive influence on the offender. The term of bail shall be set from one up to three years. A paid bail bond shall be returned upon the expiry of the term of bail where a person subject to bail has not committed a new criminal act within the term of bail as laid down by the court. A bails(wo)man shall have the right to withdraw from bail. In this case, the court shall, taking account of the reasons for the withdrawal from bail, decide on the return of a surety, also on the person's criminal liability for the committed criminal act, appointment of another bails(wo)man or the person's release from criminal liability.

If a person released from criminal liability on bail, commits a new misdemeanour or negligent crime during the term of bail, the court may revoke its decision on the release from criminal liability and shall decide to prosecute the person for all the committed criminal acts. If a person released from criminal liability on bail commits a new premeditated crime during the term of bail, the previous decision releasing him/her from criminal liability shall become invalid and the court shall decide to prosecute the person for all the criminal acts committed.

- **Release from criminal liability on the basis of mitigating circumstances:** A person who commits a misdemeanor, or a negligent crime may be released from criminal liability by a reasoned decision of a court where: 1) s/he commits the criminal act for the first time; 2) there are at least two mitigating

circumstances<sup>173</sup> provided for in paragraph 1 of Article 59 of the Penal Code; and 3) there are no aggravating circumstances.

## 7.2. Remarkable Practices

Below, some noteworthy practices of the countries researched can be found.

### 7.2.1. Belgium

In Belgium, Work Penalty can be highlighted because it does not entail an entry in the criminal record. It has been introduced to cope with prison overcrowding and is conceived of as a substitute for short-term imprisonment. The work was henceforth the main object of the sentence and not accessory to the suspension or postponement of the execution of a prison sentence. Along with the work penalty as a main sentence, the judge has to pronounce a subsidiary sentence to be enacted in the event of non-compliance. The substitute sentence can be a prison sentence or a fine. In the event of breach, the prosecutor decides whether or not the offender should serve (partially or fully) the subsidiary sentence which had been

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<sup>173</sup> Mitigating Circumstances (Art. 59)

1. The following shall be considered as mitigating circumstances:

- 1) the offender has provided assistance to the victim or otherwise actively avoided or attempted to avoid more serious consequences;
- 2) the offender has confessed to commission of an act provided for by a criminal law and sincerely regrets or has assisted in the detection of this act or identification of the persons who participated therein;
- 3) the offender has voluntarily compensated for or eliminated the damage incurred;
- 4) the criminal act has been committed due to a very difficult financial condition or desperate situation of the offender;
- 5) the act has been committed as a result of mental or physical coercion, where such a coercion does not eliminate criminal liability;
- 6) the commission of the act has been influenced by a provoking or venturesome behaviour of the victim;
- 7) the act has been committed at the request of the victim, who is in a desperate situation;
- 8) the act has been committed in violation of conditions of arrest of a person who has committed the criminal act, direct necessity, discharge of professional duty or performance of an assignment of law enforcement institutions, conditions of industrial or economic risk or lawfulness of a scientific experiment;
- 9) the act has been committed by exceeding the limits of self-defence, where a criminal law provides for liability for exceeding the limits of self-defence;
- 10) the act has been committed in a state of extreme agitation caused by unlawful actions of the victim;
- 11) the act has been committed by a person of diminished legal capacity;
- 12) the act has been committed by a person intoxicated by alcohol or drugs against his will;
- 13) a voluntary attempt to renounce commission of the criminal act has been unsuccessful.

2. A court may also recognise as mitigating other circumstances which have not been indicated in paragraph 1 of this Article.

3. When imposing a penalty, a court shall not take into consideration a mitigating circumstance which is provided for in a law as constituting the body of a crime.

scheduled by the judge. For this, the prosecutor considers the number of hours of work penalty the offender has already done.<sup>174</sup> The connection of the work penalty with a main sentence is a subject of criticism. Additionally, it has to be noticed that some acts which previously would not have been prosecuted or would have been sanctioned with a mere suspended sentence (such as traffic offences), are nowadays punished with a sentence of work penalty. Under this sanction, the offender is compelled to do unpaid work in his/her spare time. Work penalties can range of between 20 and 300 hours. Police courts can impose work penalties of between 20 and 45 hours, and correctional courts between 46 and 300 hours. Work penalties can only be performed in public services of the state, municipalities, provinces, communities or regions, or in non-profit associations or social, scientific, or cultural foundations.<sup>175</sup>

Another remarkable practice in Belgium comes from an institution, i.e. the Houses of Justice (HoJ) (*Maisons de Justice*; Act of 13 June 1999).<sup>176</sup> There are 28 HoJ in Belgium; they implement alternative measures, and they are an autonomous department of the Ministry of Justice, independent from the prison administration. Their work is not limited to criminal cases, but assist citizens in other legal matters as well. They have a very high number of cases, but the budget is three times lower than the prison administration's. Since 2006, the mandate of the Houses of Justice has been extended so that the scope of their monitoring assignment includes work punishments, electronic monitoring, limited detention, probationary conditional or suspended sentences, conditional or custodial release of prison, supervised release, placing at the disposal of the government, internment and conditional release of mentally disordered offenders. The daily supervision of offenders subject to these measures and their follow-ups are carried out by justice assistants who – since 1999 – are trained at a higher education level as social workers, social advisors, social nurses or assistants in psychology, while others are trained at a university level as social scientists (i.e. criminologists, psychologists, sociologists and educationists). The task of the justice assistant is to guide and help the offender in ensuring compliance with the imposed conditions and to report to the legal authorities. The penal assignments are carried out with a specific mandate from the judicial authority (judge, prosecutor, investigating judge, prison administration, etc.). This mandate is very important because it defines the type and range of intervention by the justice assistant against the offender.

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<sup>174</sup> See: <http://www.peinedetravail.be/fr>.

<sup>175</sup> Over the years, different and mixed forms of cooperation between the Ministry of Justice and volunteers, non-profit organisations and social service providers have been developed. Specific agreements giving rise to public subsidies have been put in place.

<sup>176</sup> A Law of 17 May 2006, partially in force as from 1 February 2007 and fully in force since 1 June 2008, has introduced new principles, among which is the creation of Sentences Implementation Courts. Most release modalities, such as semi-detention, electronic monitoring, conditional release, are now granted and revoked by these courts.

The Circles of Support and Accountability (*COSA*) pilot project in the Flemish part of Belgium has been positively evaluated by the Ministry of Justice which recommended the implementation on the national level.

### 7.2.2. Bulgaria

In Bulgaria, measures within the prison to shorten the prison term prevail. **Voluntary work** in prison has been described as a real alternative to imprisonment, since it is used to shorten the prison sentence. This can motivate prisoners to do voluntary work. It is also beneficial to the prison as the prisoners do construction and cleaning jobs. Moreover, society profits from prisoners, e.g. countering the consequences of natural disasters as prisoners recently worked to support the clean-up process after floods.

The other noteworthy practice is **studying**, vocational training or taking part in professional qualification courses, which lead to a reduction of prison time as well. Attending 16 school classes reduces the sentence by three days. If an inmate misses three or more classes per week, or violates the discipline in class, the weekly reduction of the sentence can be cancelled. Successfully passed biannual, annual or qualification degree exams equal five working days each (to honour the time for preparation). Inmates going to school can simultaneously work in the school workshops for up to four hours a day. For the prisoners who are both studying and working, the days are added together but cannot exceed 22 days per month. In the school year of 2013 – 2014, there are seven schools and four school branches in the Bulgarian prison system.<sup>177</sup> As of September 2013, the total number of inmates attending school was 1,744 (102 inmates more than the previous year). For each exam, there is an additional five days reduction. As a high share of prisoners have a low level of education, the reduction possibility heightens the level of education and motivates the prisoners to educate themselves.

Because the probation system is highly underdeveloped, probation and parole are not listed as a noteworthy practice. Additionally, one may add that comparing the figures of probation and imprisonment prior and after the introduction of probation in 2005, one can assume a net-widening effect of probation in Bulgaria (no decrease in the number of prisoners).

### 7.2.3. Germany

In Germany diversion to nothing and with certain conditions or measures can be emphasised as a remarkable practice. Though no direct alternative to imprisonment, it enables the prosecution service and the court to give juveniles (but also adults)

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<sup>177</sup> Министерство на правосъдието, Отчет за степента на изпълнение на утвърдените политики и програми на Министерство на правосъдието за периода от 01.01.2013 г. до 31.12.2013 г. [Report on the level of implementation of approved policies and programmes of the Ministry of Justice for the period from 01.01.2013 to 31.12.2013], Sofia, 2014.

the time to think over their behaviour. According to the systematic review of the Campbell Collaboration, diversion is better than formal proceedings in terms of re-offending. One problem with the decisions to cease proceedings in Germany is that there is no way to challenge diversion decisions legally. Even though the accused is not found guilty officially, that kind of decision is less than an official acquittal which is not satisfying in cases, where the accused is innocent.

Another major step in decriminalisation was to declare most traffic offences not to be criminal offences but administrative/regulatory offences outside the scope of criminal law (in 1970s). Only major offences like driving under the severe influence of alcohol/narcotics or driving without a license are dealt with by criminal law directly. The majority of infringements are subject to an administrative fine system (not based upon the actual income). In comparison to that, e.g. fare evasion is still referred to (by the courts) as a criminal offence. There are other areas of administrative/regulatory offences as well as other petty offences still being regarded as a crime.

One measure used quite often is therapy instead of prison for drug addicts (about 11,000 cases a year).<sup>178</sup> It allows a sentence or the rest of a sentence to be suspended, if it (or the rest) is no longer than two years, and the offence had been committed under the influence or withdrawal of drugs or was connected with it (not only opiates). The time spent in therapy will be accounted for as prison time, irrespective of the therapy's success. This is important since about half of all these therapies are terminated prior to their end as a problem inherent to diseases of addiction. Additionally, already the criminal proceedings can be terminated, or the sentence can be suspended, in case of an outside therapy, including substitution therapies.<sup>179</sup> But the latter regulation, although this would be a real alternative to imprisonment, is used only very rarely and the proportion of cases with this regulation being applied has declined by 76% from 2001 until 2011.<sup>180</sup> A major problem with these therapies is that the place and payment (by the social insurance system) has to be arranged by the indicted or imprisoned persons themselves. This is difficult and can result in an unsolvable problem, e.g. for migrants without a secure residence status. Another problem is that it is not applicable to persons with a pure alcohol addiction.

Since 2010, persons in pre-trial detention have the right to a defence counsel (pre-) paid by the state.<sup>181</sup> However, at the first hearing, deciding upon the imposition of pre-trial detention, there is no right to the presence of a state-pre-paid defense counsel – but solely a right to mandate a counsel at one's own expenses. Prior to the amendment, a defence counsel was to be appointed only after three months of pre-trial detention. The change resulted from a recommendation of the Council

<sup>178</sup> Körner-Patzak (2012), *Betäubungsmittelgesetz*, 7th ed. Munich, § 35 margin no. 41-2.

<sup>179</sup> Sec. 37 Narcotics Act.

<sup>180</sup> H. Zurhold, U. Verthein, J. Reimer & A.L. Savinsky (2013): *Medizinische Rehabilitation Drogenkranker gemäß § 35 BtMG ("Therapie statt Strafe")*: Wirksamkeit und Trends. Abschlussbericht. [https://www.bundesgesundheitsministerium.de/fileadmin/dateien/Publikationen/Drogen\\_Sucht/Forschungsberichte/Abschlussbericht\\_Medizinische\\_Rehabilitation.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/dateien/Publikationen/Drogen_Sucht/Forschungsberichte/Abschlussbericht_Medizinische_Rehabilitation.pdf) , p. 133.

<sup>181</sup> Sec. 140 para. 1 No. 4.

of Europe (*Rec(2006)13*, para. 25(3), 27-09-2006), because of the severity of pre-trial imprisonment. Before the amendment pilot studies existed, showing that the early participation of a defense counsel shortened the time spent in pre-trial detention, in comparison to a late or non-participation, by 14 to 20 days. Why this was the case is not exactly clear, but it was suggested that it has to do with early appeals and (informal) agreements. Lawyers, prisoners and prison staff mostly considered the project positive, the latter because of an improvement of the “prison climate”. The involved judges and prosecutors were more skeptical, in spite of or – not seeing – the results, stating that the quality of the defence work deserved criticism. It is assumed that the disruption of the routine, the rising numbers of appeals and suspects remaining silent had to do with the skeptical views of judges and prosecutors.<sup>182</sup>

Another noteworthy practice is living outside the institution but inside the system. On one hand, open prisons in Germany only have a lower security status than other prisons, and hence, they are not really to be considered as an alternative to – but another form of – imprisonment. On the other hand, especially with forensic psychiatric or withdrawal clinics, there is a possibility to live in a therapeutic flat share or in a flat of one’s own while officially still being incarcerated. Special time schedules and reporting schemes might exist on different scales. The decision to grant such a possibility lies within the sphere of responsibility of the authorities of the forensic institution. These decisions can be appealed against to the district criminal court, but the court has only limited power to rule on the clinic’s decision. A similar regulation exists in the law for juveniles allowing them to formally be in prison while actually living in an institution of a youth welfare agency (sec. 91 para. 3, *Juvenile Court Act*). There are some model projects like this which are faith-based and use elements of confrontative pedagogy. While such projects have been celebrated by the media with alleged reoffending rates of zero,<sup>183</sup> the evaluation showed no superiority against regular imprisonment but could not prove negative effects of the lower security level connected to projects like this either.<sup>184</sup>

A very small but interesting German pilot scheme of decriminalisation is offering a monthly public transport ticket to persons who suffer from multiple problematic social conditions and a history of being convicted and imprisoned for fare evasion. In the state of Bremen (about 600,000 inhabitants), up to 20 persons are provided with a special discount under which they only pay five Euros a month for a season ticket – with the rest of the price of an ordinary sponsored monthly ticket (about 25 Euros) being paid by the justice department. The scheme gained public attention

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<sup>182</sup> U. Busse (2008), *Frühe Strafverteidigung und Untersuchungshaft: Eine empirische Studie*, Göttingen, pp. 205, 289-308.

<sup>183</sup> Cf. <http://www.welt.de> 5-1-2008.

<sup>184</sup> Criminology Institutes of Heidelberg und Tübingen Universities (2008), *Abschlussbericht der wissenschaftlichen Begleitung des Nachsorgeprojekts Chance – durchgeführt vom Projekt Chance e.V. mit Mitteln aus der Landesstiftung Baden-Württemberg GmbH*, <http://www.projekt-chance.de/files/Evaluation-Nachsorge.pdf>.

all over Germany with different attitudes towards this practice.<sup>185</sup> The idea for this scheme came from probation officers, whose efforts to build a social surrounding for these persons were, time after time, voided by new prison times for fare evasion.

#### 7.2.4. Lithuania

The reduction of a prison term due to work within prison can be highlighted in Lithuania. The legal provision is promising but the implementation is lacking because of the extremely little number of existing workplaces and a missing set of criteria for the selection of eligible prisoners.

Another promising practice from Lithuania is the planned introduction of so-called "Halfway Houses". They will offer the possibility to serve part of the prison term outside the prison in flats for female prisoners with children under three years of age. The apartments will be supervised by the prison administration. The inmates will be able to look for a job, move freely etc. However, it can be questioned whether apartments run by the prison administration can be considered an alternative to imprisonment or whether they just represent another form of prison.

#### 7.2.5. Spain

Due to the problems related to the introduction of probation and its practice in Spain, it can't be said to be an alternative to imprisonment. The substitution of prison sentences by a fine or community service is largely applied to two groups of offenders/offences: traffic offences and cases of gender violence. These two groups make up 90 per cent of the substituted cases (road traffic: 76 per cent; gender violence: 14 per cent).<sup>186</sup> Since the prison population did not decline, these measures<sup>187</sup> are most likely to have a net-widening effect and cannot be seen as alternative measures. As even the General Secretariat of Penitentiary Institutions admits: "The offenses that are being punished with this sentence are minor, very often related to road safety. At other times this measure is chosen because the profile of the offender, when a person is normalised and integrated into society."<sup>188</sup> As a result, these reforms are applied to increase punishment for certain groups of offenders.

One remarkable practice in Spain is the possible suspension in drug cases with sentences of even up to five years of imprisonment.

<sup>185</sup> E. Stengel, *Unterm Strich: Rabatt für mittellose Schwarzfahrer: Wie Bremen Drogensüchtige vor dem Knast bewahrt*; *Badische Zeitung* vom 12.07.2012. <http://www.badische-zeitung.de/kolumnen-sonstige/unterm-strich-rabatt-fuer-mittellose-schwarzfahrer--61603966.html>.

<sup>186</sup> General Secretariat of Penitentiary Institutions. *Estudio del perfil de las personas condenadas a la pena de Trabajos en Beneficio de la Comunidad*. 2010 [http://www.iipp.es/web/portal/datos/descargables/estadpm/Estudio\\_CS\\_SGPMA\\_2010.pdf](http://www.iipp.es/web/portal/datos/descargables/estadpm/Estudio_CS_SGPMA_2010.pdf) (7 May 2014)

<sup>187</sup> These reforms were approved in 2004 and 2007. Probation in the sense of the definition used above started to increase in 2005 to a considerable level.

<sup>188</sup> General Secretariat of Penitentiary Institutions (2011). *The Spanish Prison System*, p. 48, [http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/publicaciones/libro\\_IP\\_inglx.pdf](http://www.institucionpenitenciaria.es/web/export/sites/default/datos/descargables/publicaciones/libro_IP_inglx.pdf) (Last access: November 28th, 2013).

## ANNEX I: DATA ON PROBATION/COMMUNITY SERVICE AND ON PRISONERS

Even though we took an approach to define alternative measures to imprisonment other than the one used in SPACE II, the numbers at least show that there is no direct connection between the imprisonment rates and the number of Community Service Orders plus Probation. Growing numbers of CSOs and Probation do not go along with decreasing numbers of prisoners. It seems more likely that in most countries the numbers of CSO plus Probation and the one of prisoners rise or fall at the same time, i.e. Community Service Orders and Probation are no alternative to imprisonment, but are more or less a surplus, targeting a different group of offenders, which would otherwise go without such measure.

**TABLE 2. PERSONS SERVING COMMUNITY SERVICE ORDERS OR BEING UNDER PROBATION ON 31 DECEMBER OF A GIVEN YEAR (STOCK)**

Total/ per100,000/ prisoners per 100,000 <sup>189</sup>	Belgium	Bulgaria	Germany <sup>190</sup>	Lithuania	Spain	Catalonia
<b>2012</b>	39,031/352/103	11,893/162/--	156,358/191/82	7,990/266/326	67,777/171/148	9,682/128/134
<b>2011</b>	40,606/369/101	12,055/164/151	156,440/191/85	7,136/234/310	56,111/145/148	9,767/131/140
<b>2010</b>	40,149/370/97	14,538/192/124	158,861/194/85	7,260/218/281	89,932/228/162	11,190/149/141
<b>2009</b>	25,462/237/95	13,555/178/132	148,805/182/87	6,889/206/260	199,991/509/167	10,023/134/141
<b>2007</b>	--/--/95	--/--/151	--/--/88	--/--/234	39,771/88/152	6,698/93/130
<b>2001<sup>191</sup></b>	7,744 <sup>192</sup> /--/85	--/--/114	84,552/--/96	155 <sup>193</sup> --/291	--/--/117	--/--/117
<b>1999</b>	1,512 <sup>194</sup> /--/82	--/--/132	--/--/98	19 <sup>195</sup> --/384	--/--/114	--/--/114

Source: SPACE II

<sup>189</sup> Prison population rate (per 100,000 inhabitants): 2007-2012 according to Workstream 1 figures, 1999 and 2001 according to SPACE I  
<sup>190</sup> Only those persons are counted who are under the supervision of a professional Probation Officer; most probationers are conducted without a (professional) probation officer.

<sup>191</sup> Numbers added of „Community Sanctions“ and „Probation“.

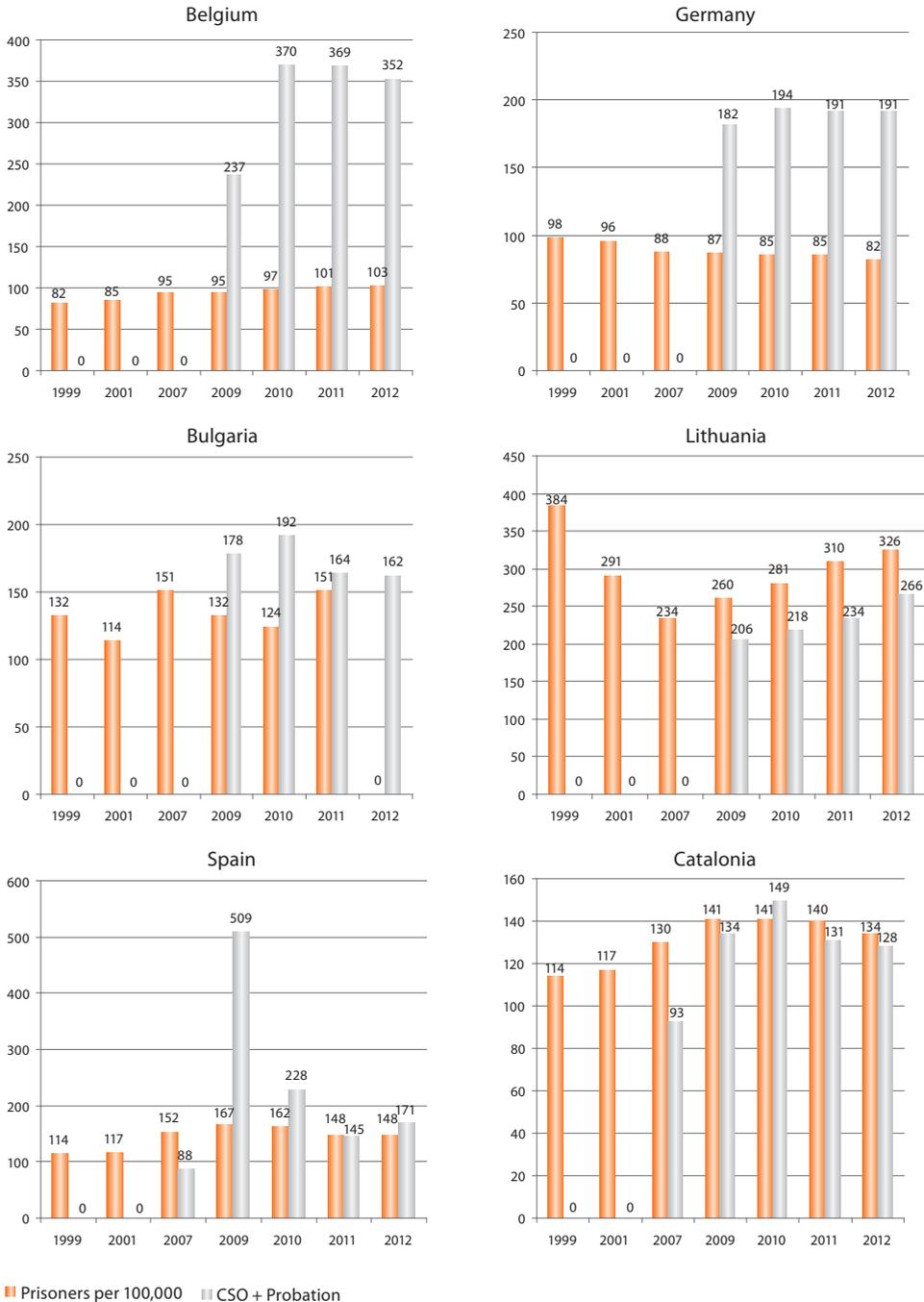
<sup>192</sup> Plus 3,567 sentences of „community service“.

<sup>193</sup> 155 sentences of „community service“ for being unable to pay a fine.

<sup>194</sup> „Community Service“ only.

<sup>195</sup> 19 sentences of „community service“ for being unable to pay a fine.

**FIGURE 1: NUMBER OF PRISONERS VS. PROBATION/COMMUNITY SERVICE PER 100,000 INHABITANTS**





# ANNEX II: EXPERIENCING SUPERVISION: COUNTRY REPORT GERMANY

## Authors:

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## I. Legal framework of offender supervision in Germany

The German criminal sanction system provides for different forms of offender supervision that need to be differentiated: Probation and parole operated by the Probation Service (Bewährungshilfe) and supervision of conduct (Führungsaufsicht) operated by a special agency in cooperation with the Probation Service. Additionally, electronic monitoring (Elektronische Aufenthaltsüberwachung) has been introduced as a possible measure within supervision orders. All these forms of supervision find their legal basis in the German Criminal Code. Whereas probation and parole are measures constructed as an alternative to imprisonment, conduct of supervision takes effect after the prisoner served his prison sentence completely or with the suspension of a consignment to a psychiatric hospital or drug/alcohol rehabilitation centre in criminal cases. In some cases, a supervision order can be assigned with the original judgement to come into force after the release of the prisoner. Whereas probation and parole can be revoked – with the consequence that the initial sentence has to be served – misconduct referring to measures assigned to such a supervision order constitutes an offence of its own and might be prosecuted (Section 145a Criminal Code: imprisonment up to three years or a fine).

While victim-offender mediation (Täter-Opfer-Ausgleich) might generally be considered as a form of offender supervision and is repeatedly mentioned in German criminal law (i.e. Section 46a Criminal Code; Sections 153a para. 1 no. 5 and 155b Code of Criminal Procedure; Section 10 para. 1 no. 7 Juvenile Court Act), it does not bear any systematic connection to offender supervision and thus, it is not covered by this report. According to the wording of the relevant provisions, victim-offender mediation is designed to prevent a criminal procedure or as a mitigating factor that might even justify the exemption from punishment.

## II. Quantitative dimension of offender supervision in Germany

The assignment of a probation officer in the course of a suspended prison sentence with probation or conditional release from prison represents the most frequent form of offender supervision in Germany, bearing in mind that the use of the Probation Service has increased considerably over the past decades. In 1970, a probation officer was appointed to offenders in 39,503 cases, whereas in 2011 criminal courts placed 182,715 convicted persons under the supervision and guidance of a probation officer (Federal Statistical Office 2013a).<sup>196</sup> A similar development may be gathered from figures on the supervision of conduct from the last years: while in 2008 this additional form of supervision came into place in 24,818 cases, this number increased to 33,381 supervision orders in 2012, amounting to an annual increase of supervision orders between six and nine per cent (DBH, 2013). This rise can be attributed to the extended number of prisoners serving a sentence of two or more years completely, without early release – or of one or more years in case of sexual offences – (Morgenstern/Hecht 2011). In view of the generally growing numbers of probational supervision orders, a corresponding decrease of prison sentences and prisoners could be expected. Such an assumption, however, turns out to be a misapprehension. Although statistics show a gradual decline in the number of prisoners – on 31st March 2007, the Federal Statistical Office counted 64,700 prisoners, whereas five years later, this figure was reduced to 58,073 (Federal Statistical Office 2013b, 12) – the overall number of internees was not diminished remarkably. The latter may be put down to the fact that there was an increase of individuals detained in psychiatric hospitals or rehabilitation centres, amounting to 166 per cent between 1991 and 2010 in the case of transfers to a psychiatry and 168 per cent in the event of admissions to rehab centres in the same time (Morgenstern/Hecht 2011, 183).

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<sup>196</sup> These figures relate to the Western German federal states only. There are no figures available for the whole of Germany.

**TABLE 3: PRISON AND SUPERVISION DATA**

Year	Prisoners (convicted adults only, whole of Germany) <sup>197</sup>	Prison entries <sup>198</sup>	Preventive Detention (Sicherungsverwahrung) <sup>196</sup>	Forensic Institutions (Psychiatry & compulsory Drug/Alcohol treatment) <sup>199</sup>	Probation <sup>200</sup>	Parole <sup>200</sup>	Supervision Order (Führungsaufsicht) <sup>201</sup>
2002	44,801	136,383	300	7,134	81,712	39,856	About 15,000 <sup>202</sup>
2003	52,384	135,002	321	7,824	86,244	39,498	
2004	53,749	129,152	342	8,276	88,238	38,381	
2005	54,038	123,184	365	8,658	90,283	38,122	
2006	54,112	116,789	398	9,021	92,335	38,806	
2007	51,870	109,996	424	9,361	94,230	38,821	
2008	52,333	105,657	461	9,538	97,351	39,679	24,818
2009	51,128	108,832	512	9,670	97,445	40,017	27,093
2010	50,451	114,596	503	10,019	96,806	40,124	29,495
2011	49,461	112,437	466	10,423	98,799	40,838	31,488

According to the figures presented in the table, the whole number of deprivations of liberty (including those detained in a forensic psychiatric institution) argues against the thesis of growing offender supervision as an alternative to imprisonment, which then should be decreasing. However, the competing thesis of an increasing punitivity resulting in growing numbers of imprisonment *and* growing numbers of offender supervision outside institutions can also not be confirmed with respect to the data given. The figures rather show a shift of focus from retributive prison sanctions to

<sup>197</sup> 30th of November; 2002: 31st December; N.B.: the numbers of Prisoners in Germany are much lower on 31st December, because of “Christmas amnesties”, home leaves etc..

<sup>198</sup> Convicted adults and juveniles entering prison (out of freedom), whole of Germany within a given year.

<sup>199</sup> 1st of January; Länder constituting the former West-Germany only.

<sup>200</sup> 31st of December, without Hamburg; persons who got a professional probation officer assigned.

<sup>201</sup> No further date, DBH-Fachverband, Peter Reckling: [http://dbh-online.de/fa/Zahlen-Laender\\_2012\\_DBH.pdf](http://dbh-online.de/fa/Zahlen-Laender_2012_DBH.pdf) .

<sup>202</sup> Estimates for 2000, in: Ministry of Justice and Ministry of Home Affairs (eds), 1st PSB, Berlin 2001, p. 399.

sanctions imposed on individuals perceived as being dangerous with the intention to incapacitate and rehabilitate at the same time. There are also growing numbers of people under control of the criminal justice with the growth being attributed to ambulant supervision.

A recent study of Cornel (2013) dealt with the development of early release in the different federal states of Germany. While this data is difficult to compare for several statistical reasons, one would expect to find at least some evidence for a decrease in numbers of early release or an increase in prison time actually served, if the hypothesis of more and more punitive court decisions should be proved. Actually, Cornel found some small changes and ups and downs but in the end no punitive development could be shown.

### III. Electronic monitoring in Germany

As it comes to electronic monitoring, which was introduced to the Criminal Code in 2011 as one further possibility of a supervision order connected with supervision of conduct, there have only been a few cases yet. On 31 December 2012, only 31 male offenders wore electronic tags (GPS) as a result of their supervision order (HMdJ, 2013).

Before its official incorporation into the Criminal Code, electronic monitoring had been tested in a pilot scheme in Hesse for several years in a legal context different from supervision of conduct orders. Designed for the purpose of electronic location monitoring, 1,109 offenders wore ankle monitors (sending signals to a system connected with a telephone) to prevent imprisonment between the beginning of the project in 2000 and January 2013. This form of offender supervision targets individuals whose probation is about to be revoked or who are threatened with a refusal of probation from the outset, or it may be used as an alternative to pre-trial detention. After the evaluation of the pilot project in Hesse (Mayer 2004) the consequences to be drawn from it remain controversial (e.g. Banzer/Scherzberg 2009, 31).

In the state of Baden-Württemberg, electronic monitoring was tested as well (Hochmayr 2013, 15). Between 2010 and 2012, prisoners were eligible for the project in connection with early release or premature transfer to work release or day parole. Originally, the project was also designed for avoiding imprisonment after default of paying a fine. A final assessment of the project in Baden-Württemberg is still awaited. As far as results from the evaluation using a randomized design are already available (Wößner/Schwedler 2012), they did not provide any evidence on an impact of electronic monitoring on resocialisation. It also turned out that prisoners assigned to the project were mainly socially integrated and reliable prisoners, in no way representing the prison population as a whole. Regardless of them being monitored, they were at a low risk of re-offending from the beginning. According to the Ministry

of Justice of Baden-Württemberg, the pilot scheme has been considered a – costly – failure and thus, it stopped the project in May 2013 (dpa 2013).

#### **IV. Short history of offender supervision in Germany**

Probation as the most important form of offender supervision was not introduced in Germany until the mid-1950ies, although the introduction of aid to offenders and ex-prisoners dates back to the first half of the 19<sup>th</sup> century when private organisations like the Rhine-Westphalian Society in Support of Prisons (1826) or the Society for the Support of Released Prisoners of Württemberg (1830) had been founded. During the 19<sup>th</sup> and the first half of the 20<sup>th</sup> century work with offenders was solely based on a network of voluntary organisations and the German penal legislation did not envision any sort of supervision of offenders on probation. After the establishment of the first registered probation service association – the “Verein Bewährungshilfe” – and the appointment of ten probation officers in several West German district courts in 1951, the Probation Service got eventually incorporated into law in 1953 and 1954 when the Juvenile Court Act and the Criminal Code were passed (Jäger 2010, 186). During the past decades, the probation system continuously expanded and the Probation Service was gradually professionalised. Originally designed as a mere monitoring body, the Probation Service was increasingly conceived of as a means to offer aid and support to the offenders in order to promote their reintegration into society.

In 1975, the German criminal law system was extensively reformed and new areas of social services in the criminal justice system emerged. In the course of this major reform, the supervision of conduct (Führungsaufsicht) was introduced to the Criminal Code and thus, new supervision bodies were established – however, the actual work with the supervisees remained with the Probation Service. According to Sections 68 et seqq. Criminal Code, supervision of conduct may be imposed on the offender by the court discretionarily in certain cases. This provision is made use of only very rarely, e.g. in 26 cases with respect to the year 2006. Mostly conduct of supervision is enforced according to a rule imposing it almost automatically, and allowing the court to restrain from it merely as an exception. Around 60 % of the supervision orders rest on a provision of the Criminal Code regulating that an individual has to be subjected to supervision of conduct if his or her prison sentence of at least two years (or one year in cases of sexual offences) has been served completely without release on parole (figures according to Groß 2012, preface to Sections 68 et seqq., marg. no. 6). The remaining around 40% refer to releases from forensic institutions. Since 1998, possibilities for courts to employ supervision of conduct have been enhanced considerably, enabling them to order supervision even for unlimited time in a number of cases (Section 68c para. 2, 3 Criminal Code).

## V. Organisational aspects of offender supervision in Germany

As mentioned above, the German Probation Service looks back on a history of more than 60 years and experienced various changes throughout the past decades. The present-day Probation Service is decentralised and therefore, one may rather speak of 16 different Probation Services.

Each federal state has its own organisational concept but in most cases, the Probation Service is accountable to the respective Ministry of Justice and assigned to the different district courts, the presidents of which act as its administrative and technical supervisors. Moreover, most of the Probation Offices have an executive officer who is responsible for the coordination and organisation of the Probation Service. The different regional Probation Services either act as independent bodies or share an office with the local Court Assistance Agency (Gerichtshilfe) and/or the supervision authority that is responsible for measures according to Sections 68 et seq. Criminal Code (Führungsaufsichtsstellen). In case of the latter, the tasks of the supervision bodies are subsumed under umbrella organisations called “Social Services in the Criminal Justice System”.

One organisational specialty is represented by the Probation Service model of Baden-Württemberg, established in 2007. Following the example set by Austria, this federal state privatised the Probation Service and vested the supervisory power in the non-profit organisation “Neustart GmbH”. The Ltd operates with two chief executives, one being responsible for economic affairs, staff and organisation and the other one for the social work and the coordination of the nine regional offices. Basing on an agreement between the state of Baden-Württemberg and Neustart, the Ministry of Justice supervises the private organisation, while the former provides for the Probation Service free of any directives (apart from those entailed in the contract).

With respect to the overall tasks of the Probation Service, federal law states a couple of requirements that legal scholars and practitioners emphasise and prioritise differently. Both help and control are aspects inherent to the job of probation officers today and they often find themselves in a twofold role (Ostendorf 2013, Section 56d marg. no. 9). In general, the Probation Service is meant to assist offenders in living a crime-free life as well as enabling them to do so without the guidance and supervision of their probation officers (ibid.). On the other hand, probation officers have to monitor the fulfilment of directives and conditions of probation, imposed on the offender by the penal court (ibid.). The same applies to the legal provisions supervision of conduct.

In case of the supervision of conduct, several actors are involved and a functional differentiation is applied. On the one hand, the court assigns a probation officer to an offender if he or she is placed under supervision of conduct. In this context, the probation officer’s task focusses less on the supervision and control of the offender but rather on building a relationship of trust and serving as an adviser and

assistant in questions of the client's everyday life. On the other hand, the convicted offender becomes subject to the supervision of a special monitoring agency (Führungsaufsichtsstelle), which is primarily designed to oversee the offender's behaviour and his or her compliance with instructions of the court in cooperation with the probation officer. Similar to the Probation Service, the supervisory agencies have evolved very differently in the federal states and presently follow diverse organisational concepts.

As it comes to the professional and educational background of offender supervisors in Germany, working for the Probation Service usually requires a diploma in "social work"/"social pedagogy". For acquiring a degree in this field, prospective probation officers have to successfully complete at least six semesters of studies at a University (of Applied Sciences and Arts), sometimes still followed by a practical year in a social institution. As these courses of study offer a broad and extensive insight into the different areas of social work, including lectures related to social work in the criminal justice system, there is no specific training for probation officers, although there are regular workshops for social workers in the criminal justice system, organised by organisations like the Association for Social Work, Criminal Law and Criminal Policy (DBH e.V.-Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik) and the ministries of justice of the federal states.

According to the Introductory Act to the Criminal Code, tasks of the agencies responsible for the supervision of conduct may be performed by senior civil servants, state-approved social workers/social pedagogues or administration officials of the upper level, while the head of the agency must be an individual who is qualified to hold judicial office. Because these supervisory agencies are rather perceived as monitoring bodies and part of the administration of justice, the proportion of social workers is comparably low in some federal states (Ostendorf 2013, Section 68a, marg. no. 3).

## **VI. Offenders under supervision**

Although the Federal Statistical Office publishes annual reports on the German Probation Service, the available statistics remain incomplete and many relevant factors concerning the offenders' personal circumstances are left out. As pointed out above, West German courts have placed offenders under the supervision of a probation officer in 182,715 cases in 2011. Since 2008, this figure remained comparably constant as the amount of cases varied between 180,074 and 182,736 (Federal Statistical Office 2013a, 11).

In 2011, the vast majority of the court orders – that is to say, 150,713 – rested on provisions from the Criminal Code, while the remaining 17.5 per cent of the orders were founded on the Juvenile Court Act (*ibid.*). Among the convicted adult offenders, the criminal courts placed individuals under the supervision of the Probation Service in connection with a suspended prison sentence in 98,799 cases, whereas

approximately 40,838 of the placements took place in the context of a release on parole (*ibid.*).<sup>203</sup>

With respect to the gender of those offenders, who were placed under the supervision of a probation officer during the past couple of years, women have been subject to such court orders way less frequently than men. In 2008, the proportion of female offenders – placed under the supervision of a probation officer – amounted to 21.4 per cent, 22 per cent in 2009 and 21.3 per cent in 2011. Since the beginning of the statistical enquiry in 1963, the highest share of Probation Service orders concerning female offenders was registered in 1970, when 36.6 per cent of these court orders were directed against women (*ibid.*).

The Federal Statistical Office also specifies selected offences, on the basis of which criminal courts have decided to order the placement of offenders under the Probation Service (*ibid.*, 16). In 2011, the highest rate of placement orders among male adult offenders represented violations of the Narcotics Act (18 %), followed by charges of bodily harm (15 %), fraud and embezzlement (15 %) and theft (13 %). Among female offenders, the highest proportion of placement decisions took place in the context of convictions on grounds of fraud and embezzlement (29 %), theft (27 %) and drug offences (14 %). Juvenile offenders, however, got subject to a placement order mostly because of sentences due to bodily harm (26 %), robbery and blackmailing (18 %), theft and burglary (15 %) as well as drug offences (11 %).

In view of the Probation Service's effectiveness, the Federal Statistical Office elaborates on the reasons for the termination of Probation Service placements (*ibid.*, 20). In 2011, probation officers ended their service in 61,132 cases, 72 per cent of which marked the discharge of a penalty, the termination of the probation period or the annulment of a placement. In this connection, there were more female probationers (78 %) whose placement ended due to the fulfilment of probation conditions than male probationers (71 %). Furthermore, this rate was higher among non-German probationers (75 %) than among German offenders on probation (71 %). Regarding age, the group of offenders at the age of 60 plus showed the highest rate (87 %) of those probationers whose probation supervision ended due to one of the above-mentioned reasons, whereas the group of probationers aged 25 to 30 exhibited the lowest (68 %). In 15,758 cases (2011) courts revoked the probation and thus supervision measures came to an end because the prison sentence had to be served.

## VII. Experiencing supervision – the offender's account

In the existing German literature on the Probation Service and other forms of offender supervision, the offenders' point of view and their lived experiences play a marginal role and therefore, studies on the probationers' perception of supervision

<sup>203</sup> The remaining around 5% of the placements took place according to sections 35, 36 Narcotics Act or due to other unspecified reasons.

are quite rare. In addition, the existing studies show some methodological limitations with respect to the involvement of (future) probation officers in gaining the data and selecting the offenders chosen for interview.

### **1. Bieker's studies on experiencing probation**

Bieker (1982) was probably the first to argue that the "addressee's perspective" on the Probation Service deserved a thorough scrutiny in Germany. He aimed at a differentiating examination of the offenders' perception of both the Probation Service and the supervision of conduct that was meant to be implemented by an extensive research project based on an enquiry of an equal number of probationers and persons placed under supervision of conduct. Unfortunately, the comparative project failed because there were too few respondents and thus, the stance of offenders under supervision of conduct remained unheard within the study.

Focussing on probationers, Bieker therefore undertook an empirical research on the Probation Service from the perspective of male German probationers of all ages (1984). Starting from the premise that potential effects of the Probation Service are dependent on the probationers' willingness to cooperate – that is, not only their conformity to imposed rules but a factual readiness for interaction with the probation officer – Bieker developed three questions on the probationers' attitude towards probation (1984, 300): 1) How is the subordination to a probation officer considered by the probationers in general? 2) Which subjective experiences influence the probationers' evaluation? 3) What is the nature of the probationers' subjective interest in using the services of their probation officer? In order to answer these questions, Bieker conducted a standardized oral survey with 228 probationers in the West German cities Cologne and Wuppertal.

Pertaining to the first question, 58 % of the interviewees showed a positive reaction towards the subordination to a probation officer, whereas more than 40 % of the respondents had a negative or indifferent opinion on supervision by the Probation Service. In contrast to this general question, 87 per cent of the respondents assessed the practical experiences with their personal probation officer as rather positive, while only three per cent of them described their experiences as clearly negative.

Considered as an indicator of trust, Bieker asked the probationers whether they took into consideration to expose information to their probation officer that might be harmful for them if used in court. Almost 64 per cent of the respondents could imagine revealing such disadvantageous information to the Probation Service and approximately 63 per cent expressed their general trust towards the probation officer. Interestingly, 68 per cent of the interviewees do not see any correlation between the probation officer's duty to report all relevant information on the probationers to the court and their willingness to confide everything to him or her.

In view of the probation officers role as a supervisor, the answers appear even more surprising: although 49 per cent of the questioned probationers conceived of

their probation officer as both their and the court's representative, only 24 per cent of them felt observed by the Probation Service. Additionally, almost three quarters of the respondents reported, they had never been interrogated by their probation officer, 94 per cent had never experienced any unexpected home visits and 89 per cent of the respondents assumed that their probation officer had not attempted to gather any information on them behind their back.

With reference to the Probation Service's potential benefits, 61 per cent of the interviewed probationers stated that they considered talks to their probation officer as oftentimes helpful, the remaining 89 respondents never or infrequently thought so. Concerning special personal problems, the usefulness of the Probation Service was regarded as comparably high in judicial and administrative matters and rather low in connection with the probationers' personal and vocational problems as well as in finding an accommodation (Bieker 1984, 305).

In order to evaluate the probationers' interest in cooperating with their probation officer, Bieker additionally queried the interviewees, whom they would preferably address to solve their problems. In case of arguments with courts, more than 86 per cent of the respondents would ask for support from the probation officer and more than 69 per cent of them would do so in case of problems with public authorities. However, only 12 per cent of the probationers would approach the Probation Service in the event of disputes with their partners, 22 per cent of them would do so if they had psychological troubles and the same amount of respondents would ask their probation officer for help if they were looking for a job. The respondents showed a similarly low interest in support from the probation officer as it comes to accommodation problems (27 %) and even with regard to settling debts, less than half of the interviewees (42.5 %) would consult the Probation Service. Moreover, half of the probationers mentioned that they often liked to see their probation officer, while 37 per cent rarely and 13 per cent never did so.

In his study, Bieker draws various noteworthy conclusions:

1. He interprets the probationers' limited interest in cooperation with the probation officer as a result of the exclusion from the decision on the assignment of a probation officer.
2. Assuming that the probationers' interest in cooperation depends on their expectation of the Probation Service's capacity for solving their problems, Bieker concludes that the lack of it rested on the confined resources and limited potential of the Probation Service.
3. Contrary to what the actual interview results suggest, Bieker refuses to deduce that there is no relevant connection between the probation officers duty to report to the court and the probationers' willingness to reveal possibly unfavourable information to him or her. Bieker doubts that there is a correlation between the responses in the interviews and the actual delivery

of such delicate information and furthermore, he reckons that the original question might have cognitively overburdened some of the respondents.

As Bieker concedes self-critically, the value and validity of his results might have been compromised by different factors. First of all, there might have been a distortion due to the fact that the enquiries

took place during the office hours of the Probation Service and probationers with a rather negative attitude towards their probation officer are less likely to appear in the office as often as probationers with a positive view. Furthermore, a third of those probationers asked to participate in the study refused to do so as they feared an identification of their – possibly depreciative – responses and resulting negative effects. Bieker also admits that such fears might have influenced those probationers who participated in the study as well. Last but not least, the probation officers' selection of interviewees might have resulted in a positively distorted display of the Probation Service.

In a further study, Bieker (1989) elaborated on the Probation Service from the "addressee's perspective". Additional to the quantitative survey, he had already used in his first research, Bieker analysed 28 intensive explorative interviews with probationers. In view of the probation officer's role, the qualitative survey revealed that most of the interviewees associated the task of the Probation Service with terms like "surveillance", "control" and "observation" (Bieker 1989, 134), while they perceived these forms of monitoring as rather negative (*ibid.*, 135). Moreover, not a few of the respondents felt a certain pressure to conform to the probation conditions and the expectations of their probation officer as the latter held a certain potential to reveal decisive, possibly negative information on the probationers to the court (*ibid.*, 136 et seq.). The role of the probation officer as an educator and helper, however, was perceived as rather secondary (*ibid.*, 137 et seq.).

With reference to the lived experiences, Bieker's qualitative research revealed that most of his respondents assessed their probation officer's helpfulness and commitment as largely positive (*ibid.*, 141 et seq.), while they distinguish between consultative and intervening assistance (*ibid.*, 145). Assessing the notion of the Probation Service's controlling aspect, Bieker identifies three categories in the interviewed probationers. One group of them – approximately a third – clearly detected the controlling function of their probation officer and regarded it as unfavourable, whereas a second – a sixth of the interviewees – recognises the controlling aspect but does not feel negatively affected by it. The third category – around a half of the respondents – is composed of those interviewees who both deny a controlling role and do not feel any restriction in the interaction with their probation officer (*ibid.*, 164 et seq.). The mainly positive outlook on the probation officer's control behaviour rests on the respondents positive experiences concerning the social workers' spare use of stringent conditions (*ibid.*, 180 et seq.), their exertion of influence on the probationers' way of living (*ibid.*, 182 et seq.) and their reporting policy (*ibid.*, 186 et seq.).

In view of the respondents' general interest in cooperation with their probation officer, Bieker – once again – differentiates between three groups of probationers: About a fifth of the interviewees articulated a predominantly confirmative response to this question resting on positive experiences with their respective probation officer, while a second group – roughly a third of the respondents – expressly denied an interest in cooperation due to a perception of the Probation Service as a mere burden (*ibid.*, 197 et seq.). Representing almost half of the respondents, the third group stands for an ambivalent attitude towards the Probation Service as those probationers might approach their probation officer in certain problematic situations but cherished general reservations towards an interaction with the Probation Service (*ibid.*, 199).

Slightly differing from the quantitative results (see Bieker 1984), the qualitatively interviewed probationers showed a comparably high interest in support from their probation officer in the event of problems of financial nature, especially those concerning monetary claims from creditors, outstanding salaries or social benefits or the regulation of debts. The respondents were also willing to cooperate with their probation officer if they had conflicts with their employers, if they were looking for vocational qualifications, jobs or apartments (Bieker 1989, 211). In case of judicial problems, many interviewees revealed their willingness to approach the Probation Service as well, expecting their assigned officer to help them prevent court sanctions, enforce pleas for clemency or the revocation of arrest warrants (*ibid.*). In all other problem areas, the interviewed probationers showed less interest in addressing their probation officer.

In his study, Bieker also explores grounds on which the respondents based their lack of willingness to cooperate with the Probation Service. In this context, the most prominent reason is a – perceived – lack of need for help on the probationers' side, which might either be derived from missing subjectively relevant burdens, the negation of a need for problem-solving, the interviewees' reference to their own ability of solving their problems or the existence of other support from the probationers' primary social field of reference (*ibid.*, 222 et seqq.). In terms of content, the interviewees especially pointed out two problem areas they omit in front of their probation officer: newly committed offences and personal affairs (*ibid.*, 228 et seq.).

According to Bieker's results, other reasons for the probationers' lack of interest in cooperation with the Probation Service are the latter's involvement in the judicial system and its controlling function as well as its limited capacities (*ibid.* 225 et seqq.).

In summary, Bieker carried out quantitative and qualitative research on the German Probation Service from the perspective of male adult offenders, but with limitations of the results' reliability. The studies draw a differentiated but principally positive picture of the German Probation Service, while naming various areas, in which the relationship of mutual trust appears expandable. The limitations of the research

design are due to restrictions by the controlling authority denying access to the register of offenders under supervision and thus leaving the admission of cases to the probation officer. This may have influenced the results, if the probation officers preferred to involve clients whom they expected to perceive probation rather positive.

## **2. Hesener's study on the relationship between probationers and probation officers**

In his evaluative study, Hesener (1986) examined the work relationship between probationers and their probation officers, considering, among other questions, the acceptance of the placement under the Probation Service by the affected offenders.

For the part of his empirical research that focussed on the probationers' attitude towards the Probation Service, Hesener developed – on the basis of an explorative preliminary study – three different standardised questionnaires, one of which dealt with the probationers' evaluation of the relationship with the probation officer, while the others aimed at the self-assessment and self-description of the probationers. The most part of the questionnaires were designed in the shape of 6-point Likert scale answer options (fully correct, correct, a bit correct, rather not correct, not correct, not correct at all). After that, Hesener contacted probation offices in nine different cities in the federal state of Lower Saxony, trying to acquire as many voluntary probation officers and probationers as possible. Eventually, 38 probation officers agreed to participate in the study and offered Hesener and his team access to their files. 10 cases of male probationers per probation officer were randomly extracted and the probation officers were requested to ask the selected offenders to take part in the research and to arrange interview appointments. In the end, the probation officers could reach and persuade 65 per cent of the randomly chosen probationers (248), some of which could not be approached due to objective reasons (e.g. in-patient therapy treatment, pre-trial detention or military service), whereas others refused to participate on various, non-specified grounds. In a further random selection, 48 probationers agreed to an interview so that 294 probationers were finally enquired. By means of comparing the probation officers' statements on those probationers who did not take part in the study, with those who participated, Hesener singled out, among others, the following characteristics of the non-participating offenders: more initiated probation revocations, a higher rate of recidivism, a worse probation prognosis, lower expectations on the probationers' side, less openness and trust in the relationship between the Probation Service and the offender.

With reference to the perception of the Probation Service, 23 per cent of the respondents considered the statement that the placement under a probation officer was a possibility to regain a foothold in society as fully correct, 30 per cent of them as correct and 22 per cent as a bit correct (Hesener 1986, Annex 20). Correspondingly, 26 per cent of the interviewees slightly to fully agreed with the

description that the Probation Service does not offer any help (*ibid.*). Moreover, half of the interviewed probationers perceived the statement that the Probation Service only existed to control the offenders as a bit to fully correct, whereas 35 per cent of all respondents considered the assignment of a probation officer as a punishment to some or full extent (*ibid.*).

As regards past experiences with the provision of help by their probation officer, 22 per cent of the respondents fully agreed that their probation officer did more than he had to do, 28 per cent found that remark correct and 26 per cent of them considered it at least a bit correct. Accordingly, only 11 per cent of the interviewees could slightly to fully agree to the statement that they had to urge their probation officer to do anything for them (*ibid.*).

In view of the controlling function of the Probation Service, 73 per cent of the questioned probationers somewhat to fully concurred with the allegation that their probation officer urged them to meet their commitments, while 29 per cent slightly to fully acknowledged that their probation officer made accusations to them frequently.

Moreover, 75 per cent of Hesener's interviewees thought that the depiction of the relationship of trust with their probation officer as open was correct or fully correct, while 72 per cent of them agreed or even fully agreed (31 per cent) to the statement that they had conversations with their probation officer as equal partners (Hesener 1986, Annex 21). Nevertheless, 19 per cent perceived their probation officer as slightly to fully unpleasant and 24 per cent of them – somewhat to fully – feared that their probation officer might reveal information on them to the judge if they told him or her everything (*ibid.*). Furthermore, 19 per cent of the respondents stated that they frequently had little to big problems to understand what their probation officer wants from them and 40 per cent considered the statement that their probation officer and they were not on the same wavelength as a bit to fully correct (*ibid.*).

With respect to the potential advantages of the Probation Service, 75 per cent of the interviewees simply or fully agreed to the proposition that their probation officer knew how to handle difficulties, while only 16 per cent of them considered it a bit to fully correct that they could not expect any assistance from their probation officer. In spite of that, 47 per cent of the respondents slightly to fully regarded the possibilities of the Probation Service to offer help to them as very limited and 38 per cent of them believed that their probation officer does not have sufficient time for helping them to some or full degree (Hesener 1986, Annex 22). Concerning the Probation Service's power, 38 per cent of the respondents simply or fully agreed to the assertion that their probation officer could harm them if he or she wanted to, whereas 66 per cent – slightly to fully – believed that they had to actively participate in the Probation Service, unless they wanted to experience serious consequences (*ibid.*). Corresponding to the latter, 64 per cent of the interviewed

probationers answered – somewhat to fully – in the affirmative that one should comply with the instructions of the probation officer in order to avoid trouble.

As to the probationers' satisfaction with the Probation Service, 56 per cent of the respondents found it correct to say that they approved of their probation officer's attempt to help them, while 33 per cent could even fully agree to that statement (Hesener 1986, Annex 23). On the other hand, 38 per cent of the interviewees rather to fully disagreed with the proposition that they would have had difficulties coping without the assistance of their probation officer (*ibid.*). A quarter of the respondents also exhibited – a little to full – discontent with the help they received from their probation officer. Moreover, 28 per cent of the interviewees stated it was a bit correct, correct or very correct to say that they felt bothered by the fact that their probation officer tried to control them.

Regarding the probationers' expectations from the Probation Service, the interviewees exhibited a rather moderate attitude (Hesener 1986, 166 et seq.). 53 per cent of them had little and 13 per cent of them no expectations at all. With reference to special problems, most of the respondents expected assistance from their probation officer as it comes to administrative affairs (59 per cent), debt regulation (39.5 per cent), personal problems (39 per cent) and job-related questions (37 per cent). In the case of alcohol and drug problems (9 per cent) as well as difficulties with partners (7 per cent), the expectations were especially low.

Hesener also enquired his interviewees about wishes for change with respect to the Probation Service (Hesener 1986, 169). Almost 97 per cent of the respondents expressed their wish to have an earlier contact to the probation officer, while around 79 per cent asked for more group work with other probationers. More than 78 per cent also wished to be able to freely choose their probation officer. Other wishes related, *inter alia*, to a better cooperation with other institutions (76 per cent), a Probation Service closer to their homes (63 per cent), better resources for the Probation Service (62 per cent) and a right to refusal of testimony for the probation officers (61 per cent).

All in all, Hesener's research results draw an ambivalent picture of the probationers' perception of the Probation Service. Although they show a rather positive attitude towards the Probation Service, there is open criticism as well. In this context, the express demand for a free choice of the respective probation officer seems noteworthy. Similar to the other studies presented in this report, Hesener's study, however, suffers from the methodological weakness that it was up to the probation officers to convince the probationers of taking part in the study and besides, most of the interviews were held in probation offices. Therefore, it is not unlikely that probationers with a rather negative opinion of the Probation Service hesitated to participate or gave positively skewed responses.

### 3. Cornel's survey on young offenders under probation

Following Bieker's approach to analyse the "addressee's perspective", Cornel (2000) conducted an extensive study on probationers, their situation and expectations of the Probation Service, but solely focussed on youths and young adults on probation.

In order to obtain representative results, Cornel carried out different surveys, applying a mix of methods. In a first step, he developed an individualised questionnaire for 1,740 young probationers – comprising of 94.5 % male and 5.5 % female interviewees – on the basis of electronically accessible data with reference to, *inter alia*, gender, age, nationality, the form of supervision and committed offences. Subsequently, these questionnaires were completed with further questions on the probationers and submitted to the respective probation officers. After an interim analysis of both the probationers' and the probation officers' responses, Cornel and his team created another questionnaire that was used for qualitative interviews with 320 young probationers, 240 of which had already taken part in the first survey.

With reference to the adolescents' trust in their respective probation officer, Cornel attaches major significance to the question whether the young probationers talk about the committed crimes with their assigned officer and therefore included this matter into the second survey. 302 interviewees responded, 87 of which stated that they had not committed any offence they could talk about. 65 % of the remaining 215 respondents confirmed that they had addressed their offence(s) to the probation officer and another 18 % of the interviewees conceded that they had at least partly discussed their wrongdoing. These figures may point to a high level of trust among young probationers.

Regarding programmes of job promotion for probationers, 262 out of 320 interviewees reported having experiences with such programmes and almost 20 % of the respondents explained that they received help from their probation officer finding a job.

With respect to the probation officer's role in general, 90 % of the 308 responding youths had obtained some sort of help from the Probation Service, while most of the young probationers conceived of their probation officer as especially helpful with respect to general advice (40 %), in conversations about personal problems (50 %) and in court (36 %).

In addition, more than 44 % of the interviewees felt always understood by their probation officer, around 30 % felt so quite often and almost 16 % sometimes, whereas merely 2 % of the respondents felt completely misunderstood by their probation officer. In this context, Cornel reveals that the proportion of those feeling always or often understood by the probation officer is considerably higher among young adults (82 %) than among youngsters (59 %).

Cornel's research manifests that the attitude towards the Probation Service among youngsters and young adults on probation seems even more positive than Bieker's surveys have exhibited in the case of male adult offenders, while their willingness to interact with their probation officers rather refers to personal problems than to judicial or vocational ones. As to the validity of the study, Cornel has applied a quite differentiated approach so that the results may be regarded as representative. Nonetheless, there is a possible distortion of the Probation Service's depiction by the probationers. In case of the first survey, the questionnaires had been collected by the respective probation officer, whereas in regard to the second survey, it may be noted that trainees of the Probation Service conducted the qualitative interviews. Consequently, the respondents may have doubted the surveys' anonymity, producing a positively distorted picture of the Probation Service.

#### **4. Kutajová's research on young offenders under probation**

Also focussing on the clientele examined by Cornel, Kutajová (2009) offers a comparative account on the perception of the German Probation Service by youths and young adults of German origin and those with a migratory background.

For her study, she interviewed 31 young male offenders on probation in the federal state of Baden-Württemberg – 11 of them without and 20 with a migratory background.<sup>204</sup> The adolescents were chosen by various probation officers of a local probation programme and confronted with a questionnaire on their personal background as well as the probation system. With regard to the selection of the interviewees, the probation officers were given a free hand and it was left to them to assess, whether a probationer was to be considered as a migrant and whether he had sufficient command of the German language to answer the posed questions.

In view of the young offenders' perception of the Probation Service and its officers, 72 % of the migrant interviewees revealed that they trust their probation officer, while 54,5 % of the non-migrant offenders did so. Only three of the 31 questioned youngsters mentioned they do not trust their probation officer at all. Moreover, 21 of the questioned probationers stated that they discuss their personal situation with their assigned probation officer, whereas five of them did not feel at ease to talk about their personal problems with the officer. As reasons for their hesitation, they point out not knowing the officer very well and having a different outlook on life. What is more, eight out of eleven non-migrant and 16 out of 20 migrant interviewees thought that the probation officer was able to help them solving their problems.

As it comes to past experiences with the Probation Service, Kutajová's interviewees reacted mainly positively: 27 of the probationers – that is to say 94 % of the migrants and 90 % of the German interviewees – indicated positive experiences

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<sup>204</sup> Under The category of persons with a Migratory background fall individuals who have migrated to Germany after 1949; or persons with foreign or German nationality, at least one parent of whom has immigrated to Germany or was born as a foreigner on German territory (Kutajova 2009, 66).

with the Probation Service, while only one questioned person had negative overall experience with his probation officer. These predominantly positive responses relied on the probation officer's helpfulness as the most significant factor; other reasons were the officer's support in solving everyday-life problems and his or her unbiased attitude in conversations with the probationers.

Considering the main objective of probation – living a life free of crime – only five non-migrant and 11 migrant probationers take the view that the probation officer actually helps them fulfilling this goal. Six of the questioned juvenile delinquents mentioned that having an offence-free life-style must be the result of the probationer's own decision as the probation officer is not present in iffy situations and thus, it is up to the probationer to withstand criminal activities. Nevertheless, 94 % of the migrant and 63 % of the non-migrant interviewees were convinced that the Probation Service makes sense in general. Furthermore, 13 of the migrant probationers and four German interviewees perceived probation as a chance and a new beginning, whereas three migrant and seven German youngsters regarded probation to be a purely compulsory programme.

Kutajová concludes that the perception of the Probation Service by young offenders is largely positive. While there are some indications that non-German young probationers have a slightly more positive attitude towards probation, she refuses to draw such conclusion in view of the small data record. Another restriction is again that the interviewees have been selected by probation officers, which may lead to a bias of the answers in favour of positive perceptions on probation.

## **5. Survey by Kawamura-Reindl & Stancu on young probationers**

A further standardised research on the relationship of probation officers and young probationers from the latter's point of view has been undertaken by Kawamura-Reindl & Stancu (2010) in Nuremberg, Bavaria. For their survey, Kawamura-Reindl & Stancu used the available database of the municipal probation office and only chose offenders – placed under the supervision of a probation officer on the basis of the Juvenile Court Act – who had already been supervised for at least half a year and whose placement was about to end within the following two months. After the development of a standardised questionnaire, the respective probation officers were requested to hand over the questionnaire in an envelope to the probationers and to ask them to put the completed forms in a specifically designed letterbox in the office. The questionnaire was meant to reveal information on the personal situation of the probationers, their experiences with the Probation Service, their trust towards their probation officer, the authenticity of their behaviour towards the Probation Service, the position of the probation officer as well as their choice of a probation officer in case of a new placement. Eventually, the questionnaire was delivered to 253 young probationers, 146 of which were completed and returned, while 145 of them (57 per cent) could be assessed. The vast majority of

the interviewees were older than 18, only seven of them minors. 124 male and 19 female probationers took part in the survey.

With regard to their initial reaction to the placement under a probation officer, 60 respondents regarded the supervision order as positive, whereas 59 of them perceived the placement as a negative incident (Kawamura-Reindl & Stancu 2010, 138). However, the actual experiences with their probation officer obviously turned out to be more favourable: More than 54 per cent of the interviewees stated the experiences with their probation officer had been very good, 33 per cent perceived them as rather good. Less than 1 per cent of the questioned probationers clearly had negative experiences with their probation officer in the past. Correspondingly, around 24 per cent of the respondents expressed that they liked to see their probation officer very much, while more than 45 per cent of them quite liked to do so (*ibid.*). Nonetheless, around a quarter of the young probationers did – rather – not like to visit their probation officer. Furthermore, approximately 66 per cent of the respondents stated that they had oftentimes or always felt better after conversations with their assigned probation officer, whereas almost a third of the interviewed adolescents had rarely or never felt better (*ibid.*, 139).

In terms of contact intensity, slightly more than half of the interviewees felt that their probation officer always had time for them, while roughly 38 per cent said their probation officer mostly had time for them. Only 14 questioned probationers stated their probation officer rarely or never had time for them. In the same context, only 11 per cent of the respondents never, rarely or sometimes had the impression they could talk things over with their probation officer when they felt bad, while more than 66 could always and more than 20 per cent could do that most of the time (*ibid.*, 140). Moreover, three quarters of the interviewees stated that both they and their probation officer decided what they talked about in their conversations. As a result, more than 72 per cent of the respondents expressed that their attitude towards the placement under the Probation Service had changed during probation for the better, while only 3 probationers a more negative posture than before (*ibid.*, 141).

Concerning the probation officers' handling of information provided by their clients, around 8 per cent of the respondents revealed that their probation officer had gathered information on them from a third party and 49 per cent of them could not rule that possibility out. Furthermore, almost 40 per cent were not sure if their probation officer had passed on personal information without their consent (*ibid.*, 141 *et seq.*). On the other hand, only around 4 per cent of the respondents stated that their probation officer had spoken of them disparagingly in front of a judge (*ibid.*, 142) and 14,5 per cent of them found that statements from their probation officer had turned out disadvantageous in court (*ibid.*, 143). In this context, it should be added that more than 23 per cent of the respondents did not know whether they had suffered from any negative consequences due to court statements from their probation officer.

As to the helpfulness of the Probation Service, according to 49 per cent of the interviewees, their probation officer had helped them in court affairs, while 36 per cent had received assistance in job-related matters, 39 per cent in the event of psychological problems, 31 per cent in case of problems with the administration and almost 28 per cent in financial questions (*ibid.*, 143). In terms of familial, partner and housing problems, the Probation Service turned out to be less helpful.

The survey conducted by Kawamura-Reindl & Stancu also covered the monitoring function of the Probation Service. In this connection, more than 67 per cent of the respondents recognised the controlling task of their probation officer more or less, while 29 per cent of them did not feel controlled by their probation officer at all (*ibid.*, 144).

Regarding questions on the probationers' trust towards the Probation Service, the results turned out to be quite clear, too. Only five per cent of the questioned probationers expressed having very little or little trust towards their probation officer, whereas around 21 per cent of them partly trusted their probation officer. The vast majority of the respondents (almost 72 per cent), however, considered their probation officer as trustworthy (*ibid.*, 145). Accordingly, 19 per cent of the respondents stated they never revealed possibly harmful information to their probation officer, while almost 36 per cent would do so even if they feared negative consequences.

With reference to the probationers' conduct while interacting with their probation officer, nine out of ten probationers asserted that they behaved naturally in front of the Probation Service and only 6 interviewees saw the need for acting differently (*ibid.*, 146). Reasons for a dissembling behaviour were a separation by the probationer between probation and spare time, the perception of probation as a serious matter and the wish to uphold a good relationship with the probation officer.

Being questioned about their choice in case of a new placement under the Probation Service, almost 83 per cent of the respondents would like to be assigned to the same probation officer (*ibid.*).

In their concluding remarks, Kawamura-Reindl & Stancu establish that the quality of the relationship between probation officers and young probationers is assessed quite positively by the latter. According to their findings, the probationers perceived their probation officers as approachable, interested and helpful, especially if it comes to dealing with the justice system. The enormous workload of the Probation Service, Kawamura-Reindl & Stancu adduce, appeared to have no effect on the young probationers as they considered their probation officer to be available most of the time. Finally, Kawamura-Reindl & Stancu also point to Bieker's results and refer to the clear similarities between the studies' outcome.

As in the case of the other presented studies, the survey conducted by Kawamura-Reindl & Stancu was based on the delivery of the questionnaires by the probation officers and the hope that the probation officers will not influence the clients'

responses. Therefore, it suffers from a possibly significant methodological weakness that might have compromised the results' reliability.

## **6. Jumpertz one case study on supervision of conduct**

As shown, offender supervision in the form of supervision of conduct has experienced a massive increase during the last years, especially with regard to offenders who have been released from prison after having served their full prison term. Nevertheless, the little available research on the subject of experiencing supervision deals with probation service only. Bieker's study was originally intended to offer a comparison of both kinds of offender supervision but ended up covering probation only. Against this backdrop, even a study dealing with one offender only might be of interest, especially because it concerns a kind of case which is important for understanding the public view on offenders under supervision as well as with respect to the (maximum) intensity of supervision in this certain case. But with respect to the rarity of such cases, one case may not seem too few.

The framework for this intensive kind of supervision is supervision of conduct after release from prison and – within this legal context – the referral of an offender to a programme specifically directed at sexual offenders after their release. These programmes register and supervise released sex offenders systematically, involving a close cooperation between the probation service and the police. They assign ex-prisoners to three different risk categories, resulting in different measures. With respect to this, examples for possible measures of the police are: controlling the ex-prisoner's place of residence or work, communication with anybody socially connected to the ex-prisoner, communication with individuals potentially endangered by the ex-offender, investigating possible break of conduct orders and reporting them to the agency responsible for supervision of conduct. The aim of such programmes is to deter the ex-prisoner from reoffending by omnipresent supervision and the threat of punishment in case of new crimes, even in case of breaking directives (which is a crime in itself according to German law).

Thus, in the following the results of the master thesis by Sandra Jumpertz (2012) at the University of Hamburg, Institute for Criminological Research, will be summarised. The results are based on qualitative interviews: A problem-centred interview with the ex-offender (O) and three expert interviews (1. with the sexual therapist of O, 2. with another psychotherapist and supervisor for probation officers dealing with those under supervision of conduct and 3. a probation officer working as well in the field of supervision of conduct). The interviews took place around two years after O's release.

The programmes for released sexual offenders, which are quite similar, are named differently in the different federal state, like HEADS (e.g. in Bavaria and Bremen) or like the one, which was addressed by the study at hand named "K.U.R.S." in North Rhine-Westphalia. O was assigned to the category of the most dangerous individuals in this programme. He was ordered to report to the police on a daily basis, to

abstain from alcohol and drugs and to accept daily testing, not to leave the city, where he lived, without permission and to undergo electronic monitoring. Two weeks after his release from prison, a girl was captured in the near of the place, where O lived at the time. He was suspected of having committed this crime and sent to remand but was acquitted later. The acquittal, however, did not prevent his neighbours, the media and the public from conceiving of him as a constantly dangerous sex offender. While he being a suspect had been reported in the media, the acquittal had not. After release from detention, O was supervised by three shifts of two police officers wearing civil clothing 24 hours a day. From this point in time, O had no chance to find a facility for released prisoners to live in. The personnel of these institutions feared to be focused by neighbours and media due to the presence of police officers, which would have endangered the work for resocialisation with respect to the other ex-prisoners living there. When trying to resettle in the community instead, the prospective neighbours already knew that he was a sex offender, because the media had reported about him using his photo. After having moved to a different city, it was still not possible to find a place to live because any eligible flat was close to a school or a kindergarten, which he was obliged – by a further directive – not to come close to but to keep a distance of at least 50 metres. All of the interviewees were suspicious that the police told the media as soon as he intended to settle at a certain place. Confirmed was the fact that the police told some of the prospective neighbours about these intentions as they were seen as potential future victims of O. O was in deep despair about his situation. He also avoided contact to people he knew because he was afraid they would be informed about his situation by the police. He also sidestepped certain activities like swimming or crossing his legs in a cafe, which would have revealed the electronic monitoring bracelet he was supposed to wear on his ankle. It nevertheless happened that electronic barriers at the entrance of a store started beeping when he crossed, thus making him appear to have stolen something, which was embarrassing to him.

By law, the measure of supervision of conduct is intended to support the rehabilitation of ex-offenders, to help with the reintegration into society with respect to e.g. living conditions, work, creation or stabilisation of social ties etc. It is – at the same time – intended to control the offender and deter him or her from re-offending. In the light of the situation of O., as shortly described above and as a result from all of the interviews, Jumpertz' final conclusion about the impact of all the measures implemented in the course of the supervision order was: All the efforts of the probation officer and psychotherapist aiming at rehabilitation were needed to compensate for the negative impact of the extensive control implemented by the police and its consequences for the social life of O. Thus, there was no potential left for the task originally related to supervision of conduct, which is rehabilitation within a long-term perspective aiming at preventing reoffending via integration into society.

This even applies – last but not least – to the most recent extensive evaluative study on the (privatised) Probation Service in the state of Baden-Wuerttemberg.<sup>205</sup> The vast majority of the study's target group, that is to say probationees who had already been placed under the supervision of a probation officer for 12 months or more, perceived the Probation Service as positive. Using the German school grading system, 54 per cent of the interviewees considered the performance of the Probation Service "very good" and 34.1 per cent of them regarded it as "good". 89 per cent of the clients confirmed that they trusted their probation officer and 94 per cent of them deemed the cooperation with him or her to be very good or good. What is more, 91 per cent of the interviewees considered the probation officer's grasp of their personal situation to be good. 66 per cent of the participating probationees felt that their general situation had improved since they were placed under the supervision of the Probation Service and 84 per cent stated that they had never been annoyed by the Probation Service.<sup>206</sup>

However, the authors of the study point out that the results have to be interpreted with caution since the questionnaires were distributed by the Probation Service and may have predominantly been filled in by those probationees whose experiences with the Probation Service had been mainly positive. Moreover, it could not be ruled out that probation officers had specifically approached positively thinking clients for the inquiry, that single probationees had filled in more than one questionnaire and even that the questionnaires had been filled in by other people than the study's target group (e.g. by probation officers themselves).<sup>207</sup> Regardless of the possibility to manipulate, the exceedingly positive perception of a coercive measure – and the placement under the supervision of the Probation Service represents such in spite of its client-supporting potential – should raise scepticism.

It is therefore unavoidable to conduct studies that approach the affected individuals not through the Probation Service, which is the object of evaluation, but by other means. In view of the clientele of probationees and other penal law-related supervisees, it is also necessary to apply other explorative methods than inquiries that directly aim at the object of research. Thus, additional to the above-mentioned problems, a written evaluation of the Probation Service may pose an obstacle especially to those affected individuals who also face the most difficulties in accessing support programmes which oftentimes require linguistic brilliance. So far as the Probation Service is related to language and linguistic skills, studies on its limitations from the perspective of the affected individuals should not be.

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<sup>205</sup> D. Dölling/D. Hermann/H. Entorf (2014): Evaluation der Bewährungs- und Gerichtshilfe sowie des Täter-Opfer-Ausgleichs in Baden-Württemberg. Abschlussbericht. <http://www.justiz-bw.de/pb/,Lde/Startseite/SOZIALE+DIENSTE> (last viewed: 2 November 2014).

<sup>206</sup> *Ibid.*, p. 141 et seq.

<sup>207</sup> *ibid.*, p. 142.

## VIII. Experiencing supervision – the account of others concerned

Unfortunately, there was no single study to be found in Germany dealing with the experience of offender supervision by relatives, employers or others concerned apart from the offenders.

## IX. Conclusion

Resuming the results of this country report may be kind of frustrating with regard to the tiny amount of research on the views of those subjected to supervision and the existing research being questionable for methodological reasons, because they have involved the supervising agencies in possibly too many ways. At the same time, it is clear that research is needed and wanted, like the study conducted by Cornel shows – the initiative came from probation officers being interested in the views of the people they work with. But how could a “further research is needed” conclusion be operationalized? One possibility could lie in interviewing former clients of the Probation Service – but to trace them without them drawing a connection between the Probation Service and the research team might be difficult. However, former clients may no more fear consequences. The remaining question would be why they should cooperate. Another approach could be to interview inmates – with probably the same obstacles because they are possible future clients of the probation service. Additionally, one might include other professions as well, like solicitors and NGO members not connected to the Probation Service. This would allow for an observation on what probationers think about their surveillance orders – maybe this is not as good as the results the studies described above seem to show, but maybe, the picture would be more realistic. The perception of others experiencing supervision would contribute to a more complete picture.

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