

# Some Reflections on Community Sanctions and Measures in Europe<sup>1</sup>

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## **Purpose:**

The focus of this article is community sanctions and measures (CSM) that are available to the courts for mainly adults in different European countries. The article draws on data gathered from a recent survey commissioned by The Conférence Permanente Européenne de la Probation (better known as CEP) which is a pan-European association of probation organizations. The purpose of this study is to provide an inventory of CSM as it is used across Europe and, from this, to draw some conclusions and suggestions for development into the future.

## **Design/Methodology/Approach:**

Some thirty-two countries participated in the survey, each submitting a report based on a specially developed questionnaire<sup>2</sup>.

## **Findings:**

This survey concluded that the number and the variety of CSM among the European countries are impressive. It also notes that, increasingly, there are specialized CSM for different categories of offenders. Lastly, new CSM were born not to replace imprisonment but to extend the state control on the 'dangerous,' even after sentence was executed.

## **Research limitations/implications:**

This study faces the same difficulties as any comparative research: language barriers, conceptual equivalence, 'touching base' etc. In order to overcome some of these before analyzing the country reports, a conceptual glossary was created.

## **Practical implications:**

This study provides a comprehensive list of CSM available in the European countries, and this contributes to a better understanding' and co-operation among European countries.

## **Originality/Value:**

It is for the first time that all the European countries were scrutinised in terms of CSM available and their use.

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<sup>2</sup> The questionnaire was developed jointly by Mr. Anton van Kalmthout and the author.

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## 1 INTRODUCTION

Most previous comparative research on penal issues tends simply to describe and comment on the penal systems or on the aspects of the sanctioning systems in different countries (see for example van Kalmthout and Tak, 1988; Vagg, 1994; Downes, 1988; Hamai, Ville, Harris, Hough, Zvekic, 1995; van Kalmthout and Derks, 2000; van Kalmthout, Roberts, J., Vinding, 2003). One significant exception to this tendency is the work of Cavadino and Dignan (2006), where the penal systems in thirteen different countries are analysed and discussed, using a more theoretical and thematically approach.

Similar surveys across Europe have, in fact, been conducted in previous years (van Kalmthout, Derks, 2000; van Kalmthout et al., 2003) and when comparing the findings derived in the past with those from this most recent study, in particular, how the era of simple and straightforward sanctioning systems have now appeared throughout Europe. Even the new democracies established after 1990 have developed numerous and complex sanctioning options, ranging from absolute discharges to waivers or from deferred prosecution to conditional or unconditional imprisonment. Even unconditional imprisonment these days can be suspended, replaced or reduced.

Perhaps in response to rising prison populations, the research evidence on the negative effects of imprisonment, and perhaps also because of the international pressure for a greater emphasis on human rights, a number of countries such as England and Wales, France, Italy, Germany and various others from Western Europe have greatly diversified the spectrum of sentencing options available to the courts. Most of these changes have been in the general direction of providing alternatives to imprisonment (according to the UN language) or as offering community sanctions and measures (CSM) (according to the Council of Europe language) – the latter term being the one we use in this article and which is widely understood within the Council of Europe as follows:

*‘sanctions and measures which maintain the offender in the community and involve some restriction of his/her liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment’* (Council of Europe, 1992: Appendix).

Before proceeding to describe the system of community sanctions and measures in European countries, there are, however, a few aspects that should first be clarified. First is the notion of “community sanctions and measures”. At a broad conceptual level, there may be few problems. However, as soon as one tries to focus on particular community measures, there is a great potential for debate and misunderstanding between different countries. The Council of Europe’s definition favours the idea of a ‘measure’ as being “... taken before or instead of a decision on

a sanction ...". But this approach suits only a very particular situation in Scotland where "probation orders" are still an order in the traditional sense meaning "instead of a sentence". In other European jurisdictions, or in the law manuals, the term "measure" has the same meaning as a penal sanction, and can be imposed either independently of, or alongside, the main penalty. By defining the measure as a 'non-sanction', the Council of Europe definition creates risk by creating potential for confusion since elsewhere they are generally regarded as penal sanctions. In Germany, for instance, the term "measure" has a very strict meaning. Here a division is made between measures intended to improve the offender, measures aimed at protecting the public and other measures (for example, confiscation, and rendering unusable etc.). The same code also covers principal and additional sentences, additional consequences and also a new category of "criminal sanctions of a punitive kind" (Verwarnung mit Strafvorbehalt – i.e. a caution with deferred sentence, which incorporates characteristics of the suspended sentence, the conditional waiver and the declaration of guilt without imposition of a penalty), or measures comparable to a penalty (i.e. community service as an obligation). As will be apparent, the language in the penal law field is very particular and precise. It is not so straightforward as describing a suspended sentence as a community sanction and measure when this term is used in the codes and manuals all around Europe as a form of enforcement of a prison sentence (e.g. in Germany and France) or as a judicial way of individualising the nature of a prison sentence (e.g. in Romania). To conclude on this point, it is arguably best to accommodate the vocabulary used in the doctrine, manuals and codes with the one used in international documents. In this way, the risks of confusion and misinterpretation are minimised. However, exactly how feasible this is in practice, given the huge diversity of options, is a matter on which we can only speculate.

Since there is not yet a single comprehensive glossary of juridical terms that applies throughout Europe, there is always likely to be scope for misunderstandings. For example, in some countries a clear distinction is made between a waiver (or unconditional discharge) and deferred prosecution (or conditional discharge). In other countries, however, a discharge is exactly that and no more – i.e. with no possibilities for conditions to be added. Likewise, in some countries the terms 'deferred prosecution' or 'deferred sentence' have been replaced with 'postponement of the prosecution or postponement of the sentence.' While the substantive content and the juridical consequences may very well be much the same, readers always need to use care when employing such terms. Without access to accurate translations into all the languages, some misunderstandings could very well arise. And even when dealing with statistics, one cannot always be sure that "the meaning of a category such as ""property offender" or "remand in custody" is even roughly consistent between countries ..." (Cavadino and Dignan, 2006: 4).

The second aspect, which should be clarified before commenting further on the survey findings, is the structure of within which CSM options are classified. In this respect, various approaches have been proffered. Worrall (1997), for example, distinguishes between classifications of CSM as self-regulatory penalties (e.g. suspension, warnings etc.) and supervisory penalties (e.g. probation order, community service, attendance centres etc.). Tournier (2004), on the other hand,

defines one category of CSM as encompassing alternatives that affect entries in the prison system, a second as alternatives that affect the duration of imprisonment, and a third category comprising alternatives which also reduce the time spent behind bars which do not change the time spent on the prison register. Arguably the classification by van Kalmthout and Derks (2000) is the most straightforward, this dividing the CSM into two main categories: those at the front-end, as pre-trial sanctions and measures, and those at the back-end, i.e. trial sanctions and measures. This classification has the benefit of following criminal procedure. However, it needs to be borne in mind that there is not always such a clear-cut division between the two categories. For instance, in some countries (e.g. Italy and the Czech Republic), pre-trial sanctions and measures can be imposed by the judge after the trial has started and, therefore, they are hardly to be described as 'pre-trial' in terms of criminal procedure stage, even though they are pre-trial in terms of juridical consequences. If mediation, for instance, is finalized with positive results, then the crime does not get recorded on the offender's criminal register.

## 2 PRE-TRIAL CSM

Pre-trial CSM (sometimes also referred to as 'out of court settlements' or diversionary measures) covers those sanctions and measures imposed by the police/prosecutor or by the investigative judge in order to divert the case from coming to court. These CSM are available especially in the countries where the prosecutor or the investigative magistrate has sentencing powers (e.g. in Austria, Belgium, and the Czech Republic) and where the governing principle of prosecution is the **expediency** or **opportunity principle**. In short, according to this principle, it is considered worthwhile prosecuting if it is in the public interest to do so. If not, the prosecutor or the examining judge may have discretionary power to settle the case. In the other countries where the governing principle of prosecution is the **principle of officialise** (e.g. Bulgaria and Romania), the only opportunity for these pre-trial sanctions and measures to be applied is when the victim's consent is required in order to prosecute. For instance, in a case of bodily harm, if the victim presses charges then the prosecutor must take the case to the court. If, on the other hand, the victim withdraws the charge (for example, after the mediation) then the prosecutor must drop the case.

The most common types of **CSM available at the pre-trial stage** are: *mediation* (e.g. in Austria, Belgium, Catalonia, Hungary, Latvia, Norway and Moldova) or *pre-sentence penal agreements* (e.g. in France), *community service* (e.g. in Austria, Belgium and Latvia), *diversion of the case to probation* (e.g. in Austria, Hungary, Latvia, Norway, Portugal and Scotland), *conditional withdrawal of charges* (e.g. in Denmark, Germany and Moldova), *termination of criminal proceedings with conditions for juveniles* (e.g. Estonia), *educational and therapeutic programs* (e.g. in Belgium), and *educational measures for juveniles or juvenile punishment* (e.g. in the Czech Republic and Finland). At first sight, this might seem to amount to quite a wide variety of CSM options, but some of them, of course, might involve the same institutions. For example, the content and the consequences of 'conditional withdrawal of charges'

might be the same as 'diversion of the case to probation'. Sometimes compensation or mediation with the victim does not mean the end of the procedure, but this will at least be a mitigating factor before the court (e.g. in Spain).

In some jurisdictions there are special CSM for **special offenders' groups**. For instance, for addicts or for offenders who have committed drug related offences, a temporary suspension of proceedings (e.g. in Austria, Portugal and Scotland) may be available. This measure is always taken with the consent of the offender and involves some medical or therapeutic treatment obligations.

Sometimes pre-trial CSM are used to **replace custody awaiting trial** in countries such as Austria (in the form of provisional probation), Belgium, and Portugal (through electronic monitoring), Croatia (as house arrest or requirement of a surety), Czech Republic (again through bail with a surety or promise) or France and Moldova (through release under court supervision), and Scotland, England and Wales (through bail supervision).

In some cases, CSM at the pre-trial stage is explicitly **excluded** for certain categories of offences. Mediation, for example, is excluded for domestic violence cases in Catalonia. CSM are not available for crimes that fall under the headings of terrorism, or offences that target the democracy and for some serious violent crimes (as in Italy).

In countries like Estonia, Finland, Scotland etc. when a **juvenile offender** is diverted from prosecution, the social services department or a voluntary organisation within the local community takes over the case and deals with it in a more restorative justice manner.

### 3 TRIAL AND ENFORCEMENT CSM

Some of these CSM are available to the sentencing judge (e.g. probation orders, community service etc.), and some of them are available also to the executional judge. Even if the sentencing judge imposes a prison sentence, sometimes the executional judge could modify the penalty into something else. Examples of this kind are to be found in Belgium where a short-term imprisonment could be replaced by a autonomous work sentence, or, in Sweden, where a six-month prison sentence could be replaced with intensive supervision with electronic monitoring (in this case, the decision being taken by the probation service).

Most of these 'back-end' options are meant to individualize the execution of the prison sentence, to reduce the offender's time spent behind bars, to prepare convicts for successful resettlement into community and/or to reduce other negative effects of imprisonment.

In some jurisdictions with strong Roman law traditions, these CSM are regarded as modalities of enforcing the prison sentence (e.g. in Belgium, Croatia, Germany, Hungary, Romania, Latvia, Portugal, Spain etc.) and they appear under the umbrella of suspended prison sentences (i.e. full suspension or partial suspension) or conditional prison sentences. In this case, the court uses a two-stage procedure: first it imposes a prison sentence and secondly it suspends the enforcement of the sentence with certain conditions and obligations. In the

case of a suspended sentence or a conditional sentence, community service, attendance centre, educational or therapeutic programs and so on, may appear as conditions or obligations attached to the suspension. In much the same situation are the jurisdictions where the prison sentence of up to a certain number of years is replaced with one CSM. For instance, in countries like Belgium, Estonia, Italy, Portugal, Spain etc. a short-term prison sentence could be replaced with community service.

In other countries, CSM stand in their own right, as a pure and simple CSM. Usually the Criminal Code categorises them as main punishments (like community service in the Czech Republic, Austria, Catalonia, Luxembourg, or as probation in Bulgaria; and probation order, community service order etc. in Ireland, Malta, England, Wales, Scotland etc.).

As obligations attached to suspended sentences or as autonomous CSM, these community sanctions and measures can be divided into two main categories:

- CSM that replace, or suspend in full, the prison sentence and
- CSM that reduce the time spent behind bars - also called "hybrid CSM" (van Kalmthout and Derks, 2000: 15). Most of these CSM are considered either as forms of prison sentence adaptation or as part of the prison treatment.

The main trial CSM from the first category are: probation (e.g. in Austria, Belgium, Bulgaria, Catalonia, Estonia, Ireland, Malta, Northern Ireland, and Sweden), deferment with probation (e.g. in France, Ireland, Luxembourg, Scotland, and Moldova), suspended the execution of the sentence with probation (e.g. in France, Luxembourg, Malta, England, Wales, Spain, Sweden, Switzerland, Poland, and Moldova), community service (e.g. in Austria, Catalonia, Denmark, France, Finland, Moldova, Hungary, Ireland, Latvia, Poland, Luxembourg, Malta, Northern Ireland, Norway, Scotland, England and Wales, Spain, Poland, Sweden, and Switzerland), release on parole (e.g. in France), social, educational, therapeutically tasks (e.g. in Catalonia and Estonia), attendance centre (e.g. Catalonia, Scotland, England and Wales), assignment of offender to the probation service (Italy).

An impressive number of CSM are at the disposal of magistrates in countries like Ireland, Northern Ireland, Scotland and England and Wales, notably: *probation order, community service order, community reparation order, supervised attendance order, restriction of liberty order, compensation order, drug testing and treatment order, supervision and treatment orders* and so on. While these CSM remained in Scotland as orders, and therefore applied "instead of sentencing", in the other countries they have been turned into community sentences. Furthermore, in England and Wales, they were renamed in 2001 as part of an initiative to build confidence among the public, so that a community service order is now referred to as a community punishment order. Similarly, a combination order has been renamed as a community punishment and rehabilitation order. After reviewing the sentencing framework in UK, Halliday (Home Office, 2001) argued that the introduction of a single non-custodial sentence with certain ingredients would decrease the risk of inconsistency and put some more logic into sentencing. Therefore, in 2003, the UK Government decided to unify the old orders under one single Community Order which will provide the judiciary with more flexibility and power to match the offender/public needs with one or more of the twelve available requirements which can be added to the

Community Order. It is still early to conclude if this new sentencing framework is achieving what it was designed to do. However, researchers are already pointing to some possible issues and problems (see for instance Mair, Cross, Taylor, 2007).

Of the second category of back-end CSM, the most important ones in terms of frequency of use are: conditional release or parole (e.g. in Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Hungary, Latvia, Norway, Portugal, England and Wales, Scotland, Spain, Sweden, Switzerland, Poland, Moldova, and Romania), early release (Italy, England and Wales), electronic monitoring (e.g. Belgium, Denmark, Estonia, France, England, Wales, Spain, Sweden, and Switzerland) or home detention (Italy, Norway, Portugal, and Scotland), mobile electronic monitoring (France), combination of custodial and suspended sentence (e.g. Denmark, England and Wales – Custody Plus), limited detention (e.g. Belgium), periodic enforcement (Luxembourg), intermittent custody (England and Wales), temporary release (e.g. France, Ireland, Northern Ireland), work release (e.g. France and Italy), semi-liberty (Italy and Luxembourg), pre-release for foreign prisoners (Luxembourg), pardon and amnesty (in all the countries represented in the survey).

As in the case of pre-trial CSM, there are special back-end CSM available for **special groups of offenders** (e.g. sex offenders, addicts, drunken drivers, and violent offenders). Most of these sanctions and measures involve supervision, control and/or medical/therapeutic treatment. Some such measures are: outpatient treatment for drug abuse or mental health (e.g. in Catalonia, Denmark, Norway, England, Wales, Switzerland, and Poland), treatment and anger management program or drunken driving (e.g. Denmark and Norway), socio-juridical supervision for sex offenders (in France), postponement of execution of the prison sentence (in Germany), assignment of special categories of offenders to the Probation Service (in Italy), psychiatric probation or parole (in Portugal), hospital order (in Scotland) and living in a therapeutic community (in Spain)

Alongside the introduction of some new criminal sentences (e.g. a life sentence of imprisonment for reasons of public protection for serious offences in England and Wales, or extended supervision in Scotland) have also emerged new forms of supervision in the community, which are not replacing custody or reducing the time spent behind bars but which instead prolong state control upon some categories of offenders (notably violent and sex offenders) after release from prison. In England and Wales, for instance, the survey revealed phrases from respondents such as *life supervision* or *extended supervision*. It seems here as though a new generation of CSM is beginning to emerge with rather different objectives than previously.

In almost all the jurisdictions covered by the survey, the CSM involve certain obligations or are accompanied by some sort of supervisory conditions and/or obligations lasting until the probation period is up. Some such obligations could be *imperative* – i.e. requirements to do certain things (e.g. attend different programs, take up a job, move to another area, meet the probation officer on a regular basis, undertake community service, follow a certain medical/therapeutic/behavioural program and so on) or *prohibitive* – i.e. requirements not to do certain things (e.g. not to contact certain people, not to visit certain places, not to drink alcohol, not to drive a vehicle etc.).

Depending on the form in which such requirements have been set, once the probation period ended successfully for the offender, the offence is considered as if it had not happened as it will not appear on the criminal register/record. Usually the measures are not registered but the sanctions are. One exception to this norm is the suspended prison sentence, which is mostly a measure of individualization of the execution of a prison sentence and which will usually be recorded in the criminal register.

In cases of failure to comply with the conditions imposed, the offender might be sanctioned depending on the modality awarded and the gravity of such a failure. Sanctions could take the form of adaptation, revision, enlargement, suspension, revocation of the order or the probation period could be prolonged. The main difference between imposing the CSM *per se* and using the suspended sentence route is that in the second scenario, in the event of non-compliance, the court is most likely to order the offender to a term of imprisonment. The other options are to extend the probation period or to add new conditions/obligations. In UK, the introduction of a suspended sentence order seems to be one of the “forces driving the level of incarceration to record levels” especially because the breach of any such requirement is likely to lead to imprisonment. However, the position here is not necessarily as straightforward as was indicated in the survey response. After examining the use and the impact of Community Order and the Suspended Sentence Order, Mair et al. (2007) concluded more cautiously in noting that: “There is no evidence to suggest that the new orders are either diverting offenders from custody or having an impact on up-tariffing” (ibid.: 31). It seems that the magistrates are aware of the “political sensitivities around prison overcrowding and were reluctant to revoke and imprison breaches” (ibid.: 29).

When using autonomous CSM in cases of offender non-compliance, the court could opt for a more severe CSM (for example moving from a probation order to community service order). In most cases, CSM are enforced by a service/agency that specializes in this task. In most of the countries this is the probation service, but there are other countries where the task belongs to the prison department (e.g. in Italy) or to the social services (e.g. in Scotland). In some jurisdictions (e.g. in Italy and in Ireland), when the only intention is to supervise the defendant during the trial, the offender may well be asked to report regularly to the police.

#### 4 SOME REFLECTIONS

Although the number of prisoners is rising in some countries and decreasing in others, the number of people under some kind of CSM has been rising steadily in all the countries represented in this survey. Indeed, the number of people on community sanctions and measures already exceeds the number of prisoners. In Germany, for instance, in 2006 there were some 65,526 offenders in custody while 170,273 were on probation. In Latvia, in the same year, 2,701 people were sent to prison while 4,750 were under a suspended sentence, out of which 1,865 people were on community service. With the total number of prisoners in Europe



currently at about 2 million, we might estimate that the number of people under some kind of CSM could well be around **3.5 million**.

It looks like the most significant factor accounting for this increase in the number of CSM imposed is what happens at the **prosecution stage**. In 2005, in Austria for example, the total number of prison sentences imposed was 7,137 and the number of community service and mediation decisions made by the prosecutors as diversion was 2,568 and 10,016 respectively. Similarly in Germany in 2006, about 50 % of all cases (juveniles and adults) were discontinued at the prosecution level.

The most popular CSM among prosecutors and judges seems to be threefold: mediation, community service, and suspended prison sentence with conditions/obligations.

More recently electronic monitoring (EM), too, is becoming more commonly used in the jurisdictions where this option exists. With just a few exceptions, (e.g. Portugal and UK) electronic monitoring is used as an obligation attached to conditional or early release from prison.

As a part of the communitarism trend, more and more countries are using CSM for **special groups** of offenders with special treatment needs: notably for drug addicts, mentally disturbed offenders and sex offenders. That means that probation services are having to increase their expertise in these matters and also that they need to cooperate more intensively with other agencies and with the local communities. An illustration of this trend is to be found in the UK where police, prison, probation but also other agencies (e.g. Social Services, YOTs, Jobcentres, Local Education Authorities, Local Housing Authorities, Registered Social Landlords, Electronic Monitoring Providers, Strategic Health Authorities and other health providers) now operate under a legal duty to “co-operate” in local partnerships known as Multi Agency Public Protection Arrangements (MAPPA).

There appears to be some **room for improvement** in relation to the application of CSM to immigrants. Due to the fact that some such people have no legal rights in the country or because they have no fixed address, most are sent to prison. In Austria, for instance, 42 % of the prison population in 2005 was comprised of foreign citizens. But countries like Sweden and Italy have started to use CSM either as alternatives to imprisonment or as a mean to reduce the time spent behind bars. In Italy in 2006, for instance, 1,631 immigrants benefited from CSM as an alternative measure.

Another conclusion resulting from the survey and also emphasised in the deliberations of a working group of the European Society of Criminology is that mechanisms for ensuring respect for human rights while on probation could be better developed. Issues such as consent, right to privacy, complaint-handling and so on, could usefully be more thoroughly reviewed and improved within probation services. In terms of complaint-handling, for instance, many countries are relying simply on internal administrative mechanisms of control. However, past experience has proven that this mechanism is not always satisfactory and that independent bodies are needed to provide a more appropriate response to such issues. The new sentences, like life supervision and new initiatives like MAPPA, also raise some very serious human rights issues and therapy dilemmas, particularly in relation to the treatment of sex offenders. The increasing use of

the risk management tools also raises some important human rights issues. Treating “the offenders as agents of harm rather than as rights-holders” (Ward and Birgden, 2007: 11), for example, arguably fails sufficiently to respect human dignity. Furthermore, treating offenders as groups rather than as individuals when applying risk assessment tools is also problematic when it comes to human rights. We await the day when there exists for those on probation an extended list of rights and clear mechanisms for monitoring their realisation (as already exists for the prisoners) and which will enable them to enjoy more freedom and well-being. Perhaps too they will “*learn how to advance their own good in ways that are personally meaningful and socially responsible*”. (ibid.: 15)

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