

## ALTERNATIVES TO DETENTION IN EUROPE

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Originally, in the 1980s when they were developed, the Council of Europe Annual Penal Statistics (SPACE) only covered the prison population of member States. A second component of SPACE was set up in the framework of the preparatory work for recommendation No. R(92)16 on "European rules for community sanctions and measures" adopted by the Committee of Ministers on October 19, 1992.

### After SPACE I, SPACE II

SPACE II only takes account of community sanctions and measures (CSMs) as defined by the Council of Europe. According to recommendation No. R(92)16, CSMs are to be understood as *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, furthermore, 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.*

Most importantly, arrangements for the implementation of CSM must entail some form of assistance and supervision in the community. Fines or suspended sentences without assistance and supervision are therefore not CSMs, according to the Council of Europe definition (see box below).

#### 1. Definition of the field covered by SPACE II

- SPACE II is not designed to cover all CSMs. It does not cover sanctions and measures provided for in juvenile criminal law or applicable only to people in certain age groups (young adult offenders or the sick, for instance).
- It only concerns measures taken subsequent to the passing of a sentence. In some countries the prosecuting authorities can choose to impose certain measures which are taken before or instead of a decision on a sanction. Such measures are not covered by SPACE II.
- The CSMs must have been ordered as principal and not supplementary penalties.
- SPACE II concerns statistics for the CSMs ordered in year n, irrespective of the date of enforcement (year n, subsequent year or not enforced at all).
- SPACE II does not cover measures taken in favor of a prisoner prior to his or her release from a penal institution (semi-liberty for example, unless such measures were ordered *ab initio*).
- SPACE II does not cover post-prison supervisory or probation measures applied to offenders in the community once they have served their sentence.

SPACE I statistics have been enriched gradually and relatively easily, both in their methodology (definitions, formulation of questionnaire items) and where data-collection is concerned<sup>2</sup>. The same is not true of SPACE II. CSMs are a most complex field in Europe. Some countries have none, whereas others have a wide range of measures, at least in positive law if not in actual practice. Expressions

that seem equivalent in different languages may cover different concepts. This is the case of the French "*probation*", which is the suspended enforcement of a sentence to personal restraint for a "potential" set period of time, as opposed to the English "probation", a measure ordered with no reference to a prison term. A same CSM, such as probation or community service work, may exist in a variety of forms within a single country. Whence the need to establish nomenclatures containing concrete descriptions of the CSM without necessarily using the existing legal formulations (in French as well as in English). The SPACE II questionnaire has gone through several experimental phases, and has been considerably improved, both in its structure and in the formulation of items, thanks to the work of the Council for Penological Co-operation on prison overcrowding<sup>3</sup>.

The latest enquiry covers CSMs ordered in 1999. 29 countries responded: Andorra<sup>4</sup>, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Macedonia, Moldova, the Netherlands, Norway, Poland, Portugal, Scotland, Slovakia, Spain, Sweden and Switzerland.

#### The eight community sanctions and measures

For each of the CSMs included in SPACE II we show those countries for which the specific use index is at least 10 per 100 (see the definition of the SUI in box 2).

#### 2. The indicators

- In addition to the number of CSMs ordered in 1999, we have statistics on partially or fully unsuspended custodial sentences for each of the eight categories studied. These serve as elements of comparison in measuring the frequency of use of the various CSMs.
- Two indices were calculated: an overall use index (OUI), obtained by comparing the number of CSMs in a given category ordered in 1999 with the number of partially or fully unsuspended custodial sentences ordered during the same year (expressed as a percentage) and a specific use index (SUI), calculated in the same way but using only sentences of less than one year as the denominator.
- Conditional release – parole (CR-P) measures were dealt

<sup>1</sup> Following his election to the Scientific Council on Criminology, Pierre V. TOURNIER asked to be relieved of his responsibilities in SPACE. Forthcoming enquiries will be conducted by Professor Marcelo AEBI of the University of Seville Institute of Criminology.

<sup>2</sup> TOURNIER (P.V.), *The Prisons of Europe, Prison Population Inflation and Prison Overcrowding*, *Penal Issues*, 2001, 12, pp. 6-9. TOURNIER (P.V.), *Prisons d'Europe, inflation carcérale et surpopulation*, *Questions Pénales*, 2000, XIII, 2, pp. 1-4.

<sup>3</sup> COUNCIL OF EUROPE, *Prison overcrowding and prison population inflation*, Recommendation No. R(99)22, adopted by the Committee of Ministers on 30 September 1999 and report prepared with the assistance of KUHN (A.); TOURNIER (P.V.) and WALMSLEY (R.), *Legal Issues Collection*, 2000.

<sup>4</sup> Figures for Andorra are not considered here, since the numbers are too small to be significant.

with separately. When such measures were applied to prisoners already serving a prison sentence, the OUI and SUI rates are hardly meaningful. It is more interesting to compare the annual number of CR-P measures with the average number of prisoners eligible for them. The denominator used in this case is the number of definitively sentenced prisoners present on September 1, 1999 as shown in SPACE I. This does not represent a *rate of granting*, strictly speaking, since all sentenced prisoners are not necessarily legally eligible for conditional release – parole.

**1. Conditional deferral of a sentence** (postponement of the passing of a sentence for a given period in order to assess the conduct of the person found guilty during that period): France (SUI = 11.5%), Cyprus (SUI = 14%), Norway (SUI = 19%), the Netherlands (SUI = 47%), Macedonia (SUI = 69%), Moldavia (SUI = 230%), Slovakia (SUI = 1300%). No other country provided figures on this point.

The existence of such differences of magnitude, which are unexplainable for the time being, points to the limits of this undertaking. The figures provided by administrations for a given item, however precisely defined, may pertain to measures of a relatively varied nature. Broad-based international statistics such as SPACE are useful for "getting our bearings", no more, but no less. It remains for users to delve further into any point they find interesting.

**2. Treatment orders** ordered *ab initio* for drug-dependent, alcohol addicted or mentally disordered offenders and for those convicted of a sexual offense. In all, we find: Croatia (SUI = 22%), Slovakia (SUI = 29%), Moldavia (SUI = 150%). In addition, we find (0% < SUI < 10%) for the Czech Republic, Denmark and Portugal. It is important to note that a treatment order combined with deferral of sentence, community service, probation, etc. will count as deferral (item 1), community service (item 4), probation (item 5), and so forth, as the case may be.

**3. Compensation orders** ordered *ab initio* by a criminal court (i.e. payment by the offender of a sum of money to the victim): Germany (SUI = 11%); Scotland (SUI = 11%), England and Wales (SUI = 12%), the Netherlands (SUI = 26%). No other country provided figures on this point.

**4. Community service order (CSO)** – five different forms of CSO are specified: 1. A sanction in its own right after an offender has been found guilty, 2. A sanction in cases in which a fully suspended prison sentence has been passed, 3. A sanction imposed in the case of the non-payment of a fine, 4. An unsuspended custodial sentence followed by community service after release, 5. Community service while on probation (a sanction in its own right) or community service: other cases: Iceland (SUI = 27%), Sweden (SUI = 29%), Czech Republic (SUI = 32%), France (SUI = 34.5%), Finland (SUI = 36%), Scotland (SUI = 58%), the Netherlands (SUI = 75%), England and Wales (SUI = 88%). Also, (0% < SUI < 10%) for Croatia, Denmark and Moldavia (see also box 3).

### 3. Community service ordered in 1999 – when figures are known and are above 0

1. A sanction in its own right after the offender is found guilty: Croatia, Finland, France, Ireland, Moldavia, Norway, Portugal, Sweden, England and Wales, Scotland.
2. In cases in which a fully suspended custodial sentence has been passed: France, Iceland.
3. Sanctions imposed in the case of non-payment of a fine: Lithuania, Switzerland.
4. Community service while on probation (a sanction in its

own right) or other cases: Sweden, Switzerland, England and Wales, Scotland.

**5. Probation** – three type of probation are identified: 1. A sentence in its own right after an offender has been found guilty, without the pronouncement of a sentence of imprisonment; 2. Pronouncement of a fully suspended prison sentence; 3. Pronouncement of a partially suspended prison sentence. It is recalled that these measures must entail assistance and supervision in the community. Findings: Denmark (SUI = 13%), Finland (SUI = 13%), Cyprus (SUI = 39.5%), Sweden (SUI = 49%), Scotland (SUI = 56%), France (SUI = 92%), England and Wales (SUI = 104%), Moldavia (SUI = 1500%). Also, (0% < SUI < 10%) for Croatia, the Czech Republic and Iceland (see also box 4).

### 4. Probation measures pronounced in 1999 – when figures are known and are above 0

1. A sentence in its own right after an offender has been found guilty, without the pronouncement of a sentence of imprisonment: Croatia, Cyprus, Denmark, Finland, Ireland, Moldavia, Sweden, England and Wales, Scotland.
2. Pronouncement of a fully suspended prison sentence: Cyprus, Czech Republic, Denmark, Finland, France, Iceland, Ireland, Portugal.
3. Pronouncement of a partially suspended prison sentence: Denmark, France, Iceland, Ireland.

**6. Electronic monitoring**, ordered *ab initio*, involving enforcement within the community of a sentence involving deprivation of liberty: Sweden (SUI = 33%). Also (0% < SUI < 2%) for the Netherlands, England and Wales as well as Scotland<sup>5</sup>.

**7. Semi-liberty** ordered *ab initio* : France (SUI = 11%), Slovakia (SUI = 30%). No other country provided figures on this point.

**8. Conditional release – parole** of a prisoner before the end of his/her sentence<sup>6</sup>.

### Specific features in different countries

"Key" alternatives: that measure for which the *specific use index* is highest and is at least equal to 10 % is called the key alternative for a given country. The key measure is "probation" for 6 countries: Cyprus, Denmark, France, Moldavia, England and Wales and Sweden; "community service" for 5: the Czech Republic, Finland, Iceland, the Netherlands, Scotland; "conditional deferral" for 3: Norway, Macedonia and Slovakia; and for two countries – Croatia and Germany – it is "compensation orders"<sup>7</sup>.

The "*Swiss Army knife*" model<sup>8</sup>. Countries are placed in this category when at least three measures have a SUI > 0 %. Ten countries are in this case: Andorra, Croatia, the Czech Republic, Denmark, France, Moldavia, the Netherlands, Slovakia, Sweden, England and Wales.

The "no CSM" model. The following countries are apparently in this case: Armenia, Austria, Belgium, Bulgaria, Greece, Ireland, Italy, Lithuania, Poland, Spain and Switzerland. This group is larger than the previous one.

Several points should be emphasized, however:

a - A country may have CSMs other than those defined in SPACE II.

<sup>5</sup> In France, this measure was first applied on four pilot sites starting on October 1, 2000. 235 commitments were pronounced between that date and May 1, 2002. Most were ordered for a sentence to less than one year (pronounced *ab initio*).

b - In the above analysis, we have naturally only considered the available statistical findings. The enquiry attempts to distinguish between the absence of legislative prescription of a given measure and the non-availability of statistical data. For example, whereas Belgium is listed as a country in the "no CSM" model, it has laws on deferral, community service and probation, but no statistics; Ireland is in the same situation, with laws on deferral, treatment orders, community service and probation, etc. If this is taken into account, Bulgaria seems to be the only country juridically devoid of CSMs. Only 29 out of 44 countries responded to our enquiry, however. There is a good probability that a relatively large number of those countries that did not respond to the SPACE II enquiry are in the "no CSM" category, legally speaking, and its questions therefore do not apply to them.

c - Lastly, and most importantly, the study of CSMs is far from covering all alternatives to custodial sentences. There are at least two reasons for this: pre-sentencing CSMs are not included, and some form of assistance and supervision is required. The following is a tentative attempt to go further, and points to the many limits of European statistics, in their present state.

### A tentative typology, to enlarge the field of analysis

On the basis of the demographic mechanisms at work in the evolution of prison populations, we have constructed a typology of alternatives to detention, using the French situation<sup>6</sup>. A distinction is made between category 1 alternatives, which result in a cutback in the number of admissions to confinement, and second category alternatives which reduce the duration of detention, or more accurately, the time on the prison register. This dichotomy is definitely inadequate, in that penal sanctions and measures cannot all be divided into two distinct categories inasmuch as many fall into one or the other category depending on how they are applied. Pretrial surveillance for instance is a first category measure if pronounced *ab initio*. But it becomes a second category measure if it is applied to a person in pretrial detention, since it reduces the length of the prison stay prior to judgment of the case. The same is true of suspended incarceration: it is in the first category if the defendant was not in pretrial detention, or in the second category in the opposite hypothesis. Conditional release - parole is in the second category. Although it does not reduce sentence-serving, it leads to early release – with removal from the prison register – the rest of the sentence being served in the community under the supervision of the probation services. Clearly, then, the issue of adjustment measures of sentences is an integral part of the question of alternatives to imprisonment.

Viewed in this way, the limits of the above-mentioned dichotomy become evident. Where, indeed, shall we class semi-liberty and employment outside of prison, which are also *de facto* alternative measures, but do not avoid entry on the prison register? They are not in the first category. Since they do not reduce the time on the prison register, nor are they in the second category either. We have therefore created a third category of alternatives, including those penal measures and sanctions which reduce the amount of time actually spent behind prison walls without removal from the prison rolls, and therefore

without reducing the time spent on the prison register. This is the case of semi-liberty and of employment outside of prison. Electronic monitoring, when used as an alternative to personal restraint, also comes under this heading.

We are convinced that the study of the extension – or of the restriction – of alternatives to prison both over time, for a given country, and across space for the member countries of the Council of Europe, requires the implementation of an exhaustive qualitative and quantitative inventory of the different penal sanctions and measures based on the typology outlined above.

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#### For further information :

TOURNIER (P.V.), La collecte des données relatives à la criminalité et à la justice pénale dans le contexte du Conseil de l'Europe, *Actes de la XII<sup>ème</sup> Conférence des Directeurs d'Administration Pénitentiaire* (CDAP), Conseil de l'Europe, 1999, pp. 35-44.

TOURNIER (P.V.), Au delà des taux de détention, in CÉRÉ (J.P.), (Dir.), *Panorama européen de la prison*, Paris, l'Harmattan, Collection Sciences criminelles, 2002, pp. 105-118.

TOURNIER (P.V.), *S.PACE II (Statistique Pénale Annuelle du Conseil de l'Europe) : sanctions et mesures appliquées dans la communauté – SMC – prononcées en 1999*, Conseil de Coopération Pénologique, PC-CP (2002) 3 REV.

<sup>6</sup> See box 2. This measure is presently being investigated separately in the framework of preparatory work on a new recommendation to the Council for Penological Co-operation.

<sup>7</sup> It is recalled that only CSMs pronounced as the main sanction are considered here.

<sup>8</sup> We are indebted to René LÉVY for this extremely expressive description. A "Swiss Army knife" is a pocket knife with a great many blades, some of which are not very useful, and in any case rarely used. Some criminal justice systems have a broad range of CSMs at their disposal, legally, but do not necessarily make much use of them.

<sup>9</sup> For a discussion of the various advantages of this typology, see TOURNIER (P.V.), *Détenus hors les murs. Des substituts du troisième type*, *Revue Nationale des Barreaux*, 2001, 63-64, pp. 153-159 ; TOURNIER (P.V.), *Prisoners out of the Walls, Alternatives of the Third Kind*, First Congress of the European Society of Criminology, Lausanne, September 2001, *Penological Information Bulletin of the Council of Europe*, 2002 (in press).