DECEMBER 2023

European interventions on systemic problems in prison systems

A critical analysis

Report based on a comparative analysis of 9 EU countries

EUROPEAN PRISON LITIGATION NETWORK

This report is based on country reports prepared in 9 EU countries

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This research was carried out in the frame of the PrisonCivilAct project, in cooperation with:

Funded by the European Union

Funded by the European Union. Views and opinions expressed are however those of the authors only and do not necessarily reflect those of the European Union. The European Union cannot be held responsible for them.

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INTRODUCTION

Prison issues have played an increasingly important role in the standard-setting work of European bodies over the last fifty years. While there are numerous reasons for this, one of the most striking is the standardisation effort undertaken by these bodies in the application of human rights. The consensual dimension attached to the fact that, despite their physical deprivation of liberty, detainees are nonetheless subjects of rights, is total.

The profusion of standards mentioned above reveals a sophisticated economy of prison criticism, organised around different actors, methods of intervention, levers of action and political scope. Although they all seem to converge on a unanimous condemnation of undignified conditions of detention, prison overcrowding and less recourse to imprisonment, the means by which this is expressed differ significantly.

The aim of the report is to explore the various forms of European intervention on structural problems in the prison system, and their practical consequences in the Member States. It is part of the PrisonCivilAct project, funded by the European Union.

This research is based on a multi-faceted methodology, combining an analysis of the main case law and soft-law standards of European bodies, a state of the art and a review of the academic literature on prison law, as well as multiple interviews with stakeholders in 9 Council of Europe (CoE) member countries: Belgium, Bulgaria, France, Greece, Hungary, Italy, Poland, Portugal and Romania. Stakeholders included prison and criminal justice officials, judges, lawyers, social workers and probation officers, representatives of NPMs and administrative authorities responsible for protecting the fundamental rights of detainees, NGOs and members of civil society.

The first part will be devoted to a macro-approach to the issue of prisons from the point of view of systemic violations of prisoners' rights (Part I). The second part will examine, at sub-national level, the ways in which European bodies intervene and their concrete effects on both the evolution of practices and the state of legislation, while comparing these elements with the opinions of both national researchers and those working in the field (Part II). This macro/micro contrast is undoubtedly the main added value of this research.

PART I. EUROPEAN PERSPECTIVES

Three main themes have been identified. Firstly, the normative output of the CoE bodies - essentially the European Court of Human Rights (ECHR), the Committee of Ministers (CMCE) and the Committee for the Prevention of Torture (CPT) - and the state of academic knowledge have been studied in depth in order to draw certain trend conclusions about the fight against structural problems in European prisons (chapter 1). In addition to this major review of the literature, a dedicated chapter focuses on the specific viewpoint and action of the European Union's bodies and instruments (Chapter 2). Finally, some statistical information has been provided so that comparisons can be made between Member States on the occurrence of the various problems considered (Chapter 3).

Chapter 1. CoE approach

1. Council of Europe prison doctrine

The European prison doctrine is the fruit of a long development process in which European bodies had to find their place and their legitimacy (a.), before certain penological paradigms took shape through mutual cooperation (b.).

a. Genesis and sources of non-binding European standards

The growing influence of the ECHR

Prisoners' complaints have been a major concern of the ECHR supervisory bodies of the European Court of Human Rights (ECHR) since their inception – first and foremost by the Commission, which mainly dealt with them in the early stages. Indeed, in the first 30 years of the Court's work, only 15 cases concerning prisoners' rights were referred to it by the Commission. The 1975 case of *Golder v. the United Kingdom* marked a turning point: for the first time, the Court rejected the doctrine of "inherent limitations" deriving from the status of prisoners[1], fundamentally placing prisoners' freedoms on the same footing as the human rights enjoyed by individuals outside prison walls.

The Golder case thus established the standard that the rights of prisoners can only be restricted on the same basis as the rights of other people. In other words, even when it comes to restricting the rights of people in detention (already deprived of their fundamental rights), states must demonstrate that any additional restrictive measures are applied in the interests of public safety and the protection of the rights of others, and that such restrictions are necessary in a democratic society. However, the Court's early case law concerned almost exclusively the procedural aspects of detainees' rights (access to court, right to correspondence, etc.). Thus, in the particular circumstances of cases such as *Silver and Others v. the United Kingdom* in 1983 and *Campbell and Fell v. the United Kingdom* in 1984, the Court was reluctant to engage with the substantive issues of prison administration underlying such technical restrictions (such as the right to correspondence).[2]

The late 1990s and early 2000s also marked a turning point in the ECHR's jurisprudence. On several occasions, the Court found a violation of Article 3 of the Convention on account of overcrowding, stressing that the absence of any intention on the part of the prison authorities to degrade prisoners did not prevent it from finding such a violation (*Peers v. Greece*, 2001, *Douguz v. Greece*, 2001), and that overcrowding in itself may constitute inhuman and degrading treatment (*Kalashnikov v. Russia*, 2002). The Court has clarified the concept of torture and shown itself more willing to apply it to the treatment to which detainees are subjected in custody, including cases of suspension of prisoners from the ceiling (*Aksoy v. Turkey*, 1996), rape (*Aydin v. Turkey*, 1997), forced feeding (*Nevmerzhitsky v. Ukraine*, 2005), death sentences combined with appalling conditions of detention (*Ilascu v. Moldova and Russia*, 2004). The Grand Chamber has also stated that treatment previously classified as "inhuman or degrading" may be assessed differently (i.e. as torture) in the future (*Selmouni v. France*, 1999).

The Strasbourg Court's rulings have led to significant reforms through the slow but progressive recognition of prisoners' rights, in areas such as release procedures, prisoners' communication with the outside world and formal disciplinary procedures.[3] However, D. Anagnostou and D. Skleparis admit, rather pessimistically, that the Court's judgments finding European prison conditions and practices to be in breach of fundamental human rights standards do not and cannot bring about fundamental reform of states' prison systems. In their view, it would be unrealistic to expect judicial

[1] D. van Zyl Smyt and S. Snacken, *Principles of European prison law* and *policy. Penology* and *human rights*, Oxford University Press, 2009, pp. 10-12; T. Daems and L. Robert, *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems*, Palgrave Macmillan, 2017, p. 4.
[2] D. van Zyl Smyt and S. Snacken, *op. cit.*, pp. 10-12.
[3] S. Livingstone, "Prisoners' rights in the context of the ECHR", in *Punishment* and *Soci*and*y*, 2(3), 2000, p. 321.

decisions to have such an effect: they are just one factor among many influencing policy-making in an area as controversial and multi-stakeholder as criminal law and prison institutions. Yet what the Strasbourg rulings have succeeded in doing over time is to reinforce judicial control over the standards and conditions of imprisonment, an area of largely administrative regulation in which prison authorities had (and still retain) considerable discretionary power. In so doing, these rulings gave national prison reformers, both political elites and state administrators, considerable leeway to bring about changes to improve conditions of imprisonment.[4] Although the ECHR rulings have not influenced any obvious change in penal policy in European states, they have triggered a series of reforms that show some positive, if limited, change (for example, helping to open up prison institutions to independent oversight bodies, or contributing to the implementation of new remedies).[5]

Building the CPT's legitimacy

Until the mid-1980s, the Convention bodies were rather reluctant to extend the application of Article 3 of the Convention to issues such as conditions of detention (following the example of *McFeeley v. United Kingdom*, 1980). Contemporary commentators have criticized this approach, regarding the ECHR's reluctance to find conditions of detention incompatible with Article 3 as a failure in its duty to apply the Convention in full. This situation has even led to consideration of the creation of an optional protocol to the ECHR dealing with prisoners' rights (such as housing, medical care, discipline and the right of association).[6]

The search for an alternative form of legal protection for prisoners against torture and inhuman or degrading treatment, which would overcome the narrow interpretation of Article 3 of the ECHR, led to the European convention for the prevention of torture and inhuman or degrading treatment or punishment (ECPT), seen at that time as an implementation of Article 3 of the ECHR through preventive action. The body created at the Council of Europe level, the European committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), was designed in a manner which should have prevented it from interfering in the interpretation of the notions of torture or inhuman or degrading treatment or punishment. It should have instead been guided by the case law of the Court and the Commission and aim at "*future prevention rather than the application of legal requirements to existing circumstances*" (as explained in the Explanatory teport to the ECPT)[7]. But the CPT's mandate proved to be more liberating than restrictive, enabling it to gradually develop its own set of standards, based on practical observations and constantly evolving.[8]

The independence of the CPT's approaches from those of the Court and the Commission began to emerge very early on, notably in the interpretation of the notions of "torture", "inhuman" and "degrading" treatment. In practice, occasional collisions emerged between the three bodies in classifying the treatment to which the same person was subjected (for example, in *Aerts v. Belgium*, 1998).[9] This difference of approach should not, as van Zyl Smit and Snacken noted, lose sight of the CPT's main strengths[10]: firstly, the importance it attaches to empirical evidence and, on the basis of this, its progressive understanding of what prison policy in European states should look like; secondly, its multidisciplinary composition and approach (legal, medical, psychiatric, penological and human rights) which has enabled the CPT to include existing psychological and penological research in its analysis of allegations of ill-treatment, conditions of detention, overcrowding, medical care, but also

[4] D. Anagnostou and D. Skleparis D, "Human rights in European prisons: can the implementation of Strasbourg court judgments influence penitentiary reform domestically?", in T. Daems and L. Robert (eds), *Europe in prisons: assessing the impact of uropean institutions on national prison systems*, Palgrave Macmillan, 2017, pp. 68-69.
[5] D. Anagnostou and D. Skleparis D, *op. cit.*, pp. 69-70.
[6] D. van Zyl Smyt and S. Snacken, *op. cit.*, pp. 12-13.
[7] COE, Explanatory report to the European convention for the prevention of torture and inhuman or degrading treatment or punishment, 26 November 1987, pt. 27.
[8] D. van Zyl Smyt and S. Snacken, *op. cit.*, pp. 13-15.
[9] *Ibid.*, pp. 16-17.
[10] *Ibid*., p. 17.

to adjust its previous positions in the light of new developments in the penological and psychiatric fields and to formulate tailor-made conclusions concerning specific categories of detainees, such as juveniles, women and mentally disturbed offenders.[11]

However, the CPT's mandate is limited to issues of torture and ill-treatment. Consequently, even allowing for occasional pronouncements on specific aspects of prison policy, as it was the case in 1999 concerning prison overcrowding and prison population inflation[12], the CPT is far from being a trendsetter in general penal policy. Nevertheless, the CPT's approach remains rather critical: in its 1997 General report (7th report), the CPT counted inhuman and degrading treatment among the harmful effects of overcrowding; in its 2001 General report (11th report), the CPT not only criticized prison conditions, but also addressed broader issues of penitentiary and penal policy which, in its view, needed to be reassessed by member states in order to solve the problem of overcrowding. Be that as it may, the Committee's state visit reports are seen as a powerful incentive for states to change their practices, as evidenced by a number of academic research studies showing that several states are making efforts to comply with the CPT's recommendations[13].

CMCE action on standards

In 1958, the Committee of Ministers of the Council of Europe (CMCE) created the European Committee on Crime Problems (CDPC), a body specializing in penological issues. In 1971, the CDPC organized a series of conferences of directors of penitentiary administrations, enabling political decision-makers, technical experts and practitioners to meet freely. These conferences highlighted the limitations of imprisonment and the need for a wider range of community sanctions and measures. Finally, the CDPC presented a number of penological resolutions and recommendations adopted by the CMCE. The first of these, the Resolution on the electoral, civil and social rights of prisoners, adopted in 1962[14], more than ten years before the *Golder* judgment of the ECtHR, implicitly provided that prisoners retained all their rights, with the exception of those which had been legitimately taken away from them. The resolution positions itself as a guide for national governments in matters of prison legislation, stating in particular that in the absence of relevant legislation, the resolution is to be regarded as the expression of European legal conscience in this matter[15].

Over the next decade, the CMCE adopted seven further resolutions focusing on limiting the use of imprisonment. In the 1960s and early 1970s, the instruments adopted by the CMCE focused mainly on probation and aftercare, with some attention paid to reducing the use of custodial measures and the alternative treatment of young offenders. The CDPC's search for alternatives to imprisonment led to the adoption of the Resolution on certain alternative penal measures in 1976[16]. Subsequent recommendations concerned prison staff and research on prisoners[17].

In 1973, the CMCE adopted the European Standard minimum rules for the treatment of prisoners (ESMR)[18], which closely followed the 1955 UN Standard minimum rules for the treatment of prisoners (also known as the Nelson Mandela rules), but were also designed to emphasise a specifically European approach to prison conditions. Their impact, however, as van Zyl Smit and Snacken point out, has been limited. The ECtHR, in particular, has explicitly stated that a breach of

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[11] *Ibid*., p. 17.
[12] CMCE, Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, 30 September 1999; See S. Snacken and D. van Zyl Smyt, "Distinctive features of European penology and penal policy-making", in T. Daems, D. van Zyl Smit and S. Snacken (eds), *European penology?*, Oxford, Hart Publishing, 2013, p. 13.
[13] D. van Zyl Smit, "International Prison Standards and Transnational Criminal Justice", in *UC Irvine journal of international, transnational* and *comparative law*, 4, 1999, pp. 109-110.
[14] CMCE, Resolution Res(62)2 on electoral, civil and social rights of prisoners, 1 February 1962.
[15] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 19.
[16] CMCE, Resolution Res(76)10 on certain alternative penal measures, 9 March 1976.
[17] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 19-20.
[18] CMCE, Resolution (73)5 on standard minimum rules for the treatment of prisoners, 19 January 1973.

the ESMR does not automatically lead to a breach of the prohibition of inhuman or degrading treatment (*X. v. Germany*, 1975, *Eggs v. Switzerland*, 1978)[19].

The revised version of the ESMR was adopted by the CMCE in 1987 as the European Prison Rules (EPR)[20]. The EPR demonstrated a commitment at official level to identifying general policies applicable to all aspects of imprisonment in Europe, and emphasised the importance of ensuring the human dignity of all prisoners (Rule 1). The researchers (Murdoch, Van zyl Smyt and Snacken) agree that the subsequent major updating of the ESMR has not had the influence that its authors might have hoped for. According to Murdoch, the ESMR did not go beyond the standards developed by the CPT in its reports. However, he admitted that there were "*many examples of convergence between general principles set by the EPR and those adopted by the CPT*", as well as instances where the CPT had used the EPRs to urge countries to follow the rules[21].

In subsequent recommendations, adopted in the 1990s[22], the CMCE showed its support for the reductionist movement by formulating the principle of using custodial sentences as a measure of last resort and advocating the use of alternative sanctions – an approach at least implicitly supported by the CPT (see above). Prison health is another major issue addressed simultaneously by Council of Europe bodies in the 1990s. The CPT provided a detailed analysis of the problem of health care in detention in its 3rd General report in 1992, followed by the CMCE's recommendations on health in prison published in 1993 and 1998, which represented a major step forward in terms of articulating European policy in this area[23].

In 2003, the Committee adopted the Recommendation on the management by prison administrations of lifers and other long-term prisoners[24], which provides a set of general penological principles in this area, defining, inter alia, the principles of individualisation, standardisation, accountability, safety and security, non-segregation and progression. These principles do not only apply to lifers and have a wider significance in the evolution of the European approach to imprisonment which seeks to develop principles before establishing specific rules. The Recommendation on conditional release[25], adopted the same year, was closely based on previous CMCE recommendations and advocated wider use of conditional release as a tool for individualising sentences and reducing overcrowding. The procedural guidelines proposed in the recommendation, as well as the attention paid to the content of the conditions that may be imposed, testify to the growing European commitment to human dignity and procedural fairness in the execution of prison sentences.

In general, the steady expansion of the corpus of European norms and the increasing "intensity" of intervention by European bodies in penitentiary and penal policy have been generally welcomed by academics, who perceive the European incursion into the nation-state's right to punish as a "humanising" or "civilising" force, embodying a mission to eradicate inhuman and degrading penal practices from penitentiary institutions across the continent. In this context, European bodies are seen as a normative power and an instrument for creating a regional human rights regime that brings penal enlightenment to the four corners of Europe, and can be mobilised to resist the punitive tendencies of Member States' policies[26].

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[19] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 20.
[20] CMCE, Recommendation Rec(87)3 to Member States on the European Prison Rules, 12 February 1987.
[21] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 23.
[22] CMCE, Recommendation Rec(92)16 on the European rules on community sanctions and measures, 19 October 1992; CMCE, Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, 30 September 1999.
[23] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 25.
[24] CMCE, Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoner, 9 October 2003.
[25] CMCE, Recommendation Rec(2003)22 on conditional release (parole), 24 September 2003.
[26] T. Daems and L. Robert, *op. cit.*, p. 4; S. Snacken, "Resisting punitiveness in Europe?", in *Theor*and*ical Criminology*, 14(3), 2010, pp. 273-292; S. Karstedt, "State crime: the European experience", in S. Body-Gendrot and. *al.* (eds), *The Routledge h*and*book of european criminology*, London, Routledge, 2013.

b. Normative circulation and penological paradigms in the European institutional area

The doctrine of the various European bodies highlights a series of consensual positions, shaped by a mechanism of mutual development.

Implementation of a common framework of rights

At least until the late 1990s, the Court and the Commission made only limited use of the EPRs: the Court never referred to them and the Commission mentioned them only 18 times – of these, the ECtHR applied the rules in only one case to support its finding of a violation of the applicant's right to confidential communication with a lawyer (*S. v. Switzerland*, 1991)[27].

The PACE, meanwhile, has called for the further development of the EPRs, their updating and the introduction of a catalogue of prisoners' rights, as well as the acceleration of work on a draft protocol to the Convention or another binding charter concerning prisoners' rights – in particular the Recommendations on the conditions of detention in Council of Europe member states[28] and on the situation of European prisons and pre-trial detention centres[29].

The first draft of this protocol had already been produced in 1994 by the Committee of experts for the development of human rights (DH-DEV), but the idea was finally abandoned in 2001, when the Steering committee for human rights (CDDH) of the CMCE rejected it, stating that such an instrument would merely codify existing case law and prevent its further development. According to the CDDH, the European Court of Human Rights had by then gone far enough in its case law on prisons, and efforts should instead have been devoted to updating the EPR in the light of the Court's case law and the standards being developed by the CPT.

The Committee of Ministers accepted the CDDH's proposal and in 2006, after an extensive consultation process involving national governments, the CPT and the Conference of directors of prison and probation services (CDPPS), it adopted the rewritten EPR. The 2006 Rules represent a synthesis of many of the trends that preceded them, promoting the use of imprisonment as a measure of last resort, focusing more explicitly on the human rights aspects of detention and emphasising the importance of general penological principles.

In most areas, the rules followed the CPT's standards. In its 15th General report, the CPT noted in this respect "*a high degree of consonance between the revised EPR and the principles and recommendations contained in CPT visit reports as well as in the Committee's General Reports*"[30]. Comments on the EPRs also frequently referred to the CPT's standards, as well as to previous recommendations of the CMCE. The Rules also rely heavily on leading judgments of the ECtHR to explain the origin and detailed scope of individual rights.

The recommendation on pre-trial detention adopted the same year extended the application of the EPRs to persons in pre-trial detention and re-emphasised the principle that pre-trial detention (like imprisonment) should only be used as a last resort. In some cases, the recommendation extends and refines the requirements of the 2006 EPRs (for example, in relation to the principle of continuous medical treatment)[31]. In the *Muršic v. Croatia* judgment in 2016, judge Pinto de Albuquerque argued that the 2006 EPR had moved from non-binding legislation to binding legislation requiring formal

[27] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 23-24.
[28] PACE, Recommendation 1257(1995) on conditions of *detention* in Council of Europe member states, 1 February 1995.
[29] PACE, Recommendation 1656 (2004) on the situation of European prisons and pre-trial *detention* centres, 9 June 2004.
[30] CPT, 15th General report, 22 September 2005, p. 16.
[31] D. van Zyl Smyt and S. Snacken, *op. cit*., p. 36-37.

recognition by the European Court of Human Rights as a binding part of the overall human rights framework in Europe[32].

It should be emphasised that the non-binding nature of the EPRs does not detract from their influence and impact on policy and, through their application by the ECtHR, on European case law. For example, the CoE's Commissioner for human rights has shown considerable political support for the 2006 EPRs, paying close attention to the rules in his statements and arguing for their widest possible implementation at national level[33]. In addition, the ECtHR has recognised on numerous occasions that the CPT's recommendations are essential to meeting the requirements of the Court as applied to prisons. Similarly, the Court has made extensive use of the CMCE's recommendations, including the EPRs, which have also been a major source of reference for the CPT. As van Zyl Smyt and Snacken point out, the overall effect of this mutually reinforcing process is that the whole has become more than the sum of its parts. The legal status of the recommendations may not have changed formally, but their widespread application by the ECtHR (as well as by national courts) has greatly increased the impact they will have on the rapidly developing body of European case law, as well as on the specific policies promoted by the CPT. Interactions between the ECtHR and the CPT have a similar reinforcing function.

Through its standard-setting and fact-finding activities, the CPT complements the judicial work of the ECtHR[34]. The Court (and formerly the Commission) has also regularly relied on CPT reports to assess the impact of prison conditions on the applicant. Developments in prisoner protection resulting from the combined work of the ECtHR and the CPT have created new standards for the treatment of prisoners and their conditions of detention[35]. While the standards promoted by the CPT were more detailed and rigorous than those of the ECtHR – in part, a difference resulting from the fundamentally different nature of each body's work and intervention – the Strasbourg Court has increasingly aligned the standards it applies in its case law with those of the CPT and has adopted a more proactive approach[36].

Strengthening of the reductionist paradigm

Mutual cooperation also took place on the development of a reductionist policy. The first resolutions and recommendations adopted by the CMCE in the penological field were in line with the growing knowledge of the many harmful effects of deprivation of liberty, which led some radical European penologists to advocate the abolition of prisons and to argue for a new approach to crime as a conflict between (private) parties, which could be resolved through mediation and compensation. Although abolitionism declined after the 1970s, its ideas helped to create a climate in which the use of imprisonment for certain categories of offender was questioned. These ideas also paved the way for the philosophy of reductionism, which advocates a reduction in the prison population through various strategies aimed at limiting prison admissions and reducing the length of detention. As we have seen, this line has been partially supported by both the CMCE and the CPT in a number of their normative outputs - the latter having clearly stated, in its 11th General Report, that prison and penal policies need to be reassessed by Member States in order to address the issue of overcrowding.

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[32] ECtHR, *Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016, partly dissenting opinion of Judge Pinto de Albuquerque.

[33] D. van Zyl Smyt and S. Snacken, *op. cit*., p. 372.

[34] J. Murdoch, "The impact of the Council of Europe's "Torture Committee" and the evolution of standard-sandting in relation to places of *detention*", in *European Human Rights Law Review*, 2, 2006, pp. 159-179; S. Snacken, "A reductionist penal policy and European human rights standards", in *European Journal on Criminal Policy* and *Research*, 12, 2006 p. 149.

[35] M. Marochini, "The Ill-treatment of Prisoners in Europe: a Disease Diagnosed but not Cured?", in *Zbornik Pravnog fakult*and*a Sveučilišta u Rijeci*, 30(2), 2009, p. 1109, 1120.

[36] J. Murdoch, "The impact of the Council of Europe's "Torture Committee" and the evolution of standard-sandting in relation to places of *detention*", *op. cit.*, pp. 166-167.

As van Zyl Smyt and Snacken argue, the principle that imprisonment should only be used as a last resort has become an integral part of the human rights framework as a matter of policy: both the CMCE's recommendations and the CPT's standards have fully incorporated a reductionist approach to imprisonment, whereas European law was less clearly committed to reductionism. While in some of its case law the ECtHR has supported the view that grossly disproportionate sentences violate the Convention, it has refrained from making a blanket statement that imprisonment should only be used as a last resort. The authors suggest in this regard that sentencing and imprisonment should be preceded by a proportionality test, similar to that required by the Court in relation to Articles 8 to 11 of the ECHR, and that such a policy could fall within the scope of Article 5 (which, unlike the former, leaves no room for the "margin of appreciation" of the State authorities), which would ultimately help to strengthen the recognition of human rights as a relevant factor in the overall reduction of the European prison population[37].

In any case, the overriding concern for the dignity of prisoners has led supranational organisations in Europe to adopt some of the fundamental principles of reductionist policy, while demonstrating a clear scepticism about the possible positive effects of imprisonment. The non-binding legislation of the Council of Europe has promoted a reductionist policy, including its strong intolerance of prison overcrowding, the refusal to increase prison capacity and the corresponding development of "*both 'frontdoor' policies to reduce the input of prisoners into the system and 'backdoor' policies to limit their length of stay in prison*"[38]. It is important to note that the non-legally binding nature of these instruments has not prevented them from bringing about significant legal changes (for example, through their crystallisation in the case law of the ECHR)[39].

Addressing the problem of prison overcrowding

The concordant criticism of overcrowding is another example of the co-construction of a common narrative between European bodies. In many Council of Europe member states, the number of places available in prisons has not kept pace with the increase in the number of prisoners. This has led to a significant and widespread problem of prison overcrowding, which is often more pronounced in remand prisons.

As we have seen CPT, in its 1992 General report, had already addressed the close link between overcrowding and quality of life in prison, which had been demonstrated by psychological research, stating that overcrowding in itself could, in certain circumstances, amount to inhuman and degrading treatment. With the increase in incarceration rates in the 1990s in several European countries and the resulting severe overcrowding, the CPT, in its 1997 General report (see supra), condemned overcrowding as a root cause of inhuman and degrading treatment. In the same vein, and as mentioned above, the CMCE adopted in 1999 the recommendation on prison overcrowding and prison population inflation, in which it states that deprivation of liberty should be regarded as a measure of last resort.

At the political level, the Parliamentary assembly of the council of Europe (PACE) has also established a link between the increase in the prison population and the increase in overcrowding, as a pan-European problem. In its 1995 and 2004 Recommendations (see supra), the PACE not only called for a reduction in the prison population, but also highlighted the dramatic effect of overcrowding on conditions of detention and, consequently, on prisoners' rights.

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[37] D. van Zyl Smyt and S. Snacken, *op. cit.*, pp. 359, 364; S. Snacken. "A reductionist penal policy and European human rights standards", in *European Journal on Criminal Policy* and *Research*, 12, 2006, pp. 161-162.

[38] A. Martufi and T. Slingeneyer, "Soft law instruments of the Council of Europe and community sanctions: criminal policy issues", in A. Bernardi (eds), *Prison overcrowding* and *alternatives to d*and*ention. European sources* and *national legal systems*, Napoli, Jovene, 2016, pp. 3-27; S. Snacken. "A reductionist penal policy and European human rights standards", *op. cit.* p. 14.

[39] S. Snacken, "Punishment, legitimate policies and values: Penal moderation, dignity and human rights", in *Punishment & Soci*and*y*, 17(3), 2015, pp. 397-423.

In its 11th General report (2001), the CPT noted that increasing prison capacity does not solve the problem of prison overcrowding, while expressing its opinion on large dormitories and staff[40]. For its part, in 2001, the ECtHR held for the first time in the cases of *Peers v. Greece* and *Douguz v. Greece* that Article 3 of the Convention could be violated as a result of serious prison overcrowding, whether or not it was intentionally created by the prison authorities. In the *Kalashnikov v. Russia* case (2002), the Court recognised that overcrowding alone could constitute inhuman and degrading treatment.

Experts have acknowledged that fighting prison overcrowding and inhumane prison conditions is an extremely complex, lengthy and demanding process, which cannot be achieved through legislative reform alone. In addition to (re)building prisons to create more places, solving the root of the problem requires a fundamental reform towards more moderate penal policies, including less recourse to pre-trial detention[41] – a highly controversial issue both politically and socially. It also requires the establishment of effective national remedies, which presupposes a certain level of acceptance of prisoners' rights, as well as a change in the national judicial approach and culture[42]. Where substantial, even spectacular, reductions in imprisonment rates have been achieved (as in Finland since the 1970s and 1980s), they have been the result of a deliberate and long-term change in policy, based on a firm political will and a consensus in favour of reducing the number of prisoners[43].

Another fundamental problem relates to the lack of a common understanding of "overcrowding", as such[44]. Scholars criticised the definition of overcrowding solely through the demand for space in prisons exceeding the overall capacity of places. On the other hand, it has been argued that the personal space allocated to each prisoner is only one of the factors used to measure overcrowding – an approach also used by the Court[45]. In this sense, a breach of the numerical standard for personal space (set by the Court at 3 square meters) creates a strong but rebuttable presumption of a breach of prisoners' rights, which must be weighed against other factors capable of adequately compensating for the scarcity of personal space (*Muršić v. Croatia [GC], 2016*)[46].

This approach seems to be supported at the political level by the CoE: the White Paper on prison overcrowding of the European committee on crime problems (CDPC)[47] notes difficulties in defining overcrowding and refers essentially to the "totality of conditions"[48]. The CPT has also recognised, when determining whether accommodation in a particular cell constitutes inhuman or degrading treatment, that standards relating to cell size cannot be regarded as absolute and that other elements of a prisoner's accommodation must be taken into account[49].

2. Systemic problems and pilot judgements: a procedural renewal

a. Solving the problem of repetitive requests

In 1998, when the reform of the Council of Europe's supervisory machinery came into force, i.e. when the European Commission of Human Rights was abolished by Protocol No. 11, the Court's workload

[40] D. van Zyl Smyt and S. Snacken, *op. cit.*, pp. 30-31.
[41] K. Kamber, "Overuse of pre-trial *detention* and overcrowding in European prisons", in *Overuse of pre-trial d*and*ention in Europe: how can we make legal assistance more effective?*, Fair Trial regional policy meanding, Brussels, 10 Oct 2019, p. 7..
[42] D. Anagnostou and D. Skleparis, *op. cit.*, p. 68.
[43] A. Coyle, "Revision of the European Prison Rules. A contextual report", in *European Prison Rules* (annex), Strasbourg, Council of Europe, 2006, p. 106.
[44] D. Moolenaar, "Correlation between crime rates and imprisonment", presentation at the High-level conference on prison overcrowding, Council of Europe, 2019, cited in K. Kamber, "Overuse of pre-trial *detention* and overcrowding in European prisons", *op. cit.*, p. 2.
[45] K. Kamber, "Overuse of pre-trial detention and overcrowding in European prisons", *op. cit.*, p. 2.
[46] ECtHR, *Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016, §§ 136-140.
[47] CDPC, White Paper on prison overcrowding (PC-CP (2015) 6 rev 7), 30 June 2016.
[48] K. Kamber, "Overuse of pre-trial *detention* and overcrowding in European prisons, *op. cit.*, p. 3.
[49] CPT, Living space per prisoner in prison establishments: CPT standards (CPT/Inf (2015) 44), 15 December 2015, §§ 21-21, cited in K. Kamber, "Overuse of pre-trial *detention* and overcrowding in European prisons", *op. cit.*, p. 4.

began to grow exponentially, leading to an awareness of the need for further comprehensive reform[50]. Two main challenges were identified: the first was the difficulty associated with the tedious examination of a large number of ill-founded claims, the second concerned the high proportion of routine and repetitive cases that were well-founded but repeatedly revealed significant shortcomings in the national legal systems of States[51]. The third factor often mentioned is the considerable expansion of the Council of Europe with the post-communist successor states of Central and Eastern Europe, with the number of systemic deficiencies in the human rights protection regime exceeding that of the "mature democracies" of Western Europe[52]. Thus, after deliberations on the intricacies of the reform, the new mechanism for handling repetitive cases was enshrined in Protocol No. 14, which establishes the jurisdiction of the new three-judge committees.

Adopted in 2004, the Resolution on judgments revealing an underlying systemic problem[53] thus lays the foundations for the Court to clearly identify underlying systemic problems and their sources in its judgments, enabling States to find appropriate solutions and the Committee of Ministers to supervise the implementation of these solutions.

The resolution defined systemic problems as issues "likely to give rise to numerous applications" before the European Court of Human Rights. However, it considered the determination of systemic problems, as well as the identification of their root causes, to be an integral part of the judicial function. The CMCE therefore left these questions to the ECHR, inviting it to "specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem"[54].

We can see, then, that the concept of "structural problem" is intimately linked to the pilot judgment procedure that will take shape in the European standard. As Buyse will summarize, the pilot judgment "could be said to address a general problem by adjudicating a specific case [...] by going beyond the mere determination that the ECHR has been violated"[55]. Or, as considered by the European Court of Human Rights, the pilot trial procedure is a "*technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems*"[56].

First case law application

In the same year, the Court handed down the Broniowski v. Poland judgment[57], where it identified a systemic problem relating to the violation of the applicant's property rights due to the government's failure to compensate for the loss of the property he and his family owned in the Bug River after their relocation to western Poland following the Second World War[58].

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[50] L. Wildhaber, "Pilot Judgments in Cases of Structural or Systematic Problems on the National Level", in R. Wolfrum and U. Deutsch (eds), *The European court of human rights overwhelmed by applications: problems* and *possible Solutions*, Springer, 2009, p. 70.
[51] V. Paraskeva, "Human Rights Protection Begins and Ends at Home : The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights", Human Rights Law Commentary, Volume 3, 2007, p. 1.
[52] R. Harmsen, " The European Court of Human Rights as a Constitutional Court : Definitional Debates and the Dynamics of Reform ", *in* J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 33.
[53] CMCE, Resolution Res(2004)3 on judgments revealing an underlying systemic problem, 12 May 2004.
[54] *Ibid.*
[55] A. Buyse, "The pilot judgment procedure at the European Court of Human Rights: Possibilities and challenges", in *Nomiko Vima*, vol. 57, 2009, p. 1890.
[56] ECtHR, Factsheand – Pilot judgments, November 2023, p. 1.
[57] ECtHR, *Broniowski v. Pol*and [GC], no. 31443/96, 22 June 2004.
[58] V. Paraskeva, "Human Rights Protection Begins and Ends at Home : The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights", in *Human Rights Law Commentary*, Volume 3, 2007, p. 8.

Although the term "pilot stop" does not appear in the text of the judgment, it clearly shows the signs of a judgment dealing with systemic problems[59]. The Court then defined in theoretical terms what a systemic violation is and applied the theoretical framework to the circumstances in question, which revealed the presence of circumstances that inevitably led to a violation of the human rights not only of the applicant, but potentially 80,000 other Polish citizens displaced beyond the Bug River.[60] After finding a violation of a systemic nature, the Court indicated the general measures that the Polish government must implement to guarantee respect for the remaining applicants' property rights - at the time, there were 167 related cases pending before the Court that had been adjourned - or to ensure that they received appropriate reparation[61].

It is possible to discern in Broniowski the main features of the pilot judgment, which are found in other subsequent cases dealing with systemic issues - still frequently cited in academic sources:

- The presence, in a State's legal system, of a gap leading to a denial of Convention rights for an entire category of individuals;
- The estimation that these shortcomings may give rise to numerous well-founded applications that may be submitted to the Court in the future;
- The need to introduce general measures to remedy the situation and indications of the modalities of these measures;
- The recognition of the retroactive effect of these measures; - The resolution to adjourn the examination of all pending applications that have been caused by the same systemic problem[62].

Since the Broniowski case, the Court has followed a broadly identical approach in cases revealing systemic violations, albeit with some divergences.[63] For example, the Court does not always adjourn similar cases[64]. This disparity has provoked lively debate among researchers, who regard the adjournment of similar motions as an essential element of the pilot-stop procedure[65]. Others say it's an important part of the decision-making process on issues such as systemic[66], while some researchers

[59] L. Wildhaber, "Pilot Judgments in Cases of Structural or Systematic Problems on the National Level", in R. Wolfrum & U. Deutsch (eds) *The European Court of Human Rights Overwhelmed by Applications : Problems* and *Possible Solutions,* 2009, p. 70.

[60] V. Paraskeva, "Human Rights Protection Begins and Ends at Home : The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights", op. cit., p. 8.

[61] *Ibid,* p. 9.

[62] Ibid, p. 9. See also a more detailed list of pilot judgment features in L. Wildhaber, "Pilot Judgments in Cases of Structural or Systematic Problems on the National Level", in R. Wolfrum & U. Deutsch *The European Court of Human Rights Overwhelmed by Applications : Problems* and *Possible Solutions,* 2009, p. 71.

[63] L. Wildhaber, "Pilot Judgments in Cases of Structural or Systematic Problems on the National Level", in R. Wolfrum & U. Deutsch *The European Court of Human Rights Overwhelmed by Applications : Problems* and *Possible Solutions,* 2009, p. 72.

[64] *Rumpf v. Germany*, judgment of 2 September 2010, no. 46344/06, para. 75 ; *Finger v. Bulgaria*, judgment of 10 Mai 2011, no. 37346/05, para 135 ; *Dimitrov* and *Hamanov v.. Bulgaria*, judgment of 10 Mai 2011, nos 48059/06, 2708/09, para 133, as cited in D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : Martinus Nijhoff Publishers, 2013, p. 261.

[65] D. Popović, " Pilot judgments of the ECtHR " in Conseil de l'Europe/Comité directeur pour les droits de l'homme (ed), Reforming the European Convention on Human Rights (Council of Europe Publishing 2009), p. 355 and seq. Cited in D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : Martinus Nijhoff Publishers, 2013, p. 46.

[66] L. Wildhaber, "Consequences for the ECtHR of Protocol No. 14 and the Resolution on judgments revealing and underlying systemic problem" in Conseil de l'Europe/Comité directeur pour les droits de l'homme (ed), Reforming the European Convention on Human Rights (Council of Europe Publishing, Strasbourg 2009). Markus Fyrnys, "Expanding Compandences by Judicial Lawmaking : The Pilot Judgment Procedure of the European Court of Human Rights' (2011) 12 *German Law Journal* 1231. Judge Zagrebelsky concurred in his partly dissenting opinion in the case *Hutten-Czapska v. Pol*and, judgment of 19 June 2006, application n° 35014/97, citée *in* D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : MartinusNijhoff Publishers, 2013, p. 46.

agree that adjournment of proceedings is not essential[67]. This latter approach, while reflecting the Court's practice, recognizes the flexibility of the pilot-stop mechanism[68].

While the adjournment of similar applications is not an essential element of a pilot judgment, the following two elements are: the Court's response to a systemic problem or practice contrary to the Convention, and the indication of general obligations on the respondent State to remedy the situation.[69] Such an indication can be found both in the reasoning and in the operative part of the judgment, the former remaining rather exceptional[70]. Some take the view that it is not the substantive elements that distinguish the pilot judgment, but rather the procedural elements: the Court initiates a procedure in which it seeks the opinion of the parties on whether to initiate the pilot judgment procedure[71]. Another important feature is that these judgments are examined as a matter of priority by the Committee of Ministers[72].

b. Scope of definition of structural problems

The authors point out that the Strasbourg Court, like the literature itself, does not seem to distinguish between systemic and structural problems[73]. The difference between "systemic" and "structural" problems is not clearly explained, even in the Court's case law. This clarification is important: it reflects the European Court's global and general approach to establishing structural problems.

Apostol argues that the term "systemic" "*call for wholistic approach, which by definition is focused on the patterns in the relationships between large groups of individuals, going beyond just one private interest or a minority from this group. They are able to bring general harm. In the systemic violations the interests are general, meaning that other individuals could become victims, even if they have not been yet affected by the systemic disfunction*"[74].

The author defines the following situations in which violations have a greater potential to become systemic: violations of substantive rights resulting from breach of the principle of legality, where the quality of domestic law does not meet the requirements of the Convention or the law is incompatible with the Convention; violations of procedural rights attributable to the authorities as a whole rather than to individuals or state agents acting in an individual capacity; continuing violations or breaches of positive obligations; violations of the specific national context resulting from local customs, social prejudices, mentality and legal culture, deeply rooted in the practice of law enforcement, administration, prosecution or the judicial system[75].

¶*The ECtHR point of view*

The European Court of Human Rights does not expressly define systemic problems or patterns. Nor does it distinguish between the terms "structural problems", "systemic issues" or "systemic

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[67] John Darcy, "Pilot judgments from the perspective of the Court and possible elements of the pilot judgment procedure which could be drafted" in Pilot Judgment Procedure in the European Court of Human Rights. 3rd Informal Seminar for Government Agents and other Institutions (Kontrast 2009) p. 36, 39, cited in D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : Martinus Nijhoff Publishers, 2013, p. 46.

[68] L. Wildhaber, "Pilot Judgments in Cases of Structural or Systematic Problems on the National Level", in The European Court of Human Rights Overwhelmed by Applications : Problems and Possible Solutions, Rüdiger Wolfrum & Ulrike Deutsch eds, 2009, p. 74.

[69] D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : Martinus Nijhoff Publishers, 2013, p. 49.

[70] For example, in the case *Scordino v. Italia* [GC], judgment of 29 March 2006, no. 36813/97, the Court's instructions to remedy the situation within a specific timeframe did not appear in the operative part of the judgment, but in its reasoning.

[71] L-A. Sicilianos, "L'implication de la Cour européenne des droits de l'homme *in* la mise en œuvre de ses arrêts : Recent Developments under Article 46 ECHR", *N*and*herl*and*s Quarterly of Human Rights*, 2014, 32(3), 235-262, p. 240, with reference to Rule 61(2) of the Rules of Court.

[72] *Ibid.*

[73] V. Boiteux-Picheral, "Quelles garanties en cas de violation massive/systématique des droits fondamentaux ?", *RDLF*, 2022/37.

[74] L. Apostol, Mandhodology for assessment of systemic human rights violations, Council of Europe, 2020, p. 18.

[75] *Ibid.*, pp. 19-20.

dysfunctions", etc., using them mainly as metonyms. The Court analyzes the existence of systemic problems on a case-by-case basis and, despite its already extensive pilot jurisprudence, does not conceptualize these problems by means of a global definition[76].

Criteria for qualifying a human rights problem as "structural" or "systemic" can nevertheless be drawn from the above-mentioned Broniowski v. Poland pilot judgment. These are:

- recognition of the problem by the national authorities, in particular the courts, in accordance with the principle of subsidiarity;
- "the Court's caseload, particularly as a result of series of cases deriving from the same structural or systemic cause" (§ 190);
- the absence of effective domestic remedies (§ 193).

The first criterion, i.e. recognition of a problem by the respondent State, was subsequently abandoned by the Court and became optional.[77]. In the Hutten-Czapska case (2006), the European Court of Human Rights linked the identification of systemic problems to the number of similar violations, not only already produced by the structural problem, but also those that could potentially result from it[78]. She further stated that systemic patterns could be found in the situation where convention-compliant legislation is faced with problematic implementation. Indeed, almost all the pilot judgments identified structural problems linked either to gaps in the legislation, or to a failure to implement it[79].

As Apostol observed, systemic problems arose above all in states where neither their willingness to cooperate with the ECHR nor their commitment to abide by the conventions had ever been called into question. They all benefited from more or less good legislation, but practice remained uncertain. Situations where national legislation was at the root of systemic dysfunction were very rare. Nevertheless, the pilot case law of the European Court of Human Rights shows that incompatible legislation can be the cause of systemic problems. Moreover, failure to tackle the root causes of the problem can itself constitute a structural problem (Scordino v. Italy (no. 1), 2006, Scordino v. Italy (no. 3), 2007, Burmych v. Ukraine, 2017)[80].

Finally, with the gradual adoption of a greater number of pilot judgments, the ECHR linked the determination of a systemic problem to a "structural malfunction in the country concerned [which] has given or could give rise to similar applications" (article 61 of the Court's rules). The development of case law relating to the pilot judgment makes it possible to identify three general criteria used by the Court to identify structural problems:

- The existence of a large number of applications arising from the same cause of action,

- The absence or ineffectiveness of legal remedies

- The recurrent nature of the problem, either in legislation or in practice (or both).

It remains unclear whether the European Court of Human Rights regards these criteria as alternative or cumulative, although it can be deduced that it observes them holistically. All systemic violations are continuous or, at least, continually produce consequences. Finally, all systemic violations are, by

[76] L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, Conseil de l'Europe, 2020, p. 11, avalaible at https://rm.coe.int/final-mandhod-sys-viol-of-human-rights-eng/16809e2a76.
[77] A. Buyse, La procédure d'arrêt pilote à la Cour européenne des droits de l'homme : Possibilités and défis (2009) ; *Olaru* and *autres v. Moldova* (2009) para. 56 ; *Hirst v. United-Kingdom (no. 2)* [GC] (2005) para. 82 ; *Greens* and *M.T. v. United-Kingdom* (2010) para. 105 ; L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit.
[78] ECtHR, *Hutten-Czapska v. Pol*and [GC], no 35014/97, (2006), paras. 236, 237.
[79] L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, Conseil de l'Europe, op. cit., p. 12.
[80] Ibid, p. 13

definition, attributable to institutions, rather than to individual actions or the omission of a state agent.[81].

The CMCE point of view

The Committee of Ministers also tends to consider that a systemic problem is closely linked to the repetitiveness of the requests arising from it. However, these are not the only indicators that would prove the existence of such a problem. The CMCE defines them as an echo of the most important cases revealing structural problems[82]. The absence of repetitive cases does not necessarily mean that a particular ruling is isolated and does not reveal any systemic problem. The systemic problem is perceived by the CMCE in substance, i.e. in the effects that the violation causes or in which it could potentially rise. In particular, the CMCE recalled that "the fact that certain cases/groups have generated relatively few repetitive cases does not diminish the importance of the underlying structural problems, as the violations found may nevertheless have great potential for generating repetitive cases (notably the so-called "pilot" judgments), and/or because of the general importance of the problem involved"[83].

The Committee of Ministers uses the notions of "systemic", "structural" and "complex" problems interchangeably, without distinguishing or defining them, except by referring to the repetitiveness and likelihood of new recurrent violations arising from the same problem[84].

The most illustrative example of the CMCE's broad understanding of the systemic problem is the determination of a "Leading case", defined as a "*case which has been identified as revealing new structural and / or systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution. Such a case requires the adoption of new general measures to prevent similar violations in the future. Leading cases also include certain possibly isolated cases: the isolated nature of a new case is frequently not evident from the outset and, until this nature has been confirmed, the case is treated as a leading case*"[85].

The CMCE also associates systemic and structural problems with its power to issue interim resolutions, a "form of decision [...] aimed at overcoming more complex situations requiring special attention"[86] Nevertheless, as L. Apostol, even from the (often formalistic) point of view of performance classification, systemic problems should not be blindly equated with structural problems, as indications of the latter do not necessarily constitute the former. In any case, the CMCE closely follows the Court's classification of problems as structural or systemic[87].

In 2006, the CMCE gave priority in its procedures to monitoring the execution of judgments highlighting systemic problems, again without attempting to identify the meaning of this concept[88]. Following on from the Interlaken and Brighton processes, the CMCE has introduced new arrangements for monitoring execution, including enhanced monitoring of the execution of judgments revealing major and/or complex structural problems as identified by the Court and/or the CMCE[89]. Consequently, while retaining certain powers to classify cases according to the criterion of some other

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[81] Ibid, p. 15

[82]Ibid, p. 28 ; Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights. Annual report, 2011 (2012) p. 40, footnote 25.

[83] Committee of Ministers, Annual Report 2017, p. 89 Footnote 228; Annual Report 2018, chap. Appendix 3 - Glossary and in-text references.

[84] L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit, p. 29

[85] CMCE, Annual report 2017, p. 55.

[86] Committee of Ministers, Annual Report 2018; Committee of Ministers, Annual Report 2017 Appendix 3 - Glossary.

[87] L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit. p. 33, 35

[88] Rule 4 of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly sandtlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meanding of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meanding of the Ministers' Deputies) (2006) ; L. Apostol, Méthodologie pour l'évaluation des violations systémiques des droits de l'homme, op. cit., p. 26

[89] Guide to the working mandhods and procedures of the Committee of Ministers, sev. 19.

"structural" or "complex" problem, the CMCE still prefers to rely on ECHR judgments in this respect[90].

Further formal indications of the concept appeared in the context of the reforms of the European Court of Human Rights in the Brighton Declaration of 2012, which first emphasized that "repetitive applications arise mainly from systemic or structural problems at national level". In this sense, "the States Parties, the Committee of Ministers and the Court are encouraged to work together to find ways of resolving the large number of applications arising from [these] systemic issues [as] identified by the Court."[91].

In short, the task of identifying systemic issues has mainly been assigned to the European Court of Human Rights, which has begun to do so in its pilot procedures. It is worth mentioning that neither the Brighton Declaration nor other subsequent high-level declarations link the concept of "structural or systemic issues" to pilot judgment procedures. For example, the Brussels Declaration simply refers to "judgments raising a structural problem", while the Copenhagen Declaration uses the general terms "systemic and/or structural human rights problems", sometimes considering them as different concepts[92].

c. The ECtHR and pilot judgments

Following the initial reasoning in Broniowski v. Poland, but also in a number of other judgments, the pilot-judgment procedure was finally codified in Rule 61 of the Rules of Court on April 18, 2011. While providing a nuanced regulatory framework for pilot judgments, this article does not specify which cases may be considered "similar"[93]. Nevertheless, a clear link is established between repetitive cases and structural or systemic deficiencies. It should be noted that the Court's competence to conduct a pilot-stop procedure, as enshrined in Rule 61 of the Rules of Court, is considered to be in line with the Convention, provided that the Court does not exceed the limits of its competence[94].

It should be noted from the outset that some of the pilot and principled rulings dealing with systemic and structural problems in prisons led to the implementation by States of substantial measures to combat prison overcrowding and, above all, to the introduction of a system of preventive and compensatory remedies capable of dealing with prisoners' complaints. The situation in some of these countries, however, quickly backfired. Consequently, as Kamber argues, although the Court's pilot judgments and judgments of principle are capable of producing concrete results, they are not, in themselves, sufficient. They must therefore be accompanied by structural and substantial national reforms envisaged in European policy documents, standards and practices[95].

Implementation of general measures

Firstly, we need to distinguish between pilot judgments and Article 46 indications, which fall into the category of "quasi-pilot" judgments. In fact, not all judgments handed down by the Court containing

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[90] Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights. Annual Report, 2011 (2012) p. 40, footnote 25; Committee of Ministers, 2017 Supervision of the execution of judgments and decisions of the European Court of Human Rights. 11th Annual Report of the Committee of Ministers (2018) p. 54; Committee of Ministers, Annual Report 2017, p. 55; L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit., p. 2.

[91] High-level conference on the future of the European Court of Human Rights: Brighton Declaration" (2012) paras. 18a and 20 ; see also : L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit, p. 11.

[92] High-level conference on the "Implementation of the European Convention on Human Rights, our common concern" Brussels Declaration of 27 March 2015" (2015), p. 9 par. 2.d ; High-level conference convened in Copenhagen on April 12 and 13, 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe. (2018). See also : L. Apostol, Méthodologie d'évaluation des violations systémiques des droits de l'homme, op. cit., p. 11.

[93] Information sheand on the pilot judgments prepared by the Court's registry, p. 1.

[94] D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, op. cit., pp. 119 -128.

[95] K. Krešimir, "Le recours excessif à la détention provisoire and la surpopulation *in* les prisons européennes". In *Overuse of Pre-Trial D*and*ention in Europe : Comment pouvons-nous rendre l'assistance juridique plus efficace ? Fair Trials Regional Poly Me*and*ing*, *Proceedings*, 2019, p. 11-12.

prescriptions under Article 46 can be qualified as pilot judgments[96]. Consequently, the adoption of general measures is no longer exclusively reserved for pilot judgments. However, whenever a case highlights systemic shortcomings in the national legal order, whatever their extent, the Court is empowered to indicate general measures[97].

The typology of judgments indicating general measures may vary: indications concerning changes in legislation or policy may be issued by the Court[98]. However, administrative changes or a different approach to case law may sometimes be ordered[99]. Pilot judgments often also point to the need to introduce an effective preventive remedy into a State's domestic legal system[100]. Whether these indications are specific or generally formulated depends to a large extent on the context surrounding the issue under consideration.

The Greens and M.T. case illustrates the Court's approach when it instructed the UK to bring forward legislative proposals to amend existing electoral law within six months, without however specifying the content of these proposals[101]. On the other hand, in other cases, such as those concerning the unreasonable length of criminal proceedings, the Court has been more precise, describing the essential features that an effective domestic compensatory remedy should include[102]. Some authors note that in the case of pilot judgments, the general measures are generally mentioned in the operative part of the judgment, whereas in the case of quasi-pilot judgments, they appear in the reasoning[103]. It is interesting to note that, in its subsequent case law, the Court discussed the systemic problem at length in the reasoning of its judgment, but omitted the corresponding conclusions in the operative part. This suggests a potential change in the Court's approach, pointing to a new reluctance to explicitly include conclusions on systemic problems in the operative part of pilot judgments[104].

An ongoing discussion on the difference in legal force attached to indications depending on their place in the judgment is worth mentioning, with some of the specialists working at the Court holding sometimes contrasting views in this respect. For example, a senior official at the Court's Registry testified to the idea that indications in the operative part, even if vaguely worded, can send a "stronger message" to the State than recommendations in the reasoning[105]. At the same time, a former president of the Court, Justice Spano, noted that "recommendations have ... only the status of obiter dicta, in

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[96] Atelier d'experts "L'exécution des arrêts de la Cour européenne des droits de l'homme", Centre de droit des droits de l'homme, Faculté de droit, Université de Nottingham, p. 4.

[97] H. Keller and V. Marti, " Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law,* 2015, 26(4):829 -850, p. 838.

[98] See ECtHR, *Greens ans M.T. v. the United Kingdom*, n° 60041/08 and 60054/08, 23 November 2010, point 6 a) of the operative provisions, cited by H. Keller and V. Marti, "Reconceptualizing implementation: The judicialization of the execution of the European court of human rights' judgments", in *European Journal of International Law*, 26(4), 2015, p. 838..

[99] See *Kurić* and *autres v. Slovenia*, judgment of 26 June 2012, no 26828/06, point 9 of the ruling, and *Broniowski v. Pol*and, judgment of 22 June 2004, no. 31443/96, point 4 of the ruling, as cited in H. Keller and C. Marti in " Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 838.

[100] See *Rumpf v. Germany*, judgment of 2 September 2010, no. 46344/06, point 5 of the ruling, as cited by H. Keller and C. Marti *in* " Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law,* 2015, 26(4):829 -850, p. 838.

[101] *op. cit.*, § 115.

[102] For example *Dimitrov* and *Hamanov v. Bulgaria*, judgment of 10 Mai 2011, nos 48059/06 and 2708/09, para. 125 ; *Ananyev* and *autres v. Russie*, judgment of 10 January 2012, n° 42525/07 and 60800/08, paras. 191 and suivants, as cited by Helen Keller and Cedric Marti *in* " Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 839.

[103] *Ibid.*

[104] D. Haider, The Pilot-Judgment Procedure of the European Court of Human Rights, Leiden/Boston : MartinusNijhoff Publishers, 2013, pp. 41-42. The same trend was observed by Alice Donald and Anne-Katrin Speck *in* " The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments ", in *Human Rights Law Review*, Volume 19, Issue 1, February 2019, 83-117, p. 94.

[105] A. Donald, A-K. Speck, " La pratique corrective de la Cour européenne des droits de l'homme and son impact sur l'exécution des arrêts ",in *Revue du droit des droits de l'homme*, volume 19, numéro 1, February 2019, 83-117, p. 86.

the form of guidance for the execution process"[106]. On the contrary, Judge Pinto de Albuquerque makes no distinction between the legal force of the indications contained in the operative part or in the reasoning of the judgment[107].

In this respect, academics note the Court's reasoned attitude towards precision in the wording of its judgments to be executed by States. The Court, as confirmed by staff members, is aware of its limited vision compared to the Committee of Ministers, which has more experience in supervising the implementation of general measures in the States and is much more familiar with the national context[108]. As Alice Donald and Anne-Katrin Speck have pointed out, "by giving corrective indications, they move away from political analysis, which requires a contextual understanding of the political and legal environment of the defendant state."[109]. One of the judges said that poorly worded general measures risked discrediting the Court and stagnating implementation, and such measures might well be adopted, as the Court generally looks at external factors and makes "a speculative assessment of the best way forward at the national level and the capabilities of the state in question."[110].

Several additional findings are worth mentioning in this regard. In fact, the Court finds that it is less difficult to determine appropriate general measures when it clarifies actions already identified by the parties themselves, particularly when ongoing reforms are being discussed at national and supranational levels[111]. This means that judgments are not adopted in a vacuum, but rather according to the Court's general understanding of the State's ability and willingness to implement changes in the national legal order. In addition, the Enforcement Department and the Committee of Ministers play an essential role in helping the Court to assess the national political context[112]. This goes hand in hand with the involvement of a judge representing the State in question in the Chamber or Grand Chamber concerned[113].

If the case is complex and technical, the indications concerning general measures tend to give the State considerable leeway in determining the most appropriate corrective measures[114]. Finally, in cases involving structural shortcomings, judges may use an Article 46 judgment as a precursor to a pilot judgment, in order to draw attention to emerging structural or systemic problems and warn the government against potential escalation[115].

From a methodological point of view, the Court (and subsequently the CMCE) relies on what is commonly known as "cross-fertilization", i.e. the use of external standards to justify decisions taken by a given body[116]. A technique that has proved effective in indirectly imposing non-binding standards - such as those of the CPT. As S. Van Drooghenbroeck and P. Tulkens, "the interpretative practice of the European Court of Human Rights sometimes results in 'taking some liberties' with the right of States to expressly consent to the rules that will be legally imposed on them. The legal commitment they thought they could avoid by taking the cautious route of soft law is ultimately imposed on them,

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[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid*, p. 97.
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid,* p. 15.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] T. Mariniello & P. Lobba, " The Cross-fertilisation Rhandoric in Question : Use and Abuse of the European Court's Jurisprudence by International Criminal Tribunals ", in , 2015/84, pp. 363-369 ; L. Glas, " The European Court of Human Rights' Use of Non-Binding and Standard-Sandting Council of Europe Documents ", *Human Rights Law Review*, 2017/17, pp. 97-125 ; D. Scalia, *Droit international de la détention*, Helbing, 2015, pp. 437-491 ; P. De Hert, S. Smis & M. Holvoand (eds), *Convergences* and *Divergences B*and*ween International Human Rights, International Humanitarian* and *International Criminal Law*, Intersentia, 2018 ; B. Pastre-Belda, "La protection des droits fondamentaux de la personne privée de liberté : quelles évolutions *in* la jurisprudence européenne ?", *Rev. trim. dr. h.*, 2019, pp. 599-618.

albeit in an indirect and attenuated way, by the use of this soft law for the purposes of interpreting the Convention"[117].

Finally, it is clear that the Committee of Ministers is interested in the fact that the Court indicates precise and clear measures that the state should implement, as this considerably simplifies the institution's work[118]. At the same time, the increasing interaction between the Court and the Committee of Ministers has strengthened the judges' confidence in making well-informed assumptions about the potential impact of remedial instructions, enabling the Court to take a more proactive approach in indicating general remedial measures[119]. For states, especially those with weak implementation structures, it is essential to receive specific instructions as to the measures to be implemented, the starting point and the desired outcome[120].

The role of the Court after judgment

The Court is not competent to decide whether the State has complied with its judgment under Article 46 of the Convention, as victims' complaints do not fall within the Court's jurisdiction and are subject to examination by the Committee of Ministers[121]. However, to say that the Court plays no role in the execution process would ignore an important nuance concerning the ways in which the judicial body is involved in the implementation of its judgments. Experts identify four main options for the Court's involvement in the execution process. The first situation arises under article 35(2)(b) of the ECHR, when the Court is asked to consider follow-up applications containing new and relevant information which was not submitted for the Court's consideration during the initial examination of the case. To decide whether the Court has competence rationemateriae to examine the case, it must carry out a case-by-case analysis to ensure that it does not encroach on the powers of the Committee of Ministers[122]. This can be a difficult and complex task.

The second possibility for the Court to intervene after delivering its first judgment is to rule on the question of just satisfaction separately from the question of the merits. For example, in the Kurić and Others case, the Court delivered a judgment on the merits after the adoption of a pilot judgment, in which it noted shortcomings in the timely establishment of an effective domestic compensation scheme[123]. Although it did not find a violation of Article 46, the Court emphasized the crucial need

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[117] S. Van Drooghenbroeck & Fr. Tulkens, "Le *soft law* des droits de l'Homme est-il vraiment si *soft* ? Les développements de la pratique interprétative récente de la Cour européenne des droits de l'Homme", *in Liber amicorum M. Mahieu*, Bruxelles, 2008, p. 520 (notre traduction) ; See also : Fr. Krenc & S. Van Drooghenbroeck, " Les droits du détenu *in* la jurisprudence récente de la Cour européenne des droits de l'Homme ", *in Le nouveau droit des peines : statuts juridiques des condamnés* and *tribunaux de l'application des peines*, Bruxelles, 2007, pp. 17-109 ; J.-P. Flauss, "Le droit du Conseil de l'Europe *in* la jurisprudence de la Cour européenne des droits de l'Homme", *in Mélanges en l'honneur de Louis Dubois, Au carrefour des droits*, Paris, pp. 47-66 ; Fr. Tulkens, S.Van Drooghenbroeck & Fr. Krenc, "Le *soft law* and la Cour européenne des droits de l'Homme. Questions de légitimité and de méthode ", *in* Hachez I. and *al.* (dir.), *Les sources du droit revisitées - Volume 1, Normes internationales* and *constitutionnelles*, Bruxelles, 2012, pp. 381-431 ; D. Scalia, " Les rapports du CPT *in* la jurisprudence de la Cour européenne des droits de l'Homme ", in Hachez I. and *al.* (dir.), *Les sources du droit revisitées - Volume 1, Normes internationales* and *constitutionnelles*, Bruxelles, 2012, pp. 433-462.

[118] *Ibid,* p. 19.

[119] *Ibid,* p. 20.

[120] H. Keller and C. Marti *in* " Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law,* 2015, 26(4):829 -850, p. 840.

[121] *Times Newspaper Ltd, Giles, Knightley* and *Potter v. United-Kingdom,* judgment of the Commission of the 6 March 1985, n° 10243/83, para. 129 ; *Haase* and *autres v. Germany* (dév.), 12 February 2008, no 34499/04, cited in *Egmez v. Chypre* (dév.), 18 September 2012, no 12214/07, para. 54, cited in H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 846.

[122] *Egmez v. Chypre* (dév.), 18 September 2012, no 12214/07, para. 54, cited in H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 846.

[123] *Kurić* and *autres v. Slovenia*, judgment of 12 March 2014 (just satisfaction), no 26828/06, para. 142, cited in H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 848.

for rapid implementation of the pilot judgment, given the large number of cases pending before the Court.

Thirdly, the Court may examine friendly settlements reached after the adoption of a pilot judgment in order to ensure respect for human rights, as required by Article 37(1) of the ECHR and Rule 62(3) of the Rules of Court. In the second proceedings following the adoption of the pilot judgment in the Hutten-Czapska case, the Court approved a settlement by analyzing both the general measures and the individual measures that the Polish government had taken to ensure the applicant's protection[124]. However, the Court's control in such cases is fairly limited. For a more extensive and thorough review, the Court has explicitly referred to the competence and duties of the Committee of Ministers.

The final notice reserved for the Court is provided for in Article 61(8) of its Rules of Procedure, which provides for the reopening of "frozen" cases that have been adjourned with the adoption of a pilot judgment, in the event that the measures specified therein have not been successfully implemented[125].

As can be seen from the above analysis, the Court has a number of possibilities to intervene at later stages, after it has given its final ruling on the case. However, these measures remain limited in nature and require a thorough examination of the circumstances in each particular case to ensure that the Committee of Ministers' powers are respected.

d. The CMCE action: a systemic turn of roles?

As we have seen, the task of supervising the execution of the Court's judgments is entrusted to the Committee of Ministers. Once the judgment has been delivered, it is transmitted to the Committee of Ministers in accordance with Article 46(2) of the Convention, and the supervisory process begins. During the special human rights meetings, the respondent state is required to provide details of the measures taken in response to the judgment. The Committee of Ministers then assesses whether the state concerned has implemented all the measures necessary to comply with the judgment[126].

The role of the Committee of Ministers in the judgment execution process, according to some researchers, has received far less attention than the judicial phase of the pilot judgment procedure[127]. With a few exceptions, the attention of researchers has been drawn to the role of the Court and not of the Committee of Ministers in the process of structural and systemic change in the contracting states[128]. In its work, the Committee of Ministers performs a specific task involving the application of relevant legal regulations, although its work is generally characterized by its political nature as the Council of Europe's executive body[129].

At each human rights meeting, the Committee of Ministers examines a limited number of cases, usually comprising one or more pilot judgments[130]. Following these discussions, the Committee may

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[124]*Hutten-Czapska v. Pol*and, judgment of 28 Avril 2008 (friendly sandtlement), no. 35014/97, para. 45, cited in H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 848.

[125]*Ibid.*

[126]*Ibid,* H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 845.

[127]L. R. Glass, " Le processus d'exécution des arrêts pilotes devant le Comité des ministres ", *13 HR&ILD 2* (2019), p. 75.

[128] F.G.E. Sundberg, "Control of Execution of Decisions under the European Convention on Human Rights - A Perspective on Democratic Security, Inter-governmental Cooperation, Unifi cation and Individual Justice in Europe", in : G. Alfredsson and autres (eds.), *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller* (2e éd., Leiden : Martinus Nijhoff Publishers, 2009) ; B. Çali and A. Koch, "Foxes Guarding the Foxes ? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe', (2014) 14 *HRLR 301* ; L.R. Glas, The Theory, Potential and Practice of Procedural Dialogue

[129]Lize R. Glass, " Le processus d'exécution des arrêts pilotes devant le Comité des ministres ", 13 *HR&ILD* 2 (2019), p. 77.

[130]Committee of Ministers, "Consolidated document - New working methods Two-way supervision system ", avalaible at https:// search.coe.int/cm/Pages/result_dandails.aspx?ObjectId=090000168049426d, para. 9(1), cited in Lize R. Glass, " Le processus d'exécution des arrêts pilotes devant le Comité des Ministres ", 13 *HR&ILD* 2 (2019), p. 78.

adopt decisions expressing concerns, calling for action or requesting the cooperation of national authorities to ensure the execution of judgments[131]. If the respondent state refuses to comply with a ruling, the Committee may initiate infringement proceedings, which may be referred to the Court for review. Finally, when the State complies with its obligation to execute a judgment in accordance with the specified requirements, the Committee of Ministers adopts a final resolution and terminates supervision.

Some have referred to the "change of role" between the Committee of Ministers and the Court. Traditionally, the Court described its judgments as "essentially declaratory"[132] and considered the indication of specific corrective measures as an ultimate tool to be applied in exceptional circumstances[133]. Control and supervision of the execution process is therefore the responsibility of the Committee of Ministers. It should be remembered in this connection that execution of the judgment is the sole responsibility of the Member State and its public authorities, and not of the Committee of Ministers, whose functions fall within the sphere of supervision of the implementation of the measures required[134].

According to the research carried out by Alice Donald and Anne-Katrin Speck, the judges and staff of the Court are indeed aware of the specific role played by the Committee of Ministers in the procedure for the execution of judgments under Article 46, and are reluctant to encroach on the functions of the other institutions[135]. In the words of the senior Court official interviewed by the researchers, the judges are aware that "each actor has been assigned specific functions under the Convention"[136].

In a wider context, the focus on systemic issues rather than on the individual implications of these issues has led to a "systemic turn", which has inevitably influenced the balance of roles within the wider Convention system when it comes to the implementation of the judgments[137]. In practice, this means that as the Court shifts its focus from individual violations to structural deficiencies, more is expected of the Committee of Ministers in terms of its supervisory function[138]. As the Court's indications are often expressed in broad language, they impose an equally broad responsibility on the Committee to enter into in-depth discussions with respondent States concerning the reform of their national legislation and practices. At the same time, national authorities become responsible for their general obligations to comply with Convention standards. The Court thus becomes a central institution within a broader framework of shared responsibility[139].

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[131] Department for the Execution of Judgments of the Court, "Inventory of tools allowing the Committee to react, if necessary, to situations of slowness in execution", https://rm.coe.int/16805b1500, para. 26, cited in Lize R. Glass, " The execution process of pilot judgments before the Committee of Ministers ", 13 HR&ILD 2 (2019), p. 78.

[132] *See Vereingegen Tierfabriken Schweiz (VgT) v. Suisse* (n° 2), n° 32772/02, fond and satisfaction équitable, 30 June 2009 (Grande Chambre), paragraphe 61, as cited by A. Donald and A-K. Speck in « The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments «, in *Human Rights Law Review*, volume 19, number 1, February 2019, 83-117, p. 94. *See also* Nicolaou, " The New Perspective of the European Court of Human Rights on the Effectiveness of its Judgments " (2011) 31, in *Human Rights Law Journal* 269, and Alastair Mowbray, " An Examination of the European Court of Human Rights' Indication of Remedial Measures ", in *Human Rights Law Review*, 2017, 17, 451-478, p. 452.

[133] A. Donald and A-K. Speck in « The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments «, in *Human Rights Law Review*, volume 19, number 1, February 2019, 83-117, p. 94.

[134] H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 834-835.

[135] A. Donald and A-K. Speck in « The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments «, in *Human Rights Law Review*, volume 19, number 1, February 2019, 83-117,, p. 101.

[136] *Ibid.*

[137] R. Harmsen, " The European Court of Human Rights as a Constitutional Court " : Definitional Debates and the Dynamics of Reform ", in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 Mar. 2012, p. 42.

[138] *Ibid.*

[139] *Ibid.*

The need to focus on systemic and structural issues is dictated by the realities of the Court's workload and the need to prioritize certain tasks. This led to a discussion proposed by constitutionalists, including former Court President Luzius Wildhaber. He advocated a more realistic view of the Court's capacity to handle thousands of cases each year and, instead of clinging to an illusory generalized right of individual petition[140] to focus on a more limited number of cases that would be "swiftly delivered and broadly reasoned [...] that establish jurisprudential principles with a compelling clarity that will make them de facto binding erga omnes, while revealing the structural problems undermining democracy and the rule of law in parts of Europe"[141]. Others insisted on the need to avoid the Court becoming a pan-European "small claims court" ruling on every alleged violation of human rights[142].

However, as Robert Harmsen points out, the academic community has been overwhelmingly skeptical of the idea of abandoning the individual right of redress in favor of a more constitutionalist approach aimed at adjudicating systemic and structural issues[143]. The approach of focusing solely on issues that reveal systemic deficiencies would lead the Court to risk losing the credibility and authority it has acquired over decades of prolific work[144]. Focusing on the "most important cases" would neglect the "greatest success" of the European system for protecting human rights, which places the individual at the heart of the mechanism for protecting his or her rights and enables monitoring of state compliance with the supranational convention.[145] As a result, the various philosophical approaches to the Court's "constitutional" function are essentially aimed at conceptualizing the purpose of the institution itself, and determining where to place the emphasis, bearing in mind the competing demands facing the Court[146].

In the Hutten-Czapska case, Judges Jaeger and Zagrebelsky underlined the dangers of upsetting the balance of roles between the Court and the Committee of Ministers[147]. Antoine Buyse agrees, adding that there is a risk that national reforms will stagnate, which would in turn lead to parallel requests not being taken into account[148]. Robert Harmsen is also concerned about "the risk of leaving applicants before the Court in a form of prolonged legal limbo, where proceedings concerning their

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[140] Ibid, p. 36.

[141]L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 in *Human Rights Law Journal* 161, 164, as cited by R. Harmsen in 'The European Court of Human Rights as a 'Constitutional Court' : Definitional Debates and the Dynamics of Reform', in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 37.

[142] P. Mahoney, "An Insider's View of the Reform Debate (How to Maintain the Effectiveness of the European Court of Human Rights)" (2004) 29 NJCM-Bullandin 170, 175, as cited by R. Harmsen *in* "The European Court of Human Rights as a "Constitutional Court" : Definitional Debates and the Dynamics of Reform', in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 Mar. 2012, p. 37.

[143]*Ibid.*

[144]*See* "Pour le droit de recours individuel", listed in appendix 3*in* Gérard Cohen-Jonathan and Christophe Pandtiti (eds), La réforme de la Cour européenne des droits de l'homme (2003) 171-75, and Florence Benoît-Rohmer, "Il faut sauver le recours individuel..." (2003) n° 38 Recueil Dalloz 2584. (2003) n° 38 Recueil Dalloz 2584. See also Florence Benoît-Rohmer, "Les perspectives de réforme à long terme de la CourEDH : "certiorari" versus renvoi préjudiciel" (2002) 14 Revue universelle des Droits de l'homme 313, as cited by R. Harmsen *in* "The European Court of Human Rights as a 'Constitutional Court' : Definitional Debates and the Dynamics of Reform', in J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 37-40.

[145] R. Harmsen, " The European Court of Human Rights as a Constitutional Court " : Definitional Debates and the Dynamics of Reform ", *in* J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 40.

[146] R. Harmsen, " The European Court of Human Rights as a Constitutional Court " : Definitional Debates and the Dynamics of Reform ", *in* J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 40-41.

[147]*Hutten-Czapska v. Pol*and, judgment of 19 June 2006, n° 35014/97, partially dissenting opinion of the judge Zagrebelsky.

[148] A. Buyse, La procédure d'arrêt pilote à la Cour européenne des droits de l'homme : Possibilités et défis (27 November 2009). Nomiko Vima (The Greek Law Journal), Vol. 57, p. 1901.

application are suspended pending a pilot judgment."[149]. At the same time, there is no doubt that large-scale reforms cannot be implemented instantaneously. Here, the Committee of Ministers plays a central role in supporting the State in its efforts to implement general measures.[150].

At the same time, Helen Keller and Cedric Marti highlight the increasing "judicialization" of the implementation process[151]. The Court is responsible for providing guidance on the implementation of its judgments - it can issue consequential orders and investigate how a judgment has been implemented. Robert Harmsen commented on the clarifying judgment procedure provided for in Protocol No. 14, pointing out that "the Court would have the possibility of engaging in rather subtle forms of 'corrective dialogue', defining the parameters of the national action required in the light of both its previous judgment and subsequent developments, without having to issue a new formal judgment."[152]. Consequently, at the present stage of the Council of Europe's evolution, execution of judgments is increasingly perceived as a "responsibility shared by a multitude of actors, including the Court".[153].

Finally, it should be noted that the Committee of Ministers supervises the implementation of all pilot judgments, as well as judgments raising structural and/or complex problems (as identified by the Court or by the Committee itself) under the "enhanced" procedure (as opposed to the "standard" procedure)[154]. Despite this approach, which is supposed to ensure increased pressure on states to tackle systemic and structural problems, PACE, in one of its latest implementation reports, expressed deep concern at the number of cases revealing structural and complex problems pending before the Committee of Ministers for more than five years[155].

3. The ECtHR and the penal system: avoiding penal?

The case law of the ECHR is ambiguous as to its relationship with criminal law. While it encourages the use of criminal law as a principle of conflict resolution (a.), it allows itself to be – slightly – critical of it when the rights guaranteed by the Convention are at stake (b.). Nevertheless, despite taking a firm stance in certain cases – such as pre-trial detention (c.) and the issue of long sentences (d.) –, the Court seems to avoid the criminal law overall.

a Encouraging the use of criminal law

In the context of the European human rights system, there has been a growing tendency to call for the intervention of criminal law to counter human rights violations, particularly in response to the structural deficiency of accountability during and after military conflicts[156].

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[149] R. Harmsen, " The European Court of Human Rights as a Constitutional Court " : Definitional Debates and the Dynamics of Reform ", *in* J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights*, Oxford, 2007 ; online edn, Oxford Academic, 22 March 2012, p. 51.

[150] *Ibid.*

[151] H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 831.

[152] R. Harmsen, " The European Court of Human Rights as a Constitutional Court " : Definitional Debates and the Dynamics of Reform ", *in* J. Morison, K. McEvoy, and G. Anthony (eds), *Judges, Transition,* and *Human Rights* (Oxford, 2007 ; online edn, Oxford Academic, 22 Mar. 2012), p. 52.

[153] H. Keller and C. Marti, « Reconceptualizing implementation : The judicialization of the execution of the European Court of Human Right's judgments', in *European Journal of International Law*, 2015, 26(4):829 -850, p. 831.

[154] Department for the Execution of Judgments of the European Court of Human Rights (DG-HL), Supervision of the execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan - Modalities for a two-track supervision systems CM/Inf/DH(2010) 37, 6 September 2010.

[155] Parliamentary Assembly of the Council of Europe, Resolution 2494 (2023)1, Implementation of judgments of the European Court of Human Rights, April 26, 2023.

[156] R. Teitel, "Transitional justice and judicial activism: A right to accountability?", in *Cornell International Law Journal*, 48(2), 2015, p. 385, 390.

By imposing positive obligations on States, the ECtHR has increasingly triggered the application of national criminal law to protect the rights and freedoms enshrined in the Convention[157]. The Court tends to support several forms of positive obligations in criminal matters (*Nikolova and Velichkova v. Bulgaria*, 2007)[158], including effective investigation (*Kaya v. Turkey*, 1998), criminalization (*X and Y v. the Netherlands*, 1985) and the creation of a system of criminal law to deter the commission of offences and the prosecution of those responsible for them (*Osman v. the United Kingdom*, 1998)[159]. The Court requires States to punish serious human rights violations, including torture, domestic and sexual violence, and systematic killings[160]. Finally, States must refrain from adopting measures that would impede criminal justice (*Marguš v. Croatia* [GC], 2014).

Critics have also pointed out that the relationship between criminal law and human rights is changing, including in the case law of the European Court of Human Rights. While human rights have traditionally been seen as a bulwark against the excesses of criminal law, the Court has in some cases encouraged the use of criminal law as a protection against human rights violations[161]. Judge Tulkens, in a concurring opinion in *M.C. v. Bulgaria* (2003), emphasised that while it was understandable that criminal law and sanctions could be used for this type of offence (rape), this should remain, in theory and in practice, the *ultimum remedium*, namely a subsidiary intervention that should be applied with "restraint"[162]. Judge Tulkens also challenged the idea that, as a general rule, criminal law offers the only or even the best prevention of undesirable behaviour.

The ECtHR, as well as other human rights body, share the assumption that criminal law is a necessary tool to advance the promoting and safeguarding of human rights. However, this "*unjustified optimism*"[163] regarding criminal law and criminal punishment as a means to ensure human rights protection has its repercussions, as Pinto points out: "*Firstly, decisions invoking the duty to exercise penal power against perpetrators might foster a "culture of conviction" at the domestic level, where limitations on due process guarantees for criminal defendants may be the price to be paid to protect victims from human rights abuses and ensuring accountability. Secondly, uncritical reliance on criminal measures as the optimal approach to ensure human rights accountability risks undermining the conception of criminal law as a last resort, as well as ruling out more adequate alternative to criminal trials. Moreover, the risk is real that the doctrine of positive obligation may be exploited by national*"[164].

b The Court's traditional refusal to interfere with the criminal policy of the Member States

The Article 46 obliges states that have ratified the ECHR to implement judgment issued by the Court at the domestic level, with a close supervision by the CMCE of the CoE. In addition to being obliged to provide an individual remedy if they are found to have violated the ECHR, national authorities have to institute general measures aimed at preventing similar human rights infringements from

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[157] S. Manacorda, ""Dovere di punire ?" Gli obblighi di tutela penale nell'era della internazionalizzazione del diritto", in M. Meccarelli, P. Palchandti and V. Sotis (eds), Il lato oscuro dei Diritti umani, Carlos III University of Madrid, 2014, p. 314. For a discussion on state obligations in criminal matters, see K. Kamber, *Prosecuting human rights offences. R*and*hinking the sword function of human rights law*, Boston, Brill, 2017; L. Lazarus, "Positive Obligations and Criminal Justice : Duties to Protect or Coerce?" in L. Zedner and J. V. Roberts (eds), *Principles* and *values in criminal law* and *criminal justice*, Oxford University Press, 2012; N. Mavronicola, "Taking life and liberty seriously : reconsidering criminal liability under Article 2 of the ECHR", in *Modern Law Review*, 80(6), 2017, p. 1026; K. Starmer, "Human rights, victims and the prosecution of crime in the 21st century", in *Criminal Law Review*, 11, 2014, p. 777.

[158] See also A. Seibert-Fohr, *Prosecuting serious human rights violations*, Oxford University Press, 2009.

[159] See also M. Pinto, "Awakening the Leviathan through human rights law: How human rights bodies trigger the application of criminal law", in *Utrecht Journal of International* and *European Law*, 34(2), 2018, pp. 161-184.

[160] A. Ashworth, *Positive obligations in criminal law*, Bloomsbury Publishing, 2015, chap. 8.

[161] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 358.

[162] ECtHR, *M.V. v. Bulgaria*, no. 39272/98, 4 December 2003, concurring opinion of Judge Tulkens.

[163] M. Pinto, "Awakening the Leviathan through human rights law: How human rights bodies trigger the application of criminal law", *op. cit.*, p. 182.

[164] *Ibid.*, pp. 182-183.

recurring. These measures can take the form of legal reform, change in domestic courts' jurisprudence, or change in administrative practices, and it can amount to broader policy change. Hence, on the basis of reviewing complaints by persons deprived of their liberty, the ECtHR's case law can exert an influence over prison reform in European states. Nevertheless, the ability of human rights judgment to influence, let alone instigate, reform or national laws and policies is considered as "highly contingent" and "rarely direct or straightforward". Nevertheless, some studies show that the influence of these judgments can be significant under certain conditions and/or in certain issue areas.[165]

In relation to the context of lawful imprisonment, intended to be a form of punishment, the application of human rights principles is constrained by a number of aspects. Some practices, which may be considered inhuman in general are more likely to be accepted in the nature of incarceration as a punitive institution, than to be regarded as contrary to the probation of degrading and inhuman treatment. This can be reinforced when an offender is considered to pose a danger to public safety, with more stringent disciplinary measures which could be applied to him and justified as necessary, leading to a re-evaluation of the standards of absolute prohibition of inhuman and degrading treatment (art. 3 of the ECHR). Some authors claimed that "all of these aspects weaken the potential of judicial bodies' review to uphold robust human rights standards in prisons".[166]

The fact that the provision of decent detention conditions requires substantial economic resources add a limitation to the effectiveness of judicial review, due to the reluctance of the Courts to interfere with policy decisions about how to allocate a finite amount of resources.[167] However, the ECtHR considers "that the lack of resources cannot justify prison conditions which are so poor as to reach the threshold of treatment contrary to art. 3 of the Convention, even as it recognises that a country's socio-economic hardships may hamper attempts to improve such conditions"[168].

Despite this restriction, the Strasbourg Court could have given governments clear indications of the type of remedial measures, including changes to national penal policies, needed to resolve underlying structural problems responsible for human rights violations. Solutions suggested by the ECtHR include decriminalization of certain offences (among them drug offences and illegal immigration), improving prison conditions (through renovation and new prisons replacing the oldest ones), fostering community sanctions and measures and early release, resorting to shorter sentences, and imposing shorter periods of, and alternatives to, remand custody.[169] The ECtHR has also encourage national authorities to modify the allocation of prisoners within establishments, including living spaces and

[165] D. Anagnostou and D. Skleparis D, "Human rights in European prisons: can the implementation of Strasbourg court judgments influence penitentiary reform domestically?" In T. Daems and L. Robert, Europe in Prisons: *Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Studies in Prisons and Penology), Palgrave Macmillan, 2017, p. 38; D. Anagnostou, *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy*, Edinburgh: Edinburgh University Press, 2013; V. Hillebrecht, "Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights", in *Human Rights Review* 13 (3), 2012, p. 279-301; L.R. Helfer and E. Voanden, International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe. International Organization 68 (1), 2014, p. 77–110.

[166] D. Anagnostou and D. Skleparis D, Human rights in European prisons: can the implementation of Strasbourg court judgments influence penitentiary reform domestically? In T. Daems and L. Robert, Europe in Prisons: *Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Studies in Prisons and Penology), Palgrave Macmillan, 2017, p. 42-43.

[167] S. Foster, The Effective Supervision of Prison Conditions. In Protecting Vulnerable Groups—The European Human Rights Framework, ed. F. Ippolito and S.I. Sánchez, 381–400. Oxford: Hart Publishing, 2015, p. 383.

[168]e.g., *Poltoratskiy v. Ukraine*, no. 38812/97, 29 April 2003 ; D. Anagnostou and D. Skleparis D, Human rights in European prisons: can the implementation of Strasbourg court judgments influence penitentiary reform domestically? In T. Daems and L. Robert, Europe in Prisons: *Assessing the Impact of European Institutions on National Prison Systems* (Palgrave Studies in Prisons and Penology), Palgrave Macmillan, 2017, p. 38.

[169] See, for example, Torreggiani and other six applicants v Italy, 8 January 2013; Stella and others v. Italy, 16 September 2014; Ananyev and others v. Russia, 10 January 2012; Ciorap v. Moldova, 19 June 2007; Rezmives and Others v. Romania, 25 April 2017; Varga and Others v. Hungary, 10 March 2015; Neshkov and others v. Bulgaria, 27 January 2015; Norbert Sikorski v. Poland, 22 October 2009; Orchowski v. Poland, 22 October 2009; Vasilescu v. Belgium, 25 November 2014; Bamouhammad v. Belgium, 17 November 2015; J.M.B. and others v. France, 30 January 2020.

hygiene facilities,[170] security and transfer,[171] renovation of dilapidated facilities.[172] Cliquennois, G., Snacken, S., & Van Zyl Smit, D. considered that "such legal developments challenge harsh prison policies and, in particular, the old principle of less eligibility, in terms of which the state's power to punish also allowed it to treat prisoners more harshly than other persons under its control".[173]

In this regard, the creation of pilot judgments has increased the influence of ECtHR, which could have put pressure on governments to change their penal system, which caused the systemic failures pointed out in the judgment, in order to make imprisonment less painful and to increase respect for the human rights and the dignity of prisoners.[174]

Regarding the habit of consolidated democracies to use the legal principles of 'subsidiarity' and the 'margin of appreciation' to resist obligations imposed by the ECtH,R Cliquennois, Snacken, and Van Zyl Smyt considered that the role of penal moderator played by the Court has become somewhat reduced through the politicization of human rights. For the authors, this is becoming visible by the changes in the Court's position on previously stated principles in respect of prisoners' rights, following not entirely convincing arguments by the national authorities that their policies had been adapted to the Strasbourg case law (e.g., in *Hutchinson v. UK* (17 January 2017), the Court neutralizes the judicialization of whole-life imprisonment in contrary to the principles established in the 2013 *Vinter* case or in *Ilnseher v. Germany* (4 December 2018), which allows preventive detention, ostensibly outlawed in the earlier case of M v. Germany).[175]

c The moderate criticism of pre-trial detention

Article 6(2) of the Convention establishes the principle that persons accused of a crime must be considered innocent until proven guilty in a court of law. This concept of the presumption of innocence is an important aspect of European legal traditions, despite attempts by some scholars to contrast it with the Anglo-American system, where the presumption of innocence has played a somewhat central role[176].

Despite the binding legal force of the Convention's provisions and the national codification of the presumption of innocence by many European states, this fundamental principle inevitably comes into conflict with the practice of pre-trial detention, which consists of placing people in police custody before their trial[177]. This form of detention can only be used as a temporary measure in specific circumstances, for example to prevent absconding or tampering with evidence. From a human rights perspective, pre-trial detention represents a deprivation of liberty and is only permitted under strict conditions[178].

From a criminological perspective, there is concern that pre-trial detention may be exploited for reasons beyond its legitimate purpose. Evidence from various countries suggests that it could be used as a punitive tool or even to extract confessions, particularly where young offenders are concerned (as in Germany) or specific ethnic groups (as in England and Wales)[179]. This practice is moving away from its original purpose, which was to ensure the defendant's presence at the trial, and is becoming

[170] Including Rezmives and Others v. Romania, 25 April 2017; Mursic v. Croatia, 20 October 2016.
[171] Ramirez Sanchez v. France, 4 July, 2006; Khider v. France, 9 July 2009; Payand v. France, 20 January 2011.
[172] Sulejmanovic v. Italy, 16 July 2009; Rezmives and others v. Romania, 25 April 2017.
[173] Cliquennois, G., Snacken, S., & Van Zyl Smit, D. (2021). Can European human rights instruments limit the power of the national state to punish? A tale of two Europes. European Journal of Criminology, 18(1), 11–32.
[174] Cliquennois, G., Snacken, S., & Van Zyl Smit, D. (2021). Can European human rights instruments limit the power of the national state to punish? A tale of two Europes. European Journal of Criminology, 18(1), 11–32.
[175] Cliquennois, G., Snacken, S., & Van Zyl Smit, D. (2021). Can European human rights instruments limit the power of the national state to punish? A tale of two Europes. European Journal of Criminology, 18(1), 11–32.
[176] V. Morgenstern, "Remand *detention* in Europe: Comparative and pan-European aspects as elements of a wider European penology", in T. Daems, D. van Zyl Smit and S. Snacken (eds), *European penology?*, Oxford, Hart Publishing, 2013, pp. 193-194.
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*

a tool of "*immediate punishment and as a security measure to protect society against 'dangerous' elements*"[180]. The mixed nature of pre-trial detention is illustrated by the common practice of subtracting the time spent in detention from the potential sentence, which raises concerns about fairness and may influence sentencing decisions. Pre-trial detention, as practised, may not be consistent with the aim of rehabilitation, as a significant number of individuals are imprisoned primarily on remand[181].

In this context, it should be noted that living conditions in European prisons are often worse than in post-conviction establishments. France can serve as an example: in short-stay prisons, a significant degree of overcrowding has been documented on many occasions, with occupancy rates sometimes exceed 200%[182]. The ECtHR has actively found a violation of the prohibition of torture and ill-treatment with regard to the degrading conditions in certain pre-trial detention centers in Europe (see the cases of *Savenkovas v. Lithuania*, 2009 or *Peers v. Greece*, 2001).

The Court has also ruled on the permissible length of detention, which is closely linked to the presumption of innocence. In this regard, the "golden standard" of the case law is that the extension of pre-trial detention must never be used as a measure anticipating an anticipated prison sentence and must, at the very least, be limited to the length of time that the defendant could potentially serve in post-conviction detention[183]. In this case, the "reasonableness" test applies without, however, setting a specific maximum period.

Additionally, it has been argued that the ECtHR jurisprudence that introduced standards contrary to the domestic courts' attempts at employing formalistic arguments rooted in stereotypes. Instead, the national authorities should assess each case of pre-trial detention individually and review the decision to keep the person in detention regularly. This definitely "restricted the leeway of judges to impose remand detention and, more importantly, to allow it to continue for a long time" and provided "moral grounds" for an introduction of more lenient penal policies in the Council of Europe Member States[184].

Nevertheless, the Court has been reluctant to pronounce on the distinctiveness of remand detention from the post-conviction detention. For example, in the case *Peers v. Greece* from 2001, the Court acknowledged that the ECHR contains no separate provisions for convicted and accused persons. This standard is lower than the one enshrined in Article 10(2) of the ICCPR, which calls for separate treatment of convicts and accused prisoners.

Martufi and Peristeridou, when noting the visible overreliance on detention against suspects and defendants, going beyond the strict requirement of *ultima ratio*, state that the ECHR standards are also partly to blame for this (in addition to the domestic law and practice). In particular, they see a problem in that the Court does not tie the applicability of pre-trial detention to the length of potential custodial sentence, unlike the domestic law in a number of countries[185]. Along with other scholars[186], they further criticised the "*risk of reoffending*" as a policy goal to restrict liberty, for its incompatibility with the presumption of innocence. They also note the vagueness of the Court's approaches and the

[180] A. Raes and S. Snacken, "The Future of remand custody and its alternatives in Belgium", in *The Howard Journal of Criminal Justice*, 43(5), 2004, p. 514.
[181] V. Morgenstern, *op. cit.*, p. 195.
[182] French section of the International Prison Observatory, "Perpignan prison: court action to suspend incarceration", 10 August 2023 [Online].
[183] *Ibid.,* p. 204.
[184] *Ibid,* pp. 205-206.
[185] A. Martufi and V. Peristeridou "The purposes of pre-trial *detention* and the quest for alternatives", *in European Journal of Crime, Criminal Law* and *Criminal Justice*, 28(2), 2020, pp. 153-174.
[186] P. Albrecht, "Die Untersuchungshaft – eine Strafe ohne Schuldspruch?, Ein Plädoyer für den Grundsatz der Unschuldsvermutung", in A. Donatsch, M. Forster and V. Schwarzenegger (eds), *Strafrecht, Strafprozessrecht und Menschenrechte – Festschrift für Stefan Trechsel zum 65 Geburstag*, Zürich, Schulthess, 2003, pp. 357–358; A. Duff, "Pre-trial *detention* and the presumption of innocence", in A. Ashworth, L. Zedner and P. Tomlin (eds), *Prevention* and *the limits of criminal law*, Oxford, Oxford University Press, 2013, pp. 128–131.

underdevelopment of its position towards the use of alternative measures, which in their view cumulatively leave "*excessive discretion*" to national authorities[187].

d The position on life sentences

The rights of life-sentenced prisoners and other long-term detainees is another aspect in which the Court, and behind it other bodies, have taken a specific stance in line with a common criticism. Thus, the CPT, in its 2001 General report, devoted particular attention to this subject and made a number of specific proposals which were taken up in the CMCE Recommendation on the management by prison administrations of life sentence and other long-term prisoners[188], while the ECtHR, in parallel, has also dealt with life imprisonment in a number of cases concerning release procedures (*Stafford v. United Kingdom* [GC], 2002) and excessively strict prison regimes for lifers in breach of Article 3 (*Iorgov v. Bulgaria*, 2004 and *G.B. v. Bulgaria*, 2004). As van Zyl Smyt and Snacken note, timely implementation of the 2003 ECJC recommendation on life-sentenced prisoners could have enabled States to avoid findings of violations of the ECHR against them[189].

In *Einhorn v. France* (2001), the Court held that the absence of the possibility of early release for lifers could raise an issue under Article 3 of the Convention. However, Snacken criticised this statement as a "*missed opportunity*" for a wider use of parole, which is an important element of the "*back door*" strategy of a reductionist policy. On the other hand, the Court's position implies that the national authorities' margin of appreciation in this area is no longer considered to be unlimited[190].

Chapter 2. UE approach

1. Substantive criminal law: ratio and method for custodial penalties at EU level

This section focuses on the EU rules of substantive criminal law involving deprivation of liberty, by looking across legislative measures and policy documents. In doing so, it assesses the rationale behind the EU legislature's reliance on custodial penalties, and the criterion used to approximate custodial penalties in the Union.

Article 83 TFEU, and particularly the first and second paragraphs thereof, empower the EU to adopt legislative measures of substantive criminal law. Security and effectiveness are visible drivers of the Union's action, as they underpin the two main legal bases for adopting instruments under Article 83(1) and (2) TFEU, respectively. The former provision grants the EU competence to approximate the definition of offences and the level of penalties for a list of serious areas of crime having a cross-border dimension. The latter allows the Union to legislate where the use of criminal law is essential to ensure the effective implementation of a policy area already subject to harmonisation. In both cases, the EU can only enact directives and only to establish 'minimum rules'. Such constraints apply, therefore, also to approximation of the level of penalties. Three aspects are particularly relevant, for the purposes of this research: the type of penalty chosen for any given instances of criminalisation; the criterion used to approximate the chosen levels of penalty; the rationale behind both choices.

a. Type of penalty

Upon reviewing the measures enacted under Article 83 TFEU – and the corresponding legal basis provided for in previous versions of the Treaties – imprisonment clearly emerges as the barycentre of the EU legislature's approach to punishment. While there are several reasons adduced to justify such

[187] A. Martufi and V. Peristeridou, *op. cit.*
[188] CMCE, Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners, 9 October 2003.
[189] D. van Zyl Smyt and S. Snacken, *op. cit.*, p. 34.
[190] S. Snacken, "A reductionist penal policy and European human rights standards", *op. cit.*, pp. 161-162.

a choice of punishment –and criminalisation more broadly– in many cases the ultimate driver seems to be the protection of the Union as a borderless area.

The first reference to custodial penalties in EU law can be found in the 1995 Convention on the protection of financial interests of the EU[191]. In that case, the EU required Member States to punish specific forms of conduct with penalties involving deprivation of liberty (at least in serious cases)[192]. Since then, pretty much all measures adopted in substantive criminal law require that Member State use imprisonment as a punishment[193]. The only exceptions are Directives 2008/99/EC and 2009/52/EC[194], which contain a generic reference to the use of effective, dissuasive and proportionate penalties[195]. Admittedly, Article 83(1) TFEU allows criminalisation in particularly serious areas of crime – such as terrorism, trafficking in humans, child pornography[196]. While less emotive, Article

[191] Art 2, Convention on the protection of the European Communities' financial interests of 26 July 1995, [1995] OJ C316/49; Article 5, Protocol to the Convention on the protection of the European Communities' financial interests of 27 September 1996, [1997] OJ C313/2.

[192] Art 5, Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union of 26 May 1997, [1997] OJ C195/2.

[193] See, inter alia, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L164/3, 22.6.2002; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L328/1, 5.12.2002; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, [2011] OJ L101/1, 15.4.2011; Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, [2013] OJ L218/8, 14.8.2013; Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, 21.5.2014, [2014] OJ L151/1; the Markand Abuse Directive; Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, [2001] OJ L149/1, 2.6.2001; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, [2002] OJ L203/1, 1.8.2002; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, [2003] OJ L29/55, 5.2.2003; Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, [2001] OJ L149/1, 2.6.2001; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, [2002] OJ L203/1, 1.8.2002; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, [2003] OJ L29/55, 5.2.2003; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, [2001] OJ L182/1, 5.7.2001; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, [2011] OJ L335/1, 17.12.2011; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, [2001] OJ L182/1, 5.7.2001; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, [2011] OJ L335/1, 17.12.2011; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [2003] OJ L192/54, 31.7.2003; Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, [2005] OJ L69/67, 16.3.2005; Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, [2005] OJ L255/164, 30.9.2005; Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, [2004] OJ L13/44, 20.1.2004.

[194] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, [2008] OJ L328/28, 6.12.2008; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L168/24, 30.6.2009.

[195] However, there is an explanation for that: these are instances of Community criminal law, passed following the *Ship-Source Pollution* case (Case C-440/05, *Commission v Council*, [2007] ECR I-9097) and prior to the entry into force of the Lisbon Treaty. The *Ship-Source Pollution* judgment stated the existence of a Community compandence in criminal matters, but the CJEU limited such power on given conditions (namely, those established in current Art 83.2). Furthermore, the Court only allowed the Community to approximate the definition of the offences, with the penalties reMaining within the realm of the law of the 'third pillar'. On that ground, the relevant Directive made no reference to imprisonment because it would have been unlawful, according to the word of the Court of Justice.

[196] This is especially the case for attempts, aiding and abandting. Furthermore, it should be noted that there is no consistent definition nor criteria to identify what a serious crime is. See A Paoli, A Adriaenssen, VA Greenfield and M Conick,

83(2) TFEU has also been used to approximate rules in areas where illegality can have a negative impact (e.g. money counterfeiting, money laundering, market abuse).

In its 2004 Green Paper on the approximation of criminal sanctions[197], however, the Commission explicitly endorsed the use of sanctions other than deprivation of liberty (financial penalties, disqualifications and confiscation)[198]. Whether that constituted a self-encouragement, or a recommendation for Member States, remains unclear. Be that as it may, imprisonment remains *the* EU's legislature preferred type of punishment, whose use is in turn imposed on Member States. A negative consequence of such a use of imprisonment is that Member States might be obliged to impose custodial penalties in areas or for conduct they did not before. It is worth noting that the choice of custodial penalties is not always the result of a Commission's proposal. The case of the Market Abuse Directive[199] is worth mentioning. While the Commission's proposal only required effective, dissuasive and proportionate sanctions, the European Parliament added specific provisions on the use of imprisonment[200].

b. Criterion of approximation

Having established that imprisonment is the barycentre of the EU's approach to punishment, the question arises as to what method the Union prescribes to the Member States as regards the establishment of custodial penalties. This criterion is the so-called minimum-maximum, formally adopted in the 2002 Council Conclusions on approximation of penalties[201]. Four levels of minimum-maximum penalties to be established and applied were identified, depending on the seriousness of the conduct: level 1 (penalties with a maximum of at least one to three years' imprisonment); level 2 (penalties with a maximum of at least two to five years' imprisonment); level 3 (penalties with a maximum of at least five to ten years' imprisonment); level 4 (penalties with a maximum of at least ten years' imprisonment). The minimum-maximum guides the EU and national legislatures, as well as Member States' judges in sentencing. The minimum-maximum criterion imposes on Member States a limit below which they shall not go, as far as the highest term of imprisonment is concerned. Therefore, it grants national authorities a generous margin for manoeuvre. Far from being an effective medium of harmonisation, it leaves Member States free to set the minimum level of penalty for the criminalised conduct (if any is provided in Member States for that specific crime) and gives them discretion as to the maximum term of punishment. Member State, in fact, can impose a higher term of imprisonment than that provided for in the relevant piece of EU's legislation.

The minimum-maximum criterion has been questioned, by the Commission as well as in the literature. In the case of the Directive on the protection of EU's financial interests through criminal law, the Commission's initial proposal featured the establishment of minimum terms of imprisonment for particularly serious offences. This was justified by the need to ensure deterrence consistently and combat fraud in an effective and equivalent manner throughout the Union. The European Parliament objected to such a provision, arguing that "*Minimum penalties do not respect the diversity of legal systems and the need for judicial discretion. Introducing them here would also not be consistent with*

'Exploring Definitions of Serious Crime in EU Policy Documents and Academic Publications: A Content Analysis and Policy Implications' (2017) 23 *European Journal of Criminal Policy & Research*, pp. 269–85.

[197] COM(2004) 334 final.

[198] Ibid, 15 onwards.

[199] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for markand abuse (markand abuse Directive), 12.6.2014, [2014] OJ L173/179.

[200] European Parliament Report on the proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and markand manipulation (COM(2011)0654 – C7-0358/2011 – 2011/0297(COD)), A7-0344/2012, 19.10.2012.

[201] Council document of 25 April 2002 on the approach to apply approximation of penalties, 9141/2002.

the position Parliament has taken as regards the draft Directive on the protection of the euro and other currencies against counterfeiting in criminal law"[202].

Consistent with this approach, the European Parliament added the following clause: "*This paragraph shall not affect the discretion of courts and judges in Member States in determining the most appropriate and proportionate sentence in any individual case*". The approved text of the Directive provides no harmonised minimum penalties, but only the requirement for Member States to impose maximum penalties consisting of imprisonment for the offences stated in Articles 3 and 4 thereof[203].

The EP had also objected to minimum penalties in the context of the Commission's proposal for a Directive on money counterfeiting, by stating that "*Given the substantial disparities between Member States the danger exists that the introduction of minimum penalties for counterfeiting the euro and other currencies might lead to lack of uniformity regarding minimum penalties within one and the same national legal system*"[204].

In the literature, the use of the minimum maximum criterion has been criticised for its lack of harmonising effect, and for being potentially counter-productive in that it might cause a race to the top as regards the establishment of penalties[205]. A group of scholars under the framework of the European Criminal Policy Initiative (ECPI) project has devised an articulated proposal for the introduction of a different method of harmonisation of sanction based on a system of relative comparability. According to its proponents, this method would have different advantages. On the one hand, it would ensure internal consistency at national level. On the other, it would allow the EU to place the offence(s) subject to approximation into a predetermined category. This would, ultimately, result in a clearer and more visibly hierarchical relationship between different types of offences under EU law[206].

c. Rationale of punishment

The Lisbon Treaty features a specific legal basis for the enactment of criminal law legislation. Such measures are adopted according to the relevant political and legislative guidelines in the Area of Freedom, Security and Justice (AFJS) regularly adopted by the Council, as well as area-specific documents (eg protection of the EU's financial interests).

The Stockholm Programme[207], the first post-Lisbon multiannual programme for the AFJS, stated that minimum rules may be established when they prove essential to ensure the effective implementation of a Union policy which has been subject to harmonisation measures[208]. Attention was also paid to serious areas of crime, such as drug trafficking, terrorism, trafficking in human beings, and the importance of fighting them by tackling the financial gain ensuing from those activities[209]. As for imprisonment, the Programme stressed the importance of implementing the European Prison Rules including *vis-à-vis* alternatives to detention, by exploring the possibilities offered by the Lisbon Treaty in this respect[210]. In the communication 'Towards an EU criminal policy: Ensuring the

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[202] EP report on the proposal for a Directive of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (COM(2013)0042 – C7-0033/2013 – 2013/0023(COD)), A7-0018/2014, 10.1.2014, pp. 30 onwards.
[203] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. 28.7.2017, [2017] OJ L198/29.
[204] See amendment to recital 16, EP report, n 10 above.
[205] L Mancano, *The European Union* and *Deprivation of Liberty. A Legislative* and *Judicial Analysis from the Perspective of the Individual* (Oxford, Hart Publishing, 2019), pp. 69-70 especially. K. Zoumpoulakis, Konstantinos, 'Approximation of Criminal Sanctions in the European Union: A Wild Goose Chase?', *New journal of European criminal law* (2022) 13(3), pp. 333–345.
[206] H. Satzger, 'The Harmonisation of Criminal Sanctions in the European Union - A New Approach', eucrim, Issue 2/2019, 115-120.
[207] The Stockholm Programme – An open and secure Europe serving and protecting citizens, [2010] OJ C115/1.
[208] Ibid, p. 15.
[209] Ibid, pp. 21–24.
[210] Ibid, p. 14.

effective implementation of EU policies through criminal law', the Commission sees in criminal law a response to citizens' concerns and a tool for the effective implementation of EU policies[211].

As a general principle, Article 67(3) TFEU envisages approximation in criminal law only *if necessary*. Article 83 establishes two legal bases for the exercise of EU's competence in this area:[212] *securitised criminalisation* under Article 83(1) TFEU, allowing for approximation to fight particularly serious areas of crime with a cross-border dimension (such as terrorism, organised crime); *functional criminalisation* under Article 83(2) TFEU, where minimum rules are essential to ensure the effective implementation of EU policy which has already been subject to harmonisation[213].

As for the use of Article 83(1) TFEU, there is no defined policy test, although references to the impact and nature of the offences as criteria to define their seriousness are regularly mentioned by the EU institutions[214]. With regards to Article 83(2) TFEU, the rules on the definition of offences and levels of penalty would increase deterrence, and would compensate for Member States' deficiencies in the enforcement of EU policies[215]. The decision on criminalisation should follow a two-step test[216]. Firstly, impact assessments appraise the necessity and proportionality of a measure by looking at: the effectiveness of Member States' sanction regimes; and the specificities of the policy area concerned. Should the need for criminal law measures at EU level be demonstrated, the issue arises as to what kind of measure to adopt. Clear factual evidence about the nature and the effect of the crime in question should be adduced. As the minimum rules referred to in Article 83 TFEU have no direct effect on citizens, the principle of legal certainty requires that EU law state clearly the result to be achieved. Furthermore, the use of sanctions other than imprisonment should be considered.

Both the *pre-* and *post-* Lisbon EU's approach to penalties (and imprisonment as the centre of gravity thereof) focuses on particularly sensitive areas of crime, and on the implementation of important EU extra-criminal policies. Deterrence is the main driver in the Union's action in this area. The use of concepts such as effectiveness and dissuasiveness is consistent with the deterrence-oriented approach to (custodial) penalties in EU law[217]: "The efficiency-driven EU criminal policy clearly represents utilitarian philosophy [for inducing members of the community to abide by the law] but from an integration-oriented approach"[218]. To this end, the dissuasiveness of criminal penalties should result in higher effectiveness of (compliance with) EU law. However, scholars have criticised the *effectiveness* requirement of Article 83(2) TFEU as an unsuitable orienting criterion for EU competences in criminal law, since it would fail to take into account other enforcement mechanisms under Union law and national law[219].

All in all, the measures of secondary law imposing on Member States an obligation to punish certain conducts with variable terms of deprivation of liberty rests on a number of reasons. Firstly, there is the need to reduce differences between Member State laws, with the view to preventing potential offenders from exploiting free movement and choosing the legal forum more favourable to their criminal activities. Secondly, penalties that are different and too low make existing law insufficiently

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[211] COM(2011) 573 final, para 1. For critical remarks on the risks of 'criminal populism', see E Herlin-Karnell, 'Is the Citizen driving the EU's Criminal Law Agenda?' in M Dougan, E Spaventa and N Shuibhne (eds), *Empowerment* and *Disempowerment of the European Citizen* (Oxford, Hart Publishing, 2012), pp. 19 onwards.

[212] V Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust* and *the Transformation of Justice in Europe* (Oxford, Hart Publishing, 2016).

[213] See for instance V Mitsilegas, ibid; S Miandtinen, 'Implied ancillary criminal law compandence after Lisbon' (2013) 3(2) *European Criminal Law Review*, pp. 194–219.

[214] Paoli and others, n 6 above, p. 280.

[215] COM(2011) 573 final, para 1–3.

[216] Ibid, pp. 7 onwards.

[217] S Melander, 'Effectiveness in EU criminal law and its effects on the general part of criminal law' (2014) 5(3) *New Journal of European Criminal Law*, pp. 274–300.

[218] M Huomo-Kandtunen, 'EU criminal policy at a crossroads bandween effectiveness and traditional restraints for the use of criminal law' (2014) 5(3) *New Journal of European Criminal Law,* pp. 314 onwards.

[219] E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, (Oxford, Hart Publishing, 2012), pp. 57–65.

deterrent and effective. Thirdly, approximation is meant to facilitate mutual recognition in criminal matters.

As for the rationale behind imprisonment, the overriding reason lies in the importance of addressing state laws' differences, and to contribute to the development of efficient judicial and law enforcement cooperation against crime. Not surprisingly, the accent is heavily on (general and specific) prevention. Imprisonment aims to increase compliance with the law[220], and has a strong deterrent effect. Occasionally, general prevention is flanked by the retributive element[221].

Furthermore, the use the minimum-maximum criterion as a method of approximation of the levels of penalty reveals the pragmatic nature of the EU approach to deprivation of liberty in substantive criminal law: facilitating judicial cooperation between Member States. Judicial cooperation and mutual recognition in the EU requires that the offence behind the request of cooperation be punishable by the law of the issuing Member State with a custodial sentence or a detention order for a maximum period of at least 12 months. The minimum-maximum criterion seems, to a degree, the *fil rouge* which ties substantive to procedural criminal laws at EU level. Questions can be raised, however, as to the soundness of the use of imprisonment and the method of approximation of penalties.

d. Conclusions and recommendations

The legal bases for criminalisation in the Treaties crystallise the two main trajectories followed by legal integration in this area over the decades: in one case, there is the focus on the fight against major crime; in the other one, the objective is to support the effective implementation of EU law and policies through criminal law.

EU law instruments of substantive criminal law approximate the definition of offences and the level of penalties, with the view to reducing legal differences across the Union and, by so doing, preventing the arising of 'safe havens' for potential offenders. The need to avoid the exploitation of free movement explains not only criminalisation per se, but also the use of imprisonment as the EU legislature's preferred type of punishment. Even more so, the minimum-maximum criterion ties the approximation in substantive criminal law to cross-border law enforcement.

The use of non-custodial penalties and the criteria for approximation are two key aspects in the EU's approach to punishment that this report chapter identifies as worth re-assessing. While both link closely to political and legal sensitivities of Member States, and hence particularly difficult to tackle, launching a debate on these issues is essential to make any significant progress in this area.

2. Judicial cooperation in criminal matters

Judicial cooperation in criminal matters is the area of most important development, as regards the EU's intervention in the area of prison conditions have developed the most. This area refers, in particular, to legislation adopted – or adoptable in the future – on the basis of Article 82 TFEU (and its corresponding version in previous Treaties). In such a category of measures, and the interpretation thereof by the EU Court of Justice (ECJ or Court of Justice), we must distinguish between two sub-sets of instruments. On the one hand, there are measures of judicial cooperation *stricto sensu*, enacted pursuant to Article 82(1) TFEU. These include e.g. the European Arrest Warrant Framework Decision (EAW FD)[222]. On the other, there are the directives approximating aspects of certain procedural

[220] See in particular Directive 2008/99/EC, recital 3 and Directive 2009/52/EC, recital 21.

[221] The randribution element may be used in a generic way, where the EU instrument requires punishment of more serious violations with imprisonment. This is especially the case of the first FDs enacted, such as FD 2001/413/JHA. Otherwise, the reference may be specifiv. Think of all those instruments providing for aggravated penalties where the offence is committed in the context of a criminal organisation, or where the crime is conducted on a large scale, affecting a significant number of persons, or it causes serious damage (see eg Directive 2013/40/EU, recital 13). See also, in relation to hate crime, COM(2021) 777 final, p. 8.

[222] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures bandween Member States, [2002] OJ L 190/1, 13.6.2002.

safeguards in criminal proceedings passed on the basis of Article 82(2)(b) TFEU, such as Directive 2012/13/EU on the right to information in criminal proceedings[223]. In most cases, such directives also establish rules applicable to European Arrest Warrant (EAW) procedures. While some of these directives feature certain procedural rights protecting a person deprived of liberty, they are not concerned with a prisoner's access to justice or their lawyer with the view to challenging the illegality of their material detention conditions. The lack of existing legal instruments on this aspect is without prejudice to the potential relevance of Article 82(2)(b) TFEU. To the contrary, there has been extensive discussion as to whether that Treaty provision could serve as a legal basis to establish common rules on detention conditions and, if so, to what extent[224].. An implicit answer to that question has recently been given by the European Commission with the publication of a recommendation on detention conditions and pre-trial detention[225]. The initiative reveals the Commission's awareness that Member States are opposed, at least for the time being, to any stronger EU's initiatives on this subject.

It is, instead, in the area of judicial cooperation that the EU has engaged more prominently with issues of poor detention conditions, systemic deficiencies and prison overcrowding. In terms of 'hard law', such an intervention has materialised exclusively – so far – into the case law of Court of Justice[226]. More specifically, the judicial development has concerned questions on the possibility to refuse the execution of an EAW because of the risk that the person concerned will be detained in inhumane detention conditions in the issuing state following the surrender. Three other Framework Decision (FDs) are relevant to this report, even in the absence of any jurisprudential developments thereon: the FD on transfer of prisoners[227],; the FD on probation measures[228], the FD on pre-trial measures alternative to detention[229].

This section is organised as follows. Firstly, the relevant case law on the EAW is presented and discussed. Secondly, the significance of the other FDs is addressed. Thirdly, the issue of the legal basis is dealt with.

a. Systemic deficiencies and the European Arrest Warrant: The approach of the Court of Justice

The Court has developed its approach to systemic deficiencies and detention conditions in the context of the EAW. In particular, the Court has devised a two-step test in reaction to concerns that, once surrendered to the issuing State, the person will be detained in inhumane conditions and therefore in violation of Article 4 of the EU Charter of Fundamental Rights (CFR). This case law-based exception to execution of an EAW was created through an interpretation of Article 1(3) EAW FD, which stipulates that nothing in that measure affects the Member States' obligation to comply with fundamental rights. In what has become a pattern in the ECJ's reasoning, the role for systemic violations in the context of the two-step test is usually addressed after a reminder of the structural importance of the EAW, mutual recognition, and mutual trust, to achieve a EU's fundamental

[223] Directive 2012/13/EU of the European Parliament and of the Council of 1 June 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1, 1.6.2012.
[224] See section 3.b. below.
[225] C(2022) 8987 final.
[226] See Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru*, EU:C:2016:198.
[227] Council Framework Decision 2008/909/JHA of 5 December 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27, 5.12.2008.
[228] Council Framework Decision 2008/947/JHA of 16 December 2008 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 [2008] OJ L 337/102, 16.12.2008.
[229] Council Framework Decision 2009/829/JHA of 11 November 2009 on the application, bandween Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional *detention*, [2009] OJ L 294/20, 11.11.2009.

objective: the creation and preservation of an area without internal frontiers[230]. Articles 4 CFR is also directly linked to human dignity[231].

The two-step test works as follows. Where the executing authority has objective, reliable, specific and properly updated evidence showing that there are deficiencies, which may be "*systemic or generalised, or which may affect certain groups of people, or which may affect certain place of detention, with respect to detention conditions in the issuing Member State*"[232], the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4[233]. For those purposes, the executing authority must, pursuant to Article 15(2) EAW FD, request that the issuing State provide supplementary information. The decision on the surrender must be postponed until supplementary information is obtained, allowing the executing authority to exclude the risk of inhumane treatment. Should that risk not be discounted within a reasonable timeframe, the executing authority must to decide whether the surrender procedure should be brought to an end. Meanwhile, the person concerned should be held in custody only in so far as the duration of the detention is not excessive, on the basis of the requirement of proportionality laid down in Article 52(1) of the Charter[234].

As for the meaning of "systemic deficiencies", the Court does not directly engage with the substance thereof. The ECJ provides the executing authority with guidance about the required qualities of the information used to establish that the deficiencies are systemic in nature. The information must be objective, reliable, specific and properly updated[235]. However, the Court 'outsources' the definition of systemic deficiencies by referring to a non-exhaustive list of sources that can be relied on by the executing authority: judgments of international courts, such as the ECtHR, judgments of courts of the issuing State, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN[236]. It is not unconceivable that different sources come to different conclusions in a specific case, as regards the existence of systemic deficiencies. In that case, the Court would probably state that a conflict between information should be resolved in favour of the issuing State and pursutant to the principle of mutual trust. Inconsistency between sources, however, would surely require a concrete assessment of a series of variables[237] and thus incentivise judicial subsidiarity towards national courts. Another important question relates to the "weight" attached to a source that does possess the qualities mentioned above. A source of such a kind which contains relevant information but is not directly related to the person's situation *may* be taken into account by the executing authority to assess the existence of those deficiencies. However, it would not suffice on its own to establish that systemic deficiencies exist[238].

Regardless of what the sources for the assessment are, the executing authority must consider whether a violation of Article 4 CFR might occur regard being had to the standard of protection of the fundamental right concerned[239]. namely, the standard set by EU law. What are these standards, however, since there has been no harmonisation so far?

Firstly, in the absence of common rules of EU law on the subject matter, the risk of a violation of Article 4 CFR following surrender must be assessed on the basis of the criteria established by the

[230] See, among many, Joined Cases C-562/21 PPU and C-563/21 PPU, *X* and *Y*, para 40.
[231] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru*, in particular paras 85 and 90; Joined Cases C-562/21 PPU and C-563/21 PPU, *X* and *Y*, EU:C:2022:100, para 45.
[232] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru*, para 104.
[233] Ibib, para 94.
[234] Ibid, para 101.
[235] Ibid, para 89.
[236] *Ibid.*
[237] For example, their times of publication, their context and scope.
[238] Case C-158/21, *Puig Gordi*, EU:C:2023:57, para 126.
[239] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi* and *Căldăraru*, para 88.

ECtHR in the interpretation of Article 3 ECHR[240]. In order for a violation of Article 4 CFR to occur, a minimum level of severity is required which depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim[241]. There is a strong presumption of a violation of that prohibition, when the personal space available to a detainee is below $3m^2$ in multi-occupancy accommodation[242]. The presumption can be rebutted only if: the reductions in space are short, occasional and minor; such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the person's detention[243]. In the assessment of detention conditions, the space factor must be considered jointly with other aspects such as access to outdoor exercise, natural light or air, ventilation, room temperature, privacy in the use of the toilet, basic sanitary and hygienic requirements[244]. These additional factors must be taken into account even if the personal space in multi-occupancy prison accommodation exceeds $4m^2$ of personal space. The calculation of that personal space must include the space occupied by furniture, with the detainees still being able to move around normally within the cell[245]. In setting those standards, the Court of Justice explicitly relies on the criteria identified by the ECtHR, and particularly the *Mursic* judgment[246].

The risk of inhumane treatment might also arise in relation to detention in a facility intended to last only for the duration of the surrender procedure, before transfer to where detention will be actually spent. While the length of a detention period may be a relevant factor in assessing the gravity of the treatment[247], an overall evaluation of all the factors involved must be carried out. A period of a few days, spent in a detention space below $3m^2$, might be considered as a short period. The same may not hold true for a period of around 20 days, especially if that period may be extended in the event of undefined circumstancesn[248]. In general, there cannot be any automatism between the brevity of detention and the discount of the risk of inhumane treatment.

Against that background, a Member State may as well establish internal standards that are higher than those laid down by the ECtHR. However, that Member State can only make the execution of an EAW subject to compliance, by the issuing State, with the standards set by the ECtHR, and not with its own national law. A different interpretation would undermine the principle of mutual trust and mutual recognition, and therefore compromise the efficacy of the EAW FD[249]. With this interpretation, in an area where there has been no harmonisation at all, the Court becomes legislator on detention conditions – at least, as far as the execution of EAWs is concerned. One might say that this is merely EU law at work in the context of criminal law, with binding standards imposed on Member States *only* in cross-border situations. The constraint brought about by the Court's interpretation, however, are particularly striking when considering that the legal anchor for such an interpretation is a provision as generic as Article 1(3) EAW FD. To an extent, the reference to mutual trust is a smokescreen. When put in the wider context of the ECJ's case law in the field, it is clear that the Court's interpretation aims to deprive potential offenders of the choice of forum. An objective, this one, normally pursued by legislative approximation rather than judicial interpretation.

In the second step of test, the executing State must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subject to inhuman

[240] Case C-128/18, *Dumitru-Tudor Dorobantu*, EU:C:2019:857, para 71.
[241] C-220/18 PPU, *ML*, EU:C:2018:589, para 91.
[242] Ibid, para 92.
[243] Ibid, para 93.
[244] Case C-128/18, *Dumitru-Tudor Dorobantu*, paras 75-76.
[245] Ibid, para 77.
[246] ECtHR, *Muršić v Croatia*, App no 7334/13, 20 October 2016.
[247] C-220/18 PPU, *ML*, para 97.
[248] C-220/18 PPU, *ML*, para 99.
[249] Case C-128/18, *Dumitru-Tudor Dorobantu*, paras 77-79.

or degrading treatment in the issuing State[250]. The assessment must concern: the conditions of detention in the *prisons* (plural) in which, according to the information available, the person is likely to be detained, including on a temporary or transitional basis; the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 CFR[251]. Therefore, the assessment may not concern "the general conditions of detention in *all* the prisons in the issuing Member State in which the individual concerned *might* be detained" (emphasis added)[252]. This can prove problematic: focusing only on the specific prisons even where the issuing State is experiencing systemic deficiencies means that, once surrendered, the person might still end up detained in degrading conditions, in a facility that was not amongst those that were deemed likely to be used at the time of the risk-assessment[253]. When deciding about surrender, the finding that a real risk exists cannot be weighed against the efficacy of judicial cooperation in criminal matters and the principles of mutual trust and recognition[254].

The Court also states that "*The executing […] authority must […] rely on information […] on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies*". This might be read as meaning that the information relied on should allow the executing authority to acquire an idea of the bigger picture concerning detention conditions in the issuing State. The word *prevailing* would thus define the size of the assessment field. There would be no requirement that inhuman detention conditions be *prevailing* in the issuing State. This interpretation would be consistent with the Court's next step in the reasoning: the information need not show that the deficiencies are *systemic or generalised*, since they can also concern certain places of detention or groups of people[255]. The question arises as to how literally the instruction to use information on detention conditions *prevailing* in the issuing State should be followed: depending on the sources available, it might be hard to perform that task within the deadline for execution set in the EAW FD[256].

b. Actual and potential challenges to the execution of an European Arrest Warrant beyond inhuman treatment

The risk of degrading and inhumane treatment caused by poor detention conditions remains the main reason behind challenges to the execution of an EAW based on concerns related to the fundamental rights of prisoners. However, both the practice and the literature have shown that other important rights might be used as well for those purposes. Questions about the execution of an EAW for prosecution of a person in charge as a sole custodian of a minor EU citizen might also materialise[257]. A question recently addressed by the ECJ focused on the possibility to refuse the execution of an EAW on health grounds, in light of Articles 3 (right to physical integrity), 4 and 35 (right to health) CFR[258]. The case concerned a EAW issued by Croatian authorities with the view to prosecuting

[250] Case C-220/18 PPU, *ML*, para 62.
[251] Ibid, para 103.
[252] Ibid, para 78.
[253] See in this sense A. Weyembergh & L Pinelli, '*Detention* Conditions in the Issuing Member state as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead', *European criminal law review*, (2022)12 (1), p. 40.
[254] Case C-128/18, *Dumitru-Tudor Dorobantu*, para 84.
[255] It is true that in both cases that followed *Căldăraru*, the conclusions start with 'when the executing judicial authority has […] information showing there to be systemic or generalised deficiencies in the conditions of *detention* in the prisons of the issuing Member state'. However, the reference to the systemic deficiencies (alone) can be arguably explained by the fact that, in those two subsequent cases, the executing authority had indeed information of that kind and therefore mentioning the *Căldăraru* alternatives (groups of people or places of *detention*) would have been redundant.
[256] Which is why, presumably, the Court refers to the suspension of execution as a first step in the real risk-assessment process, coupled with the obligation to check that the prolonged period of *detention* is compliant with the principle of proportionality.
[257] The reference to prosecution specifically is due to the fact that Article 4(6) EAW FD features a ground of non-execution of EAWs against a person who is a national, a resident or staying in the executing State, as long as the latter undertakes to enforce the penalty.
[258] Case 699/21, *E. D. L. (Motif de refus fondé sur la maladie)*, EU:C:2023:295.

E.D.L., charged with possession of drugs for distribution and sale thereof. A psychiatric examination, ordered by the court with jurisdiction over the proceedings[259], revealed that E.D.L. suffered from psychotic disorder requiring treatment, as well as a high suicide risk associated with possible imprisonment. Article 23(4) EAW FD allows the executing authority to exceptionally postpone the surrender but only on a temporary basis. However, this would not be suitable in a case of serious chronic medical conditions of an indefinite nature. A postponement *sine die* would prevent prosecution, and the situation of perpetual uncertainty might worsen E.D.L.'s conditions.

The fight against impunity has emerged as a fundamental objective orienting the interpretation of the Court in different areas[260]. However, as the Court had already found in previous cases, the executing authority cannot weigh the finding of a real risk of inhuman treatment against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition[261]. The *E.D.L.* ruling is particularly important because, for the first time, the Court recognised that the execution of an EAW could be refused in the absence of systemic deficiencies - and as long as the risk for the person cannot be ruled out within a reasonable period of time[262]. Secondly, it shows that other avenues of protection of detainee's rights in the context of EU law enforcement cooperation beyond poor detention conditions exist.

c. *Unlawful detention conditions beyond Article 4 of the Charter of Fundamental Rights ?*

Detention conditions are key to EU judicial cooperation in criminal matters, which in turn is based on the interaction between different sets of rules. The establishment of a common framework on procedural rights aims to facilitate the recognition and the transfer of judicial decisions and people – as Article 82 TFEU itself stipulates. Such a system is built on the principle of mutual trust, amounting to the presumption that Member States comply with fundamental rights – unless *exceptional circumstances* materialise. The case-law on the EAW has brought to the fore poor detention conditions as a major issue, but the two-step test has been used exclusively in relation to the prohibition of inhumane and degrading treatment[263]. That test, however, fails to take into consideration situations that clearly result in arbitrary detention without necessarily reaching the threshold required by Article 4 CFR.

The ECtHR and the ECJ have held on many occasions that a breach of Article 3 ECHR requires a minimum level of severity. The assessment of this level of severity depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim[264]. This means that a situation of overcrowding, for example, would not always amount to a violation of Article 3 ECHR in spite of being obviously not allowed by law.

What about, then, situations where a person is being detained in conditions that are poor enough to be unlawful because they breach the established legal standards, but not poor enough to meet the threshold of Article 4 CFREU? Article 6 CFR – mirroring Article 5 ECHR – states that deprivation of liberty must occur following the procedures established by law. This paper argues the following:

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[259] This is the Milan Court of Appeal, which noted that, just like the EAW FD, the Italian law implementing the EAW makes no reference to the possibility of refusing execution on grounds of health. Therefore, the Appeal Court brought an action to dandermine the constitutionality of the Italian Law in light of the right to health as protected by the Italian Constitution.

[260] See for a comprehensive perspective on the subject, L Marin and S Montaldo (eds), *The Fight Against Impunity in EU Law* (Oxford, Hart Publishing, 2020).

[261] See Case C-128/18, *Dumitru-Tudor Dorobantu*, EU:C:2019:857, para 84.

[262] Case 699/21, *E. D. L.*, para 55.

[263] That is, as far as *detention* conditions are concerned. As known, Article 47 CFR has also been a fundamental provision for the development of the Court's case law. See C-216/18 PPU, *LM*, EU:C:2018:586 and following case law.

[264] See *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR 2001-III, and *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII; *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II; *Alver v. Estonia*, no. 64812/01, 8 November 2005

the requirement that deprivation of liberty be carried out according to the procedures established by law means – *inter alia* – that it must be enforced on the basis of clear, foreseeable and accessible rules. If a person is being detained in conditions that breach the established legal standards, the question arises as to whether they are, in fact, being detained *according to the procedures established by law* and therefore in compliance with the right to liberty. At present, there is no test in EU law – both legislatively and judicially – allowing these scenarios to be addressed.

Could the right to liberty so understood be used to challenge the execution of an EAW, via the application of the two-step test? In other words, could 'ordinarily' poor detention conditions be considered *exceptional circumstances*, therefore allowing for non-execution of a request for judicial cooperation? It goes without saying that possible violations of the absolute prohibition enshrined in Article 4 CFREU constitute exceptional circumstances. Article 6 CFR enshrines a relative right, which can be restricted. The ECJ has already found that the executing authority must refrain from executing an EAW where possible violations of a relative right – to a fair trial – are at stake[265]. The Court, in that case law, has made a link between the level of protection of that right in a Member State, on the one hand, and that Member State's respect for the EU values under Article 2 TEU and the rule of law specifically, on the other[266].

Detention conditions are expression of the procedures whereby detention is enforced. If those conditions are not in line with what the law prescribes, they are in violation of an essential requirement of the right to liberty. Overcrowding or non-compliance with hygienic standards, for example, create a situation of arbitrariness, even though they do not reach – alone or in conjunction with other circumstances – the threshold of Article 3 ECHR. Unlawful detention conditions, regardless of how serious the violation, thus undermine the essence of the right to liberty, the most basic stronghold protecting the individual against abuses of the public powers. Accepting the possibility to execute the transfer of a person to a EU State where the person is at serious risk – within the meaning of the two-step test – of being detained in unlawful detention conditions would mean tolerating an attack against a centrepiece of the rule of law.

d. Beyond the European Arrest Warrant

Beyond the EAW, there are three FDs that are relevant to prisoners' rights. These are the FD on: mutual recognition of judgments imposing custodial penalties – or transfer of prisoners[267], mutual recognition of judgments imposing penalties alternative to deprivation of liberty – or probation measures;[268] mutual recognition of pre-trial measures alternatives to detention (European Supervision Order or ESO) FD[269].

The three FDs provide, just like Article 1(3) EAW FD, a general 'fundamental rights compliance' clause[270]. Compared to the EAW, however, the dynamic of cooperation established by these FDs is reversed: here, the issuing EU State seeking recognition of a decision is the one that, upon recognition, will transfer the person to the executing State (unless the person is already there). The executing State is the one that, by recognising the decision, undertakes to enforce the custodial or non-custodial penalty or measure (depending on the situation and the FD relied on)[271]. This feature has resulted in

[265] Case C-216/18 PPU, *LM*.
[266] See the Commission proposal http://europa.eu/rapid/press-release_IP-17-5367_en.htm
[267] Council Framework Decision 2008/909.
[268] Council Framework Decision 2008/947.
[269] Council Framework Decision 2009/829.
[270] Article 3(4), Council Framework Decision 2008/909; Article 5, Council Framework Decision 2009/829; Article 1(4), Council Framework Decision 2008/947.
[271] For example, an Estonian national is arrested in Spain on suspicion of having committed a crime. If the person is not resident in Spain, they are likely to be placed in pre-trial *detention* as there would be no other mechanisms of monitoring them effectively. In principle, Spanish authorities could issue a European Supervision Order, addressed to Estonian authorities (or the authorities of the EU state where the person lives). Upon recognition of that order, the person would be transfer to the EU state where they could be monitored without being held in custody, while proceedings go ahead in Estonia.

significant under-use especially of the FD on pre-trial measures alternative to detention. However, these instruments are extremely important, and particularly the FDs on probation measures and the ESO, as they would facilitate the use of measures alternatives to detention while ensuring that justice runs its course.

In the absence of a legislative amendment, are there interpretative avenues that would allow a greater use of such FDs, especially in circumstances where systemic deficiencies as regards material conditions of detention exist in a Member State? Could the risk of a breach of legal standards be used to foster – or force – cooperation? As the law stands at present, the question seems to be mostly hypothetical. Take, however, the following scenario. The person is detained on remand in the issuing State, and recognition by – and transfer to – the State of residence/nationality would allow proper supervision without deprivation of liberty while proceedings continue in the issuing State. The EU State supposed to activate cooperation is also the one that would have to forfeit control over the person.

Recourse to the FDs on probation measures and on the ESO might be important especially in cases where *not* serving the alternative sentence (or the supervision measure) in the country of residence or nationality might cause a risk of irreparable harm due to, for example, prison overcrowding in the issuing State. The FDs do not explicitly oblige a Member State to forward a judgment/decision for recognition – and subsequent transfer of the person – and even less so on fundamental rights grounds.

However, neither does the EAW FD explicitly allow for refusal of execution for those reasons: the Court used Article 1(3) EAW FD as the basis to create the two-step test. Considering that an equivalent clause is featured in these FDs as well, a symmetrical version of the EAW test of non-execution would find no strong legal objections[272]. The three FDs on custodial and non-custodial penalties, and pre-trial measures alternative to detention, stipulate that the issuing State *may* forward a judgment/certificate upon request of the person concerned, subject to the consent of the executing State[273]. Those States are also bound by the EU Charter of Fundamental Rights. If either State rejected a request of transfer, made pursuant to the FD on the basis of a real risk of violation of *e.g.* Article 4 CFR, and that violation occurred following the States' refusal to cooperate, it is difficult to see how they would *not* be in breach. Obviously, such a symmetrical test would only be applicable in exceptional circumstances. Furthermore, it would have the advantage of fostering – rather than undermine – mutual trust. It would potentially heighten the level of compliance with EU fundamental rights standards – or at least reducing the risk of violating them. In a reverse dynamic to that usually associated with mutual trust in EU criminal law, it would force EU States to trust each other; this time, that trust will be about – primarily – enforcement and monitoring.

3. The debate about approximation

a. The state of the art

As early as 2011, the Commission raised a series of issues related to the disproportionate use of pre-trial detention in Member States and pondered the adoption of minimum rules in this area to improve mutual trust[274]. As shown in the literature, however, most Member States rejected the claim that issues of pre-trial detention jeopardised mutual trust, with fourteen of them opposing the EU taking any actions in this regard[275]. Besides the political reasons for opposing such an initiative due to the possible impact on certain Member States' criminal justice systems, important legal issues touching on the very competence of the EU in this realm were also mentioned. The scepticism related to the

[272] How willing national authorities might be to resort to such an interprandation is a different question.
[273] Article 5(1) and (2), Council Framework Decision 2008/947; Article 4(5), Council Framework Decision 2009/909; Article 9(2) and (3), Council Framework Decision 2009/829.
[274] COM(2011) 327 final.
[275] T Coventry, 'Prandrial *Detention*: Assessing European Union Compandence under Article 82(2) TFEU', (2017) 8(1) *New Journal of European Criminal Law*, p. 43.

potential tension between a legislative initiative, the principle of subsidiarity and the wording of Article 83(2) TFEU, which authorised the adoption of minimum rules (1) to the extent necessary to facilitate mutual recognition (2) in criminal matters (3) having a cross-border dimension[276]. As a matter of fact, the Commission has not adopted yet any legislative proposals on the subject matter. However, awareness about the relevance of detention conditions in the EU has only grown since then. The Council adopted conclusions on use of alternative measure to detention as a way to address prison overcrowding[277], and on the use of non-custodial more generally[278]. The European Parliament has also issued numerous resolutions on detention conditions in the EU and Member States' prison systems[279], and recently published a comprehensive study on prison and detention conditions in the EU[280]. The Fundamental Rights Agency has launched a publicly accessible database on detention conditions in 2019.

In December 2022, the Commission adopted a Recommendation that provides Member States with guidance on (a) measures to strengthen the rights of persons in pre-trial detention and (b) standards of material detention conditions[281]. The definition of pre-trial detention espoused by the Recommendation risks leaving a gap of protection, as it is stated that it "should not include the initial deprivation of liberty by a police or law enforcement officer (or by anyone else so authorised to act) for the purposes of questioning or securing the suspect or accused person until a decision on pre-trial detention has been made"[282]. On the other hand, both pre- and post-conviction detainees falls under the scope of the recommendation. The Recommendation states widely accepted principles, such as: the use of detention as a last resort; the requirement that competent authorities bear the burden of proof in demonstrating the need for deprivation of liberty in the pre-trial phase;[283] the existence of a reasonable suspicion behind the decision to detain, which should be duly reasoned and justified as well as periodically reviewed following an adversarial oral hearing with the persons' legal representative[284].

The second *volet* of the Recommendation concerns standards on material detention conditions, including on the minimum cell space, hygiene and sanitary conditions, access to health care and prevention of violence and ill-treatment[285]. Importantly, the document also refers to a series of procedural safeguards that Member States should provide in relation to detention conditions. These home in on, inter alia, the facilitation of regular inspections into prison by independent bodies, as well as the granting of access to those facilities for national and European members of parliament[286]. In particular, detainees should have *effective* access to a lawyer and the case file. They should be "clearly informed of the rules applicable in their specific detention facility", and should have *effective* access to a procedure enabling to officially challenge their detention conditions. Complaints should be handled promptly and diligently by an independent authority or tribunal empowered[287]. Member States should inform the Commission on their follow-up to this Recommendation within 18 months of its adoption. The Commission should submit a report to the European Parliament and to the Council within 24 months of its adoption[288]. The Recommendation is a helpful and welcome step forward

[276] While authors such as Peers embrace a more flexible understanding of the conditions laid down in the founding treaties, Coventry expresses serious doubts about such an interprandation and, in general, about the EU's compandence to act in this area. See S Peers, *EU Justice* and *Home Affairs Law* (3rd edn, Oxford, Oxford University Press, 2011), p. 670.
[277] 14540/18.
[278] OJ C 422, 16.12.2019, p. 9
[279] See, inter alia, (2019/2207(INI)) as adopted on 20 January 2021; OJ C 168 E, 14.6.2013, p. 82; OJ C 285, 29.8.2017, p. 135; OJ C 346, 27.9.2018, p. 94.
[280] PE 741.374 - February 2023.
[281] C(2022) 8987 final.
[282] C(2022) 8987 final, p.8.
[283] C(2022) 8987 final, p. 9.
[284] C(2022) 8987 final, pp. 10 ff.
[285] C(2022) 8987 final, pp. 12-15.
[286] C(2022) 8987 final, p. 18.
[287] C(2022) 8987 final, p. 16.
[288] C(2022) 8987 final, p.21.

taken by the EU on the subject matter. However, it inevitably falls short of the legal force that might be required to occasion a paradigm shift in the way detention conditions are approached by Member States.

b. The Case for Union's Competence

Over recent years, a debate has flourished with regard to the possible existence of a legal basis for EU's action in the area of detention conditions and prisoners' rights[289]. As mentioned above, it is argued that detention conditions must be part and parcel of the requirement that detention be enforced according to the procedures established by law; and, pursuant to clear, accessible and foreseeable rules. Furthermore, issues of detention conditions are inextricably linked to the rights of the person deprived of liberty and the functioning of prisons. The 2022 Recommendation emphasises the importance that prisoners be informed of the rules applicable in the facility they are being held. The rules applied -and applicable- in prisons logically determine what the conditions therein are supposed to be. They are, therefore, part of the procedures established by law, and must be complied with. By the same token, relevant legal rules lacking clarity, accessibility and foreseeability, or conditions that do not live up to the standards laid down in the law, would create a situation of arbitrariness and therefore undermine the essence of the right to liberty. Such a scenario would, in turn, constitute an *exceptional circumstance* capable of halting – or forcing – EU judicial cooperation in criminal matters. Endorsing a system where there are substantive, objective and reliable evidence to believe that the person will be arbitrarily deprived of liberty would undermine one of the strongholds of the rule of law.

We have seen that detention conditions in EU law become particularly relevant to EU judicial cooperation in criminal matters, but also that decisive action on the part of the EU legislature has been relatively limited. The procedural rights Directives have been explicitly adopted with the view to increasing mutual trust as between Member States, which in turn is key to fostering the smooth operation of mutual recognition – and the intra-EU transfer of persons more broadly.

The main legal objection to the EU's action in this area has been centred on the lack of a suitable legal basis. To this end, Article 82(1) TFEU refers to the possibility of minimum harmonisation with regard to individual rights in *criminal procedure*. Firstly, such a concept should not be used interchangeably with that – narrower – of criminal proceedings. A systematic interpretation rests on the understanding of criminal procedure and criminal proceedings as two concentric circles, with the latter being entirely contained in the – broader – former one. The procedural rights Directives state the objective of establishing rights in criminal proceedings. They define their scope of application as *until the final judgment*. The coincidence between criminal proceedings and final judgment implies a broader scope for criminal procedure, which might be seen as including enforcement as well. Secondly, such a finding must be read in combination with the legal basis in EU procedural criminal law as laid down in Article 82(2)(b) TFEU. That provision confers upon the EU the power to adopt minimum rules on rights of individuals in *criminal procedure*. As the Treaty refers to individual rights, this article argues for the *proceduralisation* of detention conditions. Proceduralisation means understanding detention conditions as part of the 'procedures established by law' requirement under the right to liberty *and* as individual rights. A hypothetical proposal for a Directive on the subject matter should understand material detention conditions as individual rights, rather than as impersonal standards. These should be supported by the provision of a system of remedies in case of violations thereof.

Approximation of rules concerning detention conditions would undoubtedly pose political and legal challenges. Three main issues can be identified in relation to Article 82 TFEU. Firstly, detention conditions and penitentiary law more broadly may have different systemic "location" in the Member States criminal justice system: namely, be part of either substantive, procedural criminal law, or both. Member states could therefore object to considering detention conditions as part of *criminal*

[289] See, for a useful overview, the study for the EP PE 741.374 - February 2023, pp. 69 ff.

procedure. Secondly, an argument against approximation might be made on the basis of the intention of the masters of the Treaty. The *travaux préparatoires* of Article 82 TFEU show that legal basis seems meant to cover situations under Article 6 ECHR, rather than Article 5 ECHR.

These two objections might be overcome as follows. The establishment of an autonomous (EU-specific) concept of *criminal procedure* for what concerns detention conditions would facilitate the effectiveness of judicial cooperation and act as a trust-building measure. Such a step does not seem to exceed what is the existing state of (advanced) conceptual uniformity with regard to some aspects of criminal justice in the Union. Furthermore, going beyond – which does not mean inconsistently with – the original intention of the Treaty-makers would be a natural and necessary alignment with the EU-specific understanding of the right to liberty proposed here.

The third issue concerns the use of the so called "emergency break" under Article 83(3) TFEU. Pursuant to that provision, a Member State can request that a draft directive be referred to the European Council, if it considers that the proposal would affect fundamental aspects of its criminal justice system. The ordinary legislative procedure would be suspended. In case of consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Given the high sensitiveness of this topic and its proximity to one of the most intimate pockets of state sovereignty, a scenario where a proposed directive on detention conditions would be drown by one or more Member States is not unlikely to occur. Further challenges could be posed by national judiciaries, and constitutional courts especially. While acknowledging the political and legal difficulties stated above, the foregoing argument aims to establish a first step toward a legal debate concerning approximation of detention conditions at EU law level.

Furthermore, bringing detention conditions under the umbrella of EU would also entail an additional layer of monitoring, constituted by the oversight of the Court of Justice and the Commission's power under Article 258 TFEU for compliant Member States.

4. Conclusions

This paper has discussed the different ways in which EU institutions have engaged with issued related to detention conditions and prisoners' rights, particularly as regards systemic deficiencies. Firstly, it has shown that the EU legislature sees imprisonment as the centre of gravity to its approach to criminal penalties. The research highlighted the concerns raised not only by the ubiquitous nature of imprisonment in instruments of EU substantive criminal law, but also vis-à-vis the approximating criterion used by the Union. There is a need for an extensive debate on the impact of the minimum-maximum criterion on level of penalties at in Member States, as well as on the EU's use of alternative penalties. Detention conditions have come to the fore most prominently in the context of judicial cooperation in criminal matters. Systemic deficiencies in a Member State's prison system, jointly with the real risk of inhumane treatment for the person in the specific case, have emerged through the Court's case law as a legitimate ground for refusing execution of an EAW. In defining systemic deficiencies and degrading detention conditions, the ECJ has mostly referred to the approach taken by the ECtHR. The focus of the debate around poor detention conditions has been nearly exclusively on Article 4 CFR/Article 3 ECHR. As a result, the grey area represented by breaches of legal standards not amounting to degrading treatment has been completely neglected. This paper has tried to take this important issue outside the *zone d'ombre* in which it has been confined so far, and has made a case for bringing that grey area under the protection of the right to liberty. Relatedly, this research has proposed an approach to material detention conditions as individual rights, which links closely to the issue of EU's competence in this area. While the recent Commission's Recommendation is important in that it raises further awareness of the relevance of detention in the EU, it falls short of the legally-binding nature that might be required to occasion real change in this area.

Chapter 3. Statistical approach

1. Comparing prison overcrowding in Europe

a. Defining concepts

The concepts of prison overcrowding and prison inflation are often misunderstood. Inflation can increase the problem of overcrowding in prisons. It is important to distinguish between overcrowding and inflation in the number of detainees. For example, it is possible to imagine an increase in overcrowding with a constant number of detainees (i.e. no inflation): closure of dilapidated establishments, conversion of cells into workshops, etc.

Council of Europe experts define prison inflation as an increase in the number of inmates that is out of all proportion to the number of inhabitants[290]. Relative annual growth rates have been studied over a fairly long period. These data are analysed without reference to the number of places available in the establishments.

Overcrowding is expressed by calculating the prison density or occupancy rate, i.e. the ratio between the number of prisoners at a given time and the number of places available. Determining the number of places is a difficult concept, and calculating an overall index is of limited use.

Calculating the excess number of places is a supplementary measure that is obtained by adding the number of free places to the difference between the number of inmates and the number of places available[291]. Free places are those that can be reserved for certain categories of inmates (women, minors, for example) or those that are awaiting allocation due to a lack of staff. The calculation can be made simply by considering only those establishments where the occupancy rate is greater than 100.

Other indicators could be considered, given that a global approach is limited for assessing the overcrowding of establishments. These include the number of inmates per cell and the number of arrangements made due to a lack of beds (mattresses on the floor, etc.). The White Paper on prison overcrowding recommends calculating the average actual space available to prisoners and the daily time spent in cells[292].

b. The overall European situation

A comparative approach to the problem of prison population growth and overcrowding has been developed using Council of Europe statistics. The Council of Europe's Annual Penal Statistics (SPACE) are available from 1983 to 2022 for the countries of Western Europe (see Table 1 for some countries). They are compiled for 46 countries, which makes them difficult to analyse and to compare. Data production has evolved since its creation, and metadata provide useful information on data collection.

The CPT's data are at a different level because they are based on the establishments visited. The CPT refers to its findings in the establishments but also assesses the prison population rate in the State visited as a whole.

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[290] CMCE, Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, 30 September 1999, and report prepared with the assistance of A. Kuhn, P. V. Tournier and R. Walmsley, Legal References, 212 p.
[291] P. V. Tournier, "Demographic Analysis of the Penal System International: A Different Approach to Sentencing", in *Journal on Criminology*, vol 1, no 1, 2013, pp. 34-49.
[292] CDPC, White Paper on prison overcrowding (PC-CP (2015) 6 rev 7), 30 June 2016.

The same situation of overcrowding is observed to varying degrees in several member states:

Tab. 1: Prison overcrowding in Europe								
	Population (at 31/1/2022, in thousands)	Prison population	Prison capacity	Prison population rate (per 100,000 inhabitants)	Number of places (per 100,000 inhabitants)	Prison density (per 100 places)	Entry rate (per 100,000 inhabitants)	Average duration in months (based on stock and flows)
Germany	83 883 596	56 294	72 300	67	86	78	180	5
Austria	9 066 710	8 474	8 476	93	93	100	95	12
Belgium	11 668 278	10 960	9 567	94	82	115	152	7
Denmark	5 834 950	4 114	4 238	71	73	97	153	6
Spain	46 719 142	55 095	75 990	118	163	73	70	20
Finland	5 554 960	2 776	2 992	50	54	93	77	8
France	65 584 518	69 964	60 701	107	93	115	117	11
Greece	10 316 637	10 952	10 175	106	99	108	67	19
Hungary	9 606 259	18 619	18 713	194	195	99	216	11
Italy	60 262 770	54 372	50 862	90	84	107	61	18
Moldova	4 013 171	6 385	6 735	159	168	95	69	28
Norway	5 511 370	3 081	3 816	56	69	81	101	7
Netherlands	17 211 447	9 256	10 090	54	59	92	144	5
Poland	37 739 785	71 874	84 966	190	225	85	228	10
Portugal	10 140 570	11 588	12 673	114	125	91	45	31
Romania	19 031 335	23 010	18 620	121	98	124	63	23
England and Wales	59 788 501	79 092	81 292	132	136	97	184	9
Turkey	85 561 976	303 945	270 008	355	316	113	417	10,2
Ukraine	40 997 698	48 038	88 897	117	217	54	50	27,9
Average indices	-	-	-	*120*	*128*	*96*	*131*	*14*

Data from SPACE (Council of Europe)

However, international comparisons are complex. The size and composition of the prison population are the result of processes that include the frequency and seriousness of offences committed, behaviour that is penalised from one State to another and behaviour that is not (e.g. around drugs or legislation on foreigners), the effectiveness of the police services, the rigour of the law and its application by judges, policies on the enforcement of sentences (pardons, amnesties, conditional release, sentence reductions) and security.

Over the past 30 years, most Member States faced with the problem of overcrowding seem to have failed. But the situation is more nuanced, as we shall see. The European approach to prison issues is contained in documents drawn up through consultations and the work of experts from various countries, which are adopted by the Committee of Ministers of the Council of Europe.

At 31 January 2022[293], countries such as Germany, the Netherlands, Slovenia, Switzerland and the Nordic countries had remarkably low prison populations. The Scandinavian countries are always cited

[293] CoE, Council of Europe Annual Penal Statistics: Prison populations (SPACE I).

as an example, in many areas not just in terms of penal management, and one might think that there is a geographical or cultural specificity. However, countries such as Germany, the Netherlands, Spain and even the United Kingdom are also showing downward trends in their prison populations. Others, on the other hand, have seen an increase in 10 years, notably France, Hungary and Turkey. But as the authors of the SPACE 1 statistical report point out, to understand prison population rates in a given country, it is necessary to carry out a nuanced and comprehensive analysis of a wide variety of factors that can influence rates. These factors are interconnected and their influences are complex and multidimensional.

To measure the phenomenon of prison overcrowding, we have prison capacities in each country, but they are not always calculated on the same basis. In 2022, Belgium (115), Cyprus (119), France (115), Greece (108), Italy (107), Romania (124) and Turkey (113) will have the highest prison densities, i.e. the ratio between the number of prisoners and the number of places. These densities are overall and certainly mask even higher values depending on the type of establishment, as shown by the CPT's analyses, which are relevant at sub-national level. Thus, it is difficult to see correlations in table 1 due to the use of average data. High prison densities are correlated with high prison population rates, but not always. Class definitions[294] are taken from the SPACE source.

Tab. 2: Detention rate and density (31/12/2022)

Average prison population rate: 117,2%	**Average prison density: 84,4%**				
	Very high	**High**	**Average**	**Low**	**Very low**
Very high	-	Hungary	Poland	-	-
High	Romania	-	Portugal	-	-
Average	France	Greece	-	-	-
Low	Belgium	Italy	-	Bulgaria	-
Very low	-	-	-	-	-

As far as the length of sentences is concerned, the SPACE I survey reveals that several countries with high prison populations often have percentages of prisoners serving sentences of less than 6 months that are close to or below the European average (3.9%). For example, Turkey, the Czech Republic and Slovakia report percentages of around 4%. On the other hand, several countries with low prison populations tend to have higher percentages of prisoners serving sentences of less than 6 months. The Netherlands and Switzerland have 23% and 22% respectively, well above the European average.

Some countries that have limited the use of short sentences, i.e. less than 6 months (Austria, Germany, France, Greece and Portugal), suggest a backlash effect, with judges imposing harsher sentences. In the absence of a comprehensive policy, the abolition of short sentences carries a high risk of leading to longer sentences.

The length of sentences is obviously linked to the type of litigation. Across all countries, drug-related offences are the most common conviction among prisoners, accounting for 19% of the total prison population. Theft-related convictions are the second most common category, at 15%, followed closely by homicide, including attempted homicide, at 14%. Sexual offences (including rape), robbery, assault and battery make up the largest proportions, at 11%, 11% and 10% respectively.

[294] Very high (25% above the average); Average (between -5 and +5%); Low (between 5.1 and 25% below); Very low (below 25% to the average).

The authors of the 2022 SPACE report indicate that violent offences and drug offences account for two-thirds of the reasons why European prisoners serve firm sentences.

As far as final correlations are concerned, according to their analysis, systems with the shortest length of incarceration tend to have lower prison population rates, while those with longer sentences often have medium to high prison population rates.

It is difficult to analyse prison overcrowding and inflation in Europe with these data. Other elements would be necessary, such as crime-fighting priorities, public perceptions, existing sentencing practices, etc.

c. overview of the countries included in the research

Elements are taken from the Council of Europe's annual penal statistics (SPACE I) and from records following CPT visits.

The CPT's 2022 report on Belgium indicates that overcrowding remains a major (and long-standing) problem affecting the entire Belgian prison system, despite legislative initiatives to reduce the number of persons sent to prison and the time spent in prison, as well as the modernisation and expansion of the prison estate.Overcrowding is a very problematic issue in the Bulgarian prison system.In one of the prisons visited, inmates had less than 2 m² of living space and the vast majority of inmates (including almost all remand prisoners) in the three prisons visited in 2015 continued to have no access to organised out-of-cell activities.

In France, the CPT has noted (since 1991) that prisons are overcrowded to worrying levels, with occupancy rates in excess of 200% in some establishments.

In Greece, the 2021 report stresses that people are still being held in undignified conditions due to overcrowding, violence and a lack of activities.

In Italy, the CPT found that overcrowding was a problem: at the time of the visit in 2022, prisons were at 114% of their official capacity of 50,863 places, in a climate of violence and intimidation between inmates.

In Portugal, the CPT notes in 2019 that the prison population has decreased but that in three prisons visited overcrowding remains a crucial problem and vulnerable persons in these prisons were held with less than 3m² of living space each and locked in their cells for up to 23 hours a day.

Looking at trends since 2012 (Table 3), detention rates, i.e. the ratio between the number of prisoners and the general population, are falling in all countries between 2012 and 2019 (the year 2019 was chosen to avoid the impact of the one-off fall in prison populations due to the covid pandemic).

Tab. 3: Detention rate per 100,000 inhabitants

	2012	2019	2021	2022	2022/2021	2022/2012	2019/2012
Belgium	111,1	94,9	89,7	93,9	4,7	-15,5	-14,6
Bulgaria	135,2	106,7	101,9	93,3	-8,4	-31,0	-21,1
France	117,1	104,5	92,9	106,7	14,9	-8,9	-10,8
Greece	112,6	99	106,1	106,2	0,1	-5,7	-12,1
Hungary	177,1	169,5	179,7	193,8	7,8	9,4	-4,3
Italy	111,6	99,6	90	90,2	0,2	-19,2	-10,8

Poland	221,1	190,1	179,4	190,4	6,1	-13,9	-14,0
Portugal	129,1	125,2	110,8	114,3	3,2	-11,5	-3,0
Romania	158,7	106,6	113,5	120,9	6,5	-23,8	-32,8

However, these trends should be treated with caution. We know that for France they are distorted by a change in definition (from the incarcerated population to the detained population) between 2012 and 2019, resulting in a misleading drop of 15% between the two dates. On the other hand, the rates increase between 2021 and 2022, except in Bulgaria.

The detention rate is the result of two movements, i.e. the level of entries into detention and the average time spent in prison (Table 4). The detention rate is increasing and these two movements can go in opposite directions, i.e. an increased number of incarcerations but for a relatively short time. This is the case in Bulgaria and Poland in 2021. In Hungary, the number of incarcerations is high, as is the average length of detention. The average cost of detention per day is very low in these three countries. In Greece, Portugal, Italy and Romania, the number of people in prison is low, but the length of detention is very high (an average of 30 months in Portugal and an average length of pre-trial detention of 11.5 months).

Tab. 4: Flow and movement indicators (2022)

	Inflows (2021)	Entry rate	Average length of detention (in months)	Average length of pre-trial detention (in months)	Average cost per inmate per day (in euros)
Belgium	17 681	151,5	10	4,6	145,9
Bulgaria	13 106	191,5	5,8	-	13
France	76 934	117,3	10,4	3,6	126,7
Greece	6 868	66,6	19,5	10,7	-
Hungary	20 734	215,8	10,4	10	37
Italy	36 539	60,6	18	7,3	153
Poland	86 135	228,2	5,5	-	29,2
Portugal	4 551	44,9	29,9	11,5	57,3
Romania	11 952	62,8	25,9	2	37,9

The occupancy rate of establishments is represented by the number of prisoners in relation to the number of places (Table 5). The number of places is calculated in much the same way in the countries studied, i.e. on the basis of the surface area available per prisoner per m2, with the exception of Romania (4m2 according to an order from the Ministry of Justice). It is also difficult to know whether this is an operational or theoretical capacity. Nevertheless, at 31 January 2022, the rate was less than 100 prisoners per 100 places in Bulgaria, Hungary, Poland and Portugal. This is not entirely consistent with the CPT's findings. In Belgium, France and Romania, the average rate is well over 100.

Tab. 5: Indicators of prison conditions (2022)

	Number of inmates	Detention rate	Occupancy rate	Average inmates per cell	Average inmates per staff	Remand rate
Belgium	10 960	93,9	114,6	-	1,8	36,2
Bulgaria	6 386	93,3	67,6	2,7	2	16,6
France	69 964	106,7	115,3	1,3	2,4	27,6
Greece	10 952	106,2	107,6	3,9	3	23,7
Hungary	18 619	193,8	99,5	3,3	5,5	23,7
Italy	54 372	90,2	106,9	1,7	1,6	30,1

Poland	71 874	190,4	84,6	-	4,8	11,8
Portugal	11 588	114,3	91,4	-	2,8	18,5
Romania	23 010	120,9	123,6	-	3,1	11,8

The average number of inmates per cell on the same date is another indicator of the population of an establishment. However, it is not always available. The occupancy rate is below 100 in Bulgaria and Hungary, but the average number of prisoners per cell is 2.7 and 3.3 respectively, compared with 1.3 in France. The average number of prisoners per prison staff is also very high in Hungary (5.5) and Poland (4.8), and to a lesser extent in France, Portugal and Romania.

The proportion of remand prisoners on 31 January 2022 is very high (around 30%) in Belgium, Italy and France. It is low in Poland and Romania (11.8%).

The offences punishable by prison sentences vary greatly from one country to another (Table 6). A high proportion of homicides are observed in Romania and Italy (hence the long prison sentences). Drug offences are more common in Italy, Portugal and Greece. In France, the highest proportion is for violence against the person.

Tab. 6: Convicted prisoners by main offence* (2022)

%	Homicide	Injuries	Rape	Other sexual violence	Robbery with violence	Simple robbery	Financial crime	Drug trafficking	Terrorism	road traffic
Belgium	22,1	65,9	16,6	17,4		67,4	3,4	50,9	0,8	13,7
Bulgaria	14,5	2,9	3	2,5	13,4	24,4	5	12,8	0	15
France	9,1	20,8	8,4	3,6	5,6	14,8	3	12,7	0,5	4,9
Greece	9,4	1,6	2,8	1,7	15,3	14,7	3,1	23,1	2,2	0,9
Hungary	9	8,6	4	0,9	14	17,9	1,6	6,1	0	3
Italy	18,1	0,3	5,8	1,6	14,3	5	0,9	31,6	0,2	
Poland	6,6	4,7	2,6	1,9	10,5	23,2	0,7	4,3		9,4
Portugal	10	3,6	1,6	2,3	10,5	11,5	-	18,5	0	8,1
Romania	24,9	4,3	10,3	2,3	14,7	19,1	3,7	6,1	0,1	9,5

* Only Belgium takes multiple offences into account.

Convicts serving long sentences (5 years or more) account for more than half of those imprisoned in Belgium, Italy and Portugal (Table 7).

Tab. 7: Convicted prisoners by length of sentence (2022)

%	Less than a year	1 to 5 years	5 years and more	20 years and more	life imprisonment	Safety measures
Belgium	1,4	29,1	53,5	8,4	2,6	10,4
Bulgaria	27	42,4	27,6	2	3,4	-
France	17,3	50,1	31,2	5,8	0,9	-
Greece	-	-	-	-	10,1	-
Hungary	9	46,2	33,7	0,7	2,9	-
Italy	3,1	38,2	53,8	6,6	4,8	0,8
Poland	-	-	-	-	-	-
Portugal	4,1	33	57,9	3,7	0	4
Romania	3,3	49,8	45,9	4,4	0,9	-

In Belgium and Greece, there is a very high proportion of prisoners of foreign nationality (Table 8), and the highest proportion of women in Hungary (7.6) and Portugal (7).

Tab. 8: Demographic characteristics (2022)					
	Median age	**Percentage of 65 years old and more**	**Percentage of women**	**Percentage of foreigners**	**Percentage of young minor**
Belgium	36,4	2,6	4,5	43,4	0,0
Bulgaria	28	5,6	3,7	3,7	0,3
France	32	2,2	3,2	24,5	0,9
Greece	38	2,9	4,9	58,6	0,2
Hungary	37	1,9	7,6	10,0	0,2
Italy	41	4,7	4,1	31,5	-
Poland	38	2,4	4,7	2,4	1,4
Portugal	-	4,1	7	14,3	0,1
Romania	37	2,5	4,4	1,0	1,0

In all countries (except Bulgaria), the rate of probationers (Table 9) is two or three times higher than the rate of prisoners (six times higher in Belgium, but this refers to the number of files and not the number of people, as one person can have several files).

Tab. 9: Probation and detention rates per 100,000 inhabitants (31/01/22)					
	Probationers	**Rate of probationers per 100,000 inhabitants**	**Number of inmates**	**Detention rate**	**Multiplier factor (prob./det. rates)**
Belgium*	-	555,5	10 960	93,9	6
Bulgaria	4 671	68,2	6 386	93,3	1
France	186 528	284,4	69 964	106,7	3
Greece	(2 416)	(23,4)	10 952	106,2	0
Hungary	36 328	378,2	18 619	193,8	2
Italy	102 382	169,9	54 372	90,2	2
Poland	239 217	633,9	71 874	190,4	3
Portugal	32 389	319,4	11 588	114,3	3
Romania	68 343	359,1	23 010	120,9	3

* Number of files.

Taken together, these data for nine countries indicate that criminal justice systems in Europe vary considerably from country to country. Although there are similarities in the general approach to criminal justice, each country has its own laws, procedures, practices and judicial institutions that influence the way criminal cases are handled.

2. Fighting overcrowding in Europe?

a. Generalities

The situation of prison overcrowding and inflation continues to worsen in some countries, and as Françoise Tulkens, former judge at the European Court of Human Rights, points out, "none of the measures implemented seems to have had the effect of structurally reducing prison overcrowding"[295]. She suggests that overcrowding could even prevent the justice system from answering the question

[295] F. Tulkens, "Prisons in Europe. Recent Developments in the Jurisprudence of the European Court of Human Rights", in *Déviance et société,* 38(4), 2014, pp. 425-448.

of the effectiveness of prisons in rehabilitating people. Based on interviews with prison governors, Marie-Sophie Devresse notes that the argument "that no real project can be carried out in prison as long as overcrowding persists" is often used to explain the inability to assert certain prisoners' rights[296].

The announcement of a major prison building programme is a well-known way of dealing with overcrowding. One of the arguments put forward by the promoters of the new prisons is that the prison population will benefit from a significant improvement in their living conditions. It is undeniable that the new establishments offer better accommodation, with easier access to showers, for example. However, they do not offer a permanent solution to overcrowding, since their inauguration, in the absence of a deliberate policy to curb overcrowding, will create a draught that will lead to more prisoners being incarcerated[297]. The cost is not insignificant, and the material resources required are such that it has been decided to privatise certain functions that were previously the responsibility of the State. At a time of heightened security, imprisonment is falsely seen as a miracle solution. While its effectiveness is presumed despite a lack of concrete evidence, its perverse effects, including on prisoners and staff, remain forgotten.

The advent of electronic surveillance in several Member States has also been a success. The reasons often given are that it avoids recourse to prison and that recidivism is lower for those wearing an electronic bracelet than for those leaving prison. But this new sanction has not reduced the prison population and is the cause of a major extension of penal supervision for people who would not otherwise have been incarcerated[298].

The Council of Europe's Council for Penological Cooperation produced a white paper on prison overcrowding in 2016. This document lists all the strategies for fighting prison overcrowding, with a view to convincing the national authorities to take concrete decisions and review them regularly. The Committee of Ministers' recommendation on prison overcrowding and prison inflation[299] also stressed the importance of using deprivation of liberty as a measure of last resort. Decriminalisation and alternatives to criminal prosecution are other ways of reducing prison overcrowding. The CPT, in its 26th General Report on pre-trial detention, and the 31st, which includes a chapter on combating prison overcrowding, has made a major contribution to the debate on overcrowding and its causes.

The significant and chronic overcrowding in several European countries often leads to the construction of new prisons and the creation of alternatives that add to the repressive arsenal. Yet statistics show that these policies do not solve the problem of overcrowding. For more than 30 years, the European authorities have been recommending that a single response be avoided, and especially that no new buildings be built, and that a range of levers be used on all aspects of the penal pathway.

b. The causes of inflation and overpopulation: a complex combination

The number of people imprisoned is not linked to a country's crime rate. “It is not crime but penal policy that determines the rate of imprisonment”, writes Sonja Snacken[300]. Indicators of the development of delinquency and crime generally do not show a corollary development. Nor can they be equated with the level of delinquency, since some offences escape the knowledge of the police

[296] M.-S. Devresse, “The Management of Prison Overcrowding: Political, Administrative, and Legal Perspectives”, in *Droit et société*, 84(2), 2013, p. 347.
[297] C. Mouhanna and A. Kensey, “Toujours plus de prisons : pour quoi faire ?”, in *The conversation*, 16 June 2021 (online) : https://theconversation.com/toujours-plus-de-prisons-pour-quoi-faire-160645
[298] M. Aebi, N. Delgrande and Y. Marguet, “Have community sanctions and measures widened the net of the European criminal justice systems?”, in *Punishment & Society*, 17(5), 2015, pp. 575–597.
[299] CMCE, Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation, 30 September 1999; See also S. Snacken and D. van Zyl Smyt, “Distinctive features of European penology and penal policy-making”, in T. Daems, D. van Zyl Smit and S. Snacken (eds), *European penology?*, Oxford, Hart Publishing, 2013, p. 13.
[300] F. Dünkel and S. Snacken, *Prisons in Europe*, Paris, L’Harmattan, 2005.

services, who have either not observed them or not been informed of their occurrence. This is what sociologists call the "black figure" of crime[301].

In a landmark text[302], Robert and Faugeron analysed the workings of the criminal justice system in terms of what it produces. The criminal justice system operates like a funnel with successive filters, and the structure of the prison population is the result of the selection of cases and the breakdown between different circuits. The consequences are the designation of high-risk populations, i.e. essentially young men, mainly foreigners, blue-collar workers and the unemployed.

The penal system becomes more present when the living conditions of the working classes deteriorate: this assertion would explain prison inflation. Raoult and Derbey validate this correlation by analysing time series between unemployment and incarceration, although it is not perfect, as incarceration is linked to demographic factors and other factors (such as the relationship between the public and the justice system)[303]. It is nevertheless one of the causes of prison inflation that cannot be ignored.

The demographic factor has little influence on prison inflation. The increase in the prison population is out of all proportion to the demographic growth of the general population. In France, for example, the prison population grew by 36% between 2000 and 2022, while the general population only grew by 12%. This is why it is preferable to compare prison population rates per 100,000 inhabitants, to avoid the demographic effect, which is not negligible but small. However, the causes of prison population growth to be taken into account are more related to penal policy guidelines.

Identifying the factors that explain the continuing high level of prison populations is difficult because it is not always easy to produce consolidated and consistent data. At a time when most data collection systems have switched from manual to computerised production, there are gaps in the series. However, manual statistics did not provide in-depth data and only gave framework data, the reliability of which is not guaranteed, but in some countries it still exists. The data produced by the applications correspond to steering and management needs and do not necessarily cover the categorisations adopted by successive penal policy guidelines.

The demographic situation in prisons can only be analysed on the basis of "stock" statistics, i.e. the number of prisoners on a given date. Two other parameters must be taken into account in order to understand changes in the prison population: changes in the flow of prisoners into detention and changes in the length of their detention. As the situation of prison overcrowding is partly dependent on the prevailing security context, and knowing that this influences the entry into prison or the delayed release of those in it, or both, these elements can be analysed. The class definitions are taken from the SPACE source[304].

Tab. 10: Entry rate and average length of detention (2021)

Average entry rate: 164,7 %	**Average length of detention (in months): 11,2**				
	Very high	**High**	**Average**	**Low**	**Very low**
Very high	Hungary	Poland	-	-	-
High	-	-	-	-	-

[301] B. Aubusson de Cavarlay, N. Lalam, R. Padieu and P. Zamora P., "Les statistiques de la délinquance", in *France portrait social*, Insee Références, 2002, pp. 141-158

[302] P. Robert and C. Faugeron, *Les forces cachées de la justice*, Paris, Le Centurion, 1980.

[303] S. Raoult and A. Derbey, "La justice de classe, la nouvelle punitivité et le faux mystère de l'inflation carcérale", in *Revue de science criminelle et de droit pénal comparé*, no 1, 2018, pp. 255-265.

[304] Very high (25% above the average); Average (between -5 and +5%); Low (between 5.1 and 25% below); Very low (below 25% to the average).

Average	-	-	-	Belgium	-
Low	France	-	-	-	-
Very low	Italy Romania Greece Portugal Moldova Ukraine	-	-	-	-

Data from SPACE I (Council of Europe)

What has caused the prison population to grow in Hungary and Poland in 2022 is both entries and the average length of detention. In France, Italy, Romania, Greece, Portugal, Moldavia and Ukraine, it is the lengthening of sentences, as entries are lower than the European average.

Release rates are low compared to the European average in France, Italy, Belgium, Greece, Romania, Ukraine and Portugal.

c. Identifying action levers

There are a number of levers that can be used to change the prison population. The first is the policy associated with pre-trial detention. Prison is the place where, in addition to the prison sentence, pre-trial detention is carried out. And pre-trial detention plays a predominant role.

In many European countries, there is a high proportion of remand prisoners in the prison population. This means that prison is not reserved for the execution of a penalty for a single criminal case, as one might think. This representation is distorted because the proportion of pre-trial detention is high (for example, 26% on 1 January 2021 in France[305]) and there may be multiple cases (in France, 37% of convictions in 2021[306]). In addition, there is a significant quantitative effect of multiple convictions involving the same person and which are enforced in series, with varying practices of confusing sentences. Practitioners refer to this as "purging the record", the principle of which is to avoid removing convicts from prison at the end of their sentence if they still have one or more sentences to serve[307].

The proportion of remand prisoners at a given date is linked to the number of remands in custody and the length of time they have been in custody. Remand in custody may be the result of preliminary investigation proceedings or rapid appearance proceedings. The source of the length of pre-trial detention is to be found in the complexity of the case but also in the overloading of the courts and therefore the time required for hearings. In addition, pre-trial detention favours the pronouncement of a firm prison sentence at the hearing[308].

Secondly, the increase in the population may reflect the lengthening of sentences handed down by the courts (due to a change in the nature of the case and greater severity on the part of the sentencing courts), the reduction in individualised measures to adjust sentences (abandonment of parole, irregular policy of commuting sentences), and tougher legislation.

Recidivism has a major impact on sentence lengthening. Not only are sentences increased for repeat offenders, but the way in which they are enforced is also tougher. The frequency of repeat offending varies according to a number of factors. Some relate to the demographic characteristics of the offender (gender, age, marital status, nationality, etc.), others to the offender's criminal history, either prior to conviction (e.g. previous convictions) or subsequent to conviction (e.g. type and quantum of sentence

[305] Ministry of Justice (France), statistics 2022.
[306] *Ibid.*
[307] Pre-trial detention monitoring committee (France), Report 2017-2018. This committee no longer exists since 2018.
[308] G. Vaney, “La détention provisoire des personnes jugées en 2014”, in *Infostat Justice*, no 146, December 2016.

handed down). Lastly, studies[309] have shown that certain variables, such as the nature of the offence committed (murder, rape, theft, etc.), the proportion of the sentence served in custody and the method of release, have a particularly discriminatory effect (convicts released on parole have a much lower rate of re-offending than convicts released at the end of their sentence).

Tab. 11: Prison population rate and proportion of long sentences (2022)					
Average prison population rate: 117,2%	**Proportion of prisoners sentenced to 5 years' imprisonment or more: 40,5%**				
	Very high	**High**	**Average**	**Low**	**Very low**
Very high	Moldova	-	-	Hungary	-
High	Portugal	Romania	-	-	-
Average	-	-	-	France	-
Low	Belgium Italy	-	-	-	-
Very low	-	-	-	-	-

Data from SPACE I (Council of Europe)

The link between the high proportion of people sentenced to long terms (5 years or more) and the high prison population rate compared to the average for CoE member countries is direct in Moldavia, Portugal and Romania. In these countries, as well as in Hungary, the proportion of short sentences (less than 6 months) is very low.

The CPT, in its 2021 report, gives a clear summary and states that overcrowding is “mainly the result of stricter penal policies with increased criminalisation, more frequent and longer use of remand detention, lengthier prison sentences and limited recourse to non-custodial alternatives to deprivation of liberty”[310].

We can also add the debates on insecurity or the media coverage of criminal acts, which contribute to increasing the number of incarcerations and the prison population[311]. Each heinous crime awakens a feeling of insecurity that is particularly sensitive to media coverage, and new legislative and repressive measures may then emerge.

Among the causes of overcrowding, we could mention the lack of available places. Unless it is to replace dilapidated facilities, the construction of new places is generally counter-productive and even encourages a surge in incarceration, as we wrote in the introduction. According to the United Nations Office on Drugs and Crime (UNODC) manual, “the lack of prison infrastructure should not be regarded as the principal "cause" of overcrowding, but often as a symptom of dysfunction within the criminal justice system”[312].

[309] A. Kensey, *Prison et récidive. Des peines de plus en plus longues, la société est-elle vraiment mieux protégée ?*, Paris, Armand Colin, 2007.
[310] CPT, 31th General report, April 2022, p. 26.
[311] A. Philippe, “Vous jurez de n'écouter ni la haine ou la méchanceté... Les biais affectant les décisions de justice”, in *Les Cahiers de la Justice*, no 4, 2015, pp. 563-577. See on p. 572: “Sentences (handed down) are significantly higher when there has been coverage of crime stories the previous day”.
[312] UNODC, Handbook on strategies to reduce overcrowding in prisons, 2016, p. 34.

PART II. NATIONAL PERSPECTIVE

Chapter 1. Implementation of the legislative and practical measures designed in response to the European findings

1. Calculating and monitoring prison capacity

Common measures for addressing prison overcrowding on national level have been the introduction of new quantitative standards of minimum living space that a prisoner should be afforded, along with a recalculation of the official prison capacity based on the new minimum standard and the introduction of some form of a system, monitoring occupancy rates. There are nevertheless significant variations in the definitions and application of the standard of "minimum living space", resulting in heterogeneous understanding of "overcrowding" across European jurisdictions. It should be noted further that newly adopted minimum cell dimensions are often guidelines for detention facilities to be built in future and do not reflect the currently enforced standards.

a. Significant variations in the definitions and application of the european standard

Most recently, to align with European standards for detention conditions, the Belgium government adopted legislation setting out prison cells' size.[313] The new legislation envisages the minimum floor area in a single occupancy cell to measure at least 10 sq. m., in a cell occupied by two persons - 12 sq. m.; in a cell occupied by three persons - 15 sq. m.; in a occupied by four persons - 25 sq. m.; in a cell occupied by five or six persons - 38 sq. m. It further establishes a minimum standard for prison cell height of 2.5 sq. m. and width of 2 sq. m. These minimum standards not only comply with the European recommendations but even exceed what the CPT defines as "desirable standards" for multiple-occupancy cells. However, article 11 of the Decree provides for a 20-year delay before this rule comes into force for existing prisons.

Following the 2015 CPT document "*Living space for prisoner in prison establishments: CPT standards*", the Romanian authorities also declared an aim to secure the 4sq m standard to all detainees, regardless of their execution regime. At this time the minimal living space was set at 2 sq m per person for the open and semi open regime detainees and at 4 sq m per person for the other categories of prisoners, including the underaged and detainees in pre-trial detention. In 2017 the Minister of Justice approved Minimum Mandatory Norms regarding the accommodation conditions of persons deprived of liberty, requiring living space of at least 4 sq m per prisoner in a multiple occupancy cell and 6 sq m. – for single occupancy cells.[314] These norms however apply only for newly build prisons or such that are subject to serious renovation, modification, transformation, or expansion.[315]

The prison reform legislative package passed in 2017 Bulgaria introduced the 4 sq. m. of living space per person as a uniform standard that applies to both single and multiple occupancy prison cells. The new provision does not specify whether the space taken up by sanitary facilities in the cell and items of furniture, which are permanently fixed to the floor, are to be excluded from the calculation of the 4 sq. m. Nor does it take into account the reality in many detention facilities of cells used as storage of beds, lockers and other furniture, which are not used. These continue to be contentious issues in the litigation over conditions of detention at present.[316] In 2017 Hungary resolved a similar issue by means of special legislative amendments, changing the method of calculation of cell space by excluding the space occupied by the beds, the chairs, and the tables from the minimum amount of

[313] "Arrêté royal du 3 February 2019 portant exécution des articles 41, § 2, and 134 § 2, de la loi du 12 January 2005 concernant l'administration pénitentiaire ainsi que le statut juridique des détenus" (*Mon*. 14 February 2019).
[314] Ordin nr. 2.772/C din 17 Octombrie 2017, pentru aprobarea Normelor minime obligatorii privind condițiile de cazare a persoanelor private de libertate, available at https://legislatie.just.ro/Public/DandaliiDocument/194114.
[315] Ordin nr. 2.772/C din 17 Octombrie 2017, op. Cit.
[316] Interview with V.S., lawyer, Pazardzhik, 27 June 2023.

living surface. As beds and tables occupy most of the place in a cell, this change resulted in the alleviation of prison overcrowding.

Other jurisdictions, such as France, have refused to revise the method of calculating prison capacity, contrary to the explicit recommendations made by European bodies and domestic stakeholders. In 2022 the French government argued that "*the implementation of a new system for calculating capacity* [...] *would not lead to a reduction in the number of prisoners. It would have the effect of modifying the number of places per prison without any effect on the number of prisoners incarcerated*". [317].

b. Introduction of system for monitoring occupancy rates

Some jurisdictions have opted for the introduction of systems for monitoring prison occupancy levels. Essentially, the purpose of these systems appears to be limited to tracking of prison growth, awareness raising, and, in some cases, initiating action for alleviating situations of overcrowding once they occur through transfers between prisons or arranging for additional cells; they are not specifically designed to prevent overcrowding through forecasting or early identification of risks of overcrowding and implementation of measures to slow or reverse prison growth. Furthermore, reaching the maximum institutional capacity also does not seem to prevent new allocations from being made.

Since 2011, the Romanian prison administration publishes daily updates on total prison population as well as monthly updates on the numbers of people deprived of liberty in each penitentiary and the associated accommodation places which are complaint with the 4sqm standard. While this could be seen as a positive development, civil society monitoring reports raise serious concerns about the reliability of reported data. In some cases, there is a big difference between what the official statistics report on available complaint accommodation places and the reality on the ground.[318] Later, in 2018, the central prison administration has started implementing an electronic system in order to monitor the accommodation capacity of each prison.[319]

Similar mechanism has been introduced in Bulgaria. With the adoption of the 2017 legislative amendments, prison administration in the country was obligated to create a database on the prison system capacity, calculated in accordance with the new minimum living space standard[320] and prison authorities must consider the available prison capacity for the purposes of the initial geographical distribution of prisoners.[321] Where the standard of 4 sq. m. minimum living space per prisoner is not ensured, the prison administration could also order the transfer of a prisoner from one facility to another of the same type, following a consultation with the affected party.[322] Transfer orders are subject to judicial instead of administrative control.[323] If placed in a remote facility, the law requires prisoners to be granted more favourable conditions for enjoying their rights to telephone calls and visits.[324]

In France, over the last few years, several mechanisms have been put in place to circulate prison statistics among criminal justice stakeholders, whose decisions eventually might have impact on prison occupancy rates. In its response to the CPT's visit to France in 2019, the French government explained that it was experimenting in several sites with the distribution of a document entitled "Essential elements to support sentencing", intended to provide quantitative information - occupancy figures for prison facilities, and qualitative information - nature of the types of care provided at local level. It also indicated that since 2020 it had initiated a policy of prison regulation through the

[317] Action plan submitted on 12 October 2022 by the French Government to the Committee of Ministers within the monitoring of the *J.M.B.* and *others v. France* case, pp. 29-31.
[318] APADOR-CH (2022), Visit monitoring report-Iasi penitentiary, https://apador.org/raport-asupra-vizitei-in-penitenciarul-iasi-2/.
[319] Decision of the National Administration of Penitentiaries General Director no. 369/2018.
[320] EPPDA, Article 43, (2).
[321] *Ibid*., Article 58, (1).
[322] *Ibid*., Article 62, (1)(5).
[323] *Ibid*., Article 62, (3).
[324] *Ibid*., Article 86, (5).

implementation of a management tool between the various departments of the Ministry of Justice. Sent to the judicial authorities, this data provides information on the number, nature and quantum of sentences handed down by each judicial court, in order to monitor changes in the use of adaptable sentences and alternatives to imprisonment, as well as to analyse their impact on local prisons. For the government, this "barometer" is a genuine operational and decision-making tool, "*facilitating the implementation of a proactive policy in terms of sentencing and controlling the prison population*"[325].

Other mechanisms, some of which are known as "stop écrou", are sometimes implemented locally by stakeholders in the criminal justice system. For example, in the Grenoble jurisdiction in Isère, an agreement was signed in October 2020 between the various local authorities to keep the prison occupancy rate below 130%. The agreement proposes a number of measures to achieve this goal: weekly information for judges on the occupancy rate of the prison, use of deferred committal orders, use of electronically monitored house arrest (for unconvicted prisoners), identification of prisoners eligible for early release and increased use of LSC, acceleration of requests for transfer or assignment to a penal establishment, etc.

In Poland, the Prison Service has introduced an electronic system Central Database of Persons Deprived of Liberty Noe NET as a mean of ongoing control of the population of the penitentiary system[326]. More recently, pursuant to an ordinance of the Minister of Justice of Poland from 9 December 2022, a new institutional mechanism has been established, enabling participants of the criminal justice system to promptly respond to instances of overcrowding in penitentiary units through the implementation of a warning system. Under this solution, the General Director of the Prison Service has the responsibility to inform the Minister of Justice, regional directors of the Prison Service, and directors of penitentiary units about the occurrence of overcrowding in the penitentiary system. Subsequent notifications regarding overcrowding in specific units are required to be communicated to the Minister of National Defence, the National Public Prosecutor, and the presidents of appellate courts. The regulation further mandates the National Prosecutor and the presidents of appellate courts to transfer this information to the subordinate units. Upon receiving the information, the director of the penitentiary unit is obligated to take necessary measures to arrange additional residential cells. For the courts, it means examining the cases assigned for execution and assessing the feasibility of postponing the execution of sentences, as well as determining the order in which the sentenced individuals should serve their sentences. As for the prosecutors, the notification of overcrowding in penitentiary units compel them to utilize their authority as a party involved in the enforcement proceedings and implement measures to reduce the number of individuals in prison.

2. Maximising existing prison capacity

Another strategy for prevention and alleviation of overcrowding favoured by governments has been the maximasing of the existing capacity in the prison system by way of introducing more flexibility to prison administration to manage prison population through transfers or change of security classifications.

In Hungary, the so-called occupancy-balancing programme[327] was launched in 2010 and has played an even greater role since 2015.[328] The essence of this solution can be defined as the transfer of prisoners from more overcrowded institutions to less overcrowded ones, as appropriate.[329] As further steps towards optimization of existing prison capacity, in May 2023, the Hungarian Parliament adopted amendments that were intended to make the rules on placement of prisoners more flexible

[325] Response of the French government following the CPT visit to France carried out from 4 to 18 December 2019, 24 June 2021, p. 56.
[326] Poland, Action report - communication from Poland concerning the cases of Orchowski and Sikorski against Poland, DH-DD(2011)709, 12 September 2011
[327] Bogotyán (2015) pp. 29-33.
[328] Csóti (2015); Lajtár (2015)
[329] This mandhod has been used in Hungary since 2008.

and thus have a positive impact on the saturation of prisons. The new classification system is intended to replace the current nine regimes with a simpler five-tier system of categories as the basis for the enforcement of imprisonment. According to the explanatory memorandum to the legislation, this new system of categories will allow for an efficient allocation of prison staff and will also help optimise the use of prison places. The new rules will enter into force on 1 January 2024.

Similar strategies to controlling overcrowding were extensively embraced by the 2017 legislative amendments in Bulgaria which brought important innovations in the normative principles governing initial allocation, imposition and modification of security regimes and transfer of inmates. They were adopted primarily as measures to cope with the situation of uneven distribution of inmates across the prison system, where overcrowding was persistent in closed-type correctional facilities, but open-type prison hostels remained largely unaffected. Prison governors were delegated new powers to manage prison population, on the expectation that they will be able to act in a more flexible and prompt manner when needed.

Initial allocation of prisoners to open or closed-type correctional facilities is strictly conditioned by the regime, determined by the sentencing court, acting upon the relevant legal rules. With the legislative reform, the scope of application of the "general regime" as an initial regime for serving a sentence of imprisonment was expanded to include certain categories of repeat offenders, previously placed under the more stringent "severe regime".[330] Moreover, the sentencing court is now vested with the discretion to determine initial "general regime" with regard to convicted prisoners, who otherwise qualify for "severe regime", provided that the prisoner is not considered dangerous.[331] These amendments allow for a higher number of inmates to be initially allocated to open instead of closed-type prison facilities, where detention conditions in terms of occupancy, out-of-cell activities, work opportunities and family contacts are more favourable.

Further, prison governors are empowered to decide on the transfer of prisoners from closed to open-type correctional facilities and to modify their security regimes into lighter ones upon request by the prisoner or by their own motion, provided certain statutory conditions are fulfilled.[332] The requirement that the prisoner has no more than five years of his sentence left to serve in order to be eligible for transfer to an open-type facility, has been removed.[333] The new rules apply only to prisoners serving final convictions, while the decisions for allocation and transfer of unsentenced prisoners from one facility to another remain within the powers of the prosecutor or the court, depending on the stage of the criminal proceedings.

Similarly, organisational measures indicated by the Polish authorities for combating prison combustion focused transferring inmates between more and less densely populated units, and managing the legal destination of the unit in order to adjust it to the structure of inmates population[334].

In Romania, given the high discrepancies in occupancy rates between penitentiaries, the Committee of Ministers has encouraged the distribution of detainees within the Romanian prison system.[335] As mentioned above, in 2018, Romania central prison administration started implementing an electronic system in order to monitor the accommodation capacity of each prison. Based on this analysis, some detainees are now transferred from very crowded prisons to less crowded ones, in order to achieve a balance between penitentiaries.

[330] EPPDA, Article 57, (1).
[331] *Ibid*., Article 57, (3).
[332] *Ibid*., Article 64, Article 66.
[333] *Ibid*., Article 64.
[334] Poland, Action report - communication from Poland concerning the cases of Orchowski and Sikorski against Poland, DH-DD(2011)709, 12 September 2011
[335]

3. Expanding prison capacity and investments in material conditions

Arguably, expanding prison infrastructure is among the most favoured approaches for solving the systemic problem of prison overcrowding among the nine EU jurisdictions in focus. The approach entails building new prison facilities, expanding existing ones, and repurposing existing spaces to accommodate prisoners. Along with this, in their ambition to meet European standards, states have been investing in renovations and modernisation of prison facilities, and in some cases, have been closing down institutions deemed unsuitable for modernization due to aging or outdated infrastructure.

a. The predominance of the expansion and the renovation of prison infrastructure in the orientation bill

Propagating places of confinement has been at the heart of the strategy for combating prison overcrowding adopted by the French government. As part of the 2019 Justice Act, the prison building programme provides for the construction of 15,000 new prison places by 2027. In its action plan of October 2022 to the Committee of Ministers, the government reaffirmed that "*by increasing the number of prison places to 75,000 by 2027,* [this programme] *will make it possible to reduce overcrowding in prisons and achieve a rate of individual cell confinement of 80%*"[336]. It includes the construction of new remand prisons[337], as well as support structures for release ("structures d'accompagnement vers la sortie") and work-oriented establishments, in order to develop the use of alternatives to imprisonment (home electronic surveillance, probation, semi-liberty, community service, etc.). An amendment to the new 2023-2027 justice programming and orientation bill, aimed at creating 3,000 additional prison places by 2027, was also voted on 12 July 2023.

In Belgium, as well, in terms of infrastructure, the main reform has been the expansion of the prison estate. The quasi-pilot judgment *Vasilescu v. Belgium* dates from 25 November 2014, but the Belgian State had been aware of the critical state of its prisons for a long time. On 18 April 2008, it had already adopted a "Masterplan I for a more humane prison infrastructure".[338] This first Masterplan was updated in 2012 (Masterplan II) and in 2016 (Masterplan III). It announced and achieved the following objectives:

I Renovations to existing prisons (Saint-Gilles, Forest, Tournai, Hoogstraten, Leuven, Turnhout);
II Expansion of certain prisons (Hoogstraten, Turnhout, Merksplas, Paifve, Wortel);
III Building new prisons (Marche, Beveren, Leuze, Haren, Dendermonde);
IV Construction of new "Centres de psychiatrie légale (CPL)" adapted for internees (Ghent, Antwerp);
V Construction of new small "detention houses" (maisons de detention) (Mechelen, Enghien).[339]

Projects that have not yet been completed concern the construction of new prisons (Bourg-Léopold and Vresse-sur-Semois) and the renovation of many other existing establishments.

Romania has also set an ambitious plan to expand its prison complex by creating 7 849 new places and modernising another 946 places in the period 2020-2025.[340] A 10-year plan of the Portuguese government to improve prison conditions envisages the closure of Lisbon Central and Setúbal

[336] Action plan submitted on 12 October 2022 by the French government to the Committee of Ministers within the monitoring of the *J.M.B.* and *others v. France* case, p. 20.`

[337] The only overcrowded establishments, where an exception is made to the principle of individual cell confinement.

[338] https://www.lalibre.be/belgique/2014/08/05/master-plan-des-prisons-un-programme-ambitieux-Mais-parfois-chaotique-OHO3Q7G7VJHYTGX35RN7S7CNT4/

[339] « Détention and internement *in* des conditions huMaines | Régie des Bâtiments », https://www.regiedesbatiments.be/fr/projects/*detention*-and-internement-*in*-des-conditions-huMaines.

[340] 1390th meanding (December 2020) (DH), Action Plan (20/11/2020) , Communication from Romania concerning the cases of BRAGADIREANU v. Romania (Application No. 22088/04) and Rezmives and Others v. Romania (Application No. 61467/12), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a07088

Prisons, as well as the construction of a new Ponta Delgada Prison by 2024.[341] Following the case law of the ECtHR and the number of applications concerning lack of privacy in collective cells, the Portuguese Prison Service has also undertaken renovation works to ensure the privacy of sanitary facilities in cells or dormitories, aiming at ensuring adequate partitions in all prison accommodations. In 2021, works were carried out in 21 prisons, covering 1037 accommodations. These works continued through 2022 and have now been concluded.

Investment in the improvement of material conditions of detention in the Bulgarian prisons increased after the *Neshkov* pilot judgment and the 2015 public statement of the CPT.[342] Investment was in substantial renovation of the existing facilities, in building new IDFs and in reconstruction of some facilities to serve new purposes. Two new prison facilities were opened after 2015. Renovation covered all the prisons and most IDFs. Cells were refurbished and if they were too big, they were split into several smaller cells; toilets were built in each cell; new windows replaced the old ones; baths and kitchens were established for use of the prisoners; recreation facilities, such as playgrounds, fitness centers and art clubs were opened. Investment was made also in a number of IDFs. Some IDFs were closed and integrated with the adjacent prisons as recommended by the CPT. Since 2022, the building of a pilot prison facility in the village of Samoranovo in underway.

The scope and the amount of the investment work for the improvement of conditions of detention in the prisons and IDFs can be seen from the most recent account by the Bulgarian government in their addendum to the Action Plan on the Kehayov/Neshkov group before the Committee of Ministers of the Council of Europe. According to this document, for one year, between September 2021 and September 2022, the following measures for the improvement of the conditions in detention were implemented:

1. Putting in operation of a new IDF in the beginning of 2022;

2. Opening of a new Educational Centre at the Pazardzhik Prison;

3. Reconstruction works for the relocation of Keramicna Fabrika open-type prison hostel;

4. Renovation of the Samoranovo open-type prison hostel with establishment of a half way house and a detention facility;

5. Construction works for the establishment of an IDF and probation service in

Petrich;

6. Reconstruction of the Stroitel prison hostel;

7. Procedures under the Public Procurement Act are ongoing for:

- the building of a new IDF in Veliko Tarnovo;

- the building of a pilot prison connected with a half way house in the area of Samoranovo open-type prison hostel;

- the reconstruction of the Hebros open-type prison hostel with a half way house, and improvement of the material conditions in the Plovdiv prison.[343]

b. *An increase presence of private funds for the construction of security-oriented establishments*

Major constructions projects require significant financial investments and for some countries the expansion and renovation of the prison estate would not have been made possible without external funding from donor organisations, bank loans or private investors. In Bulgaria, for example, the

[341] CPT, https://rm.coe.int/1680a05953

[342] Interview with I.I., Chief Director of the CDEP, Sofia, 21 June 2023.

[343] Government of Bulgaria, *Addendum to the Action Plan Dated 7 July 2021: Neshkov* and *Others v. Bulgaria (pilot judgment)/Kehayov v. Bulgaria group of cases*, 30 September 2022, DH-DD(2022)1043.

reconstruction and renovation work in the prisons and in the pre-trial detention centers was carried out through the state budget and with the substantial support of the Norwegian Financial Mechanism (NFM). The NFM started offering financial support to the Bulgarian government already before 2014. The amount of this support increased in the period 2014-2021 for a variety of projects, a substantial part of which covered investment in material conditions. In Romania the NFM has pledged more than 125 million euros for creating 1 400 new detention places and modernization of 100 other. The Romanian government has also secured a loan of 177 million euros from the Council of Europe Development Bank for the construction of two new penitentiaries. In addition, the state has invested 102 million euros to expand the prison capacity with 4 549 new places and the renovation of another 846. In Belgium, on the other hand, most of these new prisons are being built based on a "public-private partnership" (PPP) with Design-Build-Finance-Maintain financing. Under this model, private partners finance the construction of the prison and its maintenance, then make the building available to the Belgian state for a certain number of years (usually 25) in exchange for compensation. At the end of the contract, the prison is transferred to the Belgian state.[344]

The information compiled in this study reveals that the majority of the newly established custodial facilities are high security level prisons, while less investments have been aimed at constructing open-type or rural prisons facilities, usually characterised by minor restrictions on incarcerated prisoners and more opportunities for work and rehabilitation. However, in some cases, the expansion of prison capacity entails also the creation of new types of low-security prison facilities and prison regimes. Such for example are the “transition houses” in Belgium and the “half-way houses” in Bulgaria. Placement in these small-scale semi-open facilities is intended to facilitate prisoners’ resocialisation at the end of their sentence through the provision of additional and more individualised services. Similar to these facilities are the support structures for release and the work-oriented establishments in France.

4. Legislative reforms: Decriminalisation, diversion, and alternatives to detention

Whether in response of European bodies’ recommendations for tackling prison overcrowding, or in a more general pursuit of modernization of national penal systems, some states have undertaken legislative reforms, designed to reduce the number of people convicted and sent to prison, as well as the time they spend behind bars, including through decriminalization, changing criminal procedures and sentencing polices, introducing alternatives to imprisonment and others. While each penal reform is unique, there has been a clear tendency towards extending the use of the existing or introducing new forms of alternatives to imprisonment as sentencing options, which has resulted in a significant proliferation of non-custodial and semi-custodial criminal sanctions across European jurisdictions, predominantly as alternatives to short sentences. At the other end of the spectrum, the measures that appear to be least favoured as options for achieving prison deflation, have been decriminalisation of offences and reduction of terms of imprisonment. It is also observed that some legislative changes have been repealed shortly after their introduction, while in other cases further legislative modifications have brought along new penal policies, contradictory to the progressive aims of initial reforms.

a. The proliferation of non-custodial and semi-custodial measures

Below are presented examples of legislative reforms undertaken in some of the jurisdictions, covered by the present research.

The example of the Portugal

In 2009 Portugal implemented a significant reform of its penitentiary law. The motivation behind the reform was mostly national (the main reasons for reform, as stated in the draft law, were the law being

[344] J. F. Pontégnie, "Prison. Le masterplan, un ersatz politique", *ACRF-Femmes en milieu rural*, analyse 2017/08, p. 5, available on https://www.acrf.be/wp-content/uploads/2017/03/acrfana_2017_08-masterplan_ersatz-politique_JFP.pdf

out of date with the evolution of prison practices, the change in the profile of the prison population, the evolution in the social and criminal reality and the new challenges of prison intervention), but the developments in international (mostly, European) law and standards have also served as an impetus for reform. This is clearly stated in the Explanatory Memorandum of the Law Proposal presented by the Government to the Parliament: "the most recent international guidelines on the subject were an important contribution to the drafting of the present draft law, especially those contained in the Recommendation Rec(2003)23 of the Committee of Ministers to Member States on the management by prison administrations of life sentence and other long-term prisoners, the European Prison Rules of 2006 and Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse".[345]

The Code sought to translate European norms, especially the European Prison Rules, into national law. It also sought to implement many recommendations from the CPT, especially those formulated or reiterated in the CPT report of its visit in 2008. Considering that precisely in 2008 the drafting of the Code was being finalised, the recommendations of the CPT report were taken into account in the draft law.

Further, the Law No. 94/2017 amending the Portuguese Penal Code[346] introduced a new system of home detention as a form of implementation of prison sentences up to two years, or the remaining two years of imprisonment in case of recall to prison following revocation of a non-custodial sentence. Those prison sentences shall be implemented in home detention, whenever the court finds that by this means the purposes of punishment are adequately and sufficiently fulfilled. Home detention implies an obligation to remain at home, with electronic monitoring, for the length of the prison sentence. A "rehabilitation plan", which shall guide the implementation of the sentence, must be prepared by the probation service whenever the sentence exceeds six months or the offender is younger than 21 years old; the plan is subject to the approval of the court responsible for the implementation of sentences. The court may allow the offender to leave home at certain times of the day for specific purposes, namely to attend rehabilitation programmes, keep a job, or attend school or vocational training. The court may additionally impose certain duties. Both the duties and the leaves of absence may be modified throughout the implementation of the sentence by the court responsible for the implementation of sentences. Law 94/2017 also eliminated from the Penal Code two penalties of a custodial nature: weekend detention and semi-detention, due to their inefficacy in practice.

The explanatory memorandum of this law does not cite European sources as a motivation for the amendment, rather referring to the Government's Programme, which aimed to: review short-term sentences in low-risk cases, enhancing probationary solutions; admit the use of home detention with electronic monitoring, in cases judicially determined, with the possibility of leaving to work; and combat overcrowding in prisons, guarantee a safe and healthy environment and promote accommodation compatible with human dignity, the proper treatment of young adults, remand prisoners and first-time prisoners.

The example of Romania

The 2014 penal reform in Romania was profound and marked a paradigm shift: custodial sentences were redefined and there was a progressive transition towards reintegrating condemned people into society. Community sanctions and alternatives to detention were expanded while the Codes took a different approach to juvenile offenders, putting an emphasis on educational rather than punitive

[345] §29 of the Explanatory Memorandum, Law Proposal No. 252/X, https://www.parlamento.pt/ActividadeParlamentar/Paginas/DandalheIniciativa.aspx?BID=34330.
[346] Lei n.º 94/2017, de 23 de agosto, Diário da República n.º 162/2017, Série I de 2017-08-23, páginas 4915 – 4921 available at https://diariodarepublica.pt/dr/dandalhe/lei/94-2017-108038373

measures.[347] The Criminal Code, adopted in 2014, created two new institutes, diverting offenders from prison - the waiver of the punishment and the postponement of the application of the punishment. Among the international acts considered for the regulation of these new institutions, the official documents at that time make reference to the Council of Europe Prison Overcrowding and Prison Population Inflation: Recommendation No. R (99) 22, Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures, Recommendation Rec (2006)2-rev of the Committee of Ministers to member States on the European Prison Rules. Concerning the sanctioning of minors, deprivation of liberty has become exceptional. The new Code provides for four non-deprivation of liberty educational measures (civic traineeship, supervision, curfew on weekend, assistance on a daily basis) and two custodial ones (confinement in an educational centre and confinement in a detention centre).[348] At the same time, the Codes introduced alternatives to deprivation of liberty-judicial control, judicial control on bail and house arrest as well as the application of alternatives methods for resolving a criminal case- especially the waiver of prosecution or the guilty-plea. The Codes also extended the scope of criminal fines for various offences.

The example of Poland

In a response to the systemic problem of prison overcrowding, Poland also implemented vasrious modification to the existing laws and penal policy, the structure of sentences, and the rules governing imprisonment. The Penal Code reform introduced in 2015[349] in Poland strongly addressed the issue of conditional suspension of custodial sentences. Prior to these changes, courts were allowed to conditionally suspend the execution of a custodial sentence that did not exceed two years. The 2015 amendment significantly restricted the courts' ability to impose a conditionally suspended custodial sentence. According to its wording, the court was only allowed to conditionally suspend a custodial sentence in cases where the offender was not previously sentenced to a custodial sentence at the time of the offense. Moreover, it was required to determine that the application of the suspension will be sufficient for the purposes of the sentence. Finally, the amendment limited the maximum length of the custodial sentence that could be suspended to only one year.

These changes were accompanied by the introduction of the so-called mixed penalty. This was intended to fill the gap created after limiting the possibility of imposing imprisonment with conditional suspension of its execution. The new form of punishment allowed for the imposition of a short-term imprisonment sentence (typically up to 3 months, or 6 months for more serious offenses) combined with the imposition of the sentence of restriction of liberty in its new form. Moreover, the legislator envisioned that this type of punishment could be imposed regardless of the punishment specified for the offense.

In addition to these solutions, Article 37a was added to the Penal Code, granting the court the possibility to impose a sentence of restriction of liberty or a fine in any case where the statutory penalty for committing a crime does not exceed 8 years of imprisonment. This solution was justified by the necessity to encourage courts to impose noncustodial sentences instead of imprisonment[350].

Another important modification of the Penal Code concerned the addition of Article 75a, which aimed to mitigate the consequences of frequent custodial sentences imposed by the courts with conditional suspension of their execution. This provision allowed the criminal court to refrain from ordering the

[347] Ioan Durnescu&Ioana Morar (2020), 'An Examination of The Romanian Prison System During The COVID-19 pandemiv. Are "Zero Cases" Possible', Victims & Offenders, volume 15, https://doi.org/10.1080/15564886.2020.1829766

[348] Law no. 253/2013 on the enforcement of penalties, educational measures and other non-custodial measures ordered by judicial bodies within the criminal proceedings.

[349] Poland, the Act amending the Act - Criminal Code and some other laws (Journal of Laws, item 396).

[350] Poland, Sejm (7th term of office), Explanatory Memorandum attached to the government's Draft Act on Amendments to the Act - Penal Code and Certain Other Acts, Sejm document no. 2393.

execution of a suspended custodial sentence and replace it with a non-custodial sentence if the objectives of the punishment can be achieved in this manner. Article 75a was repealed in 2022[351].

The 2015 reform brought also changes to the statute of limitations for criminal offenses, reducing the maximum period for serious offenses by 5 years. However, this change was reversed in 2016, after the parliamentary elections.

In terms of stricter criminal law, the most recent significant amendment to the Penal Code was adopted in 2022[352]. This amendment notably increased the maximum penalties for certain offenses, extended the maximum term of imprisonment to 30 years (previously 20 years), and introduced the possibility of imposing life imprisonment without the possibility of conditional release. The justification for these changes, as argued by the drafters, was the need to enhance the protection of society through stronger criminal law measures. They believed that the existing sanctions in the Code did not adequately reflect the level of harm caused to society by these crimes, resulting in lenient treatment of offenders and insufficient realization of the preventive function of punishment.

Another significant change[353] aimed at reducing prison overcrowding was connected with the 2009 revision of the content of Article 151 of the Executive Penal Code governing the postponement of the execution of a sentence. According to the amendment, the penitentiary court was granted the authority to defer the execution of a prison sentence for a period of up to 6 months whenever the number of inmates in penitentiary institutions or remand centres exceeded on a national level the overall capacity of these facilities. However, this deferral could not be applied to offenders convicted of certain specified offenses. In 2012[354], the grounds for deferring the execution of a custodial sentence were modified. The legislature expanded the list of individuals for whom the penitentiary court had no authority to defer the sentence execution due to exceeding the overall capacity of the penitentiary units. This group once again included inmates who had committed a violent or threatening offense. Penitentiary recidivists and individuals who derived regular income from criminal activities, as well as those convicted of sexual offenses related to sexual preference disorders, were excluded from the possibility of receiving such a deferral.These rules were further amended as part of a significant reform of criminal procedure that came into effect in 2015. Under this reform, the option to grant a deferral of the execution of a custodial sentence was limited to cases where the deferred sentence did not exceed one year of imprisonment.

In 2007 Poland introduced also the use of electronic surveillance system as an alternative form of imprisonment. The implementation of the electronic surveillance system was directly tied to the necessity of reducing the prison population by introducing an alternative system to incarcerate individuals serving short-term custodial sentence[355]. The Explanatory Memorandum accompanying the draft Act clearly stated that the implementation of electronic surveillance aimed to address the "most significant challenge to upholding the basic rights and freedoms of convicts - the issue of overcrowding in penitentiary units"[356]. It also highlighted their alignment with international soft law instruments[357].

[351] Poland, Act of 7 July 2022 amending the Act - Penal Code and certain other acts (Journal of Laws, item 2600, as amended). This Act will enter into force in October 2023.
[352] Poland, Act of 7 July 2022 amending the Act - Penal Code and certain other acts (Journal of Laws, item 2600, as amended). This Act will enter into force in October 2023.
[353] Poland, Act of 9 October 2009 amending the Act - Executive Penal Code (Journal of Laws No. 190, item 1475).
[354] Poland, Act of 16 September 2011 amending the Act - Executive Penal Code and certain other acts (Dz. U. No 240, item 1431, as amended).
[355] Poland, Sejm (5th term of office), Explanatory memorandum to the Government's Draft Act on Execution of Prison Sentences Outside the Penitentiary Institution in the Electronic Dispensation System, Sejm document no. 1237.
[356] Poland, Sejm (5th term of office), Explanatory memorandum to the Government's Draft Act on Execution of Prison Sentences Outside the Penitentiary Institution in the Electronic Dispensation System, Sejm document no. 1237.
[357] Poland, Sejm (5th term of office), Explanatory memorandum to the Government's Draft Act on Execution of Prison Sentences Outside the Penitentiary Institution in the Electronic Dispensation System, Sejm document no. 1237.

Eligible to serve a custodial sentence under the electronic surveillance system were individuals who had been sentenced to a maximum of six months' imprisonment, had a permanent place of residence, and had given their consent to serve the sentence in this manner. Additionally, the penitentiary court had to determine that the execution of the sentence through electronic surveillance would be sufficient to achieve the objectives of the sentence. Inmates who had previously been sentenced to imprisonment for an intentionally committed offense were disqualified from the possibility to serve their sentence in the system of electronic surveillance. In addition, the Act allowed prisoners sentenced to longer sentences to serve the last 6 months of their sentence in the system. The decision in that field was based on the convict's past behaviour, a positive prognosis of his/her behaviour at liberty, in particular the absence of a risk that he/she would commit a crime. In the following years, the system was modified for several times. The 2010 amendment[358] modified requirements for serving a prison sentence in the system of electronic surveillance. It extended the maximum duration of a sentence that could be served in this system to one year of imprisonment.

The example of Greece

More recently, in 2021 Greece has adopted a new Criminal Code, replacing the long-outdated one from 1951. In accordance with its explanatory memorandum, the new code aspires to set out the basic principles of a modern "liberal criminal law" as a reliable guarantee of individual freedoms, strengthen the rule of law, the democratic principle and the principle of legality, and uphold human dignity as an "absolute limit to the exercise of any power". The preparatory work done to arrive at the final text of the code references multiple times the principles, values and specific provisions of the ECHR, the jurisprudence of the European Court of Human Rights, and the EU Charter of Fundamental Rights, as well as European values in general.

Aside from the changes in the overall direction and philosophy of criminal legal framework, the new code introduced a number of changes to specific provisions with direct influence over penitentiary policy and the overpopulation of Greek prisons, including the introduction of community service as a clear sentencing option, reducing the maximum term of imprisonment to fifteen years and limiting the number of crimes punishable by life imprisonment; modernising the institution of suspension of the execution of the sentence; abolishing the commutation of custodial sentences into a pecuniary punishment and replacing it with total or partial conversion of a custodial sentence into community service. Moreover, provision is made for a further reduction of the already reduced sentence in cases where the offender has more than one reason to request it. Amendments have also been made to the framework on mitigating circumstances. An interesting addition here, with particular relevance to the chronic issues of the Greek justice system, identified by the ECtHR in relation to the requirement for a speedy trial, is the mitigating circumstance of the "non-reasonable duration of the criminal proceedings" through no fault of the accused. The category of "habitual offenders" has been removed. Instead, persons who commit a particular offence more than once are treated favourably, as they are deemed to have additional difficulties to "resist" the crime. Finally, the criminal category of misconduct and the punishment of unlikely attempts have been removed from the code.

The legislative reform in Greece entailed also the adoption of a new Code of Criminal Procedure. Key amendments with particular relevance to the penitentiary system and overpopulation include new provisions on the postponement and abstention from prosecution. The new provisions promote the abstention from the prosecution for low disapprobation misdemeanours (those threatened in the law with a penalty of up to one year's imprisonment or a fine or with the provision of community service or a combination thereof, if it is considered that there is no serious public interest in instituting criminal proceedings. Furthermore, the code provides for the temporary suspension of the prosecution in misdemeanours incurring imprisonment of up to three years, on the basis of criminal mediation

[358] Poland, Act of 21 May 2010 amending the Act on Execution of Prison Punishment Outside the Penitentiary Institution in the Electronic Dispensation System (Journal of Laws no. 101, item 647).

and a serious attempt at reconciliation with the victim, payment of a certain amount of money to a charitable institution or fund, etc. The .,fulfilment of these conditions leads to a definitive abstention from prosecution. New code further emphasises alternatives to detention in the context of pre-trial detention as well. [359] The new framework on alternatives to detention is clearly defined based on the principle of necessity and *stricto sensu* proportionality and subsidiary relation of detention to its alternatives (including house arrest under electronic monitoring).

The example of Belgium

The Belgian government also aims to adopt a new Book I of the Code penal, introducing a new sentencing philosophy designed to combat prison inflation. The new philosophy includes two major features. First, prison is seen as the exception rather than the rule. The judge will therefore have to give priority to what are currently known as "alternative penalties" and will only be able to impose a prison sentence as the *ultimum remedium*[360]. To achieve this objective, the legislature plans to introduce a more diversified range of sanctions. Second, prison sentences may no longer be less than six months. The government initially wanted to extend this rule to 12 months, but changed its mind following the opinion of the "Conseil supérieur de la Justice", which stated that "When carried out shortly after the commission of the offence, such sentences can lead to a new awareness on the part of the perpetrator"[361]. The Government also justified its decision by stating that it had heard "the real fear that judges, who felt they could not use a non-custodial sentence, might be forced to impose a one-year prison sentence when, if they had been given the opportunity, they would have handed down a sentence of lesser length."[362]

The example of France

Back in 2013, the French government presented a bill, adopted the following year, which was partly aimed at reducing the occupancy rate of establishments. As European pressure increased, particularly with the condemnation of Russia in 2012[363] and Italy in 2013[364], France turned its attention to the ECHR's recommendation to "*implement measures likely to curb the problem of prison overcrowding*" [365]. With the 2014 law[366], the government created the penalty of "penal constraint" (contrainte pénale), presented as an alternative "*to a certain number of prison sentences*"[367]. The law also created the "release under constraint" (libération sous contrainte – LSC) measure, available to people sentenced to five years' imprisonment or less who have served two-thirds of their sentence. This measure puts an end to the prison sentence and places the offender under an alternative regime (conditional release, electronic bracelet, semi-liberty or external placement), regardless of whether or not he or she requests it. In a highly symbolic move, the 2014 law also established the principle that "*an unconditional prison sentence may only be handed down as a last resort if the seriousness of the*

[359] Pre-trial dandainees are held in special chapters of closed prisons and are calculated in the general prison population, albeit under a special slot.
[360] Projand de loi (I) introduisant le Livre Ier du Code pénal, Dov., *Ch*, n° 55, 3374/001, p. 9.
[361] Conseil supérieur de la Justice, Avis sur l'avant-projand de Code pénal, Livre Ier, 23 November 2022, p. 13 (available on https://csj.be/admin/storage/hrj/20221123-avis-code-penal-livre-i-final.pdf).
[362] Projand de loi (I) introduisant le Livre Ier du Code pénal, Dov., *Ch*, n° 55, 3374/001, p. 126.
[363] *Ananyev* and *others v. Russia*, n°42525/07 and 60800/08, 12 January 2012.
[364] *Torreggiani* and *others v. Italy*, n°43517/09 (and 6 others), 8 January 2013.
[365] Ministry of Justice, impact study of the bill on the prevention of recidivism and the individualisation of sentences, 7 October 2013, p. 31.
[366] Law n°2014-896 of 15 August 2014 on the individualisation of sentences and reinforcing the effectiveness of criminal sanctions.
[367] Ministry of Justice, impact study of the bill on the prevention of recidivism and the individualisation of sentences, 7 October 2013, p. 32.

offence and the personality of the offender make such a sentence necessary and if any other sanction is manifestly inadequate"[368].

As we said, less than a year before the *J.M.B.* ruling, the 2019 Justice Act was passed. It aimed to limit the use of short prison sentences by encouraging *ab initio* sentence adjustments (*i.e.* decided by the trial court) for sentences of one year or less, and by prohibiting prison sentences of less than one month[369]. Two stages are considered:

a For sentences of six months to one year, the judge must decide, "*if the convicted person's personality and situation so permit*", that the sentence will be served in the form of an alternative ;
b For sentences of one to six months, the judge must impose an alternative sentence "*unless this is impossible due to the convicted person's personality or* [and not and] *situation*".

It should be noted, however, that at the same time the law lowered the maximum sentence that could be adjusted *ab initio* from two to one year, thus putting an end to the automatic review of the adjustment of sentences of two years or less. The 2019 Act also replaced the "contrainte pénale" and the "sursis avec mise à l'épreuve" (suspended sentence with probation) with the new measure of "sursis probatoire" (suspended probation), and at the same time created the sentence of home detention under electronic surveillance, which can be decided as an alternative to imprisonment, not just as a form of adjustment but as an independent sentence. A new provision also slightly modified the LSC system (release under constraint), making it automatic unless the judge decides that it is impossible (due to material impossibility, risk of re-offending or risk to the victim).

The law of December 2021[370] – the only real reform to take place after the *J.M.B.* ruling – introduced a number of changes to criminal procedure and the enforcement of sentences. In order to "*continue to curb prison overcrowding*"[371], the law first aimed to limit pre-trial detention by promoting the use of "electronically monitored house arrest" and the "mobile electronic anti-seizure device" in cases of domestic violence – the judge will now be required to give special reasons for any extension of pre-trial detention beyond eight months. In the case of convicted prisoners, the law introduces "automatic" LSC (release under constraint). Not requiring a rehabilitation plan – as for the "classic" LSC (see above) – this mechanism allows the remaining part of a sentence to be served in the form of an alternative measure. Already possible for sentences of less than five years from two-thirds of their term, it becomes automatic for people sentenced to two years or less, when the remainder to be served is less than three months – the idea being, according to the government, "*to encourage reintegration by limiting so-called "dry exits"*"[372]. There are, however, a number of exceptions that limit the application of this measure[373]. Last but not least, the 2021 law restructred the system of sentence reductions: whereas the old system distinguished between "ordinary" sentence reductions – which were granted in advance and could only be withdrawn in the event of bad behaviour – and so-called "additional" sentence reductions – which could be granted in the event of rehabilitation efforts such as work or participation in activities –, the new system merges these two systems and removes all automaticity. These new types of credits can now be awarded, in theoretically identical quantities to the old system, to people "*who have given sufficient evidence of good conduct and who have made*

[368] Article 132-25 of the Code of Criminal Procedure.
[369] The interprandative circular concerning the application of the law, issued on 20 May 2020, also specified that "*particular attention should be paid to the situation in prisons*", especially in order to prevent the enforcement of short sentences leading to "*new peaks in prison overcrowding*".
[370] Law n°2021-1729 of 22 December 2021 on confidence in the judiciary.
[371] Ministry of Justice, impact study of the bill on confidence in the judiciary, 13 April 2021, p. 7.
[372] *Ibid.*, p. 152.
[373] Article 720, II and III° of the Code of Criminal Procedure. The "automatic" LSC does not apply:
a In the event of "*material impossibility resulting from the absence of accommodation*" ;
b To persons convicted of offences classified as crimes or for acts of terrorism, violence or offences against minors, against a public officer or against a partner ;
c persons who have been handed a disciplinary sanction during their *detention* for acts of violence or for "*any collective action likely to compromise the security of the establishment or to disrupt its order*".

serious efforts towards rehabilitation" [374]. The reforms of the "automatic" LSC and of the sentence reductions both came into force on 1 January 2023.

It should also be noted that a new justice law was approved by Parliament on 18 July 2023[375]. Although some of the debates, instigated by left-wing MPs, concerned the implementation of a prison regulation mechanism (see below), the bill did not include any provisions aimed at reducing the number of people imprisoned. On the contrary, it provides for longer periods of pre-trial detention, in particular by increasing the time limits for referral to an immediate hearing[376] (a procedure to which 60% of people in pre-trial detention were subject in 2022), as well as the time limit by which judgment must be handed down, when the person is detained, failing which his or her detention will be invalidated (from two to three months). As far as prisons are concerned, the only provision made is for the use of body cameras by prison guards.

b. The limited use of decriminalisation by European governments

Decriminalisation of certain behaviours as a way to divert people from the criminal justice system has not been widely utilised by European governments in their efforts to addressed structural problems in prison, including overcrowding. The 2013 amendments to the Polish Penal Code and the Misdemeanours Code that modified the penalty of certain offenses are one exception to this general observation. [377] Essentially, pursuant to the amendments, the offence of bicycling under the influence of alcohol from the Penal Code to the Misdemeanours Code. Furthermore, the amendments increased the minimum threshold of damage required for theft to be classified as a crime rather than a misdemeanour[378]. In 2012 in Romania several offences, stipulated by special laws, were decriminalized in order to avoid double incrimination. [379] However, those decriminalized offences referred to relatively minor acts such as the issuing of a check, acts regarding copyright, acts regarding the establishment of the minimum wage or the execution of a state of emergency, failure to submit financial statements, etc.). The number of offences were not reduced by these procedures and some offences provided for in the special laws became contraventions.

Lowering the legally prescribed minimum and maximum length of prison sentences is yet another strategy for combating overcrowding that has been applied although narrowly. In Romania, the 2014 penal reform led to the reduction of the limits of the terms of imprisonment for some offences,[380] with significant reduction observed for example it regard to theft and robbery (Table 1).

Table 1		
Offense	Old Criminal Code	New Criminal Code

[374] Article 721 of the Code of Criminal Procedure.
[375] Ministry of justice policy and programming law 2023-2027, voted by the National Assembly on 18 July 2023.
[376] While the current time limits bandween the first hearing and the committal hearing are bandween 2 and 6 weeks, or bandween 2 and 4 months when the offence is punishable by 7 years' imprisonment or more, the bill envisages standardising these time limits so that they are systematically bandween 4 and 10 weeks.
[377] Poland, Act of 27 September 2013 amending the Act - Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended).
[378] Poland, Act of 27 September 2013 amending the Act - Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended).
[379] statement of reasons to the law implementing the new criminal code (law 187/2012) - point 2.2 and point 4, respectively pages 4-9 and 11-12 of the statement of reasons https://www.cdep.ro/proiecte/2011/100/00/0/em100.pdf.
[380] Page 31 of the statement of reasons for the draft law on the new criminal code https://www.cdep.ro/proiecte/2009/300/00/4/em304.pdf. In this sense, the Ministry of Justice has published on its website the new criminal code, accompanied by the comments of the Ministry of Justice regarding the new regulations in the criminal code, including the policy of reducing the limits of punishments https://www.just.ro/wp-content/uploads/2021/11/noul-cod-penal-precizari_01022013.pdf.

Theft	1-12 years of imprisonment	6 months-3 years of imprisonment and fine
Robbery	3-18 years of imprisonment	2-7 years of imprisonment

At the same time, the new Criminal Code provided for more severe sanctioning for recidivism and contest of offences.[381] Before 2014, the sanctioning regime provided for the offence contest was less severe. The heaviest sentence of all sentences applied was applied, to which an increase of up to 5 years could be applied. In the 2014 criminal code the heaviest sentence of all offences is applied, to which a mandatory increase of 1/3 of the total of the other penalties applied. [382]

Notably, in Greece, as stated above, the new Criminal code has reduced the maximum term imprisonment to 15 years and the limited the number of crimes allowing the imposition of life imprisonment.

c. The reduction of prison population through early release schemes

In their efforts to reduce prison population, some European states have implemented legislative reforms in the early release schemes to allow easier access and to broaden eligibility criteria. Notably, one of the most comprehensive reforms in that regard have taken place in Bulgaria, where the early release system was modified in close consideration of the rules of the *Committee of Ministers Recommendation Rec (2003)22 concerning conditional release*. There are at least four novelties that should be underlined in this regard.

First, the scope of application of conditional release is widened to include all prisoners serving fixed term sentences of imprisonment, regardless of whether they have applied previously. Prior to the reform, early conditional release could have been granted only once in the lifetime of a person. Second, individuals convicted of crimes which qualify as "dangerous recidivism" become eligible for early release after serving two-thirds of their sentence, regardless of the time that is left to be served, which was previously fixed to a maximum of three years.[383] Third, for the first time in the history of the Bulgarian penitentiary law, prisoners are now entitled to apply for conditional release directly before the court.[384] Under the old regulations, this right was reserved for the prosecutor and the Commission for the Execution of Sentences. Last, the 2017 amendments provide a list of what should be considered by the court as evidence of prisoners' rehabilitation – good behaviour, participation in work, education, trainings, sports activities, participation in treatment programmes.[385] They also stipulate what should not constitute sole grounds for refusing of parole. If early release is not granted, a new request could be made after 6 months at the earliest.[386]

Another example of early release reform has been observed in Poland, where the 2010 amendment[387] removed the requirement that a convicted person must serve at least 6 months of imprisonment before being eligible for conditional early release. As a result, the convicts had to serve only half of the imposed prison sentence in order to qualify for conditional release.

In 2014 France introduced a new form of early release – the "release under constraint" (libération sous contrainte – LSC) measure, available to people sentenced to five years' imprisonment or less who have served two-thirds of their sentence. This measure puts an end to the prison sentence and

[381] Interview 1, lawyer, 23 May 2023.
[382] Interview 1, lawyer, 23 May 2023.
[383] *Criminal Code*, Article 70, (1)(1).
[384] *Code of Criminal Procedure*, Article 437, (2).
[385] *Ibid*., Article 439a, (1).
[386] *Ibid*., Article 439a, (3).
[387] Poland, Act of 5 November 2009 amending the Act - Penal Code, the Act - Penal Procedure Code, the Act - Executive Penal Code, the Act - Fiscal Penal Code and some other acts (Journal of Laws No. 206, item 1589).

places the offender under an alternative regime (conditional release, electronic bracelet, semi-liberty or external placement), regardless of whether or not they request it.

Although not a foreign idea, criminal amnesties, pardons, and other exceptional release mechanisms remain unpopular tools for managing prison population and easing overcrowding across Europe. The Covid-19 pandemic has temporarily altered this situation, at least for some jurisdiction, which enacted emergency release measures to reduce the risk of contagion related to the overcrowding. Following the outbreak of the pandemic, the Portuguese parliament adopted exceptional measures aimed at preventing the spread of the coronavirus in the prison system, including pardons and special prison leaves, which allowed for the immediate release – either permanent or temporary – of inmates. Under the new law, 2 035 inmates were released (either temporarily or permanently) from the prison system. Italy is another example for a jurisdiction where the legislator intervened to deflate prison population during the COVID-19 pandemic, making it possible for sentences under 18 months, or sentences with under 18 months left to serve, to be served under house arrest.

On 19 June 2023, a law proposal establishing an amnesty and a collective pardon of penal sentences,[388] within the framework of the celebrations of the World Youth Day Lisbon 2023 and the visit of the Pope. It encompasses offences committed by young persons between 16 and 30 years of age at the time of the commission of the offence. One year of imprisonment is pardoned for all sentences of imprisonment up to eight years. Several exclusions apply, mainly related to the type of offence.

5. Introduction of new remedies

a. Remedies with variable forms

The creation of a dedicated compensatory and preventive remedies in Bulgaria

One of the most progressive developments in Bulgarian legislation, driven by the *Neshkov* judgment, was the establishment of dedicated preventive and compensatory remedies with regard to any form of treatment that amounts to torture, cruel, inhuman or degrading treatment of convicted prisoners or detainees. They were introduced in legislation two months after the deadline set in *Neshkov* and the enforcement of the preventive remedy was postponed for another three months – until 1 May 2017.[389]

The new remedies are meant to complement each other, but could be applied independently. The preventive remedy, taking the form of a special complaint procedure before the administrative court, is enacted in the new Chapter Six in the *Execution of Punishments and Pre-Trial Detention Act* – "Protection against Torture, Cruel, Inhuman or Degrading Treatment". By virtue of the new provisions, convicted prisoners and detainees are entitled to complain directly before the administrative court against any alleged violation of their right to be free from torture, cruel, inhuman or degrading treatment, including in cases of overcrowding and/or placement in poor material conditions.[390] In this regard, applicants could request the court to issue an injunction or grant other equitable relief appropriate to ensure termination or prevention of any treatment, violating Article 3 of the EPPTA.[391]

In order to establish the facts of the case, the court may use all evidentiary means available, as well as to request information from third parties, such as the prosecutor, the police, experts, the Ombudsman or non-governmental organisations.[392] The case is heard within 14 days after the complaint is filed, with the participation of the applicant, his/her representative and the head of the

[388] Draft Law 97/XV, available at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DandalheIniciativa.aspx?BID=173095 .
[389] *Ibid*., Transitional and Concluding Provisions, § 53.
[390] *Ibid*., Articles 276, 277, (1).
[391] *Ibid*., Article 276, (1).
[392] *Ibid*., Article 278.

respective correctional or detention facility.[393] If the complaint is found to have merit, depending on the nature of the underlying problem, the court orders prison authorities to perform, restrain from or terminate the performance of certain acts amounting to violations of Article 3 of the EPPTA.[394] The decision of the administrative court is appealable before another panel of the same court.[395] The court's decisions are binding on the prison administration.

The legislative amendments in Bulgaria from 2017 also set up a dedicated court procedure for the examination of claims for damages resulting from such treatment. This model of compensatory remedy was preferred to the establishment of a general domestic remedy for the protection of all rights and freedoms, enshrined by the Convention, which was also discussed in the *Neshkov* judgment.[396]

The remedy was introduced in a new Chapter Seven of the EPPTDA. It is designed to provide monetary compensation to persons who are or have been subject to detention conditions, contrary to Article 3 of the EPPTDA. The authority, which is competent to hear claims for damages, is the administrative court in regular two-instance proceedings. Until 2020 the second instance was the Supreme Administrative Court (SAC). At the end of 2019 this was changed and now the second instance is the three-member panel of the same administrative court. The change aimed at avoiding unnecessary transfers of prisoners to Sofia, the seat of the SAC. Claimants do not have to deposit court costs in advance, as was the case before.[397] By virtue of an express provision, once a *prima facie* case is submitted to the court, a presumption that non-pecuniary damages have occurred applies.[398] Another legislative novelty is that the court is now under obligation to examine the cumulative, as opposed to the individual, effect of the different aspects of the detention conditions on the prisoner, as well as the time that they has spent in these conditions, in order to establish whether the treatment has amounted to a violation of Article 3.[399] The law does not stipulate specific rules, guiding the determination of the amount of money to be awarded as compensation for non-pecuniary damages, meaning that the amount of compensation is to be determined with regard to the general rules of the Bulgarian tort law. Presumably, it "must not be unreasonable in comparison with the awards of just satisfaction made by this Court".[400]

The compensatory remedy is now available to all prisoners serving their sentences of imprisonment or pre-trial detention measures, as well as to those who had been released in the six months before the introduction of the remedy.[401] Moreover, recourse to the remedy is also available to prisoners who were released earlier, but who in the meantime had complained to the ECtHR about the conditions of their detention and their applications were pending at the time of the introduction of the remedy.[402]

Outside the scope of the reforms addressing prison overcrowding, the 2017 legislative amendments in Bulgaria claimed to be introducing substantive amendments in the legal framework governing the highly restrictive "special regime" applied to life prisoners, in order to conform to the judgment in the case of *Harakchiev and Tolumov v. Bulgaria.* However, it failed to comply with one of the explicit recommendations of the ECtHR, namely, to discontinue the automatic application of the "special regime" to life prisoners without prior individual risk assessment. The most significant novelty in regard to the "special regime" regulation is that governors are now obliged to periodically review the necessity of keeping life prisoners under "special regime" and to lower the regime to "severe", if deemed appropriate. The review must be carried out at least once per year, starting from the end of

[393] *Ibid*., Article 280, (1).
[394] *Ibid*., Article 280, (2).
[395] *Ibid*., Article 281, (1).
[396] ECtHR, *Neshkov* and *Others v. Bulgaria,* § 286.
[397] EPPDA, Article 285, (3).
[398] *Ibid*., Article 284, (5).
[399] *Ibid*., Article 284, (2).
[400] ECtHR, *Neshkov* and *Others v. Bulgaria*, § 288.
[401] EPPDA, Transitional and Concluding Provisions, § 47.
[402] *Ibid*., § 48.

the first year of imprisonment.[403] Governors' decisions are subject to judicial control in single-instance court proceedings.[404]

However, life prisoners and prisoners sentenced to fixed terms of imprisonment who are placed under "severe regime" are not treated equally. The rule is that life prisoners placed under "severe regime" remain isolated, in constantly locked cells and under enhanced supervision, unless otherwise decided by the prison governor.[405] Governors' decisions to keep life prisoners on "severe regime" isolated, instead of placing them in common cells, with the right to participate in all collective activities, could be challenged in court.[406]

A dedicated remedy before the judicial judge in France

A new remedy against inhumane or degrading conditions of detention in France was introduced by means of the promulgated on 8 April 2021 law, creating a new article 803-8 of the Criminal Procedure Code. This mechanism was detailed by implementing decree on 15 September 2021[407] and came into force on 1 October of the same year.

This new remedy enables detainees to apply to the liberty and custody judge (if they are in pre-trial detention) or the sentence enforcement judge (if they have been definitively sentenced) for an end to the indignity of their conditions of detention. The law thus provides for a four-stage procedure:

a An assessment of the admissibility of the request, on the basis of allegations that are "*detailed, personal and current, such that they constitute prima facie evidence that the person's conditions of detention do not respect* [his] *dignity*" ;
b An assessment of the merits of the request, during which the judge "*carries out or arranges for the necessary checks to be carried out and receives the observations of the prison administration*" ;
c A remediation by the prison administration, which is "*exclusively competent to assess the measures to be implemented*"[408] ;
d And, if the remedial measures fail, a judicial decision that may go as far as releasing the detainee.

The law also sets maximum time limits for each stage. In total, the maximum period for obtaining a judicial decision is one month and thirty days, rising to three months and ten days in the event of an appeal.

A remedy threw local control committees in Belgium

The first major legislative reform of prison law in Belgium enacted with the Law from 12 January 2005 knows as the Dupond Act. Among other things, the law envisaged the creation of a "Commission centrale de surveillance pénitentiaire" (CCSP), responsible for independent monitoring of prisons and submitting opinions to the government (article 22) and the establishment of "Commissions de surveillance" in each prison, to which a prisoner may complain about any decision taken against him by the prison director (article 108). However, its various articles have been delayed in coming into force. The provisions relevant to the national prison monitoring body and the local committees were brought into life with legislation via legislation from 2016 and 2020.

According to article 22 of the Dupont Act, the CCSP is the national body responsible for three main tasks. Firstly, it is responsible for monitoring prisons and ensuring that prisoners are not subjected to degrading treatment. This means that it has the power to enter all prisons (all rooms), to have access

[403] *Ibid*., Article 198, (1), (3).
[404] *Ibid*., Article 198, (2).
[405] *Ibid*., Article 71, (3).
[406] *Ibid*., Article 198, (4).
[407] Article R.249-17 of the Code of Criminal Procedure.
[408] Article 803-8 of the Code of Criminal Procedure states that at this stage, "*the judge may not order the prison administration to take specific measures*".

to all administrative documents and to take evidence from prisoners on a confidential basis[409]. The CCSP's observations must then feed into an annual report that will be send to the Belgian government. Finally, the CCSP is also responsible for managing the creation and coordination of local control commissions.

Local control committees focus their control on a particular prison and are therefore entrusted with two additional specific tasks. Firstly, they are required to mediate between the director and prisoners regarding any problems brought to their attention (article 26). Secondly, since October 2020, they examine complaints submitted by detainees against a decision taken against them by the prison director. Previously, prisoners who believed themselves to be victims of degrading treatment could only assert their rights through conventional procedures and the ECtHR had recognised that all these procedures did not allow prisoners to effectively contest the treatment inflicted on them.

A single judicial complaint combining the characteristics of both a preventive and compensatory remedy in Greece

Greece has introduced a single judicial complaint procedure for prisoners to complain against their general detention conditions, which combines characteristics of both a preventive and a compensatory remedy. The article 8 of the new Penitentiary Code stipulates that a prisoner may appeal for failure of the state to comply with the rules underpinning detention conditions (including for those held in administrative detention or in police custody), as established in Article 3 ECHR and other national and international law on the treatment of prisoners, if said conditions offend human dignity. The potential outcomes from the exercise of this remedy may be:

1 A change of prison cell and, if not possible, the transfer of the appellant to the prison hospital or another public hospital, or their priority transfer of the applicant to another detention facility;
2 Monetary compensation for the moral damage suffered by the prisoner, [410] and
3 Early release based on a favourable calculation of time served. [411]

It should be noted that the draft bill upon which the public consultation took place included a very different version of this article, which effectively excluded the majority of prisoners from its scope, denoting fears about the practical implications of the successful exercise of the relevant rights. Early release was not included as a possible outcome, nor was the change of the place of detention within the prison. Essentially, the main option for the adjudicating court was to order the prisoner's transfer to another prison with better conditions.

The Court's decisions on the prisoners' complaints are not subject to appeal and are immediately enforceable. Moreover, this provision also applies to released prisoners, who may appeal on the same grounds up to four months from the time of their release. All relevant decisions are notified to the NPM.

b. Remedies nullified by changes in the political environment

Suspension of the payments of compensation after suspicion of abuse by convicted criminals for their own enrichments in Hungary

With *Act No. CX of 2016, amending certain Acts on criminal matters in relation to the judgment adopted by the ECtHR in the case of Varga and Others v. Hungary*, Hungary introduced as a preventive measure the possibility for prisoners to submit a complaint to the commander of the

[409] O. Nederlandt and M. Lambert, "La réforme du Conseil central de surveillance pénitentiaire and des commissions de surveillance des prisons : entre attentes déçues and raisons d'espérer ?", *e-legal*, *Revue de droit* and *de criminologie de l'ULB*, vol. 2, April 2019, p. 14.
[410] The amount of which is sand at bandween five (5) and thirty (30) euros per day of violation, depending on the gravity of the violation.
[411] One (1) additional day of time served is reduced from the sentence per ten (10) days of *detention* in unfavourable conditions.

penitentiary institution about overcrowded conditions. The new rule put the commander of the penitentiary institution in charge of taking the necessary measures to improve or counteract the conditions of detention to the extent possible if the complaint proves well-founded. Such measures could be transfer to another cell, allowing more time in the open air or increasing contact opportunities, transfer to a penitentiary institution in which the living space provided for by law could be ensured, etc.

New legislation adopted in 2016 in Hungary introduced a compensation procedure to ensure effective compensation proportionate to the damages caused by overcrowding. Under this procedure, the amount of pecuniary compensation may be determined by the prison judge based on the number of days spent in detention in breach of Article 3 of the Convention multiplied by the daily rate tariff. The law fixed the lower and upper limits for the daily amount of compensation, the minimum being 1,200 Hungarian forints a day. The judge was instructed by the law to exercise their judicial discretion in order to award an amount proportionate to the gravity of the violation found, taking into account, for instance, the absence of toilets separated from the living space in the cell, in addition to a general situation of overcrowding, or to other inadequate conditions of detention. The law ordered the payment of the compensation within sixty days of the decision being served.

However, four years later a Government Decision 1004/2020 (I. 21.) was adopted to take action against what they considered to be abuse of the compensation procedures initiated based on overcrowding. The Government's position was that the compensation procedures were abused by certain convicted criminals and their accomplices for their own enrichment, which was damaging to society's sense of justice, especially that of the victims of crime. The Government therefore called on the Minister of Justice to suspend the payment of compensation without delay and to revise the legislation. This was followed by the adoption of Act IV of 2020 on immediate measures to end the abuse of prison overcrowding compensation, which entered into force in March 2020. The act suspended the payment of compensation until 15 May 2020 and set a target to reduce the average occupancy rate of prisons to below 100% by 30 September 2020. Later, Act LV of 2020 – entered into force on 15 June 2020 – prolonged the suspension of payments until 31 October 2020.

As of 1 January 2021, with amendments to the Act CCXL of 2013 on the execution of punishments, measures, certain coercive measures and petty offence confinement, the system of preventive and compensatory remedies introduced after the *Varga and Others v. Hungary* pilot judgment was transformed. One of the most important changes was the abolition of the requirement that detainees held in inhuman or degrading conditions must file a preliminary complaint with the prison commander before they can submit a claim for financial compensation. Act CL of 2020 also introduced a new 'simplified compensation procedure', while the already existing 'ordinary' compensation procedure remained part of the compensation scheme. The amendment brought about substantial changes to the payment of the amount awarded to detainees. Among others, it instructed the Ministry of Justice to approach the Hungarian Chamber of Bailiffs to clarify whether there are any debts that the compensated inmate has vis-a-vis private parties before the actual payment of compensation.

Abolishment under safety concerns of a remedy providing conditional release for detainees who had served their sentence in poor material conditions in Romania

Invoking the semi-pilot decision in the case of *Iacov Stanciu v. Romania* (July 2012), the Government of Romania submitted, on January 31, 2017, in an emergency procedure, to the Parliament, a draft law on the granting of compensatory measures to persons who executed their sentences in inappropriate premises. The main objective of the draft law, explicitly mentioned in the Explanatory Memorandum[412] was to avoid a pilot judgment against Romania, which urged the state to take all the necessary measures for solving overcrowding, within a determined, relatively short term. The pressure coming from the European Court and the Committee of Ministers to find effective solutions

[412] Chamber of Deputies, PL-x no. 160/2017.

was the main factor behind the adoption of the law: "*we didn't really care about prisoners' rights, the compensatory remedy was adopted because the Council of Europe asked us to, I don't think we would have adopted this law by our own initiative".*[413]

In parallel with the legislative process of the draft law on the compensatory remedy, on April 25, 2017, the ECtHR pronounced the pilot judgment in the related *Rezmiveş and others v. Romania*.[414] In July 2017 the Parliament adopted the law that aimed to provide compensations for persons serving their sentences in poor material conditions, including overcrowding[415]. According to the law, all persons deprived of their liberty had the right to benefit from conditional release if they met the conditions set by the law or who had been or were housed in improper conditions (defined as a space smaller than or equal to 4 sqm or a space with improper hygiene means). The law provided that for every 30 days spent by a prisoner in an inadequate space, 6 days were deducted from his/her original sentence. It was given retrospective effect back to 24 July 2012. The same year, a Minister of Justice Order was adopted on the approval of the minimum mandatory rules on conditions of accommodation of persons deprived of liberty, the prison administration set in motion an assessment of the prisoner's situation based on an inventory of the prisons which were not ECtHR compliant.[416]

However, soon after, the compensatory remedy was abolished. The decision was prompted by public safety concerns triggered by the early release of prisoners convicted of serious crimes and reports of reoffending. By the end of 2019, the mechanism became the focus of intense public and political debate.[417] During the December 2019 meeting, attended by the Romanian Minister of Justice, the Committee expressed grave concern at this development and stressed its dissatisfaction with the fact that the Parliament would abolish a measure which was visibly contributing to reducing prison overcrowding.

Ministry of Justice representatives recall that participating in that meeting was not easy "*the Minister of Justice and I had to go to Strasbourg, to explain why the law on compensatory remedy did not in fact solve the problem of overcrowding. It only released people earlier from prison but it neither re-educated them, nor did it solve the problem of improving poor detention conditions".*[418] One judge supervising the execution of sentences in the Rahova penitentiary agrees: "*I personally did not see this law as a solution, it could not have solved the overcrowding problem because we have a high recidivism rate and you practically just postpone the inevitable or offer compensation but do not solve the systemic problem. And our systemic problems are the insufficient detention places and the high recidivism rate. I would rather see a solution in the sense of executing the rest of the sentence at home, the use of the electronic bracelet, measures to combat recidivism."*[419]

[413] Interview 2, Senior Lecturer at the University of Bucharest, Faculty of Sociology and Social Work, 14 June 2023.
[414] European Court of Human Rights (ECtHR), *Rezmiveș* and *Others v. Romania*, No. *61467/12, 39516/13, 48231/13* and *68191/13*, 25 April 2017, https://hudov.echr.coe.int/fre#{%22itemid%22:[%22003-5698279-7228685%22]}.
[415] Law no. 169/2017 for amending and complanding the Law no. 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceeding.
[416] Minister of Justice Order no. 2772/C/2017. This legislative act reiterated the need for *detention* spaces to respect human dignity and to be in line with minimum sanitation and hygiene standards, depending on the air volume, light, sources of heating and ventilation and correlating with the provisions of law no. 169/2017 in the part where it concerns the definition of improper conditions of *detention*.
[417] Liberă, Europa. « Legea recursului compensatoriu, care a scos peste 21.000 de deținuți înainte de termen, a fost abrogată. Merge la promulgare ». *Europa Liberă România*, 11:19:09Z, sect. Politică. https://romania.europalibera.org/a/legea-recursului-compensatoriu-care-a-scos-peste-21-000-de-deținuți-înainte-de-termen-a-fost-abrogată-merge-la-promulgare/30307121.html.
[418] Interview 3, Ministry of Justice legal adviser, Department for the Elaboration of Normative acts, 14 June 2023.
[419] Interview 5, judge supervising the execution of sentences in the Rahova penitentiary, 30 June 2023.

For lack of political will, a similar compensatory remedy has never been adopted since the end of 2019. Financial compensation for detainees has also not been introduced, despite the Committee's repeated requests in relation to this aspect[420].

Chapter 2. Assessment of implemented measures

1. Impact on prison rates

To assess the impact of the legislative and practical measures designed in response to the European findings of prison overcrowding across the nine jurisdictions in focus, this research attempted to track and develop an understanding of the evolution of the prison population following the implementation of these measures. The evidence suggests that in most cases the rates of imprisonment are increasing, and where a reduction of prison population has been achieved, it has been rather a temporary effect, with a current trend again pointing toward an increase of people in prison, without producing lasting effects.

a. The case of France

The case of France presents an illustrative example unsuccessful response to prison overcrowding. In France, from 1 June 2021 to 1 June 2023, the number of people in prison has effectively risen from 66,591 to 73,699 (a record in French history), representing an increase of 10.6%. These figures, covering a period including the entry into force of the 2019 and 2021 laws, are sufficient to demonstrate the ineffectiveness and even counterproductive nature of the provisions they contain, and which are supposed to act on prison overcrowding. The analysis shows that although the report attached to the 2019 Justice Act asserted that "*the overhaul of the punishment system and the scale of sentences are likely, by reducing prison overcrowding, to make a major contribution to improving prison conditions*", it has to be said that the results are quite different. While the spirit of the law was to limit the use of sentences of less than one year, the statistics only reveal a slight adaptation of punitive practices. While the proportion of sentences of less than six months' imprisonment did fall between 2019 and 2021 (from 49.5% of prison sentences to 40.5%), the proportion of those between six months and one year increased (from 28.5% to 35%), as did the proportion of sentences of between one and three years (from 17.2% to 19.6%). We also see that the average length of incarceration (all sentences taken together) is steadily increasing: from 10.1 months in 2012, it rose to 10.9 months in 2021 (and 10.6 months in 2018, *i.e.* before the 2019 reform came into force). Lastly, while it is still too early to assess the effectiveness of the measures implemented by the 2021 law – which came into force on 1 January 2023 – the record numbers of people detained for the 4th month in a row suggest a limited effect. In this context, it has to be said that the government's stated objective of "*continuing to curb prison overcrowding*"[421] remains wishful thinking.

b. The case of Romania

In Romania, as shown by the annual reports of the National Administration of Penitentiaries,[422] the number of people deprived of liberty grew during 2008-2012: from 26 716 in 2008 to 31 817 in 2012. However, the Romanian prison occupancy rate has decreased significantly between 2015 and 2019, from 164% in January 2015 to 111.33% in October 2019. Following the adoption of the new Criminal

[420] According to the action plan submitted in January 2018, the authorities were to establish, by the end of June 2018, a remedy allowing financial compensation to be awarded to those who have not benefitted or will not be able to benefit from a reduction in sentence and who have lodged, or could lodge, complaints with the European Court about their conditions of *detention*. In March 2018, the Committee encouraged this legislative work. In October 2018, the authorities indicated that their analysis with respect to the modalities of such a remedy was in its final stages but did never submited a clear revised time-table for the adoption of the required legislation.

[421] Ministry of Justice, impact study of the bill on confidence in the judiciary, 13 April 2021, p. 7.

[422] National Administration of Penitentiaries 2011 annual report, https://anp.gov.ro/wp-content/uploads/2017/04/Bilant-activitate-ANP-20111.pdf.

Code in 2014, there was a drastic decrease in the use of pre-trial detention – from 11170 detainees, arrested on remand or convicted in the first instance, in 2014 to 2051 in 2020.[423] The new criminal legislation has led also to a high number of cases being referred to the Probation Service, with 103 815 supervised persons in 2022 compared to 735 in 2001[424]

However, since 2020, there has been a constant upward trend of the prison population. [425] Authorities explained that this was due to the repeal of the compensatory mechanism and to a growing number of prisoners transferred from abroad to serve their sentences in Romania. [426] Despite all measures adopted, the overcrowding rate remained high. As of 31 December 2019, the prison system still had a deficit of 2 301 accommodation places, compliant with the 4sqm for each detainee.[427]

The National Administration of Penitentiaries in Romania attributes the downward trend of the prison population to a combination of measures of the changes in the criminal codes and the implementation of the Strategy[428] for the social reintegration of persons deprived of liberty: "*there is also the contribution along the lines of the effective programs carried out in penitentiaries, the intervention packages. In 2023, we have the lowest percentage of recidivists. If in 2010 the percentage was 44.92%, in 2014-43% (the new code), in 2023 we have a recidivism rate of 36.94%.* [429] As showed above, the Probation Service is also to be credited for the decrease in the recidivism rate of the last years.

The real impact of the new criminal Codes changes on the overcrowding rates is difficult to assess. Some experts tend to agree that the new Codes are inconsistent when it comes to the measures designed to reduce overcrowding. "*Certain measures had a positive impact, other negative. Overall, the impact is not necessarily a good one. Although the Codes developed the alternatives to detention, the sanctions provided for recidivism/for offence competition have become stricter and the application conditions for conditional release have also become stricter. That is, on the one hand it relieves the burden, it leads to release, but on the other hand it leads to an inflation of those who either stay longer or return to the penitentiary."*[430] Romanian penal policy still provides for severe sanctioning for recidivism and contest of offences.[431] Also, the offences removed from the Penal Code were rarely sanctioned in practice and their decriminalization did not impact the overcrowding level.[432]

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[423] Communication from Romania concerning the cases of BRAGADIREANU v. Romania (Application No. 22088/04) and Rezmives and Others v. Romania (Application No. 61467/12), 1390th meanding (December 2020) (DH).

[424] According to a response of the Probation National Directorate to an APADOR-CH FOIA request, June 2023.

[425] Data taken from the annual reports of the National Administration of penitentiaries https://anp.gov.ro/despre-anp/rapoarte-si-studii/.

[426] 1369th meanding, 3-5 March 2020 (DH), H46-23 Rezmives and others and Bragadireanu group v. Romania (Applications Nos. 61467/12 and 22088/04).

[427] National Administration of Penitentiaries annual report for 2019, https://anp.gov.ro/wp-content/uploads/2020/06/Raport-de-activitate-Anul-2019.pdf.

[428] The national strategy for the social reintegration of persons deprived of liberty, for the strategic cycle 2020-2024, approved by Government Decision no. 430/2020, published in the Official Gazandte of Romania no. 494 of June 11, 2020.

[429] Interview 4, former deputy director of the National Administration of Penitentiaries, current director of the Social Reintegration Direction, 25 June 2023.

[430] Interview 2, Senior Lecturer at the University of Bucharest, Faculty of Sociology and Social Work, 14 June 2023; Interview 4, President of GRADO, human rights organization, 30 June 2023; Interview 5, judge supervising the execution of sentences in the Rahova penitentiary, 30 June 2023.

[431] Interview 1, lawyer, 23 May 2023.
Before 2014, the sanctioning regime provided for the offence contest was less severe. The heaviest sentence of all sentences applied was applied, to which an increase of up to 5 years could be applied. In the 2014 criminal code the heaviest sentence of all offences is applied, to which a mandatory increase of 1/3 of the total of the other penalties applied.

[432] Interview with lawyer, 23 May 2023. Prostitution, insult and slander were also decriminalized in 2014.

c. *The case of Portugal*

Portugal also experienced a relevant decrease in the prison population, from 13614 in 2014 to 11412 in 2020, as a result of elimination of weekend detention and establishing a new regime of home detention and enforcing the exceptional release measures during the pandemic. Nevertheless, following 2020 the prison population in Portugal is again in a growth trend, reaching 12383. It appears that the growth in the prison population is not the result of a lower application of alternatives to imprisonment, but of the general increase in the number of persons who have been subject to criminal sanctions. Although the general occupation rate is 98%, there are some overcrowded prisons. Overcrowding most frequently occurs at prisons designated for the initial entry of inmates and located in the metropolitan areas of Lisbon and Porto, as well as those in the Autonomous Region of the Azores. It should be noted, in this particular regard, that prisons of entry are establishments in which the prison population is highly mobile and stays for short periods.

d. *The case of Hungary*

In Hungary, there has been a moderate decline in number of detainees from 2017, which was followed by a considerable growth form 2019. The percentage of pre-trial detainees remained steadily high, above 25% between 2009 and 2014, showed a gradual decline until 2019, and it has started to rise again thereafter. In line with these trends, the prison population rate also experienced a decline between 2016 and 2019, followed by a sharp increase. Since the turn of the century the rate was the highest last year, with 158 prison population rates per 100,000 inhabitants in 2000 and 193.8 in 2022.[433]

At the same time, the capacity of the penitentiary institutions, has been steady increasing since 2009 primarily due to the capacity expansion programme. The most significant growth in the number of places occurred in 2019, when capacity increased by almost 3,000 places.

Changes in the number of prisoners and a steady increase in the number of places available meant that in 2013 overcrowding started to slowly decline. The pace of decrease became more significant in 2017, when, in addition to the capacity expansion and occupancy-balancing programmes, the legislative responses to the requirements of the European bodies entered into force. As a result of this positive trend the occupancy rate of penitentiary institutions went below 100% in 2021. However, this situation proved to be temporary, as the occupancy rate exceeded 100% again in 2022.

e. *The case of Italy*

In 2013, the year of the publication of the *Torreggiani* judgement , the number of individuals incarcerated in Italy amounted to 66.028[434]: in the following years, because of the implementation of the new reforms introduced by the Italian government in response to the input of the Court of Strasbourg[435], this number would steeply decrease, going from 58.092 in 2014, to 52.164 in 2015, not having been that low since 2006, year of a particularly large pardon[436] aimed both at providing relief to the chronically congested judicial system and at providing a palliative remedy to prison overcrowding[437] swiftly reducing the number of incarcerated people from 61.264 to 39.005 in the

[433] Source: Aebi, M. F., Cocco, E., & Molnar, L., (2023). SPACE I - 2022 – Council of Europe Annual Penal Statistics: Prison populations. Council of Europe and University of Lausanne. Available at: https://wp.unil.ch/space/space-i/annual-reports/; For those years missing from SPACE I., own calculation based on Hungarian Central Statistical Office data on population and justice available at: https://www.ksh.hu/stadat_files/nep/hu/nep0003.html and here: https://www.ksh.hu/stadat_files/iga/hu/iga0007.html

[434] These data, as well as all the following, are the official results of the monitoring and analysis carried out by the Statistical Office at the Italian Ministry of Justice: they are freely accessible at https://www.giustizia.it/giustizia/it/mg_1_14.page.

[435] These reforms consisted in the D.L. n. 78 del 2013, then converted into the law no. 94/2013, and in the D.L. no. 146/2013, converted into the law no. 10/2014.

[436] L. 31 July 2006, no. 241, "Concessione di indulto".

[437] See the report compiled in 2007 by the private research centre Eurispes, available at http://www.ristrandti.it/areestudio/amnistia/documenti/eurispes_indulto.pdf.

same year. As had been the case with the aftermath of the 2006 pardon, the emergency approach to overcrowding also displayed post *Torreggiani*, even if effective in momentarily tackling the issue with even impressive results, has consistently failed to produce lasting improvements on the general state of the Italian prison system. Furthermore, as anticipated above, the introduction of domestic remedies, even if conceived with the function of preventing the human rights violation intrinsic to being detained in an overcrowded facility, has proven not to have been particularly impactful[438]. The only remarkable diminution in the number of prisoners in the recent years has to be attributed to the effect of the emergency measure put in place because of the COVID anti-contagion policies: while in the period between 2015 and 2019 the number of incarcerated individuals had risen up to 60.769, at the end of 2020 it went back to 53.364. It must be underlined how the punctual intervention over the overcrowding of Italian prisons produced yet again no structural change to this endemic issue: since the end of the COVID pandemic the prison population started rising again at an alarming rate, amounting to 57.525 incarcerated individuals at the end of June 2023. This shows how prison overcrowding in Italy is not simply a matter of logistics or material availability of suitable prison facilities, but a problem deriving from the overall legal structure of imprisonment as a form of criminal punishment in the Italian legal system, as well as an issue of juridical culture and sensitivity.

f. The case of Poland

In Poland the reduction in the inmate population has been a gradual process that started in 2007 when the number of inmates reached its peak at almost 90,000[439]. This downward trend continued until 2016 when the population of penitentiary units dropped to 71,456 inmates[440]. However, since then, there has been a consistent upward trend, with the exception of the year 2020. The COVID-19 pandemic led to a significant decrease in the number of inmates by almost 7,800 in that year. However, from December 31, 2020, there has been a systematic increase in the inmate population once again[441].

Changes in penal policy, such as a reduction in the number of individuals sentenced to imprisonment with probation, also contributed significantly to reducing overcrowding. The judiciary began to prioritize alternative penalties to imprisonment, and measures were implemented to limit the penality of certain offenses, particularly those related to bicycling under the influence of alcohol.

A substantial decrease in the population of penitentiary units would not have been achievable without a significant reduction in the number of pre-trial detainees. This reduction was influenced by changes in the practices of law enforcement agencies, which, in part, resulted from the increased independence of the prosecutor's office from executive supervision. This change led to a decrease in the number of requests for pre-trial detention submitted to the courts.

The adoption of new technologies played a vital role in alleviating overcrowding. The electronic surveillance system, in particular, allowed thousands of inmates to serve their short-term custodial sentences outside penitentiary units. Additionally, the introduction of mechanisms to defer the execution of prison sentences due to overcrowding facilitated better control over the influx of individuals sentenced to imprisonment.

Furthermore, there was a noticeable inclination among state authorities, particularly penitentiary unit directors and penitentiary courts, to employ tools aimed at reducing the population of penitentiary units. This trend facilitated convicts and inmates in applying for sentence breaks and conditional early release.

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[438] CIUFFOLANDTI S. – CAPUTO G. (2017) 'Marriage Italian Style. A decryption of Italy and ECtHR's relationship concerning prisoners' rights', in CLIQUENNOIS G., DÉCARPES P. and DE SUREMAIN H. (curated by) (2017), Monitoring penal policies in Europe, Routledge, 2017

[439] Poland, Prison Service annual statistics for the years 2001-2022, own study.

[440] Poland, Prison Service annual statistics for the years 2001-2022, own study.

[441] Poland, Prison Service annual statistics for the years 2001-2022, own study.

These changes were further reinforced by demographic factors, including the wave of economic emigration and an aging population. However, the prison reform was left incomplete. Beside the statistical improvement in addressing overcrowding, it did not bring about systemic changes in the conditions of imprisonment and pre-trial detention, as there was lack of corresponding improvement in the national standard of surface area per prisoner. As a result, living spaces for detainees still fell short of meeting the standards set by the European Committee for the Prevention of Torture. Consequently, individuals incarcerated in Poland continue to experience the repercussions of overcrowded prisons.

Lastly, it is evident that a significant reduction in the population of penitentiary units would not have been possible without the adequate commitment of public authorities to respect human rights, uphold the rule of law, and adhere to judgments of the European Court of Human Rights. However, with a change in the ruling political camp, there has been a notable shift in this regard, with public authorities failing to take measures aimed at improving detention conditions. The politicians are rather focusing on making sentences more severe and conditions of detention more painful.

As of June 23, 2023, there were 77,890 inmates in Polish penitentiary units, which represented 92.09% of the total capacity (92.89% for residential wards)[442].On the other hand, one cannot overlook the fact that the standard of space per detainee in Poland is only 3 m². All of the interviewees highlighted it as being too low and not in line with the recommendations of international bodies, particularly the CPT. In their opinion, it results in the ongoing overcrowding in penitentiary units in Poland, affecting the psychosocial well-being of the inmates.

Indeed, considering the current conditions and the standard of space per inmate in Poland, increasing the surface area per inmate would result in a reduction in the number of available places in penitentiary units to around 60 000[443]. If the current number of inmates is maintained, this would lead to a renewed increase in the population ratio of penitentiary units to approximately 130%[444].

g. The case of Bulgaria

The data for Bulgaria suggests a sharp decrease in the average number of prisoners per day in the Bulgarian prisons after 2014. In 2022, their number was 57% of their number in 2012, the peak for the entire period. The explanation of this trend and in particular measuring the effect of the 2017 reform is not an easy task. According to the preliminary data from the 2021 census, the population of Bulgaria in 2021 constituted 88.5% of its population in 2011, the year of the previous census.[445] This decrease was due to the lower birth rate and to migration. Both these factors caused even sharper decrease of the number and the share of young people who were statistically most likely to be imprisoned. On the other hand, after 2011 Bulgaria registered economic growth after the depression, which reflected on the decrease in some popular criminal activity, such as the theft. Accordingly, since 2011 there has been a decrease in the number of sentenced persons in Bulgaria. Their number in 2021 was 59% of their number in 2011.[446] Between 2011 and 2015, the annual decrease in the number of sentenced persons has been between 3,000 and 4,000 persons. After 2015 it continued, albeit at a slower pace.

Thus, in the past ten years Bulgaria has experienced, on the one hand, a sharp decrease of the number of prisoners and, on the other hand, expansion of the overall living space in the entire system by putting into service of two relatively large closed prison hostels for adult males, Debelt and Boychinovtsi. These were developments, which would have alleviated the overcrowding by themselves, without regard to the effects of the 2017 reform, which in fact is difficult to measure.

[442] Poland, Prison Service, Information on the population of penitentiary units as at 23 June 2023.
[443] Poland, Supreme Audit Office (SAO), Information on the results of the control. The safandy of inmates, 2020.
[444] Poland, Supreme Audit Office (SAO), Information on the results of the control. The safandy of inmates, 2020.
[445] Data from the National Statistical Institute sites on the 2021 and 2011 census: https://census2021.bg/ and https://www.nsi.bg/census2011/, accessed on 19 June 2023.
[446] Data is from: NSI, *Crimes* and *persons convicted - 2021*, Sofia, NSI, 2022, p. 19 (in Bulgarian).

There should nevertheless be no doubt that the increase in the use of the preventive and especially of the compensatory remedy after 2017 must have exercised pressure on the system to deal with overcrowding.

The decrease in overcrowding was facilitated through the more even distribution of prisoners in the different types of prison facilities, with an increase in the share of prisoners placed in open-type hostels over a period of ten years. This is clearly due to the possibilities offered by the 2017 legislative reform. While the material conditions of detention in the open-type hostels are not always better than those in the closed-type facilities, the overall quality of life in the former is much better as they offer more opportunities for work and other activities, better medical care, better conditions for family visits and a more relaxed prison regime.

The impact of the 2017 legislative reform on early release on parole and on the general decrease in overcrowding is not so clear. With the exception of 2017, when the share of prisoners who were released on parole from all released prisoners was relatively high, the overall trend is not positive. On the contrary, after 2017 it is negative. It can therefore not be said that the better opportunities for early release, which the 2017 legislative reform offered, by itself influenced overcrowding in a significant way.

This data suggests a stable rate of detention in the IDFs over a period of 20 years, except between 2009 and 2012. The legislative reform of 2017 did not result in a decrease of the number of persons placed in the IDFs. Except for the COVID years 2020 and 2021, the daily numbers of persons detained in Bulgaria's IDFs after 2015 have always been more than 850 and in December 2022 it reached 920. Moreover, if we take into consideration the decrease in the number of criminal prosecutions and criminal convictions in this period, the relatively high and stable level of pre-trail detention looks problematic.

2. Undesired effect

a. negative impact of some measures on prisoners

Certain implementation measures have been described as having some undesired or even adverse impact on prisoners. For example, in Poland, the policy of reducing overcrowding in penitentiary units has had mixed effects on the situation of prisoners. While the acquisition of new places often involved converting common, disciplinary and technical rooms into living cells[447], this not always had a positive impact on inmates' living conditions, as it results in multi-bedding and inadequate sanitary conditions (e.g. situation where some cells were not equipped with sanitary facilities). On the other hand, it had also resulted in inmates' challenges in accessing recreational facilities. Ultimately, the struggle against overcrowding has also affected the rehabilitation processes of prisoners. The Prison Service obliged the directors of the penitentiary units to use every vacant place in the unit to reduce the effects of overcrowding. This resulted in situations, where inmates from different classification subgroups were housed together in the same cell[448].

In Hungary, several interviewees also pointed out that the change in the reintegration custody regulations had a negative impact on the practice of grating rewards and imposing disciplinary measures. Since the amendment, it has become much more difficult to obtain rewards, which may be significant given that one form of reward under the Penitentiary Code[449] is the removal of the executed punishment from the record. In addition, as one interviewed expert has stressed, the disciplinary punishment of the prisoner precludes the authorisation of their placement into reintegration custody according to judicial practice.

[447] Poland, Commissioner for Human Rights, the report on the actions of the CfHR in 2010.
[448] Poland, Commissioner for Human Rights (CfHR), CfHR report on the activities of National Preventive Mechanism in Poland in the year 2010.
[449] Penitentiary Code § 165 (2) k)

Although not a result of the reforms undertaken to ensure compliance with the European bodies' recommendations, it should also be noted that the National Penitentiary Service in Hungary unilaterally terminated the cooperation agreement with the human rights NGO Hungarian Helsinki Committee on 24 August 2017, after 18 years. The reason for the termination was that the rights of prisoners were ensured even without the agreement remaining in force.[450] The Hungarian Helsinki Committee's monitoring of detention facilities ended with the termination of the agreement. As a result, the civil control of detention facilities in Hungary ceased and the level of prisoners' rights protection decreased significantly.

b. Failure to take vulnerable groups into account

The research finding suggest that when implementing reforms to address systematic problems identified by the European bodies, governments seem to pay little or no regard to intersecting issues such as racial or gender discrimination, situation of people with disabilities or other vulnerable groups in prison. It has been claimed, for example, that in Romania there has not been no comprehensive, public, assessment about how the overall measures adopted to solve the problem of overcrowding would affect vulnerable detainees, especially those with mental health issues, representing more than 30% of the prison population. [451] The only concrete references made in the action plans are related to plans to increase the number of psychiatrists and psychologists, the number of out of cell activities and-as it pertains to minor offenders-modernized detention places.

Furthermore, the medically vulnerable persons as well as those with serious mental disorders have also been impacted by the measures adopted as part of the action plan and the transfer policies within the prison system. According to a 2020 Decision of the Prison Administration[452], within the Poarta Albă, Mărgineni, Mioveni and Bucharest-Rahova Penitentiaries, spaces were created for the accommodation of medically and socially vulnerable persons deprived of their liberty (detainees with HIV), depending on the execution regime. Also, within the 2020-2025 Plan of Measures, measures and activities were established regarding the relocation of persons with serious mental disorders within the four penitentiary units. [453] The impact of these transfers on vulnerable detainees has not been assessed albeit civil society reports emphasize that detainees with HIV perceive the "special" sections to which they have been assigned as a form of discrimination, feeling isolated because of their medical condition.[454]

The assessment made on the implementation of some early release mechanisms has concluded that they tend to discriminate the most socially disaffiliated people. This has been found particularly true for ""automatic" release under constraint" which is excluded in the event of "*material impossibility resulting from the absence of accommodation*", or for the new system of sentence reductions, which promotes an exclusively merit-based system based on guarantees of rehabilitation such as a job, housing, family structure, etc. As the most precarious of the precarious, illegal foreign offenders also appear to be strongly affected by these restrictive criteria, and very often pay the price for their poor prospects of reintegration by having less access to sentence adjustments and reductions. Several Courts of appeal, such as the Paris have also interpreted the new provisions of the "release under constraint" strictly, considering that it is irrelevant to foreign detainees who do not hold a residence permit. This approach, which is not legally established, appears to be highly discriminatory. It is, unfortunately, in line with a widespread judicial practice aimed at depriving illegal residents of any form of sentence adjustment on the grounds of their irregular situation, leading to an increase in their

[450] 'Authorities terminated cooperation agreements with the HHC' available at: https://helsinki.hu/en/authorities-terminated-cooperation-agreements-with-the-hhc/
[451] According to civil sociandy estimates, based on prison monitoring visits and discussions with doctors.
[452] Decision no. 360/2020 on the profiling of places of *detention* subordinated to the National Administration of Penitentiaries.
[453] Idem 54.
[454] APADOR-CH (2022), Monitoring visit report, Margineni prison, https://apador.org/raport-asupra-vizitei-in-penitenciarul-margineni-2/, APADOR-CH (2022) monitoring visit report, Rahova prison (January 2023), https://apador.org/raport-asupra-vizitei-in-penitenciarul-rahova/.

representation in prison. As a result, on 31 March 2023, while foreign nationals accounted for 25.5% of people in prison, they represented only 9.5% of the population under alternative measures[455].

Discriminatory application of alternatives of detention seems to be an issue in Greece as well. For example, house arrest with electronic monitoring, an option included in past versions of the criminal code and upgraded in the current, in practice only benefits those who can afford to pay for the requisite equipment, a cost not covered by the state.

3. Assessment of the remedies

The review of the reform initiatives in the nine sates finds that not a single remedy introduced to prevent violations of Article 3 pertaining to prison overcrowding and poor material conditions has been assessed as currently being successful in achieving its prime goal. Most commonly, problems are manifested in the design and accessibility of the procedures established for seeking redress, as well as the undesirability of the potential solutions, which in turn results in low levels of engagement with the remedy. While in some jurisdictions, such as Greece, the newly introduced preventive remedy has been described as a step in the right direction, which effectiveness is yet to be assessed, in others, as in France, practitioners have categorically denied the potential of the national preventive remedy to produce any favourable impact on the state of prison overcrowding at all.

a. Problems in the design and accessibility of the procedures

Fear of retaliation against applicants is also commonly suggested as a deterrent to using the preventive remedy, as it is usually required prisoners to bring a case in the court against the prison administration they have to deal with on a daily basis. In the case of Greece, for example, the Hellenic League of Human Rights has noted its concern on the lack of guarantees of impartiality or avoidance of retribution against the detainee, given his or her particularly vulnerable position vis-à-vis the prison administration, in particular in light of wide-spread allegations that in some prisons, directors use threats and countermeasures to prevent the lodging and publication of complaints about living conditions. Similar concerns have been shared with regard to the use of the preventive remedy in Bulgaria. In France some lawyers also reported cases of reprisals against prisoners who dared to complain about their conditions of detention. Others indicate that remand prisoners are sometimes afraid to lodge an application for fear of negative consequences in their criminal case and the related proceedings (particularly with the judges responsible for extending pre-trial detention).

In the case of Bulgaria, it has been also stressed that the low number of cases of use of the preventive remedy reflect the current state of the material conditions in the Bulgarian prisons and IDFs which have been improved significantly as a result of the reform. Other reasons mentioned for the low take-up by prisoners of the new preventive remedy in France are complexity of the procedures, unsuitability of the length of the process for short sentences, etc.

A study from Bulgaria, analysing 373 proceedings on the use of the preventive remedy between 7 February 2017 and 31 December 2019 revealed that not only the number of cases reaching the court was small, but that more than 85% of the proceedings have been terminated at the initial stages, for different reasons, mostly technical. The remaining proceedings resulted in 33 orders and 13 decisions. The majority of them were negative orders or decisions with which the courts rejected the applicants' requests. In only 8 cases the courts found for the claimants. In some cases, the requests did not involve issues of inhuman and degrading treatment. According to a judge from the Sofia Administrative Court, this is very often the case.[456] But in other cases it was the restrictive approach of the courts in the application of the law, which stood behind the rejections. Examples of problematic requestions of requests regarding material conditions in Bulgarian places of detention include: rejection as unfounded of a request that involves less than 4 sq. m. living space per person and lack of

[455]Directorate of Prison Administration, quarterly statistics for the closed and open environments as at 31 March 2023.
[456] Interview with N.A., judge at the Sofia Administrative Court, Sofia, 28 June 2023.

ventilation;[457] rejection as unfounded of a request involving poor material conditions - a living space of less than 4 sq. m., high humidity, lack of ventilation, impossibility of washing and drying;[458] rejection as unfounded of a complaint about the quality of drinking water in the prison;[459] rejection as unfounded of a request to oblige the Varna Prison governor to order the cell in which the applicant was placed to be designated as a non-smoking cell.[460]

The complaint procedure introduced in the Belgian prison law in the aftermath of the Vasilescu ruling in assessed by the CCSP as ineffective, especially considering the systemic nature of overcrowding. The CPSC also considered that, although the introduction of the right to complain was a step forward in terms of prison jurisprudence, it could not be regarded as an effective remedy against the conditions of detention, given that the main purpose of the prisoners' right to complain was to enable them to challenge a decision taken against them by the prison director.[461] However, it seems that a broad conception of "prison director's decision" allows complaints commissions to condemn the fact that some prisoners are incarcerated in cells that are too small.[462]

Other jurisdictions, such as Portugal, have not yet established specific remedies for inadequate detention conditions, and not all decisions of the prison administration impacting prisoners' rights may be challenged by the prisoners in court. So, concerning preventive remedies, the national research has concluded that the available remedies are insufficient to meet the requirements of ECtHR case law. Further on the evolution of the use of domestic remedies following the intervention of the European instances, a lawyer interviewed for the research has expressed an opinion that the intervention of the European bodies has resulted in no improvements. This actor also highlights the fact that even if there were, the inmates would have difficulty in knowing their rights and opportunities, because there is a lack of legal counselling during the incarceration period.

The research from Bulgaria points out towards more frequent use of the compensatory remedy by the prisoners compared to the preventive remedy, the main reason being the possibility for prisoners to lodge a claim for compensation for inhuman and degrading conditions of detention when they are no longer in the hands of the prison authorities and there is therefore no risk of victimization.

b. Derisory character of the amount of compensation awarded

Research on the early Bulgarian's case law of the courts, including 247 decisions on the use of the compensatory remedy between 2017 and 2020, conducted by the BHC, revealed serious problems with the amounts of compensations awarded to the claimants for inhuman and degrading conditions of detention. In very few cases the amounts were comparable to the amounts awarded by the ECtHR in similar cases. Thus, for the worst IDF, that of Gabrovo, which was located underground (in 2021 it was closed), the court awarded BGN 1,500 (EUR 769) to a detainee who spent 6 months in extremely bad conditions (overcrowding, lack of access to natural light, lack of possibilities for outdoor exercise, bad hygiene and inaccessible toilets).[463]

The early case law of the administrative courts on the use of the compensatory remedy against prisons has been similarly restrictive. As an example, an amount of BGN 200 (EUR 103) awarded by the SAC in 2019 to a claimant who spent 6 months in the Burgas prison, one of the worst at the time, and specifically targeted by the CPT in its 2015 public statement. In this case all the allegations of the claimant for overcrowding, bad hygiene, poor access to the toilet, lack of permanent access to water, were accepted as proven by the court;[464] An amount of BGN 500 (EUR 256) awarded in 2019 by the

[457] Administrative Court – Vratsa, Order No. 1009 of 22.11.2018.
[458] Administrative Court – Vratsa, Order No. 715 of 08.09.2018.
[459] Administrative Court – Pleven, Order No. 628 of 31.01.2019.
[460] Administrative Court – Varna, Order No. 2223 of 11.02.2019.
[461] *Ibid*.
[462] Klachtencommissie Gent, 19 April 2023, KC09/23-0039 - KC09/23-0050, available on https://rechtspraak.ctrg.belgium.be/files/KC0923-0039-0050.pdf
[463] Administrative Court – Gabrovo, Decision No. 173 of 26.10.2020.
[464] Supreme Administrative Court, Decision No. 9085 of 14.06.2019.

Supreme Administrative Court to a claimant who spent 6 years under conditions, which for significant amounts of time included overcrowding, lack of permanent access to a toilet and water and insufficient food.[465]

Many claims for compensation for non-provision of adequate medical care were rejected. One of the most drastic in this regard was the case of inadequate treatment with a drug in the Lovech prison, as a result of which the claimant got heart attack. The SAC argued that medical treatment was not a "typical administrative activity" and therefore the case does not fall under Article 284 of the EPPTDA.[466]

Some of the cases of ineffective use of the compensatory remedy, which were initiated after the 2017 legislative reform, reached the ECtHR. In several judgments the Court found violations of Article 3 of the Convention because the applicants received no or inadequately low amounts of compensation for inhuman and degrading conditions of detention.[467] More cases are pending.

Over the past two years the situation with the amount of compensations gradually improved, at least in some jurisdictions. Thus, according to the lawyer V.S. it improved significantly with the Plovdiv Administrative Court and somewhat also with the Pazardzhik Administrative Court. "We are gradually moving towards alignment of the level of compensations with those of the ECtHR".[468] In his view this process was two-fold: on the one hand, the national courts started awarding higher compensations whereas, on the other hand, the amount of compensations of the ECtHR offered through friendly settlements decreased.

According to a judge from the Sofia Administrative Court, interviewed for the purposes of this research there exists a problem with the evidence, particularly in cases of the use of the compensatory remedy. The claims often refer to situations, which have been in existence several years ago and it is difficult to verify the allegations at the time of the proceedings. There are also serious problems with the documentation in the prisons.[469] According to another judge from the same court, interviewed for the purposes of this research, there is a need to have more regular inspections of independent bodies, such as the Ombudsman, on the results of which the judges could rely in such cases.[470]

Similarly, the statistical data from Hungary show the high application of the new compensation procedure already in 2017, the first year of its operation. In 2021, the number of compensation procedures dropped significantly and in 2022 the trend was downwards. The growing number of incoming cases, and in particular the sudden increase of the case-load in 2020, can be explained by the fact that some 7,000 compensation cases previously suspended by government order were reopened in June 2020.[471] According to the data provided by the Ministry of Justice both the number of compensation payments and the amount of compensation decreased between 2020 and 2021.

The view expressed in the scholarly literature on the subsequent amendment of the rules introduced after 1 January 2017 is that the abolition of the rules on the pre-complaint procedure for compensation was justified. This is explained by the fact that the legal practitioners considered the complaint not as a real remedy but as a precondition of the compensation. Thus, the legal instrument did not actually fulfil its intended function.[472]

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[465] Supreme Administrative Court, Decision No. 16946 of 11.12.2019.
[466] Supreme Administrative Court, Decision No. 15065 of 07.11.2019.
[467] ECtHR, *Ivanov* and *Others v. Bulgaria*, No. 2727/19 and al., Judgment of 4 June 2020; ECtHR, *Yordanov* and *Dzhelebov v. Bulgaria*, No. 31820/18 and 31826/18, Judgment of 4 June 2020; ECtHR, *Dimitar Angelov v. Bulgaria*, No. 58400, Judgment of 21 July 2020.
[468] Interview with V.S., lawyer, Pazardzhik, 27 June 2023.
[469] Interview with D.M., judge at the Sofia Administrative Court, Sofia, 28 June 2023.
[470] Interview with N.A., judge at the Sofia Administrative Court, Sofia, 28 June 2023.
[471] Source: 'Ügyforgalmi elemzés 2022. év' (Analysis of case-load, year 2022), available at: https://birosag.hu/sites/default/files/2023-04/ugyforgalom_2022.ev_.pdf
[472] Boda – Bagossy (2020) p. 22.

Professionals interviewed for the purposes of this research hold different views on the introduction of the simplified compensation procedure. The amendment had accelerated the procedures. The reason for this was clearly seen in the large number of compensation procedures and the huge case-load of the courts. This is in line with the view in the scholarly literature[473] indicating that the amendment, which came into force on 1 January 2021, was partly aimed at eliminating problems of legal interpretation and partly at speeding up the procedure. It has simplified the procedure, made it more transparent and predictable for the detainee, and thus better satisfied the requirements of the rule of law. One interviewee criticised the amendment because it had the effect of marginalising the individual even more. In the simplified compensation procedure, prisoners are treated more facelessly. Another one was critical in noting that the simplified compensation procedure is primarily an advantage for the state: faster procedures, lower case load, and smaller amount to be paid. An expert also pointed out that the human dignity and human quality of prisoners were again pushed into the background with the regulation of the compensation procedure. They became numbers, and the aim is only to calculate and pay the amount due to them. The focus is not on solving individual problems.

The application of the 2017 compensatory measures in Romania, including a form of release from prison, are believed to have contributed to reducing the problem of overcrowding. From the adoption of the law on compensatory remedy in 2017 until December 2019, date of its repeal, all persons deprived of liberty in places of detention subordinated to the National Administration of Penitentiaries who were accommodated in inappropriate conditions, benefited from this compensatory mechanism. During this period, a number of 23,518 people were released from prisons.[474] The National Administration of Penitentiaries admits that the 2017 law on compensatory remedy had a positive effect on those detainees who benefited from it and that once abolished *"it generated reactions from a part of some detainees, an expectation was created-the expectation was for it to continue, for others to benefit too."*[475]

c. Undesired effect of the potential solutions

Transfer of prisoners from one penitentiary facility to another is often the single or most favoured solution for remedying overcrowding and poor conditions of detention. Yet is has various undesired effects on prisoner's ability to maintain contacts with family, lawyers and reduces their overall prospects of successful resocialisation upon completion of the detention measure or sentence. Some interviewees from Poland further noted that each transfer of a detainee has a detrimental effect on their personal situation, making it challenging for them to develop a meaningful relationship with prison staff.

It's not the case that trust relationships between inmates and psychologists or prison educators are established immediately.

Thus, the fears of being transferred to another establishment at the cost of their family life, education, healthcare, work, etc., make it unlikely for prisoners to apply to choose to apply the remedy.

In addition, stakeholders make note of the instrumentalization of transfers in the context of Greek penitentiary practice and the danger of transfers which are performed without request of the prisoner or for one of the grounds provided for in the Criminal Code (health, education or procedural reasons) to take a punitive character. This is further exacerbated by the lack of remedy against said transfer, given that, as mentioned, the relevant decisions will be final and immediately enforceable. This fact, coupled with the opaque appointment procedures of some of the persons potentially responsible to examine these applications, creates a potentially chilling and hostile framework for its application.

[473] Szurok (2021) p. 5.
[474] July 2020, answer of the National Administration of Penitentiaries to an APADOR-CH FOIA request.
[475] Interview 4, former deputy director of the National Administration of Penitentiaries, current director of the Social Reintegration Direction, 25 June 2023.

Chapter 3. Implications of EU criminal policies for prison issues

The research findings support the conclusion that the transposition and implementation of EU legislative instruments have had a relatively marginal effect on the functioning of national prison systems, on prison overcrowding or other structural problems related to prison, while the impact of refusal of the execution of European Arrest Warrants as a result of the CJEU case law has been assessed as more substantive.

1. The lack of impact of the transposition and implementation of EU legislative instruments

It has been noted that EU instruments on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial imposing or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, and to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions are not significantly used or where used, they have failed to produce noticeable effect on custody rates or other aspects of the national penitentiary systems. For example, in 2015 France passed a law transposing new EU instruments into national law[476], including framework decisions 2008/947/JHA of 27 November 2008 and 2009/829/JHA of 23 October 2009, aimed at the mutual recognition between EU States of decisions relating respectively to probation measures and pre-trial measures. Their impact on the structure of the French prison system has been limited: while the first framework decision was essentially aimed at reducing the number of pre-trial detainees not residing in the State where the procedure is being carried out (the French authorities had thus set their sights on a reduction of 100 detainees), the second concerns only the field of alternative measures to detention and has therefore had no impact on shortcomings in the prison system.

It is further highlighted that under the EU Treaties, the management of prisons falls within the competence of the Member States. There is therefore no legally binding instrument relating to conditions of detention. Furthermore, as the scope of the Charter of Fundamental Rights of the European Union is limited to those areas in which EU law applies, it cannot come into play. One example is the Act transposing the framework decision on custodial sentences in France, which does not contain any specific provision making enforcement of a sentence handed down by a court in an EU Member State conditional on the conformity of prison facilities with European standards. The respect for the human dignity of persons serving a foreign sentence in France is only presumed by the obligation, referred to in Article 3 of the framework decision, to respect the fundamental rights enshrined in Article 6 of the Treaty on European Union.

A representative of the National Preventive Mechanism of Portugal considers that Framework Decisions, by establishing common standards and promoting cooperation between Member States, can contribute to the improvement of prison conditions when, for example, these instruments set minimum requirements for conditions of deprivation of liberty. In their opinion, the EU Framework Decision on the transfer of prisoners can have an impact on prison overcrowding by allowing the transfer of sentenced prisoners to their countries of origin or to other Member States, which can relieve pressure on a prison system and help to reduce overcrowding. It has been noted however that the transfer of prisoners is not a solution in itself to prison overcrowding and that it is necessary that destination countries have adequate capacity and resources to receive and reintegrate transferred prisoners. In addition, the transfer of prisoners should respect their rights and ensure that they are treated in accordance with international human rights standards. However, the Framework Decisions, either because of their limited application or because of some lack of knowledge of them by judicial actors, do not yet have a visible effect on the problems associated with prisons.

[476] Law n°2015-993 of 17 August 2015 adapting criminal procedure to European Union law.

With the EU legislator progressively adopting new legislation that prioritises imprisonment sanctions as a "strong deterrent for potential offenders"[477], the question about the effects of this tendency on rates of imprisonment on national level becomes inevitable. Although there might be an expectation for an increased punitiveness, observations made in some of the researched countries indicate that the effect of the harmonisation of penal sanctions on sentencing policies on the situation of prison systems is negligible if any at all.

Bulgaria for example has transposed in their essence and in their content all EU directives adopted in pursuance of the approximation, although not always properly. But the crimes they envisage do not constitute a significant share of the crimes targeted for prosecution by the Bulgarian criminal justice system. Thus, of the 30,740 cases prosecuted in 2021, only 43 concern trafficking in human beings,[478] and only 18 of them resulted in effective imprisonment of the perpetrators.[479] Similarly, in 2021 all "document frauds", of which fraud to the Union's financial interests[480] are just one part, constituted 48 prosecutions, of which only 9 of them resulted in effective imprisonment.[481]

Similarly, with regard to Portugal, approximating legal instruments are considered to have no impact on the prison systems. This is explained with the fact that the harmonisation of penal sanctions pursued by those instruments is not strong (establishing either a duty to impose sanctions that are "*effective, proportionate and dissuasive*" or "*a maximum term of imprisonment of at least X years*"), so it does not imply significant changes in the penalties provided in the Penal Code. Even where approximation causes a rise in the maximum limit of the penalty for the offence, the minimum limits remain unchanged, and the impact on sentencing is not noticeable. Asked whether the approximation of criminal sanctions had any impact on national criminal law (e.g. an increase in punishment), a representative of the DPJP considers that penalties were already within the said *minimum* and *maximum*. However, the interviewee admits that it may have had an impact through the creation of new types of criminal offence.

On the other hand, the case law of the CJEU on the European Arrest Warrant and the refusals to extradite have triggered a more serious impact on the situation of prisoners and conditions of detention in EU Member States.

2. The impact of the refusal of the execution of European Arrest Warrant

Across some jurisdictions, it has been observed that the requirement for prison administrations in the extradition procedure to provide assurances that the person to be surrendered will be accommodated in facilities which comply with Article 3 ECHR requirements might exercise pressure on national authorities to improve detention conditions and serve as an impetus for further investments in prison infrastructure. However, some renovations implemented as a response to the CJEU case law seem to be limited to one cell or a corridor in a prison, which in turn creates tensions among prisoners. As an example, it has been reported that in Romania some of the "regular" detainees feel discriminated against on grounds that extradited persons are given preferential treatment and are placed in ECHR rooms because assurances need to be respected.[482]

The obligation for the requesting state to ensure decent conditions of detention in jurisdictions, experiencing systematic problem with prison overcrowding, where only a limited number of cells or facilities comply with European standards, has resulted in new powers for prison authorities, allowing

[477] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L1371

[478] As per Directive 2011/36/EU.

[479] NSI, *Crimes* and *persons convicted – 2021*, available at: https://www.nsi.bg/bg/.

[480] As per *Directive 2017/1371/EU*.

[481] *Ibid*.

[482] Information coming from APADOR-CH's monitoring visits, https://apador.org/monitorizarea-conditiilor-de-dandentie-penitenciare/.

them to allocate prisoners to facilities further away from their usual residence. This has had negative consequences on prisoners' family life, going against the general rule that prisoners shall be allocated to prisons close to their homes or their places of social rehabilitation. One illustrative example of this has been provided in an interviewee with a Romania expert:

"I had a case where the National Administration of Penitentiaries had to offer guarantees for someone who had to go to the Bacau prison. But the Administration could offer guarantees in the Slobozia prison. Slobozia was far from family, it isolated him. In the end, he asked to be moved to Bacau, even if detention conditions were not compliant, to be closer to his parents and wife. This request was denied because it meant the State had to keep the promises made to the judge in respect of his guarantees. So, I really wonder to what extent these guarantees help anyone?"[483]

It has been further signalled that doubts arise in the context of the requirement for the executing judicial authority to perform a two-stage assessment of the risk of inhuman or degrading treatment before taking a decision on the execution of the EAW. This test requires determining the presence of systemic problems regarding the conditions of sentence execution in the issuing state, as well as establishing a real risk of inhuman or degrading treatment. In light of these factors, the Helsinki Foundation for Human Rights highlighted in its report on the European Arrest Warrant[484] that in Poland it is impossible to accurately predict in which penitentiary unit a person surrendered based on an EAW will be detained. Polish law lacks mechanisms guaranteeing that individuals surrendered under the EAW will remain in a specific penitentiary unit throughout their detention. On the contrary, amendments made to the Executive Penal Code between 2009 and 2015 removed provisions that ensured detainees would be held near their place of residence or made it challenging to transfer them. These issues, according to the HFHR, significantly hinder the ability to present compelling evidence to foreign courts demonstrating a concrete risk of violating the prohibition of inhuman or degrading treatment for surrendered individuals[485].

On a separate note, serious concerns have been raised in civil society reports, for example, in Romania, as to the credibility and reliability of the official prison data reported by national authorities.[486] In 2021 the CPT asked to receive a detailed breakdown of the number of persons held in each prison establishment visited according to regime on a trimester basis.[487] This practice should also be adopted by other European bodies and it should be extended to the whole penitentiary system. The European Committee and the Court still rely on official data provided by the Government as the main source of information. While this is an important source of information, it should be questioned more regularly, based on a clear methodology and followed up by a consistent and transparent monitoring tool.

The EU normative framework does not envisage an independent mechanism for monitoring compliance with the assurances granted. In Romania, individual guarantees offered to states in EAW cases are monitored by the central prison administration.[488] The monitoring consists of an internal analysis meant to ensure that the surrendered persons are guaranteed the 3 sqm personal space and

[483] Interview 2, Senior Lecturer at the University of Bucharest, Faculty of Sociology and Social Work, 14 June 2023.
[484] Helsinki Foundation for Human Rights (HFHR), The practice of applying the European arrest warrant in Poland as an issuing state.
[485] Helsinki Foundation for Human Rights (HFHR), The practice of applying the European arrest warrant in Poland as an issuing state.
[486] APADOR-CH (2022), Monitoring visit to the Iasi Prison, discussions with dandainees executing and EAW in the Iasi Penitentiary, https://apador.org/raport-asupra-vizitei-in-penitenciarul-iasi-2/.
[487] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2021, Report to the Romanian Government on the ad hoc visit to Romania carried out from 10 to 21 May 2021, p.32, https://rm.coe.int/1680a62e4b.
[488] Information provided by the National Administration of Penitentiaries on 25.06.2023.

other ECHR compliant material conditions promised by the Romanian state for the entire duration of the sentence execution. Nevertheless, there is evidence assurances are sometimes breached.[489].

Portugal reports that on occasion EU Member States' judicial authorities (namely German) have refused to execute a European Arrest Warrant issued by Portugal for reasons related to the application of the *Aranyosi and Caldararu* case-law, due to the fact that they deemed the information provided by Portuguese authorities on the concrete prisons to which the detainee would be transferred to after initial entry insufficient, thus not allowing for the removal of the risk of being subject to detention conditions violating Article 3 of the ECHR and/or Article 4 of the EU Charter. However, there are also cases where the assurances provided by the Portuguese authorities are deemed sufficient. E. g., in an appeal concerning an EAW issued by Portugal and executed by an English court, the High Court considered that "a general assurance applicable to all potential places of detention may suffice to exclude a real risk of inhuman or degrading treatment"; and that "given that there is no evidence of a systemic problem affecting all parts of all Portuguese prisons, it is clearly possible for the Portuguese authorities to detain the appellant in a prison, or part of a prison, which does not risk breaching his rights; and the principle of mutual trust requires this court to assume that the Portuguese authorities will do so."[490] Recently, a Portuguese ruling refused the extradition of an individual to Brazil, which demonstrates that courts are becoming more aware of European jurisprudence.

For one of the Polish practitioners, interviewed in the course of this research, the test outlined in the CJEU judgment is difficult to apply and lacks specificity. However, she expressed her belief that European Union law provides another platform for implementing rulings from the European Court of Human Rights and giving them significance. She also emphasized the need for stronger involvement of the European Union in safeguarding the rights of individuals deprived of their liberty.

We have EU instruments on access to a lawyer, why don't we have instruments on decent treatment? There is a need for a stronger EU commitment to prisons. The Union has the instruments to do so.[491]

This view was shared by another interviewee who emphasized the importance of the European Commission taking a stronger stance in the protection of human rights. The interviewee expressed a desire for the European Commission to prioritize human rights concerns and advocate for their protection more assertively. She believed that the Commission should play a pivotal role in upholding the principles enshrined in the Treaties and ensuring that human rights are not compromised for political expediency.

Interesting comparison and assessment of the impact of the CJHR and ECtHR have been offered by an interviewee from Hungary. According to them, the CJEU in the *Aranyos* decision has been effectively conducting a fundamental rights inquiry and, in this context, many experts have questioned whether the Court had exceeded its powers. In addition, the interviewee pointed out that the CJEU's decisions did not entail the same legislative constraints as the ECtHR's pilot decision and therefore did not have such a strong impact, as well as that the domestic legislator may have thought that if it complied with the ECtHR's requirements, it would also meet the CJEU's expectations, since the ECtHR's requirements are also agreed by the EU. Therefore, the domestic legislator may not have attached as much importance to the CJEU's decisions as to the ECtHR's decisions.

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[489] APADOR-CH (2022), The respect for procedural rights of suspects and defendants from their perspective, Bucharest, 2022- during the implementation of the study one dandainee who was surrendered to Romania and was executing a sentence in the Slobozia penitentiary claimed before APADOR-CH representatives that many of the assurances given in his case were not being respected; https://apador.org/en/respectarea-drepturilor-procedurale-ale-suspectilor-si-inculpatilor-din-perspectiva-acestora/.

APADOR-CH (2022), Monitoring visit to the Iasi Prison, discussions with dandainees executing and EAW in the Iasi Penitentiary, https://apador.org/raport-asupra-vizitei-in-penitenciarul-iasi-2/.

[490] England and Wales High Court (Administrative Court) Decision, [2018] EWHC 2995 (Admin), Case No: CO/4177/2017, https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2995.html&query=(title:(+duarte+)).

[491] Interviewee 2, Poland.

CONCLUSION

Since the 1990s, the overall prison population in Europe and the countries of the Council of Europe has increased, at least in part, as a result of the distinctive tendency in criminal law to impose stricter and longer sentences designed to control crime and segregate certain individuals from the rest of society. However, this trend varies considerably from one country to another. The wide variations observed in the prison populations of the different States surveyed are undoubtedly linked to differences of opinion about imprisonment as a benchmark sentence and what it is supposed to achieve, or to the low levels of social trust and political legitimacy that may make the policies of some countries more punitive than others.

What is certain is that the causes of this upward trend are complex and cannot be seen as a direct reflection of rising crime levels, but are rather linked to the existence of more repressive criminal legislation, with prison sentences for offences that would not previously have been subject to such penalties, or longer periods of incarceration. The dominant positions of politicians and media, who encourage the judicial authorities to be less and less intransigent towards offenders, have undoubtedly also contributed to the overall increase in the prison population.

It is difficult to determine whether the recommendations of European bodies are guiding or endorsing national penal policies. Broadly speaking, prison overcrowding, due to the central role played by prison in the modern penal rationale and the lengthening of sentences in particular, tends to be resolved – or attempts to be resolved – by the creation of new establishments and reforms that are often limited in their ambition. Electronic surveillance, for its part, is playing an increasingly important role in the repressive arsenal, but is struggling to produce any significant impact on reducing the number of people imprisoned. On the whole, prisoners remain individuals with few economic and social resources, and the idea of addressing social issues first and foremost has little support in legislation.

In the same clear way, a correlation could be drawn between the intensification of normative production by European bodies and the overall deterioration of the prison system (or at least its inertia). More generally, the meagre introduction of individual rights in detention cannot hide the general trend of increasing numbers of prisoners and the inherent worsening of prison conditions. This disproportion – or rather inverse proportion – raises questions about the practical effects of European intervention.

The nine national research reports indicate that generally, the European bodies are successful in identifying and addressing some of the most critical and systemic issues that plague the national prison systems, and their findings carry significant weight and are held in high regard among national human rights monitors. Issues such prison overcrowding, poor material conditions and lack of effective domestic for those detainees suffering from inadequate detention conditions, as well as inability of the life prisoners to obtain reduction of their sentences are among those that are most commonly documented and litigated both on national and international level.

However, several factors tend to reduce the scope of this prospective work. Firstly, the European bodies do not overlap entirely with those identified by the national human rights monitoring institutions and civil society organisations, particularly those that fall outside the scope of Article 3. On the other hand, the wide margin of manoeuvre left to States to re-establish compliance with European standards attenuates the impact of these criticisms, as the European bodies remain very cautious about the solutions proposed.

In this regard, the ECtHR's traditional reluctance to assess the merits of States' penal policies is an obvious limitation, probably even more so than the constraints associated with the division of roles between the Court and the Committee of Ministers, which gives the latter responsibility for

supervising and monitoring States' execution of judgments handed down. The Court, and to a lesser extent the CPT and the Committee of Ministers, are concerned not to offend the sensibilities of States and not to take sides on national penal policies, with the exception of the use of pre-trial detention (because of the authority conferred by Article 5 of the ECHR). The result seems to be a tendency to focus the debate on a managerial approach to the problem, which leaves aside the overcrowding factors recognised by the Council of Europe's authoritative documents on the subject (in particular the White Paper on prison overcrowding).

As a result, the recommendations made by European bodies often boil down to general and procedural solutions (transferring detainees, granting them more rights, detaining fewer people, ensuring that preventive detention remains the exception), but their ability to put an end to the problem identified remains doubtful.

While concrete solutions are sometimes proposed and followed up - such as the introduction of effective domestic remedies or the access to a concrete possibility of release for life-sentenced prisoners -, their capacity to impact the structural nature of the problem is limited. As an illustration, the review of the reform initiatives in the 9 sates finds that not a single remedy introduced to prevent violations of Article 3 pertaining to prison overcrowding and poor material conditions has been successful in achieving its prime goal.

The same applies to the strategies implemented to reduce prison overcrowding. Although reforms have been predominantly motivated by European standards, it is not uncommon that politics, rather than penological knowledge, dominate their formulation and implementation. Some jurisdictions have adopted systems to control occupancy levels, but in an essentially reactive rather than preventive manner. Expansion of the prison infrastructure is also widely favoured, despite European recommendations to the contrary, leading to the construction of high-security prisons rather than open facilities. Legislative reforms are sometimes aimed at reducing sentencing, but implementation is complex and often temporary. Similarly, alternatives to imprisonment are encouraged, but obstacles remain, such as unpopular decriminalisation and reluctance towards amnesties.

In the end, the contrast between the prolific production of norms and jurisprudence and the mediocrity of the European prison system highlights a considerable waste of energy. However, the events of the last few years have provided empirical proof that the reforms encouraged by European bodies (and behind them by civil society) can be implemented. In several countries, the health crisis has led to a significant reduction in the prison population through the implementation of a combination of measures, without leading to an increase in delinquency. These experiments have also shown the possibility of reducing the number of people imprisoned without creating additional places. However, they were limited in time. The Committee of Ministers stated, in 2021, that “overcrowding can be quickly and effectively reduced”[492], which could be interpreted as an indirect recommendation to extend these measures over time. This horizon appears essential.

[492] CMCE, 1411th meeting (DH), 14-16 September 2021, J.M.B. and Others v. France.