EUROPEAN PRISON LITIGATION NETWORK

Annex 1 – Summary of the cases examined

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1. Ciorap v. Moldova, no. 12066/02, 19 June 2007 (complex problem, closed) & I.D. v. Moldova, no. 47203/06, 30 November 2010 (complex problem, pending)

The group of cases is pending execution. In its examination, the CM stresses that the situation requires a strategy providing for a systemic approach reflecting CoE standards and expertise (1265th meeting, CM decision, 2016; 1443rd meeting, CM decision, 2022). This strategy should be based on the identification of the root causes of overcrowding and include measures such a revision of criminal law to ensure that "imprisonment is a measure of last resort" (1406th meeting, Notes, 2021), a wider use of alternatives to detention and of adjustment of prison sentences and a reduced recourse to detention on remand (idem and 1348th meeting, Notes and CM decision, 2019).

The authorities have been called on to put in place a compensatory remedy consisting in a reduction of sentences for prisoners continuously held in inadequate detention conditions. Introduced by the Italian authorities, such a system is deemed effective as it has an impact on the prison population (see below). According to the latest assessment of the situation by the Committee of Ministers (2021), no strategic approach has been adopted so far, and the measures taken by the authorities (establishment of a remedy including reduction of sentences, legislative amendments related to release on parole and replacement of imprisonment with non-custodial punishment) have not significantly impacted overcrowding rates.

2. Orchowski v. Poland, no. 17885/04, 22 October 2009 & Norbert Sikorski v. Poland, no. 17599/05, 22 October 2009 (pilot, closed)

The group of cases is closed. It was examined between 2011 and 2016.

In the pilot judgment already, the Court, referring to the structural situation of overcrowding, stated that if "the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment" (Orchowski, § 153).

As noted by the Secretariat, "the solution of the problem of overcrowding in detention facilities in Poland, is indissociably linked to the solution of the problem of the excessive length of pre-trial detention" (1164th meeting, Notes, 2013). This problem was addressed through a number of measures examined in a separate group of cases (Trzaska v. Poland): awareness-raising activities to judges and prosecutors, legislative amendments limiting the grounds for detention, the maximum period of pre-trial detention and providing for an appeal mechanism.

The authorities also took a number of measures aimed at decreasing the number of convict prisoners, through the promotion of alternatives to detention (penalty of limitation of liberty, electronic surveillance replacing short sentences, decriminalization of some petty offenses - cycling in a state of intoxication, theft or misappropriation of property worth less than one fourth of the minimum wage).

In view of the measures taken and the decrease in the prison population, the Committee closed the case in 2016.

3. Nisiotis v. Greece, no. 34704/08, 10 February 2011 (complex problem, pending)

The case is pending execution. In 2022, the CM regretted that after more than 10 years of supervision of the situation in the country, a "comprehensive long-term strategy to resolve the problem and introduce a domestic effective remedy" was still lacking (1428th meeting, CM decision, 2022).

The authorities have adopted a number of measures over the years: a strategic plan for prisons 2018-2020 was adopted (resulting from a wide consultation with domestic experts and experts from the Council of Europe, including the CPT); legislative amendments in the area of criminal and prison policies have been voted (e.g. abolishing petty offences, providing for suspension of sentences for

some infractions, introducing community service and plea bargaining, limiting the use of remand custody for serious offences, introducing a more lenient criminal law for young offenders…).

Despite this, overcrowding persists in Greek prisons, which is the sign that a "holistic approach" called on by the Secretariat, the CM and the Greek NPM, reconsidering "the penal system and the interaction between the legislature (penalty system), the judiciary (sentences) and the correctional system (conditions of detention)" is still lacking (1288th meeting, Notes, 2017). The CM stressed that "further measures underpinned by a strong and enduring commitment at high political level are required to bring about a swift, comprehensive and sustainable resolution of the problem of overcrowding and poor conditions of detention" (1390th meeting, Notes, 2020). Building new prisons are "part of the solution" but do not constitute a long-term response (1172nd meeting, Notes, 2013).

The Secretariat and the CM have repeatedly asked the authorities to "place greater emphasis on non-custodial measures in the period before the imposition of a sentence" coupled with training for judges and prosecutors, and "to the use of alternatives to imprisonment" (1390th meeting, Notes, 2020). A relevant point to note is that in the latest assessment of the situation (2022), the authorities, after having passed in 2019 amendments towards a more moderate criminal policy, have implemented measures that are "likely to result in a further increase of prison inmates" (1428th meeting, CM decision, 2022). These concern especially: "rendering more severe sentences for a number of serious criminal offenses" while suspending the existing scheme of alternative sentences". The Secretariat recalled that according to CoE and domestic experts, "the increase in punitiveness at the upper level of the penal scale cannot be compensated by the more modest decrease at the lower end". Such policy "usually results in increasing imprisonment rates and, consequently cannot tackle the prison overcrowding consistently" (1428th meeting, Notes, 2022).

4. Mandic v. Slovenia, no. 5774/10, 20 January 2012 (complex problem, closed)

The case was closed in 2020. Noting that the main measure envisaged by the government was the construction of a new prison facility, the Secretariat had to insist that "the increase in the number of prison places will not alone be sufficient to offer a long-lasting solution to the problem of overcrowding" (1259th meeting, Notes, 2016). The Secretariat suggested a number of measures, embedded in a strategy, based on various CoE Recommendations, such as an "increased application of non-custodial measures before imposition of a sentence" and the promotion of alternatives to imprisonments (idem). The measures adopted by the Italian authorities were mentioned as an example (see below).

The CM was eventually satisfied with the measures adopted by the authorities, consisting in a "detailed multi-faceted national strategy to combat the problem of overcrowding" which includes the automatic transfer of prisoners from Ljubljana prison when the maximum capacity is reached, an increased use of non-custodial measures (with weekend sentence and home arrest replacing prison sentences). Also, which shows the diversity of actors involved, the State Prosecutor General issued guidelines on prosecution policy focusing on alternatives to criminal prosecution. Also, the number of suspended sentences and of settlements was found to be on the rise. Crucially, the Secretariat also noted that in parallel with the application of non-custodial measures, the authorities introduced a probation body tasked with following up on these measures (1294th meeting, Notes, 2017).

5. Ananyev v. Russia, no. 42525/07, 1 October 2012 (pilot, pending)

The case is still pending execution. At the time the judgment was adopted, the Court had already underlined "the close affinity between overcrowding and the equally recurring Russian problem of excessive length of pre-trial detention" (§ 195). Accordingly, the Secretariat's and CM's analysis focused on measures aiming at reducing recourse to pre-trial detention and to detention. The authorities introduced for instance a new measure (house arrest) and a new sanction (community work, not defined as deprivation of liberty in domestic law, although it is "a punishment which is implemented through placement in "correctional centres for community work", (1348th meeting, Notes, 2019). This approach required as well that the Russian authorities develop training and awareness-raising activities directed at prosecutors and investigations.

The Russian authorities also took a number of measures to improve material detention conditions. This combination of measures in several, interrelated areas, led the CM to note "with satisfaction that the action plan is based on a comprehensive and long-term strategy for the resolution of the structural problem identified by the Court" (1157th meeting, CM decision, 2012). The solution was however far from solved as in its latest decision (2019), the CM noted "with concern" that the ECtHR "continues to deliver judgments finding overcrowding in a number of detention facilities and invited the authorities to provide information on the measure taken to address this problem" (1348th meeting, CM decision, 2019). As regards the set-up of remedies available to detainees, the CM "invited the authorities to explore other possible compensatory measures, such as systems for the reduction of sentences" as implemented by the Italian authorities in the *Torreggiani* case (1288th meeting, Notes, 2017).

6. Torreggiani v. Italy, no. 43517/09, 8 January 2013 (pilot, closed) & Sulejmanovic v. Italy, no. 22635/03, 16 July 2009 (complex problem, closed)

The cases are closed. They were examined between 2012 and 2016. In the pilot judgment *Torreggiani*, the Court recalled its subsidiary role, insisting that it is not its task to indicate how States should elaborate their penal policies and organise their prison system. However, it also reminded that CoE recommendations invite States to adjust their penal policies in order to limit the use of imprisonment (§ 95).

The *Torreggiani* case is taken as an example in several other cases (see e.g. Slovenia above, Romania and Hungary below). The Italian authorities have coupled the creation of prison places (a measure which, the Secretariat says, should remain exceptional and is insufficient alone to solve the problem of overcrowding (1150th meeting, Notes, 2012) with penal policy measures developed between 2012 and 2016.

The measures include the development of alternatives to detention, the decriminalization of petty offences (including minor drug-related offences), the widened recourse to probation, the limited recourse to pre-trial custody, the increased possibility to be granted release on licence, the reduction of sentences for some crimes, the increased use of electronic tagging, etc.

The CM and the Court have also positively assessed the compensatory remedy put in place, which provides for the possibility to reduce the sentence of prisoners held in inadequate detentions (a reduction of one day for each period of ten days of detention that were incompatible with the Convention, see ECtHR decision *Stella v. Italy,* no. 46169/09, 2014). The Court said in particular that this form of redress has "the undeniable advantage of helping to resolve the problem of overcrowding by speeding up detainees' release from prison" (§ 60: *"cette forme de redressement présente l'avantage indéniable de contribuer à résoudre le problème du surpeuplement en accélérant la sortie de prison des personnes détenues"*).

The CM decided to close the case, in view of the drop in the prison population rate, coupled with the remedies put in place and the policy changes brought (which "in so far as they concerned structural reforms to criminal policy, their application was likely to continue to have a favourable impact on prison overcrowding in Italy", § 51 of the *Stella* decision, see original version: *"dans la mesure où il s'agit de réformes structurelles de politique pénale, leur application est susceptible de continuer à avoir un impact favorable sur la surpopulation carcérale en Italie"*).

7. Vasilescu v. Belgium, no. 64682/12, 25 April 2014 (structural problem, pending)

The case is still pending execution. While at the initial stages of the examination, the CM noted with interest the "comprehensive measures" taken or envisaged by the authorities, aiming both at "reducing the prison population and renovating the prison infrastructure with a view to, in particular, implementing an appropriate penological policy" (1265th meeting, CM decision, 2016), this complex endeavour seemed to have been short-lived. In later examinations, the CM urged the authorities to prioritise the reduction of the prison population over the expansion of the prison estate, and to put in place the Penitentiary Council (foreseen in a 2019 law) tasked with evaluating the policies adopted so far and contributing to the elaboration of "a comprehensive plan to combat overcrowding, based on an

integrated and systematic approach to all its factors and measures that make it possible to monitor, in real time, the evolution of the prison population" (1436th meeting, CM interim resolution, 2022).

A constant request of the CM and the Secretariat over the years is to make enhanced use of alternatives to detention, notably for pre-trial detention and short prison sentences (1355th meeting, Notes, 2019). This has been done through enhanced use of electronic monitoring as an alternative to both pre-trial detention and detention (1475th meeting, Notes, 2023).

However, to reach this full effect, such measures require enhance training directed at relevant actors ("prosecutors, investigating and enforcement judges, prison administration and probation services", 1436th meeting, Notes, 2022), as well as increased means channelled to the probation service (1355th meeting, Notes, 2019). The lack of noticeable effect led the CM to recommend to carry out "similar reflections on adjusting prison sentences" (1355th meeting, CM decision, 2019) and, starting in 2022, to put in place binding measures to regulate the prison population, e.g. through "numerical limits", based on the CPT recommendations in its 31th general report (1436th meeting, Notes & CM resolution, 2022; 1475th meeting, CM decision, 2023). It was also suggested to amend the criminal law in order to "reduce the number of cases of imprisonment provided for by law" (idem).

8. Neshkov v. Bulgaria, no. 36925/10, 27 January 2015 (pilot, pending) & Keyahov v. Bulgaria, no. 41035/98, 18 January 2005 (complex problem, pending)

The cases are still pending execution. The Court adopted a pilot judgment ten years after the first leading judgment on detention conditions, seeing no progress in the scale of overcrowding. This situation was in spite of a wider recourse, in the early years of the review, to alternatives to imprisonment and to probation, early release, amnesties and pardon. This shows that a comprehensive, long-term strategy built on relevant domestic and CoE recommendations (including respectively the Ombudsman and the CPT), promoting further measures alternative to detention and preliminary detention, was still lacking (1172nd meeting, Notes and CM decision, 2013).

Over the years, the authorities have adopted reforms which have widened the scope of electronic monitoring, "allowed detainees to file requests for conditional release directly with the competent court and relaxed the conditions for early conditional release of detainees considered as 'recidivists'" (1310th meeting, Notes). These reforms have brought some results. However, the cases remain pending. An indicator of the centrality of the systems of remedy in the CoE's view, the CM insisted that "improving conditions of detention and reducing prison overcrowding are vital for ensuring the proper functioning of the remedies, in particular the preventive remedy" (1236th meeting, CM decision, 2015).

9. Varga and others v. Hungary, no. 14097/12, 10 March 2015 (pilot, pending)

The cases under this group are still pending execution, although in its latest examination (2021) the CM noted that overcrowding has been eradicated (1398th meeting, CM decision, 2021). This is due to the fact that the national penal policy remained more or less unchanged: over the years, the Secretariat and the CM have continuously called on the authorities to promote the use of alternatives to detention and minimizing the use of pre-trial detention. If the legal framework was adapted to introduce new alternatives to detention, chiefly for persons convicted of petty offences or misdemeanours, their "potential […remained] underused" (1377bis meeting, Notes, 2020). The CM recommended to "encourage prosecutors and judges" to use them as "widely as possible" (1288th meeting, CM decision, 2017).

The Secretariat also mentioned as a source of inspiration "measures which have been put forward in the communication of the Hungarian Helsinki Committee", which include: the abolition of custodial measures for some offences, the abolition of pre-trial detention for offences carrying a sanction of less than three years' imprisonment, the abolition of unlimited pre-trial detention, etc. (see 1310th meeting, Notes, 2018 and the corresponding communication).

More broadly, building on CPT recommendations, both the Secretariat and the CM recalled that "the only sustainable solution to control overcrowding is to moderate the number of persons sent to prison"

(1398th meeting, CM decision, 2021; for the reference to the 2013 CPT report, see 1236th meeting, Notes, 2015). The importance to eradicate overcrowding for the proper functioning of the remedies put in place was also recalled on numerous occasions (see e.g. 1310th meeting, Notes, 2018), with references to the measures put in place by the Italian authorities when implementing the pilot judgment *Torreggiani* (see above).

10. Rezmiveș v. Romania, no. 61467/12, 25 April 2017 (pilot, pending) & Bragadireanu v. Romania, no. 22088/04, 6 December 2007 (complex problem, pending)

Both cases are still pending, almost 15 years after the first of the two judgments was handed down. Following a steady and promising decline in the prison population between 2014 and 2020, the prison population has been growing ever since.

The decrease was arguably a consequence of a wide criminal law reform introducing alternatives to detention and to detention on remand, coupled with training to judges and prosecutors (see 1122nd meeting, Notes, 2015), and by the introduction of a compensatory remedy in the form of reduction of sentences for prisoners held in inadequate conditions (1331st meeting, Notes, 2018).

From the outset, the Committee considered the latter insufficient to produce lasting effects, especially as the reform contained "factors of prison inflation" such as longer sentences for reoffenders and tougher conditions of access to conditional release (1310th meeting, Notes, 2018). It therefore recommended additional measures, such as to implement the project to "pursue the wider application of electronic monitoring" (1310th meeting, CM decision, 2018) – which required to reinforce the probation service, in view of its "crucial contribution" to the authorities strategy to combat overcrowding (1331st meeting, CM decision, 2018; see also 1362nd meeting, Notes, 2019: the probation service is said to divert more than 100,000 people from the prison system). The authorities however are yet to make a wider use of electronic monitoring.

Similarly, the compensatory remedy's impact was bound to be short-lived, and to disappear with the problem of inadequate detention conditions (1331st meeting, Notes, 2018): the authorities were therefore quickly "invited them to determine whether it is necessary to develop other means to reduce the prison population to make sure that their global strategy against prison overcrowding remains sustainable in the long term" (1331st meeting, CM decision, 2018). In this context, the said remedy was abolished, which might be interpreted as one of the causes of the rise of the prison population. More recently, the authorities have announced their intention to work on a "major reform of the State's criminal policy" (1468th meeting, Notes, 2023), in parallel to a planned expansion of the prison estate. This was welcomed by the Secretariat and the CM who recalled that "measures designed to reduce prison population and to keep it at manageable levels, embedded in a rational and coherent penal policy, are crucial to achieving a lasting solution" (1468th meeting, CM decision, 2023) to prison overcrowding. Both recommended to make use of the recommendations set out in the pilot judgment, and also in CoE's work ("Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation and other similar instruments in the fields of criminal law and procedure, criminology and penology; the CPT general and specific recommendations; and the European Committee on Crime Problems 2016 White Paper on Prison Overcrowding", see 1468th meeting, Notes, 2023). The Secretariat recalled that a recent CPT report recommended "that the authorities make increased efforts to tackle prison overcrowding through promoting greater use of alternatives to imprisonment, in addition to increasing the capacity of the prison estate" (idem).

11. Petrescu v. Portugal, no. 23190/17, 3 December 2019 (structural problem, pending)

The case is still pending. As soon as the first examination of the case (2021), the CM noted that despite a decrease in the prison population, a number of prisons remained overcrowded – and accordingly recommended to think of "specific measures" applying to these facilities, but also to implement more general measures such as making "greater use of alternatives to imprisonment" as introduced in a recent reform, making permanent the "more flexible enforcement of sentences introduced by the authorities in the context of the COVID-19 pandemic", which had contributed to the drop in the prison population, but also to reinforce awareness-raising activities towards judges and prosecutors, who play an important role in the area (1398th meeting, CM decision, 2021).

In the second examination, alternatives to imprisonment were not seen as a central solution since, as noted by the Secretariat, that "the prison population inflation and overcrowding grew in spite of a greater use of alternatives to imprisonment" (1475th meeting, Notes, 2023). Consequently, the authorities were rather called on to "rapidly adopt a comprehensive strategy aimed at identifying and tackling the root causes of prison overcrowding, in consultation with all stakeholders and drawing fully on the relevant Council of Europe expertise, work and instruments and recommendations of the National Preventive Mechanism" (1475th meeting, CM decision). The CM suggested to act both on the flux by "limiting the entries in the prison system", and on the stock, by guaranteeing "effective access to conditional release" (idem). The Secretariat made also the proposal (not followed by the CM) to introduce a ""binding legal system of prison regulation, to be activated as soon as overcrowding situations occur (for example by introducing an absolute upper limit for the number of prisoners for every prison […])" (1475th meeting, Notes, 2023).

12. Sukachov v. Ukraine, no. 14057/17, 30 January 2020 (pilot, pending)

The pilot judgment is still pending execution. In the judgment, the Court, in view of its existing case law on Ukraine, recommended to make use of alternatives to detention and limit the use of pre-trial detention.

These two recommendations are reflected in the Secretariat's and CM's assessments and recommendations (1390th meeting, CM decision, 2020; 1406th meeting, CM decision, 2021; 1475th meeting, CM decision, 2023).

Recent draft legislation (with the following objectives: creating the "probationary supervision", increasing accessibility of bail as an alternative to detention on remand and limiting the total period of detention on remand (12 months, 24 months, 48 months depending on the gravity of the crime)) going in this direction have been seen as a positive step, yet too narrow in scale and insufficient in the current war context since the number of functional detention facilities has decreased: measures taken so far need to be intensified to have an impact on overcrowding (1475th meeting, Notes, 2023) Furthermore, these measures need to be integrated within an overall strategic approach to resolve structural problems in the Ukrainian prison system, which has been under supervision for over 15 years, and involve all relevant actors (idem).

13. J.M.B. and others v. France, no. 9671/15, 30 January 2020 (structural problem, pending)

The case is still pending execution. Three main lines of action stem from the Secretariat's and the CM's intervention. Firstly, the CM called on the authorities to "adopt a coherent long-term strategy to reduce the prison occupancy rate" (1411st meeting, CM decision, 2021) since "despite the constant increase in prison capacity and the adoption of numerous measures and legislations, the prison population has continued to grow" (1451st meeting, Notes 2022 – see also the 2021 CPT mentioned therein).

Secondly, this strategy should include increased efforts to raise jurisdictions' awareness on alternatives to detention (through steering tools, circulars and training, see 1451st meeting, Notes and CM decision, 2022). The "crucial role of the judge" has been recalled by the Secretariat, who stressed that it is "the only person who can order release or sentence adjustments and thus act on the 'sources' of violation of Article 3." (idem). As a matter of fact, the Secretariat noted that the overcrowding of remand centres and quarters (directly impacted by the use of short sentences and pre-trial detention) can be partly caused by the fact that "judges are more severe" and since short-term sentences increased between the two examinations of the case (2021,2022 – see 1451st meeting, Notes, 2022). The Secretariat also pointed to longer sentences which contributes to "the over-occupation of prison places over time" (idem).

Thirdly, the CM and the Secretariat suggested a number of legislative measures to "emphasise alternatives to detention" (1451st meeting, CM decision, 2022), instore "a stricter framework for recourse to pre-trial detention" or "restoring the possibility of ab initio adjustment of imprisonment sentences between one and two years", which had been recently abolished (1451st meeting, Notes,

2022). Also, the CM recommends to “consider new legislative measures that would regulate the prison population in a more binding nature” (1451st meeting, CM decision, 2022).