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1. *Introduction: the development of alternative sanctions in the Belgian context*
- 1.1. *The origins: social defense, or, the concern towards more flexible and individualized sanctions*

The history of alternatives to imprisonment and its progressively more flexible implementation began in the late nineteenth century in Belgium. The neoclassical Penal Code of 1867 foresaw two main penalties: imprisonment and fine. At the heart of this retributive system, we find a social defense movement, led by A. Prins, which introduced the first step toward an individualized treatment of punishment, based on the social dangerousness of offenders. In 1888, the “Act Le Jeune” on suspended sentence and conditional release (law of 31 May 1888 establishing parole and conditional sentences in the penal system) allowed for suspended sentences and for conditional suspended sentences for less serious offenders. In case of conditional release, a guidance was performed by “patronage committees”, reflecting an ideal of rehabilitation under control². These measures were designed both as alternatives to imprisonment for purposes of rehabilitation and as modalities to control the condemned for the purpose of social defense³. In 1930, an Act of social defense (Social Defense Act of April 9, 1930 against abnormal and habitual offenders) introduced the principle of internment for mentally ill offenders considered dangerous. Characterized as a measure of safety and care, this social defense measure was designed as an alternative to prison sentences⁴.

In 1964, these two legal devices were amended. The Social Defence Act of 1930 for mentally ill offenders was reformed, however without altering its fundamental philosophy⁵. Furthermore, the Act of 29 June 1964 with regard to suspension, suspended sentence and probation, extended the terms of suspended sentence and introduced probational sus-

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² *Pasinomie*, 1888, 245.

³ M. VAN DE KERCHOVE, “Punir hors les murs en Belgique. La place des sanctions pénales non privatives de liberté dans le système pénal”, in P. PONCELA, R. ROTH (eds.), *La fabrique du droit des sanctions pénales au Conseil de l'Europe*, Paris: La Documentation française, 2006, 121.

⁴ The 1930 Act also introduces a safety measure following the sentence for habitual offenders.

⁵ Y. CARTUYVELS, G. CLIQUENNOIS, “The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control”, in *Champ Pén.*, 12, 2015, 1-30.

pension. During a period in Belgian history marked by the new social defense⁶, the belief in the ideal of rehabilitation and treatment contributed to expanding the possibilities of alternatives to prison sentences, or imprisonment itself. But despite the extension of the field of application of probation, these new measures turned out to be a failure. They were perceived as insufficiently punitive, and the ideology of rehabilitation attached to them was ill-fitting with the retributive sentencing culture of the judges at the time⁷. The general trend was not yet to alternatives, even if, as early as in 1979, the Criminal Code Revision Commission suggested diversifying sanctions “in order to avoid the systematic use of imprisonment” and proposed to raise withdrawal of rights interdictions and confiscation to the rank of autonomous sentences⁸. Furthermore, at pre-sentence report level, the prosecution office had at its disposal a discretionary power, which allowed it to take no further action against certain infractions and, since 1935, to offer a transaction to the authors of lesser criminal offenses.

1.2. *The 1990s: expanding the pool of alternatives to fight against insecurity and prison overcrowding*

In 1990, Article 35 of the new Act on preventive detention introduced, in certain circumstances, an alternative to pre-trial detention, in the form of keeping the accused out of custody (under certain conditions). The goal of this measure being to reduce pre-trial detention, which significantly contributes to prison overcrowding. In 1994, an Act of 10 february amending the 1964 Act with regard to suspension, conditional release and probation (Law of 10 February 1994 amending the law on suspension, suspended sentence and probation) and an Act on penal mediation (Act of 10 February 1994 organizing a victim-offender mediation process) aimed at boosting the principle of alternative sanctions, and promoting the development of a ‘third way’ between unconditional waiver by the public prosecutor (deemed too soft) or imprisonment (deemed too severe). The first Act introduces community service and training orders as new modalities of probation at the sentencing stage. The goal is to revive the probation system by introducing more “punitive” conditions that would make it more compelling. The second Act al-

⁶ M. ANCEL, *La défense sociale nouvelle*, Paris: Cujas, 1954.

⁷ K. BEYENS, *Straffen als Sociale Praktijk. Een Penologisch Onderzoek naar Straftoemeting*, Brussels: VUBPress, 2000.

⁸ Commission pour la révision du Code pénal, *Rapport sur les principales orientations de la réforme*, Bruxelles, 1979, 142.

lows the prosecutor (at pre-sentencing stage) to propose to the accused a victim-offender mediation, community service, training order, or therapy, rather than dismissing the case, or remanding the accused to the trial court. This Act also expands the scope of transaction to other offenses. These initiatives emerged in a social context dominated by the rise of insecurity linked to petty crime, and a strong criticism of the “lax character” of criminal justice. The concern, using these ‘third way’ devices, was to fight against the feeling of impunity felt by the offenders, and to give more weight to the victim⁹.

1996 was a key year in the development of Belgian penal policies. The Minister of Justice at the time, Stefaan De Clerck, proposed to discontinue short prison sentences for certain offenses, and to replace them with non-custodial sentences, in order to reverse the idea whereby imprisonment would be the “only true penalty”¹⁰. The Minister also proposed to develop alternative sentences and to bring players in charge of monitoring people on extramural probation within so-called “Houses of Justice” (‘Maisons de justice’). The first initiative was rather unsuccessful. 1996 was the year when the “Dutroux Case” scandal broke out in Belgium¹¹. Under public pressure, the authorities focused on reforming parole (access to which was made more difficult) and on building new prisons. However, in May 1999, the service of Houses of Justice was enshrined in law. Probation workers, victim support workers, penal mediators and other social workers of the para-judicial services were integrated as «judicial assistants» in 27 Houses of Justice, which were placed under the authority of a «General Directorate of the Houses of Justice»¹².

Besides, at post-sentencing stage, the flexibility and individualization of execution of the sentence increased. Other devices were added to the conditional release in order to individualize the trajectory of the condemned. Let us but point out the semi-liberty regime, introduced in various forms in the 1960s, and provisional release introduced in 1972. Both were applied more systematically by the prison administration in the 1980s and 1990s. Furthermore, provisional release, justified for reasons of prison overcrowding, was expanded to sentences of up to three years,

⁹ L. VAN CAMPENHOUDT, Y. CARTUYVELS, F. DIGNEFFE, D. KAMINSKI, P. MARY, A. REA (eds.), *Réponses à l'insécurité. Des discours aux pratiques*, Bruxelles: Labor, 2000; S. SNACKEN, “Penal Policy and Practice in Belgium”, in *Cr. and Just.*, 2007, 127-215.

¹⁰ S. DE CLERCK, *Les arbres et la forêt. Réformer la justice*, Gent: Lanoo, 1997.

¹¹ The Dutroux case involved “the kidnapping and murder of four little girls” by Mr Dutroux, a repeat offender on parole.

¹² A. BAUWENS, A. DEVOS, “Probation in Belgium”, in A.M. VAN KALMHOUT, I. DURNESCU (eds.), *Probation in Europe*, 2015, CEP, 7.

whereas prison sentences of up to six months were not systematically implemented, for the same reasons¹³.

1.3. *The second wave of alternatives in the 21st century: diversification and empowerment of means to fight against impunity and reduce prison overcrowding*

The 2000s witnessed the emergence of a new development of alternative sanctions, with the creation, at sentencing stage, of autonomous alternative sanctions. The first of these new sanctions is the work penalty, introduced in 2002 as police penalty for misdemeanor and for offense. This new sentence, meant to replace community service as a probational option, is explicitly conceived as a substitute for imprisonment¹⁴. The goal is, by giving a status of “real penalty” to community service, to encourage its use by judges who seldom resort to it as probational condition. In 2003, the Sentence Implementation Courts Commission proposed to introduce conviction itself as a form of punishment, and to turn probation into an autonomous sentence¹⁵. That same year, the autonomisation of the training order (another probational modality) as a specific penalty was also considered, based on the work penalty model. Proponents of this new penalty noted that the training order indeed did have a punitive character; that it should help empower and rehabilitate the defendant and, that, as a discrete and autonomous penalty, it should help reduce prison overcrowding. The project was nonetheless rejected¹⁶. Unlike community service, whose punitive nature had been recognized, training order was deemed insufficiently punitive to be elevated to a punishment in its own right¹⁷. The Minister of Justice of the time, Mr. Marc

¹³ S. SNACKEN, K. BEYENS, M.A. BEERNAERT, “Belgium”, in N. PADFIELD, D. VAN ZYL SMIT, F. DÜNKEL (eds.), *Release from prison. European policies and practice*, Cullompton Devon: Willan Publishing, 2010, 70-130.

¹⁴ C. GUILLAIN, “La peine de travail, peine autonome? Analyse de la loi du 17 avril 2002 instaurant la peine de travail comme peine autonome en matière correctionnelle et de police”, *JT*, 2002, 641-649.

¹⁵ Commission Tribunaux d’Application des Peines Statut Juridique Externe des Détenus et Fixation de la peine, *Rapport final*, Bruxelles, 2003, 28 and 38.

¹⁶ Proposed law of 7 April 2003 establishing training as a penalty in matters of misdemeanor and minor offenses, *Documents parlementaires*, Chambre des représentants, 2002-2003, 50-2451/1.

¹⁷ C. FRANÇOISE, D. KAMINSKI, “L’injonction formative en matière pénale: valorisation et obstacles à son effectivité”, *Rev. dr. pén. crim.*, 5, 2008, 541.

¹⁸ Proposal to amend the Criminal Code and introducing community service and training as alternative sanction, *Documents parlementaires*, Chambre des représentants, 2000-2001, 0549/11, 5.

Verwilghen, even considered that making training order into a separate sentence would, given its helpful character to the litigant, constitute a “bonus to the offense”¹⁸.

During its evolution, the work penalty enjoyed increasing success. While probational or community service were not perceived by the judges as “real sentence”¹⁹, work penalty transpired indeed as a multi-functional penalty, satisfying both the goals of retribution and rehabilitation, or even reparation²⁰. It was also perceived as an effective alternative to the policy of non-enforcement of short prison sentences, correlated to prison overcrowding. Following the success of the work penalty, political authorities concluded that the creation of other autonomous alternative penalties should further reduce the use of imprisonment, contributing thereby to reducing prison overcrowding²¹. Thus two new autonomous sanctions were introduced into the Criminal Code in 2014. The electronic monitoring penalty (EM as autonomous penalty) was introduced by an Act of 7 April 2014, and the autonomous probation penalty (probation as an independent sanction) by an Act of 10 April 2014. The regime of these new penalties, enforced on 1 July 2016, was modeled in many ways on the system of the work penalty. But unlike work penalty, which replaces community service as probational condition, these two new sentences do not replace, but rather add to the probation system introduced by the 1964 Act as well as to the electroning monitoring system, which has constituted an execution modality of the custodial sentence since 1998.

At the postsentencing stage, the ‘justicialization’ of the execution of the sentence enjoyed significant progress. Initiated in 1996 by the Minister of Justice S. De Clerck, a substantial prison law reform project led to a reform of the prisoner’s external (*extra muros*) status by two Acts of 17 May 2006²². A new body – the Sentence Implementation Court was called upon to play a key role in monitoring and controlling the execution of the sentence²³, especially regarding the procedure for granting

¹⁹ K. BEYENS, *Straffen als Sociale Praktijk. Een Penologisch Onderzoek naar Straftoemeting*, op. cit.

²⁰ H. LUYPAERT, K. BEYENS, C. FRANÇOISE, D. KAMINSKI, *Werken en leren als straf. Le travail et la formation comme peines*, Bruxelles: VUBPress, 2007, 37.

²¹ K. BEYENS, “The new generation of community penalties in Belgium. More is less...”, in G. ROBINSON, F. MCNEIL (eds.), *Community Punishment. European Perspectives*, Abingdon: Routledge, 2016, 17.

²² A reform of the internal status of the prisoner is also provided by the “Law of 12 January 2005 on the prison administration and the legal status of inmates”.

²³ P. MARY, *Enjeux contemporains de la prison*, Bruxelles: USL, 2013.

and executing imprisonment – such as semi-liberty, electronic monitoring and parole. Furthermore, the legislation on mentally ill offenders was also revamped in the 2000s. The 1930-1964 social defense Act was first reformed by an Act of 21 April 2007 on internment of mentally ill offenders (Law of 21 April 2007 on the internment of people with a mental disorder). This law however never entered into force, and was itself replaced by a new Act of 5 May 2014 on the internment of mentally ill persons (Act of 5 May 2014 on the internment of individuals) whose enforcement is scheduled as of 1 October 2016, but the contents of which are already currently the subject of a draft revision²⁴. The main changes made by the latter two laws are, firstly, the judicialisation of the internment measure as an alternative to punishment, now controlled by the Sentence Implementation Court (TAP); secondly, the desire to improve healthcare for internees.

By means of conclusion, we propose three final comments. First, the path chosen in recent years is clearly that of a diversification of measures and alternative sanctions, in order to foster rehabilitating sanctions and to fight against recidivism, to answer the ineffectiveness of short prison sentences and to fight against prison overcrowding²⁵. Secondly, there is increased use of technology to promote custody modes outside of the prison walls (such as in-house arrest, etc). This applies to all three stages of the criminal process, with the implementation of electronic monitoring as a means of executing the custodial sentence (1998), as a means of executing the pre-trial detention (2014) and as a standalone penalty (2016). Thirdly, an important methodological problem remains in Belgium regarding the collection and publication of statistical data in criminal matters. Despite or because of the existence of various databases, crime statistics remain scattered among various services which sometimes produce different figures about the same realities. Comparing these figures is often hazardous, due to differences in elements being counted (facts, people, files), delays in encoding, difference in the counting modes/systems or the non-inclusion of some statistically relevant facts (as in matters of internment). Belgium still lacks a truly integrated statistics system. The figures presented in this report must therefore be taken with caution.

²⁴ Legal bill of 18 January 2016 relative to internment and various provisions of Justice, *Documents parlementaires*, Chambre des représentants, 2015-2016, 54/1590.

²⁵ F. TULKENS, M. VAN DE KERCHOVE, Y. CARTUYVELS, C. GUILLAIN, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Bruxelles: Kluwer, 2014, 594-600.

2. *Prison population*

2.1. *Numbered data*

TABLE 1. *Prison population*

Year	Number of citizens	Number of inmates	Detention rate (%100 000 habitants) ²⁶	Prison capacity	Overcrowding rate (pour 100 places) ²⁷	Amount of square footage provided by law
2000	10 237 300	8 688	84,8	7 462	116	NAP
2001	10 262 200	8 544	83,2	7 436	114	NAP
2002	10 263 400	8 605	83,8	7 436	115	NAP
2003	10 355 800	9 308	89,8	7 866	118	NAP
2004	10 490 000	9 245	88,1	8 092	113	NAP
2005	10 445 900	9 375	89,7	8 133	114	NAP
2006	10 430 300	9 635	92,3	8 311	115	NAP
2007	10 392 200	10 008	96,3	8 311	120	NAP
2008	10 404 000	9 858	94,7	8 384	117	NAP
2009	10 753 100	10 159	94,4	8 404	120	NAP
2010	10 839 900	10 561	97,4	8 949	118	NAP
2011	11 000 638	11 065	100,5	9 128	121	NAP
2012	11 094 850	11 212	101	9 159	122	NAP
2013	11 161 642	11 645	104,3	9 384	124	NAP
2014	11 203 992	11 578	103,3	9 931	116	NAP
2015	NA	NA	NA	NA	NA	NAP

Source: Direction générale des Établissements pénitentiaires du SPF Justice; Eurostat (<http://ec.europa.eu/eurostat>); Statbel (<http://statbel.fgov.be>). Abbreviations: NA: not available; NAP: not applicable.

2.2. *Analytical Findings: growth of the incarcerated population and prison overcrowding*

Imprisonment figures have been substantially on the rise since the turn of the 21st century in Belgium. Between 2000 and 2014, Belgium has seen its overall population increase by 9%. Yet during the same period, the Belgian prison population increased by 33%, extending its prison estate by the same figure. Nevertheless, a slight decrease of the

²⁶ This column is calculated by us.

²⁷ This column is calculated by us.

prison population has been noticeable since 2014, although this statistics is offset by increasing use of electronic monitoring as a term of “imprisonment without walls”²⁸ (see below). Prisoners are divided between 33 establishments in the country, as well as a prison in the Netherlands (Tilburg) that rents out space for Belgian inmates. Prison overcrowding rates are endemic. Thus, the latest SPACE I report puts Belgium at a sad fourth position in a ranking of countries with the highest rate of prison overcrowding²⁹. This situation has led to a condemnation of Belgium by the European Court of Human Rights, stressing the “structural character” of prison overcrowding in Belgium³⁰.

Increase in prison population, in Belgium and in other countries, is linked to both the increase in the average length of detention and the increasing number of imprisoned people³¹. This increase, together with the resulting prison overcrowding, poses a variety of problems. Prison overcrowding reduces the possibility of operating a coherent classification within prisons. This lack of classification worsens overcrowding, as it delays early releases: prisoners are placed in institutions according to available space, instead of being placed in the most accurate institutions to prepare their rehabilitation plan. The distinction between imprisonment as punishment and remand has lost its relevance in the current situation³². The scale of the problem has as its consequence that no legal provision has dared to set the number of square footage a prisoner is entitled to in jail. The law of 12 January 2005 on the internal legal status of detainees evokes the “living space” of prisoners. But the text does not specify said living space’s size. Moreover, it does not retained the original concept of space of “individual” stay, despite the fact that this specification was in conformity with the requirements of the Council of Europe (Rec (2006) 2, Rule 18.5). In practice, the latest report of the Committee for the Prevention of Torture (CPT) shows great disparities between institutions and even within the same establishment (CPT / Inf (2012) 36)³³.

²⁸ K. BEYENS, M. ROOSEN, *Electronic Monitoring in Belgium*, Briefing paper, Criminal Justice Programme of the European Commission (JUST/2013/JPEN/AG/4510), 2016.

²⁹ M. F. AEBI, N. DELGRANDE, “SPACE I - Council of Europe Annual Penal Statistics: Prison Populations”, Strasbourg, Council of Europe, 2014, 60.

³⁰ ECtHR, *Vasilescu v. Belgium*, 25 November 2014, § 73.

³¹ G. CHANTRAINE, A. KUHN, P. MARY, M. VACHERET, 2007, “L’État en retrait? Trente ans d’usages des peines (Belgique, Canada, France, Suisse)”, in *Dév. et Soc.*, 2007, 505-526.

³² M.-S. DEVRESSE, L. ROBERT, C. VANNESTE, “Classification et régimes dans les prisons belges”, in *Rev. dr. pén. crim.*, 2014, 174.

³³ Thus, within the same institution, the CPT has noted that a cell of 9 to 10 square meters was occupied by one to three inmates.

To address the problem of prison overcrowding, the European Council recommends several strategies. The first one is to consider various forms of decriminalization. The European Council calls on states to “consider the possibility of decriminalizing certain types of offense, or reclassifying them so as to prevent their calling for imprisonment” (R (99) 22, Rule 4; R (92) 17). It is uncertain that lawmakers have acted in this direction in Belgium, as the Belgian system is rather characterized by a process of penal inflation³⁴, as well as by maintaining custodial sentence as the reference penalty.

The second strategy proposes to *reduce the use (and length) of remand* (R (99) 22, rule 11). However, despite the various reforms of pre-trial detention in Belgium, this goal has never been reached³⁵. The number of incarcerated defendants increased by 19% between 2000 and 2014, from 3023 to 3610 people³⁶, despite alternative measures being in place at this stage of the procedures (see below, pre-sentencing stage).

A third recommended strategy consists in setting a maximum capacity number of inmates per establishment, in order to “avoid excessive levels of overcrowding” (R (99) 22, rule 6). But in Belgium, prison capacity is continually exceeded and the concept of “capacity” was not even taken into account by the Act of 12 January 2005 on the internal legal status of detainees. The issue was debated, but the government did not adopt the idea for reasons of an economic nature. It was estimated that the introduction of a quota system would require to build new prisons, an investment deemed too expensive. Ten years later, this justification is perplexing: the main measures taken by successive governments to fight against prison overcrowding has indeed been an extension of the penitentiary estate³⁷. The European Council is however skeptical as to the advisability of such a reaction: “The extension of the penitentiary estate should rather be an exceptional measure, since it is not generally likely to offer a lasting solution to the problem of overcrowding [...]” (R (99) 22, rule 2). This finding of the European Council has indeed be-

³⁴ S. SNACKEN, “Penal Policy and Practice in Belgium”, op. cit.

³⁵ A. JONCKHEERE, L. KENNES, “Les solutions radicales pour limiter la détention préventive”, in D. VANDERMEERSCH, B. DEJEMEPPE (eds.), *Détention préventive: 20 ans après?*, Bruxelles: Larcier, 2011, 163-181.

³⁶ SPF Justice, *Justice en chiffres*, 2013, 46; SPF Justice, *Justice en chiffres*, 2011, 56; General Directorate of Prisons of the Federal Justice, *Rapport annuel*, 2015, 50.

³⁷ V. SERON, “La loi de principes concernant l’administration pénitentiaire et le statut juridique des détenus: vers la fin d’un non-droit?”, in *Jour. des trib.*, 2006, 553-562; M.-S. DEVRESSE, “La gestion de la surpopulation pénitentiaire: perspectives politiques, administratives et juridictionnelles”, in *Dr. et Soc.*, 2013, 84, 339-358.

come reality in Belgium, since the increase in prison capacity was accompanied by a steady increase in the average overcrowding rate.

Finally, in order to reduce prison overcrowding, the European Council also recommends *reducing the use of long prison sentences and replacing short custodial sentences by community sanctions/service* (R (99) 22, R 14). With respect to the first point, Belgium has witnessed an increase in the number of convicts serving a long prison sentence³⁸. With regard to the second point, the European Council sees it as a priority and calls on States to have at its disposal a wide range of community sanctions: “There should be an appropriate set of sanctions and measures applied in the community, possibly graded in terms of severity; it should encourage prosecutors and judges to use them as widely as possible” (R (99) 22, Rule 3). Belgium has partially responded to these calls, diversifying the range of measures and sanctions in the community. Studying these devices, their forms, their goals and their impact in terms of prison overcrowding is the subject of the present report.

3. *Alternative measures at the pre-sentencing stage*

3.1. *Analytical Inventory of existing devices at the pre-sentencing stage*

The Belgian criminal system is guided by the principle of discretionary prosecution, that is to say that the prosecutor’s office has the power to decide which response it will give to criminal cases introduced before it. Once they have been introduced to the prosecutor’s office, files can go down a multiplicity of channels. The file can thus be made available to other parquets or be attached to other dossiers. The files can be concluded at prosecutor’s office level, through transaction, victim-offender mediation, unconditional waiver by the public prosecutor (and, since February 29, 2016, through a kind of plea bargaining); or be sued before courts and tribunals; or lead to the examination of a case by an investigating judge.

It emerges from the prosecutor’s office statistics that most of the files brought to its attention are processed and closed (taken no further action on) at the prosecutor’s office level, without referral to the investigating judge or the court. The examination and closing of a case by the prosecutor’s office at the ‘information’ stage is the most common form of treatment of criminal cases.

³⁸ M. VAN DE KERCHOVE, “Punir hors les murs en Belgique. La place des sanctions pénales non privatives de liberté dans le système pénal”, op. cit.; P. MARY, “La surpopulation pénitentiaire”, in *Cahier hebdomadaire du CRISP*, 2012, n° 2137.

TABLE 2. *Decisions by the prosecutor's office to dismiss the cases*³⁹

Year/End	Information	Instruction	Sentencing	Total
2003	888 483 (96%)	16 634 (1,80%)	20 405 (2,20%)	925 922
2004	796 474 (95,28%)	17 438 (2,09%)	21 983 (2,63%)	835 895
2005	746 921 (94,91%)	18 926 (2,40%)	21 119 (2,68%)	786 956
2006	697 800 (94,56%)	19 943 (2,61%)	20 920 (2,83%)	737 963
2007	670 384 (94,37%)	18 621 (2,62%)	21 383 (3,01%)	710 388
2008	678 332 (94,58%)	17 786 (2,52%)	20 500 (2,90%)	706 618
2009	680 447 (94,55%)	17 299 (2,40%)	21 949 (3,05%)	719 695
2010	700 267 (94,65%)	16 906 (2,34%)	21 777 (3,01%)	723 740
2011	696 035 (94,77%)	16 634 (2,31%)	21 004 (2,92%)	718 703
2012	677 714 (95,06%)	15 186 (2,13%)	20 024 (2,81%)	712 924
2013	666 919 (95,09%)	14 324 (2,04%)	20 124 (2,87%)	701 367
2014	632 732 (94,86%)	14 677 (2,20%)	19 630 (2,94%)	667 039
Total	8 532 508 (95,36%)	204 374 (2,28%)	250 818 (2,80%)	8 947 210

3.1.1. *Unconditional waiver by the public prosecutor*

The unconditional waiver by the public prosecutor is the fact, for the prosecutor's office, of setting a file aside, and consists in a temporary waiver of prosecution. It may be subject to compliance with certain conditions, in which case one speaks of 'pretorian probation', or conditional waiver by the prosecutor. If the unconditional waiver by the public prosecutor is part of the principle of discretionary prosecution and was legally consecrated in 1998, there is no legal basis with regard to the conditional waiver by the public prosecutor ("pretorian probation")⁴⁰.

³⁹ Source for Tables 2-7: Annual statistics of the prosecution, the Prosecutors. State on December 31 of each year (<http://www.om-mp.be/stat/corr/start/f/home.html>). The percentages have been approximated to the lower or higher tenth. Figures are not available before 2003 or after 2014 (as of 19 February 2016). For Table 2: the "Information" category sector gathers the cases handled without the intervention of a judge and includes the unconditional waiver by the public prosecutor, transaction and victim-offender mediation, but also cases attached to others cases, as well as cases available to other prosecutor's offices; the "Instruction" category includes examining the case while "Judgment" sector includes direct transmission of the case to the judge.

⁴⁰ C. JANSSEN, J. VERVAELE, *Le ministère public et la politique de classement sans suite*, Bruxelles: Bruylant, Centre national de criminologie, 1990.

Cases can be dropped as soon as they are introduced to the prosecutor, or after being subjected to examination by the prosecutor's office ('information'). To a lesser extent, they can also be dropped after going through other decisions (such as an unsuccessful or incomplete victim-offender mediation proposed by the prosecutor). The practice of unconditional waiver by the public prosecutor can be determined by a range of factors, sometimes related to the structure or organization of prosecutor's offices, sometimes to the elements in the case, sometimes even depending on the current criminal policy. The unconditional waiver by the public prosecutor can thus intervene on technical grounds (author unknown, no offense, insufficient evidence, prescription of the public action, ...), but also for reasons of opportunity, where the prosecutor's office considers that the prosecution, although possible, is not appropriate (priorities in terms of research policy and prosecutions, limited social repercussions of the offense, absence of criminal record, small prejudice, insufficient investigation means, ...)⁴¹. The unconditional waiver by the public prosecutor is considered provisional as long as the public action is ongoing or hasn't been closed, and the case can be reopened on the basis of new evidence.

TABLE 3. *Number of cases dropped, and percentages compared to the overall number of cases closed by the prosecutor's office*

Year	Case dropped	Prosecutor's office
2003	716 635 (77,40%)	925 922
2004	624 880 (74,76%)	835 895
2005	581 981 (73,95%)	786 966
2006	535 681 (72,59%)	737 963
2007	506 772 (71,34%)	710 388
2008	505 254 (71,50%)	706 618
2009	515 704 (71,66%)	719 695
2010	528 493 (73,02%)	723 740
2011	522 322 (72,68%)	718 703
2012	515 976 (72,37%)	712 924
2013	506 696 (72,24%)	701 367
2014	484 046 (72,57%)	667 039
Total	6 544 440 (73,14%)	8 947 210

⁴¹ See annex 1 of the circulaire COL 12/98 of the Collège des procureurs généraux, regarding the 12 March 1998 Act relative to the improvement of the legal procedure at the stage of information and instruction (see also annex 1 of the circulaire 16/2014, 26 June 2014).

TABLE 4. *Orientation of cases dropped and percentages relative to the entirety of cases dropped ('classés sans suite' - CSS)*

Year	Technical reason	Reason of opportunity	Other reasons	Unknown/ Other	Total of cases dropped
2003	516 998 (72,27%)	178 928 (25,01%)	19 428 (2,72%)	1281	716 635
2004	428 137 (68,57%)	178 543 (28,60%)	17 660 (2,83%)	540	624 880
2005	385 338 (66,26%)	179 684 (30,90%)	16 498 (2,84%)	461	581 981
2006	345 612 (64,58%)	173 897 (32,49%)	15 685 (2,93%)	491	535 681
2007	313 015 (61,84%)	175 364 (34,65%)	17 754 (3,51%)	639	506 772
2008	309 883 (61,40%)	174 819 (34,64%)	20 006 (3,96%)	546	505 254
2009	319 101 (61,93%)	173 602 (33,69%)	22 541 (4,37%)	460	515 704
2010	322 097 (60,99%)	176 205 (33,37%)	29 781 (5,64%)	410	528 493
2011	319 582 (61,26%)	167 533 (32,11%)	34 597 (6,63%)	610	522 322
2012	320 470 (62,17%)	158 035 (30,66%)	36 979 (7,17%)	492	515 976
2013	315 029 (62,24%)	151 480 (29,93%)	39 675 (7,84%)	512	506 696
2014	303 698 (62,75%)	143 434 (29,64%)	36 863 (7,62%)	51	484 046
Total	4 198 960 (64,22%)	2 031 524 (31,07%)	307 467 (4,70%)	6 493	6 544 440

The unconditional waiver by the public prosecutor is the most common mode of processing criminal offenses (Table 3). However, it is most often used for reasons of a technical nature and, to a lesser extent, for reasons of opportunity (Table 4). If we try to really evaluate the policy of unconditional waiver by the public prosecutor as it is conducted by the prosecutor's office, it seems relevant to favor another statistical approach which, as is the case in France, does not take into account "non prosecutable cases"⁴² or "forced unconditional waiver"⁴³. Such approach is tantamount, in Belgium, to disregarding closed cases for technical reasons, and to calculate the rate of unconditional waiver by the public prosecutor for reasons of expediency alone, based solely on the numbers of "prosecutable cases"⁴⁴. If one favors this approach, the dismissal rates drops to 43 % of all prosecutable cases handled by prosecutors (Table 5).

⁴² *Annuaire statistique de la justice*, ed. 2011-2012, La Documentation française, 2012, available on http://www.justice.gouv.fr/art_pix/stat_annuaire_2011-2012.pdf.

⁴³ Sénat français, *Les infractions sans suite ou la délinquance mail traitée*, Rapport de la Commission des Finances, n° 513, available on http://senat.fr/rap/r97-513/r97-513_mono.html.

⁴⁴ The number of prosecutable cases includes the entirety of cases taken up by the prosecutor's office, minus those that were dropped for technical reasons.

TABLE 5. *Number of cases dropped for reasons of opportunity and percentage relative to the entirety of prosecutable cases*

Year	CSS for reason of opportunity	Prosecutable cases
2003	178 928 (44%)	408 924
2004	178 543 (44%)	407 758
2005	179 684 (45%)	401 628
2006	173 897 (44%)	392 351
2007	175 364 (44%)	397 373
2008	174 819 (44%)	396 735
2009	173 602 (43%)	400 594
2010	176 205 (44%)	401 643
2011	167 533 (42%)	399 121
2012	158 035 (40%)	392 454
2013	151 480 (39%)	386 338
2014	143 434 (44%)	329 034
Total	2 031 524 (43%)	4 713 953

3.1.2. *Transaction*

Introduced by the Royal Decree of 10 January 1935, *penal transaction* is a procedure that allows the prosecutor's office to close a case in exchange for payment in money by the offender. The transaction is an initiative of the prosecutor's office, and is therefore unilateral and facultative. Since its inception, transaction has aimed to differentiate the treatment of infringements depending on their severity, and to relieve courts from benign cases, so that they may focus on their "real mission"⁴⁵. The procedure was amended several times thereafter, most recently in 2011 and 2016, to relax the conditions of application of transaction, and to expand its scope.

A transaction can be proposed when the prosecutor's office "considers that the deeds do not seem to be of such gravity that they should be punished with imprisonment of more than two years or a more serious penalty, including confiscation, and that the deed had no serious consequence on bodily integrity". The penalty to be taken into consideration here is the *in concreto* penalty, namely the sentence likely to be imposed by the judge in case of prosecution, after admission of mitigating circumstances. In practice this means that the transaction can be applied

⁴⁵ Report to the King, *Pasinomie*, 1935, 6.

to facts that entail, *in abstracto*, a penalty of up to twenty years in prison (felony). This underscores the very wide scope coverable by transaction. Since its amendment in 2011, a transaction can occur at any stage of the procedure, provided that no criminal judgment has been pronounced.

The amount to be paid, proposed to the offender by the prosecutor's office, can not exceed the maximum fine established by law, and must be proportionate to the offense. In addition, "damage caused to the other parties must eventually be fully repaired" before the transaction can be proposed or, at least, the author should have "acknowledged in writing his/her civil liability for the damage done and produced evidence of compensation for the uncontested part of the damage and settlement arrangements thereof". Once the author has met all the conditions of the transaction, the prosecution is extinguished. Since the Act of 5 February 2016, transactions are recorded in the central criminal record if they occurs after a judge has been seized with the case, without however being transcribed in records issued to individuals.

TABLE 6. *Number of transactions paid, percentage relative to the total of decisions made by the prosecutor's office, and percentage relative to the total of prosecutable cases*

Year	Transaction	Total Prosecutor's office	Prosecutable cases
2003	7 663	925 922 (0,83 %)	408 924 (1,87%)
2004	6 441	835 895 (0,77%)	407 758 (1,57%)
2005	5 988	786 966 (0,76%)	401 628 (1,49%)
2006	5 380	737 963 (0,73 %)	392 351 (1,37%)
2007	5 683	710 388 (0,80%)	397 373 (1,43%)
2008	5 075	706 618 (0,72%)	396 735 (1,27%)
2009	6 682	719 695 (0,93%)	400 594 (1,66%)
2010	6 210	723 740 (0,86%)	401 643 (1,54%)
2011	4 985	718 703 (0,69%)	399 121 (1,24%)
2012	6 677	712 924 (0,94%)	392 454 (1,70%)
2013	7 549	701 367 (1,08%)	386 338 (1,95%)
2014	7 363	667 039 (1,10%)	329 034 (2,23%)
Total	75 696	8 947 210 (0,84%)	4 713 953 (1,60%)

In quantitative terms, transaction is not often mobilized by the prosecution: it intervenes in less than 1% of all cases closed by prosecutors, and less than 2% of all prosecutable cases (Table 6).

3.1.3. *Mediation*⁴⁶

The *penal mediation* was introduced by the Act of 10 February 1994 and was part, at the time, of a Justice reform aimed at speeding up the sentencing of petty crime, while also promoting other forms of penal reaction which do not involve the Court's intervention. Much like with transaction, the penal mediation allows the prosecutor's office to offer to the perpetrator to extinguish public action, in exchange for compliance with certain conditions, which may be formulated separately or cumulatively.

In order for the public action to be extinguished, four different conditions can be proposed to the perpetrator. The condition(s) must be "accepted" by the offender, and then "satisfied". The first condition consists in duly attested compensation or reparation for the damage caused by the offense; the second condition is that the offender follow medical treatment or any other adequate therapy, and to periodically provide evidence of said treatment, within a period not exceeding six months⁴⁷. This applies in the event that the perpetrator has invoked, as the cause behind the offense, circumstances such as illness or addiction to alcohol or drugs; the third condition is for the offender to perform community service, or to follow a specific training lasting 120 hours at most. The fourth measure, which alone deserves the qualification of *penal mediation*, is for the prosecutor's office to "set up a meeting with the victim (simultaneously or at another time) and to intervene between the accused and the victim" in order to obtain their agreement regarding "the compensation and its terms".

Much as in the case of transaction, the prosecutor's office may resort to penal mediation for any criminal offense, provided that "the deed does not appear likely to be punished with a main penalty of imprisonment of more than two years or a heftier penalty." The penalty to be considered here is also the penalty *in concreto*, which again emphasizes the very broad scope of the penal mediation. Unlike transaction, mediation can only occur at the stage of examination of a case by the prosecutor's office ('information' stage), i.e. before any prosecution with trial courts

⁴⁶ A draft law, approved by the Council of Ministers March 25, 2016, about reforming the procedure before the Commercial Court (*tribunal du commerce*) and the appeal to judgments pronounced by this court, changing the legal status of detainees and imparting various provisions in matters of justice, aims to change the name of the penal mediation, and to replace it by "extinguishing of public action after the execution of measures".

⁴⁷ The aforementioned draft law aims to extend this period to one year, much as is the case with community service and training.

has taken place, or ahead of any referral to an investigating judge⁴⁸. It is not recorded in a person's criminal record (so that it can not appear on documents issued to individuals).

TABLE 7. *Number of completed criminal mediations, percentages relative to all cases closed by prosecutors and percentages relative to all prosecutable cases*

Year	Mediation	Total Prosecutor's office	Prosecutable cases
2003	1 939	925 922 (0,21%)	408 924 (0,47%)
2004	1 949	835 895 (0,23%)	407 758 (0,47%)
2005	1 998	786 966 (0,25%)	401 628 (0,49%)
2006	2 157	737 963 (0,29%)	392 351 (0,54%)
2007	2 226	710 388 (0,31%)	397 373 (0,56%)
2008	2 361	706 618 (0,33%)	396 735 (0,59%)
2009	2 324	719 695 (0,32%)	400 594 (0,58%)
2010	2 420	723 740 (0,33%)	401 643 (0,60%)
2011	2 304	718 703 (0,32%)	399 121 (0,57%)
2012	2 800	712 924 (0,39%)	392 454 (0,71%)
2013	2 800	701 367 (0,40%)	386 338 (0,72%)
2014	2 763	667 039 (0,41%)	329 034 (0,83%)
Total	28 041	8 947 210 (0,31%)	4 713 953 (0, 59%)

The penal mediation is a marginal occurrence, both with regard to cases closed by the prosecutor's office, and in relation to the overall numbers of prosecutable cases (about 0.50%) (Table 7).

3.1.4. *Plea bargaining*

The law of February 5, 2016 (effective February 29, 2016) introduced, in the Code of Criminal Procedure, the plea bargaining. The latter "implies that the public prosecutor and the suspect or the accused, after pleading guilty to the acts attributed to them, pass an agreement on the sentence that they then submit to the court for approval." The pro-

⁴⁸ The draft legislation aims to model the procedure of penal mediation on that of transaction, to allow its application to all stages of criminal procedure, provided that no definitive criminal judgment has been pronounced.

cedure can be applied to those facts that do not seem likely to call for imprisonment of more than 5 years (penalty *in concreto*). Save for exceptions as provided for by law (certain serious crimes and acts punishable *in abstracto* by a sentence of more than 20 years in prison), the procedure can be applied to all offenses. This new procedure tends to “quickly and efficiently [solve] those cases in which the facts are clear and the author has confessed to them”. It aims to “alleviate the workload of the criminal court and the police court, and to reduce the length of criminal procedures” and it “also allows a more effective enforcement of penalties since the suspect previously agreed to his/her punishment”⁴⁹.

The procedure is flanked by a number of safeguards meant to respect the rights of the defense and to avoid any form of pressure on the accused. Thus, the presence of the lawyer is mandatory during the guilty plea, and the accused may confer confidentially with him/her, after having acquainted themselves with the file. The law specifies that the prosecutor’s office can offer reduced sentences than were required earlier, or offer a suspended sentence (single or probationary), or even provide suspension of the sentence (single or probationary) in keeping with the guidelines provided by the law of 29 June 1964 on suspension, suspended sentence and probation⁵⁰. As stated in the explanatory memorandum, “the recognition of guilt is therefore taken into account in the proposed penalty”⁵¹. The final decision belongs to the trial court required to approve the agreement and to impose the penalties proposed. The sentences are recorded in the criminal record and appear on criminal records issued to individuals. The accused is heard by the court which checks whether he/she has satisfied all the conditions, if the agreement was made in a free, fair and informed way, and if this agreement corresponds to the facts and their legal classification. The court also checks whether the penalties proposed by the prosecution are proportionate to the seriousness of the facts, the personality of the accused and his/her desire to repair the damage. The court has the option to defer consideration of the case to a later hearing, in particular to allow the plaintiff to clarify the damage or the accused to provide information about his/her willingness to repair it. The court may refuse to approve the agreement, but it can not modify it. In case of refusal of approval, the file is delivered to the prosecutor’s office which may, prior to referral to the court, consider mediation or transaction.

⁴⁹ Draft law amending the criminal law and criminal procedure, and laying down miscellaneous provisions in matters of justice, *Documents Parlementaires*, Chambre des Représentants, 2015-2016, 54-1418/1, 88-89.

⁵⁰ See below, sentencing stage.

⁵¹ *Ibidem*, 94.

3.1.5. *Alternatives to pre-trial detention: release under conditions or on bail and electronic monitoring*

The investigation of a case by the prosecutor's office with the intervention of an investigating magistrate is mandatory for crimes, and optional for offences. When such examination of a case is opened, the judge may issue an arrest warrant. But they may also release the accused, subject to compliance with certain conditions, or bail. One speaks, in such case, of 'alternative to pre-trial detention' or 'release under conditions or on bail'. Such alternatives to pre-trial detention were introduced by the Law of 20 July 1990, and aimed at reducing the number of preventive detentions, in order to reduce prison overcrowding. Alternative measures are expected to be given priority over detention, since "the decision to place an accused under arrest may only be made after the non-existence of real alternatives has been established"⁵².

Being a replacement to pre-trial detention rather than a complementary measure, release under conditions or on bail is only permitted if the conditions to issue an arrest warrant exist. First, the offense must lead to, *in abstracto*, a one-year imprisonment or more. Secondly, the judge may only issue a warrant in cases of absolute necessity for public safety. Finally, if the maximum applicable penalty does not exceed 15 years in prison, the judge has to see if there are serious reasons to fear that the accused might commit new crimes or offenses, abscond the course of justice, attempt to remove evidence, or collude with third parties. Legal criteria can thus still pursue the same objectives as well as other devices, particularly in terms of risk of recidivism or threat to public safety. If the criteria for issuing an arrest warrant are not met, the judge can not release the accused under conditions or on bail, and has no other choice but to not put the accused in custody.

In case of a release under conditions, the conditions with which the accused must comply are at the discretion of the investigating magistrate. They may be imposed on the accused without his/her consent, unless they affect the accused's physical or psychological integrity⁵³. The conditions that are recurrently found in the records may either be obligations, or abstentions⁵⁴. Release on bail is subject to the prior payment in full of

⁵² H.-D. BOSLY, D. VANDERMEERSCH, "La nouvelle loi belge sur la détention preventive", in *Rev. dr. pén. crim.*, 1991, 188.

⁵³ Review of the Conseil d'Etat, *Documents Parlementaires*, Sénat, 1988-1989, 658/1, 64.

⁵⁴ C. GUILLAIN, C. SCOHIER, "La gestion pénale d'une cohorte de dossiers stupéfiants. Les résultats disparates d'une justice dite alternative", in L. VAN CAMPENHOUT, Y. CARTUYVELS, F. DIGNEFFE, D. KAMINSKI, P. MARY, A. RÉA, *Réponses à l'insécurité. Des discours aux pratiques*, Bruxelles: Labor, 2000, 312.

an amount of money, fixed by the investigating magistrate, taking into account the financial capacity of the accused.

In keeping with a view to reduce the prison population, pre-trial detention can also be performed under electronic monitoring since 1 January 2014. As home detention or house arrest, it involves the permanent presence of the accused at a specific address, controlled through a GPS system. The only authorized movements of the accused are those that are necessary in the context of legal procedure, those motivated by a medical emergency or other case of *force majeure*.

Contrary to release under conditions or on bail, pre-trial detention under electronic monitoring does not constitute an alternative to an arrest warrant, but a mode of execution of the latter⁵⁵.

TABLE 8. *Number of alternative measures to pre-trial detention, and percentage of the measures relative to the total of persons under arrest warrant*⁵⁶

Measures / Year	Arrest warrant	Alternatives to pre-trial detention	Arrest warrants and alternatives
2000	9 171	ND	
2001	9 230	ND	
2002	10 434	ND	
2003	10 745 (77%)	3 181 (23%)	13 926
2004	10 090 (74%)	3 460 (26%)	13 550
2005	10 611 (74%)	3 713 (26%)	14 324
2006	11 810 (74%)	4 107 (26%)	15 917
2007	10 309 (69%)	4 563 (31%)	14 872
2008	10 842 (69%)	4 917 (31%)	15 759
2009	12 123 (71%)	4 949 (29%)	17 072
2010	12 161 (73%)	4 436 (27%)	16 597
2011	11 788 (72%)	4 606 (28%)	16 394
2012	10 183 (69%)	4 495 (31%)	14 678
2013	10 611 (69%)	4 850 (31%)	15 461
Total (2003-2013)	121 273 (72%)	47 277 (28%)	168 550

⁵⁵ M. A. BEERNAERT, N. COLETTE-BASECQ, C. GUILLAIN, O. MANDOUX, M. PREUMONT, D. VANDERMEERSCH, *Introduction à la procédure pénale*, 5^e éd., Bruxelles: La Charte, 2014, 251.

⁵⁶ Source: Justice en chiffres 2013, Service Public Fédéral Justice. Regarding arrest warrants: (http://justice.belgium.be/fr/information/statistiques/justice_en_chiffres/2013/cours_

The deprivation of liberty appears as the favorite instrument of the investigating magistrate, representing over 70% of all cases to have been examined by the prosecutor's office with the intervention of an investigating magistrate, and having led either to an arrest warrant, or to an alternative to pre-trial detention (Table 8)⁵⁷.

3.2. *Global evaluation of existing devices at the pre-sentencing stage*

3.2.1. *Analytical evaluation of legal texts in view of European standards*

Several recommendations of the Council of Europe deal with the implementation of sanctions and measures in the community at pre-sentencing stage. These recommendations suggest the recourse to the principle of prosecutorial discretion and plea bargaining to favor an alternative treatment for minor offenses and remedy the slowness of the criminal justice system (Rec (87) 18). Similarly, Rec (99) 19 encourages mediation in criminal matters at all levels of the procedure, in order to promote a negotiated justice involving the perpetrator and the victim, while also involving the community. With regard to pretrial detention, the European *soft law* insists that the use of remand be exceptional and always justified (Rec (2006) 13). It encourages the use of alternatives to detention (Annex 2 to Rec (2000) 22), notably by advocating the use of electronic monitoring measures (Rec (2000) 22, CM / Rec (2014) 4). On this note, the various alternative devices of prosecution and pre-trial detention introduced in Belgium are generally in line with the recommendations of the Council of Europe.

Regarding the implementation of these devices at the PSR stage, the law of the Council of Europe also emphasizes observance of various principles, such as the principle of legality, which requires that the conditions and obligations of sanctions be defined by clear and explicit provisions (R (92) 16, CM / Rec (2010) 1, Rec (2000) 22), or the principle of the sanction's proportionality to the gravity of the offense, which prohibits indefinite sanctions (R (92) 16, R (99) 19, R (2000) 22 (Appendix

et_tribunaux/siege/juges_d_instruction). Regarding alternatives to pre-trial detention: (http://justice.belgium.be/fr/information/statistiques/justice_en_chiffres/2013/maisons_de_justice/matieres_penales). The percentages have been rounded to lower or higher tenths. Some figures are not available before 2003 or after 2013, so that the totals were calculated only for the years 2003 to 2013 (as of February 19, 2016). It should be emphasized that alternative measure to pre-trial detention may follow an arrest warrant.

⁵⁷ Let us specify that there can be several people indicted per instruction.

1), CM / Rec (2010) 1). This law also emphasizes the need to obtain the informed consent of the alleged perpetrator (R (92) 16) and the necessary existence of legal guarantees and recourse (R (92) 16).

In light of these principles, a number of difficulties arise. While the various existing Belgian devices observe the *principle of legality* at PSR stage, several elements must be specified. While the unconditional waiver by the public prosecutor made by the prosecutor's office, according to its power of opportunity, is inscribed in the law, there is no legal criterion that determines either the conditions governing the unconditional waiver by the public prosecutor, or the conditions that may accompany it (conditional waiver by the public prosecutor). One may lament the fact that these conditions are sometimes stipulated in the criminal policy directives, instruments issued by the executive power encroaching upon the principle of separation of powers.

Regarding the *principle of proportionality*, probationary terms that come with an unconditional waiver by the public prosecutor can be cumulated without limit in time, except for that of the prescription of the public action. The Council of Europe does however only approve the use of sanctions of undetermined duration in exceptional cases and for serious offenses which represent, due to personal characteristics of the offender, "a constant and serious threat to the life, health or safety of community members" (Annex 1 to the Rec (2000) 22). This is certainly not the case for the majority of offenses, whose cases are dropped. The same applies with those conditions that may be imposed in connection within the frame of release under conditions. While limited in time, these conditions are left to the discretion of the investigating magistrate, subject to control exercised by the investigating authorities. Be it penal mediation, transaction or unconditional waiver by the public prosecutor, the law does not specify the consequences in case of non-compliance with the conditions.

Regarding *consent*, the unconditional waiver by the public prosecutor, with conditions, is imposed on the offender, while R (92) 16 states that a community sanction or measure "shall be imposed only once it is known what conditions or obligations might be appropriate for the offender, and whether or not the latter is willing to cooperate and observe them." Since the different alternatives to prosecution or to pre-trial detention formally require the agreement of the offender, one can question the measure to which the scope of the consent that must be made "freely" (R (99) 19) is indeed made freely and in an informed and unencumbered manner, while the only alternative in case of refusal consists of legal procedure, or the issuance of an arrest warrant.

If the prosecutor's office must in no way *give a reasoned justification* for its decision to resort to mediation or transaction, it must indicate the reason for said decision to close a case without further action. The headings of unconditional waiver by the public prosecutor, however, are not required by law but by a circulaire of the Collegium of general prosecutors⁵⁸. Furthermore, these headings are particularly short and boil down to whether the classification occurs for technical reasons or opportunity. It is difficult, in this context, for the offender, to whom the decision is not communicated, "to understand the sanction as a just and reasonable reaction to the offense" and to strive toward an individualization of punishment (R (92) 16).

At PSR stage and with alternatives to pre-trial detention as an available option, the community sanctions are taken on by the prosecutor and not by the trial court. Admittedly, this is not contrary to European soft law, which states that "the decision on the imposition or revocation of a sanction or a pre-trial measure in the community must be taken by a judicial authority", the latter being understood as "a court, judge or prosecutor". It is nevertheless difficult to talk about *justicialization* at this PSR stage: such decisions as the unconditional waiver by the public prosecutor, mediation and transaction are not taken by a sentencing judge⁵⁹. They are sovereignly decided by the prosecutor's office at *information* stage, without the possibility of consulting the file by the *accused*⁶⁰ and / or *revocation* by a higher authority (R (92) 16, R (99) 19). Under certain circumstances, the prosecutor's office is thus sovereign in the exercise of public action and, because of the separation of powers, the criminal court can not interfere in political prosecutions conducted by the prosecutor's office⁶¹.

3.2.2. *Impact, difficulties and issues raised by the devices*

It appears from the judicial statistics (Table 2) that, of all cases notified to the prosecutor's office, only a small minority leads to the pro-

⁵⁸ See Annex 1 of the 12/98 COL circulaire of the Collège des procureurs généraux regarding the 12 March 1998 law on the improvement of criminal procedure at the stage of information and instruction.

⁵⁹ Except the transaction decided at the sentencing stage.

⁶⁰ *Ibidem*.

⁶¹ C. GUILLAIN, "Les directives de politique criminelle comme source du droit", in Y. CARTUYVELS, H. DUMONT, P. GÉRARD, I. HACHEZ, F. OST, M. VAN DE KERCHOVE, *Les sources du droit revisitées. Normes internes infraconstitutionnelles*, Vol. 2, Bruxelles: Université Saint-Louis, Louvain-la-Neuve: Anthémis, 2012, 347-381.

nouncement of a sentence by a judge (less than 3%) or are the subject of an investigation by a investigating magistrate (just over 2%). Most offenses are processed and closed at the information stage by the prosecutor's office (95%). The relative stability in time of the recorded data is also noteworthy. Whatever the real crime, it is clear, from year to year, that the percentage of closed cases by the prosecutor's office is broadly similar.

As an actor of discretionary prosecution, the prosecutor's office now plays a central position within the judiciary⁶². Certainly, we know of its dependency vis-à-vis the police force, as the latter makes a series of choices, as to which offenses and informations they transfer (or not) to the prosecutor's office⁶³. However, once past this first filter, the prosecutor's office has not only at its disposal the ability to determine which offenses will be subject to research in its district, but also the power to choose the offenses it will prosecute or not, and the terms of such procedures⁶⁴.

Moreover, the majority of cases of offenses dealt with at the prosecutor's office stage are closed with an unconditional waiver by the public prosecutor (over 70%) (Table 3). Even if one "neutralizes" those cases dropped under technical motifs, on the grounds that they are not "triable", one sees that mediation and transaction only occupy a small place on the criminal spectrum, less than 1% and less than 2% of all prosecutable cases respectively (Table 6 and 7). However, transaction procedures and penal mediation clearly aspired to replace the unconditional waiver by the public prosecutor for two reasons: on the one hand, to enable a more credible response to the offense than the unconditional waiver by the public prosecutor (probationary)⁶⁵; on the other hand, on

⁶² C. JANSSEN, J. VERVAELE, *Le ministère public et la politique de classement sans suite*, op. cit.; C. MINCKE, *Efficacité, efficience et légitimité démocratique du ministère public. Quand l'arbre cache la forêt*, Louvain: Leuven University Press, Samenleving Criminaliteit en Strafrechtspleging, 2002.

⁶³ P. PONSAERS, Y. CARTUYVELS, V. FRANCIS, C. GUILLAIN, J. VAN EX, W. VANHAVERBEKE, A. VERHAGE, M. VOGLIOTTI, *Le traitement policier: une autonomie relative? Etude empirique sur le traitement policier autonome*, Gent: Academia Press, Politique scientifique fédérale, 2003.

⁶⁴ "From this perspective, we can consider that the public prosecutor plays a complementary role in creating criminal law by *de facto* defining the outline of criminalization, which may be the object of a penalty for the justiciable, and, conversely, by 'des-incriminating' an act that will not be prosecuted" (C. GUILLAIN, "Les directives de politique criminelle comme source du droit", op. cit., 354).

⁶⁵ Bill organizing the penal mediation, *Documents Parlementaires*, Sénat, 1992-1993, 652/1, 4; see also the circulaire of 1 June 1995: "It is applicable in cases where a waiver, even with conditions, is not a sufficient response to the offense", and the circulaire of 12 Septem-

the grounds that these procedures provide for legal control, which offers more guarantees than hierarchical control in case of unconditional waiver by the public prosecutor, and which are described as inquisitorial or even arbitrary⁶⁶.

It is clear, in practice, that both penal mediation and transaction are very seldom used, despite their wide scope of application. Both devices ultimately have quite a marginal effect on the discretionary exercise of the prosecuting power, while the Council of Europe urges prosecutors to use community sanctions “as widely as possible” (R (99) 22). As the Federal Public Service Justice admits, “paid transactions and successful criminal mediations occur in very small proportion of all cases closed by prosecutors in correctional matters (offences). In 2008, these two types of closure decisions accounted for just 1% of all closed cases⁶⁷. This particularly limited use of mediation or transaction leads one to conclude to the failed attempt to strengthen the legal framework governing the power of opportunity of prosecutors. It is also telling of the latter’s capacity not to be locked into a legal framework considered too rigid or inappropriate, where measures such as unconditional and conditional waivers by the public prosecutor offer it more leeway. Thus, contrary to the transaction or penal mediation which extinguish the prosecution, the (always provisional) waiver allows the prosecutor’s office to exercise greater control over a person over time, since it can theoretically go on until the extinction of public action. In addition, it imposes compliance with certain requirements unmarked by law and left to the discretion of the magistrate. The record may be reactivated on the basis of new information or non-observance of conditions. Besides, the unconditional waiver by the public prosecutor does not imply procedural constraints and can be organized in collaboration with the police, without having to resort to judicial assistants, as is the case in penal mediation⁶⁸.

ber 1995: “to avoid the feeling of impunity caused by measures of unconditional waiver by the public prosecutor, in cases that require an organized social reaction, without having to resort to the pronouncement and execution of a short prison sentence”.

⁶⁶ Bill on the extension of the scope of public action, for certain offenses, in exchange for payment of a sum of money, *Documents Parlementaires*, Chambre des Représentants, 1982-1983, 698/1, 3: “the possibility of recourse to the extinguishing of the prosecution by paying a sum of money, presents less risks that the right to drop a case, which is much more arbitrary. [...] The right to take no action presents more risks because it can be sovereignly exercised by the public prosecutor and does not exclude the possibility of some outside interventions or pressures”.

⁶⁷ *Justice en chiffres 2009*, Service Public Fédéral Justice, 2010, 35.

⁶⁸ C. GUILLAIN, “Le parquet: entre dépendance institutionnelle et autonomie décisionnelle”, in L. VAN CAMPENHOUT, Y. CARTUYVELS, F. DIGNEFFE, D. KAMINSKI, P. MARY, A. RÉA (eds.), *Réponses à l’insécurité. Des discours aux pratiques*, op cit.

The few figures available to us as to the application of alternatives to pre-trial detention compels us to remain cautious in drawing any sort of conclusion. However, we note that if release, and release under conditions, or on bail are supposed to be given priority over detention, they represent less than 30% of cases, whereas the arrest warrant is issued in more than 70% of cases (Table 8). This could partly be explained by the fact that the instruction is often limited to sufficiently serious cases, which more frequently call for the issuance of an arrest warrant. Numerous studies have, however, highlighted the massive application of pre-trial detention despite stressing its exceptional nature, and the relative absence of alternatives to pre-trial detention⁶⁹. Several factors may explain this phenomenon. First, it appears that the prosecutor's office has a significant influence on the decision of the investigating judge, so that the latter would only confirm a decision taken upstream of the penal system⁷⁰. Thus, sorting of files is done by the prosecutor's office, the latter frequently sending files for instruction, even in the case of minor offenses. In addition, the prosecutor's office only rarely, if ever, requires some sort of means of release under conditions. Both examination of a case by the prosecutor's office with the intervention of an investigating magistrate and the use of pre-trial detention would therefore be more functions of the policy pursued by prosecutor's office than dictated by procedural constraints. Besides, the 24 hours during which the investigating judge must decide on the release of the suspect is often considered too short a span of time to favor a measure of freedom, the use of detention being perceived as a safer option in view of the relative guarantees that the litigant can provide. Finally, we have often stressed the ambiguity of the legal criteria to meet to decide on an arrest warrant or a release under conditions, especially regarding the risk of recurrence or threat to public safety⁷¹. An increased use of pre-trial detention testifies to the will of the penal system to keep the offender under control, tipping the balance in favor of a 'secitarian' rather than an alternative justice system. The recent appearance of electronic monitoring as an embodiment of pre-trial detention does not seem likely to reverse the trend. Several stud-

⁶⁹ S. SNACKEN, A. RAES, K. DE BUCK, K. D'HAENENS, P. VERHAEGEN, *Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden*, Vrije Universiteit Brussel en National Instituut voor Criminalistiek en Criminologie, 1996-1997.

⁷⁰ S. SNACKEN, A. RAES, S. DELTENRE, C. VANNESTE, P. VERHAEGEN, *Recherche qualitative sur l'application de la détention préventive et de la liberté sous conditions*, Vrije Universiteit Brussel en National Instituut voor Criminalistiek en Criminologie, 1998-1999, 34 and 233.

⁷¹ C. GUILLAIN, C. SCOHIER, "La gestion pénale d'une cohorte de dossiers stupéfiants. Les résultats disparates d'une justice dite alternative", op. cit.

ies have highlighted the factual obstacles to its implementation, such as the requirement to have a fixed address and reside there permanently. This emphasizes the static side of electronic monitoring, which often amounts to house arrest in the absence of any rehabilitation goal. This has as its paradoxical consequence that the legal regime of the electronic monitoring is stricter at PSR stage than at sentencing stage, or that of the execution of the sentence, while the accused is still presumed innocent. This reality also encourages the risk of widening the penal net⁷². Finally, studies point to the reluctance of judges to resort to electronic monitoring for certain disputes, such as domestic violence, or because of inadequate means of control⁷³.

4. *Alternative measures to the sentencing stage*

4.1. *Analytical review of existing devices at sentencing stage*

Two generations of alternatives to imprisonment can be distinguished here. On the one hand, we have the fine and the suspended sentence, a legacy of the twentieth century. On the other hand, the work penalty, the autonomous probation penalty and electronic monitoring, introduced in the 21st century. Furthermore, internment could also be considered as an alternative punishment to imprisonment for insane offenders.

4.1.1. *The fine*

A fine may be imposed as principal penalty in matters of misdemeanor (fine of 26 euros at least) and matters of minor offense ('affaires de police') (fine of 1 to 25 euros), but it constitutes also an accessory penalty in criminal, correctional and police matters, added to the main sentence. Only as a main penalty may a fine constitute an alternative to imprisonment⁷⁴. The judge must consider factors invoked by the defendant in relation to his social position to determine the amount of the fine, and he may impose a fine inferior to the legal minimum if the offender

⁷² K. BEYENS, M. ROOSEN, *Electronic Monitoring in Belgium*, op. cit., 110.

⁷³ E. MAES, B. MINE, C. DE MAN, R. VAN BRAKEL, "Thinking about electronic monitoring in the context of pre-trial detention in Belgium: a solution to prison overcrowding?", *Eur. Jour. Prob.*, 4, 2, 2012, 10; E. MAES, B. MINE, "Some Reflections on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-trial Detention in Belgium", in *THJ*, 52, 2, 2013, 154.

⁷⁴ The available numbers do not provide information about the status (main or accessory), of the fine.

submits a document that brings proof of his/her precarious financial situation. In case of non payment of a fine, the public prosecutor may initiate the execution of the subsidiary imprisonment sentence, which the judge must include in their sentence. In practice, the use of this alternative penalty no longer applies since a circulaire of 17 January 2005⁷⁵.

TABLE 9. *Numbers of fines*

2000 169632	2001 182932	2002 180264	2003 190116	2004 207352	2005 242124	2006 211695
2007 182537	2008 18775	2009 200745	2010 193254	2011 194454	2012 216134	2013 186234

Source: Website of the Service de la politique criminelle (www.dsb-spc.be).

Recourse to fine is characterized by an irregular evolution, which makes it difficult to draw any valid interpretation.

4.1.2. *Suspension*

Under the Act of 29 June 1964 on suspension, suspended sentence and probation, *suspension of the sentence* is the decision of the judge who, on the one hand, finds the facts charged to the defendant (guilty verdict) and, on the other hand, does not pronounce a sentence on the condition that, during a probationary period of one to five years determined by the judge, the suspension of the conviction is not revoked. This suspension may be simple (*suspension*) or assorted with conditions (*conditional suspension*). The suspension is pronounced by the sentencing Courts (with the exception of the Assize Court) or by the investigating Courts (juridictions d'instruction) and, facultatively, it comes with a prior social investigation and/or short information report (brief pre-report) on the behavior and environment of the accused. The objective of the measure is to reduce the inconvenience to imposition of a sentence, in terms of stigma and desocialization⁷⁶.

The suspension implies first and foremost a guilty verdict. It presupposes that the accused has not been subject to a prior conviction to a sentence of more than 6 months of imprisonment. It also presupposes

⁷⁵ D. DILLENBOURG, M. FERNANDEZ-BERTIER, "L'exécution effective des peines pécuniaires: un coup 'd'EPE' dans l'eau?", in *Actualités de droit pénal, Recyclage en droit*, Limal, Limal: Anthémis, 2015, 66.

⁷⁶ R. CHARLES, "La loi du 29 juin 1964 concernant la suspension, le sursis et la probation", in *Ann. dr. Louv.*, 1964, 4, 193-240.

that the offense is neither punishable by more than 20 years of imprisonment, nor likely to result *in concreto* in correctional imprisonment exceeding 5 years, or a more severe punishment. It requires the agreement of the accused. If the suspension is conditional, social guidance is provided, entrusted to a “justice assistant” under the supervision of a “probation commission”, in charge of checking the probationary measures. Suspension may be revoked by the prosecutor’s office 1) if the offender commits, during the probation period, a new offense leading to a conviction and main penalty of prison sentence of at least one month; 2) if the offender does not meet the conditions of probation, and that this breach appears serious enough in the eyes of the justice assistant and probation commission responsible for monitoring the measure. The revocation is never mandatory. Simple suspension can be replaced with a conditional suspension, which can also be subject to new conditions. If the suspension is revoked, the sentence for the facts giving rise to the suspension is combined with the sentence for the new offense committed during the probation period.

TABLE 10. *Numbers of (conditional) suspensions of the sentence*

Year	Number of simple suspensions	Number of conditional suspensions	Total number of suspensions
1995	6041 (87,3%)	876 (12,6%)	6917
2000	5945 (72%)	2314 (28%)	8259
2001	6656 (73%)	3244 (27%)	9909
2002	7063 (68,4%)	3259 (31,6%)	10322
2003	6699 (79,6%)	1716 (20,4%)	8415
2004	6940 (86,8%)	1055 (13,2%)	7995
2005	8307 (84,5%)	1519 (15,5%)	9826
2006	9146 (86%)	1488 (14%)	10634
2007	8137 (83,5%)	1610 (16,5%)	9747
2008	6116 (78,9%)	1633 (21,1%)	7749
2009	5789 (78,4%)	1591 (21,6%)	7380
2010	6400 (81,2%)	1478 (18,8%)	7878
2011	6466 (81,3%)	1489 (18,7%)	7955
2012	7971 (79,9%)	2001 (19,1%)	9972
2013	5739 (75,5%)	1858 (24,5%)	7597

Source: Website of the Service de la politique criminelle (www.dsb-spc.be).

After a rather promising start, conditional suspension was practically no longer applied in the early 1990s⁷⁷. The system was revived in 1994, with the introduction of community service and training as conditions of probation. A sharp increase in simple suspensions was observed between 1995 and 2006 (+ 50%), followed by a downturn in the following years, and a further increase from 2010 on⁷⁸. The increase in conditional suspensions is more spectacular, with a 200% jump between 1995 and 2002, mainly attributed to the activity of the police courts⁷⁹. We then see a decline, which could be related to the entry into force in 2002 of the autonomous work penalty, and the concomitant suppression of community service as a probationary condition.

4.1.3. *Suspended sentence*

As stated in the Act of 29 June 1964, a *suspended sentence* allows the judge to decide that the sentence will not be executed in whole or in part if, during a probationary period (from one to five years)⁸⁰ determined by the judge, the suspended sentence is not revoked. To justify their decision, the judge may ask to a justice assistant a preliminary social investigation and/or a brief information report on the behavior and environment of the accused. The suspended sentence can be simple (*simple suspended sentence*) or with conditions (*probationary suspended sentence*). A suspended sentence may be pronounced by all trial courts and may cover all the main penalties (imprisonment and fine) unless they are pronounced as a subsidiary alternative, and with the exception of work penalties, autonomous probation, electronic monitoring and confiscation. The objective of the suspended sentence is to reduce the inconvenience of a sentencing, particularly short prison sentences (stigma and desocialization), but also to facilitate the amendment of the condemned.

The granting of a suspended sentence is subject to several conditions. On the one hand, a suspended sentence may be granted if the author has previously been sentenced to more than 3 years of imprisonment. However, since the Law of 5 February 2016, the simple suspended sentence may be ordered only against the author who has not previously incurred a higher sentence than 12 months of imprisonment. In other

⁷⁷ V. DEMAEGT, R. SERLET, *Trente ans de probation. Bilan et perspectives*, Bruxelles: Ministère de la Justice, Service social d'exécution des décisions judiciaires, 1994.

⁷⁸ Because of delays in data encoding, the figures for 2013 are more than likely underestimated. The same goes for the other numbers mentioned for 2013.

⁷⁹ P. MARY, *Probation: histoire, normes, pratiques*, Bruxelles: Bruylant, 2015, 50.

⁸⁰ With regard to fines and prison sentences not exceeding six months, the duration of the suspended sentence cannot exceed three years (art. 8, § 1, al. 4).

cases, only the probationary suspended sentence may be granted, which seems to reflect an increased desire to control recidivists. On the other hand, while prison sentences pronounced by the judge can not be higher than 5 years imprisonment, a simple suspended sentence may be imposed on the convict. If it is probationary, granting it requires the consent of the convict to comply with probation. In which case, the person on probation is subject to a social guidance by a judicial assistant, under the supervision of the probation commission.

A suspended sentence can be revoked (optional revocation) by the judge if the convict commits a minor offense during the probationary period, or does not observe the conditions of probation. But, in case of simple suspended sentence, the judge may prefer to impose probationary conditions and, in case of a probationary suspended sentence, to modify

TABLE 11. *Number of convictions with (probationary) suspended sentence*

Year	Simple suspended sentence	Probationary suspended sentence	Penalty without suspension (peines sans sursis) ⁸¹	Total
1995	14583	1656	13584 (45,5%)	29827
2000	12205 (45,8%)	2156 (8,1%)	12248 (46%)	26609
2001	12787 (45,3%)	2300 (8,1%)	13123 (46,5%)	28210
2002	12536 (45,5%)	2210 (8,0%)	12810 (46,5%)	27556
2003	11341 (42,8%)	2032 (7,6%)	13074 (49,4%)	26447
2004	10897 (41,4%)	1944 (7,3%)	13478 (51,2%)	26319
2005	10247 (39,7%)	1978 (7,6%)	13578 (52,6%)	25803
2006	9578 (38,1%)	1956 (7,7%)	13576 (54%)	25110
2007	9134 (36,8%)	2098 (8,4%)	13586 (54,7%)	24818
2008	8079 (34,1%)	2325 (9,8%)	13273 (56%)	23677
2009	7870 (32,8%)	2371 (9,9%)	13692 (57,2%)	23933
2010	8140 (32,6%)	2574 (10,3%)	14241 (57%)	24955
2011	8710 (32,8%)	2571 (9,6%)	15269 (57,5%)	26550
2012	9366 (33,9%)	2685 (9,7%)	15578 (56,4%)	27629
2013	8338 (31,4%)	2544 (9,5%)	15623 (58,9%)	26505

Source: Website of the Service de la politique criminelle (www.dsb-spc.be).

⁸¹ This column is calculated by us.

the unmet probationary conditions. However, a revocation becomes mandatory in case of more serious offenses (punishable by a custodial sentence of more than 6 months without suspension) committed during the probation period. In case of revocation, the suspended sentence is enforceable and combined with the sentence for the new offense. However, a circulaire of 15 July 2015 recommends the automatic provisional release of the imprisoned convict, if the operative part of that prison sentence does not exceed one year. This release comes after a period which depends on the length of the enforced sentence. The provisional release becomes optional if the enforced part of the prison sentence is longer than one year, with additional specific conditions in the case of sex offenders.

Over the course of twenty years, the number of simple suspended sentences has decreased sharply (around 40%), even if this tendency seems to have taken a new turn since 2010. However, probationary suspended sentences – even if they are granted proportionally rarely – are experiencing an overall increase, which becomes continuous from 2005. The number of sentences without suspension has also been on the rise consistently, both in real terms as well as in percentage terms.

4.1.4. *Work penalty*

Introduced as an *autonomous* penalty in correctional and police matters in 2002, the *work penalty* consists of work done for free by the convict during his free time, for a public service, a non-profit association or a foundation. Its duration varies between 20 hours and 45 hours (police penalty), 46 hours and 300 hours (misdemeanor), but the total can reach up to 600 hours in case of recurrent offense⁸².

The objective of this autonomous work penalty is to propose a rehabilitative sentence as an alternative to imprisonment, and aims to fight against prison overcrowding⁸³. In order to avoid limiting work penalties to minor offenses and to counter the risk of *net-widening*⁸⁴, the legislator intended the work penalty to be in fact applicable to all offenses, except in cases of particularly serious offenses, which are listed by law, or, since the law of 5 February 2016, if the crime is punishable, *in abstracto*, with

⁸² C. GUILLAIN, “La peine de travail, peine autonome? Analyse de la loi du 17 avril 2002 instaurant la peine de travail comme peine autonome en matière correctionnelle et de police”, op. cit., 643.

⁸³ K. BEYENS, “The new generation of community penalties in Belgium. More is less...”, op. cit., 17.

⁸⁴ K. BEYENS, “De werkstraf als hedendaagse straf”, in *Panopt.*, 2006, 4, 7-18.

a maximum sentence exceeding 20 years of imprisonment. Similarly, the existence of a criminal record is not a barrier to work penalty, a fact which underscores its quality as an autonomous penalty, and the will to extend its scope. Finally, if the work penalty is listed in the central criminal record, it is not listed on the criminal records issued to individuals and constitutes no basis for recidivism⁸⁵. Besides, the law also mentions that if the consent of the person (in person or via their representative) were required, the judge could ask a brief information report or a social survey conducted by a judicial assistant to inform their decision. If they do not pronounce the work penalty, the judge must justify their choice.

Finally, the execution of the work penalty is subject to monitoring by a judicial assistant, under the supervision of the probation commission responsible for monitoring the work penalty. In case the work penalty is not completed (partly or in full), the prosecution may order the application of the alternative penalty of fine or imprisonment, taking into account the amount of the work penalty already executed.

TABLE 12. *Numbers of work penalties*

2000/2001 NAP	2002 1027	2003 5382	2004 7658	2005 9323	2006 10071	2007 9474
2008 9033	2009 8868	2010 9604	2011 8620	2012 9471	2013 8971	

Source: Website of the Service de la politique criminelle (www.dsb-spc.be).

Since its inception, the work penalty has enjoyed a spectacular increase before stabilizing itself. This “success story” can be explained, on the one hand, by the fact that work penalty, as a genuine ‘penalty’, is more popular with judges than other alternatives, deemed ‘too soft’, and which it is in competition with; on the other hand, the success can be accounted to the fact that work penalty has largely substituted itself to fines or short prison sentences that are not executed⁸⁶, thereby contributing to the classical phenomenon of net-widening⁸⁷ rather than fighting against prison overcrowding.

⁸⁵ F. TULKENS, M. VAN DE KERCHOVE, Y. CARTUYVELS, C. GUILLAIN, *Introduction au droit pénal. Aspects juridiques et criminologiques*, op. cit., 594.

⁸⁶ Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, Bruxelles, 2011, 67.

⁸⁷ S. COHEN, *Visions of social control*, Cambridge: Polity Press, 1985.

4.1.5. *Probation as an autonomous penalty*

Introduced by an Act of May 8, 2014 as principal punishment in correctional and police matters, and having entered into force on 1 July 2016, *probation as an autonomous penalty* is the imposition of the conditions to be met by the convict during a probationary period set by the judge. This period may not be shorter than six months but cannot be longer to two years. As in the case of work penalty, probation as an independent sanction can in fact be applied to all offenses, with the exception of serious crimes and other deeds punishable *in abstracto* by a maximum sentence exceeding 20 years of imprisonment. Recidivism does not preclude probation penalty, and its pronouncement, which is not included in the criminal record issued to individuals, can not be considered a base for a recurrent offense. A subsidiary imprisonment penalty or a fine must be included in the court order. In this case, the judge does not have the option to request a summary report or a social survey toward the delivery of a sentence, this in order not to delay the procedure⁸⁸. If the information and consent of the defendant (in person or through his/her representative) on the principle of punishment is required, the concrete content of the sentence is left to the probation commission. If a judge refuses to grant probation, they must give reasons for their decision.

The purpose of probation is threefold: to diversify the penalties in order to avoid the use of imprisonment, to contribute to the individualization of punishment to promote reintegration, and to fight against recidivism. It aims in particular those defendants who no longer have a right to suspended sentence because of their criminal record⁸⁹. Its implementation is subject to judicial guidance exercised by a judicial assistant, under the supervision of the probation commission. This commission may suspend all or part of the actual content of the probation or adapt it to given circumstances. It can also, if necessary, extend once the probation period to a maximum of one year or, conversely, prematurely end said probation if the goal of the latter is met before the end of the appointed term. In case of total or partial breach of probation, the prosecutor may decide to execute the sentence of imprisonment or fine alternative, while taking into account the probationary sentence already executed.

⁸⁸ M. GIACOMETTI, C. GUILLAIN, “Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l’emprisonnement?”, in M.-A. BEERNAERT (ed.), *Actualités de droit pénal*, Limal: Anthemis, 2015, 128.

⁸⁹ M. GIACOMETTI, C. GUILLAIN, “Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l’emprisonnement?”, *op. cit.*, 122-123.

4.1.6. *Electronic monitoring as an autonomous penalty*

Introduced by an Act of 7 February 2014 as autonomous penalty in correctional matters, EM as an autonomous penalty, *has been applicable since 1 July 2016* and consists in imposing on the accused permanent stay under a specific address, except for authorized movements or leaves of absences. The duration of this penalty is equal to the duration of the prison sentence that the judge pronounced. The duration of this penalty may not be inferior to one month, nor exceed one year. It is meant to replace imprisonment when the deed is liable to be punished with imprisonment of up to one year (*in concreto*). In practice, it can therefore apply to criminal offenses punishable in abstracto by a prison sentences of up to twenty years, but does not apply to those crimes that call for work penalty and probation sentences. Recurrence does not preclude its application. The pronouncement of the sentence, while indicated in the criminal record, is not included in the criminal records issued to individuals, and may not constitute a basis for the status of recidivist. A subsidiary prison sentence is included in the conviction, and, in order to calculate the term of the sentence, one day of electronic monitoring is considered equivalent to one day of imprisonment. In preparing their sentence, the judge can rely on a social investigation and/or a brief information report entrusted to the “competent authority for the organization and control of electronic monitoring”. The accused must be informed of the scope of the penalty and must give his/her consent, in person or through their counsel. If the judge refuses to issue an EM as an autonomous penalty, he must give reasons for this decision.

EM as an autonomous penalty has several goals: to diversify penalties, in order to avoid the negative effects of prison, and curb prison overcrowding; to fight against recidivism, but also to put an end to the non-execution of prison sentence terms between six months and one year⁹⁰. This reflects a significant change in philosophy. A few years earlier, the introduction of electronic monitoring as an autonomous penalty had been ruled out, because of the risk of net widening (Commission on the Sentence Implementation Courts, 2003, 53).

When EM as an autonomous penalty is pronounced by the judge, the detailed modalities of its implementation are set by an official of the relevant authority for electronic monitoring, and controlled by this service as well as the prosecutor's office. After serving a third of his/her term, the convict may request a suspension of the sentence, which

⁹⁰ Draft law of 17 January 2011, instituting electronic monitoring as autonomous penalty, *Documents Parlementaires*, Chambre des Représentants, 2010-2011, 53-1042/1, 4.

amounts to a form of provisional release or parole. If EM as an autonomous penalty is not served in full or in part in accordance with established procedures, the prosecution may decide to repeal it and proceed with the subsidiary imprisonment deducting, from the period of sentence, the number of days spent under electronic monitoring⁹¹.

4.1.7. Internment for “insane offenders”

Section 71 of the Penal Code, combined with the Social Protection Act of April 9, 1930, amended in 1964, stipulates that the perpetrator of a crime or misdemeanor, who is in a *state of dementia* or in a *serious state of mental imbalance* or *mental impairment*, rendering them incapable of controlling their actions, escapes criminal repression. However, if this person constitutes a social danger, the investigating or judgment court may subject the offender to a measure of internment for an indefinite period. The internment, considered as a measure of care and safety, is an alternative to custodial sentences. Although they are the author of an offense punishable by imprisonment or confinement, the “offender”, because of his/her criminal irresponsibility, enter an alternative system of “social defence”, under the supervision of a social defence commission (‘Commission de défense sociale’, CDS). In principle, internment takes place in a specialized institution. In practice, in a system dominated by the question of the risk of recurrence, the shortage of space and the reluctance of healthcare institutions, such internment still overwhelmingly takes place in the psychiatric wards of prisons⁹². This fact did earn Belgium several convictions by the European Court of Human Rights in 2014 and 2015, for breaches of Articles 3 and 5 of the ECHR⁹³.

A law of 21 April 2007 on the internment of persons with mental disorder was meant to substantially modify the system of internment. This law reflected a justicialization of social defense, with the replacement of the Social Defence Committee by the Sentence Implementation Court as a monitoring actor of the internment measure. This law was replaced before it came into force by an Act of 5 May 2014 on the internment of people, implemented on 1 October 2016. Until that moment, the regime of the 1930 Act was the applicable act.

⁹¹ O. NEDERLANDT, “La surveillance électronique comme peine autonome et comme modalité d’exécution des peines. Présentation et commentaire de la loi du 7 février 2014”, *Jour. des Trib.*, 2014, 6568, 441-446.

⁹² Y. CARTUYVELS, G. CLIQUENNOIS, “The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control”, *op. cit.*

⁹³ G. CLIQUENNOIS, Y. CARTUYVELS, B. CHAMPETIER, “Le contrôle européen et national sur les prisons belges”, in *Dév. et Soc.*, 2015, 4, 491-519.

TABLE 13. *Internment figures (partial data)*

2007	2008	2009	2010	2011	2012	2013	2014
969,4 10,1%	1013,3 10,2%	1061,0 10,4%	1095,7 10,4%	1091,4 9,9%	1132,7 10%	1138,7 9,8%	1087,7 9,4%

Source: Direction Générale des Établissements pénitentiaires.

“The total number of internees in Belgium is not the subject of a systematic count and is therefore difficult to assess”⁹⁴. The figures above, available from 2007 on, take into account the internees placed in psychiatric annexes of prisons and Social Defense Facilities (Etablissements de Défense Sociale, EDS) under the Ministry of Justice. These figures underline the relative stability in the number of prisons internees, as well as their percentage relative to the overall inmate population (about 10%). But other figures show an increase in the number of internees of over 80%, relatively speaking, between 2002 and 2013, a period over the course of which the number of convicts and defendants saw their population grow by “only” 50% and 15% (Justice en chiffres, 2013). These figures also greatly understate the reality of internment. To these numbers, one must add those of internees housed in two institutions of Social Defence under the governance of the Ministry of Health (Mons, 32 beds, and Tournai, 344 beds), to which similar establishments in the Flemish Region were recently added. In addition, many ‘low risk’ internees are often under a regime of conditional release, in secure wings of general psychiatric hospitals (mainly in the Dutch-speaking region of the country). In overall numbers, a research report mentioned 3306 internees in 2004⁹⁵; another inquiry evoked an approximate number of 4000 internees in 2009⁹⁶, and other more recent sources report a total population of 3,800 internees in 2013⁹⁷.

4.2. *Global evaluation of the existing devices at sentencing stage*

4.2.1. *Conformity to European standards? Yes, but...*

Overall, European standards are generally met by alternative measures and penalties in Belgium, whether to diversify the range of sanc-

⁹⁴ Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, op. cit., 121.

⁹⁵ P. COSIJNS, *Werkgroep Forensisch Psychiatrisch Zorgcircuit, Syntheseverslag*, Brussel: Ministère de la Justice, 2005.

⁹⁶ Annales, Sénat, 23 february 2001, COM 5-43.

⁹⁷ Y. CARTUYVELS, G. CLIQUENNOIS, “The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control”, op. cit.

tions in the community, to give them an objective of social rehabilitation and fight against prison overcrowding, or to respect, in their implementation, various fundamental principles of criminal law of human rights (legality, proportionality, information and consent of the convict, individualization, non-automaticity of subsidiary punishment, procedural guarantees). This choice responds to an explicit wish of the political authorities, something stressed by the Minister of Justice S. De Clerk in 2009 when he spoke of the “great challenge” to the practical implementation of European recommendations on “probation rules”⁹⁸.

Observance of European ‘soft law’ in this area is far from being absolute and several shortcomings can be highlighted.

First, the *principle of legality* is not always clearly observed. Thus, while the content of the work penalty or autonomous probation penalty is defined by the judge, it is actually set by the probation commission and the judicial assistant, at best in collaboration with the probationer as a model of consensual justice. Regarding probation as an independent sanction, this delegation was denounced as illegitimate or problematic under the principle of legality, both by the Council of State and the High Council of Justice⁹⁹.

Secondly, the *principle of proportionality* is not always planned in case of revocation and application of a subsidiary prison sentence. Thus, in the case of work penalties, autonomous probation and electronic monitoring, it is up to the prosecutor (ministère public) to decide, in a discretionary manner, of the application of the subsidiary prison sentence. And yet, with regards to work penalty and probation as an independent penalty, the law provides no method of calculation to derive the proportional share of the sentence already served from the duration of the subsidiary sentence¹⁰⁰. The risk here being, as already stressed in the case of work penalty, that the alternative/subsidiary penalty be applied disproportionately; or that it be applied in full¹⁰¹; or that its duration be longer than the prison sentence that would have been imposed directly as a primary penalty¹⁰²; or that it would not be enforced because of its short duration.

⁹⁸ S. DE CLERCK, “Allocution”, in *10 ans des Maisons de Justice. Bilan & Perspectives. Actes du colloque des 2&3 décembre 2009*, Bruxelles, 2012.

⁹⁹ M. GIACOMETTI and C. GUILLAIN, “Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l’emprisonnement?”, op. cit., 134.

¹⁰⁰ F. KUTY, “La peine de probation autonome”, in *Rev. dr. pén. crim.*, 12, 2014, 1001.

¹⁰¹ P. REYNAERT, “Pourquoi tant de peines? La peine de travail ou les métastases de la pénalité alternative”, in *L’exécution des peines/ De strafuitvoering*, Bruxelles: La Charte, 2006, 377.

¹⁰² K. BEYENS, “De werkstraf als hedendaagse straf”, op. cit., 10.

Thirdly, *information, informed consent and will to cooperate* by the probationer, while mentioned by the legal texts, can also be problematic in practice. First, the probationer may be represented at the hearing by his/her lawyer, and the judge's decision thus be taken without any real contact having occurred with the probationer (to-be). Then, the information given at the hearing by the judge on the contents of penalties or measures may be purely formal, given the overload of the courts and the speed with which cases are handled in court¹⁰³, but also given the accused's lack of understanding of the labyrinth that is the judicial system¹⁰⁴. The consent of the probationer is thereby potentially biased and this makes one regret the decline in the use of brief pre-report or social inquiry prior to the court decision, despite the fact that these are considered the relevant instruments of *individualized* punishment by the Council of Europe. Optional and rarely used by judges since the inception of probation, the social survey was made mandatory in 1994 for probational community service until 2002. Made optional only for the work penalty and EM as an autonomous penalty, because of reasons of speed and cost, these preliminary reports are no longer considered for probation as an independent sanction. And yet, while they are intended to enlighten the judge¹⁰⁵, these reports also allow the judicial assistant to inform the prospective probationer of the content and effects of probation, and thus to prepare his/her informed consent to the sanction¹⁰⁶.

Fourthly, the application of the subsidiary penalty for non compliance with the conditions of probation or non-performance, partial or total, of work penalty, of probation or electronic monitoring, is still sometimes *systematic* or *automatic* when it should always be optional. On the one hand, the addition of these main penalties to imprisonment as subsidiary punishment may, in case the case is returned to the prosecutor's office due to "serious problems"¹⁰⁷, favor the systematic execution of the subsidiary prison penalty, lest it discredit the main sentence¹⁰⁸. On the other hand, in case of probationary suspended sentence, revocation remains mandatory if an offense committed during the probation period is punishable by a prison sentence of more than six months without sus-

¹⁰³ K. BEYENS, "De werkstraf als hedendaagse straf", op. cit., 11.

¹⁰⁴ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 99.

¹⁰⁵ K. BEYENS, V. SCHEIRS, "Encounters of a different kind. Social enquiry and sentencing in Belgium", in *Pun. & Soc.*, 2010, 309-328.

¹⁰⁶ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 63.

¹⁰⁷ H. LUYPAERT, K. BEYENS, C. FRANÇOISE, D. KAMINSKI, *Werken en leren als straf. Le travail et la formation comme peines*, op. cit., 121.

¹⁰⁸ F. KUTY, "La peine de probation autonome", op. cit., 1001.

pension. In other words, in this case, the main sentence, which has the practical status of subsidiary sentence, is automatically implemented (which is not the case if the offense at the source of the revocation is less serious).

Finally, the procedural guarantees provided by the European recommendations raise questions on two levels. First, one may question the role granted to the prosecutor's office in case of possible revocation of a community measure or sentence. On the one hand, the mission could have been entrusted to the Sentence Implementation Court, a judicial body better equipped to deliver a possible alternative and individualized punishment taking into account the original offense, the situation of the probationer and grounds for revoking the main sentence¹⁰⁹. On the other hand, there is no appeal for the decision to impose the alternative sentence. Finally, it is emphasized in Rec (99) 22 that judges specifically justify their decision to impose a prison sentence. In Belgium, another system exists, which refers to the principle of negative selection: the judge must motivate their decision to go with imprisonment only if they do not choose work penalty or autonomous probation, which are less severe sentences.

4.2.2. *Rehabilitation and treatment, imprisonment as ultima ratio and prison overcrowding: increase or decrease?*

Two essential tenets of the use of alternative sanctions, present in the European soft law, have yet to be examined. The first one has to do with the goal of *treatment and social rehabilitation*. Claimed in 1964 by the Act on suspension, suspended sentence and probation, this goal of treatment must of course, from the outset, deal with the law's concern for control, highlighting the difficulties of social work in court. But the emergence of a "new generation" of alternative penalties¹¹⁰ has clearly expressed, since the 2000s, a shift of priorities towards risk control and punishment. The discursive change (one now speaks of autonomous *penalty*) and the evolution in objectives (the fight against impunity, preventing recidivism through effective control, the fight against prison overcrowding) attest to this. In practice, the decline in pre-reports but also the changes in guidance of probationers also underline this trend. In 1964, the Act on suspension, suspended sentence and probation introduced the principle of a "social guidance", focused on helping and treating the probationer. In 2002, the Act on work penalty mentioned "mon-

¹⁰⁹ K. BEYENS, "De werkstraf als hedendaagse straf", op. cit., 11.

¹¹⁰ K. BEYENS, "De werkstraf als hedendaagse straf", op. cit., 16.

itoring” by a judicial assistant and “control” by the probation commission. In 2006, the Act on suspension, suspended sentence and probation stated that social guidance “aims at avoiding recidivism” by “tracking and monitoring the compliance with the conditions”. In 2014, the Autonomous Probation Act evoked a “judicial guidance” and the law on electronic monitoring the “control”, the “monitoring” or the “guidance” of the condemned by the “department officials in charge of electronic monitoring” and not any more by judicial assistants. This semantic evolution, coupled with managerial evolution of social work in court, underlines a decline in social welfare ideals and treatment goals, in favor of a control and risk reduction logic¹¹¹. A similar tension between care and control is noticeable in the field of insane offenders internment. On this note, Belgium was the object of repeated condemnations by the ECHR in 2014 and 2015, due to the lack of care given to the internees in psychiatric wards of prisons. The recent construction of “(highly secure) forensic psychiatry centers” is a response to this recurrent problem in an area marked increasingly by the categorizing of the inmates based on the level of risk they represent (*high, medium, low risk*)¹¹².

The second founding tenet concerns a systemic objective of the use of alternatives to detention. One must contribute, through the multiplication of alternative sanctions and penalties, to making deprivation of liberty a *last resort measure (ultima ratio)*. In this regard, the current development does not inspire optimism. While the number of alternative measures and sentences has increased in recent years, with some success for some of them, such as work penalty, this phenomenon goes hand in hand with a continuous increase of the daily population in custody, although a slight decrease has been noticeable since 2014 (see above). In other words, it is likely that alternative sanctions in effect (suspension, suspended sentence, work penalty) clearly reflect a *net widening* phenomenon: sometimes they encroach upon one another, sometimes they are preferred by judges, as in the case of work penalty, to replace short prison sentences that would likely not be executed anyway.

Three factors may explain, in part, the phenomenon of net-widening that could also have bearing on the new probation as independent sanction (probably less so in the case of EM as an autonomous penalty). First, the discourse on the deprivation of liberty as a last resort competes in Belgium with the “impunity narrative”, which has of late gained legit-

¹¹¹ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 84-96.

¹¹² Y. CARTUYVELS, G. CLIQUENNOIS, “The punishment of Mentally Ill Offenders in Belgium: Care as legitimacy for Control”, op. cit.

imacy among both politicians and legal representatives¹¹³. Secondly, autonomous alternative punishments did not impose themselves as the go-to reference penalty for certain categories of offense. They are therefore not formally contributing to exclude imprisonment for some offenses. Thirdly, alternative sentencing, although autonomous, is related to imprisonment as a subsidiary sentence. However, the weak preparation of probationary sanctions and changes to guidance increases the chance of failure and thereby encourage all the more the application of the subsidiary prison sentence¹¹⁴. In other words, we can conclude here, as does the Auditors Copurt (“Cour des Comptes”) with regard to the work penalty, that alternative sentences, in their current configuration, can undoubtedly contribute to “a humane penal policy” but have “little potential as an effective instrument to fight against prison overcrowding”¹¹⁵.

5. *Alternative measures at the post-sentencing stage*

5.1. *Analytical state of the art of existing devices at post-sentencing stage*

Once governed by ministerial circular, the main measures related to the execution of the prison sentence are now regulated by a law of 17 May 2006 on the external legal status of inmates. If this law formally improves the judicial security of inmates, it is however *not yet fully in effect*. This should only be the case as of January 1 2017¹¹⁶, but in the meantime, the status of those sentenced to three years or less is still partly regulated by ministerial circular.

The law of 17 May 2006 reflects a justicialization of the implementation of the sentence. This law entrusts to two authorities – the Sentence Implementation Judge (Juge de l’application des peines, JAP) for sentences of three years or less, and the Sentence Implementation Court (Tribunal d’Application des Peines, TAP) for sentences of more than three years – the competence hitherto entrusted to the Minister of Justice, namely to grant most of the implementing measures for the deprivation of liberty. If JAP is a professional judge linked to the trial court, the TAP is a body composed of three judges: one professional judge, and two ‘lay-judges’, one specializing in sentence enforcement and the other

¹¹³ K. BEYENS, M. ROOSEN, “Electronic monitoring in Belgium: a penological analysis of current and future orientations”, in *Eur. Journ. Prob.*, 2013, 3, 5, 56-70.

¹¹⁴ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 141.

¹¹⁵ Cour des Comptes, *Mesures de lutte contre la surpopulation carcérale. Rapport transmis à la Chambre des représentants*, op. cit., 74.

¹¹⁶ Caution is required here, because the legislature has already pushed back this date several times.

in social reintegration. These bodies *are as of 1 october 2016*, the relevant authority to grant the implementing rules of internment.

A wide array of measures prevents the deprivation of liberty from being executed in prison. It is possible to classify these measures, depending on whether they constitute a suspension (“temporary” non-execution) of the deprivation of freedom outside the prison walls (S); a mode of execution of the deprivation of freedom outside the prison walls (M); a reduction in the execution of deprivation of liberty (R) and a “definitive” non-execution of deprivation of liberty (I). It is also possible to distinguish between discretionary measures taken on the basis of the assessment of an individual dossier (D), and quasi-automatic measures (A).

TABLE 14. *Overview of measures at post-sentencing stage*

	Convict ≤ 3 years	Convict > 3 years	Convict put at the disposal of the TAP	Internee ¹¹⁷	Decision maker (and type of decision)	Legal basis
Release in view of removal (libéra- tion en vue d'un éloignement) (M)	X (foreign- ers)	X (for- eigners)	X (for- eigners)		MJ (D)	Law 17.5.06
Short prison leave (M) (permission de sortie) Permission de sortie (M)	X	X	X		MJ (D) TAP (D)	Law 17.5.06 Law 17.5.06
Furlough (M) (congé)	X	X	X		MJ (D) TAP (D)	Law 17.5.06 Law 17.5.06
Provisional release for medical reasons (M) (libération provisoire pour raisons médicales)	X	X	X		JAP (D)	Law 17.5.06
Interruption of the sentence execution (S)	X	X	X		MJ (D)	Law 17.5.06
Electronic monitoring (M)	X	X	X		DIR (A) ou MJ (D) TAP (D)	Circulaire 17.7.13 Law 17.5.06

Continues

¹¹⁷ Once the Act of 5 May 2014 on the internment of persons (1 october 2016), the internees may apply for leave permissions, furlough, semi-liberty, an electronic monitoring and early release for foreign prisoners with a view to their expulsion.

Follows: TABLE 14. *Overview of measures at post-sentencing stage*

	Convict ≤ 3 years	Convict > 3 years	Convict put at the disposal of the TAP	Internee	Decision maker (and type of decision)	Legal basis
Provisional release (S) (libération provisoire)	X		X		DIR (A ou D) ou MJ (D)	Circulaire 15.7.15
Parole (M)		X			TAP (D)	Law 17.5.06
Provisional release (for foreign prisoners with a view to their expulsion) (M)		X (foreigners)	X (foreigners)		TAP (D)	Law 17.5.06
Conditional release (for individual placed at the TAP's disposal) (M)			X		TAP (D)	Law 17.5.06
Probationary release for internees (M) (Libération à l'essai)				X	CDS (D)	Law 9.4.30
Pardon (R ou I)	X	X	X		King (A ou D)	Const.
Amnesty (I)	X	X	X		PARL (A)	No written legal basis
Prescription of the penalty (I)	X	X	X		AUTO (A)	Penal Code

Abbreviations: A: automatic; AUTO: automatically; CDS: Commission de Défense (Social Defense Committee); D: discretionary; DIR: Directeur de prison (prison director); JAP: Sentence Implementation udge; MJ: Minister of Justice; PARL: Parliament; TAP: Sentence Implementation Court.

The main measures will be presented by taking into account the impact (from the lowest to highest) they have on incarceration. This criterion corresponds for the most part to the temporal criterion of eligibility for these various measures.

Release in view of *removal or transfer* is a recent measure (2012), which ensures that the administrative detention of foreigners subject to deportation take place in closed centers of the Foreigners' office¹¹⁸. This measure appears to facilitate removals of prisoners, which have increased from 378 in 2012 to 625 in 2013¹¹⁹.

¹¹⁸ *Documents Parlementaires*, Sénat, 2011-2012, 5-1364/3, 4.

¹¹⁹ Office des étrangers du SPF Intérieur, *Rapport d'activités*, 2013, 15.

The *short prison leave permission* is the authorization given to the convict to leave the prison for a fixed duration, which may not exceed sixteen hours. This measure is occasionally granted, to respond to social, family or medical needs, and periodically, so as to prepare the inmate for social reintegration. In the latter case, it can only be granted in the two years preceding the date of eligibility for parole (see below).

TABLE 15. *Requests and granting of prison leave permission*

	2000/2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Request	ND	6122	ND	5484	4963	ND	ND	5101	5027	ND
Granting %	ND	3760	ND	3019	2617	ND	ND	2614	2799	ND
Granting ¹²⁰	ND	61,4	ND	55,1	52,7	ND	ND	51,2	55,7	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 44; 2010, 151 et 154; 2011, 169 et 172; 2014, 76; 2015, 56.

The number of jail leaves granted and the grant rate decrease from 2007 to 2013.

TABLE 16. *Success in the case of short leave permissions and furlough*

	2000/2008	2009	2010	2011	2012	2013	2014	2015
Granting	ND	3928	3451	ND	ND	3586	ND	ND
Failure %	ND	595	341	ND	ND	274	ND	ND
Failure	ND	15,1	9,9	ND	ND	7,6	ND	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2010, 151, 154 et 155; 2011, 169, 172 et 173; 2014, 76.

The “failure” rate, which unfortunately does not distinguish short prison leave from furlough, seems encouraging. High refusal rates may lead to two interpretations: either these high refusal rates are regrettable considering the low failure rate (argument of an overly cautious security system) or the failure rate is low because the refusal rates are high (argument of reliable prediction).

A *prison leave* is the authorization given to the convict to leave the prison for a term of up to three times thirty-six hours per trimester. This measure is meant to help maintain family bonds and social contacts, and to prepare the inmate for reintegration. It can only be granted in the

¹²⁰ This line is calculated by us.

year preceding the date of eligibility for parole. Except in the case of an incident, prison leave is renewed automatically¹²¹.

TABLE 17. *Requests and grantings of prison leaves*

	2000/2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Request	ND	6137	ND	3688	3641	ND	ND	3815	3077	ND
Granting	ND	2093	ND	909	834	ND	ND	972	1208	ND
%										
Granting ¹²²	ND	34,1	ND	24,6	22,9	ND	ND	25,5	39,3	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 44; 2010, 151 et 154; 2011, 169 et 172; 2014, 76; 2015, 56.

The number and rate of granted leaves stabilize over time.

Semi-liberty allows offenders to leave, on a regular basis, the penitentiary for a fixed term of maximum twelve hours per day¹²³. The convict therefore leaves prison during the day and spends the night in jail. This measure is granted to allow the convict to be able to attend to professional, family or educational interests. It can only be granted six months prior to the date of eligibility for parole. Semi-liberty (for sentences of three years or less) is used very seldom (1% of convicts serve their sentence under this modality). Semi-liberty faces competition from electronic monitoring.

Electronic monitoring (EM) allows the condemned to serve all or part of his/her prison sentence outside of prison, following a predetermined execution plan, compliance with which is monitored through electronic means. Electronic monitoring should help “optimally promote reintegration” and “pursue the objectives of limiting the harmful effects of detention and compensation for victims”¹²⁴. More recently, EM has been presented as a tool to fight against impunity by allowing some “effective and rapid execution of [...] short prison terms, [which] is a necessity in order to restore credibility to the legal system”. EM should “become the standard for penalty execution [...] for those convicted to sentences of up to three years”¹²⁵. It can only be granted (for those sen-

¹²¹ This line is calculated by us.

¹²² This line is calculated by us.

¹²³ A statutory amendment, not yet in force, states that the duration spent outside the institution may be of no more than 16 hours (*Documents Parlementaires*, Chambre des Représentants, 2015-2016, 54-1418/17).

¹²⁴ *Documents Parlementaires*, Sénat, 2004-2005, 3-1128/1, 21, 45 and 46.

¹²⁵ This policy recommendation has not yet been reached, and there is already shortage of electronic bracelets (C. HOFFMANN, O. NEDERLANDT, “L’exécution des peines à l’heure de

TABLE 18. *Convicts under electronic monitoring*

	2000	2001	2002	2003	2004	2005	2006	2007
Number % ¹²⁶	NAD	22	167	286	278	277	337	523
	NAD	0,5	3,6	5,6	5,6	5,4	6,2	8,8

	2008	2009	2010	2011	2012	2013	2014 ¹²⁷	2015
Number %	599	827	933	983	1009	1338	1783	ND
	10,3	13,2	14,3	14,3	13,7	16,6	20,8	ND

Source: SPF Justice, 2013, 46; Direction générale des Établissements pénitentiaires du SPF Justice, 2008, 130; 2009, 160; 2010, 145; 2011, 163; 2012, 193; 2013, 107; 2014, 71; 2015, 51.

tenced to more than three years of imprisonment) six months from the date of eligibility for parole.

These figures reflect the political intentions of the various justice ministers, to put forward EM for the past ten years. Politicians seem attracted by the “technological” dimension of this device, allegedly a guarantee of its credibility as a control device.

TABLE 19. *Success of electronic monitoring*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	
2010 ¹²⁸	2580	78,7	210	6,4	477	14,6	10	0,3	3277
2011	2801	80,5	183	5,3	486	14	11	0,3	3481
2012	2622	74	320	9	601	17	7	0	3550
2013	2581	73	285	8	656	19	8	0	3530
2014 ¹²⁹	3494	74	305	6	935	20	11	0	4745

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

la traçabilité”, in A. JACOBS, A. MASSET (eds.), *Actualités de droit pénal et de procédure pénale*, Bruxelles: Larcier, 2014, 302).

¹²⁶ This calculation can be meaningful in that the convicts serving their custodial sentence through electronic monitoring are administratively attached to a prison; they can therefore be considered part of the prison population. This line is calculated by us.

¹²⁷ The 2014 figures are not easily comparable with previous years, since electronic monitoring also concerns the defendants (see above).

¹²⁸ For the year 2010, the percentages have been calculated by us.

¹²⁹ The 2014 figures are not easily comparable with previous years, since electronic monitoring also concerns the defendants (see above).

The reasons for the closure of the mandates of a judicial assistant (in charge of monitoring) can be used as an indicator of the failure rate of EM (for those sentenced to terms of more than eight months only, since other convicts are not controlled by a judicial assistant). The success rate, of over 70%, is encouraging.

Parole allows the offender to serve his/her sentence outside prison, subject to the conditions imposed during an appointed probationary period. Parole “ensures better protection of society because [it] is based on the rehabilitation of the convict, and because measures can be taken to reduce recidivism through the guidance and supervision exercised on the parolee”¹³⁰. Parole can be granted once one third of a sentence has been served, for “primary” convicts, and once two thirds of the sentence have been served, for recidivists¹³¹. This measure applies only to those sentenced to more than three years of imprisonment. The duration of the probationary period is equal to the length of the custodial sentence that

TABLE 20. *Granting of parole and percentage relative to release at the end of the penalty*

	2000 ¹³²	2001	2002	2003	2004	2005	2006	2007
Number	678	800	662	670	704	645	598	754
% ¹³³	76,1	76,7	64,9	65	72	61	58,6	64,2

	2008	2009	2010	2011	2012	2013	2014	2015
Number	742	711	688	781	713	666	717	ND
%	61,8	56,7	51,9	55,7	50,1	46,7	47,5	ND

Source: S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, Rapport non publié, 2008; Direction générale des Établissements pénitentiaires du SPF Justice, 2000, 112; 2008, 135 et 136; 2009, 163 et 164; 2010, 147 et 148; 2011, 165 et 166; 2012, 195 et 196; 2013, 109 et 110; 2014, 73 et 74; 2015, 53 et 54.

¹³⁰ Documents Parlementaires, Sénat, 2004-2005, 3-1128/1, 22.

¹³¹ Specific rules, which were tightened in 2013, concern those sentenced to a minimum of 30 years in prison.

¹³² Figures for 2000 to 2006 are from S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, Rapport non publié, 2008. These figures and those of future years should be compared with caution. Indeed, Deltenre's figures only concern custodial sentences of more than three years, while the figures for later years relate to all convicts.

¹³³ This line is calculated by us.

the offender must still undergo on the day when the decision relative to parole has become enforceable. However, the duration of the probationary period may not be of less than two years.

Between 2000 and 2014, the numbers of paroles granted are stationary, while the population of convicts is clearly increasing. The proportion of parole compared with *regular penalty releases* steadily decreases.

TABLE 21. *Success rate of parole*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	
2010 ¹³⁴	388	54,4	9	1,3	302	42,3	14	2	713
2011	406	56,1	9	1,2	295	40,7	14	1,9	724
2012	389	53	12	2	312	43	16	2	729
2013	458	60	6	1	289	38	15	2	768
2014	422	62	8	1	240	35	10	1	680

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

The reasons behind the closing down of the mandates of judicial assistants can be used as an indicator of the parole failure rate. Again, with a success rate of over 60%, the results are encouraging.

Provisional release (for foreign prisoners with a view to their expulsion) is a measure destined to foreign convicts who have no right to stay in Belgium. Eligibility conditions are very similar to those of parole. In a concern to “not discriminate”, the 2006 lawmaker (législateur)¹³⁵ gave good results, as the release rate of these foreign prisoners were similar to the rate of parole¹³⁶. However, the situation could be complicated since the Law of 5 February 2016 prohibits, to those convicted PS, CP, semi-liberty, the SE and parole.

Probationary release is available to interneers. It may be granted when the mental state of the internee has sufficiently improved and his/her conditions of social rehabilitation are met (Social Protection Act

¹³⁴ For the year 2010, the percentages have been calculated by us.

¹³⁵ *Documents Parlementaires*, Sénat, 2004-2005, 3-1128/1, 61.

¹³⁶ S. DELTENRE, *Des commissions de libération conditionnelle aux tribunaux d'application des peines: analyse de l'impact des libérations conditionnelles et des libérations provisoires en vue d'éloignement sur la population pénitentiaire*, op. cit., 45.

of 9 April 1930). In 2004, out of internees 3306, 1999 (60.5%) were released as part of a socio-legal experiment¹³⁷.

Provisional release is the main measure allowing for the early release of those sentenced to terms of imprisonment of three years or less¹³⁸. The primary objective of provisional release is to fight against prison overcrowding. Most recently, it was presented as allowing “more energetic enforcement of sentences” and as fighting against a certain type of impunity (*circulaire* of 15 July 2015). Depending on the circumstances, this measure, granted by the Director or Minister of Justice, is sometimes automatic (which is the exception in Belgian law), sometimes discretionary. To benefit from provisional release, the convict must have served a portion of the sentence in custody; this portion ranges from one month to one third of the sentence¹³⁹. When the offender must meet specific conditions (which is an exception: see below), the duration of the supervision is two years.

TABLE 22. *Granting of provisional release and new guidance mandates*

	2000	2001 to 2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number	3860	ND	5411	5030	5857	6248	6348	6202	7289	8038	ND
Guidance	NAP	ND	229	245	279	290	299	212	178	108	ND

Source: Direction générale des Établissements pénitentiaires du SPF Justice, 2000, 112; 2001, 53; 2008, 135 et 136; 2009, 163 et 164; 2010, 147 et 148; 2011, 165 et 166; 2012, 195 et 196; 2013, 109 et 110; 2014, 73 et 74; 2015, 53 et 54; Direction générale des Maisons de Justice du SPF Justice, 2013, 97; 2014, 108; Administration générale des Maisons de Justice, 2015, 53.

The number of provisional release has been steadily on the rise from 2000 to the present. This measure could nevertheless not thwart the rise in prison population over the same period. The “exceptional” character of provisional release “with conditions” seems to be observed (as indicated by the (reduced) number of new guidance mandates carried out by judicial assistants).

¹³⁷ P. COSYNS, C. D'HONT, D. JANSSENS, E. MAES, R. VERELLEN, “Les internés en Belgique: les chiffres”, in *Rev. dr. pén. crim.*, 4, 2008, 367.

¹³⁸ This measure is not a modality of executing the sentence, but a suspension thereof. This has negative consequences for the beneficiary (postponment of the date of the prescription of punishment, non- inclusion of the period of liberation “that went well” to determine the re-admission period in case of revocation, postponment of the date allowing for rehabilitation).

¹³⁹ It can be considered a pure non-execution of the deprivation of freedom sentence, for those convicted to not more than 4 months without having to serve a portion of that sentence.

TABLE 23. *Success rate of provisional releases*

Year	Mission accomplished		Mission non executable/ not carried out		Interrupted mandate/ revocation		Death		TOTAL
	N	%	N	%	N	%	N	%	
2010 ¹⁴⁰	173	64,3	10	3,7	83	30,9	3	1,1	269
2011	192	69,3	21	7,6	58	20,9	6	2,2	277
2012	194	67	14	5	78	27	2	1	288
2013	173	75	8	3	50	22	1	0	232
2014	110	77	5	4	24	17	3	2	142

Source: Direction générale des Maisons de Justice du SPF Justice, 2011, 256; 2012, 251; 2013, 100; 2014, 111; Administration générale des Maisons de Justice, 2015, 54.

The reasons behind the closing down of the mandates of judicial assistants can be used as an indicator of the rate of provisional release failure. However, these figures (encouraging in terms of success) give only a very partial view, since they concern only the exception, that is to say those provisional releases that have been subject to control by a judicial assistant.

5.2. *General evaluation of existing devices at post-sentencing stage*

Characterized by measures of a discretionary nature, the Belgian system of alternative sanctions at the post-sentencing stage pursues, as a priority, an objective of social reintegration, in accordance with the recommendations of the Council of Europe. The Belgian system is also characterized by individualized and consensual measures, which is also stated by the Council of Europe. Moreover, the major procedural safeguards promoted by the Council of Europe (legality, proportionality, non-discrimination and *justicialization*) are generally adhered to in the Belgian system, although not without bending some rules.

5.2.1. *Discretionary and controlled measures in the service of a reintegration objective*

For the Council of Europe, community sanctions should be *discretionary measures*, taken on the basis of an “individual case”. It is only in-

¹⁴⁰ For the year 2010, we did calculate the percentages.

cidentally that the Council of Europe envisages automatic measures, granted “automatically” (Rec (2003) 22). The CE is very critical of collective measures aimed primarily at the management of prison overcrowding (R (99) 22). In Belgium, most of the post-sentencing measures are indeed discretionary, except for collective pardon, amnesty, electronic monitoring (for some convicts sentenced to up to three years of imprisonment) and provisional release.

These measures are clearly *at the service of a reintegration objective* by the legislator¹⁴¹ even if the Belgian lawmaker mentions regularly, in recent reforms, an objective to fight against impunity. To contribute to reintegration, it is essential to avoid late access to these measures. Several difficulties should be pointed out here. First, if the Council of Europe asks “to grant prison leave as early as possible and as frequently as possible [...]” (R (82) 16, Rule 3), in Belgium, a convict qualifies for leave only a year before he/she becomes eligible for parole¹⁴². In addition, the frequency with which leave is granted (three times thirty-six hours per trimester) remains low. When it comes to the subject of parole, the Council of Europe recommends that “competent authorities” open the procedure toward obtaining parole, such that “the decision [...] can be made as soon as the prisoner has served the minimum period required” (Rec (2003) 22, rule 17). Belgian law used to conform to this request, since it provided an automatic transmission of the file to the TAP. Since 2013 however, a written request from the convict is required, to have his/her case handled by the TAP. This amendment, which causes a delay in the processing of files, could prove detrimental *for* isolated or vulnerable prisoners, ill-informed (or not informed at all) of their eligibility for parole. Finally, in general, the practice of “gradual expansion” (not required by law) delays the granting of the measures. In fact, the Minister of Justice does only grant leave after “successful” short prison leaves¹⁴³. Similarly, the TAP dare only grant parole after first subjecting the convict to a period of electronic monitoring¹⁴⁴.

Overall, the Belgian system also meets the requirement of sanctions accompanied by individualized and controlled conditions. However,

¹⁴¹ *Documents Parlementaires*, Chambre des Représentants, 2005-2006, 51-2170/1.

¹⁴² Besides, access to the latter has been delayed by recent legal *changes*.

¹⁴³ B. MINE, L. ROBERT, “Des avis et des décisions: un contraste éclairant pour un processus décisionnel méconnu”, in B. MINE, L. ROBERT (eds.), *Uitgaansvergunningen en penitentiair verlof: de deur op een kier. Permissies de sortie et congé pénitentiaire: la porte entrouverte*, Antwerpen: Maklu, 2014, 201.

¹⁴⁴ T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, Saarbrücken: PAF, 2014.

there are in principle no individualized conditions to observe, be it for electronic monitoring for convicts sentenced to less than eight months, or in the case of provisional release¹⁴⁵. In such cases, the intervention of a judicial assistant is not provided.

While the Council of Europe emphasizes the *importance of monitoring* to ensure the credibility and effectiveness of measures in the community, it also believes that “*monitoring should not be considered simply as a form of control*” but must also come with advice, assistance and guidance (CM / Rec (2010) 1, rule 55, emphasis added). This concern is particularly strong in the case of electronic monitoring, which should not “undermine or replace the establishment of constructive professional relations”, but should instead be a complementary measure to the existing means of support, “on the social and psychological levels” (CM / Rec (2014) 4). In this respect, while Belgium had gotten ready for a “global” social care for detainees under EM, things seem now to be moving more towards a purely technical control, justified by a calculation of efficiency and traceability¹⁴⁶. Moreover, in the eyes of the Council of Europe, the *modalities of control must have certain limits* in order not to compromise reintegration. In order to not aggravate the “punitive character” of sanctions (R (92) 16, R 27), these rules should be limited to what is “require[d] to a strict enforcement of the sanction” (R (92) 16, rules 24 and 74) and the authorities may not subject the offender to requirements beyond those provided by the deciding authority (R (92) 16, rule 73). In Belgium, this limitation is not always observed¹⁴⁷, among other reasons because the guidance work of judicial assistants is officially presented as a work of “verification” of conditions (*circular* of 30 July 1999 and March 12, 2015). Moreover, one of the goals of reintegration is to allow “early termination” of a sanction if the latter is no longer deemed necessary (“principle of minimum intervention”; R (92) 16, rule 88). This pos-

¹⁴⁵ Without calling into question the qualities of the principle of required controlled conditions, certain terms and designs of said control can be counter-productive to the goal of rehabilitation. This is the case when revocation is seen more as a result of successful control than as a failed rehabilitation. The European Council is aware of the problem, and has set up limits to said control (see below).

¹⁴⁶ K. BEYENS, M. ROOSEN, “Electronic monitoring in Belgium: a penological analysis of current and future orientations”, in *Eur. Jour. Prob.*, 2013, 5, 3, 56-70; M.-S. DEVRESSE, “La surveillance électronique des justiciables”, in *C. H. CRISP*, 2014.

¹⁴⁷ T. SLINGENEYER, “Rôles des services psychosociaux et des assistants de justice dans le cadre de la libération conditionnelle en Belgique: l’hypothèse d’une colonisation sécuritaire”, in P. MBANZOULOU (ed.), *Les métiers pénitentiaires, enjeux et évolutions*, Agen, Les presses de l’Énap. 2014, 141-158; ID., *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l’ère des commissions belges de libération conditionnelle*, op. cit.

sibility does not exist in Belgian law: it is possible to eliminate (or reduce) individualized conditions, but not to shorten the duration of the penalty.

The goal of reintegration implies certain *limits to the sanctions for behavioral problems identified by control*. According to the Council of Europe (R (92) 16), revocation must not be the only sanction (the Belgian system also provides for the suspension and the tightening of conditions) and should not necessarily lead to incarceration (the Belgian system consistently proposes imprisonment in case of revocation). Moreover, in case of revocation, in order to determine the portion of the sentence to be served in prison, "One must take into account to what extent and in which manner the set conditions and obligations have been met by the offender" (R (92) 16, rule 85). Belgian law has observed this rule in case of semi-liberty and electronic monitoring. But, in case of parole, a period of probation that "went well" is not automatically deducted. And in case of provisional release, the period that "went well" is not deducted, since provisional release is only a "suspension" of the custodial sentence.

5.2.2. *Measures that are individualized and accepted by the convict*

A. *The principle of individualization*

The *personal circumstances of the offender* should have bearing on the type and duration of the sanction granted in the community. Belgian law does not give details about the elements that should guide this individualization. Thus, for measures of parole, electronic monitoring and semi-liberty, it is expected that the *Sentence Implementation Court* designate "individualized special conditions" related to the reintegration plan, the risk of recidivism and the victims' interests. Belgian law therefore operationalizes the personal circumstances of the offender in a "defensive" manner, as the primary concern is risk prevention¹⁴⁸. This is not the case of the Recommendations of the Council of Europe, which evoke more "positive" elements ("individual needs", "the potential" of the offender, "receptivity [...] to the intervention", "likely effect of the punishment on the person of the offender", "health"...) allowing the penalty to have "greater meaning" and to contribute to "personal and social development". Compared with the content of "individualized special condi-

¹⁴⁸ Many legal measures on the execution of sentences in Belgium were taken following the Dutroux case, which may explain in part the tone of a legislator "under pressure", and having to demonstrate the ability to avoid other "dysfunctions".

tions”, some studies have been able to show a use of “standardized” conditions, highlighting the limitations of this work of individualization¹⁴⁹.

The *duration and monitoring of measures* should be tailored to the individual. In Belgium, this is not always the case. Thus, the length of parole depends on the portion of the sentence that the offender must still serve, but is also subject to *minima* whereby the device is standardized (see above). The duration of provisional release is automatically set at two years without individualization. Moreover, in the current securitarian climate, the work of monitoring by judicial assistants is highly controlled. This type of managerial control is promoted by circular and encouraged by the use of IT tools¹⁵⁰. It results in a standardization of practices, problematic in light of the requirement of measures “appropriate to each particular case” with “sufficient flexibility” given to the operational staff (R (92) 16, rule 71).

Finally, individualization is regularly mentioned in the most recent Recommendations in the context of *risk assessments* (CM / Rec (2014) 3; CM / Rec (2014) 4; CM / Rec (2010) 1). Such a development is also reflected in the Belgian legislation. A directive from February 2007 imposes onto prison psychologists the use of at least a “risk assessment technique”, the results of which will be forwarded to decision makers. This legal rule recommends a ‘categorical’ inflection, which alters the very concept of individualization (as well as the tools to achieve it).

B. *Free consent and acceptance by the convict*

Recommendations of the Council of Europe formally require the *consent* of the convict to non-custodial measures (even if the CE’s recommendations are ambiguous on the scope of this requirement; see above). Similarly, the Council of Europe insists on an *authentic acceptance* of the sanction by the convict, which would allow the latter’s *cooperation* and *active participation* (R (92) 16, CM / Rec (2010) 1). At post-sentencing stage in Belgium, the legislation (including ministerial circular) holds the agreeing of the convict to the community sanction as a condition for granting it. This agreement does not, however, necessarily constitute a real acceptance on the part of the convict. This would presuppose a true explanation of the content of the measure, in accessible

¹⁴⁹ K. BEYENS, M. ROOSEN, “Electronic monitoring in Belgium: a penological analysis of current and future orientations”, op. cit.; T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l’ère des commissions belges de libération conditionnelle*, op. cit.

¹⁵⁰ A. JONCKEERE, “L’accompagnement socio-judiciaire saisi par l’informatisation en Belgique”, *Dév. et Soc.*, 2013, 345-357.

language, to the convict. Moreover, this agreement as a source of accountability may also reflect a form of “allegiance” of the condemned¹⁵¹. Indeed, these injunctions toward accountability are particularly difficult to implement for convicts, and the way the agreement is reached also points to a transfer of responsibility in case of failure.

5.2.3. *Procedural guarantees: a shifting degree of observance*

A. *The legality principle*

The very existence of the sanction in the community should be provided by law (R (92) 16, Rule 3). Under Belgian law, the regimes of semi-liberty, electronic monitoring¹⁵² and of provisional release are provided only by ministerial circular. To be more specific, a law exists (and has for almost ten years now) but it is not yet in force. The reasons for this delay are probably of budgetary nature (Sentence Implementation Judges should be appointed) but above all, they are organizational. There is concern that the projected system, bringing a justicialization of the decision making, will slow down the flow of releases and thus worsen prison overcrowding.

The principle of legality does not preclude the inclusion of service enforcement measures in *operating instructions* (“instructions de service”). These instructions cannot be “manifestly in conflict with the legal instruments” (R (97) 12, Annex II, Regulation 1). Some directives require that the justice assistant control those elements that are beyond their control (which are only conditions for release) that is provided legally. Research has shown that, faced with such a normative conflict, the practice of justice assistants is influenced more by the directive than by law itself¹⁵³.

B. *The Proportionality principle*

According to the Council of Europe, *access to the measure must be proportionate to the length of the term of incarceration*. The term of incarceration required for access to parole should, insofar as possible, not be “so long that the purpose of parole [cannot] be achieved” (Rec (2003)

¹⁵¹ D. KAMINSKI, “Prenez la peine d’adhérer: entre police du contrat et politique de la responsabilité”, in Actes du colloque *Le pénal aujourd’hui, pérennité ou mutation. Punishment today, permanence or mutation*, Centre International de Criminologie Comparée, 2008, 9.

¹⁵² As of 31 December 2012, 64.5% of convicts who obtained electronic monitoring did obtain it on the basis of a ministerial circular (Direction générale des Maisons de Justice du SPF Justice, 2014, 120, calculated by us).

¹⁵³ T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l’ère des commissions belges de libération conditionnelle*, op. cit., 396.

22, rule 6). A legal reform of 2013 has delayed the date of eligibility for certain convicts. Research¹⁵⁴ indicates that parole is granted increasingly late. Other studies have also pointed out that some judges forestall “the non-execution of sentences and therefore pronounce more severe sentences, to ensure that the convicted person spends at least some time in prison”¹⁵⁵. Postulating the almost automatic non-execution of short sentences, those magistrates (judges and members of the prosecutor’s office) thus contribute to extending the length of sentences all the while, suggesting the existence of a certain laxism (which they think they should stand up against).

The duration of the sanction must be proportionate to the remaining length of sentence to be served. Parole “ought be imposed for a period which should not be out of proportion with that of the sentence remaining to be served” (Rec (2003) 22, rule 10). This rule seems to be observed, because Belgian law states in principle that the duration of the probationary period be equal to the length of the sentence remaining to be served. However, exceptions to this principle are numerous: no probationary period may be of less than two years, this period may have to be between five and ten years, or still, to be a mandatory ten years. Such exceptions may push the convict to refuse community sanctions, which is counter-productive for both reintegration and for the protection of society. Regarding provisional release, a fixed term of two years is the same for all convicts, regardless of the remaining length of sentence to be served.

According to the Council of Europe, the *consequences of breaching* the conditions of the measure must be proportionate to the seriousness of the breach. While the Council of Europe makes a distinction between “minor” failure and “significant” failure (R (92) 16, Rules 78 and 80; Rec (2003) 22, rule 30), Belgian law does not include this distinction and states that the penalty for breach of post-sentence stage, should be the revocation of the measure. Thus, in the case of provisional release, dismissal is the only possible sanction for new conviction or non-compliance with the conditions. In the case of parole, there are three possible sanctions (revocation, suspension and tightening of conditions), but they all target the same assumptions. For instance, relatively benign behavior

¹⁵⁴ A. RIHOUX, “Tendances passées et effets de la réforme sur les flux d’entrées, les flux de sorties et les durée de détention”, in *La libération conditionnelle: évaluation des pratiques*, Nivelles-Louvain-la-Neuve: Département de droit pénal et de criminologie, 2000, 259; T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l’ère des commissions belges de libération conditionnelle*, op. cit., 457.

¹⁵⁵ K. BEYENS, C. FRANCOISE and V. SCHEIRS, “Les juges belges face à l’(in)exécution des peines”, in *Dév. et Soc.*, 34, 3, 2010, 401.

(e.g., to fail to notify the authorities of a change of address) can lead to revocation. In 2006, the revocation of parole was primarily related to non-compliance with conditions (49%), the cumulation of non-compliance with an offense (38.8%) and finally to the fact of committing an offense (12.2%)¹⁵⁶. The heaviest sanction is therefore not systematically related to the most serious behavior.

C. *The non-discrimination principle*

According to the Council of Europe, *foreign convicts* may obtain alternative measures to facilitate reintegration, and without discrimination. In Belgium, access to provisional release (for foreign prisoners with a view to their expulsion) is currently doubly disrupted. On the one hand, the legislator created (in 2012) a competing measure, the *release with a view to the remoteness*. This measure is hardly a genuine release because, while it actually allows the convict to leave the prison walls, it does not allow for any return to “free life.” Indeed, it leads the convict from the walls of the prison to those of a closed center¹⁵⁷. Moreover, since 2016, the legislator no longer allows the foreign convict who has no residence permit to effectively prepare this release, since the foreign convict can not be granted leave permissions, furloughs, semi-liberty or electronic monitoring.

The *economic and social circumstances* of the convict (his/her difficulties in finding employment or permanent housing) should not “constitute a ground for refusal or deferral” of alternative measures (R (92) 16, rule 20; Rec (2003) 22, rule 19; CM / Rec (2014) 4, rule 7). Under Belgian law, the absence of “reintegration prospects” and of “the potential [...] to have a home” are counter-indications which justify the refusal to grant semi-liberty, electronic monitoring, parole and provisional release (for foreign prisoners with a view to their expulsion). Regarding provisional release for convicts sentenced to more than a year in prison, the “inability to meet their material needs (shelter, livelihood)” is a counter-indication to the release (circular of July 15, 2015). The security context transforms the conception of social reintegration: rather designed initially as the reason for the release, it becomes a possible counter-indication to it.

Finally, the principle of non-discrimination does not preclude the Council of Europe from seeing, in the convict’s *dangerosity*, a relevant criterion of distinction (CM / Rec (2014) 3; R (2000) 22). It seems, un-

¹⁵⁶ T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l’ère des commissions belges de libération conditionnelle*, op. cit., 445.

¹⁵⁷ To speak of “release” is akin here to what VAN DE KERCHOVE called the “mystifying power of legal language” (“Des mesures répressives aux mesures de sûreté et de protection. Réflexions sur le pouvoir mystificateur du langage”, in *Rev. dr. pén. crim.*, 1976, 245-279).

fortunately, that the Belgian legislation, in terms of parole, makes distinctions (considered non-discriminatory by the Constitutional Court)¹⁵⁸, based more and more explicitly on this highly questionable criminological concept.

D. *The justicialization principle*

In principle, the decisions to grant (or deny) and to revoke (or not) the measure must be taken by a “judicial authority” (R (92) 16). However, some more recent Recommendations recognize a decision taken by a “judicial or administrative authority” (CM / Rec (2010, 1), or even a decision “by a judge or subject to judicial review” (CM / Rec (2014) 4). The Belgian lawmaker immediately took advantage of this. Thus, (short) prison leave, furlough, release with a view to remoteness, electronic monitoring for those sentenced to maximum sentences of less than three years and provisional release are not taken on by a judicial authority, but by the Minister of Justice.

The Council of Europe mentions the *motivation* for decisions (Rec (2003) 22, 32d rule.). Thus, it deems important to “signify, to the greatest possible extent, the reasons behind a prison leave refusal to the inmate” (R (82) 16, rule 9). In Belgium, the decisions of the Minister of Justice only very rarely include an overview of the detainee’s situation justifying a refusal of leave, but are instead limited to certain counter-indications. This way of drafting decisions is counter-productive (phenomenon of “self-fulfilling prophecy”) in that it is a source of demotivation in the convict and exacerbates a series of negative feelings (confusion, discouragement, helplessness, frustration and even anger)¹⁵⁹.

Finally, a *right of appeal* to a higher independent and impartial body must be included, regarding both the substance of the decision and procedural safeguards. However, the TAP’s decisions are not subject to appeal. Only appeal to the Supreme Court (cassation) is possible. As for decisions to grant or refuse provisional release, they are subject to neither appeal nor cassation.

6. *Conclusion*

As recommended by the Council of Europe, the range of community sanctions and measures has greatly expanded in Belgium in recent

¹⁵⁸ T. SLINGENEYER, “Une étape dans la neutralisation des ‘monstres’ jugée constitutionnelle”, in *Rev. dr. pén. crim.*, 2016, 222-233.

¹⁵⁹ B. MINE, L. ROBERT, “Des avis et des décisions: un contraste éclairant pour un processus décisionnel méconnu”, *op. cit.*, 207-209.

years, on all three stages of the criminal trial. From the analytical presentation laid out above, we propose to draw some general conclusions relative to three points: the conformity of Belgian criminal law to European soft law; major inflections expressed, in supervision of offenders, by the implementation of these sanctions and measures; and the impact of these devices on the use of imprisonment and prison overcrowding.

6.1. *The conformity of Belgian criminal law with the recommendations of the Council of Europe: a globally observed imperative*

Regarding the implementation of community sanctions and measures, the Council of Europe focuses on a number of principles. These are generally respected, at least at the level of primary criminalization. Some differences exist, however, which are sometimes reinforced by the practical implementation of sanctions and measures.

The *principle of legality*, relative to the creation and content of the sanctions, is globally respected. However this is only made possible at the expense of resorting to a principle of “extended legality”¹⁶⁰, also accepted by the Council of Europe, and probably better equipped to meet the principle of individualization of sanctions. Thus, at pre-sentencing stage, the discretionary power of prosecution of the prosecutor’s office, enshrined in law, remains discretionary and is sometimes framed by criminal policy directives, instruments which are issued by the executive power. At the sentencing stage, the concrete content of the work penalties or autonomous probation is *de facto* passed onto the commission of probation and the judicial assistant. Similarly, the content of EM as an autonomous penalty is entrusted to services dependent on the administration. Finally, at post-sentencing stage, several early release measures are created by ministerial circular and their modalities governed by operating instructions, the content of which sometimes exceeds their legal requirements.

The principle of *proportionality* is regularly undermined. It is thus that probationary conditions that may accompany an unconditional waiver by the public prosecutor can accumulate without limit in time, other than the requirement of public action. Moreover, in case of non execution of a work penalty, of an autonomous probation penalty or of EM as an autonomous penalty, it is up to the prosecutor’s office to discretionarily decide whether or not to enforce a sentence of imprisonment or

¹⁶⁰ F. TULKENS, M. VAN DE KERCHOVE, Y. CARTUYVELS, C. GUILLAIN, *Introduction au droit pénal. Aspects juridiques et criminologiques*, op. cit., 250-269.

of subsidiary fine. In this case, if the prosecutor's office must take into account the work penalty, autonomous probation or electronic monitoring already carried by the convict, no method of calculation has been provided by the legislator regarding work penalties and probation. The convict runs the risk of undergoing a relatively heavy subsidiary penalty, potentially disproportionate since it can reach five years of imprisonment¹⁶¹. As for the post-sentencing stage, it happens that the trial period of the measure exceeds the length of the sentence remaining to be served (parole). Besides, in matters of provisional release, revocation appears to be the only possible sanction, regardless of observed misconduct, which goes against the principle of proportionality. The same applies for parole since, if more sanctions are possible in case of a breach, the law allows revocation, even for modest violations.

The Council of Europe also emphasizes the principle of *justicialization* of the process of granting and modification or revocation of community sanctions or measures. In Belgium, one should point out, in this regard, the important role played by other actors than the *sentence judge*. At pre-sentencing stage, the prosecutor's office plays a central role, the sole decision-maker in matters of granting (or not) alternatives penalties or alternatives to the prosecution. At the sentencing stage, it is the *probation commission* which decides about potential amendments to the penalty, while the prosecutor's office decides of the possible execution of subsidiary penalty, when the convict fails to meet the conditions. This latter decision cannot be the object of any appeal, whereas one could have expected the intervention of the *Sentence Implementation Court*. Finally, at post-sentencing stage, if the setting up of the *Sentence Implementation Court* clearly reflects a desire to *justicialize* the monitoring of the enforcement of sentences, the fact remains that certain decisions remain the purview of the Minister of Justice. To the *justicialization* concern, the soft law of the Council of Europe associates an obligation to *justify* the measures for purposes of understanding and individualization of the penalty. Nonexistent or purely formal at PSR stage, motivation refers to a principle of "negative selection" at sentencing stage: judge must not positively motivate their choice of a custodial sentence or a fine, but merely highlight, in their decision, the counter-indications to the choice of a 'softer' penalty (work penalty or autonomous probation). Finally, at post-sentencing stage, motivation is the rule for decisions taken by the Sentence Implementation Court, but these decisions are not subject to appeal.

¹⁶¹ In the case of EM as an autonomous penalty, the law provides that a penalty run day equals one day of imprisonment.

Moreover, the decisions taken by the Minister of Justice are limited to emphasizing the counter-indications to the granting of a measure, and these measures are not subject to appeal.

The Council of Europe's Recommendations also stress the foundations of a consensual justice system, which requires *information* and *acceptance* of a sanction by the recipient, in order to obtain real *cooperation*, considered a guarantee of success. In Belgium, the requirement of consent is usually formally required by the legislation, even though this is not always the case (see release under conditions as an alternative to pre-trial detention). But the outlines of the requested consent shed proper light on the ambiguities of a "consensual" justice model as a new modality of the exercise of power¹⁶². First, the agreement is only free formally. Requested under the threat of resorting to a more severe punishment, it is more akin to a form of "subjugation"¹⁶³, a sort of pledge of allegiance following which the offender "becomes the manager of his/her own punishment"¹⁶⁴ on top of being also held responsible in case of its potential failure. Moreover, obtained at pre-sentencing stage, this agreement allows to "launder" the liberties taken by the legal authorities with respect to fundamental rights. On the other hand, the recipient's acceptance and willingness to cooperate assumes that this consent be informed. Actually, it often is the case that the recipient's agreement is given by his/her representative, or that the offender does not measure the true extent of his commitment. In this respect, the absence or decline of recourse to prior social relationship to the ruling, found in practice and/or endorsed by some of the more recent laws, stresses the formal nature of the requested consent¹⁶⁵.

The *individualisation* of the process of granting or withdrawal of community sanctions and measures is another important axis of the soft law of the Council of Europe. This principle is generally respected by Belgian law, as evidenced by the generally facultative character of sanctions and measures granting, and the amount of choice left to the judicial authorities in case of breach by the convict. However, this individualization space is also limited in part by the automatic quality (intended or likely) of some decisions. Thus, in matters of probationary suspended

¹⁶² A. SUPIOT, *Homo Juridicus. Essai sur les fondements anthropologiques du droit*, Paris: Seuil, 2005.

¹⁶³ D. KAMINSKI, "Prenez la peine d'adhérer: entre police du contrat et politique de la responsabilité", op. cit.

¹⁶⁴ M. FOUCAULT, "Alternatives à la prison: diffusion ou décroissance du contrôle social. Une entrevue avec Michel Foucault", in *Crim.*, XXVI, 1, 1993, 18.

¹⁶⁵ P. MARY, *Probation: histoire, normes, pratiques*, op. cit.

sentence, revocation is, in some cases, the only option, and it can also be mandatory in some cases. Furthermore, the attaching of autonomous work penalties, probation and electronic monitoring to a subsidiary penalty of imprisonment makes the latter a likely alternative in case of failure or breach of conditions by the convict¹⁶⁶. At the post-sentencing stage, it is also expected that the TAP appoint individualized conditions, which take into account the circumstances of the convict. However, this practice reflects the increasing use of standardized conditions¹⁶⁷, that the use of computerized procedures in the handling of cases might very well increase.

6.2. *The main inflections of offender supervision: from personal assistance to control, from handiwork to management, from relational to technical interactions*

Community sanctions inevitably raise, in their implementation, the question of social work in the field of justice. In Belgium, several inflections mark the evolution of this work of accompaniment of accused or convicted individuals. These can be broadly grouped into three main trends, something that is emphasized both in the legal texts and the latest devices, as well as in the practice of social workers in penal justice. The first trend enshrines the *shift from a logic of assistance and treatment toward a will to control and toward risk management*. A product of the times, the 1964 Act on probation was clearly taking over penal welfarism. Focusing on an ideal of treatment and reintegration, this law showed the concern to favor the reclassification of the convicted on the prevention of recidivism¹⁶⁸. It is thus that the social enquiry, although optional, was oriented as much on the person as on the environment of the offender, in an attempt to identify the environmental causes of the offender's acting out¹⁶⁹. Similarly, social guidance was individualized, linked to the structural causes of acting out, and useful in the treatment of the author and his/her reintegration¹⁷⁰. On the field, probation officers were mainly social workers, characterized by a "need-based approach". The latter, it has to be noted, was not necessarily consistent with the retributive culture of

¹⁶⁶ F. KUTY, "La peine de probation autonome", op. cit.

¹⁶⁷ T. SLINGENEYER, *Gouvernementalité et libération conditionnelle. Les pratiques décisionnelles sous l'ère des commissions belges de libération conditionnelle*, op. cit.

¹⁶⁸ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 25.

¹⁶⁹ M.L. MARCK, "L'enquête de personnalité", in *Bulletin de l'administration pénitentiaire*, 1966, 153-167.

¹⁷⁰ J. CORNIL, "Déclin ou renouveau de la répression pénale", in *Revue de droit pénal et de criminologie*, 1965, 8, 718.

the judges. Benefiting from significant leeway, these social workers favored a relational approach with probationers, sometimes reluctantly applying the dimension of control to their work.

Much as happens in other European countries, the “new generation of community sanctions”¹⁷¹ that emerges in Belgium at the turn of the 21st century emphasizes a change of direction. More directly influenced by a *securitarian* environment, these new community sanctions take on a punitive rhetoric, closer to the culture of judges. Although they do not endorse the emergence of an actuarial risk logic¹⁷², they nevertheless reflect a punitive inflection and the primacy of a control logic over the dimension of rehabilitation. Competition made to the social enquiry (need approach) by the brief information report (output oriented) and the gradual decline of the two instruments is a first sign of such a tendency. The transformations of the “guidance”, which, device after device, becomes “monitoring”, or the “social” which becomes “judicial”, is the second indicator of this trend. These changes also raise professional identity problems for justice assistants, whose relational ideals and logic of help to the offender are in conflict with the control logic of their institutional mandate¹⁷³. Composed more often of people with university degrees of various backgrounds rather than people with a social workers’ training, the new generation of judicial assistants gradually gets used to this culture of control, although some scholars find important differences between the “old” and the younger generation of judicial assistants¹⁷⁴.

The second strong trend, congruent to the first, emphasizes the influence of *New Public Management* on the organization of work in court. From the late 1990s on, the creation of *Houses of Justice* has reflected a principle of centralization of the terms of social work in the field of justice, with a goal of increasing consistency and standardization. A few years later, the *Houses of Justice* system was subjected to *Business Process Reengineering*¹⁷⁵. The latter brought a new dimension to the judiciary institution, namely managerial work technology. This tool promotes the standardization of professional standards, of practices in the processing of files, and allows quantitative comparative evaluations of workers’ perfor-

¹⁷¹ A. BOTTOMS, S. REX, G. ROBINSON (eds.), *Alternatives to Prison, Options for an Insecure Society*, Cullompton, Devon, Willan, 2004.

¹⁷² K. BEYENS, V. SCHEIRS, “Encounters of a different kind. Social enquiry and sentencing in Belgium”, in *Pun. & Soc.*, 12, 2010, 315.

¹⁷³ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 82.

¹⁷⁴ A. JONCKHEERE, D. KAMINSKI, “Les maisons de justice: le travail au travail”, in *Rev. dr. pén. crim.*, 2013, 1173.

¹⁷⁵ P. MARY, *Probation: histoire, normes, pratiques*, op. cit.

mance. Using a *PARajudicial Computer System* (SIPAR), it also introduces the principle of a computerized control of social work in the legal field¹⁷⁶. Made compulsory from 2005 on, the use of this software responds to a quadruple concern: administrative rationalization (objectifying practices and allowing a comparison of social workers in terms of performance and needs); standardization of procedures and reporting (for purposes of equal treatment); standardization and implementation of data network (for purposes of control and continuous monitoring); and trajectory modeling (identification of “standard-path” of the probationer, according to his/her profile)¹⁷⁷. This computerized-turn was welcomed on behalf of its potential of objectification and efficiency¹⁷⁸, and appreciated by some judicial assistants who see, in the tool and protocols the system provides, a shelter in terms of accountability. Yet this turn is also criticized in the name of the effects it has had, including through an overly formalized communication. Potentially reducing the complexity of the case handled¹⁷⁹, computer (pre)coding work would allegedly focus on control, and reflect the shift away from assistance to the offender toward serving the justice administration¹⁸⁰. Overvaluing a technicist and conformist management of the files, this turn reduces the relational part, the creative dimension and the individual aspect of the job. As such, it is sometimes challenged or circumvented by the older social workers, in the name of the threats that the tool carries on the ethics of social work¹⁸¹.

Finally, the third trend reflects the growing confidence in the *technicisation* of offender supervision. While this is a landmark in the growing use of computerization, it is also evident in the popularity, in recent years, of electronic monitoring to the three stages of the criminal process. While, initially, a balance was sought in the implementation of electronic monitoring between social support and technical control, this “Belgian model” nonetheless witnesses a decline in relational supervision in favor

¹⁷⁶ A. JONCKHEERE, “SIPAR, un système informatique emblématique des transformations observables au sein des maisons de justice”, in *Champ pén.*, Séminaire innovations pénales, 2008.

¹⁷⁷ A. JONCKHEERE, X. DE LARMINAT, “L’édifice informatique des services socio-judiciaires en France et en Belgique: une architecture paradoxale?”, in *Gouvern. act. pub.*, 105-128.

¹⁷⁸ A. BAUWENS, “Organisational change, increasing managerialism and social work values in the Belgian Houses of Justice, Department of Offender Guidance”, in *Eur. Jour. Prob.*, 3, 2011, 15-30.

¹⁷⁹ A. JONCKHEERE, “SIPAR, un système informatique emblématique des transformations observables au sein des maisons de justice”, op. cit., 10.

¹⁸⁰ A. JONCKHEERE, D. KAMINSKI, “Les maisons de justice: le travail au travail”, op. cit., 1162-1174.

¹⁸¹ A. JONCKHEERE, X. DE LARMINAT, “L’édifice informatique des services socio-judiciaires en France et en Belgique: une architecture paradoxale?”, in *Gouvern. act. pub.*, 105-128.

of a purely technical control¹⁸². The same trend is underlined in the case of GPS tracking at pre-sentencing stage¹⁸³. This trust in technology, also justified by an economic calculation, is echoed still in electroning monitoring as autonomous penalty, since supervision by a judicial assistant is no longer required¹⁸⁴.

The three trends identified above could very well underline the gradual shift from an ideal of rehabilitation towards a “culture of control”¹⁸⁵ in social work in the legal field. In this sense, this evolution is part of a broader movement endorsed by the Council of Europe. Indeed, in various recent recommendations, the Council stresses “intensive monitoring”, “preventive monitoring” or even measures to extend monitoring to an “indefinite” duration or even “for life” (CM / Rec (2014) 4; Rec (2003), 22; Rec (2000) 22; R (99) 22). Similarly, some texts focus on rehabilitation, not any more as an end in itself, but as a means to serve “risk reduction of recidivism” (CM / Rec (2014) 4, Rule 8). This shift toward a control logic, encouraged in Belgium by a renewed reading of the goals, the import of *New Public Management* instruments and the increasing use of technical tools, could however take a different configuration in the future. If it maintains the competence of enactment of alternative sanctions and measures on the Federal State, the last reform of the State, however, decided the transfer of the offender supervision from the Federal State to the Communities (Flemish, Francophone and German-speaking) effective from 1 July 2014¹⁸⁶. If it is likely to undermine the process of standardization of current practices, this transfer is still too recent for us to be able to evaluate its impact on substantive directions the legal system will take.

6.3. *Alternative sanctions and prison overcrowding: a shot in the dark?*

Since the 2000s, the new wave of community measures and sanctions has been largely justified by the need to fight against prison overcrowding. Both the work penalty and electronic monitoring – the two

¹⁸² K. BEYENS, M. ROOSEN, “Electronic monitoring in Belgium: a penological analysis of current and future orientations”, 56; M.-S. DEVRESSE, “La surveillance électronique des justiciables”, op. cit.

¹⁸³ K. BEYENS, M. ROOSEN, *Electronic Monitoring in Belgium*, op. cit.

¹⁸⁴ K. BEYENS, “The new generation of community penalties in Belgium. More is less...”, op. cit., 18.

¹⁸⁵ D. GARLAND, *Culture of control: Crime and Social Order in Contemporary society*, 2001, Chicago: University of Chicago Press.

¹⁸⁶ M. GIACOMETTI, C. GUILLAIN, “Les peines de surveillance électronique et de probation autonome, nouvelles peines alternatives à l’emprisonnement?”, op. cit., 142.

devices that have dominated the field from a quantitative standpoint for the past 15 years – reflect this objective, regularly reminded by the lawmaker¹⁸⁷. In fact, this goal is not reached, even if the increased recourse to electronic monitoring at pre- and post-sentencing stage allowed for a stabilization of the *intra muros* incarcerated population from 2014 on¹⁸⁸. The increase in the prison population has been continuous in Belgium for years, with Belgium being sentenced in recent years by the European Court of Human Rights, both because of poor detention conditions related to the overcrowding, and for the poor conditions of reception and care given to the internees.

How can we explain the failure of alternative measures and sanctions on that point? Several explanatory factors can be mobilized. First, certain sanctions (such as work penalty) or some modalities of implementation of the sentence (such as electronic monitoring) have also been introduced as a substitute for the non-execution of short custodial sentences. They can thus fulfil, like the work penalty whose quantitative success is unquestionable, a *net-widening* role in strengthening the effectiveness of short prison sentences, rather than being an alternative to prison overcrowding. Secondly, autonomous alternative sentences were not imposed as a unique, go-to, default-type penalty for the categories of offense they were aimed at. They are therefore not formally contributing to excluding imprisonment as a penalty for some offenses. Furthermore, although autonomous, these penalties are attached to imprisonment as an alternative sentence. However, the weak preparation of probationary sanctions, the decline of social guidance and increase of a purely technical monitoring (including via electronic monitoring) increases the chances of failure of community sanctions, and encourage all the more the application – still too often automatically – of the subsidiary penalty, namely imprisonment¹⁸⁹. Thirdly, the discourse on the deprivation of liberty as last resort competes in Belgium with the “impunity narrative”, which has gained legitimacy among politicians but also legal actors¹⁹⁰. The latter do not hesitate to impose sentences of three years or more (sometimes three years and 1 day) to avoid an untimely process of provisional release¹⁹¹.

¹⁸⁷ K. BEYENS, “The new generation of community penalties in Belgium. More is less...”, op. cit., 19.

¹⁸⁸ K. BEYENS, M. ROOSEN, *Electronic Monitoring in Belgium*, op. cit., 5.

¹⁸⁹ P. MARY, *Probation: histoire, normes, pratiques*, op. cit., 141.

¹⁹⁰ K. BEYENS, M. ROOSEN, “Electronic monitoring in Belgium: a penological analysis of current and future orientations”, op. cit., 56-70.

¹⁹¹ K. BEYENS, “The new generation of community penalties in Belgium. More is less...”, op. cit., 19.

Can we conclude, as does the Court of Auditors about the work penalty, namely that if, in their current configuration, alternative penalties contribute perhaps in some cases to a “humane penal policy”, they have “little potential as an effective instrument to fight against prison overcrowding” (ECA, 2011, 74)? It would be tantamount to embracing the diagnosis whereby “without active and radical politics [...], diversification of ‘sanctions’ is not accompanied by the reduction of the use of/recourse to prison”¹⁹². Such a policy would probably fancy itself as acting on two levels. From a technical point of view, it would be good 1) to promote all the “alternative” sanctions and measures as one single reference penalty, exclusive of imprisonment, for certain categories of offenses. Indeed, the only reasonable reductionist policy involves “legislative reforms limiting the recourse to imprisonment”¹⁹³. 2) to remove the backing of these sanctions and alternatives to subsidiary imprisonment (or fines) in case of failure. If this does not appear possible, the *automatic* nature of recourse to the alternative punishment in case of failure of community sanctions should at the very least be deleted; 3) to introduce greater automaticity in granting alternatives to post-sentence stage; 4) to maintain and strengthen support systems and human accompaniment of offender supervision in order to reduce the number of failures. From a societal point of view, it would be necessary to fight against the success of the “impunity narrative” with judges and politicians. On this note, it is important to remind the reader that the Council of Europe emphasizes the importance of strengthening the credibility of alternatives with the judicial authorities, the general public and politicians, explaining “the economic and social interest in resorting less to prison sentences and to make greater use of community sanctions and measures...” (Rec (2000) 22).

¹⁹² D. KAMINSKI, S. SNACKEN, M. VAN DE KERCHOVE, “Mutation dans le champ des peines et de leur execution”, *Déviance et Société*, 31, 4, 2007, 500.

¹⁹³ D. KAMINSKI, S. SNACKEN, M. VAN DE KERCHOVE, “Mutation dans le champ des peines et de leur execution”, *op. cit.*, 492.