

**PROMOTING NON-DISCRIMINATORY ALTERNATIVES TO
IMPRISONMENT ACROSS EUROPE**

**NON-CUSTODIAL SANCTIONS AND MEASURES
IN THE MEMBER STATES OF THE EUROPEAN UNION**

The Netherlands

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November, 2021

Published by:

Instituto Jurídico
Faculdade de Direito da Universidade de Coimbra
Colégio da Trindade | 3000-018 Coimbra | PORTUGAL

www.uc.pt/fduc/ij



**Funded by
the European Union**

This report is part of the project ***Promoting non-discriminatory alternatives to imprisonment across Europe*** (PRI Alt Eur), funded by the European Commission under the programme JUST-JCOO-AG-2020 — action grants to promote judicial cooperation in civil and criminal justice.

The project is implemented together by Penal Reform International, the Institute for Legal Research of the University of Coimbra (Portugal) and the Hungarian Helsinki Committee.

The European Commission support for the production of this publication does not constitute endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Non-custodial sanctions and measures in the Member States of the European Union

The Netherlands

(Gerard de Jonge, Sonja Meijer and Leo Tigges¹)

I. LEGAL FRAMEWORK

1 General framework of the national system of penal sanctions

1.1 General features of the penal sanctions system²

The Dutch Criminal Code (CC) defines and enumerates the penal sanctions that can be imposed for **crimes** and **misdemeanours**.³

Penal sanctions are divided in **penalties** (punishments) and **measures**. A punishment mostly has a mixed aim; often the aim is primarily retaliation, but most sentences also intend to influence the behaviour of offender (special prevention) and/or intend to prevent others from offending (general prevention). A penal measure aims at reforming the behaviour of the offender and the protection of the society against reoffending.

1.1.1 Penalties

The penalties enumerated in Article 9 CC can be divided in **principal** and **ancillary penalties** and in **custodial** and **non-custodial** penalties.

Principal custodial penalties

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² Penalties and measures for juveniles and young adults fall outside the scope of this report.

³ The CC consists of three 'Books': Book One, *General provisions*, Book Two, *Crimes*, and Book Three, *Misdemeanours*. Other Codes (like for instance the Code on Economic Offences) may contain criminal sanctions as well and lower legislation on county or municipal level may also provide for penal sanctions for violation of their provisions. The general rules pertaining to all penal sanctions in Book One of the CC fully apply to penal sanctions in lower legislation. This report focuses on the CC only.

Imprisonment

Imprisonment is for a **fixed term** or for **life**, as stated in Article 10, para 1, CC. Fixed term prison sentences may vary between **one-day minimum** and **eighteen years maximum** (Article 10, para 2, CC). The one-day minimum term applies to *all* crimes and misdemeanours. Theoretically, therefore, murder can be punished with a prison sentence of just one day, even in the form of a suspended sentence. The applicable maximum term of imprisonment is specified in the legal definition of the offence committed.

The eighteen years maximum for fixed term sentences can – in legally specified cases (Article 10, para 3 CC) – be increased to a maximum of **thirty years**, for instance for committing terrorist crimes.

Life imprisonment is for the duration of the life of the convict and as such for an indefinite term. A life sentence can be commuted to a fixed term sentence (or any other punishment) by way of pardon only (Article 6:7:1 Dutch Code of Criminal Procedure (CCP)). As a consequence of the *Vinter-case*⁴ and its sequels, an *Advisory Committee Life Prisoners* has been created for a regular assessment of the eligibility of 'lifers' for re-integrative programmes, furlough and, finally, for pardon.⁵ After 25 years of imprisonment, this committee advises the Minister of Legal Protection⁶ on whether the prisoner is eligible for re-integration activities. It is up to the Minister to decide whether the life sentence prisoner may participate in re-integration activities or not. Two years after the prisoner has participated in the reintegration activities, the same committee advises on granting pardon to the prisoner, i.e. conversion of the life sentence into a fixed-term sentence, which opens up the possibility of parole. If the advice of this committee is positive, the Minister will consider pardoning the lifer. 'Life' therefore means at least 27 years of imprisonment.

Detention

Detention as a penal sanction (*'principale hechtenis'* – 'principal detention') is a less severe and shorter form of deprivation of liberty than imprisonment. As a rule, it must be served in a detention centre, not in a prison.

The minimum term of detention is one day (possibly as a suspended sentence); the maximum term is one year. This maximum can be increased with four months in case of a conviction for multiple offences or recidivism (Article 18 CC).

When a fine is imposed, the court shall set a term of substitute custody to be served if the fine is not paid or not fully paid in due time (Article 24c CC). This form of detention is called '**substitute detention**'. According to Article 24c, para 2, CC, every € 25 of the unpaid fine counts for one day in jail maximum. According to so-called 'starting-points' for the judiciary, up to a fine of € 1000, the court will impose

⁴ ECrtHR 09/07/2013, nrs. 66069/09, 130/10 and 3896/10.

⁵ Governmental Decree on the Advisory Committee Life Prisoners - Besluit Adviescollege levenslanggestraften, *Official Gazette* 2016, 65365

⁶ In the Netherlands, the Ministry of Justice and Security has two Ministers: a Minister of Justice and Security and a Minister of Legal Protection. The latter is politically responsible for the execution of criminal sanctions.

'only' one day of substitute detention for every € 50 unpaid fine.⁷ The minimum term of substitute detention is one day; the maximum term is one year.

The government currently investigates the option of imposing an alternative community service order in the event of non-payment of fines instead of converting the original sentence in detention. The proposal originally came from the Dutch Probation Service.⁸

Detention as a penal sanction is also to be distinguished from **pre-trial detention**, which is a custodial *procedural* measure, not a criminal sanction, though the detained suspect would not feel the difference.

Principal non-custodial penalties

Community service

For a description of this non-custodial sanction see para 2.1 below.

Fine

For a description of this non-custodial sanction see para 2.1 below.

Ancillary penalties

1. Disfranchisement⁹;
2. Forfeiture;
3. Publication of the sentence.

Ancillary penalties can be imposed for specific criminal offences only.

Though ancillary sanctions are always non-custodial, they will not be discussed here further as they are hardly ever imposed and are not relevant in the discussion concerning the role and development of non-custodial sanctions in Dutch criminal justice.

1.1.2 Measures

Penal measures can be divided in **custodial and non-custodial measures**.

Custodial penal measures:

Placement in a forensic psychiatric institution

If this is necessary to ensure the safety of others or the general safety of persons or property, the court may, on the basis of a prior psychiatric assessment, order that an

⁷ Starting-points National Consultation Subject Criminal Law - Oriëntatiepunten Landelijk Overleg Vakinhoud Strafrecht, version July 2021 (via rechtspraak.nl)

⁸ *Kamerstukken II*, (Parliamentary Documents, Lower House) 2020/21, 24587, nr. 804.

⁹ Article 28 CC: denial of access to certain offices; denial of the right to serve in the army, denial of the right to vote or to be elected; prohibition to act as a lawyer; prohibition to practice certain professions.

offender of unsound mind is placed in a (closed) psychiatric institution (Article 37a CC). The first term of placement is two years. The court can extend this term by one or two years up to a maximum of four years or – depending on the nature of the offence – to a maximum of nine years or even life (Articles 38d-38e CC).

The criminal court may also order the placement of an offender with a grave mental disorder in a *civil* (closed) psychiatric institution if he/she meets the criteria laid down in Article 2.3 of the *Law on Forensic Care* (Wet forensische zorg). This type of court order therefore cannot be defined as a *penal* custodial measure and will not be discussed here.

Placement in an institution for repeat offenders (Article 38m CC)

For certain categories of repeat offenders placement in a closed institution for repeat offenders is an option. One of the legal requirements for placement in such a special institution is that the offender was sentenced at least three times preceding the actual offence to a custodial penalty or measure or community service and further recidivism is to be expected (Article 38m CC).

The term of placement is two years, but the convict has the right to request the court anytime to assess the necessity of continuation of the enforcement of the measure (Article 38n, para 3, CC).

A study by Tollenaar a.o. on the effectiveness of this measure indicates that it is far more effective than a prison sentence.¹⁰

Non-custodial penal measures

Order to withdraw seized illegal items from circulation (Article 36b CC);

Items seized in the course of a criminal investigating can – by decision of the court – be taken out of circulation. Most of the times this concerns illegal drugs or illegal arms.

Deprivation of the illegally obtained advantage (Article 36e CC);

This – regularly used – measure obliges the convict to turn over his illegally obtained advantage – as estimated by the court – to the state. If he/she does not or cannot do so within a fixed term he/she will be detained (imprisonment for debt) for a time proportional to the imposed sum of money at a rate of one day per € 25,- to a maximum of three years.

The obligation to pay damages to the victim(s) of the crime (Article 36f CC);

¹⁰ N. Tollenaar, A.M. van der Laan, and K.A. Beijersbergen, *Korte- en lange-termijn effecten van de ISD-maatregel. Technisch rapport*. WODC. Den Haag. 2014 (English summary available via wodc.nl)

On the reasoned request of the victim of a crime the criminal court can grant him/her (emotional and/ or material) damages to be paid by the offender. If the request of the victim is too complex to be adjudicated by the criminal court the victim can submit his/her request to the civil court.

Suspended placement in a forensic (penal) psychiatric institution (Article 38 CC);

Placement in a forensic psychiatric institution as described above can be ordered with the proviso that this measure will not be enforced as long as the convicted person complies with special conditions concerning his/her treatment and supervision as stipulated in the verdict. The maximum term of this measure is nine years (Article 38e, para 2, CC). Non-compliance with these conditions can lead to the conversion of this non-custodial mode of this measure to a custodial one, e.g. placement in a closed forensic institution ('detention during the State's pleasure') as described above (Article 6:6:10, para 1e, Code of Criminal Procedure (CCP)).

Restriction of certain personal freedoms (Article 38v CC);

For the protection of the society or to prevent (further) criminal behaviour of a convict the court can impose a measure implying restriction of certain freedoms (Article 38v CC). The following restrictions can be imposed:

- a) the prohibition to be in a certain area,
- b) the prohibition to contact a certain person or certain persons,
- c) the obligation to be present periodically at a certain location,
- d) the obligation to present him-/herself periodically to a specially designated policeperson.

The maximum duration of this measure is five years. It can be imposed together with other penalties and measures and can take effect immediately if stated so in the sentence, meaning that an appeal does not suspend this measure.

Every time the convicted person violates the terms of this measure he/she can be arrested and taken into custody for a term, stated in the sentence, but at least for three days per violation. However, the total of this kind of detentions may not exceed six months.

Measure aimed at influencing behaviour and/or restricting liberty (Article 38z CC).

Recently, a measure aimed at influencing behaviour and/or restricting liberty has been introduced in the CC to enable (life-long) supervision of offenders whose placement in a forensic psychiatric institution has ended and of parolees who were convicted to a prison sentence for violent or sex crimes (Article 38z CC). The measure can be imposed in order to protect the safety of others, or the general security of persons or property. Once the measure is imposed, it can only be executed by a court order at the request of the Public Prosecution Service. The measure can be executed if serious consideration must be given to the possibility that the offender will again commit a crime for which the court may impose a

measure aimed at influencing behaviour and/or restricting freedom, or this is necessary to prevent seriously damaging behaviour towards victims or witnesses (Article 6:6:23b, para 1, CCP). When ordering enforcement, the court may impose various conditions.¹¹ The measure may be imposed for two, three, four or five years and may be extended by a court order for two, three, four or five years at a time (Article 6:6:23c CCP).

1.2 Reference sanctions prescribed in the legal provisions of criminal offences

Reference sanctions for *offences defined as crimes* (Book Two CC) are a) **imprisonment** up to a maximum specified in the applicable legal provision or b) a **fine** up to a maximum, specified in the applicable legal provision. Only a few crimes can be punished with a term of detention.

For instance: causing bodily harm (Article 300 CC) can be punished with imprisonment up to three years **or** a fine up to € 21.750 (as of January 1st 2020; the amount of fines will be updated every two years).

Reference sanctions for *offences defined as misdemeanours* (Book Three CC) are a) a **fine** up to a maximum specified in the applicable legal provision or b) **detention** up to a maximum specified in the applicable legal provision **or** a **fine** up to a maximum specified in the applicable legal provision.

For instance: trespassing (Article 481 CC) can be punished with a **fine only**. Public drunkenness (Article 453 CC) can be punished with **detention or a fine**.

1.3 Replacement of a term of imprisonment by a non-custodial sentence

The principal alternative for a fixed term imprisonment is the punishment of **community service**. Community service in terms of Article 22c CC is a principal punishment by which the offender is obliged to perform unpaid labour during a fixed term, not exceeding 240 hours. The sentence may state the type of work to be performed but leaves this almost always to the discretion of the organisation that is entrusted with the implementation of this sanction. In the Netherlands the probation service(s) are executing this task. (Other **non-custodial sentencing modes** will be discussed below).

Article 9, para 2, CC states that instead of imprisonment or detention a term of community service can be imposed for **crimes** that are punishable with imprisonment or a fine and for **misdemeanours** that can be punished with detention.

¹¹ A prohibition on using narcotics or alcohol and the obligation to cooperate in blood or urine tests in order to comply with this prohibition; the admission of the offender to a care institution; an obligation to submit to treatment by an expert or care institution; the residence in an institution for assisted living or social care; the participation in a behavioural intervention; a prohibition to perform voluntary work of a certain nature; other conditions concerning the offender's behaviour; a prohibition on location; a prohibition on contact; a location prohibition; a reporting obligation; a restriction of the right to leave the Netherlands; a prohibition to settle in a certain area; an obligation to move out of a certain area (Article 6:6:23b, para 2, CCP).

However, there are **exceptions** to this rule. Article 22b CC states that community service shall not be imposed if the conviction concerns:

- A crime punishable by imprisonment for a term of six years or more and which resulted in a serious violation of the physical integrity of the victim;
- The crime of coercion (Article 181 CC) or crimes concerning the sexual integrity or sexual exploitation of minors (Articles 240b, 248a, 248b, 248c and 250 CC).

Currently, a law is pending (but has not yet entered into force), which states that community service may also not be imposed for – in short – assault of public servants.¹²

Furthermore, recidivism within five years after the imposition of a community service forbids imposing a community service for a new offence that is comparable with the previous one.

For prison sentences of up to two years, the court may decide that the whole sentence or part of the sentence may be enforced on probation (Article 14a, para 1, CC). For prison sentences of more than two years and up to a maximum of four years, the court may decide that part of the sentence, up to a maximum of two years, may be enforced on probation (Article 14a, para 2, CC).

1.4 The possibility of non-imposition of a sentence – ‘judicial pardon’

Having been convicted for a crime does not necessarily mean that a sentence must be imposed. Article 9a CC states the court can decide *not* to impose any punishment or a measure in petty cases, or when the personality of the offender or the circumstances of the case justify so. The offender is convicted but a sentence is not imposed. Such a judgment is called informally ‘judicial pardon’. Article 9a CC is applicable for all types of crimes and misdemeanours.

The phrases ‘personality of the offender’ and ‘circumstances of the case’ allow the courts to show leniency in cases where no penal aim can be attained by imposing a punishment or measure.

Normally, petty cases will not reach the court at all because they will be disposed of by the prosecution service, for instance by means of a formal (conditional) dismissal of the case.

2 Non-custodial sanctions

It is important to distinguish between 1) non-custodial penalties which may eventually be converted into custodial penalties if the offender does not (fully) co-operate in their enforcement and 2) custodial penalties which may not or may no longer be enforced if the offender complies with general or specific conditions relating his or her conduct, e.g. suspended prison sentences and conditional release.

¹² *Kamerstukken* (Parliamentary Documents) 35 528, Law(project) extending community service prohibition.

2.1 Types of non-custodial penalties and measures

2.1.1 Non-custodial penalties

Next to the custodial ‘principal’ sanctions mentioned above (imprisonment and detention) article 9 CC enumerates the following non-custodial penalties:

Community service

According to Article 22c CC community service entails the obligation to perform unpaid labour to a maximum of 240 hours. The sentence can define the type of labour to be performed but can also leave this to the discretion of the implementing authority. Community service can be imposed directly, without having to impose a prison or detention penalty first. In the Netherlands the implementation of community service is entrusted to the probation service (Article 3:6 Governmental Decree on the Enforcement of Decisions in Criminal Cases).

In its verdict the court states a term of ‘substitute detention’ (see above) in case the community service has not been (properly) performed. This term is at least one day and at most four months (Article 22d CC).

Community service ordered by the court must be completed within 18 months (Article 6:3:1 CCP).

Community service may not be imposed for all types of offences (see above, para 1.3)

Fine

The minimum fine for *all* offences is € 3.- (Article 23, para 2, CC).

The maximum fine that can be imposed for a crime or misdemeanour equals the amount corresponding to the category stated in the legal provision defining the offence.

Article 23, para 4, CC enumerates six categories:

First category:	€ 435
Second category:	€ 4.350
Third category:	€ 8.700
Fourth category:	€ 21.750
Fifth category:	€ 87.000
Sixth category:	€ 870.000

These amounts apply from 1 January 1 2020 and will be reviewed every two years.

The *Central Judicial Collection Agency* (CJIB: Centraal Justitiele Incassobureau) is responsible for collecting a range of different fines, such as traffic fines and punitive orders (*‘strafbeschikkingen’*).

2.1.2 Conditional mode of imprisonment

The penalty of imprisonment can be imposed unconditional, partly conditional or entirely conditional.

Imprisonment up to two years, detention, community service or a fine can be imposed conditional or partially conditional. Imprisonment of more than two years and up to a maximum of four years can be imposed conditional up to a maximum of two years. In case of ancillary penalties the court may decide that they will not be enforced, provided the convict complies with certain conditions (Article 14a CC).

The court defines a probationary period and when during this period the offender does not comply (wholly) with the conditions set he/she can be taken in custody to serve the conditional part of the sentence. The probationary period is maximum three years or ten years if the offender is considered a serious risk for the physical safety of persons or the health or welfare of animals (Article 14b CC).

In case of a fully or partially conditional sentence, the convict is bound by the general condition that he/she will not reoffend during the probationary period (Article 14c, para 1 CC).

If the court deems this necessary it can bind the offender to special conditions (Article 14c, para 2 CC)¹³, which will be supervised by the probation service (Article 14c, para 3, CC). Electronic monitoring may be attached to a special condition (Article 14c, para 4, CC).

¹³ The special conditions mentioned in Article 14c, para 3, CC are:

- 1°. compensation, in whole or in part, for the prejudice caused by the offence;
- 2°. compensation, in whole or in part, for the damage caused by the offence;
- 3°. deposit of a guarantee to be determined by the court, not exceeding the difference between the maximum fine that may be imposed for the offence and the fine imposed;
- 4°. payment of a sum of money, to be determined by the court, to the Damage Fund for Violent Crimes or to an institution whose purpose is to promote the interests of victims of criminal offences. The amount may not exceed the maximum fine that may be imposed for the offence;
- 5°. a prohibition on making contact or allowing contact to be made with certain persons or institutions;
- 6°. a prohibition on being at or in the immediate vicinity of a certain location;
- 7°. an obligation to be present at a certain location at certain times or for a certain period of time;
- 8°. an obligation to report to a certain authority at certain times;
- 9°. a prohibition on the use of narcotics or alcohol and the obligation to cooperate in blood or urine tests to ensure compliance with this prohibition;
- 10°. admission of the convicted person to a care institution;
- 11°. an obligation to seek treatment from an expert or care institution;
- 12°. staying in an institution for assisted living or social care;
- 13°. participation in a behavioural intervention;
- 14°. other conditions relating to the offender's conduct.

If no *special* conditions are imposed to a fully or partial conditional sentence the court may nevertheless order supervision of the general condition (not to reoffend) by the probation service during the probationary period (Article 14c, para 1 and para 6, CC).

During the probationary period the court is entitled to, impose yet, change or lift special conditions (Article 14c, para 7, CC).

28% of all supervisions carried out by the probation service concern freedom-restricting conditions (Article 14c, para 2, 5⁰-8⁰ CC) and 72% behaviour-influencing conditions (Article 14c, para 2, 9⁰-13⁰ CC).¹⁴

2.1.3 Conditional mode of measures

The measure 'placement in a forensic psychiatric hospital' may be imposed in a 'conditional' mode, as the court may suspend the enforcement of this measure as long as the convicted person complies with strict conditions concerning his/ her treatment and behaviour as formulated in the judgement (Article 38 CC). Supervision of the offender is carried out by the probation service. When one or more conditions are violated this suspended measure will be converted into unconditional (custodial) placement in a forensic psychiatric hospital.

Another measure that can be imposed conditional is placement in an institution for repeat offenders (Article 38m CC). The probationary period is three years maximum and special conditions concerning the treatment and behaviour of the repeat offender are imposed in the judgement. Supervision is carried out by the probation service (Article 38p CC). Non-compliance with the conditions will lead to the enforcement of this measure.

3 Rationale for sentencing: determining the type and term of a non-custodial sentence

3.1 No separate sentencing phase

In Dutch criminal procedure there is no sentencing phase separate from the assessment of proof/guilt-phase. The decision on the guilt of the offender and the sentence are part of the same the judgement.

3.2 The choice of penalties or measures

The judgement must be reasoned, especially concerning the choice of the penalty or measure. It must specify which circumstances determined the length of the penalty. These circumstances are not listed in the law; it is up to the court, which circumstances it considers relevant. The law does not require that the judgment specify the punitive objectives by the choice of the sanction(s) imposed; the court is free to do so but in 'run of the mill' cases the phrase 'taken into consideration the

¹⁴ M. de Kok, L. Tigges and A. van Kalmthout, the Netherlands (2020), p. 25 in: *Probation in Europe*; <https://www.cep-probation.org>

circumstances of the case and the personality of the offender' will do. The degree of culpability is reflected in the level of the penalty imposed. Upon reasoning the court can choose between the minimum and the maximum sentence that the proven crime permits. The CC does not contain mandatory penalties.

3.3 Non-custodial sentences are imposed by the trial judge

Non-custodial sentences must be imposed by the trial judge. Dutch criminal law does not feature a judge responsible for the execution of sentences (there is no '*juge d'application des peines*'). The courts have no duty to impose non-custodial sentences and mandatory non-custodial sentences are non-existent in Dutch criminal law.

Penal sanctions may also be imposed by the public prosecutor by means of a penal order ('*strafbeschikking*') (Article 257a CCP). The public prosecutor may impose penalties and measures for misdemeanours and crimes punishable by a prison sentence of up to six years. The public prosecutor can only impose some types of non-custodial sanctions.¹⁵ Only a court may impose a custodial sanction.

3.4 Sentencing guidelines and 'starting points'

When sentencing, the court may take into account the sentencing guidelines of the public prosecutors ('*vervolgingsrichtlijnen*') and/ or the 'starting points' of the judiciary ('*oriëntatiepunten*'). These guidelines and starting points apply to various offences and are not legally binding.

3.5 Appeals

Appeals of criminal judgments concern the entire judgment; appealing the type and length of the sentence alone is not possible. Both the convicted person and public prosecutor can appeal criminal judgements.

4 Implementation of non-custodial sanctions and consequences of non-compliance

4.1 No supervising judge.

There is no judicial supervision of the implementation of non-custodial sanctions and no specialized court/judge responsible for supervising their implementation.

4.2 Consequences of breaking conditions

If a person sentenced to a **suspended sentence** breaches the conditions, his/ her recall to prison is not automatic. It requires the public prosecutor requesting the court to order such a recall.

¹⁵ I.e. community service of up to 180 hours; a fine; forfeiture; compensation for the victim; disqualification from driving motor vehicles for a maximum of six months. The criminal-law decision may also contain instructions, which the accused must comply with.

When **community service** has not been carried out properly or entirely the public prosecutor can order the enforcement of substitute detention. The convicted person may object by filing a notice of objection with the court.

When a **fine** has not been paid (in full), and recovery from the offender's property has not been possible, substitute detention will be executed automatically by law, without the possibility to object by the sentenced person (Article 6:4:1-6:4:8 CCP).

4.3 Modifying the sentence

The court cannot modify the length or type of a penalty of measure in the course of its implementation. This only can be brought about by way of a (partial) pardon, granted by Royal Decree.

The court may only amend the special conditions and the probationary period attached to a suspended sentence during the execution of the sentence.

5 Penitentiary programme, early release and indefinite suspension of the sentence

Prisoners to a term of imprisonment of up to one year may be placed in a **penitentiary programme**. Prisoners with a prison sentence of more than one year are eligible for **conditional release**. A foreign national who does not have lawful residence in the Netherlands within the meaning of Article 8 of the *Aliens Act 2000* (*Vreemdelingenwet 2000*) may be granted indefinite suspension of the sentence.

5.1 Penitentiary programme

Towards the end of his term a prisoner who has been sentenced to a prison sentence can be allowed to participate in a penitentiary programme, consisting of participation in extra-mural activities (e.g. work, education, vocational training) under supervision of the probation service. A penitentiary programme takes one to two months, depending on the prison term to be served yet. The prisoner can be monitored electronically. The Minister of Legal Protection can grant participation to prisoners with a prison term of minimum six months up to one year (Article 4 *Penitentiary Principles Act*). Provided the programme is carried out correctly, the programme ends with the end of the prison term; if not, the participant is recalled to serve the rest of this term.

5.2 Conditional release – requirements – time frames

Prisoners sentenced to a non-suspended prison sentence of between one year and a maximum of two years may be conditionally released after serving one year plus one third of the remaining sentence (Article 6:2:10, para 1a, CCP).

Prisoners sentenced to term of imprisonment exceeding two years may be conditionally released after serving two thirds of the imposed term, provided that the period for which conditional release is granted shall not exceed two years (Article 6:2:10, para 1b, CCP).

5.2.1 Conditions to be imposed

In addition to these formal requirements, an important condition for granting conditional release is that the prisoner has behaved well during his/her detention, for example by participating in intramural reintegration programmes (Article 6:2:10, para 3a, CCP).

The probation service and the prison service always advise the public prosecution's service about conditional release and the special conditions that should be imposed.

Conditional release is granted under the general condition of not re-offending during the probationary period. In addition to this general condition various special conditions can be imposed concerning the behaviour or treatment of the parolee (Article 6:2:11, para 3, CCP).¹⁶ Electronic surveillance may be attached to a special condition (Article 6:2:11, para 4, CCP). Supervision is carried out by the probation service. Non-compliance with one or more conditions can lead to a (partial) recall of the conditionally released prisoner to prison.

5.2.2 Probationary period

The probationary period of the conditional release is the same as the period of conditional release, but shall not be less than one year. At the request of the public prosecutor, the judge may extend the probationary period by up to two years in all cases. If the suspect has been sentenced to a 38z-measure (see 1.1.2 above) and there are serious grounds for believing that the offender will again commit a crime against or causing danger to the inviolability of the body of one or more persons or if this is necessary in order to prevent seriously incriminating behaviour towards victims or witnesses, the court may, at the request of the public prosecutor, extend the

¹⁶ The special conditions may include:

- a. a prohibition to make contact or allow contact to be made with certain persons or institutions;
- b. a prohibition to be at or to be in the immediate vicinity of a certain location;
- c. an obligation to be present at a certain location at certain times or during a certain period;
- d. an obligation to report to a certain authority at certain times;
- e. a prohibition on the use of narcotics or alcohol and the obligation to cooperate in blood or urine tests to ensure compliance with this prohibition;
- f. admission of the offender to a care institution for a period of time not exceeding the probationary period;
- g. an obligation to undergo treatment by an expert or care institution for a specified period, not exceeding the probationary period;
- h. staying in an institution for assisted living or social care during a certain period, not exceeding the probationary period;
- i. participation in a behavioural intervention;
- j. a prohibition to perform voluntary work of a certain nature;
- k. a restriction on the right to leave the Netherlands;
- l. full or partial compensation for the damage caused by the offence or making an arrangement for the payment of the compensation in instalments;
- m. the obligation to move from a certain area;
- n. other conditions relating to the behaviour of the convicted person, with which he must comply during the probationary period.

probationary period by a maximum of two years each time (Article 6:1:18, para 2, CCP).

5.2.3 Early release is the public prosecutor's competence

The public prosecutor is competent for granting, denying, postponing or revoking early release (Article 6:2:13-13a CCP). Therefore, the public prosecutor may decide whether the sentence is recalled in whole or in part, and for what part. Denial, postponing and revoking can be challenged in court (Article 6:6:8 CCP). A specialized office (*Centrale Voorziening voorwaardelijke invrijheidstelling, CVvi*) within the public prosecutor's office is responsible for these decisions.

5.3 Indefinite suspension of a custodial sentence

A foreign national who does not have lawful residence in the Netherlands within the meaning of Section 8 of the Aliens Act 2000 may be granted indefinite suspension of a custodial sentence (Article 40a *Regulation on temporary departure from the institution - 'Regeling tijdelijk verlaten van de inrichting'*). If a custodial sentence of no more than three years has been imposed, suspension of the sentence may be granted after serving at least half of that sentence. If a custodial sentence of more than three years has been imposed, a suspension of the sentence may be ordered after at least two-thirds of the sentence has been served. The suspension of the sentence is subject to the condition that the foreign national does not return to the Netherlands. If the foreign national fails to comply with this condition, enforcement of the sentence shall resume. The suspension of the sentence will take effect from the moment the foreign national actually leaves the Netherlands.

6 Sanctions or measures applicable to vulnerable persons and minority groups

There are **no special non-custodial sanctions** – or specific programmes as part of a non-custodial sanction – designed for particularly vulnerable persons (young adults, older persons, women, foreign nationals, persons with disabilities, people with mental health conditions, ethnic minorities, Roma, Indigenous peoples, LGBTIQ+ or other). Nor do different requirements exist for giving a non-custodial alternative to those categories. There is **no preference** for non-custodial sanctions regarding vulnerable groups and/or minorities. When imposing a sentence the court always has to take into account any special circumstances of the case and the personality of the offender. See para 4 above. There are **no legal barriers** to vulnerable persons or minority groups accessing non-custodial sanctions, nor specific forms of early release for these groups/ persons.

II NON-CUSTODIAL SANCTIONS/MEASURES IN PRACTICE

1 Non-custodial sanctions and measures in practice

1.1 Significance of alternative sanctions

To get a good picture of the relative use of alternative sanctions two indicators can be used: data on **settlements by the court** and data on the **enforcement of sanctions** (implemented by the sectors of the Judicial Institutions Service, the Probation Service, the Child Protection Board and the Central Judicial Collection Agency).

Settlements by the courts

In 2019, 36% of all penalties imposed by the courts was custodial, 30% community service and 22% a fine.¹⁷ (The other settlements consisted of acquittal, discharge from prosecution and conviction without sentencing). Important to notice is that 46% of all custodial sanctions were unconditional, whereas the rest was either conditional (30%) or 24% partly conditional/partly unconditional.

Enforcement of sanctions

In 2019, the majority of sanctions implemented consisted of 82% financial sanctions, 11% non-custodial sanctions, and 7% custodial sentences.¹⁸

Data over 2020 are not available yet.

No other statistical data on the use of these sentences then presented above are available.

1.2 No data for vulnerable/ minority groups

In the Netherlands no data are assembled about the imposition of sentences on vulnerable and/or minority groups with the exception of data concerning the distribution of minors/adults and the number of women/men in the probation system. No disaggregated data on application of non-custodial sanctions for specific groups are available.

1.3 Application of early release

In 2020 for 1.550 prisoners the Penitentiary program was started. As a consequence of limiting the use of the penitentiary programme only for prisoners with a sentence of less than one year, it is expected that in the near future around 400-450 prisoners will be benefiting from this kind of early release. Electronic monitoring will be applied depending an assessment of the behaviour of the prisoner, the risk he/ she poses and the situation of the victim.¹⁹

Regarding conditional release, each year, approximately 1,100 convicted detainees are eligible for conditional release. Their cases are processed by the specialized office within the Public Prosecution service. Of the mentioned number, 86% to 90%, so about 950 to 1000 cases are granted conditional release. (This number is relatively small compared to the total number of persons who were released from custody, approximately 2%. Only cases with an unconditional prison sentence of more than one year are eligible; 85% of all prisoners serve less than six months). The average length of the probationary period is just under two years.

¹⁷ WODC, *Criminaliteit en Rechtshandhaving 2019*, Cahier 2020-16, The Hague 2020, p. 68.

¹⁸ WODC, *Criminaliteit en Rechtshandhaving 2019*, Cahier 2020-16, The Hague 2020, p. 73

¹⁹ Information received from the Custodial Institutions Agency

In about 10% of the cases, the decision for conditional release is not granted or postponed.

Of the total number of cases in which conditional release is granted, the release is not only subject to the general condition (not to reoffend), but also to one or more special conditions (approx. 70%). This involves a rich variety of special conditions. In most cases, there is a combination of special conditions (three to four per convict who has been released on parole).

Violation of the general terms was reported in approximately 5% of the cases. The violation of special conditions is reportedly high: around 33%. In more than 80% of all these cases, the conditional release is revoked.²⁰

The above information remains unchanged for the year 2020. In that year, the total number of prisoners on conditional release was 2643.²¹

The daily average prison population was 11,000 persons in 2020.

No further specific information is available.

1.4 Bias is no issue

There is no discussion whatsoever on potential or actual bias on the part of sentencing authorities in adjudicating cases for vulnerable persons or minority groups which affects their access to non-custodial sanctions.

1.5 Pre-sentencing reports

Pre-sentence (advisory) reports are provided often, especially when a conditional or partial conditional sentence is a likely outcome of a trial. In 2019, 19,404 reports were issued in the framework of the trial in the first instance.²² The number of cases settled by the court of first instance in that year was 85,000.²³ It can be deduced from this that information report from the probation service were issued in 22% of the cases. The reports take into account all relevant aspect of the case and the person concerned, including if necessary the possible vulnerability of the suspect/ offender and/or victims.

²⁰ Based on: J. uit Beijerse, S. Struijk, F.W. Bleichrodt, S.R. Bakker, B.A. Salverda and P.A.M. Mevis, *De praktijk van de voorwaardelijke invrijheidstelling in relatie tot speciale preventie en re-integratie*, Boom Juridisch, Den Haag, 2018 and Memorie van Toelichting bij Wijziging van de Penitentiare beginselenwet, het Wetboek van Strafrecht en enige andere wetten in verband met de wijziging van de regeling inzake detentiefasering en voorwaardelijke invrijheidstelling (Wet straffen en beschermen); *Kamerstukken II* (Parliamentary Documents Lower House) 2018/19, 35 122, nr. 3, page 24.

²¹ Information from the Public Prosecutor's Service

²² Information received from the statistical information department of the Probation Service.

²³ <https://www.rijksoverheid.nl/documenten/rapporten/2020/10/27/tk-bijlage-criminaliteit-en-rechtshandhaving-2019>

2 Supervision of the implementation of non-custodial sanctions/ measures

2.1 Bodies are in charge of monitoring the implementation of non-custodial sanctions/measures

The probation service is in charge of monitoring the implementation of non-custodial sanctions. The probation service comprises three private organizations. The Ministry of Justice and Security is politically responsible for probation. The three probation organisations (Dutch Probation Agency, Salvation Army (probation branch) and Addiction Care) are almost 100% funded by the Ministry of Justice and Security and for a small part by private donations. Probation in the Netherlands has a long history of almost two hundred years, starting with the foundation of the Dutch Society for Moral Reform of Prisoners in 1823.²⁴

Probation is mainly aimed at adult offenders (18 years and older). There is a separate service for offenders under 18.

The probation service is active in all stages of the criminal justice process, from the pre-trial stage up to and including the enforcement stage and often in the stage after the end of the sentence as well. The probation service is therefore a continuous and stable factor in the whole criminal justice process, not only for the criminal justice system (public prosecutors, courts, prisons etc.), but also for the offenders.

The key tasks of the probation service are: preparing pre-sentence and other advisory reports for the judicial authorities, supervision of penalties, measures or special conditions imposed by the court or the public prosecutor (including supporting the offenders in their desistance processes), and executing and supervising community service. The preparation of advisory reports and probation supervision take place in the pre-trial and enforcement phase.

In 2019, the three probation organisations prepared 42,141 reports to support judicial decisions across the entire criminal justice system.²⁵ In 2019, 31,562 separate offenders were implemented under supervision by the probation service and 25,313 community punishment orders were completed.

It is generally assumed that the number of prisoners is low due to the high number of pre-sentence reports and the frequent use of community sanctions and measures implemented by the probation service. In the Netherlands, the prison population rate (number of inmates per 100,000 residents) is low compared to other countries.²⁶ Most inmates serve short sentences: 85% of all prisoners serve less than six months. The probation population rate is fairly high (in 2018: above 250 per 100,000 residents).

²⁴ G.Th Kempe, *Reclassering in onze samenleving – voorlichten, rechtdoen, helpen*, Van Loghum Slaterus, Arnhem, 1958, p. 15-39.

²⁵ M. de Kok, L. Tigges, A. van Kalmthout: The Netherlands, p. 4, in *Probation in Europe*, Confederation of European Probation, June 2020, <https://www.cep-probation.org>

²⁶ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Prisoners_per_100_000_inhabitants,_EU-27,_average_2016-2018.png

Though in name a private organisation, the probation service forms part of the criminal justice system: it cooperates intensively with the police, Public Prosecution Service, prison system, Child Care and Protection Board, Victim Support and forensic psychiatry. There is cooperation over both strategy and individual cases.

A fulltime probation officer with no other tasks than making reports, is expected to make ten reports a month. A fulltime probation officer with no other tasks than supervision, has 15-20 offenders in caseload. A fulltime probation officer with no other tasks than community service, has 100-110 offenders in his/her caseload.²⁷

As pre-sentence reporting is such a characteristic and central element in the Dutch system of probation, more detailed information on this task is included in the Annex to this report.

Disaggregated data, or information as available, on the representation among the staff (including leadership) of the probation or relevant agency in terms of gender, ethnicity, nationality, and representation of vulnerable or minority groups are not available.

Probation work is highly individualized and has a rehabilitative purpose. It is much more than control or monitoring. It includes, like the definition used in the *Council of Europe Probation Rules* 'a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender' (see also Article 8 *Rehabilitation Regulation* 1995 '*Reclasseringsregeling* 1995').

The majority of people who come into contact with the probation service undergo a so-called 'RISC analysis' to identify their risk and needs and what should be done to reduce the risk of reoffending and promote their reintegration. Probation supervision entails control and monitoring, but the intensity and duration depend on the risk of recidivism. If recidivism decreases during supervision, the focus on supervision and control can be reduced, but guidance and assistance continue.

2.4 Involvement of the community in the implementation of non-custodial sanctions

Although the Dutch probation service originates from citizens who wanted to play a role in the moral improvement of offenders by focusing on the circumstances in prisons and providing assistance when prisoners returned to society, the contribution of **volunteers** to the probation work is nowadays absent, with some exceptions (like for instance the 300 Dutch volunteers who live abroad - in total in 60 countries- and who are on a regular basis visiting Dutch nationals detained abroad.²⁸ It is the ambition of *Reclassering Nederland* that in 2023 each probation region will have a network of volunteers who can be brought in for the counseling and support of probation offenders. Those volunteers will be deployed for tasks and activities that are supplementary to regular probation work.²⁹ (Ex-) detainees who need support and help can turn to municipal organisations for support (ID, housing, income and social benefits, work, social support, mental health problems). Together with the

²⁷ M. de Kok, L. Tigges and A. van Kalmthout, The Netherlands (2020), p. 48 in: *Probation in Europe*; <https://www.cep-probation.org>

²⁸ M. Hoïng and I. Heemskerk, *Flexibele bruggenbouwer zoekt stevig fundament. Wat werkt bij de inzet van vrijwilligers binnen de reclassering?*, WODC, Den Haag, 2019.

²⁹ See note 26, page 16.

prison service and the municipalities the probation service prepare prisoners to return to society. To that end the prison service is implementing its strategy to involve both the Probation Service and the municipalities as soon as the offender enters the custodial institution.

Furthermore, the community is involved in the implementation of community service. The probation service is responsible for the acquisition of projects in the community where community service can be carried out (Article 3:6 Governmental Decree on the enforcement of judicial decisions). The work to be carried out may not concur with free labour, must serve a public purpose and must be meaningful (Article 3:7 of the aforementioned Decree).

2.5 The application of technology to the implementation or supervision of non-custodial sanctions

Unlike in many other European countries, electronic monitoring in the Netherlands does not exist as an independent sanction. Electronic monitoring can be used as a means of monitoring compliance with special conditions (location ban or location order). Electronic monitoring is rarely a stand-alone provision. It almost always contributes to the monitoring component of a broader action plan, arrived through a thorough assessment (RISC). The Dutch practice is in line with Rule 57 of the European Probation Rules: When electronic monitoring is used as part of probation supervision, it shall be combined with interventions designed to bring about rehabilitation and to support desistance.

The Probation Service aims to organize its work more smartly by better digital facilitation of staff, fewer rules and less recording, which will leave more time for face-to-face probation work. The offender will have the ability to consult information (such as hours of community service and advisory reports) quickly and easily, and to use apps to identify risk or networks. Four probation apps are already in use: *My Life*, *My Risks*, *My Contacts* and *Step by Step*. There is also a client portal by which each offender has access to his/her own file and can make his/her own agreements officer. Future developments are aimed at virtual reality and artificial intelligence.³⁰ At every office of the probation service the offender's identity can be checked by finger scan devices.

The table below shows a breakdown on use of Electronic Monitoring by sentence modality.³¹ Most of the use of electronic monitoring arises from progressive stages of detention with several degrees of freedom (phased detention, leave and conditional release). Another striking aspect is the relatively high use in the context of suspension of pre-trial detention.

³⁰ See note 28, page 56

³¹ M. de Kok, L. Tigges, and A. van Kalmthout: The Netherlands, p. 36, in *Probation in Europe*, Confederation of European Probation, June 2020, <https://www.cep-probation.org>

Suspension of pre-trial detention	558 (16%)
Suspended sentence	116 (3%)
Penitentiary program and leave from detention	2,034 (60%)
Conditional release	174 (5%)
Other	492 (16%)
Total connections	3,374

3 Effectiveness of non-custodial sanctions in achieving the purposes of punishment and reducing the use of imprisonment

3.1 Data on the (relative) effectiveness of non-custodial sentences/measures

There is growing evidence about the effectiveness of probation. Research has shown that offenders who undergo community service reoffend 47% less often than prisoners serving short sentences.³² And also, the recidivism rate for offenders who were placed under probation supervision is less than that of ex-prisoners.³³

The first source on the relative effectiveness of community sentences is to be found in a study comparing only those sentenced to community service or short (less than nine months) imprisonment, and subsequently matched for risk, community service led to a reduction in recidivism of 46.8% measured over five years compared to rates of recidivism after imprisonment. (Wermink et al.).

We refer in the second place to the *Recidivism Monitor*, a report of the Research and Documentation Centre of the Ministry of Justice and Security (Recidivism among offenders in the Netherlands: Report on the period 2006-2018).³⁴ The Recidivism Monitor distinguishes several groups. For the sake of the questionnaire, here only ex-prisoners, ex-community service offenders and ex-probation clients are mentioned, not the group of adult offenders, whose cases were settled by the public prosecution service, and juvenile offenders. The groups were matched on background

³² H.T. Wermink, A.A.J. Blokland, P. Nieuwbeerta, D. Nagin and N. Tollenaar, Comparing the effects of community service and short-term imprisonment on recidivism: a matched samples approach, *Journal of Experimental Criminology*, vol 6, no. 3, p. 325-349.

³³ G. Weijters, S. Verweij, N. Tollenaar and J. Hill, *Recidive onder justitiabelen in Nederland - Verslag over de periode 2006-2018*, Cahier 2019-10, WODC, Den Haag 2019.

³⁴ (https://repository.wodc.nl/bitstream/handle/20.500.12832/228/Cahier_2019-10_Volledige_tekst_tcm28-396007.pdf?sequence=2&isAllowed=y)

characteristics, such as sex, country of birth, age and criminal history, of the different groups. The report focuses on the two-year general recidivism prevalence since 2015. This is the percentage of people from each research group that within a follow-up period of two years committed an offence leading to a new criminal case. First, general recidivism was examined, i.e. all new offences regardless of the type or severity of the offence. Second, very serious recidivism was examined, i.e., new offences whereby according to the penal code a custodial sentence of eight years or longer can be imposed. Finally, for ex-prisoners custodial sentence recidivism was examined, i.e. new offences whereby a (partly) unconditional custodial sentence can be imposed. As well as recidivism prevalence, the average number of new criminal cases was also calculated.

Results:

The two-year general recidivism rate for ex-prisoners released in 2015 was 47%. The two-year adjusted very serious recidivism rate: 6%.

The two-year general recidivism rate was 29% for those having completed community service in 2015, and a two-year very serious recidivism rate 3%.

The two-year adjusted general recidivism rate for ex-probation clients of the year 2015 was 36%, the two-year very serious recidivism rate 5%.

3.2 Specific measures taken with the implementation of non-custodial sanctions to vulnerable persons or minority groups

Currently, the category of slightly mentally handicapped offenders (mild intellectual disability) is getting special attention from the probation service and the whole criminal justice system. This category comprises people who have an IQ between 50 and 85; limited social adaptive behaviour in different areas of life; and the disability arose before the age of 18. Guidelines have been developed how best to adapt the existing instruments and skills to the specifics of this group.³⁵

3.3 Data on the impact of alternative sentences on the use of imprisonment

In the Netherlands, it is generally assumed that the number of prisoners is low due to the frequent use of community sanctions and measures implemented by the probation service. In 2008 the government started a programme to “optimize the use of conditional sentences”³⁶ by improving the communication between the chain partners and aligning their work processes, but improving the quality of pre-sentence reports, by an immediate start of the alternative sanction once it was imposed, by - from the part of the probation organisations – swifter and clearer informing the prosecution service of breaches. Partly as a consequence of this programme, more community service sanctions, and conditional sentences were applied. The number of prison sentences decreased. The prison population rate (number of inmates per

³⁵ P. Vrij, H. Kaal, R. Bernard, Licht Verstandelijke Beperking en Reclassering, Een handreiking voor reclasseringswerker over de begeleiding van cliënten met een LVB, Hogeschool Leiden, Leiden 2018.

³⁶ M. Jacobs and M.Siesling, M., with the cooperation of A. van Kalmthout, Optimalisering voorwaardelijke sancties; Een procesevaluatie 2009, IVA/ WODC, Tilburg/ The Hague 2009, with a summary in English. See also: W.Smit, M. Kuin, S. Meijer and G. Homburg, Evaluatie Wet voorwaardelijke sancties & Wet rechterlijke vrijheidsbeperkende maatregelen, Regioplan, Amsterdam 2018, Publication no. 17083, with a summary in English (Evaluation of the Conditional Penalties Act and the Measures Involving Deprivation of Liberty Act)

100,000 residents) is nowadays low compared to other countries (in 2020: 51). Most inmates serve short sentences: 85% serve less than six months.³⁷ The probation population rate is fairly high (in 2020: above 205).

However, the phenomenon of net widening as such has not been subject of academic or applied research.

3.4 Possible barriers to a wider use of alternatives to imprisonment

The use of alternatives to imprisonment in the Netherlands fluctuates a bit over time, depending on the criminal politics of the government in charge, but it stayed fairly high over the last decade and is generally viewed as an important achievement.

To maintain the use of alternatives and possibly intensify and broaden the use of them it is important that free society accepts and recognizes the importance of alternatives to custody. Research shows that these questions cannot be answered easily. The acceptance by the general public alternative sanctions like community service depends on various factors, like the type of offense, the quality of the victim, the person of the offender and the perceived relative weight of the alternative sanctions compared to 'main sanctions'.³⁸

The research-report "The citizen as judge. A study into preferred sanctions for crimes in the Netherlands" revealed that the Dutch population had very different views about which punishment modality is appropriate in the event of a certain crime scenario. According to the researchers, it was impossible to speak about 'the' support for certain punishment modalities and heights among the Dutch population. Nevertheless, the imposition of community service was widely supported for almost all crimes, including serious violent and sexual crimes such as aggravated assault, rape and assault. However, community service orders for more serious offenses could count on less support than for relatively minor offences. There was less support among the respondents for the imposition of community service in the event of recidivism.³⁹

III IMPACT OF THE COVID-19 PANDEMIC ON THE IMPOSITION AND IMPLEMENTATION OF NON-CUSTODIAL SANCTIONS AND MEASURES;

1 Non-custodial sentences or measures aimed at reducing the prison population as a means of preventing the spread of the virus within prison facility

³⁷ M. de Kok, L. Tigges and A. van Kalmthout: The Netherlands, p. 39, in Probation in Europe, Confederation of European Probation, June 2020, <https://www.cep-probation.org>

³⁸ S. Ruiter en J. Tolsma, 'Taakstraffen langs de lat: strafopvattingen van Nederlanders, *Rechtstreek*, 2010-01-01, Vol 7, no. 3)

³⁹ This summary was retrieved from: J. de Ridder, B.J.M. Emans, R.A. Hoving and E. Krol Mr. N. Struiksma, *Evaluatie Wet Beperking Oplegging Taakstraffen (2018)*, page 22. The research to which this summary refers is: Ruiter, S.; Tolsma, J.; de Hoon, M.; Elffers, H.; van der Laan, P., *De burger als rechter: een onderzoek naar geprefereerde sancties voor misdrijven in Nederland*, Boom Lemma, Den Haag 2011

No special sanctions (penalties) or measures were designed to allow for the release of people during the pandemic. No new non-custodial sanctions/measures have been created for this purpose.

However, the stay of detainees in the final phase of their detention in low security institutions (*beperkt beveiligde afdelingen*) was temporarily suspended. In practice, this was done by granting longer consecutive leave. The leave was implemented with the use of electronic monitoring.⁴⁰ No data are available on possible recidivism during the periods of extended leaves (furloughs).

No specific measures were applicable to vulnerable groups and/or minorities.

2 Impact of the pandemic on non-custodial sanctions/measures

Covid had an enormous impact on probation work. Probation workers obtained the status of front-line workers, which meant that their children could continue to visit day-care. Except for high-risk offenders, all “live” contacts were suspended in the first period of the pandemic. Community Service work came to a standstill in the months April, May and June of 2020 (as the places where the work was carried out were shut down on the instruction of the Minister of Justice and Security). The workload in some probation areas (work in the penitentiary institution, pre-sentencing reporting and community service) decreased significantly as the flow of work from police, public prosecutors and courts dropped remarkably. Probation workers were not allowed to work in their offices, or only for restricted periods and days. Most of their work was carried out online. It had to be figured out how to safely work in the offices and meet high-risk offenders in person. Probation officers needed to be able to carry out their work online from their homes. Online meetings with offenders, either from the probation service’ office or from the probation officer’s home were practiced on a large scale. Online meetings with the offenders were occasionally alternated with making joint walks. Community Service work was resumed in the summer of 2020, but on a smaller scale (because of the 1,5-metre requirement, fewer offenders could sit in the vehicles to the workplaces and there was less availability of workplaces). The probation service is coping now with a backlog of 5000 cases that have to be caught up in December 2021. On the basis of article 29 of a Covid Emergency Act, the implementation period of 18 months for the execution of Community Service has been extended by one year.⁴¹ This Emergency Act has so far been extended every two months.

The detailed questions put in para III.2 of the questionnaire are not answerable on this short notice and perhaps never can be by lack of data. However, some information is available on the impact of Covid on the probation service and the enforcement of the measure of placement in a forensic psychiatric institution at the State’s Pleasure. A general answer to these questions can be derived from a joint letter of the Dutch Minister of Justice and Security and the Minister of Legal Protection to the Chair of the Lower House.

⁴⁰ Letters of the Minister of Legal Protection of 13 March 2020 respectively 2 April, *Parliamentary Documents Lower House 2019-2020*, 24 587 and 25 295, no. 763 respectively 765.

⁴¹ Temporary Act of 24 April 2020 COVID-19 Justice and Security, *Staatsblad* 2020, 124.

Impact of Covid on the Probation Service:

'The pandemic has impacted the entire criminal justice system. The effect was visible looking at the decrease of our output figures. The amount of supervisions decreased 6%, the amount of advice reports decreased 7%. Community service was hit hardest by the lockdown. Caused by a stagnation of many months and the loss of many work-projects the enforcement of community service decreased by 47%.⁴²

Impact of Covid on the enforcement of placement in a forensic psychiatric hospital

The joint forensic psychiatric hospitals wrote this on the impact of Covid on their functioning:

'In 2020 COVID-19 had a serious impact on patients and staff. It required constant adapting, getting accustomed to the new situation and adapting again. Mid-March the hospitals went into temporary lockdown. Almost all furloughs were cancelled and family visits were prohibited. The daily routine of therapy and activities were curtailed and sometimes discontinued. Several hospitals were confronted with infection of patients and staff leading to the quarantine of certain sections. As a result the freedom of movement of patients was restricted to their own section and room. Most of all the impact of Covid-19 was reflected in the amount of granted furloughs. From mid-March until well in June patients almost never went on furlough. From then onwards granting of furlough was resumed, with special conditions attached. It is not clear yet whether the period during which furlough was granted in a limited way or not at all has had an impact on the time needed for the treatment of the patients.'⁴³

Impact of Covid on the criminal justice system

In a joint letter of May 10, 2021, the Minister of Justice and Security and the Minister of Legal Protection wrote the following to the Chair of the Lower House on the effects of Covid on the criminal justice system. This is - in a nutshell - what they wrote:

The outbreak of the Corona-virus and the measures that had to be taken subsequently has led to a **backlog** in the criminal justice system from March 2020. Court hearings and hearings by the prosecution service could not be held or only restricted. The enforcement of community-service was restricted too. The continuing pandemic frustrates especially the enforcement of custodial sentences and of community-service.'

The prosecution service settles more criminal cases on its own accord and the courts hold their sessions more often with a single judge and have recalled retired judges to the bench.

To prevent infections with the Corona-virus to spread the prison service took various precautions, with noticeable consequences for the capacity of the prison system (...).

⁴² Annual report Probation 2020/Jaarverslag reclassering 2020 (reclassering.nl).

⁴³ TBS Nederland, *Cijfers en Bijzonderheden 2020*, juni 2021, p. 9. (tbsnederland.nl)

The admission-procedure was modified: the first eight days a new prisoner was placed in a single cell, which meant that multiple-person cells had to be used as single cells. Inside the prisons the safe distance to be respected was 1½ meters. Groups were downsized and activities compartmentalized, which also affected the capacity negatively. The influx of prisoners decreased significantly, especially of convicted, but not yet detained, persons who, are to report themselves to serve their term.

'Covid-measures' like keeping a safe distance from each other of and staying home when showing symptoms of infection seriously impaired the execution of community service. Many work-projects temporarily were not or only partially available. In all 58% projects were closed. The acquisition of new and bigger-scale work-projects is ongoing. The continuing restrictions led to a higher absenteeism of persons due to work on community service projects. By introducing 'absence-coaches' the probation service is (successfully) nudging the absentees back to the work projects.

Until now the Corona-crisis had little effect on the enforcement of financial sanctions, the Ministers wrote. Compared to previous years the proceeds are stable. Fines can be paid in instalments and in 2020 a special governmental decree concerning the 'ability-to-pay' principle is made easier to arrange a settlement. However, if over time citizens should grow more indebted the problems with collecting fines could become problematic. This situation will be monitored closely, the Ministers said.⁴⁴

3 Impact of the pandemic on the future of non-custodial sanctions

The probation service decided to have the **distance work** evaluated by the University of Applied Sciences in Utrecht.

Some results: Clients are generally positive about remote contact. Some indicate that they miss the personal contact. According to most probation officers, working remotely is efficient, saves time and travel expenses, is suitable for certain phases of the probation process (especially at a later stage, when there is already is a working relationship), and is especially suitable for clients with few problems and a low risk level. Conversations are often more business-like, which can be a disadvantage.

There is particular concern about being able to identify increasing risks, that online contact is sometimes noncommittal/without engagement and that there is a risk of disrupting of the work-life balance of the probation officer. Workers indicate a need to increase their knowledge and skills in working with offenders online.⁴⁵

The probation service expects that online working will be continued, be it on a smaller scale. They have experienced that it is not always necessary to see each other face to face. A 'blended' form of probation (both online and face to face contact), will be further developed (for instance, by developing a guideline

⁴⁴ *Kamerstukken II (Parliamentary Documents, Lower House), 2020/21, 29 279, nr. 651. See also: W. Huisman, Corona, criminaliteit en strafrechtspleging, Delikt en Delinkwent, DD 2021/37.*

⁴⁵ Source: <https://www.hu.nl/onderzoek/projecten/werken-op-afstand>

'Structuring counselling conversations on distance' and training for probation officers in online (discussion) techniques and technical skills).

The probation service became aware of the fact that the probation organisation is vulnerable if they are mainly dependent on many small external parties for the execution of community service orders. That is why the probation service is focusing on collaboration with large national partners. Examples of new cooperation partners are Ministry of Defence, Ministry of Infrastructure and Watermanagement, Nature Conservation Agency (*Staatsbosbeheer*) and housing associations

IV. PROSPECTS FOR THE FUTURE OF ALTERNATIVES TO IMPRISONMENT

1 Innovative initiatives regarding alternatives to deprivation of liberty

In the Netherlands, inspired by the British model⁴⁶, community service was introduced in 1989 as a main punishment, intended as a viable alternative for imprisonment. Over time this sanction has earned its place in the criminal justice system. No new alternative main penalties have been introduced in the Criminal Code since. There is, however, a debate about the question whether a **restorative approach** of dealing with criminal cases can reduce the use of custodial sanctions. In 2017 a group of lawyers and criminologists published a detailed proposal to introduce **mediation** in the Code of Criminal Procedure in as a possible (voluntary) way of dealing with criminal cases.⁴⁷ *Thus mediation could be an alternative to custodial sanctions.*

Inspired by the proposal of the aforementioned group the Minister of Legal Protection sketched in an annex to a letter to the Chair of the Lower House a framework for a policy concerning the possible role of a restorative justice/mediation in all phases of the criminal process, from police investigations to the execution of the sentence.⁴⁸ The Lower House unanimously supported this initiative. Existing pilots are being charted and evaluated by the Research and Documentation Centre of the Dutch Ministry of Justice and Security. Results are not available yet.

2 Prospects

The restorative approach as advocated by the government seems a promising development.⁴⁹ Mediation is made possible at the stage of the criminal proceedings and the execution phase.

A recent Dutch study (instigated by the government) recommends imposing an alternative community service order in the event of non-payment of fines instead of substitute detention.⁵⁰ The same study also recommends making use of supervision as an alternative to substitute detention.

At the moment, fines that are not paid (in full) or not paid on time are automatically by law converted into substitute detention. Substitute detention is served in the detention centre (remand house). A different, stricter regime applies in the detention

⁴⁶ H. Singer-Dekker, *Dienstverlening*, Gouda Quint BV, Arnhem, 1984. In her book describes the author the preceding national debate about the pro's and con's of introducing a Dutch equivalent of the British Community Service Order (CSO).

⁴⁷ J. Blad, J. Claessen, G.J. Slump, A. van Hoek and Th. de Roos, *Voorstel van Wet strekkende tot de invoering van een herstelgericht afdoening via bemiddeling in strafzaken in het Wetboek van Strafvordering inclusief Memorie van Toelichting*, Wolf Legal Publishers, Oisterwijk, 2017.

⁴⁸ *Kamerstukken II*, 2019/20, 29 279, nr. 560

⁴⁹ N. Elbers, I. Becx and K. Lauwaert, *Herstelrecht als duurzaam alternatief voor het strafrecht*, *Secondant* 2020, no. 7.

⁵⁰ Boone et al, *Vervangende taakstraf bij het niet betalen van een geldboete (pre-evaluatie)*, Den Haag/Leiden: WODC/Universiteit Leiden 2021.

centre than in a prison. In 2019 and 2020, approximately 47.154 days of substitute detention were executed.

There is increasing use of supervisory measures in criminal law. In recent years, more and more supervision measures have been introduced in the Criminal Code. Examples are the judicial supervision measure (Article 38v of the Criminal Code) and the behavioural and freedom restricting measure (Article 38z of the Criminal Code) (see above).⁵¹ It is unclear whether these measures are imposed as an alternative to detention or whether they have a net-widening effect.

Compared to other European countries, relatively many short prison sentence are imposed. Adult inmates are detained for an average of 110 days. In 2017, 85% of the detainees had a sentence not exceeding six months (Ministry of Justice and Security, 2018).⁵² As the negative side effects of prison sentences are recognized, more and more it is suggested that short sentences should be replaced by fines or alternative sanctions.⁵³ However, a change in the imposition of these sentences cannot be discerned so far.

Alternatives to imprisonment for the most serious crimes are not only conceivable but they are reality. Despite the community service prohibition for serious crimes (see para 1.3 above), judges do impose community sentences in these cases, depending on the circumstances of the case, by combining this punishment with one or a couple of days of imprisonment, imposing a fine instead of community service, or ignoring the community service prohibition.⁵⁴

New technologies can lead to a decrease in inter-personal contacts between suspects/offenders and the various actors in the criminal process. A personal approach is to be favoured over electronic monitoring/control and electronic communication.

Electronic monitoring/control without personal interaction between the offender and the monitoring agency will not lead to sustainable change. This is the view of the probation service that is in line with the European Probation Rules and the Recommendation CM/Rec (2014)4 of the Committee of Ministers to Member States on Electronic Monitoring.

⁵¹ M.M. Boone, *Paradoxen van toezicht*, Den Haag: Boomcriminologie 2019.

⁵² Criminaliteit en Rechtshandhaving 2018, page 61. *Cahier* 2019-16, The Hague 2020, p.68

⁵³ Current research projects include the project *Changing Justice Gears* (Restorative Justice Netherlands, Universities of Maastricht, Amsterdam (VU), Nijmegen (Radboud), and Utrecht University). In 2021, the Council of the Administration of Justice and the Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming, RSJ*) will also advise of the use of and alternatives for short sentences. A symposium of the future of short sentences is being held in November 2021.

⁵⁴ L. Noyon, 'De geschiedenis van het taakstrafverbod van artikel 22b Sr: een klucht vol verwarring', *Ars Aequi* 2017, 307-315.

Annex: More information about the pre-sentence report⁵⁵

Selection

It is not efficient and impractical to issue a probation advice for every case that is submitted to the court. A selection is therefore made in which cases an information report is required.

To use the capacity of the probation service efficiently, in principle no probation advice is requested in cases concerning organized crime, in cases where more than four years in prison is expected and in cases of suspects without residency status. In all other cases, the judge or public prosecutor can request a pre-sentence report.

After a suspect is arrested, the police questions him. It is customary for the police to conduct a so-called social interrogation during the first interrogation and before the criminal offenses are discussed. In this social interrogation, the suspect's social circumstances are discussed: with whom does the suspect live, what are his living conditions, does he have a job and an income, does he have addiction issues or are there other problems. Based on the social interrogation, it can be assessed whether a pre-sentence report is desirable. For example, in a simple case in which personal circumstances played a limited role, no probation advice will be requested. Also, in cases where the suspect makes use of his right to remain silent, a pre-sentence report is usually not requested.

A suspect must be presented to a judge within three days and fifteen hours of arrest. During the arraignment, the court assesses whether the arrest was lawful and whether the pre-trial detention should be extended. On that occasion, the court can request a presentence report. The public prosecutor can also request a report on that occasion or later when assessing the case. In most cases, the presentence report is requested by the public prosecutor. To ensure that the probation service also provides the information it needs, agreements have been made between the Public Prosecution Service and the probation service about the form and content of the report. Consultations are held regularly between the Public Prosecution Service and the probation service to further agree on the working arrangements.

Request report and lead time

Probation advice is requested digitally by means of a standard form. The following information is stated on this application form:

- Criminal case data
- Suspect data
- Date of court session and type of court session (single judge or multiple judges)
- Purpose of the application

⁵⁵ This annex is retrieved from a forthcoming article titled Probation Advice in Serbia and the Netherlands, by Dijana Jankovic, Judge of the Appellate Court in Nis, Republic of Serbia, Marina Beun, Public Prosecutor, Haarlem, the Netherlands, to be published in: International Scientific Conference "Archibald Reiss Days" Belgrade; publication expected beginning of 2022.

The application form can also be used to request attention for certain subjects, for example the possibilities of electronic surveillance or the application of juvenile criminal law.

The Public Prosecution Service has made agreements with the probation service about delivery times. For example, for a report for the hearing, it has been agreed that the instruction to report will be given no later than ten weeks before the date of the hearing. The report will then be delivered two weeks before the hearing. The report is uploaded into the digital system by the probation service. The public prosecutor is authorized to provide the report to the court and the lawyer.

Content of the probation advice

When applying for a presentence report, the indictment and the questioning of the suspect will in any case be provided to the probation service. The probation service has a meeting with the suspect. With the suspect's permission, the probation service can contact referees from his environment, for example family members, friends or a professional who knows the suspect well. In addition, the probation service can request information about the suspect from the police, the judiciary or a health care institution without the permission of the suspect.

If necessary, the probation service can order a so-called in-depth investigation to gain more insight into the problems or to estimate the risk of recurrence.

Such an in-depth investigation may consist of:

- A personality assessment
- An investigation into psychiatric problems
- An intelligence test (IQ test)
- An investigation into the influence of addiction problems on criminal behaviour

The probation service will issue a recommendation based on all the information obtained. This advice is drawn up according to a standard model. The probation advice consists of a standard cover sheet, followed by the conclusion and substantiation based on a number of themes. The report is often accompanied by advice about any special conditions. These conditions are standardized and coordinated with the Public Prosecution Service and the judiciary.

The probation advice includes the following topics:

- What the suspect has told the probation officer about the offense and how the suspect views the offense
- A description of his personal situation
- The probation officer's professional judgment on the criminal case
- An assessment of the probability that the suspect will commit a criminal offense again
- Advice on what is needed to prevent the suspect from committing another criminal offence.

An important part of the probation advice is the risk assessment. The probation service makes an estimate of the risk of recidivism. The probation service makes this risk assessment using the RISC. In this way, the probation service provides a structured overview of the risk and protective factors, an estimate is made of the risk

of recidivism and an advice is formulated about the special conditions. The questions in this RISC are based, among other things, on scientific theories about building and dismantling of criminal careers.

The probation advice does not say anything about the evidence, that is not what the probation service is about. The advice is discussed with the suspect and his reaction is included in the probation advice, so that the judge can also take note of it.

The use and function of the probation advice

In addition to the official report and the criminal record, the probation advice is part of the case file. The public prosecutor uses the probation advice to determine the requirement in the criminal case. Although sentencing guidelines have been laid down for most offences, the probation advice means that more tailor-made sentences can be demanded. For example, if it is clear in a criminal case related to benefit fraud that the suspect has significant health problems and it is also clear that the chance of repetition is limited, then the public prosecutor is more likely to demand a sentence that is lower than the guidelines prescribe. In this way, the personal circumstances of the suspect can be taken more into account. In such a case, a fully suspended prison sentence can be requested instead of an unconditional prison sentence, as the guidelines prescribe.