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DEALING WITH DANGEROUS OFFENDERS IN EUROPE. A COMPARATIVE STUDY OF PROVISIONS IN ENGLAND AND WALES, GERMANY, THE NETHERLANDS, POLAND AND SWEDEN

I INTRODUCTION

Offenders who pose a potential danger to society and individuals are in focus of the media and of criminal policy. Spectacular crimes, prison breakouts and cases of brutal and/or frequent recidivism regularly draw attention to this particular category of perpetrators. On the one hand, criminal justice systems are obliged to protect society from these persons. On the other hand, they are also required to comply with human rights. For this group of perpetrators, the interplay between security and the offenders´ rights is especially striking.

Article 3 of the European Convention of Human Rights states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This is particularly relevant for dealing with dangerous offenders, because in these cases very restrictive measures might be applied in all stages of the criminal proceedings. Regarding prison sentences, the European Court of Human Rights (''ECHR'') has approved ''*high–security prisons for particular categories of detainees*''.[1] The ECHR has, however, demanded at the same time to ensure ''*that a person is detained in conditions which are*

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[1] *Van der Ven v. Netherlands* Article 50.

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compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured''.[2] It is, for example, not generally prohibited to stop a prisoner from interacting with other prisoners (eg for safety reasons), but a total sensory and social isolation is seen as an inhuman treatment that cannot be justified by any reason.[3] Life sentences, to give another example, are not per se regarded as an inhumane treatment by the ECHR. However, there has to be a perspective of release via a review of significant changes in life circumstances and progress in rehabilitation.[4]

Countries across Europe have developed differentiated systems to deal with so-called ''dangerous'' offenders. Over the last decades, several new sanctions and measures have been incorporated (or are about to be introduced) into the legal systems, such as a long-term supervision order in the Netherlands[5] or electronic monitoring in Poland[6]. Different answers to the challenge of dealing with dangerous offenders provide possibilities for interesting comparative analyses: How are so-called ''dangerous'' offenders dealt with in European countries? Which similarities and differences can be observed between criminal justice systems? Such a comparative glimpse beyond the national level provides new perspectives for politicians, researchers and practitioners – in a field that has become increasingly important in Europe.[7]

After a short description of previous research on this topic, this article will address the approach of our comparative study (§2), definitions of dangerousness (§3) and the project´s results (§4 through 6). In §4, we will present a short overview of the criminal justice systems of the participating countries (England and Wales, Germany,

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[2] *Kuda v. Poland* Article 92 ff.; see also A. Barbu, Managing high-risk offenders – from sharing experiences to drafting better national laws and European tools, in F. Dünkel, J. Jesse, I. Pruin, & M. Von der Wense (Eds.), *European Treatment, Transition Management, and Re-Integration of High-Risk Offenders* (2016), 105.

[3] *Van der Ven v. Netherlands* Article 51.

[4] See eg *Vinter* et al. *v. UK* Article 119; see also Barbu supra note 2 at 105 ff.

[5] For more information see §5.4.3.

[6] See eg §5.1.4.

[7] F. Dünkel, J. Jesse, I. Pruin, & M. Von der Wense, Introduction, in F. Dünkel, J. Jesse, I. Pruin, & M. Von der Wense (Eds.), *European Treatment, Transition Management, and Re-Integration of High-Risk Offenders* (2016), p. 1.

the Netherlands, Poland and Sweden), followed by comparative analyses of dealing with dangerous offenders via four (fictional) case studies (§5). Finally, selected figures will be presented on the application of different sanctions and measures for dangerous offenders in order to evaluate their frequency in practice (§6).

Among the previous research, the Justice Cooperation Network Project (''JCN'')[8] stands out as a recent and comprehensive study on this topic. This project, funded by the European Commission, aimed at developing a European network and a model for best practice of transition management of prisoners leaving custody, especially regarding high-risk offenders. The results include a comparison of existing legal provisions and practices concerning the treatment of dangerous and high-risk offenders in Estonia, Finland, Ireland, and Germany[9] (as well as Belgium, Slovakia and Slovenia as associated partners).[10] With a focus on release and on transition management, the scope of these comparisons encompasses definitions of dangerous offenders and high-risk offenders, legal provisions on early/conditional release, practices of the penitentiary system, preparation for release, and aftercare.

In the JCN project, the term ''high-risk offender'' was defined as follows: ''*Someone (violent/sexual offender) who presents a high probability to commit crimes, which may cause very serious personal, physical or psychological harm*''.[11] The evaluation has shown that not all legal systems have a definition of such offenders.[12] The project also revealed manifold differences between the countries´ regulations concerning early/conditional release: Forms of mandatory or quasi-automatically early/conditional release, which do not depend on the risk of reoffending, exist in Finland and in Ireland.[13] The criteria and modalities of discretional early/conditional releases vary widely be-

[8] ''*European treatment and transition management of high-risk offenders*'', results of the final conference can be found in supra note 7 at 253–294.

[9] A comparison of dealing with dangerous offenders through preventive detention in Germany (s. 66 of the German Criminal Code („Strafgesetzbuch – StGB")) and in England and Wales can be found in A. Aumüller, Dealing with dangerous offenders through preventive sentencing: a comparison of Germany and England and Wales, Hannover: Kriminalwissenschaftliches Institut (2013); this study, however, refers to the legal situation earlier than 2013.

[10] Barbu supra note 2 at 99; Dünkel et al. supra note 8 at 254 ff.

[11] Barbu supra note 2 at 99.

[12] Dünkel et al. supra note 7 at 254 ff.

[13] Ibid.

tween the participating countries, eg regarding the minimum term served in prison.[14] Concerning the execution of prison sentences, the study showed certain peculiarities for dangerous offenders, eg security measures like solitary confinement and potential exclusion from prison leaves.[15] All participating countries provide some kind of release planning and transition management, but only one country (Finland) reported the existence of half-way-houses.[16] In some legal systems, one agency is responsible for all tasks of aftercare, while in others, supervision and support are carried out by different institutions.[17]

As part of the JCN-publication, Lappi-Seppälä focused on Nordic countries, analyzing legal provisions, history and application of preventive detention[18] as well as risk management in Finland, Norway, Sweden, and Denmark.[19] His comparison showed differences between legal systems, eg concerning the duration of preventive detention, its classification as a criminal punishment, its target group (criminal responsibility of the offender), and its prerequisites.[20] Differences have also been detected in terms of existence and modalities of life-sentencing, concepts and criteria for criminal responsibility, conditions for compulsory care (psychiatric hospital orders), and sentencing rules.[21] The analysis is complemented by available figures, eg regarding the number of life prisoners, the actual length of life imprisonment, the amount of persons in compulsory care after committing a crime and the duration of their treatment.

Information on sanctioning dangerous offenders can also be found in more general analyses, eg Ruggiero/Ryan (2016), that provide an overview of criminal justice systems in European countries: Dealing

[14] Dünkel et al. supra note 7 at 257 ff.

[15] Dünkel et al. supra note 7 at 260 f.

[16] Dünkel et al. supra note 7 at 270 f.

[17] Dünkel et al. supra note 7 at 274.

[18] This term refers to possibilities of indeterminate sanctions for offenders; it is eg used by the ECHR for the German "*Sicherungsverwahrung*" (s. 66 of the German Criminal Code („Strafgesetzbuch - StGB")); see: ECHR, *M. v. Germany*, of 17/12/2009.

[19] T. Lappi-Seppälä, Preventive detention and risk-management in the Nordic countries, in F. Dünkel, J. Jesse, I. Pruin, & M. Von der Wense, (Eds.), *European Treatment, Transition Management, and Re-Integration of High-Risk Offenders* (2016), pp. 123–150.

[20] Lappi-Seppälä supra note 19 at 142.

[21] Lappi-Seppälä supra note 19 at 143 ff.

with penal systems as a whole, this compilation includes the treatment of dangerous offenders, such as the TBS-order and high-security prisons in the Netherlands,[22] the incapacitation order in Germany,[23] and the increasing use of life prison sentences instead of forensic psychiatric hospital orders as well as raising average times served in prison for life prisoners in Sweden in the past decades.[24] The focus of this compilation is not set on dealing with dangerous offenders, but on a critical analysis of penal systems and punitivity.

The study of *Padfield* et al. (2011) focuses on release from prison. Their comparative analysis showed that minimum terms to be served in prison before an early release differ throughout Europe: For life sentences, this period ranges from 10 years (in Belgium) to 30 years in Estonia.[25] In some countries, there is no such fixed minimum term: In England and Wales, the judge sets a minimum term to be served but in Sweden and in the Netherlands there is no minimum term because early release of life prisoners is an act of grace.[26] In a few countries, such as Croatia, life sentences do not exist, but long-term sentences up to 40 years can be imposed.[27] This study also addresses the difference between automatic and discretionary release systems. While early release is "*more or less automatic*"[28] in countries like Sweden, a positive prognosis is required eg in the Polish criminal justice system.

Another study focusing on indeterminate post-release supervision, specifically looking at sanctions for sex offenders, is Van der Wolf

[22] M. Boone & R. van Swaaningen, Regression to the Mean: Punishment in the Netherlands, in V. Ruggiero & M. Ryan (Eds.), *Punishment in Europe*, pp. 16, 21.

[23] B. Dollinger & A. Kretschmann, Contradictions in German Penal Practices: The Long Goodbye from the Rehabilitation Principle, in V. Ruggiero & M. Ryan (Eds.), *Punishment in Europe*, p. 146.

[24] From approximately 8 years to approximately 17 years: H. Von Hofer & H. Tham, Punishment in Sweden: A Changing Penal Landscape, in V. Ruggiero & M. Ryan (Eds.), *Punishment in Europe* (2016), p. 36 f.

[25] F. Dünkel, D. van Zyl Smit & N. Padfield, Concluding thoughts, in N. Padfield, D. van Zyl Smit & F. Dünkel (Eds.), *Release from Prison, European policy and practice* (2011), p. 408.

[26] Dünkel/van Zyl Smit/Padfield et al. supra note 25 at 420. Since 2006, there is in force an Act on conversion of life imprisonment to a fix-term imprisonment in Sweden (the Law nr. 2006:45). Prisoners may ask a court for the conversion after 10 years of imprisonment. However, there is no right to conversion.

[27] Ibid.

[28] Dünkel/van Zyl Smit/Padfield et al. supra note 25 at 420 f. („*unless particular grounds militate against it*").

(2016).[29] It compares relevant provisions in England and Wales, France, Germany, the Netherlands and Spain, addressing human rights regarding this topic as well.

Thus, previous comparative analyses either deal with penal systems as a whole or focus on certain sanctions for dangerous offenders (such as preventive detention or supervision) or stages of the execution (such as release and transition management). Our project aims at filling a research gap by focussing on dangerous offenders differentiated by various forms of dangerousness (see below, §3.). Covering all stages of the proceedings, our study compares sentences and measures applied to those dangerous offenders in an exemplary set of European countries.

II APPROACH OF THE STUDY

The above-mentioned previous studies hint at the existence of different approaches for dealing with dangerous or high-risk offenders in European countries. Because of the vast variety of applicable sanctions, it is not reasonable to compare a singular measure in this field. As the concept of criminal responsibility, psychiatric hospital orders, long or life prison sentences, and measures like incapacitation orders can interact with each other, the treatment of dangerous offenders has to be studied as a whole.[30] Consequently, this project does not compare specific sanctions in European countries, but investigates how these legal systems deal with different types of dangerousness. Taking this comprehensive approach, it explains – at large – the applicable sanctions/measures/concepts in these cases. Our approach covers all stages of the criminal trajectory: The comparison encompasses the identification and assessment of dangerous offenders, the sentencing and the execution stage as well as rehabilitation and measures after release.

The study covers criminal justice systems of five European countries – England and Wales,[31] Germany, the Netherlands, Poland and Sweden. Thus, it encompasses different European regions – common law as well as continental law systems, former socialist countries as

[29] M.J.F. van der Wolf (ed.), *Legal constraints on the indeterminate control of "dangerous" sex offenders in the community: a European comparative and human rights perspective (Special Issue), Erasmus Law Review* (9) 2016-2.

[30] Lappi-Seppälä supra note 19 at 143.

[31] The criminal justice system in England and Wales is different from those in Scotland and in Northern Ireland.

well as ''western'' countries. The project was carried out by a network of experts in the respective national criminal justice systems, which are at the same time authors of this article. After having identified challenges regarding the comparability of the legal systems, a questionnaire was developed by the group of experts in order to collect information on concepts of dangerousness, penal systems and on how dangerous offenders are dealt with in the participating countries.

This questionnaire included four (fictional) case studies, for which the countries should describe sanctions or measures that will most likely be applied according to their legal system, further prerequisites for their application as well as important procedural aspects. In this way, the applicable sanctions and measures can be illustrated and compared for different forms of dangerousness, eg because of (major) mental illness.[32] Thus, the comparative approach of the project can be described as ''problem-oriented'' rather than ''measure-oriented''. The description of concrete scenarios is preferable because legal definitions of dangerousness may differ between the criminal justice systems (see §3). These four case studies were accompanied by a set of differentiated questions covering different stages of the criminal proceedings, such as the court decision, the execution stage and applicable measures after release. This part of the questionnaire not only addressed the sanctioning, but also existing facilities, the relation between the health system and the criminal justice system and competences.

The project concentrates on ''conventional'' dangerous offenders, especially sexual and violent offenders, leaving out special measures concerning terrorism. With a focus on dangerous *offenders*, forms of commitment to a psychiatric hospital are only covered, when this takes place in the judicial system, that is, when a crime has been committed (eg, the TBS-order in the Netherlands). Provisions for persons admitted to a psychiatric hospital without having committed an offence are not included in this study. As a first step, a suitable definition for the term ''dangerousness'' has to be found (§3).

III CONCEPTS OF DIFFERENT TYPES OF DANGEROUSNESS

Comparing the treatment of ''dangerous offenders'' in Europe is a challenging task. Difficulties arise while finding a definition for this

[32] For further information on the definitions and types of dangerousness: see §3.

term as a common ground for the analysis across countries. As the Council of Europe (''CoE'') points out, dangerousness *''is not a clear legal concept. It is also vague in scientific terms, in so far as the assessment of criminological dangerousness and individual risk of reoffending in the long term lacks sufficient supporting evidence to ensure an accurate measurement of dangerousness.*''[33] The recommendation 2014(3) of the Council of Europe defines this concept as follows:

> ''*a. A dangerous offender is a person who has been convicted of a very serious sexual or very serious violent crime against persons and who presents a high likelihood of re-offending with further very serious sexual or very serious violent crimes against persons.*
>
> *b. Violence may be defined as the intentional use of physical force, either threatened or actual, against persons, that either results in, or has a high likelihood of resulting in, injury, psychological harm or death. This definition identifies four means by which violence may be inflicted: physical, sexual and psychological attack and deprivation of liberty.*
>
> *c. Risk is defined as the high likelihood of a further very serious sexual or very serious violent offence against persons.*''[34]

Is a similar definition used in the legal systems of the countries covered by this project? What deviations exist, eg concerning the offences covered by this term? In England and Wales, the definition of dangerous offenders is similar to the CoE definition: An offender is considered dangerous if the court is of the opinion that ''*there is a significant risk*[35]*to members of the public of serious harm occasioned by the commission by him of further specified offences*''[36]. Serious harm means death or serious personal injury, whether physical or psychological. Therefore, the term dangerous offender is used for any type of offence: most of these would be serious sexual offences or violence but they could for example include kidnapping, harassment,

[33] Commentary to recommendation CM/Rec 2014(3), paragraph 7.

[34] CM/Rec 2014(3), Appendix Part I.

[35] The term ''significant risk'' is not defined in the legislation and it is a matter of the court to assess this in each case. However, the Court of Appeal has held that significant means noteworthy, of considerable amount or importance. Risk must be to members of the public.

[36] Article 225 I b of Criminal Justice Act 2003 (c. 44).

stalking, people trafficking, etc., which usually, but not exclusively are connected with (physical) violence.

In the other countries covered by this project, there is no legal definition of a ''dangerous offender''. However, the concept of ''dangerousness'' is addressed in several sections of the Dutch and the German Criminal Code. In Germany, the concept of dangerousness is eg mentioned in relation to preventive detention (hereinafter: ''incapacitation order''[37]) in s. 66 of the German Criminal Code (,,Strafgesetzbuch-StGB'', hereinafter: ''GCC''). This measure requires[38] – inter alia – a comprehensive evaluation of the convicted person and his offences at the time of the present conviction, which *''reveals that, due to his propensity to commit serious offences, particularly of a kind resulting in serious emotional trauma or physical injury to the victim, he poses a danger to the general public*''[39] (s. 66 GCC). *Dünkel* et al. regard s. 66 GCC as a ''*quasi-definition of a high-risk offender*''.[40] The legal term ''dangerousness'' is also addressed in other sections of the German Criminal Code, but with different wordings. To give an example, a mental hospital order for offenders (who are of no or diminished criminal responsibility) shall be imposed ''*if a comprehensive evaluation of the offender and the act leads to the conclusion that as a result of his condition, future serious unlawful acts can be expected of him and that he therefore presents a danger to the general public*''[41] (s. 63 GCC). Since 2016, these expected offences have to be considered causing serious psychic or bodily damage or danger for the victim or serious economic damage.

In the Dutch Criminal Code (,,DCC''), dangerousness is not defined by a fixed definition, but there exist a few different criteria (for imposing sanctions) related to dangerousness/risk that are for example required to impose the safety measure of ''*terbeschikkingstelling*'', the so-called TBS-order. In this context, the concept of dangerousness is defined as: ''*the safety of others, or the general safety*

[37] The term ''preventive detention'' for the German ''*Sicherungsverwahrung*'' (s. 66 of the German Criminal Code (,,Strafgesetzbuch – StGB'')) is eg used by the ECHR; see: ECHR, *M. v. Germany*, of 17/12/2009. In this article, we refer to this and similar measures as ''incapacitation orders''.

[38] For further information see §5.4.2.

[39] Translation of the GCC provided by: Prof. Dr. Michael Bohlander (www.gesetze-im-internet.de).

[40] Dünkel et al. supra note 7 at 256.

[41] Another dangerousness-related section of the GCC is eg early release from prison (§ 57 I GCC); for further examples: Dünkel et al. supra note 7 at p. 256.

of persons or goods demands the imposition of the measure'' (article 37a s. 1 DCC). In order to concretise this broad concept, the provisions state that the seriousness of the offence and the frequency and seriousness of former offences are taken into account by the imposing court.

The definition of dangerousness for other measures is defined differently in the Dutch Criminal Code. For a psychiatric hospital order, to give an example, danger to oneself is added to the abovementioned criteria regarding the TBS-order and one of the dangers, worded as ''serious detriment'' (to self, other or general) needs to be present in order to impose the psychiatric hospital order (article 2.3 Forensic Care Act, FCA, up until 2020 it was 37 s. 1 DCC). This criterion seems out of place within an act concerning criminal law in a country in which attempted suicide is not criminalized, as harm to self does not seem to serve any relevant interest of criminal law. However, the psychiatric placement as a part of criminal law was never a dogmatic but a pragmatic choice. It was found cumbersome to have the criminal court rule on legal insanity and then the civil court on a coerced commitment, handing the criminal court also the latter competence. In effect, it is a provision of mental health law inserted within criminal law. For the imposition of the Dutch measure for repetitive offenders (ISD-order), next to a severity criterion, a detailed criterion showing that the offender is a repeat offender [42] and the criterion that it should seriously be taken into account that the defendant will commit another offence, the safety of persons or goods shall demand the imposition. Risk criteria can also be found in other sections of the Dutch Criminal Code, eg in article 14b (s. 3), which allows a probation period of ten years. This definition includes the risk of harm for the health or wellness of one or more animals.

These examples illustrate that there are various wordings for the concept of ''dangerousness'' in some countries, while in others, the term is not explicitly defined. Case studies can be a helpful tool for international comparison of legal provisions and practices. Therefore, the project developed fictional cases that are regarded as examples for ''dangerous offenders'' in all five legal systems covered by this project (England and Wales, the Netherlands, Germany, Sweden and Poland). The study distinguishes between the following different types of dangerousness based on its origins: A focus is set on

[42] Three irrevocable convictions to sentences of deprivation or restriction of liberty in the previous five years are required for such an ISD-order. For more information on this measure see §5.3.3.

dangerousness because of (major) mental illness (like schizophrenia), on dangerousness because of serious personality disorders and on dangerousness because of alcohol/drug addiction. In addition, the study also addresses dangerousness that is not treated by detention in a forensic psychiatric hospital or in a drug addiction facility, but either by detention besides or after punishment (eg incapacitation order in Germany) or life-long or long prison sentences as well as supervision after imprisonment/detention. In consequence of the approach, dangerousness is not restricted to offences causing harm to humans but could also include serious economic damage or danger to goods. As this group includes so called repetitive property offenders, and as repetitive offending is generally acknowledged to be the most robust predictor of future offences, especially its likelihood for reoffending positions the group within our broad definition of dangerousness.

IV OVERVIEW OF THE CRIMINAL JUSTICE SYSTEMS

All criminal justice systems provide a wide range of different sanctions, such as fines, probation, or imprisonment. However, details of the sanctioning process, eg the duration of a prison sentence in a certain case, differ largely between legal systems. A short overview of the penal systems with a focus on dangerous offenders in England and Wales, Germany, the Netherlands, Poland and Sweden identifies essential similarities and differences. As a second step, a more concrete comparison in §5 evaluates how a specific case would be handled in each of these legal systems.

A basic sentencing principle in all five observed criminal justice systems is criminal responsibility. In Germany, in the Netherlands, and in Poland, no punishment is possible without criminal responsibility. However, (safety or rehabilitative) measures, which are applicable regardless of the criminal responsibility, can be imposed in these cases. In such a twin-track system there is a differentiation between criminal sanctions on the one hand and (safety or rehabilitative) measures on the other. These measures can be imposed singularly or – if there is at least diminished criminal responsibility – in combination with a sanction (eg imprisonment, see *Figure1*). In the Netherlands, one of these measures is the TBS-order, which can be imposed with or without a (prison) sentence. The same is true for Germany, where eg. the commitment to a forensic psychiatric hospital is possible in cases of no or diminished criminal responsibility.

In Poland, a psychiatric hospital order can be imposed on persons with mental disturbances with no or diminished criminal responsibility; other protective measures like electronic monitoring can be imposed also in case of full criminal responsibility..

In England and Wales, there are very few cases where a person is found not criminally responsible because of insanity (so-called M'Naughten Rules[43]). This is possible if the offender does not know what he was doing or if he did not know that his actions were wrong. The concept of diminished criminal responsibility[44] (applicable to psychiatric illnesses as well as to personality disorders) is only a partial defense that can reduce the offence from murder to manslaughter (see also §5.1.1).

A different approach is followed by the Swedish criminal justice system: According to Swedish law, everybody is deemed criminally responsible, because the philosophical concept of free will and of a free decision to commit an offence is not acknowledged. In consequence, mental illnesses are only relevant for choosing a sanction. Until 2009, unsuspended prison sentences were not applicable to offenders with serious mental disturbances. Since 2009, this restriction is only valid for very serious cases of mental illnesses (in which the offender might be qualified as not criminally responsible in other legal systems). Other criminal law sanctions, eg fines or probation, may be imposed in any case (Chap. 30 section 6 Penal Code). The most frequent sanction for offenders with serious mental illnesses is the psychiatric hospital order (Chap. 31 section 3 Penal Code).

4.1 *England and Wales*

4.1.1 *Competences*

All cases involving criminal actions come to the criminal court and not the civil court. Sentencing in England and Wales is the prerogative of the judge alone, informed by guidelines set out by the Sentencing Council.[45] The decision as to whether the offender is in any way mentally disordered is a matter for the judge once the case has come to court. The judge may be guided by experts but his decision is

[43] *United Kingdom House of Lords Decisions. "DANIEL M'NAGHTEN'S CASE. May 26, June 19, 1843". British and Irish Legal Information Institute* .

[44] For a summary of the legal position see the Prosecution Service web site at https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter.

[45] See: www.sentencingcouncil.org.uk.

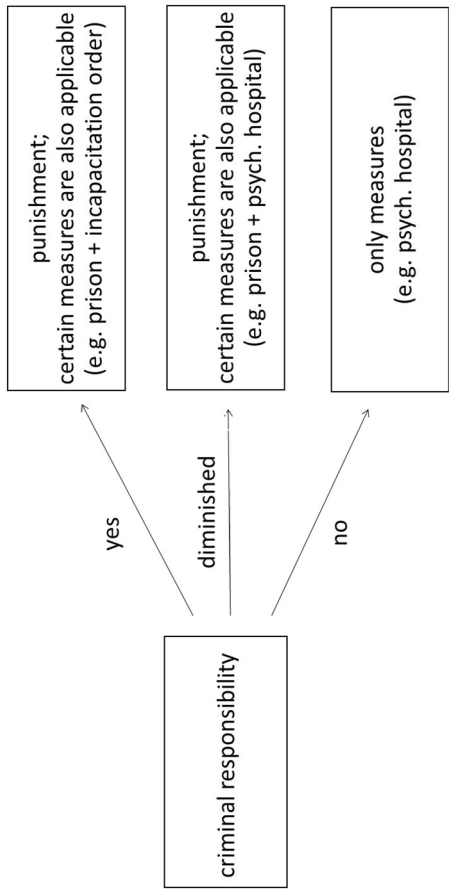

Figure 1. Applicable sanctions and measures in a twin-track system (Germany, the Netherlands, Poland)

final, subject to appeal. It is also the competence of the judge to decide on the release, eg from a psychiatric hospital.

The health and the justice system are completely separate although they work closely together in cases where offenders have been sent to a non-secure hospital, which is run by a health institution.

4.1.2 *Sentencing and measures*

According to the above mentioned guidelines dangerous offenders are generally sentenced to imprisonment. Sentencing is based on the principle of proportionality. The length of the prison sentence depends on the seriousness of the offence as well as the past criminal history, vulnerability of the victim and other aspects. But it also depends on the likelihood of reoffending. There are hardly any mandatory sentences and the judge may sentence below the maximum of the sentencing guidelines. A judge who decides that an offender is mentally disordered in some way has a range of options to take into account including sending the offender for treatment in a secure or a non–secure hospital.[46] Treatment, eg addiction treatment or anger management, is available in prisons and can be part of the sentence. Treatment orders can also be imposed on those sentenced to probation and community service.

For serious offences where the offender was deemed to be a risk to the public there were indefinite public protection sentences (''IPPs'') from the years 2003 to 2013.[47] Under IPPs an offender could be kept in prison even though his sentence had been completed. This law has now been repealed but there are still several thousand IPPs remaining in prison under the old law and each such case is being considered on its merits. The current law for dangerous offenders allows for release at the end of the prison sentence into the community on a licence of up to 8 years during which any offence could result in an immediate return to prison.

4.1.3 *Youth*

There are different sentencing guidelines for those under 18.[48] The principal difference between adults and youths is that in the case of a youth, if the offence does not merit a custodial period of at least 2

[46] Under sections 37/41 of the Mental Health Act 1963.

[47] A form of indeterminate sentence introduced by s.225 of the Criminal Justice Act 2003.

[48] Full details are given at https://www.cps.gov.uk/legal-guidance/sentencing-dangerous-offenders.

years, even if there are previous convictions for Schedule 15A offences,[49] the young offender may not be sentenced, if found to be dangerous, to either an indeterminate sentence or an extended sentence.

4.2 *Germany*

4.2.1 *Competences*

All criminal cases are in the responsibility of the criminal courts, not the civil courts. The criminal judges decide on criminal responsibility and on sentencing. An expert´s opinion on mental illnesses (with a possible effect on criminal responsibility) is usually requested by the court in respective cases, but legally only needed if mental hospital orders, custodial addiction treatment orders or an incapacitation order are in question.[50]

Psychiatric hospitals are run by the health system, but a special criminal judge has to decide on the release of the offender (based on an expert´s opinion)[51]. The execution court has to examine the possibilities of release every year (s. 67e § 2, no. 2 GCC). There are psychiatric hospitals, which are exclusively responsible for the treatment of offenders, and others for both offenders and other psychiatric patients.[52] Inpatient addiction treatment also takes place in facilities that are part of the health system. The incapacitation order is executed in special institutions or units of prisons run by the criminal justice system.[53] The court has to examine the possibilities of release from this measure every year; the decision is based on an expert´s opinion.

[49] These are offences involving communication with a child under 16 for sexual purposes.

[50] See Münchener Kommentar Strafprozessordnung/Trüg/Habetha, § 246a, 2016; Satzger, Schluckebier, Widmeier, Strafprozessordnung/Sättele § 246a, 4. Aufl. 2020; Nedopil/Müller, Forensische Psychiatrie, 5.Aufl., 2019, S. 30ff.

[51] S. 67d § 2, 6 GCC; see Münchener Kommentar Strafgesetzbuch/Veh § 67d, Rn. 48; 2016; Satzger, Schluckebier, Widmeier/Jehle/Harrendorf, Kommentar Strafgesetzbuch § 67d Rn. 36; 4.Aufl. 2019;

[52] Kammeier/Pollähne, Maßregelvollzugsrecht, $. Aufl. 2018, S. 96 ff.

[53] See Schwind/Böhm/Laubenthal/Jehle, Kommentar Strafvollzugsgesetze, 7.Aufl. 2020, S. 11 ff., 1457 ff.

4.2.2 *Sentencing and measures*

One of the basic sentencing principles is proportionality determined by the constitution.[54] The sentencing is restricted by the minimum and maximum penalties in the German Criminal Code and the punishment determined by the guilt of the offender and the seriousness of the concrete offence (s. 46 GCC)[55]. Within these boundaries, preventive aspects are relevant, too (s. 46 § 1 sentence 2 GCC). Recidivism can have an effect on the sentencing, because previous convictions are a factor to be considered in the sentence (s. 46 § 2 sentence 2). The dangerousness of the offender, however, cannot increase the length of the sentence.

If there is no criminal responsibility, offenders have to be acquitted, but certain measures can be imposed, such as the commitment to a forensic psychiatric hospital, in case the offender is deemed dangerous (s. 63 GCC). For addicts, an inpatient addiction treatment order can be imposed (s. 64 GCC). In case of diminished criminal responsibility (s. 21 GCC), the sentence (eg an unsuspended prison sentence) can be mitigated and combined with such measures. A special security measure is the incapacitation order (s. 66, 66a,b GCC) – a kind of detention, which is executed after a prison sentence (or after release from a psychiatric hospital).[56]

4.2.3 *Youth*

For juveniles (aged 14–17), a different sanctioning system exists that is mainly oriented at educational aspects.[57] Juvenile criminal law offers a wide range of applicable sanctions and measures, including custodial ones. Juveniles can be committed to a forensic psychiatric hospital or to an inpatient addiction treatment, too (s. 7 § 1 Juvenile Courts Act, JCA), but in judicial practice this takes place only rarely.

[54] Permanent jurisdiction of the Federal Constitutional Court, e.g. decisions 9, p. 167, 169, 86, p. 288, 313; see also Leipziger Kommentar Strafgesetzbuch/Schneider Vor § 46 ff., Band 4, 13. Auflk. 2020, S. 308 ff.; Hilgendorf, Strafrecht im Kontext der Normenordnungen, in: Handbuch des Strafrechts Band 1, 2019, S. 791, 828f.

[55] See further also Leipziger Kommentar Strafgesetzbuch/Schneider § 46 , Band 4, 13. Aufl. 2020, S. 310 ff.; Münchener Kommentar Strafgesetzbuch/Miebach/Meier § 46; 3. Aufl. 2016; Satzger, Schluckebier, Widmeier, Kommentar Strafgesetzbuch/Eschelbach § 46, 4. Aufl. 2020;

[56] An overview of the criminal justice system in Germany can be found in J.-M. Jehle, *Criminal Justice in Germany*, Sixth Edition, Mönchengladbach: Federal Ministry of Justice and Consumer Protection (2015), pp. 18 ff. (for measures like commitments to a psychiatric hospital: 38 f. and 55 f.).

[57] Section 2 of the Juvenile Courts Act (Jugendgerichtsgesetz)

Regarding the incapacitation order, even stricter prerequisites for the imposition apply for this age group (s. 7 § 2 JCA). For young adults (aged 18–20), the court decides, which sanctioning system (juvenile criminal law or adult criminal law) is applied (s. 105 JCA). Even in case of adult criminal law, there are certain particularities for the sentencing of young adults, eg restrictions and higher requirements concerning the incapacitation order (s. 106 § 2-6 JCA).[58]

4.3 *Netherlands*

4.3.1 *Competences*

On the basis of his discretionary competence the public prosecutor can bring a case to a civil court instead of a criminal court if he thinks a civil hospital order suffices in reaction to the offence considering the mental state of the perpetrator. But research shows that when the offences are serious, cases are always brought before criminal courts.[59] In one trial, the court decides on the (proof of the) facts, criminal responsibility and the sentencing of the offender. For imposing a TBS-order in relation to the diminished criminal responsibility, an opinion of at least two behavioural experts from different disciplines (psychiatry and usually psychology) is needed. Since 2020, the FCA allows that the criminal court (and not only the civil court) imposes a civil commitment to a psychiatric hospital at any stage of the criminal proceedings (also after the execution of a sentence).

The Netherlands is known to be unique in the fact that high security forensic psychiatric centers are a part of the criminal justice system instead of the mental health system; mainly used for execution

[58] An overview of the sanctions under juvenile criminal law in Germany can be found in J.-M. Jehle, *Criminal Justice in Germany*, Sixth Edition, Mönchengladbach: Federal Ministry of Justice and Consumer Protection (2015), pp. 41 ff.

[59] E. Gremmen, *De kwetsbare psychisch gestoorde verdachte in het strafproces. Regelgeving, praktijk en Europese standaarden, Oisterwijk*: Wolf legal publishers (2018); see also: H.J.C. van Marle, M.M. Prinsen & M.J.F. van der Wolf, ''Pathways in Forensic Care: The Dutch Legislation of Diversion'', in K.T.I. Oei & M.S. Groenhuijsen (eds.), *Progression in Forensic Psychiatry: About Boundaries*, Deventer: Kluwer (2012), pp. 105–120.

of the TBS-order.[60] Within the penitentiary system, the Minister of Justice and Security can place prisoners in need of care in Penitentiary Psychiatric Centers (''PPCs''), in forensic or general psychiatric hospitals. There are also high or extra high security prisons for prisoners labelled as extremely dangerous. The Ministry of Justice and Security also buys in beds in general psychiatry (of course only in institutions, which provide the necessary security). Commitments to a psychiatric hospital are carried out in mental hospitals that are run by the national mental health system. In these cases, the hospital decides on the release of detainees. If the hospital wants to continue the treatment after the fixed term, the civil court has to decide on its request. In all these facilities, also within the criminal justice system, the Ministry of Health plays a part in the inspection of the quality of care.

4.3.2 *Sentencing and measures*

The length of the (prison) sentence is bound by maximum penalties in the DCC and influenced by factors like the seriousness of the committed offence, level of criminal responsibility and dangerousness of the offender, and the occurrence of re-offending. A life sentence is only optional for a few very severe offences like murder. When sentencing, the judge also considers the so-called ''LOVS-guidelines'' for sentencing.[61] These guidelines aim at legal equality and only cover frequent crimes (like theft), as more rare and serious offences are considered to require a more individual approach.

Up until 2020 the criminal court could only send the defendant to a psychiatric hospital if the judge found that the offender could not be held criminally responsible for the crime because of his mental defect or disorder. Since 2020, it can also do this after an acquittal or next to some other sentence (not a long unconditional sentence) if the defendant is found (diminished) criminally responsible. If more security or longer treatment is needed, a so-called TBS-order can be imposed in case of no or diminished criminal responsibility, which can be prolonged infinitely every two years (article 37a DCC). In case

[60] For a dogmatic and historical background, see M.J.F. *van der Wolf* & M. *Herzog-Evans*, Mandatory measures: ''safety measures''., Supervision and detention of dangerous offenders in France and the Netherlands: a comparative and Human rights' perspective', in M. Herzog-Evans (ed.), *Offender release and supervision: The role of Courts and the use of discretion,* Oisterwijk: Wolf Legal Publishers (2014), pp. 193-34.

[61] See: www.rechtspraak.nl/SiteCollectionDocuments/Orientatiepunten-en-afspraken-LOVS.pdf.

of diminished responsibility the order may be imposed in combination with a sentence. The order can also be imposed conditionally, but then the possible additional sentence is restricted to five years imprisonment and the total duration to nine years – however the order can be changed into an unconditional TBS-order if conditions are breached or "*the safety of others, or the general safety of persons or goods demands it*". A safety measure with a slightly different orientation – repetitive (petty crime) offenders – was enacted in 2003: This "ISD-measure" permits the placement in a custodial treatment facility (eg for drug addicts) for two years (article 38m DCC).[62] An order of restriction of liberty is in place for location and contact bans for a maximum of five years (article 38v DCC). A new measure that exists since 2018 is the long-term supervision order, which can be imposed in combination with a TBS-order or a prison sentence and may last a lifetime through prolongation (article 38z DCC).[63] Electronic monitoring is not a separate measure, but may be ordered to control location bans as a restrictive condition in many sanction-modalities.[64]

4.3.3 *Youth*

For juveniles (aged 12–17),[65] article 77s of the DCC provides separate sanctions. In serious cases, there is a measure called by the public "youth-TBS" which is carried out in a special institution for juveniles. This measure has the aim to provide education for the youngster and the necessary care, together with protection of the community. The measure is imposed for a minimum of two years and can be prolonged up to a maximum of seven years. If after these

[62] See S. Struijk, Punishing Repeat Offenders in the Netherlands: Balancing between Incapacitation and Treatment, Behavioral Sciences & the Law (2015), 33(1): pp. 148–166.

[63] See S. *Struijk &* P.A.M. Mevis, Legal Constraints on the Indeterminate Control of "Dangerous" Sex Offenders in the Community: The Dutch Perspective, *Erasmus Law Review* (2016), pp. 95–108.

[64] See A. Hucklesby, K. Beyens, M. Boone, F. Dünkel, G. McIvor & H. Graham, . Creativity and Effectiveness in the Use of Electronic Monitoring: A Case Study of Five Jurisdictions, *EMEU-Report* (2016). Also, see M.H. Nagtegaal, "Electronic monitoring as a front door initiative, A quickscan into European experiences." *The Hague: WODC* (2013), cahier 2013-04.

[65] And possibly for adolescents up to 23 years. Adult sentences are possible under circumstances for 16–17 year-olds. See J. uit Beijerse,; "The new Dutch law and policy on young adult offenders", *Probation and Community Justice* (2016), *4* (2), pp. 1–8.

seven years "*the safety of others, or the general safety of persons or goods demands",* the order may be changed into TBS for adults (article 77tc). Sanction modalities of rehabilitation and restriction of liberty in the community exist in different shapes and forms, also for youngsters. For 16–17 year olds adult sanctions may be imposed if the severity of the offence, the personality of the offender or circumstances of the case justify it (article 77b DCC). For adults up to 23 years old youth sanctions may be imposed on the basis of their personality or circumstances (article 77c DCC).

4.4 *Poland*

4.4.1 *Competences*

All criminal cases are in the responsibility of the criminal courts, not the civil courts. The court decides on the criminal responsibility and on the sentencing. However, there are some measures for mentally ill persons or addicts which can be imposed by civil courts. The criminal court can impose a protective measure provided in the Polish Criminal Code only if civil measures were not imposed by the civil court or were imposed by the civil court but are deemed insufficient, because protective measures provided in the criminal law should be *ultima ratio* (article 93b § 1 PCC[66]). For the decision on lack of criminal responsibility, an expert's opinion is needed.

As a rule, the criminal justice system and the health care system are separate. Psychiatric facilities are not part of the criminal justice system, but of the health system. In most cases, offenders committed to a forensic psychiatric hospital are placed in special units within a psychiatric hospital that is also responsible for the treatment of non-offenders. There are only two high-security psychiatric facilities, which solely hold offenders. These were exclusively created for the most dangerous offenders.[67] The execution court has to examine the possibility of release of the offender every six months (article 204 § 1 PCEC[68]). The court decides on the release based on the opinion of

[66] The Act of 6 June 1997 – The Criminal Code („*Kodeks karny*"), hereinafter: PCC.

[67] For the organization of the Polish system of forensic psychiatric facilities see eg K. Postulski, Kierowanie do wykonania środków zabezpieczających, in L. K. Paprzycki (Eds.) System Prawa Karnego, Środki zabezpieczające: C.H. Beck (2015), pp. 402–405.

[68] The Act of 6 June 1997 – The Criminal Executive Code („*Kodeks karny wykonawczy*"), hereinafter: PCEC.

psychiatrists and psychologists from the hospital (although it is also possible to consult external experts).

4.4.2 *Sentencing and measures*

The sentencing in Poland is restricted by the minimum and maximum terms provided by Polish criminal law. There are also some general sentencing principles provided in the Criminal Code, such as the proportionality of the punishment. The court has to take into account eg the degree of social harmfulness of the act, protective and educational aims, and legal awareness of the society (article 53 § 1 PCC). A deprivation of liberty is considered as *ultima ratio* (article 58 § 1 PCC).

In case of no criminal responsibility, the court may only apply so-called protective measures, such as the commitment to a forensic psychiatric facility. Protective measures can also be imposed in case of diminished criminal responsibility – eg in combination with an unsuspended prison sentence. For addicts, the court can combine a sanction (eg a prison sentence) with an addiction therapy (articles 93a and 93c PCC).

4.4.3 *Youth*

All measures provided by Polish criminal law may be imposed on persons aged ≥ 17 years (in case of serious offences like murder: ≥ 15 years, article 10 § 1 and 2 PCC). The only exception is that the penalty of deprivation of liberty for life may not be imposed on the perpetrator aged < 18 years while committing a prohibited act (article 54 § 2 PCC). Juveniles < 15 years are not subject to criminal liability. Instead of a penalty, the court may impose educational, therapeutic or correctional measures prescribed for juveniles (eg placement in a psychiatric facility).[69]

4.5 *Sweden*

4.5.1 *Competences*

All criminal cases are brought to the criminal courts, not to the civil courts. The criminal courts decide on the sentencing; a decision on criminal responsibility is not needed as all offenders are deemed fully criminally responsible in Sweden (see above).

[69] The Act of 26 October 1982 – The Juvenile Delinquency Act („*Ustawa o post*ępowaniu w sprawach nieletnich"), articles 5, 6 and 12.

The implementation of forensic psychiatric care is carried out by the health service. There is no connection between this system and the criminal justice system. In consequence, there is no further competence of the criminal judge concerning release etc. The detention of mentally ill offenders is – to some extent – controlled by administrative courts, but not by criminal courts. The decision on release is usually taken by the hospital. In serious cases, a special release assessment is carried out by the administrative court on proposal of the hospital.

4.5.2 *Sentencing and measures*

One main characteristic of the Swedish criminal justice system is that all offenders are deemed fully criminally responsible and that mental illnesses etc. are only relevant for the selection of the sanctions/measures (see above). Compulsory forensic care is possible even if there is no causal relation between the mental illness and the crime. If – on the other hand – the mental illness does not exist anymore at the time of the trial, there is no need of psychiatric care. In case of drug or alcohol addiction, imprisonment can be combined with an order to undergo a specific program for addicted prisoners.

Regarding the sentencing, the steering principles are proportionality (assessed by the seriousness, the damage, the danger, and the motives of the crime), equivalence and humanity. Recidivism may increase the final sentence under certain circumstances. Imprisonment is seen as ultima ratio, especially if the sentence would be less than one year.

4.5.3 *Youth*

For offenders aged between 15 and 20 years, the maximum length of the deprivation of liberty is 14 years, life imprisonment is not applicable, and the sanction is reduced by 20–80%. Offenders between 15–17 years are usually not sentenced to an unsuspended prison sentence, but to special care for youngsters.

In minor cases, the public prosecutor may decide on ''penalty warning'' (Swedish: straffvarning). This is possible for young offenders aged 15–17. If the young offender participated in a mediation process (offender-victim meeting), the possibility to be ''warned'' instead of regular prosecution is higher. The warning may be issued repeatedly. New sanctions are gradually introduced, such a young offenders community service (Swedish: ungdomstjänst; chap. 32 section 3 PC) and surveillance of young offenders (Swedish:

ungdomsövervakning; chap. 32 section 3 a PC; in force from the 1st January 2021).

V DEALING WITH DANGEROUS OFFENDERS IN EUROPEAN COUNTRIES

Each of the following paragraphs (5.1, 5.2, 5.3 and 5.4) will integrate the corresponding case(s) as examples for these different types of dangerousness. In this way, the case(s) can serve as an introduction that will lead to explaining the particularities of each criminal justice system in detail.

5.1 *Dangerousness because of (major) mental illness*

This situation refers to an offender, who suffers from a (major) mental illness, eg in the following **case 1: "An adult person has committed intentional homicide suffering from schizophrenia executing a "divine" order."**

5.1.1 *England and Wales*

In England and Wales, the offender **in case 1** is most likely to be given a sentence of life imprisonment, which is mandatory in murder cases.[70] But he will probably be sentenced to serve this in a secure psychiatric hospital (for treatment) to be released, or moved back to prison, only when it is deemed safe to do so, as far as public protection is concerned. His sentence will be executed either in a secure hospital within the prison system or in a psychiatric hospital in the National Health Service (NHS) The detention in both hospitals is usually indeterminate. There are neither prerequisites for this in terms of former offences, the offence at stake nor expected offences in fu-

[70] Only in very few cases, there is a verdict "not guilty by reason of insanity". This can happen if an offender does not know what he was doing or knew what he was doing but did not know it was wrong. For this verdict, there is no specific set of diseases, which the offender has to suffer from. See *United Kingdom House of Lords Decisions. "DANIEL M'NAGHTEN'S CASE. May 26, June 19, 1843". British and Irish Legal Information Institute*. For this assessment, the prosecution and the defense have their own medical and legal experts and the jury often has to be assisted in interpretation by the judge. There is also the concept of diminished criminal responsibility (in cases of psychiatric illnesses or personality disorders), a partial defense that can reduce the offence from murder to manslaughter, avoiding the mandatory life sentence and allowing the judge to impose a hospital order under sections 37/41 of the Mental Health Act 1963.

ture; only an assessment of the risk to the public. Tribunals reporting to the Ministry of Justice carry out the decision if it is safe to release the offender, but the court and the hospital can make recommendations. The prerequisites of release are the following: A full risk assessment must be undertaken and the offender must be deemed co-operative with the authorities (an example of non-cooperation is when the offender still refuses to acknowledge guilt after many years). After release from a secure hospital within the prison system or a psychiatric hospital in the NHS, certain conditions are usually imposed. For dangerous offenders this could involve a license of 8 years after release; in case of life sentences (eg murderers as in case 1), the license is indeterminate. Offenders under such license can be sent to prison at any time if a court finds they have breached conditions of release: eg if a convicted pedophile approaches a school when forbidden to do so. Usually, the probation services carry out the supervision after release, but there will also be close collaboration with the hospital from which the offender was released. Since the recent privatization of much of the probation service, most of the more serious offenders are expected to be dealt with by the smaller National Probation Service rather than the privatized services. The end of supervision depends on the most recent risk assessment, which will also take into account the original offence.[71]

5.1.2 *Germany*

In Germany, the applicable sanction **in case 1** depends on the question to which degree the criminal court based on an expert´s opinion[72] finds the person not criminally responsible (or only severely diminished criminally responsible) for the committed homicide and how dangerous for future re-offending. If considered not responsible (as the example indicates) but dangerous (in terms of expected considerable offences), the offender has to be acquitted and the offender is committed to a forensic psychiatric hospital. For this commitment, there are no prerequisites in terms of former offences. Concerning the offence at stake, it has regularly to be of considerable nature; if not, special circumstances have to indicate a risk of considerable re-offending. The expected offences in future have to be considered

[71] More details are given on the prosecution service web site at https://www.cps.gov.uk/legal-guidance/sentencing-dangerous-offenders

[72] An expert´s opinion is usually requested by the court, is it obligatory if the commitment to a forensic psychiatric hospital (or a custodial addiction treatment order (see §5.3.2) or an incapacitation order (see §5.4.2) are in question.

causing considerable psychic or bodily damage or danger for the victim or serious economic damage.

The offender is sent to a forensic psychiatric facility run by the health administration. The execution is controlled by special criminal courts, which decide on a final release based on an expert opinion. The execution court has to examine the possibilities of release every year. The prerequisite for release is that there is no or a considerably reduced risk of re-offending (in terms of serious offences). If the expected offences are considered causing serious psychological or bodily damage for victims (as probably in case 1), the commitment to a forensic psychiatric hospital is indeterminate; for other expected offences it is restricted to six or ten years respectively. The average stay takes about 8 years with a broad range.[73]

After release, a special supervision by probation officers and forensic ''ambulances'' (outpatient centres for therapeutic treatments) takes place. This implies assistance and control, medical and psychotherapeutic aftercare and – as an option – electronic monitoring (especially in terms of sexual offenders). The regular length of this supervision is 5 years, in serious cases or because of a strong likelihood of re-offending, the court can prolong this or impose indeterminate supervision.

5.1.3 *Netherlands*

In the Netherlands, the applicable sanction **in case 1** depends on the degree of criminal responsibility assessed by the advising behavioural experts and the court as well as on the degree of dangerousness. If the offender is considered not criminally responsible (as the example suggests) and dangerous to the extent that can be controlled within general psychiatry, he will be committed by the criminal court to a psychiatric hospital (art. 2.3 FCA). If more security is needed, easily to be assessed in the case of homicide, or if the criminal responsibility is deemed (severely) diminished, a TBS-order is the designated alternative (for information on TBS-orders see paragraph 4.3.2).

General psychiatric hospitals are run by the national mental health system, forensic hospitals may be paid for by the Ministry of Justice and Safety. For the commitment to a psychiatric hospital, the offender has to be deemed dangerous (''serious detriment to self, others or the general safety of persons and goods'') due to a mental illness. However, there are no specific prerequisites for the commitment to a

[73] All detainees in a forensic psychiatric hospital, not distinguishing between no or diminished criminal responsibility; see: BT-Drs. 18/7244, p. 32.

psychiatric hospital in terms of former offences or the offence at stake (seriousness, specific offence types, etc.) and no further prerequisites in terms of expected offences in the future (only ''serious detriment'').

The commitment to a psychiatric hospital can be ordered by the criminal court for the maximum of six months, but the civil court can prolong it afterwards (if the hospital wants to continue the treatment after the fixed term, the civil court has to decide on its request). Therefore, in theory, the detention can be indeterminate, but in practice usually isn't. The offender is released if there is no longer a disorder or dangerousness, if less intrusive means are sufficient or treatment is no longer deemed effective. There is no supervision after the release from a forensic psychiatric hospital other than dependant on the personal initiative of hospital staff.[74]

5.1.4 *Poland*

In case of no criminal responsibility because of insanity based on experts´ opinion[75], the offender cannot be convicted and punished in Poland, only so-called ''protective measures'' may be imposed: In the case of insanity i.e. electronic monitoring, therapy, commitment to a forensic psychiatric hospital and specific types of prohibitions (articles 93a, 93c point 1, 99 PCC). If the offender in case 1 was not criminally responsible (as the example suggests), criminal proceedings will be discontinued and he will not be sentenced to a punishment (article 17 § 3 PCPC[76]). Instead, the criminal court will commit him to a forensic psychiatric hospital as a protective measure, if the following prerequisites are met: the offence at stake is of substantial social harmfulness and related to the mental illness, there is a high risk of reoffending with such an offence in future, and imposing a

[74] See P. *Schaftenaar*, *Contact gezocht, Relationeel werken en het alledaagse als werkzame principes in de klinische forensische zorg* (diss.), [Aiming at contact. Relational caring and the everyday interaction as effective principles in clinical forensic care]. *Amsterdam: SWP* (2018).

[75] Insane offenders are defined as an offender ''*incapable of either recognizing the significance of his act, or controlling his conduct due to a mental illness, mental impairment or other disturbance of mental functions*'' while committing an act - article 31 § 1 PCC. Translation of the Polish Criminal Code provided by: A. Wojtaszczyk, W. Wróbel, W. Zontek, LEX: electronical version. The opinion of two psychiatrists is obligatory, as well as a psychologist's opinion. The experts should be consulted as soon as doubts arise about the perpetrator's state of mental health.

[76] The Act of 6 June 1997 – The Criminal Procedure Code („*Kodeks post*ępowania karnego''), hereinafter: PCPC.

protective measure is necessary to prevent reoffending (as other measures are insufficient, articles 93g § 1, 93b § 1 PCC).

Forensic psychiatric hospitals are run by the health system. The commitment to such a hospital is indeterminate (article 93d § 1 PCC); the execution court will examine the possibility of release every six months (article 204 § 1 PCEC). It decides on the release of the detainee, based on the opinion of psychiatrists and psychologists from the hospital (it is also possible to consult external experts, article 204 § 1 PCEC). The prerequisites for a release are that there is no high risk of reoffending (in terms of crimes with substantial social harmfulness), eg because the mental health condition has improved as a result of treatment.[77]

There is no supervision after release from a forensic psychiatric hospital, but in suitable cases, the execution court may replace the commitment to a forensic psychiatric hospital by indeterminate electronic monitoring or outpatient therapy as another – more lenient – protective measure (article 93d § 2 PCC). The execution court examines the ending of this measure every 12 months (article 204 § 4 PCEC).

5.1.5 *Sweden*

In Sweden, all offenders are seen as fully criminally responsible. Thus, the court does not address the question of criminal responsibility; it only decides, which sanction will be imposed – if any. If the offender committed the crime under the influence of a serious mental illness (assessed by an expert), it could be a reason for the court to impose the sanction "*commitment to a forensic psychiatric hospital*" (Chap. 31 section 3 PC). There are no specific prerequisites for this in terms of former offences, the offence at stake or expected offences in future, because it is only motivated by the need of treatment, not by dangerousness.

The mental hospitals are run by the health system. The conditions of treatment are fully regulated by the Act on forensic psychiatric care, the Law nr. 1991:1129. According to this law, a forensic psychiatric treatment can go on for 4 up to 6 months. However, prolongation is possible and there is no maximum length (prolongation has to be examined at certain intervals). The hospital usually decides on the release. As an exception, the administrative court decides

[77] See M. Pyrcak-Górowska, *Detencja psychiatryczna orzekana jako środek zabezpieczają*cy w świetle badań aktowych, Krakowski Instytut Prawa Karnego Fundacja (2017), pp. 203–206.

about the release (on the proposal of the hospital) if the offender committed serious crimes (as in case 1) and a ''special release inquiry'' was imposed. The state of health of the detainee is decisive for a release, in cases of a ''special release inquiry'' (probably in case 1), it also depends on the risk of recidivism.

There is usually supervision after release from a forensic psychiatric hospital (carried out by the hospital), because the treatment may be changed from institutional (closed) to outpatient care and vice versa. The prerequisite of ending supervision is a good state of the health of the offender.

5.1.6 *Summary*

In the Netherlands, Germany and Poland, dangerous offenders having committed an offence fully influenced by a major mental illness are not seen as criminally responsible and cannot be convicted. In England and Wales, in contrast, this is only exceptionally the case and in Sweden, all offenders are deemed fully criminally responsible. Nevertheless, the applied measure is rather similar: In all countries, the offender in case 1 is most probably sent to a (forensic) psychiatric hospital for an indeterminate (or at least indeterminately prolongable) period of time; in the Netherlands, considering the offence of homicide, most probably under a TBS-order. In England and Wales and Sweden, there are no specific requirements for this in terms of former offences, the offence at stake or expected offences in future. In Germany, Poland and the Netherlands, there are certain prerequisites: In Germany, the offences at stake has to be of ''considerable nature'' and the expected offences in future have to be considered causing considerable mental or bodily damage or danger for the victim or serious economic damage. In Poland, the offence at stake and the expected offences have to be of ''substantial social harmfulness''. In the Netherlands, for a TBS-order it is necessary that the offence has a maximum penalty of four years or more (or is a specifically mentioned offence).[78]

Concerning the decision on release from the forensic psychiatric hospital, the risk of reoffending is a crucial aspect in all countries. In Sweden, however, this is only true if a special release inquiry has been imposed (in case of serious offences as in case 1). Supervision after release from a forensic psychiatric hospital is obligatory in Germany,

[78] For a prolongation of the order beyond five years the offence had to be ''directed against or caused danger to the inviolability of the body of one or more persons''.

it is optional in England and Wales ("licence"). In Sweden, a period of supervision after release is common as the custodial treatment can be changed to outpatient care and vice versa; in Poland, supervision after release is not usual, there is only a possibility to replace the hospital order by electronic monitoring as a more lenient measure in suitable cases. In the Netherlands there is no supervision after release from a psychiatric hospital, which can be explained by the fact that the more dangerous non-responsible offenders go to a TBS-clinic, after which supervision is possible (see §5.2.3).

5.2 *Dangerousness because of personality disorders*

This situation refers to an offender, who suffers from (serious) personality disorders, such as in **case 2: "An adult male person beats up heavily his wife for the second time on the basis of a severe anti-social personality disorder."**

5.2.1 *England and Wales*

In England and Wales, the concept of diminished criminal responsibility (applicable to psychiatric illnesses as well as to personality disorders) is only a partial defense that can reduce the offence from murder to manslaughter[79] (see also §5.1.1). It would not apply to case 2 unless the wife dies as a result of the beating(s). The offender **in case 2** is likely to be sentenced to imprisonment and to undergo treatment in a prison or in a psychiatric hospital, involving medication, Cognitive Behavioral Treatment (CBT) or other forms of anger management. Because of the repeat offending, the sentence is likely to be higher than for a first time offender. The commitment to a psychiatric hospital order in such cases can be indeterminate or of restricted length. For the commitment to a psychiatric hospital, there are no specific prerequisites, neither in terms of former offences, nor the offence at stake, nor expected offences in future. Instead, an individual risk assessment will be carried out (based *inter alia* on medical advice), which also depends on the offender´s history including the offence for which sentenced.

The measures imposed and the order of their execution depend on the offender´s needs and the public risk. The commitment to a psychiatric hospital can be executed in a psychiatric facility run either by the criminal justice system or by the health system, depending on

[79] For the detailed legal position see the prosecution service web site at https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter

availability and risk assessment. There is no specific rule if the time spent in the mental hospital will be deducted from a parallel prison sentence. The Ministry of Justice decides on the release of the detainee, as advised by medical and other experts, usually through a series of tribunals.[80] The prerequisite for release from indeterminate detention is that the public risk has become reduced sufficiently. There is usually a period of supervision of several years after release, depending on the original sentence. This supervision is carried out by the Probation Services in collaboration with medical services.[81]

5.2.2 *Germany*

In Germany, a personality disorder of a certain degree of seriousness may lead to a diminished responsibility. Yet, in practice especially persons with an anti-social personality disorder are mostly deemed fully responsible for their acts.[82] In cases of repeat assault, such as **in case 2**, a stable deficient attitude is more probable to be indicated than for a first time offender. Therefore, the assessment of diminished criminal responsibility[83] and of dangerousness is not unlikely. If diminished criminal responsibility is given[84] and the offender is deemed dangerous, the consequences are both – a (diminished) prison sentence and the commitment to a forensic psychiatric hospital. There are no requirements for this in terms of former offences. Concerning the offence at stake, the offence has usually (see above 5.1.2) to be of considerable nature. The expected offences have to be deemed causing considerable psychic or bodily damage or danger for the victim or serious economic damage.

[80] For details see https://www.mind.org.uk/information-support/legal-rights/leaving-hospital/mental-health-tribunal/

[81] For details see https://hub.unlock.org.uk/knowledgebase/supervision-in-the-community-after-release-from-prison-and-on-probation-or-community-order/

[82] According to the Federal Criminal Court (e.g. BGH Beschluss vom 19.12.2006 – 4 StR 530/06) an anti-social personality disorder per se is not sufficient for applying the legal prerequisite of "schwere andere seelische Abartigkeit" (any other serious mental abnormality); but only further circumstances, especially a comorbidity can lead to a diminished responsibility (see Konrad/Rasch, Foreensische Psychiatrie, 4. Auflage 2014, p. 171 ff, 381 f.

[83] An expert´s opinion is only needed if a mental hospital order (or a custodial addiction treatment order (see §5.3.2) or an incapacitation order (see §5.4.2) is in question.

[84] If full criminal responsibility is given, there will be only a "normal" punishment (likely a prison sentence).

Regularly, the offender is first sent to a forensic psychiatric facility, run by the health system. The mental hospital order is indeterminate if the expected offences are considered to cause serious psychic or bodily damage for victims; for others it is restricted to six or ten years respectively. The average stay takes about 8 years with a broad range.[85] The execution court has to examine the possibilities of release every year. The court decides on the release of the detainee (based on an expert opinion), which requires that there is no or considerably reduced risk of re-offending (concerning serious offences). The term served in the forensic psychiatric hospital is deducted from the prison term (up to two third of the prison sentence; the remainder of one-third can be suspended). After release, a special supervision usually takes place (regularly for 5 years); the same rules apply as in §5.1.2.

5.2.3 *Netherlands*

In the Netherlands, a personality disorder can lead to diminished criminal responsibility.[86] If this is the case and the offender is also considered dangerous, a TBS-order is possible (article 37a DCC). Therefore, **in case 2** it is most likely that such a TBS-order is imposed on the offender – in general in combination with a prison sentence for the part that the offender is held responsible. For most TBS-patients (89%), this prison sentence is shorter than 6 years,[87] but it can be up to a maximum of 30 years. Depending on the level of security needed, the TBS-order will be imposed unconditionally or conditionally. For imposing such a TBS-order, an assessment report of at least two behavioural experts, one of them being a psychiatrist, who have examined the defendant, is required.

The unconditional TBS-order is carried out in special TBS-clinics (Forensic Psychiatric Clinic, ''FPC''), governed by the criminal justice system. It can only be imposed for offences with a legal penalty of at least four years imprisonment or specifically mentioned offences,

[85] All detainees in a forensic psychiatric hospital, not distinguishing between no or diminished criminal responsibility; see: BT-Drs. 18/7244, p. 32.

[86] The term diminished responsibility is not mentioned in law, but plays an important role in (legal) practice. See M.J.F. van der Wolf & H.J.C. van Marle, Legal approaches to criminal responsibility of mentally disordered offenders in Europe, in K. Goethals (ed.), *Forensic Psychiatry and Psychology in Europe. A Cross-Border Study Guide, Basel: Springer International Publishing* (2018), pp. 31–44.

[87] M.H. Nagtegaal, G. Meynen & K. Goethals, De tbs-maatregel: kosten en baten in perspectief; The TBS order: costs and benefits in perspective. *Tijdschrift voor Psychiatrie* (2016), 58 (10), pp. 739–745.

previous convictions (and the personality) ''are taken into account''. The offender has to be seen as ''dangerous'' according to Article 37.1 DCC (see above), but there are no specific prerequisites in terms of expected offences in future. The order of execution is not exactly described in law, but in practice, the convicted person is first sent to prison, and generally after 2/3rd of his prison sentence the TBS-order is carried out. The first term of the TBS-order is two years. After that, only upon the request of the public prosecutor, the TBS-order may be prolonged by one or two years (the average intramural phase of the unconditional TBS-order takes about 8 years[88]). In case of unconditional TBS-orders for violent offenders, there is no maximum term, the order can be prolonged indeterminately (each time by one or two years).[89] The maximum term for a conditional TBS-order is 9 years, but it can be changed into an unconditional TBS-order in the meantime, when the conditions imposed are violated or when the person becomes too much of a danger to others (article 38c DCC).[90] The offender is released from the FPC, if he is no longer deemed dangerous. The sentencing court also decides on the prolongation and termination of the TBS-order but only upon the request of the public prosecutor. If the public prosecutor does not apply for prolongation, the TBS-order ends by default. For prolongation, the sentencing court is advised by the clinicians treating the patient. When the moment of prolonging the order for more than 4 years arrives, also an external multidisciplinary advice is required.

After release from an FPC, most TBS-patients have to go through a year of conditional release upon a prolongation request by the public prosecutor. For a long time, the maximum duration of the conditional release was 4 years, however, in 2010 this was increased to 9 years[91] and as of 2017, it has become an indeterminate order.[92]

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[88] Dutch Custodial Institutions Agency, DJI in getal 2013–2017 [Dutch Custodial Services in numbers, 2013–2017]. *The Hague, The Netherlands: Dutch Custodial Institutions Agency* (2018).

[89] For ''non-violent'' offenders, the maximum term is 4 years (article 38a #1 DCC).

[90] The prevalence rate of conditional TBS-orders that are converted into unconditional TBS-orders is 26.3% (*Nagtegaal, Boonmann & Stuurman*, 2017); also see: M.H. Nagtegaal & C.Boonmann, ; Conditional release of forensic psychiatric patients consistent with or contrary to behavioral experts' recommendations in the Netherlands: Prevalence rates, patient characteristics and recidivism after discharge from conditional release. *Behavioral Sciences and the Law* (2016), 34, pp. 257–277.

[91] Staatscourant ''Alterations Conditional TBS-order and Conditional Release, nr. 14627.'' *Dutch Government: The Hague* (2010).

In addition, a special supervision measure after release from an FPC or from prison (in certain cases), the so-called ''supervision order'' will also be introduced in the legal system (see §5.4.3 for details).

5.2.4 *Poland*

In Poland, the concept of diminished criminal responsibility exists, its assessment is based on experts´ opinion.[93] It can be caused by ''*mental illnesses, mental impairments or other disturbances of mental functions''* – article 31 § 2 PCC (eg age-related diseases like Alzheimer's or the result of diseases like cancer or diabetes). Personality disorders may lead to a diminished criminal responsibility as an ''other disturbance of mental functions'', too. The criminal responsibility is diminished, if the offender´s ''*capability to recognize the significance of an act or to control the conduct while committing a crime*'' was significantly lessened (article 31 § 2 PCC). In practice, however, offenders with a severe anti-social personality disorder will rather exceptionally be deemed diminished criminally responsible; they will usually be seen as fully criminally responsible and sentenced to a ''normal'' punishment.[94] The offender **in case 2** is most likely sentenced to an unsuspended prison sentence; a suspended prison sentence is rather not possible due to the reoffending (article 69 § 1 PCC). The exact sanction depends ia on the degree of harm caused to the victim. In cases of personality disorders, irrespective of whether they do or do not lead to diminished responsibility, the court cannot commit the offender to a forensic psychiatric hospital. But other protective measures – indeterminate electronic monitoring or indeterminate outpatient therapy – are possible, if the offender is sentenced to an unsuspended prison sentence and the following prerequisites are met: The offender has committed an intentional crime against life and health, liberty, sexual freedom, decency or against family and guardianship ''*in relation to his personality disorder*

[92] Staatscourant Alterations to the Conditional TBS-order and Conditional Release, nr. 68524. *Dutch Government: The Hague* (2016). The average time spent in conditional release is currently 684 days.

[93] The opinion of two psychiatrists is obligatory, in practice there is almost always also a psychologist's opinion.

[94] See A. Golonka, Zaburzenia osobowości i ich wpyw na ocenę poczytalności sprawcy przestępstwa, *Zeszyty Prawnicze* (2013 no 13.3), pp. 107–126, D. Krakowiak, Psychopatia, socjopatia i charakteropatia a odpowiedzialność karna, *Prokuratura i Prawo* (2019 no 3), pp. 5–28. In case of significantly diminished criminal responsibility, the court may apply an extraordinary mitigation of the penalty, article 31 § 2 PCC.

of such character or intensity that there is at least a high risk'' of reoffending ''*involving the use of force or the threat of its use*'' (article 93c point 4 PCC) and that a protective measure is necessary(article 93b § 1 PCC). It deserves to be noted that such a protective measure can be imposed in case 2 regardless if the offender is deemed fully or diminished criminally responsible.

If a protective measure is imposed, the penalty of the deprivation of liberty will be executed first. Then, no sooner than 6 months ahead of the assumed conditional release or completion of the prison term, the execution court will determine whether the execution of the protective measure is still necessary (in order to determine that necessity, it will hear a psychologist and a psychiatrist, articles 93d § 3, article 199b § 2 PCEC). If so, the protective measure will be executed after the offender is released from prison (article 93d § 5 PCC). The execution court will examine the possibility of ending the protective measure every 12 months (article 204 § 4 PCEC).

5.2.5 *Sweden*

In Sweden, all offenders are seen as fully criminally responsible (see above, §5.1.5); there is neither a concept of ''no criminal responsibility'' nor of ''diminished criminal responsibility''. The seriousness of the mental illness may only have consequences on the sentencing. The offender **in case 2** is most likely to be sentenced to imprisonment; probation is not probable because of the re-offending. The fact of recidivism may lead to a longer prison sentence than for first time offenders (Chap. 26 section 3 PC). If a person is sentenced to a prison term, but needs special psychiatric care, he can be sent to a forensic psychiatric hospital (or to a closed psychiatric hospital) and later may be moved back to prison. In this case, the sentence is not to forensic medical care (as in case 1), but to imprisonment, the medical care is only given in the frame of the execution of the sentencing to imprisonment. The length of the medical care is the same as for mentally disturbed persons committed to a forensic psychiatric hospital (see above, 5.1.5). Apart from this ''compulsory'' psychiatric care for prisoners described above, it is also possible that a prisoner undergoes treatment in a psychiatric hospital voluntarily. Neither the compulsory nor the voluntary psychiatric care suspend the execution of the imprisonment. If the prisoner is healthy, he is sent back to prison. If the time of imprisonment expires during the psychiatric care, the offender stays nevertheless in the psychiatric facility

according to the Act on Compulsory Psychiatric Care. After release, follow-up outpatient treatments usually take place.

5.2.6 *Summary*

The concept of diminished criminal responsibility does not exist in Sweden, where all offenders are deemed fully criminally responsible. In contrast, it is applied in Germany, in the Netherlands and in Poland (in England and Wales, diminished criminal responsibility is only a partial defense that can reduce the offence from murder to manslaughter, not applicable in other cases). Serious personality disorders can be a reason for a diminished criminal responsibility in these countries, in Poland and Germany, however, this is only exceptionally the case in practice. As a common ground, it can be observed that the sanctioning of case 2 includes an unsuspended prison sentence in all countries. The possibility of imposing additional sanctions or measures in this case is, however, very diverse: In England and Wales and in Germany, the (diminished) unsuspended prison sentence is combined with a kind of treatment in a forensic psychiatric facility, which is executed in Germany usually *before* the prison sentence (in England and Wales the order of execution depends on the offender´s needs and the public risk). In the Netherlands, the unconditional prison sentence is followed by a TBS-order, executed *after* the prison sentence. In Poland, the commitment to a forensic psychiatric hospital is not possible for offenders with personality disorders. Instead, the unsuspended prison sentence can be combined with indeterminate electronic monitoring or indeterminate outpatient therapy, executed *after* the prison sentence (if they are still necessary). In Sweden, therapy is in case 2 only possible in the frame of the execution of imprisonment if the prisoner needs special psychiatric care.

In the Netherlands, there is a mandatory year of conditional release after release from an FPC as long as the public prosecutor requests prolongation of the order, which can be prolonged indefinitely, and further supervision measures have recently been introduced in Dutch law. Supervision after release is also usual in England and Wales and in Germany in cases as No. 2.

5.3 *Dangerousness because of alcohol/drug addiction*

This situation refers to an offender, who suffers from alcohol and/or drug addiction, such as in **case 3: "An adult male person who commits**

his third violent robbery under the influence of his severe heroin addiction."

5.3.1 *England and Wales*

There is no clear concept of drug/alcohol addiction, but addiction to heroin (or any other drug) is no defense to the charge of robbery. The offender **in case 3** would be sentenced heavily and undergo heroin treatment such as methadone replacement therapy in prison. Because of his previous convictions, the prison sentence is likely to be longer than for a first time offender.[95] Prison and therapy will not be seen as separate sanctions; instead, the treatment will be given in prison, usually in a special wing of the prison reserved for addicts. There are no prerequisites for the addiction treatment order in terms of former offences, the offence at stake or expected offences in future. The treatment order is usually time limited, the length could range for a few weeks to a year or more, depending on what treatments are available and appropriate. But the offender is only released from prison when the term of his unsuspended prison sentence is completed. If therapy fails, eg because the patient is not willing or still consuming, he can be taken back to court for a review of his sentence.

After release, serious offenders can be supervised by the National Probation Service, less serious offenders by privatized services. Such a special supervision after release is, however, not usual in cases of drug/alcohol addiction.

5.3.2 *Germany*

Generally, the effect of drug/alcohol addiction is not sufficient for a diminished criminal responsibility, but in combination with other forms of personality or psychic disorders, it can lead to this assessment. **In case 3,** the assessment of diminished criminal responsibility and of dangerousness is not unlikely because the repeat robbery indicates a rather stable addiction (it is more likely than for first time offenders). In both cases – diminished or full criminal responsibility – a prison sentence has to be imposed. The difference is that in case of diminished criminal responsibility, the prison sentence may be mitigated.

Independently from the question of criminal responsibility, a custodial addiction treatment order can be imposed in addition to the

[95] If the offence in case 3 was less severe, treatment in the community is also possible, usually combined with a conditional prison sentence.

prison sentence in case 3.[96] The prerequisites for such an addiction treatment order are that, on the one hand, the offence is linked to the addiction and, on the other, the addiction leads to a certain risk of re-offending (offences of considerable nature). There are no prerequisites in terms of former offences or the offence at stake.

The addiction treatment order is regularly executed first, if the parallel prison sentence is no longer than 3 years. The addiction treatment is carried out in facilities run by the health system. Its duration is ultimately 2 years, but can be prolonged when a parallel prison sentence is valid. The average stay takes less than 2 years.[97] The execution court has to examine the possibilities of release every 6 months (its assessment is based on an expert opinion). The measure can be suspended previously when no further danger of considerable reoffending exists. It has to be ended when the therapy appears to have no chance of succeeding, eg because the patient is not willing or still consuming. The prior time spent in the addiction treatment facility is deducted from the prison sentence (up to two third of the prison sentence, the remainder of one third can be suspended).

Regularly, there is a special supervision after release (regularly for 5 years); according to the same rules as for release from a forensic psychiatric hospital (see above, ch. 5.1.2).

5.3.3 *Netherlands*

There is not a clear concept of alcohol/drug addiction in the DCC. An addiction will generally only be associated with diminished responsibility if an additional mental disorder like a personality disorder is assessed. If a person is of sound mind, he is expected to be aware of possible behavioural changes when taking alcohol or drugs. Depending on the level of dangerousness, treatment will take place

[96] In case of diminished criminal responsibility in case 3, a mental hospital order could be imposed alternatively, if the principal problem is not seen in the addiction but in another personality disorder. At the same time, the prerequisites of an incapacitation order are met in case 3, if there are two previous prison sentences and a minimum prison term of 2 years, the commission of a serious offence (here: robbery) and the risk of serious re-offending (for more information on the incapacitation order see §5.4.2). However, there is a general rule that the milder consequence or measure has to be preferred – that is the custodial drug addiction treatment order.

[97] See: A. Dessecker, ''Unterbringung nach § 64 StGB in kriminologischer Sicht''. *Recht und Psychiatrie* (2004), p. 195 f.; H. Satzger, W. Schluckebier & G. Widmaier (Eds.); ''Strafgesetzbuch''. Kommentar, 3. edition. *Köln: Carl Heymanns Verlag* (2016), § 64 n. 2.. The average duration of *successful* treatments is, however, longer (for references see: MK/*van Gammeren* (2016): § 64 n. 9 ff.).

either within prison, a forensic facility, or (through a condition) in a psychiatric hospital or rehab clinic. Because of the repeat offending in case 3, the offender is more likely to be deemed dangerous and diminished responsible than first time offenders. In this case, a TBS-order in combination with a prison sentence seems to be the most probable sentence. Depending on the level of security needed, the order is imposed conditionally or unconditionally. About 70% of TBS-patients have (a history of) substance abuse. For details on the TBS-order see ch. 5.2.3.

If the offences in case 3 were not three robberies, but a couple of less severe offences (eg 5 thefts), another measure is likely to be imposed instead, because the TBS-order is restricted to severe offences. The former "order for addicts" was changed into an "order for repeat offenders" (ISD-order, article 38m DCC), which in practice includes many persons with substance abuse problems (81.6%).[98] The repeat offenders are admitted to an Institution for Repeat Offenders, usually parts of prisons. This order for repeat offenders can also be imposed conditionally. It cannot be combined with a prison sentence, as it is an alternative to a prison sentence. The prerequisites for imposing an order for repeat offenders are the following: in the previous five years three irrevocable convictions to sentences of deprivation or restriction of liberty are required. The offence at stake should be committed after those and be serious enough for remand. It should be likely that a similar offence will be committed in the future. In the majority of the cases, the order is imposed for property offences.

The order for repeat-offenders can be imposed for a minimum of one and a maximum of two years. The court may decide in an interim decision that the offender can be released in case of reduced risk for recidivism, or if no treatment is possible or there is no chance of improvement. In all other cases, the order ends by default at the maximum date. If therapy fails because the patient is not willing or still consuming substances, the therapeutic efforts could be ended while the order continues. There is an extramural phase within the sentenced timeframe. After this, there is no option for supervision.

[98] N. Tollenaar & A.M. Van der Laan, "Effecten van de ISD-maatregel". [Results from the ISD-measure], *The Hague, the Netherlands: Research and Documentation Centre* (2012), Factsheet 2012-1.

5.3.4 *Poland*

A severe heroin addiction[99] as **in case 3** may lead to a diminished criminal responsibility, if the offender´s capability to recognize the significance of an act or to control the conduct was significantly lessened when committing the crime. In practice, a diminished criminal responsibility is exceptional for addicted offenders. Therefore, the offender in case 3 is most likely to be deemed fully criminally responsible and will be sentenced to an unsuspended prison sentence.[100] According to The Drug Abuse Prevention Act, the court can impose (on offenders addicted to narcotic or psychotropic substances) an outpatient addiction therapy – article 71(1) or the commitment to an addiction therapy facility as a protective measure additionally to the prison sentence – article 71(3), if the prerequisites are met. No specific offence types in terms of former offences, the offence at stake, or expected offences in future are required by the legal provisions. The only condition is that the committed offence was in relation to the offender's addiction. Both measures can be imposed in case 3 irrespective if the addicted offender is deemed fully or diminished criminally responsible. The addiction therapy is an ambulant measure, executed in an outpatient facility, the commitment to an addiction treatment facility is a custodial measure carried

[99] In the Polish Criminal Code, there is no definition of drug/alcohol addiction, but The Act of 29 July 2005 –The Drug Abuse Prevention *Act (''Ustawa o przeciwdziaaniu narkomanii'')* provides several definitions, eg of addiction to narcotic or psychotropic substances or so called ''legal highs''. This is defined in article 4 point 29 as mental or somatic phenomena resulting from the actions of narcotic or psychotropic substances or so called ''legal highs'' on the human body, characterized by a change in behavior or other psychophysical reactions and the need to use such substances continuously or intermittently in order to experience their impact on the psyche or to avoid withdrawal symptoms.

[100] In case of less severe crimes (ie not applicable in case 3), the prosecutor or the court may suspend the proceedings if the offender undergoes therapy or rehabilitation. After the therapy, the prosecutor or the court decides whether to continue or to discontinue conditionally the criminal proceedings, taking into account the results of the therapy or rehabilitation – article 72 of the Drug Abuse Prevention Act.

out in institutions supposed to be run by the health system.[101] The differences between these two measures for addicts are the following:

In case the offender is sentenced to a suspended prison sentence, an outpatient addiction therapy has to be imposed. Addiction therapy is imposed for an indeterminate time, but it cannot last longer than the test period. It is combined with the supervision of the person, carried out by the institution or association designated by the court (article 71(1) of The Drug Prevention Act). If the offender evades the addiction therapy or breaches the rules of the addiction therapy facility, the court may order the execution of the prison sentence (article 71(2) of The Drug Prevention Act). After the lapse of the test period, the addiction therapy ends. It can also be finished earlier if the results of treatment and rehabilitation are positive (article 74 § 2 PCC). There is no supervision after the ending of the outpatient addiction treatment and lapse of the test period.

In contrast, in case the offender is sentenced to an unsuspended prison sentence, the commitment to an addiction therapy facility may be imposed.[102] If the offender in case 3 is committed to an addiction therapy facility, this custodial protective measure will be executed *before* the prison sentence (article 71(3) of The Drug Prevention Act). The duration of the measure is not determined in the verdict, but the maximum stay in such an addiction treatment facility is 2 years.[103] The execution court decides on the release from the addiction therapy facility on the basis of the treatment´s results (the opinion of a psychiologist is required and psychiatrist and/or addiction specialist may be required, article 199b PCEC). After the end of the therapy, the execution court will decide whether the prison sentence will be

[101] In practice such institutions were not established and commitment to a custodial drug addiction therapy facility is not executed – see K. Krajewski, Środki zabezpieczające o charakterze leczniczym stosowane wobec sprawców przestępstw uzależnionych od środków odurzających I substancji psychotropowych na podstawie przepisów ustawy o przeciwdziaaniu narkomanii, in L. K. Paprzycki (Eds.) System Prawa Karnego, Środki zabezpieczające: C.H. Beck (2015), pp. 402–405.

[102] In case the commitment to a custodial addiction therapy is not imposed, the offender addicted to drugs may undergo an addiction therapy in the therapeutic ward of a prison during execution of the prison sentence. This addiction therapy is not imposed as a separate protective measure, but it is a special treatment program for addicted prisoners – article 96 § 1 PCEC.

[103] In case therapy fails, eg because the offender is not willing or still consuming, he may be released from the addiction therapy facility and the unsuspended prison sentence will be executed – article 71(4) of The Drug Prevention Act.

executed or not. If the court decides that the prison sentence will be executed, the period spent in the addiction therapy facility will be deducted from the imposed prison term (article 63 § 1 PCC).[104] There is no supervision after release from the addiction treatment facility – even if the prison sentence is not executed.

In case the offender is addicted to alcohol, an addiction therapy or electronic monitoring may be imposed (articles 93a § 1, 93c point 5 PCC). It can be imposed in addition to any sanction – not only in addition to unsuspended prison sentences, but also to a fine, for example. If the outpatient addiction therapy is imposed in combination with an unsuspended prison sentence, as probably in case 3, the prison sentence will be executed first (article 93d § 5 PCC).[105] During execution of the prison sentence, the offender addicted to alcohol may also undergo an addiction therapy in the therapeutic ward of a prison. This addiction therapy is not imposed as a separate protective measure, but it is a special treatment program for addicted prisoners (article 96 § 1 PCEC). Then, no sooner than 6 months ahead of the assumed conditional release or completion of the prison term, the execution court will determine whether the execution of the outpatient addiction therapy imposed as a protective measure is still necessary (in order to determine that necessity, it will hear a psychologist and it may hear a psychiatrist and/or may also hear an addiction specialist, article 93d § 3 PCC, article 199b § 2 PCEC). If so, the protective measure will be executed after the offender is released from prison. Addiction therapy is imposed for an indeterminate time; the execution court will examine the possibility of ending this measure every 12 months (article 204 § 4 PCEC). The prerequisites for a release are positive results of treatment and rehabilitation.[106] There is no supervision after the ending of the outpatient addiction treatment.

[104] If the court decides that the prison sentence will not be executed, there are no further sanctions or measures applied on the offender. For that reason, this may happen rather exceptionally – eg when the results of the therapy were positive or when the therapy in the addiction facility lasted longer than the prison sentence would last, see M. Pyrcak-Górowska, Artyku 71, in W. Górowski, D. Zając (Eds.) Przestępstwa narkotykowe i dopalacze: Krakowski Instytut Prawa Karnego Fundacja (2019), p. 398–399.

[105] If the addiction therapy is imposed in addition to another sanction, such as a fine, the addiction therapy and the other sanction will be executed simultaneously.

[106] See M. Pyrcak, Okresowa kontrola nad dalszym stosowaniem środka zabezpieczającego oraz jego uchylenie, in W. Wróbel (Eds.) Nowelizacja prawa karnego 2015. Komentarz: Krakowski Instytut Prawa Karnego Fundacja (2015), p. 762.

5.3.5 *Sweden*

In case 3, the fact that the offender has committed the crime under the influence of his severe heroin addiction does not lead to a diminished or to no criminal responsibility, because all offenders are deemed criminally responsible in Sweden (see above). However, the narcotic drug addiction may be important for the type of applicable sanctions. In case 3, the most likely sanction will be imprisonment, where the offender can take part in specific programs for addicted prisoners. Only if the penal value of this crime will be estimated to less than two years imprisonment (which is not probable in case 3), and the offender agrees, he could be sentenced to the so called ''contract care'', which is probation combined with special therapy related instructions (Chap. 30 section 9 PC).

Theoretically, the offender in case 3 could also be committed to a treatment of drug misusers, which is a compulsory care. In that case, the court may hand the case over to the social welfare committee to arrange the necessary treatment. However, if the punishment provided for the crime is more severe than imprisonment for one year (as in case 3), a commitment to such an institutional treatment shall only be ordered if there are special grounds for this. In practice, this provision is applied very seldom. This treatment is an alternative to imprisonment and it is not possible to combine it with a sentence of imprisonment. The treatment is executed in special therapeutic state institutions under a state authority called ''The Swedish National Board of Institutional Care'', which also decides on the release. The release depends on the state of health of the detainee, but the treatment has to be finished within 6 months at the latest. The average duration of this treatment is 138 days.[107] There is no special supervision after release from this treatment.

For all addiction related measures, there is no clear concept of drug/alcohol addiction and there are no prerequisites in terms of expected offences in the future; it is decisive if the crime has been committed because of the addiction.

5.3.6 *Summary*

In Germany and the Netherlands, an addiction may lead to a diminished criminal responsibility if it is combined with other personality disorders (or a major mental illness). In Poland, a diminished criminal responsibility for drug or alcohol addicts is possible, but exceptional in practice. Regardless of the question of criminal

[107] See: http://www.stat-inst.se/globalassets/arlig-statistik/sis-i-korthet-2014.pdf.

responsibility, an addicted offender committing several serious crimes as in case 3 will most probably be sentenced to an unsuspended prison sentence in all countries involved. This case also reveals that some kind of treatment programs for drug addicted offenders exist in all countries, but the circumstances of their imposition and their execution differ: In Germany, the prison sentence can be combined with a custodial addiction treatment order, which is executed *before* the prison sentence (if the latter is no longer than 3 years). In the Netherlands, the (unsuspended) prison sentence may be combined with a TBS-order. This order is in practice, however, not executed before, but *after* the prison sentence. In Poland, the unsuspended prison sentence in case 3 may be combined with a custodial treatment in an addiction therapy facility (executed *before* the prison sentence). In England and Wales, Sweden and in Poland, in contrast, the offender in case 3 will most probably undergo a drug addiction treatment in prison instead (not imposed as a separate measure, but as a part of the prison sentence).

5.4 *Other forms of dangerousness: life-long or long prison sentences and (indeterminate) measures of detention*

This paragraph deals with an offender, who neither suffers from a major mental illness, nor from a (serious) personality disorder, nor a drug/alcohol addiction, but is deemed dangerous. The analysis does not only include prison sentences, but also measures of detention besides or after punishment and of "supervision" after release. As an example, we refer to the following situation in **case 4: "An adult male person was sentenced before for sexual abuse of minors and is re-offending with such an offence."**

5.4.1 *England and Wales*

In England and Wales, the offender **in case 4** will be sentenced to a long (but not life-long) prison sentence and a likely lengthy period of release on licence after the sentence is completed. Sentencing guidelines deal with certain aspects that influence the length of a sentence: According to these guidelines, the sentencing is based on the principle of proportionality, the length of the prison sentence depends on the seriousness of the offence as well as the past criminal history, vulnerability of the victim and other aspects. Re-offending has to be

considered as an aggravating factor, so the sentence in case 4 has to be longer than for first time offenders of such offences.[108]

In England and Wales, there are no special treatments for life- or long-term prisoners. An external tribunal usually decides on the early release, as advised by the prison service and agreed by the Ministry of Justice. The prerequisites for an early release are that at least 50% of the prison sentence must be served[109] and that there is no risk to the community from the offender. In exceptional cases this decision can be reviewed and changed by the High Court. [110] Prisoners are usually released or early released on a licence of typically up to eight years,[111] under which any further offence or breach could result in return to prison. Several restrictive orders can be imposed after release or early release from prison, these are restrictions on what an offender may do, eg from home or in a probation hostel (such as restrictions on movement, association, residence, requirements for continued treatment, etc). Supervision is carried out by Probation Services (including commercial organisations or charities under contract to them); it ends when the conditions imposed are successfully completed.

For offenders convicted before 1/12/2012, it was possible to apply indeterminate public protection orders, which were usually executed in a prison facility. These offenders could be kept in prison until the authorities were satisfied they are no longer a danger to the public. Nowadays, a special detention besides or after a prison sentence (like the "incapacitation order" in Germany) cannot be imposed in England and Wales. However, around 3000 prisoners are still being detained on (abolished) indeterminate public protection orders and only gradually being released, after successful risk assessments have been carried out.[112]

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[108] Details of sentencing guidelines can be found at https://www.sentencingcouncil.org.uk/.

[109] In case of life sentences (eg for murder), the court has to determine a minimum prison term to be served before parole can take place, periods vary from typically 10–15 years upwards. A small number of life sentences are indeterminate, perhaps a couple of dozen in all at any one time.

[110] In 2018, it was announced that a convicted multiple rapist, Worboys, was to be released but the public outcry was so great, that a judicial review was held in the High Court which concluded that the reviewing tribunals had not done their job properly: see https://www.bbc.co.uk/news/uk-43572321.

[111] Only in case of life sentences, licence is indeterminate.

[112] For more details of IPPs see https://commonslibrary.parliament.uk/research-briefings/sn06086/.

5.4.2 *Germany*

In case of the repeat offence of sexual abuse of a child, a higher risk of recidivism is indicated. Even so, this is usually not seen as sufficient for applying the provision of diminished criminal responsibility if no further disorders indicate this. One has to take into account the possible reasons for committing such an offence like pedophilia as a paraphilia on the one hand and other deficits like a very low IQ or an antisocial personality disorder on the other. Without such additional deficits, the offender **in case 4** will likely be deemed fully criminally responsible and sentenced to a longer unsuspended prison sentence. The sentencing is based on proportionality. The basic principle of sentencing is guilt, which is determined by the seriousness of the offence as well as personal and social circumstances. If the former conviction because of sexual abuse of a child took place no longer than 5 years the minimum penalty is a prison term of one year. Besides that the dangerousness of the offender cannot lead to an increased length of the prison sentence. The constitutional principle "nulla poena sine lege" forbids punishments which exceed guilt. According to the German double-track sanction-system, sanctioning beyond the range determined by guilt is not a matter of punishment, but of other measures.

In Germany, there are special programs for long-term prisoners: A so-called socio-therapy is conducted in a special prison facility, particularly in terms of sexual and violent offenders (as in case 4). If this is successful, the remainder of the prison term (usually one third) can be suspended and the prisoner can be released under the supervision of the probation service. If the treatment fails, the prison term has to be fully served. The court decides on the (early) release of the prisoners. In case of an earlier release of long-term prisoners convicted because of certain violent and sexual offences like sexual abuse, an external opinion is needed. The prerequisite of (early) release is no or a considerably reduced risk of re-offending. Supervision after having fully served a prison term is obligatorily imposed by the execution court (with certain exceptions) for all prisoners after a prison term of two years and more (one year for sexual offenders). The supervision period is usually 5 years, the same rules apply as for supervision after release from a forensic psychiatric hospital (see §5.1.2).

In addition to a prison sentence, an incapacitation order (a special kind of detention executed after the prison term) can be imposed, if

various prerequisites of former offences are met.[113] The most likely option in case 4 is that the offender has been previously sentenced to a prison term of min. three years and is now sentenced to a prison term of min. two years. In addition, the offender has to be a danger to the general public due to his propensity to commit serious crimes; the expected offences have to be deemed causing considerable psychic or bodily damage or danger for the victim or serious economic damage. The incapacitation order is indeterminate in terms of expected offences causing serious psychic or bodily damage for victims; for other expected offences it is restricted to ten years. The factual length of the incapacitation order cannot easily be determined, only figures on the length of detention of released detainees exist.[114] The incapacitation order is executed after the prison term in a special separate department within the prison administration. If the full prison term is over, the court has once again to examine whether the prerequisites of the incapacitation order are still given. During the execution of the incapacitation order, the court has to re-examine the possibilities of release every year (based on an expert opinion). The prerequisite for (early) release from the incapacitation order is no or considerably reduced risk of re-offending (in terms of serious offences). The incapacitation is not only a safety measure but has at the same time to aim at the rehabilitation of the detainees.[115] So, special therapeutic programs for these detainees, mainly socio-therapy and cognitive behavioral therapy, psychotherapy, and special programs for sexual and violent offenders are provided. After release from the incapacitation order, a special kind of supervision takes place, the same rules apply as for supervision after release from a forensic psychiatric hospital (see above 5.1.2).

[113] One option is eg that there are two previous serious prison sentences and an offence at stake out of a list of specific serious offences, particularly sexual and violent crime (optional exception: multiple serious offences at stake without former convictions).

[114] Offenders released from the incapacitation order have – on average – spent 14.5 years in detention (imprisonment plus following incapacitation order; median of releases in 2011): A. Dessecker, ''Lebenslange Freiheitsstrafe und Sicherungsverwahrung''. *Wiesbaden: KrimZ* (2013), p. 95; The average duration of the incapacitation order itself was significantly shorter for these released offenders (median: 6.23 for releases in 2011): Dessecker, p. 94.

[115] This is a consequence of the ruling of the ECHR (ECHR, *M. v. Germany*, of 17/12/2009) and the following ruling of the German Federal Constitutional Court (BVerfG - 2 BvR 2365/09 -, of 04/05/2011).

5.4.3 *Netherlands*

If the offender **in case 4** is deemed dangerous, but fully responsible,[116] he is likely to be sentenced to a long (but not life-long) unsuspended prison sentence. In cases of re-offending, a longer imprisonment is more likely than for first time offenders.[117] Courts have discretion to determine the length of the prison sentence up to the legal maximum for that offence. Many deliberations influence the duration of the sentence, among others of course the seriousness of the offence. Relapse counts as an aggravating factor, possibly up to one and a third of the legal maximum. The sentence cannot be aggravated because of dangerousness. For very few offences (such as murder), the maximum sentence is life, but the court keeps discretion as there is no mandatory life sentence. As yet, a life sentence in the Netherlands does not have a tariff, but recent changes in legislation state that after 25 years an advisory committee has to advise the minister about the possibilities for rehabilitation. Also, the Minister of Justice and Security is currently examining possibilities to change the law on this subject.

In the Netherlands, there are no special treatment programs for life-long or long-term prison inmates. In general (not including life sentences), after 2/3rd of the sentence conditional release can follow.[118] Conditional release can however be postponed or dropped, among other reasons if conditions cannot reduce the risk of reoffending sufficiently (article 15d DCC). Conditional release is offered only to prisoners with a prison sentence of 1 year or more. The vast majority of Dutch prisoners however receives a sentence shorter than 1 year (n = 20,475), that is 92% of all (partially) unsuspended prison sentences.[119]

Until recently, supervision was only possible during conditional release from prison in the Netherlands, but not after the duration of the sentence had expired. A special detention besides or after

[116] If he is not only deemed dangerous but also diminished criminally responsible, a (conditional or unconditional) TBS-order (see above, §5.1.3) in combination with a prison sentence seems to be most likely.

[117] For first-time offenders, the range of sanctions for sexual abuse of minors can be very broad, depending on eg the severity of the abuse, assessment of criminal responsibility and dangerousness (range varies from a conditional community service sentence (possibly with a treatment condition) to a long and unsuspended prison sentence).

[118] However recently a bill has been adopted to shorten the period of early release in long sentences to a period of two years.

[119] StatLine, Database from Statistics Netherlands (statistics updated on 6/10/2016), retrieved 14/11/2016.

imprisonment (such as the ''incapacitation order'' in Germany) does not exist as an alternative in the Netherlands. However, recent legislation has created new possibilities for supervision after release from prison. It is now possible to prolong the period of conditional release and keep prolonging it indefinitely. Moreover, a new ''supervision-order'' has been introduced (art. 38z DCC).[120] The supervision order has comparable features to a suspended sentence or to a conditional release; for example that it is carried out by the Probation Services. There are conditions that should not be breached, which could include cooperation with intramural treatment. In case 4, relevant conditions could be outpatient treatment (like psychotherapy), bans to meet the victims or to be or live in certain areas, possibly controlled by electronic monitoring, etc. Breaching a condition could mean a prison sentence (up to a maximum of six month). The prerequisites for such a supervision-order are the following: it can be imposed in combination with a TBS-order or a prison sentence for a violent offence, with a legal maximum of 4 years or higher, or for some designated (mainly hands-off) sex offences. It is a two-step sentence: At conviction, it is imposed, and then prior to release from prison or from the TBS-clinic, a court has to decide whether it should be carried out. For that second step, an expected offence is a prerequisite (or expected obstructing behaviour towards victims or witnesses). The imposition decision and the execution decision are based on a probation report.[121] The supervision order can be practically indeterminate, as prolongations of 2, 3, 4, 5 years are possible indefinitely and there is no maximum term. In general, the court decides on the ending of the supervision order, which requires a reduction of risk.

[120] Staatsblad, ''Wet van 25 november 2015 tot wijziging van het Wetboek van Strafrecht en Wetboek van Strafvordering in verband met het laten vervallen van de maximale duur van de voorwaardelijke beëindiging van de verpleging van overheidswege, het verlengen van de proeftijden van de voorwaardelijke invrijheidsstelling en de invoering van een langdurige gedragsbeïnvloedende en vrijheidsbeperkende maatregel voor ter beschikking gestelden en zeden- en geweldsdelinquenten (langdurig toezicht, gedragsbeïnvloeding en vrijheidsbeperking)'' [Law of 25th November 2015: Long-term supervision order, measure to influence behavior and to limit the freedom of TBS-patients, and sex offenders and violent offenders]. Nr. 460. *The Hague: Dutch government* (2015).

[121] In addition, a medical statement is needed, if inpatient treatment is to be one of the conditions.

5.4.4 *Poland*

The sentencing **in case 4** depends on whether the offender is deemed to have a paraphilia (translated literally as ''aberration of sexual preferences''). If there is none, the punishment will be ''normal'' (probably a long, but not life-long, unsuspended prison sentence) and imposing a protective measure is not possible. The length of the prison term is not only based on the principle of proportionality; the seriousness of the offence is just one of many relevant factors (including eg preventive aspects). The sentence can be aggravated in case of relapse (but not because of dangerousness of the offender). Hence, the prison sentence in case 4 will be higher than for a first-time offender, because of the reoffending (article 64 § 1, § 2 PCC).

There is no special facility for ''dangerous'' or long-term prisoners as in case 4 (although there are special closed-type prisons or prison wards for penitentiary recidivists, article 86 § 1 PCC). A specific treatment for life-long or long-term prisoners does not exist. The penitentiary court decides on the (early) release of the detainee. An external opinion is obligatory in case of certain sexual offences (eg rape) committed in relation to a paraphilia; in other cases, it is optional (article 162 § 1 PCEC). The prerequisite for an (early) release from prison is a low risk of reoffending, based on the offender´s ''*demeanor, personal conditions, the circumstances of the committed crime and the behavior after committing the crime and while serving the penalty''* (article 77 § 1 PCC). The sentenced person may usually be conditionally released after serving at least half of the penalty.[122] ''*The remainder of the penalty becomes a test period with probation supervision, which may last no less than 2 years and no more than 5 years*''.[123] There is no supervision after having fully served a prison sentence in Poland, if protective measures (like electronic monitoring, see below) are not applicable.

If the offender in case 4 has a paraphilia, this kind of mental disturbance can lead to a diminished criminal responsibility, if the offender´s capability to recognize the significance of an act or to

[122] Article 78 § 1 PCC. In case of reoffending conditional release is possible after serving two-thirds or three-quarters of the penalty. ''*A person sentenced to the penalty of deprivation of liberty for 25 years may be conditionally released after serving 15 years of the penalty and a person sentenced to the penalty of deprivation of liberty for life after serving 25 years of the penalty''* - article 78 § 3 PCC. In exceptional cases of particularly serious crimes, the court can determine an even higher minimum length of serving the penalty before conditional release is possible – article 77 § 2 PCC

[123] Article 80 § 1 PCC. For 25 years and life-long sentences, the test period lasts 10 years – Article 80 § 3 PCC.

control the conduct was significantly lessened. In practice, paraphilias will only exceptionally lead to a diminished responsibility,[124] the offender will usually be considered fully responsible and the punishment will be ''normal'' (i.e. probably an unsuspended prison sentence, which will be longer than for a first-time offender, see above).

In addition to the unsuspended prison sentence, the court can impose a protective measure to offenders with paraphilias, if the prerequisites are met. The protective measures of indeterminate electronic monitoring and/or indeterminate therapy[125] require a probability of reoffending and that imposing a protective measure is necessary (article 93b § 1 PCC). If there is even a *high* probability that the offender in case 4 will commit a crime against life, health or sexual liberty in relation to his paraphilia, a commitment to a forensic psychiatric hospital may be imposed additionally to the unsuspended prison sentence (article 93g § 3 PCC). If such a protective measure (electronic monitoring, therapy or commitment to a forensic psychiatric hospital) is imposed in case 4, the unsuspended prison sentence is executed first (article 93d § 5 PCC). During execution of the prison sentence, the offender with paraphilias may also undergo a therapy in the therapeutic ward of a prison. This therapy is not imposed as a separate protective measure, but it is a special treatment program for prisoners with paraphilias (article 96 § 1 PCEC). Then, no sooner than 6 months ahead of the projected conditional release or completion of the prison term, the court will determine whether the execution of a protective measure is still necessary (article 93d § 3 PCC). If so, the protective measure will be executed after the offender is released from prison (article 93d § 5 PCC). The execution court will examine the possibility of release from the psychiatric hospital every 6 months, and the ending of electronic monitoring or therapy every 12 months (article 204 § 4 PCEC).

Irrespective of whether the offender does or does not have a paraphilia, the court will also impose certain restrictions in addition to the unsuspended prison sentence and the above mentioned protective measures: In cases as No. 4, it is obligatory to impose a

[124] See P. Marcinkiewicz, Znaczenie opinii seksuologicznej dla oceny poczytalności sprawców najpoważniejszych przestępstw seksualnych, *Seksuologia Polska* (2014 no 1–2), pp. 31–35.

[125] The protective measures of indeterminate electronic monitoring or indeterminate therapy can also be imposed in addition to another penalty, eg a fine, but the most likely sanction for the offender in case 4 is an unsuspended prison sentence (see above).

restriction in terms of positions, professions or activities related to minors for a life-long period (article 41 PCC); other restrictions (eg restrictions of movement) also have to be imposed – for a certain amount of time and may be imposed for life (article 41a PCC). In addition, information about the offender and his conviction will be entered into the register of sex offenders.[126]

Although it is not currently applicable to the offender in case 4, it deserves to be noted that between 2013 and 2015 there was a kind of ''incapacitation order'' in Polish law, a placement in the National Centre for Preventing Dissociative Behaviour (''*Krajowy Ośrodek Zapobiegania Zachowaniom Dyssocjalnym*''[127]). This kind of measure has been abolished and can only be imposed for offenders convicted of a crimes committed before July 1st, 2015 (article 3a The Act on KOZZD). It is not imposed by the criminal court in the verdict, but later by a civil court at the end of the execution of the unsuspended prison sentence (articles 2 and 9 The Act on KOZZD). There are no specific requirements in terms of former offences or the offence at stake, but the following prerequisites must be fulfilled to impose this measure (which are probably not met in case 4). The offender was sentenced to an unsuspended prison sentence or a prison sentence for 25 years and he is detained in the therapeutic ward of a prison, during the execution of the prison term at least one of the following mental disturbances occurred: mental impairment, personality disorders or paraphilia, and the abovementioned mental disturbances are of such

[126] It was established in 2017 – article 4 of The Act of 13 May 2016 – The Sexual Offences Act („*Ustawa o przeciwdziaaniu zagrożeniom przest*ępczością na tle seksualnym''). For the Polish register of sex offences see also M. Bocheński, Criminological problems of registers of sexual offenders: remarks on the sexual offences act of 13 may 2016, *Problems of Forensic Sciences* (2016, vol. 105), pp 370–393.

[127] See article 3 of the The Act of 22 November 2013 - The Act on the procedures related to people with mental disorders posing a danger to other people's life, health or sexual freedom („*Ustawa o post*ępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób'), hereinafter: The Act on KOZZD. The introduction of the provisions of The Act on KOZZD was accompanied by numerous controversies. Doubts were caused, among others, by the possible violation of the *ne bis in idem* rule, see eg A. Barczak-Oplustil, Środki reakcji ''prawnokarnej'' wobec osób z zaburzeniami psychiacznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób w perspektywie zasad zawartych w Konstytucji. Zagadnienia wybrane, *Czasopismo Prawa Karnego i Nauk Penalnych* (2014 no 4), pp. 53–77. In the judgment of 23 November 2016 (K 6/14) the Polish Constitutional Tribunal stated that the provisions of The Act on KOZZD were to a large extent consistent with the Polish Constitution.

character or intensity that there is a very high probability of committing a crime involving the use of force or threat of its use against life, health or sexual freedom, whose maximum sentence exceeds 10 years of unsuspended prison sentence (article 1 The Act on KOZZD). This measure is of indeterminate length, executed in a special facility separate from the prison system (article 4 The Act on KOZZD). The civil court decides on the release of the detainee (based on experts´ opinion); it has to examine the possibility of release every 6 months (article 46 The Act on KOZZD). The prerequisite for release is that the risk of reoffending in terms of the above mentioned crimes is no longer very high, eg because the mental health condition of the offender has improved as a result of treatment (article 47(1) The Act on KOZZD). While releasing the perpetrator from the Centre, the court may impose protective supervision (article 47(3) The Act on KOZZD). This is possible when the risk of reoffending in terms of the above mentioned crimes is not *very* high, but still high (article 14(2) The Act on KOZZD). During this supervision period, the offender has to inform the Police about every change of residence, employment, or name. On request, he is also obliged to provide information about his whereabouts (article 22(3) The Act on KOZZD). The civil court can end the protective supervision when the risk of reoffending in terms of the above mentioned crimes is no longer high (article 24(1) The Act on KOZZD).

5.4.5 *Sweden*

In Sweden, the offender **in case 4** will be sentenced to a long (but not life-long) imprisonment. The sentencing has to be based on the principle of proportionality, it can be aggravated in case of relapses in three respects: The recidivism may be the reason for choosing imprisonment. If imprisonment would have been chosen anyhow, the relapses can lead to a longer term of imprisonment. If the relapses concern serious crimes, it may be the reason for sharpening the range of sanctions for the crime in issue, by adding 1, 2 or 4 years imprisonment to the legal maximum penalty of the respective offence (ch. 26, s. 3 PC). The dangerousness of the offender (this term is not used by Swedish law) may only have an effect on the sanctioning in terms of the seriousness of the crime and the choice of the sanction (eg decision if probation or unsuspended prison sentence is imposed). The length of the prison term, in contrast, cannot be increased because of the dangerousness.

In prison, special treatment programs for prisoners are oriented at certain types of crimes, eg violent offences, sexual offences or addiction. The prison administration decides on the (early) release of the detainees, an external opinion is not needed. The prerequisite for an early release is that 2/3 of the prison time have been served.[128]

Supervision after release is not imposed in Sweden, if the detainee has fully served his prison term. However, there are some voluntary organizations, which have contacts with released prisoners, if they are interested. A special detention besides or after imprisonment (such as the ''incapacitation order'' in Germany) does not exist.

5.4.6 *Summary*

The offender in case 4 will be sentenced to a long (but not life-long) unsuspended prison sentence in all countries involved. In Germany, there are special treatment programs for long-term prisoners. In Sweden, special treatment programs for prisoners exist for certain offence types, eg for sexual offences as in case 4. The same is true for Poland, where special treatment programs for prisoners exist for those convicted for some sexual offences with paraphilia, or addicted to alcohol or other substances, or with mental impairments, but there is no special treatment for life-long or long-term prisoners. In England and Wales and in the Netherlands there are no special treatment programs for long-term or dangerous prisoners.

Currently, supervision after having fully served the prison sentence (i.e. if there is no early release) can only be imposed in Germany and in England and Wales (''licence''). In Poland, supervision after having fully served a prison sentence is only possible in case 4 via electronic monitoring as a protective measure, if the offender has a paraphilia. In the Netherlands, supervision after imprisonment has long been only possible during a conditional (early) release, but new possibilities for supervision have been adopted, like prolongation of the term for conditional release (already enacted) and a ''supervision-order''.

Detention besides or after punishment is currently only applicable in Germany (the so-called ''incapacitation order''). A similar measure was abolished in England and Wales in 2012 and in Poland in 2015. Such a measure does not exist in the Netherlands nor in Sweden. In Poland, a commitment to a forensic psychiatric hospital can be imposed as a protective measure combined with an unsuspended prison

[128] There is no minimum prison term for life-long prison sentences to be served before parole can take place.

sentence, if the offender in case 4 has an paraphilia. This is not comparable to an "incapacitation order", but a measure with a custodial aspect that can be executed after an early release or after having fully served a prison sentence. An intramural treatment can also be one of the conditions in the (new) Dutch frameworks for supervision after prison.

VI FIGURES ON THE APPLICATION OF DIFFERENT SANCTIONS/MEASURES FOR DANGEROUS OFFENDERS

In this paragraph, we analyze the quantitative importance of sanctions and measures for dangerous offenders in the countries covered by this paper. How many long prison sentences are imposed and how many persons are handled outside the prison? In order to measure the application of certain sentences and measures, we calculated rates per 100,000 population for total judgements and for different criminal court decisions. The most recent year for which we could get the numbers most complete for all countries was in 2014, so that year makes for a fair comparison (see Table 1): Unsuspended prison sentences (total and differentiated per length) as well as commitments to a forensic psychiatric hospital, drug/alcohol addiction treatment and the incapacitation order.[129] If any relevant developments in numbers have occurred in more recent years or if percentages of the total of convictions are available, this is mentioned in the text.

Data availability for the commitment to a forensic psychiatric hospital was rather good (especially with regard to total offences), while fewer data could be gathered for drug/alcohol addiction treatments. For the incapacitation order, figures were only available in Germany, but not in Poland (where a similar measure was still applicable in the year 2014). In England and Wales, in the Netherlands and in Sweden, such a measure could not be imposed in 2014. Table 1 also includes rates of prison sentences and of (safety and rehabilitative) measures for selected offence categories. The data cover two main offence groups associated with "dangerous" offenders: Rape/sexual assault and homicide. Data availability for these offence categories was not as good as for total offences. Moreover,

[129] Comparing stock figures of persons serving a special measure in an institution (eg inmates in a forensic psychiatric hospital) is also an interesting approach. These data were only available in Germany and in the Netherlands. Therefore, the analysis of criminal court decisions is more suitable.

some offence-related figures had to be excluded because of differing offence categorizations: Concerning rape/sexual assault, the data for England and Wales refer to all sexual offences and are therefore not comparable to the other countries. The same is true for the Dutch figures for total unsuspended prison sentences in this offence group. Similar difficulties concern the offence category homicide, as the Dutch figures for total unsuspended prison sentences also encompass bodily harm. These figures had to be excluded from our analysis.

Table 1 demonstrates that the rates of prison sentences and of the above mentioned measures differ between the countries. Referring to total offences, the highest rate of commitments to a forensic psychiatric hospital could be found in Sweden (2.71 per 100,000 population). In this country, 0.4% of all judgements referred to such a measure (which is also the highest percentage among the countries covered by this article). In the selected offence groups, however, Sweden neither shows the highest rates of this measure, nor the highest percentages regarding all judgements: For rape/sexual assault, the rate of commitments to a forensic psychiatric hospital was higher in Poland (0.03 per 100,000 population) than in Germany (0.02)[130] and in Sweden (0.01). For homicide, the highest rates could be found in England and Wales (0.18 per 100,000 population), followed by Germany (0.14), Sweden (0.12) and Poland (0.09).

Figures for drug/alcohol addiction treatments were only available in the Netherlands (where figures refer to ISD-orders) and in Germany. With 3.08 (in Germany) and 1.96 (in the Netherlands), the rates per 100,000 population were higher for addiction treatment orders than for commitments to a forensic psychiatric hospital in both countries. This effect cannot be observed in the selected offence categories: In the Netherlands, unconditional ISD-orders are not applicable for cases of rape/sexual assault or homicide. In Germany, the rates for the addiction treatment orders concerning rape/sexual offences were – indeed – higher than for psychiatric hospital orders (0.06 vs. 0.02 per 100,000 population); but for homicide, the opposite effect occurs (0.10 vs. 0.14 per 100,000 population).

With 9.04 per 100,000 (8.46 in 2016), England and Wales showed a particularly high rate of long unsuspended prison sentences (≥ 5 years incl. life-long prison sentences). These long or life-long prison sentences covered 0.4% of all English and Welsh judgements and 5.7%

[130] Information on the rate of psychiatric hospital orders, addiction treatment orders and incapacitation orders in Germany and their development over the last decade can be found in: Jehle supra note 56 at 38 f. and 55 f.

of all unsuspended prison sentences respectively (those percentages are also lower in the other countries). Only 8.1% of these long or life-long prison sentences in England and Wales referred to homicides (in Poland 48%, in Germany 22.8%). Regarding this particular offence group, the following results could be observed: For homicide, the respective rate regarding long or life-long prison sentences was higher in Poland (0.89 per 100,000 population) than in England and Wales (0.74) and in Germany (0.46).[131] In Poland and in England and Wales, long prison sentences covered more than 85% of all judgements and of all unsuspended prison sentences in this offence group. In Germany, these percentages were lower (50.4% of all judgements and 71.7% of all unsuspended prison sentences). In all countries,[132] the importance of long prison sentences was lower in the offence group rape/sexual assault than for homicides. Data for forms of detention after imprisonment were only available for the German incapacitation order (see above): This measure was only rarely imposed (rate of 0.05 per 100,000 population for total offences, which was still the number in 2018) – even for serious offences (1% of all judgements in the offence group homicide).[133]

Such comparisons of prison rates or other sanctions and measures between the countries have to be interpreted cautiously, because the results depend on a variety of statistical and legal aspects.[134] Among others, different concepts of legal terms and mental illnesses can have an impact on such comparisons, as well as a different crime rate, data availability and the categorization in national criminal justice statistics. For instance, the categorization of prison sentences is slightly different in the Netherlands and in Poland (see explaining footnotes

[131] For the length of prison sentences in Germany see also: Jehle supra note 56 at 34 ff.

[132] The figures for England and Wales had to be excluded from the analysis because of a differing categorization (see above).

[133] Incapacitation order: N = 44 for total offences, n = 7 for homicide.

[134] For more information on the challenges of comparing international criminal justice statistics see eg: S. Harrendorf, Towards Comparable International Crime and Criminal Justice Statistics. Where Do We Stand? What Can We Expect? In A. Kuhn, C. Schwarzenegger, P. Margot, A. Donatsch, M.F. Aebi & D. Jositsch (Eds.), *Kriminologie, Kriminalpolitik und Strafrecht aus internationaler Perspektive. Festschrift für Martin Killias zum 65. Geburtstag. Zürich: Stämpfli* (2013), pp. 131 – 47 and J.-M. Jehle, "How to Improve the International Comparability of Crime Statistics". In M. Joutsen (Ed.), *New Types of Crime. Proceedings of the International Seminar Held in Connection with HEUNI's Thirtieth Anniversary Helsinki: HEUNI* (2012), pp. 134–140).

to Table 1), which affects the rates in these sentencing categories. Regarding offence-related data, the categorization and definition of offences, eg including/excluding attempts, may affect the comparative analysis, too.

When comparing rates of (safety and rehabilitative) measures like psychiatric hospital orders, it is crucial to consider their categorization in the available data. It is also important, that all applicable measures are covered by the data and that figures add up to 100%. In the Netherlands, to give an example, the figures for drug/alcohol addiction treatments refer to unconditional orders for repeat offenders (ISD-orders according to article 38m DCC, see ch. 5.3.3). On the one hand, data on conditional ISD-orders were not available. On the other, the ISD-orders are not only imposed on drug/alcohol addicts. Many, but not all, persons sentenced with such orders have a substance abuse problem (81.6%).[135] Therefore, it could be seen as the Dutch equivalent for a drug/alcohol treatment order, but has a slightly different scope of application. In addition, Table 1 does not include data for conditional and unconditional TBS-orders in the Netherlands. These measures do not fit in one of the categories, because the TBS-order serves different purposes (treatment of major mental disorder or personality disorder or addiction and incapacitation) if the criteria are met (mainly dangerousness, see above). When adding the unconditional TBS-orders (rate: 0.66) and conditional TBS-orders (rate: 0.42),[136] the overall rate of the above mentioned measures (commitments to forensic psychiatric hospitals, drug/alcohol addiction treatments, incapacitation orders and TBS-orders) was almost as high in the Netherlands as in Germany. In the other countries, such an ''overall'' rate cannot be calculated because of a lack of data. In Germany, to give another example, the figures for commitments to a forensic psychiatric hospital do not cover all psychiatric hospital orders.[137] They only refer to offenders with no

[135] N. Tollenaar & A.M. Van der Laan. Effecten van de ISD-maatregel. [Results from the ISD-measure], *The Hague, the Netherlands: Research and Documentation Centre* (2012), Factsheet 2012-1.

[136] In total, 111 unconditional TBS-orders and 70 conditional TBS-orders were imposed in the Netherlands in 2014. Regarding rape/sexual assault there were 8 unconditional TBS-orders and 20 conditional TBS-orders. For homicide, 43 unconditional TBS-orders and 20 conditional TBS-orders were imposed.

[137] Cases of dangerousness because of major mental illnesses that were acquitted due to a lack of criminal responsibility, but without a commitment to a forensic psychiatric hospital are not included in these data.

TABLE 1
Criminal court decisions in 2014 – rates per 100,000 population

	Total judgements	Total unsuspended prison sentences	Unsuspended prison sentence of ≥ 2 years and < 5 years	Unsuspended prison sentence of ≥ 5 years (restricted length)	Life-long unsuspended prison sentence	Commitment to forensic psychiatric hospital[a]	Drug/alcohol addiction treatment order[b]	Incapacitation order
Total offences								
England and Wales*	2,117.62	159.06	22.13	9.04	0.00	0.74	n. avail.	n. appl.
Germany**	1,143.26	47.04	11.62	1.88	0.12	0.72	3.08	0.05
Netherlands***	582.32	132.95	5.23	1.13	0.00	0.58	1.96	n. appl.
Poland****	776.88	93.73	16.31	1.80	0.06	1.20	n. avail.	n. avail.
Sweden	628.96	112.95	n. avail.	n. avail.	n. avail.	2.71	n. avail.	n. appl.
Rape/sexual assault								
England and Wales*	(10.86)	(6.42)	(2.01)	(2.36)	(0.00)	(0.05)	n. avail.	n. appl.
Germany**	1.96	0.53	0.34	0.13	0.00	0.02	0.06	0.02
Netherlands***	n. avail.	(2.34)	n. avail.	n. avail.	0.00	n. avail.	0.00	n. appl.
Poland****	1.71	1.00	0.77	0.16	0.00	0.03	n. avail.	n. avail.
Sweden	2.02	1.68	n. avail.	n. avail.	n. avail.	0.01	n. avail.	n. appl.
Homicide								
England and Wales*	0.86	0.82	0.07	0.74	0.00	0.18	n. avail.	n. appl.
Germany**	0.91	0.64	0.17	0.34	0.11	0.14	0.10	0.01
Netherlands***	0.73	(13.87)	n. avail.	n. avail.	0.00	n. avail.	0.00	n. appl.
Poland****	1.01	1.00	0.10	0.83	0.06	0.09	n. avail.	n. avail.

TABLE 1
continued

	Total judgements	Total unsuspended prison sentences	Unsuspended prison sentence of ≥ 2 years and < 5 years	Unsuspended prison sentence of ≥ 5 years (restricted length)	Life-long unsuspended prison sentence	Commitment to forensic psychiatric hospital[a]	Drug/alcohol addiction treatment order[b]	Incapacitation order
Sweden	1.41	1.20	n. avail.	n. avail.	n. avail.	0.12	n. avail.	n. appl.

Rates are calculated per 100,000 population (of 1/1/2014 (Eurostat: 2015); except England and Wales, these refer to a different date and stem from the annual mid-year population estimates 2014 (ONS: 2015)). The criminal justice data stem from: https://www.gov.uk/government/organisations/ministry-of-justice/about/statistics/criminal-justicestatistics (England and Wales); Strafverfolgungsstatistik, Statistisches Bundesamt 2016 (Germany); S.N. Kalidien, Criminaliteit en rechtshandhaving 2015. Ontwikkelingen en samenhang'. [Criminality and Law enforcement 2015.]. *The Hague: WODC, CBS en Raad voor de Rechtspraak* (2015) (Netherlands); Ministry of Justice and Director of the National Centre for Preventing Dissociative Behaviour (Poland); https://www.bra.se/bra-in-english/home/crime-statistics/persons-found-guilty-of-offences.html, see convictions (Sweden).

*England and Wales: The indeterminate order for public protection (similar to incapacitation order in Germany) is not applicable for offenders convicted after 3 December 2012. The data for "rape/sexual assault" refer to all sexual offences.

**Germany: The data for forensic psychiatric hospital orders only refer to cases of no criminal responsibility described in 5.1.2. Cases of diminished criminal responsibility described in 5.2.2 are excluded. The drug/alcohol addiction treatment orders and incapacitation orders refer to all impositions of such a measure – irrespective the criminal responsibility.

***The length of the prison term in the Netherlands refers to a slightly different categorization ("≥ 2 and < 6 years", "≥ 6 years" and "life-long"). The data for total unsuspended prison sentences refer to all sexual offences in the category "rape/sexual assault" and to homicide and bodily harm in the category "homicide". The rates for drug/alcohol addiction treatments refer to unconditional orders for repeat offenders (figures for 2013; the number of conditional orders for repeat offenders is not available).

****In Poland, the categorization of the length of the prison term is slightly different ("3 years to 5 years", "more than 5 years" and "life-long").

[a]Ie dangerousness because of major mental illness.

[b]Ie dangerousness because of drug/alcohol addiction.

criminal responsibility described in §5.1.2,[138] excluding offenders with diminished criminal responsibility described in §5.2.2 (who are sentenced to a combination of this measure and a sanction, eg an unsuspended prison sentence).[139]

A different issue affects the Polish data: The figures in Table 1 do not reflect the current situation in Poland presented in the paragraphs above, because substantial changes regarding the rules of sentencing came into force on 01/07/2015. The possibility of imposing a penalty with conditional suspension of its enforcement was reduced, categories and rules of imposing protective measures were completely changed and the placement in the National Centre for Preventing Dissociative Behaviour (similar to the German incapacitation order) has been abolished and can only be imposed for crimes committed before 01/07/2015. For example total unsuspended prison sentences rose to 130.36 per 100.000 in 2018, partially explained by the rise in sentences for rape/sexual assault (1.32). Swedish numbers for 2018 showed a drop of total prison sentences to 105.31, and a rise of commitments to psychiatric hospital (3.18) while data were then also available for life-long sentences (0.1) and addiction treatment orders (0.1).

On the whole, the figures provided in Table 1 allow for an overview into the treatment of dangerous offenders in practice. However, the above mentioned issues of data comparability have to be taken into consideration while interpreting these rates and differences between the participating countries. Especially, lengthy prison sentences may result from other considerations than dangerousness and prevention. Of course, retributive considerations based on the extent of guilt, severity of the offence and mens rea, explain a large part of the imposed duration. But as in most of the countries (England and Wales, The Netherlands, Sweden) prison sentences may be extended above the extent of guilt due to dangerousness, while repeat offending may also serve as a separate aggravating factor (see case 4), it would be an omission to leave lengthy prison sentences outside the scope of Table 1. The total amount of judgements and prison sentences may be less relevant for discovering how dangerousness is dealt with, but this information serves the comparison to provide some insight into

[138] N = 583 for total offences, n = 19 for sexual assault/rape and n = 112 for homicide.

[139] N = 179 for total offences, n = 22 for sexual assault/rape and n = 20 for homicide.

the general sentencing culture of the countries as a highly relevant context.

VII DISCUSSION AND CONCLUSIONS

The study met its aim in observing how dangerous offenders are dealt with in different European countries. Comparing legal systems via four (fictional) case studies was a fruitful approach: This "problem-oriented" method allowed contrasting applicable sanctions and measures in concrete situations, their prerequisites and important procedural aspects. Instead of comparing selected sanctions, it was possible to show how legal systems deal with four different forms of dangerousness: Dangerousness because of a (major) mental illness, dangerousness because of serious personality disorders, dangerousness because of alcohol/drug addiction, or demonstrated through repeat offending. The case-related approach worked fine, because different national concepts of dangerousness and of sentences and measures do not affect the comparison.

In the course of the project, it was feasible to collect information on different stages of the criminal proceedings, such as applicable sentences and measures for different groups of dangerous offenders in the sentencing stage and treatment programs for dangerous prisoners in the execution stage and forms of supervision after release. Procedural and institutional aspects, eg existing facilities, the relation between the health system and the criminal justice system, and the involvement of experts in the assessment of dangerous offenders, were also included.

Our study highlights the existing variety of criminal justice systems in Europe, with a focus on dealing with "dangerous" offenders. The differences between the legal systems of England and Wales, Germany, the Netherlands, Poland and Sweden can be illustrated by the following examples: A so-called "incapacitation order" can only be imposed in Germany at the moment. In all other countries of the project, a comparable form of detention after a punishment does not exist[140] or has been abolished in recent years.[141] A more fundamental difference refers to the concept of criminal responsibility: This is a crucial requirement for punishment in the Netherlands, in Germany and in Poland. In consequence, offenders suffering from a major

[140] In the Netherlands and in Sweden.

[141] In England and Wales (2012) and in Poland (2015).

mental illness, which completely explains the offence, cannot be convicted, but only detained because of dangerousness, in these countries. In the other participating legal systems, criminal responsibility is rarely (England and Wales) or never (Sweden) denied. In consequence, more similarities can be observed within the twin-track systems (Germany, the Netherlands and Poland), than in comparison to England and Wales and Sweden. The particularities of each legal system are based on legal traditions and have to be acknowledged as long as national criminal justice systems exist.

Nonetheless, the applied sanctions or measures in a comparable case lead to similar consequences. This can be illustrated by comparing how an offender is dealt with, who commits a serious offence under the influence of a major mental illness. Despite the major differences concerning criminal responsibility (see above), such an offender will usually be sent to a psychiatric hospital (or to a comparable institution) for an indeterminate[142] period of time – either as a criminal conviction (eg in Sweden) or as a security or rehabilitative measure (in twin-track systems like Germany).

The same is true for dealing with an addicted person, who committed several serious offences: Despite huge differences regarding the concept of diminished criminal responsibility, such an offender will usually be sentenced to an unsuspended prison sentence in each of the participating countries. He will also receive a kind of addiction treatment in all of these legal systems – either *before*[143] or *after*[144] imprisonment, or as a treatment program *in prison*.[145]

These examples show that the analyzed criminal justice systems provide functional equivalents for dealing with comparable forms of dangerousness. At the same time, the results of our project confirm that it is preferable to compare the sanctioning of dangerous offenders via (fictional) cases rather than contrasting singular sanctions or measures.

From a normative perspective, of course much can be said about the problems of sanctioning based on dangerousness. Not only is the validity of assessments of dangerousness limited, preventive sanctioning is less bound by general sentencing safeguards such as proportionality. The theoretical distinction between sentences/penalties

[142] In the Netherlands and in Sweden, the commitment to a psychiatric hospital is of restricted length, but can be prolonged indeterminately.

[143] In Germany (if the prison sentence is no longer than 3 years) and in Poland.

[144] Such as the TBS-order in the Netherlands.

[145] In England and Wales and in Sweden.

and safety-measures is in that regard indeed highly theoretical: Unintended suffering is still suffering. Moreover, certain groups – sometimes unwarrantedly – perceived as deviant and dangerous may be confronted with extreme measures of social control beyond due process.[146] Especially preventive detention, as deprivation of the fundamental right to freedom has been under international scholarly scrutiny.[147] While on the other hand, the reality of such measures has been legitimized when safeguarded by the principles of legality, risk-proportionality, subsidiarity and fair judicial review.[148] For the sanctions in our study, information about some of these aspects has been collected, but not systematically enough to provide any normative assessment. Our aim was merely to describe and explain similarities and differences, but the information provided here may serve as a starting point for further normative scrutiny.

In terms of advantages of one system over the other, it very much depends on whether one values a more dogmatic or pragmatic approach. Systems in Germany and Poland are most dogmatic concerning the upholding of the guilt principle, even though Sweden is dogmatic in not acknowledging criminal responsibility as such. From within Sweden there has been criticism on (and legal change concerning) the consequences of not looking at the mental state at the time of the crime but at the time of examination.[149] The Netherlands has the most pragmatic, and therefore dogmatically ''messy'' twin track system (both with safety measures and sentences exceeding the extent of guilt), while England and Wales have the most ''messy'' single track system (or sentencing regulations in general for that matter), for example also with civil (supervision) orders in place for (potential) sex offenders thereby avoiding certain safeguards of

[146] M.J.F. van der Wolf, Legal control on social control of sex offenders in the community: a European comparative and human rights perspective, *Erasmus Law Review* (9) (2016), 2, p. 39–54; B. McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (2014).

[147] Eg P. Keyzer (ed.), *Preventive Detention: Asking the Fundamental Questions* (2013); M. Caianello and M.L. Corrado, *Preventing Danger: New Paradigms in Criminal Justice,* Durham: Carolina Acadmic Press (2013).

[148] C, Slobogin, Preventive detention in Europe, the United States, and Australia. *Vanderbilt Public Law Research Paper Working Paper* (2012), p. 12–20.

[149] S. Radovic, G. Meynen & T. Bennet, ''Introducing a standard of legal insanity: The case of Sweden compared to the Netherlands'', *International Journal of Law and Psychiatry* 2015, p. 43–49.

criminal law.[150] When it comes to liberty depriving indeterminate sentences or measures, the Dutch TBS system stands out as a measure that is legitimized on two grounds of article 5.1 ECHR: a. conviction by a competent (criminal) court, and e. persons of unsound mind. In order to strengthen the prerequisites for indeterminate incapacitation, Germany has responded to human rights´ and dogmatic critique by adding e-ground criteria for specific cases.[151] In the Netherlands the definition of mental illness is stretched to incorporate most dangerous offenders, calling for a discussion about the – debatable – relation between disorder and risk.[152] So many advantages in terms of law enforcement come at the expense of legal protection.

From a quantitative criminological perspective, an especially challenging task proved to be the collection of comparable figures in this field. Data availability was good for categories of prison sentences and for the commitment to a psychiatric hospital, but fewer data were available for addiction treatments and for offence categories. With 2.71 per 100,000 population, Sweden showed the highest overall rate of commitments to a psychiatric hospital, while England and Wales has the highest rate of long[153] or life-long unsuspended prison sentences (9.04 per 100,000 population). These results though, are only valid for total offences. We also managed to collect offence-related figures for dealing with dangerous offenders via two suitable offence categories: Rape/sexual assault and homicide. When differentiating by offence groups, other countries show the highest rates for these sanctions and measures: In the offence category homicide, long prison sentences were most frequent in Poland (rate of 0.89 per 100,000 population), the highest rate of psychiatric hospital orders was found in England and Wales (0.18 per 100,000 population). However, these results should be interpreted with caution: Data comparability can ia be affected by different legal concepts and data

[150] See N. Padfield, for The English perspective in Van der Wolf 2016, supra note 151.

[151] See J. Kinzig, ''The ECHR and the German system of preventive detention: An overview of the current legal situation in germany'' and M.J.F. van der Wolf ''Comment on Kinzig'', in M. Caianiello & M. L. Carrado (eds.), *Preventing danger: New paradigms in criminal justice*, Durham: Carolina Academic Press 2013, p. 71–101.

[152] See J. Bijlsma, T. Kooijmans, F. de Jong & G. Meynen, Legal insanity and risk: An international perspective on the justification of indeterminate preventive commitment, *International Journal of Law and Psychiatry* 2019 (66).

[153] This refers to prison sentences of ≥ 5 years.

categorization, the availability of figures for a certain measure and by different offence rates.

All in all, our project met its aim in providing a descriptive comparison on the legal and procedural aspects of dealing with dangerous offenders in Europe. The case-related method of our study has been fruitful and it is promising to extend such an approach in a broader study including more European countries. Further research is needed regarding the comparative analysis of the frequency of certain sanctions and measures for ''dangerous'' offenders in practice. In this respect, future projects might find a way to overcome some of the challenges of data comparability that have been revealed in the recent study.

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