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#### NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Draft Council conclusions on alternative measures to detention

The draft Council conclusions on alternative measures to detention have been examined at COPEN meetings on 9 and 22 October, by JHA Counsellors on 4 November and in CATS on 12 November 2019. Following CATS, a few minor additions in points I.1 (and similar measures based on emerging technologies') and I.5 ('for practitioners') of the text in annex have been introduced. It appears that there is now full agreement on the text.

The final text of the Council conclusions is set out in the annex. Subject to agreement by Coreper, the Council (Justice and Home Affairs) is invited to adopt these conclusions at its meeting on 2/3 December 2019, and to agree to publish the conclusions in the *Official Journal of the European Union*.

**DRAFT COUNCIL CONCLUSIONS ON ALTERNATIVE MEASURES TO DETENTION:  
THE USE OF NON-CUSTODIAL SANCTIONS AND MEASURES IN THE FIELD  
OF CRIMINAL JUSTICE**

**Introduction**

1. According to the new Strategic Agenda 2019-2024, adopted by the European Council on 20 June 2019, protection of citizens and freedoms is a key priority for the next institutional cycle. The European Union is committed to building on and strengthening the fight against terrorism and cross-border crime and improving cooperation.
2. Effective systems of criminal sanctions play an important role in protecting the citizens and ensuring security. Criminal sanctions and measures used and the way in which they are enforced contribute to the prevention of reoffending and thereby affect the security in society.
3. Enforcement of the criminal sanctions and measures should be based on knowledge deriving from relevant research that indicates that the sanctions and measures used reduce reoffending and promote security.
4. Serious offences require appropriate responses, and detention is a necessary instrument in criminal sanctions systems. There is, however, a broad consensus that detention should be used only as a last resort (*ultima ratio*)<sup>1</sup>. Applying non-custodial sanctions and measures - instead of detention - where appropriate and taking into consideration the individual circumstances of the case, can have several advantages, as supported by a long-standing tradition of research.

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<sup>1</sup> See, e.g., point 4 in the recitals to Council of Europe Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules: “No one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law”. The European Court of Human Rights has in its case law referred to these recommendations for over 1000 times.

5. An important role of alternative measures to detention is to promote social rehabilitation and reintegration of the offender, which is one of the key aims for using such measures<sup>2</sup>. These alternative measures have also several other benefits, in particular by reducing reoffending and, therefore, promoting public security. They may be applied in the interests of the offender but also in the interests of the victims, potential future victims and, more generally, of the society.
6. Alternative measures to detention exist in all Member States, for example in form of suspended prison sentences, community service, financial penalties and electronic monitoring. Furthermore, new developments in technology and digitalisation may contribute to a more effective system of non-custodial sanctions and measures in the future.
7. It is also particularly important to take victims of crime into account. With regard to offences that are suitable for mediation, restorative justice can offer opportunities with regard to the way in which offences are dealt with, by acknowledging the role of the victim and wider society and by focusing on repairing the harm caused by the offender.
8. Detention is not only used as a criminal sanction, but it is also widely used in the pre-trial stage of the proceedings. Alternative measures to detention should therefore be considered throughout the whole criminal justice chain.
9. As regards individual cases, the relevant authorities determine the appropriate sanction or measure. On a general level, Member States can examine the benefits of enabling the use of non-custodial sanctions and measures throughout the criminal proceedings and promote their use, when deemed appropriate and effective.

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<sup>2</sup> See, e.g., Council Conclusions of 8 March 2018: Promoting the use of alternatives to coercive sanctions for drug using offenders, doc. 6931/18, as well as the European Union Drugs Strategy 2013-2020 (OJ C 402, 29.12.2012, p.1) and the European Union Action Plan on Drugs 2017-2020 (OJ C 215, 5.7.2017, p. 21).

10. The criminal sanctions system falls within the competence of the Member States and systems vary between Member States. Therefore, the focus at EU level should be on non-legislative measures.
11. In addition to the above mentioned benefits it is expected that the enhanced use of non-custodial sanctions and measures could produce positive effects also on issues relating to prison overcrowding, insufficient prison conditions, prison radicalisation and obstacles encountered in mutual recognition in criminal matters, all of these being issues that have been raised in different EU forums during the last years.

### **Alternative measures to detention - policy background**

12. Alternatives to detention have been, explicitly or implicitly, on the EU's agenda for several years and in many contexts. The 2004 Hague Programme and the 2009 Stockholm Programme recognised that detention and alternatives to detention were an important area of EU justice policy.
13. In 2011, the Commission presented a Green Paper on "The application of EU criminal justice legislation in the field of detention"<sup>3</sup>. In the Green Paper it was considered, among other things, that unless more efforts were made to improve detention conditions and promote alternatives to custody, it could be difficult to develop closer judicial cooperation between Member States.
14. In its resolution of 5 October 2017 on prison systems and conditions<sup>4</sup>, the European Parliament noted that prison overcrowding is very common in Europe, but that increasing prison capacity is not the sole solution to overcrowding. Parliament further insisted that efficient long-term management of penitentiary systems should be implemented, reducing the number of prisoners by more frequent use of non-custodial punishments.

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<sup>3</sup> COM (2011) 327 final.

<sup>4</sup> A8-0251/2017.

15. In addition, in the Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism of 20 November 2015<sup>5</sup>, alternatives to detention at all stages of the of criminal proceedings were mentioned as possible action when considering criminal justice responses to radicalisation.
16. In accordance with Article 82(1) TFEU, judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions. The principle of mutual recognition is founded on mutual trust between the Member States. The Court of Justice of the European Union, in its judgement of 5 April 2016 Aranyosi and Căldăraru<sup>6</sup> indicated that poor prison conditions in Member States may hamper mutual trust and undermine mutual recognition and underlined that inhuman or degrading treatment or punishment is prohibited by the Charter of Fundamental Rights. Following the ruling, the Council - during the Austrian Presidency of the Council - adopted conclusions on “Promoting mutual recognition by enhancing mutual trust”<sup>7</sup> in December 2018. According to these conclusions, Member States are encouraged to have legislation in place that, where appropriate, allows use to be made of alternative measures to detention in order to reduce the population in their detention facilities, thereby furthering the aim of social rehabilitation and also addressing the fact that mutual trust is often hampered by poor detention conditions and the problem of overcrowded prisons. The Court of Justice further clarified the requirements from the Aranyosi and Căldăraru judgement in the recent Dorobantu judgement<sup>8</sup>.
17. The Council of Europe already has a long tradition in addressing issues relating to detention and the use of non-custodial sanctions and measures, and has also gathered a deep knowledge on the topic. The EU could therefore benefit from closer cooperation with Council of Europe in this regard.

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<sup>5</sup> 14419/15, of 20 November 2015.

<sup>6</sup> Judgment of 5 April 2016 in C-404/15, Aranyosi and Căldăraru.

<sup>7</sup> OJ C 449, 2018, p. 2.

<sup>8</sup> Judgement of 15 October 2019 in C-128/18, Dorobantu, in which the Court clarified the requirements for the executing judicial authority in cases regarding European arrest warrants and the surrender procedures between Member States.

## The way forward

18. At the meeting of Justice and Home Affairs Ministers in July 2019, the Ministers acknowledged that there is a need to tackle complex issues relating to prison conditions, prison overcrowding, prison radicalisation and also cooperation in criminal matters. The Ministers also emphasised the importance of enhancing the use of alternative measures to detention in Member States in the coming years underlining the benefits that their use can have.
19. The progress already made in the Member States on the use of alternative measures to detention, both at the pre-trial and the post-trial stage, is welcomed. Further increase in the use of non-custodial sanctions and measures as alternatives to detention throughout the criminal proceedings, when deemed appropriate, should be a common aim across the EU during the next years.
20. The ninth round of mutual evaluations will, among other issues, analyse the Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European supervision order (2009/829/JHA) and gather valuable information on the reasons why the use of these instruments has been limited thus far. There is, however, a need to gather wider information on the use of non-custodial sanctions and measures in the Member States, and to discuss the different benefits they may have.
21. The sharing of best practices is a useful way in which the Member States can learn from each other and improve their own legislation, procedures and practices. EU can also benefit from closer cooperation with the Council of Europe and other relevant organisations.

## THE COUNCIL OF THE EUROPEAN UNION THEREFORE CONCLUDES THAT

### I. Actions to be taken at national level

1. The Member States are encouraged to explore the opportunities to enhance, where appropriate, the use of non-custodial sanctions and measures, such as a suspended prison sentence, community service, financial penalties and electronic monitoring and similar measures based on emerging technologies.
2. The Member States are encouraged to consider enabling the use of different forms of early or conditional release. The aim is to better prepare offenders for reintegration into society and to help prevent reoffending.
3. The Member States are encouraged to consider the scope for and benefits of using restorative justice.
4. The Member States are encouraged to provide in their legislation a possibility to apply non-custodial measures also in the pre-trial stage of criminal proceedings.
5. The Member States are encouraged to ensure that information concerning the legislation on non-custodial sanctions and measures is easily available for practitioners throughout criminal proceedings.
6. The Member States are encouraged to raise awareness among legal practitioners of the benefits of alternative measures to detention as well as of the availability and technical features of existing tools, such as electronic monitoring.
7. The Member States are encouraged to provide training for legal practitioners on the use of alternative measures to detention, including restorative justice, and on existing recommendations as developed by the Council of Europe on this topic.

8. The Member States are encouraged to develop or improve training for prison and probation staff, judges, prosecutors and defence lawyers on the content and the use of Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on European supervision order (2009/829/JHA) and to raise the awareness of the scope for using non-custodial sanctions and measures throughout criminal proceedings.
9. As regards the use of alternative measures to detention, the Member States are encouraged to pay particular attention to the needs of vulnerable persons such as children, persons with disabilities and women during pregnancy and after giving birth.
10. The Member States are encouraged to improve the collection of data on the use of non-custodial sanctions and measures, and on the application of the Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European supervision order (2009/829/JHA).
11. The Member States are encouraged to improve capacity for probation services, including the supervision of non-custodial sanctions.
12. The Member States are encouraged to share with each other and with the Commission best practices as regards all aspects of non-custodial sanctions and measures, with the aim to learn from each other.
13. The Member States are also encouraged to continue their efforts to improve prison conditions, to counter prison overcrowding and to promote reintegration of offenders into society taking into account the impact of reducing recidivism and the risk for prison radicalisation.



## **II. Actions to be taken at EU level**

1. The Commission is invited to explore the options for promoting the use of non-custodial sanctions and measures in its agenda and to increase awareness of the benefits of non-custodial sanctions and measures among policy-makers and practitioners.
2. The Commission is invited to assess the need to carry out a comparative study to analyse the use of non-custodial sanctions and measures in all Member States so as to support the dissemination of national best practices.
3. The Commission is invited to continue to enhance the implementation of both the EU Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European supervision order (2009/829/JHA), taking into account the information gathered during the ninth round of mutual evaluations.
4. The Commission is invited to develop training for judges and prosecutors through the European Judicial Training Network (EJTN), as well as for prison and probation staff at EU level through the European Penitentiary Training Academies (EPTA) which is currently funded by the Justice programme.
5. The Commission is invited to launch regular experts' meetings on detention and non-custodial sanctions and measures, in order to encourage the exchange of best practices between experts and practitioners across all Member States as regards national policies and practices in this field.
6. The Commission is invited to consider ways in which Member States can be given funding to further develop probation services, including the supervision on non-custodial sanctions and measures, and improve prison facilities.
7. The Commission is invited to continue to support the European Organisation of Prison and Correctional services (EuroPris), the Confederation of European Probation (CEP) and the European Forum for Restorative Justice (EFRJ), currently funded under the Justice programme. It is invited to examine options for closer cooperation with these organisations, in particular by supporting the work of CEP in gathering data on alternatives to detention in the Member States.

8. The European Judicial Network (EJN) is encouraged to continue discussions in its meetings on the use of Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European supervision order (2009/829/JHA). The aim is to identify obstacles for practical application of the instruments and to seek for ways in which to increase the use of such instruments.
9. EJN is encouraged to continue to update the EU Atlas tool on a regular basis.
10. EJN is invited to consider gathering information on its webpage on the different non-custodial sanctions and measures in each Member State. For this aim, cooperation with any relevant organization, including Confederation of European Probation (CEP), may be considered.

### **III. Actions to be taken to enhance cooperation with the Council of Europe and other relevant organisations**

1. The EU should work closely with the Council of Europe and other relevant organisations so as to find synergies regarding work relating to detention and the use of non-custodial sanctions and measures.
2. The Commission and the Member States are encouraged to enhance cooperation with the Council of Europe and other relevant organisations, in order to raise the awareness of the benefits of using non-custodial sanctions and measures. The Commission is invited to continue cooperation with the Council of Europe by financially supporting the gathering of statistics in the area of prison and probation (SPACE Statistics) and the operation of the EU Network of National Preventive Mechanisms (EU NPMs).
3. The Commission and the Member States are invited to consider ways in which to promote the dissemination of the Council of Europe standard-setting texts, the relevant case-law of the European Court of Human Rights and the CPT recommendations regarding detention and the use of non-custodial sanctions and measures.