The "Net-Widening" Problem and its Solutions: The Road to a Cheaper Sanctioning System

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***Abstract**: The net-widening problem was first raised by sociologists. It refers to the risk of new criminal reforms expanding the social control over individuals. To be precise, alternative sanctions which are meant to be imposed on prison-bound offenders are in practice used for low-risk offenders who would otherwise receive lighter sanctions. However, the net-widening effect may be also viewed as an impediment to efficient sentencing system from the law and economics perspective. Alternative sanctions such as community service and electronic monitoring have the potential to constitute a "cheaper" substitute for prison. Thus, not imposing these sanctions on prison-bound offenders would miss its potential. Furthermore, replacing less costly punishments such as fines with these alternatives may unnecessarily increase the costs of the sentencing system. Therefore, this paper attempts to identify possible reasons for the net-widening effect and to offer a solution. The main idea developed in this paper is changing the structure of the alternative sanctions, clarifying its goals and designing procedural rules which would direct decision makers to apply the alternative sanctions efficiently.*

Contents

1. Introduction

The need to reduce the use of short-term imprisonment has been discussed for decades. The main argument to support this goal was the criminogenic effects of socialising with the prison population and the ineffectiveness of short-term incapacitation in deterring criminals.[1] However, the necessity to find alternatives to short-term imprisonment is important now more than ever. The current prison crisis in Belgium could serve as good example. The prison overcrowding problem, which was strengthening over the years, resulted in shortage of prison cells. In the aftermath of this, prison punishments of up to eight months ceased being executed in Belgium.[2] From the law and economics perspective, it is clear that such a crisis would lead to under-deterrence and, thus, to the increase of crime. On the one hand, offenders derive benefits from committing offenses. On the other hand, the costs of crime (i.e. the punishment) are reduced to zero once a sentence is imposed, yet not executed.[3] The shortage of prions drove Belgium to rent cells from the neighbouring Netherlands.[4] Nevertheless, the Netherlands, as other European countries, is currently also searching for methods to cut prison costs. Recent reforms attempt to meet the target reduction of 340 million in prison costs by 2018.[5]

In order to overcome the constant increase in prison population, many European countries introduced alternative sanctions at the end of the 20th century. The two main recent alternatives are community service and electronic monitoring. The former refers to the

[1] See for example, Jeremy Bentham asserting that "[i]n a moral point of view, an ordinary prison is a school, in which wickedness is taught by surer means than can ever employed for the inculcation of virtue", in Jeremy Bentham, *Theory of Legislation: Principles of the Penal Code*, vol. 2, translated from French by Etienne Dumont (Weeks, Jordan & Company, Boston, 1840), p. 132. For a discussion of similar idea see Thomas Fowell Buxton, *An Inquiry: Whether Crime and Misery are Produced or Prevented, by Our Present System of Prison Discipline*, 2nd ed. (John and Arthur Arch, London, 1818), pp. 47-50; David Garland, *Punishment and Welfare : a History of Penal Strategies* (Gower, England, 1985), p. 60 ; Francis T. Cullen, Cheryl Lero Jonson and Daniel S. Nagin, "Prisons Do Not Reduce Recidivism the High Costs of Ignoring Science," *The Prison Journal* to 91(3) (2011), 48S-65S.

[2] Kristel Beyens and Marijke Roosen, "Electronic Monitoring in Belgium: a Penological Analysis of Current and Future Orientations," *European Journal of Probation* 5(3) (2013), 56-70, p. 63.

[3] This assumption holds if the costs of trial and its punitive effects for the offender are not taken into account.

[4] René van Swaaningen and Jolande uit Beijerse, "Bars in Your Head: Electronic Monitoring in the Netherlands," in *Electronically Monitored Punishment: International and Critical Perspectives*, Mike Nellis, Kristel Beyens and Dan Kaminski eds., (Routledge, New York, 2013), 172-190, pp. 185-186. (Hereinafter: "*Electronically Monitored Punishment*").

[5] See http://www.iamexpat.nl/read-and-discuss/expat-page/news/major-reforms-to-dutch-prison-system (accessed on 3.12.2013). Similar austerity targets may be found in other European countries. For example, in England and Wales prison service budget cuts led to a proposal to halve the penalty for criminals who plead guilty in the earliest stage. See http://www.bbc.co.uk/news/uk-politics-19630614 (accessed on 3.12.2013).

sanction of unpaid work, and the latter depicts the use of technology to remotely monitor a person in a place outside prison.[6]

The sanction of community service has the potential to substitute imprisonment, especially short-term custody. There are several advantages of this alternative over prison. First, it avoids the negative effects prison has on offenders. Second, forasmuch as prisons are costly, it reduces the costs of punishment for the society. Third, this sanction in particular increases social welfare through the unpaid work performed by the offender for the public benefit. This work may be translated to money which may be invested in crime prevention policies and further decrease the use of the enforcement budget.[7] These types of policies bring the criminal justice system closer to a self-sustainable system. Another positive element of this sentence is that the offenders might acquire work moral and skills. A series of interviews in Israel with people involved in the execution of community service demonstrated this benefit. The interviewees reported that some of the offenders continue to volunteer even after finishing their duty since they see there is a weak population to whom they might assist (old people, mentally and physically disabled, etc.). In addition, some of the employers are so satisfied with the offenders' work that they employ them after the sentence was completed.[8]

Electronic monitoring has the advantage of transferring the criminal from custody to the community. Consequently, the offender avoids the criminogenic effects and keeps his family and social ties. In addition, this form of detention is less costly than prison,[9] and may also reduce the need of building new prisons.

Despite the potential and the ambitious goals set for these two alternatives, many countries experienced the net-widening effect. The most prominent goal in introducing alternative sanctions is to substitute a prison sentence. However, in practice these sanctions are often used to substitute other non-custodial punishments, e.g. probation. Consequently, the costs of

[6] Different countries sometimes use different terms for these instruments. However, for the simplicity, these terms are used throughout the paper. In addition, the term "sanctions in the community" refers to both, community service and electronic monitoring. The terms electronic monitoring and electronic tagging are used interchangeably.

[7] See for instance, Scottish government, *Community Payback Order: Scottish Government Summary of Local Authority Annual Reports 2011-12* (The Scottish Government, Edinburg, 2012). "*Many of the reports included "before" and "after" photographs of unpaid work projects which they had completed. Some translated this into the number of hours and equivalent financial benefit (for example in one local authority a total of 78,695 hours of unpaid work was completed in 2011-2012 which they estimate was, based on a living wage of £7.20, worth £566,604). Others mention proceeds from the sale of goods produced by those doing unpaid work raising money for charity (one authority raised £4000)*", p. 8.

[8] Bilha Sagiv, *Community Service - As an Alternative to Custody*, PhD dissertation (Hebrew University in Jerusalem, Jerusalem 1997), pp. 224, 229. (In Hebrew).

[9] See Section 3.2.

the criminal sentencing system increase. The net-widening effect may cause inefficiency in two ways. First, the new sanctions fail to reduce the prison population which imposes the highest costs on the society. Second, even though these instruments are less costly than prison, they entail more expenses than the traditional non-custodial sanctions (e.g. fine). Thus, a system which imposes community service or electronic monitoring on lighter offenders unnecessarily increases the sentencing costs.

The aim of this paper is to analyse the net-widening effect from the law and economics perspective, to identify its causes and to propose a solution. One possible reason why community service and electronic monitoring are prone to the net-widening problem is their current structure. In order to constitute an alternative to prison, the new sanction needs to impose sufficient punishment costs on the offender. Otherwise, these costs may be lower than the benefits of committing this crime. In addition, any new sanction which aspires to replace prison needs to be perceived as legitimate by the public and the sentencers. This paper suggests a new structure of community service (the substantive solution) which would reduce the net-widening effect, yet at the same time allow expanding the sentencing continuum. In addition, clear goals and ways of implementation are offered in order to properly identify the target groups for community service and electronic monitoring. Finally, it is suggested in this paper that in order to optimise the use of the alternative sanctions, the substantive solution needs to be supplemented by a procedural one. To this aim, insights from the behavioural law and economics are used.

The paper is structured as follows. Section 2 defines the net-widening problem and analyses it from the law and economics perspective. The current use of community service and electronic monitoring is reviewed in Section 3.[10] In addition, this Section identifies possible problems in the implementation of these alternatives which may explain the net-widening effect. The Israeli model of community service is discussed in Section 4. The substantive solution for the net-widening problem follows. Section 5 presents and discusses the procedural solution. Some limitations of the suggested policy are mentioned in Section 6. Lastly, Section 7 offers concluding remarks.

[10] This paper analyses the situation in the Western Europe. However, the suggestions presented here, with adjustments, might be extended to all the Western criminal justice systems.

2. The Problem of "Net Widening"

The notion of net widening was first introduced by the sociologist Stanley Cohen decades ago to illustrate the dangers in new criminal reforms.[11] In this context, "net-widening" refers to the problem of expanding the social control over individuals through different new programmes. Although the initial goal of these reforms is usually to divert people from the criminal justice system, sometimes just the opposite occurs. The net of social control may be wider, stronger and newer. The underlying idea behind this criticism is that the new alternative sanctions which are introduced in order to divert offenders from custody, in practice, constitute "new alternatives to old alternatives".[12] The net-widening is not only a sociological problem but may be also viewed as an inefficient structure of the sentencing system from the law and economics perspective. If people may be deterred by less expensive means, it is not cost-effective to impose on them more restrictive and expensive sanctions. The current section presents empirical evidence for the existence of the net-widening problem in different criminal justice systems. Subsequently, this problem is analysed from the law and economics point of view.

Alternative sanctions such as community service are usually introduced with the intention to be imposed on offenders who would otherwise be sentenced to prison. Instead, in many cases this sanction is used to punish convicted individuals who would be sentenced to a less strict sanction if this alternative was not available. This criticism is referred to diversion programmes as well. These programmes initially targeted young offenders and aspired to divert them from the criminal justice system. However, in practice it led to the situation that juveniles who would otherwise be released without any treatment from the enforcement authority, were sent to different programmes.[13] From the law and economics perspective, the reforms had the potential to reduce the level of "consumption"[14] of the criminal justice system. This in turn would reduce the costs of this system. Instead, more sentences were provided by the enforcement authorities and the costs might have become higher. Forasmuch as this study discusses only the alternative sanctions, i.e. community service and electronic monitoring, net-widening in the context of this paper refers solely to the problem of penalties which are not used efficiently to divert offenders from prison.

[11] Stanley Cohen, *Vision of Social Control* (Polity Press, Cambridge, 1985), pp. 41-42.
[12] James Austin and Barry Krisberg, "Wider, Stronger, and Different Nets: the Dialectics of Criminal Justice Reform", *Journal of Research in Crime and Delinquency* 18 (1981), 165- 196, p. 44.
[13] Austin and Krisberg (1981), *supra* note _, pp. 169-172; Stanley Cohen, "The Punitive City: Notes on the Dispersal of Social Control," *Contemporary crises* 3 (1979), 339-363, pp. 346-349.
[14] Consumption in this context means the imposition of sanctions on convicted offenders.

The net widening problem was observed in different countries which apply alternative sanctions. In England and Wales community service was introduced in the 1970s following concerns regarding negative effects of custody, prison overcrowding and the costs of imprisonment. Initially the relevant act stated that this sanction should be available only for imprisonable offenses. Following this the Home Office issued guidelines that it may only occasionally be used to substitute non-custodial punishment. Nevertheless, in about 50% of the cases, community service was imposed on offenders who would not otherwise be sent to prison.[15] Moreover, some studies suggested that judges perceive this sanction more as an alternative to non-custodial sanctions.[16]

In Scotland, similarly to England and Wales, this sentence was introduced in times of growing prison population and was considered to constitute a "cheaper" sentence. Therefore, the primarily aim was to impose community service on offenders who faced a sentence of custody. However, based on his research in Scotland, Gill McIvor found that less than 50% of the offenders who are sentenced to community service would otherwise be sent to prison.[17]

A research on the net-widening effect was also conducted in the Netherlands. Community service in this country was introduced during the 1980s and meant to substitute short-term imprisonment. As in other countries, the reform was based on the belief that this alternative sanction may avoid the negative effects of short-term custody and reduce prison costs. It was promoted in times of increasing prison population with the hope to invert this trend. Nevertheless, in practice this sentence was subject to the net-widening effect and often community service was imposed on offenders who would otherwise receive a less restrictive punishment.[18]

The net-widening problem was discussed also in the context of using electronic monitoring as a sanction. After its introduction in different countries, electronic monitoring is used for home confinement and may be imposed as a sentence, as a parole condition or as a pre-trial

[15] Ken Pease, "Community Service Orders," *Crime and Justice* 6 (1985), 51-94, pp. 59-63; Ken Pease, S. Billingham and Ian Earnshaw, *Community Service Assessed in 1976*, (Home Office Research Study no. 39, 1977), pp. 3-9.
[16] See for example, Pease, Billingham and Earnshaw (1977), *Ibid*., p. 9.
[17] Gill McIvor, *Sentenced to Serve* (Billing and Sons Ltd, Worcester, 1992), pp. 8-14, 134-139.
[18] E.C. Spaans, "Community Service in the Netherlands: Its Effects on Recidivism and Net-Widening," *International Criminal Justice Review* 8 (1998), 1-14, pp. 1, 9-11; Peter J. Tak, "Netherlands Successfully Implements Community Service Orders," in *Sentencing Reform in Overcrowded Times*, Michael Tonry and Kathleen Hatlestad eds. (Oxford University Press, New York, Oxford, 1997), 200-203, pp. 200, 203; Peter J. Tak, "Sentencing and Punishment in The Netherlands," in *Sentencing and Sanctions in Western Countries*, Michael Tonry and Richard S. Frase eds. (Oxford University Press, New York, 2001), 151-187, p. 168.

confinement.[19] Similarly to community service, there is evidence suggesting that this sanction is also subject to the net-widening effect. This method is imposed not only as an alternative to prison, but many times on offenders whose freedom would otherwise be less restricted.[20] Consequently, the prison population is not decreasing and more people find themselves under a strict (and costly) penal supervision.[21]

The net-widening effect may be found also in other countries.[22] In the United States for example, this problem applies to different alternative sanctions such as community service, boot camps, intensive supervision programs, electronic monitoring, etc.[23] Moreover, this is not merely an old problem, but continues to persist nowadays when alternatives are used for minor offenses and do not sufficiently divert offenders from prisons.[24]

From a law and economics perspective the net-widening effect may be detrimental for efficiency. Cost-effective crime control policy requires a range of sentences which may be tailored to the offender and the offense. In the scale of sentences, a harsher punishment should not be imposed if the criminal may be sufficiently deterred using lighter and/or less expensive methods. Alternative sanctions such as community service and electronic monitoring are important in reducing sentencing costs while maintaining an acceptable level of deterrence. Those sanctions are meant to be imposed on offenders for whom a fine or

[19] See Section 3.2.

[20] Karl F. Schumann, "Widening the Net of Formal Control by Inventing Electronic Monitored Home Confinement as an Additional Punishment: Some Issues of Conceptualization and Measurement" in *Will Electronic Monitoring Have a Future in Europe*, Markus Mayer, Rita Haverkamp and Réne Lévy eds. (Edition Iuscrim, Freiburg, 2003), 187-197, p. 192; Christopher Baird and Dennis Wagner, "Measuring Diversion The Florida Community Control Program," *Crime & Delinquency* 36 (1990), 112-125, pp. 122-123; Michael Tonry and Mary Lynch, "Intermediate Sanctions," *Crime and Justice* 20 (1996), 99-144, pp. 122-123.

[21] Mike Nellis, Kristel Beyens and Dan Kaminski, eds., *Electronically Monitored Punishment: International and Critical Perspectives* (Routledge, New York, 2013), p. 9. (Hereinafter: "*Electronically Monitored Punishment*").

[22] See for example, Josine Junger-Tas, *Alternatives to Prison Sentences: Experiences and Developments*, Ministry of Justice (Kugler Publications, The Hague, 1994), p. 56; United States: Joan Petersilia, *Expanding Options for Criminal Sentencing* (RAND Corporation, Santa Monica, 1987), pp. 86-87; Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford University Press, New York, Oxford, 1990), p. 158; Ireland: Bill Lockhart and Colette Blair, "Community Sanctions and Measures in Ireland," in *Community Sanctions and Measures in Europe and North America*, Hans-Jörg Albrecht and Anton van Kalmthout eds., (edition iuscrim, Freiburg, 2002), 285-326, p. 299. (Hereinafter: "*Community Sanctions and Measures"*).

[23] Tonry and Lynch (1996), *supra* note _, pp. 101-103, 109, 116, 125.

[24] Miranda Boone, "Only for Minor Offences: Community Service in the Netherlands," *European Journal of Probation* 2(1) (2010), 22-40, p. 36; Gill McIvor, Kristel Beyens, Ester Blay and Miranda Boone, "Community Service in Belgium, the Netherlands, Scotland and Spain: a Comparative Perspective," *European Journal of Probation* 2(1) (2010), 82-98, p. 89; Rod Morgan, "Thinking about the demand for probation services," *The Journal of Community and Criminal Justice* 50(1) (2003), 7–19, p. 18.

conditional imprisonment is too lenient, however, prison is over-deterring[25]. Therefore, a situation where community service and electronic monitoring are imposed on offenders other than those who are expecting a prison sentence may lead to financial waste. First, net-widening means that some offenders, who may be deterred using less costly alternative sanctions, are imprisoned. Second, alternative sanctions are used, to some extent, to punish low-risk offenders. Those offenders may be deterred by less costly sanctions such as a fine or conditional imprisonment, thus, inducing unnecessary costs of sentencing. In order to minimise the costs of sentencing system without compromising deterrence, a scale of punishment (in terms of costs and level of restriction) should be used. The most used punishment should be fines and conditional imprisonment. These sanctions are reserved for low-risk offenders. If this sanction is not sufficient to deter the perpetrator (e.g. higher risk level), community service may be imposed. Nevertheless, in case this sanction still fails to deter, more restrictive method, i.e. electronic monitoring, should be employed. Finally, if no other sanction may deter the offender from committing crimes, a custody sentence should be used.

Furthermore, the net-widening problem impedes the marginal deterrence. Alternative sanctions enable to create a gradual scale of sentencing which considers the deterability of the offender as well as his offenses. This way, each criminal who is not deterred entirely, is at least deterred from committing severer crimes. For instance, if the scale of a fraud is positively correlated with the sentence, i.e. the larger is the scale the harsher is the punishment, offenders are incentivised to commit a "lighter" fraud. However, if these alternatives are not used properly, and too many eligible offenders are instead sent to prison, marginal deterrence diminishes. In other words, the costs of different offenses are too similar to prevent potential offenders from choosing the harsher crime.

Some jurisdictions, e.g. the Netherlands, do not longer state that the discussed alternative sanctions should serve as a substitute for prison, but allow it to be used instead of other non-custodial sanctions.[26] This paper suggests that community service and electronic monitoring

[25] "Over-deterring" in this context does not refer to the classical situation where the person reduces his activity beneath certain optimal level. In this context it means that less restrictive methods may be used in order to deter this offender from committing more crime.
[26] See for example, Boone (2010), *supra* note _.

should be imposed on offenders who would otherwise be sent to prison.[27] First, as discussed earlier, these sanctions were introduced due to the increasing prison population and meant to replace custody, improve rehabilitation and make the punishment more human.[28] Imposing these sanctions instead of lighter non-custodial punishments would miss its goals.

Second, not imposing these alternative sanctions on prison-bound offenders might lead to distorted results. Community service for instance, is usually carried out in lieu of imprisonment. Namely, the penalty for breaching the conditions of this sanction is prison. Therefore, imposing this punishment on a person who would be otherwise sentenced to a lighter sentence might result in an increase of his initial punishment in case of a breach.[29] This result would increase prison population[30] and the costs of sentencing. In addition, from the retributivist perspective this outcome might be perceived as unjust since an offender committing a light offense is punished harshly. On the other hand, if the penalty for breaching the conditions of community sanctions or electronic monitoring is lighter, e.g. a fine[31], there is an incentive not to complete the sentence. For the offender, this is an "efficient breach" since the costs of the breach are lower than the costs of compliance. This in turn, leads to waste of resources, i.e. the costs of evaluating the suitability of the offender and assigning to community sanctions might be spent in vain. However, if the alternative sanctions are imposed on prison-bound offenders, imprisoning them in case of violation is the appropriate result. The offender receives an opportunity to serve a lighter sentence, if he does not exploit this opportunity, the original punishment would be imposed on him.

Furthermore, the net-widening effect means that scarce resources are not used optimally. The number of places of unpaid work is limited, especially due to the restriction of not harming fair competition in the market. With respect to electronic monitoring, this sanction entails a usage of technology which imposes non-negligible costs on the society. Therefore, these sanctions ought to be used only in those cases where offenders may not be deterred using less intrusive sanctions. Imposing community service and electronic monitoring on "light"

[27] There is a possibility to introduce a form of community service to substitute prison, alongside with another form of community service which would be a part of the sentencing continuum. This suggestion is discussed in length *infra* in Section 4.2.1.
[28] See Boone (2010), *supra* note _, p. 27; Tonry and Lynch (1996), *supra* note _, p. 99; Pease (1985), *supra* note _, p. 59.
[29] McIvor (1992), *supra* note _, pp. 142-143.
[30] Similar results are found in the context of electronic monitoring. Offenders supervised by this method are caught more often than those under regular probation. Consequently, offenders who would otherwise be on regular probation are now sent to prison. See for example, Tonry and Lynch (1996), *supra* note _, p. 101.
[31] For example, in Spain, see McIvor, Beyens, Blay and Boone (2010), *supra* note _, p. 86.

offenders leads to a waste of these resources and limits its implementation on the harsher offenders who may be diverted from prison.

In recent years there is a public demand in different jurisdictions to make the community service more punitive and a criticism that its softness makes it unsuitable for certain offenders.[32] Sanctions in the community are a cost-effective alternative for prison sentence, especially those of a short-term. While using it as a substitute for prison enables to reduce the cost of sentencing, imposing community sanctions on offenders who may be punished with lighter penalties increases the costs of the criminal justice system.

3. The Current Use of Community Service and Electronic Monitoring

Prior to suggesting a way to overcome the net-widening problem, one should understand the current implementation and the problems of the relevant sanctions. Community service is a fairly widespread form of punishment in Europe. Albeit based on the same fundamental elements, there are differences in the implementation of this penalty across jurisdictions. Electronic monitoring is a more recent alternative form to prison which is applied less frequently than community service. These forms of control and punishment are used as a "front-door" strategy or as a "back-door" strategy. The front-door strategy refers to a reduction of prison population by introducing other sanctions or forms of detention in the sentencing or pre-trial stage of the criminal justice system. On the other hand, the "back-door" scheme denotes the reduction of the prison population by releasing offenders from custody prior to the completion of their sentences. The following sections review these two alternatives in selected European countries and raise the problems in their implementation which may explain the net-widening effect.

3.1. Community Service: Countries' Experience

3.1.1. England and Wales

England and Wales was the first country to introduce the Community Service Order in Europe in the *Criminal Justice Act of 1972*. Initially this sanction was imposed on offenders convicted of imprisonable[33] offenses with the intention to divert them from prison. The court could impose a number of hours of unpaid work which ranges between 40-240 hours and was

[32] McIvor, Beyens, Blay and Boone (2010), *supra* note _, p. 88.
[33] Offenses for which a prison sentence may be imposed.

meant to be performed during leisure time within one year.[34] In 2000, the name of this sanction was changed to "Community Punishment Order" and in 2003 the *Criminal Justice Act* increased the maximum number of unpaid work hours to 300.[35]

This sanction was not successful as an "alternative to custody" since it was not perceived as a proper substitute to prison in the form it was offered. Therefore, the idea of substitution was abandoned already in the 1990s. Looking on the characteristics of the offenders may lead to the conclusion that unpaid work is imposed as an alternative to probation rather than to imprisonment. As compared to probation offenders, community service offenders have fewer previous convictions and they are less frequently convicted for more than one offense.[36] Furthermore, it is explicitly stated in the government's guidelines that this sanction is reserved for first-time offenders.[37] From an observation of the sanctioning trends in recent years it seems that community service is underused. While the use of short-term imprisonment (up until 3 months) was increasing between the years 2005-2012 the use of unpaid work as a sanction has significantly decreased. In 2005, more than 65,000 offenders received community punishment order and in 2012 the number has dropped to 15 offenders.[38]

3.1.2. Scotland

Scotland was the next country to implement community service as a sanction in 1979,[39] with the intention to create a "cheaper" substitute for prison. The law stated that this sanction ought to be imposed on imprisonable offenses. Similar to other countries, only around 45% of the offenders serving this sanction were diverted from custody.[40] Consequently, the explicit requirement to impose this sanction as a substitute to prison sentence was introduced

[34] Pease (1984), *supra* note _, p. 54. The tradition of imposing this sanction during leisure time remains today as may be seen in the guidelines provided by the UK government, see https://www.gov.uk/community-sentences/community-payback (accessed on 12.11.2013).
[35] Section 199(2), *Criminal Justice Act 2003*.
[36] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, Cambridge UK, 2010), pp. 319, 342. See also Morgan (2003), *supra* note _, p. 18.
[37] See https://www.gov.uk/community-sentences (accessed on 12.11.2013).
[38] Table Q5.8, *Criminal Justice Statistics 2013* (UK). A comparison of the sentences in the years 2005 and 2012, demonstrates an increase in the number of prison sentences of almost all lengths, and in the average of imprisonment period (Table Q5.6). Interestingly, the use of suspended sentence began growing approximately at the same time as community service started dropping. This might imply that offenders, who were sentenced before to unpaid work, now received a conditional prison. However, this would simply mean that those offenders anyway were not diverted from prison, especially since the prison population is not affected by this significant change in the community service.
[39] *Community Service by Offenders (Scotland) Act 1978*.
[40] Gill McIvor, "Paying Back: 30 Years of Unpaid Work by Offenders in Scotland," *European Journal of Probation* 2(1) (2010), 41-61, pp. 42-43.

in 1991.[41] In addition, the number of hours which may be imposed has increased from 40-240 to 80-300.[42] The sentence needs to be performed during leisure time. Furthermore, the nature of the work should assure fair competition, thus only tasks which would not be otherwise performed by paid workers, may be assigned to community service offenders. This sentence was expanded over time to be imposed on fine defaulters and by prosecutors as an alternative to criminal procedure. In case of an established breach the court may fine the offender, change the number of community service hours or re-sentence the offender for the original offence.[43] By 2012, the use of this sanction expanded so that currently it constitutes around 5% of all sanctions imposed on convicted offenders.[44]

Following the increasing use of short-term prison sentences in the late 2000s there was a demand for a broader implementation of community sanctions. However, since community measures were perceived as too soft to replace prison, a new reform was suggested. This reform intended to make the community service more punitive while treating different aspects of the offender's misbehaviour.[45] Consequently the new "Community Payback Order" was introduce in the *Criminal Justice and Licensing (Scotland) Bill 2010*. Under this order the offender may be sentenced to perform an unpaid work (with or without other activities) between 20-300 hours.[46] The work has to be completed within six months if the order is more than 100 hours and within three months if the order is shorter than 100 hours.[47] This order is an explicit substitute for imprisonment as the act specifies "[…] *the court may, instead of imposing a sentence of imprisonment, impose a community payback order on the offender*."[48]

A recent assessment by the Scottish Government demonstrates that the number of community sanctions has increased between 2010 and 2012, as opposite to the trend of reduction in the preceding years. In addition, the average number of hours imposed under the community

[41] Section 61(3), the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.
[42] Section 3, *The Community Service by Offenders (Hours of Work) (Scotland) Order 1996*.
[43] McIvor (2010), *supra* note _, p. 43-46.
[44] The Scottish Government, *Crime and Justice Statistics 2002-2012*, 2013 available at http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendData (accessed in 2.11.2013).
[45] Graham Ross, *Criminal Justice and Licensing (Scotland) Bill Community penalties in Scotland* (The Scottish Parliament: the Information Centre, 2009), p. 3. More than 80% of all prison sentences in Scotland in the period of 2006-2007 were for the period of six months or less.
[46] Article 14 referring to Section 227I(4), the *Criminal Justice and Licensing (Scotland) Bill 2010*. The part referring to sentencing in this law amends the *Criminal Procedure (Scotland) Act 1995*.
[47] Article 14 referring to Provision 227L, the *Criminal Justice and Licensing (Scotland) Bill 2010*. Other requirements such as treatment may also be imposed under this sanction in order to tailor the punishment to the offender. See Ross (2009), *supra* note _, p. 3.
[48] Article 14 referring to Section 227A(1), the *Criminal Justice and Licensing (Scotland) Bill 2010*.

service has increased (from 145 hours in 2007 to 155 hours in 2012).[49] The nature of the unpaid work is mainly littering cleaning, gardening and maintenance.[50] With regard to the prison population it seems that the new reform led to some changes. Whereas the number of sentenced to up to three months imprisonment have decreased, the number of offenders sent to custody for a period of 3-6 months have increased.[51] In Scotland three months of imprisonment should by default be imposed as a community sanction.[52] Therefore, the opposite trend for three months and longer sentences might imply that courts impose longer prison sentences to avoid community service. If this is the case, one explanation may be that this sanction is still not perceived by judges as a proper substitution for prison.

3.1.3. The Netherlands

In the Netherlands the sanction of community service was introduced into the *Dutch Penal Code* in 1989 after a period of experimentation. Since then it went through several modifications, with the most recent one in 2012. Currently, the maximum number of unpaid work hours which may be imposed on the convicted offender is 240 and it has to be performed within a year (Article 22c of the *Dutch Penal Code*). In case of breaching the conditions of the sanction, the offender may be sent to detention for up to four months (Article 22d of the *Dutch Penal Code*).

The sanction of community service was explicitly introduced in order to replace custody and reduce the prison population. As was stated in the Penal Code, it was meant to be imposed on offenders who would otherwise receive up to six months unconditional prison. Moreover, the judges were instructed to state in their judgment the length of the prison sentence which the community service order replaces. At that point it was not allowed to impose community service instead of conditional prison, fine or on fine defaulters.[53] During a short period in the 1990s this sanction was in practice imposed for serious offenses due to a shortage of prison cells.[54]

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[49] The Scottish Government, *Criminal Justice Social Work statistics for 2011-12* (The Scottish Government, Edinburg, 2012), p. _.
[50] The Scottish government, *Community Payback Order: Scottish Government Summary of Local Authority Annual Reports 2011-12* (The Scottish Government, Edinburg, 2012), p. 3.
[51] The Scottish Government, *Prison statistics and population projections Scotland: 2011-12* (The Scottish Government, Edinburg, 2012), Table A.3, p. 26.
[52] Article 15 adding provisions 3A-3B, *the Criminal Justice and Licensing (Scotland) Bill 2010*.
[53] Tak (2001), *supra* note _, pp. 166-167.
[54] Boone (2010), *supra* note _, p. 36.

However, in 2001 a substantial reform was made. The term "task sentence" was adopted and signified the expansion of the sentence to replace other non-custodial sanctions as well. Consequently, the judges were no longer obliged to impose this sanction as a substitute for a certain period of imprisonment. In recent years, community service sanctions are not used to their full range. The average number of imposed hours is decreasing and the sanction is used for minor offenses. For instance, in 2008 the average number of imposed hours was around 69 as compared to the prescribed maximum of 240 hours.[55] Furthermore, the 2012 reform has limited the judicial sentencing discretion by prohibiting the imposition of this sanction on certain offenders (e.g. offenders who committed sex offenses against minors or certain recidivists).[56] These changes are in line with the public opinion that community sanctions are not severe enough to be imposed on more serious offenders and offenses.[57]

3.1.4. Spain

In Spain, community service was introduced in the *Criminal Code* of 1995. It was created in order to be imposed on first-time offenders who commit less severe offenses and explicitly replace weekend imprisonment.[58] Initially this sanction was used rarely since the judges did not believe it is an effective sanction. Consequently, different reforms were introduced in the 2000s which expanded the use of this penalty beyond the sole purpose of substituting imprisonment. The reforms in fact created two systems of unpaid work. One in which community service is an independent and direct sanction for certain offenses. The second system is a direct substitute for a prison sentence of up to two years (Article 88 to the *Spanish Criminal Code*).[59]

The *Spanish Criminal Code* prescribes this sanction in days rather than in hours. Therefore, the offender may be required to perform an unpaid work up until 180 days.[60] However, article

[55] Boone (2010), *supra* note _, pp. 24-25, 32, 36. Besides unpaid work, community service in the Netherlands also includes training orders. However, this type is not discussed in this paper.
[56] This change has entered into force in 2012. The relevant article mentions that community service may still be imposed in these cases if they are supplemented with unconditional imprisonment. In addition, in the Netherlands community service may be imposed also by the prosecutor instead of criminal prosecution.
[57] Boone (2010), *supra* note _, p. 36.
[58] M. Dolores Valles Port, "Community Sanctions and Measures in Spain and Catalonia," in *Community Sanctions and Measures* (2002), 511-534, pp. 517. Similar to other countries, community sanctions may also be imposed in the form of training or rehabilitation, however, this paper focuses on the unpaid work.
[59] Ester Blay, ""It Could Be Us": Recent Transformation in the Use of Community Service as a Punishment in Spain," *European Journal of Probation* 2(1) (2010), 62–81, pp. 64-67. The "independency" of the sanction in the first system is limited. Forasmuch as the consent of the offender to the community service order is required, this sanction still constitutes an alternative to another sanction (prison or non-custodial sanctions).In addition, another channel through which community service may be imposed is on fine defaulters.
[60] Article 33(3)(k), *The Spanish Criminal Code (YEAR)*.

88 of the *Spanish Criminal Code* states that in some cases a sentence of up to two years imprisonment may be substituted by a fine and community service.[61] This sanction is rarely imposed as a substitute for custody (under article 88 to the *Spanish Criminal Code*). The reason for this phenomenon is that the unpaid work penalty is reserved for the same target population as the suspended prison sentence. Thus, the prison sentence of these offenders is usually suspended and there is no need for community service. On the other hand, community service orders are quite frequently used as a direct sanction for traffic and minor domestic violence offences.[62]

The punitive element of community service is only the limitation on the liberty of the offender during his leisure time. To be precise, the sanction ought to be imposed in a way that it does not interfere with other obligations of the offender, e.g. work, education, family. Inevitably this requirement burdens the placement task since in practice most of the unpaid work may be performed only during the evenings and weekends. Furthermore, this limitation makes it difficult to complete long orders within the prescribed one year limit.[63]

The maximum number of hours the offender may be required to work per day is eight, and it depends on his other obligations. Offenders under community service order usually perform work of maintenance, gardening, assistance in elderly houses, etc. In 2008 this sanction constituted 26% of all imposed sanctions. Most of the orders were up until 30 days and less than 4 hours of work per day. Furthermore, the majority of community service orders were imposed on traffic offenders (around 76% as compared for example to less than 4% property crimes). As a result, the reform which introduced this sanction for traffic offenses was criticised for extending criminal intervention for a population who is not really in need of it.[64]

The consequence of a breach depends on the way the community service sanction was imposed. If it was imposed as a substitute for custody, then the offender is required to complete the remaining prison term. However, if this sanction was imposed as an independent sanction, the breach becomes a new offence for which the penalty is a fine, and the original offense remains unpunished.[65] This type of a system stresses the problem in using

[61] Blay (2010), *supra* note _, p. 65. The author suggests that this option in the law leads to rare cases where courts impose a sentence of 400-700 days of community service.
[62] Blay (2010), *supra* note _, pp. 67-68.
[63] Blay (2010), *supra* note _, p. 65.
[64] Blay (2010), *supra* note _, p. 67-72, 76; Blay (2008), *supra* note _, p. 252.
[65] Blay (2010), *supra* note _, p. 66-68.

community service to replace other non-custodial sanctions. It increases the offender's incentives to breach the order and might lead to a waste of resources (see Section 2).

3.1.5. Summary and Identification of Common Problems

The following table summarises the main features of community service in the reviewed countries (Table 1).

Table 1: Community Service in Selected European Countries.

Country	Year of Introduction	Prescribed Hours	Average Imposed Hours	Completion Rates
England and Wales	1972	40-240		
Scotland	1979	20-300	155	65%
Netherlands	1989	40-240	69	75%
Spain	1995	180 days (or up to 2 years)	30 days or less	-

Source: own table based on *ibid*.

The abovementioned overview stresses several problems in the implementation of community service. These difficulties impede the sanction's potential to substitute a significant portion of custody sentences. First, the prescribed maxima of hours for community service are too low and lead the judges to perceive this penalty as a "favour" to the offender. Therefore, it is imposed mainly in cases of non-serious crimes such as traffic offenses and property crimes. This may also explain the merely partial substitution of prison sentences (net-widening effect).[66] Second, this sanction mainly restricts the leisure time of offenders, especially when the offender is employed (unpaid work during evenings or weekends). This feature of the sanction makes community service comparable to fines rather than to prison. The European model of community service often allows the offender to maintain the way of life he had before being sentenced. The offender may keep his current job, continue his education etc. Certainly, this kind of punishment may not be genuinely considered as a substitution to imprisonment. A prison sentence usually means a significant restriction of the person's liberty and a substantial change in his way of life. On the other hand, performing the unpaid work during leisure time may be considered as a "fine on

[66] See Anton Van Kalmthout, "Community sanctions and measures in Europe: a Promising Challenge or a Disappointing Utopia?" in *Crime and Criminal Justice in Europe* (Council of Europe Publishing, Strasbourg, 2000), 121-133, p. 127.

time"[67]. Instead of giving away a portion of a person's wealth, he gives away a portion of his time. In order to place community service above fines and closer to a prison sentence on the sentencing scale, the opportunity costs of this sanction for the offender should be substantially higher than the monetary equivalent of a fine. The punishment costs the offender experiences from community service should be more similar to his costs of prison.

The third problem of implementation is that the community service sanction is often not used to its full extent. Courts tend to impose sentences which are significantly shorter than the prescribed maximum number of hours. The lower is the number of unpaid work hours imposed on the offender the weaker is the restriction on his liberty. Thus, not using this sanction to its full extent decreases its potential to substitute a prison sentence. A support for this argument may be found in a study conducted on community service in the Netherlands. This study demonstrated that only when the upper bound of community service hours was used (150-240 hours), the net-widening problem was minimised.[68]

Another difficulty raised in some countries is the delay in the execution of orders.[69] In most of the jurisdictions the criminals are required to carry out work which otherwise would not be performed. This condition was introduced in order to avoid unfair competition in the employment market. However, this restriction constitutes one of the factors which brings about the shortage of placement opportunities. Delays in the execution of a punishment undermine the credibility of the criminal justice system. Moreover, celerity of enforcement is an important element in crime prevention.[70] Therefore, prolonging the period between the crime and the punishment might lead to under-deterrence.

In order to exploit the potential of community service as a substitute for custody, the costs of this punishment for the offender ought to be raised to resemble better the costs of custody. Due to respect for human rights, these costs should not be raised by imposing on the offender a more burdensome work by nature. Instead, the costs might be raised by increasing the incapacitating element of community service, e.g. longer periods of unpaid work. A more incapacitating nature of the community service would raise the confidence of the public and the sentencing agents in this alternative sanction and allow for a genuine substitution of custody.

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[67] Pease (1985), *supra* note _, p. 74.
[68] Spaans (1998), *supra* note _, p.13.
[69] McIvor, Beyens, Blay and Boone (2010), *supra* note _, p. 85.
[70] Cesare Beccaria, *An Essay on Crimes and Punishments* (International Pocket Library, Boston, 1983), Chapter 19, p. 51.

3.2. Electronic Monitoring: Countries' Experience

Electronic monitoring is used in Europe in different stages of the criminal justice system. Almost in all jurisdictions this measure was introduced in times of overcrowding prison population with the aim of having a less costly yet credible substitute for prison (or remand[71]). The most commonly used monitoring technology in Europe is the Radio Frequencies (RF). Under this equipment a monitoring device is put around the ankle of the offender. This device sends signals through a phone line whenever the individual is absent from a certain defined area (usually his home). This may be used also to exclude a person from certain areas. Another technology is voice verification. This is the least costly option since no device is installed. The offender is supervised by phone calls with voice verification made to the location where he is ordered to be. Finally, some countries apply, or discuss the possibility of using the Global Positioning System (GPS). This technology is more advanced and allows following the whereabouts of the offender at any given time.[72] Therefore, this technology is also more expansive than RF and voice verification.

3.2.1. England and Wales

England and Wales were the first in Europe to introduce electronic monitoring in the 1980s, after adopting it from the Unites States. This new measure was explored in times of growing prison population and as a response to the net-widening problem of other alternatives such as community service. Following the experimentation with electronic tagging it was introduced in the *Criminal Justice Act 1991*. Electronic monitoring was perceived negatively both by the sentencers and by the Probation Office and was rarely implemented. Eventually, in 1999 due to a 50% increase in the daily prison population the Home Detention Curfew (HDC) programme was initiated. Under this scheme, eligible prisoners serving a sentence of three months to four years could be released to home confinement 60 days prior to the completion of their sentence. Subsequently, the number of individuals under electronic monitoring significantly increased. At this stage the programme was perceived positively and its estimation indicated that this policy saved around 2000 prison places which economised around £36 million. As a result, the period of HDC was extended from 60 to 90 days.[73]

[71] Pre-trial and during trial arrest.
[72] Nellis, Beyens and Kaminski (2013), *supra* note _, pp. 5-6.
[73] George Mair and Mike Nellis, "'Parallel Tracks': Probation and Electronic Monitoring in England, Wales and Scotland," in *Electronically Monitored Punishment* (2013), 63-81, pp. 64-69.

Electronic monitoring in England and Wales is imposed at the stage of early release, pre-trial, and as a requirement attached to other community penalties. As compared to other European countries, this jurisdiction has the highest number of electronically monitored offenders. In 2011, there were around 23,000 offenders under this scheme at any given day. RF is the main technology used for the surveillance and the maximum hours the offenders may be confined per day is 12. The completion rates are quite high, however this may be attributed to the fact that only low-risk offenders are found to be eligible for this option. The estimated daily costs of the programme per offender are around €14.40 (£12.10)[74] and they include all the monitoring, service, equipment, installation and breach expenses.[75]

Nevertheless, the lack of clarity with regard to the target group for this sanction is a persistent problem in England and Wales, and might be the cause of its underuse. In addition, its ability to constitute a cost-effective mechanism is criticised in recent years in the course of internal discussions on budget cuts. When imposed by the court, it is mainly applied to delinquents who would not otherwise be imprisoned, thus causing the net-widening effect. Consequently, albeit being less costly than prison, electronic monitoring is becoming an expensive sanction[76] when substituting other non-custodial sentences such as fine.[77]

3.2.2. Sweden

Sweden was one of the first European countries to introduce electronic monitoring as an alternative sentence for short-term imprisonment in the 1990s. The main justification for this reform was to avoid the negative effects of prison by offering a proper alternative to it. In addition, it was meant to constitute a less costly sanction as compared to custody. Sweden began piloting the programme in a limited number of regions in 1994 within a scheme named Intensive Probation with Electronic Monitoring (ISEM). The new sanction combined intensive control with rehabilitation. Therefore, the offender had to stay under home confinement (with RF electronic monitoring) and leave the premises only according to a schedule for work, treatment and other agreed activities. The programme was finally

[74] Converted based on http://www.xe.com/currencyconverter/ (accessed on 8.12.2013).
[75] Mair and Nellis (2013), *supra* note _, p. 73; Susana Pinto and Mike Nellis, Survey of Electronic Monitoring in Europe: Analysis of Questionnaires 2012," *8th CEP Electronic Monitoring Conference* (2012), pp. 2, 5.
[76] For example, the costs of a fine is expected to be lower. Even if there are costs of enforcing and collecting the fine, these costs are conditional on the lack of compliance by the offender. In other words, as long as some offenders comply with their sentence and pay their fines, the costs of enforcing the fine are zero. On the other hand, the expenses on electronic monitoring are always required, even when the offender is in compliance. First, the electronic device and its installation have costs. Second, a staff of supervisors needs to be employed in other to monitor the offender.
[77] Mair and Nellis (2013), *supra* note _, pp. 73-74.

introduce in the *Swedish Penal Code 1999* and extended to the whole county. It was used to replace prison sentences of up to three months upon the request of the offender and his eligibility. One of the conditions for receiving this alternative was to have employment. In addition, this scheme was used for an early release. In 2005, the target group of offenders was extended to cover sentences of prison up to six months, and a wider range of early releases.[78] Although the private sector is dealing with technical supervision, the Probation Service is entirely in charge of implementing and supervising this sentence. The hours of confinement range between 8-23 hours, and the offender is usually obliged to pay a daily fee of around €6 (50SK)[79] to a victim's fund.[80] According to an assessment conducted in 2011, the daily expenditure on electronic monitoring per offender is around €3.50 but it includes only the costs of equipment and installation.[81]

Even though the use of this sanction picked in 1998, later its application decreased due to the introduction of community service with a suspended sentence which targeted the same offenders group. A number of evaluations of ISEM were conducted and found to be positive. The programme was announced as a success in terms of programme completion, costs, prison diversion (half of the sentenced to three months custody served it under ISEM) and offenders' satisfaction. However, this alternative sanction is mainly imposed on drunk drivers and low risk offenders who in general have a better social background as compared to prisoners. A study on recidivism rates demonstrated that there is no significant difference between offenders under ISEM and comparable offenders in prison. Nevertheless, drunken driving delinquents perform somewhat better on the above-mentioned criteria after ISEM.[82]

3.2.3. France

France is another European country which implements electronic monitoring also in the stage of sentencing. This measure was first discussed in France in 1989 as an instrument to solve the prison overcrowding problem. In 1997 electronic tagging was introduced in the *French Penal Code* and allowed to substitute a sentence of up to one year, or enable early release a year prior to custody completion. For several years it was not implemented, possibly due to

[78] Inka Wennerberg, "High Level of Support and High Level of Control: An Efficient Swedish Model of Electronic Monitoring?" in *Electronically Monitored Punishment* (2013), 113-127, pp. 113-114.
[79] Converted based on http://www.xe.com/currencyconverter/ (accessed on 8.12.2013).
[80] Wennerberg (2013), *supra* note _, pp. 115-116.
[81] Pinto and Nellis (2012), *supra* note _, p. 4.
[82] Wennerberg (2013), *supra* note _, pp. 114-122. The strength of this study lies in the reliable control group. Since initially the policy was implemented only in certain areas, it was possible to match the treatment group to a control prison group in another area where ISEM was not available.

the increasing use of other alternatives. However, at the beginning of 2000s this situation changed. Electronic monitoring was introduced in all stages of the trial, i.e. pre-trial detention, court sentencing and post-trial release. In 2009, the period of home confinement for early released offenders was expanded to two years, enabling releasing a larger portion of offenders. Finally, the tracking system (GPS) was introduced and applied to dangerous offenders after serving their prison sentences.[83]

The condition to impose electronic tagging as a substitution for short-term imprisonment is the existence of work, family obligations, education etc.[84] This option is used mainly for drunk-drivers, other traffic offenses, drug and some violence offenses, usually only during the week-days. Those delinquents have on average more favourable characteristics than prisoners (employment, family, education). The completion rates are high, with only around 5% withdrawing from the programme. When observing sentencing distribution during the 2000s, it does not seem that this alternative had an effect on the growing prison population. In 2011, less than 8,000 individuals were under electronic surveillance as a sentence and early release. The estimated daily expenses on electronic tagging are €15.50 for RF and €30 for GPS. These costs include equipment, installation and monitoring.[85]

3.2.4. The Netherlands

In the Netherlands the discussion on the electronic monitoring began during the 1980s. The primary goal of considering introducing this method was to resolve the scarcity of prison cells and reduce the penalty costs. The first experimentation with electronic surveillance was initiated in 1995 in a couple of Dutch provinces. Following that electronic monitoring was introduced in different stages of the criminal justice system.[86]

The Penitentiary Principles Act of 1999 regulates a back-door policy. Under this Act, selected prisoners are chosen to serve the remaining period of their prison sentence outside prison. During this period they are electronically monitored (the first third of this programme) and obliged to participate in different activities which would assist them to integrate into the society.[87] In addition, electronic tagging may be used in the remand phase,

[83] René Lévy, "From Tagging to Tracking: Beginnings and Development of Electronic Monitoring in France," in *Electronically Monitored Punishment* (2013), 128-149, pp. 128-132.
[84] Article 132-26-1, *The French Penal Code (YEAR)*.
[85] Lévy (2013), *supra* note _, pp. 136-137; Pinto and Nellis (2012), *supra* note _, pp. 2, 6.
[86] Van Swaaningen and Beijerse (2013), *supra* note _, pp. 172-175.
[87] Peter J.P. Tak, "Prison Policy, Prison Regime and Prisoners' Rights in the Netherlands under the 1998 Penitentiary Principles Act," *International Penal and Penitentiary Foundation* (2008) available at

and this form is regulated by the prosecution.[88] Finally, electronic monitoring may be imposed also as a front-door scheme. This form of control may be combined with a suspended sentence or other non-custodial sanctions for the period of 6-12 months.[89] This option is rarely used. For instance, during the period of 2002-2003 this sentence constituted only 3% of all the forms in which electronic monitoring was used. However, electronic monitoring was implemented also as a way to execute a prison sentence of up to 90 days, i.e. "Electronic Detention" (and later on "Electronic House Arrest"). This was introduced by the Ministry of Justice in 2004 and administered by the Prison Department. The offenders under this scheme may keep their work and the rest of the time ought to remain under home arrest. The unemployed offenders are required to remain 22 hours a day under home confinement and they have two hours of free time. An evaluation of this programme was positive. Around 93% of the offenders completed their sentence. Furthermore, the daily expenditure for electronic monitoring was €40 per person, which constitutes one third of the costs of a prison cell in low-security prison. This scheme was discussed for several years as a potential sanction to be introduced in the law. However, in 2011 it was eventually rejected by the State Secretary of Security and Justice with the assertion that it does not constitute a credible alternative to prison.[90]

3.2.5. Belgium

In Belgium, electronic monitoring was first discussed in 1996 and the first pilot programme took place in 1998. The need for custody alternative emerged in times of overcrowding prison population. Namely, 116% of the prison capacity was used during this period. In 2000, the implementation of electronic monitoring was extended to the whole country through regulatory documents (Ministerial Circular Letters). Albeit being introduced with a rehabilitative aim, alongside the controlling goal, as of 2006 electronic monitoring became merely a cost-effective substitute for custody. The daily cost of this measure is €39, which is three times less than the daily expenditure on one prisoner, i.e. €126.[91]

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http://www.internationalpenalandpenitentiaryfoundation.org/Site/commun/contributions_Stavern.htm (accessed on 28.11.2013).

[88] Van Swaaningen and Beijerse (2013), *supra* note _, p. 186.

[89] Tak (2001), *supra* note _, p. 170.

[90] Van Swaaningen and Beijerse (2013), *supra* note _, pp. 179-182.

[91] Beyens and Roosen (2013), *supra* note _, pp. 57-59; Kristel Beyens and Dan Kaminski, "Is the Sky the Limit? Eagerness for Electronic Monitoring in Belgium," in *Electronically Monitored Punishment* (2013), 150-171, pp. 150-153. The Act of 17 May 2006 created the Sentence Implementation Courts which is in charge of the early release process, and regulated the use of electronic monitoring as a way to execute a custodial punishment. In

Currently electronic surveillance is used as back-door and front-door schemes. The former is available for offenders who are serving a prison sentence of more than three years. In these circumstances, they may be released to home confinement six months prior to their eligibility to parole. The latter scheme, the front-door option, is used for prison sentences of up to three years. In this case, a court-ruled prison sentence is almost automatically converted to home detention by the prison governor. In addition, since 2012 Belgium is using voice verification technology as a home surveillance. This method reduces significantly the expenditure on electronic monitoring since its daily operation costs are only around €5.50 per person. Offenders without meaningful activity may leave their house only for four hours per day, in order to search for a job, medical treatment, etc. This "time-window" may be extended to eight or even 12 hours if the offender has employment or other important activities. In 2009, around 72% of sentences under electronic monitoring lasted up until 150 days. However, some offenders spent more than two years under this surveillance. The rate of compliance that year was around 76%. Finally, the current Minister of Justice announced that a GPS system would be introduced in the pre-trial phase in January 2014.[92]

The use of electronic monitoring in Belgium is increasing over the years (from less than 300 at the beginning of 2000s, to around 1318 offenders in 2013). On the one hand, it seems that the problem of prison overcrowding has not been resolved. Whereas in 2006 around 116% of prison capacity was exploited, by 2013 it was already 123%. On the other hand, there are almost no short-term (up to one year) prisoners in Belgium, which implies electronic monitoring is a real alternative to custody. The explanation for this may be that until 2013 prison sentences of up to eight months were not executed due to prison cells shortage. Hence, the new technology enabled to execute prison sentences which before went unpunished.[93]

3.2.6. Summary and Identification of Common Problems

The following table summarises the main features of electronic monitoring implementation in the discussed countries (Table 2).

fact, electronic monitoring was never discussed and introduced by the Parliament in a regular legislative procedure. Hence, there is no clear instruction and criteria of the target group for this measure (p. 154).

[92] Beyens and Roosen (2013), *supra* note _, pp. 59-64; Beyens and Kaminski (2013), *supra* note _, p. 162.

[93] Beyens and Roosen (2013), *supra* note _, p. 65; Beyens and Kaminski (2013), *supra* note _, p. 165.

Table 2: Electronic Monitoring in Selected European Countries.

Country	Year of first programme (P)/Introduction (I)	Stage of the Criminal Justice System	Prescribed Period	Completion Rates
England and Wales		▪ Pre-trial ▪ Early Release ▪ Requirement to a community sentence	90 days (early release)	
Sweden	1994(P)/1999(I)	Sentence	6 months (sanction)	
France	1997(I)	▪ Pre-trial ▪ Sentence ▪ Early Release		95%
Netherlands	1995(P)/1999(I)	▪ Remand ▪ Supplement to a suspended prison sentence ▪ Way to execute a prison sentence ▪ Early release	▪ 6 months (supplement) ▪ 90 days (executed prison sentence)	
Belgium	1998(P)/2000(I)	▪ Way to execute a prison sentence ▪ Early release	▪ 3 years (prison execution) ▪ 6 month (early release)	76%

Source: own table based on *ibid.*

The above-mentioned overview suggests there are significant differences across jurisdictions in the way of implementation and the stages in which electronic monitoring is dominant. Nevertheless, some common problems might be identified. First, often there is no clear understanding and uniformity with regard the target population for this method. All the more so when other alternative sanctions such as community service are also available. Second, when imposed as a punishment, it seems there is a net-widening effect, and it is often used to deal with minor offenders.[94] Finally, despite the potential of electronic monitoring to substitute a prison sentence, not many countries use it as a sanction (or as a way to entirely execute a prison sentence).

Similar to community service, electronic monitoring may constitute a credible substitution to a prison sentence. This solution can be cost-effective when properly used. However, those

[94] Those were also partially the reasons not to introduce electronic monitoring in Belgium in the sentencing phase. See Beyens and Marijke Roosen (2013), *supra* note _, p. 61. See also Mair and Nellis (2013), *supra* note _, pp. 73-74, for the persistent problem of identifying the right target group.

two alternative sanctions often overlap in the sense of their target groups. Therefore, the goals and the structure of their implementation ought to be clear. The following sections discuss possible substantive and procedural solutions. First, the Israeli model is presented in order to assist in designing the substantive structure of community sanctions. Second, the structure, goals and the target group of both community service and electronic monitoring are discussed. Lastly, a procedural solution which must complement the substantive suggestion is offered.

4. Substantive Solution

In order to design sanctions in the community which may be truly used as an alternative to prison it has to impose similar costs of punishment on the criminal as the costs of custody. Namely, the penalty has to be burdensome. The idea behind deterrence is the imposition of higher expected costs of crime as compared to the benefits the criminal derives from it.[95] Therefore, in order to deter behaviour which was previously punished by prison the alternative sanctions must impose sufficiently high costs. Support for this argument may be found in the common criticism that these sentences are too soft and incapable for replacing custody.[96] Hence, in order to legitimise and promote these sanctions as a substitute to custody, they have to be perceived by the enforcement authority and the public as punitive and deterring enough. The Israeli model of community service is presented since it imposes sufficient costs of punishment. In addition, the structure of this punishment in Israel provides clarity and assists in using community service for the "right" population. Therefore, it may assist in designing a model of community service which would deal with the identified problems.

4.1. Community Service: The Case of Israel

In the Israeli criminal justice system there are two sanctions which entail an unpaid work in the community, i.e. “Community Service” and “Service for the Public Benefit Order”

[95] Gary S. Becker, "Crime and Punishment: An Economic Approach," *The Journal of Political Economy* 76(2) (1968), 169-217.

[96] See for example, Paul Larsson, “Punishment in the Community: Norwegian Experiences with Community Sanctions and Measures,” in *Community Sanctions and Measures* (2002), *supra* note _, 393-419, p. 402; Dick Whitfield, *The Magic Bracelet: Technology and Offender Supervision* (Waterside press, Winchester, UK 2001), p. 47; Boone (2010), *supra* note _, p. 22; Tonry and Lynch (1996), *supra* note _, p. 112; The Scottish Government, *2010/11 Scottish Crime and Justice Survey: Main Findings* (The Scottish Government, Edinburgh, 2011), p. 107.

(SPBO). They differ in the severity of the punishment, their implementation and the characteristics of the target population.

The SPBO was introduced in Israel in 1979 in certain municipalities and in 1994 it was expanded to the whole country. The nature of this punishment significantly resembles the European model of the community service order. It is imposed in the form of a number of unpaid work hours and intended to be performed by the offender during his leisure time. The SPBO must be performed within one year and the probation office is the body in charge of this penalty. Initially the SPBO was introduced as an alternative to custody. However, similar to the European experience, it served more often as an alternative to other non-custodial sanctions.[97]

The current Israeli Penal Code explicitly states that the SPBO is not an alternative to prison.[98] According to the law, the SPBO may be chosen as a sanction by the court *only* if a prison sentence was not imposed. This sanction may be combined with other sanctions or be inflicted as a single punishment. As stated before, the unpaid work is imposed in hours and intended to be performed during the leisure time of the offender. In case of a breach, the court may cancel the order and impose on the culprit a new sentence for the original offence.[99]

Community service was introduced as a penalty into the Israeli Penal Code in 1987. As stressed in the explanation for the Bill Proposal, the main reason for adopting this sanction was to reduce prison overcrowding and to avoid the harmful effects of short-term imprisonment.[100] This sanction is an explicit alternative for a prison sentence as expressed in its name and its relevant provisions in the law.

The full name of this punishment is "Serving Prison in Community Service". Thus, already suggesting it is not an independent sanction, but a form of carrying out a prison sentence. In addition, the sanction of community service is considered as a custody penalty in the criminal record of the offender. Furthermore, Article 51b(a) states the following "*the court which sentenced the defendant to a prison term of not more than six months, may decide that the*

[97] Bilha Sagiv, *Service for the Public Benefit Order in Jerusalem January 1982-July 1985*, Thesis Manuscript (Hebrew University Jerusalem, Jerusalem 1988). (In Hebrew).
[98] Article 71a(a), *The Penal Code, 1977*.
[99] Article 71d, *The Penal Code, 1977*. Which sanction should be imposed on the offender in case of a breach is not specified, thus, it depends on the discretion of the court.
[100] *Bill Proposal 1766* (14.1.1986), p. 76. The introduction of community service came as a replacement to the *Penal Labour Act of 1927*. Under this act, police could convert a prison sentence of up to three months to a work punishment outside the prison. In practice, only few of the offenders were actually referred to this option and the work was mainly performed at police stations without any rehabilitative value.

sentenced defendant would serve the prison sentence, in whole or in part, in community service […]".[101] Therefore, the law explicitly requires that this sanction would be imposed solely on offenders who were sentenced to prison. Similarly to European countries, the execution of community service is conditioned upon the offender's consent.[102]

The nature of the work according to the law is for the public benefit, without remuneration,[103] in state institutions, or other bodies.[104] In the past, the sanction of community service was divided into two types, i.e. sector work and public work. The former work was intended to be performed in non-state bodies. In addition, the private employer was obliged to pay a wage to the prison which would then transfer the money to the offender after deducting administration expenses. In order not to create unfair competition and create unemployment, only the "unwanted" jobs could be assigned to community service offenders.[105] The public work, on the other hand, was unpaid work performed in state bodies.[106] In practice, over the years no distinction was made between the two types of work and wages were never paid to the offenders.[107] Consequently, in 2009 the law was amended and currently all the work is unpaid and for the public benefit, however, it may be performed in state and non-state bodies.[108] Currently, there are around 450 work places[109] which include hospitals, community

[101] Nevertheless, in practice, since prison is considered as a harsher sentence than community service, *ceteris paribus*, the community service term might be longer than a prison term, and not one-to-one. See for example, C"A (Criminal Appeal) 537/89 *State of Israel v. Abrahmein*, pp. 772-773, suggesting that the court should receive the community service administrator's opinion regarding the suitability of the offender for unpaid work prior to sentencing since it might affect the length of the sentence.

[102] Article 51b(b)(2), *The Penal Code, 1977*. When the law was discussed in 1987, some of the parliament members offered to increase the prison term which may be substituted to nine months. Due to the novelty of the sanction, the parliament agreed to introduce six months, assuming in the future the discussion of prolonging this term would resume. See Parliament Discussion (1.4.1987) on the *Penal Bill Proposal (Amendment no. 21) – 1987,* (Second and Third Voting). (In Hebrew).

[103] Forasmuch as community service is a full-time employment, some of the offenders do not have income during the period of the sentence. Therefore, under certain conditions, the Israeli law entitles these offenders to social security benefits to provide their basic needs. The monthly payment in these cases is around €300, which constitute approximately 16% of the average wage in Israel. See First addition, Article 16, and Second addition, *Income Support Law, 1980*. This amount is for a single offender, and may be increased if the offender has dependents. Nevertheless, the conditions for receiving the benefits are very strict and not all offenders are found to be eligible. For example, at the beginning of the 1990s, only 34% of those serving the community sentence received social welfare. See Sagiv (1997), *supra* note _, p. 236. (In Hebrew).

[104] Article 51a, *The Penal Code, 1977*.

[105] Article 51a, *The Penal Bill Proposal (Amendment no. 21)-1987*. Parliament Discussion (1.4.1987) on the *Penal Bill Proposal (Amendment no. 21)-1987,* (Second and Third Voting). (In Hebrew).

[106] Article 51a, *The Penal Bill Proposal (Amendment no. 21),1987*.

[107] HCJ (High Court of Justice) 114/06 *Ganot and others v. The Prison Service* (20.9.2007), para. E. (In Hebrew).

[108] Amended Article 51a, *The Penal Code (Amendment no. 102), 2009*.

[109] Prison Service, *Yearly Report 2012*, p. 172, available at http://ips.gov.il/Web/He/News/Publications/Reports/Default.aspx (accesses on 16.11.2013). (In Hebrew).

centres, rehabilitation institutions, museums, gardens, municipalities, police stations, prisons, centres for disabled children, elderly houses, schools, homeless shelters, etc.[110]

There are no prescribed limitations on the type of offenses and offenders who may be sentenced to community service. The length of the community service equals the length of the prison term with subtracted weekly rest days and sabbaticals by law. Furthermore, the period of community service decided by the court must be completed in a sequential manner. The structure of community service is eight and a half hours of work per day, five days a week. In exceptional cases the court may reduce the daily quota of hours, but not below six hours.[111] In case of unjustified breach of this sanction, generally the offender would be obliged to serve the remaining of his sentence in prison.[112] The body which is in charge of the administration of the sanction is the Prison Service.

The most extensive study on the Israeli community service was completed in the 1990s. It compared four groups of offenders: (1) defendants who were sentenced to community service after the 1987 law, (2) offenders who were sent to prison of up to six months before the introduction of community service, (3) offenders who were sent to prison of up to six months after the introduction of community service, (4) criminals who received the SPBO.[113] The following main characteristics were found with regard to the offenses and the offenders serving community service. The majority of the offenders were male; convicted for violence offenses (more than 50%); with a criminal record[114] (74%, on average 7 offenses) and about 24% of them committed drug offenses in the past; were convicted in the past (79%, on average 4.8 offenses); did not serve prison sentence (71%); received between 4-6 months[115] of community service (61%) with additional penalties such as fine, suspended prison, etc. (97%). Around 13% [116] of these offenders committed additional offenses during their community service, and 22% within a year and a half after completing the sentence. In terms

[110] An official reply by the Prison Service to an administrative court order 24952-06-11 (17.12.2012).
[111] Article 51f, *The Penal Code, 1977*.
[112] Articles 51i-j, *The Penal Code, 1977*.
[113] Sagiv (1997), *supra* note _, pp. 78-79.
[114] Criminal record in this context contains the number of cases in which the offender is/was suspected of a crime. This is different from the number of convictions which refer to cases in which the offender was found guilty.
[115] Among prisoners there is a higher portion of offenders who receive less than five months imprisonment. See Sagiv (1997), *supra* note _, p. 110.
[116] This estimation is similar to the portion of offenders committing crimes during their community service order in England and Wales and in New York City. See Morris and Tonry (1990), *supra* note _, pp. 161-162. It should be noted, that prisoners, albeit incapacitated, occasionally commit crimes during the prison time as well. For instance, the above-mentioned study found that around 5%-7% of prisoners commit crimes while serving their sentence. See Sagiv (1997), *supra* note _, p. 125.

of criminal record and past convictions, the community service offenders resemble more the group of prisoners than the SPBO offenders. However, in terms of recidivism rates, community service offenders are closer to SPBO offenders. Interestingly, the offenders who were sent to prison after the introduction of the community service sanction have a "richer" criminal record than those who were imprisoned before the amendment. This might imply that "lighter" offenders were diverted from prison and made place for "harsher" offenders.[117]

The main three elements for the assessment of community service's success are the level of prison substitution, the rate of completion and the rate of recidivism. The first element refers to the question of net-widening effect. The trend of imprisonment in Israel after the introduction of community service presents evidence for the reduction of prison sentences up to six months. At the same time, the number of prison sentences longer than six months increased. Nevertheless, the trend of prisoners per 100,000 inhabitants was reversed and began decreasing. These findings imply that the new alternative sanction - albeit not entirely avoiding the net-widening effect - indeed diverted a portion of delinquents from short-term imprisonment.[118] Therefore, it may be concluded that the community service in Israel is not reserved only for first-time offenders who commit "light" crimes and would otherwise receive non-custodial sanctions.

The second factor which should be considered when assessing the success of an alternative sanction is the rate of compliance. If the delinquents are diverted from prison, but do not serve their sentence in full, the alternative sanction may not be regarded as an appropriate response of the criminal justice system. Examining the Israeli completion rates reveals a promising result. Between the years 2005-2012 the number of sentenced to community service per year was mostly more than 4000 offenders. The completion rates of this sanction during this period ranged between 77%-94%.[119] To place this finding in perspective, it may be compared to the completion rates in some European countries. For example, in Scotland only 65% of the offenders completed their sentence between the years 2007-2008.[120] During the same period, around 76% of delinquents completed community service orders in the

[117] Sagiv (1997), *supra* note _, pp. 98-143.
[118] Sagiv (1997), *supra* note _, pp. 217-220. This diversion is not absolute since the portion of reduced short-term prisoners is lower than the increase in community service offenders.
[119] Prison Service, *Yearly Report – 2005-2012*, available at http://ips.gov.il/Web/He/News/Publications/Reports/Default.aspx (accesses on 16.11.2013). (In Hebrew).
[120] McIvor (2010), *supra* note _, p. 51.

Netherlands.[121] The Israeli findings are especially important since its community service is substantially more burdensome than the European model in terms of time. The majority of the community service orders in Israel are of 5-6 months, full-time employment. Certainly, such a sentence requires higher commitment from the offender. Furthermore, the profile of the Israeli community service offenders is not "lighter" than in Europe. In fact, in recent years, almost 60% of those offenders were incapacitated in their past in one way or another (served a prison sentence, community service, or spent some time in pre-trial detention).[122]

With respect to recidivism, in the above-mentioned research it was found that delinquents after community service reoffend twice as less as compared to ex-prisoners (22% versus 42% respectively).[123] Certainly, a plausible argument is that these findings might be attributed to the selection bias. In other words, those results might simply suggest that the courts impose prison sentences on more risky offenders. Nevertheless, a counter argument might be the characteristics of the Israeli community service offenders. A criminal record is usually a good predictor of reoffending. Therefore, the fact that the majority of delinquents receiving the sanction of community service possess criminal records (74%), suggests they are not low-risk offenders. In addition, even if the difference in reoffending rates between those two groups is smaller or even non-existing, community service may be viewed as a cost-effective policy for the following reasons. First, prisons are considered as a more expensive method of punishing than community service. Second, under the latter sanction, offenders are potentially producing benefits for the society through unpaid work.[124] Therefore, community service may be regarded as a success in terms of subsequent reoffending as well.

4.2. Suggested Structure of the Alternative Sanctions

Sections 2 and 3 identified several problems which might decrease the cost-effectiveness of the sentencing system. First, the alternative sanctions, i.e. community service and electronic monitoring, suffer from the net-widening effect. This in turn, may increase the costs of the

[121] Boone (2010), *supra* note _, p. 34.
[122] Prison Service, *Yearly Report – 2009-2012*, available at http://ips.gov.il/Web/He/News/Publications/Reports/Default.aspx (accesses on 16.11.2013). (In Hebrew).
[123] Sagiv (1997), *supra* note _, p. 212.
[124] This argument might not hold if the prison serves as a better incapacitation method and prevents crimes during the execution of the punishment. This is true if the rate of reoffending during the community service is significantly higher than during the prison term. In the example of Israel, this does not seem to be the case, see *supra* note _ and the accompanying text, suggesting that the probability of reoffending under community service is more probable only by 7% than prisoners during their sentence. In addition, as explained by Morris and Tonry (1990), *supra* note _, pp. 161-163, it is too expensive endeavour to incapacitate all offenders who pose some risk of reoffending, and the benefits might not justify it.

sentencing system since too costly sanctions are imposed on offenders who may be deterred more "cheaply". Possible reasons of the net-widening effect are the softness of the alternative sanctions; lack of public support; the need for intermediate sanctions which are not only substituting prison; and difficulty in identifying the cases for which these sanctions should be used. The second problem with the use of alternative sanctions is the delays in their execution due to limited placement opportunities. Third, with the current European model of community service and electronic monitoring it is not clear in which cases and on what population it should be imposed. The suggested design of the community service and electronic monitoring in the following sections may potentially resolve these problems.

As mentioned before, the underlying suggestion is to increase the offender's punishment costs of these alternatives. In addition, it is recommended to introduce clear goals and structure of these sanctions. The latter would assist in placing the community service and electronic monitoring on the sanction continuum.

4.2.1. Community Service: The Double-Track System

As have been already discussed, the sanction of community service has many benefits. First, it has the potential to divert offenders from custody. This in turn, might avoid the negative effects of prison on the offenders in terms of socialising with delinquent population; reduce the costs of punishment; avoid isolation of the offender from his family and the society; enable the delinquents to acquire work skills; increase the benefits for the society through performing an unpaid work, etc. An additional advantage is the expansion of the sentencing system in order to better suit the different offenses and offenders. This would assist to tailor the punishment to the severity of the crime and the characteristics of the offender and thus, achieve better marginal deterrence. However, in order to achieve these goals, the community service sanction must be implemented efficiently. Therefore, this section proposes a model which might achieve the abovementioned goals.

On the one hand, community service should be perceived as severe enough in order to truly legitimise it as a substitution for a prison sentence. On the other hand, a similar sanction should be available in the continuum of sanctions as an independent penalty. There are cases which are too "light" to be dealt with an imprisonment or its alternatives, yet too severe to be dispensed with merely a fine or a suspended sentence. Therefore, it is suggested to create a "double-track system" of community service sentence based on the Israeli model.

The first punishment would be called the "Public Penalty" and resemble the above-described Israeli model of community service. In other words, sentences of up to six months of prison might be converted to the same period of unpaid work. A week of this sanction would include 5 days of unpaid work, 8 hours per day. After a period of implementation, this sanction might be extended to substitute a longer prison sentence (e.g. one year). Such punishment imposes on the offender sufficient costs of incapacitation[125], while diverting him from prison. Hence, the public and the courts might perceive it as an appropriate alternative for a prison sentence and use it more often for the "right" population.[126] Consequently, community service would not be reserved only for first-time offenders committing light crimes. This in turn, would reduce the burden on prisons. In addition, a system which directly translates a prison term to work periods assists in creating uniformity in the sentencing decision-making. When the law is merely providing the maximum bound of hours which may be imposed on the offender, it is difficult for different courts to impose similar sanctions in comparable cases.[127] This might impede deterrence since the expected costs of a crime are not clear. On the other hand, when the sanction of unpaid work is imposed in the same way as imprisonment, it is simpler to achieve unity.

The second punishment in the double-track system would be called "Social Benefit Service" (SBS). This sanction of unpaid work should resemble the European model. However, it should clearly be an independent sanction which does not substitute a prison sentence. The SBS should be used on offenders who may not be deterred only by fines, or those who committed crimes which are too severe to be punished by fines. Like in Europe, the Social Benefit Service would be imposed in hours to be performed during a certain period. Nevertheless, since it is not intended to be used in cases of offenders who would otherwise be sent to prison, the upper limit does not have to be high. This sanction should be placed on the scale of sentencing below the Public Penalty and above fine and suspended sentence.

[125] The classical meaning of incapacitation is the physical restriction of the offender in order to prevent him from committing crimes. The sanction of community service restricts the freedom of the offender during the working hours, thus, decreasing his opportunities of committing crimes.
[126] Some evidence for the decrease of the net widening effect when imposing harsher community service may be found in the Netherlands. Spaans (1998), *supra* note _, found that the offenders who received the maximum range of community service hours (151-240 hours) resembled the prison population (p. 13).
[127] For this problem see for example, McIvor (1992), *supra* note _, p. 147.

Creating a dual system with two different sanctions[128] might better achieve the goals of both, reducing imprisonment and creating a more diversified sentencing system. The names of the sanctions have a purpose as well. It expresses their different punitive "bite". Nevertheless, the two sanctions would not differ in the nature of the performed work, but only in its length. As prison terms vary in their length and not in their conditions, the Public Penalty should not impose a more burdensome work than the Social Benefit Service. This separation might assist the courts to use it optimally imposing it on the right population. It would prevent confusion with regard to the goal of the sanction and the ways to properly implement it. The SBS provides the courts with an intermediate sanction which may be imposed on the offenders and offenses which are too serious for a fine but not serious enough for prison. Therefore, this system minimises the temptation of using the Public Penalty on those offenders and widening the net.

The introduction of a double-track system solves also the problem of the response to a breach. In case the breach is of the Public Penalty, the offender is sent to complete the remaining prison term. However, if the SBS is breached, there should be a separate sanction for the primary offense and for the violation. For instance, in criminal justice systems which use the day-fine, the breached SBS would be translated to a comparable fine. Yet, in addition, the number of the imposed days, which expresses the severity of the crime, would be increased in order to capture the response for the breach. This is possible since a breach of the original sanction may be viewed as a violation of a court order. Consequently, the double-track system avoids two problems. On the one hand, contrary to the current model of community service, it does not impose a prison sentence on people who without the existence of community service would receive non-custodial punishment. On the other hand, it does not create incentives for an efficient breach of the original sanction.[129] The additional sanction for the mere violation of the SBS increases the costs of breaching and prevents it from being efficient for the offender.

[128] The closest example of such a system is Spain, see Section 3.1. However, community service as a direct substitution to prison (under article 88 to the Spanish Criminal Code), is rarely used. In addition, the majority of community service orders in Spain are imposed on traffic offenders. The Israeli model, on the other hand, diverts "harsher" criminals and a larger range of offenses. Furthermore, both forms of community service in Spain (direct community service, and the substitution for prison) could replace prison, thus making this system inherently different from the suggested double-track system.

[129] As discussed in Section 3.1 in Spain for instance, in case of a breach the offender is sanctioned for it but the original offense remains unpunished.

Different criminal justice systems often impose a prison sentence on fine defaulters.[130] The less punitive systems impose community service sanctions. This paper suggests imposing the SBS sanction on fine defaulters. The fine default population should not immediately receive a prison sentence since the costs of this punishment are much higher than a fine, both for the offender and for the society. The severity of the offense usually does not justify imprisonment and the fine is often not paid due to inability rather than a choice. Similarly, the Public Penalty also should not be a default response for failing to pay a fine. This sanction is an alternative for prison, thus, imposing similar high costs of punishment on the offender. On the other hand, the SBS punishment might accurately substitute a fine for offenders who do not pay it. First, it is the next sanction on the scale of sentencing, thus being a legitimate substitute for a fine. Second, the fine may be easily translated to a number of working hours. For instance, if the offender received a fine of 500 euro, and the minimum wage per hour is 10 euro, he would be required[131] to complete 50 hours of SBS. Such a system would simply impose "fine on time" and allow offenders to choose the way to repay their fine.

Another suggestion concerns the nature of the work which should be imposed on offenders performing either the Public Penalty or the SBS. A substantial problem which arises in different European systems is the lack of suitable work places. One of the reasons for this phenomenon is the limitation on the nature of the work (i.e. places which are not occupied by paid workers to protect fair competition). This in turn, leads to delays in executing the punishment.[132] As previously discussed, late implementation of a sanction prevents celerity of the criminal justice system, which is important for deterrence. This problem might arise in the double-track system since potentially it would increase the number of the offenders performing unpaid work. Therefore, it is suggested to relax the limitation on the nature of the work. All the services which are provided by the state and projects which are financed from the state budget should be available for unpaid work sanctions. The rationale behind this suggestion is that the saved money may be "injected" back into the private market to produce new places of employment.[133] Thus, the workers who are not employed in the state projects

[130] See for example Blay (2008), *supra* note _, p. 251, for Spain.
[131] Of course, the same rules with regard the offender's consent as in community service sanctions would apply in this case.
[132] McIvor, Beyens, Blay and Boone (2010), *supra* note _, p. 85.
[133] One option may be reducing the social security contributions by employers. This policy is believed to increase the employees' recruitment. See for example, OECD, "Supporting Employment through Reduced

due to unfair competition may find work in the private market. This type of policy would significantly increase the opportunities to impose the unpaid work sanctions on offenders, while at the same time would not increase the unemployment rate. In addition, the expansion of types of work might allow imposing this sanction on a population which was previously excluded.[134] Nevertheless, the places which were available until now for those offenders (tasks which otherwise would not be performed) should remain in the pool of community service work.

Furthermore, the administrating authorities should optimise the placement of the offenders. To be precise, each delinquent should be matched, as much as possible, to the place of work based on his skills. This strategy of allocation might improve the performance of the offenders, increase the benefits derived from their work and improve the satisfaction of the sentenced individuals. Notwithstanding, offenders without prior skills should also be allocated to different work places in order to allow them to acquire expertise for the future.

Lastly, the courts should be allowed to combine these community sentences, Public Penalty in particular, together with other sanctions when necessary. This would enable better matching of the punishment to the specific circumstances. Moreover, combination of different sanctions might increase their strength, and expand the continuum of sentencing.

4.2.2. Electronic Monitoring

The Public Penalty should be the default alternative to replace a short-term prison sentence. As opposed to electronic monitoring, the Public Penalty does not require a special technology, which reduces the costs of its implementation. In addition, as discussed before, the offender provides benefits for the society by performing an unpaid work. These benefits may be used to cover the costs of executing the punishment. On the contrary, electronic monitoring involves the installation and maintenance of electronic devises which have costs. Furthermore, the offender under home confinement does not perform unpaid work, thus, does not provide any tangible benefits. Nevertheless, electronic monitoring is advantageous as compared to prison. The daily costs of confinement are lower than prison; it reduces the need to build new prisons; it allows the offender to maintain family and social contacts and avoids the negative effects of prison. Thus, this option may be implemented wherever the Public

Social Security Contributions," *International Labour Office* (2011). Another possibility is to offer tax benefits for new enterprises which would create job opportunities.

[134] Boone (2010), *supra* note _, p. 36.

Penalty is not available, e.g. when the offender is unable to perform an unpaid work, yet his risk assessment allows to execute his sentence in the community.

Research has shown that some offenders are significantly underrepresented in the community service alternative due to disability, substance addiction, etc.[135] Those offenders may be suitable to serve their sentence outside the prison walls but do not receive this opportunity as a result of their inability to perform work or due to a higher risk of reoffending. The Dutch experience demonstrates the other side of the coin. Courts sometimes impose community service on offenders who may not really perform it, thus those delinquents often breach the conditions. The justification for this practice is that sometimes the severity of the crime does not justify prison but also not the lighter non-custodial sanctions.[136]

Therefore, this paper suggests that in the sentencing stage electronic monitoring ought to be reserved for the cases which do not fit community service. To be precise, in the first stage the court imposes Public Penalty where applicable (following the consent of the offender). This decision is made based on the severity of the crime and the risk assessment of the criminal. However, if later on the offender is found, by the assigning body, as unfitting to perform the unpaid work, his prison sentence should be executed in home confinement under electronic monitoring.

In order to constitute a credible alternative to prison, similar to the Public Penalty, the costs of punishment for the offender should be closer to those of prison. Namely, the offender's liberty should be meaningfully restricted. Under the suggested structure of electronic monitoring the delinquent should be required to spend his time at home. He may receive a number of hours per day (between 2-4 hours) of free time in order to perform necessary activities (shopping for groceries, medical treatment, sport, etc.). In this "window" of free time the offenders ought to participate in different treatment programmes (e.g. rehabilitation from addiction). In order to improve the credibility of confining offenders with alcohol problem, the RF system might be complemented by 'remote alcohol monitoring' (RAM). This technology enables to randomly check alcohol use from a remote location.[137] As in prison, good behaviour may be rewarded by increasing the free time, or even providing "days off" (prison furlough). Unlike in the common European model, those individuals should not be allowed to work. The rationale behind this limitation is that this punishment ought to be

[135] Van Kalmoth (2000), *supra* note _, pp. 131-132.
[136] Boone (2010), *supra* note _, p. 30.
[137] Nellis, Beyens and Kaminski (2013), *supra* note _, p. 5.

imposed only on prison-bound offenders who would otherwise lose their employment and be imprisoned. Hence, to make the alternative credible and gain the public support, the incapacitation power should be closer to imprisonment. Moreover, this restriction would not be burdensome due to the above-presented rule of making the community service a default punishment. Therefore, the offenders which are sentenced to home confinement under the suggested structure are those who were anyway found unfit to perform work.

Offenders detained with electronic monitoring devices are incapacitated to a larger extent than Public Penalty offenders. For instance, the former group is required to stay under the same "monitoring" conditions during the weekends. On the contrary, those delinquents performing unpaid assignments are incapacitated only while working. Thus, their weekends and after-work hours are free. This differentiation avoids distorted incentives. If the level of incapacitation would be equal under both sanctions this would mean that some offenders work and others have leisure time at home. Consequently, delinquents would be incentivised to fail their suitability examination to convert the Public Penalty to home confinement with electronic monitoring. Increasing the incapacitation level of home confinement "compensates" the lack of work. On the other hand, this increased constrain on the liberty of the person may not be viewed as a discrimination as compared to the Public Penalty group. Forasmuch as those offenders are chosen from the pool of individuals who are found not to fit work, the alternative they are facing is prison. Certainly, home confinement with free time may be viewed as imposing lower costs of incapacitation than prison.

The length of home confinement should be up to six months like the Public Penalty (or up to one year in jurisdictions which are willing to prolong it). Prisons usually consist of individuals with commitment problems. The lack of self-restrain is one of the reasons for an individual to commit crimes in the first place. Electronic monitoring acts through the threat of detection and punishment and not through physical restriction as prisons. Inevitably, it requires the offender to self-commit to tough conditions of limited freedom. Thus, prolonging home confinement to several years (e.g. Belgium) may result in too high incidents of a breach.

To extend the sentencing continuum and to enable a larger diversion from prison, electronic monitoring may be combined with the Public Penalty. To be precise, offenders can be required (with their consent) to perform an unpaid work during the day, and stay at home under electronic monitoring during the night. The surveillance device may be also installed in the place of work in certain cases. This sanction should be reserved for those offenders who

are found to be fit for Public Penalty, yet their level of risk does not allow for complete freedom outside the working hours. Consequently, this option would allow including in the target group more serious offenders who committed harsher crimes without compromising the public safety. In addition, electronic monitoring may be combined with suspended sentence for those who would otherwise be too risky for only a suspended sentence.

Due to its non-negligible costs and restrictive character this paper suggests not including electronic monitoring in the sentencing continuum beyond the abovementioned structure. The tangible costs of the net-widening problem are higher in case of electronic monitoring than in case of the Public Penalty. The implementation of this sanction entails the usage of technology. Therefore, imposing these conditions on offenders who would otherwise receive a fine or probation would increase the general costs of sentencing. Nevertheless, electronic monitoring should be used as a back-door strategy. As the European experience demonstrates, this allows prolonging the period of early release. In turn, offenders have more time to adjust to life outside prison, i.e. to reintegrate, and the state saves costs of punishment. In addition, the target group for early release is expanded.

This paper suggests that this sanction would be managed by the prison administration. Electronic monitoring, as the Public Penalty, should be complemented with sporadic human supervision. In order not to increase significantly the costs of these alternatives, the supervisors should make unexpected random home/work visits to assure the offender is complying with the conditions.

5. Procedural Solution

The substantive solution discussed above needs to be supplemented by a procedural change. The first step in achieving more efficient use of alternatives was to introduce sanctions which potentially may substitute prison and expand the sentencing continuum. The second step is to assure this system is implemented properly in order to achieve its goals. Namely, the decision makers need to impose the alternative sanctions on the “right” population. Offenders who may be deterred by less costly sanctions than prison should be punished by the alternative sanctions. However, those sanctions should not be expanded to cover the culprits who may be sufficiently deterred by fines, probation or conditional imprisonment. Imposition of community service and electronic monitoring on such offenders increases in vain the costs of the sentencing system. This goal might be realised by designing better procedural rules for the sentencing decision-making using insights from the behavioural law and economics.

If judges are assumed to act as fully rational actors, these procedural rules are not necessary. One of the assumptions of the rational choice theory is the 'independence of irrelevant alternatives'. Given this assumption, the desirability of a choice X over Y should not depend on the introduction or the elimination of choice C.[138] Thus, under these conditions, courts are expected to impose the Public Penalty and electronic monitoring according to the intention of the legislator. However, studies from cognitive psychology demonstrate that in many circumstances this assumption is violated and the choice does depend on the available (relevant or irrelevant) alternatives. The following sections explore how these biases may assist in designing more efficient procedural rules. Efficiency in this context refers to rules which direct judicial decision-making into the desirable implementation of the substantive solution.

5.1. The Two-Step Procedure

The first suggestion is to set in the criminal law the procedure to impose the alternative sanction. This procedure would consist of two steps. In the first stage, based on the severity of the crime and other relevant factors, the judge may impose a prison sentence on the offender. In the second stage, the court is allowed to decide that this sanction would be executed in the community (either under the Public Penalty or electronic monitoring).[139]

The rationale for this suggestion is the existence of anchoring effect in judicial sentencing. This term was coined by Daniel Kahneman and Amos Tversky in 1974. Anchoring effect refers to the tendency of people to adjust their estimation to some initial value. This value may for instance, derive from the formulation of the problem. To demonstrate this phenomenon the authors conducted a series of experiments. In one of those experiments they provided the subjects with a number which resulted from the spinning of a wheel of fortune (either 10 or 65). The participants were then instructed to determine whether this number is higher or lower than the percentage of African countries in the United Nations (UN). In the last stage the participants indicated according to their opinion what the percentage of African countries in the UN is. The results demonstrated the anchoring effect. The median participant in the group who was exposed to number 10 in the wheel of fortune answered 25% to the

[138] See for example Kenneth J. Arrow, *Social Choice and Individual Values,* 2nd edition (John Wiley and Sons, Inc. New York, 1963), p. 28, suggests that the superiority of X over Y depends only on the individual's preferences between these two options.
[139] This procedure must not be available with regard to the Social Benefit Service which is not meant to be imposed on offenders who would otherwise receive a prison sentence.

previously mentioned question. On the other hand, the median subject from the group who was exposed to the number 65 rated the percentage as being 45%.[140]

These findings were extended to the area of judicial sentencing. In a series of experiments, Birte Englich and Thomas Mussweiler demonstrated that judges were influenced in their sentencing decision by the initial sentence demand put forward by the prosecutor. This effect remained even when this initial information was rated as irrelevant by the subjects, and when decided by more experienced judges. In other words, judges who were exposed to a lower requested sentence, imposed on average a shorter prison term than judges who read a higher demanded sanction.[141] A later study with legal professionals as subjects (judges, prosecutors and lawyers) presented evidence that the anchoring effect persist even when the initial value is explicitly random. In this study, the authors conducted three experiments in which they found the influence of anchoring. In the first experiment the subjects were influenced by a suggested sentence presented by a journalist, which is clearly irrelevant. In the second experiment, the participants were affected by a demanded punishment of the prosecutor which was stated to be random. The most striking results were presented in the third experiment. In this experimental design the judges were instructed to set the demanded sanction by rolling a dice. The results demonstrated that this number had an impact on the length of the judged sentence.[142]

A different type of study on the sentencing decision-making examined how the framing of the problem affects the verdict. The subjects in this experiment acted as jurors. The design of the problem relied on the American system where in murder cases the jurors are instructed to put forward their decision in a gradual scaling. Namely, first they ought to decide whether the defendant is guilty of a first degree murder. If they do not agree on this verdict, next they need to deliberate whether the defendant is guilty of a second degree murder, and so forth.[143] In case there is no agreement on any of the verdicts, the defendant is acquitted. The first group in this study was required to state their decision after deliberating from harsher-to-

[140] Amos Tversky and Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases," in *Judgment Under Uncertainty: Heuristics and Biases*, Daniel Kahneman, Paul Slovic and Amos Tversky eds. (Cambridge University Press 1982), 3-20, p. 14.

[141] Birte Englich and Thomas Mussweiler, "Sentencing under Uncertainty: Anchoring Effects in the Courtroom," *Journal of Applied Social Psychology* 31(7) (2001), 1535, 1551.

[142] Birte Englich, Thomas Mussweiler and Fritz Strack, "Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making," *Personality and Social Psychology Bulletin* 3 (2006), 188-200.

[143] The options are first degree murder, second degree murder, voluntarily manslaughter, involuntary manslaughter, acquittal.

lenient verdict (as described before). The second group was requested to perform a similar task, however, the order of the possible verdicts which had to be decided was reversed, this being from lenient-to-harsh.[144] The results demonstrated that the verdict was harsher in the first group (harsh-to-lenient) than in the second group (lenient-to-harsh).[145] This might suggest that the first verdict the subjects were required to deliberate served as an anchor to which the final verdict was adjusted.

The anchoring effect may be a useful instrument in the context of alternative sanctions. In order to strengthen the effectiveness of the substantive solution, the judges need to implement it in the way the legislator intended. Therefore, to minimise even more the temptation for net-widening, the cognitive biases can be used. To be precise, when judges decide independently on the implementation of alternative sanctions, they might (and as Sections 2 and 3 demonstrate, sometimes do) impose it on the "wrong" population. However, if the sentencing procedure is framed as a two-step approach, there is a helpful anchor. First, the offender is sentenced to prison. Thus, this sets the initial "value" of his sanction and avoids other information to serve as an irrelevant anchor. Next the judge may adjust the sentence according to the relevant information and decide whether this sentence should be served in the community. Due to the anchoring effect, it is expected that the offenders who would be sentenced to the Public Penalty would be closer to the prison-bound offenders rather than to those delinquents who would otherwise be sentence to a non-custodial punishment.

The nature of the Public Penalty as described in Section 4.2.1 increases the costs of this sanction for the offender to resemble the costs prison incapacitation imposes. This in turn, legitimises this sanction to constitute a substitution to custody. In the next stage, using a "proper" anchor the judge may evaluate whether the offender should be sent to prison or to perform an unpaid work.

A similar procedure may be found in the Spanish criminal justice system. According to the *Spanish Criminal Code* a judge may impose a prison sentence and in the next stage, convert it to community service (or a fine, or both). In practice, this process is rarely realised.[146] The underuse of this alternative may be explained by ideological resistance of judges. Moreover, the contradictions in the Spanish Criminal Code create confusion among the sentencing

[144] Thus, the subjects started with the option of 'not-guilty' and went on with the scale of harshness to first degree murder.
[145] Jeff Greenberg, Kipling D. Williams and Mary K. O'brian, "Considering the Harshest Verdict First: Biasing Effects on Mock Juror Verdicts," *Personality and Social Psychology Bulletin* 12(1) (1986), 41-50.
[146] Blay (2010), *supra* note _, p. 67.

agents. On the one hand, there is a limit of 180 days when imposing community service order. On the other hand, a prison term of up to two years may be substituted by the community sentence. In theory, this means the judges are allowed to impose up to 730 days of community service orders. Inevitably, this kind of sanction is tremendously difficult in terms of administration.[147] In addition, there is a lack of confidence in this sentence due to the absence of a proper administrative body, low completion rates and long delays in executing this sanction. Furthermore, although the judge is imposing the sentence in days, the correctional social services[148] are those who decide on the number of unpaid work hours per day. Their decision is usually based on the work and family obligations of the offender rather than on criminal law criteria. Therefore, in practice most of the offenders work less than four instead of eight hours a day.[149] Once reducing the working hours, this sentence ceases to be an equivalent of a prison term and becomes a mere limitation on leisure time. In order to legitimise community service as a true alternative to custody, the costs of incapacitation ought to be comparable. Under the Public Penalty, the offender may still keep his family and social ties, which in turn, may prevent the negative effects of isolation. However, the limitation on the offender's time should be meaningful.

In the Netherlands, until the 2000s reforms, a similar practice to the suggested two-step procedure existed. According to the (then) *Dutch Criminal Law* the judge had to state in his verdict the prison term which is replaced by the community service order.[150] Although, as in other countries, the Netherlands witnessed a net-widening effect, it does not necessarily implicate on the ineffectiveness of anchoring. An important fact about the Dutch community service order is that it is accepted as an additional punishment in the sentencing continuum. However, this sanction rather lacks the public support as a true alternative to a prison sentence.[151] This may partially explain the reluctance of the judges to substantially implement it instead of prison.[152] Nevertheless, it seems that supplementing the two-step procedure with the suggested substantive solution might raise the public and judicial confidence in this sanction as a true alternative to custody.

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[147] Ester Blay, "Work for the Benefit of the Community as a Criminal Sanction in Spain," *Probation Journal: The Journal of Community and Criminal Justice* 55(3) (2008), 245-259, p. 254.
[148] This is the body which is in charge of implementing the sentence.
[149] Blay (2008), *supra* note _, p. 252-254.
[150] Tak (1997), *supra* note _, p. 201.
[151] Boone (2010), *supra* note _, p. 36.
[152] It was more relevant in the past since nowadays there is no obligation to use this sanction only as a substitution to custody.

5.2. The Two-Authority System

The second suggestion is to transfer the power to convert a prison sentence to a Public Penalty or electronic monitoring to a different authority. All the current sanctions, apart from the Public Penalty and electronic monitoring, would be available for the trial courts. In the first step, the trial courts would sentence the offenders to one of these punishments. The Public Penalty and electronic monitoring would be available sanctions for the additional authority, which may be called the "Sentencing Administrator". This body ought to have legal education, preferably it should be a judge and would have an authority over the prisoners. The sentencing administrator would be allowed, under specified conditions, to convert the prison sentence into Public Penalty, electronic monitoring or both. The prison administrator may decide whether to convert the whole prison sentence of up to six months (or one year) to the alternative sanction, or only in the early release stage. Since the SBS is still available for the court judges, it may be efficiently used in the continuum of sentencing. On the other hand, the Public Penalty and the electronic monitoring should be viewed only as a way of serving a prison sentence rather than a punishment by itself.

The reason to expect that the two-authority system would increase the efficiency of the alternative sanctions is the existence of a 'Contrast Effect'. Things or events are not valued absolutely, but in relative terms. For instance, a discount of €20 is valued higher when purchasing an item costing €30 than when buying a €1000 item. The contrast effect refers to a situation where a decision is changing depending on the reference point. This effect was investigated for decades in different areas.

One study examined the perception of weight with and without the existence of an anchor. The authors of this study found that when an item is compared to a heavier object, it is perceived as lighter than when weighted independently. This finding is the result of the contrast effect which changes the perception of things due to a reference point.[153] Another study found similar results in the context of perceived beauty. In a series of experiments the authors requested the subjects to rate on a given scale the level of attractiveness of a woman on a picture. The treatment group was exposed to highly attractive woman prior to making their decision. The control group on the other hand, was not exposed to any image. Their findings demonstrated that, *ceteris paribus*, participants in the treatment group rated the

[153] Muzafer Sherif, Daniel Taub and Carl I. Hovland, "Assimilation and Contrast Effects of Anchoring Stimuli on Judgments," *Journal of Experimental Psychology* 55(2) (1958), 150-155.

woman in the picture as less attractive than the control group. The authors concluded that due to the contrast effect, the exposure to the beautiful woman decreased the perceived attractiveness of the 'average' woman.[154]

The investigation of the contrast effect was extended to the area of criminal sentencing decisions. Albert Pepitone and Mark DiNubile conducted a series of experiments to assess whether the order of the cases which are judged has an impact on the results. To be precise, the authors investigated whether the level of severity and the length of the prison sentence would be affected by the anchor case. They found that when a murder case was judged after an assault case, the participants rated its severity as higher than when the murder case was judged after another murder case. In addition, the prison sentence which was imposed for the murder was significantly higher when this case was judges after an assault case as compared to a different murder case.[155] Therefore, even in this context the anchor (the assault offense) increased the perceived severity and the punishment for murder. This may be explained by the contrast effect. The murder is perceived even harsher when the decision maker is previously exposed to a lighter offense.

In the context of this paper, the contrast bias might serve as one possible explanation for the net-widening problem. Judges who are expected to impose the community service orders on prison-bound offenders are exposed to many other lighter crimes and delinquents. The lighter offenses and the less dangerous offenders judged by the courts might serve as an anchor. Hence, the medium ranked offenses may be perceived as more serious compared to this anchor than they actually are. Consequently, delinquents who would otherwise receive a non-custodial sentence might be perceived as prison-bound offenders and be sentenced to community service. On the other hand, the suggested sentencing administrator is exposed only to the pool of prisoners. Thus, this authority may choose the 'lighter' prisoners to serve their sentence in the community, and in turn, impose this sentence on the 'right' population. Since only the prisoners are assessed, there is no danger of net-widening. Accordingly, the

[154] Douglas T. Kenrick and Sara E. Guiterres, "Contrast Effects and Judgments of Physical Attractiveness: When Beauty Becomes a Social Problem," *Journal of Personality and Social Psychology* 38(1) (1980), 131-140.

[155] Albert Pepitone and Mark DiNubile, "Contrast Effects in Judgment of Crime Severity and the Punishment of Criminal Violators," *Journal of Personality and Social Psychology* 33(4) (1976), 448-459. The results of the opposite case, when the assault case was judges after a murder case, should be mentioned. In this situation the assault offense was rated as less severe than in the situation of judging this offense after a different case of assault. The punishment for the assault was lower when imposed after a murder than after an assault case. However, the latter results were not statistically significant. One explanation for this might be the limited lower bound of punishment (the minimum sentence had to be 3 years) which prevented more significant differences (p. 456).

alternative sanctions would be used as an actual substitution to custody and potentially reduce the prison population.

The best example of such a procedure may be found in Belgium. Electronic monitoring is not available in Belgium as a sentence which may be imposed by the courts. Instead, it is perceived as a way to execute a prison sentence. Candidates for electronic monitoring are chosen from the pool of prisoners sentenced to a prison term of up to three years. In addition, the authority in charge of converting the prison sentence to home detention with electronic monitoring is the prison governor and not the trial court.[156] In terms of diverting offenders from prison, this policy may be regarded as a success. In 2009, around 85% of prisoners sentenced to up to three years, served their sentence under electronic monitoring.[157]

Another example for this procedure is the Dutch "Electronic Detention". This scheme constitutes a way to execute a prison sentence of up to 90 days. Similar to Belgium, the candidates for this scheme are chosen from the pool of prisoners. Furthermore, the Prison Department is the body in charge of converting the sentence and not the trial court.[158]

This paper suggests making the two-authority system available for both sanctions - Public Penalty and electronic monitoring. Therefore, the sentencing administrator should assess the prisoners sentenced to six months of prison (or one year if prolonged), and decide whether the prison sentence may be executed through one of the alternatives.

5.3. Default Rules

The last suggested procedural option is the default rule. Under this structure the law should provide that any sentence of up to six months (or one year) imprisonment should be converted to the Public Penalty. In case the person is not eligible for unpaid work, the sentence should be carried out in home confinement. Nevertheless, the court may impose a custodial sanction on the offender providing there are circumstances which substantially impede the effectiveness of community sanctions in the particular case. For instance, if the judge concludes the offender is dangerous to society. In this case, the court must justify his

[156] Beyens and Roosen (2013), *supra* note _, p. 59.
[157] Beyens and Kaminski (2013), *supra* note _, p. 165.
[158] Van Swaaningen and Beijerse (2013), *supra* note _, p. 179.

decision. Thus, the default rule is community sanctions and the exception to the rule is short-term imprisonment.[159]

The justification for the expected efficiency of this rule may be found both in the economic analysis and in the behavioural insights. The most prominent example of default rules in the law and economics literature may be found in the context of contract law. It is believed that creating default rules which satisfy the majority of the contracting parties may decrease the transaction costs. Parties to a contract may not negotiate on all possible contingencies due to significantly high costs of a 'complete contract' and future uncertainties.[160] In the context of this section the economic rationale for default rules in sentencing decision-making lies in the decision costs. The suggested structure introduces zero decision costs for imposing community sanctions. The judge in this case is simply required to choose the prescribed option. On the other hand, if the court wishes to send the offender to prison, he needs to incur some decision costs. In order to impose a custodial sentence the judge is required to write down arguments to justify his deviation from the prescribed option. Those costs might be justified only in the presence of exceeding costs of the alternative. For instance, if the court is convinced that sending the offender to serve a community sentence would harm the society, which in turn, might affect his reputation. Therefore, based on the rational choice theory, it is expected that the default rule would be chosen more often and deviation from it would occur only in exceptional cases.

The behavioural law and economics approach may also explain the expected efficiency of the suggested rule. To be precise, the reason to predict that more judges would impose community penalties lies in the 'Status Quo Bias'. This effect refers to the tendency of people to "stick" to default rules, even when the transaction costs of the change are low or non-existing. This bias was investigated in the seminal work by William Samuelson and Richard

[159] Another exception is of course when the offender refuses to perform unpaid work. In that case, the prison sentence remains as a custody sanction. With regard to home confinement the necessity of the offender's consent is questionable. Most countries require the offender to consent to electronic monitoring instead of prison prior to imposing this measure. However, this practice is odd and most likely affected by the mandatory consent in case of community service. Nevertheless, there is a rationale to require a voluntarily consent to perform unpaid work. Since this sanction is "active", democratic countries want to avoid forced labour. The offender's consent reassures that. On the other hand, home confinement with electronic monitoring is a "passive" punishment. Therefore, it is not clear what the rationale to demand the offender's consent to it is. The question arises, if there is no demand for consent in case of a prison sentence, fine, probation, etc. why should this requirement exist in case of electronic monitoring? One possible rationale to require a consent for electronic monitoring is to reassure the commitment of the offender to comply with the conditions.

[160] See for example, Hans-Bernd Schafer and Claus Ott, *The Economic Analysis of Civil Law* (London, 2004), pp. _; Russell Korobkin, "The Status Quo Bias and Contract Default Rules," *Cornell Law Review* 83 (1998), 608-687, pp. 613-617.

Zeckhauser in 1988. In their paper, the authors offer a rich set of empirical and anecdotal evidence for the existence of this effect. To examine its existence and conditions Samuelson and Zeckhauser conducted laboratory experiments where the subjects were required to choose among different alternatives. The treatment group had a default option and the control group did not and had to choose between "neutral" options. The paper demonstrated that each given option was selected more often if it was the default, less often in the neutral condition, and the least frequent when constituted an alternative for the default option. In addition, the authors found the existence of the status quo bias in field experiments where people were choosing their health care or a pension scheme. The authors provide different explanations for this phenomenon, however, assert that the best explanation is the anchoring effect. Furthermore, their empirical evidence suggests that the status quo bias is weaker when the individual has a strong preference for the alternative.[161]

In the context of this paper, the status quo bias may assist in "nudging" judges in the direction of reducing short-term prison sentences. The term "nudging" was coined by Richard Thaler and Cass Sunstein. It refers to the possibility to improve people's choices by using the knowledge on the behavioural biases. For instance, in one study an organisation was interested in reducing the number of printed papers. To this end, the organisation tried to impose a tax on printing or to reward less printing. These methods were not efficient enough. Therefore, in the next stage a default option was introduced in the printing settings, i.e. double side printing. Consequently, the number of printed papers was reduced by 15%. The explanation for this finding is the status quo bias. People simply printed with the default option and did not change it to one-side printing.[162] Similarly, nudging may be applied in the sentencing decision-making. Namely, setting the community penalties as a default option for six months prison sentence would enhance the choice of this option due to the existence of the status quo bias. In turn, this might reduce the use of short-term custody. Nonetheless, the nudge is light and does not limit the judge in imposing prison where appropriate. As stressed before, this bias is weaker when there is a strong preference for the alternative. Therefore, in cases where the offender is not suitable for sanctions in the community, the judge would experience a stronger preference for a prison sentence. Consequently, in these cases a prison term would be imposed and only the "right" population would be diverted from custody.

[161] William Samuelson and Richard Zeckhauser, "Status Quo Bias in Decision Making," *Journal of Risk and Uncertainty* 1 (1988), 7-59.
[162] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008), pp. _.

A good example of default rules in sentencing may be found in Germany in the context of suspended prison sentence. In order to reduce the usage of short-term prison sentences Germany went through a reform which introduced the following rules:

> *"(1) Sentences not exceeding 6 months must be suspended, if the offender's prognosis is positive.[...]*
>
> *(2) Sentences between 6 and 12 months must also be suspended, unless the "protection of the legal order" [...]"*[163]

The number of prison sentences less than six months significantly fell in the aftermath of the new reform. While in 1969 a total of 64,073 offenders were sentenced to short-term custody, by 1976 this number dropped to 10,704. Although the default rule was not the sole reason for the following reduction in prison sentences, it might have been a contributing factor.[164] Over the years the prison term which by default should be suspended has been increased and currently it stands on one year.[165]

Default rules may be found in the context of community penalties as well. In Finland for instance, community service was introduce as a sanction in 1992 in some regions and then expanded to the whole country. This sanction is the default alternative for a prison sentence of up to eight months. The wording of the *Finish Criminal Code* is the following:

> *"(1) An offender who is sentenced to a fixed term of unconditional imprisonment of at most eight months shall be sentenced instead to community service, unless unconditional sentences of imprisonment, earlier community service orders or other weighty reasons are to be considered bars to the imposition of the community service order."*[166]

However, this procedural rule is not supplemented by a similar structure as the suggested substantive solution, i.e. increasing the incapacitating power of the Public Penalty in order to legitimise it as a substitution to a prison sentence. In fact, the maximum number of hours which may be imposed instead of eight months prison sentence is 200 hours.[167] A simple calculation of the maximum number of working hours (200) and the maximum prison sentence (eight months) it shall replace, yields the following results: 200/(4 weeks)*(8

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[163] Albin Eser, "Germany," *The American Journal of Comparative Law* 21(2) (1973), 245-262, p. 255. (Emphasis added).

[164] Robert W. Gillespie, "Fines as an Alternative to Incarceration: The German Experience," *Federal Probation* 20(44) (1980), 22-26.

[165] Section 56, *The German Criminal Code (YEAR).*

[166] Section 11, *The Finish Criminal Code (YEAR)*. (Emphasis added).

[167] Tapio Lappi-Seppälä, "Criminology, Crime and Criminal Justice in Finland," *European Journal of Criminology* 9(2) (2012), 206-222, p. 218. The community service sanction in Finland is imposed in 5% of the cases. The median length of an unconditional prison sentence is 4 months and the average is 10 months. The difference between these measures of the central tendencies is due to the sensitivity of the average to less frequent long term prison sentences. (p. 219).

months)=6.25 hours of work per week. In terms of incapacitation, an offender serving a community sentence is incapacitated less than 4% of his time each week. This is significantly weaker incapacitation than in prison. Moreover, this calculation is based on the assumption that the maximum number of hours is imposed, which is rarely the case as have been presented in Section 3.1. Therefore, community service in this form might not truly constitute an alternative for imprisonment.

Another example is Scotland. In the *Criminal Justice and Licensing (Scotland) Bill of 2010* the "presumption against short periods of imprisonment" was introduced. This presumption makes the alternative sanctions as a default penalty instead of three months' imprisonment and requires justification from the court when exceptionally imposing up to three months imprisonment.[168] Following the introduction of this default rule (combined with other changes) the number of prison sentences below three months decreased, yet sentences of 3-6 months increased.[169] Since only the prison sentence under the default rule was affected in the desired direction, this might imply on its effectiveness.

5.4. What is the "Right" Procedural Rule?

The abovementioned instruments are mostly mutually exclusive. Their expected costs and benefits may assist different criminal justice systems to choose the most appropriate instrument for them. In any case, this paper suggests that at least one of the procedural rules needs to supplement the substantive solution in order to be effective. The current section compares the three procedural rules in terms of decision costs, expected efficiency and system costs. "Decision costs" refer to the time judges spend on sentencing decisions in terms of opportunity costs. Namely, the time which is devoted for making the given decision may not be used for adjudicating other cases. The relevant costs concern only the decision whether to impose a prison sentence or sanctions in the community.[170] Efficiency in this context is the ability to divert offenders from prisons and avoid the net-widening problem. Finally, "system costs" denote the need for expanding the criminal sentencing system, i.e. additional decision makers.

[168] Article 15 adding provisions 3A-3B, *the Criminal Justice and Licensing (Scotland) Bill 2010*.
[169] The Scottish Government (2011-2012), *supra* note _.
[170] The costs of assessing whether the offender is suitable to perform an unpaid work or should he alternatively be placed under home detention are not taken into account. In any case, the Probation Office is usually the organ in charge of inquiring the offender and his surroundings and assessing his suitability.

The two-step approach has some decision costs. In a regular procedure, the court is able to impose sanctions in the community directly. Therefore, there are no additional costs of decision after assessing the suitability of a certain criminal to the chosen punishment. Under the two-step system on the other hand, the court is always required to impose a prison sentence first. Thus, even in the situation where the judge might consider a sanction in the community as appropriate, he may impose it only after deciding that a prison sentence is justifiable in this case. Albeit constituting opportunity costs for the judge, who may use this additional time for other cases (or leisure time), this procedure may minimise the net-widening effect. As explained in Section 5.1 the first step sets the 'right' anchor. Nevertheless, courts still may impose the Public Penalty or electronic monitoring on the "wrong" population. The decision costs of the first step are not markedly high. Thus, courts might simply state a prison sentence is justifiable for the formality after already deciding (in their mind) that the person would receive a sentence in the community. Consequently, this system is more efficient then no system, but is expected to be less efficient that the other procedural rules. Finally, there are zero system costs under the two-step procedure since the requirement involves only the sentencing judge.

The two-authority system has zero decision costs. The Public Penalty and electronic monitoring are not available as sanctions for the trial court. Thus, the judge may only send the offender to prison and does not need to decide between custody and alternatives. The expected efficiency is high in general and the highest among the proposed procedural rules. The sentencing administrator - body responsible for converting the prison sentence – chooses from a pool of prisoners, thus having no risk of net-widening. As mentioned in Section 5.2, in Belgium, where similar procedural rule is applied, more than three quarters of the target group of prisoners serve their sentence under electronic monitoring.[171] Nevertheless, the system costs are high. First, the trial court assesses the crime and the offender and sentences him to prison. In the next stage, a separate body needs to assess the offender once again and decide whether he is suitable for an alternative punishment. In order to improve and legitimize the decision with regard to the final sentence, the sentencing administrator needs to be a judicial body. Thus, the two-authority system increases the system costs and imposes an additional burden.

[171] Beyens and Kaminski (2013), *supra* note _, p. 165.

The default rules have zero decision costs if the court chooses the penalty in the community, i.e. Public Penalty or electronic monitoring. This option is prescribed by the law. However, there are decision costs in case the court wishes to impose a prison sentence. In this situation the court has to write down the arguments to justify his choice of the exception rather than the rule. Nevertheless, the efficiency of this procedural rule is exactly derived from these costs. The higher are the opportunity costs in this case, the higher is the expected efficiency of the rule. The default rule scheme is expected to deal better with the net-widening problem than the two-step system, but worse than the two-authority system. Finally, there are zero system costs since the decision is made by the trial court and there is no need to expand the sentencing structure.

Another option is to combine the two-authority system with a default rule. In other words, a sanction in the community might be prescribed to all prisoners receiving up to six months (or one year) of imprisonment. The exception to this rule is where the sentencing administrator decides that public safety or other concerns justify a prison sentence. This combination is expected to achieve the highest efficiency in terms of diverting offenders from prison. The costs of this system would not differ substantially from the costs of the two-authority system.

6. Possible Limitations

6.1. The Unconstitutionality of the Two-Authority System

One might argue that the two-authority system lacks legitimacy since the judges are deprived of their sentencing power. There are two possible responses to this limitation. First, there is a similar system existent in the context of early parole. Most, if not all, of the European criminal justice systems allow for early release of prisoners. This is usually automatically and denied only in special circumstances. Some countries even extend the early release period to 2/3 of the imposed prison sentence.[172] If the court imposes for example, three months of imprisonment, this rule suggests that the offender would be released after one month. Therefore, there is already a system where another body is authorised to change the judge's decision. Thus, suggesting there would be less resistance to the two-authority system than might be expected. This assumption is supported by the opinion of the Belgian judges to the practice of converting prison sentences to home detention by the prison governor. An interview of different judges was conducted in Belgium on the question whether electronic

[172] See for example, Lévy (2013), *supra* note _, p. 132.

monitoring should be introduced as a sanction available for the courts to impose. The judges replied that for different reasons, it is better to keep this form of control in the hands of prison administration rather than introducing it as a sentence.[173]

The second response to the concern of constitutionality of the two-authority system may be found in its structure. The sentencing administrator does not have to be an administrative body but may be a judge himself. Consequently, the discretion power regarding the conversion of the prison sentence remains in professional hands and does not jeopardise the constitutionality of the decision. Nevertheless, such a system might increase the costs since the case is examined twice by the judicial body.[174]

6.2. Distorted Incentives

Another concern with the two-authority system is that it might incentivise judges to impose longer sentences in order to avoid them being converted to the alternative sanction. This is a plausible situation and requires further research. However, once again, since the mechanism is similar to early release, these distorted incentives should exist already in the current systems. Nevertheless, it does not seem to constitute a significant problem. In addition, the creation of a more credible alternative for prison, as provided by the substantive solution, might convince judges to impose it and not to seek methods to avoid it.

7. Concluding Remarks

Sanctions in the community have a potential to constitute a proper replacement for the short-term imprisonment. They may completely change the face of the criminal sentencing system. Penalties may be more human, more rehabilitative and less costly. A proper structure and implementation of these alternative sanctions might almost entirely eliminate the need for short-term imprisonment. The effectiveness of a short custody is doubtful. This method does not keep the criminal away from society for a sufficient time to expect a significant reduction due to incapacitation. Its deterrent power does not seem to be significantly higher than the deterrence effect of the alternatives. And it may even increase recidivism due to negative environment and the isolation of the criminal from his family and the society.[175] Community

[173] Beyens (2013), *supra* note _, p. 61.
[174] There are pros and cons for choosing an administrative or a judicial body as the sentencing administrator. However, due to the limited scope of this paper, it is not further discussed here.
[175] See for example, Martin Killias, Gwladys Gilliéron, Françoise Villard and Clara Poglia, "How Damaging is Imprisonment in the Long-Term? A Controlled Experiment Comparing Long-Term Effects of Community Service and Short Custodial Sentences on Re-Offending and Social Integration," *Journal of Experimental*

service and electronic monitoring on the other hand, are cost-effective alternatives. Under these sanctions the criminals may be punished without imposing a heavy financial burden on the society.

The net-widening problem is a major obstacle to the success of these alternatives to substitute short-term custody. The tendency to impose community sanctions or electronic monitoring on offenders who would otherwise receive a lighter punishment increases the costs of the criminal justice system. However, at the same time it does not increase its efficiency. If an offender may be punished and deterred using a "cheaper" method, this path ought to be chosen.

This paper identifies several problems in the current implementation of community service and electronic monitoring. First, these sanctions usually are not restrictive enough. Thus, they are not perceived by the public and the sentencers as a suitable replacement for custody. Consequently, there is no strong justification to impose them on prisoners. Second, often there is confusion with regard to the target population of these instruments. All the more so, in jurisdictions which implement both alternatives. Community service and electronic monitoring target similar populations since they are intended to replace a short-term prison. In addition, there is no clear understanding of how to translate the prison term to a period (usually hours) of the alternative sanctions. This in turn, leads to lack of uniformity between judges and reduces legal certainty. Third, the limitation on the nature of the unpaid work under community service causes delays in the execution of the punishment. This problem is even stronger when the "wrong" population occupies these places and prevents the system from being used for the "right" population.

The current paper offers a new structure of the alternative sanctions. Community service should be the default sentence to replace short-term prison. Only in case this sanction is not sufficient or if the offender is found unfit to perform the unpaid work, should home detention with electronic monitoring be used. This ranking solves the problem of overlapping target groups. In addition, it optimises the use of the alternatives since community service is a less costly punishment and offers more benefits, both for the society and for the rehabilitation of the offender. Furthermore, the paper suggests creating a double-track system of the

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Criminology 6 (2010), 115–130; Paul Nieuwbeerta, Daniel S. Nagin and Arjan A. J. Blokland, "Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison," *Journal of Quantitative Criminology* 25 (2009), 227–257; Patrick Bayer, Randi Hjalmarsson and David Pozen, "Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections," *The Quarterly Journal of Economics* (2009), 105-147.

community service. The Public Penalty is the sanction which would replace directly short-term prison. Its level of restriction on the liberty of the offender would be similar to that of prison, thus, establishing sufficient costs of punishment for the offender. This penalty constitutes a legitimate substitution for custody. Due to the clear structure of the Public Penalty, it resolves the confusion of translating a prison sentence to this alternative. The second punishment in the double-track system is the Social Benefit Service. The unpaid work is imposed in hours which should be performed during the leisure time of the offender. Including this punishment expands the sentencing continuum and offers a better scaling of sanctions to match the individual criminal and the crime. The underlying idea behind the Social Benefit Service is to act as a "fine on time". The offender is paying for his crime through unpaid work rather than a fine. This method also offers a proper and "cheap" response for fine defaulters.

Changing the structure of the alternative sanctions is only the first step. The second step is to create efficient procedural rules of implementing the sanctions by the sentencing authority. This paper offers three procedural rules which use behavioural biases or overcome them in order to prevent a net-widening problem. The rules are the "two-step" approach, "two-authority" system and the default rules. One or more of these rules are applied by different countries, but it seems that none of them supplements it with the substantive change of the alternative sanctions. It is asserted that only the combination of the two would significantly reduce the net-widening effect. In addition, this paper presents the channels through which the procedural rules operate. This understanding may assists in choosing the proper rule. It seems that the most efficient way to reduce the use of short-term imprisonment is the two-authority system which splits the sentencing decision-making between two bodies. Combining this procedural rule with the new structure of community service and electronic monitoring is expected to significantly reduce the net-widening effect. In turn, the cost-effectiveness of the criminal sentencing system may increase.