



Pre and Post Trial Alternative Measures in Europe

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The Position of Member States on Alternative Measures

At the meeting of Justice and Home Affairs Ministers in July 2019, the Ministers emphasised the importance of enhancing the use of alternative measures to detention in Member States in the coming years underlining the benefits that their use can have. The ninth round of mutual evaluations recognized that *“the use of Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on the European supervision order (2009/829/JHA) has been limited thus far. There is, however, a need to gather wider information on the use of non-custodial sanctions and measures in the Member States, and to discuss the different benefits they may have. The sharing of best practices is a useful way in which the Member States can learn from each other and improve their own legislation, procedures and practices”* (2019/C 422/06)

The legal instruments

In Italy the total number of people serving pre-trial detention, following the annual figures since 2000, is 10.000/year (average). Total number of people (flow and daily rate, average) serving alternative sanctions, following the historical series since 2000 and rate per 100,000 population, is the following: 15.000 Number of people sentenced to semi-detention, supervised liberty and community service; 105.000 Number of people sentenced only to a financial sanction. 52.000 Total number of people serving alternative measures during execution. ***Data on the application of CFDs 2008/947/ and 2009/829/JHA concerning pre-and-post trial alternative measures for non-resident citizens are not available by the Italian Ministry of Justice.***

The core of the EU strategy is represented by the following Council Framework Decisions:

CFD 2009/829/JHA (ESO) pre-trial phase
in relation to **art. 12 of CFD 2002/584/JHA** and
CFD 2008/947/JHA during penal execution .

Recidivism and Probation

As the European Prison Observatory noted: *“there are not systemic research available which have followed the life courses of people having in the past been subject to the alternatives at issue in comparison with those of people having served the same period of time entirely in detention... There are not data on recidivism rates. For what concerns working as well as familiar and social relationships, alternative sanctions – without including financial ones and expulsion for foreigners – explicitly aim at not interrupting valuable working and social relations when not necessary”*. We need to gather quantitative data on the passive and active application of the results of CFD 2008/947/JHA compared with the application of CFD 2002/584/JHA but also on the qualitative dimension, through an analysis on the recidivism data. The quantitative and qualitative data will provide a solid base to action tangible measure for a better implementation of the principle of mutual recognition at EU levels to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

Gaps and Level of Implementation

The EU noted that: “In conclusion, **the level of implementation of the CFDs 947 and 829 is far from satisfactory**, and sometimes the transposition is partial and incomplete, formally adopted but underused in practice, while relevant cultural problems impact on the effectiveness of the instruments supporting non-custodial measures in the pre-and-post trial phases.”

What Italian and EU practices have shown, is that a wider use of probation measures during penal execution to reduce prison overcrowding, mitigate recidivism and combat discrimination between resident and non-resident in the application of penal measures is necessary, as well as a better balance between custodial (EAW) and non-custodial surveillance measures (ESO), while carefully considering the needs of special target groups, such as women and children when defining pre-trial alternative measures and probation judicial projects.

Critical Nodes from the EU perspective

1. ESO and EAW: From a policy perspective, we need to address the issues emerging from the correlation between ESO (CFD 2009/829/JHA) and EAW (CFD 2002/584/JHA). The EAW typically involves pre-trial detention, even though the suspect has not yet having been convicted. This happens in a context of alarming prison overcrowding across Europe, of which people held in pre-trial detention constitute over 20% on average. Overcrowding often leads to worsening prison conditions, threatening mutual trust and the functioning and legality of mutual recognition instruments. Art. 12 of the EAW is underused and more best practices on the use of this tool need to be disseminated among Italian prosecutors and judges of the preliminary investigation. The absence of common EU standards on pre-trial detention means that there is no EU oversight over these trends, and this is a relevant policy issue, that the network wants to address in form of actions, sharing of knowledge and tangible initiatives at Italian level.

Critical Nodes from the EU perspective

2. EQUALITY AND ROLE OF PUBLIC PROSECUTORS: the EAW legislation does not make it compulsory for judicial authorities to conduct a proportionality assessment and as part of that, consider whether alternative, less restrictive measures would meet the needs of the investigating authorities (typically, for the person to be present at trial or respect certain prescriptions ordered by the court). It is all too easy to resort to the EAW when a person is living abroad or has a foreign citizenship for authorities, this immediately gives rise to a suspicion that there is a risk that the person will evade justice and not appear for trial or cannot comply with certain obligations because of lacking familiar and logistical connections. So, put simply, in our common European space, where people can circulate freely – the exercise of their right to do so will put them at a disadvantage, at the risk of detention with life-changing consequence, as compared to people who are living in their country of citizenship. For this reason, recently the Italian Court of Cassation (Cass. 37739/21) underlined the importance of the principle of obligation in the mandatory application of the ESO (CFD 829) and/or recognition of probation and alternative measures during penal execution (CFD 947) when these discriminatory circumstances may arise.

Critical Nodes from the EU perspective

3 PRINCIPLE OF PROPORTIONALITY AND EU CASE LAW: The Italian court of cassation established well defined borders in the application of preventive custodial measures (Judgement n. 48/2015, Sez. U, n. 20769 del 28/04/2016, Lovisi) and made restriction of freedoms possible only where there is no other option (*ultima ratio*). This requires careful analysis on a case-by-case basis and considering whether alternative measures are available and can be implemented in the executing countries. Similarly to the decisions of the Italian Court of Cassation, the Court of Justice of the EU (CJEU) has sought to fill this gap concerning the balance between security and fundamental rights with its ruling of 28 January 2021, and this trend emerged in several judgement of Member States, such as Austria (case [C489/19 PPU](#)). Therefore, PRE-AND-POST will promote the need for a more nuanced approach to issuing restrictive measures and foster among prosecutors, judges, and lawyers a culture aimed at balancing security and fundamental rights through the harmonized use of alternative measures and restorative justice.

Critical Nodes from the EU perspective

4. Finally, a policy component is relevant to improve the use of the two FCDs. As noted by CEP, ***the differences between EU legal systems, national legislations and alternative services at territorial level pose an additional obstacle when applying the instruments.*** For example, the differences regarding the maximum penalty and different rules on pre-trial detention across the EU require steps of adaptation in Italy when executing foreign judgments.

Another example is offered by the ***very diverse services available at regional level for the execution of alternative measures in the pre-and-post trial phase.*** The lack of available services, in line with the court orders/projects, is one of the main reasons why in certain Italian regions the level of alternative measures remains low. This is a need that involves the policy level and requires an awareness raising campaign addressing specific policymakers and involving the local governance of the territories.



Grazie

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