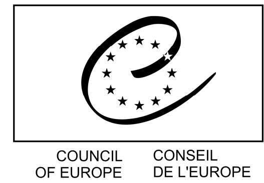

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

SUMMARY ANALYSIS OF THE NATIONAL REPLIES TO THE QUESTIONNAIRE RELATED TO THE TREATMENT OF JUVENILE OFFENDERS

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The opinions expressed in this report are the responsibility of the authors and do not necessarily reflect the policy of the Council of Europe

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1. Introduction

The following chapter is based on a questionnaire[1] that was sent to the member states of the Council of Europe on 1st October 2006 in order to receive information on the actual legal situation and statistical data on juveniles subject to non-custodial and custodial sanctions or measures. The aim was to draft European Rules for Juvenile Offenders Subject to Sanctions or Measures (ERJOSSM, Rec [2008]11[2]) on the basis of evidence gathered from the responses provided by the member states.[3] Some replies to the questionnaire were coming back with significant delays;[4] the last one was received at the end of 2007. At this time the drafting of the Rules was almost completed. Nevertheless much information could be usefully considered and reflected meanwhile, particularly extracted from the timely responses of a few countries.

2. Participating countries and methodological comments

The following report is primarily based on the replies received from the national authorities of 33 countries.[5] The study is, however, not only based on the questionnaire mentioned above, but also on information from several other projects in the field of juvenile justice in which the authors are involved, such as the AGIS-project "Juvenile justice systems in Europe – current situation, reform developments and good practices" (JLS/2006/AGIS/168, funded by the EU 2007-2009) and the publication by *Junger-Tas/Dünkel* on "Reforming Juvenile Justice Systems" which is to be published in the first half of 2009.

Table 1 shows the 34 jurisdictions of 33 respondent countries:

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1 The questionnaire was drafted by *Andrea Baechtold*, University of Berne, *Frieder Dünkel*, University of Greifswald, and *Dirk van Zyl Smit*, University of Nottingham under the terms of reference of the Council for Penological Co-operation (PC-CP) of the Council of Europe (Chairperson: *Sonja Snacken*, Free University of Brussels). The questionnaire is related to the work carried out by the same group of experts on the text of a Recommendation Rec(2008)11 of the Committee of Ministers containing European Rules for Juvenile Offenders Subject to Sanctiions or Measures. It contains approximately 200 questions related to deprivation of liberty in its different forms and to the execution of community sanctions and measures. It also required from the Council of Europe member states to send links to legal texts available on the Internet-sites of the countries or the hard copy version of the texts.

2 Adopted by the Committee of Ministers of the Council of Europe on 5 November 2008.

3 The questionnaire was sent out with the following request: "*The Committee of Ministers of the Council of Europe has entrusted the Council for Penological Co-operation (PC-CP) with the task of drafting European rules for juveniles, who, as a result of their involvement in criminal activity, are subject to deprivation of liberty or to community sanctions or measures. ... The PC-CP in turn has appointed three scientific experts on juvenile justice to assist it in this task. ... A preliminary examination of the project quickly led the PC-CP to conclude that ... juvenile offenders are not necessarily or primarily dealt with by the criminal justice system or even by special juvenile courts. Welfare, educational, or even mental health agencies may be involved in responding to juvenile offenders, often without any formal procedures to determine whether the juveniles concerned are criminally responsible. At this stage the PC-CP wishes to enquire from member states what they see as the most important areas in which rules are required to regulate the response to juvenile offenders.* ***Member states are requested to reflect on their own practices and to describe in general terms what they regard as key areas to be covered by the new Rules****. In addition, member states are requested to complete the attached* ***questionnaire****. This will enable the PC-CP to have an overview of the main responses to juvenile criminal activity in Europe and to draw conclusions about what new Rules are required most urgently. The intention of this questionnaire is to collect information regarding all forms of deprivation of liberty or community sanctions or measures imposed on juveniles as a result of their involvement in criminal activity, including the so-called status offences ... Please include information on all forms of deprivation of liberty or community sanctions or measures, whether they are imposed as a result of criminal proceedings, family court hearings, administrative decisions (e. g. of the youth welfare departments), following a referral to mental health institutions or otherwise. If the information needs to be gathered from other sources, you are kindly requested to circulate this questionnaire to all the national agencies concerned*" (see: pc-cp\docs 2006\pc-cp (2006) 08revE).

4 Even after two subsequent reminders which were sent in January and in April 2007.

5 The UK is represented twice, once under England and Wales and further under Scotland; they are dealt with in the study separately.

Table 1: The participating countries
(language in which the questionnaire was answered)

1.	**Andorra (fr)**	**18.**	**Italy (en)**
2.	**Armenia (en)**	**19.**	**Latvia (en)**
3.	**Austria (en)**	**20.**	**Lithuania (en)**
4.	**Belgium (fr)**	**21.**	**Malta (en)**
5.	**Bulgaria (en)**	**22.**	**Monaco (fr)**
6.	**Cyprus (en)**	**23.**	**Netherlands (en)**
7.	**Czech Republic (en)**	**24.**	**Norway (en)**
8.	**Denmark (en)**	**25.**	**Portugal (fr)**
9.	**England/Wales (en)**	**26.**	**Russia (en)**
10.	**Estonia (en)**	**27.**	**San Marino (en)**
11.	**Finland (en)**	**28.**	**Scotland (en)**
12.	**France (en)**	**29.**	**Slovakia (en)**
13.	**Georgia (en)**	**30.**	**Spain (sp)**
14.	**Germany (en)**	**31.**	**Sweden (en)**
15.	**Greece (en)**	**32.**	**Switzerland (fr)**
16.	**Hungary (en)**	**33.**	**Turkey (en)**
17.	**Ireland (en)**	**34.**	**Ukraine (en)**

At the time of our study the Council of Europe had 46 member states (today, 2009: 47).[6] This means that the response rate is 72% (33 out of 46)[7] which can be seen as satisfactory. On the other hand we have to underline that many countries did not reply to the entire questionnaire. There are several reasons for that. First of all, the questionnaire with about 200 questions was very ambitious and comprehensive. As the questions dealt with areas for which different ministries are responsible a complicated procedure within the member states had to take place which sometimes led to a loss of information as different branches or departments were not able to deliver information in due time.

The legal provisions for depriving juvenile offenders of their liberty vary a lot all over Europe. So do the types and/or manner of execution of community sanctions or measures for young offenders. The aim of the present study was to collect information about all forms of deprivation of liberty for juveniles and about the different community sanctions and measures (often called alternatives to imprisonment) available in the European countries.

Deprivation of liberty is not only possible through imprisonment or pre-trial detention. It is sometimes forgotten that placing juveniles in closed educational homes or similar institutions is also a form of deprivation of liberty, not less intrusive to human rights than formal imprisonment, even if it is claimed to be in the best interest of the child. So due procedural guarantees and human rights safeguards are of great importance. The same applies to a special form of deprivation of liberty: the placing of juvenile offenders in mental health institutions. And last but not

6 Montenegro became member state only on 1st July 2007, when our inquiry was widely completed.

7 In this case we count England and Wales together with Scotland, as they are part of one member state. The following member states did not reply: Albania, Azerbaijan, Bosnia & Herzegovina, Croatia, Iceland, Liechtenstein, Luxembourg, Moldova, Poland, Romania, Serbia, Slovenia, and The Former Yugoslav Republic of Macedonia.

least educational measures and sanctions may pose dangers to the rights of juveniles and are often applied with large discretionary power. In this case due procedural guarantees are of great importance as well.

There was a great degree of diversity in how the participating countries completed the questionnaire. In many cases individual questions or entire question-groups remained unanswered (Andorra, Austria, England and Wales, Greece, Hungary, Malta, Monaco, Scotland), sometimes without indicating any reasons, and sometimes because the questions were not deemed relevant to the system of the respective country. So for example Austria indicated the nonexistence of open or closed welfare institutions for juvenile offenders. Hungary stated not to have any open institutions. In Andorra exists a closed institution for pre-trial-detention, but obviously there is no practical relevance, because no juvenile is incarcerated there. Ireland did not answer the specific questions but submitted instead a general account of the current national situation, similarly did Bulgaria.

The complexity of the questions and the variety of answers received is partly due to the fact that dealing with juvenile offenders at national level falls within the scope of more than one ministry or agency and partly to the fact that on some occasions these have not been consulted before the replies were sent to the Council of Europe Secretariat. In part, there appeared to be communication and classification difficulties, for example in determining to which category an institution belongs, the distinction between "welfare institutions" and "youth prisons"[8] or the definition of the proportionality between the severity of the offence and the resulting punishment. Turkey left a lot of questions out and in part provided not really informative responses.[9]

Another methodological problem was the translation of the terms as such. The problems to define institutions of the national juvenile justice systems or alternative sanctions in the requested language of the questionnaire are considerable. Most countries answered in English and therefore used English vocabulary. But the Common Wealth systems differ a lot from the juvenile justice systems in most of the continental European countries. As a consequence the meaning of the English terms is often strongly connected to the respective systems, so for example the term "detention centre" [10] in England and Wales in earlier time prescribed a special form of "short sharp shock"-regime, whereas this term could in other countries be used to describe an institution for custodial sanctions in general. The difficulty of the communication about juvenile justice within the Anglo-Saxon systems as such can be seen in the existence of a "Dictionary of Youth Justice" which contains terms from United Kingdom and shows how they differ from each other.

The problems to define an institution as a prison or a welfare institution are also related to the differences between the European juvenile justice systems[11] which will be shortly described in **chapter 3**. Within this analysis we will provide information about the different forms of juvenile justice systems and the age groups which are covered by these systems. We also describe the trends and developments of juvenile justice policy in Europe.

Different or similar forms of deprivation of liberty may concern very different age groups of juvenile offenders. So, for example, custodial sanctions in England and Wales may concern 10-17 years old juveniles, whereas the same forms of deprivation of liberty in Germany, called youth imprisonment, deal with 14-24 years old juveniles and young adults. We therefore will explain in chapter 3 also the Table used in the Appendix of the Rules showing the different age groups which have to be differentiated when talking about "juvenile offenders" and reactions to juvenile delinquency.

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8 Some replies had to be clarified by contacting the responsible authorities. So, for example Monaco stated that there is a department for juveniles in a prison. This department is, however, not mentioned under welfare nor youth prison facilities.

9 For instance the answer to question 2.2.8: "The size of the rooms is compatible with the European Prison Rules and UN legislation".

10 Abolished in 1988, see *Muncie* in *Goldson*, Dictionary of Youth Justice, 2008.

11 See *Cavadino/Dignan* 2006; *Muncie/Goldson* 2006; *Bailleau/Cartuyvels* 2007; *Junger-Tas/Decker* 2006; *Patané* 2007; *Dünkel/Grzywa/Pruin* 2009.

Chapter 4 deals with Part II of the questionnaire, i.e. questions regarding community sanctions and measures. Following the structure of the ERJOSSM we explicitly emphasise the importance of community sanctions and measures which are to be given priority to custodial sanctions and measures.

Chapter 5 deals with Part I of the questionnaire on deprivation of liberty.

As a consequence of the lack of answers especially to questions relating to statistical data it is not possible to compare which types of offenders are deprived of their liberty in the European countries and how the numbers have developed over the last 20 years. It is possible to show at least for the countries which answered the questions the absolute numbers of detainees in the respective institutions/prisons.[12] This will be presented in **chapter 5.1** of this report.[13] In the following chapters we will analyse the situation in welfare institutions (**chapter 5.2**), pre-trial detention institutions (**chapter 5.3**), juveniles in youth prisons or similar prison-like institutions (**chapter 5.4**) and mental health institutions (**chapter 5.5**). In **chapter 5.6** we will discuss the question to what extent the transfer between the different institutions is possible. Finally **chapter 6** will present some conclusions with regards to the importance of the ERJOSSM and their future implementation.

3. Juvenile offenders in the systems of juvenile justice and welfare

Youth justice systems in Europe were established at the beginning of the 20th century (first youth courts between 1905 and 1912 in the Netherlands, United Kingdom, Belgium, France, and Germany). Today's juvenile justice systems vary in several aspects but parallel to that show a lot of common approaches.

If one compares the *juvenile justice systems from a perspective of classifying according to typologies*, the "classical" orientations of both the justice and the welfare model can still be differentiated.[14] The welfare model is characterised by a wide degree of discretion in the decision-taking of the juvenile judge or other decision-taking bodies (social workers, psychologists etc.). It is also characterized by informal procedures not accompanied always by procedural safeguards**.** The typical sanctions of the welfare model are of an indeterminate nature, the completion of which depends on the estimated educational outcome. Educational interventions are typically applied in cases of criminal behaviour as well as of irregular situations or in need of care or education (for example ***"waywardness", "endangerment":*** this trend is most strongly practiced in the juvenile justice systems of Belgium and Poland).

Contrary to the welfare model, the justice approach is concerned exclusively with criminal behaviour as defined in criminal law. The state reactions are proportional to the gravity of the offence and the degree of guilt**,** and are of a determinate duration. The procedure tends to provide

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12 Similar difficulties can be seen in the data presented by SPACE (see *Aebi/DelGrande* 2007) and in the *European Sourcebooks of Criminal and Criminal Justice Statistics* (2003; 2006, see *Killias et al.* 2003; *Aebi et al.* 2006).

13 In the following chapters and particularly tables we will use the following abbreviations

d.	day(s)
m.	month(s)
n. a.	no answer / not available
r. s.	reformatory school(s)
sqm.	square meter(s)
y.	year(s)
y. i.	youth imprisonment
y. p.	youth prison(s)

14 See *Kaiser* 1985; *Dünkel* 1997; 2003; *Doob/Tonry* 2004, 1 ff.

for the same guarantees as for adults. Decisions are made in formal proceedings by (specialist) legal practitioners.

One only rarely encounters these “ideal types” of welfare or justice models in their pure form. Rather, there are several examples for mixed systems, for instance within German juvenile justice policy. The German system is a mixture of the welfare and the justice model by combining (educational) welfare measures with the justice model that provides the same legal safeguards and guarantees as in the criminal procedure for adults. Regarding sentencing provisions, education remains paramount, and juvenile imprisonment is regarded as a sanction of last resort (“ultima ratio”, in Germany: *Jugendstrafe* acc. to § 17 *JGG*).

Tendencies towards *minimum intervention* i. e. the prioritization of informal procedures (diversion), including offender-victim-reconciliation, as well as *reparative strategies* can also be viewed as independent models of juvenile law (“*minimum intervention model”*, “*restorative justice model”*)[15] *Cavadino* and *Dignan* identify not only the “*minimum intervention model”* (priority of diversion and community sanctions) and the “*restorative justice model”* (priority of restorative/reparative reactions), but also the “*neo-correctionalist model”***,** which is particularly characteristic of contemporary trends and developments in England/Wales.[16]

Here, too, there are no clear boundaries, for the majority of continental European juvenile justice systems incorporate elements of both welfare and justice philosophies***,*** minimum intervention,[17] *restorative justice* as well as elements of “*neo-correctionalism”* (for example increased “responsibilisation” of the offender and the parents, tougher penalties for re-offenders, secure accommodation of/for children). Rather, differences are more evident in the *degree* of orientation towards *restorative* or *punitive* elements.

In general one can conclude that the European juvenile justice converges to a mixed system that combines welfare and justice elements, which are more or less supplemented by the new trends mentioned above.[18]
Despite obvious and undeniable national particularities, there is a recognizable degree of convergence among the systems. From an international comparative perspective, systems based solely on child and youth welfare are on the retreat, especially since the United Nations’ Convention on the Rights of the Child was passed in 1989.[19] This is not so evident in Europe where more or less “purely” welfare orientated approaches exist only in Belgium, Poland and Scotland – than, for instance, in Latin American countries.[20]

On the one hand, one can speak of a *European philosophy of juvenile justice* that becomes apparent in the recommendations of the Council of Europe on *education*/*rehabilitation*, the consideration of victims through *mediation* and *restoration,* as well as the observance of *legal* procedural safeguards. However, there is no indication of *harmonisation* of the age of criminal responsibility in Europe.

The minimum age of criminal responsibility in Europe varies between 10 (England), 12 (Netherlands), 13 (France), 14 (Germany, Italy, Austria, Spain and numerous Central and Eastern European countries), 15 (the Scandinavian countries) and even 16 (for specific offences in Russia and other eastern European countries). After the contemporary reforms in Central and Eastern Europe, the most common age of criminal responsibility is 14 (see the following *Table 1*).

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15 See Cavadino/Dignan 2006, 199 ff., 205 ff.

16 See Cavadino/Dignan 2006, 210 ff.

17 As is especially the case in Germany, see *Dünkel* 2006.

18 See *Dünkel/van Kalmthout/Schüler-Springorum* 1997; *Albrecht/Kilchling* 2002; *Tonry/Doob* 2004; *Jensen/Jepsen* 2006; *Junger-Tas/Decker* 2006; *Bailleau/Cartuyvels* 2007; *Patané* 2007, *Dünkel/Grzywa/Pruin* 2009.

19 See *Höynck/Neubacher/Schüler-Springorum* 2001.

20 Which were traditionally oriented to the classic welfare approach, see *Tiffer-Sotomayor* 2000; *Tiffer Sotomayor/Llobet Rodríguez/Dünkel* 2002.

Table 1: Comparison of the Age of Criminal Responsibility in Europe

Country	Minimum age for *educational* measures of the family/youth court (juvenile welfare law)	Age of criminal responsibility (juvenile criminal law)	Full criminal responsibility (adult criminal law can/must be applied; juvenile law or sanctions of the juvenile law can be applied)	Age range for youth detention/ custody or similar forms of deprivation of liberty
Austria		14	18/21	14-27
Belgium		18	16**/18	Only welfare institutions
Belarus		14***/16	14/16	14-21
Bulgaria		14	18	14-21
Croatia		14/16*	18/21	14-21
Cyprus		14	16/18/21	14-21
Czech Republic		15	18/18 + (mit. sent.)	15-19
Denmark****		15	15/18/21	15-23
England/Wales		10/12/15*	18	10/15-21
Estonia		14	18	14-21
Finland****		15	15/18	15-21
France	10	13	18	13-18 + 6 m./23
Germany		14	18/21	14-24
Greece	8	13	18/21	13-21/25
Hungary		14	18	14-24
Ireland		10/12/16*	18	10/12/16-18/21
Italy		14	18/21	14-21
Latvia		14	18	14-21
Lithuania		14***/16	18/21	14-21
Macedonia		14***/16	14/16	14-21
Moldova		14***/16	14/16	14-21
Montenegro		14/16*	18/21	14-23
Netherlands		12	16/18/21	12-21
Northern Ireland		10	17/18/21	10-16/17-21
Norway****		15	18	15-21
Poland	13		15/17/18	13-18/15-21
Portugal	12		16/21	12/16-21
Romania		14/16	18/(20)	16-21
Russia		14***/16	18/21	14-21
Scotland	8	16	16/21	16-21
Serbia		14/16*	18/21	14-23
Slovakia		14/15	18/21	14-18
Slovenia		14***/16	18/21	14-23
Spain		14	18	14-21
Sweden****		15	15/18/21	15-25
Switzerland		10	18*****	10-22

Turkey		12	15/18	12-18/21
Ukraine		14***/16	18/21	14-21

* Criminal majority concerning juvenile detention (youth imprisonment etc.);
** Only for road offences and exceptionally for very serious offences;
*** Only for serious offences;
**** Only mitigation of sentencing without separate juvenile justice legislation
***** The Swiss Criminal Law for Adults provides as a special form of detention a prison sentence for 18-25 years old young adult offenders who are placed in separate institutions for young adults; they can stay there until they reach the age of 30, see Art. 61 Swiss Criminal Code.

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In part, purely educational sanctions of the family and youth courts are applicable at an earlier age, as has most recently and explicitly been the case in France (from the age of 10 upwards) and Greece (from the age of 8). In Switzerland, contemporary law only provides educational measures for 10- to 14-year olds, whereas youth imprisonment is restricted to juveniles at the age of at least 15.

Further still, some countries employ a graduated scale of criminal responsibility, according to which only more serious and grave offences can be prosecuted from the age of 14, while the general minimum age of criminal responsibility lies at 16 (see Lithuania, Russia, Slovenia).

Whether these notable differences can in fact be correlated to variations in sentencing, is not entirely apparent. For within a system based solely on education, under certain circumstances the possibility of being accommodated in a home or in residential care (particularly in the form of closed or secure centres like in England or France) as a “last-resort” can be just as intensive and of an equal (or even longer) duration as a sentence to juvenile imprisonment. Furthermore, the legal levels of criminal responsibility do not necessarily give any indication of whether the practice under juvenile justice or welfare is more or less punitive. Practice often differs considerably from the language used in the reform debates.[21] Accordingly, legal intensifications are sometimes the *result* of changes in practice, and sometimes they *contribute to changes* in practice. Despite the dramatization of certain events by the mass media in some countries, there is for instance in Germany a remarkable degree of stability in juvenile justice practice.[22]

There are also interesting developments in the upper age limits of criminal responsibility (the maximum age to which juvenile criminal law or juvenile sanctions can be applied). The most central issue in this regard is the extension of the applicability of juvenile criminal law – or at least of its specifically educational measures – to incorporate 18-20-year old young adults, as it occurred in Germany as early as in 1953.[23]

This tendency is well founded in juvenile criminology by reference to extended transitional phases of personal and social development from adolescence to adulthood. Over the last 50 years, the phases of education and of integration into working- and family life (the establishment of ones “own family”) have experienced a prolongation well beyond the age of 20. Therefore, developmental-psychological “crises” and difficulties in the transition to adult life are characteristic for the group of young adults, yet can also occur up to the mid-thirties.[24]

The common German practice of incorporating young adults in the competence of the juvenile court as well as the flexible approach of sentencing under either juvenile or adult law according to their level of development and maturity (see § 105 German Juvenile Justice Act, *JGG*) can be

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21 See *Doob/Tonry* 2004, 16 ff.
22 See *Dünkel* 2002; 2003b; 2006.
23 See also the recent reforms in the Netherlands, Croatia, Austria, and Lithuania, in summary *Dünkel* 2003, 82 ff.; 2003a; *Pruin* 2007.
24 See *Pruin* 2007; *Dünkel/Pruin* 2008.

viewed as a major success in the advancement of an independent juvenile justice system. Since 1953, the proportion of young adults proceeded against under juvenile law has risen to more than 60%. In cases of particularly serious or grave offences, the figure is more than 90%. This results in "softer" sentences than would have been imposed under adult criminal law. Juvenile law proscribes a maximum prison term of ten years, while adult criminal law provides for imprisonment for up to 15 years, or a life sentence. The pattern of responding to particularly serious offences with juvenile law can be attributed to the relatively high minimum sentences in German adult law, for example three or five years for serious robbery, 1-2 years for specified (serious) drug offences, or for rape/sexual assault. Thus, the youth judges aim to avoid unreasonably long and educationally harmful prison sentences by applying sanctions of the juvenile law. Adult criminal law is preferably applied in the cases of certain minor crimes such as motoring offences (driving without a license, drunk driving among others), because under the law of adult criminal procedure such widespread offences can be routinely dealt with by a written summary procedure.[25]

This development is in sharp contrast to the trends in the USA, where juveniles – sometimes children – who have committed serious offences are referred to adult courts in order to facilitate a harsher punishment than could be achieved before a juvenile court.[26] In Europe, such a "waiver" is possible in Belgium, England and Wales, Ireland and the Netherlands. To exclude certain categories of juvenile offenders out from the juvenile justice systems is a clear breach of international guidelines if this results in a clear retributive instead of educationally oriented sanctioning.

The other European countries in which juvenile legal provisions can be applied to young adult offenders – the Netherlands, Croatia, Lithuania, Russia, Serbia and Slovenia – apparently make less extensive use of this option.[27] In the Netherlands[28], this could be attributed to the fact that Dutch domestic adult criminal law provides a plethora of alternative sanctions (in contrast to the German criminal code, *StGB*, which "merely" provides for fines and suspended prison sentences as alternatives to unconditional imprisonment). In particular, the order to community service is a pivotal sanction in Dutch sentencing. This makes a "shift" to juvenile criminal law less likely or necessary. The fact that the provisions of § 105 German JGG have been in place since 1953 certainly plays a prominent role. In Germany, in any case the sentencing of young adults lies in the jurisdiction of the juvenile courts (see § 108 German JGG) which have a "natural" tendency of more frequently applying the JGG with which they are much more familiar.

If one regards the developments in the disposals that are applicable for young offenders, there has been a clear expansion of the available means of diversion. However, these are often linked to educational measures or have the mere function of validating norms by a warning etc. This is the case for example with the German form of victim-offender-reconciliation. In Greece, for instance, a recent reform of criminal procedure in 2003 introduced far-reaching possibilities to waive the strict principle of legality for below 18, especially in connection with restorative/reparative efforts on behalf of the offender.[29] Diversion in this form is also favoured in the new Czech juvenile law[30] and the law in Serbia from 2006.[31] On the other hand, in England/Wales the practice of diversion has recently been limited by the introduction of a new cautioning system for young offenders by the 1998 Crime and Disorder Act. The 1998 reform amended the police cautioning system insofar that a second offence – following a prior *reprimand* for first time minor offences – is automatically responded to with a *final warning.* Any further offence is automatically subsequently referred to the prosecution service.[32]

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25 See *Dünkel* 2003a; 2005; *Pruin* 2007.

26 See *Stump* 2003.

27 See in summary *Pruin* 2007.

28 Where only roughly 1% of young adults are sentenced according to juvenile law, see *Dünkel* 2003a, 22.

29 Art. 45a Greek Criminal Procedure Act, see *Spinellis/Tsitsoura* 2006.

30 See *Válková* 2006; *Válková/Hulmáková* in *Dünkel/Grzywa/Pruin* 2009.

31 See *Škulić* 2009.

32 See *Cavadino/Dignan* 2002, 286 ff.

Still, we can presume that – regardless of whether the juvenile justice systems are more welfare or justice oriented – the vast majority of juvenile offending is dealt with out of court by means of informal diversionary measures. In Germany in 2006, 69% of all proceedings that should end in court (West-Germany: 68%; East-Germany: even 75%) were dealt with through diversion (totally 69%, see *Heinz* 2008; *Dünkel* 2006, *Dünkel* 2009). In Belgium, one of the few countries that still employs an unambiguous welfare approach to juvenile criminal policy, roughly 80% of all proceedings are dealt with out of court.[33]

Constructive measures such as, for instance, social training courses (Germany) or so-called labour and learning sanctions or projects (The Netherlands) have also been successfully implemented. Many countries explicitly follow the ideal of education (Portugal), and incidentally emphasis is placed on preventing re-offending, i. e. special prevention (as is the case in the Council of Europe's Recommendation "New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice" of 2003).[34]

However, most recently we have witnessed *contrary developments* in several European countries that imply an *intensification of juvenile justice policy and interventions* through raising the maximum sentences for juvenile detention and by introducing other forms of secured accommodation. The juvenile justice reforms in the *Netherlands* in 1995 and in some aspects in *France* in 1996, 2002 and 2007 should be mentioned in this context, as should the reforms in *England* in 1994 and 1998.[35] In other countries such as Germany a juvenile crime policy oriented to welfare and a moderate justice approach is maintained (priority to diversion and "education instead of punishment").[36] Many countries have implemented elements of "*restorative justice*"[37].

The causes for the observed more repressive or "neo-liberal" approach in some countries are manifold. It is likely that the new "punitive" trend with penal law approaches of retribution and deterrence coming from the USA was not without considerable impact in some European countries, particularly in England and Wales. The "*new policy of punishment*"[38] does not halt before the doors of juvenile justice. However, juvenile justice is more "immune" against "neo-liberal" tendencies, as the international human rights standards prevent a total shift in juvenile justice policy. More repressive penal law orientations have gained importance in some countries that face particular problems with young migrants and/or members of ethnic minorities, and problems with integrating young persons into the labour market, particularly with the growing number young persons living in segregated and deteriorated city areas. They often have no real perspectives to escape "underclass" life, phenomena which "undermine society's stability and social cohesion and create mechanisms of social exclusion".[39]

In the case of the continental European countries, there is nonetheless no evidence of a regression to the classical perceptions of the 18th and 19th century. There is an overall adherence to the prior principle of education or special prevention, even though justice elements have also been reinforced. Therefore, the area of conflict – if not paradox – between education and punishment remains evident. The reform laws that were passed in Austria in 1988 and 2001, in Germany in 1990, in the Netherlands in 1995, in Spain in 2000 and 2006, in Portugal in 2001, in France and Northern Ireland in 2002, as well as in Lithuania in 2000,[40] the Czech Republic in 2003[41] or in Serbia in 2006[42] are suitable examples.[43] The reforms in Belgium (2007) and Northern

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[33] See *van Dijk/Dumortier/Eliaerts* 2006; *Drenkhahn* 2006.

[34] See Rec (2003)20.

[35] For a summary, see *Dünkel* 2003; *Kilchling* 2002; *Cavadino/Dignan* 2002, 284 ff.; 2006, 215 ff.; *Junger-Tas/Decker* 2006; *Bailleau/Cartuyvels* 2007.

[36] See *Dünkel* 2006.

[37] Reparation, mediation, family conferences, see e. g. *Christiaens/Dumortier/Nuytiens* (on Belgium) and *O'Mahony* (on Northern Ireland) in *Dünkel/Grzywa/Pruin* 2009.

[38] *Pratt et al.* 2005; see also *Garland* 2001; 2001a; *Roberts/Hough* 2002; *Tonry* 2004.

[39] *Junger-Tas* 2006, 522 ff., 524.

[40] See *Dünkel/Sakalauskas* 2001.

[41] See *Válková* 2006; *Válková/Hulmáková* in *Dünkel/Grzywa/Pruin* 2009.

Ireland (2002) are of particular interest, which strengthened restorative elements in juvenile justice including so-called family conferencing.[44]

With this background in mind, upon more specific observation one can identify certain *successful reform strategies* in a number of western European countries. In *Austria, Germany* and the *Netherlands,* the community sanctions that were introduced by the reforms in 1988, 1990 and 1995 respectively were systematically and extensively piloted. Nationwide implementation of the reform programmes was dependent on a prior empirical verification of the projects' *practicability* and *acceptance*. The process of testing and generating acceptance – especially among judges and the prosecution service – takes time. Continuous supplementary and further training is required, which is difficult to warrant in times of social change, as is the case in Central and Eastern Europe. Yet a "*reform of juvenile justice through practice*"[45] appears preferable to a reform "from above" which often omits to provide the respective infrastructure.

The *developments* in the *countries of Central and Eastern Europe* are characterised by a clear increase in the levels of officially recorded juvenile crime since the late 1980s up to the early 1990s. The need for juvenile justice reform, a widely accepted notion in all of these countries, stems from the right to replace old (often Soviet or Soviet-influenced) law with (Western) European standards as they are stipulated in the principles of the Council of Europe and the United Nations. This process has, however, in part produced different trends in criminal policy.

Since the early 1990s, there have been dynamic developments in the reform movement both in law and in practice, which is exemplified not only in numerous projects but also in the appointment of commissions for legal reform and in some cases the adoption of reform laws.[46]

One the one hand, the development of an *independent juvenile justice system* is a prominent feature (see for example the *Baltic States*, *Croatia*, the *Czech Republic*, *Serbia*, *Slovakia*, *Romania* and *Russia*), and in connection with this the development of procedural safeguards and entitlements that also take the special educational needs of young offenders into account. However, for example in the Baltic States, up to now there are no independent youth courts. In Russia a first model of a juvenile court is running in Rostow/Don, and such a project has also been established in Romania in Brasov.[47] But in general, the required infrastructure for the introduction of modern, socio-educational concepts in the field of juvenile justice and welfare is widely lacking.

In order to deter recidivists and young violent offenders in particular, the expansion of sentences not only involves new community sanctions and possibilities of diversion, but also tough custodial sentences are propagated. Accordingly, the still largely nonexistent infrastructure and lacking acceptance of community sanctions (see chapter 4 below) so far result in the frequent application of prison sentences. However, developments in Russia, for example, show that a return to past sanctioning patterns (with a prison-sentence proportion of roughly 50%) has not occurred, and that especially forms of probation are now quantitatively more common and frequent than sentences of imprisonment. What is becoming clear in all Central and Eastern European countries is the fact that the principle of imprisonment as a last resort (*ultima* ratio) is being taken more seriously, while custodial sanctions are being increasingly repressed.

Regarding *community sanctions*, the difficulties of establishing the respective necessary infrastructure are clear. Thus, initially the greatest problem in this respect was the lack of methodologically qualified social workers or social educators, even more so since the respective training courses have – to the largest part – not yet been fully introduced and developed.

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42 See *Škulić* 2009.

43 See *Dünkel* 2003; *Dünkel/Grzywa/Pruin* 2009 for a summary.

44 See *Christiaens/Dumortier/Nuytiens* 2009; *O'Mahony/Campbell* 2006.

45 For Germany see *Bundesministerium der Justiz* 1989.

46 See for example Estonia, Lithuania, Serbia, Slovenia, the Czech Republic, see *Dünkel* 2003, p. 69 ff.; *Dünkel/Grzywa/Pruin* 2009 for a summary.

47 See *Schtschedrin* (on Russia) and *Păroşanu* (on Romania) in *Dünkel/Grzywa/Pruin* 2009.

The adoption of the concept of conditional criminal responsibility – as expressed in German (§ 3 dJGG) and Italian law – is another interesting development. This approach – which implies that young people are not criminally responsible per se, but rather only when the individual's capacity to discern right and wrong and to act accordingly (*Einsichts- und Handlungsfähigkeit*) has been positively ascertained **–** was recently incorporated in Estonia by the 2002 reform, and most recently in the Juvenile Justice Act of the Czech Republic in 2003 and in Slovakia for 14 year old offenders when reducing the age of criminal responsibility from 15 to 14.[48]

The reform tendencies in the countries of Central and Eastern Europe have been and are often influenced by Austrian and German juvenile law as well as by international minimum standards, recommendations and regulations.

One development that appears to be common to Central, Eastern and Western European countries is the emergence of elements of "*restorative justice*". Victim-offender-reconciliation, *mediation,* or sanctions that require reparation or apology to the victim have played a particular role in all legislative reforms over the last 15 years. These elements are predominantly linked to informal disposals (diversion). In some countries, for example in England/Wales (*reparation*, *restitution order*) or Germany[49] juvenile law provides them as independent sanctions at the disposal of the youth court. The *"family group conferences*" – originally introduced and applied in New Zealand – are now being piloted and reflected by the law reform of 2007 in Belgium (see above). These conferences are a form of mediation which activate and take into account the social family networks of both the offender and the victim. Most recently, the juvenile justice reform in Northern Ireland (Juvenile Justice [Northern Ireland] Act of 2002), too, has effected the introduction of *youth conferences,* which have been running in pilots since 2003. Additionally, the *reparation order* that was introduced in England & Wales in 1998 was incorporated into the act.[50]

Whether these restorative elements are to be seen as either influential on sentencing practice or merely as the "fig-leaf" of a more repressive juvenile justice system can only be determined if one takes into account the different backgrounds and traditions in each country. *Victim-offender-reconciliation* has attained a formidable quantitative degree of significance in the sanctioning practices of both the German and the Austrian youth courts.[51] If one also takes community service into account as a – in the broader sense - „restorative" sanction, the proportion of all juvenile and young adult offenders who are dealt with by such – ideally educational **–** constructive alternatives increases to more than one third.[52]

4. Community sanctions and measures

4.1. General comments

Part II of the questionnaire is dealing with juveniles subject to community sanctions or measures. This issue is dealt with by Rules 23-49 of the ERJOSSM. The ERJOSSM were developed by re-adapting the European rules on community sanctions and measures (Recommendation n° R(92)16) with special emphasis on what would be of particular importance for juvenile offenders. The questionnaire reflected the general approach of also earlier recommendations and international instruments that "*a wide range of community sanctions and measures, adjusted to the different stages of development of juveniles, shall be provided at all stages of the process*" (see Rule 23.1 of the ERJOSSM). The guiding philosophy of the ERJOSSM is on the one hand to promote as far as possible educationally meaningful community sanctions and measures and on

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48 On the Czech Republic see *Válková* 2006; *Válková/Hulmáková* in *Dünkel/Grzywa/Pruin* 2009.

49 So-called obligation for reparation (*Wiedergutmachungsauflage*) or victim-offender-reconciliation (*Täter-Opfer-Ausgleich*) as an educational directive, see §§ 10, 15 JJA, *JGG*.

50 See *O'Mahony/Campbell* 2006.

51 Roughly 8% of all sanctions imposed on juveniles, see *Dünkel/Scheel/Schäpler* 2003 for the Federal State of Mecklenburg Western-Pomerania; for Austria see *Jesionek* 2001; *Bruckmüller* 2006.

52 See also *Heinz* 2008; *Dünkel* 2006.

the other hand to protect juveniles subject to community sanctions or measures from human rights violations. The questionnaire was developed under these general considerations. We also wanted to collect information on the application of community sanctions and measures in practice.

The intention of questions 3.1 – 3.3 was to collect information about
a) the types of community sanctions or measures which are available in the member states and
b) the extent of the application of these alternatives to prison.

Unfortunately, approximately one third of the participating countries did not answer these questions. Others only provided incomplete information.

It was possible to compile table 4.1.1 below from the answers of 23 countries, presenting the different community sanctions or measures available. As can be seen, community sanctions play an important role in today's European juvenile justice systems. Historically the systems have tended to expand the variety of "alternative" court dispositions in order to reduce the use of different forms of deprivation of liberty. The idea of "deinstitutionalisation" started with regard to closed welfare institutions in the USA and Europe in the late 1960ies. The experiment in Massachusetts in the early 1970ies triggered abolitionist discussions concerning youth imprisonment in Europe. Actually, in California there has been a surprising revival of the idea of closing down youth prisons.
The introduction of educational sanctions involving restitution, social training or educational courses, community service orders and other so-called intermediate sanctions is indicative of a strong movement for more constructive and educational responses to juvenile delinquency. Whether alternative sanctions can contribute to an at least "reductionist" approach is an open and frequently discussed question, because creating more "alternatives" can also contribute to "net-widening" without any reduction in the application of liberty depriving sanctions.

4.2 The available community sanctions and measures

Table 4.1.1 reveals the variety of community sanctions and measures. Absolute discharge can be seen as the least invasive sanction, followed by conditional discharge and verbal sanctions. Payment sanctions such as fines are also available in most countries, although the possibility to fine juveniles is rarely used in practice as usually juvenile offenders dispose with only limited financial means.[53] A wide range of other alternative sanctions exerts more or less influence on the life of the offender. Whereas some measures like, for example, community service can be imposed in almost all European countries, others like house arrest or electronic monitoring only exist in a few systems. Victim-offender mediation seems to be available in most countries as well. In most countries victim-offender mediation is not designed as a special sanction but is primarily carried out outside the criminal justice system, for example in Sweden. In Finland, victim mediation is not regarded as a punishment, but out-of-court mediation has a relatively major impact on decisions of the police, public prosecutors and the courts. Such settlements may constitute grounds for not bringing in an accusation and thus not to proceed to trial. In principle the courts may, like public prosecutors, take into account any mediation or any other reconciliation efforts by the parties when considering whether to waive prosecution (diversion) or adjust the sentence.

Many but not all European countries provide the possibility of suspending a juvenile's prison sentence. In many cases suspended sentences are combined with supervision by the probation service or a similar service with a social work approach. In Germany such supervision is obligatory. The continental European model of suspended sentences implies the imposition of a youth prison sentence, the execution of which is postponed. Should an offender fail to meet the conditions of the probation term, the suspension is revoked and the juvenile serves the term of imprisonment set at the first trial. The common law countries provide for probation as a special sanction. This sanction is – as its name indicates – always connected with support from and control by the probation service. Contrary to the continental European model, in common law countries no term of detention is fixed. Therefore, where an offender fails to comply with the probationary requirements the term of imprisonment is determined in a second sentencing trial.

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53 See *Dünkel/Pruin* 2009; *Dünkel/Grzywa/Pruin* 2009.

Other community sanctions or measures which are not explicitly comprised by the table below are, for example, special directives or obligations which can be imposed by the judge and are concerning the everyday life, like orders concerning the whereabouts (existing for example in Austria and Germany). These educational "directives" can be imposed either as independent sanctions or as complementary elements of other sanctions like, for instance, probation or suspended prison sentences.[54] The aim of such educational directives is always to improve the educational impact on the one hand and to reduce the risk factors in the juvenile's daily life on the other.

Some Eastern European countries provide a form of correctional labour, which can be distinguished from community service with respect to its philosophy: The idea of community service is that the offender gives something back to the society, whereas correctional labour wants to rehabilitate the offender through his work.

In some countries (i.e. Netherlands, Portugal, Spain)[55] it is possible to confiscate a person's driver's license. In these cases the courts have to consider a certain susceptibility to unequal treatment, because there are special groups of juveniles or young adults who are more dependent on driving a car than others (due to work obligations, poor local infrastructure)

Lithuania provides for a special form of short term youth detention in special disciplinary centres, which can be found in Estonia, Germany, Spain and Ukraine as well (see chapter 5.4). Such short term detention sometimes can be seen as an "alternative" sanction replacing longer custodial sentences such as youth imprisonment. But in general one can assume that it is more likely to replace other community sanctions or measures and thus is an expression of net-widening. The educational effect of detaining young people in a closed institution for a short period of time can be deemed questionable. German research results have shown extremely high recidivism rates among persons who experience short-time detention (70% within four years of sentence, compared to less than 40% for educational community sanctions for similar offenders).[56]

Other forms of non institutional educational treatment can be educational assistance for the family of origin or the placement in a foster family. It should be stressed that the latter is a very invasive measure which in this sense approximates custodial measures.

Table 4.1.1 does not differentiate between sanctions that are used as diversionary ("informal") measures and community sanctions that are imposed as "formal" sanctions by the courts. It is evident that the character of community sanctions varies in this respect. In all European countries most community sanctions can be imposed as formal sanctions in court proceedings. Diverting young offenders from juvenile courts in less serious cases with the intention to prevent stigmatisation or other negative effects of more serious justice interventions is extensively used in some European countries.[57] Often diversion of the case is connected with special conditions. Within these conditions community sanctions and measures play an important role. In Austria and Serbia for example, victim offender mediation or community service can be applied as a diversionary measure, but not as a formal sanction. In many countries both possibilities are available.[58]

The principles for choosing community sanctions instead of custodial sanctions generally follow two major ideas. One is that deprivation of liberty should be a measure of last resort (named the principle of "*subsidiarity*" in some countries).[59] The second principle is the idea of "education instead of punishment" or of prioritizing the most promising educational sanctions in order to

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54 See *Dünkel* 2006.

55 See *Dünkel/Pruin* 2009.

56 See *Jehle/Heinz/Sutterer* 2003; *Dünkel/Pruin* 2009.

57 See *Dünkel* 2009.

58 See Table 1 in *Dünkel/Pruin* 2009.

59 See e.g. §§ 5 and 17 of the Juvenile Justice Act in Germany.

facilitate social re-integration. So the prevailing idea is to give the juvenile judge sufficient discretionary power to select the most appropriate sanction in the best interests of the juvenile (see also Rule 6 of the ERJOSSM).

4.3 The practice concerning the imposition of community sanctions and measures

Due to the general lack of data (see also chapter 2 above) it is not possible to compare the sanctioning practice for community sanctions and measures in European juvenile justice systems. From the few countries that provided information on these questions, we could identify different structures:

In Austria different kinds of verbal sanctions play the most important role in the sanctioning practice for juveniles aged 14-18. They were used more than four times more (2.248 cases) than unconditional imprisonment (514 cases) in the year 2005. Victim offender mediation with 1.359 cases played an important role in the sanctioning practice for juveniles. Suspended sentences were imposed relatively often as well (1.163 cases), followed by community service orders (1.072).

Denmark did not provide much data and did not specify the exact age group which is covered by the presented data, but it can be seen as obvious that community service was imposed frequently in 2005 as well (4.235 cases). Probation played an important role (3.136 cases), whereas only a remarkably small number of juveniles were imprisoned (not more than 9 cases).

In Finland, imprisonment rates for juveniles aged 15-17 were extremely small in 2005 as well (3 cases). Fines are the most common penalty for all age groups and also for juveniles aged 15-17 (3,244 cases). This is very interesting because fines seem not to play a special role in most of the other European juvenile justice systems.[60] Suspended sentences and probation seem to be used quite frequently as well (suspended sentences: 824 cases for 15-17 years old juveniles, probation: 1,646 cases related to the year 2004 and covering juveniles aged 15-20).

In France in the year 2005 unconditional and conditional discharge was used in most cases for juveniles aged 15 and older (20,705 respectively 63,408 cases). Verbal sanctions were also used quite frequently (32,624 cases), whereas the use of all other community sanctions varied between 3,873 cases (community service) and 9,453 (suspended sentence). 6,204 juveniles were imprisoned in the same year.

According to the information from the replies to the questionnaire, community service orders were imposed in most cases on juveniles and young adults (14-20 years old) in Germany in the year 2004 (45,895 cases), followed by verbal sanctions in 28,318 cases. No data were available for all forms of diversion. From other sources we know that diversionary measures are applied intensively in almost 70% of all cases of juvenile offences.[61] In 6,596 of the cases juveniles were sent to a youth prison in the same year.

In Hungary, in 2005 probation and judicial supervision was used most frequently for the 14-18 years old juveniles (3,780 cases), followed by verbal sanctions (2,689 cases). Imprisonment for the same age group was imposed in 1,818 cases.

In Lithuania in 2005 the most frequently imposed community sanction was the suspension of a sentence with 1,314 cases for the age group 14-18 years old. Community service or verbal sanctions were applied relatively seldom (42 respectively 99 cases), whereas the frequent use of imprisonment can be seen with regards to the relatively high number of juveniles who were sentenced to unconditional prison sentences (802 cases). Short term detention (see above) was imposed in 145 cases.

Scotland, surprisingly chose monetary sanctions in most cases, unfortunately not defining the

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60 See *Dünkel/Pruin* 2009.

61 See *Heinz* 2008, *Dünkel/Pruin* 2009.

respective age group (3,721 cases in the period 2004/2005). In the same period, verbal sanctions were imposed in 1,131 cases. Probation was applied in 1,065 cases, whereas 749 juveniles were sent to prison.

In Sweden, judicial supervision seems to be imposed relatively often: in the year 2005 judicial supervision was applied in 147 cases of juveniles aged 15-17, whereas only 10 juveniles were imprisoned in the same year. A similar situation is given for young adults aged 18-20: judicial supervision was imposed in 1,065 cases, and only 147 young adults were sent to prison.

In Switzerland in the year 2005 community service was imposed in 4,874 cases for juveniles aged 10 – 18. In the same year verbal sanctions were issued in 3,461 cases, relatively often compared to other community sanctions and to the number of imprisoned juveniles (296 cases).

The information from the replies to the questionnaire corresponds to what we know about the sanctioning practice in the European juvenile justice systems from other sources[62]: The sanctioning practice varies considerably. Deprivation of liberty is relatively often used in many Eastern European countries, sometimes due to a lack of infrastructure for community sanctions. In this sense some countries report that mediation is never or only seldom practiced due to a lack of organisational infrastructure at the local level.[63] In the Scandinavian countries, on the contrary, low imprisonment rates are remarkable, connected with a wider use of community sanctions.

4.4. Results from the questionnaire

4.4.1 The legal grounds for sentencing juveniles to community sanctions and measures can be found in the legislation for juvenile offenders in the respective country. As a rule, the offence must not be too severe on the one hand, but on the other hand serious enough so that a fine or diversion without any interventions seem not to be appropriate (or proportional) to the severity of the offence (see for example answers on question 4.1 from Austria, Finland, Lithuania, Malta).

Generally, the Probation Service or similar organisations (i.e. Youth Court Assistance in Germany) monitor the execution of the community sanctions. In most countries who answered question 4.2 (15 countries) the legal grounds for the execution of different community sanctions is regulated in special laws and not in the Penal Codes. (i.e. Denmark: Enforcement of Sentences Act, Lithuania: Code of Execution of Sentences).

4.4.2 All countries which answered to question 4.5.1 claim to follow the principle of proportionality within the process of the imposition of a community sanctions. The Norwegian answer can be seen as a good example for most answers: "*The duration of the community sentence is proportional to the act committed and other factors which might enter the court's contemplation: the personality of the offender, the circumstances under which the offence was committed, the personality of the victim etc.*" The answers from Slovakia and Ukraine are somewhat evasive: Slovakia stresses that "*the sentence of mandatory work is ordered by court, with agreement of the offender*" and Ukrainian authorities probably understand the principle of proportionality in a different way ("*Punishment must answer an act, committed by juvenile.*"). The mis- or non-understanding of the principle of proportionality could be the reason for the missing answers of 11 countries.

4.4.3 Community sanctions or measures are in the interest of the young person who remains in the community and help preventing him/her from committing any further crime (see Finland) respectively rehabilitate him or her (see Malta, Austria, Georgia, answers to question 4.1. in combination with 4.5.2). So the legally defined grounds for sentencing refer – besides to reflecting the seriousness and kind of the committed act – to treatment needs and social rehabilitation. Therefore not only the nature of the offence but the character of the offender, his social surroundings etc. have to be taken into consideration. Sometimes the conditions are defined in another way, see for example Sweden: "*Sentencing to imprisonment presupposes that no other*

[62] See *Cavadino/Dignan* 2006; *Dünkel/Pruin* 2009.

[63] See country reports from Czech Republic, Poland and Kosovo in *Dünkel/Grywa/Pruin* 2009.

sanction is suitable".

The questionnaire asked for the legal aims of community sanctions under table 3 of the questionnaire. The presented legal aims varied comprehensively. Partly education is seen as the legal aim of every community sanction (see for example Switzerland or Lithuania). Others stress punishment as a reason for all community sanctions, i.e. Hungary (Hungary refers to "*other*" legal aims, which are not specified further). Most countries like Sweden see other reasons like reparation or therapy as the goal for community sanctions. In Spain punishment is not mentioned as an aim for any sanction, but therapy, education or reparation.

The claimed legal aims correspond to the prevailing juvenile justice system in the respective country (see chapter 3 above). Countries with a strong welfare approach would not highlight "punishment" as legal aim. Countries which embed the education and treatment of young offenders more in the general criminal justice system have fewer problems to claim punishment as a legal aim and principle of sentencing juveniles.

4.4.4 According to the answers to question 4.5.3, the legal framework of the community sanctions or measures is not explicitly related to certain categories of juvenile offenders. In some countries, special community sanctions are only available for some age groups. Georgia limits a special type of community measures ("*Compulsory Educational Measures*") to first time offenders. Despite these answers it is possible that the courts take into consideration prior convictions or recidivism within their wide discretionary power which is given to them with regards to the application and selection of community sanctions. The Scottish answer stresses the structural condition that partly certain disposals are targeted at specific groups – for example drug abusers in the case of the Scottish Drug Treatment and Testing Orders.

4.4.5 According to the answers of the questionnaire there is a series of legal guarantees in sentencing to and/or executing of the community sanctions and measures (see question 4.5.4). There seems to prevail an understanding that community sanctions must like other criminal sanctions be seen as direct interventions into the rights of the offender. A good example is in this respect the answer from Cyprus: "*All the fundamental rights and liberties envisaged in the European Convention on Human Rights, are enshrined in Part II of the Constitution, which is in fact modelled on the Convention, including all the basic principles of the judicial process, namely, judicial control over arrest and detention, free access to the Courts, the right to a fair and open trial, the presumption of innocence, the principles of "ne bis in idem" and of proportionality of the punishment to the severity of the crime committed, the right to a lawyer, to call witnesses, to free legal assistance etc.*"

In almost all countries an appeal is possible against the imposition of a sanction or measure (see question 4.5.5). The Italian answer is somewhat unclear: "*The project is set up by juvenile and Youth Welfare Officer operators, it isn't an imposition.*" Apparently, in Italy community sanctions are not seen as a special invasion into the rights of the offenders, probably because they can only be imposed with the consent of the offender. The situation in Slovakia seems to be similar: There are no appeal procedures available against the imposition of the sentence of community work, because this sanction can only be imposed with the agreement of the offender and therefore the appeal procedure is not seen as necessary (see also Cyprus with a comparable answer). The laws from Switzerland do not foresee any appeal procedures in this field. In Ukraine only an appeal from the prosecutor is possible, but not from the offender. The possibilities to appeal against the execution of a sanction and measures (see question 4.5.6) in some countries differ from the above mentioned appeals against the imposition in one central point: Before appealing to a court the offender must complain directly at the organisation that executes the sanction or measure. In Sweden and Slovakia no appeals are possible. Regarding the ways of execution of community sanctions and measures Cyprus stressed that community sanctions shall not be contrary to the offender's religious beliefs or habits or affect his usual work or education. France underlines the demand for an educative value of any sanction or measure.

4.4.6 In most countries (Austria, Cyprus, Estonia, France, Germany, Latvia, Netherlands, Norway, Portugal, Scotland, Slovakia, Spain and Sweden, see question 4.6.1) the responsibility for the

execution of community sanctions and measures to which juvenile offenders are subjected is shared between private and public agencies or bodies. As a rule the overall responsibility lies on public services, but the practical implementation is however largely carried out by the facilities and services of private agencies, see for example the answer from Estonia: "*In general the responsibilities are in the public bodies, but implementation and offering the services, for example the social programmes can be bought in from the NGO-s*." In all countries the private organisations are non-profit organisations, rare exceptions can be seen from the answers of Germany and Scotland.

4.4.7. The possibilities for development in the area of defined criteria or requirements set for the agencies and other bodies responsible for the execution of community sanctions and measures to which juvenile offenders are subjected (see question 4.6.2) seem to be capacious. No country presented criteria for the quality of education (Lithuania claims for the existence of such criteria but did not provide any further explanation). Special training for staff is at least available in some countries. Latvia describes the legal requirement of limiting the number of juveniles for which a staff member is responsible. In Denmark there exists also a special post-graduate training for staff as well as a "*mandatory leadership education programme for all managerial positions at the operational and tactical level*".

Finland, Germany, Norway and Sweden provide a special accreditation for the different projects as a part of their quality management. According to the Swedish answer, there can be found interesting standardized projects for special groups of offenders: "*In the context of National Programmes accredited by an Accreditation Board, the Prison and Probation Service has developed evidence-based programs for special target groups, such as violent offenders, drug abusers, sex offenders etc.*"

Quality management through specific procedures and measures of supervision or control concerning the quality of community sanctions and measures (see question 4.6.3) apparently exists only to a certain degree: Controls or inspections through other agencies and/or committees seem to be common. Indications for a systematic approach of such a quality management could not be found in the majority of the answers with two remarkable exceptions: Finland obviously uses classical quality management tools like long- and short-term-goals to be set up by the Probation Service. Norway has set up special quality indicators as follows: "*The most important ones are that: a) a community sentence must be commenced within two months after the probation service has received the sentence, b) at an aggregate level, the percentage of unpaid work in the sentences must not exceed 75%.*"

4.4.8 The extent of scientific evaluation studies in the field of community sanctions or measures is very poor. This could explain the failing systematic character of quality management, because no evidence-based approaches are possible without scientific research in this field. 9 countries describe evaluation or scientific research in this area. According to the answers of Scotland ("*Most new community disposals introduced in Scotland have been subject to independent research while running on a pilot basis.* ") and Norway the most evaluation reports could be found there. However, it has to be considered in this respect that many countries did not answer this question at all (18 out of 33) and that, for example, England and Wales have a strong tradition of criminological research in the field of community sanctions.[64] Furthermore it is also possible that the responsible person in the ministry that filled out the questionnaire has not full access to the scientific literature in this field.

4.4.9 Only in one third of the participating countries the programmes for the execution of community sanctions or measures differentiate according to the characteristics of the juveniles (question 4.6.4). Cyprus, Denmark, Finland, France, Germany, Latvia, Lithuania and Turkey[65] differentiate with respect to the age of the offender. Cyprus, Germany, Hungary[66] differentiate the

64 See for example *Shapland et al.* 2008 or http://www.justice.gov.uk.

65 Turkey answered with yes to every category without giving any further explanations.

66 Only on an institutional basis

gender and Finland, France, Italy and Turkey consider the type of offence committed. Cyprus furthermore considers the place of residence and work and Germany and the Netherlands provide special programmes for special offenders (for example in the case of violence behaviour).

4.4.10 When asking which are the persons or groups involved in the execution of community sanctions and measures (question 4.6.5) one can see that in almost all countries the parents take part in the execution. The only exception is Ukraine; Sweden stresses that the participation of the parents or family members only rarely takes place. Teachers and victims participate in less countries, the latter group is – naturally – involved in victim-offender-mediation. In many countries also members of the community take part in the execution, although the question sometimes might have been misunderstood: It was asked if other people outside the administrative structure of community sanctions as such could be involved in the execution.

4.4.11 Question 4.6.6 concerns the very important decision about the consequences for the juveniles if they breach the rules of conduct that may be prescribed during the execution of community sanctions or measures. Only in the Czech Republic, Latvia and in Malta such a breach is considered to be a penal offence (which can be seen as a violation of Rule 30.2 of the ERJOSSM). In all other countries, the breach is only a penal offence if the breach constitutes a penal offence itself. Vice versa committing a penal offence is considered a breach of the community sentence (see Norway). In the case of a breach there are a lot of sanctions provided. Generally, these sanctions are connected with the embedding of community sentences into the sanction system as such: If normally a prison sentence is imposed but within the verdict is substituted through a community sanction, a breach of the rules is generally followed by the revocation of this substitution which leads in fact to imprisonment (i.e. Lithuania, Hungary). If community sanctions are independent sanctions, a breach is as a rule followed by the change of the sanction, an adjustment of the obligations, extension of the probation period etc. (i.e. Germany, Sweden). In Finland and Norway exists a special gradual system of different types of warnings. In Finland, for example, in the case of juvenile punishment there has firstly to be an oral notice, then a written notice, then a written warning and only after these consequences the sanction is interrupted by the Probation Service and the matter is sent back to the prosecutors office for retrial. "*The juvenile is, however, given many chances to improve his behaviour*." Some countries seem to see detention for a certain period as a good idea to punish breaches of the rules, see, for example, Armenia and Germany. Lithuania provided an interesting list for the substitution of community sanctions through other sanctions.

The competent authority to sanction a breach of the rules of execution is in most countries the judge respectively the court. In some countries also the public prosecutor can be responsible if she or he was the competent authority for the imposition of the community sanction (i.e. Austria, the Netherlands). In Finland and in Lithuania also the Probation Service is competent to "sanction" a breach of the rules.

Asked for legal guarantees, most countries emphasize obligatory legal assistance in the process that follows the breach of the rules. Some countries refer to the general legal guarantees in court proceedings. Similar are the answers to the question about appeal procedures: in most countries an appeal or a complaint is possible, with all the rules that are valid for the respective legal remedy in the country.

In *conclusion* we can see that community sanctions and measures for juveniles obviously are widely legally provided and also applied in practice. Many community sanctions are available all over Europe; legal guarantees are provided in most – albeit not all – countries, the principle of proportionality is considered in most countries. But it must be taken into account that the extent of use varies a lot, sometimes due to a lack of financial and organisational infrastructure at the local level, sometimes due to the system of embedding community sanctions into the general sanction system. Community sanctions have their own value as independent sanctions and not just substitutes for prison sentences. On the other hand the question of to what extent they are able to replace custodial sanctions or function as additional (and sometimes in combination with other community sanctions more intrusive) sanction (the problem of net-widening) remains open and deserves further attention.

It must be emphasised that our conclusion is limited by the fact that many countries did not answer the questions concerning community sanctions at all. Further comparative in-depth research in this area is urgently needed. Quality management and evaluation are a very important issue for the further development of juvenile justice and welfare. Therefore international rules for the imposition and execution of community sanctions and measures (such as the ERJOSSM) are more than useful, particularly if the Council of Europe will carefully monitor their implementation.

Table 4.1: Community sanctions and measures in European countries

Type of sanction/measure	Andorra	Armenia	Austria	Belgium	Cyprus	Czech Republic[67]	Denmark	Estonia	Finland	France	Georgia	Germany	Hungary	Italy	Latvia	Lithuania	Malta	Portugal	Scotland	Spain	Sweden	Switzer-land	Ukraine
Unconditional discharge	X				X				X	X	X	X	X	X	X	X	X	X	X		X		
Conditional discharge (with obligat.	X	X			X					X	X	X	X	X	X	X	X	X		X	X		
Verbal sanctions (warning/cautioning, etc.)	X		X		X			X		X	X	X	X			X	X	X	X	X		X	
Payment sanctions (fines, etc.)		X	X		X	X		X	X	X	X	X	X		X	X	X	X	X		X	X	
Suspended or deferred sentence	X		X		X	X	X		X	X	X	X	X	X	X	X	X			X		X	
Probation, judicial supervision	X	X	X		X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X
Electronic monitoring	X						X			X									X			X	
Victim-offender mediation	X		X	X				X	X	X		X		X	X			X		X		X	
Community service	X		X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X	X
Referral to an attendance centre	X				X							X	X	X		X				X		X	
House arrest	X							X						X						X		X	
Combination of the measures listed above	X				X		X					X			X		X			X	X	X	
Other forms of treatment, sanctions/measures (to specify)	X[68]				X[69]	X[70]			X[71]			X[72]				X[73]		X[74]		X[75]			

67 Answers were not taken from the questionnaire but from Act on Juvenile Justice, No. 218/2003 Coll.

68 Order to stay at the familie´s residence during the weekend, Order not to leave the family´s residence during the evenings, Confiscation of driving a vehicle or carrying any arms, orders relating to the whereabouts, order to take medical treatment, *Accueil pour une autre personne, noyau familial ou institution d'assistance, Amonestament*

69 No further explanation.

70 Prohibition on activity, forfeiture of items or other asset value, expulsion.

71 Juvenile punishment.

72 Orders relating to place of residence, living in a family, acceptance of job or training, social training course, road safety instruction, care order, educational support condition to personally apologise to the injured party; orders relating to living in a home or placement in a home; instruction to undergo rehabilitation or detoxification treatment.

73 Restitution or elimination of damages; Unpaid work of educational nature, Transfer to the parents or other natural persons or legal bodies taking take care of children for their supervision and care; Behaviour restrictions.

74 *La mesure de Fréquence aux programmes de formations prévue par l'article 15.*

75 Orders relating to the place of residence, living with a person or in a family, social training courses, confiscation of driving a vehicle or to own arms.

5. Juveniles deprived of their liberty

5.1 Statistical approach

With part I of the questionnaire we intended to collect data about the types of institutions, about the number of juvenile offenders deprived of their liberty in the last 25 years, about age groups, gender, nationality and types of offences which lead to deprivation of liberty. Unfortunately most countries failed to provide information regarding statistical data completely or for most parts. This is probably due to the fact that specified statistical data is not easily available in most countries.[76] As a consequence there is not enough statistical data available to compare the fluctuations in the number of detainees in the respective institutions and countries or to analyse special groups of offenders.

What one can see from the statistical data is the variation of the forms of deprivation of liberty which are used in some countries. Table 5.1.1 contains the analysis of the answers to the questionnaire's question 1: "Types of institutions and statistical data".

It is obvious that many countries did not communicate information about a lot of issues of interest. This may – again – be due to the fact that in many countries these data are not available, which can be seen as a point of concern in itself. Juveniles deprived of their liberty should be registered, because any form of deprivation of liberty is an intensive intervention into the rights of juveniles.

What we can see from our analysis of question 1 in table 5.1.1 is the difference between the systems. In some countries, open or closed welfare institutions do not play an important role with respect to deprivation of liberty for juveniles. There are no or few institutions, and the larger part of juvenile offenders is detained in specialised juvenile prisons or in adult prisons. Examples are Germany, Greece, the Netherlands or Turkey. In other countries specialised juvenile prisons are not of major importance and most juveniles are placed in open or closed welfare institutions, for example France, Belgium, Italy, Slovakia, Switzerland, Norway and Sweden). Bulgaria also belongs to this category, because they claim not to have any youth prisons but different forms of educational (reformatory) schools.

The prevailing type of institution with regards to deprivation of liberty of juveniles is explained by the specific juvenile justice approach (welfare or justice oriented, see chapter 3 above).

In countries which follow a welfare approach, welfare institutions are the first choice. A strict welfare system would not allow accommodating juveniles in (adult or juvenile) prisons, because in such systems juveniles can not be sanctioned with criminal sanctions but only treated with welfare measures. Bulgaria is an example of such a welfare oriented policy which claims the absence of any youth prison.[77]. France has 22 closed welfare institutions (CEF and CER, see chapter 5.2 and 5.4) and has just recently planned and established 7 juvenile prisons. However, until recently a lot of juveniles were placed in adult prisons. Belgium has 7 closed welfare institutions and only 1 juvenile prison. In Italy a lot of juveniles are placed in open welfare institutions and relatively few in juvenile prisons. Switzerland does apparently rely very much on welfare institutions, most of them are open facilities, whereas juveniles in separate prison units are the very exception. We can see in these countries that the welfare approach is not the only principle in the respective juvenile justice system but plays an important or even dominating role.

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[76] As a good example for the collection of comparable data at least for certain areas in the field of criminal justice see The European Sourcebook of Crime and Criminal Justice 2006, pdf download http://www.europeansourcebook.org/esb3_Full.pdf.

[77] It remains unclear if and how many juveniles are imprisoned in prisons for adults.

Countries which follow the justice approach treat the juvenile in first line as an offender and emphasise due process guarantees. Consequently, welfare institutions are only an offer to the juveniles which can be used voluntarily (for example to avoid custody in youth prisons or pre-trial detention). Thus closed welfare institutions do not play an important role compared to juvenile prisons. Therefore we find in Germany 180 juveniles in closed welfare institutions (2005; which are partly used to avoid pre-trial detention) and 5,844 places in juvenile prisons. Greece and the Netherlands present no data about juveniles in welfare institutions but in specialised juvenile prisons.

The Scandinavian countries can hardly be placed into this category, because they do not have special juvenile justice systems nor specialised youth prisons. Young offenders are placed in adult prisons or – as in Denmark – in prisons for young adults (see chapter 5.4). But the intention to avoid imprisonment for juveniles is taken very seriously in Scandinavian countries, as one can see from the Norwegian and Swedish example in table 5.5.1: the numbers for juveniles in prison are very small. On the other hand, some juveniles are placed in open, respectively closed welfare institutions. This shows that the connection between the justice and the welfare system is very strong.

Similarly the age-limits for the imprisonment of juveniles show little conformity. The upper age-limit for the placement of juveniles in prison-like institutions or pre-trial detention is mostly higher than the upper age limit for the placement in a welfare institution (which is usually 18 years of age).[78] Table 1 (see chapter 3) presents comparative results regarding the age of criminal responsibility of juveniles and the range of age groups concerning the allocating young offenders in youth prisons.

The replies to the questionnaire revealed that sometimes juveniles are placed in adult prisons. This must be seen as a clear violation of the principle of separation of juveniles from adults (see art. 37c CRC and Rule 11.1 of the EPR). Placement of juveniles together with adults can on the one hand produce bad influences or victimisation of the younger. On the other hand it must be questioned if special interventions for juveniles can be offered in such an institution.

[78] See the results about Andorra, Norway, Slovakia, Sweden and Switzerland in Table 5.1.

Table 5.1: Types of institutions and statistical data

	Open welfare institutions Number of institutions/ range of age/ total number of juveniles 31.10.2006	Closed welfare institutions	Pre-trial detentions centres	Specialised juvenile prisons	Adult prisons (including juveniles held in separate departments of adult prisons)	Juvenile mental health institutions	Other
Andorra	1/0-18/n. a.	n. a.	1/12-18/n. a.	n. a.	1/12-18/0	n. a.	n. a.
Armenia	n. a.	1/14-18/28	1/14-18/10	n. a.	n. a.	n. a.	n. a.
Austria	n. a.	n. a.	16/14-18/105	1/14-18/43	5/14-18/38	n. a.	n. a.
Belgium	n. a.	7/n. a./n. a.	1/14-18/42	1/n. a./n. a	34/n. a./n. a.	n. a.	n. a.
Bulgaria	n. a.[79]	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.
Cyprus	n. a.	n. a.	2/15-17/11	n. a.	1/16-21/46	n. a.	n. a.
Czech Republic	n. a.	n. a./15-18/111	n.a./15-18/59	n. a.	2/n. a./n. a.	n. a.	n. a.
Denmark	n. a.	n. a.	41/15-17/11,4[80]	n. a.	13/15-17/6,7[81]	n. a.	n. a.
England/ Wales	n. a.	n. a.	n. a.	n. a./10-17/2996	n. a.	n. a.	n. a.
Estonia	n. a.	n. a.	1/n. a./50	1/n. a./47	1/n. a./1	n. a.	n. a.
Finland	n. a.	n. a.	79/ n. a./216	n. a.	35[82]/15-20/104	23/ n. a./636	n. a.
France	n. a.	22/13-18/732	n. a.	7/13-18/0[83]	188/n.a./687[84]	n. a.	n. a.
Georgia	n. a.	n. a.	1/15-18/105	1/15-20/122	1/15-18/3	n. a.	1[85]/11-17/33
Germany	n. a.	14/ n. a./ca. 180	63/<14/1786	28/<14/5844	28/<14/891	24/14-24/177	29[86]/ n. a./757
Greece	n. a.	n. a.	n. a.	3/13-21/361	2/13-21/38	1/10-18/0	1[87]/13-17/47

[79] From other sources a high number of juveniles in open and closed welfare institutions can be assumed, see *Kanev et al.* in *Dünkel/Grzywa/Pruin* 2009.

[80] On average.

[81] On average.

[82] 26 prisons, 9 prison units.

[83] Opening was planned for 2007.

[84] “Mineurs et majeurs”.

[85] Boarding school.

[86] Special kind of short time detention for juveniles up to four weeks.

[87] Educational Establishment for minors of Volos for males.

Hungary	n. a.	n. a.	3/14-19/143	7[88]/14-19(21)/44	n. a./n. a./62	n. a.	n. a.
Ireland	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.
Italy	29/14-21/n. a. (13901)[89]	n. a.	n. a.	18/14-21/344	n. a.	n. a.	13[90]/>21/49
Latvia	n. a.	n. a.	n. a./14-18 (21)/ n. a.	1/14-18 (21)/132	4/14-21/77	4/0-18/n. a. (150)[91]	20[92]/7-18/3560
Lithuania	n. a.	n. a.	1/14-18/ n. a.	1/14-18/ n. a.	1/14-18/ n. a.	n. a.	2[93]/14-18/18
Malta	n. a.	n. a.	1/<24/25[94]	n. a.	1/<24/25[95]	1/8-16/8	n. a.
Monaco	n. a.	n. a.	n. a.	n. a.	1/13-16/6	n. a.	n. a.
Netherlands	n. a.	n. a.	15/12-18/1073	17/12-18/1283	n. a.	n. a.	4/12-18/31
Norway	51/(12)14-18/122	n. a.	n. a.	n. a.	49/>=15/14	n. a.	n. a.
Portugal	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.	10[96]/12-21/262
Russia	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.
San Marino	n. a.	n. a.	n. a.	n. a.	1/n. a./0	n. a.	n. a.
Scotland	n. a.	n. a.	n. a.	1/14-17/140	9/14-17/61	n. a.	n. a.
Slovakia	n. a.	19[97]/6-18/769	11/14-18/n.a. (126)[98]	1/14-18/106	n. a.	n. a.	n. a.
Spain	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.	n. a.

88 3 reformatory schools (14-19), 4 juvenile prisons (14-21).

89 Average 2005.

90 Ministerial Educational Communities.

91 Total number of beds for children in 2005.

92 2 Educational institutions of social correction for juveniles aged 11-18 with 72 juveniles and 18 Boarding schools (educational institutions for homeless juveniles, juveniles from poor families and orphans aged 7-18) with 3488 juveniles.

93 Aditionally Lithuania refers to 4 “Special children’s educational and care residencies” and 1 “Educational and support centre of Kaunas district” where 109 juveniles were institutionalized in the year 2005.

94 Statistics do not allow to distinguish between pre-trial detention and imprisonment.

95 Statistics do not allow to distinguish between pre-trial detention and imprisonment.

96 „Centres éducatifs fermés”.

97 There are two types of institutions for juveniles: a) “educational children´s homes” for children from 6 – 16 years, b) “re-educational juvenile centres” for juveniles from 16-18 years. The total number contains juveniles in a following structure: 302 were detained in re-educational children´s homes, 441 in re-educational juvenile centres and 26 in re-educational centres for mothers and children. 55 detainees were deprived of liberty based on the decision of a court of law on protective education (non-criminal offences); 16 of them were sent into re-educational children’s homes, 32 were sent into juvenile re-educational centre, 7 into re-educational centres for mothers with children.

98 Average number of detainees in the year 2005.

Sweden	n. a.	33/12-21/511	n. a./<18-<21/12 (<18)+128(<21)[99]	6[100]/15-17/65	n. a./<18-<21/1 (<18)+184(<21)[101]	30/12-18/1-2[102]	n. a.
Switzerland	161/7-22/3300	14/14-22/280	8[103]/14-18/n. a.	14[104]/n. a./280	n. a./14-18/433	n. a.[105]	n. a.
Turkey	n. a./n. a./47	n. a.	n. a.	n. a./n. a./796	n. a./n. a./1165	n. a.	n. a.
Ukraine	n. a.	n. a.	n. a.	32/>=14/1148	11/14-22/2375	n. a.	n. a.

[99] 1. October 2005.

[100] These 6 juvenile prisons are part of the before mentioned 33 closed welfare institutions.

[101] 1. October 2005.

[102] During a census day.

[103] These institutions are part of the before mentioned 14 closed welfare institutions.

[104] These institutions are part of the before mentioned 14 closed welfare institutions.

[105] Il existe toute une série d'institutions psychiatriques pour mineurs. Quelques unes sont des divisions spéciales de cliniques psychiatriques pour adultes, d'autres sont des institutions prévues spécialement pour les mineurs. Le placement dans ces institutions n'intervient que pour des raisons d'ordre médical. On peut penser que le nombre de mineurs placés dans ces institutions et qui se sont vu infliger une mesure pénale par un tribunal des mineurs est très petit.

Due to a lack of data stemming from the questionnaires, a comparison of juvenile imprisonment rates and their development between 1990 and 2005 is only possible for Hungary. Data for one individual year (usually 2005) were reported by Andorra, Czech Republic, Estonia, Georgia, Germany, Italy, Netherlands, Slovakia (only 1990!), Switzerland and Turkey, but often not complete and failing to provide data either on the number of juveniles in the general population or the number of juvenile prisoners. All of the remaining countries didn't answer at all.

5.2 Juveniles in welfare institutions

5.2.1 The following part deals with the placement of juvenile offenders in welfare institutions.[106] The ERJOSSM contain only three special rules for juveniles in welfare institutions in the special part of the Recommendation (Rules 114-116). Rule 114 clarifies that "*welfare institutions are primarily open institutions and shall provide closed accommodation only in exceptional cases and for the shortest period possible.*" Indeed this seems to be the reality everywhere. In Germany about 260 places exist in closed welfare institutions or in departments of open facilities, which make only for 0.3% of all beds in welfare residential care.[107] Similarly in France the about 300 beds in the closed welfare units for juvenile offenders ("*centres fermés éducatifs*") count only for an insignificant proportion of all places in juvenile welfare facilities.

Rule 115 emphasizes that "*all welfare institutions shall be accredited and registered with the competent public authorities and shall provide care to the required national standards*." We did not expect that the national authorities would report that their welfare institutions would not meet these requirements, but on the other hand there were almost no positive answers that accreditation and quality management is an inherent and widely accepted principle within the juvenile welfare system.

Rule 116 stipulates that "*juvenile offenders who are integrated with other juveniles in welfare institutions shall be treated in the same way as such juveniles*." This principle is important insofar as in many institutions juveniles in need of care are accommodated together with juveniles showing problems of delinquent behaviour. It would be discriminating for those who are there not because of criminal but just of problematic behaviour to be submitted to the more restrictive regime for juvenile offenders. On the other hand juvenile offenders who are allocated to such a mixed institution should benefit from the general regime these institutions offer to all juveniles.

Another special rule for juveniles in welfare institutions is laid down as an exception to the general rule of No. 60 concerning accommodation: normally male and female detainees shall be accommodated separately, at least in different units or wings of the respective institution. But on the other hand according to the same rule "*separation between male and female juveniles need not be applied in welfare or mental health institutions*." This exception is reflecting very well an established "good practice" in many countries which can be seen as an expression of the principle of "normalization" within a closed setting.

One of the aims of the ERJOSSM is to draw the attention of the member states to possible human rights violations in any closed setting, including in welfare institutions. Therefore the legislation needs to address not only legal guarantees concerning the imposition of institutional care sanctions, but also the manner of their execution, particularly when it takes place in a closed welfare home.

In this context it should be noted that most countries appear not to have special legislation for juveniles deprived of their liberty in juvenile welfare institutions. An exception might be

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106 Part 2.4 of the questionnaire.

107 See *Dünkel* 2008, 123 with further references.

Sweden where is introduced the law on care for children and youths (LVU – Care of Young Persons Act), which is a complement to the Social Services Act and covers detailed regulations concerning the execution of respective care sanctions. Other countries such as Germany do not have legal regulations for the execution of care sanctions in (closed) welfare institutions. Sometimes the area of welfare institutions might be covered by the legislation regarding juvenile penitentiary institutions, but this could not be clearly grasped from the replies to the questionnaire.

5.2.2 The question of whether there are "welfare institutions" designed to accommodate juvenile offenders in the respective countries was often answered negatively. In our opinion, this can in part be attributed to misunderstandings or differences in the categorization of institutions. Hungary, for instance, does not class its "reformatory schools" as "welfare institutions", while at the same time they clearly differentiate them from youth prisons. Consequently, it does not become clear – at least not from the information provided in the replies sent to the questionnaire – which requirements have to be met so that juveniles can be sent to "reformatory schools", and under which conditions/circumstances they can be deprived of their liberty (for instance, whether also in cases of pure "need for care" in which there are no signs of behaviour that is relevant to criminal law?). The Netherlands on the other hand classify their so-called treatment centres as "youth prisons", which in other countries possibly could have been classified as "welfare institutions". The Dutch answers indicate that there are no welfare institutions at all which could be a misunderstanding.

Considering all the countries who state that welfare institutions for juvenile offenders do not exist within their systems (Austria, Estonia, Georgia, Greece, Hungary, Latvia and Monaco) and all the countries who did not give any answers to the respective questions (Andorra, Denmark, England/Wales, Ireland, Malta, Netherlands, San Marino and Scotland) there is an enormous lack of answers within this section compared to the other sections of the questionnaire. This limits the conclusions that can be drawn from the following comparative analysis.

5.2.3 The indicated *legal grounds* (question 2.1.3) are varying from country to country. In some countries a criminal act is the ground for placement in a welfare institution (Belgium, Italy, and Turkey); some countries indicate the need of care as the unique legal ground (Armenia, Slovakia, and Ukraine). Despite these differing answers there can be seen a common aim in all answers: Placement in welfare institutions serves to protect children whose health or development is at risk as a result of certain circumstances which can be criminal behaviour, drug abuse or intolerable family conditions. This common aim is very well expressed in the Norwegian answer ("*The social welfare board shall take a child into care and provide substitute care for him/her, if his/her health or development is seriously endangered by lack of care or other conditions at home, or if the child seriously endangers his/her own health or development by abusing intoxicants, by committing an illegal act [other than a minor offence], or by any other comparable behaviour*").

5.2.4 The answers to the next question (2.1.4.) allow us to conclude that the measures – despite their welfare approach – are deemed to be a substantial intrusion into a person's liberty and therefore legal guarantees are designed to protect the child's rights. In nearly all countries that provided a response to this question a *court* ultimately *decides on placement in a welfare institution*. The only difference is that depending on the countries a penal court, a family court or a youth welfare court is competent for making this placement decision. In Finland and Norway special "welfare boards" are responsible and in Finland their decisions need to be confirmed by the court. Norwegian welfare boards are at least arranged in a "court-like" fashion. Apparently, in Ukraine the public prosecutor or a medical expert commission can also decide on whether to place a person in a welfare institution.

It is interesting to examine a synopsis of questions 2.1.3 and 2.1.4, which in particular reveals the similarity of the above mentioned „common aims": Armenia, for example, states

the „need of care“ as the only precondition for placing of minors in welfare institutions. However, on the other hand, the decision of imposing this allocation is made by the “criminal court” which only steps into action in cases of offending. This implies that in Armenia offending is interpreted as being in “need of care”. Thus, the legal ground mentioned here does not differ from those stated by the other countries.

5.2.5 There are also variations regarding the *authority competent to assign a juvenile to a welfare institution*. In Armenia it is the criminal court, whereas in Belgium and Portugal the juvenile judge is responsible within the scope of the welfare oriented juvenile law. In Bulgaria local commissions (interdisciplinary teams) and in Finland similarly the municipal social welfare board is competent.[108] “*Before taking a child into care the local social welfare board must always ascertain the child’s and the parents’ own wishes and opinions. If a child aged 12 or over (or the custodians) opposes the decision it must be submitted within thirty days to the Provincial Administrative Court for approval.*”

In Germany it depends whether the case is a criminal matter or a case of a juvenile “in need of care”. Juvenile offenders can be sent to a welfare institution as a temporary measure instead of to a pre-trial detention (§ 71 JJA) and by a final youth court decision according to § 12 JJA in combination with § 34 of the Youth Welfare Act. In “welfare cases” responsibility for the suitability and necessity of educational assistance in a facility in conjunction with deprivation of liberty lies with the local Youth Office. Since deprivation of liberty in these exceptional cases is a necessary condition for ensuring the best interests of the child, it may be imposed in the facility only with the agreement of the Youth Office and under family court authorisation (see § 1631b Civil Law), and only for as long as is necessary to ensure the child’s best interests.

In France, Italy, Monaco and Switzerland the juvenile criminal court judge is responsible.

5.2.6 The *authorities responsible* for the *execution of juvenile welfare measures* of this kind are the public services for juvenile protection in Belgium, Germany or France, although the institution itself may be a non-profit private one. Youth (welfare) offices typically belong to the local municipality (Finland, Germany, Italy, and Norway).

5.2.7 The *authority responsible to end* a confinement to a welfare institution is normally the same which is responsible for the assignment. But in the Scandinavian countries apparently also the social welfare boards alone can release a juvenile if this is in his/her best interests or the educational purposes have been successfully carried out.

5.2.8 Another question related to the issue whether *welfare institutions are managed by the public service or by (usually non-profit) private entities* (question 2.1.7). In Armenia, Belgium, Bulgaria, Italy, Slovakia, Sweden, and Turkey the institutions are managed by the public service. In Finland, France, Germany, Norway and Switzerland a mixed system of (non-profit) private and public institutions has been developed. In Germany § 4 (2) of the Juvenile Welfare Act gives priority to private non-profit organisations: if appropriate private organisations can provide the necessary educational support to juveniles in need of care, the local public youth office will refrain from doing so. The result is that residential care and particularly the few closed welfare units – as far as it can be seen –are run entirely by private entities. Similarly the majority of welfare institutions are run by private organisations in some of the Scandinavian countries and in Switzerland. In Finland 70%, in Switzerland more than 80% of them are managed by private services.

5.2.9 The *minimum size of rooms* (space per juvenile) and maximum number of places in institutions (question 2.1.8) differ a lot. In Armenia the minimum space per juvenile is 4 sqm,

[108] A comparable situation is to be found in Norway where the county social welfare board is the competent authority. The county social welfare board is a court-like administrative body.

in Slovakia it is 8 sqm, whereas in Germany every juvenile as a rule has a right to be accommodated in a room of 14 sqm. Some countries also referred to the size and structure of the respective institutions. So in Bulgaria the sleeping rooms for juveniles are equipped with 2-4 beds, which differs considerably from the large dormitories to be found in the prison administration. Therefore the statement that "*every juvenile shall have personal place*" is to be understood as a practice which indicates some progress compared to traditional penitentiary institutions.

In Finland "*each child welfare institution contains one or more housing units. In institutions with several housing units, the units may be separate from each other. Each housing unit may accommodate a maximum of eight children or juveniles at any one time, and a maximum of 24 children or juveniles may be accommodated in one group of buildings at any one time.*"

France disposes with the classical welfare institutions ("*foyers*") and the closed educational centres ("*centres éducatifs fermés*"). The latter ones dispose with 10 places each, only with single rooms (about 10-12 sqm). The "*foyers*" have units of 12 places grouped around sanitary facilities with showers etc. Each (single) room has 11 sqm.

In Portugal the legal prerequisites of the law no. 323-D/2000 of 20 December 2000 stipulate that open welfare institutions dispose with a maximum of 14 places, semi-open facilities of 12 places and closed or therapeutically specialized institutions of 10 places.

The size of a single room in Swiss welfare institutions is 10 sqm and of a double room 14 sqm. Welfare institutions are structures divided into small living units with 6-10 places. The total size of the institutions is normally less than 30 places, the largest institution is about 70 places.

5.2.10 The *daily net cost per juvenile* (question 2.1.9) seems to differ extremely. According to the given answers there is a difference between the daily costs per juvenile between 2 € in Armenia, 13.50-15.80 € in Slovakia, 188 € in Finland (2004) up to 200-300 € in Germany,[109] 693.50 € in Sweden (2005) and 877 € in France in a closed educational centre with an orientation of special security ("*centre éducatif renforcé*", CER, of the public sector).[110] In Switzerland (as probably elsewhere) the costs differ considerably between the institutions. The daily costs vary between 125-500 €. The large differences between Eastern and Western European countries, but also within Western Europe can only to a smaller extent be explained by the different levels of income and economic living standards. The major reason apparently is explained by different policy orientations and developments of the social welfare state.

5.2.11 The *minimum age for an assignment* to a welfare institution (question 2.1.10) differs. In some countries (e.g. Finland, France, Germany) a minimum age does not exist. Others differ from 10 (Switzerland) until 14 (Italy) years. In Belgium the age of criminal responsibility is 18 (exceptionally 16), but within welfare law the minimum age for an assignment to an open or closed welfare institution is fixed at the age of 12. The assignment to a closed unit is restricted very much by law and by-laws.[111]

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109 In some institutions the costs are more than 400 € per day and therefore about 4-5 times higher thanin ordinary youth prisons

110 The daily net costs in other welfare institutions were communicated as follows: placement in a "*foyer d'action educative*" (FAE) (public sector): 468 €; placement in a "*centre de placement immediate*" (CPI) (public sector): 657 €; placement in a "*centre éducatif fermé*" (CEF) (public sector): 731 €.

111 See the "*circulaire ministérielle du 28 septembre 2006 n° 1/2006 relative aux lois des 15 mai 2006 et 13 juin 2006 modifiant la législation relative à la protection de la jeunesse et la prise en charge de mineurs ayant commis un fait qualifié infraction.*"

In Bulgaria the age range for welfare institutions is from 8 to 18, in Germany from 11-17, in Italy from 14-21.[112]

In Norway, Portugal, Slovakia and Sweden the minimum age is 12 and in Ukraine 11. The Norwegian authorities emphasise, however, that in practice the minimum age is 14. The same will be true in other countries, too. According to the statistical data we have at our disposal, the confinement to closed welfare units for juvenile offenders below the age of criminal responsibility remains the absolute exception (e.g. Finland, Germany, and Sweden).

5.2.12 As the stay in a welfare institution is based on the best interests of the child and solely educative measures are used, there is usually no minimum or maximum term fixed by law (question 2.1.11). Welfare measures typically end at the age of 18 latest. But in many countries they may continue until 21 (Sweden), in special cases even longer (Germany: 27).

Great differences are recognizable in the duration of time for which juveniles can/have to remain in "welfare institutions". Some countries have fixed limits that show a great degree of variation within Europe (10 days to 15 years), while some have established maximum age limits for residence in such institutions (usually 18, see above). These two differing systems can presumably be explained by whether placement in a "welfare institution" is understood as a sanction or rather as a welfare measure. In Bulgaria the length of stay is reported to be 3 years, which would be a very long and not always proportionate confinement to welfare institutions. In France the range is 10 days until 5 years, in Portugal 3 months up to 5 years. The maximum in Norway is two years, the assignment is for 12 months with the possibility for a renewal of further 12 months. It is important that in Norway and Sweden every 6 months there is a review by the responsible authorities in order to justify the continuation of the stay in the institution.[113]

In Ukraine the stay in a medical-social-rehabilitation centre depends on the time that is necessary for treatment, not longer than 2 years. In schools and professional schools for social rehabilitation it is "within the limits of term", not longer than 3 years.

5.2.13 The question on what *legal safeguards are in place in the decision-making for assigning a juvenile to a welfare institution (e. g. concerning due process rules, legal aid, rules of deprivation of liberty as a last resort etc.* (question 2.1.12) was not always easy to answer as typically welfare authorities feel to be acting in the best interests of the juvenile and therefore are not always aware of due process rules etc. Nevertheless progress in this respect is also noticed. This can be seen particularly in the Belgium law (which is strongly welfare oriented) that regularly provides legal advice and representation and has established a system of legal guarantees with explicit reference to the UN Convention on the Rights of the Child. Similarly the Welfare Law ("*Ley tutelar*") in Portugal emphasises the principles of minimum intervention, proportionality and legality when dealing with 12-16 years old offenders.

All countries provide appeals against the placement in a welfare institution which is particularly of importance if the original decision is taken by social welfare boards or local youth offices (see the Scandinavian countries).

In Germany a preliminary decision of the local youth office (according to § 42 (5) Juvenile Welfare Act, Book Eight of the Social Code) has to be approved by the family court. Even if

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112 It is not clear if the Italian authorities really refer to welfare institutions or rather to juvenile institutions of the penitentiary system. The data for Germany may well reflect the practice (there are no cases known of an assignment below the age of 11), but there is no minimum age fixed by law.

113 The answer of the Turkish authorities that the length of the stay can be from 30 days until 15 years is strange and contradictory insofar as the confinement in welfare institutions is provided for the age group only from 12 to 18.

the person assigned to custody consents, placement of a juvenile in a closed facility by the Youth Office requires family court approval pursuant to section 1631b of the Civil Code in all cases. Placement should not occur until after a court hearing has taken place.

Also Norway stresses the legal guarantees of the Child Welfare Act and free legal aid.

5.2.14 On the other hand there are not always *legal safeguards to ensure that the measures imposed are proportionate to the seriousness of the offence* (question 2.1.13; e.g. Finland, France, Germany). This is somehow logical as the grounds for assigning a juvenile to welfare institutions do reflect the seriousness of a crime only as an indicator for educational interventions or for the kind of treatment to be provided in the institution. Nevertheless the above mentioned principle of proportionality is also to be observed at least theoretically in juvenile welfare legislation.

5.2.15 The following section deals with the questions concerning *the legal and administrative framework of welfare institutions* (questions 2.1.14a-w).

As regards the competent authorities for juvenile welfare institutions (questions 2.1.14a) interesting variations can be seen. Whereas in some countries the ministries of justice are also responsible for welfare institutions dealing with juvenile offenders (Armenia, France,[114] Italy, Slovakia, Switzerland), in other countries these institutions are under the responsibility of the Ministries of Social Affairs and of Health or of Family or Youth Affairs (Finland, Germany, Norway, Sweden).

The question (2.1.14b) on the *guiding general principles of the regime* (for example, reintegration, retribution, restoration, education, normalisation, preventing negative effects of deprivation of liberty, etc.) has (if ever) unanimously been answered by emphasising the ideas of protection and education. So, for example Finland refers to section 2 of the Child Welfare Act: "*The purpose of child welfare is to protect the rights of the child mentioned in section 1 by providing a good general environment in which to grow up, by assisting those responsible for the upbringing of the child, and by providing family-oriented and individual child welfare*." In all circumstances, a child shall be provided such care as is stipulated in the Child Custody and Right of Access Act (361/1983).

Germany clarified that "*Reintegration, education, normalisation, preventing negative effects of deprivation of liberty*" are goals pursued by youth services by way of measures involving deprivation of liberty. The latter goal is to be achieved by step-by-step plans according to which juveniles may be given additional leave after several weeks if they comply with the rules. "Retribution" and "restoration", by contrast, are not goals of measures involving deprivation of liberty.

The general prevailing principle of *allocating* juveniles to a welfare institution is as far as possible "close to the juvenile's home" (question 2.1.14c). This may not always be feasible when specific treatment is needed in institutions which are located farer away. But such allocation should be limited in time (see the response of France). The different responding countries also stress the aim to enable the continuation and preservation of relationship with the family which is also in support of the principle of an accommodation close to home. Swiss authorities give priority to adequate treatment programmes over allocation close to home, but distances in Switzerland are never very far, so this statement is rather an academic one.

The question regarding *accommodation* (including legal minimum standards concerning the number of juveniles in one room) revealed interesting facts, although the majority of countries did not answer (question 2.1.14d).

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114 The institutions for youth protection ("*établissements de la Protection Judiciaire de la Jeunesse, PJJ*") belong to the Ministry of Justice.

In Armenia the minimum space is 4 sqm per juvenile. They are accommodated in dwellings for 10 juveniles in open and 6 in semi-open institutions. In semi-closed institutions the maximum number of detainees in one cell is 6. The communal bedrooms in Bulgarian welfare homes dispose with 2-4 beds.

Finland has no legal rules in that respect, but in practice welfare authorities try to give each juvenile a single sleeping room.

In France differentiated legal provisions have been established by the Law of 9 September 2002 concerning closed educational centres ("*centres éducatifs fermés*"). Each centre has 10-12 single rooms of at least 9 sqm (sometimes including a toilet). All buildings have about the same architecture and contain a surface of about 700sqm, of them 100 for administrative offices, 200 for recreational group meetings, 100 for educational and school activities, 150 for sleeping accommodation, sanitary equipment etc. The total size of such closed institutions including space for outside activities is 3000-5000 sqm.

Germany, Norway and Sweden usually provide single rooms, the same is valid for Switzerland where single rooms or in some cases double rooms are provided.

The few countries answering the question on measures that can be taken against *overcrowding* (Question 2.1.14e) emphasised that there are no possibilities to accommodate more juveniles than the approved fixed number of places in the institution (Germany, France, Norway). Therefore juvenile judges when considering an assignment to a (closed) welfare institution have to check available places in the different institutions. Apparently overcrowding nowhere seems to be a real problem (see e.g. the statement of Switzerland).

Juveniles in welfare institutions normally (e.g. Bulgaria, Finland, Germany, France, Norway, Sweden, Switzerland) wear their own clothes (question 2.14f). Only in Slovakia clothes of the institution are provided, however, juveniles can request wearing own clothes.

As to the *differentiation, classification and separation* (boys and girls, young mother departments, specific offender and age groups, question 2.1.14g) most countries do have mixed institutions of boys and girls, particularly in open or semi-open settings. So in France only certain closed centres (CEF or CER) are not mixed. In Bulgaria a separation of gender is generally applied, but also in Germany or Sweden the more closed institutions usually are non-mixed. The opposite is true for Denmark and Norway.

Another criterion of differentiation is the age (Sweden, Switzerland; e.g. in Slovakia 12-15 and 15-18 years old juveniles are separated). As far as can be seen specific offender groups according to crimes are not differentiated. In some cases there are only special groups for particular mentally disadvantaged juveniles.

Concrete educational/rehabilitative programmes are not always prescribed by law (question 2.1.14h), but in general school and meaningful leisure time activities as well as psychological and other treatment programmes (including drug and alcohol prevention) are essential everywhere. The orientation is to an individualised treatment according to the specific educational needs (see e.g. the response of France).

There is a duty to participate in educational programmes in general only with regard to schooling during the compulsory school age which usually is until 16. In partly or fully closed institutions in Germany and in Italy an obligation to follow other treatment and educational measures exists (question 2.1.14i).

With regard to an obligation to work (question 2.1.14j) all countries replied negatively with the exception of Italy. This is somehow logic as programmes in welfare institutions are primarily based on school and other educational activities which usually excludes any work activities

besides some cleaning within the institution. Belgium and France referred to the obligation to do community service, which can be combined as a sanction together with the assignment to a welfare institution.

The question on *coercive drug, alcohol or other treatment* (question 21.14k) was apparently misunderstood by some of the respondents as they did not always reflect the context of such treatment in welfare institutions. Nevertheless it can be said that in Belgium, Finland (sect 32b Child Welfare Act), France, Italy and Norway as well as in Switzerland coercive drug or alcohol treatments is provided in some specialised welfare institutions, whereas Germany, Latvia, Slovakia, Sweden and Ukraine do not provide such coercive treatment in juvenile welfare institutions.

As to *contacts of juveniles with the outside world* (visits, family long-term visits, leaves, etc., question 2.1.14l) it was surprising to see the very extensive possibilities in Armenia. Juveniles in welfare institutions can receive long-term visits, short-term visits, leaves up to 7 days or leaves up to 30 days for social rehabilitation. All countries that responded emphasize the particular importance of contacts with the family that are promoted as well as contacts with pro-social friends and relatives.[115] Germany added a special phase oriented aspect: "*Most facilities with deprivation of liberty impose a ban on leaving and contact in the first few weeks (exception: correspondence by letter). More and more contacts are possible as the deprivation of liberty is relaxed, ranging as far as free-time home visits*." Switzerland clarified that only very few places exist in a closed setting and that in these institutions a similar phase model is applied with increasing contacts and leaves over the time.

In Sweden a guiding principle is the focus on reintegration and normalization. Therefore the institutions work to establish pro-social activities, for example the young person can attend the community school close to the institution, can have family long-term visits, leaves etc.

As it was repeatedly said, the *involvement of parents in the execution and preparation for release* (question 2.1.14m) is seen as one of the most important elements for further reintegration as juveniles in most cases will return to their family. The Finnish Child Welfare Act (sect. 34) provides special after-care for juveniles when released from a welfare institution that involves also intensive work with the parents or legal guardians (if needed until the juvenile reaches the age of 21). Also in Slovakia and Switzerland the parents are specially integrated in joint activities ("*parents groups*" etc.). Germany pointed out specific problems that can be observed in that respect: "*Efforts are made in the facilities to work closely with parents, and above all to ensure parental support for the measure. However, there may be severe limits to parental involvement because of long distances and because the parents often have severe problems of their own. In any case, juveniles' home visits are carefully prepared and in some cases involve an accompanying staff from the institution*."

Another question concerned the *involvement of victims* (mediation, reparation schemes, restorative elements, question 2.1.14n). Belgium is a good example of how to give more attention to restorative justice in the field of juvenile welfare. The new law provides for several forms of mediation and reparation. Similarly in France since 1993 reparation has been included in the "*Ordinance*" of 1945. However, usually the area of applying these measures is the pre-trial stage (diversion) or the sentencing stage before the juvenile judge or court. The respondents did not clarify to what extent the victims and their compensation can play a role in the educational concept of welfare institutions. Therefore the answers of Germany, Norway and Sweden seem to be more realistic: "The facilities are not responsible for this" (Germany), or: "Not organized for all homes. Can occur in individual cases" (Sweden). Switzerland is probably one of the few cases where at least in some welfare

[115] Norway stated: "*Contact with the outside world, with family and pro-social friends, is considered as very important*."

institutions a systematic approach of integrating the work with victims and of encouraging mediation exists.[116]

The procedure for ending the assignment (question 2.1.14o) is similar in all countries, although only few countries provided substantive information. The same authority which has assigned a juvenile to a welfare institution (as mentioned under 5.2.5 e.g. the juvenile judge, social welfare board, youth office in combination with the family court etc.) usually ends the stay by a decision of discharge. An application for such a decision can be submitted by the juvenile himself, his parents, or the tutors in the institution. If the original assignment is for a specific term (e.g. Belgium), the stay in the institution may end just because the term has expired (if there is not a renewal decision). Another way to end the measure is when the juvenile reaches the age of 18 and is released on this legal ground (lack of further competence of the welfare system, see e.g. Finland). In Finland according to the Child Welfare Act (sect. 20)[117] another legal ground for ending the measure is that the juvenile gets married.

In this context it has to be mentioned that at least in some countries an automatic review (ex officio) is provided. In Belgium every 6 months, in Switzerland latest every year the competent authorities for the execution of the placement have to examine if a release is possible.

The responses on what *measures for preparation for release* (question 2.1.14p) are usually provided are rather general. They indicate that the local services are responsible for aftercare. It is interesting that in Finland "*the local social welfare authorities are responsible for arranging a flat for a released juvenile and other after-care measures up until the juvenile has attained the age of 21.*" In Norway the organisation of aftercare is obligatory only until the age of 18, after that it is voluntary. In Germany in most cases, a non-custodial follow-up youth services measure is proposed – in consultation with all persons involved in planning the assistance measure, including the juvenile. These follow-up measures are not mandatory, however. If juveniles are also involved in criminal proceedings, they must comply with conditions laid down by the youth court, for example by meeting with youth court assistance or probation services. Also in France, Italy and Switzerland strong relationships and links to the local social services exist that can guarantee the continuity of educational care. Therefore it may be concluded that some countries are following the recommendations of the ERJOSSM on continuous care (see Basic Principle No. 15 and Rule 51), although the only few responses of the member states leave the impression that this is not everywhere a common standard.

Measures that are used *to maintain good order* (question 2.1.14q) are a temporary isolation in special rooms, particularly in case of violent behaviour, (attempted) escapes or drug offences. In Belgium this isolation usually lasts only a few hours, the maximum period can be 5 days. Juveniles in isolation are under strict supervision and care of the staff of the institution and all steps have to be laid down in a protocol in the isolation register. This register has to be reported annually to the Ministry.

Another method of maintaining good order in Belgium is based on a phase model of institutionalisation. At the beginning the juvenile is placed in the so-called entry group, where

[116] "*Dans certaines institutions, il existe des formes de prise en charge qui associent la victime et encouragent la médiation*."

[117] The main ground is, however, related to the educational goals and the best interests of the juvenile: "*The social welfare board shall discharge a child from care, when the need for care or substitute placement, as stated in section 16, no longer applies, unless such discharge is clearly contrary to the best interests of the child. In determining what is in the best interests of the child, the duration of the substitute care, the relationship between the child and the persons providing the substitute care, and the contacts between the child and his/her parents shall be taken into account*."

he is relatively isolated from the other groups of juveniles and also from the outside world. This enables the planning of educational measures and gives the juvenile an orientation. The further phases are more open and less restrictive in their regime.

Disciplinary measures usually are provided for by law, but not, for example, in France. So other forms of conflict resolution by educational measures have to be developed. On the other hand often the conflict may constitute a criminal offence (damage to property, bodily injury, drug offences etc.), which are to be dealt with by the judiciary.

In Germany some facilities also have lockable rooms. Juveniles who put themselves and others at risk may be placed coercively in such rooms, usually as a "time out" for only a few hours.

Some countries report on special legislation which regulates in detail the rights and duties of juveniles in welfare institutions and the way deviant behaviour is dealt with (e.g. France, Norway, and Switzerland). In Norway, for example, these problems are "strictly regulated by the Regulation on the rights of children and use of force in child welfare institutions of 12 December 2002." In Switzerland, art. 16 of the Juvenile Justice Act limits disciplinary isolation to a maximum of 7 days. More detailed rules are laid down in regulations of the cantons.

The question on *access of juveniles to legal aid* (question 2.1.14r) was answered only by 9 countries, 8 of them positively without further details, one (Slovakia) reported that access would be provided by social workers or the family (which is rather vague). As to *complaints procedures* (question 2.1.14s) the same countries answered that there is an appeal to a judicial authority such as the juvenile judge or an administrative court (Finland) or to special court-like authorities. Belgium seems to have a separate and extended system of control as a lawyer must be informed about every decision of the judge. Furthermore the French community in Belgium has introduced an ombudsman for children's' rights ("*Délégué général aux droits de l'enfant*"). In Norway individual decisions made by the child welfare service may be appealed before the county governor.[118] In Sweden the juvenile has the right to appeal the decisions of the welfare institution before the county administrative court, he also "*can complain to the Swedish National Board of Institutional Care*." Apparently there is not always an access to courts, because when asking about access to courts concerning decisions on disciplinary measures etc. (question 2.1.14t) some countries such as Armenia or Norway referred to the prosecutor's office or Ministry of Justice or the county governor (Norway). In France such an access is not seen as necessary as there are no disciplinary hearings or procedures (see above).

Regular inspections (question 2.1.14.u) by internal control mechanisms and administrative bodies are provided practically everywhere (mentioned e.g. by Armenia, Finland, France, Germany, Norway, Slovakia, Sweden, and Switzerland).

It is interesting that in some countries several ministries are involved, so for example in France the Ministry of Social Affairs and of Justice are sending inspectors. In Slovakia regular inspections are provided by the Slovak State Inspection (by the Ministry of Education) as well as by the Ministry of Health and by the Supreme Audit Office. In Sweden the schools in the institutions fall within the legal framework and national aims of the general Swedish public school system. This system is audited and supervised by the Swedish National Agency for Education. Health care facilities are supervised by the National Board of Health and Welfare and the Head Office of the municipal social services is responsible for the supervision of care taking activities.

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118 It is not clear, but probably a further appeal will be possible the social welfare board, a court-like administrative body, as in other areas of juvenile welfare, see above 5.2.4.

It is not always clear what mechanisms of external (independent) inspection and control have been developed. Countries that provide ombudsman-like institutions apparently have such structures (see below). Some refer also to the Council of Europe's Committee for the Prevention of Torture and its visits (Belgium).

Question 2.1.14v was related to the access to an ombudsman or similar independent bodies to submit complaints. Armenia, Belgium, France,[119] Norway[120] and Sweden,[121] whereas Latvia explicitly denied having such an institution. Finland referred to the judicial system of control by the administrative court.

The question on *management, training and selection of staff* (question 2.1.14w) was answered only exceptionally. Nevertheless, some interesting aspects could be found. Finland has passed a Decree in addition to the Child Welfare Act that regulates in detail the staffing of certain institutions. A similar kind of quality management seems to exist in other Scandinavian countries, but also in Switzerland. In Sweden a "*PhD is the minimum level of education for work that concerns treatment and care in the homes*", which represents a really high standard of recruiting staff. Similarly in Switzerland it is required that at least two thirds of the educational staff must have a diploma of a university or a specialized social work school. On the other hand the lack of sufficient and well trained staff in Central and Eastern European countries is probably not only in Slovakia a big problem. Slovakia noted in the questionnaire that "*Home cares face a lack of professionals*" and that "*no sufficient training is provided for staff*."

5.2.16 As to the question of *how the legal framework responds to certain categories of offenders* (question 2.1.16) the answers indicate that in general there is no specific approach to certain categories of offenders. However, the response of France shows an interesting development as the newly created (see the la of 9 September 2002) closed welfare institutions ("*centres éducatifs fermés*", CEF) are dedicated to multi-recidivists aged 13-18. They are placed under judicial control "*contrôle judiciaire*" in combination with a suspended sentence or a conditional release from a (youth) prison. French authorities mention in this context that the same law also provides for more speedy trials (within 10 days to one month) for these recidivist juvenile offenders.

5.2.17 *Altogether* some interesting developments concerning the deprivation of liberty in welfare institutions could be found. However, the structures are not always clear and legislation seems to be more developed in the Scandinavian countries than elsewhere. But it is not only the legislation where Scandinavia seems to be ahead. Our impression is that in the Scandinavian countries judicial and welfare authorities have developed since long time "sensitivity" to human rights issues and to providing high standards of educational care. This may be the result of the prevailing social welfare state orientation in these countries. On the other hand "*good practices*" can also be seen in Belgium, France, Germany or Switzerland. The situation in Central and Eastern European countries is more difficult and the infrastructure is not yet as developed as required by the ERJOSSM. There might be deficiencies in many other countries including in Western Europe. But to explore and describe the situation more thoroughly further research is needed.

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[119] France has introduced a "defense council for juveniles" ("*Défenseur des enfants*") by the law of 6 March 2000.

[120] "*Children and youngsters can at any time contact the county governor. Norway also has an ombudsman for children (Office of the Commissioner for Children)*."

[121] The Ombudsmen of Justice (JO) (or the Parliamentary Ombudsmen) are elected by the Swedish Riksdag (Parliament) to ensure that public authorities and their staff comply with the laws and other statutes governing their actions. The Ombudsmen exercise this supervision by evaluating and investigating complaints from the general public, by making inspections of the various authorities and by conducting other forms of inquiry that they initiate themselves.

5.3 Juvenile offenders in preliminary or pre-trial detention

5.3.1 The ERJOSSM emphasise the necessity to avoid pre-trial detention as far as possible. Basic principle No. 10 stipulates that “special efforts must be undertaken to avoid pre-trial detention.” Most standards for pre-trial detention are the same as for any other form of detention and therefore dealt with by the general part of the Rules. However, some specific rules are provided in No. 108-113. They underline that the regime and the treatment in police or pre-trial detention must take into account the principle of presumption of innocence. One consequence is that juveniles cannot be compelled to work (No. 112). Two principles that also apply to juveniles in other forms of deprivation of liberty are particularly important for pre-trial detention: Rule 109 stresses the responsibility of state authorities to preserve the dignity and personal integrity of juveniles during their detention and requires taking special care during the initial period of detention which is a phase of high vulnerability. Rule 110 emphasises the principle of through care, which is of particular importance as pre-trial detainees here experience for the first time the helplessness and the shock of incarceration which should be addressed by the agencies which will be responsible for the juveniles after their release or while they are subject to custodial or non-custodial sanctions or measures in the future. Such a through care may be organised by the juvenile welfare authorities or probation services in a strict co-operation with the social services within the institution. The principle of through care is already mentioned in basic principle No. 15 and in Rule 51, but re-emphasised for pre-trial detention in Rule 110.

The Special Part concerning rules for pre-trial detention furthermore stresses the necessity to make available a “range of interventions and activities” which are not compulsory, but should be available on request made by the juvenile. Therefore it may be recommendable to accommodate juveniles in pre-trial detention close to the facilities for sentenced offenders which would facilitate the participation in school or vocational programmes offered in the latter. Apparently this idea leads to the lack of independent pre-trial detention institutions.

5.3.2 *The legislation for pre-trial detention also for juvenile offenders is generally based in the codes of criminal procedure* (abbreviated in the following sections CCP). Typically the legal grounds for pre-trial detention are laid down in the CCP, but special restrictions and extended alternative measures for juveniles are contained in the juvenile laws (juvenile justice acts, juvenile welfare laws etc.; see, for example Austria, Germany). Even in welfare oriented systems such as the Polish or Scottish legislation some basic legal provisions of the CCP apply to juveniles as far as they exceptionally can be sent to pre-trial detention.

Pre-trial detention is seen as a very last resort (“*ultima ratio*”) even more than in criminal procedural legislation for adults. Juvenile laws therefore provide for various alternatives to preliminary or pre-trial detention[122] either by placing juveniles in an open, but sometimes more controlled setting, including supervision by the family, home confinement and other alternatives to pre-trial custody, or by sending them to a welfare institution. Usually these are open facilities, but – as can be seen by the emerging discussion on closed welfare homes (see e.g. England, France, Germany) – as a last resort several countries provide also places in closed welfare institutions. Preliminary residential care in an educational institution is explicitly given priority to in Germany (§ 71 JJA) and Portugal (Art. 57 JA).

5.3.3 The “classic” *legal grounds and aims* for imposing pre-trial detention are fear of escape from trial, danger of interference with evidence or influence on witnesses (e.g. collusion), the gravity of criminal offence and the danger of an immediate relapse into further (serious)

[122] We use the term „preliminary detention“ for juvenile offenders that are placed in welfare institutions under normally less restrictive and more educationally oriented conditions, run by the Ministries of Education, Social Affairs or the like, and the term “pre-trail detention” for juvenile offenders in more or less custodial institutions, typically run by the Ministries of Justice

crimes. In a more welfare oriented system of importance can also be the educational needs, the need of care or any “irregular situation” which endangers the well-being of the juvenile. Under question 2.2.3 we asked which the prerequisites in the national legislation were.

Most national laws emphasise that there must be a *strong* (or well-founded) *suspicion*, i.e. the high probability that the juvenile has committed the crime and therefore will be convicted (Austria, Belgium, Germany, Finland etc.).[123]

The legal grounds such as fear of escape (not standing trial) etc. are somehow similar in all jurisdictions. There are, however, some important differences. Thus some general criminal procedural regulations restrict pre-trial detention to specified serious crimes because of the danger that the offender will continue criminal activities (Germany).

On the other hand an extended legal ground is the “exceptional trouble a crime has caused with regard to the public order” as a reason to impose pre-trial detention in France. However, in practice these cases will be the ones which in other jurisdictions will justify pre-trial detention because of the gravity of the offence.

Juvenile laws restrict the application of pre-trial detention specifically for juveniles. So, for example, the German Juvenile Justice Act restricts pre-trial detention for juveniles with regard to the principle of proportionality by emphasising the negative effects of detention particularly for young and vulnerable offenders under 18 (§ 72 I JJA). The juvenile judge has to give special arguments why an alternative measure to pre-trial detention is not applicable. Pre-trial detention for 14 and 15-years old offenders because of fear of escape is further restricted to juveniles who have already escaped or who have no place of residence in Germany (§ 72 II JJA). Similarly in Georgia the age and personal characteristics of the juvenile and his family situation have to be taken into account.

The principle of proportionality can also be considered by restricting pre-trial detention for petty offences. So in Finland pre-trial detention may be imposed when the crime is punishable with a minimum sentence of two years. If the minimum sentence is one year pre-trial detention may be ordered if there is a concrete fear of escape etc. In all other cases it is only possible when the defendant has no residence in the country, refuses to divulge his name or address, or gives evidently false information.

In the Netherlands, too, there is a restriction concerning the gravity of the offence: pre-trial detention is only permitted for crimes punishable with more than 6 years of imprisonment.[124] Some countries try to restrict pre-trial detention in emphasising such abstract criteria, others by the concrete punishment expected in the case. So, for example it is widely recognised in the German jurisprudence that imposing pre-trial detention in a case where no unconditional prison sentence is to be expected would be a violation of the principle of proportionality (which is not only a principle of the CCP, see § 112, but also of the Constitution, *Rechtsstaatsprinzip*).

5.3.4 The first phase of investigation is usually initiated by the police or the prosecutor. Arresting a juvenile offender for 24, 48 or 72 hours in *police detention* is possible with an order of the investigating authorities. With regards to Art. 5 (2) of the European Convention on Human Rights the question of pre-trial detention has to be decided by a *judge* within the shortest possible time (or as it is written in many national laws: “*without undue delay*”).

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123 Bulgarian law refers to a “real” fear of escape, see *Kanev et al.* in *Dünkel/Grzywa/Pruin* 2009.

124 The Ukrainian law is less restrictive in that respect: defendants with crimes punishable with more than three years of imprisonment can be taken to custody, exceptionally even offenders with less severe crimes, see Art. 155 CCP.

The *competent authorities* which impose pre-trial detention (question 2.2.4) in all countries are *judges*,[125] sometimes special investigating judges, but usually judges of the penal court. In several countries it is the juvenile judge who is competent (Belgium, Germany, Italy, Switzerland). This is a recommendable way of organising prosecution of juvenile offenders, as particularly, where the juvenile law provides specific (more restrictive) regulations, it is the juvenile judge who will be familiar with these rules and will apply them more properly.

5.3.5 The responsible authority for the *execution of pre-trial detention* (question 2.2.5) usually is the Ministry of Justice which runs pre-trial detention facilities.[126] However, many decisions concerning the execution of pre-trial detention are in the competence of the investigating or another judge. For example visits, censorship of letters, and other questions concerning contacts with the outside world are under the responsibility of the judge. It is a difficult interplay of judicial and prison administrative power that governs the questions of execution of pre-trail detention (see e.g. Austria, Germany).

If the juvenile offender is transferred to a welfare institution it is the responsibility of the Ministry of Education or Social Affairs which runs or (in case of private non-profit organizations) supervises these institutions.

5.3.6 While the imposition of pre-trail detention is always a judicial decision, release from such detention in some countries can also be ordered by the prosecutor (e.g. Denmark, Czech Republic,[127] Georgia, Norway, Russia, Sweden, and Ukraine).

5.3.7 The results of our questionnaire demonstrate that "pre-trial detention institutions" for juvenile offenders are rarely self-contained independent institutions. In Europe, as a rule pre-trial detention is apparently carried out in already existing institutions ("welfare institutions" or "youth prisons"). Only rarely juveniles are accommodated in pre-trial detention institutions for adults (Turkey, but in separate units). In the Czech Republic juvenile pre-trial and sentenced detainees because of their small number are accommodated in separate departments of two adult prisons.

The majority of institutions for pre-trial detainees are publicly/state run, only Italy and the Netherlands answered that there would be non-profit private organisations be involved.[128] In France and Switzerland "parts of the education" can be transferred to private institutions. Altogether one can state that services concerning the execution of pre-trial detention for juveniles in Europe are transferred to private entities only in exceptional cases. However, one exception from this rule is Italy, whose response must be understood that the implementation of pre-trial detention lies in the hands of private agencies.

5.3.8 In some of the responding countries, minimum standards for accommodation (see question 2.2.8) appear to be entirely non-existent. In those European countries that do in fact provide standards, the prescribed minimum space varies considerably (2.5 sqm in Estonia up to 10.5 sqm in France or 12 sqm per person in Switzerland, see table 5.2 below). Minimum standards in that respect have been more frequently established for regular youth imprisonment/custody (see chapter 5.4.10 and table 5.4 below).

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125 Only in Armenia "the investigator and prosecutor" seem to have a right to impose pre-trail detention, but it may be a misunderstanding and the answer refers rather to police detention which in all countries is possible within the first 24, 48 or 72 hours.

126 Ukrainian legislation has created a special State Department for Execution of Sentences, which is not under the Ministry of Justice, but closely related to it. The Head is nominated by the President of the Republic, not the Minister of Justice.

127 During the investigative proceedings, during court trial proceedings by the judge.

128 The Italian authorities mention non-profit private institutions on the community level which are responsible for the execution of pre-trial detention of juvenile offenders. The Netherlands reported that there are 6 state run and 8 non-profit private institutions.

Table 5.2: *Are there legal provisions for* ***the minimum size of rooms*** *(space per juvenile) and* ***maximum number of places*** *in institutions? If so, what are they?*

Andorra	n. a.
Armenia	4 sqm per juvenile.
Austria	Capacity of the institutions: several provisions, at any rate the regulation concerning the capacity has to be approved by the Federal Ministry of Justice. Size of the cell: minimum is 7.5 sqm per single person, the maximum per person is 12.3 sqm. The biggest cells in Austria are those for 6 persons, but for the future it is the goal of the Austrian prison service to avoid cells with a capacity of more than four inmates
Belgium	50 places in the unique institution
Bulgaria	No
Cyprus	No special pre-trial institutions
Czech Republic	4 sqm per juvenile. A single room must have at least 6 sqm.
Denmark	No
England/Wales	n. a.
Estonia	Minimum size of the room 2.5 sqm per person
Finland	min. 5.5 sqm. per juvenile
France	4 to 60 places, individual cell: 10.5 sqm
Georgia	108 places in the unique pre-trial institutions for juveniles, 2.5 sqm living-space per juvenile
Germany	No legal provisions (but according to the case law of the German Constitutional Court: not less than about 7 sqm; otherwise: violation of the basic right of human dignity)
Greece	n. a.
Hungary	No legal provisions
Ireland	n. a.
Italy	9 sqm per person
Latvia	3 sqm per juvenile
Lithuania	n. a.
Malta	n. a.
Monaco	A special pre-trial institution does not exist
Netherlands	10 sqm per room (i. e. one detainee)
Norway	No legal provisions
Portugal	10-14 places
Russia	On the basis of Article 23 (5) of the Federal Law (15.07.1995 № 103-FL «About detention of suspected and accused persons») the sanitary norm of the cell per person shall be 4 sqm. According to Point 20 of the Regulations (bylaw) of the pre-trial detention centres of the penal system approved by the order of the Ministry of Justice of Russia (14.10.2005 No. 189) juveniles are placed, as a rule, in cells per 4-6 persons, located in separate buildings, sections or on floors according to their age, physical state, lack of education. They are provided with improved living conditions.
San Marino	"No. However, they must be comfortable."
Scotland	n. a.
Slovakia	4 sqm per juvenile
Spain	Special pre-trial institutions do not exist
Sweden	Minimum size 8.5 sqm incl. WC
Switzerland	10 sqm per juvenile, and 2 sqm for sanitation facilities, 14-18 sqm for double-rooms
Turkey	"The size of the rooms is compatible with the European Prison Rules and United Nation's legislation."
Ukraine	No

5.3.9 The *daily net costs per juvenile* (question 2.4.9) have been communicated only by some countries (about one third, see Table 5.3.2). The variation seems to be extreme even if one considers the different levels of income and living costs in the general life outside. In Armenia (1.7 €) or Ukraine (0.9 €) standard of living for juvenile offenders and staff – prisoners ratio apparently is very low (similarly in Estonia, Georgia and Turkey), whereas Austria, Germany and Italy with about 80-90 € represent the middle level. The Scandinavian countries, Switzerland and the Netherlands spend much more money for the accommodation, activities and personnel in pre-trial detention facilities for juvenile offenders and reach a level which might be two to three times higher than the amount spent in the aforementioned European counties.

Table 5.3: Daily net costs for juveniles held in pre-trial detention (2006/7):

Armenia	1.7 €
Austria	80 €
Estonia	16 €
Germany	86.64 €
Georgia	18 €
Italy	80 € (but for specific treatment units and offenders, for example in psychiatric departments, up to 200 €)
Latvia	21.63 € (2005)
Netherlands	About 300 €
Norway	About 165 €
Sweden	180 €
Switzerland	133-400 €
Turkey	16 €
Ukraine	0.9 €

5.3.10 The *age limits concerning* the *minimum age for pre-trial detention* (see question 2.2.10) usually are the same as for the criminal responsibility (see chapter 3 above). But there are important restrictions in some countries.

So, for example, criminal responsibility in Austria for 14 and 15 years old juveniles is restricted and those committing minor offences are not criminally liable and therefore also not subject to pre-trial detention.[129]

In Germany there is not a comparable restriction of criminal responsibility, but the aforementioned restriction with regard to pre-trial detention for the same age group (see 5.5.3 above).

In France pre-trial detention is excluded for offenders under 16 if they are prosecuted only for a misdemeanour ("*délit*" in contrast to the more serious "*crimes*"). Juvenile offenders under 16 also can be sent to pre-trial detention if they fail to comply with the judicial supervision order called "*contrôle judiciaire*".

[129] According to Section 4 Para 2 of the JGG the juvenile offender cannot be sentenced in the following cases where 1. he is not able to understand the unjustness of his behaviour or to act according to this understanding, 2. he is under the age of 16, the guilt is not grave and the application of the Juvenile Justice Act (JGG) is not necessary to prevent the juvenile from committing further crimes or 3. the prerequisites of Section 42 Penal Code are fulfilled. Section 42 Penal Code states that if the sanction for the deed to be prosecuted *ex officio* is only a fine, imprisonment for less than three years or such imprisonment plus fine, the deed shall not be punishable if 1. the guilt of the offender is little, 2. there were none or only insignificant consequences of the deed or, if the offender at least seriously tried to do so, the consequences of the deed were remedied, made good or otherwise compensated to a major part, and 3. punishment is not suitable in order to keep the offender from committing punishable acts or to counteract commission of punishable acts by others ("*mangelnde Strafwürdigkeit der Tat*").

Ukraine and other countries from Eastern Europe differentiate the ages of 14 and 16 with regard to criminal responsibility (see chapter 3 above). The same applies to pre-trial detention which for juveniles under 16 is usually restricted to serious and violent offenders.

Belgium has no criminal responsibility before the age of 18, in special serious cases of 16. It represents the classic welfare model. Therefore pre-trial detention is not allowed for juveniles who are not criminally responsible. Nevertheless, there is the possibility for preliminary detention in open or closed facilities of the welfare system ("*protection de la jeunesse*"). The minimum age is 12. There is another closed welfare institution at the federal level (*De Grubbe*), where juveniles can be sent at the age of 14 years or above.

Similarly Scotland with a welfare oriented system allows forms of preliminary detention for 8 to 16 years old juveniles and different forms for juveniles aged 16 and 17 as they usually are not dealt by the Children's Hearings system, but by criminal courts and therefore (exceptionally) can be subject to pre-trial detention orders.[130] Children below the age of 14 can only be placed in local (open) welfare institutions. Those between 14 and 16 exceptionally can be committed to a remand centres if they are certified by the court to be "unruly or depraved" (Sect. 51 (1)b CPA Scotland).

An interesting case is Switzerland. As mentioned already under chapter 3, criminal responsibility in principle begins with the age of 10, but youth prison sentences are excluded for those under the age of 15. The same applies to pre-trial detention. Preliminary detention in welfare institutions is possible, but these institutions are almost exclusively open facilities.

5.3.11 Question 2.2.11 deals with the *maximum length of pre-trial detention* for juveniles and other forms of limiting or shortening the time spent in pre-trial detention (regular reviews etc.). The legal situation varies considerably (see Table 5.3.3).

Table 5.4: Maximum length of preliminary/pre-trial detention

(What is the maximum period of pre-trial detention that is allowed by law?
Are there specific rules for reviewing the decision on pre-trial detention? Please differentiate by age and offender groups when answering this question).

Andorra	n. a.
Armenia	2 months
Austria	Before trial, decisions on the placement under detention or its prolongation are valid only for a certain maximum period of time („*Haftfrist*"). A hearing about the justification of further detention („*Haftverhandlung*") has to be held each time before the maximum period expires, otherwise the detainee must be released. The first hearing after the initial court decision on remand ("*Verhängung der Untersuchungshaft*") has to take place within 14 days upon arrest, the following within one month upon the first prolongation and every ensuing one within two months upon the previous decision (§ 181 CCP). Review takes place automatically (*ex officio*). Once the trial of the case has been opened ("*Beginn der Hauptverhandlung*"), there are no further *ex officio* hearings about the justification of detention. Irrespective of the rules on *ex officio* review, the detainee is entitled to submit a request for release any time. If this move is not endorsed by the public prosecutor, a hearing on the further justification of detention ("*Haftverhandlung*") must promptly be held by the court, at the end of

[130] See for the very restrictive practice *Burman et al.* in *Dünkel/Grzywa/Pruin* 2009.

	which the investigating judge takes a formal decision (§ 193 para 5 CCP). If the public prosecutor withdraws his request for remand in custody or does not apply for its prolongation, the detainee is to be released. In addition several provisions set maximum time limits for detention in relation to the seriousness of the offence. Furthermore, the detainee must be released as soon as the prerequisites for detention cease to exist or the duration of detention would become disproportionate to the nature of the alleged offence or the prospective sentence of deprivation of liberty in case of conviction (including possibilities of early release; Section 193 CCP).
Belgium	Preliminary protective measures must be as short as possible and used as a last resort. The initial order of the juvenile court is valid only for 5 days. During this time the court has to approve, change or revoke the preliminary measure. In case of an approval or change the measure can last a further month. It can be renewed only once for one further month. Therefore the absolute maximum length of stay at the centre De Grubbe is two months and 5 days. Juveniles exceptionally can be preliminarily committed to remand centres ("*maison d'arrêt*") for a maximum period of 15 days.
Bulgaria	Two months, exceptionally one year, if the charge is for a severe crime and two years if the charge is for a crime that is punishable by imprisonment for fifteen years or more (see Art. 152 para 2 CCP; *Kanev et. al.* in *Dünkel/Grzywa/Pruin* 2009).
Cyprus	Police detention by order of a judge: maximum 8 days; Remand detention: maximum 3 months (see also *Kyprianou* in *Dünkel/Grzywa/Pruin* 2009.)
Czech Republic	Maximum: 2 months, in exceptional serious cases 6 months. "*Upon expiry of this period custody may be extended in an exceptional case by a further two months and in proceedings concerning a particularly serious offence up to a further six months, if it has not been possible in view of the difficulty of the case or for other serious reasons to terminate criminal prosecution within this time period*" (sect. 47 Act No. 218/2003 Coll. on Juvenile Justice.[131]
Denmark	There is no total maximum period, but detention can at the most be ordered for four weeks at a time.
England/Wales	n. a.
Estonia	In pre-trial procedure, a suspect or accused shall not be kept under arrest for more than six months.
Finland	There is no upper time limit for pre-trial detention (remand in custody). However, the court must set a time limit for the prosecution. After that time limit the pre-trial detainee must be released, if the prosecutor has not brought charges against the person. If the suspect is under 18 years old the prosecutor must decide without delay if he/she will prosecute the person. If a suspect is arrested a court must make a decision on pre-trial detention at the latest the 4th day after the apprehension. After that the decision has to be reviewed by the court when the pre-trial detainee requests to do so, but not sooner than 2 weeks after an earlier proceeding. A court must review an arrest sooner than this if new evidence has emerged since the previous proceedings. The person in charge of the

[131] The answer to the questionnaire is somehow different insofar as it states that the maximum period would be one year in cases where a single judge is competent and two years where a tribunal is competent. In exceptional serious or complicated cases even three or four years of pre-trial detention are justified.

	investigation must immediately inform the court and the detainee of the grounds for not detaining the remand prisoner any further. If, after hearing from the arresting official, the court decides that there are no longer any grounds for keeping someone under remand imprisonment the remand prisoner must be released immediately. If the official in charge of the investigation says that there are no further grounds for detention, a court must rule on the detainee's immediate release. Also, if no charge is laid by a set deadline, and no request to postpone that deadline has been made, then the detainee must be released immediately.
France	Art. 11 of the Ordinance of 2 February 1945 fixes the age limits as follows: Pre-trial detention under the age of 13 is excluded. Juveniles between 13 and under 16 years of age can be remanded in two cases: • If they are charged for a very serious offence ("*crime*"), the maximum length of pre-trial detention is 6 months, renewable by another 6 months (total maximum: one year). • If they have agreed to the obligations of a supervision order ("*contrôle judiciaire*") with regards to the regulation of ch. III of art. 10-2, i.e. the placement in a closed educational centre ("centre éducatif fermé") Juveniles aged 16 can be committed to pre-trial detention: If they are charged for a very serious offence ("*crime*"), the maximum length of pre-trial detention is 6 months, renewable (total maximum: two years). If they are to receive a prison sentence of 3 years or more with regard to prior convictions and the nature of the crime (law of 9 September 2002). The length of pre-trial detention varies according to the expected sentence. If it is 7 years or less, pre-trial detention cannot exceed one month, renewable once (total maximum: 2 months). If it is more than 7 years, pre-trial detention cannot exceed 4 months, renewable twice (total maximum: one year).
Georgia	According to paragraph 6 of Art. 18 of the Constitution of Georgia the period of detention of an accused (both pre-trial and during the trial) should not exceed 9 months. The same time limit is reflected in Art. 162 of the CCP para 1, which stipulates that the whole detention period of a person both as an accused and defendant should not exceed 9 months. The flowing of this 9 month period starts from the very moment of an arrest of the person or if the arrest did not take place from the moment of the execution of the measure of constraint imposed by the court. To be more specific, within 72 hours after an arrest of a person the court should decide on the lawfulness of his/her detention (Art. 18 of the Constitution). Under Art. 151 of the CCP the court may impose the measure of constraint in a form of pre-trial detention. According to para 3 of Art. 162 of the CCP the time limit for pre-trial detention is two months. Pre-trial detention may be prolonged for one month, but only twice, if there still exist the circumstances listed in Art. 151 of the CCP or an accused has not conformed to the less restrictive measure of constraint or aggravated charges are brought against him/her or because of the complexity of the case. The period of pre-trial detention of an accused may be further extended up to 60 days if the case is returned for additional investigation. Before the expiration of pre-trial detention period of an accused (that might make up for a maximum of 6 months, 2 months + 1 month + 1 month + 60 days) the accused is either released or the case is submitted to the court for trial. Within 24 hours after the court receives the case it decides either to release a person or leave him/her in detention during the trial (from this moment the period of detention of a person as a

	defendant during the trial starts to flow – trial detention). Trial detention may last for different periods of time. However, the pre-trial detention together with trial detention should not exceed 9 months. The legislation of Georgia provides for specific rules of appeal of the decision on pre-trial detention in accordance with the right to fair trial ensured by the relevant international human Rights instruments. Pursuant to the Art. 243 of the CCP, the order imposing preventive measures can be appealed by the defendant, his/her lawyer and prosecutor in the Investigative Panel of the Court of Appeals within 48 hours from the moment it was issued. Appeal is filed with the judge/court, who issued the order and who will immediately refer the appeal to the relevant court. The Court hearing should be held not later than 72 hours after the receipt of a case file. The process is adversarial and held with the participation of both parties. After examining the appeal the judge shall render one of the following decisions: 1. to leave the order in force and reject the appeal, 2. to revoke the appealed order and satisfy appeal. This ruling is final and shall not be subject to further review. Apart from this, under Article 140.17 the motion on the alteration of the pre-trial detention with a more lenient type of preventive measure may be lodged before the Court according to investigative jurisdiction. Within 24 hours from the acceptance of the motion, the Court decides on its admissibility and holds an oral hearing in case the motion is admissible.
Germany	As long as no main hearing has yet taken place, pre-trial detention may last longer than six months only on order by the Higher Regional Court (ex officio review of detention pursuant to sections 121, 122 and 122a of the Code of Criminal Procedure). This is contingent on the particular difficulty or the special scope of the investigations or another important reason not yet having permitted a judgment to be handed down and justifying continued detention. If the accused remains in pre-trial detention, the review should be repeated at the latest after three months (section 122 (4) of the CCP). Furthermore, the duty to conduct proceedings particularly expeditiously applies to pre-trial detention pursuant to section 72 (5) of the Juvenile Justice Act (*JGG*).
Greece	n. a.
Hungary	Pre-trial detention against a juvenile may last for 2 years at the maximum, except the court has upheld it after having pronounced its definitive decision on the case and if there is a new trial pending on the case (Section 455 CCP) The rules on ordering, prolongation, termination and reviewing of pre-trial detention are uniform; no difference is made between age groups.
Ireland	n. a.
Italy	6 months. Specific rules for reviewing the decision on pre-trial detention: It depends on the seriousness of the crime and the juveniles' behaviour or their specific needs.
Latvia	An appeal can be made to a regional court. In accordance with Article 278 of the Criminal Actions Law for juveniles maximum length of pre-trial detention could not be longer than half of the maximum period of pre-trial detention for adults. The maximum periods of pre-trial detention for juveniles are the following: 4,5 months when being charged for less serious crimes; 6 months when being charged for serious crimes; 12 months when being charged for very serious crimes.
Lithuania	n. a.

Malta	n. a.
Monaco	n. a.
Netherlands	The maximum period is 104 days. First 4 days, then 10 days, and then 30 days, twice renewable to a maximum of 90 days. On every occasion prolongation of the pre-trial detention is decided by a judge. There is no differentiation by offender group. With regard to youth the judge is legally obliged to review the pre-trial detention constantly. If possible the pre-trial detention is suspended either with or without conditions.
Norway	There is no maximum period of pre-trial detention for juveniles or others. When considering whether to prolong the period, the Prosecution Service as well as the judge must take into account section 174, and at all times seek alternatives to pre-trial detention, especially within the juvenile welfare system.
Portugal	n. a.
Russia	If a person is under investigation he (she) may be a detainee not longer than 2 months. In case of impossibility to finish preliminary investigation after 2 months and if there are no arguments to change or to cancel a measure of restraint this term can be prolonged until 6 months. The further prolongation, until 12 months, is possible for those accused of serious and very serious crimes and only in case of special complexity of a criminal case. The custody term can be prolonged until 18 months in case if a person is accused of especially serious crimes on the request filed by the investigator with the consent of the General Public Prosecutor of the Russian Federation or his deputy (Art.109 of the CCP of the Russian Federation).
San Marino	There exist no distinctions, except for consideration of the kind of offence and of the personality of the interested person.
Scotland	Trial must start: With court hearing within 12 months from date of first appearance, see CP(S) 95 s64. Summary trials: within 6 months from date of first appearance, see CP(S) 95 s136.
Slovakia	It depends on the gravity of the criminal offence: In pre-trial procedure: charge for minor offences: maximum 6 months, crimes: maximum 18 months, especially serious crimes: maximum 24 months. The whole maximum period of detention: minor offences: maximum 12 months; crimes: maximum 36 months; especially serious crimes: maximum 48 months.
Spain	Special pre-trial institutions do not exist
Sweden	Normally after 14 days there must be a new decision by the court. The pre-trial detention must be reviewed continuously by the public prosecutor.
Switzerland	The length of pre-trial detention has to be the minimum period possible (art. 6 para 1 JJA). In the canton of Geneva, for example, any out of family placement must be approved by the juvenile court within 8 days. (art. 26 JJA).
Turkey	2 years (exceptionally 3), every month reviewed.
Ukraine	Up to 18 months depending on the gravity of the crime (Art. 156 of the CCP of Ukraine).

In general it can be said that the legal provisions in order to limit the period of pre-trial detention in many cases do not seem to cause much pressure for more speedy trials for juvenile cases. If exceptionally two or even more years are fixed as a maximum period it can hardly be seen in accordance with the Council of Europe's efforts to further avoid pre-trial detention (see Rule 10 of the ERJOSSM and also Rule 16 of the Recommendation on "New

ways of dealing with juvenile delinquency and the role of juvenile justice" from 2003 [Rec(2003)20], which stipulates that remand in custody shall not be longer than 6 months until the commencement of the trial. Also Rule 15 of the same Recommendation (2003) that police custody should not be longer than 48 hours is not always met by national legislation (see e.g. Georgia).

Even if one takes into consideration that trials in cases of very serious crimes may need more time a maximum of 36 or even 48 months as is the case in Slovakia is totally unacceptable. In contrast the regulations in Belgium (maximum 2 months and 5 days), Cyprus (maximum 3 months) or the Netherlands (104 days maximum) indicate what could be judged as "good practice" in the European context. On the other hand some countries provide short time limits for (regular) judicial reviews (e.g. Austria, Denmark, Italy, Sweden, Turkey) which may also be effective ways of shortening pre-trial detention periods.

5.3.12 The *proportionality* between the *severity of the offence* and the *application of pre-trial detention* (question 2.2.12) appears to be assured specifically not in all jurisdictions although the principle of proportionality in general is inherent to regulations that set limiting time periods. The responses to this question demonstrate that its meaning could quite possibly have been misleading and misunderstood. Nevertheless some – compared to question 2.2.10 – interesting additional aspects have been pointed out by some respondents. So the Dutch authorities emphasised that a judge has to end the pre-trial detention if the expected sentence is shorter than the period of pre-trial detention served up to the moment.

The French respondents cite Article 144-1 of the CCP: "*Pre-trial detention cannot exceed a reasonable period as compared to the gravity of the acts alleged to be committed by the person under investigation and the complexity of the investigation needed to establish the truth*". Pre-trial detention in France "*therefore has to be applied in an appropriate manner (the principle of proportionality) and only for the period when it is strictly necessary*."

The German CCP and particularly the Juvenile Justice Act emphasize explicitly the principle of proportionality: "*Pre-trial detention must be proportionate to the gravity and seriousness of the criminal offence and to the anticipated sanction*", see § 112 I 2 CCP, *StPO*). In addition further restrictions can be found in the Juvenile Justice Act, *JGG*: "The special stresses and strains to which particularly juveniles are exposed when they are sent to pre-trial detention must be considered" by the judge, see § 72 (2) 2 JJA (*JGG*).

The Norwegian response also clarifies: "*Section 170a CCP applies to all coercive measures and forbids a measure to be used when it would be a disproportionate intervention in view of the nature of the case and other circumstances. This rule in effect limits the possible time period for which a juvenile can be kept in pre-trial detention.*"

The Anglo-Saxon systems particularly rely on the system of bail as an alternative to pre-trial detention. In England and Wales as well as in Scotland the priority for bail is legally provided. This contrasts the practice for adults. The Scottish response to the questionnaire was as follows: "*All offences can be considered for bail. On first appearance of a person from custody, whether on complaint or on petition, the court is automatically obliged to consider his admission to bail. Each case is judged on its own merit and entirely at the discretion of the judiciary*."

5.3.13 The answers on living conditions in pre-trial detention (question 2.2.13a-w) often were not really informative.

There is only little uniformity concerning the principles of allocation (2.2.13c) for juvenile pre-trial-detainees. Some countries (Austria, Denmark, Georgia, Latvia, and Slovakia) emphasize that the juveniles should be detained close to their homes. Others (Finland, Sweden) see the vicinity to the court or to the place of the crime (Russia) as the most important issue. In other

countries the specialisation of a department (Estonia) or the availability of places (Italy) decides about the allocation. Denmark stressed in its answer the overall priority of alternatives to detention.

The presented legal minimum standards of accommodation (2.2.13d) for juveniles vary significantly. In Denmark, Germany, Norway, Sweden and Switzerland single rooms for juveniles are foreseen, whereas in Latvia (6 persons), Russia (4-6 persons) and Turkey (up to 3 persons) can be closed up in one cell.

In Armenia and Cyprus the minimum space for juveniles is 4 sqm, in Italy 9 sqm, and in Norway 10 sqm, whereas in Georgia this minimum is only 2.5 sqm.

Not many *regulations and requirements to prevent overcrowding* (2.2.13e) were presented. Denmark describes a convincing approach as follows: "*New spaces have been established to avoid overcrowding. Every year an occupancy forecast is prepared - and in that light a capacity action plan.*" Germany stresses that pre-trial detention is only imposed on juveniles if no alternatives (like provisional orders) are possible. France and Switzerland do obviously not have any problems with overcrowding.

In almost all countries juveniles have the right to wear their own clothes during pre-trial detention (2.2.13f) as a basic principle. The only exception is Sweden, where all inmates have to use special prison clothes.

We could not see from question 2.2.13h-j that a lot of countries follow a special concept concerning meaningful activities and educational programmes for pre-trial detainees. Some countries stated to offer them educational, cultural, free-time and mainly sports activities, but did not specify further how the special situation of pre-trial detention is considered within this context. In Denmark, the institutions shall "*as soon as possible seek to prepare, based on the young person's motivation and overall qualifications, a special treatment programme*". Ukraine points out that educational or rehabilitative programmes are not foreseen at all during pre-trial detention. Sweden stresses that due to the special situation all activities of the inmates must be voluntarily. Nevertheless the assumption could be confirmed that the living conditions in pre-trial detention in general are problematic as meaningful activities and educational programmes are the exception and therefore sometimes much time is lost which could have been used better for rehabilitative activities. But this is in part due to the legal situation and the consequences of the principle of presumption of innocence which hampers the integration of pre-trial detainees in educational or treatment programmes.

Drug, alcohol or other treatment is as a rule not compulsory (2.2.13k). The answers to the question about contact with the outside world during pre-trial detention show some differences: in Austria, Denmark and Finland pre-trial detainees can be visited as many times, as this is possible without causing detriment to the order and operations of the prison, in Austria at least twice per week. In the Czech Republic, Estonia, Latvia, the Netherlands and Slovakia there can be up to one visit per week, in Germany and Russia visits are allowed every two weeks. Other countries did not indicate the frequency of the visits. It should be emphasized in this context that - regarding the special situation of the pre-trial detainees - every effort should be made to protect their contacts to the outside world.

The involvement of the parents in the execution or preparation for release (2.2.13m) or of the victim (2.2.13n) seems to be the exception.

Special procedures for ending the assignment to pre-trial detention (2.2.13o) seem not to be developed for juveniles. Pre-trial detention ends when there are no further grounds for arrest or when the detainee is convicted or acquitted. Only a few countries report on special services like social assistance for a better re-entry into society (Germany). If the pre-trial detention ends with a transfer to a youth prison there are likewise only few regulations

(2.2.13p): The most common statement was that juveniles must be transported separately from adults.
Security or disciplinary measures are used almost everywhere (only Italy informs of the non-existence of such measures). Compared with the measures to maintain good order in juvenile prisons (see 5.4 below) the periods of confinement seem to be shorter for pre-trial-detainees (Denmark and Norway: 2 weeks, Georgia: 20 days for juveniles above 16, Ukraine: 5 days).

19 countries answered positively the question about the access to legal aid (2.2.13r). Not in all countries free legal aid provided by a lawyer is available. As regards questions 2.2.13s and 2.2.13t, different complaints procedures and the access to courts relating to disciplinary measures were presented, but it is not clear, if in practice these procedures protect the rights of the juveniles effectively enough. Public control over pre-trial institutions is likewise organised in different ways which cannot be considered sufficient without carrying out further research (2.2.13v).

Regarding the *management, training and selection of staff* (2-2-13w) in pre-trial detention institutions, only some countries reported on trainings which are tailored to the work with juveniles.

5.3.14 If looking at the *prerequisites for imposing pre-trial detention* the differences for juveniles as compared to adults are widely described under 5.3.13. Contrary to adult pre-trial detention juveniles in some countries are obliged to follow educational activities, particularly schooling (e.g. Czech Republic, Germany), sometimes they are also obliged to work (Germany). One could further add that access to legal representation is facilitated and in some cases (Germany) even a defence council is obligatorily designated. Information to and contact with parents is guaranteed as one of the important special legal rights of juvenile detainees.

Regarding the *conditions in pre-trial detention* in accordance with international human rights standards the *separation of juveniles from adults* is required everywhere. However, in some countries this principle is not followed always strictly. This is partly due to the small number of juveniles in pre-trial detention as well as to the concept of allocating detainees as close as possible to their home in order to facilitate the contacts with the family (see e.g. Denmark).

Living conditions in pre-trial detention traditionally are characterised as being poorer and offering less meaningful activities, treatment or schooling and other rehabilitative programmes than youth prisons or even lesser than youth welfare institutions.[132] Nevertheless from the legal point of view it is stipulated that pre-trial detention takes care of the educational and rehabilitative needs of juveniles much more in detention centres for adults. The answers to the question what aspects of juvenile pre-trial detention differ from institutions for adults were somehow disappointing as rather often it became clear that no strong differences in daily practice and life exist.

The respective law regulations put more or less the emphasis on educational activities and in case of compulsory school age the obligation to attend schooling. But it is highly probable that law and practice will differ particularly in the area of pre-trial detention. At the same time some aspects of daily life seem to be more favourable in juvenile pre-trial detention than in adult detention centres.

Georgian legislation "*obliges the state to ensure that the juveniles do not suffer the effects of deprivation of liberty. Therefore, juveniles shall be placed in better conditions than the adults. The difference between the conditions of juvenile and adult detainees in pre-trial detention institutions generally reflects the special needs and characteristics of vulnerable detainees*

[132] See *Dünkel/Vagg* 1994; *van Zyl Smit/Dünkel* 2001.

such as minors. In contrast with the adult detainees, minors are entitled to spend more time outside the building. They may walk or exercise in the yard of penitentiary institution 2 hours daily. The state is obliged to provide minors with secondary education even during the pre-trial detention" (see Art. 136 of the CCP).

In Germany the execution of juvenile pre-trial detention should also fulfil an educational purpose. In contradistinction to the execution of adult pre-trial detention, no. 80 (2) of the Remand Detention Execution Rules provides for an obligation to work in order to protect juveniles against any detrimental effect of incarceration.[133] "*Educational work should also include group activities and instruction in particular.*"

Latvia enumerated the following differences which are not specifically referring to the conditions in detention: "*There are the following differences: the terms of hearing criminal case are shorter; the participation in legal action of advocate is obligatory; juveniles are treated separately from adults, and pre-trial juvenile detainees have a wider range of rights and shorter terms of detention.*"

The Netherlands very generally stated that "*juvenile institutions differ in various ways from the remand houses for adults.*"

The Slovakian authorities referred to better accommodation conditions, the "mitigating regime with the possibility of education", the specifics of treatment, the higher nutrition ration, more visits and the limitations of disciplinary sanctions that make a difference with pre-trial detention for adults.

In Sweden, where the general conditions are more favourable than in most other countries, there are no real differences "*other than that there is an individual treatment of every person. Young age is of course an important factor concerning the individual treatment.*"

In Turkey the general standards apparently differ from countries like Sweden. The situation for juveniles doesn't show "*important differences*" compared to adults except for the recruitment of more qualified staff and in juvenile reformatories there are no external armed police forces as is apparently the case in prisons for adults. "*All staff recruited in juvenile prisons is trained for dealing with juveniles. There are much more communal facilities, teachers, and psychologist in juveniles' prisons than in adult's ones.*"

5.3.15 *Summarizing* the answers regarding the legal provisions of imposing and executing preliminary and pre-trial detention the idea suggests that this area is comparatively underdeveloped and that the concerns expressed by various recommendations of the Council of Europe and also the ERJOSSM seems to be justified. On the other hand some results indicate that there can be found "good practices" also in accordance with international standards. The sometimes reluctant and incomplete answering as a result the lack of information deserves further attention. The Council of Europe should encourage more in-depth research particularly in the field of pre-trial detention.

5.4 Juveniles in youth prisons

5.4.1 The following part deals with the placement of juvenile offenders in youth prisons or similar prison-like institutions for juveniles which from country to country may be named differently (young offender institutions, juvenile/youth prisons etc.), but have as a general common criterion that they are managed by the Ministries of Justice in relation to a sanction

[133] This, however, is a violation of the Basic Principle of Rule 13 of the ERJOSSM which stipulates that juveniles shall not have fewer rights than adults (also not if it is based on educational grounds).

of deprivation of liberty pronounced by a youth/juvenile court in application of the (juvenile) criminal law.

5.4.2 The general sections related to deprivation of liberty contained in Part III of the EJOSSM were drafted primarily to deal with such institutions but also with welfare institutions (see chapter 5.2), pre-trail detention (see chapter 5.3) and mental health institutions (see chapter 5.5) for which in addition were developed special rules. Quantitatively the placement in a youth prison relatively is the most important compared the other forms of deprivation of liberty (see chapter 5.1).

It is not possible to comment the details of the EJOSSM in the context of youth prisons here. They will be referred to in different parts of this chapter.

5.4.3 The legislation for imposing youth imprisonment (see question 2.3.1) is generally based on the criminal codes,[134] special juvenile justice acts (Austria, Germany, Switzerland), in criminal procedure legislation (Italy, Turkey) and rarely in youth welfare laws (Belgium).

Part 2.4 of the questionnaire, however primarily deals with the execution of youth prison sentences. One major result with respect to juvenile prisons is that only in a few cases special laws exist for the execution of juvenile imprisonment in reformatory schools or similar specialised institutions. They exist in Hungary, Portugal, Scotland and Sweden. In Germany the Federal Constitutional Court has outlawed the situation existing in 2006, when only a few legal provisions for youth prisoners were contained in the Juvenile Justice Act (JGG) and obliged the legislator to pass primary legislation until the end of 2007.[135] Since 1st January 2008 all 16 German federal states dispose with detailed primary legislation. In most countries special regulations for juvenile imprisonment are contained in chapters or sections of the general prison legislation.

5.4.4 The usual reason for which juveniles are imprisoned (question 2.3.3.) is the perpetration of a criminal offence. Youth imprisonment is seen as a sanction of last resort everywhere in Europe and therefore the primary ground for imposing a youth prison sentence is the gravity of the offence.[136] In most countries though the young offender's need for educational treatment is to be considered as well. Moreover, there are a number of desired effects of imprisonment. In part, imprisonment is supposed to prevent the offender from committing further criminal offences, while for example in Hungary another effect is seen in the deterrence of other potential offenders. But in principle, general deterrence and retribution are not seen as a primary goal of juvenile justice and of sentences depriving juveniles of their liberty. The German juvenile law reform of 2008 explicitly outlawed deterrent goals and emphasised education and rehabilitation as the primary aims of juvenile justice.[137]

5.4.5 It was sometimes difficult to compare the answers to the questions regarding competent authorities for the imposition and execution of youth imprisonment (questions 2.3.4 and 2.3.5), as the meaning of terms like "juvenile judge" or of the sanctions is not always clear. Juvenile judge could be a family court magistrate (see, e.g. Portugal, *Tribunais de Família e Menores*) or a judge in a separate juvenile justice system (Austria, Belgium, Czech Republic, England/Wales, Germany, Greece, Ireland, Malta, Spain, Switzerland, and Turkey). Many countries just answered that the responsibility to impose juvenile

[134] See for England and Wales: Detention and Training Order: sections 100-107 of the Powers of the Criminal Courts (Sentencing) Act 2000; for very serious offences: sections 90 and 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

[135] See *Bundesverfassungsgericht* Neue Juristische Wochenschrift 2006, 2093 ff.; for an analysis of this decision in the context of German constitutional law see *Dünkel/van Zyl Smit* 2007, 347 ff.

[136] See, e.g. Belgium, Cyprus, England/Wales, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Lithuania, Norway, Portugal, Russia, Slovakia, Sweden, Turkey, and Ukraine.

[137] See § 2 Juvenile Justice Act (*JGG*) and *Dünkel* in *Dünkel/Grzywa/Pruin* 2009.

imprisonment lies with the courts, not further specifying the kind of court. Nevertheless we can conclude also from other sources that most countries have specialised juvenile courts, whereas the Scandinavian countries do not provide a special court organisation, notwithstanding that judges base their judgements on the special rules regarding imprisonment of juveniles. The principle of prison sentences as a means of last resort is probably developed mostly in Scandinavian countries which have almost no juveniles kept in prisons (see chapter 5.1). The same "reductionist" approach can be seen in Austria, Germany and Switzerland, where youth imprisonment has really become a "last resort" ("*ultima ratio*").[138]

In many Eastern European countries the development of an *independent juvenile justice system* is a prominent feature (see for example the Baltic States, Croatia, the Czech Republic, Serbia, Slovakia, Romania and Russia). In the Czech Republic juvenile courts have been established after the major law reform of 2003.[139] However, for example, in the Baltic States, up to now there are no independent youth courts. In Russia a first model of a juvenile court is running in Rostow/Don, and such a project has also been established in Romania in Brasov.[140] But often the required infrastructure for specialized youth judges who are trained to deal with juveniles in an educative manner widely lacking.

Sanctions like the placement in reformatory schools, youth prisons or custody or the special "youth confinement" (Denmark) have to be clearly described in order to find similarities and differences.

5.4.6 Question 2.3.5 was often misunderstood. Some countries emphasised the responsibility of judges also for the execution of youth imprisonment, but did not mention if the Ministry of Justice or the Ministry of Social Welfare or another ministry is responsible for the organisation of youth prisons, reformatory schools etc. In some cases like Austria, the Czech Republic or Germany it is the juvenile judge who is also responsible for the execution of youth prison sentences and the Ministry of Justice which is responsible for the organisation of youth prisons. This was not always clearly seen in the responses to the questionnaire. Nevertheless some interesting aspects could be drawn from the answers. So, some countries differentiate between (youth) prison sentences served in institutions or departments of the prison system and reformatory schools which are run by the local authorities (Estonia) or the Ministry of Social Affairs (Hungary). In Portugal the Institute for Social Rehabilitation (*Direcção-Geral de Reinserção Social*) – attached to the Ministry of Justice – is responsible.

5.4.7 In most countries early release is granted by a decision of a judge, either a special judge for the execution of penalties (France, Italy, Spain) or a juvenile judge (e.g. Austria, Belgium, Germany, Turkey, see question 2.3.6). Only in Norway and Switzerland the Correctional Services have the competence to decide on parole/early release. In Sweden the Swedish National Board of Institutional Care decides on the release from welfare institutions where most juveniles are placed (see chapter 5.1 and 5.2.7).

5.4.8 Youth prisons, reformatory schools and similar institutions are usually under the authority of a public service (see question 2.3.7 as is the case with pre-trial detention, see chapter 5.2.7 above). Only in England and Wales (7 out of 36 youth prisons) and the Netherlands privately run institutions are of a considerable importance. In England these are

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138 See in summary *Dünkel*, *F.*: Youth custody and the balance between education and punishment - an international comparison of developments and prospects, pc-cp\docs 2006\pc-cp (2006) 09E of 6 June 2006; *Dünkel/Grzywa/Pruin* 2009.

139 See *Válková* 2006; *Válková/Hulmáková* in *Dünkel/Grzywa/Pruin* 2009.

140 See *Păroşanu* in *Dünkel/Grzywa/Pruin* 2009; summarizing *Dünkel* 2008, 104.

profit organisations,[141] while in the Netherlands only non-profit organisations are involved. There are 6 state-run public and 8 (non-profit) private institutions in the Netherlands. To a very minor extent single private institutions also exist in Scotland (one institution out of 15) and in Germany (two small open facilities).[142] In individual cases in Norway[143] and France the responsibility for certain aspects and fields of imprisonment can be transferred to private entities.

5.4.9 The minimum size of the cell for one juvenile prisoner varies largely (see question 2.3.8) and has been pointed out already under 5.3.8 with respect to pre-trial detention. In comparison to pre-trial-detention (see table 5.3.1 above), minimum standards regarding the size of cells etc. are more frequently in place (see question 2.3.8). In Hungary minimum standards are in place for imprisonment, yet not for pre-trial detention, as is also the case in Cyprus. Estonia provides more detailed and fixed rules. These minimum standards differ greatly between the individual countries. (Denmark: Juveniles are not to be allocated to cells together with persons above the age of 17, Estonia: precise regulations for the height and size of the cells). So in youth prisons and reformatory schools the minimum size per juvenile varies between 2.5 sqm in Estonia, 3 sqm in Latvia, 3.5 sqm in Hungary and Russia, 4 sqm in the Czech Republic and Ukraine, 5.5 sqm in Finland, 9 sqm in Italy and 10.5 sqm in France (see table 5.4.1 below). The legal situation is quite unsatisfactory and needs improvement. In Germany the standard is 10-12 sqm, although it is not prescribed by law. The German Federal Constitutional Court outlaws cells of less than 7 sqm as violating human dignity.

Table 5.5:
Are there legal provisions for the minimum size of rooms (space per juvenile) and maximum number of places in institutions? If so, what are they?

Andorra	n. a.
Armenia	n. a.
Austria	A decree of the Ministry of Justice specifies the minimum size of rooms and their capacity. The facilities depend on the concrete penitentiary.
Belgium	50 places, one room for one person, placing two people together is forbidden.
Bulgaria	n. a
Cyprus	The size of the individual cells must be at least 7 sqm.; a juvenile block of a closed prison is no larger than 18 cells
Czech Republic	4 sqm per juvenile. A single room must have at least 6 sqm.
Denmark	No, juveniles shall not share living quarters with inmates above the age of 17.
England/Wales	n. a.
Estonia	For reformatory schools: height of the studying rooms: at least 2.5 m, area for one person at least 1.7 sqm., area of the sleeping room for one person: 6 sqm Juvenile prison: 2.5 sqm per person - same as for adults
Finland	5.5 sqm per juvenile
France	10.5 sqm per person; places per institution vary between 4 and 60.

141 According to the respondents to the questionnaire there were two young offenders institutions run by private profit organisations in 2007and all 4 secure training units were organized by the private profit oriented sector. The secure children homes were all public institutions except for one, which was privately run for profit.

142 With 33 places out of about 7,000 places of he total youth prison system.

143 The very few cases of detained juveniles are dealt with by the public prison service; however, exceptionally the execution can take place in an institution partly managed by a private entity.

	Most institutions have between 10 and 20 places.
Georgia	160 places in the unique youth prison of Georgia, 3.5 sqm per juvenile
Germany	The size and furnishing of rooms must be adequate, for the case law of the Federal Constitutional Court see also chapter 5.3.7 above (at least about 7 sqm).
Greece	"Law 2776/99, Correctional code, articles 21-22"
Hungary	Reformatory schools: 12 persons maximum in one group and one room (in special cases: 8 persons), 5 sqm of bedroom and study space per juvenile, at least 30 sqm of common living space per group. Youth prisons: at least six cubic meters of air space available per convict and in case of juveniles at least 3.5 sqm of moving space per person.
Ireland	n. a.
Italy	9 sqm per person
Latvia	3 sqm per person
Lithuania	Rulebook of Correctional Institutions (approved by the written order of the Minister of Justice No. 461 dated 2 July 2003) provides for the maximum number of places in the institution. The written order of the Director General of the Prison Department in conformity with the sanitary norm HN 76: 1999 "Custodial and Pre-trial Detention Institutions: Equipment, Maintenance, Health Care" (approved by the written order of the Minister of Health Care No. 461 dated 22 October 1999) provides for the number of places in custodial and pre-trial detention institutions. According to the latter document the minimum space per person in a cell of a remand prison is 5 sqm and 3 sqm in a correction house.
Malta	36 places, every juvenile offender has his own cell which is constructed in line with the European Prison Rules, each cell has private sanitary facilities, as well as adequate lighting facilities, windows allow natural light to enter and do not have prison bars.
Monaco	A youth prison does not exist
Netherlands	10 sqm per room
Norway	No
Portugal	Maximum number of places in open institutions: 14; in semi-open institution: 12; in closed institution: 10.
Russia	According to Article 99 of the Penal Code of the Russian Federation the standard norm of living space per prisoner in juvenile colonies cannot be less than 3.5 sqm.
San Marino	n. a.
Scotland	Accommodation standards are the same as for adults, no specifics for prison design/cell size.
Slovakia	4 sqm per juvenile.
Spain	General rule: individual cell for each offender; if there are no medical or security reasons: offenders can share rooms, if these have sufficient and adequate conditions to maintain intimacy and special place to keep the belongings.
Sweden	No.
Switzerland	12 sqm.
Turkey	"Compatible with the European Prison Rules and United Nation's legislations"
Ukraine	Min. 4 sqm per juvenile. Number of places in education colonies is not prescribed.

5.4.10 The costs for a young prisoner per day vary extremely if one considers that in Ukraine prison authorities disposed with about 1 €, in Hungary 6 €, Estonia 16 €, Latvia 22 € per day and young prisoner, whereas in Germany about 87 €, in Portugal and Norway 160-165 € and Sweden or Scotland the daily costs are almost 700 € or 900 € per day (see question 2.3.9 and table 5.6 below). In England and Wales the stay in a young offenders institution costs 206 € per day, in a secure training centre 470 € and in a secure children's home even about 534 €. In Switzerland, too, the costs vary according to the type of institution with daily costs from about 133-400 €. Again it has to be noticed that these differences can be explained only to a smaller extent by different income and living standards, but to a larger extent indicate the importance that is given by prison and welfare policy to guarantee minimum standards for the care and treatment of juvenile prisoners.

Table 5.6: Daily net costs for juveniles held in youth prisons (2006/7):

Andorra	n. a.
Armenia	n. a.
Austria	About 120 € per day
Belgium	n. a.
Bulgaria	n. a
Cyprus	2005 – £ 32.57 (Cyprus Pounds) = 56.86 €
Czech Republic	n. a.
Denmark	n. a. ("No separate calculations/statements are made on the expenditure for young offenders.")
England/Wales	Young Offender Institutions: 138.36 £ per place and day = 206 € Secure Children's home: 533.70 per place and per day = 794 € Secure Training Centre: 469.86 per place and per day = 699 €
Estonia	16 € reformatory schools: 3 € per day
Finland	125 € (2005) per juvenile
France	n. a.
Georgia	45 GEL (= 19 €)
Germany	86.64 € (average 2005)
Greece	n. a.
Hungary	Reformatory schools: n. a. Juvenile prisons: HUF 549,000/year = 2,237.47 € = 6.13 € per day
Ireland	n. a.
Italy	n. a.
Latvia	In 2005 – 15.2 LVL (21.63 €) ("without investment money")
Lithuania	In 2004 the average daily net costs per juvenile was 111.50 Lt (= 32.20 €).
Malta	This data is not available but the average daily cost of an inmate at CCF is 25 LM = 58.37 €
Monaco	n. a.
Netherlands	n. a.
Norway	One place in a prison with a high security level is estimated to cost approximately 500,000 Norwegian kroner per year (= about 165 € per day)
Portugal	160.50 €
Russia	n. a.
San Marino	n. a.
Scotland	Average 600 £ = 892 € per day for sentenced children
Slovakia	1031 SKK per juvenile (= 30.62 Euro)
Spain	n. a.
Sweden	693.50 € (2005)

Switzerland	133-400 €
Turkey	n. a.
Ukraine	205.8 UAH per month = 31 €. About 1 € per day.

5.4.11 The *minimum age* at which a young person can *be imprisoned* (question 2.3.10) varies between 10 and 15 years and is strongly related to the age of criminal responsibility described in chapter 3. There are, however important exceptions: In Switzerland the age of criminal responsibility is 10, but youth imprisonment is possible only for juveniles aged 15. Similarly in England and Wales detention in a young offenders institution is provided for 15-17 years old juveniles (and in separate units for 18-20 years old young adults), whereas 12-14 years old (recidivist) offenders can be placed in a secure training centre and in exceptional serious cases also 10 and 11 years old children can be placed in secure children's homes. In Belgium, where a welfare law excludes criminal responsibility under the age of 18 (in serious cases 16), nevertheless a minimum age is fixed for the placement in a closed welfare facility (which corresponds more or less to reformatory schools or youth prisons in other countries): Only juveniles older than 12 are accepted. In Croatia, Montenegro and Serbia the age of criminal responsibility is 14, but youth imprisonment is restricted to juveniles of aged 16 years or more.

The *age range of young offenders kept in youth prisons*, reformatory schools and other prison-like confinement therefore is sometimes very large (e.g. 14-24 in Germany, 14-27 in Austria) if one considers that in many countries also young adults can be sentenced to youth imprisonment and may serve such a sentence up to the age of 21, 23 (Denmark), 24 (Germany), 25 (Greece) or even 27 (Austria). Almost all countries keep juveniles who reach the age of majority while in detention in youth prisons if this enables the juvenile to finish school or vocational education or specific treatment in the young offender institution. A transfer to adult prisons is usually provided only for those young adults who have reached the age of 21. Few exceptions can be seen: In the Czech Republic at the age of 19 and in France 6 months after reaching the age of 18 a transfer is possible (see table 3.1 and chapter 3 above).

5.4.12 Great differences can be observed regarding the duration of imprisonment (question 2.3.11.). When stating the prescribed *minimum term* to which a young person can be imprisoned in some countries it has to be considered that there exist special short term sanctions involving deprivation of liberty (short-term detention, in Germany, "*Jugendarrest*", Estonia, Latvia, Russia, and Ukraine), whereas the category of „youth imprisonment"covers sentences served in specialised prison-like institutions (youth prisons, reformatory schools etc.).

Such youth imprisonment sometimes has a higher minimum period compared to the general criminal law for adults. This is the result of the inherent educational ideology which requires a certain minimum period to be served in order to improve the effectiveness of educational and treatment programmes.

An outstandingly high *minimum penalty* exists in Slovakia, i.e. 24 months, and also in the Czech Republic (12 months),[144] whereas Germany, Greece and Latvia provide a minimum of 6 months, Italy and Portugal of 3 months. The other countries do not exclude short term imprisonment and provide imprisonment of less than three months, possibly only for a few days or weeks.

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[144] It has, however, to be considered that the Czech law allows for special mitigation if the penalty *would be disproportionately severe for the juvenile and that the purpose of the penal measure can be achieved even with a shorter period of imprisonment* (sect. 37of the Act on Juvenile Justice, No. 218/2003 Coll.).

A few countries have a special short-term sanction (detention centre), which can be from 2, 5 or 15 days up to 4 weeks or 45 days (Germany, Lithuania, Ukraine). Latvia has introduced such short-term detention of 1 month up to 6 months.

The *maximum youth penalties* vary between 3 years in Portugal, 4 years in Switzerland, 5 years in the Czech Republic, 10 years in Germany, Estonia and Greece and even longer terms up to (theoretically) life imprisonment in England and Wales, the Netherlands or Scotland (in the latter cases restricted, however, to juveniles of at least 16 years of age). In general the maximum is fixed to 10 years, sometimes allowing an increase of penalties of up to 15 years for very serious crimes. It is amazing, however, that countries such as Portugal or Switzerland even for very serious (murder) cases do not allow for longer sentences than 3 or 4 years.

Table 5.7: Minimum and maximum length of youth imprisonment

Country	Youth detention/imprisonment	
	Minimum sentence	Maximum sentence
Armenia	**3 m.**	**7 y.** (under 16 y. of age) **12 y.** (≥ 16 years of age)
Austria	**1 d.**	Instead of life imprisonment or 10-20 y. 10 y. (under 16); 15 y. (≥ 16 years of age) All other cases: The **maximum sentence is decreased by one half** and no minimum term is fixed by law
Belgium	-	**6 m.** placement in an open institution; **6 m.** in a closed institution
Bulgaria	n. a.	n. a.
Cyprus	n. a	n. a.
Denmark	**30 d.**	**8 y.**
England/Wales	**4 m.** (detention in a young offender institution)	**24 m.** (detention in a young offender institution) **Life sentence**, when sentenced by the Crown Court
Estonia	**1 d.**	**10 y.**
Finland	**14 d.**	**12 y.**
France	**2 m.**	**The maximum sentence is decreased by one half**
Georgia	n. a.	**10 y.** (14 a. 15 years old juveniles) **15 y.** (≥ 16 years of age)
Germany	2 d. (detention centre) **6 m.** (y.i.)	4 w. (detention centre) **5 y.** (y.i. for 14-17 years old juveniles) **10 y.** (y.i. for very serious felonies of 14-17 years old juveniles and in general for 18-20 years old young adults)
Greece	**6 m.**	**10 y.**
Hungary	**1 y.** (reformatory school) 1 m. (youth imprisonment)	3 y. (reformatory school) 15 y. (youth imprisonment)
Ireland	**No minimum fixed** (detention in a children detention school)	**No maximum fixed**, but no longer than a prison sentence for an adult would have been.[145]
Italy	**3 m.**	**18 y.**
Latvia	1 m. (detention centre) **6 m.** (y.i.)	6 m. (detention centre) **10 y.** (y.i.) **15 y.** (y.i., very serious cases)
Lithuania	5 d. (detention centre) **3 m.** (y.i.)	45 d. (detention centre) **10 y.** (y.i.) **The maximum sentence is decreased by one half**

[145] See *Walsh* in *Dünkel/Grzywa/Pruin* 2009. The detention order is served either in former reformatory schools or in St. Patrick’s Institution.

Malta	n. a.	n. a.
Monaco	n. a.	n. a.
Netherlands	**1 d.**	**1 y.** (y.i. for 12-15 years old juveniles) **2 y.** (y.i. for 16 and 17 years old juveniles) **Life imprisonment** for 16 and 17 years old juveniles transferred to adult courts)
Norway	**14 d.**	**21 y.**
Portugal	**3 m.**	**3 y.**
Russia	1 m. (detention centre) **2 m.**	6 m. (detention centre)[146] **6 y.** (14 a. 15 years old juveniles) **10 y.** (≥ 16 years of age)
San Marino	n. a.	n. a.
Scotland	**7 d.** (≥ 16 years of age)	**Life imprisonment** (≥ 16 years of age)
Slovakia	**2 y.** 7 y. (very serious cases)	**7 y.** 15 y. (very serious cases)
Spain	**1 d.**	**10 y.**
Sweden	**14 d.**	**4 y.**
Switzerland	**1 d.**	**4 y.**
Turkey	**1 d.**	**15 y.**
Ukraine	15 d. (detention centre) **2 m.** (y.i.)	45 d. (detention centre) **10 y.** (y.i.) **15 y.** (y.i., very serious cases)

5.4.13 The majority of responses to the question on the application of the principle of proportionality with regard to the gravity of the offence (question 2.3.12) could predominantly be interpreted as being negative. It was evident that this question had been interpreted differently from country to country. While Austria, Germany, Lithuania, Norway and Sweden confirmed this proportionality in law, a number of other countries stated general limitations stemming from the rule of law (right to an attorney etc.) or fundamental principles (for example imprisonment as *ultima ratio*). Some countries explicitly denied the importance of this principle, but on the other hand referred to the principle of last resort, which can also be interpreted as an expression of a proportional sentencing. This generated the impression that many countries are not sensitized to questions regarding the proportionality of the gravity of the offence and the resulting punishment. We personally understood the question as whether or not rules are in place that ensure that imprisonment is only imposed in cases in which there is a notable degree of guilt and only for a period that is not disproportionate to the offence (limiting function of the principle of proportionality). The degree of guilt depends on the way in which the offence was committed. If the guiding principle for determining the length of youth imprisonment is proportionality it will be based more on the degree of guilt than on the specific educational needs of the offender. It may well have been difficult for countries with predominantly welfare-oriented juvenile justice systems to understand the question in this sense, because this notion of proportionality is foreign to systems that mainly respond to the (educational) needs of the offender. So, for example, England and Wales noted that the principle of proportionality is considered where the juvenile court refers the case to the Crown Court because of the seriousness of the crime, but "*it is unclear if the principle of proportionality applies also in cases where the offender stays in the juvenile justice system and is sentenced by the juvenile court*" .

On the other hand there is a variety of responses to question 2.3.3 concerning the grounds for imposing youth imprisonment. In those countries in which the gravity of the offence is taken into consideration when sentencing to imprisonment, one could presume a certain

146 Detention centers for short-term detention have not been implemented in practice and the abolition of this sanction is discussed, see *Schtschedrin* in *Dünkel/Grzywa/Pruin* 2009.

degree of proportionality. However, a number of these countries did not mention or convincingly present the idea of proportionality under question 2.3.12.

5.4.14 The sections 2.3.13a-w of the questionnaire dealing with the *legal and administrative framework of youth imprisonment* institutions will be addressed in the following part of the chapter.

The *competent authority for the execution of youth imprisonment* in general is the Ministry of Justice (see question 2.3.13a). However, some peculiarities could be observed. Thus in England and Wales the Youth Justice Board, a non-departmental public body sponsored by the Home Office is responsible for organizing and supervising the detention in young offender institutions. In Estonia (as probably in some other countries, too) the Minister of Education and Research and the Minister of Social Affairs exercises supervision over the performance of duties in the areas of education, social welfare and health care in prisons. In Germany the responsibility for prison legislation was transferred from the national to the federal states level. The Ministry of Justice of each state ("*Land*") remained the body which organizes and supervises the prison system.

In Hungary reformatory schools operate under the direct management and supervision of the Ministry of Social Affairs and Labour. As to youth imprisonment the organization of penal institutions is headed and managed – by virtue of law – by the Minister of Justice and Law Enforcement who is responsible for the lawful operation of the organization of penal institutions.

In Sweden the National Board of Institutional Care is responsible for the enforcement of sanctions for juveniles sent to welfare institutions. The very few cases of prison sentences are under the competence of the Prison Service and Ministry of Justice.

Guiding general principles of the regime in general are *education* and *social rehabilitation* (see question 2.3.13b). A wide range of principles is listed by the Cypriote authorities: "*Protecting the public, reintegration, retribution, restoration, education, normalization, preventing negative effects of deprivation of liberty, preserving basic human rights of the defendant.*"

In most cases the priorities are not indicated explicitly, but it becomes clear that particularly the Scandinavian countries emphasize the principle of normalization besides the primary aims of education and re-socialisation. Special educational efforts can be seen in France where from 2007 on specific youth prisons ("*Etablissements Pénitentiaires pour Mineurs*", EPM) have been established, which are designed for a well-structured rehabilitative programme. The same can be said about the closed educational centres ("*Centres educatifs fermés*", CEF, and "*Centres educatifs renforcés*"), which dispose with an excellent staff-inmate ratio.

Germany has 28 youth prisons with about 7,000 places for 14-24 years old offenders (90% of them older than 18), which are designed according to the 16 laws of the federal states to promote effective rehabilitation and to prevent recidivism.

In Hungary reformatory schools as well as youth prisons are to provide educational guidance and to facilitate re-integration of juveniles into society. There might be not big differences concerning the guiding principles, but the length of stay in reformatory schools is 1-3 years, in youth prisons or departments for juveniles it can be shorter or longer (see table 5.4.3 above), which influences the organizational structure.

Norway emphasises the re-socialisation by as far as possible gradual transition from imprisonment to complete freedom.

The Spanish and French authorities besides the guiding principles named by most other respondents emphasize the multi-disciplinary approach of educational interventions.

Ukraine refers to a complex system of educational measures which aims at: "*1. Providing conditions of life of detained persons, consonant with human dignity and norms which are accepted in society; 2. Support and development of a juvenile´s self-esteem through minimization of the negative consequences of imprisonment and difference between life in prison and at liberty; 3. Support and strengthening of socially-useful connections with relatives and other positive relationships; 4. Providing improvement of educational level and receipt of professional skills, granting possibility to develop skills and addictions which will help them successfully to join society after their discharge.*" It is remarkable in this context that Ukrainian authorities are aware of the negative effects of imprisonment under the conditions their prisons traditionally had to work.

The principle of allocation in most countries is the placement as close as possible to the home or the place where the juvenile will be released to (see question 2.3.13c). In many countries, however, only a few institutions for juvenile offenders exist (in Austria only one) and therefore (particularly for girls)[147] this principle cannot always be followed. The new French EPM are located close to the most important industrial cities or agglomerated regions where the majority of the offenders will be residing.

One principle of allocation is to separate boys and girls. Only in Denmark this principle is not strictly followed. An interesting further aspect is the allocation according to language in Estonia. Apparently the Russian minority is not always placed in mixed units with the Estonian juveniles.

In Norway apart from the principle of allocating juveniles close to their homes section 3 of the Execution of Sentences Act stipulates that particular importance shall be attached to a child's right of access to his or her parents during the execution of a sanction.

Question 2.3.13d deals with *accommodation* (including legal minimum standards concerning the *number of juveniles in one room*). Austrian authorities reported that the only juvenile prison in Gerasdorf has 100 single rooms and 5 double rooms for juvenile inmates. In Belgium the placement of more than one juvenile per room is forbidden. The only closed institution at Grubbe has 50 beds and each single room has about 12-15 sqm. In traditional Eastern European penitentiary institutions juveniles are accommodated in larger dormitories with double-decker beds. Sometimes about 30[148] or even more than 50 beds (e.g. Russia) are installed in these dormitories.[149] In contrast, in Germany in all 16 new laws for the execution of youth prison sentences single accommodation during the night is obligatory if the juvenile requires so. These strict regulations were promoted by the German Federal Constitutional Court[150] and supported in general after a killing of one inmate by three co-inmates in a youth prison at the end of 2006. The same practice exists also in Denmark, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland.

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147 In many countries girls are accommodated together with adult female offenders (e.g. Latvia, Lithuania, see *Sakalauskas* 2006, 267 ff., 271), not always really separated from adults (see for an overview on women's imprisonment in Europe *Dünkel/Kestermann/Zolondek* 2005; *Zolondek* 2007).

148 In the Ukraine juvenile units dispose with dormitories of 10-30 beds.

149 Therefore it may be seen as a progress that in Latvia the dormitories for male juveniles are restricted to a maximum of 10 beds, and that girls are accommodated in rooms with 2-3 beds. In Lithuania in pre-trial detention the maximum number of juveniles in one room is 4, sentenced priusoners are accommodates

150 See *Bundesverfassungsgericht* Neue Juristische Wochenschrift 2006, 2093 ff. and *Dünkel/van Zyl Smit* 2007.

In Hungary 2-3 juveniles are accommodated in one room of reformatory schools and apparently more in juvenile prisons, where 3.5 sqm have to be provided per inmate. In Italy 9 sqm is the norm (see table 5.5 above), usually in single or double accommodation.

Regulations or requirements to prevent overcrowding (question 2.3.13e) are not always to identify. Austria has no such regulations, the German laws for the execution of youth prison sentences strictly forbid overcrowding, but the prison administration within the limits of constitutional right (with regard to the violation of human dignity)[151] can define the capacity of cells and thus deal with increased prisoners numbers. However, currently overcrowding is not a problem as the numbers of juvenile detainees are decreasing. Denmark has developed strategies to tackle the problem by emphasizing the "*possibilities of early release under sect. 40a of the Danish Criminal Code. Juvenile offenders with sentences of three months' imprisonment or less may apply for permission to serve the sentence under electronic surveillance. Every year an occupancy forecast is prepared – and in that light a capacity action plan.*" Finland (as Denmark from time to time, too) has created the possibility to delay the enforcement of prison sentences of up to 6 months for a period of maximum 8 months. Greece has introduced the most extensive legal regulations for "good-time" (i.e. the remission of sentences for working or good behaviour) and thus early release of working prisoners can contribute to solving the problem of overcrowding. But the general impression is that overcrowding in youth custody in most countries is not really an issue (England and Wales did not answer this question).

As to clothing (question 2.3.13f) three models exist: in some countries juveniles usually wear prison clothes (Austria, Estonia, Latvia [boys], Russia, Slovakia, and Ukraine), in other countries they usually wear their own clothes (Belgium, Cyprus, Czech Republic, Georgia, Greece, Italy, Latvia [girls], Lithuania, Netherlands, Norway, Spain, Sweden, Switzerland, and Turkey) and thirdly it depends on the institution: In Finland in open prisons juveniles wear their own clothes, in closed prisons they may wear own clothes. In Germany the respective laws give the prison governor the discretionary power to decide what would be appropriate in his institution). In Hungarian Reformatory Schools juveniles have the choice, whereas in juvenile prisons they wear uniforms. Portugal provides clothes of the institution that are as much as possible similar to the juveniles' own clothes.

In general it can be summarized that in the large majority of countries and almost in all Western European countries juvenile detainees are allowed to wear their own clothes (sometimes with the condition that they clean their clothes and keep them in good order).

Differentiation, classification and separation (boys and girls, specific offender and age groups) is an important issue of prison organization (question 2.3.13g). The most often criterion is sex. Apart from Denmark, France (EPM), the Netherlands (only in treatment centres) and Norway (some prisons, all halfway houses) all countries provide separate units for boys and girls. England and Wales, however does not separate according to sex in the Secure Children's Homes for 12-14 years old juveniles.

Second criterion is age, as in some countries the very young age groups are separated from older ones (e.g. Cyprus, Estonia). In some German youth prisons a differentiation is made for prisoners with special treatment requirements (similarly in Hungary and Sweden) or long-term prisoners.

Only exceptionally the seriousness of the offence or similar criteria (recidivists/first time offenders, violent/non-violent offenders) are criteria for separated allocation (Czech Republic, Georgia, Lithuania, Turkey, and Ukraine).

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[151] The German Constitutional Court has outlawed accommodating two prisoners in a 8 sqm room without separate sanitary equipment, see *Bundesverfassungsgericht* Europäische Grundrechtszeitschrift 2002, 196 and 200.

Youth prisons are organized around a variety of different educational and treatment programmes (question 2.3.13h). Typically the participation in schooling and vocational training is obligatory. The priority of schooling and vocational training over work – as recommended by Rule 78.1 of the ERJOSSM –is often laid down in a statute (e.g. Germany). Based on an individual plan juveniles generally have the right to education and rehabilitative programmes and meaningful leisure time activities as described by Rule 77 p. f of the ERJOSSM. To what extend these programmes are offered and effectively carried out is a question that cannot be answered by our questionnaire.

In all countries juvenile inmates are obliged to participate in schooling and vocational training (question 2.3.13i), often also to work (e.g. Austria, Denmark, Estonia, Germany, Georgia, Hungary, Lithuania, Netherlands, Slovakia, Spain, Sweden, Turkey, and Ukraine). On the other hand a further participation in psychological or other treatment programmes is not obligatory (e.g. Germany). However, in Latvia juveniles may have to undergo compulsory drug/alcohol addiction treatment. Also the Czech authorities emphasize mandatory individual treatment programs.

An obligation to work (question 2.3.13j) is established in most countries, but not in Belgium, Greece, Latvia, Sweden and Ukraine.

Usually there is no obligatory drug/alcohol or other treatment (question 2.3.13k) and most countries explicitly emphasize the voluntariness of participating in such programmes. Nevertheless in the Czech Republic, Latvia, Slovakia and Ukraine the authorities responded that there would be also compulsory treatment for drug or alcohol addicts in juvenile prisons.

Contact of juveniles with the outside world (visits, family long-term visits, leaves, etc., see question 2.3.13l) are of major importance (see Rule 83 of the ERJOSSM). Therefore all countries provide regular visits (to a larger extent than in prisons for adults), regular periods of leave, either escorted or alone, etc. Rule 86.1 of the ERJOSSM state that this should be "part of the normal regime" and not a privilege for good behaviour. The answers of the questionnaire do not allow judging how far the Rules of the EJRJOSSM are applied effectively. But it is clear that most countries are sensitized and ready to extend their practice. (Unsupervised) long-term visits (allowed for juveniles who have no possibilities for prison leaves, see Rule 86.2 ERJOSSM) are mentioned only by Estonia, Lithuania, Russia, Spain and Ukraine.

The involvement of parents in the execution and preparation for release (question 2.3.13m) is not very much developed yet. The answer of Denmark represents probably the common sense with regard to that issue: "*Parents are not involved in the enforcement of the sentence, but will be contacted in connection with leave and release on parole, if the juvenile delinquent is to live with his parents*." So in general one can state that "*there is no obligation to that but parents of young offenders are often somehow involved in the execution and preparation for release if they and the prisoner wish for that*." (Finland). Any further involvement also in specific activities during the execution in the institution apparently is an exception.

The *involvement of victims (mediation, reparation schemes, restorative elements)* (question 2.3.13n) is not yet an important issue in the European youth prison systems. Most countries give a negative answer to this question. However, in Belgium a recent directive emphasizes the idea of restorative justice also in prisons or juvenile institutions. In Switzerland some experiences also exist in involving victims and in promoting presenting apologies by the offender or even a meeting between the victim and the offender if both agree and it might be helpful to take responsibility on the one hand and to cope with the trauma of the victim.

In France and Germany mediation and reparation are given an important role in the system of disciplinary sanctions. Most German juvenile penitentiary laws give priority since 2008 to such informal conflict resolution.

Procedures for ending the assignment to a juvenile prison (question 2.3.13o) are usually starting in the institution with an assessment and prognostic evaluation of the juvenile's progress. But it is *always* the *(juvenile or another) court* who – with a few exceptions – decides on release. In Denmark the Directorate of the Prison and Probation Service and in Norway the Correctional Services take the decision upon recommendation from the prison.

Question 2.3.13p deals with *measures for preparation for release and the involvement of services outside* (for ex. probation service, private welfare agencies etc.). In Denmark, England/Wales, Finland, France, Germany (reinforced by the juvenile penitentiary laws of 2008), Hungary, Italy (with indicated problems in implementing the legal provisions for co-operation), Latvia, Lithuania, Norway, Portugal, Scotland, Slovakia, Spain, Sweden, Switzerland, and Ukraine the probation and aftercare services are systematically involved, sometimes by requesting involvement of aftercare services within a certain period (e.g. 6 months) before an (early) release. The co-operation is often laid down in the sentence plan of the institution which clarifies the responsibilities of the probation or aftercare service in every individual case. The great number of countries which confirmed the commitment of probation and aftercare services or the local social services makes clear that the importance of continuous care is understood and addressed. The ERJOSSM contain rules recommending measures to be taken in this respect (see Rules 15 and 51).

The majority of countries replied to the question 2.3.13q on *procedures for transferring juveniles to welfare or specific treatment institutions (drug treatment etc.)* that this is possible in one or the other way if, e.g. the juvenile has serious drug or alcohol problems (see e.g. Finland). Only Latvia and Portugal denied such a possibility.

Measures that are used to maintain good order (security measures, disciplinary measures, use of force etc.) are common everywhere (question 2.3.13r). However, the systems vary considerably and in most countries solitary confinement for disciplinary or security reasons is possible for longer periods (punishment in a disciplinary cell: Denmark: maximum 4 weeks; Estonia: 45 days; Germany and Finland: two weeks; Georgia: up to 6 months for at least 16 years old juveniles; Latvia and Lithuania: up to 10 days) than according to the ERJOSSM would be acceptable (see Rules 91.4 and 95.4 and the respective commentary). It is interesting to see that only few countries do not provide for any disciplinary solitary confinement (Norway, Sweden). In Sweden also solitary confinement for security reasons is widely banished (the maximum period is 24 hours).

Juveniles usually have the possibility of *access to legal aid* (question 2.3.13s). Visits of defence councils are unsupervised. Nevertheless problems are sometimes connected to free legal aid as the juveniles most often do not have the necessary financial means. The effectiveness of different national regulations cannot be judged by the often rather general answers to our questionnaire.

Complaints procedures (to the responsible head of the institution and to appeal to an independent court or body) are provided everywhere, but again their effectiveness and acceptance by the juveniles as well as by the institutions cannot be judged from the information given in the replies to the questions (see questions 2.3.13t and 2.3.13u).

There are also regular *inspections by the governments and independent bodies* (see question 2.3.13v) as required by Rules 20 and 125 of the ERJOSSM. Some countries mentioned the European Committee for the Prevention of Torture (CPT), others ombudsmen or special supervisory councils (e.g. Netherlands, Norway, Sweden).

The *access to an ombudsman* (see question 2.3.13w) – as indicated before – is provided in many countries such as Finland, Georgia, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Norway, and Sweden.

The *management, training and selection of staff* (question 2.3.13x) is difficult to evaluate as most countries note that there are some methods of quality management in force, but the content and intensiveness of training programmes for staff are not always communicated. So in Cyprus staff receive a one month training, in England and Wales it is not much longer, whereas in Germany a two years intensive training is provided.

5.4.15 The answers to question 2.3.14 on *how the legal framework responds to certain categories of offenders* were not always related to the execution of youth imprisonment and apparently misunderstood. Only a few countries reported on specific offence related arrangements of youth imprisonment. Such specific treatment and sometimes separation concerned serious (recidivist) offenders (e.g. Georgia: to be separated from first time offenders) or drug offenders (Greece). But most countries emphasized that the category of offenders – apart from separating males and females, convicted and remand juveniles, and sometimes differentiating according to age groups as mentioned under 5.3.13 above – does not play an important role. The legal framework in about all countries stresses the importance of organising treatment and education with regard to the educational needs in every individual case (see e.g. Hungary, Italy, Norway, or Portugal). This is the base for sentencing plans as they are usually provided in all countries and required by Rules 79.1-4 of the ERJOSSM. In this context also the offence may be considered or the way of committing an offence (e.g. as a member of a juvenile gang (see the answer of Spain).

5.4.16 The final question (2.3.16) to this chapter was: "*Please describe what characteristics of juvenile prisons (dealt with under 2.3.13) differ from prisons for adults. (What are the peculiarities of juvenile compared to adult prisons, e.g. the stronger orientation towards education, vocational training, prison regimes etc.?).* As expected most countries answered similarly by emphasizing the more educational approach of youth prisons. The answer from the Czech Republic may be typical: "*In contrast to adult prisons more efforts to prevent negative effects of imprisonment, more intensive individual treatment. Treatment focused on development of intellectual, emotional and social maturity. Intensive training of cognitive skills.*" Denmark noted that there are no juvenile prisons, but that the prison in Ringe is dedicated for young offenders aged 15-28. In the same institution also a special unit is provided for offenders in need of special social and educational care, usually those who are under 18.

Whereas all youth prisons or similar institutions dispose with different and more extensive treatment and educational options compared to prisons for adults, some also provide better living conditions and nutrition ratios (e.g. Georgia, Lithuania) and less restrictive regimes[152] (particularly in Eastern European countries which still dispose with different prison types where prisoners are allocated depending on the type of crime committed and not their individual characteristics). Juvenile prisons do not have different levels of the regime and in case they do, they do not have the most severe regime category (e.g. Latvia, Lithuania, and Russia). This may mean that juvenile institutions provide also more minimum space per inmate (e.g. Slovakia, Ukraine), but also more visits and other contacts with the outside world (e.g. Lithuania, Ukraine). Particular emphasis is given to contacts with parents which does not play a specific role in prisons for adults. Sometimes it was stated that in juvenile prisons in contrast to adult prisons no overcrowding would hamper the educational work (Hungary). The educational concepts often also include positive incentives encouraging juveniles to

[152] One particular issue in this context is that solitary confinement as a disciplinary measure is allowed only for shorter periods compared to prisons for adults, e.g. in Germany two instead of 4 weeks.

participate in schooling and vocational training and other activities which promote their re-integration (see e.g. Germany, Lithuania).[153]

Considerable differences can also be seen with regard to staffing. In some juvenile institutions such as in Belgium or Portugal no wardens of the traditional style are working. In the more prison-like settings (most other countries) there is a higher staff/inmates ratio in general and a higher proportion of staff belonging to the educational and therapeutic professions (teachers, social workers, psychologists).[154]

5.4.17 To *summarize* the chapter on juvenile prisons or similar institutions one can clearly see the efforts made to diminish negative effects of imprisonment and to promote a pro-social climate in order to re-integrate juvenile offenders into society. More and more the need for continuous through care is seen and several models of integrating the probation and aftercare services have been developed (e.g. England/Wales, France, Germany, Scandinavian countries). The transfer to more open settings in the transitional part from closed institutions to release and aftercare is usually also promoted. Thus it becomes clear that the ERJOSSM express a European consensus on "*good practices*" which have been developed in many countries and institutions for juveniles deprived of their liberty.

5.5 Juvenile mental health institutions/departments

5.5.1 The following part deals with the placement of juvenile offenders in mental health institutions.[155] The ERJOSSM contain only three special rules for juveniles in mental health institutions (Rules 117-119). All other aspects are covered by the general rules for deprivation of liberty (Rules 49-107). Rule 117 emphasizes that "*juvenile offenders in mental health institutions shall receive the same general treatment as other juveniles in such institutions and the same regime activities as other juveniles deprived of their liberty*." We could not find indications that this aspect is not followed or at least generally accepted by the answering member states. This may be the result of the fact that a strict separation of juvenile offenders and other juveniles is often not possible and also not desirable.

The same is true for Rule 118 that stipulates that "*treatment for mental health problems in such institutions shall be determined on medical grounds only, shall follow the recognized and accredited national standards prescribed for mental health institutions and shall be governed by the principles contained in the relevant international instruments*" and Rule 119 ("*In mental health institutions safety and security standards for juvenile offenders shall be determined primarily on medical grounds*"). The countries that answered the questionnaire seem to be sensible for both aspects as can be seen from the following parts of chapter 5.5.

In general we can summarize that the information given by the member states is less comprehensive than the information on other custodial sanctions. This may be due to the fact that mental health institutions are run by different authorities and juvenile offenders make only for a small part of mental health patients in general and of mentally ill offenders in particular. In some countries such as Germany even legislation varies between different federal states and therefore it is difficult to identify the specific situation concerning the execution of mental health orders for juvenile offenders.[156] There are almost nowhere

[153] The Lithuanian authorities noted:"*More types of incentives are projected for good behaviour, diligent work and learning of juvenile inmates*."

[154] In Turkey a peculiarity of staffing is the absence of armed gendarmerie, which is typical for adult prisons.

[155] Part 2.4 of the questionnaire.

[156] In Germany the 16 individual Federal states (*Länder*) are competent for the issue of juvenile offenders in mental health institutions. Each *Land* has a law permitting the placement of mentally ill persons who present a risk to public security and order because they pose a considerable danger to others or

independent separate juvenile mental health institutions. In most cases juvenile offenders with mental disorders are held in mental health departments of larger general mental health institutions for adult offenders, not always strictly separated in departments for juveniles. Therefore it is difficult to identify the number of juvenile offenders placed in mental health institutions for offenders or – which also occurs – in general mental health hospitals of the health care system (see chapter 5.1). The statistical data of the Council of Europe given by SPACE only indicate the total numbers of mentally ill offenders held in psychiatric institutions and do not differentiate according to age groups.[157]

5.5.2 As to the *relevant legislation* (question 2.4.1) only 18 out of 33 countries provided information, and only 5 countries (Belgium, Estonia, Finland, Germany and Sweden) answered that they dispose of English versions of the relevant legislation[158] (in most cases, however, of the Criminal Codes or Prison Acts, not the specific legislation for the execution of mental health orders).[159]

5.5.3 Nevertheless the answers indicate that the *grounds for placing* juvenile offenders in a mental hospital are very similar and such deprivation of liberty is used only as a last resort. It is used particularly in the stage of investigation, when there are indications for mental illness that might be relevant for the question of responsibility under criminal law. Criminal law systems that are based on the double track system of penalties for criminally responsible offenders and penal measures for rehabilitating the offender and protecting the public dispose on such sanctions typically within their criminal codes (e. g. Austria, Germany). The implementation and execution of such measures may be regulated in mental health care legislation. Grounds for a placement are typically mental health needs, crisis intervention and (also for diagnostic purposes) the gravity of a criminal offence in connection with (serious) mental health disorders.[160] The placement of juvenile offenders is not always based on compulsory orders but also on the consent of the juvenile and his parents or legal guardians, particularly in the area of child welfare laws or civil law family legislation.[161]

In case of a court referral order it is in most cases the *criminal trial court* that places a juvenile offender in a mental health institution. But there are different models in Scandinavia,

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themselves (http://www.alzheimer-gesellschaft-bonn.de/recht/psychkg.html). Eight states assisted in answering the Council of Europe questionnaire (questions 1-1.3). The state of Bavaria furnished the answers to the following questions 2.4-2.4.15.

157 See *Aebi/DelGrande* 2007. 21. Table 1.2 gives numbers only for 16 out of 49 countries or regions.

158 Latvia, Norway and Slovakia answered that they don't dispose of English translations of the relevant legislation; Austria has only a German version that can be found under www.ris.bka.gv.

159 These countries indicated the relevant Internet-sites as follows: Belgium: http://www.juridat.be/cgi_loi/wetgeving.pl; Estonia: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=ps%FChhiaatrilise+abi+seadus&nups.x=15&nups.y=11; Finland (Mental Jealth Act): http://www.finlex.fi/en/laki/kaannokset/1990/en19901116?search%5Btype%5D=pika&search%5Bpika%5D=mental%20health%20; Germany: http://bundesrecht.juris.de; Sweden (Criminal Code): http://www.sweden.gov.se/sb/d/2707.

160 In Finland a minor can be legally required to receive treatment in a psychiatric hospital against his/her will, if a) the person needs treatment for a serious mental disorder which, if left untreated, would deteriorate or severely endanger his/her health or safety or the safety of others, and if all other mental health services are inappropriate. (Mental Health Act, section 8), b) a mental examination of a suspect is required (Mental Health Act, sections 15 and 16) or c) an assessment for psychiatric hospital treatment and/or a subsequent treatment is needed for a person who has not been sentenced on grounds of his/her insanity (Mental Health Act, sections 21 and 22).

161 Belgium reported an interesting pilot project within the Public Health Service which established special units for juveniles with an indication of mental health disorders. Staff is composed interdisciplinary, the placement by a judicial order, but welfare order aims at providing the necessary therapeutic and treatment arrangements. The measure can last only 6 months and only be once renewed for another up to 6 months.

where for example in Finland the referral is prepared by several medical expertises and decided by an *administrative court* according to the Mental Health Act (sect. 9-11).

As mental health orders for juvenile offenders typically are of an indeterminate length, the question of whom to *decide on release* is crucial. In Austria a special branch of the court (3 judges) is responsible for the release decision (the same is true for Germany), in Sweden an administrative court gets involved and in Finland the National Authority for Medico-Legal Affairs. In Norway the mental health professional at the institution has the competence to order release of a transferred person. In addition the mental health professional can make a request to the court to transfer the person from compulsory mental health care to a prison service facility. In general one can state that – as it was indicated by the Ukrainian respondents – the renewal, changing and the release from compulsory mental health treatment is ordered by a court on the base of the recommendation or expertise of medical staff, sometimes the doctors involved in the treatment, but sometimes – as required in Germany – also from external psychiatric experts.

5.5.4 *Privatisation* of mental health services until now probably is a rare phenomenon in some countries of the "Western world". But all 9 countries answering the question emphasised that *only public services* are dealing with juvenile mentally ill offenders.[162]

5.5.5 As to the minimum space for one juvenile patient, only Estonia and Latvia indicated that there exist some legal requirements. A single patient room must dispose with at least 8 sqm. This is remarkable insofar as it is roughly the double of the size that must be provided for juvenile offenders in prisons in these countries.

5.5.6 The *daily net costs* (question 2.4.9) have been reported only exceptionally (by 5 out of 33 questionnaires). In Austria the costs were 537 € per day, in Latvia only 22 € and in Estonia 38 €. Even when considering the different level of income and costs for basic needs, one can presume that the level and quality of services should be different. Germany reported daily net costs of 267.60 €[163] and Sweden the very remarkable range of 400-1,200 €. Even when considering the different levels of income and living costs it seems that the situation in Estonia and Latvia is much worse than in Western European countries.

5.5.7 The *age limits* for an assignment of a juvenile offender to a psychiatric institution are the same as for criminal sanctions in general (see chapter 3). Usually there is no fixed *minimum* or *maximum* period as the measures applied against mentally ill juvenile offenders are of an *indeterminate nature*. In Estonia there is, however, a fixed minimum of 6 months for a placement in a psychiatric institution.

But in general it has to be underlined that the principle of proportionality also applies to imposing and implementing a placement in a psychiatric institution. So, for example, in Austria such a placement is only possible if the crime committed would be punishable with more than one year of imprisonment. Forced drug and alcohol treatment in an institution of the health care system can only last for a maximum of two years in Germany. In many countries an obligatory review (*ex officio*) is necessary if the treatment is to be continued (in Sweden every 6 months, in Austria and Germany after one year, in Greece every three years).

Special regulations exist in some countries for those offenders who are sent to psychiatric institutions for observation and diagnostic purposes. In Finland latest after 4 days an expertise must be given in order to extent the stay for further examination or treatment.

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162 Only within the scope of the above mentioned Belgian pilot projects some private hospitals may be involved.

163 The questionnaire does not give any reference, but as in Sweden there is a wide range of institutions and in many cases the daily costs will be higher than indicated in the questionnaire.

Involuntary treatment shall not last longer than 3 months. A further extension of up to 6 months needs the approval of the Administrative Court and any longer compulsory treatment needs a decision to be taken by the National Authority for Medico-legal Affairs.

5.5.8 It is not the seriousness of the offence, but the seriousness of mental illness that determines the placement in a psychiatric institution (see question 2.4.12).[164] Particularly the Scandinavian countries emphasize this aspect, but also Latvia, Austria and Germany. This seems to be self-evident and a reason for many countries not to answer this question. On the other hand it is remarkable that no country stressed the principle of proportionality in this context although it seems to be widely recognised that a placement in a psychiatric institution must also be seen under the principle of proportionality and therefore somehow limited in time.

5.5.9 The legal and administrative framework (question 2.4.13) shows apparently quite a lot of variations. One general structural framework condition is that the responsibility for the organization and living conditions in psychiatric institutions for offenders is with the Ministries of Social Affairs and/or Health Care.[165] Therefore a different approach compared to the Ministry of Justice responsible for prisons can be observed. It is much more treatment oriented and staff in psychiatric institutions is primarily medical staff.

In question 2.4.13b) we asked for the "*guiding general principles of the regime (for example, therapy, reintegration, retribution, restoration, education, normalisation, preventing negative effects of deprivation of liberty, preserving basic human rights of the defendant).*" The answer in the Finnish questionnaire based on the Finnish Mental Health Act and other administrative legislation may best explain the key principles of organizing the placement in a psychiatric institution which more or less are probably the same in most countries:

- "*respect for human dignity and human rights (e.g. right of self-determination);*
- *respect for the rights of the child, the priority of the child's best interest;*
- *promotion of psychiatric health and development, well-being and the ability to function;*
- *prevention and treatment of psychiatric illnesses and disorders;*
- *medical, social and professional rehabilitation; and*
- *the prioritisation of non-institutional care.*"[166]

As to principles of *allocation* (question 2.4.13c) Finland reported that "*institutions for care and treatment are situated almost without exception (just like other hospitals and health care facilities) in population centres, or in their close vicinity, so that patients can be sent in the first instance to a hospital of his/her hometown or area of residence.*" The principle of being allocated to an institution close to homes or places of social rehabilitation seems to be widely recognised and probably is an usual practice in many countries because units for juvenile offenders usually are situated within a greater complex of psychiatric care.

The question regarding *accommodation* (including legal minimum standards concerning the number of juveniles in one room) was answered only by 6 countries (question 2.4.13d). Finland and Sweden reported that there are no provisions in the legislation.

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164 The gravity of offences may be of importance amongst other factors indicating the necessity of compulsory psychiatric treatment. So, for example, Art. 94 of the Ukrainian Criminal Code stipulates that *compulsory medical measures may be imposed "depending on the seriousness of a mental condition, the gravity of an action committed, and the degree to which the offender is dangerous to himself or others:"*

165 The Estonian report reveals that there is a joint responsibility of the Ministry of Justice and of Social Affairs. The Latvian authorities reported that the Ministry of Education is responsible for education in psychiatric departments for juvenile offenders which are run by the Ministry of Health.

166 Very similar statements are given by the Swedish questionnaire with regards to the Swedish Health and Medical Services Act.

A very high standard is indicated for Belgium, where juvenile offenders in psychiatric institutions are accommodated in separate living units of 8 single rooms. These units dispose with rooms for therapeutic treatment, recreational facilities (for example for group activities) and exceptionally even guest rooms, if the presence of a family member is considered to be beneficial.

In Estonia – as mentioned above (5.5.5) – the general hospital room provides 7 sqm per person, single rooms 8 sqm and' special rooms for surveillance 9 sqm.

If there are shared sleeping rooms provided, the maximum will be 4 beds. There are strict rules laid down by law for the *minimum space* for juveniles in psychiatric institutions: A single room must provide at least 8 sqm, a shared room for juveniles above ten years 6 sqm, for those below 10 years of age 5 sqm and for those below three years 3 sqm per individual.[167]

The standards in the German federal state of Bavaria are two-bed rooms with toilet/shower in each room, small living units with standard occupancy of 14 patients per unit as near as possible to normal living conditions at home.

In Greece all patients reside in rooms with 2-4 beds. There is also a room for social activities and a special room for visits.

Psychiatric units experienced increasing numbers of inmates during the last decade in several countries. Therefore the *problem of overcrowding* should be well known. It was amazing to see that only Germany answered the question of how the system deals with such a situation and what measures can be taken to prevent overcrowding. The federal state of Bavaria reported that there exists no obligation to accept patients and that acceptance must be contingent with the accommodation capacity.[168] Finland and Sweden report that there are no regulations for that.

As to the question if juveniles are allowed to *wear* their *own clothes* (2.4.13f), 7 countries answered, 5 of them positively that juveniles are allowed to wear their own clothes (Belgium, Finland, Germany, Greece and Latvia), whereas Estonia and Sweden reported that there are no legislative regulations.

Differentiation, *classification* and *separation* (boys and girls, young mothers departments, specific offender and age groups, see question 2.4.13g) is provided in some countries. It is probably a problem according to the small numbers of juveniles in psychiatric institutions. In Finland there is a differentiation in accommodating children below 7 from those of school age. The living units are mixed (boys and girls), sometimes special units are created for special treatment (e.g. a unit for patients with eating disorders, a unit for families), or, to some extent, on the basis of the severity of a disease (e.g. units for children and juveniles whose condition is very difficult to treat, 2 of those).

In Germany, too, boys and girls live in the same living unit, but sleep in separate rooms at night. In Latvia 14-15 years old juveniles are accommodated in psychiatric institutions for

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167 Furthermore there are clear regulations for the architecture of sanitary facilities in Belgium. There must be one washbasic with running water for two patients, one bathroom (with shower) for 10 patients and one toilet for 5 patients. It is even provided that patients should have a garden, terraces and/or yards for walking outside at their disposal.

168 An additional question then would be where are accommodated mentally ill offenders in case of overcrowding. In this regard a 2007 amendment of the Criminal Code in Germany has to be cited. Juvenile and adult offenders that have also received a (youth) prison sentence can be accommodated in prisons instead of immediately serving the mental hospital measure (primarily due to treatment considerations, but also reflecting the capacity of the psychiatric institution), see § 67 Criminal Code.

children (where boys and girls are mixed), those over 15 in adult institutions, where they are only accommodated mixed when the juveniles are specially guarded. Otherwise they are separated by gender.

Educational/rehabilitative programmes (see question 2.4.13h) are in general prescribed by law: school, work, psychological and other treatment, meaningful leisure time activities etc. But only a few countries reported how these programmes are structured and who is responsible for delivering adequate programmes.

Belgium reports about an interesting network of inner-institutional programmes and activities and of services organised from outside by the communities and different private and state organisations. The programmes are organised as temporary activities as according to the law they can last only 6 months with a possibility to prolong them only once for additional 6 months.

In Finland the general approach includes various therapies, supervised recreational activities, and if possible, practical training, etc. These therapies are not specified in the legislation. School attendance by children of compulsory school age (usually between 7 and 17) is stipulated in the Basic Education Act and, depending on their condition and ability, these children and juveniles attend school in hospital. In most cases, they attend the hospital school, or if necessary, private tutors are arranged for them.

In Germany multi-professional teams prepare patients for the Lower Secondary School-leaving Certificate or the Intermediate Secondary School-leaving Certificate. German language courses, vocational training measures such as the acceptance of apprenticeships in the context of home leave and meaningful leisure time activities are offered.

Similarly in Latvia an integrated approach of therapeutic, educational and vocational programmes is provided.

When asking for the *obligation*, if any, on juveniles to *participate in educational programmes*, only Germany reported "a limited obligation to take German lessons or civics. However, this does not mean that juvenile offenders are not obliged to participate in schooling programmes: most of them are in the compulsory school age and therefore obliged to follow the normal (in the general hospital) or specially organised school programme.

In general – with the exception of Latvia[169] – there is *no obligation to work*. The Bavarian government in Germany, however, states that work or occupational therapy is an obligatory part of the therapy programme.[170]

The question on coercive drug, alcohol or other treatment (2.4.13k) again was answered only by 8 countries. The responses were not always explicit, but those countries that provide special measures for coercive alcohol and/or drug treatment such as Germany and Sweden evidently provide such (possibly involuntary) treatment.[171] The *Finnish* response was the most comprehensive one and shows a sensible and exemplary consideration of human rights aspects: "*If a child under the age of 18 severely endangers his/her own health or development by misuse of substances, the Child Welfare Act (section 16) stipulates that, where necessary, the child shall be taken into custody and substitute care shall be provided for him/her. During this period in institutional care, a child may be subject to the restrictions stipulated under the Child Welfare Act, but only to the extent that is required to fulfil the purpose of the custody, and to safeguard the child's or any other person's health or safety,*

[169] "Ignorance of process may lead to prolongation of detention (it means that the process of treatment was not successful)."

[170] It is not clear if this is valid for the whole of Germany.

[171] Only Latvia explicitly denied such coercive treatment possibilities.

as stipulated in the act. The procedures shall be implemented with utmost care and safety and the child's human dignity shall be respected (section 30a)" It would be desirable that legislation in other countries follows this approach.

Contacts of juveniles *with the outside world* (visits, family long-term visits, leaves, etc., see question 2.4.13l) in Belgium are only possible with the permission of the juvenile judge. In Germany from "*the very beginning of the therapy, juveniles have the possibility of receiving visitors on a regular basis, later on, excursions with staff members are provided, then home leave for hours at a time during the day at first and, finally, also on weekends. In addition there is also the possibility of 'home leave' and to work outside of the facility*."

In Greece "*all patients are allowed to have visits three times a week, subject to doctor's approval, depending to their health condition*." These statements from Germany and Greece are remarkable insofar as the possibilities of contacts with the outside world are much more developed than in custodial settings of youth prisons etc., although the psychiatric patients usually are deemed to be a "danger" for the public (or themselves).

Also in Sweden according to the provisions in the Forensic Mental Care Act, the patients may get a permission to leave the perimeter of the medical institution for a certain time. Other forms of contact are not regulated by this law.

In Latvia only visits, particularly family (legal guardian) visits are provided, leaves are not allowed.

As regards the *involvement of parents* in the execution and preparation for release (question 2.4.13m) Belgium provides for parents to ask for a transfer of the juvenile to the family if the kind of mental illness and the possibilities of treatment allow for such a family care. The emphasis given to this aspect varies considerably, for example in two neighbouring countries: Estonia and Finland. Whereas in Finland "*a child's contact with his/her parents or guardians, and co-operation with them during a child's psychiatric care, is of utmost importance*",[172] Estonian authorities show a more reluctant way of dealing with that issue by stating that "*if needed, then it is possible to involve parents.*" Sweden stated that according to the Forensic Mental Care Act relatives shall be involved with the exception that it is deemed improper.[173]

The *involvement of victims* (mediation, reparation schemes, and restorative elements) is only exceptionally provided (Germany) and restorative measures probably make more sense outside institutions such as psychiatric hospitals (see the response of Finland). Nevertheless Belgium has introduced a new Juvenile Law that emphasises mediation and restorative justice more than before and even in custodial and detention settings (see *Christiaens/Durmontier/Nuytiens* 2009).

Procedures for *ending the placement in a psychiatric hospital* can be initiated by the juvenile himself or any other interested person (e.g. parents). Usually it will be the medical director who gives a recommendation for release. Then the public prosecutor will be involved and possibly formal (and independent) psychiatric assessments will be needed. In the same way

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172 Similarly the response from Germany: "*Early establishment of contact with parents and relatives and discussions with relatives is an inherent part of the therapy programme. In the course of treatment, home leave together with relatives and weekend leave to visit relatives also become possible. Preparation for release is carried out with the involvement of the social setting into which the patient is to be released*." Also Latvian authorities emphasised the "*important role*" of integrating parents, "*especially in period of preparation for release*."

173 This is in line with the ERJOSSM which express this reservation in Basic Principle No. 14 (…"*except if it is not in the best interests of the juvenile*")

as the decision of placing a juvenile in the institution it will also be a judge who decides on release.

In Finland the decision to terminate treatment is made primarily by the doctor in charge of the child's treatment. But there is also access to administrative judicial authorities if release is being refused (similar procedures can be seen in Sweden).

As a measure for preparation of release usually services outside (for example, the probation service, private welfare agencies etc.) are involved (see question 2.4.13p), and if so, they sometimes are even obliged to get involved.

Belgium refers to a model project (mentioned also above) where the psychiatric institutions and (private) after-care services of the communities work closely together in order to ease the process of social reintegration.

Again the Finnish response demonstrates a strategy of good practice: "*In practice, any necessary follow-up treatment of and other support measures for a minor, after hospital treatment, are always carefully planned, bearing in mind the individual needs of the child, and in co-operation with all the parties involved, including basic health care authorities, school and child welfare authorities. In addition, it is possible to arrange for the child to make follow-up visits to the outpatients' clinic of the hospital where he/she was treated.*"

However some of the few respondents demonstrate the problems the national systems still experience. So Greece stated that "no structured procedure" is provided and Latvia notes that the state probation service deals only with persons in prisons. There are apparently structural problems of lacking after-care services particularly in the Central and Eastern, but also Southern European countries and probably also elsewhere. To the contrary, the Scandinavian countries seem to have developed much more comprehensive ways of transition from psychiatric detainment to liberty. Sweden, for example, states: "*The preparation for discharge generally includes numerous permissions to leave the perimeter of the medical institution for a certain time, according to the provisions in the Forensic Mental Care Act. The cooperation with social agencies is an integral part of this process.*"

As to procedures for *transferring juveniles to other treatment institutions* (drug treatment etc., see question 2.4.13q) Belgium reported that with the decision of the director of the medical institution a transfer to another institution that provides more appropriate treatment is possible, if the director of this institution agrees. In addition the juvenile and his representatives must be informed and can object to that proposal within 8 days by a written complaint. Furthermore the juvenile judge and the prosecutor have to be informed.

The Finnish response emphasises that substance addiction can be treated in juvenile psychiatric institutions as part of the patient's general psychiatric treatment. "*If after the psychiatric hospital treatment a juvenile needs follow-up treatment in an institution specialising in substance abuse, the transfer shall be planned and implemented (just as with any other follow-up treatments and procedures) according to a treatment plan and in co-operation with the young person, his/her parents, and those in charge of the follow-up treatment.*"

Most of the few other countries that replied to that question indicate some problems as there is no structured or regulated procedure for such further treatment.

Measures that are used to maintain good order (security measures, disciplinary measures, use of force etc., see question 2.4.13r) are provided in every jurisdiction. It is astonishing that the few replies to this question are rather poor and vague. Only the Finnish response merits to be cited: "*Section 4a of the Mental Health Act stipulates that the right of self-determination and other basic rights of a patient subject to involuntary psychiatric examinations or*

treatment, may be restricted only to the extent that is required by the treatment of his/her illness, his/her safety, or the safety of any other person, or any other interest as stipulated in the act. Procedures shall observe the patient's safety and respect his/her human dignity. The legislation has detailed regulations on how these procedures should be implemented, recorded and monitored. Such procedures are: restriction of the right of movement and/or contact; isolation; detention; involuntary medication; involuntary treatment of physical illness; binding; inspection and confiscation of the patient's personal things, and body search."[174]

All 5 countries that replied to the question on access of juveniles to legal aid were positive. In every country such access is guaranteed, however, a more in depth research could explore how effective such procedures are in practice.

Somehow unsatisfactory were also the answers concerning complaints procedures (question 2.4.13t) as it is not always clear to what extent the decisions of the psychiatric institution are subject to formal judicial complaints. Therefore it was a wise decision to emphasise these issues in Part IV and V of the ERJOSSM on legal advice and complaints procedures (Rules 120-124).

The more concrete question on "*access, if any, of juveniles to a court and/or other body to review administrative decisions relating to disciplinary measures, the regime to which they are subject or other aspects of the implementation of detention*" (question 2.4.13u) remained to a large extent unanswered. In some countries it seems not to be possible, but in general there are some procedures that guarantee at least some protection, even if it is not always a formal court but some institutions like ombudsmen or supervisory bodies of the mental health system (e.g. Greece, Sweden).

Regular *inspections* by *government and independent bodies* are more and more becoming standard in Europe. The few replies to our questionnaire indicate that both state and independent inspections take place quite regularly. In Estonia and Finland furthermore an ombudsperson is involved. In Greece a Committee for the Protection of the Rights of Persons with Mental Disorders and the Ombudsman are responsible, in Latvia the Latvian State Human Rights Bureau, Treatment Quality Control Inspection (MADEKKI) and an Ombudsman (created in 2007), in Sweden the National Board of Health and Welfare (and the general ombudsman).

The management, training and selection of staff differ apparently largely. Whereas in Estonia and Germany much emphasis is put on selection, training and quality management, in Greece (and similarly in Latvia) there is no obligatory training and no special selection.

5.5.10 The *legal framework* only exceptionally responds to *certain categories of offenders*. This is not because there is no clear and differentiated treatment orientation, but because of the small numbers of juvenile offenders in psychiatric institutions that do not allow for very strict classification and differentiation systems. To some extend on the level of the Criminal Code there is to be found the differentiation when alcohol and drug addicts are provided for special treatment measures. Within psychiatric institutions it is not so much the differentiation to crime related categories of offenders but rather to categories of psychiatric indications (reference to a medically identified illness/disorder).

5.5.11 The last question in this part was to identify *aspects of youth mental health institutions that differ from institutions for adults* (question 2.4.16). In the majority of countries presumably there are *no differences* (probably as juveniles are in the same institution, not

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[174] Similarly the Swedish response: Measures to maintain good order are "*regulated in the Forensic Mental Care Act. There is a general demand on good security at the institutions and more specified demands on staff, premises and equipment to obtain good security. The regulation permits the measures needed to prevent patients from absconding and to maintain order at the institution*."

always strictly separated etc.). Only a few countries indicated some differences. Again the Finnish and German comments deserve special attention. The Finnish answers confirmed some special necessities when considering juvenile offenders in psychiatric institutions: "*Anyone providing psychiatric care to minors is required to have adequate professional qualifications. The examination and treatment of children and juveniles (as distinct from the treatment of adults) require knowledge of the special developmental characteristics of children and juveniles. It is also more important with children than with adults, to work inclusively with the families and other parties in the child's life (e.g. the school and school authorities). In child and juvenile units, there is usually proportionately more staff than in the adult units. ... The Public Health Act (Section 41) and the Specialised Medical Care Act (section 10) oblige the proper authorities to provide training to keep health care personnel up to date.*"

Similarly the German comment points out the differences: "*The differences lie, above all, in the following areas: additional educational work, schooling, more intensive training work, greater role-model function of therapists, other legal competences and jurisdictions such as the jurisdiction of the juvenile judge, greater significance for example of encouraging young offenders to pursue meaningful leisure time activities.*" Another aspect is given by the Swedish authorities: "*The units are smaller and more homelike.*"

5.5.12 Altogether one can *summarize* that the results of the study have justified the efforts of the rather large approach of a differentiated questionnaire, although it might have had a somehow "deterrent" effect and therefore many countries did not reply to this part of the questionnaire. We have, on the other hand, to realise that the questionnaire was sent out to the Ministries of Justice and some replies such as the Austrian one just commented that they were unable to get information from the responsible Ministry of Health in due time. Nevertheless to some extent good practices (see the Scandinavian countries) and also the problems in several countries could be identified. The report so far could be used as a starting point for more and in depth research that evidently is needed in this area, too.

5.6 Transfer between different institutions

The last part of our questionnaire deals with the transfer between different institutions, for example welfare and prison-like institutions or mental health institutions and youth prisons. Unfortunately most countries did not answer this question. Those who answered referred to the transfer of juveniles in pre-trial detention for the purpose of the investigation of their mental condition to determine whether or not they are criminally liable (Austria, Germany, and Hungary). Others referred to the transfer of juveniles with serious mental illness to specialised mental health institutions to protect themselves or other detainees and to give the medical treatment they need (Austria, Cyprus, Denmark, Finland, France, Germany).[175]

Another very important point is the possibility of a transfer from a closed to an open institution or from a "prison" to an educational institution to serve the prison sentence there. According to the answers especially Denmark follows this strategy: Juvenile offenders who must serve a prison sentence are, in most cases, placed outside state and local prisons.

[175] In Germany (and similarly in other countries) temporary placement in a psychiatric hospital or detoxification clinic can be ordered pursuant to section 126a of the Code of Criminal Procedure if urgent reasons justify the presumption that the juvenile was either partially or not criminally liable at the time the offence was committed. If the court in its judgment will order such placement pursuant to §§ 63 or 64 of the Criminal Code, or §§ 7, 93a of the Youth Court Act, and if temporary placement is necessary for reasons of public security the juvenile will be placed in a mental health institution also when he additionally is sentenced to a prison term (when being judged partially criminal responsible). In that case the mental health order will usually be served first and the time served in the mental hospital will be counted for two thirds of the youth prison sentence. Thus the juvenile will be conditionally released from the mental health institution to freedom, see § 67 Criminal Code.

Instead placements can be made in a hospital, in family care, in a suitable home or institution. Germany foresees the possibility to place juveniles during pre-trial detention not in a prison but in a youth services home. Vice versa is the situation in Hungary, where pre-trial detention is usually served in a reformatory school and where the juvenile under exceptional circumstances can be placed in a penitentiary institution or in a police detention facility for five days at the maximum.

Spain refers to the transfer of juveniles between the same types of institutions in several autonomous regions of the country. This was not specified by the question, but is still a very important point, because juveniles should be located as close as possible to their families to avoid that they lose the contact.

Nevertheless, assuming that the countries have not just overseen the question, a lot of countries seem not to provide for any possibilities of a transfer although a transfer to more appropriate institutions is often in the best interests of the child and should be prescribed by law.

6. Concluding remarks

In the previous chapters we analysed replies from 34 jurisdictions to a questionnaire which was sent to the member states of the Council of Europe in order to receive information about the current legal situation and statistical data on juveniles subject to non-custodial and custodial sanctions or measures. Despite some methodological problems (see chapter 2) we could show a wide range of differing answers. Some differences were basically caused by the different juvenile justice approaches that prevail in the countries (some more welfare, some more justice oriented, see chapter 3), some originated from different financial conditions (like the size of the rooms in institutions or the infrastructure for community sanctions) and others were based on different sensitization to the topic (for example the different or wrong understanding of the principle of proportionality).

The first part of the analysis regarding community sanctions and measures (chapter 4) pointed out that indeed there is a wide range of community sanctions and measures available in the participating member states. But the extent of the implementation and use of these alternatives to imprisonment shows a lot of disparity which might in the first place be due to the different levels of infrastructure for the execution of community sanctions and measures. So for example the rules concerning the extent of legal guarantees for juveniles subject to community sanctions or measures vary, and so do guidelines for special trainings for the responsible agencies for the execution of these sanctions. There is also a great diversity in the existence and extent of quality management. Whereas in most countries this is not or little developed, Finland, Germany, Norway and Sweden provide a special accreditation for the different projects as a part of their quality management. So far many countries do not differentiate a lot according to the special characteristics and needs of different groups of juvenile offenders.

There seem to be some possibilities for the further development of promising and evidence based community sanctions and measures in Europe. The ERJOSSM can be seen as an important instrument to adjust the different approaches and to contribute to an exchange on "best practices". The European countries can learn a lot from each other in this field. Some countries have developed examples of good practices such as mediation and victim-offender-reconciliation, family conferences, social training courses, different forms of community service or educational programmes for different groups of offenders (anti-aggression-trainings for violent offenders, cognitive-behavioural programmes for sexual offenders etc.) which should be communicated to other countries and evaluated with respect to their possible implementation in other jurisdictions. Empirical research can make a contribution to this and should be highly supported by the member states.

The second part of the analysis deals with *juveniles deprived of their liberty* in different institutions (chapter 5). Regarding the statistical data (chapter 5.1) it seems to be almost impossible to receive comparable data from the member states. It could be seen as an important point of concern itself that apparently not every member state is obliged to register every juvenile in detention. It must be guaranteed that every form of deprivation of liberty is seen as an intervention into fundamental rights of the juveniles, regardless if they are accommodated in youth prisons, welfare or mental health institutions. The results of the questionnaire furthermore revealed that sometimes juveniles are placed in adult prisons, which indicates a violation of the principle of separation of juveniles from adults (see art. 37c CRC and Rule 11.1 of the EPR).

Only a limited number of countries answered the questions about *welfare institutions* (5.2). This was partly due to the fact that the countries defined their institutions in different ways (see 5.2.2). The common aim for the placement in welfare institutions is the protection of children whose health or development is at risk as a result of certain circumstances which can be criminal or delinquent behaviour, drug abuse or intolerable family conditions (5.2.3).

Several answers showed that the placement in a welfare institution is seen as a substantial intrusion into a person's liberty so that legal guarantees are designed to protect the child's rights. So for example in all countries judges and/or courts are the competent authorities to assign juveniles to welfare institutions. On the other hand the principle of proportionality that ensures that the measures imposed are proportionate to the seriousness of the offence or behaviour is not always paid attention enough. This is probably due to the fact that the placement in welfare institutions is based on educational needs of the juveniles. But nevertheless it is part of his or her legal guarantees that no measure is derived from the guilt. From the answers to the questionnaires it is not possible to judge whether the existing complaint procedures are effective enough in practice, thus this question needs more in-depth research.

The duration of time for which juveniles can/have to remain in "welfare institutions" and the living conditions in youth welfare institutions vary considerably. The daily net costs which are spent per juvenile vary correspondingly (see 5.2.10; between 2 € in Armenia and almost 900 € in France).

Altogether we would like to state that the structures and legislation concerning welfare institutions are better developed in some countries, particularly in Scandinavia, than in others.[176] Whereas some countries are very sensible for the importance of legal guarantees in this area, other jurisdictions are in need of improvement. "*Good practices*" can also be seen in Belgium, France, Germany or Switzerland. The widely accepted and practiced opening of welfare institutions to the outside world makes them a promising alternative to prison for juvenile offenders. The situation in the Middle and Eastern European countries is more difficult and the infrastructure is not yet as developed as required by the ERJOSSM. There might be deficiencies in many countries, also the so-called developed Western European countries. But to explore and describe the situation more thoroughly further research is needed.

As regards the answers to the legal provisions of imposing and executing *preliminary and pre-trial detention* (chapter 5.3) one gets the impression that this area is comparatively underdeveloped and that the concerns expressed by various recommendations of the Council of Europe and also the ERJOSSM seem to be justified. The living conditions in pre-trial detention in average are worse than in youth prisons and there are less meaningful activities provided. This is not only a consequence of the presumption of innocence which allows educational or treatment programmes only on a voluntary base, but also of a lack of

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[176] See also the concluding remarks in chapter 5.2.17.

infrastructure and well-designed programmes for continuous ("through") care from the beginning of any deprivation of liberty. On the other hand some results indicate that there can be found "good practices", too. The sometimes reluctant and incomplete answering and by that the lack of information deserves further attention. The Council of Europe should encourage more in-depth research particularly in the field of pre-trial detention. Of particular interest should be to explore the possibilities and practices to avoid pre-trial detention by using less intrusive forms of educational care in residential facilities or other welfare programmes.

Chapter 5.4 deals with *juveniles in youth prisons* or similar (prison-like) institutions. In many countries one can clearly see the efforts made to diminish negative effects of imprisonment and to promote a pro-social climate in order to re-integrate juvenile offenders into society. The need for a continuous ("through") care is increasingly realized and several models of integrating the probation and aftercare services have been developed (e.g. in England/Wales, France, Germany, Scandinavian countries). Also the transfer to more open settings in the transitional part from closed institutions to release and aftercare is usually promoted. Thus it becomes clear that the ERJOSSM express a European consensus on "*good practices*" which have been developed in many countries and institutions for juveniles deprived of their liberty.

The results of the questionnaire concerning *mental health institutions* (chapter 5.5) justified the efforts of the comprehensive approach to different forms of deprivation of liberty, although many countries did not reply to this part of the questionnaire. It is striking that apparently most countries even don't know how many juveniles are deprived of their liberty in mental health institutions. Nevertheless to some extent good practices (see the Scandinavian countries) and also the problems in several countries could be identified by our study. The report so far could be used as a starting point for more and in depth research that evidently is needed in this area, too.

Altogether the exercise of asking the member states for detailed information on the legal framework on the execution of community sanctions and measures as well as on different forms of deprivation of liberty to certain extent was a success. The present report indicates the variations of legislation and practice in Europe and the necessity of further evaluation with regards to "good practices", but also to less promising practices or even failures to comply with international standards. The ERJOSSM could be a mark stone for the further development of human rights of juveniles subject to sanctions or measures. The Council of Europe should try to "make these standards work" by carefully evaluating their implementation in national legislation and practice.

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