Results of the Complementary Investigations

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The following is a summary of the key findings from the complementary investigations mentioned above\(^1\) which were essential for the project outcome. These studies mainly intended to deepen the legal comparison at certain points, to verify hypotheses on the effects of previous harmonisation measures and to examine the practicability and feasibility of possible harmonisation models such as the category model proposed hereinafter.

1. Examination of the common penalty scales

During the evaluation of the answer sheets, considerable differences between the penalty scales used in the legal systems examined became apparent. For example, the maximum legal term of imprisonment in Finland is in principle only 12 years, while in other Member States such as Italy, France and Romania it is 30 years; the statutory minimum is 1 day in Aus-

\(^1\) Cf. Research Report, p. 40 and pp. 41 et seq.
tria and 3 months in Spain. In order to obtain more detailed information on the legal framework of sanctions in the different Member States and to examine whether the EU specification of well-defined penalty scales would be a realistic option for the future harmonisation of criminal sanctions, a complementary study of the threatened sanctions in the different Member States was carried out.

1.1. Identification and evaluation of the penalty scales

To this end, the rapporteurs first prepared a tabular overview of all the penalty scales provided for by law in their respective legal orders by filling the columns of the table with the upper limits and the rows with the lower limits. On the basis of this data, a general overview of the minimum and maximum penalties used in the various Member States and the number and width of the different penalty ranges was generated.

Therefore, the lightest penalty threatened by law was used as the lower limit of the penalty range. In the case of the alternative threat of imprisonment and fine, the lower limit was attributed the value “0” in order to represent the corresponding penalty scales in a comparable form irrespective of the national statutory minimum for custodial sentences. A penalty scale providing for “imprisonment for up to five years or a fine” (e.g. § 242 CC-DE) was thus represented, for example, with the value 0 - 60 months.

This type of depiction, however, did not permit to adequately represent national peculiarities such as the alternative threat of a fine and an increased minimum of imprisonment. Unless both penalty variants are used anyway (once imprisonment with and once without the option to impose an alternative fine), corresponding penalty threats were listed twice (once as “0 - maximum of imprisonment” and once as “(increased) minimum of imprisonment - maximum of imprisonment”) for better comparability.

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2 See Comparative Conclusion, pp. 520 et seqq.
3 For better comparability, the reported daily, weekly and annual values were converted into months, with 1 day corresponding to 0.03 months, 1 week to 0.25 months, and 1 year to twelve months; the threat of a fine without an increased minimum was represented by the value 0.
4 This type of threat of punishment can be found, for example, in Greek and Polish criminal law (see p. 648); in principle, the law provides for an increased minimum sentence for imprisonment; however, if the court decides to impose a fine, only the statutory minimum applies.
5 In any case, this only concerns the penalty range of imprisonment from 10 days to 3 months or a fine because all other increased lower limits of the penalty range are

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Unfortunately, recent reforms in Greece and Poland have led to a significant change in the number and extent of penalties in use in the Member States studied between the collection of the data, their initial analysis and publication. Therefore, the following presentation does not include a detailed evaluation of all collected data and is limited to a description of the main features.

1.2. Number and width of penalty scales

When analysing the common penalty scales in the legal orders examined, two things were particularly noticeable. On the one hand, the legal systems already differ quite considerably with regard to the number of different penalty scales used. While France, for example, only provides for twelve different penalty scales, Italy has 30 and Spain 49 different penalty scales.\(^6\)

In many non-European legal systems, there are likely to be much greater differences in this respect, as can be seen from the example of Argentina which has an almost unlimited variety of penalty scales.\(^7\) On the other hand, the width of the penalty scales can also vary greatly. Member States with only a few different penalty scales provide for rather broad ranges,\(^8\) while in jurisdictions with many different penalty scales a higher maximum usually corresponds to an increased minimum, which leads to comparatively narrow penalty scales.\(^9\) These differences are particularly noticeable in a graphical representation of the different sanction systems.

If one depicts the existing penalty frames using a bar chart,\(^10\) the diagrams of the countries with a few different but very wide penalty frames resemble a steep ski jump (cf. Figure 1).

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6 This figure, of course, only refers to the penalty scales threatened for the respective basic offences and does not take into account modifications of the penalty scales provided for qualifications etc.

7 See Overview of Criminal Sanctions in Argentina, p. 573 (fn. 4).

8 French law, for example, provides for penalties ranging from 1 year to 30 years or from 2 years to life imprisonment.

9 In particular, the penalty frameworks in ES often leave only a margin of several months to the judge; examples are the penalty scales providing for imprisonment from 3 months to 5 months, from 5 months to 7 months and from 3,5 years to 5 years.

10 For this purpose, the penalty frames are displayed as a bar chart, with a separate bar for each penalty frame on the X axis, which begins vertically at the value of
For example, Denmark and France do not in principle provide for an increased minimum compared to the legal minimum of imprisonment.\textsuperscript{11} Hence, the width of the penalty range is largely determined by the upper penalty limit.

\textbf{Figure 1 – Legal orders with only a few penalty scales}

In legal systems with many different but very narrow penalty ranges, as in Spain, on the other hand, an increased maximum always leads to a higher minimum penalty, which means that the corresponding diagrams tend to resemble a lying banana or a crescent moon (cf. Figure 2).

\textsuperscript{11} In DK, penalty ranges which permit the imposition of fines (the left ten bars of the diagram) can be distinguished from those providing only for custodial sentences with a statutory minimum of 7 days (the middle ten bars); overall, only two penalty ranges provide for an increased lower limit compared to the statutory minimum (cf. Country Report DK, p. 96); in FR, only sentences exceeding 10 years or life imprisonment are punishable by an increased minimum of 1 or 2 years (see Country Report FR, p. 240).
A graphic representation of the penalty ranges reveals a third group of legal systems, each of which is characterised by distinct plateaus (cf. Figure 3).

These result from the regular use of certain upper and lower limits of penalties. In jurisdictions which provide for different forms of imprisonment (such as imprisonment and criminal imprisonment)\(^\text{12}\), these often correspond to the legal minimum or maximum of these types of penalties. In Greece\(^\text{13}\), for example, both the statutory maximum of imprisonment and the statutory minimum of criminal imprisonment are 5 years, which means that, in principle, there is no penalty scale which provides for both a lower minimum and a higher maximum.\(^\text{14}\)

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12 For example in FR (pp. 225 et seq.), GR (p. 262), IT (pp. 299 et seq.); similarly also the Argentine law on sanctions (cf. p. 570).
13 The figure of the Greek penalty scales reflects the legal situation before the recent reform in June 2019.
14 In practice, however, such a penalty framework can still be brought about by mitigating grounds.
5 and 10 years are also used in German and Austrian criminal law both as minimum and maximum values,\textsuperscript{15} which results in similar plateaus. Unlike in Greece, however, both legal systems provide for penalty scales which include these thresholds (e.g. the threat of robbery according to § 249 CC-DE ranges from 1 year to 15 years), so that the plateaus are in any case not as distinct as in Greece.

This already shows that the three models rarely exist in pure form; most legal systems can rather be described as a mixed form of the different models. For example, like in Spain, the Italian and Portuguese systems generally provide for a large number of different penalty scales, which are, however, much broader in detail (see Figure 4). In addition, certain minima or maxima are used more frequently than others, resulting in a proximity to legal regulations whose penalty scales are characterised by distinctive plateaus.

\textsuperscript{15} In Germany, the upper limit of 5 years corresponds to the former statutory maximum of imprisonment (cf. § 16 CC-DE in the version valid until 1 April 1970).
In total, almost 150 different combinations of minima and maxima are used in the twelve legal systems examined. From a European perspective, it is particularly interesting to note that there is no penalty scale used in all the countries. The highest level of agreement is found in penalty scales which provide for imprisonment for up to 6 months, 1 year or 2 years or a fine. Only three other penalty scales and the absolute threat of life imprisonment exist in more than half of the countries surveyed. In addition, the penalty scales used in the various Member States are often subject to major changes. In Spain, for example, the number of different penalty levels has almost doubled since 1995 (from 34 to 49 variants). In Greece

16 These threats of punishment are completely unknown in Spanish criminal law, which in principle only provides for custodial sentences; in PL, the upper limit of 6 months of imprisonment is unknown, because only the so-called restriction on liberty sentence is threatened for sentences with a maximum of less than 1 year.

17 In addition to the absolutely threatened lifetime imprisonment, these are the penalty ranges imprisonment up to 3 years or fine, imprisonment from 6 months up to 5 years, and imprisonment from 1 year up to 5 years, although this penalty range occurs only once in DE (§ 339 I CC-DE).
and Poland, the latest reforms in June 2019 have also significantly changed the available penalty frameworks.

1.3. Combination of different types of penalties

There are also major differences regarding the combination of fines and imprisonment. While for minor offences in some countries only fines can be imposed (e.g. the French infringements), other legal systems (e.g. the Spanish one) do not even provide for fines in this case but only allow them to be imposed by replacing a custodial sentence. An intermediate form is the Polish system, where the lightest offences are also not punishable by imprisonment but only by fines or a so-called restriction on liberty sentence. In most countries, however, the combined threat of fines and imprisonment is common, especially for minor offences. The situation is somewhat different in Greek criminal law, which provides for fines without an increased minimum as an alternative to a custodial sentence with a (sometimes considerably) increased minimum of imprisonment. Conversely, in Poland the recent judicial reform tended to introduce increased minimums also for fines, the level of which would depend on the upper limit of the penalty. Finally, there are also differences between the legal systems examined with regard to the possibility of imposing a combined fine and imprisonment: While the cumulative imposition of custodial and monetary penalties is common practice in France, for example, this possibility has in principle been abolished in Portugal.

1.4. Thresholds or common minima and maxima

However, not only the number of available penalty scales and the possibilities to combine different types of penalty differ between the legal systems examined, but also the thresholds used to describe their upper and lower limits.

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18 For example, Art. 370 § 3 CC-GR threatens imprisonment of 1 to 3 years or a fine.
20 See Country Report FR, pp. 234 et seq.; this possibility also exists under certain conditions in DK (p. 91), DE (p. 126), ES (p. 156), GR (p. 265) und PL (pp. 347 et seq., 356); in RO, cumulation was previously excluded but has recently become possible under narrow conditions (pp. 443 et seq.).
Particularly large differences exist with regard to the lower limits of penalty ranges, where only the minimum of 1 year is used in all the countries examined. Apart from this, only the minima of 6 months, 2 years and 10 years (n = 9), 5 years (n = 8) and 3 years (n = 7) are known in more than half of the Member States surveyed. On the one hand, this is due to the fact that some of the countries examined in the range between 1 and 15 years have no further lower limits at all.\(^{22}\) On the other hand, however, there are also differences between the countries which differentiate further. For instance, many legal systems rely almost exclusively on even numbers,\(^{23}\) while others also threaten odd values.\(^{24}\) However, penalty scales with a lower limit of 15 years or more are known in only a few of the Member States surveyed.\(^{25}\)

Comparable differences also exist regarding the upper limits of penalty scales, where only the maximums of 1, 2 and 10 years are known in all the countries examined. Eleven countries provide for penalty scales with a maximum of 3 years or for life imprisonment,\(^{26}\) ten Member States use the upper limit of 5 years\(^{27}\) and nine Member States provide for penalty scales

\(^{22}\) This applies both to DE, GR and AT, which each have only lower limits of 2, 3, 5 and 10 years, as well as to DK and FR, which, with the exception of the 2-year lower limit for felonies in FR and the 5-year minimum penalty for manslaughter in DK, do not provide for any increased lower limits of the penalty range compared to the statutory minimum of imprisonment.

\(^{23}\) This is particularly true for FI, where only minimum sentences of 2, 4 and 8 years are known, and SE, where only minimum sentences of 2, 4, 6 and 10 years are threatened; the Portuguese legal system provides for minimum sentences of 2, 3, 8, 10 and 12 years, and in PL minimum sentences of 2, 3, 5, 8, 10 and 12 years are threatened.

\(^{24}\) In addition to the minimum penalties of 2, 3, 4, 5, 6, 10 and 12 years, IT also has a 7-year minimum; such a minimum also exists in RO in addition to the minimum penalties of 2, 3, 5, 6 and 10 years; in addition to the minimum penalties of 2, 3, 4, 5, 6, 8 and 10 years, ES also provides for penalties of 1 year and 6 months, 3 years and 6 months, and 9 years.

\(^{25}\) The minimum penalty of 15 years exists only in ES and RO; in GR it was recently abolished (see Country Report GR, Preliminary Remarks, p. 257); ES also knows minima of 20 and 25 years (see figure on p. 645), IT of 21, 25 and 30 years (see figure on p. 647).

\(^{26}\) All the legal systems examined except SE provide for a maximum sentence of 3 years; life imprisonment exists in all legal systems except PT.

\(^{27}\) The maximum penalty of 5 years is known to all countries except DK and SE; the same is true for the maximum penalty of 6 months, which is unknown only in PL and RO.
with a maximum of 15 years. The maximum penalty of 8 years is common in only two thirds of the countries surveyed and the maximum penalty of 12 years is provided for in seven jurisdictions surveyed. In contrast, only half of the countries surveyed know the maximum of 4 years.

These differences not only show that the EU's setting of concrete penalty levels is not an option in the near future at any rate, but also provide an explanation for the problems reported in many questionnaires in the implementation of previous European legal acts. In many cases, these resulted from the fact that until now, the EU did not take account of the national maxima when setting minimum maximum sentences, which meant that the Member States could only implement them by threatening to impose much higher maximum sentences. The most blatant example is Greece, where the value of 5 years – as shown – is both the statutory maximum for misdemeanours and the statutory minimum for felonies, which is why offences with a maximum of more than 5 years are always classified as felonies and are punishable by a minimum threshold of at least 5 years. Against this background, the implementation of a minimum maximum penalty of 6 years is extremely problematic in Greece: If the EU's target was adopted unchanged, this would result in a penalty range of only 1 year in width (imprisonment from 5 to 6 years), which, from a national point of view, would have to be regarded as contrary to the system. If one tries to avoid this, of course, a much higher upper limit must be chosen as a result. Although this formally complies with the European “minimum provision” (cf. Art. 83 (1) TFEU), it results in the use of a maximum limit for penalties which is significantly higher than the European legislator had ac-

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28 This upper limit, which corresponds to the legal maximum in DE, AT and now also in GR, does not exist in DK (where the statutory maximum is 16 years) and in SE (where the statutory maximum is 18 years); in FI, a 15-year prison sentence can only be imposed as an overall penalty; the statutory maximum for a single offence is 12 years.

29 This upper limit does not exist in AT, DE, FR and RO.

30 This maximum is unknown in AT, DE, FI, FR and GR.

31 The 4-year limit exists only in DK, ES, FI, IT, PT and SE; almost as frequent is a maximum of 20 years which exists in AT, ES, FR, PT and RO and which is to be introduced in PL through the recent reform, while it was recently abolished in GR (see Country Report PL, Preliminary Remarks, p. 336; Country Report GR, Preliminary Remarks, p. 257).

32 On this issue, see Guidelines, pp. 712 et seqq. and Comparative summary, pp. 538 et seq.

33 The most recent reform, which downgraded many felonies to misdemeanours, providing for a penalty range of only 2 years in width (3 to 5 years), may of course have defused this objection to some extent.
tually intended and thus contributes to an (here even unintentional) increase in punitivity.\textsuperscript{34}

2. \textit{Case Study}

These large differences between the legal orders seem to indicate that the current EU regulations have been futile in achieving an effect of harmonisation regarding legal consequences. While a minimum maximum penalty of 15 years would, for example, already constitute a breach of the constitutionally defined maximum of 12 years imprisonment in Finland,\textsuperscript{35} the very same regulation would not even necessarily lead to an increase in penalty in states which have maximum penalties of up to 30 years.\textsuperscript{36} In order to verify this hypothesis, an exemplary case concerning the – already harmonised – crime of money laundering\textsuperscript{37} was created in order to compare the penalties which could be expected in the various legal orders.

In the base example, a fictitious case was created concerning money laundering with multiple culprits.\textsuperscript{38} Firstly, the relevant penalty scale as well as the expected penalty for culprits and participants to the offence were determined. Secondly, the base case was altered regarding the damage, whether or not the offence was committed from within a group, and whether or not the culprits are reoffenders, in order to assess how these alterations influence the expected penalty. The participants answered these questions based on the national legal provisions and relevant judgments.\textsuperscript{39}

\textsuperscript{34} Cf. Country Report GR, pp. 289 et seq.
\textsuperscript{36} A maximum penalty of 30 years is currently in place in FR (p. 225), IT (p. 321) and RO (pp. 431 et seq.); PL now also has instigated such a maximum penalty (cf. Comparative Conclusion, pp. 520 et seqq.).
\textsuperscript{37} This offence was originally harmonised in the Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJIL 140 of 14 June 2000, p. 1), which has been replaced by Directive 2014/62/EU of the European Parliament and the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA (OJIL 151 of 21 May 2014, p. 1).
\textsuperscript{38} The example case at the core of this case study is attached in the appendix of this publication.
\textsuperscript{39} Thomas Elholm e.g. managed to validate the expected penalty by comprising all 20 cases between 1980 and 2016 pertaining to money laundering in DK and compared them to the example case.
and included opinions of practitioners from the Member State they were examining.

Despite previous harmonisation efforts, a large divergence was already apparent when comparing the possible penalty ranges. Whilst the penalty range regarding the “base case” was generally between 1 and 12 years in most states, France has a maximum penalty of 30 years and Greece even provides for a range of 10 to 20 years imprisonment. The minimum penalty in Greece was therefore equivalent to the maximum penalty in Romania and Austria and even exceeded the maximum possible in Finland, Poland and Sweden. Another noticeable difference was the penalty range open to the judge. Whilst in France the judge’s margin of appreciation amounts to almost 30 years, Finnish law stipulates a range of 4 months to 4 years imprisonment and in Spain this range is from 8 to 12 years. The court’s sentencing thus deviates greatly among the legal orders of the European Union.

In the course of the evaluation, it became apparent that the sentences which can be expected in practice do not deviate as much as the range of possible sentences might indicate. This is due to the fact that states with high penalty ranges (such as Greece) tend to correct the severe penalties stipulated by law by applying mitigating reasons and making extensive use of probation regulations. In general, the penalty which is to be expected for the main culprit in the “base case” is between 1 and 3 years on average and only exceeds this average in a few cases (e.g. Romania, Portugal and Poland which have an average of 3 to 5 years of imprisonment in this specific case). A stronger variation of the expected penalty can be observed regarding the participants of the crime, possible instigators or accomplices. This mostly depends on whether or not these participants are sentenced based on a separate penalty range or if there is merely a facultative mitigation based on the penalty range applied to the main culprit.

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40 However, the recent reform of the Greek criminal code downgraded money laundering from a felony to a misdemeanour which is now only punishable with imprisonment from 3 to 5 years.
41 In FI, money laundering is punishable with 4 months to 4 years of imprisonment, in SE with imprisonment of up to 4 years, whereas in PL the “base case” would be classified as a lesser offence and warrants a penalty of 20 months to 4 years of imprisonment.
42 In GR, the previous provisions permitted a reduction from 10 to 20 years to 2 to 12 years if there were mitigating circumstances; considering the possibility of suspending the punishment after two fifths of the sentence has been served, the punishment is in practice comparable to that in the other states.
Regarding the variations of the “base case”, large variations were observed concerning the question whether the factors which were changed are to be considered only in the context of sentencing (within the range of sentences applicable to the base crime) or if they lead to a higher penalty range. Committing the offence in a commercial context for example leads to an increased minimum penalty in Germany, Finland, Spain and Italy, whilst in Greece and Sweden only the maximum penalty is aggravated. The largest variation can be observed in cases of recidivism and cases with a particularly high damage. In some cases – e.g. committing the offence from within a group –, other criminal provisions may be triggered – such as membership of a criminal group –, which in result also lead to higher penalties.

3. Examples of Categorisation

The final supplementary study served the purpose to test the practicability of the category model. The national sanctions were divided into five categories according to their respective severity. It turned out that such a categorisation is generally possible, whereby various criteria were used to determine the severity of a specific sanction. Legal orders which make use of minimum penalties for crimes showed to be more reliant on the lower delimitation of the range of sanctions as legal orders which did not have minimum penalties. Hence, legal orders without minimum penalties tended to be more oriented towards the higher delimitation of the sentencing range. Special attention was also given to the different types of penalties, modalities of enforcement and procedural provisions relating to jurisdiction as well as further differences (e.g. the difference between misdemeanours and felonies, which is still prevalent in many legal orders, as well as statutes of limitation).

The results of this attempt at categorisation will be showcased in the following and explained with the aid of four examples from national legal orders. It has to be noted that the differentiation is by no means all-encompassing and may equally be undertaken in a different manner. The following model shall therefore serve solely as one of many feasible categorisations and demonstrate the possibility to divide the national sanctioning

43 Cf. Research Report, pp. 41 et seq.
44 The differentiation between felonies and misdemeanours is also relevant in US criminal law when assessing offences (cf. pp. 548 et seq.).
regimes into five distinct categories. The conclusions drawn from this study may serve as basis for national legislators when implementing sanctioning regimes based on a category model and are not intended to limit the freedom to categorise the sanctions as deemed fit and appropriate.

3.1. German Example

Therefore, the following thoughts on the categorisation of the German sanction regime do not aim to be the sole possible model to successfully categorise the 18 distinct penalty ranges within the German criminal code. Rather the delimitations may be drawn in other ways for many different reasons. Some of these alternative proposals will be hinted at in the footnotes of the following section.

The central element of differentiation in German criminal law regarding the gravity of a crime is to be seen in the distinction between misdemeanour and felony.\textsuperscript{45} The legislator did not only mean to attribute an offence with a certain gravity when classifying it as a felony; rather, this classification entails a number of consequences in material as well as in procedural law.\textsuperscript{46} The question therefore arises how many of the five categories shall pertain to felony and how many to misdemeanour. The approach championed in this study decides to reserve three categories for misdemeanours and two categories for felonies respectively, due to the frequency of their use and the possibility of harmonisation in the various areas of law (whereby the current minimum maximum penalties of 1, 2, 3, 4, 5, 8, 10 and 15 years may serve as a basis).\textsuperscript{47} This also minimises the risk of increasing the sanctions due to European harmonisation. At the same time – particularly if the category model is contextualised \textit{de lege lata} as to be a mere minimum harmonisation\textsuperscript{48} – the option to increase sanctions is also upheld for the legislator.

\textsuperscript{45} If one were to assess this differently, one could include felonies which have a specific maximum penalty in category III, whilst felonies which have the legal limitation of sanctions would be included in category IV.

\textsuperscript{46} Cf. Country Report DE, pp. 127 et seq.

\textsuperscript{47} Another possibility would be to divide the area of felonies into three categories; the penalty scale would be from 10 to 13 (with minimum penalties of 1 to 2 years), which would form category III, while the penalty scale 14 to 15 with a minimum penalty no less than 3 and no less than 5 years respectively would be in category IV; this is of course problematic as the legislator would have very limited liberty regarding especially category IV.

\textsuperscript{48} Regarding the interpretation of Art. 83 TFEU cf. Guidelines, pp. 735 et seqq.
Within the two categories pertaining to felonies, the possibility to impose a life sentence is the differentiating criterion between category IV and V as it entails a particular moral severity of the offence committed. For the delimitation of categories II and III within the misdemeanour context, it was decided to differentiate according to whether or not a monetary fine may be imposed. This is possible generally for offences with a minimum penalty of up to 6 months of imprisonment. The unique sentencing range of § 243 CC-DE was also put into the more severe category III, in particular due to its much higher maximum penalty of 10 years and subsequent higher limitation period. Categories I and II on the other hand are differentiated according to the higher limitation period – which is connected to the maximum penalty.

49 This is also the criterion chosen to describe the most severe category in the examples from FR and PL (pp. 656 et seq. and pp. 658 et seq.); another option would be to rely on the (theoretical) possibility of a suspension on probation (cf. fn. ); in this case, all offences with a minimum penalty of more than 2 years would form category V or alternatively make the categorisation dependent on the jurisdiction based on the anticipated sentence (according to § 25 Nr. 2 GVG, offences which are anticipated to be adjudicated with no more than 2 years are relayed to a single judge, the district court’s jurisdiction is limited to offences from 2 to 4 years, cf. § 24 I I Nr. 2 GVG); another approach would rely on the practice of trying and suspension.

50 The penalty scales for § 243 CC-DE (3 months to 10 years) and § 339 CC-DE (1 year to 5 years) are both used only once and are therefore printed in bold.

51 The 3 months minimum penalty of § 243 CC-DE does not exclude a fine; in practice, however, the courts order a fine just as rarely as for comparable crimes with a minimum penalty of 6 months; for example according to statistics, the courts order fines just as often – around 30% of the time – for offences falling under § 243 CC-DE as for offences falling under § 244 I I Nr. 1 CC-DE, the latter of which having a minimum penalty of 6 months; this may be explained by the fact that in less severe cases of § 243 CC-DE, the courts tend to rely on § 242 CC-DE, whilst in less severe cases of severe theft according to § 244 III CC-DE, the courts will make use of the possibility to go under the minimum provided for by § 244 III CC-DE.

52 This period of limitation indicates after which period of time the legislator does no longer see necessity to sanction (Satzger, Jura 2012, 433, 434 et seq.); this is why offences with the same limitation period may be seen as equally severe from the legislator’s point of view; alternativly, one may resort to the type of offence indicated within the criminal code; for example category I could also be limited to offences which are prescribed with either a fine or imprisonment, whilst category II may be reserved for a single penalty scale (Nr. 6).
This leaves us with the following categories:

- **Category I** is for misdemeanours which have a limitation period of 3 years.
- **Category II** is for misdemeanours which have a limitation period of 5 years and for which the law permits an alternative imposition of a fine.
- **Category III** is for misdemeanours which have a limitation period of over 5 years or which generally cannot be punished by a fine.
- **Category IV** encompasses felonies which only allow imprisonment for a certain period of time.
- **Category V** encompasses felonies for which the law permits the imposition of a life sentence.

<table>
<thead>
<tr>
<th>#</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Possibility of suspension</th>
<th>Character of the offence</th>
<th>Limitation period</th>
<th>Fine possible</th>
<th>Category</th>
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<tbody>
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<td>1</td>
<td>Fine</td>
<td>6 months</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>3 years</td>
<td>Yes</td>
<td>I</td>
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<td>Fine</td>
<td>1 year</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>3 years</td>
<td>Yes</td>
<td>I</td>
</tr>
<tr>
<td>3</td>
<td>Fine</td>
<td>2 years</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>5 years</td>
<td>Yes</td>
<td>II</td>
</tr>
<tr>
<td>4</td>
<td>Fine</td>
<td>3 years</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>5 years</td>
<td>Yes</td>
<td>II</td>
</tr>
<tr>
<td>5</td>
<td>Fine</td>
<td>5 years</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>5 years</td>
<td>Yes</td>
<td>II</td>
</tr>
<tr>
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<td>3 months</td>
<td>5 years</td>
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<td>Misdemeanour</td>
<td>5 years</td>
<td>No</td>
<td>III</td>
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<tr>
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<td>6 months</td>
<td>5 years</td>
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<td>Misdemeanour</td>
<td>5 years</td>
<td>No</td>
<td>III</td>
</tr>
<tr>
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<td>3 months</td>
<td>10 years</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>10 years</td>
<td>No</td>
<td>III</td>
</tr>
<tr>
<td>9</td>
<td>6 months</td>
<td>10 years</td>
<td>Possible according to § 56 I StGB</td>
<td>Misdemeanour</td>
<td>10 years</td>
<td>No</td>
<td>III</td>
</tr>
<tr>
<td>10</td>
<td>1 year</td>
<td>5 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>5 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>11</td>
<td>1 year</td>
<td>10 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>10 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>12</td>
<td>1 year</td>
<td>15 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>20 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>13</td>
<td>2 years</td>
<td>15 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>20 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>14</td>
<td>3 years</td>
<td>15 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>20 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>15</td>
<td>5 years</td>
<td>15 years</td>
<td>Possible according to § 56 II StGB</td>
<td>Felony</td>
<td>20 years</td>
<td>No</td>
<td>IV</td>
</tr>
<tr>
<td>16</td>
<td>5 years</td>
<td>Lifetime imprisonment</td>
<td>No suspension possible</td>
<td>Felony</td>
<td>30 years</td>
<td>No</td>
<td>V</td>
</tr>
<tr>
<td>17</td>
<td>10 years</td>
<td>Lifetime imprisonment</td>
<td>No suspension possible</td>
<td>Felony</td>
<td>30 years</td>
<td>No</td>
<td>V</td>
</tr>
<tr>
<td>18</td>
<td>Lifetime imprisonment</td>
<td>Lifetime imprisonment</td>
<td>No suspension possible</td>
<td>Felony</td>
<td>30 years</td>
<td>No</td>
<td>V</td>
</tr>
</tbody>
</table>

3.2. **Polish Example**

The Polish criminal code also contains 18 distinct penalty ranges which can be divided into five categories. As in the German model, categories I - III contain misdemeanours and categories IV - V contain felonies.53 Rele-

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53 Art. 7 § 2 CC-PL categorises offences with a minimum penalty of 3 years or more as a felony.
vant criteria for the categorisation include the type of sanction as well as the possibility to exchange imprisonment for a milder form of imprisonment or a fine – this possibility being reserved for offences which have a maximum penalty of 8 years or less according to Art. 37a CC-PL. Another criterion in the possibility to impose a combined penalty for misdemeanours – cumulatively consisting of imprisonment for 1 to 3 months or 1 to 6 months and a limitation of freedom for up to 2 years, also according to Art. 37a CC-PL. Furthermore, consideration was given to the possibility of conditional adjournment of the procedure according to Art. 66 § 2 CC-PL (only pertaining to misdemeanours which do not exceed a penalty of 5 years), the possibility of suspension of the penalty on probation (only applicable to sentences of up to 1 year, Art. 69 § 1 CC-PL) as well as the limitation period of Art. 101 CC-PL, which again is dependent on the maximum sanction.

This leaves us with the following categories:

- **Category I** contains misdemeanours which are sanctioned by fines or sentences resulting in restriction of liberty.
- **Category II** contains penalty scales which alternatively enable the imposition of fines, of a sentence resulting in restriction of liberty or of a custodial sentence which may be suspended.
- **Category III** encompasses misdemeanours which are sanctioned only by imprisonment and generally cannot be replaced or be suspended.
- **Category IV** includes felonies which entail imprisonment of up to 25 years.
- **Category V** contains felonies which may be sanctioned by life imprisonment.
The French sanctioning system is interesting for three reasons. Firstly, the French system distinguishes between misdemeanours, felonies and petty offences, whereby each category of crimes generally equates to a different type of sanction. Secondly, the French system abandoned minimum penalties in 1994, thus making different criteria more relevant for the distinction of the categories as the German or Polish system. For example, the legislator in France cannot exclude the imposition of a probation sentence. Thirdly, the judicial discretion has a much higher relevance in the French criminal system (including sentencing). This leads to less, but more flexible ranges of sentencing as in the systems outlined above.

3.3. French Example

The French sanctioning system is interesting for three reasons. Firstly, the French system distinguishes between misdemeanours, felonies and petty offences, whereby each category of crimes generally equates to a different type of sanction. Secondly, the French system abandoned minimum penalties in 1994, thus making different criteria more relevant for the distinction of the categories as the German or Polish system. For example, the legislator in France cannot exclude the imposition of a probation sentence. Thirdly, the judicial discretion has a much higher relevance in the French criminal system (including sentencing). This leads to less, but more flexible ranges of sentencing as in the systems outlined above.

54 Petty offences may be adjudicated with a mere fine, whilst misdemeanours lead to imprisonment and felonies to criminal imprisonment or criminal detention (cf. Country Report FR, pp. 223 et seq., 225 et seq.).

55 This is not a unique approach in Europe, the Netherlands and DK do also not know specific minimum penalties so that this particularity must be included in a category model.
In order to categorise the 13 different penalty ranges, the basis must be the legal distinction between misdemeanours, felonies and petty offences (cf. Art. 111-1 Code pénal), which equates to a lower, medium and higher degree of severity. This classification also forms the starting point for periods of limitation for prosecution (cf. Art. 7 et s. CPP). Insofar as special provisions exist which deviate from the respective standard limitation period, these are usually also justified on the grounds of the seriousness of the offence.\textsuperscript{56} Aside from this, the character of the offence also determines the jurisdiction. Correctional courts generally adjudicate misdemeanours, whilst felonies generally will be adjudicated by a jury court.

Central importance is also given to the rather practical question of the anticipated sanctions, in particular whether imprisonment or an alternative sanction shall be imposed.\textsuperscript{57} Imprisonment of up to 5 years may be imposed on probation; imprisonment of up to 2 years which cannot be suspended will generally be exchanged for an alternative sanction.\textsuperscript{58} The 5 year mark also presents an important milestone for the possibility of settlement of proceedings, for example by way of admission of guilt, a penalty order or a settlement in court.\textsuperscript{59}

The following categorisation seems feasible for France:

- **Category I**: Petty offences which do not permit imprisonment as a sanction.
- **Category II**: Misdemeanours which enable imprisonment for up to 5 years.
- **Category II**: Misdemeanours which enable imprisonment for over 5 years.
- **Category IV**: Felonies which enable up to 30 years in prison.
- **Category V**: Felonies which enable the imposition of lifetime imprisonment.

\textsuperscript{56} In this way, acts of terror and narcotics offences have a longer period of limitation (30 years) than the standard of 20 years, while the misdemeanours in the context of sexual offences against minors have a period of 10 years and infliction of bodily harm of a minor leading to inability to work has a period of 20 years instead of the standard of 6 years for misdemeanours; this period of limitation starts only when the minor reaches adulthood (cf. Art. 8 CPP).

\textsuperscript{57} Cf. on this Country Report FR, pp. 246 et seqq.

\textsuperscript{58} Cf. on this Country Report FR, pp. 246 et seqq.

\textsuperscript{59} Cf. on this Country Report FR, pp. 244 et seqq.
The 25 penalty ranges in Portugal can also be categorised by severity into five categories. Challenges present themselves due to the nonexistence of a life sentence as well as a lack of distinction between misdemeanours and felonies, so that different criteria had to be remedied.

The distinction between Category I and Category II was therefore made largely on the basis of the maximum penalty. Accordingly, all penalty ranges with a maximum of up to 1 year were assigned to Category I. Category II, on the other hand, contains penalty levels with an upper limit of between 2 and 5 years and a lower limit of less than 1 year. Category III encompasses penalty ranges with a minimum of 1 or 2 years which generally do not permit an alternative fine or where such a fine is usually not imposed, but for which it is possible to replace a custodial sentence with other alternative forms of sanction. Category IV includes penalty ranges with a minimum of 3 years and a maximum of 10 years or more which generally do not permit an exchange for an alternative form of sanctioning. Category V lastly includes penalty ranges with a particularly elevated minimum of 8 years and more and a maximum of over 15 and which do not permit the exchange for alternative forms of sanctioning.

This results in the following possible categorisation:

- **Category I**: Offences which do not provide for imprisonment of more than 1 year.
• **Category II**: Offences with a maximum penalty of more than 1 year of imprisonment which may be exchanged for fines, communal labour or a professional ban.

• **Category III**: Offences which entail a prison sentence of at least 1 year which may generally not be exchanged for a fine but for a professional ban.

• **Category IV**: Offences with a minimum penalty of 3 years or more which permit a suspension on probation but not an exchange for alternative sanctions.

• **Category V**: Offences with a minimum penalty of at least 5 years which thus do not permit a suspension on probation.

<table>
<thead>
<tr>
<th>#</th>
<th>Minimum Penalty</th>
<th>Maximum Penalty</th>
<th>Possibility of Suspension</th>
<th>Statutory Limitation</th>
<th>Possibility of Substitutive Fine</th>
<th>Possibility of Substitutive Community Work</th>
<th>Possibility of Substitutive Prohibition of Function</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>fine</td>
<td>3 months</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>I</td>
</tr>
<tr>
<td>2</td>
<td>fine</td>
<td>6 months</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>I</td>
</tr>
<tr>
<td>3</td>
<td>fine</td>
<td>1 year</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>I</td>
</tr>
<tr>
<td>4</td>
<td>1 month</td>
<td>3 months</td>
<td>yes</td>
<td>5</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>5</td>
<td>1 month</td>
<td>1 year</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>6</td>
<td>fine</td>
<td>2 years</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>7</td>
<td>fine</td>
<td>3 years</td>
<td>yes</td>
<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>8</td>
<td>fine</td>
<td>5 years</td>
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<td>2</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>9</td>
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<td>2 years</td>
<td>yes</td>
<td>5</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>10</td>
<td>1 month</td>
<td>3 years</td>
<td>yes</td>
<td>5</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>11</td>
<td>1 month</td>
<td>4 years</td>
<td>yes</td>
<td>5</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>12</td>
<td>1 month</td>
<td>5 years</td>
<td>yes</td>
<td>10</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>13</td>
<td>6 months</td>
<td>4 years</td>
<td>yes</td>
<td>5</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>II</td>
</tr>
<tr>
<td>14</td>
<td>1 year</td>
<td>5 years</td>
<td>yes</td>
<td>10</td>
<td>(unlikely)</td>
<td>yes</td>
<td>yes</td>
<td>III</td>
</tr>
<tr>
<td>15</td>
<td>1 year</td>
<td>8 years</td>
<td>yes</td>
<td>10</td>
<td>(unlikely)</td>
<td>yes</td>
<td>yes</td>
<td>III</td>
</tr>
<tr>
<td>16</td>
<td>2 years</td>
<td>5 years</td>
<td>yes</td>
<td>10</td>
<td>no</td>
<td>(unlikely)</td>
<td>yes</td>
<td>III</td>
</tr>
<tr>
<td>17</td>
<td>2 years</td>
<td>8 years</td>
<td>yes</td>
<td>10</td>
<td>no</td>
<td>(unlikely)</td>
<td>yes</td>
<td>III</td>
</tr>
<tr>
<td>18</td>
<td>2 years</td>
<td>10 years</td>
<td>yes</td>
<td>10</td>
<td>no</td>
<td>(unlikely)</td>
<td>yes</td>
<td>III</td>
</tr>
<tr>
<td>19</td>
<td>2 years</td>
<td>12 years</td>
<td>yes</td>
<td>15</td>
<td>no</td>
<td>(unlikely)</td>
<td>yes</td>
<td>IV</td>
</tr>
<tr>
<td>20</td>
<td>3 years</td>
<td>10 years</td>
<td>yes</td>
<td>10</td>
<td>no</td>
<td>no</td>
<td>(unlikely)</td>
<td>IV</td>
</tr>
<tr>
<td>21</td>
<td>3 years</td>
<td>12 years</td>
<td>yes</td>
<td>15</td>
<td>no</td>
<td>no</td>
<td>(unlikely)</td>
<td>IV</td>
</tr>
<tr>
<td>22</td>
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<td>15 years</td>
<td>yes</td>
<td>15</td>
<td>no</td>
<td>no</td>
<td>(unlikely)</td>
<td>IV</td>
</tr>
<tr>
<td>23</td>
<td>8 years</td>
<td>16 years</td>
<td>no</td>
<td>15</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>V</td>
</tr>
<tr>
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<td>20 years</td>
<td>no</td>
<td>15</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>V</td>
</tr>
<tr>
<td>25</td>
<td>12 years</td>
<td>25 years</td>
<td>no</td>
<td>15</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>V</td>
</tr>
</tbody>
</table>

3.5. **Conclusion**

These efforts to categorise the four very different sanctioning systems of Germany, France, Poland and Portugal according to five categories...
demonstrate that such a categorisation is generally possible despite national particularities. These particularities make it necessary to utilise slightly different criteria when assessing the severity of an offence. Hence, even similar criteria may differ, as different legal orders weigh various aspects of an offence quite differently.\textsuperscript{60} However, due to the leeway granted to the Member States in this respect, the category model should nevertheless be much less problematic to implement than alternative approaches to the harmonisation of criminal sanctions (such as the implementation of minimum maximum penalties).

Even if a direct prescription of the five categories by the EU seems far-fetched right now,\textsuperscript{61} the four examples above make certain tendencies visible:

- **Category I** encompasses the lightest offences which either do not entail an imprisonment (cf. France and Poland) or which generally are adjudicated by fines in practice.
- **Category II** equates to offences which may entail imprisonment or fines which may be alternated or suspended on probation.
- **Category III** equates to offences which do not permit fines but only imprisonment which may even not be exchanged for alternative penalties.
- **Category IV** generally contains offences which (as far as different types of offences exist) are classified as felonies and may lead to imprisonment for a certain period of time which is generally not to be suspended.
- **Category V** is generally reserved for the most severe offences which lead to very long custodial sentences or – as far as this is known in the respective legal order – lifetime imprisonment.

These attempts do not only present the difficulties posed by very different national sanctioning regimes,\textsuperscript{62} but also explain that a categorisation generally only leads to a relative comparability. This is demonstrated also by the fact that the models presented were drawn up independently by representa-

\textsuperscript{60} This is applicable to the suspension of imprisonment on probation, which can be excluded in some legal orders due to a specific minimum penalty, whilst this is not possible in countries which do not use minimum penalties; as far as probation is generally to be considered, this can be done by including the practical probabilities of an adjudication of probation.

\textsuperscript{61} Regarding the Member States’ “liberty to fill” cf. Guidelines, pp. 727 et seqq., pp. 734 et seq.

\textsuperscript{62} Cf. Guidelines, pp. 727 et seqq.
sentatives of the respective countries. As far as the practical implementation of the category model is concerned, it may be anticipated – also due to the flexible and solely exemplary character of the model – that the various states may influence each other and may also adjust their categories according to other systems.\textsuperscript{63} This dynamic flexibility may be one of the main advantages of the category model presented here and may also lead to further harmonisation.

This model can therefore not be compared to the current minimum maximum penalty approach. The fact that the category model will lead to a general maintenance of the current standards in sanctioning,\textsuperscript{64} without risking the disadvantages connected to the minimum maximum system,\textsuperscript{65} indicates that such a model is leading in the right direction. It will lead to increased harmonisation as it may also entail harmonisation in the less severe areas of criminality where some states (e.g. France and Poland) do not impose imprisonment.\textsuperscript{66} On the other side, the category model also showcases that national legal orders tend to apply higher penalties than the currently highest minimum maximum penalty of 15 years. This also implies that European provisions which only force some Member States to make use of the highest national sanction cannot lead to harmonisation from the outset.\textsuperscript{67}

\textsuperscript{63} On the category model as a part of the streamlining of the Member States systems cf. Guidelines, p. 741.

\textsuperscript{64} The current minimum maximum penalties of 2 to 5 years equate to the category II in most legal orders, the minimum maximum penalty of 8 to 10 years to the category III and the minimum maximum penalty of 15 years to category IV.

\textsuperscript{65} Cf. Guidelines, pp. 712 et seqq.

\textsuperscript{66} The fact that the so-called petty offences in French law do not necessarily imply a less severe offence is indicated by the fact that in other legal orders, these offences (such as less severe cases of unintentional or intentional bodily harm) equate to offences which lead to imprisonment in the German and other legal orders and are also adjudicated in the judicial practice of France as more severe offences.

\textsuperscript{67} Cf. the implementation of the Framework Decision on terrorism in FI (cf. p. 650; Guidelines, p. 672; Country Report FI, p. 215).