Summary

The past two decades have seen an increase in the differentiation of sanctions. Furthermore, the importance of influencing behaviour (mainly to push back recidivism) has grown and there is more scientific evidence to back this up. These developments raise the question to what extent do the courts use the power they have to give tailor-made orders with a view to influencing behaviour when meting out punishment or ruling on the execution of a sanction. This was the main question in this survey. The answer to this question is mainly based on the material collected during observations of hearings and interviews conducted with judges in relation to these hearings.

First of all, we addressed the issue of how courts obtain information on the execution and efficiency of sanctions and how this information is incorporated in their rulings. The interviews present a fragmented picture. Courts have different sources with information on the execution and efficiency of sanctions at their disposal, but whether judges actually use them is mainly a matter of personal interest. Although there are training courses available on the subject, judges are not obliged to follow them. Generally speaking, judges are not well informed on the developments in the prison system. They have hardly any idea how the imprisonment they have ordered is executed, when the person whom they have sentenced to imprisonment will or may first be released and how imprisonment can be used to have a positive effect on the condemned person’s behaviour.

The observations made regarding imprisonment also apply to community service. In general, judges are informed about the type of work that is done as part of community service and they are also familiar with some important rules of play, particularly those that may be raised during a hearing. The details of community service, however, are left to the probation and aftercare service. As a result, the courts also believe that this very general and limited information will suffice. Training orders and behavioural interventions imposed by way of a special condition with a conditional sentence or order are different in the sense that these are explicitly named in the ruling. But even in this case, judges hardly ever deviate from the proposal submitted by the probation and aftercare service in their report. As a result, judges are familiar with the most frequently-occurring interventions, but not with the details of the programme, nor how it may affect the convicted person’s behaviour.

And finally, the penal measures that can be imposed on mentally disturbed offenders who can not be hold responsible for their deeds. Courts have been vested with important powers in this field; after all, they must decide on the periodical extension of the hospital order and they can submit a special order for habitual offenders to a preliminary review. As a result, judges are probably better informed about the way orders aimed at curtailing an offender’s freedom are executed than about the execution of detention orders. While judges have all sorts of theories of their own on the efficiency of the sanctions they impose, they do not know anything – or very little – about scientific results on this subject.

One of the most important findings of this survey is that the court’s ruling on the punishment with the aim of influencing the convicted person’s behaviour strongly depends on the availability of a probation and aftercare service report or a behavioural report. Furthermore, courts exercise hardly any control on the availability of the probation and aftercare service report. The public prosecutor is responsible for the application of a report. It is true that the court may insist (e.g. in chambers) that the probation and aftercare service produces a re-
port and it may suspend the trial because of it, but in practice this does not – or only rarely – occur. The reasons for this are primarily pragmatic: it is evident, for example, in the dislike of arrests owing to rules laid down in the arrest protocol. Other reasons are the court’s reluctance to interfere with the work of the public prosecution service and the suspect’s interest in not having to remain in custody for too long.

Furthermore, this survey has made clear that slowly but surely the probation and aftercare service report’s objective has changed. That report’s objective is no longer primarily the supply of information on the person of the suspect and possible intervention strategies. Its primary goal now is to examine whether imposing an order with the aim of behavioural intervention is possible and useful. Judges do not seem to be troubled by this. They do not require any information on the suspect’s background and the offence committed, or they think they are able to find out by asking specific questions during the hearing. Only if an offence of some gravity was prompted by psychological problems is the case adjourned in order to seek the advice of a behavioural expert.

Formally speaking, the availability of a report and the changed nature of the probation and aftercare service report only restricts the court in its power to mete out punishment if it considers ordering hospital treatment as a special condition; after all, the institution’s details must be included in its ruling. In reality, the influence of the availability of the probation and aftercare service report in particular is much greater. Firstly, the court is not well informed about the details of behavioural interventions and their impact on behaviour (see above). That is why it will follow up on the recommendation of the probation and aftercare service in most cases. Secondly, the probation and aftercare service is strongly against imposing behavioural intervention orders it has not recommended itself. The strictness of the arrangements made between the probation and aftercare service and the public prosecution and the bench and the extent to which courts obey them are different in each district. In some districts judges do their utmost to act in accordance with these arrangements, even if they are considering imposing a behavioural intervention order which is not supported by the probation and aftercare service. Judges in two other districts say they have more leeway, although we have not seen them using this leeway during the hearing.

Against the backdrop of these findings it therefore comes as no surprise that courts do not or hardly use most of the powers arising from adult criminal law on the execution of punishments and penal measures. Courts hardly ever use their powers to give a ruling on the place of the detention on remand nor do they recommend where a prison sentence must be executed. With regard to these issues, too, the argument is that the court does not want to interfere with the work of the public prosecution service, while it is also recognised that courts are not well informed on the different modalities of imprisonment and the different regimes. Court interference in the details of a community service is minimal, in spite of concerns about the behavioural impact it may have. The specific details of a training order are laid down in the ruling, but all the court does is follow up on the advice of the probation and aftercare service. The same applies to behavioural interventions which are imposed as special conditions: the court is bound to follow up on the probation and aftercare service’s judgment.

Restraint in the use of powers can also be observed regarding the imposition and execution of hospital orders. With respect to this, judges view their lack of knowledge compared to the experts as the main problem. It means that the failure to give a hospital order despite the experts’ recommendation to do so is rare. It is also evident in exceptional cases when a court fails to extend a hospital order contrary to a recommendation. If the recommendations are contradictory, the reporters are invited to attend the hearing or the recommendation of a third reporter is sought. Some judges say that they prefer experts to attune their recommen-
dations in advance. Other judges emphasize their desire for the reports to show where the experts disagree. The interviews with NIFP staff and the probation and aftercare service show that the recommendations are regularly brought into line with one another.

The courts’ active stance is identifiable in two sub-areas. First of all, in the imposition and the preliminary review of the special order for habitual offenders, which is a relatively new type of order. Even though judges find it difficult to grasp the behavioural reports made with respect to hospital orders, they are of the opinion that they are very well able to judge the merits of the application or the continuation of a special order for habitual offenders. Barring a few exceptions, judges feel that the order can only be given or continued if there is an appropriate programme for the convicted person. As a result, they often use their power to review the order and do not hesitate, according to the judges themselves, to discontinue the order if there is no appropriate programme available.

Judges also take action when they are asked to decide on the conversion or replacement of one sanction by another. This situation occurs when the convicted person objects to the execution of the replacement custody when the community service fails and when the execution of a conditional punishment (or a part of it) – imposed earlier – is demanded. The judges often consider the probation and aftercare service reports in these procedures to be too summary and unconvincing. If the convicted person has a credible story and there is no one from the probation and aftercare service at the hearing to give their view, the convicted person is often given the benefit of the doubt and the court adjourns the case. This position displeases probation and aftercare service staff, who do not understand why the court has decided to give the convicted person a second chance contrary to their recommendation.