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Day Fines Systems: Lessons from Global Practice

Fair

Trials

Acknowledgments

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About Fair Trials

Fair Trials¹ is a global criminal justice reform organization with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. For the past 20 years, Fair Trials has worked to develop and implement improved procedural rights standards for criminal defendants across Europe and around the world. Our expertise in European criminal justice systems is informed by our network of criminal lawyers, academics, and civil society organizations in each of the 28 member states of the European Union (EU) and the UK, the Legal Experts Advisory Panel. Our work, the Transatlantic Bridge² seeks to facilitate learning on criminal justice reform between activists, system actors and policy makers in the USA and the EU.

One of the most valuable lessons that the US can learn from Europe is a reframing and refocus of the penological value of fines as sole sanction, and a principled separation of that value from the revenue interests embedded in the overgrowth of fines, fees and surcharges in the US.

Introduction

The Harvard Criminal Justice Policy Project (CJPP) is engaged in an analysis of the German day fines system, with the aim of evaluating whether such a system could be a useful innovation in the US context as a method of making fine-setting fairer. As part of its comparative work with the Transatlantic Bridge project, Fair Trials partnered with CJPP to look in a broader way at day fines models in other European practice.

This report is designed to as a companion piece to the CJPP report, *The Limits of Fairer Fines: Lessons from Germany*. However, sufficient background is provided such that readers should be able to comprehend it on its own, and some duplication between these reports is inevitable. This report relies on the definition of terms in *The Limits of Fairer Fines*.

The purpose of the research in this report is to offer regional and international context for the German experience with day fines with reference to other European jurisdictions; to evaluate whether models other than the German system might have features that could offer value to the US system; and to draw broader conclusions about the potential benefits and challenges day fines can offer to US jurisdictions given the various ways they are used in Europe. The primary interest of *The Limits of Fairer Fines* is to learn from the practical application of the proportionality analysis that makes day fines an attractive innovation to US reformers as a way to avoid the injustice that has resulted from the over-use of fines and fees against poor people. This report aims to provide additional information and detail about the ways that ability to pay is determined in (non-German) European day fine systems, with an emphasis on the impact on the poorest defendants. The addition of information from jurisdictions other than Germany may help to spark greater flexibility in modelling ability to pay determinations in US contexts, and to help readers to evaluate whether challenges raised to the application of the German system in *The Limits of Fairer Fines* can be ameliorated with reference to other systems currently in practice.

In addition to examining the variation in comparative ability to pay determinations, this report also takes note of the scope of use of day fines in different justice systems. Fines are common across Europe as a primary sentence, comprising approximately a third of all sentences across the region (see table below). 22 European countries currently use day fines. Scandinavian countries incorporated them first, beginning with Finland in 1921, decades before they reached Germany in the 1960's as a replacement for short terms of incarceration, and continue to use them at greater rates even than Germany. Denmark and Finland, for example, use fines as sentences in approximately 84% and 88% of cases, respectively (see table below).³

As noted in *The Limits of Fairer Fines*, the fact that such a large proportion of convictions in Germany can be sentenced with fines alone is due in part to the fact that day fines are considered a serious consequence. This is also true in the other European jurisdictions that make heavy use of day fines. The perceived severity of the day fine as a sanction was made possible in part by shifting from fixed to proportional fines, which allow for much higher fines for wealthy offenders and for serious offences than are possible in the context of fixed fines, which quickly become oppressive to the majority of (poorer) defendants. Therefore, the proportionality of day fines to income and to the seriousness of the offence is directly linked to their ability to be used as a substitute for more severe punishments.

In order to understand the potential of day fines as alternatives to incarceration, this report makes note of the maximum possible fine in each jurisdiction studied, as well as the variety of offences for which they are applicable. In some countries (like Sweden), fines are used as the sole punishment even for more serious offences than they are in Germany; including, for example, weapons possession and assault. As reflected in this report's discussion, much of the political debate around the setting of fines in European jurisdictions focuses on whether fines can be severe enough to deliver justice without incarceration, rather than concern about poor defendants being punished too lightly.

Table 3.2.3.1 Total persons receiving sanctions / measures in 2010— Criminal Offenses: Total	Total sanctions and measures per 100,000 pop.	Of which: % verdict / admonition only	Of which: % fines	Of which: % non-custodial sanctions and measures				Of which: % suspended custodial sanctions and measures			Of which: % unsuspended custodial sanctions and measures			Of which: % other measures
				Total	Of which: % community service	Of which: % supervision	Of which: % probation as a sanction of its own right	Total	Of which: % with community service	Of which: % with supervision	Total	Of which: % partially suspended	Of which: % psychiatric hospital	
Albania	270	59.1	41.4	13.5	...	...	...	...	...	...	45.1	...	...	...
Armenia	137	...	17.7	19.4	0.1	8.5	...	...	...	...	...	...	...	0.0
Austria	458	...	31.8	...	...	...	...	43.1	...	...	50.4	16.6	...	...
Bulgaria	517	...	5.4	...	...	...	...	...	...	...	57.4	...	...	2.0
Croatia	670	1.1	4.4	7.8	36.8	63.2	...	57.3	...	...	15.6	...	...	21.6
Cyprus	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Czech Republic	672	2.9	4.9	...	...	...	...	62.8	...	6.3	16.7	...	...	1.8
Denmark	2611	...	83.9	...	...	...	...	7.8	...	...	6.8	...	...	1.5
Estonia	681	...	...	...	...	...	...	...	...	...	...	...	...	...
Finland	3851	0.0	87.9	1.3	99.2	0.8	...	7.3	1.2	...	3.1	...	...	0.4
France	1082	1.0	39.5	15.7	...	...	...	26.0	5.1	30.6	17.8	27.5	...	...
Georgia	382	...	...	...	...	...	...	...	...	...	...	...	...	...
Germany	1005	1.0	70.0	11.1	...	...	...	12.5	...	...	5.4	...	...	...
Greece	384	...	47.9	...	...	...	...	...	...	...	...	...	...	...
Hungary	892	0.5	32.4	66.1	16.9	...	13.4	22.3	50.2	...	11.6	...	...	...
Ireland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Italy	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Kosovo (UNR)	449	2.0	46.8	...	...	...	...	...	...	...	...	...	...	...
Latvia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Lithuania	471	0.7	31.0	12.4	60.1	...	...	12.8	...	...	52.9	...	...	...
Malta	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Netherlands	578	1.1	38.9	25.6	98.9	...	...	10.4	75.9	...	23.0	33.5	0.6	0.9
Poland	1134	...	21.3	11.5	100.0	...	...	58.0	...	27.5	9.2	...	...	0.0
Portugal	732	1.5	67.5	0.5	19.2	...	...	18.5	...	54.7	8.1	...	0.2	0.2
Serbia	297	0.8	11.1	60.9	0.5	...	...	59.2	...	...	27.2	...	...	...
Slovakia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Slovenia	395	1.5	3.0	0.0	...	...	...	...	...	...	15.0	...	...	0.7
Spain	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Sweden	1479	46.1	26.1	5.3	19.2	...	...	8.3	41.0	...	9.6	1.4	1.8	4.6
Switzerland	1339	...	...	90.6	4.6	...	...	2.4	...	...	7.0	...	...	...
Turkey	1673	...	29.4	12.3	...	...	...	6.3	...	...	17.6	...	...	34.5
Ukraine	369	...	14.9	...	...	...	...	...	...	...	24.2	...	...	3.5
UK: E & W	2458	...	65.3	92.5	...	...	...	3.5	...	...	7.5	...	...	9.7
UK: N. Ireland	1602	...	63.0	9.7	30.0	42.4	...	9.6	...	...	8.9	...	...	3.7
UK: Scotland	1252	17.0	41.4	20.9	47.4	1.5	47.7	...	...	...	20.7	...	0.1	...
<i>Mean</i>	994	9.1	37.1	25.1	41.0	23.3	30.5	23.8	34.7	29.8	20.0	19.7	0.7	5.7
<i>Median</i>	677	1.1	32.4	12.4	30.0	8.5	30.5	12.7	41.0	29.1	15.6	22.0	0.4	1.8
<i>Minimum</i>	137	0.0	3.0	0.0	0.1	0.8	13.4	2.4	1.2	6.3	3.1	1.4	0.1	0.0
<i>Maximum</i>	3851	59.1	87.9	92.5	100.0	63.2	47.7	62.8	75.9	54.7	57.4	33.5	1.8	34.5

This can be contrasted with the position of fines in the US, where fines and fees are not linked in a specific way to the seriousness of the offence or to the means of the defendant—rather they are often treated as “add-ons” to other punishments and are not seen as serious punishments in themselves. This may be in part due to the generally punitive nature of US criminal sentencing, but it is also a consequence of the lack of proportionality in criminal fines in the US. Because they must be applied in the same quantities to the very poorest defendants, criminal fines in the US context cannot adequately deliver justice in more serious offences or for defendants of greater means, so their potential use as a decarcerative tool is blunted. Although the current consideration around the use of day fines in the US tends to focus more on the administrability of proportionality assessments in current fine regimes, the experience of European day fine systems may open up the possibility that consideration of the proportionality of fines can also shift the lens through which US actors view money as punishment.

The pecuniary interest of public authorities in issuing fines in the United States also interferes with their use as purely instruments of sentencing. The practice of raising general revenue through criminal fines can be strongly contrasted with the practice in many European jurisdictions. Fair Trials has not found any other examples of jurisdictions outside the United States where criminal fines are used for the purpose of raising revenue. Speaking in general terms, monetary sanctions in European jurisdictions consist of a mixture of both fixed and income-graduated fines, asset forfeiture, and victim restitution. Fees and surcharges generally are not heavily used, and the structural conflict of interest identified in US jurisdictions whose budgetary functioning depends on the capture of fines is not present. It is worth noting that this fundamental difference in political/economic approach to funding court functions—in which (generally speaking) European systems are entirely tax-funded and many US systems substantially funded by fees imposed on arrested people—creates very different incentives for policy-makers. Through this lens, one of the most valuable lessons that the US can learn from Europe is a reframing and refocus of the penological value of fines and a principled

separation of that value from the revenue interests embedded in the overgrowth of fines, fees and surcharges in the US.

Methodology

Fair Trials conducted a combination of desk research, survey research with criminal defense lawyers, and public information requests in relation to the following jurisdictions: Austria, Hungary, Finland, France, Poland, Spain, and Sweden. It also conducted desk research in relation to a short-lived experiment in the use of day fines in England and Wales,

The survey asked about:

- a. The relevant laws and policies providing for day-fines: when these were adopted; to what offences they apply; and the procedure afforded defendants in the setting of day-fines.
- b. Statistical information on (i) percentage of criminal cases that result in fine vs. jail time and (ii) the rate of incarceration for default on fines.
- c. Details of how ability to pay is determined for the purpose of setting fines
- d. Details of how the unit is set.
- e. Other factors used to set the final fine amount.
- f. Procedural and substantive rights in enforcement of day-fine judgments.

In some jurisdictions (Austria, Finland, Spain and Sweden), we also engaged in qualitative interviews with defense lawyers, where we focused questions on the following topics, amongst others:

- a. How does the ability to pay determination happen in practice? What sources of income are actually used and how is income evidenced?
- b. What are the main offenses for which you see day-fines being used in your practice?
- c. In practice, how do poor people fare in the system?

Public records request were made of relevant government agencies in respect of France and Austria. For these, we asked the following questions:

- a. How many convictions receive a day-fine as the sole sentence, in numbers?
- b. As a percentage of all cases?
- c. As a percentage of misdemeanour cases?
- d. How many/what percentage of these are paid in full?
- e. What percentage/how many of these fines are paid on a payment plan?
- f. What is the average length of time for a payment plan?
- g. What is the average amount of fine?
- h. How many defendants incur imprisonment as a result of non-payment of a day-fine?
- i. What are the 10 most common offences for which day fines are used?

In Austria, the Ministry of Justice (to whom the information request was made) informed us that it does not collect evidence relevant to the queries, due to a lack of automated collection of criminal case files. Swiss authorities also indicated that they were unable to answer the questions provided. Only authorities in France were able to provide information. These answers are reflected in the France section of this report.

Poor data retention by national authorities in the target countries has hampered robust analysis of the impact of day-fines on incarceration rates, as well as our ability to determine reliably the extent to which indigent defendants subject to day-fines find themselves subject to imprisonment for inability to pay.

Unless otherwise referenced, all information is sourced in the surveys Fair Trials circulated.

Overview of findings and observations

Ability to Pay Calculation: Most jurisdictions calculate ability to pay on a net-income basis. There is significant variation in which factors (housing costs, child support and other debts, dependents) are subtracted from income as part of the ability to pay determination, and whether these are evidenced with particularity to each defendant (Hungary, Poland) or according to a formula (Finland, Sweden). At the more detailed end of the spectrum, Hungary for example, considers and requires evidence of income not only from the defendant but also from their spouse and cohabiting family members, along with assets and actual living expenses backed up by evidence provided by the defendant. Other jurisdictions make rougher calculations based on, for example, a defendant's tax returns (which can, in some countries, be accessed directly by the court and even arresting police as in Sweden and Finland) or simply based the personal testimony of the defendant as to their income and expenses.

Most jurisdictions appear to have relatively flexible practices around the use of evidence of ability to pay, with more evidence and use of official records being demanded only exceptionally, for example in relation to higher earners who may have major sources of income that are obscured by routine income investigations. In most jurisdictions, any evidence provided by the defendant, which can include income declaration forms distributed by police, tax records, pay stubs, rental agreements or simple declarations without further evidence, seemed to be accepted by courts without the need for extensive investigations. Certain assumptions and fixed formulas, particularly in relation to low-income defendants, may be easier to make in jurisdictions where welfare rates and state housing provision are regular and known to the court, than they may be in US jurisdictions.

It is notable that in the countries that use day fines the most successfully (i.e. for a large proportion of cases with lower incarceration rates associated with non-payment), fixed formulas tend to be used. In the countries where very detailed accounting is made of ability to pay on an individualized basis (for

example, Hungary and Poland), day fines are infrequently used. In Spain, where day fines are increasingly used, judges have significant discretion to set fines but do not tend to engage in lengthy income assessments. This may suggest that ease and regularity of the ability to pay determination is associated with the ability of judges to use them more effectively in a larger number of cases.

Scope of use: In evaluating the usefulness of European experiences of day fines to US reform aspirations, it is important to take into consideration the reasons for which day fines were adopted and the scope of offences for which they can be used. There is variation in the seriousness of the offences for which day fines can be used, with impacts on the significance of day fines as a viable alternative to incarceration. In countries where use of day fines is most robust (Germany, Finland), the scale of maximum sentence and fine are quite high or non-existent, leading to potentially greater gains in decarceration as a larger proportion of offences (including drugs and some weapons and assault charges in some jurisdictions) could be sentenced without the use of incarceration. Accordingly, most of the political debate around ability to pay in these high day fine-use countries tends to coalesce around the high end of the fine scale. Policy in these jurisdictions is crafted with the goal of ensuring that the day fine is seen as sufficient punishment for wealthy and more serious offenders. Having a sufficient level of possible severity is seen as key to ensuring legitimacy of the fine as a significant enough sanction to stand in for incarceration. A day fine system that makes a dent in incarceration will have to be capable of administering relatively severe sanctions – but in doing so, it will be even more important to reckon with the impact of significant fines on indigent people.

Indigency: None of the studied jurisdictions provided special statutory guidance for truly indigent groups (including asylum seekers, homeless people, etc.). It was more common instead in some jurisdictions (Spain, France) to allow for fines to be terminated if a defendant is declared insolvent, and most jurisdictions allow for fines to be reduced if the economic circumstances of the defendant change. In general, payment plans are more com-

mon responses to inability to pay than full recission of the fine. Substitution of community service is an almost universal option, but little information is available about specifics of these programs—for example, how they are managed and enforced and how people with disabilities may participate. Specific consideration of true indigency in European day fines systems may be due to more comprehensive welfare systems in Europe and lower rates of extreme poverty. The existence of regular welfare may also make it easier for judges to impute income and to assume, whether erroneously or not, that few defendants are truly unable to pay a fine at the lowest end of the scale.

Incarceration as enforcement of non-payment: The persistence of incarceration as a possible sanction for non-payment complicates the fair use of day fines significantly. Incarceration exists at least in principle as an enforcement mechanism even in the most progressive of European jurisdictions. Unfortunately, not all countries keep adequate data about the number of people who ended up in prison due to non-payment of fines. The view of many practitioners across jurisdictions conforms to the idea that imprisonment is used only when a defendant is unwilling, rather than unable, to pay, but it is not clear whether this is accurate in fact. Sweden seems to be the jurisdiction that uses imprisonment the least in practice. Decisions to postpone, suspend, or extend payment plans seem to depend heavily on the discretion of individual judges, which suggests that effective use of these ameliorative options depends substantially on judicial culture. Furthermore, comparative collection practices, asset seizure, wage garnishment, and other civil measures to enforce payment have also been insufficiently studied and theorized. In a legal culture like the US, in which both carceral approaches as well as predatory debt enforcement practices abound, it is likely that stronger guidelines and limits on the use of incarceration and ability to mitigate fines for those unable to pay will be crucial.

Pre-trial detention: When defendants are held in pre-trial detention for offences that could be sentenced to day fines, this undermines the power of day fines as a sole sanction for offences. Given the relatively short prison sentences available for unpaid day fines, sentences of “time served” for peo-

ple who have been detained pre-trial may be more rational and proportionate than adding fines onto the pre-trial detention period. This approach is evident in Sweden, which uses short prison sentences more often than day fines⁴—this may be due to the widespread use there of pre-trial detention (which is widely and presumptively imposed for charges carrying a possible sentence of at least two years, but usually for very short duration).⁵ US jurisdictions seeking to implement day fines as an alternative to incarceration should consider doing so alongside reforms to pre-trial detention regimes that prohibit pre-trial detention for charges that are likely to result in a fine only sentence (as is the law in Sweden,⁶ for example).

Other alternatives to incarceration: Where day fines are used successfully, they are implemented alongside a number of other decarcerative measures, including decriminalization of minor offences, diversion, and extensive use of community sanctions. When designing a day fines system, it is useful to consider what sentences day fines will be replacing, and what the relative risk of incarceration is for each. For example, if day fines replace conditional imprisonment, it would be helpful to know what rate of conditional sentences are eventually converted into incarceration compared with the rate of day fines that are converted into incarceration. Depending on the policy goals of adopting day fines, it may be that expanding decriminalization, diversion, and other alternatives to sanctions that may result in incarceration may be preferable to expanding the use of day fines for minor offences. It should be noted, however, that in countries that treat some minor offences as administrative, rather than criminal, infractions, administrative fines can be even more burdensome than criminal day fines, with similar effects on financial solvency, but with fewer procedural safeguards (this issue was raised by survey respondents, for example, in Austria and Spain).

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Review of Day Fines Systems in Europe

FINLAND

Background: Finland was the first European country to establish and codify a day-fines system in 1921, when they were introduced in order to make the monetary value of the fine more resilient to inflation and deflation.⁷ Finland still uses them more than any other

country in Europe, making it a useful point of comparison for Germany (comprising 87.9% of all sentences). It is a mature system that relies on strong sentencing norms and use of technology and access to public records to ease the burden of evaluating ability to pay.

The Finnish day fines legislation is subject to regular revision, in particular to raise the level of the unit payment such that it remains a credible alternative to incarceration.⁸ This has resulted in highly publicized fines on the high end of the spectrum (i.e. the famous \$100,000 speeding ticket).⁹ Despite the occasional headline, public polling has documented that a high proportion (70%) of Finns believe that the fine system is fair, and 80% agree that fines should be apportioned according to income.¹⁰

The place of day fines in Finnish sentencing: Fines in Finland fit into a progressive sentencing regime with six possible sentence responses that range in a “ladder” from non-prosecution to unconditional imprisonment of up to life (those serving a life sentence usually only spend 10–12 years in prison).¹¹ Fines are the third “step” in sentencing, following 1) non prosecution and 2) withdrawal from the sentence (which implies a conviction but no sentence).¹² Conditional imprisonment (analogous to a suspended sentence and replaceable with community service), the fourth “step” on the sentencing ladder can be imposed for sentences of 8 months–2 years.¹³ Community service is only available as a substitute for imprisonment. “Net widening” via com-

munity service is avoided by a 2-step judicial decision making process which first decides that a sentence of conditional imprisonment is indicated, and then decides whether community service can be substituted for internment.¹⁴ More serious offences are dealt with by a conditional sentence combined with a fine, and the most serious with an unconditional (i.e. imposed) sentence of imprisonment (with an average length of 11.8 months).¹⁵ Finnish sentences and rates of imprisonment have continued on a downward trajectory since the 1970s, with a slight uptick in 2018.

Offences Sentenced to Day Fines: The most recent national statistics report that driving under the influence makes up 19 percent of day fine sentences, petty theft 14 percent, and assault 11 percent.¹⁶ Minor traffic offences result in summary fines (still following the day fines model) imposed directly by police which cannot be converted into imprisonment.¹⁷ Prosecutors bring cases to court only when a sentence of imprisonment is possible or when a summary fine (or the amount imposed) is contested.

Setting the fine: The number of day fine units ranges between 1 to 120¹⁸ (unless several crimes are punished concurrently, in which case, the max is 240) and the amount is largely determined by the defendant's income. The minimum unit is valued at 6 EUR and there is no maximum cap.

Ability to pay determination: Finland moved to a net-income calculation in ability to pay during a 1999 law amendment.¹⁹ The day rate is calculated as 1/60th of the monthly mean income during the year, with deductions for taxes, social security payments, and a living allowance of 255 euro monthly for the defendant and further deductions for each dependent. Assets can also be considered. Until the 1999 reforms, authorities tended to accept the testimony of the defendant regarding their income. However, police can now access tax records quickly via mobile phones, allowing them to make "on the spot" assessments of ability to pay even in simple traffic stops.²⁰ If the defendant lies about their financial circumstances, it is considered an offense

punishable by a secondary fine or up to three months of prison. In the case of non-payment, the day-fine may be converted to imprisonment through separate proceedings.

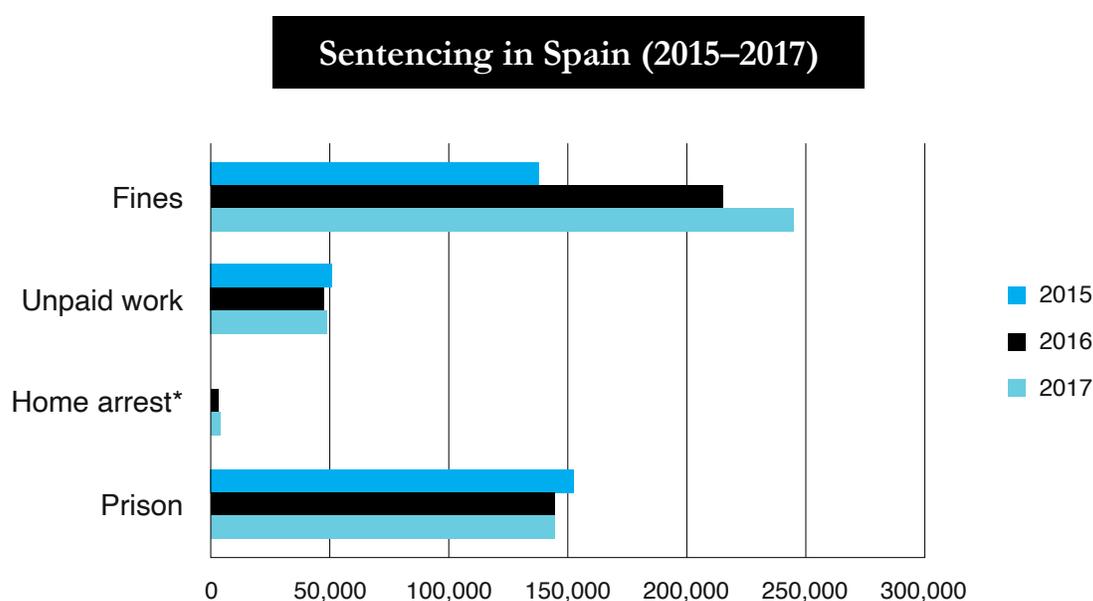
Enforcement: Finland converts unpaid day fines into imprisonment according to a calculus slightly more generous to defendants than does other countries, with three unpaid day fine units converted into one day in prison. Conversion to prison is only available as a sanction for day fines cases that have been imposed following a trial proceeding, not for those imposed summarily by police or prosecutors. Community service can be imposed where a conversion of the day fine to imprisonment for non-payment has been made. As with other prison sentences in Finland, the possibility to substitute prison sentences of 8 months or less into community service means that in practice, imprisonment for non-payment of fines is quite rare. When incarceration for non-payment is imposed, it is for a minimum of 4 days and a maximum of 60 days.²¹

SPAIN

Background: The Spanish day fines system is characterized by wide use of judicial discretion in both setting and enforcing fines. The day fines penalty was first introduced in the Criminal Code of 1995 (currently in force) and is widely used. Spain has two different kinds of fine-based penalties. One is the day fine, and the other, used less frequently, is the ‘proportional fine’ (which is established in proportion to the damage caused by the offender). Day fines penalties are calculated on daily units: each month equals 30 days. According to the Spanish criminal code, day fines can be used as the sole penalty, as an alternative to a sentence of incarceration, or alongside a prison sentence.

Setting the Fine: The day rate can range between 2–400 EUR (for individuals—it can go up to 5,000 EUR for corporate defendants), for between 10 days–2 years.²²

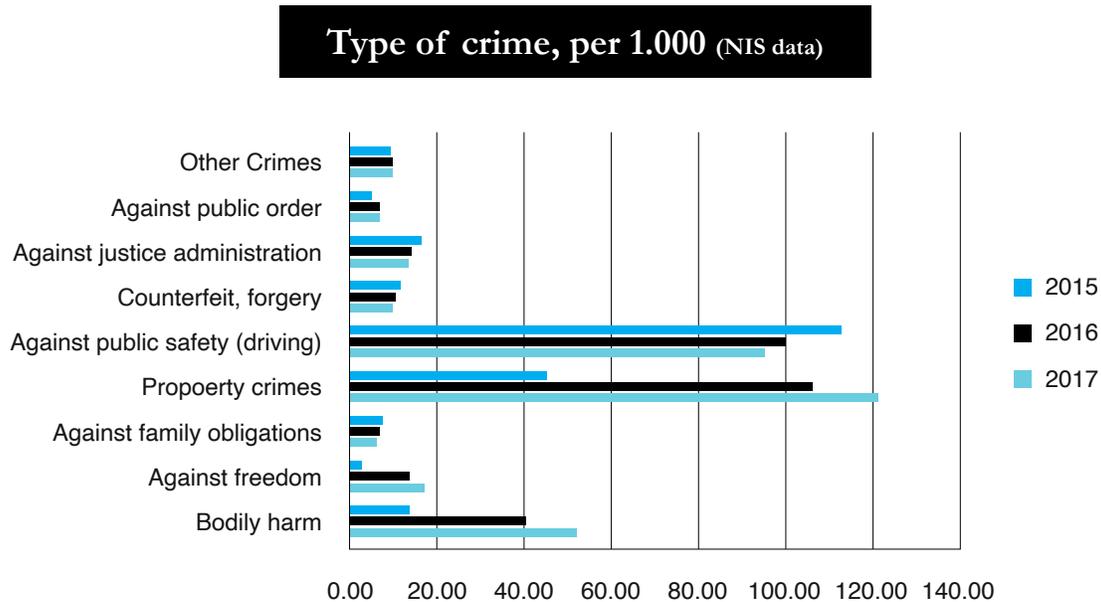
Offences Sentenced to Day Fines: Fines (inclusive of both fixed and day fines, but primarily day fines [over 94% of all fines imposed]) are being used in an increasing number and proportion of criminal cases. In the past two years, it has dominated Spanish sentencing and is now used more frequently than any other sanction (see below table).²³ However, it is worth noting that use of incarceration has not significantly diminished as the use of fines has increased.



Day fines in Spain are used primarily in driving offences and minor thefts, though simple assaults causing bodily harm are also frequently sentenced to day fines (see below table).

Example:

Minor shoplifting can be sanctioned from one to three months of imprisonment converted to a day fine. For example, if the defendant is sentenced to two months of prison, they will have to pay at minimum 180 euro. (60 days sentence x day rate of 3 euro).



Ability to Pay Determination: There is no established protocol to determine ability to pay, and courts have discretion to set units and day rates based on their own perception. Evidence stating the defendant's economic situation (wages, unemployment certificate, mortgage deed or rental agreement, family situation, special payments, etc.) are verbally introduced and documents handed to the court during the hearing. The court has discretion to value the evidence gathered. Family, health, and housing circumstances are usually considered. Evaluation of ability to pay is made during the main hearing, where the defendant has the right to counsel. The imposition is made in the sentence. If a person is in a precarious situation, the fines imposed will be between 3–6 EUR a day. In practice, according to a recent study²⁴ in courts in Barcelona and Girona, little differentiation according to wealth was made. However, the average unit value observed was relatively low on the scale—on average 4.6 EUR a day, for 190 days (for an average total fine of 874 EUR).

Enforcement: The enforcement of non-payment of fines is sometimes dealt with by a court of execution (essentially, a sentencing court) by the sentencing judge, or at other times by an independent judge. The fine must

be paid within two years of sentencing.²⁵ In the event of non-payment, the criminal code foresees one day of prison for each two days of fine days non-paid. Enforcement actions can be appealed to a higher court, and legal aid includes the right to a lawyer during the first 2 years of the execution phase. Execution judges have the ability to reduce fines if the financial situation of the defendant changes. The defendant can also request an “insolvency declaration,” which means that even if the defendant cannot pay the day fine, incarceration will not be imposed for as long as the defendant is insolvent. A typical instalment plan for a day fine might be 50 EUR per month, for example. The court can agree to substitute day fines imposed (including unpaid fines) by community services in the same ratio as imprisonment— one day of community service per two days of fines. Typically, when defendants merely forget to pay, rather than wilfully avoiding payment, the court sends a reminder with no further enforcement action. Nonetheless, a recent study observed that 4% of people convicted to a fine ended up in prison for non-payment.²⁶

SWEDEN

Background: Sweden has one of the world’s oldest and most established day-fine systems, adopted in 1927, in order to ensure that criminal sentences would impact rich defendants in a more equitable way vis a vis poor defendants.

Setting the Fine: Day units are sentenced to a minimum of 50 and a maximum of 150 units, and the daily rate is at minimum 5 EUR a day and maximum 105 EUR.²⁷ The daily unit is calculated as 1/1000 of a person’s gross wealth (not income alone), which works out to about 30% of the daily income.²⁸

Ability to Pay Determination: All wealth can be considered, not only income, in making the ability to pay determination, with reference to higher tax rates for wealthier defendants.²⁹ Tax records of individuals are readily available online. Prosecutors have detailed guidance as to what elements

should be considered in order to set (in particular, to raise) the daily rate.³⁰ Some deductions are made, but as in Finland, these tend to be according to a formula (standard deductions for each family member, for example) and do not involve particularized accounting of actual debts,³¹ making the ability to pay determination easier. A “pre-trial protocol” can be produced by the court in relation to taxed income based on access to tax records, but this is rarely used in practice, according to practitioners. There are no special calculations/default amounts for indigent defendants.

Offences sentenced to day fines: Day-fines are the most-used sentence in Sweden comprising over half of all convictions (58%), primarily used for minor drug offenses, small theft, traffic offenses and drunk driving. However statistics show that day fines are also used occasionally even for more serious crimes, such as weapons possession. In comparison, imprisonment only comprises 12% of all convictions, with the most common sentences lasting only 2–6 months.³²

Examples:

- Driving under the influence: The minimum day fine for driving under the influence is 40 units, with a minimum amount for unit of SEK 50 (approx 5 EUR). This means that for a poor defendant with an uncomplicated DUI case, a fine of about 185 EUR is foreseeable. Units increase depending on the blood alcohol level determined at arrest.
- Fare evasion: Fare evasion is handled in two different ways—if the person shows an identification document and signs a citation, it is counted as a breach of contract and the defendant receives a bill from the operator. If the person refuses to show identification documents or is suspected of attempting to forgo the fee, they may be guilty of “poor fraud.” If the value of the theft of service is a maximum of SEK 300 (about 28 EUR), the number of day fines is 30; then it gradually increases by 10 day fines up to 120 day fines if the value of the theft of service amounts to SEK 1,600 (approx 148 EUR). Beyond that amount, day-fines are not an option as punishment. Therefore, a

poor defendant could conceivably face at least the equivalent of 139 EUR for a fare evasion conviction.

Enforcement: A person sentenced to a fine receives a payment card from the police that is sent to the home to the sentenced person. No payment instalment, deferment or postponement is available at this stage. If the fine is not paid within 30 days once the judgment has become legally binding, the sentenced person will receive a reminder. If the fine is not paid within the following two weeks, the case is escalated to the Swedish Enforcement Authority. If this happens, additional costs can be added. If the defendant cannot pay the fine, they can get in touch with the Enforcement Authority, which has the authority to grant postponements or payment plans or to cease enforcement in situations such as unemployment or illness. However if the defendant is perceived to be voluntarily failing to pay, enforcement can be undertaken via property foreclosure or garnishment of wages, via the tax enforcement authority (rather than the judicial system).³³ In practice, unpaid fines are discharged after 5 years of non-payment.³⁴

In theory, unpaid day fines, on the action of the prosecutor, can be converted into prison sentences of between 14 days and three months, but this action is exceptional and can only take place if the prosecutor sees that the defendant has the means to pay and is purposely evading payment, and if it would be offensive to the general consciousness of law if there was no penalty. It must be ordered by a judge. However, in practice this power is almost never used.³⁵

AUSTRIA

Background: Austria's criminal justice system most closely resembles Germany's among European countries. Day fines have been included in the Criminal Law Code and Criminal Procedure Code since 1974 (around the same time Germany adopted them), and the relevant legislation has been amended several times in the intervening years. In particular, important amendments introduced in order to reduce the incidence of

imprisonment for minor crimes were made in 2008 (which saw the introduction of community service as an alternative to imprisonment in the event of inability to pay) and in 2015 (which clarified the application of day-fines to different lengths of sentences, with the effect of harmonizing sentencing and reducing the possibility that short prison sentences would be used in place of fines).

Despite its cultural and legal similarities to Germany, there are some differences in the use of day fines in Austria and Germany. Austria uses them significantly less frequently than does Germany (resolving between 30–40% of cases via day fine). This may be due to greater flexibility on the part of Austrian prosecutors to use other forms of out of court procedures, such as penal orders.

It was the view of the Austrian lawyers we interviewed that day-fines are a “working man’s sentence,” and that they were not appropriate for use with truly indigent defendants. These defendants, it seems, do run the risk of imprisonment for non-payment, although data on imprisonment for payment default does not seem to be collected in a systematic way by Austrian authorities. However, it was the view of survey respondents that many indigent defendants may be detained in pre-trial detention even for minor offences (due to assessed risk of failure to appear because of homelessness, drug addiction, or foreign national status [i.e. asylum seekers and other migrants]), and are therefore more likely to be sentenced to ‘time served’ rather than a day fine. This means that day fines lose much of their benefit in the context of an accused person who has been detained pre-trial, so that they are not often used in cases of indigent people in detention.

Setting the fine: Day-fines are the presumptive sentence for all sentences of up to one year (760 daily rates, with one day of imprisonment for each 2 daily rates). Fines can also be imposed in some cases for sentences of up to three years imprisonment. Daily rates are fixed between a minimum of EUR 4 and a maximum of EUR 5,000. However as in Germany, rates are rarely set in the maximum daily ranges.

Offences sentenced to Day Fines: Examples of typical Austrian day fine sentences include:³⁶

Severity of crime/ Daily rates imposed

Lowest level offence: 20 / 40 units (Ex: simple theft or fare evasion)

Low level offence: 20–60 units / 40–120 units

Medium-severe offence: 60–140 units / 120–280 units

Severe offence: 140–240 units / 280–480 units

Very severe offence: 240–360 units / 480–720 units

There are no special rates for indigent defendants, asylum seekers, etc. Despite the high upper end of potential daily rates, as in Germany, Austrian judges rarely sentence defendants to more than 180 units.³⁷

Ability to Pay Determination: The ability to pay determination is calculated on the basis of the personal circumstances and the economic capacity of the offender at the time of the judgment. A survey of the defendant's economic situation is generally taken in the police station upon arrest, and this is commonly used by judges to assess income. This survey contains questions about income and expenses, but there is no fixed guidance on how these should be calculated. The court has the ability to access tax records and registers of bank accounts, but this is not usually done except in high-value white collar crime cases. For ordinary criminal cases in which day-fines are used, it is typical for judges to accept the income stated by the defendant without requiring further evidence of ability to pay.

Enforcement: Imprisonment can be imposed for the amount of fine that is unpaid. One day of imprisonment corresponds to two daily rates. Before imprisonment is ordered, payment may be postponed on the request of the defendant, and this postponement is regulated: for sentences of up to 180 daily rates, payment can be postponed for up to a year; for sentences between 180–360 daily rates, it can be postponed up to two years; and for 360–860 daily rates for up to three years. Community service is also possible in lieu of payment, but this may not be imposed if it encroaches on the “per-

In Sweden, day-fines are used for over half of all convictions (58%) . . . [They] are also used occasionally even for more serious crimes, such as weapons possession. Virtually no one is imprisoned for non-payment of criminal fines.

sonal rights or lifestyle” of the accused. There is no provision allowing for the fine to be commuted or cancelled.

FRANCE

Background: Day fines have been a feature of French criminal procedure since 1983, when they were adopted in order to replace imprisonment in low level offences (fixed fines remain the norm for other forms of fine-based sentencing). They are used relatively infrequently, in approximately 1% of all criminal cases (4.3% of misdemeanors). In 2016, 18.8% of misdemeanors resulted in actual imprisonment (as opposed to suspended sentences, or sentences suspended with community service, etc.), and 4.3% resulted in day fines (on average, 24–25,000 cases per year). Day fines are applied pursuant to regular criminal procedure which provides for hearings at every stage and allows for right to counsel at each of those stages.

Setting the fine: Day fine units may be set at a maximum of 360 days, at 2 EUR–1000 EUR per day unit, with one day of imprisonment standing in for one day fine unit.³⁸ The average day fine is 9.2–9.4 euro per day.³⁹

Offences Sentenced to Day Fines: Day fines apply to all misdemeanours (crimes punished by 10 years of jail maximum, 20 years in case of recidivism) that are punishable by a prison sentence, whatever the quantum. They do not apply to felonies (crimes punished by 15 years of jail or more).⁴⁰ They can be combined with a jail sentence but not with another fine. Day fines are most common with respect to driving offenses—driving without a license is the most common offence for which day-fines are levied, followed by driving under the influence of alcohol, theft, and minor drug offenses.⁴¹

Ability to Pay Determination: The penalty must be individually determined, pursuant to offender’s income and liabilities (*revenus et charges*), on a net-income basis. The burden of proof of income and liabilities lies on the defendant. It is usually determined by producing proof of income (such as pay slips) and of “liabilities” (such as a rental contract), as well as tax

returns. No special calculations or default amounts for special groups (e.g. homeless, asylum seekers, etc) are available. According to our respondents, prosecutors are unlikely to suggest a day fine as sentence in respect of truly indigent individuals for that reason. Defendants may petition the court (*Juge d'application de peines*) for an adjustment of the fine amount due to changed circumstances at any point in the repayment period.

Enforcement: If the fine is unpaid, a defendant will receive notification from a bailiff, and seizure of property or garnishment of wages is possible. The defendant may be arrested and brought before a designated judge for the adjustment of penalties, who will decide if the defendant will have a reduction in the fine amount, an extension period, payment plan, or incarceration. In exceptional cases, the prosecutor may declare the defendant insolvent and not request further incarceration nor payment. According to the Ministry of Justice, very few people are incarcerated for non-payment of a day-fine—property seizure is more common.⁴²

HUNGARY

Background: Hungary adopted day fines in 1978 as a way to ensure greater proportionality and effectiveness of sentences. Reforms since that time have been implemented to both lower the minimum and raise the maximum monetary value of a day unit, with particular concern that the maximum was not sufficiently high to ensure accountability for convicted people with significant means.

Setting of Fine: The minimum number of daily units to be charged is 10, and the maximum is 540. For offences governed by the criminal code (which can be sentenced in tandem with imprisonment), the minimum value of a unit is 1000 forints (around 3 euro) with a maximum of 500,000 forints (around 1500 EUR). For petty offences, the scale is minimum 5,000 forints (15 EUR) and maximum 150,000 forint (450 EUR), with a higher maximum available of 300,000 forint (around 900 EUR) for petty offences that carry possible imprisonment.

Offences sentenced to Day Fines: They can be used as the sole sentence in any case with a maximum possible penalty of 3 years; they can also be used in addition to imprisonment for any more serious case (barring those carrying life imprisonment) in which the perpetrator has acted with the purpose of gaining material benefit, and where the defendant has sufficient wealth.

Ability to Pay Determination: The Hungarian courts take a relatively comprehensive approach to calculation of ability to pay. The following circumstances are taken into consideration by the court:

- the income of the person (total daily income);
- the income of the person's spouse and cohabiting family members;
- the assets (i.e. shares, savings, real estates owned, bank account monies, etc.) of the person;
- the personal relations and if needed the lifestyle of the person;
- living expenses and other expenditures (maintenance orders, mortgages, credits etc.).

One daily unit is comprised of the daily income and wealth of the person, from which living expenses and other compulsory expenditures are subtracted. The remaining spare amount equals the amount of one daily unit.

Enforcement: No appeals against determinations of ability to pay can be made. However, upon showing of changed circumstances, a one-year postponement of payment is available (6 months for petty offences). Installment plans can be used for up to a 2-year period, with the possible further extension if special circumstances apply. However, installment plans cannot be paid for longer than a 5 year period. In cases of non-payment, incarceration is imposed, with one day of prison imposed for every day unit unpaid. Partial payment can be accepted by judges, so a potential mechanism for the reduction of fines does exist.

POLAND

Background: Poland adopted day-fines more recently,⁴³ in 1997, in an attempt to rationalize existing regimes of criminal fines and to allow a more accurate and probing assessment of each defendant's ability to pay. Since its adoption, the relevant legal provisions have been changed in order to increase the maximum number of daily units and maximum value of one daily unit. The Polish legislation seems to have been motivated more by the desire to see wealthy defendants appropriately punished than to reduce the use of imprisonment.

Setting the fine: The lowest number of daily units is 10, and the highest is 810, and fines may be imposed between 20 and 5,000 PLN (Approx 4–1,200 EUR) per day. One day of prison equals two day fine units.⁴⁴

Offences Sentenced to Day Fines: In 2016, 34% of convictions were sentenced to a fine, 43% to prison, and 21% to home arrest, electronic or other monitoring.⁴⁵ Unfortunately, recent numbers on the percentage of those sentenced to a fine who end up in prison for default are not available. However, 2012-era data from the Ministry of Justice in relation to the Prison System reported that 5.52% of the total prison population was imprisoned for default of a fine.

Ability to Pay Determination: The court takes into consideration the person's income earned from all possible legal sources. The basic source of information are tax returns submitted annually to tax offices, to which the criminal court has access. The ability to pay determination is comprehensive of personal and family conditions, personal wealth and assets. The court must take all personal circumstances into account (e.g. disability, indigency). It considers factors including: the defendant's income, age, education, profession, health, having a dependent family, number of children, wealth and assets, and actual income (including the labour market situation and likelihood of obtaining future income).

Enforcement: An individual receives a court notice prescribing the amount of fine and payment deadline, which becomes binding if not challenged. In case of non-payment, the court bailiff performs an enforcement action. Notification is not required prior to enforcement action.⁴⁶ During enforcement, the bailiff can seize the person's property or may garnish salary. The defendant may also be entered into the National Register of Debtors which, in practice, creates certain barriers to participation in public and economic life. The court does have the ability to terminate or reduce full payment if collection is impossible. Furthermore, payment plans and postponements can both be used. If immediate execution of the fine would cause harmful consequences for the defendant or their family, the court can create a payment plan for a period not to exceed one year. This can be extended again for up to 3 years if warranted by the facts of an individual case (for example, in the case of very large fines). If a fine goes unpaid for some length of time (10 years in general or 3 years for a petty offence), enforcement becomes time-barred.⁴⁷ Community service may be imposed in lieu of payment of the fine if payment is impossible. Imprisonment may be imposed for non-payment if the defendant does not agree to community service, fails to perform it, or if community service is impossible for any reason.⁴⁸ The court's decision regarding imposition of community service or imprisonment may be challenged.

PORTUGAL

Background: Day fines have been regulated by the Portuguese Penal Code since 1995, with no major reforms since their inception. It is not commonly used—only 343 people were sentenced to a fine in 2018, out of 286,637 convicted people.⁴⁹ Day fines are applicable for crimes with a prison sentence lower than one year. They cannot be combined with probation or jail.

Setting the fine: Day fines can be imposed for a minimum of 10 days and a maximum of 360 days. The minimum daily unit is €5, and the maximum amount is €500. The judge determines the amount in accordance with

the specific circumstances of the defendant and their ability to pay, but there is no specific guidance.

Ability to Pay Determination: Ability to pay may be proved by all means available, but sources are not regulated by law. Evidence is usually provided through income tax documents, bills, proof of assets and pay stubs evidencing means and listing of school payments, car payments, other regular expenses, and health expenses, among others. In practice, evidence of a variety of sources proffered by the defense is accepted.

Enforcement: In cases of non-payment, a prison term can be imposed. However imprisonment for non-payment of fines can be suspended for up to 3 years if the sentenced person can prove that they are unable, not merely unwilling, to pay. The court can remedy non-payment by designing a payment plan for the defendant, changing the amount of money owed per instalment, imposing community service, etc. The legal standard/inquiry before fines can be converted to jail time for failure to pay is usually a notification, sometimes followed by a hearing if the amount owed is contested or the financial situation has changed.

ENGLAND AND WALES UNIT FINE EXPERIMENT

Background: England and Wales experimented with a unit fines system and legislation for a short period between 1992 and 1993. The motivation behind the adoption of so-called “unit fines” was to increase the use of fines (which had previously been used in up to 80% of sentences in the 1970s but then declined precipitously to around 39%) in place of costly probation and community supervision, as well as to reduce incarceration for unpaid fines.⁵⁰ They have since then been abolished, as it proved to be unpopular with magistrates and the public.⁵¹ Instead of a day fines system, England and Wales now requires magistrates to consider a defendant’s means when imposing a fine, but this assessment is not done according to a mathematical formula nor by replacing days of prison with equivalent day fines. Still, it is useful to consider the English and Welsh experiment both for specific features which could

be rescued and tried elsewhere, and in terms of a cautionary tale for failed day fines systems, as both political and judicial resistance made its sustained implementation impossible.

Despite some evidence that unit fines were administrable, improved equality with respect to incomes and increased payment of fines,⁵² the unit fines system was scrapped when several magistrates protested it and widespread media coverage portrayed the proportionality of fines to income as unfair (e.g. the poor underpunished and the rich overpunished). For example, in the case of a fight between two men, one of whom was fined £640 and one £64 for the same conduct, due to their differing incomes.⁵³ The practice of fining individuals at the highest rate when they failed to produce evidence of income was also criticized.⁵⁴ This coincided with a political turn to imprisonment as a preferred sentence.⁵⁵ In addition to these challenges, judges resented being regulated in their discretion to set fines at the level they deemed appropriate.⁵⁶

Nonetheless, some characteristics of the short-lived unit fines system may still be of interest to US reformers; in particular the tools for the calculation of ability to pay.

Setting the fine: The number of units were commensurate to the seriousness of the offence within an existing system of categorization by offence level. For example:

- (a) 2 units in the case of a level 1 offence;
- (b) 5 units in the case of a level 2 offence;
- (c) 10 units in the case of a level 3 offence;
- (d) 25 units in the case of a level 4 offence; and
- (e) 50 units in the case of a level 5 offence or a statutory maximum offence

The value given to each unit was determined by the court by reference to the offender's disposable weekly income within a range of £4–£100. Defining income per week rather than per day is unique to the English and Welsh

system, and was chosen as magistrates were accustomed to making income assessments based on salary or benefits which were payed weekly.⁵⁷

Ability to Pay Determination: The defendant was ordered to fill out a “means enquiry form” which asked how much the defendant earned, any dependents they had and what their 'spare income' (defined as disposable income) was. If the defendant falsified the form, they would be subject to summary conviction of imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale (described above). If a defendant failed to supply the court with a means enquiry form, it enabled the court to impose any fine it thought fit. In practice, this was often the highest possible fine in order to incentivize defendants to fill out the form accurately.

The amount of a fine was calculated by reference to the offender's disposable weekly income that was determined by a formula. This formula subtracted the expenditure level considered appropriate from the defendant's net weekly income and then divided this figure by three. The guideline for the courts to impose the penalty by subtracting the defendant's expenditure from his or her weekly income was provided as below:

Member of household	Item of expenditure
Offender	Food
	Heating
	Housing costs
	Community charge
	Water rates
	Clothing
	Travel to work
Spouse/cohabitee	Food
	Community charge
	Clothing
Adult dependents/children	Food
	Clothing

As an example, one court reduced weekly disposable income by £75 for the defendant, £50 for their spouse, and £25 for each child.⁵⁸ Housing costs were not deducted at first, but later adapted as interest rates (and thus housing costs) rose. During the unit fines experiments, judges in different regions tended toward different norms of daily rates, taking into consideration local labor market and prevailing wages, leading to significant geographic variation. In some courts, judges would regularly set a daily rate of £1, but in others special rates below the statutory minimum were never made. Judges tended to set the daily rate according to their own sense of affordability based on the means form, and did not make precise calculations.⁵⁹

Enforcement: Fines and custodial sentences were not interchangeable. The unit fines system only applied where a fine would have been otherwise imposed if it was a level on the standard scale (i.e. 1–5—did not exceed £5000). It was possible to imprison offenders who defaulted in paying their fines as set out below:

Amount of the fine	Maximum period of imprisonment
Not more than 2 units	7 days
More than 2 units but not more than 5 units	14 days
More than 5 units but not more than 10 units	28 days
More than 10 units but not more than 25 units	45 days
More than 25 units	3 months

The laws regulating the unit fines system did not explicitly allow the court to modify fines, nor to create postponement or payment plans, though appeals against fine amounts were permissible. However, it did seem to allow for the remission, or mitigation, of fines in certain circumstances (i.e. hardship). In practice, judges permitted time extensions with some regularity.⁶⁰

Conclusions

- Few jurisdictions engage in extensive investigations of income and actual costs of living in order to assess ability to pay. Instead, judges either accept the testimony of the defendant (often in the form of a short income declaration form filled out upon arrest) or rely on accessible tax records where these exist. Some jurisdictions use formulas to deduct living expenses, rather than requiring evidence of actual housing costs and debts.
- Imprisonment for non-payment varies significantly between jurisdictions and is poorly documented, but the experience of Sweden (and, it would seem, Finland) suggests that it is possible to administer a robust day fines system without reliance on imprisonment for non-payment.
- Although there are no examples of guidelines for indigent defendants, in practice people without employment can usually appeal to the court for extensions, payment plans without interest, community service or, in some jurisdictions, abandonment of collection.
- In systems where day fines are well established, they have been adopted alongside other reforms aimed at decriminalising low level offences and introducing other forms of alternatives to incarceration (i.e. suspended sentences, conditional release, home arrest, etc.) to reduce incarceration.
- Ramping down the severity of punishment across different offence levels, along with the two-step day fines process which allows for significant penalties to be levied in more serious crimes, allows day fines to function effectively as sole sanctions.

**It is possible
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ENDNOTES

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