Offender Supervision in Europe
COST Action IS1106

cost EUROPEAN COOPERATION IN SCIENCE AND TECHNOLOGY

European Norms, Policy and Practice

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Our aim

The briefing summarises the learning from the first year's activities in Working Group 4 of the COST Action about Offender Supervision in Europe (COST IS1106: www.offendersupervision.eu).

We now have evidence that there is a specific European approach to key aspects of punishment – there is a pan-European rejection of the death penalty; a European approach to prisoner's rights; the Committee for the Prevention of Torture is a strong monitoring body and we also share the idea that prison must be used as a means of last resort. The WG on European Norms, Policy and Practice explores whether this approach extends to punishment and offender supervision enforced outside prisons.

If we want to find out about the 'European element' in offender supervision, we may adopt, broadly speaking, two approaches: We may look for similarities and differences in a horizontal comparison. But we also have the international and the regional - European - level from where influences on offender supervision in Europe can be detected. So we also must compare vertically: How do European institutions shape norms, practice and policy in Europe? How, in turn, are their activities shaped by Member States (Governments, judiciary, NGOs…)? How good are their initiatives and standards? How do they interact? This second approach is mainly how our working group contributes to the COST Action: While the other Working groups do much of the horizontal comparative work, we add this necessary further level of comparison and analysis.

Background: What Europe?

In our Working Group 9 jurisdictions are represented: Norway, Lithuania, England/Wales, Belgium, Germany, Austria, Italy, Spain and Malta. We therefore can draw upon examples from Europe's North and South, East and West (geopolitically); common and civil Law jurisdictions, EU and Non- EU countries. Our main points of orientation are the various initiatives of the Council of Europe and the European Union.

The Council of Europe is an international organization and currently has 47 Member States. The promotion of the rule of law and human rights is one of the main objectives and the European Convention of Human Rights (ECHR) with its powerful and influential control mechanism, the European Court of Human Rights (ECtHR), is one of the Council's outstanding achievements. With regard to offender supervision, several of the fundamental rights may be affected – the right to respect for private and family life (Art. 8 ECHR) – by electronic monitoring or the obligation to register as a sex offender; the right to a fair trial (Art. 6) – by revocation procedures; the right to liberty (Art. 5 ECHR) – again think of recall or denial of bail; the prohibition of forced labour (Art. 4 ECHR) – by certain work penalties; perhaps even the prohibition of inhuman or degrading treatment or punishment (Art. 3 ECHR) – again imagine certain ways to enforce unpaid labour penalties or certain conditions of probation.

Crucial to our work are the European Rules on Community Sanctions and Measures (ER CSM), adopted in 1992, and the Council of Europe's Probation Rules (ER Prob) of 2010. As mere recommendations they are not legally binding. They have a measure of authority, however, because they were adopted unanimously by representatives of all the member states. Additionally, they were lobbied for by several NGOs active in the field of offender supervision (for example the CEP – The European Probation Organisation). The principal aims of the ER CSM are to safeguard the rights of the offender and to supply guidelines for good practice. The ER Prob focuses on the fact that probation agencies are among the key agencies of justice and are designed to instruct and to promote good practice for actual probation work by many rules relating to accountability, organisation and staff as well as interventions such as pre-sentence reports, community service orders, the contact with families, work with foreign probationers, etc.

Our second frame of reference is the European Union, which has 28 Member States with more than 500 million people living within its borders. Here, mainly intensified cross-border cooperation is relevant. The legal concept or tool adopted to achieve this is 'mutual recognition of judicial decisions in criminal matters': any decision made by a judge in State A should be accepted in State B as if a judge in State B had pronounced it. Of interest is a Framework Decision (FD) 947 adopted by the EU in 2008 on 'supervision of probation measures and alternative sanctions'. It requires, in principle, member states to supervise offenders sentenced in another state and thus to implement 'foreign' supervision orders. The second one, the FD 829 on the European Supervision Order (ESO), adopted in 2009, seeks to transfer pre-trial supervision measures (cf. bail conditions). The FDs are, unlike the two instruments of the Council of Europe, legally binding; not directly, but because they have to be implemented by the Member States and transposed to national legislation.

Knowledge and Reception of European Initiatives on Offender Supervision

Against this background the Working Group started to explore the question of the potential impact of the European initiatives by surveying the Members as

'country experts'. With regard to the recommendations of the Council of Europe we looked at translation and dissemination of the ER CSM and ER Prob: Are they used, by whom and for what? Our first general impression is that they still are not very well known in Europe. This general conclusion, however, has to be made with some reservations:

- They are translated in all countries represented in our working group where English or French is not the first language.
- They are used sometimes by policymakers, governmental or NGOs, particularly when reforms are discussed.
- Scholarly analysis is rare but exists.
- Practitioners (in probation services or in the judiciary), however, have hardly been reached. At best, the two instruments are signposted at websites of national probation organizations or associations. But here again we have exceptions: they are sometimes used for staff training and at universities, are discussed in professional associations, there are published papers in probation journals, and there are some news stories on the instruments.

The main instrument under European Union law, the FD on Probation Supervision (and transferring sentences) has recently been discussed extensively while the FD on Pre-trial Supervision is less known. Even if member states should have transposed both FDs in domestic law by the end of 2011 and 2012, respectively, this has been done only by eight and five states respectively. Several European projects are or have been aimed at enhancing the ability of the relevant actors (in ministries, probation agencies and courts) to understand probation procedures and practices within different jurisdictions across the Union better and to develop more confidence in them. Among them was the 'European Probation Project'[1] that compiled a list of available alternatives to prison sentences and further country information in order to ensure an adequate cross-border enforcement of supervision in the context of probation and comparable sanctions. It went beyond the state by state-approach by providing different deliberations on how implementation could be achieved best - also from a human rights point of view. The ongoing ISTEP[2] seeks to develop remedies to identified legislative and practical implementation – mainly by providing information in the form of factsheets, databases, or a handbook.

There has been some discussion as to whether there is an actual need for the two FDs. The FD on Probation was advocated for by arguments related to the free movement of citizens within the European Union (which has been increasingly simplified), leading to more and more sentences that are imposed on non-residents and, as a consequence, have to be executed elsewhere.

[1] www.euprobationproject.eu/index.php. A book has been edited with all the information and additional analysis by Flore et al. 2012.
[2] Implementation Support for Transferring of European Probation Sentences, http://www.cepprobation.org/page/211/projects.

It is difficult to assess the potential effect of the mechanism because several categories of offenders could be affected: Firstly, it is the group of those EU citizens that have already been given a non-custodial sentence which has to be supervised, and who stay in the country that issues the non-custodial sentence, even if the sentence would be supervised more effectively in their home country. This group, according to estimates we have, is small: In Ireland, the Probation Service, together with the Probation Board of Northern Ireland, looked at the numbers of foreign nationals in its caseloads on a single day in May 2009. The results revealed that 97% of its probationers were Irish, or UK nationals for whom informal co-operation mechanisms were already in place. This meant that only a very small proportion were from other EU States. Also in Catalonia the percentage was less than 3%. Secondly, the FD Probation might apply to a group of EU citizens who is sent to prison (as a pretrial measure or as a sentence) because the judge believes that non-custodial supervision is not suitable in the country where the judgment has been pronounced and can, so far, not be supervised in the home country. And then there is a third group that so far 'got away' because the sentence cannot be executed since the offender is no longer in the country where the judgment has been pronounced.

Like other EU legislation in the field of mutual recognition, the FD Probation has been heavily criticized by scholars and practitioners. Discussions often refer to its complexity and to how unwieldy it is, as well as to practical and technical issues - e.g. about the responsibility for subsequent decisions, mainly in the case of breaches or costs (for supervision measures that involve treatment, translation costs or transfer costs).

Other discussions are more doctrinally driven and often relate to the issue of double criminality. Problems could arise in the area of petty crimes. Similarly, anti-social behaviour of a certain kind may constitute a criminal offence in some countries while this is not the case in others, similar problems arise where a category of misdemeanours exist that elsewhere are administrative offences – particularly with regard to traffic offences. Possession and use of small amounts of drugs are a particularly contested area. Mutual recognition here finds its limit - the Framework Decision allows the state that is supposed to execute/supervise the sentence to refuse the supervision (Art. 10 (3) and 11 (1d) of the FD) when the judgment relates to acts which would not constitute an offence under its law.

Offender Supervision as a European Cross-cutting Challenge: Some examples

There are several examples of significant challenges that may arise in relation to developing European cooperation in relation to supervision.

Infringing human rights?

As mentioned above the reasons to refuse cooperation under the FD are limited, but human rights issues can play a role in this matter. According to the FD it is not possible, however, to refuse a judgment because it seems unduly harsh - here the principle of (unconditional) mutual recognition

applies and only a moderate adaptation is possible. Sentences that seem adequate in one country and disproportionate in another, nevertheless, have been one of issues that have a human rights dimension and have often been discussed. It is indeed questionable how far a grossly disproportionate community sanction may be regarded as a human rirights infringement - when applied for an excessively long period or when, for example, the obligation to carry out unpaid work imposes an unreasonable amount of hours. Community service as a measure or sanction exists in most European States, nevertheless big differences can be found with regard to the maximum amount of hours an offender can be required to work. The FD on Probation only provides for an adaptation of the measure, for example when the duration of measure in the judging state exceeds the maximum duration provided for under domestic law of the executing state. But the FD forces the executing state to fully exploit the domestic sentencing framework – the adapted measure may not be below the maximum duration provided for equivalent offences. This is a problem in states with very wide sentencing ranges. So, in Spain, 480 hours of community work in theory is possible but might be regarded as grossly disproportionate.

Other forms of treatment or some probation conditions could contravene human rights by their nature. One example is surgical castration of sex offenders. By its nature this measure affects Art. 8 ECHR and, according to the European Committee for the Prevention of Torture (CPT), also contravenes Art. 3 ECHR, as it is a form of inhuman and degrading treatment,. This indeed has been an issue during the discussions on the FD because e.g. in Germany and the Czech Republic surgical castration is possible with the consent of offenders under certain (strict) conditions, and coercive chemical castration of sex offenders is increasingly being discussed in other states. Generally, the FD Probation (and all other in the field) allows member states to refuse execution when fundamental rights and fundamental legal principles are not respected. The question remains when this exactly is the case. Arguing that a measure from state Y contravenes the national order in state X may be difficult within the 'common area of freedom, security and justice' of the EU and often states want to avoid to be seen as 'bad Europeans'. But arguing that it contravenes common European standards by using the Recommendations of the Council of Europe (that are based on common values and all Member States of the EU have adopted!) should be a good idea.

Social rehabilitation?

A second European challenge in the field of offender supervision is connected to the concept of social rehabilitation. The term and its many translations are typical for the Babylonian confusion we sometimes find when we discuss OS because the word 'rehabilitation' exists in many of our languages, but does not necessarily stand for the same thing. A closer look at the different European instruments - that themselves use different terms and, arguably, concepts (including social adjustment, social inclusion, social rehabilitation) - is worthwhile: If we can rely on a comparable understanding of what is considered to be of central importance, problems should be resolved relatively easily. If this is not the case, things become more complicated. A related question is who has the final say or right to interpretation in disputed cross

border cases, i.e. when it has to be decided where social rehabilitation can best be achieved.

Involvement, consent and cooperation

A third challenge relates to offender involvement, consent and co-operation. How to involve the offender in the transfer process and particularly, his cooperation and the question of – informed - consent are key issues for probation work. The latter is usually discussed with reference to particular sanctions, in particular community service, electronic monitoring (here also of others living in the same place as the offender) and also with reference to medical, psychiatric or addiction treatment. Whereas it must always be obtained in the pre-trial phase because of the presumption of innocence (Art. 6 ECHR), the extent to which it is also regarded as necessary in other instances differ amongst the member states. This can more generally be said about 'voluntarism', which is seen as a common underlying principle in European probation by some. Arguably, many - and increasingly often - exceptions, to this principle can be found in Europe. In the Council of Europe's recommendations great emphasis is put on offender involvement. The ER Prob, for example, state: "As far as possible, the probation agencies shall seek the offenders' informed consent and cooperation regarding interventions that affect them." In the context of the FD on Probation it will be important that consent requirements will not be circumvented by transfer procedures, in transfer cases information duties lay on authorities and services in the issuing as well as the executing state.

A second related issue is consent to the transfer. When introducing the FD it was always said that consent to the transfer was a necessary element, with the underlying notion that achieving the aim of social reintegration otherwise is illusionary. Apart from the question of consent and its specifications (when? to what? depending on what information?) the question arises whether the sentenced person has a right to be transferred if he is of the opinion this is best for his social reintegration. This again raises question as to how to assess the likelihood of reintegration and who may decide this.

First conclusions

- The Council of Europe's recommendations in the field of offender supervision merit further dissemination, implementation and scholarly interest. Many states may rightly claim that they meet – most of – the standards. We will, however, have a closer look whether this really is the case.

- Added value can be seen in the fact that they are common European standards and can thus provide a yardstick when problems are discussed across the border. This becomes truly valuable when concrete cases and offenders are affected, and concrete problems must be solved in cross-border supervision cases within the European Union. Practitioners (particularly defense lawyers) then will find the standards helpful.

A more detailed account of the findings of this and the other Working Groups will be provided in our forthcoming book: **Offender Supervision in Europe**, edited by Fergus McNeill and Kristel Beyens, which is due to be published by Palgrave in December 2013.

For more information about the Action, check out our website: www.offendersupervision.eu

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