Offender Supervision in Europe
COST Action IS1106

cost EUROPEAN COOPERATION IN SCIENCE AND TECHNOLOGY

Consultation about the European Rules on Community Sanctions and Measures

The European Rules on Community Sanctions and Measures are currently being updated by the Council of Europe. The Council for Penological Co-operation (PC-CP), which advises and reports to the European Committee on Crime Problems (CDPC), undertakes this work (Prof Rob Canton being the PC-CP expert that has contacted the COST Action).

Rules about CSM were first adopted in 1992 in form of the Recommendation No. R (92) 16, European Rules on Community sanctions and measures.[1] Another Recommendation on "improving the implementation of the European rules on community sanctions and measures" Rec (2000)22 was adopted in 2000.[2] The Council believes that an update is required, bringing together the substance of the two earlier Recommendations and taking account of the many changes that have taken place since 2000. The starting point was to study these two earlier Recommendations. As they are very differently structured there is no easy way of combining them in a single document. The Committee therefore accepted a suggestion that the new Recommendation should be structured under the headings you can find in Annex.

The COST Action Offender Supervision in Europe has been asked to take part in this work, considering three aspects.

- **What do you think are the strengths and shortcomings of the two original Recommendations?**
- **What changes have taken place since 2000 that suggest a need for amendment or for new Rules?**
- **Is there anything else you would like to contribute to this process of revision and updating?**

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[1] They can be found here https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%2892%2916&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864 and their Explanatory Memorandum (a commentary and "instruction manual" by the authors) here: <https://wcd.coe.int/ViewDoc.jsp?id=615649>).

[2] <https://wcd.coe.int/ViewDoc.jsp?id=388373&Site=CM>.

- **General remarks**

The two existing Recommendations under scrutiny are **different in nature**: The ER CSM of 1992 are designed "to establish a set of standards to enable national legislators and the practitioners concerned [...] to provide a just and effective application of community sanctions and measures" (preamble of the ER CSM). The Recommendation of 2000 is meant to guide Member States' Governments in "their legislation, policy and practice in relation to the creation, imposition and implementation of community sanctions and measures [...] for achieving a more effective use of community sanctions and measures" (recital of the Rec (2000) 22).

The latter has altered two provisions of the former recommendation and in general seeks to ensure the widest possible dissemination of the relevant CoE instruments. **In short: While the ER CSM are meant to codify certain common European standards for CSM in law and practice, the Recommendation of 2000 is more a policy paper to advocate for the use of CSM.**[3] We can see here a subtle shift in emphasis from justice to effectiveness.

It can also be observed that the **language** of the Recommendation of 2000 is less authoritative; "should" is dominating. If standard setting is envisaged with the new recommendation this must be expressed accordingly (and more in line with the ER CSM). Equally, provisions with restrictions like "where constitutional principles and legal traditions so allow" (No. 6, (2000)22) are of little use.

- **What do you think are the strengths and shortcomings of the two original Recommendations?**

The ER CSM can be considered as a highly principled approach towards the human rights based use of community sanctions and represent what human rights lawyers call "evolving standards of decency" in the respective field. The principal aims are to safeguard the rights of the offender and to supply guidelines for good practice – so basically they promote the approach that only what is just is working well. They are to a great extent the "non-custodial" equivalent of the *European Prison Rules*.

Unlike them, however, the ER CSM are not well known, they have no back-up from other, binding instruments and control mechanisms such as the Committee for the Prevention of Torture (CPT). Even if they are based on the *European Convention of Human Rights* in the same way as the Prison Rules, almost no jurisdiction by the European Court of Human Rights can be found with regard to the application and enforcement of community sanctions and measures. This means that the Court has no occasion to draw on the ER CSM (as it does on the European Prison Rules), which clearly is a disadvantage and impedes their implementation and distribution. It is, however, doubtful that this "legal environment" will change in the future.[4]

[3] The Rec. (2000) 22 must also be seen as reflecting persistent criminal policies in some of the member States: The ER CSM 1992 contained the provision that "no community sanction or measure shall be of indeterminate duration" (Rule 5). In the version of 2000 this changed so that it is merely stated that this "ordinarily" shall not be the case. Several member states retained measures of offender control within the community for an indeterminate period – the ER CSM adjusted to that policy.

[4] One reason is that even if the aspect of "fairness" in Art. 6 ECHR seems to fit, this article is for now only used in the period of the criminal proceedings until conviction, not in the enforcement stage (even if it can be debated whether it should be used accordingly for example for breach proceedings). Art. 3 ECHR (prohibition of torture, inhuman and degrading treatment and punishment) that for some years now is used in the

Nevertheless the focus on the legal position of the offender and his rights and legal guarantees as one of the great strengths of the ER CSM: They underline the need for legal safeguards for every sanction or measure that has a penal content, stressing that the idea of alternative or community sanctions being soft options or even privileges for the offender in comparison with a custodial sentence is wrong. They call for clear and explicit legal provisions on the introduction, definition and application of community sanctions and measures[5] (that means sentencing and enforcement, especially regarding conditions and obligations and consequences of non-compliance[6]). One of the fundamental principles is the concept of proportionality[7] (proportionate to the offence, not the perceived risk!) in a sense of a minimum intervention that takes into account the offenders personal circumstances.

Therefore, the subheadings found in the ER CSM "judicial guarantees" (chapter 2) and "respect for fundamental rights" (chapter 3) should be kept; even if the structure within these chapters may be changed (for example because some of the provisions on complaints procedures are moved to the new section VII). To safeguard the offender's rights and thus to implement the legal citizenship of the offender, the ER CSM contain detailed provisions on complaints procedures as well as the requirement of the offender's informed consent to measures before or instead of a formal proceeding or trial. Furthermore, they stress that the co-operation of the offender is crucial for the success of the measure. They also stress the right to privacy of the offender and his family, which is of utmost importance, on the one hand with regard to the use and dissemination of personal data and on the other hand with regard to visits and other personal contact.

According to the preamble of the ER CSM the application of community sanctions has to balance the need to protect society and the needs of the offender having regard to his social adjustment.[8] The victims' interests are incorporated indirectly in this preamble in the form that CSM must be implemented in a way that allows for "reparation for the harm caused to victims". It can thus be said that the ER draw **mainly on the concept of rehabilitation** of the offender, all enforcement activities should gear towards it. This, again, must be seen as a particular achievement.

There are, however, **weaknesses in the ER CSM**: The issue of breach is dealt with in Rules No. 76-79. Here, the importance of information about the content of the sanction, the expectations towards the offender as well as information about the

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jurisprudence of the ECtHR when it comes to terrible prison conditions, equally so far has never been invoked with regard to CSM enforcement. Even bad practice here probably does not reach the intensity of degrading or inhuman treatment (even if we could think of such practices with regard to dangerous community work, community work that deliberately exhibits or humiliates the offender, or electronic monitoring that leaves no privacy).

5 ER CSM 3, 4, 7, 9.

6 ER 4.

7 ER 6: "The nature and the duration of community sanctions and measures shall both be in proportion to the seriousness of the offence for which an offender has been sentenced or of which a person is accused and take into account his personal circumstances."

8 "The present Rules are intended: a. to establish a set of standards ... to provide a just and effective application of community sanctions and measures. This application must aspire to maintain a necessary and desirable balance between, on the one hand, the need to protect society both in the sense of the maintenance of legal order as well as the application of norms providing for reparation for the harm caused to victims, and, on the other hand, the essential recognition of the needs of the offender having regard to his social adjustment; ... " (Preamble).

consequences of non-compliance is highlighted. The offender must be also informed "of the rules under which he may be returned to the deciding authority" – which means that there must be rules of that kind. Clearly defined procedures for probation officers or other staff must be available, both towards offenders and towards the deciding authority (normally a court). In addition, a flexible, informal reaction to "minor transgressions" is favoured, but offender must be heard, and any actions must be documented in the case record. Nevertheless all this seems to be **rather vague:** What is a minor transgression – what is a "significant failure"? And what should be the rules to follow (for the implementing authorities)? It seems that standards procedures in the member States of the Council of Europe are very different in this regard and very flexible are opposed to quite rigid systems.

Some of the recommendations in **(2000) 22** for legislators are of **great importance**, for example No. 2, 3 and 8, in particular with regard to repeat offenders or offenders with certain types of offences (that must not be excluded from CSM). It is therefore good to incorporate them under the draft heading "**sentencing**" in the new recommendation – albeit with a wording of more binding character, stating that no specific category of offenders must be prevented for being considered for CSM.

When the ER CSM were reviewed for the first time in 1997 by a committee of experts[9] the outcome was, amongst other findings, that sufficient **complaints procedures** against the ways agencies actually enforced ECM existed almost nowhere – a judgement that is still shared ten years later by van Kalmthout/Durnescu (2008, p. 36) and probably has not changed since. This was not well reflected in the Recommendation of 2000, so this could be something to highlight in a new recommendation. Linked to this we suggest to discuss if probationers in the breach procedure could benefit from **legal aid** if their income is below a certain level.

Additionally and like for the prison system, **independent monitoring** should be in place. This would decrease the level of abuses and errors in the implementation agencies and contribute to their public visibility.

Another weakness of the existing Recommendations is that they did not adress the need to prevent **CSM inflation**. They all seem to be created with the mind frame that we have to provide more and more CSM to prevent/replace custody. In the same time, they do not provide safeguards or recommendations on how to prevent up-tariffing and net-widening. In the light of the latest paper by Aebi and others (2015) we have evidence that this particular objective of CSM has failed in most of the European jurisdictions. The new Recommendation could challenge this issue. How to do that is quite complicated to answer because every jurisdiction has its own CSM inflation pathways but some general principles could be worked out.

- **What changes have taken place since 2000 that suggest a need for amendment or for new Rules?**

There are many changes and the penal policy in many Member States has been harsh and not very favourable for a rational and humane approach towards offenders. In the last 15 years in many countries new forms of CSM emerged or were used more frequently that **expand the state control** over certain categories of offenders (e.g.

9 The Committee consisted of national experts from 15 countries (both east and western European countries). Elected chairperson of this group was Sir Graham Smith from the UK. Additionally three scientific experts were involved, K.-K. Kunz from Switzerland, P. van der Laan from the Netherlands and N. Bishop from Sweden.

sex offenders, violent offenders etc.) **even after maxing out**. Sanctions like extended supervision, lifelong supervision, judicial control (in countries like Germany, England, France etc.) pose many human rights issues and most often have not enough guarantees to protect offenders from abuse.

Another example we can see is the changing attitude towards the need to work with the **offender's consent** – if at all, compliance is seen as something rather instrumental. This particularly refers to community service. Here, the meaning of **Art. 4 (2) of the European Convention of Human** Rights seems to be taken into account too little and should be discussed when preparing a new instrument.

If consent is required, the right point of time within the proceedings is a problem. To check cooperation and/or consent before the judgment (declaration of guilt) can be in conflict with Art. 6 (2) of the European Convention on Human Rights (**presumption of innocence**).

The importance of offender cooperation and participation already is emphasised in the Rules of 1992, but here we have a lot more research since then. Therefore, **participation and co-production must be promoted** in the new instrument. We know from the literature how co-production can support substantive compliance and desistance.

But also the conditions under which CSM operate have changed in Europe: While in 2000 many of the Eastern and Central European States were still in a **transitional period** with regard to new laws and, in particular, in creating new probation systems and practices, this development in 2015 is more or less **concluded**. So less general policy directions are needed, but more concrete "standards of decency".

The **European Probation Rules** (ER Prob) have been adopted in 2010. It is a problem that many (in particular) practitioners take them as an isolated instrument, although they cannot be understood without knowing the ER CSM. One example: A colleague criticised the ER Prob for not foreseeing guarantees in the breach procedure. She was not aware of the provisions in the ER CSM. So the new recommendation must make sure that they do not overlap or even contradict each other but rather that they really complement each other. Probably some of the provisions of the ER CSM in the section on "Operation of the Sanction or Measure" are not necessary any more because they are covered in the ER Prob. It would be worthwhile to discuss if not the European Probation Rules as well could be incorporated into the new instrument, **because principles, legislation and guarantees should not be seperated from their implementation**. **One document** dealing with all these issues into a coherent and consistent way to us seems to be the better solution.

In many European countries the share of **foreign offenders** is rising; they are however, often under-represented as probationers. New rules should address this problem – here, however, there is a need to take into account the Recommendation on Foreigners.[10]

[10] Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners; https://wcd.coe.int/ViewDoc.jsp?id=1989353&Site=CM. Some additional reference to the existing new practices within the EU could help: the new FD 947, the conclusions oft the 947 expert group regarding the need for closer cooperation and coordination between different probation systems etc.

Electronic Monitoring is, much more than in 2000, a common practice in Europe. Here, again, a specialised Recommendation exists,[11] which must be taken into account.

Another development that could be better represented in the new instrument is the identity work that is suggested in the desistance literature. **Hope, narrative change** and so on are quite underscored in the CSM practice.

Research is needed, and comparable databases and statistics are needed. The situation, however, has changed as compared to 2000 because meanwhile a lot more research is done, also on a comparative European level, than before. Now, it is very important on the European level to make this research accessible (again: with databanks, collections) and to promote this kind of networking and exchange.

This directs to the last, but a very important point: Meanwhile, and totally different to 2000, the **European Union** has become active in the field, particularly with the Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments[12] and probation decisions with a view to the supervision of probation. This is one reason why more comparative research is being done, but is also one reason, why common European standards are so important. The new recommendation probably must take this development into account (for example by stipulating that the transfer of probationers must always adhere to the aim of rehabilitation - and what this means). The relevance for the problem of foreign offender within the EU has been mentioned already. In addition, the need for exchange between practitioners could be considered int his context.

- **Is there anything else you would like to contribute to this process of revision and updating?**

The ER CSM are a most valuable instrument – so we deem it important that much of it will be kept or strengthened and surely must be protected against any watering down. As mentioned above, the ER CSM must be adjusted to a comprehensive system of Recommendations in the field, namely to the European Probation Rules, the Rec. on foreigners and the Rec. on Electronic Monitoring. **It will hopefully keep its spirit, main aim and character as a Human rights instrument.**

When considering the other relevant Recommendations it could be useful not to do in a very general manner in the recital or preamble of the new recommendation, but in an explicit way (to certain rules of importance). This is much easier for the reader and cross-referencing may have a positive effect on dissemination of the actual content of the various instruments.

Even if the COST Action will be terminated in April 2016, we (as individual researchers and as ESC Working Group on Community Sanctions and Measures) are available to comment on the draft instrument once there is one.

Dr Christine Morgenstern, Greifswald University

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11 Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring; https://wcd.coe.int/ViewDoc.jsp?id=2163631.

12 see also reference in footnote 10

Annex:

Suggested Structure of a new Reccomendation on CSM (by Rob Canton), E-Mail 6/10/2015

Preamble

I Basic Principles, scope and application

II Legal Framework:

- Legislation
- Sentencing

III CSM implementation and methods

- General
- Methods of work
- Case records and personal information

IV Community participation

V Consent, cooperation and enforcement

- Non-compliance

VI Staff, Organisation and resources

- Professional staff
- Use of volunteers
- Financial resources

VII Complaints procedures, inspection, monitoring

VIII Research, evaluation, work with media and public

Glossary