

SHORT COMMENTARY ON THE RECOMMENDATION CM/REC(2010)1 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE COUNCIL OF EUROPE PROBATION RULES¹

SILVIU GABRIEL BARBU*
LORENA EPURE**
GOGA ALEXANDRU SILVIU***

Abstract

The present paper has the purpose to analyze the Recommendation of the Committee of Ministers to member states on the Council of Europe Probation Rules adopted in the 1075th gathering on the 20th of January 2010. This recommendation has a very important role in the construction of the probation systems in the European states, having a great contribution in the harmonization of the legislation of the member states in the field of criminal sanctions. Its goal is to better criminal justice and strengthen public safety by deterring and reducing criminal behavior.

In the present paper we will analyze more than 100 rules introduced by this Recommendation, outlining the frequently used terminology and the most important regulations.

The objectives of the paper are to make a summary of the new regulations within this Recommendation, to make a comparative analysis with all the existing laws and rules in this field, the paper also giving some conclusions on the matter.

Key-words: recommendation, Council of Europe, probation rules, criminal justice, reoffending

1. Introduction

The field covered by the present study is represented by the provisions, regulations and content of the Recommendation mentioned in order to give a better understanding of the European understanding and application of the legal act.

The importance of this study can be understood from different points of view. First of all it can be regarded as important by the scientific community that can benefit from an authorized commentary of a Recommendation. Another point of view can be regarded from the view of legal practitioners, and authorities that have to enforce the laws regarding criminal offences and probation. And last, but not least, another way in which the study can be significant is that of the students that have to study criminal executional law in Law Faculties, Police Academies and so on, or the future agents in probation agencies that have to be very knowledgeable with the subject.

Some of the objectives of the present paper are to make a short outline of every rule in the Recommendation, analyze them, explain them in a brief paragraph, and give comparisons if any to the current status in our country. Other secondary objectives are that of creating an instrument that can work together with the Recommendation to be easily used by any interested person. In the end, the study will make some conclusions and recommendations upon the subject.

We, the authors, have analyzed the recommendation and other commentaries and we will pursue the challenge to give every rule a short explanation or just mention an important aspect important to remember or relevant to discuss.

¹ Adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers' Deputies.

* Lecturer, PhD, "Transilvania" University of Braşov, Faculty of Law (silbarg@hotmail.com); judge.

** Lawyer in Brasov Bar Association.

*** LLM, legal counsel, "Transilvania" University of Braşov, Faculty of Law (alexandrugoga@gmail.com).

There have been other commentaries done by NGOs that work in the field, and also by other practitioners, but these have been done right exactly after the enactment of the recommendation or in a very exhaustive manner.

It is clear that the phenomenon of criminal offences is a constant in human history, with periods of increase and decrease, but the very existence of criminal behavior requires of us to take institutional and regulatory measures to ensure public safety. It is mandatory to establish a balance between the coercive force of the state through its institutions on the one hand, and the protection of individual human rights. Thus, the fundamental rule is that of guaranteeing individual freedom and the development of personality, in the sense that freedom cannot be taken away only in exceptional cases, and even after that we have to take into consideration special provision such as probation in order to make the criminal justice system be functional and humane.

2. Content

Firstly we have to address the structure, the role and the place of probation agencies in the European justice systems. The term “probation” should be defined as broadly as possible.

While *probation* is not easy to define simply or precisely, it is a familiar term understood widely and internationally to refer to arrangements for the supervision of offenders in the community and to the organizations (probation agencies, probation services) responsible for this work. In many countries, the *statutory supervision of offenders* in the community is the main characteristic of probation.

If people offend or commit crime again or fail to comply with certain conditions, they may be taken back to court and be liable for punishment. The definition adopted in the Recommendation we are analyzing puts an emphasis on especially the *statutory* basis of probation in the implementation of sanctions and measures in response to criminal offences; *supervision*, which involves guidance and support as well as control in appropriate cases; and the *purpose* of its work, which is to enhance both the social inclusion of offenders and community safety.

We have noticed and it is mentioned in other commentaries that the EU has adopted the broad term *probation* to encompass the diverse range of work undertaken by probation agencies across Europe, taking account of different probation traditions, institutions and practices across the continent, not only in those countries where probation is well-established, but also new services are emerging and being developed.

It is important to mention that the notion of “Probation agencies” includes probation services and criminal justice social work services, whether organized at national, regional or local level. These rules apply to other organizations in their performance of the tasks covered in these rules, including other state organizations, non-governmental and commercial organizations.

Probation agencies are here defined with reference to their responsibilities and the tasks they have to accomplish.

It has been noticed that all around Europe, probation agencies perform a wide and diverse range of tasks, reflecting the various origins and developments of probation practice in different countries, as well as legal, social and cultural differences. We understand that this definition refers explicitly to the most common encountered tasks in the national legislations. These and other tasks are discussed in more detail later in the rules and the present and others commentaries. While most probation agencies were originally established to work with offenders, in many countries the responsibility to work with victims as well has been assigned to these agencies.²

² The general duties of states to victims of crime are set out in Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims and in many countries probation agencies make an important contribution to fulfilling those duties.

2.1. Basic principles

1. It is a general fact that probation agencies work as part of a system of criminal justice. They have to implement the decisions of the courts and other authorities and work with other agencies to try to reduce crime. Probation agencies can be distinguished by their emphasis on assistance, guidance and persuasion in working with offenders.

Probation agencies do all they can to reduce reoffending and, where interventions providing help and support are insufficient to protect the public or are rejected by the offender, measures of control may also be necessary and are applied. In the meantime, probation agencies also deliver monitoring and control.

Taking into consideration the belief that people can change, probation aims to achieve rehabilitation through working with offenders to help them and to encourage them to lead law-abiding lives. This has to include the creation of opportunities that are meant to help them acquire the skills they need to make good use of these opportunities and motivating them to do so. Social inclusion is a requirement of justice and is a key objective of probation practice. Probation's commitment to promoting social inclusion can contribute to reducing offending.

2. Probation staff must always have regard to the human rights of offenders. A principle of *minimum intervention* should apply.

The human rights should not be jeopardized simply because of their offending behaviour. In the attempt to reduce the risks of reoffending and in particular any risk of serious harm, offenders' rights may sometimes have to be constrained. In particular, there are circumstances in which the right of *freedom of movement* may be limited and the *right to privacy* may also have to be curtailed. It is understood at a European level that the respect for the rights of offenders is also a necessary condition for their social inclusion and supports their rehabilitation.

3. It is noted that in some European states probation agencies offer services directly to victims of crime. In others, they often work in co-operation with other organizations or individuals who offer support to the victim. We note that this rule requires probation agencies to protect the human rights of actual and potential victims and also respect their interests in all their work.³

4. The same services are not appropriate to everyone. For example, supervision arrangements that are thought to be suitable for men may not always be suitable for women. Unfair discrimination may also be based on other considerations, including sex, race, colour, disability, language, religion, sexual orientation, political or other opinion, nationality, social origin, association with a national minority, property, birth or other status. The recommendation states that in order to ensure that everyone is dealt with appropriately and equitably, services must take full account of **individual** circumstances and needs.

5. Rights may be restricted as punishment for offences and / or to protect the public. Where rights are restricted in order to protect the public from future offending, this must be guided by a proper and rigorous assessment of the risks that offenders pose, by making use of the best available methods of assessment⁴. *While giving effect to a judicial decision, the probation agency must not restrict the rights of offenders beyond the necessary consequences and implications of the lawfully imposed sanctions or measures.*

6. Wherever the offender's formal consent to probation involvement is required, probation staff must ensure that offenders understand their rights and the full implications of granting (or withholding) consent. This must be explained clearly to offenders and care must be taken to make sure that they understand. Even where consent is not formally required, probation staff shall do all they can to secure the offender's understanding of and, so far as possible, consent to any decisions that affect them. While the duty of probation staff to prevent offending will sometimes require them

³ The responsibilities of probation agencies towards victims are set out in Part VI of these rules.

⁴ See Rule 66 and Commentary on that Rule.

to take action against the offenders' wishes, this must be explained to offenders and the attempt made to gain their acceptance of the legitimacy of the decision.

7. Although probation's involvement before guilt has been established is limited in some jurisdictions, in other jurisdictions the judicial authorities may instruct the probation agency to become involved *before* or *instead of* prosecution and trial. This principle states that defendants must be presumed innocent and therefore any probation intervention in such circumstances must depend upon their informed consent.

8. The agencies' responsibilities and tasks must be founded on a sound legal basis to establish their authority and their accountability, in order to be able to alter even human rights.

9. In some jurisdictions probation tasks are delivered by other agencies, including other public authorities, independent, charitable or non-governmental organizations. Commercial companies also sometimes participate in such work by hiring people that have been given the punishment to do community work, or hire prisoners as cheap workforce. Others have mentioned, and we agree there have to be robust and adequate systems of scrutiny and accountability.

10. According to all the opinions in classic criminal legal doctrine and more modern commentary probation work should be recognized as a key element in a just and humane criminal justice system. Such work requires considerable knowledge and skills and must be accorded a status that recognizes its value and the expertise of practitioners. Probation too can be "overcrowded" such as prisons and this constrains its potential to protect the public and to work to rehabilitate offenders successfully.

11. The deciding authorities should recognize and value the knowledge and skills of probation staff which can help them take just and effective decisions. Rule 11 requests the deciding authorities to respect the expertise and experience of probation agencies and to consider attentively the advice they offer. We have to note that in many jurisdictions probation staff can and sometimes must report back to the competent authorities on the progress of their work and may, in some circumstances, seek further guidance or instruction from these authorities.

12. This rule mentions if the social inclusion of offenders is to be achieved, probation must work in close co-operation with a wide range of other agencies, such as Workforce Placement Agents, Re-qualifications centers. We have to understand that the complex needs of many offenders also require a coordinated and complementary inter-disciplinary work.

13. Probation agencies have to appraise their work whilst respecting the regulations, principles and standards from their national law. It is important to mention that the international community, especially through the UN, EU and Council of Europe, sets standards, respective to human rights, which gives the possibilities to countries to compare their own practices with those of other countries and to use this as a check against disproportionate or otherwise unethical intervention.⁵

14. It is an imperative that probation agencies can be held accountable not only by the public authorities, but also by the former offender or others that use their services. Everyone should be informed about how to complain and straightforward and impartial procedures should be made available.⁶

15. We look at this rule in correlation with Rules 8 and 9. We can have independent monitoring, and agencies must be open to question and scrutiny through independent inquiry. This monitoring can be done with the help of an Ombudsman or human rights defendants are among the ways in which this may be achieved. There have to be 'progress reports' on individuals under supervision.

⁵ Recommendation No. R (97) 12 *on staff concerned with the implementation of sanctions and measures* in its Appendix II sets out many of these ethical standards.

⁶ This is considered more fully in Part VII of these rules.

16. It is believed and we have to concur with this belief that the best probation practice should be evidence-led. Research should investigate all consequences of policies and practices, some of which may be unintended. Research should be rigorous and impartial and the participation of universities and other centres of research can ensure impartiality and give authority to such inquiries. The findings of research should be made public as it is essential that research findings are used to guide the development of policy and practice.

17. Other NGOs have found it to be quite common, in a great number of countries that the public has little knowledge or understanding of what probation agencies do. Usually prisons attract public attention. In order for the media to be interested probation should be imaginative and creative to enhance public understanding of and confidence in probation work.

2.2. Organization and staff

18. We have to note that Rule 18 affirms that a well-ordered and adequately resourced organization is required if the importance and value of probation are to be recognized.

19. It is important to mention that service delivery is managed in different ways in different countries. Instructions and the delivery of them based on clear rules should be reviewed and updated as necessary.

20. While many probation agencies are part of the public sector, this Rule recognizes that there are private agencies (non-governmental, charitable and commercial) involved in the administration and delivery of probation tasks and services in many countries.

21. Just as the work of the probation agencies in general⁷ is poorly understood, other professionals and members of the public often have an insufficient understanding of the distinctive expertise of probation staff.

22. It is important that all recruitment and selection procedures to be fair and rigorous and in all other ways respect the principles of good employment practice. Probation agencies should be as clear as possible about what qualities and characteristics are required and it is these that should be tested in the selection process. We believe that is very important to have intellectual abilities and appropriate educational level selection procedures. Recruitment and selection should respect the best principles of equality of opportunity. Equality of opportunity has many criteria that have to be upheld.

23. Different staff has different roles to play in probation and therefore different levels of education and training would be required. Access to education and training at different stages of their career should be made available to all staff in order to ensure the best quality of service provided. It should be linked to their tasks and responsibilities and useful for their professional development.

24. When starting the training there should be a curriculum. This must be based on a clear understanding of the skills, knowledge and values required to do the work. Attendance at training events or 'on the job' training, while often are very important they are definitely not enough: staff must be assessed to determine that they have achieved the standards required. It is also important that staff have access to qualifications that confirm the level of competence achieved.

25. Initial training should prepare staff to work reliably in their new professional role. In-service training should also be available to all staff. This is needed to take account of new legislation, policy, practices and other relevant developments. At the same time, there should be training to enable staff to move into new roles as the agency may require and to develop their own continuous professional development.

26. Probation work involves making judgments and taking decisions. While the actions of staff are circumscribed by law and by agency policy, staff shall be trained and encouraged to exercise their professional judgment to take valid decisions whilst recognizing the need for accountability.

⁷ See comment on Rule 10.

27. This Rule deals with the particular case of offenders who tend to commit particular kinds of offences (for example, sexual offences, violent offences) and / or whose offending behaviour is associated with persistent difficulties (for example, drug or alcohol misuse, offenders with mental health problems). The extent to which work is devolved to specialized sections of the agency will vary from country to country.

28. This Rule is in relation with the Rule 4 and recognizes that training must attend to diversity and individualization. Initial training should prepare all staff to work with diverse offenders and to take account of the distinctive skills needed to work with particular offenders or victims. For example, to work effectively with young people may require rather different skills from those needed to work with adults. Women may have particular needs as well.

29. An adequate staff complement is essential to the agency's effectiveness and efficiency. If staff workloads are too large, then the probation agency will not be able to work as it should. Workloads should be assessed in a holistic way with an assessment made of the demands of individual cases and not simply on the number of cases or offenders under supervision. An overall shortage of resources constrains an organization's potential and excessive workloads will prevent individual members of staff from achieving their best practice.

30. It is essential that management staff provide leadership and guidance. Regular meetings between individual members of staff and their line managers should take place for supervision/detailed case discussion. They also allow the line manager to consider what the organization needs to do to support staff in what is often extremely demanding and complex work.

Just as the probation agency is accountable to public authorities⁸, individual members of staff must be in a position to account to their managers for their practice. One important part of this is keeping and updating records – a record of contact with the offender, of significant communications and decisions relating to their case. This will be retained on the case file and will be drawn upon as and when the agency reports back on progress to the judicial authority. Case records must be accurate and up-to-date and available for inspection by line managers. Case records will be subject to monitoring and may be used as evidence in the investigation of complaints.⁹

31. This Rule states that, while all members of staff play a part in inter-agency work, managers have a distinctive responsibility to establish these working partnerships and to ensure that they are set on a sound basis.

32. Some issues are appropriately dealt with in individual meetings¹⁰, but consultation with the staff group is a critical responsibility for managers. Professional associations, trade unions and more informal arrangements may all have a contribution to make here in the effective liaison between staff and their managers. As well as consultation about conditions of work and employment, there must be opportunities for staff to influence the agency's policies in other respects as well: staff are uniquely placed to inform policy makers about the results of putting policies into practice and their experience is a large part of the evidence that should lead policy and practice¹¹.

33. This Rule affirms that salary and conditions of service should reflect the standing of the profession (Rule 21), the particular set of tasks and responsibilities they are entrusted with and the expertise of managers and practitioners.

34. This Rule applies to volunteers who work on behalf of probation agencies and not to those who, independently or in other organizations, work as volunteers with offenders. In many countries, probation evolved from voluntary work and volunteers still make an invaluable contribution to the work of the agency and to helping and supporting victims and offenders.

⁸ Rules 8 and 15.

⁹ These matters are discussed more fully in Rules 88 – 92, in Part VII and in the associated commentary see Rule 30 above.

¹¹ Rule 16.

Volunteers, just like probation staff, have a duty to protect the public and their relationship with offenders therefore may not be completely confidential.¹² Offenders themselves, as well as staff and volunteers, must understand the rights and responsibilities involved in the working relationships.

2.3. Accountability and relations with other agencies

35. Rule 35 refers to specific account to and liaison with the judicial authorities in respect of particular cases. These authorities are entitled to receive such information and only in this way will they be enabled to have confidence in probation.

36. Probation agencies should produce regular reports providing information on their work. These reports should be published and be made available to judicial authorities, other authorities making decisions on offenders and the general public. The scope of the information to be provided should be defined by national law (see basic principle contained in Rule 8) in accordance with regulations concerning professional confidentiality. The reports should enable the competent authorities and the general public to make judgments about the overall performance of the probation agencies in achieving their aims.

37. Offenders often have complex needs associated with their offending. Rather than trying to create or deliver all services to meet these needs, probation agencies should work in co-operation with other organizations which have the relevant expertise and resources. This includes not only agencies of criminal justice and law enforcement, but organizations of the wider civil society. Enabling fair access to services is a key component of social inclusion. This approach also allows probation agencies to concentrate their resources on their principal tasks.

38. Probation agencies shall encourage and support community agencies to undertake their inherent responsibilities regarding taking care of offenders as members of society. This Rule should not be interpreted as imposing an obligation on probation agencies to sponsor private associations, but rather to help, advise and assist them in their work with offenders and, as appropriate, with victims of crime.

39. In some countries, prison and probation form part of a single organization. Even where this is not the case, the work of probation inevitably calls for close working relationships with the prison service. Probation staff in some countries deals with prisoners while in prison and not only for preparing their release. Probation is often responsible for supervision after release and probation staff should be actively involved in preparing prisoners for their release and in working towards their resettlement¹³.

40. Partner agencies need a general framework to be set and agreed in order to achieve an appropriately high standard of intervention with offenders.

Where probation is commissioning work to another organization, it incurs a responsibility to make sure that this organization works effectively and justly. Accountability for the results achieved and, if appropriate, for the money spent is a minimum prerequisite of such relations.

41. Rule 41 stipulates that inter-agency agreements should include protocols about the exchange of information, based on the relevant national data protection legislation. .

2.4. Probation work

We have to take into consideration every national legal system and we can determine that all the probation agencies may be entrusted with one or more of the following tasks split into two categories:

a) tasks involving supervision and guidance to offenders

¹² General principles of confidentiality and information exchange are set out in Rules 41, 88 – 92 and explained in the associated commentary.

¹³ see also Rule 7, the European Prison Rules and Recommendation Rec(2003)22 on conditional release (parole).

b) Tasks without supervisory element

42. Any work relating to the preparation and presentation of pre-sentence reports must fully respect the procedural rights and safeguards provided by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms the presumption of innocence.

This Rule also requires probation agencies to communicate regularly with the judicial authorities about the circumstances in which reports are to be prepared. A report is neither possible nor necessary in every case. Where the court is likely to impose an immediate custodial sentence, but is willing to consider alternatives, a report would be of particular value.

43. The report shall be as up-to-date and accurate as possible. Reports are written in respect of specific offences and old reports that may have been retained on file should not normally be submitted again. Although interview(s) with the offender are an important source of information, report writers should use other sources as well to try to corroborate information.

44. The offender's *involvement* here means that the purpose of the report, its significance and consequences must be fully explained to the offender. There may be circumstances in which the offender is unwilling to cooperate and this may have to be accepted.

45. As well as pre-sentence reports, probation staff prepare other reports, especially in connection with proposals for early release from prison or other forms of detention. These reports will be based on a careful assessment in each individual case. Their distinctive contribution here will be to inform the authorities of the community context to which the prisoner will be returning, the risks and protective factors to be taken into account and how these will be managed, and the need to impose any particular conditions on the terms of release.

Where there has been contact with the victim(s) of the original offence, their views should be reflected in the report. When their views are being sought, it is important that they should be made aware that while their views may be one important consideration, they will not be decisive¹⁴.

46. As before, the offender's *involvement* here means that the purpose of the report, its significance and consequences must be fully explained to the offender. There may be circumstances in which the offender is unwilling to cooperate and this may have to be accepted. The member of staff responsible for the report should make sure that the offender understands the consequences of withholding co-operation and that this will be made clear to the deciding authority. The offender should be given an opportunity to express an opinion about the content of the report, although it is for the author of the report to decide on its final content. Offenders or their legal representatives have a right to challenge the content of the report.

47. Community service involves undertaking unpaid work for the benefit of the community as a response to an offence. In some countries, this sanction may only be imposed with the offender's consent; while in other countries it is for the court alone to decide upon this and the offender has to follow the judicial decision.

48. Since community service constitutes real and/or symbolic reparation, work undertaken must be of genuine benefit to the community. Agencies shall seek out tasks in the community and shall strive to ensure that all community members have an opportunity to nominate appropriate tasks. In no circumstances shall this work be used for the profit of agencies or individual members of staff or for commercial profit. Although the position may vary in different jurisdictions, so far as possible community service must not displace people from gainful employment.

49. Community service workers shall be subject to risk assessment like all others under probation supervision¹⁵. Minimizing risk to the community will be paramount in determining an appropriate work placement.

¹⁴ see Rule 95.

¹⁵ see Rules 66-71 and associated commentary.

50. Probation agencies have a responsibility to safeguard the health and safety of community service workers. General safety regulations should be respected and public liability insurance schemes should be arranged to indemnify offenders assigned to community work. Probation agencies and their staff should also be adequately insured in order to be able to address compensation claims in case of accident.

51. Community service tasks can take many forms and agencies should be imaginative in identifying suitable work. Differences of ability and of personal circumstances should be taken fully into account to make sure that the scheme can accommodate anyone for whom this is considered to be an appropriate sanction or measure. In some jurisdictions, community service may be used as a direct alternative to custody and no one should be sent to prison solely because appropriate work tasks have not been found.

52. As with other aspects of offender consultation, Rule 52 does not mean that offenders take the decision about the work they will undertake. Community service is widely recognized by offenders, as well as by the public, as a fair penalty and one aspect of this is that offenders should be consulted about it. Offenders should be asked about their experience of the work they are undertaking and this should form part of the periodic assessment.

53. Community supervision takes place in a number of different circumstances. While there are differences in the legal basis of these modes of supervision and, for example, in the consequences of non-compliance, the following rules prescribe general standards of supervision.

54. The nature and intensity of the supervision¹⁶ should depend on the individual offender and be subject to revision depending on changes in the offender's the personal circumstances and in progress towards the objectives of supervision. Probation agencies shall do all they can to promote compliance with the formal requirements of supervision. This includes taking full account of personal circumstances that might make compliance more difficult and working with the offender to see how such difficulties can be overcome. For example, so far as possible, people should not be required to attend appointments that may conflict with their responsibilities as carers (including, but not only, parents of young children) or as employees. People who are homeless or itinerant may also face particular challenges in complying with some of the formal requirements.

55. This Rule recognizes that probation should arrange for relevant interventions to take place. These may be provided not only by probation staff, but by other agencies and individuals as well. The Rule offers some examples – educational or skills-related training and treatment, such as may be provided for people who need psychiatric help or treatment for misuse of alcohol or other drugs.

56. Sanctions and measures affect not only offenders, but also their families and dependents. This is especially likely where a custodial sentence has been imposed, but also in the case of other sanctions or measures. Where this is provided for in law, probation agencies should offer support, information, advice and assistance to families affected by the offender's crime and punishment.

57. While traditionally probation has worked through personal relationships to bring about change, many jurisdictions in Europe are making increasing use of newer technologies. Electronic surveillance – especially the 'tagging' that can monitor the presence of an individual at particular times and places and the 'tracking' made possible through global positioning system technology - has a strong political appeal. It seems to dispense with any need for the offender's consent or active co-operation and suggests a possibility of comprehensive and up-to-the-minute information.

58. Some methods of surveillance, including electronic monitoring, have the potential to intrude significantly on people's rights of privacy and perhaps other rights as well. Not only offenders, but in some circumstances their families and friends may be affected as well. This Rule insists on a level of surveillance and personal intrusion that is proportionate to the seriousness of the offence(s) and to the need for community safety.

¹⁶ for example, the frequency of required reporting to the supervising officer.

59. Basic principle 6 of the European Prison Rules¹⁷ states “*All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.*” In many countries, probation agencies are responsible for supervision of offenders after release. This Rule requires agencies who will be undertaking this role to work actively during the term of detention to prepare for release. This is likely to involve contact with the offender, by letter, visits, video conferences; liaison with the prison authorities; contact with friends or family to whom the offender might be returning; and approaches to community agencies that may need to offer services and support after release.

We believe that successful resettlement work requires a case-management approach to ensure that the contributions of all responsible agencies are properly coordinated and managed. Positive changes and achievements made during the term of imprisonment are at risk of getting lost at the time of release and the need for continuity is paramount.

Resettlement work should not be confined to the assessment and management of risks and offending-related needs.

In many circumstances, release is subject to one or more formal conditions and the supervising agency, often probation, has a responsibility to ensure that the offender complies with these conditions.

60,61 As already stated in the commentary to Rule 59 above consistent finding of research in many countries shows that constructive work undertaken in prison is often lost on release. For example, learning from treatment programmes is not followed up and any benefits soon disappear.

62. Desistance from offending has been described as a *process* rather than as an event and offenders may need continuing support and encouragement long after release. This Rule recognizes that, once the formal period of post-release supervision has ended, the offender has no formal obligation to keep in touch with the probation agency. At the same time, where national law provides for this and where resources permit, probation agencies should offer support for as long as they can so that no one commits an offence because they feel they have nowhere to go for help. Provision should also be made where possible for the very large number of prisoners who are released from prison without any formal resettlement obligations, but who are often likely to need advice, assistance and encouragement.

63. For a number of social, economic and political reasons, there has been an increase in the movement of people across the European continent. People arriving in other countries may be ‘in crisis’, having few resources and few or no contacts when they arrive in the country. Probation agencies have a strong ethical obligation to make sure that such vulnerable people are dealt with fairly and well. In some countries, however, non-nationals lack many of the legal rights of nationals and find themselves excluded from the services they need. This is a prominent challenge for many countries.

Probation’s main objectives – for example, community integration, social inclusion, resettlement – have a quite different significance to people who have few or no connections within the country and, indeed, may be required to leave it because of their offence(s).

64. For member states of the EU, a Framework Decision has been adopted that allows for the transfer, in certain circumstances, of probation supervision from one jurisdiction to another – typically where offenders convicted in another country are returned to their own country for supervision¹⁸.

65. This Rule addresses the exact same problems as Rules 63 and 64, but from the point of view of the state to which offenders are to return. Offenders and ex-offenders returning to their country of origin are also likely to be poorly supported and vulnerable and agencies must ensure that their needs are met.

¹⁷ Recommendation Rec. (2006) 2 of the Committee of Ministers to the member states.

¹⁸ Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

2.5. Process of supervision

66. We acknowledge that his Rule does not interfere with the criteria provided by national law related to judging the need of carrying out assessments of offenders at different stages of the criminal procedure. It is there to guide the probation services themselves in their everyday work with offenders. The efficiency of the implementation of community sanctions and measures is greatly enhanced by prior assessment of each individual case. The Rule brings to the attention of the probation agencies some important principles in carrying out good assessment.

It is important to remember that assessment must also include a review of the resources that might be available to tackle the identified problems.

67. The process of assessment – *how* it is undertaken – is as important as the outcome. The member of staff may have a very clear idea of the offender's problems, but offenders must be enabled to make the discovery for themselves. There are skills – for example, motivational interviewing – that may be used to help offenders recognize some of their difficulties. But supervision will not be successful unless there is sufficient agreement between the supervisor and the offender.

68. Assessment should be the product of discussion and exploration between staff and the offender. Where there is disagreement between them, this should be noted and may in itself be a focus of work, as we have seen in the commentary to Rule 67.

69. Assessment should be undertaken periodically to check progress and to ensure its continuing accuracy and relevance. Supervisors also need to be alert to the possibility of changes in offenders' lives that make a difference. Since community safety is a priority for probation agencies, changes in the level and nature of risk should particularly be emphasized here.

70. We have to note that there are some important 'milestones' during supervision when assessment needs to be reviewed. These are specified in this Rule.

71. Modes of risk assessment are usually distinguished as either 'clinical' (individual, person-by-person) assessment or 'actuarial' assessment, based on statistical techniques for assessing probability, where a probability 'score' (of re-offending, or of the risk of harm) is usually produced. Actuarial techniques, using 'static' factors (e.g. age, type of offence, criminal record, which cannot be changed) are said to be more reliable, but these are based on aggregates and have limitations in predicting the risk-levels of individuals.

72. Supervision should be put into effect in a planned way. Once assessment has taken place, the supervisor, in discussion with the offender, must decide how the identified problems are to be tackled. Objectives should be specific and measurable (so that progress can be monitored). They must also be achievable and have a clear time frame.

73. As with assessment, a work plan that the offender does not understand or (does not understand sufficiently well) agree with is unlikely to be implemented. We should try to make the process of planning to be negotiated as far as possible and explained in a way that the offender can understand.

74. There must be a strong and natural connection between the assessment and the plan, as the commentary on Rule 72 explains.

75. Rules 69 and 70 emphasize the importance of regular reviews of assessment.

76. Interventions are structured and planned pieces of work with offenders aimed at their rehabilitation and their desistance from offending. The nature of the interventions by probation agencies shall depend on and be limited by the sanction or measure and the conditions imposed by the deciding authority. Interventions thus will often aim at social and family support through employment schemes, educational programmes, vocational training, budget management training and regular contact with probation staff, or will include *offending behaviour programmes*, often based on the principles of cognitive behavioural psychology.

77. Other skills will be deployed by probation staff themselves and Rule 27 refers to the specialized training that some staff will need.

78. Offenders must be prepared by their supervising staff member for the interventions in which they are to participate. Sometimes offenders will be unsure or even unwilling to attend and the supervisor will need to work hard to enhance their motivation. An offender who understands the reason for the intervention is very much more likely to attend and to gain from the experience.

79. This is a corollary of Rules 37 and 77. Engaging services based in the community promotes social inclusion and also allows offenders to benefit from a broad range of expertise.

80. This is an important principle of working with offenders. An inter-agency and multi-modal approach is most effective, but the involvement of different agencies – and often several staff within the same agency – can lead to confusion of roles. This Rule commends that there should be a single responsible member of staff who undertakes assessment, decides on the work plan and coordinates the interventions. Research has shown that the offender's experience of involvement with probation should be characterized by continuity, consistency, providing opportunities for consolidation and staff commitment. Without such coordination, the experience of supervision can be fragmented, disorganized and confusing for everyone – especially the offender. This case manager or offender manager, as the role is often called, will also be responsible for ensuring that the terms of the sanction or measure are fulfilled and for taking action in response to noncompliance. *Evaluation*

81. We believe that the evaluation of the progress by the individual offender is a continuing process throughout the period of supervision. The supervisor's and the offender's view of the period of supervision should be summarized, recorded and retained on the records of the agency. In some countries, reporting to the deciding authority on this progress must be done periodically, in others probation agencies only report at the end of the supervision or in case of a breach of conditions

82. It is important to note that this Rule refers to the need for legal possibilities for staff to apply to the judicial authority to change the conditions of supervision. Where good progress has been made, where a condition no longer seems relevant or has proved impracticable, or where assessment indicates that a lower level of supervision may be used, the probation agency should be able to make application for the conditions to be amended or for the order to be ended early. This is partly a question of resources – resources should be focused on those offenders most in need of supervision – but it is also important to recognize and acknowledge formally that offenders have often made significant achievements during their supervision.

83. The offender's experience of the value of the service received should be an important part of the (periodic and final) evaluation. Probation agencies should consider collating information from these evaluations to see if any general themes emerge, suggesting the agency's particular strengths and ways in which they might improve the quality of their services.

84. We know that any kind of supervision during probation must be concluded with a full review and evaluation of what has been achieved, what has been less successfully managed and what might have been done differently, whether by any party.

85. This Rule mentions that probation agencies have a responsibility to give effect to the sanctions and measures ordered by the judicial or other deciding authorities. Fairness is very important also. It is a known fact that people are much more likely to cooperate when they feel they are being dealt with fairly.

86. It is the nature of the sanction or measure that must be fully explained to offenders: they must know what is expected of them. Even our probation agencies have understood that supervisors should not rely solely on threat of further sanction to gain compliance. There are occasions when supervisors will offer advice to offenders – which they may choose to accept or not.

87. Non-compliance must always be taken seriously and professional judgment exercised within the standards set by national law. Non-compliance is unacceptable; the supervisor shall discuss with the offender what shall be done to bring about compliance in the future.

One must remember that probation hopes to encourage and enable changes in people's lives. Some of the changes we have to mention— notably obtaining regular employment – are likely to make a significant difference to the individual's future behaviour.

An offender who is at work all day may find it difficult to report to the probation officer.¹⁹

88. We understand the importance of keeping records. Keeping these is a significant part of the work of probation agencies. Records also communicate information between the agencies and authorities to whom they must give account. Records typically include personal and other important information. The file also retains information about an offender's previous convictions and earlier experiences of supervision or imprisonment.

89. Principles of confidentiality must be renounced for the need to share information among responsible agencies, particularly where there is a high risk. The basis of information exchange must be clear and confidentiality must be respected as far as this is consistent with the need to ensure community safety.

90. It is important for records to be scrutinized in used in monitoring and inspecting.

91. Rule 35 refers to the responsibility of the probation agency to give account to judicial and other deciding authorities in particular cases.

92. Obviously offenders have a right of access to their records. Should one offender dispute the accuracy of the record, there shall be an exact procedure in place to respond to their concerns.

2.6. Other work of probation agencies

93. There are very many instances in which victims of crime often report that they not feel well supported by the agencies of criminal justice, which typically give priority to detection and prosecution and, in general, focus their work on the offender rather than the victim. It is mentioned in other commentaries that some probation agencies are involved directly in offering support to victims;

Take into consideration that principles of non-discrimination and individualization (see Rule 4) have to apply as much to victims as to offenders.

94. In some countries and in even in ours, NGOs, have been established to offer support to victims. Some national law provides, probation agencies shall do all they can to support this work and respond positively and cooperatively to approaches from victim support organizations.

95. In some jurisdictions, probation agencies contact victims of serious crimes and keep them informed about the circumstances of the offender. We should remember always that probation staff must be aware of the offender's right to confidentiality and recognize that some information need not and should not be divulged. A victim may prefer, for example, that an offender should not be permitted to live in the same neighbourhood. But the desire of victim is not necessarily that of the probation agency.

96. We have to mention that this Rule recognizes that rehabilitation requires offenders to take responsibility for their own behaviour and this includes their recognition of the harm they have done. There is work to be done to enhance victim awareness allows them to be assured that their distress will be recognized and respected in the work that probation agencies undertake with offenders.

97. We have to mention that rule 97 refers to *restorative justice* interventions which typically involve work with offenders, victims and the community. We acknowledge that restorative practices can take many different forms. A United Nations Handbook explains "*Restorative justice approaches and programmes are based on several underlying assumptions: (a) that the response to crime should repair as much as possible the harm suffered by the victim; (b) that offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences*

¹⁹ Rule 10 of Recommendation No. R (92) 16 of the Committee of Ministers to the member states on the European rules on community sanctions and measures states "*No provision shall be made in law for the automatic conversion to imprisonment of a community sanction or measure in case of failure to follow any condition or obligation attached to such a sanction or measure.*"

for the victim and community; (c) that offenders can and should accept responsibility for their action; (d) that victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and (e) that the community has a responsibility to contribute to this process.²⁰

Restorative approaches include **mediation services** – for example, mediation between victim and offender to explore how amends can be made and how those affected can manage the consequences of the crime. Mediation can also be used to prevent crime – for example by working to reduce neighbourhood disputes before they lead to crime. Recommendation Rec (99) 19 on mediation in penal matters sets out standards for mediation. This is not yet applicable in Romania.

Restorative justice approaches call for distinctive skills and probation agencies should ensure that staff are trained to undertake such work appropriately.

98. This Rule refers to the need for probation agencies to share their experience and knowledge and to participate in partnerships with other organizations to reduce offending and make the community safer.²¹ Probation agencies should participate actively in such endeavours.

2.7. Complaint procedures, inspection and monitoring

99. It is a clear fact that due to the nature of probation work, it can lead to disagreement and dispute between staff and offenders. Sometimes disagreement can give rise to formal complaint.

There must be a clear procedure available for offenders and other service users who wish to complain. There have to be several levels of resolving a complaint.

100. Those investigating complaints should be impartial and should avoid any assumptions that might prejudice the outcome of their inquiry. In some cases, it will be sufficient for the line manager of the member of staff who is subject to the complaint to undertake the investigation. There is a role too for an independent authority²² to respond to complaints, but normally this process should be invoked only when other mechanisms have failed to bring a satisfactory resolution. The procedure is always checked to be fair and impartial. It is also important to distinguish between complaints against members of staff and, on the other hand, dissatisfaction with the agency's policy.²³ 101. Any complaint must be duly investigated and given a solution. It is important to mention that probation agencies should respond undefensively to complaints.

102. We acknowledge there has to be a system to be able to check performance against the required professional standards. All the internal audits should focus not only on individual performance, but should also take into consideration if staff are adequately trained and have all the necessary support and resources to do their work. Statistics are very important also.

103. We have to mention that monitoring from various independent monitoring bodies is very important for ensuring high quality of professional standards of probation work. In other countries this is done by the ombudsman, in others national supervising committee such as the case of Romania, etc. Any competent authority, should also take the opportunity to learn more about the realities of probation practice and to advocate as necessary on the agency's behalf for changes in policy or in levels of resourcing.

²⁰ Handbook of Restorative Justice programmes, Criminal Justice Handbook series, United Nations, 2006.

²¹ If, for example, probation staff become aware that many of the offenders under supervision are drug-users, this should prompt them to encourage other authorities (perhaps, in this case, the health service) to see if educational or treatment services could be devised to prevent offending – not only to reduce re-offending by offenders under supervision, but to prevent or discourage people from starting to offend in the first place.

²² Usually the Ombudsman or another institution.

²³ For example, an offender may wish to complain about a decision to recall him to prison, but, if the agency is satisfied that this decision was taken and implemented properly, it should be prepared to support its members of staff.

2.8. Research, evaluation, work with the media and the public

104. We believe that the most important criterion of effectiveness is the *reducement of reoffending*. Different countries apply different probations methodologies, such as strengthbased approaches or social work approaches. Any probation methodology should always be open to change and reconsideration. Established methods of intervention may need to be revised. There are always new methods that are likely to emerge and their effects should be investigated. We and other commentators of this Recommendation have analysed this Rule and we have found that it recognises the value of research and recognises that resources must be made available for this to take place as an investment in the improvement of services.

105. It is a fact that politicians in many countries are under considerable pressure to introduce effective measures to reduce crime. All policies created by politicians should be supported by research, reason and argument.

106. Probation agencies should work actively to explain their work to the public. Examples of the achievements and successes of probation should be announced through the media such as television, radio and especially Internet.

107. This Rule is a corollary of the last one. Probation policy and practice develop and these developments should be explained to the public. It is also important that the public sees a probation agency as an active, responsive organization which is always keen to enhance the quality of its work.

108. We have to have for probation clear and realistic statements of its purposes and real transparency. This Rule further emphasis the value of international exchange of ideas and practices.

3. Conclusions

The present article tries to do as complete as possible an analysis and commentary of the Recommendation. The results we have accomplished is to have a tool in the form of this present that can help any person in relation with probation, even if it is an offender, a victim or a probation worker. Practically, this present paper can be used alongside with the Recommendation to clarify all the rules and to give a short glimpse on the exact application of sed rules.

The desired impact of this paper is to be a starting point for further analysis and commentary, and also to determine other scientific minds to create such commentaries, and give even more insight on these aspects. Also we believe that we have to create a paper of a more considerable dimension that can take into consideration other recommendations also.

Probation is actually very important and necessary for the proper function of the criminal justice system and in the absence of such rules and regulations it cannot give the necessary support and aid to courts, victims, offenders and eventually society.

We can suggest and give indication that future papers should take into account the legislation from other countries also. Countries can learn from one another's experience – not only from successes, but also from mistakes.

This present paper is also a starting point for any person that desires to study and begin an understanding of probation and probation services. One should first read the recommendation then the present commentaries and after that we can happily say that a minor understanding of the european perspective of probation has been achieved.

References

1. Silviu Gabriel Barbu, Alexandru Șerban, *Drept execuțional penal*, ediția 2, Edit.C.H.Beck, București 2008.
2. SG Barbu, Al. Șerban, *Drept execuțional penal*, Editura ALL Beck, 2005.
3. SG Barbu, *Drept execuțional penal – partea generala*, Editura Sitech, Craiova 2012.

4. European Committee on Crime Problems (CDPC) – d. Commentary to Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe probation rules - http://www.cepprobation.org/uploaded_files/CommentaryRec_2010_1_E.pdf Accessed February 2013.
5. Gheorghe Florian, *Penitentiary dynamics*, Oscar Print, București, 1999.
6. Ilie Pascu, et al., *New criminal code - commented*, vol.I, General part, Universul Juridic, București 2012.
7. Ion Rusu, *The individualisation of punishments*, Universul Juridic, București 2011.
8. Law no.83 of the 13th of May 2010 for the modification of Law 275 of 2006 regarding punishments.
9. Recommendation (2006)2 european prison rules.
10. Recommendation R(87)3.
11. Rob Canton, David Hancock, *Dictionary of Probation and Offender Management*, Cullompton: Willan.
12. The Statute of Probation Officers issued by the Romanian Ministry of Justice and other relevant documents, <http://www.just.ro/Sectiuni/Direc%C5%A3ii/Direc%C5%A3iadeProba%C5%A3iune/tabid/172/Default.aspx>, Accessed February 2013.
13. Walmsley R., *Penitentiary systems from Central and Eastern Europe*, HEUNI Publication Series nr. 29, HEUNI, Helsinki.