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SHORT COMMENTARY ON THE DRAFT CONCEPT ON PROBATION REQUEST FROM THE INSTITUTE FOR LEGISLATION OF THE VERKHOVNA RADA

Background to the request

The *Institute for Legislation of Verkhovna Rada* requested UEPLAC to deliver an opinion on the draft concept on probation prepared by a multidisciplinary working-group. The request demanded to verify the compatibility and alignment of the draft text with International and European guidelines and rules on the institute of probation, also with reference to best European practices.

The following documents, recalled in the text of the concept itself, have been used as background against which confronting the letter and the spirit of the text.

- Council of Europe (CoE) – *European Rules on Community Sanctions and Measures*, Rec. N°R(92)16 Comm. of Ministers and Rec. R(2000)22 on *improving the implementation of the rules*; Rec(2003)20 Comm. of Ministers, *on new ways of dealing with Juvenile delinquency and the role of Juveniles Justice*;
- CoE legislation on prisons, and in particular the *Revised European Prison Rules (2006)*, and Rec. R(99)22 *on the overpopulation of prisons and the growing number of imprisoned individuals*;
- CoE CPA(2005)4, *background questionnaire for the CoE Conference on Probation and Aftercare*, 14-16 Nov.'05, (Annex to this reply);
- *UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, GA res. 45/110 14.12.2990; Handbook on Probation Services, Publication 60, UNICRI, 1998
- *EU Action Plans on Drugs, Ukraine-EU Revised Action Plan on Freedom, Security and Justice, EU-UA ENP Action Plan*

The consultant also undertook to interview over the telephone some of the members of the Working Group in order to understand the reasoning behind the text.

In the request mention was made to Council of Europe and EU legislation on the matter. It is important to highlight here that as far as probation is concerned the EU has no specific competences and therefore no legal text have been produced at present. The only legislation on the subject matter is a draft currently being negotiated in the EU Council *on mutual recognition of supervisory orders for suspected offenders or convicted individuals*. Nonetheless, the institute of probation and alternative sanctions is often recommended in specific context such as drug policy, where the EU supports the application of alternative sanctions for problematic drug users, or more broadly as crime prevention initiatives. Furthermore, probation is commonly used in the EU MSs, and several joint initiatives have been developed also with the financial support of the EU.



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Finally, any reference to authors or official documents is clearly indicated in the text, and enclosed to this work there is a comparative overview of several Council of Europe Member States (CoE, Conference on Probation and Aftercare - CPA (2005) 4).

The following analysis is structured in line with the format of the text, ie, with a general introductory comment on it and more specific and detailed comments on the individual parts of the concept.

Concept Analysis

The initiative, as presented in **SECTION I** and **SECTION II**, is to be welcomed as it meets the objectives under the “Justice” chapter of the *EU-UA Revised Action Plan on Freedom, Security and Justice* by addressing the establishment of a functional and effective probation system and service, with a specific section dealing with probation for juveniles.

Probation, and penal sanctions which are alternative to imprisonments, have been now for long object of recommendations and support from the United Nation, the Council of Europe and more broadly from the European Union, as well as from uncountable Civil Society Organisations across the whole of Europe. Furthermore alternatives to imprisonment are indicated without exception as preferred and most effective response to many forms of petty criminality, in particular (though not only) drug related. Scholars and several practitioners along across the whole of Europe also believe probation and alternative sanctions should always be the rule in dealing with Juvenile delinquency.

As highlighted by the drafters of the concept, offences and their predicate crimes break the links between individuals living in society, and traditional punishment and imprisonment alone does not contribute to re-establish those links while failing to discourage and prevent other crimes to be committed. Offenders’ recidivism is a constant over the years in the majority of Criminal Justice Systems (CJS), in Europe as well as across the world. At the same time, in all European CJS the vast majority of offenders in prison are there on short-term sentences for minor offences requiring less than 12 (effective) months of imprisonment. Minor drug offences (ie, not related with serious drug trafficking) on the other hand count, depending on the Member State, for up to 3 quarter of offences across the EU Member States (*H.Stover, Assistance to Drug Users in Prison in the EU, EMCDDA-Cranstoun, London, 2002*). Those offenders can successfully be treated in different ways than by imprisonment, which is per se very detrimental to attempts of reintegration into society.

Overall the first two Sections of the Concept correctly address the International and European documents quoted in the text. It would also be very beneficial to the overall consistency of the draft with European Standards a more specific attention to gender related needs and service design, for which a mention in the text is helpful.

The definition in **SECTION III** of probation system is indeed in line with the International and European texts taken into consideration and does not call for any particular comments. Indeed,



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in this section is to be welcomed (and fully in line with European texts and best practices) the idea of introducing reparation and victim-offenders mediation and overall the intended use of the instruments offered by restorative justice.

It is also to be highlighted the importance of the offender's acceptance of any probation order and the fact that before such an order is actually adopted by judicial authority the offender has to agree to it and, possibly, he/she should also sign a related "probation contract" with the service in order to increase the sense of responsibility and engagement of the individual concerned.

Probation, as indicated in the draft concept, shall be applicable during all stages in the CJS, from pre-trial to probation during sentence, and this too is indeed in line with the Council of Europe and UN Rules on the matter.

The most relevant concern with this Section of the concept, and with the concept as a whole, is the intended application of all probation measures and alternative sanctions only to first time offenders alone. This is not in line with the above mentioned texts, neither with European best practices.

From the reading of the text it is unclear the strategy behind such limitation, which per se may jeopardize the functionality of the system with respect to its ultimate goal to re-integrate into society individuals who have broken with it and to repair the damages done to it by the criminal act.

If it is a matter of easier promotion of the draft concept in its early stages of the legislative process the drafter may wish to reconsider this strategy. For, on the one hand, as of its birth the system would not be equipped with the necessary instruments to deal with the whole of the offenders' population, which is composed by a large proportion of recidivists. In this way probation in Ukraine may not be enabled to confront in its whole the problematic that the drafters aim to solve by succeeding in "facilitating public security, the protection of the interests of society and the State". On the other hand, rehabilitation and treatment programmes, as much as clients' tailored as possible, may not work at first, especially eg with problematic drug or alcohol users. Probation's goal is not to be punitive, it is rather, as expressed in the draft, to enable society to be safer by enabling former offenders to fully reintegrate it. As such, it should dispose of all possible instruments to serve its goals and to reach all of its potential clients.

A possible solution for the above could be envisaging a clear public message and public awareness campaign about the aims and functions of probation. The risk of being seen as "too soft on crime" is present in each country that applies probation measures. Often at the occasion of visible and dramatic events (eg, a death caused by an offender on probation), governments and administrations are faced with public outcries for the indiscriminate application of the most severe measures of incarceration, which does not work as the drafter themselves acknowledge very extensively and correctly in Section I and II of the draft concept.



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An effective and successful probation system will never be “soft on crime”, it will only and always be very hard on it by fighting its very root causes with a long-term strategy of successfully defending society and its citizens.

Paragraphs 3, 4 and 5 of **SECTION III** do not call for any major comments as they are in line with the contents and recommendations of the International and European texts mentioned in the introduction of this opinion.

Two things are however worth mentioning within this part of the text, ie the role and involvement of Civil Society Organisations (CSO), and the institutional set-up of the probation service itself.

On the first count the English translation of the draft concept probably does not render justice to the intentions of the drafters, nonetheless it seems that the role of CSO is more limited compared to what European texts suggest and more in particular to what some EU Member States implement (eg, UK). Practices like eg arrest referral schemes for problematic drug or alcohol users have been evaluated as being effective with this target group. In such schemes police agrees a memorandum of understanding with CSO providing drug and alcohol services. The service so defined aims to allow that the apprehended offender is reached by the CSO already during police custody and before seeing a judge, and diverted from the criminal justice system into treatment from the very beginning. With those kind of practices in mind it could be useful to envisage in the text a more active role for CSO both in the system and in the definition and making of probation policy. This comment applies also to the Sections on Juveniles, where it does not seem to emerge a significant role for CSO.

On the second count, the institutional arrangements of the probation service are indeed and entirely a matter of opportunity and consideration of the Ukrainian authorities. The only recommendation is that the Service should not be placed into a structure whose goals are by its own institutional culture focused on security rather than reparation and reintegration. Away from this risk, several options are available for consideration, each of those with pros and cons, whose analysis and evaluation depends on specific national constraints and context. As highlighted by the UN Handbook on Probation Service (UNICRI publication N°60, 1998):

The positioning of probation services varies widely. Controversy exists on whether probation should be part of the judicial or executive branch of government, whether it should have a social work, law enforcement or correctional orientation including, and especially, who should administer it.

Those who favour it in the judicial branch state that: probation would be more responsive to the courts; relationship of probation staff to the courts creates an automatic feedback mechanism on the effectiveness of dispositions; courts will have a higher awareness of resources needed; and if probation were incorporated into a department of corrections, it might be assigned a lower priority than it would have had it been part of the court. Opponents argue that: judges are not equipped to administer a probation agency; services to probationers may receive lower priority than services to the courts; probation staff may be assigned duties unrelated to



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probation; courts are adjudicatory and regulative rather than service oriented bodies.

Supporters of placement within the executive branch argue: allied human service agencies are located in the executive branch; all other corrections subsystems including law enforcement are located in the executive branch; more co-ordinated and effective program budgeting as well as increased ability to negotiate fully in the resource allocation process becomes possible; reduction of officer isolation and access to improved staff training and career development opportunities; as well as co-ordinated continuum of services to offenders and better utilisation of probation manpower are facilitated.

In terms of **SECTION IV** of the draft concept the same general remarks expressed above apply. In particular on the “first time” limitations, which for juveniles can be even more counter-productive and that should be lifted.

Two additional comments however deserve to be made. First, the target group of probation for juveniles, where European and UN rules suggest that Young Offenders until the age of 21, depending also on the nature of the crime, should and could be treated differently from the adult population. Consideration therefore could be given on whether to extend the scope of the probation for juveniles to include also young offenders or to at least leave this option open for the judge to decide on a case by case basis (CoE Rec. R(2003)20).

Conclusions

As expressed above, the Concept overall meets the aims of the European texts, with the reserves mentioned.

Overall the text could also benefit from a clear indication of the importance to produce and provide an evidence based policy that aims to be effective. In this sense, it is suggested to include amongst the tasks of the service to conduct and commission research and evaluation of results in order to better inform policy development in the two stages of implementation. It is also recommended that provision is made on the careful monitoring of the implementation of legislation in this field.

Finally, it is also recommended to include the planning of a wide public information campaign explaining the public at large the aims and advantages of probation over sole incarceration. The campaign should make use of suitable means and of the full range of IT and Communication instruments in order to reach the wide general public.

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