COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (92) 17

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

CONCERNING CONSISTENCY IN SENTENCING

(Adopted by the Committee of Ministers on 19 October 1992
at the 482nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that it is one of the fundamental principles of justice that like cases should be treated alike;

Considering that in member states there has been increasing awareness that unwarranted disparity in sentencing sometimes occurs at different levels;

Considering that unwarranted disparity and perceptions of injustice might bring the criminal justice system into disrepute;

Taking into account Articles 3, 5 and 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms and also the fundamental principle of the independence of the judiciary;

Bearing in mind that the decision of the court must always be based on the individual circumstances of the case and the personal situation of the offender;

Considering that consistency in sentencing should not lead to more severe sentences;

Recalling the conclusions of the 8th Criminological Colloquium in Strasbourg, 1987,

Recommends that the governments of member states, while taking into account their own constitutional principles and legal traditions, and in particular the independence of the judiciary, take appropriate measures for the promotion of the principles and recommendations set out in the appendix to this recommendation, so as to avoid unwarranted disparity in sentencing.

Appendix to Recommendation No. R (92) 17

A. *Rationales for sentencing*

1. The legislator, or other competent authorities where constitutional principles and legal traditions so allow, should endeavour to declare the rationales for sentencing.

2. Where necessary, and in particular where different rationales may be in conflict, indications should be given of ways of establishing possible priorities in the application of such rationales for sentencing.

3. Wherever possible, and in particular for certain classes of offences or offenders, a primary rationale should be declared.

4. Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.

5. The rationales for sentencing should be reviewed from time to time. The tendency to establish uniform rationales and priorities at European level should be encouraged and promoted. Sentencing practice should be subjected to critical reappraisal so as to avoid undue severity.

6. Sentencing rationales should be consistent with modern and humane crime policies, in particular in respect of reducing the use of imprisonment, expanding the use of community sanctions and measures, pursuing policies of decriminalisation, using measures of diversion such as mediation, and of ensuring the compensation of victims.

7. No discrimination in sentencing should be made by reason of race, colour, gender, nationality, religion, social status or political belief of the offender or the victim. Factors such as unemployment, cultural or social conditions of the offender should not influence the sentence so as to discriminate against the offender.

8. In proposing or imposing sentences, account should be taken of the probable impact of the sentence on the individual offender, so as to avoid unusual hardship and to avoid impairing the possible rehabilitation of the offender.

9. Delays in criminal justice should be avoided: when undue delays have occurred which were not the responsibility of the defendant or attributable to the nature of the case, they should be taken into account before a sentence is imposed.

B. *Penalty structure*

1. Maximum penalties for offences and, where applicable, minimum penalties should be reviewed so that they form a coherent structure which reflects the relative seriousness of different types of offence.

2. The range of available sentences for an offence should not be so wide as to afford little guidance to courts on its relative seriousness. States should therefore consider the grading of offences into degrees of seriousness, provided, however, that minimum penalties, where applicable, do not prevent the court from taking account of particular circumstances in the individual case.

3. *a.* Wherever it is appropriate to the constitution and the traditions of the legal system, some further techniques for enhancing consistency in sentencing may be considered.

b. Two such techniques which have been used in practice are "sentencing orientations" and "starting points".

c. Sentencing orientations indicate ranges of sentence for different variations of an offence, according to the presence or absence of various aggravating or mitigating factors, but leave courts with the discretion to depart from the orientations.

d. Starting points indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect aggravating and mitigating factors.

4. *a.* In particular, for frequently committed or less serious offences or offences which are otherwise suitable, consideration may be given to the introduction of some form of orientations or starting points for sentencing as an important step towards consistency in sentencing.

b. Wherever it is appropriate to the constitution or the traditions of the legal system, one or more of the following means, among others, of implementing such orientations or starting points may be adopted:

i. legislation;
ii. guideline judgments by superior courts;
iii. an independent commission;
iv. ministry circular;
v. guidelines for the prosecution.

5. *a.* Custodial sentences should be regarded as a sanction of last resort, and should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate. Where a custodial sentence on this ground is held to be justified, that sentence should be no longer than is appropriate for the offence(s) of which the person is convicted. Criteria should be developed for identifying the circumstances which render offences particularly serious. Wherever possible, negative criteria to exclude the use of imprisonment, in particular in cases involving a small financial loss, may be developed.

b. The introduction of legislative restrictions on the use of custodial sentences, in furtherance of paragraph *a*, should also be considered, in particular as regards short-term custodial sentences.

c. In order to promote the use of non-custodial sanctions and measures, and in particular where new laws are created, the legislator should consider indicating a non-custodial sanction or measure instead of imprisonment as a reference sanction for certain offences.

6. Consideration should be given to grading the available non-custodial sentences in terms of relative severity, taking account not only of the different forms of sanction (for example suspended sentence, fine) but also the varying degrees of harshness (for example high or low fines, long or short community orders); such grading would enable courts to select the non-custodial sentence appropriate for the offender and, subject possibly to the offender's consent, from among a group of sentences which also reflect the relative seriousness of the offence.

7. Where there is a failure to comply with the requirements of a non-custodial order (other than by the commission of a subsequent offence), the offender should not be sent to prison unless the court is satisfied that all other legally prescribed methods have been used or are inappropriate, and that the offender has had the ability to comply with the order. So far as fines are concerned:

a. as a matter of principle, every fine should be within the means of the offender on whom it is imposed;

b. custody should be avoided so far as possible in cases of inability to pay, in view of the fact that the original offence was considered insufficiently serious for imprisonment or because such a penalty was inappropriate for other reasons;

c. states should, as a matter of urgency, explore other non-custodial means of enforcing the payment of fines, including suspension of payment and modification of the sentence.

8. In states where the suspended sentence of imprisonment is available, it is important to ensure that, where an offender breaches the suspended sentence, the implementation of the suspended sentence is a judicial decision which allows some discretion, in terms of full implementation, part implementation or other possibilities.

C. *Aggravating and mitigating factors*

1. The factors taken into account in aggravation or in mitigation of sentence should be compatible with the declared rationales for sentencing.

2. The major aggravating and mitigating factors should be clarified in law or legal practice. Wherever possible, the law or practice should also attempt to define those factors which should not be considered relevant in respect of certain offences.

3. The factual basis for sentencing should always be properly proved. Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is proved beyond reasonable doubt and before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exist.

D. *Previous convictions*

1. Previous convictions should not, at any stage in the criminal justice system, be used mechanically as a factor working against the defendant.

2. Although it may be justifiable to take account of the offender's previous criminal record within the declared rationales for sentencing, the sentence should be kept in proportion to the seriousness of the current offence(s).

3. The effect of previous convictions should depend on the particular characteristics of the offender's prior criminal record. Thus, any effect of previous criminality should be reduced or nullified where:

a. there has been a significant period free of criminality prior to the present offence; or

b. the present offence is minor, or the previous offences were minor; or

c. the offender is still young.

4. There should be a coherent policy with regard to the relevance of discontinued proceedings, foreign judgments, amnesty, pardon or time-barred offences.

5. Where an offender is sentenced on one occasion for several offences, the decision on the severity of the sentence or combination of sentences should take some account of the plurality of offences but should also remain in proportion to the seriousness of the total criminality under consideration.

E. *Giving reasons for sentences*

1. Courts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. Where sentencing orientations or starting points exist, it is recommended that courts give reasons when the sentence is outside the indicated range of sentence.

2. What counts as a "reason" is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing.

F. *Prohibition of* reformatio in peius

1. The principle of the prohibition of *reformatio in peius* should be taken into account where only the defendant appeals.

2. In states where such a remedy exists, the powers of prosecutors to use their right to accessory appeal should not be used with a view to undermining the principle of the prohibition of *reformatio in peius*, thereby deterring offenders from appealing.

G. *Time spent in custody*

In principle, time spent in custody before trial or before appeal shall count towards the sentence. There should be a coherent policy with regard to time spent in custody abroad.

H. *Role of the prosecutor*

The sentencing policies and training of prosecutors should ensure that prosecutorial practices make a contribution to overall consistency in sentencing.

I. *Sentencing studies and information*

1. Arrangements should be made to ensure that judges and the public are regularly provided with information about the overall functioning of the criminal justice system, and in particular of sentencing practice.

2. In order to promote consistency in sentencing, judges and magistrates should have the opportunity to attend seminars and conferences on sentencing, on a regular basis.

J. *Statistics and research*

1. Sentencing statistics should be officially established. They should be compiled and presented in a way which is informative to judges, particularly in respect of sentencing levels for relatively quantifiable offences (for example drunk driving, thefts from supermarkets).

2. Statistics should be compiled so as to ensure that they give sufficient details to measure and to counter inconsistency in sentencing, for example by linking the use of particular penalties to types of offence.

3. Research should be done regularly to measure accurately the extent of variations in sentencing with reference to the offences punished, the persons sentenced and the procedures followed. This research should pay special attention to the effect of sentencing reforms.

4. The decision-making process should be investigated quantitatively and qualitatively for the purpose of establishing how courts reach their decisions and how certain external factors (press, public attitudes, the local situation, etc.) can affect this process.

5. Ideally, research should study sentencing in the wider procedural context of the full range of decisions in the criminal justice system (for example investigations, decisions to prosecute, the defendant's plea, and the execution of sentences).

K. *European co-operation on sentencing information*

1. States should consider the establishment of some method of a continual exchange of information about trends and new developments in sentencing law, policy and practice, in order to spread knowledge of the sentencing practices of other European states and to inform states about possible methods of improving consistency in sentencing.

2. To this end, states should encourage the establishment of a regular European newsletter on sentencing, prepared by an appropriate institution and distributed to judges and other interested parties in greater Europe. States should also consider the desirability of providing a forum for meetings of judges and others involved in the criminal justice systems of member states, so as to spread awareness of shared problems and possible solutions.