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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMPILATION OF COMMENTS BY DELEGATIONS TO THE DRAFT RECOMMENDATION OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING DANGEROUS OFFENDERS

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Finland

Finland suggests an addition to the commentary, in paragraph 34, as follows in bold:

34. The Preamble underlines that national legislation, policies and practice are addressed by this Recommendation. This means that the Recommendation offers a guide for both legislation and the framework for good practice concerning dangerous offenders. It does not entail, however, that the Recommendation offers an exhaustive guide to every aspect of daily practices concerning this group. It is for the different CoE member states to accommodate these Rules into their legislation and to translate them into ***practice insofar the constitutional and legal traditions and the independence of the judiciary of the member states allow. The consequence of this is that there will be no obligation to be guided by this recommendation in member states where these kinds of preventive detention and preventive supervision without fixed term are not recognised in the national legislation.***

Explanation: this addition would clearly express that it is not mandatory to be guided by this recommendation concerning this issue.

- The Finnish Ministry of Justice suggests that the preamble should contain a reference to the Recommendation Rec (2003)22 on conditional release.

- In the meeting of the CDPC held in May 2013 Finland suggested that a systematic review of the decisions of the European Court of the Human Rights concerning preventive detention should be prepared by the drafting group. It is mentioned in the commentary, in section 28 that relevant case law of the ECtHR has been taken into account. However, only few decisions are mentioned in the draft commentary. Such a systematic review would have been necessary when the member states have been drafting a new recommendation on preventive detention.

Germany

Comments on the Draft Recommendation:

Part I - Definitions and basic principles

Definitions

1. For the purpose of this Recommendation:

   a. **Dangerous offender** is a person who has been convicted of a very serious ~~sexual or very serious violent crime against person(s) and who presents a high likelihood of re-offending with further very serious sexual or very serious violent crimes against person(s).~~ crime or several serious crimes, in particular a sexual or violent crime against person(s), and who presents a substantial likelihood of re-offending with further serious crimes."

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   b. **Risk** is defined as the substantial~~high~~ likelihood of ~~a~~ further ~~very~~ serious offences, in particular serious sexual or ~~very serious~~ violent offences against person(s).

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   c. **Secure preventive detention** means detention imposed by the judicial authority on a person to be served during or after the fixed term of imprisonment in accordance with its national law. It is not imposed merely because of an offence committed in the past, but also on the basis of an assessment revealing that (s)he may commit other ~~very~~ serious offences in future.

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Comment [EM1]: The definition under 1a is too narrow. Pursuant to this definition, "dangerous offender" only encompasses sex offenders and violent offenders. Persons convicted of serious offences against the security of the state, of serious offences which pose a danger to the general public – such as arson – or of offences under the Narcotics Act would thus not be covered by this definition.

Comment [EM2]: The wording "very serious" is also too restrictive, as a conviction of several serious offences must also be sufficient for a preventive detention order to be made. The formulation "or several serious crimes" should therefore be added to the text.

Comment [EM3]: The required "high likelihood" is also too restrictive. A substantial likelihood/risk should, in principle, be sufficient to constitute a negative prognosis.

Comment [EM4]: We therefore suggest that the definition be worded as follows: "Dangerous offender is a person who has been convicted of a very serious crime or several serious crimes, in particular a sexual or violent crime against person(s), and who presents a substantial likelihood of re-offending with further serious crimes."

Comment [EM5]: As regards the definition of "risk" under 1c, "high" should be replaced by "substantial", "very" should be deleted and an explicit limitation to sexual and violent offences should be avoided. The text should therefore read as follows: "Risk is defined as the substantial likelihood of further serious offences, in particular serious sexual or violent offences against person(s)."

Scope, application and basic principles

2. This Recommendation shall not apply :
   a. to children below the age of fourteen (alternatively: "a. to children below the age of criminal responsibility");

Comment [EM6]: The term "children" is not defined within the draft at hand. The Convention on the Rights of the Child" (Art. 1) and several other international standards such as, for example, the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010; No. II lit. a) defines "children" as persons below the age of eighteen. In Germany it has been possible since 2008 to impose preventive detention on juveniles (i. e. persons who are at least fourteen years old, the age of criminal responsibility). For reasons relating to the protection of the general public, the legislator considered it urgently necessary to apply the instrument of preventive detention – in very rare and extraordinary cases, which can nevertheless not be totally excluded – to highly dangerous young offenders, subject to extremely strict conditions. It cannot be expected that this view will change in the foreseeable future.

Actually, this amendment might be considered as non-essential. Because, in a strict sense, the draft recommendation at hand does not determine exclusively the cases in which secure preventive detention or preventive supervision may be imposed on a person. It provides for specific conditions to be fulfilled in case of imposition and further (protective) standards for the enforcement etc. No. 2 lit. a of the draft does not say "Secure preventive detention or preventive supervision may not be imposed on children" but, taken literally, it would exclude children from the protective regulations of the recommendation. That would make no sense. So this provision of non-applicability can only be interpreted as a common understanding that the named measures should not be imposed on "children". Thus from the German point of view the amendment proposed above is indispensable.

b. to mentally ill ~~disordered~~ persons who are not under the responsibility of the justice / prison system

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Secure preventive detention

3. The decision of a judicial authority to impose secure preventive detention against a dangerous offender should take into account a risk assessment report from the experts.

4. A dangerous offender should only be held in secure preventive detention on the basis of an assessment establishing that (s)he may with substantial ~~high~~ likelihood commit furthe~~r a very~~ serious crimes, in particular serious sexual or ~~very serious~~ violent offences ~~crime~~ against person(s) ~~in the future~~.

Comment [EM7]: The wording of 2b has to be changed and clarified in accordance with explanatory comment no. 42. Firstly, the term "mentally ill persons" should be used in order to reflect and emphasize the differentiation made in explanatory comment no. 42 from persons with a mere "mental disorder", especially a "personal or developmental disorder". Secondly, instead of just saying "prison system", the text should say "justice/prison system".

Comment [EM8]: In accordance with the changes to be made to the definition of "dangerous offender" (no. 1), no. 17 should also be adapted. More specifically, the last half-sentence should read as follows: "that (s)he may with substantial likelihood commit further serious crimes, in particular serious sexual or violent offences against person(s)".

Ireland

1. The draft Recommendation's focus seems to be on preventive detention. "Preventive detention", whereby an offender who has served their sentence continues to be detained in prison, would be unconstitutional in this jurisdiction and as such the relevant provisions of the draft recommendations would not be applicable here.

2. At the same time, it is not clear if that the above is all that is being provided for in the draft Recommendation. It could be that it is also intended to set guidelines for a criminal court in imposing preventative detention on a person whom it deems dangerous but who has not been convicted of an offence (again, this would not be applicable in Ireland), and/or where prevention is to be a consideration in arriving at a sentence for a convicted offender who is deemed dangerous. Sentencing policy is a matter for the courts and not for the executive. While risk assessment is part of the existing management of sex offenders, it is not used by the courts as a formal system of offender classification with specific implications for the person in question. While (as the executive) we cannot speak for Ireland's judiciary, we would not be in favour of introducing such a scheme.

3. The alternative of preventive supervision (paragraphs 24-26) may also not be applicable in Ireland, but it is difficult to tell without greater clarity being provided on the intended scope of such measures. If the provisions are intended solely as an alternative to preventive detention, then they would not appear to be applicable to Ireland. However, clarification is needed as to whether the provisions in question are also intended to apply to convicted offenders on probation, parole, suspended sentences, post-release supervision etc.

4. In light of the foregoing, Ireland would have difficulties conforming with the recommendation if adopted in its current format.

5. Ireland suggests that it would be better if the recommendation clearly stated the objectives to be achieved and, in a non-prescriptive way, specified (a) general principles to be observed in assessing and managing risk and (b) measures that may be taken to reduce risk, prevent harm to the public and rehabilitate the offender.

6. The reference to constitutional principles, etc. in the recitals/preamble has been noted. At the very least, the same statement should appear in the instrument itself.

Netherlands

- ***Rule 4 of the recommendation***

4. **Without prejudice to the competence of prison authorities to take decisions relating to internal prison conditions [and limitations],** Any decision that could result in a deprivation or restriction of liberty of a dangerous offender will be decided or agreed by the judicial authority. Restriction and intervention measures should not be disproportionate to the level of risk and the least restrictive measure consistent with the protection of the public and the reduction of risk should be applied.

- ***Commentary on rule 4***

51: Measures that limit personal liberty require the decision of the judicial authority. ~~In other cases, other competent authorities may be involved in imposing the restriction on the offenders, for example d~~**Decisions of prison authorities with relation to internal prison conditions and limitations** ~~Decisions of this kind that~~ are not within the scope of a judge's power but should at least be subject to judicial review

- ***Rule 6 of the recommendation***

6: The risk management of dangerous offenders should **- if possible/ where appropriate -** have the long-term aim of their safe reintegration into the community in a manner consistent with public protection from the risk posed by the offender. This should involve an individual plan that contains a staged process of rehabilitation through appropriate intervention.

In case of lifelong imprisonment with no initial or actual intention of ending this imprisonment (i.e. pardon) risk management has not this aim. In these cases it wouldn't be appropriate to hold out the prospect of reintegration into the community while there are no actual plans to do so, neither from the view of the prisoner, nor from the view of victims or their relatives.

Therefore I suggest to add the words 'if possible' to bring to expression that in some cases this aim is not realistic.

Norway

A. Recommendation

i) Rule 19 – Number 19 in the Recommendation needs to be modified or deleted. When secure preventive detention replaces an ordinary sentence, it is, certainly, not the intention to state that it should be subject to "regular review at least every two years. The intention is to ensure that [when secure preventive detention takes the form of detention beyond the period prescribed for punishment, or rather the *fixed* term, it is essential that those detained are able to challenge their detention…]; as pointed out in item 20 in the Recommendation. Subsequently item 19 in the Recommendation could be deleted and the corresponding items in the ER could be added to items corresponding to item 20 in the Recommendation instead. *See also commentary on ER no.45 (below)*

ii) Rule 24 – we propose an addition to the provision so that it reads:

24. Preventive supervision may be applied as an alternative to secure preventive detention, ***as conditions for release on probation,*** or after release and should be reviewed on a regular basis.

iii) Rule 25, first paragraph - we propose an addition to the provision so that it reads:

25. Such supervision may consist of one or more of the following measures set up by the competent authority ***as far as national law provide such measures***: (…)

iv) We suggest a new rule XX either under part III or IV - *Balancing the rights of the prisoner on the one hand and the protection of society on the other lies at the heart of this Recommendation. That being said, there is reason to underscore that to a wide extent the rights of the prisoner and the obligation to protect the society are in fact two sides of the same coin. As an example preparation for release can be mentioned. This is important not only/solely for the prisoner, but for the protection of society; as it will diminish the risk of re-offending/recidivism.*

v). **We suggest a new rule in part V** - *Preparation for release does not only/solely encompass education, vocational training, interventions because of psychiatric problems, etc. Contact with the outside world is also of high importance in this regard. Being released to society directly from a high-security prison is extremely difficult for a long-term prisoner and should, hence, be avoided. The prisoner should instead be gradually prepared for a life in freedom by moving him or her to prisons with less strict security regimes when possible. The prisoner should also be allowed to have leaves of absence before he or she is being released.*

B. Explanatory Rapport

i. **See IV above.** Either as a new paragraph 51 or insert into paragraph 90

ii. **See V above**. Could be a new paragraph 168

iii. **In paragraph 45** in the ER "only" or "solely" should be added in the second sentence: "For the purpose of this Recommendation, secure preventive detention is considered to be a measure for public protection and not **only/solely** a penal sanction." Otherwise this item is not in conformity with the definition of secure preventive detention in item 1 g) in the Recommendation. Reference is also made to **paragraph 88** in the ER; where it is stated in the second sentence that "In other countries, secure preventive detention replaces an ordinary sentence." This is the case in Norway; where secure preventive detention is a penal sanction which implies that the convicted person serves his or her sentence under a special regime.)

iv. **Paragraph 46** is not entirely correct. (As all CoE-members have ratified UNCRC, "Children" is to be understood as persons under 18 years of age in all CoE Member States.) The second sentence should be deleted; as it is only partly true. The first and last sentence are sufficient. NB! In the last sentence Article 37 of UNCRC should be added (to Article 40).

v. Reference is made to the last meeting in the working group; where it was agreed that it should be carefully pointed out in **paragraph 51** in the ER what sorts of "decisions that can result in restriction of liberty" that falls within the scope of this rule in the Recommendation item 4 (i.e. first and foremost secure preventive supervision). It is critical to point out that not all decisions that restrict a dangerous offenders liberty are meant to be comprised. Both the police and the prison administration make numerous decisions related to a dangerous offender's liberty; which are not meant to be included. (Otherwise it would be impossible for them to carry out their tasks.)

vi. Further, the link between **paragraphs 52 and 53** in the ER should be better defined; i.e. that all the three mentioned conditions should be fulfilled if personal liberty is to be limited.

vii. In **paragraph 61** in the ER it should be added that where appropriate and possible, the victim (and the offender) should be offered Restorative Justice-meetings/dialogue. According to recent research, Restorative Justice-encounters have proven very valuable for victims of serious/violent crime, and if this can improve the quality of life for the victim it should be used to the extent possible.

Switzerland

- **Rule 9**

Rule 9 specifically refers to "special risk-related needs of dangerous offenders ". This definition, where needs are to be mentioned, should be replicated verbatim throughout the text. The concern is indeed not to settle for the too general term "needs", but to specify that these are needs relating to the risk.

- **Part III – Risk assessment principle – proposal to amplify the title**
  Part III – Principe of risk assessment **during the implementation of a sentence**

The idea is to make it clear that this part deals with risk assessment during the implementation of a sentence, not at the time of pre-trial judicial decisions.

- **Rule 28 – proposed amendment**

Risk assessments should involve a detailed analysis of the previous behaviours and the historical, personal and situational factors that led to and contribute to it as well as of the detailed reports of the therapists concerned. …

A thorough assessment of the risk posed by an offender is not possible without the assistance of the therapists concerned and of their reports recording the conduct/functioning of the therapies.

- **Rule 32 - proposed amendment**

Assessments should be coupled with opportunities for offenders to address their special risk-related needs and change their attitudes and behaviour.

cf. explanation above under R9

United Kingdom

- **Rule 5**

*5. Careful adherence to criteria for identifying the 'dangerous offender' should take into account that this group is a small minority of the total offender population without compromising public safety. Such criteria should include evidence of previous serious violence, **sexual offending**, characteristics of the offender or his/her offending that indicate likelihood of substantial and continuing risk of violence **or sexual offending**, evidence of the inadequacy of lesser measures, such as previous failure to comply and persistent offending despite the application of lesser measures. Length of sentence or the offender's general recidivism cannot constitute the only criteria for defining an offender as dangerous in this sense.*

Explanation
The recommendations relate to both violent and sexual offending (see para 1.a of the Definitions) and paragraph 5 hence needs to refer to both violent and sexual offending to be consistent with this. It is possible for there to be serious sexual offending that does not meet the criteria for an offence of violence.

- **Rule 9**

*9. Special risk-related needs of dangerous offenders should be addressed throughout the period of the intervention and sufficient resources should be allocated ~~in order to deal effectively with the particular situation and specific needs~~ **to provide for an appropriate system for dealing with such needs**.*

Explanation
The ECHR case of *Lee James and Wells* and the recent High Court case of *Kiayam* do not prescribe an individual duty to prisoners, just a duty to provide sufficient resources to put an appropriate system in place. This is an important distinction. As the drafting stands, it is inconsistent with the ECHR cases and we have therefore suggested an amendment. This amendment is particularly important as there may also be practical consequences for Member States' offender management services, not only in having to deal with challenges that may arise from these recommendations, but – in the possible case of adverse judgments – Member States could find themselves expected to comply with unaffordable and impracticable demands.

- **Rule 23**

*23. Dangerous offenders in secure preventive detention should, after the expiry of the period prescribed for punishment, be held in appropriate conditions, **subject to the requirements of risk management, security and public protection**. In any case respect for human dignity shall be guaranteed.*

Explanation
As the draft stands it is inconsistent with paragraph 22, and appears to suggest that once the term for punishment is served a prisoner should be moved to less secure conditions. Security categorisation is not linked to whether prisoners are pre-or post tariff: it is linked to security, good order and public protection. Again, this amendment is particularly important

as there may also be practical consequences for Member States' offender management services: not only in having to deal with challenges that may arise from these recommendations, but it is suggesting that even if a prisoner is a danger to the public and other prisoners they should be kept in unsecure conditions – in the possible case of adverse judgments – Member States could find themselves hindered from keeping dangerous offenders in an appropriately secure setting.

- **Rule 43**

43. ~~As soon as possible after admission~~ ***At an appropriate time (with due regard to case law and the readiness of the offender to engage)*** *and after an assessment of the risks, special risk-related needs and characteristics of the offender, appropriate treatment in a suitable institution should be prepared in the light of the knowledge obtained about individual special risk-related needs, capacities and dispositions.* ***Subject to security considerations and availability of interventions****, this should take into account proximity to relatives and specific conditions. The implementation will be supervised by a competent authority.*

Explanation

As currently drafted the recommendation suggests that interventions should be triggered as soon as possible after admission. This conflicts with both current practice and ECHR case law. Case law (*Lee James and Wells*) has made it clear that interventions need to take place once the punishment period has been completed. This proscribes interventions as soon as possible after the offender is sentenced. Whilst some do start early on it is unlikely that this could be afforded or is practical in most cases where the offender is not ready to engage. Again, this amendment is particularly important as there may also be practical consequences for Member States' offender management services, not only in having to deal with challenges that may arise from these recommendations, but – in the possible case of adverse judgments – Member States could find themselves obliged to carry out expensive interventions at inappropriate times.

As currently drafted the second sentence suggests that "proximity to relatives" is a key priority. This should be qualified to ensure that it would not be a priority over being placed in an appropriate institution of the relevant security level and where the requisite interventions are available.