

21 November 2011
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

**DISCUSSION PAPER ON FOLLOW-UP TO BE GIVEN TO
THE CONCLUSIONS ADOPTED AT THE 16TH CONFERENCE OF
DIRECTORS OF PRISON ADMINISTRATION**

Document prepared by the Directorate General I - Human Rights and Rule of Law

1. The CDPC Bureau at its meeting on 20-21 October 2011 decided to: “instruct the Secretariat to prepare a working document on possible follow-up to the CDAP Conclusions to be submitted to the CDPC at its plenary meeting in December 2011, containing substantial elements for discussion on : a) how to provide the necessary follow-up to the establishment of an electronic platform for the exchange of best practices; b) the feasibility of developing ethical regulation on the use of electronic monitoring as a matter of priority and c) the possible drafting in the future of a European Code of Ethics for Probation Staff. As regards the latter points, the Bureau expressed its view that activity b) should be considered as a priority while activity c) may be given lower priority.”
2. In relation to p. (a) - electronic platform - please refer to document CDPC (2011) 25 which discusses in greater details the possible creation of such a platform and the steps necessary in this respect.
3. In relation to p. (b) please consider the below points:
4. Since 1992¹, the Council of Europe has been giving consideration to the kinds of regulation which should govern the use of electronic monitoring (EM) in member countries. The current Council of Europe Rules on Probation² (2010) contain the following recommendations:
 58. When electronic monitoring is used as part of supervision, it shall be combined with interventions designed to bring about rehabilitation and to support desistance.
 59. The level of technological surveillance shall not be greater than is required in an individual case, taking into consideration the seriousness of the offence committed and the risks posed to community safety
5. The aim of such rules has been to set (or at least imply) an ethical framework and ensure that EM is implemented in ways that are commensurate with the probation ideal of rehabilitating and resettling offenders. These rules remain though rather general as the scope of the Probation Rules is much broader.
6. The Rules do not contain such important definitions like what is EM and what it entails, technologically-speaking, as supervision and control, at which stage of the penal process it may be put in place, its length, intensity, essence as a means of enforcing compliance with the restrictions or measures imposed, etc. The rules further tend to have been conceived as constraints on potentially bad uses of EM – which is indeed a legitimate endeavour – but not to promote positive aspects of its use.
7. The new technological developments warrant further ethical reflection on the purposes of EM, and refinement of the Council of Europe standards relating to EM in the light of them. Proper ethical reflection on the nature of EM as a penal measure at all phases of the criminal justice system – pre-trial, sentence and post-release - is arguably long overdue, not only to better ground any regulation of existing practice in defensible moral principles, but to anticipate potential developments and indicate the kind of ethical stance which might be taken towards them.
8. The use of EM as a stand-alone measure may at first sight be defensible at the pre-trial stage as a means of reducing pressure on remand prison populations. Ethical questions may though arise as at this stage of the process the person is not yet found guilty and issues such as the overall length of the order; the maximum period of home confinement in any given 24 hours; and the rights of third parties in this respect may have to be dealt with in greater details.

¹ Recommendation n° R(92)16 on the European Rules on Community Sanctions and Measures

² Recommendation CM/Rec (2010)1 on the Council of Europe Probation Rules

9. Because of the home confinement element of EM, the rights of third parties in the house where offenders live are more salient than they tend to be in relation to other community penalties – particularly the impact on female householders - and warrant ethical reflection in their own right.
10. Another important aspect relates to the question whether personalised “crime prevention” uses of EM seem feasible – imposing periods of home confinement at specific times when offenders shoplifters, car thieves have been known to offend - and if so should they actively be promoted as a constructive measure?
11. GPS tracking is both a form of mobility surveillance (if used indiscriminately to monitor persons wherever they go) and/or a means of enforcing exclusion from specified places (as well as confinement). Both can be undertaken on a 24/7 basis, and in “real-time”, giving a hitherto unprecedented degree of both reach and immediacy to a community sanction.
12. Remote alcohol monitoring technology (which has been piloted in Europe but is not widespread) can check compliance with a court-ordered ban on consuming alcohol. This constitutes a move towards monitoring (and modifying?) behaviour rather than just monitoring the schedules and locations of the offender, which is primarily what EM has been upto now.
13. EM has generally been conceived as a restriction of liberty and compared (sometimes literally, sometimes metaphorically) to imprisonment, to which it has often been considered a lesser form of confinement. It might more accurately - in both its house arrest and tracking forms – be thought of as a restriction of mobility in the community, a way of constraining an offender’s use of public space in which, as a free citizen, he would otherwise be entitled to roam during both the day and the night. All forms of community sanctions regulate spatial locations and temporal schedules to some degree – requiring attendance at particular places at particular times, and sometimes penalising unpunctuality – but EM takes such regulation to a level, monitoring compliance to an infinitely more meticulous degree, and automating the process. Probation and community service “appointments” notionally have an end beyond themselves – the benefits of being helped with problems, or of undertaking unpaid work for others, but in its stand-alone form EM arguably makes spatial and temporal regulation an end in itself. The ethics of spatial regulation as a penal measure – with or without EM - needs to be thought through more carefully than it has been. The role of probation services in this respect and the ethical value of their interventions under EM measures need to be dealt with as a matter of urgency.
14. In relation to point c) the PC-CP shares the CDPC Bureau view that it is indispensable to adopt first rules related to the ethical framework of EM and the applicable procedures of its use before drafting an European Code of Ethics for Probation Staff, as a number of ethical issues related to EM would be applicable also to the work of probation services.