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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Cooperation
(PCCP)

DRAFT RECOMMENDATION ON
ELECTRONIC MONITORING

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION CM/REC(201X) XX
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
CONCERNING PRISON OVERCROWDING AND PRISON POPULATION INFLATION

*(Adopted by the Committee of Ministers on XXXX
at the XXX meeting of the Ministers' Deputies)*

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

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Desirous of further developing international cooperation in the field of execution of penal sentences;

Considering that such cooperation should help improve justice, sanction effectively and humanely offenders and reduce crime;

Agreeing that imprisonment should be used as a measure of last resort as the best social reintegration of offenders can be achieved in the community thus serving better the interests of society itself;

Reiterating that prison overcrowding and prison population growth are a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions;

Recognising that electronic monitoring used in the framework of the criminal justice process can help reduce the use of detention while ensuring effective supervision of suspects and offenders in the community and thus helping prevent crime;

Recognising at the same time that electronic monitoring technologies should be used in a well regulated and proportionate manner in order to reduce their potential negative effects on the private and family life of a person under electronic monitoring as well as of concerned third parties;

Agreeing therefore that ethical and professional standards need to be developed regarding the use of electronic monitoring in order to guide the national authorities, including judges, prosecutors, prison and probation services, police as well as agencies providing equipment or supervising suspects and offenders;

Taking into account:

- The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51);
- Recommendation No. R (92) 16 on the European rules on community sanctions and measures;
- Recommendation No. R (92) 17 concerning consistency in sentencing;
- Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures;
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation;
- Recommendation Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures;
- Recommendation Rec (2003) 22 on conditional release (parole);

- Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures;
- Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules.

Bearing in mind:

- The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (Resolution 45/110);
- The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (Resolution 2010/16);
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (Resolution 40/33);
- The European Union Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;
- The European Union Council Framework Decision 2009/829/JHA 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;

Recommends to the governments of member states to:

- take all appropriate measures, when reviewing their relevant legislation and practice, to apply the principles set out in the Appendix to this Recommendation;
- ensure the widest possible dissemination of the Recommendation and its explanatory report among the relevant authorities and agencies and in the first place the ministries of justice, the prison administration, the probation services and any other agency providing electronic monitoring equipment or supervising persons under electronic monitoring in the framework of the criminal justice process.

Appendix to Recommendation CM/REC(201X)XX

I. Scope

The aim of this Recommendation is to define a set of professional and ethical rules and standards enabling national authorities to provide just, proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process in full respect of the rights of the persons concerned.

It is also intended to bring to the attention of national authorities that particular care needs to be taken when using electronic monitoring not to undermine or substitute the building of constructive professional relationships with suspects and offenders by competent staff dealing with them. It should be underlined that the imposition of technological control can be a useful addition to existing socially and psychologically positive ways of dealing with any suspect or offender.

II. Definitions

Electronic monitoring is a general term referring to forms of surveillance with which to monitor the location, movement and specific behaviour of persons in the framework of the criminal justice process. The current forms of electronic monitoring are radio wave, biometric or satellite tracking. They usually comprise a device attached to a person and monitored remotely.¹

Depending on the national jurisdictions electronic monitoring may be used in one or more of the following ways:

- during the pre-trial phase of criminal proceedings²;
- as a condition for suspending or of executing a prison sentence;
- as a stand-alone means of execution of a criminal sanction or measure³;
- in combination with other probation interventions; as a pre-release measure⁴;
- in the framework of conditional release from prison;
- as an intensive guidance and supervision measure for certain types of offenders after release from prison;
- as a means of monitoring the internal movements of imprisoned offenders and/or the perimeters of open prisons⁵

Where electronic monitoring is used as a modality of execution of a prison sentence, in some jurisdictions those under electronic monitoring are considered as prisoners.

In some jurisdictions it is managed by the prison, probation or police services or other competent public agency while in others it is implemented by private companies under a service-providing contract with a state agency.

In some jurisdictions the suspect or offender carrying the device is contributing to the costs for its use, in others it is exclusively the state which covers the costs of electronic monitoring⁶.

Agency providing electronic monitoring equipment: usually⁷ a private company which produces, markets, sells and maintains such equipment.

Agency responsible for supervising persons under electronic monitoring: a public agency or private company which supervises the location, movement or specific behaviour of a suspect or an offender for a specified period of time.

Probation agency: a body responsible for the execution in the community of sanctions and measures defined by law and imposed on an offender. Its tasks include a range of activities and interventions, which

¹ For more details refer to Appendix II

² As a bail condition, substitution for or a modality of pre-trial custody

³ Without being combined with other interventions or treatment measures

⁴ For example prison leave, work outside prison, meetings with social or probation services, etc.

⁵ This document is not dealing with the intramural use of EM

⁶ Rec(92)16, Rule 69 states: "In principle, the costs of implementation shall not be borne by the offender."

⁷ In the Russian Federation this is a state company attached to the Federal Service for Execution of Punishments

involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety. It may also, depending on the national legal system, implement one or more of the following functions: providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions; and offering assistance to victims of crime.

A probation agency may also be, depending on the national legal system, the “agency responsible for supervising persons under electronic monitoring”.

III. Basic principles:

1. The use, as well as the types, maximum duration and modalities of execution of electronic monitoring in the framework of the criminal justice shall be specified by law.
2. Decisions to impose or revoke electronic monitoring shall be taken by the judiciary or allow for a judicial review.⁸
3. Where electronic monitoring is used at the pre-trial phase as an alternative to remand in custody special care needs to be taken not to net-widen its use to offences for which remand in custody is not provided by law.
4. The type and modalities of execution of electronic monitoring shall be proportionate in terms of duration and intrusiveness to the seriousness of the offence alleged or committed, shall take into account the individual circumstances of the suspect or offender and shall be regularly reviewed.
5. Electronic monitoring shall not be executed in a manner restricting the fundamental rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it.⁹
6. When imposing electronic monitoring account needs to be taken of its impact on the rights and interests of third parties in the place of residence to which the suspect or offender is confined.
7. There shall be no discrimination in the imposition or execution of electronic monitoring on the grounds of gender, race, colour, nationality, language, religion, sexual orientation, political or other opinion, national or social origin, property, association with a national minority or physical or mental condition.
8. When electronic monitoring is imposed it should be taken into account that it can ensure supervision and thus reduce crime over the period of its execution. In order to seek longer term desistance from crime, it should always be combined with other professional interventions aimed at the social reintegration of offenders.
9. Where private sector organisations are involved in the implementation of decisions imposing electronic monitoring the responsibility for the effective treatment of the persons concerned in conformity with the highest international ethical and professional standards shall remain with public authorities.
10. Public authorities shall ensure that all relevant information regarding the private sector involvement in the delivering of electronic monitoring is transparent and shall regulate the access to it by the public.
11. The handling and shared availability and use of data collected in relation to the imposition and execution of electronic monitoring by the relevant agencies shall be specifically regulated by law and effective sanctions against its misuse shall be introduced.
12. Staff responsible for the implementation of decisions related to electronic monitoring shall be sufficiently numerous and adequately trained to carry out their duties professionally. Their training shall include data protection issues.
13. There shall be regular government inspection and independent monitoring of the agencies responsible for the execution of electronic monitoring.

⁸ In most European countries EM is combined with other probation sanctions or measures which are imposed by the judiciary

⁹ The size of any imposed exclusion zones, and the duration of exclusion from public space is particularly important in this respect.

IV. Pre-trial stage

14. The suspect's consent shall be sought in order to use electronic monitoring as an alternative to custody.
15. The modalities of execution and level of intrusiveness of electronic monitoring shall be proportionate to the offence alleged to be committed and shall be based on properly assessed risks of absconding, tampering with evidence or committing new crime.
16. National law shall regulate the manner in which time spent under electronic monitoring supervision at pre-trial stage is to be deducted by the court when defining the overall duration of any final sanction or measure to be served.

V. Post-sentencing stage (alternative, stand-alone, conditional release post-release measure)

17. Electronic monitoring may be used as a stand-alone sanction or measure or as part of a broader set of professional interventions aimed at dealing with an offender in the community and at reducing crime.
18. Electronic monitoring confining offenders to a place of residence without the right to leave the place should be avoided as far as possible in order to prevent the negative effects of isolation, in case the person lives alone, and to protect the rights of third parties who may reside at the same place.
19. Preparation for release of prisoners shall start as soon as possible after their admission to prison. Depending on the type of offence and the personality of a given prisoner electronic monitoring supervision may be used, if needed, in case of short-term prison leaves, work outside prison or placement in an open prison.
20. Electronic monitoring may be used, if needed, in case of early release. In such a case its duration shall be proportionate to the remainder of the sentence to be served.
21. If electronic monitoring is used in case of conditional release as a post-release measure its duration and intrusiveness shall be carefully defined in full consideration of its overall impact on former prisoners, their families and third parties.

VI. Ethical issues

22. Age, disability and other relevant specific conditions or personal circumstances of each suspect or offender shall be taken into account in deciding whether and under what modalities of execution electronic monitoring may be imposed.
23. Under no circumstances may electronic monitoring equipment be used to cause physical or mental harm or suffering to a suspect or offender.
24. Data collected in the course of the use of electronic monitoring shall be subjected to specific regulations based on the relevant international standards regarding storage, use and sharing.
25. Such regulations shall be regularly reviewed in order to take into account the technological developments in the area of electronic monitoring equipment.
26. Particular attention shall be paid to regulating strictly the use, storage and sharing of such data by the police and by probation services.
27. A system of effective disciplinary and penal sanctions shall be put in place in case of abuse of the handling of such data.
28. Private agencies providing electronic monitoring equipment or responsible for supervising persons under electronic monitoring shall be subjected to the same rules and regulations regarding handling of the data in their possession.
29. Persons involved in the imposition or execution of electronic monitoring shall be regularly updated and trained on the handling, use and impact of the equipment.

30. In case it is provided by national law that a suspect or an offender contributes to covering the costs for the use of electronic monitoring equipment, the amount of such contribution shall not be prohibitive in order not to impede the equality of treatment of all eligible for electronic monitoring suspects or offenders.

VII. Work with the public, research and evaluation

31. The general public shall be kept informed of the ethical and technological aspects of the use of electronic monitoring, its effectiveness, its sense and purpose. Awareness shall be raised regarding the fact that electronic monitoring cannot be a substitute for professional human intervention and support for suspects and offenders.
32. Regular research and independent evaluation and monitoring shall be carried out in order to help national authorities take informed decisions regarding the ethical and professional aspects of the use of electronic monitoring in the criminal process.

Appendix II

Types of Electronic Monitoring

Different EM technologies have different practical and ethical implications for the supervision of offenders. For example satellite tracking is not in fact a single system. It has a number of capacities, types of use and permutations, some of which might be regarded as less ethically acceptable than others. Data protection issues can also arise in relation to the use of modern EM technologies. New technologies are continuing to emerge and are constantly improving and the ethical implications should be considered in advance as far as possible.

Radio frequency (rf) electronic monitoring entails the wearing of an ankle bracelet (or tag), the signal from which can be picked up by a transceiver installed in the offender's home. So long as s/he remains in proximity to the transceiver his or her presence in the home will be registered in the monitoring centre, via either the landline or mobile telephone system. Radio frequency technology can be used to monitor house arrest or night-time curfews. Most straps are made of toughened plastic with optic fibres running through them, and cease to work if this fibre is cut. Straps can be made of leather with steel bands running through them: these can only be cut with powerful bolt cutters and are much harder for a wearer to remove. Wrist tags are available where health considerations are require using these instead of ankle tags. Worldwide, radio frequency technology has been understood as the "first generation" of electronic monitoring, and is still the commonest form of it: the technology has been constantly upgraded to improve performance, reliability and ease of use. Internationally, however, a professional/commercial debate has begun which suggests that this "first generation" technology should be supplemented and perhaps superseded by more versatile "second generation" technology (satellite tracking), and in the past five years at least two countries adopted this without ever having used "first generation" technology.

Satellite tracking - combined with mobile phone location technology - monitors the location or movement of a person on the earth's surface, outdoors and indoors, but not necessarily underground. It entails the wearing of an ankle bracelet (sometimes accompanied by a belt-worn computer) which can both pick up and triangulate signals from orbiting satellites (currently the American Global Positioning System (GPS)) and cell phone towers, and transmit/upload an offender's location through the mobile phone system to a monitoring centre. It can do this in "real-time", so that an offender's whereabouts are always known immediately to the monitoring centre, or retrospectively, in which a record of an offender's movements is compiled (and analysed) some hours later. Some systems combine both immediate and retrospective monitoring, and some have in-built texting facilities for giving instructions to the offender. A person being satellite tracked is required to spend part of the day recharging the battery which powers the equipment s/he wears or carries. In case of a one-piece tracking tag the person has in the past been required to remain attached to the plug-in system for recharging, but technology is emerging which can charge the tag from a short distance away. Tracking technology can be used to monitor house arrest (by creating small "inclusion zones"), to follow all of a person's movements and to create exclusion zones (areas of past offending, neighbourhoods of former victims) which the offender is forbidden to enter. Satellite tracking technology can also be used as part of a victim protection scheme which requires a victim to carry a device which warns her/him of the offender's proximity. Some satellite tracking systems can be combined with mapping software which shows the location of recent crime scenes, making it possible to see if the offender was in the vicinity of the crime at the time. This can be presented to the offender as a tangible means of demonstrating that s/he is desisting from crime, and the data may be used in legal proceedings incriminating or exonerating him/her. The cost of satellite tracking has been steadily decreasing, making it more attractive to penal and judicial authorities than it has been in the past. The availability of other satellite systems apart for the American one may make offender tracking even more feasible in the future, and rival systems of terrestrial tracking may be customised for the same purpose.

Voice verification is a form of electronic monitoring which uses a person's unique biometric voiceprint, recorded at the point of conviction. Each time the monitoring centre phones the offender his or her voice is matched to the voiceprint stored on the computer, while the location of the phone being used by the offender is simultaneously registered. Voice verification can be used to monitor the presence of a person at a single location, or to track his or her movements between a number of specified locations, e.g. a community service placement, or a jobcentre. Because it does not entail the use of a wearable device there is no risk of stigma or of using the tag as a trophy and for this reason some experts believe that this makes voice verification a more acceptable form of EM for juveniles and young offenders.

Remote Alcohol Monitoring (RAM) exists in two forms. The first links a breathalyser to radio frequency electronic monitoring - specifically to the transceiver - in the offender's home. The offender is randomly phoned by the monitoring centre and asked to use breathalyser, whose result can immediately be transmitted by landline. The offender using the breathalyser is identified either by voice verification technology, or by photograph, or by (biometric) facial recognition technology.

The second form of RAM is mobile, and does not require the offender to be in a single location. It entails the offender wearing an ankle bracelet which picks up the presence of alcohol in the offenders system "transdermally" - through his/her skin - and periodically uploads that data to the monitoring centre via the mobile phone system. RAM can be used with offenders whose crimes have been alcohol-related, where the court has either forbidden them to use alcohol over the period of supervision, or required supervisors to help offenders reduce its intake. Some offenders value the technology because it helps them to self-manage their intake of alcohol.

Kiosk reporting is a form of electronic monitoring installed at the office of the probation agency and ostensibly designed to help probation officers manage large caseloads, focused specifically on low-risk offenders at some point in the supervision process, although not (at present) all of it. When offenders report to a probation office, instead of meeting a real probation officer face-to-face, they are required to interact with a kiosk-based computer (similar to a cashpoint machine). The machine requires them to answer certain questions about their recent activities, and may contain instructions from their probation officer. The offender identifies himself or herself to the machine – undergoes verification that it is him/her who is reporting and not a substitute - by means of a fingerprint, although a voiceprint could also be used.

It is clear from the above that different types of surveillance technology are now being combined in EM, for example biometrics and location monitoring and while we intend to explore the ethical implications of these for offenders our comments on biometrics in general will not be exhaustive.

A Note on Commercial Organisations Involved in Electronic Monitoring.

There are essentially two kinds of private company involved in the delivery of electronic monitoring. Firstly, technology manufacturers (who produce equipment - hardware and software - train public sector staff to install it, provide technical support services and manage monitoring centres). Secondly, full service providers (who employ field and centre-based monitoring officers, install equipment, manage monitoring centres and may sometimes be involved in the legal aspects of revocation, supplying technical evidence of non-compliance in respect of offenders who are not on any other kind of supervision apart from EM). All countries require some degree of partnership between their electronic monitoring providers and national telecommunication companies (e.g. in terms of access to landline and cell phone networks), and in some countries these companies may be contracted to provide monitoring services themselves, buying or renting equipment from technology manufacturers and working in conjunction with state agencies. There is a sense in which the effective operation of EM is dependent on, and constrained by the technical quality and administrative efficiency of existing telecommunication infrastructures. Some of the larger global corporations involved in full service provision may also manufacture their own technology. These larger companies may also be involved in wider security and surveillance activities (guarding and CCTV management), in the provision of private prisons, in the provision of back-office functions for police forces and a range of what have hitherto been understood as statutory probation services - hostel accommodation and community service. Both technology manufacturers and service providers may also be involved in the provision of electronic monitoring in the tele-care and tele-health fields (monitoring the locations and "life signs" of old people, or people with dementia): research and technical development in electronic monitoring overlaps in the health and criminal justice fields.