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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMPILATION OF COMMENTS BY DELEGATIONS TO THE DRAFT RECOMMENDATION ON ELECTRONIC MONITORING AND ITS DRAFT COMMENTARY

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France

Three focus points, only the first really appears to pose difficulty:

- III.3.: the new version of the draft recommendation projects an alteration likely to come into conflict with current French positive law: "***Where electronic monitoring is used at the pre-trial phase special care needs to be taken*** ***not to use it on suspects who would not otherwise be remanded in custody***".

The previous version simply stated that care should be taken not to widen the application of electronic monitoring as a pre-trial measure. **This latest version restricts the application of electronic monitoring as a pre-trial measure solely to accused persons who are liable to come under a pre-trial detention measure.**

In French law, and **in context of a judicial investigation,** Article 142-5 of the Code of Criminal Procedure provides that "electronically monitored house arrest may be ordered, with the consent or at the request of the person concerned, by the investigating judge or the judge responsible for releases and detention if the accused shall be sentenced to correctional imprisonment at least two years or a more severe sentence.", "it may also be enforced under the system of placement under mobile electronic monitoring, by means of the procedure provided for by Article 763-12, if the defendant for an offence punishable by seven years of imprisonment for which social and judicial follow-up is incurred." Article 142-12-1 of the Code of Criminal Procedure further provides that an electronically monitored house arrest (ARSEM) may be ordered when the accused is charged with violence or threats, punishable by at least five years of imprisonment, perpetrated either against the spouse, the cohabitee or partner bound by a "civil solidarity pact", or against his children or those of his spouse, cohabitee or partner. These provisions are also applicable to the former spouse, cohabitee or partner in a "civil solidarity pact".

These criteria do not match to those of remand in custody in the context of investigation proceedings as they are defined in Articles 143-1 et seq. of the Code of Criminal Procedure. In criminal cases (or in serious offenses), remand is always possible. However, in correctional cases (or in ordinary offenses), the remand in custody of adults is possible provided that the sentence incurred is 3 years or more.

Furthermore, **in order to the procedure of summons on minutes** defined by Article 394 of the Code of Criminal Procedure, applicable to any offence, whether or not punishable by imprisonment (excepting the offences restrictively enumerated in Article 397-6 of the Code of Criminal Procedure), the public prosecutor may have the summoned person brought before the judge responsible for releases and detention for the purpose of being placed under judicial supervision or under house arrest with electronic monitoring. In the framework of this procedure and at this stage, the accused cannot be remanded in custody.

On the other hand, under the **procedure of prior appearance** (Article 396 of the Code of Criminal Procedure), which means that when the court cannot be convened on the same day with a view to immediate trial, the accused may be placed under judicial supervision, under house arrest with electronic monitoring or in pre-trial custody, according to the same criteria as regards the length of the sentence incurred.

Thus the field of application of house arrest with electronic monitoring is plainly wider than that of pre-trial custody. French positive law therefore is not in keeping with this new version of the draft recommendation.

- III.1 and III.12: query about the concept of “law”: from an overall reading of the draft, it seems that the term refers to the "law" in the broad sense, hence to all normative provisions. It might be expedient to verify this point with reference to the French version, since in French positive law some norms, at least in part, are regulatory rather than statutory.

- III. 8.: introduction of the concept of “supportive measures”: we have checked with PMJ1 (cf. attached e mail) whether this term was indeed consistent with the present conception of the functions of the SPIP (prison rehabilitation and probation service), which is the case.

Germany

In no. 15, the requirement of seeking the suspect's or offender's consent has to be deleted. In the case of electronic monitoring of whereabouts under section 68b of the German Criminal Code (*Strafgesetzbuch*, StGB), this consent would, as a general rule, not be given, since a suspect or offender would be unlikely to see any advantage in giving his consent (in contrast to cases where such monitoring is a milder measure compared to the otherwise imposed deprivation of liberty). This recommendation does not take sufficient account of the different target groups and forms of monitoring as well as the need for protection of the general public. Rather, it must be possible to impose electronic monitoring on dangerous offenders without their consent, especially if no more severe measures (deprivation of liberty) are available. Therefore, the word "compliance" in no. 15 should be followed by "in general", and the following sentence should be added: "However, this does not exclude the possibility to impose electronic monitoring on dangerous offenders without their consent, as far as this is necessary for reasons of public protection, in particular to avoid the repeated commitment of serious crimes". The explanatory comment regarding no. 15 should be adjusted accordingly. Moreover, the observations made in the second half of this comment, stating that electronic monitoring would not be practicable without the offender's consent, are clearly too short-sighted: Electronic monitoring of whereabouts – which has been successfully used in Germany since 1 January 2011 – particularly shows that such monitoring can also be enforced against the offender's will if, as a means to exert pressure on the offender, there is a provision that the offender can incur criminal liability (section 145a StGB) if he disregards the instruction to always keep the technical means necessary for the monitoring on his person and in working order and not to impair the functioning of these means (section 68b (1), first sentence, no. 12, StGB). Therefore, the second part of the explanatory comment on no. 15 should be corrected accordingly.

No. 17, pursuant to which national law must regulate the manner in which time spent under electronic monitoring supervision instead of in remand detention may be deducted from a final sanction, appears excessive. Since electronic monitoring is precisely not a deprivation of liberty, such a deduction is in no way mandatory. Moreover, the severity of the interference depends on the individual case, as has correctly been pointed out in the commentary on no. 17. However, it would hardly be possible to do such an individual case justice by adhering to statutory, and thus general, deduction rules. This means that, in order to do each individual case justice, it must be sufficient that a court can take into account potential burdens caused by electronic monitoring in the framework of the general sentencing without having to adhere to specific provisions. This is also true because – as has also been correctly pointed out in the commentary on no. 17 – pre-trial monitoring generally requires the suspect's consent. This also means that a suspect is free to refuse this consent in order to ensure that the time spent in remand detention will be deducted from the subsequent custodial sentence. No. 17 should therefore be deleted.

No. 19 also appears problematic, at least with regard to the observations made in the explanatory comments, as these take insufficient account of the needs of adequate victim protection. Effective victim protection is likely to require that an offender is not just "temporarily" prohibited from entering specific zones (e.g. the victim's residence). The assumption that judicial and penal authorities should place trust in the offenders to conduct themselves in a law-abiding manner also appears inappropriate, at least as far as the monitoring of offenders who are still considered dangerous is concerned. In the case of convicted child sex offenders, the scepticism expressed with regard to placing exclusion zones around every school in a town or city also seems inappropriate. (Should only every second or third school be excluded?) It could also be argued that larger exclusion zones around the victim's exact residence would serve to prevent the offender from finding out the victim's address. The observations should therefore be modified accordingly.

The commentary cites electronic monitoring as a reason for rule no. 25. The information provided is incorrect: electronic monitoring is available not just for offenders released from prison after January 2011. Rather, it has been possible since 1 January 2011 to order electronic monitoring. (The order can also be retroactive.) Moreover, the collected data must be deleted after two, not three months. Furthermore, the use of these data is regulated very restrictively in section 463a (4) of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO); (e.g. the prosecution of criminal offences).

As regards the data protection rules in nos. 29 and 30, the suspect's or offender's consent should be included as the legal basis.

Netherlands

We studied the revised draft recommendation on electronic monitoring. We saw that substantive changes have been made but we saw that some of the remarks I made during the CDPC which were received positively by the chair of the PC-CP, have not been reflected in the new draft.
Therefore we thought it best to convey to you these remarks in writing with the request to forward them to the chair of the PC-CP.

Rule 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.
Proposal: delete “maximum” and replace “specified by law” by: governed by law. These amendments make clear that the application of EM requires a legal framework. It is not necessary, however, that all aspects of the application of EM are detailed (“specified”) in the law. Within the legal framework the courts can specify the “types, duration and modalities of execution” of EM.

Rule 23. Electronic monitoring may be used as an alternative execution of a prison sentence in which case its duration shall be defined by the judiciary.
Proposal: replace “defined by the judiciary” by: governed by law. This amendment seeks to clarify that there has to be a legal framework concerning the duration of EM. The duration of EM may be defined by a court, but may also be laid down in the law.

Rule 39. The general public shall be regularly informed of the ethical and technological aspects of the use of electronic monitoring, its effectiveness, its purpose and its value as a means of restricting liberty of suspects or offenders. Awareness shall also be raised regarding the fact that electronic monitoring cannot replace on its own professional human intervention and support for such suspects and offenders.

Rule 40. 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.

Proposal: delete “regularly” and “regular”, since it is not clear what is meant by these terms in the different Member States. While the importance of an informed public and research concerning EM is recognized, a reference to the frequency of public information and research and evaluation should be included in the Commentary, not in the Rules themselves.

United Kingdom

III. Basic principles:

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8. Electronic monitoring may be used as a stand-alone measure in order to ensure supervision and reduce crime over the specific period of its execution. In order to seek longer term desistance from crime it consideration should be given to combinedcombining it with other professional interventions and supportive measures aimed at the social reintegration of offenders.

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IV. Conditions of execution of electronic monitoring at the different stages of the criminal process

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15. In order to ensure compliance the suspect's or offender's consent and willingness to cooperateion should be sought established as far as possible prior to the imposition of electronic monitoring.

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18. Where there is a victim-protection scheme using electronic monitoring to supervise the movements of a suspect or an offender it is essential desirable to obtain the victim's prior consent and every effort shall be made to ensure that the victim understands the capacities and limitations of the technology.