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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Cooperation
(PC-CP)

DRAFT RECOMMENDATION
ON
ELECTRONIC MONITORING

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION CM/REC(201X) XX
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON ELECTRONIC MONITORING

*(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;

Agreeing that it is necessary to further develop international cooperation in the field of enforcement of penal sentences;

Considering that such cooperation should contribute to improving justice, to execute sanctions effectively and in full respect of human rights and dignity of offenders and to reducing the incidence of offending;

Agreeing that deprivation of liberty should be used as a measure of last resort and that the majority of suspects and offenders can be efficiently and cost-effectively dealt with in the community;

Considering that the continuing growth in prison populations can lead to detention conditions which are not in conformity with Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as highlighted by the increase in relevant case-law from the European Court of Human Rights;

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 resorting to deprivation of liberty 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 rules about limits, types and modalities of provision of electronic monitoring technologies need to be defined in order to guide the governments of the members states in their legislation, policies and practice in this area;

Agreeing further that ethical and professional standards need to be developed regarding the effective use of electronic monitoring in order to guide the national authorities, including judges, prosecutors, prison administration and probation agencies, 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 Rec(2006)2 on the European Prison Rules;
- 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 ;
- Recommendation CM/Rec (2012) 5 on the European Code of Ethics for Prison Staff.

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 dissemination of the Recommendation and its commentary among the relevant authorities and agencies and in the first place the relevant ministries, the prison administration, the probation agencies, the police and other relevant law enforcement agencies as well as among 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 basic principles related to ethical issues and professional 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 in the community. 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 as defined by the relevant Committee of Ministers recommendations and more particularly by Recommendation n° R(92)16 on the European rules on community sanctions and measures, Recommendation n° (97)12 on staff concerned with the implementation of sanctions and measures, Recommendation Rec(2006)2 on the European Prison Rules, Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules and Recommendation CM/Rec(2012) 5 on the European Code of Ethics for Prison Staff.

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 based on radio wave, biometric or satellite tracking technology. They usually comprise a device attached to a person and are monitored remotely.

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 proceedings;
- as a condition for suspending or of executing a prison sentence;
- as a stand-alone means of supervising the execution of a criminal sanction or measure in the community;
- in combination with other probation interventions;
- as a pre-release measure for those in prison;
- 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 prisons;
- as a means for protecting specific crime victims from individual suspects or offenders

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

In some jurisdictions electronic monitoring is directly managed by the prison, probation agencies 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 required to contribute to the costs of its use, while in others it is exclusively the state which covers the costs of electronic monitoring.

In some jurisdictions electronic monitoring may be used in the case of juvenile suspects and offenders while in other jurisdictions the measure is not applicable to juveniles.

Suspect means any person who is alleged to have committed or who has been charged with having committed a criminal offence but who has not been convicted of it.

Offender means any person who has been convicted of a criminal offence.

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

Agency responsible for supervising persons under electronic monitoring: a public agency or a private company which is entrusted by the competent authorities to supervise 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 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.
3. Where electronic monitoring is used at the pre-trial phase special care needs to be taken not to net-widen its use.
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 rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it.
6. When imposing electronic monitoring account needs to be taken of its impact on the rights and interests of families and third parties in the place 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. 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 should 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 relevant 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. Where suspects and offenders are contributing to the costs for the use of electronic monitoring the amount of their contribution shall be proportionate to their financial situation and shall be regulated by law.
12. 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.
13. Staff responsible for the implementation of decisions related to electronic monitoring shall be sufficient in number and adequately and regularly trained to carry out their duties efficiently, professionally and in accordance with highest ethical standards. Their training shall cover data protection issues.

14. There shall be regular government inspection and avenues for independent monitoring of the agencies responsible for the execution of electronic monitoring.

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

15. In order to ensure cooperation and compliance the suspect's or offender's consent should be sought prior to the imposition of electronic monitoring.
16. The modalities of execution and level of intrusiveness of electronic monitoring at the pre-trial stage shall be proportionate to the offence alleged to be committed and shall be based on properly assessed risks of absconding, interfering with the course of justice, posing a serious threat to public order or committing new crime.
17. National law shall regulate the manner in which time spent under electronic monitoring supervision at pre-trial stage may be deducted by the court when defining the overall duration of any final sanction or measure to be served.
18. Where there is a victim-protection scheme using electronic monitoring to supervise the movements of a suspect or an offender it is essential 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.
19. In case electronic monitoring relates to exclusion from or limitation to specific zones, efforts shall be made to ensure that such conditions of execution are not so restrictive as to prevent a reasonable quality of everyday life in the community.
20. Where substance abuse needs to be monitored, consideration shall be given to the respective intrusiveness and therapeutic and educative potential of electronic and traditional approaches when deciding which approach is to be used.
21. Electronic monitoring confining offenders to a place of residence without the right to leave it 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.
22. In order to prepare offenders for release and depending on the type of offence and treatment programme, electronic monitoring may be used in order to increase cases of short-term prison leaves, work outside prison or placement in an open prison.
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.
24. Electronic monitoring may be used, if needed, in case of early release from prison. In such a case its duration shall be proportionate to the remainder of the sentence to be served.
25. If electronic monitoring is used, if needed, after the prison sentence has been served, 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.

V. Ethical issues

26. 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.
27. Under no circumstances may electronic monitoring equipment be used to cause physical or mental harm or suffering to a suspect or an offender.
28. Rules regarding the use of electronic monitoring shall be periodically reviewed in order to take into account the technological developments in the area so as to avoid undue intrusiveness into private and family life of suspects, offenders and other persons affected.

VI. Data protection

29. 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.
30. Particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings.
31. A system of effective sanctions shall be put in place in case of careless or intentional misuse or handling of such data.
32. 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.

VII. Staff

33. All relevant rules of Recommendation n° R(92)16 on the European rules on community sanctions and measures, of Recommendation n° (97)12 on staff concerned with the implementation of sanctions and measures, of Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules and of Recommendation CM/Rec(2012) 5 on the European Code of Ethics for Prison Staff which relate to staff shall be applicable.
34. Staff shall be trained to communicate sensitively with suspects and offenders, to inform them in a manner and language they understand of the use of the technology, of its impact on their private and family lives and on the consequences of its misuse.
35. Staff shall be trained to deal with victims in case of using victim-support schemes in the framework of electronic monitoring.
36. In establishing electronic monitoring systems consideration shall be given to the respective merits to both human and automated responses to the data gathered by the monitoring centre bearing in mind the advantages of each.
37. Staff entrusted with the imposition or execution of electronic monitoring shall be regularly updated and trained on the handling, use and impact of the equipment on the persons concerned.
38. Staff shall be trained to install and de-install technology and provide technical assistance and support in order to ensure the efficient and accurate functioning of the equipment.

VIII. Work with the public, research and evaluation

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.
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.