



# Electronic Monitoring, Human Rights and Jurisprudence

**Silke Eilzer, Judge at the district court,  
Offenbach, December 11<sup>th</sup> 2014**



# Great Expectations ....

- Know your objective
- Consent vs. Compliance
- Data protection



# Know your objective I

How to avoid conflicts with the proportionality principle:

1. Be sure about your objective first
2. Than choose your technology



## Know your objective II

Three examples:

- Unreliable offenders
- Suspects on remand
- High risk violent and sex offenders



## Unreliable Offenders (Hessian project)

Offenders, who are **too unreliable** to observe the conditions set by the court because

- ▶ they lack **self discipline** and **motivation** and
- ▶ are therefore not able to live **a structured life**

are usually very difficult to handle by the probation service and the justice system.

Consequently, parole will be revoked or will not be granted in the first place.



# What do you want?

- ▶ **24/7 surveillance**

allowing an **immediate reaction** to breaches and

- ▶ **close supervision**

by the probation service in an effort to help the participant to live a more **structured life** by giving him or her a **daily schedule**

= specific times for being at or absent from home (work, therapy) or for leisure



## The Joint Monitoring Centre

- receives 24/7 all events that may imply a potential dangerous situation or a violation of directions
- each shift consists of at least one social worker
- contacts the participant in order to find out the reason for the event and to de-escalate the situation
- if necessary informs the police
- reports to the supervising authority / the probation service



## The probation service is vital to the project:

- ▶ recommendations to the court on the suitability of a participant within one week
- ▶ weekly personal contact with the participant
- ▶ receives reports on events by the Joint Monitoring centre on the next working day to be included in the educational work
- ▶ reports to the court on the development of the participant and makes recommendations





# The Tech: Just RF, no GPS?

- RF keeps it simple
- Not all target groups require EM via GPS
- Until 2011 no explicit mentioning of EM in the German Code of Criminal Procedure or the German Criminal Code; however, regulations have always been open to “unnamed measures” as long as they are proportionate. RF is less intrusive than GPS, so consent is sufficient and explicit legislature not necessary.



# Suspects on remand

## What do you want?

- ▶ To reduce the flight risk compared to an obligation to register with the police
- ▶ Victim protection



# The Tech: RF or GPS?

- ▶ GPS offers more possibilities despite its limitations than RF
- ▶ Hessian project: RF only, it is more focused on reducing the flight risk



# High risk sex and violent Offenders

M vs. Germany (2010):

ECtHR ruling on preventive detention (application No. 19359/04) prompts the German legislator to revise the law



## What do you want (Federal Approach)?

- to increase the offender's inhibitions to commit further crimes by increasing the risk of discovery
- to improve victim protection
- to use the data in criminal proceedings in case of relapses



## The Tech:

GPS seems to be the obvious choice



# Consent

- For all target groups?
- Consent vs. Compliance
- How far does consent go?



## Consent II

There is a difference between using EM

- in order to avoid imprisonment and
- as part of a post-release order like a supervision order





## Supervision order?

- post-release court order
- belongs to the measures of correction and prevention like the preventive detention order or the mental hospital order
- may include inclusion and exclusion zones, restraining orders, ban on alcohol and drug use etc.



## Legal Prerequisites for EM via GPS in a supervision order:

- ✓ the convicted person must have fully served a sentence of at least 3 years or a measure of correction and prevention must have been suspended
- ✓ offence listed in sec 66 of the German Criminal Code (e.g. sex offences and violent crimes)
- ✓ risk of re-offending with regards to the listed offences
- ✓ EM is necessary to prevent the offender from re-offending
- ✓ no unreasonable demands may be made to the lifestyle of the convicted person



## How far does consent go?

- You cannot consent to everything (“Peep Show”; “Dwarf Throwing”)
- The more intrusive the technology, the less valid is consent as the sole legal basis



# Right to data protection

- Important achievement in the context of human rights
- Offenders and even less suspects do not seem to have the right to it
- GPS is more intrusive and does not only concern offenders/suspects if there is a victim protection project where the victim is given a (removable) tracker too



# Restrictions: Necessary but be careful not to defeat the purpose

What do you think?

- Should the authorities be able to look at the data and the real time movements at will?
- Should the data be erased and if yes, when?



# Data use and the Federal approach:

Being a suspect in a criminal proceeding is not enough. The crime in question must be either

- a specific type of crime (sex offences, violation of exclusion and inclusion zones defined by the court in the supervision order, tampering with the EM equipment)

or

- a crime punishable by a minimum prison sentence of one year.

The data has to be erased after two months.