

# Data protection and electronic monitoring in Germany

**Silke Eilzer explains the cautious approach and insists on the centrality of data protection**

Shelves with a length of 111 kilometres full of files on citizens, 1.7 million pictures, 27,600 tape recordings and 2,800 video recordings: this, according to the Federal Commissioner for its records, is the legacy of the Ministry for State Security of the former German Democratic Republic, better known as 'Stasi'. It is also one of the reasons why data protection in general is a political issue in Germany and electronic monitoring (EM) as such has been little used, and is still viewed with unease by some.

Currently, there are two different approaches to EM in Germany.

## The Hessian project

The Hessian project is the oldest EM project in Germany and still in many ways unique. It was launched after initiatives to introduce EM on the federal level as an alternative form of short-term imprisonment failed due to diametrically opposite views on EM; on the one hand it was considered to be a 'luxury form of imprisonment for the privileged' and on the other hand as an 'Orwellian nightmare violating human dignity' (Dahs, 1999; Krahl, 1997).

Even though there is still no explicit mention of EM in the context of pre-trial detention and probation, the relevant provisions of the German Code of Criminal Procedure and German Criminal Code are open to so called 'unnamed measures' as long as they are considered proportionate. This openness was the key for Hesse to introduce EM on Länder level in 2000; an explicit amendment of the provisions themselves in the form of a bill by Hesse on the Länder level would not have been possible since the above mentioned codes are federal bills.

The Hessian project is an educational one. Apart from suspects on remand, it is targeted mainly on those who are too unreliable to observe the terms of probation set by the court because they have never learned to organise their life and lack self-discipline. For these, probation is usually revoked, or the court does not grant it in the first place. Under EM, offenders are granted a very last chance to avoid imprisonment. It is consent-based and requires a judicial decision. The consent has twofold significance; it signifies the offender's willingness to co-operate and it is also the legal basis for data collection. Since the Hessian project uses only radio frequency technology which is not as intrusive as GPS it is, in accordance with views of the Hessian Data Protection Commissioner, possible to give informed consent to such a measure.

The most important aspect of the Hessian project is the close supervision by the probation service (social workers). Usually, a Hessian probation officer has a caseload of 80 to 100 offenders which means personal contact takes place every six to eight weeks. Under EM, weekly personal contact is mandatory, allowing a much closer insight and understanding. To achieve this, the social workers in the EM project have a lower caseload (20 to 25 per cent). In agreement with the court, they set weekly schedules including times where the offender has to be at home, or *may* be at home, or *has to be* absent. The times of absence are as important as the times of presence because offenders cannot learn structure and reliability by staying home 24/7. For that reason each offender has to have a meaningful occupation outside his home; this

can be community work, school, professional training or drug counselling, something which requires them to leave home and keep appointments for their own good.

The second key to success is the rapid reaction to infringements of the schedule by the Joint Monitoring Centre (JMC) of the Federal States acting as an emergency service in this project. The JMC immediately calls the offender to clarify the situation. This alacrity is a new experience for the offender since they long ago learned that the justice system usually responds slowly. They are now forced to justify their actions immediately, and experience a fast reaction from the probation service and – depending on the seriousness of the infringement – a fast reaction by the courts as well.

After 13 years and about 1,200 participants it was concluded that taking part in the project has a sustained, stabilising effect on the conduct of the participant, at least for a noticeable period of time.

## The federal approach

Since 2011, EM has been introduced on the federal level as part of the already existing German judicial instrument 'supervision of conduct'. It belongs to the measures of correction and prevention which can generally be applied *in addition* to a penalty in order to prevent relapses. A supervision order is a post-release measure and may be issued even if the offender has fully served his sentence. The order usually includes terms such as not entering certain areas, not leaving certain areas without permission (which nonetheless cannot be used to make the offender stay at home in the sense of a curfew), not having contact to certain persons, or not drinking and so on. Infringements are punishable by law.

The introduction of a new form of EM is a direct result of the European Court of Human Rights (ECHR) judgment *M v. Germany* on preventive detention which became final in 2010. 'M' was a repeat violent offender who had spent most of his life in various forms of custody. The preventive detention order was

finally given in addition to a prison sentence of five years for attempted murder and robbery in 1986. At that point preventive detention had been limited to ten years. In 1999, however, the federal legislator abolished this limitation on preventive detention with immediate and retrospective effect on all offenders so that 'M' remained in custody well after ten years had passed. The ECHR were unhappy with this, and wanted offenders subject to preventive detention to be released.

Not surprisingly, this was not a very popular ruling in Germany, neither on the political level nor in the eyes of the public. Headlines like 'Dangerous offender now released', 'Citizens concerned' proliferated.

The introduction of electronic monitoring (as GPS) was part of the revision of the existing law on measures of correction and prevention. The 2011 amendment enables the courts to force certain groups of high risk offenders to wear a GPS tracking device, even without their consent. Among other requirements the offender must have either fully served a prison sentence of at least three years or a custodial measure of correction and prevention must have been declared settled. Furthermore, the predicate offence must be a specific type of crime (e.g. sex offences) or a crime punishable by a minimum prison sentence of one year. The principle of proportionality must also be observed.

The aims are to increase the inhibition to commit further crimes by increasing the risk of discovery and to help protect former victims. In addition, data on the offenders' movements and locations may be used as additional evidence, if there is a relapse – keeping in mind that the target group are high risk offenders.

In part because the federal approach makes use of GPS, the federal legislator placed great emphasis on data protection provisions. The legislator was clearly worried about the new possibilities created by the technology; this resulted in a very restrictive way to deal with the collected data. Most notably, the data has to be automatically erased after two

months unless needed for specific purposes defined by the legislator. These purposes have a twofold significance; they also constitute plausible cause to look at the movement data in the first place, since it is simply not allowed for any agency to do so at will. It is not even sufficient if the tracked person is suspected to having committed a crime; it needs to be a *specific type of crime* (e.g. sex offences, but also tampering with the EM equipment, violating inclusion or exclusion zones) or a crime punishable by a minimum prison sentence of one year. An investigation into a burglary for example wouldn't be a sufficient reason to check the movement data without the offender's consent; robbery would.

To make matters even more complicated, even though GPS tracking is governed by a federal law, the federal level is not responsible for actual implementation. This is the responsibility of each *Länd*, and as such there could potentially have been 16 different approaches to it. Taking into account that the offenders are in principle free persons having fully served their sentence, the potential danger to society posed by them, and the costs for each *Land* to establish its own 24/7 monitoring centres, it soon became clear that a common, shared approach to EM was the better way to handle the situation. Thus was born the JMC, located in a former court building in Bad Vilbel/Hesse (near Frankfurt), established by an Inter-State Treaty that addresses both legal and administrative competencies and data protection issues.

The JMC consists currently of 15 Hessian civil servants, eight social workers and seven support staff. It operates 24/7 and each shift includes at least one social worker. The JMC deals with the incoming events and evaluates the situation with regards to the necessity of an immediate reaction (e.g. informing the police). The JMC contacts the offender directly in case of an event via phone to clarify the situation and, if possible, to de-escalate it. This is the most important task and the very reason for having social workers in each shift; it is their training in

communication with offenders we rely on.

The JMC also reports to the supervising authority and the local probation service – each offender under a supervision order is appointed a local probation officer irrespective of EM – so that the latter may incorporate events exposed by monitoring in their work with the offender.

To make EM as accessible and efficient as possible forms were developed that are used nationwide. They include the most important personal facts, whom to call if the JMC cannot de-escalate the situation and the technical aspects of EM handled by the Hessische Zentrale für Datenverarbeitung, a public company. Electronic monitoring, its forms and all other appropriate supervising directions are discussed in 'case conferences' consisting (in Hesse) of the local probation service, the public prosecutor as the executing authority, prison staff, the police and the supervising authority if possible. However, the outcome of the discussion is only ever a recommendation to the court with regards to include EM in the supervision order, and it is or the court to determine the response.

Currently, there are 63 people supervised under the federal approach to EM throughout Germany. Since 2012, there have been 4,911 events indicating a potentially dangerous situation for the JMC to evaluate and respond to. In only 5.35 per cent of the cases (172) did the police have to be informed, so that it seems as if the de-escalation policy used by the JMC is working out as hoped. ■

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