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"You'll never stand-alone": Electronic monitoring in Germany

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Abstract

Electronic monitoring (EM) in Germany is used only exceptionally in cases of high-risk offenders released from prison after fully having served a prison sentence or after release from the preventive detention measure (added to a prison sentence in cases of "dangerous" violent or sex offenders). About 70 cases on a daily total of more than 36,000 supervision of conduct cases are under global positioning system (GPS)-EM. Only in one federal state (Hesse) EM on radio frequency technology is also used to avoid pre-trial detention or in regular probation/parole cases. Numbers remain very low also in this context. EM is always combined with a probation or supervision of conduct order, which means that it is embedded in the rehabilitative work of the probation services. The German judiciary and crime policy are very reluctant to expand EM, as there is no pressure from the prison system (no overcrowding) and the "ordinary" probation service (without EM) works quite efficiently.

Keywords

Crime policy, electronic monitoring, high-risk offenders, principle of proportionality, probationary supervision, supervision of conduct

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Introduction: History of EM in Germany

Electronic monitoring (EM) has never been an important issue in crime policy in Germany. Discussions at the end of the 1990s led to a pilot project in the federal state of Hesse, where EM is primarily used as a judicial directive in combination with a suspended sentence or as a directive for an accused to avoid pre-trial detention, both forms together count for about 80 cases per year. But, besides this pilot project in one out of 16 federal states – contrary to other countries (see Haverkamp [2014] for an overall view) – a nationwide and broader introduction was never intended in Germany as it was not realised as a promising option to replace imprisonment either in the pre-trial stage nor as a court disposal at the sentencing stage.

There were occasional discussions and attempts to introduce EM during the execution of prison sentences for preparing release from prison by so-called relaxations of the prison regime ("Vollzugslockerungen", prison leaves), but again only three federal states (Hesse, Baden-Württemberg and Saxony-Anhalt) introduced the possibility in their prison legislation.[1]Within the Hessian pilot project, EM prison leaves are restricted to just a handful of cases, in Saxony-Anhalt the legal possibility to use EM is not applied so far and EM thus remains only a theoretical option, and in Baden-Württemberg the attempt to implement EM in combination with prison leaves or as an alternative form of the execution of prison sentences for fine defaulters was abolished.[2]

While prison overcrowding was a driver for the implementation of EM in some European countries, prison overcrowding both in the past and currently is not an issue at all in Germany. Instead, the need for EM became "urgent" with the decision of the European Court of Human Rights (ECtHR) (M. vs. Germany, no. 19359/04), which stated that the instrument of preventive detention was a violation of the European Convention on Human Rights, with the consequence that several "dangerous" offenders had to be released from preventive detention. The legislator reacted in 2010 by introducing EM as an element attached to the measure of "supervision of conduct" (Führungsaufsicht), which is a special intensive supervision by the probation service and the supervision of conduct agency (Führungsaufsichtsstelle) for so-called high-risk offenders. Main target groups are offenders released from psychiatric hospitals or from preventive detention (Sicherungsverwahrung)[3], and offenders released from prison after having served the full sentence and if their prognosis for reoffending is high.

The so-called electronic location monitoring (Elektronische Aufenthaltsüberwachung, EAÜ) is the only form of EM that is accepted in all German federal states. EAÜ uses GPS-technology and thus theoretically allows the location of the person under EM to be continuously monitored. Nevertheless, EAÜ-EM is not practiced as a 24/7 live surveillance of the offenders' movement. Instead, the involved authorities only gain access to the "geo-data" in cases when deviating events are reported via the global positioning system (GPS)-technic – that is, mainly when the offender (potentially) has left an inclusion zone or illicitly sets foot in an exclusion zone (e.g. playgrounds, schools, kindergartens or the place of residence of a former victim). The purpose of EAÜ is to minimise the risk that offenders, who have committed serious sexual or violent offences (dangerous offenders), reoffend after their release from prison or from a forensic institution.

In this respect, the use of EM in Germany may be distinguished in two fields of application: (1) Long-term GPS-EM for high-risk offenders, which is accepted in all federal states, but that owing to its legal conception is only applicable in exceptional cases. (2) Short-term Radio-Frequency-EM as a "front-door" alternative to imprisonment and thus as a measure of more rehabilitative character, which is, however, only practiced in the federal state of Hesse as a model-project with a very limited number of cases (only about 80 cases out of 16,000 probationers are under EM).

EM as an alternative to imprisonment: State of research

Though there are some (long-standing) practical experiences with "front-door"-EM approaches in Germany owing to the two referred model projects, in which EM is used in Hesse respectively was used in Baden-Württemberg as an alternative to imprisonment, either as a sentencing option for the judge, i.e. a suspended sentence/probation or early release in combination wit EM, or as an alternative to pre-trial detention. The current state of research in this field is still largely left open and at this point it is insufficient.

The Hessian model project was only once extensively evaluated, namely in the year 2004, four years after the project's start, by Mayer (2004). The author of this study came to a rather cautious conclusion: While on the one hand he contributed "slightly positive signals" to the EM-model-project – in fact, he especially underlined that the reality of EPK (Elektronische Präsenzkontrolle [Electronic presence verification])-EM would be far less dramatic then critical voices pictured it to be, before the measure was implemented –, on the other hand he remained sceptical towards EM – in particular towards EM as an alternative measure for pre-trial detention – and advised to reconsider its use. It was argued by Mayer, that using EM for a wrong selection of offenders (and thus using EM an opposite direction than intended) would be a general risk of this measure, which could not be denied (Mayer, 2004: 195). The project has not been further evaluated since.

A study conducted by the Max Planck Institute for Foreign and International Criminal Law, which accompanied the recently discontinued attempt to use EM as a direction in combination with prison leaves or as an alternative execution of a (substitute) prison sentence for fine defaulters in Baden-Württemberg, attributed the failure of this project to similar observations: The admission criteria for prisoners to take part in the project were considerably high. Therefore, especially those prisoners with an extensive need for rehabilitation measures were excluded from this programme; prisoners, which could fulfil these requirements, predominantly had favourable social prognosis and thus there was no need to monitor them additionally during their prison leaves (Wößner and Schwedler, 2014: 73).

Overall, the empirical research in Germany in this respect is not able to either prove or to disprove the fears of net-widening. The state of research, however, indicates that a wrong selection of probands[4] is, in fact, the main problem for front-door EM approaches and net-widening effects hence are a realistic danger.

Own empirical research: Methodology and research process

The research on which this report is based is part of the joint research project "Creativity and Effectiveness in the Use of Electronic Monitoring as an Alternative to Imprisonment

in EU Member States" (EMEU), a comparative analysis of the use of EM in five European jurisdictions (Belgium, England and Wales, Germany, the Netherlands and Scotland), which aimed to compare the law, policy and practices of EM in these five (former) EU-member states (Hucklesby et al., 2016, and in this volume, also to the methodological approach in more detail).

Compared with the four other jurisdictions it was plain from the outset that Germany, to a certain extent, holds a special position in the use of EM. The aim of our work was (and so is the aim of the following article), to give a detailed review on the German use of EM and to analyse its practical implementation. Owing to its special role, a further intention was, to highlight (constitutional, legal and practical) circumstances, which – above all – seem to be particular for Germany and that limit its implementation. Against the background of this initial situation in Germany, it also seems relevant not just to ask how EM should ideally be conceptualised, but rather to question if EM is, in fact, a necessary and inevitable instrument for a modern sanction system.

The actual research was subdivided into two segments. From December 2014 to March 2015 its primary focus laid on EAÜ-EM and in the following months on the Hessian approach. During these two research segments, 11 days of observation and 30 interviews were collected. The research further included an extensive literature review. The observations were carried out in the agencies that are involved in the German EM-practice, namely the monitoring centre (GÜL, Bad Vilbel, 5 days), the agency for technical support (HZD, Hünfeld, 2 days), two EM-specialised agencies for supervision of conduct (Rostock, Munich, 3 days) and the Hessian Ministry of Justice (Wiesbaden, 1 day). Its aim was to get a comprehensive overview of the internal and external EM processes, especially the monitoring process, multi-agency-work and the agency-proband-communication.

In order to deepen this overview, 30 interviews with experts, practitioners and decision-makers in the field of EM were conducted. Besides this, police officers, judges and criminal law experts were interviewed for complementarily purposes. Altogether, four mangers (from the technical agency, the monitoring centre, as well as from the agencies for supervision of conduct), 10 persons from the monitoring staff, five persons from the technical staff, three judges, four probation workers, two police officers and two criminal law academics agreed to be available as interviewees.

The criteria for targeting interview partners were mainly defined by their experience in the field of EM. However, it is important to notice that EM is of minor importance in the German sanction practice and that number of potential participants hence was limited. With a particular focus on the interviewed judges and police officers, it has to be pointed out that this study is not to be seen as a representative survey. Instead, the research in particular aimed to achieve an overall impression of the German EM practice and a first insight in the practitioners' point of view.

Legal framework and aims

The German sanctions system distinguishes between criminal sanctions based on the guilt of the offender on the one hand, and measures for rehabilitation and security based on the dangerousness of the offender on the other. In Germany, EM is not an independent criminal sanction or measure by these means. This is the result of a penal culture that is

strongly oriented towards rehabilitation (in German terms "Resozialisierung", resocialisation) since several major law reforms in the late 1960s and 1970s. Resocialisation is a constitutional principle based on the principle of human dignity (Art. 1 of the Federal Constitution, FC) and the principle of the social welfare state (Art. 20 FC).[5] Therefore, purely technical measures of supervision are constitutionally outlawed. Every sanction and punishment (even preventive detention for "dangerous" offenders) have to be oriented to this principle of rehabilitation. EM therefore is always attached as a further condition to other (rehabilitative) measures or sanctions such as probation or conditional/early release with supervision by the probation service.

There are several legal bases in the German sanctions system for the use of EM:

- As a directive for dangerous offenders in the context of the measure of supervision of conduct ("Führungsaufsicht") (see § 68b (1) No. 12 Criminal Code, CC)
- As a directive in combination with a suspended sentence of up to two years of imprisonment (§§ 56, 56c Criminal Code)
- As a directive for offenders who are released early (§§ 57, 57a in combination with § 56c Criminal Code)
- As a directive for an accused to avoid pre-trial detention (§ 116 Criminal Procedure Act, CPA)
- During the execution of prison sentences for preparing release from prison by so-called relaxations of the prison regime ("Vollzugslockerungen", prison leaves) in two federal states' Prison Laws (Hesse – § 16 (3) Prison Act, Saxony-Anhalt – §§ 45 (9), 47 (1) n. 10, (2) Prison Act).

Although there are several legal bases for its implementation in federal law, the German sanction practice is very reluctant towards EM as an option. First of all, these legal possibilities for the use of EM are highly controversial. It is not clear if the options under §§ 56c in combination with §§ 56, 57, 57a CC are legally possible as the EM-directive is not explicitly enumerated. The EM practice in this legal context tries to overcome the problem of a missing clear legal basis by emphasizing the necessity that the offender declares his consent.[6] Owing to the intrusive nature of EM supervision, this must be a formal (written) consent by the offender himself as well as by his housemates on the base of substantive information given to them.[7] On the other hand, a consent is not required in the case of the directive of supervision of conduct as EM is used to reduce the high-risk "dangerous" offenders present.[8]

EM as an alternative to pre-trial detention is not seen as a real option as it cannot prevent escape effectively (the offender can always take off the device and flee).

This was also the conclusion of the major evaluation report on the use of EM throughout Germany (see Bräuchle and Kinzig, 2016: 16). If a suspect presents a high-risk of escape, EM does not function as a preventive measure; if the offender does not present a risk of escape, pre-trial detention legally cannot be applied (see §§ 112 ff. CPA). Therefore, the target group is difficult to identify, requiring in depth prognoses if the accused is in the range between a low- or high-risk candidate for escaping.[9]

Another important issue in German Criminal Law, and in sentencing in particular, is that the principle of proportionality requires that the more intrusive sanction or

measure always has to be justified by a comparative prognosis: If simple suspended sentences seem to be appropriate for preventing recidivism, they should be given priority to suspended sentences with supervision by the probation service (see §§ 56d, 57d CC). If a suspended sentence with supervision by the probation service seems to be sufficient, the additional directive of EM is not justified. So, EM is always the last resort in supervision of offenders and always in combination with probationary supervision. The same principle applies also with the supervision of conduct order. The judge must always clarify if supervision by the probation and supervision of conduct services and agencies is sufficient or that EM as an additional directive is indispensable. According to Bräuchle and Kinzig (2016: 9, 19) an expert opinion is obligatory with regards to the difficulties of assessing the “dangerousness” (as a legal prerequisite) and because of the intensity of intervention.

EAÜ-monitored persons are under intensive supervision. In addition to their EAÜ directive (EM), which is attached to the primary measure of supervision of conduct, they receive a high number of other directives or conditions; that is, therapeutic directives or directives that demand abstinence from alcohol. Compared with a control group of offenders under supervision of conduct without an EAÜ directive, they receive significantly more directives, which is questionable in the light of the principle of proportionality (Bräuchle and Kinzig, 2016: 11).

At this moment, we may summarise that EM in Germany is provided only as an integrated measure with intensive care and supervision by the probation services and only in exceptional cases.

The aim of EM is the prevention of recidivism and to support the rehabilitative efforts of the probation work. As EM technology is not rehabilitative in itself (see Nellis, 2015: 16), the German legislator consequently allows for EM only in combination with sanctions or measures based on the rehabilitative ideal.

This particularly applies to EPK-EM, which primarily serves as a means for keeping people out of detention and imprisonment. It focuses on offenders who are on the threshold between custody and probation and who also show a lack of discipline. Compared with EAÜ, probands subjected to EPK receive much more positive support. The different level of supervision compared with EAÜ is primarily a result of EPK’s stronger focus on providing a primarily special preventive influence on the persons subjected to it. One of the most decisive roles of the probation service is to develop – together with the proband and after consulting the courts, and in line with the judge’s instructions – an individualised weekly timetable for the proband. This timetable usually includes fixed times at which the proband is required to take part in meaningful work and/or work for the benefit of the community outside of his or her residence (usually about 12 hours a week).

The use of EM in Germany: Statistical aspects and organizational structure

The nationwide form of EM in Germany is the supervision of conduct order, which can be combined with GPS-based EM in cases of high-risk-offenders. Since its introduction in 2011, it has been imposed by the courts only in 136 cases.[10] There are considerable regional differences of its application in comparison of the 16 federal states. Fifty-seven

Table 1. Electronic location monitoring (EAÜ) cases in the federal states on 31 May 2016.

Federal state	Offenders under EAÜ-EM		Offender group		
	In total	Interruptions*	Fully served prison sentence	Conditionally released from "measures"**	Both
Baden-Württemberg	**6**	2	6	0	0
Bavaria	**30**	7	23	4	3
Hamburg	**3**	1	2	1	0
Hesse	**8**	1	7	0	1
Mecklenburg-Western Pomerania	**10**	1	9	0	1
Lower Saxony	**3**	1	2	0	1
Northrhine-Westphalia	**7**	4	6	0	1
Rhineland-Palatinate	**1**	1	1	0	0
Saarland	**1**	0	1	0	0
Saxony	**2**	2	2	0	0
Schleswig-Holstein	**1**	0	1	0	0
Thuringia	**2**	0	2	0	0
Total:	**74**	**20**	**62**	**5**	**7**

*Because of re-incarceration (revocation of the directive or pre-trial detention) or other circumstances.
**Psychiatric hospital or preventive detention, §§ 63, 66 CC.

EM-orders (i.e. 42%) have been issued in Bavaria, the other federal states are using EM only in individual rare cases. Per 100,000 inhabitants, Mecklenburg-Western Pomerania (MV) on 31 May 2016 had the highest rate of offenders under an EM-order with 0,69.[11] Thuringia has 0,41, Bavaria 0,35, Hesse 0,2 and North Rhine-Westphalia only 0,07; that is, only one tenth of the rate in MV. In other federal states with a similar population such as Baden-Württemberg and Lower Saxony, the use of EAÜ is limited to a small number of cases (see Table 1).

EAÜ is primarily used for offenders who are released from prison after having served their full sentence. Around 75% are sexual offenders, while the remaining 25% are persons who had been sentenced for other violent offences.

So far, the EAÜ-directive has exclusively been ordered for sexual and violent offenders, this is why Bräuchle and Kinzig (2016: 7), with good reason, raised the question to reduce the catalogue of the offences for which EM can be ordered.

On 31 May 2016, a total of 74 offenders were under EM-tracking, 30 of them (41%) in Bavaria, 10 of them (14%) in MV (see Table 1 above). With regard to all new cases starting EM during the period from 1 January 2015 until 31 May 2016 is similar, with a large concentration of cases in Bavaria (see Figure 1).

In total, EM plays a very marginal role if one considers that in Germany on a given day almost 37,000 offenders[12] are under the supervision of conduct order supervised by the probation service. This means that 0.2% of the population of high-risk-offenders are electronically supervised.

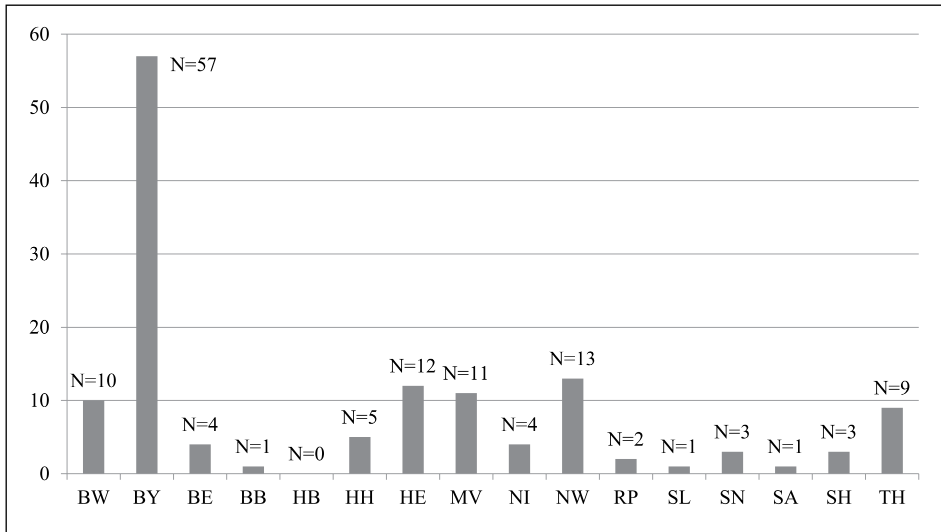

Figure 1. Number of GPS-based EM-orders (electronic location monitoring, EAÜ) in comparison with the 16 federal states (from 1 January 2012 until 31 May 2016).

Therefore, one can summarise that EM in Germany quantitatively is of no relevance. Regarding this, a further decline can be expected as there will be less high-risk-offenders released from preventive detention with a specific negative prognosis as has been the case in 2009 and 2010 after the decision of the ECtHR mentioned above (see section 1).

As mentioned above, only in Hesse a project of the Ministry of Justice has ran since 2000 in the general criminal justice system administered by the probation and prison service. In March 2013, a total of 83 persons were under electronic supervision based on the radio frequency (RF) technique, 41 of them were in the context of suspended sentences and probationary directives/conditions (§§ 56, 56c CC), 42 in a EM-monitored house arrest to avoid pre-trail detention. Again, these numbers have to be taken into account against the number of "normal" probationers, which were in the federal state of Hesse of about 12,500.[13] This means that only about 0.7% of all probationers in this federal sate were electronically supervised and that also in Hesse, EM is of almost no importance quantitatively. Another critique – as mentioned above for the pre-trial cases – is the very selective practice in terms of regional variations: 61% of electronically monitored offenders released from prisons come from two out of nine districts (Darmstadt and Frankfurt/M.), whereas the other districts use EM only to a very limited extent.[14]

Unfortunately, there is no real evaluation of the Hessian project apart from about the first 30 cases in the model phase (see Mayer, 2004), and therefore the critique that EM in Hesse contains a very selective and arbitrary practice with uncontrolled effects of net-widening seems to be justified.

The organisational structure of EM as a condition of the supervision of conduct order (§ 68b (1) No. 12 CC) is rather complicated and statutory strictly regulated. Within the EAÜ-EM, the actual monitoring process is preceded by a decision-making process that

involves numerous actors. The first actor to be mentioned is the state prosecution service (SPS). The SPS convenes case meetings at which the different parties involved can give a recommendation with regard to whether or not an EAÜ-directive should be issued in that specific case. These parties include the so-called Agency for the Supervision of Conduct (German: Führungsaufsichtsstelle, ASC), the police, probation workers or other parties that have observed the monitored person's development in the course of him/her serving sentence. Despite administrative regulations of the 16 federal states concerning the case meetings, an evaluation of the EAÜ-EM practice in Germany revealed that case meetings are not always carried out (Bräuchle and Kinzig, 2016: 9).

Supervision of conduct is ordered by the competent court shortly before the offender has served full sentence. This is usually the Court for the Execution of Prison Sentences (German: Strafvollstreckungskammer) of the regional court district in which the prison sentence or the secure measure of rehabilitation and security is being enforced. EM can be applied in this context as an ancillary directive attached to the measure of supervision of conduct.

The State Prosecution Service as well as the Court for the Execution of Prison Sentences take action for the second time in case of breaches of directives in accordance with § 145a Criminal Code.[15]

Where supervision of conduct is ordered with an ancillary EAÜ-directive, in accordance with § 68a (3) Criminal Code, the ASC monitors the convict's behaviour and adherence to the directives to which he/she has been subjected, in agreement with the court and with support from the responsible probation worker. In accordance with § 68a (6) Criminal Code, the court can issue the ASC and the probation service with instructions for their activities. The ASC is the central agency for the monitoring of EAÜ-probands (i.e. offenders or suspects under EM) subject to measures of supervision of conduct.

The majority of federal states have established ASCs at their regional courts (about 200 districts nationwide). In Mecklenburg-Western Pomerania, by contrast, responsibility for supervision of conduct is centralised, in the hands of the so-called State Agency for the Execution of Non-custodial Sanctions ("Landesamt für Ambulante Straffälligenarbeit").

In Bavaria – the federal state with the highest EAÜ-caseloads – a "Central Probation Service Coordination Office" (German: "Zentrale Koordinierungsstelle Bewährungshilfe") has been set up, serving as a superordinate agency that coordinates inter-agency communication and collaboration in Bavaria, including the context of EAÜ.

In contrast to the issuance of EAÜ-directives and their monitoring/supervision by the ASCs, the actual technical tracking of offenders is performed uniformly by the same single agency (monitoring center – GÜL) in all federal states. The federal states had previously agreed in an inter-state treaty to establish such a shared agency. The monitoring center is responsible for providing 24-hour GPS data tracking and is the "first responder" in cases of potential violations by the person under EM.

Another agency that is active beyond federal state boundaries is the so-called "Hessian Centre for Data Processing" (German: "Hessische Zentrale für Datenverarbeitung", HZD). While the HZD is a subdivision of and thus subordinated to the Hessian Ministry of Justice, it nonetheless also acts on behalf of other federal states in the context of EAÜ. Like the GÜL, the HZD, too, is responsible for technical monitoring aspects. Where so required, the HZD sets up individualised exclusion zones or presence zones (zones in

which the monitored person is obliged to be located). HZD is, furthermore, responsible for providing GPS-tracker maintenance and monitors technical details, like charge characteristics and whether or not the tracker is in motion. In doing so, the HZD has no access to information pertaining to the EAÜ-proband's precise whereabouts. The HZD is also tasked with installing and uninstalling the GPS-trackers. For this purpose, the private organisation Securitas acts on behalf of HZD as a subcontractor.

In accordance with § 68a (1) Criminal Code, offenders who are subject to the measure of supervision of conduct are assigned a probation worker. The probation worker maintains personal contact with the monitored person and, in doing so, acts in a dual role as both supporter of the rehabilitation and reintegration process, and as an agent of supervision and control. Probation workers are thus more independent from the actual monitoring process than the other actors involved in the EAÜ-directive.

Police officers take part in case meetings, where the necessity to order GPS-EM for potentially dangerous probands is discussed by several actors and agencies in advance. During the execution of the EAÜ-EM, the police only plays a passive role. They are only involved as a fast response if the monitoring center regards a (possible) violation of directives (zone violations, damage to the device) as so severe that other persons are endangered or that the proband might escape.

In summary, the organisational challenge is the cooperation between a multiplicity of involved agencies (GÜL, HZD, probation service, Agency for Supervision of Conduct, police, Court for the Execution of Prison Sentences), which is a consequence of the scope of the EAÜ within the German sanction system. Owing to very strict data protection law in Germany, a cautious handling with personal data is necessary. Consequently, there are challenges concerning the exchange of information about the monitored person between the different agencies. In practice, the agencies meet constitutional concerns by short deletion periods, limited access to geo-data and strict regulations concerning the transfer of data.

The cooperation between authorities and data protection are inevitable necessary preconditions concerning the use of EM. Owing to the number of different agencies involved and owing to the fact that these parties with regards to data protection provisions, are each entitled to save/retain and share differing parts and contents of the proband's files, the communication procedures between them are strongly bureaucratized.

In many areas, the current practice works well (see Bräuchle and Kinzig, 2016: 9 f.). Rapid reaction in the few serious cases where immediate action is required is carried out smoothly in cooperation with police forces. Worthy of note is the cooperation between the two state-crossing agencies, i. e. HZD and GÜL.

However, there are limits in other fields: For instance, the practical implementation even of only minor changes in circumstances (for example setting up a corridor so as to enable a proband to visit the hospital) can be highly laborious. The particular emphasis on the effective cooperation of central agencies is consequently understandable, but indicates simultaneously also the administrative and organisational effort of the management of even small numbers of probands.

Like with EAÜ, in the context of EPK, personal data pertaining to the proband are exchanged between several agencies involved in the process (judges, GÜL, HZD, police, probation workers). One key difference to EAÜ, however, is that no geo-data are

recorded, since EPK uses RF rather than GPS. In the context of EPK, the focus lies on determining/monitoring whether the proband is at home or away from home at the times fixed in his/her timetable. One result of this different focus is that the process is subject to less stringent or strict standardization. Multi-agency-communication mainly takes place between judges and probation workers. In practice, competency for discretionary decision-making is often devolved to the probation worker to a certain degree.

Main drivers for a very limited use of EM in the German jurisdiction

There are several reasons why EM is used only in a very restrictive way (also in Hesse where it is implemented on a larger legal base, see above).

First of all, the principle of proportionality is of major importance. As pointed out in section 2, EM is never a stand-alone measure and therefore must be justified in its function of an additional form of control against the regular probationary supervision. This is challenging and increasing the court's workload. Judges tend to avoid prognostic expertise on the necessity of EM owing to the "dangerousness" or the high risk the offender presents. The result is that judges regularly use the "normal" supervision of conduct orders after the offender has fully served a prison sentence or in the case of release from psychiatric hospitals or preventive detention.

There is also a strong opposition in the judiciary against any form of privatisation. When in the early 2000s the federal state of Baden-Württemberg privatised the probation service, which later was found to be unconstitutional by the Constitutional Court of this state.[16] In the meantime, Baden-Württemberg is on the way to renationalise its probation service. All other federal states have denied such privatisation issues, in the prison system as well as in probation. More than 90% of the judges are against any privatisation in the probation service.[17]

There is widespread agreement among respondents of our research that private companies will continue to play only a minor role in EM-practice in Germany in future. Moreover, a stronger involvement of private entities is not desired – their economic interests are viewed as being contrary to the aims and objectives of both EAÜ and EPK. The state monopoly on sentencing and punishment is generally accorded importance, especially by judges.

As mentioned above the German criminal justice culture is very much oriented towards rehabilitation ("Resozialisierung") and therefore simple technical supervision by EM is not accepted. The debates about EM in the early 2000s showed that EM in the way it was used abroad (e. g. in Sweden, England and Wales) in Germany regularly were dealt with fines or by the probation service. So, no real target group that would have impact on problems of overcrowding (which at that time existed) could be found.

Not least owing to the strict data protection requirements that are in place, personal information relating to the monitored person is used only very reluctantly. Insofar as is necessary in each individual case, the ASC forwards all information known to it to the Central Monitoring Centre (GÜL, Bad Vilbel) and to the assigned probation worker. In the course of the monitoring process, access to the EM-proband's personal data is restricted to only these three agencies. All involved agencies and parties are only

provided with the information that they require to be able to properly perform their tasks within the monitoring process.[18] All data concerning persons who are subjected to EAÜ-GPS are deleted one year after the monitoring process has ended. The fact that despite the broader technical possibilities of the GPS-system even the monitoring centre is not allowed to monitor offenders in real-time, underlines the strong influence of constitutional principles to the EM practice in Germany, as well.

There are a few negative events that have high-lightened the limited function of EM, in particular one case in Hesse where a monitored person under EM-EPK took off the device and escaped to join the ISIS in the war in Syria. This maybe have supported the reluctant practice and the distrust that EM effectively can prevent escape; for example, in the pre-trial stage as an alternative to pre-trial detention. Additionally, public opinion and perceptions of EM are stated by the interviewees to be rather negative. EAÜ and EPK come to be equated with each other without any deeper reflection, and individual cases of breach or abuse of EM-directives are scandalised in the media. This negative atmosphere is supplemented by high, often unrealistic expectations of what EM can achieve.

Moreover, in terms of GPS-EM the vast majority of problems arising are said to stand in connection with technological deficiencies. On the one hand, this concerns the tracker itself, which is described as being too heavy and cumbersome for its carriers. Short battery life and slow recharge speeds are likewise problematic, as is the fact that maximum battery charge levels decrease with increased use. The most commonly arising practical issue is the fact that the proband can only be inaccurately located or pinpointed. Where GPS reception or transmission capabilities are compromised (which occurs quite commonly inside houses or other closed structures), tracking via LBS (location-based services)-positioning must be resorted to. LBS-positioning uses radio waves, making it greatly dependent on the available local infrastructure. At the same time, LBS-positioning does not allow the whereabouts of the proband to be precisely pinpointed. Only rough calculations or estimates are possible. Being inside a car, a train or a building with a metal roof can cause both monitoring signals to be lost, which automatically triggers an alarm. The expected benefits of GPS-technology (cost-effective and precise location determination) did not verify to a full extend. The practice of GPS-EM instead is somewhat disillusioning and the system has to be constantly adapted to developments and technical issues.

Policy options and the future of EM in Germany

Owing to the differing objectives and conceptual frameworks of the two contexts in which EM can be applied in Germany, making blanket statements or sweeping assessments would not be advisable. Accordingly, there is need for differentiation.

As to the GPS-based EM (EAÜ-EM), it has to be noticed that historically that EAÜ in its current form is primarily to be understood as a consequence of the judgements rendered by the ECtHR and the Federal Constitutional Court, which essentially effected the subsequent (almost total) abolition of subsequent preventive detention in Germany. EAÜ also serves to replace the (in terms of the constitutional law debatable) practice of subjecting persons to 24-hour police surveillance, a practice that had come to be used as a means for countering the loss of control that had resulted from the abolition of

subsequent preventive detention.[19] EAÜ targets persons who are released from prison and who have been assessed as still being dangerous. It needs to be borne in mind that EAÜ is statutorily linked to the measure of supervision of conduct, and is thus always connected to the said measure. It cannot be applied as a stand-alone measure, and is instead intended to support enforcement of the measure of supervision of conduct and its rehabilitative aim (see Schönke et al., 2014, § 68 n. 3). Therefore, EAÜ-EM is thus already rendered an exceptional practice by its statutory conceptualisation, and is restricted to the very few offenders who pose a high risk.

There are, however, different problem areas in this respect. On the one hand, the capabilities and possibilities of technical supervision, surveillance and monitoring should not be overestimated. The assumption that the special preventive, deterrent effects of EAÜ reduce recidivism is directly linked to the assumption that the offenders who are subjected to EAÜ base their behaviour and decision-making on reason and rational choice. Focus is thus placed on factors relating to structures of criminal opportunity. This is, however, not always the case, especially with regard to the circle of offenders to whom EAÜ is applicable. Justifying EAÜ on the basis of its benefits for clearing up new offences would be insufficient on its own. Doing so would imply that, at the time of ordering EAÜ, it had already been decided or taken as fact that the offender will reoffend, which would, in turn, essentially be greatly counterproductive for the offender's rehabilitation and social reintegration.

Implementing EAÜ in practice is a laborious endeavour, both technically and administratively. Practice has to be constantly adapted to developments, advancements and technical difficulties. The strict and elaborate statutory data protection requirements that directly affect and guide EAÜ-practice are constitutionally binding. Accordingly, EM-practice in Germany is greatly bureaucratised and, almost unavoidably, inter-agency collaboration is strictly formalised in this regard.

In summary, the following can be said: EAÜ is currently designed to cater for only a very limited scope of eligible offenders, and is equally as complicated in Germany as it is restricted. There is the danger that the agencies involved – not least owing to the effort and resources they have already invested – may seek to expand the application of EAÜ beyond what has been statutorily regulated. On the other hand, it is to be feared that EAÜ is increasingly coming to be regarded or perceived as a stand-alone measure by the actors involved. However, the EAÜ-directive only makes sense when it forms but one element within a network of supportive measures and interventions (see Nr. 8 of the CM/Rec (2014)4). Comparison between the federal states of Germany shows that EM indeed has the potential to become a "political pawn".

RF-based EM (EPK-EM) is practiced only in the context of a project in Hesse, and thus plays only a very peripheral, subordinate role in German EM-practice. A wider application of EPK is already inhibited by a lack of a clear statutory basis. In contrast to EAÜ, where the aspect of control is as important as rehabilitative aims, EPK is regarded as being more closely connected to rehabilitative and reintegrative efforts – after all, the purpose of EPK is to ensure that the person subjected to EM successfully adheres to a previously elaborated individualised daily routine/timetable. Probation worker, in particular, regard the EPK-directive as a possible "compromise" with the judge that offers offenders a "last gasp" alternative to being imprisoned. EPK-EM benefits from a less

rigid organisation structure and a broader decision-making and management scope for the probation worker. Using EM alone as a mere means of control, without any accompanying positive support measures, however is neither suitable nor recommendable and not accepted in German criminal law legislation and its implementation by the courts. An important aim of EM is to provide a daily structure to the offender thus reducing opportunities to reoffend, and also to provide not only specific times where the offender has to be at home, but also hours she or he should spend outside in order to work, attend school or vocational training or other meaningful activities.

Notwithstanding, the danger of net-widening effects[20] should not be ignored. This applies in particular to cases in which EM is used as a means of avoiding pre-trial detention/secure remands. From the perspective of the interviewed judges this was the main driver to refuse EM. There have been indications that EM is not used as a promotive, positive instrument, but rather merely as an additional measure of control. The study at hand is unable to close the knowledge gaps that do indeed remain in this field. Thus, it remains to be seen what can be drawn from further empirical research and analyses.

Even EPK-EM is in fact – owing to stigmatising effects and strict control – an intrusive measure and an encroachment on basic rights. Such an encroachment can only be justified from the principle of proportionality as it is enshrined in the German Constitution, when EM actually presents a less intrusive measure then imprisonment and on the other hand the existing alternative penalty options, especially the "regular" probation work must be deemed inappropriate. As long as dangers of net-widening cannot be excluded with sufficient certainty, this cannot be assumed hasty. The German understanding of the principle of proportionality hence requires to carefully review new sanction measures and to reject such when net-widening effects are indicated and therefore are a realistic *risk* (and just not when there is indisputable empirical evidence).

In closing, the described legal frameworks and conditions, practical implementation problems and gaps in scientific knowledge show that EM has been met with only little popularity in the German sanctioning system and sentencing practice, and remains limited to extreme cases of a more exceptional nature.

Summarising the situation and perspectives of EM in Germany, one may conclude with the following key statements:

- EM in Germany on the federal level is statutorily conceptualised as an exceptional instrument for very high-risk offenders (EAÜ-EM).
- EM on the state level is subject to critique as to only ambiguous statutory regulations and restricted to singular projects of quantitative minor relevance (see the project in Hesse).
- There is no visible political will to introduce such regulations and expand EM on offenders outside the scope of high-risk offenders. Political discussion to use EM in new fields of application are often short-lived impulsive responses to current events (e.g. EM for potential terrorist offenders as discussed after the recent Berlin-attack) and hardly lead to actual legislative initiatives.
- Practitioners interviewed in our research report a predominantly negative public opinion in terms of the actual EM-practice, mostly based on negative incidents, that are scandalised by the media. They assume that the public is not well informed

and also not much interested beyond specific cases that fuel media debates. This perceived public perception might influence practitioners as well as politicians.
- Also, the judiciary reveals a rather sceptical perspective on new fields of application. However, the regional variations with a relatively extensive use in Bavaria in contrast to most other federal states are to be criticised.[21]
- The practice of implementation discloses considerable technological deficiencies in the present practice.
- There is a lack of empirical research, in particular on the effectivity of EM.
- High data-protection standards based on the constitutional right of privacy and "informal self-determination" result in complex administrative structures and financial costs.
- In Germany, there is no "urgency" to further reduce the prison population, since prison overcrowding is not an issue anymore.

Likewise, it is our insistent advice addressed to the deciding political actors that these factors need to be borne in mind, while discussing new fields of application. EM is a serious encroachment upon basic rights and involves the danger of net-widening effects. Its implementation is not inevitable a cost-effective alternative – as often declared – but linked with major administrative and financial affordability. Costs of €45–90 per day in the Hessian project (Albrecht et al., 2008: 29 ff.) reveal that EM is not much cheaper than imprisonment (about €100 per day) and that this small cost-benefit-effect hold only if imprisonment is really replaced by it. This is definitely not the case for EAÜ-Monitoring, where EM is an additional form of control to "normal" probation.

Germany is distinct from the other jurisdictions in respect of its cautious approach to EM. This, however, must not be understood as an erroneous trend, but rather as an expression of a sanction system, which is heavily shaped by constitutional considerations and consequently imposes high requirements to the sanction practice. In this context, EM offers no "holy grail" and does not inevitably provide only benefits, as often headed by supporters of this measure. For many of the discussed and practised fields of application, it is worth considering that the use of traditional responses might be equally effective and less intrusive. These include support and control of high-risk offenders by the supervision of conduct measure, "regular" probation work, avoiding short prison sentences, and an open-minded approach to prison relaxations (prison leaves) and sentence enforcement (conditional/early release). In our view, the reluctant, reserved and cautious approach to EM as a legal instrument – that, in fact, stands in stark contrast to the models and approaches applied in other countries in Europe – therefore remains vitally necessary (see also Baur and Kinzig in Baur and Kinzig, 2015).

We may end with the conclusion giving by the researchers who evaluated cases of supervision of conduct combined with EM during the years 2011–2013:

> With regard to the intrusive character of EM and the given research evidence on its effectiveness, GPS-based electronic monitoring should be understood as a last resort. In total EAÜ is no panacea for preventing serious crimes of those being released from prisons or psychiatric institutions, who are classified as "dangerous". It is only (but at least) one element of the measure of supervision of conduct, which apart from its controlling function, should always be seen as part of rehabilitative efforts. (Bräuchle and Kinzig, 2016: 20).

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Notes

1. The legislative competence for prison law is held by the 16 federal states.
2. Baden-Württemberg introduced EM in a special law in 2009, but this law was seen as a failure as almost no suitable cases could be found (see Wößner/Schwedler, 2014; Schwedler and Wößner, 2015; and Haverkamp and Wößner, 2016: 124 f). The law, which was passed only for limited period, was not prolonged and is out of force since 2013.
3. Preventive detention according to §§ 66 ff. CC is an indeterminate imprisonment that is added to a regular prison sentence and is served after the determinate prison sentence; it is not based on the guilt of the offender, but on his dangerousness.
4. The term "proband" for the monitored person is used as neither "probationer" nor "offender" fits for all fields of application, while "person subjected to EM" or "monitored person" sounds too bulky.
5. See the basic decisions of the Federal Constitutional Court (FCC) in BVerfGE 35, p. 202 ff; 98, p. 169 ff.
6. With regard to the consent, see Haverkamp (2002: 196 f.).
7. See for more details, Harders (2014: 109 f.).
8. This corresponds to the Council of Europe standards, see Nellis (2015: 28).
9. Therefore, in the project in Hesse during 16 years EM has only been used in 387 cases as a measure to avoid pre-trial detention (of the 221 cases, i.e. 34%, in one of the nine district courts in Hesse). The practice reveals considerable regional variations and demonstrates that also in Hesse the majority of judges does not rely in EM as an option, see also section 3 below.
10. Regularly, the court for the execution of sentences ("*Strafvollstreckungskammer*"), see §§ 462 ff. CPA, deciding on conditional release from the measure of psychiatric hospital or preventive detention or on the modalities of the supervision of conduct order after having fully served a determinate prison sentence.
11. Data on EAÜ-cases are collected by the Ministry of Justice in Hesse; see, for example, the statistics under http://www.bewaehrungshilfe.de/wp-content/uploads/2013/02/2015-08-31-Statistik-Anzahl-EA%C3%9C-Probanden-Bundesweit.pdf. Bräuchle and Kinzig (2016) computed all cases in the period from 2012–2015 per 100,000 inhabitants with the same result of an overrepresentation of EM-EAÜ-cases in Bavaria and Mecklenburg-Western Pomerania and a strong contrast to other federal states.
12. According to the data collected by the German Central Probation Agency (DBH Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik), the number of offenders under the supervision of conduct order (Führungsaufsicht) rose from 24,818 in 2008 to 36,706 at the end of 2014 (+48%), see http://www.dbh-online.de/Führungsaufsicht.
13. According to Statistisches Bundesamt (2013: 13), there were 12,372 offenders under probationary supervision.
14. Including the pre-trial cases, 66% of the cases come from these two districts. In total 1141 persons have been electronically monitored from 2000 until 3 April 2016; that is, about 71 per year, see in detail Dünkel et al. (2017).

15. See in detail Dünkel et al. (2017).
16. See BVerwG 2 C 24.13, decision of 27 November 2014.
17. See Wößner and Schwedler (2014, 2015). HEADS ("Haft-Entlassenen-Auskunfts-Datei-Sexualstraftäter"), see for the special database for sex offenders in the different federal states, Rohrbach (2014: 152 ff).
18. Geo-data can only be retrieved when there has been a potential violation, and can only be forwarded to the police and probation service without prior approval from the ASC or the court if there is imminent danger. In this context, the data are intended to serve law enforcement purposes, as evidence. In principle, movement data have to be automatically deleted within two months. In exceptional cases, the ASC can request that the data be frozen; that is, retained beyond the two months' period, as long as there is reasonable suspicion that a criminal offence has been committed (breaches of directives in particular). See Rohrbach (2014: 136 ff.) for a critical perspective concerning the constitutionality of the 24-hour police surveillance.
19. See also Kaiser (2016: 34 f.).
20. As already described in the first evaluation of the Hessian project, see Mayer (2004).
21. See also for this aspect Baur and Kinzig in Baur and Kinzig (2015).

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