

## Thinking about electronic monitoring in the context of pre-trial detention in Belgium: a solution to prison overcrowding?

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### Abstract

*Prison overcrowding is a major problem in the Belgian criminal justice system, with almost 40% of the current population consisting of prisoners in remand custody. Driven by a goal of prison overcrowding prevention, electronic monitoring has been implemented nationally since 2000, but only as an alternative to the execution of the entire or a part of the prison sentence imposed. This article aims to report some final results of a recent research on the possible application of electronic monitoring as an alternative to pre-trial detention in Belgium.*

**Keywords:** Pre-trial detention, Electronic monitoring, Prison overcrowding, Alternatives

### 1. PRISON OVERCROWDING AND PRE-TRIAL DETENTION IN BELGIUM

Prison overcrowding is a topic that highlights the political agenda and public debate in Belgium since several years. Over a period of thirty years the average Belgian prison population has grown significantly; between 1980 and 2004, this population increased by no less than 63% (Maes, 2010: 48-49). At certain moments in 2007, the ‘historical’ threshold of 10,000 prisoners was exceeded in Belgian prisons, with a figure of 10,008

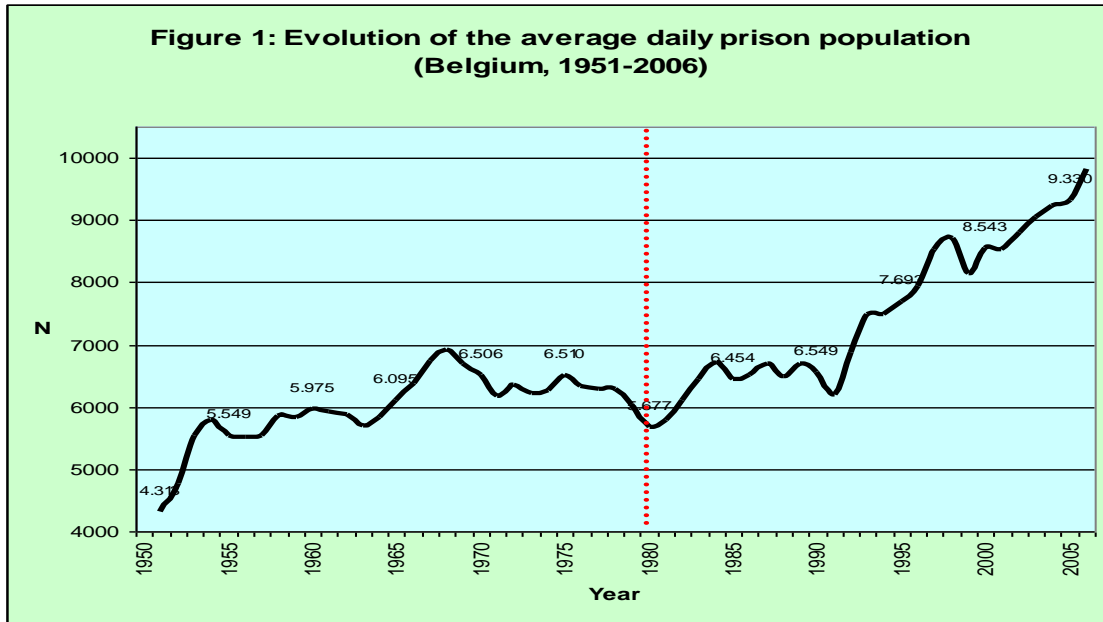
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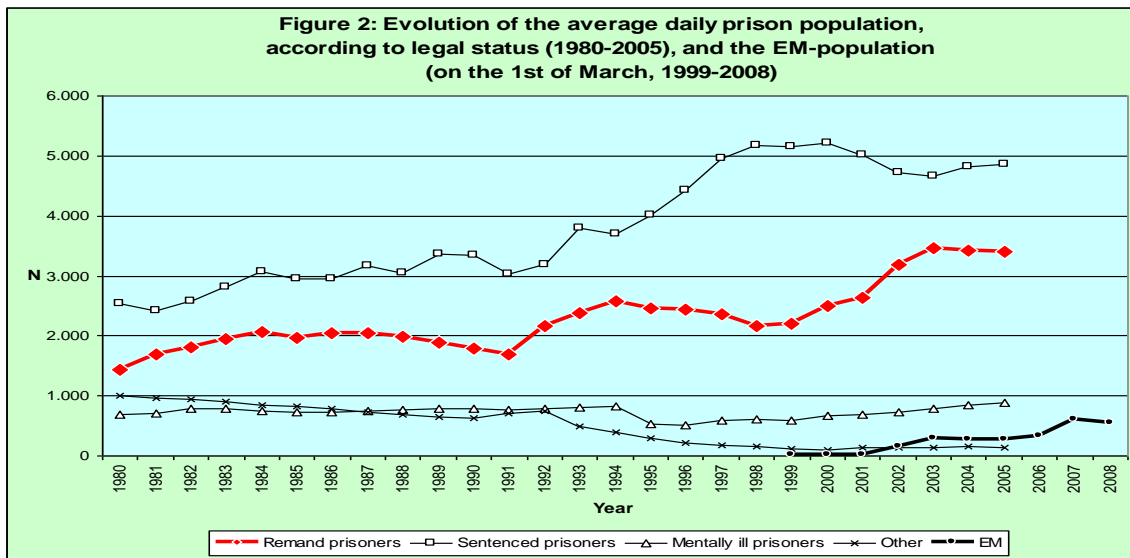
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prisoners on the 1<sup>st</sup> of March 2007 (see *Justitie in cijfers 2010*, p. 56). At the end of 2010, the prison population approached a new record high of 11,000 prisoners. While the prison population during the last half of the 1980s was at a level similar to the situation at the end of the 1960s ( $\pm 6,500$  prisoners), it rose very strongly from the beginning of the 1990s (Maes, 2010: 49).



Source: Maes (2010: 49)

Although that, given the principle of presumption of innocence that dominates the criminal investigation stage, pre-trial detention is considered to be an exceptional measure to prevent committing further criminal offences by suspects and/or to guarantee more effectively the criminal investigation process, the Belgian population of remand prisoners more than doubled between 1980 and 2009. Today, this population represents almost 40 percent of the overall prison population and moved from an average of some 1,500 detainees in 1980 tot 3,500 in 2009. (see Maes 2010; *Justitie in cijfers 2010*, p. 56)



Source: Maes (2010: 54)

According to Belgian law (Pre-trial Detention Act of 20 July 1990), pre-trial detention is only possible when the criminal offence(s) is punishable with a prison sentence of one year or more and in presence of strong indications of guilt. Furthermore, in case the maximum sentence for the criminal offence does not exceed 15 years of imprisonment, remand in custody has to be based on additional grounds, i.e. a risk of recidivism, absconding (escape), collusion or making evidence disappear (embezzlement).

Confronted with this phenomenon of prison overcrowding and a high number of remand prisoners within the total prison population, in his general policy note for the year 2009 the former Belgian minister of Justice Jo Vandeurzen announced that

*‘pre-trial detention could be optimised by the application of electronic monitoring and the deployment of modern techniques such as GPS-monitoring, as alternative for pre-trial detention’<sup>2</sup>,*

which aimed to be a new step in tackling overcrowding in Belgian prisons.

Nowadays electronic monitoring (EM) is solely implemented as a modality of execution of prison sentences. Offenders sentenced to a prison sentence of 3 years or less are able to execute their prison sentence under the form of electronic monitoring, most times without being incarcerated before. For offenders sentenced to prison sentences of more than 3 years, electronic monitoring is used as a ‘back door’ strategy of release from (traditional) prison preceding conditional release (parole) or sentence end. With respect to the first group of offenders the decision is taken by the prison administration itself, for the latter the application of electronic monitoring depends on the decision of the judicial authority (implementation of sentences courts).

<sup>2</sup> *Parl. St.*, Kamer (House of Representatives), 2008-2009, no. 52 1529/016, p. 71 – Algemene beleidsnota van de minister van Justitie (General policy note of the Minister of Justice).

The question arose if the system of electronic monitoring could, in one way or another, be extended to the criminal investigation stage and by doing so serve as an alternative to pre-trial detention. At present the Belgian Pre-trial Detention Act provides only for release on bail or under conditions (e.g. the obligation to work, to follow professional training or specialised treatment, not to disturb victims ...) as an alternative for pre-trial detention, if all conditions for issuing a warrant of detention (cf. *supra*; in Dutch: *aanhoudingsbevel*; in French: *mandat d'arrêt*) are satisfied.

Moreover, according to Belgian law, pre-trial detention has no absolute maximum length. However, if a warrant of detention is granted by the investigating judge (in Dutch: *onderzoeksrechter*; in French: *juge d'instruction*), the judicial council (in Dutch: *raadkamer*; in French: *chambre de conseil*) will rule within five days on whether pre-trial detention will remain in force. As long as the judicial inquiry continues, the judicial council will decide every month or every three months (in case of the most serious crimes) whether the pre-trial detention may be preserved. Appeal against decisions of the judicial council can be made to the so-called chamber of indictment of the Court of Appeal (in Dutch: *kamer van inbeschuldigingstelling*; in French: *chambre des mises en accusation*) (see for a more comprehensive overview of the Belgian Pre-trial Detention Act: van Kalmthout *et al.*, 2009: 149-181).

The desirability and possibilities to introduce electronic monitoring as an additional alternative to pre-trial detention was studied in a research, conducted by the Belgian National Institute of Criminalistics and Criminology (NICC)<sup>3</sup> between March and December 2009. While the underlying justification for the possible introduction of electronic monitoring in the context of pre-trial detention in Belgium was not explicitly mentioned as such in the abovementioned ministerial policy document, it nevertheless may be clearly stated that the research project assigned to the NICC<sup>4</sup> came about within the earlier sketched context of prison inflation (with overpopulation of prisons as result), especially the high number of remand prisoners among the global prison population.

## **2. RESEARCH QUESTIONS AND METHODOLOGY USED**

It is then also not surprising that in this research, the central question concerned the extent to which the use of pre-trial detention could be reduced via the possible introduction of electronic monitoring to replace detention in the context of the preliminary criminal inquiry. Or to put it differently, to what extent could electronic monitoring take the place of the actual process of pre-trial detention (with respect to both the intake into and the duration of the pre-trial detention)? This is why an attempt was made to investigate:

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<sup>3</sup> The NICC is a research institute which depends on the Federal Public Service of Justice of the Belgian Government.

<sup>4</sup> For a comprehensive overview, see the following research report: De Man, C., Maes, E. (promotor), Mine, B. and Van Brakel, R. (2009) *Toepassingsmogelijkheden van het elektronisch toezicht in het kader van de voorlopige hechtenis – Possibilités d'application de la surveillance électronique dans le cadre de la détention préventive* (onderzoeksrapport/rapport de recherche nr. 23), Brussels: Nationaal Instituut voor Criminalistiek en Criminologie, Operationele Directie Criminologie (Dec. 2009), 304 p. + appendices [hereinafter referred to as: Report, 2009].

- how broadly electronic monitoring might be applied were it to be available presently as an additional alternative;
- in which concrete cases (description of criminal offences and/or profile of the accused) might electronic monitoring be applied;
- which model or which form of electronic monitoring is preferred (for a short description of these models, see below, par. 3.4.);
- what objections might be raised to finally reject the use of electronic monitoring; and,
- should the occasion arise, what legal form should be given to electronic monitoring and what practical matters would need to be implemented.

The research under discussion consisted of three major components, each based on a specific line of questioning and point of view, and referring to an appropriate research methodology.

In the first place, a study of the literature was made and site visits took place, which allowed us to identify different types of electronic monitoring. We arrived at a distinction between three possible models of electronic monitoring, namely: the ‘traditional’ model, the ‘house arrest’ model, and the ‘GPS model’. What we called in our research the ‘traditional’ model implies that the person under electronic monitoring must be present at the place of residence assigned to him at specific times, and this is verified electronically (electronic bracelet and receiving unit in the assigned residence); the person under electronic monitoring is allowed to leave the place of residence at scheduled times in order to engage in specific activities (work, training, treatment ...) (Goossens *et al.*, 2005; Beyens *et al.*, 2007). We called this model – from an exclusively Belgian point of view - the ‘traditional’ model because it is the model of electronic monitoring that is applied in Belgium with respect to the execution of prison sentences since several years now. This is therefore also the EM-model that is best known to the Belgian judiciary and other practitioners. The ‘house arrest’ model is quite similar to this ‘traditional’ model (cf. the condition to be present at the assigned place of residence), but it has this particularity that the time that may be spent away from home is considerably limited (e.g. to two hours a day in order to handle errands, etc.) (see Kelk, 2005; Goossens and Maes, 2010). The GPS model, which boils down to using a bracelet and a portable monitoring unit, allows continuous tracking of *all* movements of the person under electronic monitoring, and is principally used to control the observation of specific conditions related to not entering or remaining in specific pre-defined geographic zones; here again, as is the case with the ‘traditional’ model, it is possible for the person under electronic monitoring to be outside the home for a greater part of the day (Nellis, 2005).

In this literature review the use of electronic monitoring in the Netherlands (with an on-site visit), France, England and Wales (also with on-site visits) were examined in detail (analysis of legislation, practical implementation, evaluation studies, statistics ...). In addition we also examined – in a more general way however – electronic monitoring in a number of other countries or regions, where it was decided to introduce or *not* to introduce electronic monitoring in the context of pre-trial detention (Hungary, Portugal,

Scotland, New Zealand, Quebec)<sup>5</sup>. An overview was made of the most relevant critiques and comments contained in the literature concerning electronic monitoring. To conclude the literature study, a short sketch was given of the current situation in Belgium (with regard to the execution of prison sentences), and a number of older and more recent proposals for implementing house arrest and electronic monitoring in the context of pre-trial detention were explained and commented on.

In addition to the literature review, a question round was organised with a number of actors in the field who are in a position to decide on or to request for the application of alternatives to pre-trial detention.

In the first place, this concerned round table discussions – one in French and one in Dutch – with investigating judges, members of the judicial council and the chamber of indictment, members of the public prosecution service and the Bar. The intent was to interrogate these actors concerning concrete cases in which they might or might not apply electronic monitoring, and to obtain their opinion concerning a number of the more legal-technical or practical-organisational aspects that frame this issue (e.g. the duration of electronic monitoring, the deduction of time spent under electronic monitoring from the final sentence, the role and competences of different actors to be involved in the preparation of the decision and the control of the measure, ...). With respect to the case discussions these actors were asked to present two concrete (anonymous) cases: one in which they would apply electronic monitoring (whether as a real replacement of pre-trial detention or as a particular form of release under conditions) and one in which they would not do so. Furthermore they were questioned respectively on the preferred EM-model and, if so, their motivations for not choosing for electronic monitoring.

In a later phase, a larger sample of judicial files was analysed with respect to the possible applicability of electronic monitoring. Via a pre-defined registration form the researchers interviewed investigating judges (IJ), members of the judicial council (JC) and the chambers of indictment (CI) with respect to cases in which the arrest of the suspect or a continuation of pre-trial detention was ordered (see table 1). In this registration form some information was noted about the suspect and the current pre-trial detention (sex, age, nationality, a brief case description of the offense and relevant circumstances, date and motivation of the arrest warrant) – on the basis of a lecture of the arrest warrant and/or (additional) information provided by the judicial actor during the interview. In addition, the judicial actors were asked whether they would apply electronic monitoring in these concrete cases (if it were available at the moment of the interview), under which form (what EM-model), or, on the contrary, why they would not apply electronic monitoring at all (motivations for not applying electronic monitoring)<sup>6</sup>. The cases of the chambers of indictment (CI) and those of the judicial councils (JC) were cases examined during court sessions at the time when the interviews took place and where it was decided to extend the period under pre-trial detention; the cases of the investigation judges (IJ) concerned

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<sup>5</sup> For more detailed information and literature references, see Report, 2009 (p. 11-101): The Netherlands (p. 11-25), France (p. 27-44), England and Wales (p. 45-69), Hungary (p. 71-72), Portugal (p. 72-74), New Zealand (p. 85-86), Québec (p. 86), Scotland (p. 87-88) and Belgium (p. 89-96).

<sup>6</sup> The following categories were provided: four legal grounds that allow the issuing of an arrest warrant and two additional criteria that refer to the severity of the offence and the status of illegal residency (see Tables 2 and 3).

cases in which these actors had decided previously to apply pre-trial detention and where the suspect was still in prison at the time of the interview.

**Table 1. Overview of judicial files (number of cases) screened with respect to legal instance, district/jurisdiction and linguistic register**

District	IJ	JC	CI	Total	French/Dutch*
Liege	19	-	23	42	128
Brussels (French)	38	22	26	86	
Brussels (Dutch)	24	-	(24)**	24	77
Antwerp	17	14	22	53	
<b>Total</b>	<b>98</b>	<b>36</b>	<b>71</b>	<b>205</b>	
	98	107			

\* The difference in the number of Dutch and French language judicial files is explained by diverse factors such as the willingness to participate in the research, urgent deadlines in the context of the research phases, and incomplete detailed information concerning a number of cases.

\*\* With all the participating judicial actors there was a face-to-face contact in order to fill out the registration form, except with a member of the Dutch-speaking chamber of indictment of the judicial district of Brussels who requested to fill out the registration form himself. However, due to a lack of sufficient detailed information on certain aspects we were asking for, these cases finally seemed not very useful for further analysis.

And finally, based on data from the SIDIS-database of the prison administration, a picture was sketched of the most recent applications of pre-trial detention (2008), of the profile of the population taken into custody, and of the duration of pre-trial detention (maximally to the moment of dispensation of justice), differentiated according to various relevant characteristics. Based on information in the SIPAR database of the Probation Service (in Dutch: *Directoraat-generaal Justitiehuisen*; in French: *Direction Générale Maisons de Justice*), these data were also linked to corresponding figures concerning the population that was released under conditions during the same reference year.

### 3. AN OVERVIEW OF SOME IMPORTANT RESEARCH RESULTS

As already stated, the research project principally appears to be dictated by the strong representation of accused in our prison population (i.e. electronic monitoring considered from a ‘systemic’ point of view). Yet, theoretically, various objectives (or advantages) can be attributed to the introduction of electronic monitoring in the context of pre-trial detention compared to traditional confinement in the closed environment of a prison. These objectives can be categorised under the following headings: a systemic objective (combating prison overpopulation), an ethical-penological objective (limiting the harms of detention), a legal objective (preserving the presumption of innocence), a social

objective (retention of the family and professional environment to prevent marginalisation), and an economic objective (saving the costs associated with detention).

Despite the fact that the introduction of electronic monitoring was assessed against the background of these diverse objectives, attention in the study was largely placed on the way in which electronic monitoring might contribute to ‘combating’ prison overpopulation, or better, prison ‘inflation’. Hence, in that which follows, we focus especially on the reasons given for applying or not applying electronic monitoring (nature of the cases and objections raised; par. 3.1. and 3.2.<sup>7</sup>), the possible scope of application for electronic monitoring and the associated methodological and other observations (par. 3.3.), and preferences for models of electronic monitoring (par. 3.4.). Finally, a number of specific legal-technical aspects are examined that would be important should electronic monitoring find acceptance in the preliminary criminal inquiry phase (par. 3.5.).

### ***3.1. Some specific (offence- and offender-related) case characteristics and the (non-)application of electronic monitoring***

Regarding possible cases to which electronic monitoring might be applied in the context of pre-trial detention, various (offence-related) situations were cited throughout the *round table discussions* in which possibilities were seen for the use of the electronic monitoring (as a real replacement measure for actual pre-trial detentions or as a particular form of the alternative of release under conditions). Thus, for example, reference was made to cases of stalking, as well as to forms of intra-family violence<sup>8</sup>, albeit only under specific conditions, namely when the partners or family members do not reside in the same place. In these cases, consideration was primarily given to the application of GPS technology, with as aim the ability to monitor orders prohibiting contact (between the suspect and the victim). According to certain actors, electronic monitoring might also be possible in serious cases such as murder and homicide depending on the circumstances (e.g. the killing of a partner): while some indicated here that electronic monitoring could be applied after the committal ruling (dispensation of justice), others were of the opinion that the choice for the moment of committal as pivotal point is arbitrary and thus needs to be seen separately from the decision to apply electronic monitoring. Another possible category for its application concerns so-called young adult first-time offenders for whom pre-trial detention or electronic monitoring, after an initial short period of custody, is seen as an instrument to clarify and confirm the ‘norm’ (see also below).

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<sup>7</sup> Although both paragraphs refer to certain objections against the use of electronic monitoring, we estimated that it would be useful to divide the research results concerning this topic into two separate sections, as paragraph 3.1. refers to concrete offence- or offender-related issues (case specific elements) while paragraph 3.2. mainly reports on legal grounds that can justify the issuing of an arrest warrant and therefore can be used as an argument for not applying electronic monitoring as an alternative to pre-trial detention.

<sup>8</sup> It is not possible to determine to what extent intra-family violence leads to pre-trial detention, as the available statistics refer to broader offence categories. However, with respect to the offence of stalking, our analysis of data from the prison database show that this offence appeared in 1.8% of the arrest warrants executed in 2008 (n=206 on a total of 11,226). Assault and battery for example were represented in 10.8% (combined or not with other types of offences).



Cases in which the application of electronic monitoring would tend not to be considered are those in which there is talk of the sexual abuse of minors, certainly when the offences were committed in the home environment; of drug dealing, more specifically when – and this also applies to other forms of criminal behaviour – the offences could be repeated from the assigned place of residence. The issue of illegality (absence of the right to stay in the territory) also weighed heavily in assessing whether or not to apply electronic monitoring, in the sense that it would seriously jeopardise possibilities for applying electronic monitoring, but also other alternatives. The situation of ‘illegal’ aliens among the Belgian prison population indeed deserves attention in view of the fact that possible reducing effects (in the sense of restricting the prison population) of new legal measures or instruments are negated to a significant degree when foreigners are excluded from their scope (e.g. in the case of limiting the duration of pre-trial detention; see Deltenre and Maes, 2004: 367). In the present research, from the quantitative analysis based on the SIDIS-database of the prison administration, no conclusive pronouncements were made concerning the precise share of ‘illegal aliens’ among the accused, but it was clear that illegal aliens (when registered as such) remain in pre-trial detention longer than average (see Report, 2009: 233). In any case, a *screening of the judicial files* (for more detailed results on a larger sample of cases, see paragraph 3.2.) indicated that this problem of staying in the country illegally – certainly in some districts – is very severe. While illegal aliens were not by definition excluded from the scope of electronic monitoring, they were eligible much less often than average (and often only subject to specific preconditions, e.g. in combination with residence in an asylum seekers centre). The surveyed magistrates for that matter also indicated that illegal aliens were sometimes remanded in custody for quite minor offences such as (non-violent) shoplifting, whereas citizens or legal aliens in Belgium not would have been so detained (Report, 2009: 189 and 273). The detention of illegal aliens appears especially to be based on the high assessment of the probability of escape.

Based on the *round table discussions*, however, possibilities were considered for applying electronic monitoring in the context of pre-trial detention. Nevertheless, it was much more difficult to assess the extent to which electronic monitoring – if it were to be applied – would be used to replace actual ongoing pre-trial detention or release under conditions. In other words, it was unclear what actual effect electronic monitoring might have as a *detention replacement*. In any case, the general tenor was that it was much more difficult to find examples of cases where electronic monitoring would replace pre-trial detention than it was to find examples of cases where electronic monitoring would be imposed as a purely supplementary means (an additional monitoring possibility) in the case of normal release under conditions or would not be applied at all.

Further *screening of real judicial files* (N=205 cases) indicated that the cases in which electronic monitoring could be applied, where the suspect remained in pre-trial detention in the absence of such an alternative, varied significantly depending on the nature of the offences committed. This concerned the possession, trading and importing of narcotics, ordinary theft or robbery, as well as computer fraud, assault and battery, and even homicide. As was the case with the round table discussions, it could be inferred that there were no offences that could be excluded *a priori* from the scope of EM-application.

Rather, the possibility for applying electronic monitoring was assessed case by case, taking into account the nature of the offences, but also the suspect's profile, the concrete circumstances in which the offences were committed, the process and progress of the judicial inquiry ...<sup>9</sup> (see also text frame 1 for some case descriptions in which electronic monitoring would be applied instead of pre-trial detention).

**Text frame 1. Sample case descriptions (based on the screening of judicial files/interviews: cases in which electronic monitoring would be applied if available at the moment of the interview)**

[1] Attempted homicide: *An exchange of words between the suspect and two other people in front of a nightclub in the centre of Brussels. It seems that one of these people spit on the suspect and threw a brick in the face of his friend when passing the nightclub. In response to the compromise to their physical integrity and sense of honour, the suspect followed the victim and stabbed him in the back with a knife.*

[‘Traditional’ model – investigating judge – French-speaking case]

[2] Perpetration or co-perpetration non-violent shoplifting: *The suspect is living in Belgium illegally. He was on the lookout while his companion stole something from the shop. He has an address but no income.*

[‘House arrest’ model – investigating judge – Dutch-speaking case]

**3.2. (More legally based) arguments against the use of electronic monitoring in the context of pre-trial detention**

Electronic monitoring would be applicable only to cases where the avoidance of recidivism is the focus and the application of electronic monitoring would *not* (or no longer) inhibit the process of gathering evidence (judicial inquiry): during the *round table discussions* it was stated – by process of elimination – that the danger of recidivism was the only factor that does not exclude the application of electronic monitoring in advance. The arguments that often were cited against the use of electronic monitoring appear to be related significantly to the needs of the judicial inquiry. Thus, it was stated that electronic monitoring provides insufficient guarantees concerning the neutralisation of a number of risks (for which pre-trial detention is presently used), such as the risk of collusion and tampering with evidence. However, the risk of escaping and the danger of recidivism also play a very prominent role.

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<sup>9</sup> As already may be clear from the preceding presentation, the application of electronic monitoring would depend on answers to certain case-specific questions, such as: What is the relationship between the offender (suspect) and the victim? Are the suspect and the victim living together or do they reside in the same neighbourhood? Has the suspect the right to reside in the country or not (see also par. 3.2.)? Is it possible to continue committing the same type of crimes from the residency assigned for the application of electronic monitoring? Has enough (material) evidence been established to prosecute the suspect before the court (see also par. 3.2.)?

Based on the results of *screening the judicial files (interviews)*, the danger of escaping appeared to be one of the most important factors (even the most important factor on the Dutch-speaking side; see table 2) for not considering electronic monitoring.

**Table 2. Overview of the justifications for the warrant of detention and not making use of electronic monitoring (Dutch-speaking cases in which electronic monitoring was not considered)**

<b>Criteria</b>	<b>Justification for warrant of detention</b>	<b>Justification for <u>not</u> applying EM</b>
Severity of the offence	---	33.9%
Risk of collusion	41.3%	33.9%
Risk of embezzlement	9.5%	12.9%
Risk of escaping	74.6%	75.8%
Risk of recidivism	66.7%	56.5%
<i>Illegal residency</i>	58.7%	61.3%

\* N=62 (justification for arrest warrants)

\*\* N=63 (justification for not applying electronic monitoring)

It also appears that the severity of the offences and the possible danger of recidivism form major obstacles to the use of electronic monitoring; on the French language side, the danger of recidivism even appears as *the* most important objection (see table 3; Report, 2009: 179 and 188-189). This applies to a lesser degree to the danger of collusion and embezzlement, certainly when the length of the pre-trial detention is already quite long.

**Table 3. Overview of the justifications for the warrant of detention and not making use of electronic monitoring (French-speaking cases in which electronic monitoring was not considered)**

<b>Criteria</b>	<b>Justification for warrant of detention*</b>	<b>Justification for <u>not</u> applying EM*</b>
Severity of the offence	---	53.6%
Risk of collusion	41.2%	38.1%
Risk of embezzlement	21.6%	20.6%
Risk of escaping	40.2%	40.2%
Risk of recidivism	73.2%	73.2%
<i>Illegal residency</i>	24.7%	24.7%

\* Percentages calculated on 97 cases, because of the fact that in 10 cases information on the justification for the warrant of detention was not available.

Against these arguments made concerning the appropriateness of applying electronic monitoring in the context of pre-trial detention, however, is also the fact that several times – i.e. during the round table discussions – the impression (implicitly) was created of the occasional ‘improper’ use of pre-trial detention. Reference was made, for example, to the ‘intimidating’ or shock effect that pre-trial detention can bring about (see young adult first time offenders):

*‘They will continue to take advantage of us, as they have done all along. All of the people we encounter, without exception, understand the norm differently than we do (...) because they haven't felt the pain of the sentence, which in fact they didn't serve (...) Pre-trial detention need not be imposed as a punishment, but must be considered as a statement to them that we are dealing with the situation and that it is not in their interest to start again (...).’* (translated from French; Report, 2009: 146)

Furthermore, a certain amount of pressure from the outside world (media, public opinion) was noted, in particular in the case of murder or homicide, that could dissuade some magistrates from considering a release (with or without conditions):

*‘(...), participant E would accept considering electronic monitoring in the case of homicide or murder only after a period of pre-trial detention. He believes that one must keep in mind the social order and the message given to the population by freeing an individual.’* (translated from French; Report, 2009: 139)

In such a context, in our opinion, one should not so much be asking questions concerning what alternative to custody could be introduced. Rather, the more fundamental issue here concerns the correct use of pre-trial detention, viewed as a very exceptional measure. It can also be added that there was dissatisfaction among some actors concerning the execution of prison sentences (non-execution of short prison sentences; execution of certain prison sentences, entirely by way of electronic monitoring and with a possibility of early, provisional release, cf. EM as ‘front-door strategy’), which has (can have) consequences for the use of pre-trial detention, in the sense that pre-trial detention would be used as a sort of ‘pre-punishment’, meaning that at least a part of the ‘punishment’ would certainly consist of imprisonment:

*‘participant E [stated] that 40% of pre-trial detentions are in fact a reaction to the non-execution [or reduced execution] of sentences under three years: ‘because the sentences are not executed, it quite simply is a question of balance’* (translated from French; Report, 2009: 164); and:  
*‘certain convicts with short sentences, seeing that their sentences are not executed (...), begin to think that they can go unpunished’* (translated from French; Report, 2009: 138).<sup>10</sup>

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<sup>10</sup> By way of illustration, we selected here only the passages that best speak for themselves.

### 3.3. Scope of application of electronic monitoring in the context of pre-trial detention

In the context of the screening of judicial files, an attempt was also made to study what the quantitative effects associated with the scope of application of electronic monitoring (as a replacement for current pre-trial detention) might be. This screening revealed that of a total of approximately 200 cases analysed, electronic monitoring would be applied in some 15% of the cases according to one or another model. This number deserves an even higher estimate when account is taken of the expanded authority of the investigating judge to suspend pre-trial detention at any time during the proceedings (i.e., without intervention of the judicial council/chamber of indictment, or possibility to appeal against decisions to release, taken by the investigating judge): thus if we only examine the cases of the investigating judges, a scope of application of some 25% is obtained (see text frame 2).

#### Text frame 2. Overview of electronic monitoring application according to language community and legal instance

General: in 15 → <b>25%</b> (only investigating judge cases) of the cases
➤ Dutch (14 out of 77 cases; i.e. 18.2%):
• <b>Investigating judges:</b> 11 cases out of 41 ( <b>26.82%</b> )
• Judicial council (14.28%)
• Chamber of indictment (4.54%)
➤ French (19 out of 128 cases; i.e. 14.8%):
• <b>Investigating judges:</b> 15 cases out of 57 ( <b>26.31%</b> )
• Judicial council (8.69%)
• Chamber of indictment (4.08%)

From this reported scope of application (*intake* into electronic monitoring from pre-trial detention), however, it may not easily be inferred that the introduction of electronic monitoring would also reduce the accused *population* in prison in an equal proportion, for diverse reasons, namely:

- The investigating judges who participated in the research study are possibly more favourable to electronic monitoring than others. Moreover, there was, even among those who were positive in principle, some occasional scepticism and, for example, questions were raised concerning the concrete functioning of the technology, its reliability and the potential for tampering with the equipment.
- Electronic monitoring would probably also lead to a greater level of revoking, given the more effective control it enables; again, if applied not only as a replacement for detention, but also imposed in cases for which ‘regular’ release under conditions (thus no pre-trial detention) would otherwise be foreseen, this probably would result in a significant number of re-incarcerations.
- The duration of the pre-trial detention time ‘saved’ via electronic monitoring could not be accurately assessed, despite this being a critical fact; the prison population after all is not only determined by intake (flow), but also by the term of detention (see the formula:  $Stock = Flow * Term$  (in days)/365).

- In certain cases, a release from pre-trial detention is not (immediately) possible due to other reasons for detention (e.g. enforcement of earlier sentences).
- Sometimes electronic monitoring would only be applied if other specific conditions are fulfilled (e.g. admission into an asylum seekers centre, application of GPS technology ...).
- The opinion reflected by investigating judges can contain a projection of decisions they would only take in a (much) later stage (decision to release, with or without conditions)<sup>11</sup>.
- If the period served under electronic monitoring has no impact on the final prison sentence pronounced later (cf. the sentencing stage), electronic monitoring will only have an effect on the prison population *to the extent that electronic monitoring is considered as ‘detention time served’* (under pre-trial detention; for a concrete example see below in footnote).

The conclusion of this story is that electronic monitoring will probably enjoy a certain level of application in the context of pre-trial detention, and thus some reducing effect might be expected. Yet, given the existence of a number of uncertainties (saved duration of pre-trial detention time, equation of EM-duration with detention time served) and possible side effects that the application of electronic monitoring might bring about (net widening, probably combined with a greater number of re-incarcerations), expectations in this regard may not be too high. In a certain sense, it is expected that electronic monitoring will contribute on the one hand to a *de*-population of prisons, but on the other hand to *re*-populating them.

### **3.4. Preferred models of electronic monitoring**

As already mentioned, electronic monitoring can be applied in very different ways. In our research we distinguished three models of electronic monitoring: the ‘traditional’ model, the ‘house arrest’ model and the GPS-model. The results of our analyses show that all of these three models could enjoy a certain level of application, and thus – if electronic monitoring is implemented in the preliminary inquiry phase – a differentiated application, adapted to the individual situation, must be possible. Differences, however, appear to exist depending on the language group surveyed. On the one hand, the screening of judicial files shows that on the Dutch-speaking side, sometimes more than one specific model was considered useful for the same case (on the French-language side, always a single model). On the other hand, most French-language magistrates preferred one specific model: in 7 out of 10 cases they found suitable for applying electronic monitoring, they opted for the ‘traditional’ model. This contrasts with their Dutch-speaking counterparts, who demonstrated more diversity and greater balance in the proposed models.

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<sup>11</sup> Although the researchers asked whether the investigating judges would apply electronic monitoring instead of pretrial detention if this ‘alternative’ would be available at the time of the interview, it is not impossible that in fact, while confirming the application of electronic monitoring, some of them were talking about a decision they would only take in a subsequent stage of the criminal investigation procedure (but not at the time of the interview).

However, some French-language magistrates – during the round table discussions – stated that, theoretically speaking, the ‘house arrest’ model had the most in common with pre-trial detention. In comparison to the other models, according to them, the ‘house arrest’ model seemed to resemble the most the *enforcement of pre-trial detention* (electronic monitoring as a *modality of execution* of pre-trial detention; see Report, 2009: 153-156). The contrast between this theoretical reflection (the ‘house arrest’ model as being the most similar to pre-trial detention) and the opinions they expressed concerning the practical application of the different models of electronic monitoring (cf. the abovementioned predominance of the ‘traditional’ model as the preferred model) could probably to a large extent be explained by the fact that: the judicial actors are more familiar with the ‘traditional’ model (which is currently applied as a modality of the execution of prison sentences), and/or the ‘house arrest’ model is estimated as a very strict model, a model which possibly could lead more easily to violations of EM-conditions and therefore could be considered as less suitable.

### ***3.5. The (desired) legal character of the diverse models of electronic monitoring and associated consequences***

In line with this discussion on the preferred models of electronic monitoring, and in addition to numerous other (also more practical-organisational) aspects (see for a comprehensive overview, Maes and Mine, 2010), an important (legal) question arises, i.e. whether electronic monitoring constitutes a *modality of execution* of pre-trial detention (i.e. has to be considered as ‘real detention time’), or rather must be understood as a *special form* of the current alternative of release under conditions?

With respect to this question concerning the juridical (legal) framework of the cited models of electronic monitoring – and in particular the associated consequences with respect to maintaining/extending the measure, its maximum length, compensation in the case of unjustified (wrongful) detention, and deduction from the sentence finally pronounced –, our research teaches us that some would consider electronic monitoring legally equivalent to release under conditions in *all* cases (thus regardless of the model). On the other hand, others (and indeed most) made a distinction between electronic monitoring conceived as a specific form of enforcing pre-trial detention (modality of execution) and electronic monitoring as a special (namely more intense) form of release under conditions.

In general, it may be stated that the application of the GPS model, when it is used only to monitor very specific conditions (referring, for example, to so-called defined exclusion zones), is considered more as a (special) form of release under conditions. The other models (‘traditional’ model and ‘house arrest’ model) were rather catalogued as ways to enforce pre-trial detention, since in this case we can speak of a certain degree of freedom *deprivation* (or detention), while other (prohibitive) stipulations – than not leaving the assigned place of residence at specific times – were seen as freedom *limiting* measures. Certainly with respect to the ‘house arrest’ model, most of those surveyed were convinced that this model of electronic monitoring must be considered equivalent to actual custody. Opinions about the ‘traditional’ model were somewhat divided, although

a strong tendency existed on the Dutch-speaking side to also view this model as a form of detention.

The distinction formulated above is fundamental in nature, in the sense that the legal consequences that are or can be associated with one or the other option are very different.

Assessed according to the prevailing opinions in this regard, it became clear that, if it concerns a *modality of execution* of pre-trial detention:

- in principle, the appropriateness of continuing electronic monitoring must be assessed more regularly, e.g. monthly, analogous to the system of pre-trial detention (except for the most severe crimes that cannot be dealt with by the correctional court);
- the period of electronic monitoring served must be deducted from the finally pronounced (possibly) prison sentence; and,
- also analogous to pre-trial detention, the awarding of compensation must also be foreseen in the case of unjustified (wrongful) electronic monitoring (according to the damages sustained).

For electronic monitoring applied as a *special form of release under conditions* ('new style' release under conditions), in this area the parallel must be drawn with the existing release under conditions system (imposed for a maximum of 3 months, and extendible; no compensation; no deduction from the later pronounced sentence).

Treating the 'traditional' model of electronic monitoring and the 'house arrest' model as equivalent to normal traditional custody (in prison) for that matter is in keeping with that which presently prevails concerning the execution of prison sentences. Electronic monitoring as a special modality of the execution of the prison sentence after all is conceived in its effects as an enforcement of the pronounced prison sentence that has to be served, even if the granted electronic monitoring might be revoked in a later phase (in that case, the days served under electronic monitoring are fully equated with detention time served)<sup>12</sup>.

The logic of the stage of the execution of prison sentences should also be followed when applying the so-called 'conversion rule', in the sense that one day of electronic monitoring would be equivalent to one day of pre-trial detention undergone (and in the case of sentencing to a prison sentence: one day of prison sentence served), even if other conversion rules are applied elsewhere (see for example England and Wales: maximum half-rate) (see in this regard in more detail: Report, 2009: 252-253). In addition, more generally with respect to the relationship between pre-trial detention and the final prison sentence, one could also ask the question whether pre-trial detention (traditional incarceration, and by extension electronic monitoring) must not be counted as 'more severe' with respect to the final sentence (for example, one day pre-trial detention equals

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<sup>12</sup> See article 68, § 5, first section of the Act of 17 May 2006 on the external legal position of convicts with a custodial sentence and the rights awarded to the victim in the framework of sentence enforcement, *Belgisch Staatsblad* (Official Journal), 15 June 2006.



two days of prison sentence served)<sup>13</sup>. One could even consider deducting from the finally pronounced sentence all measures taken in one way or another during the preliminary criminal inquiry phase, whether freedom-depriving or not.

In any case, as previously described in passing (see above, par. 3.3.), electronic monitoring would or could only have a reducing effect on the prison population – and this is, as it were, a *conditio sine qua non* – if the period served under electronic monitoring is also actually deducted from the finally pronounced sentence. A similar effect is also obtained if the suspect is acquitted or sentenced to a non-freedom-depriving punishment. If, however, the suspect is sentenced to imprisonment without the possible electronic monitoring period being deducted, this would mean that the time that was previously ‘saved’ with electronic monitoring must still be served at a later time, namely in the context of the execution of the prison sentence<sup>14</sup>, unless the criminal judge on the merits were to favourably take into account the EM-time served when stipulating the nature and duration of the sentence (i.e. in the sense of sentence-mitigation).

The legal issues cited here are but a few of the themes that need to be addressed if the introduction of electronic monitoring in the context of pre-trial detention is actually to take place. In the context of the research, after all, numerous other issues were identified that must be definitively settled if this is to come about, such as: Must a maximum term be set for electronic monitoring, and if so, what should it be? What capacity of EM-bracelets and/or GPS technology must be foreseen, and must a certain capacity be exclusively reserved for application to electronic monitoring in the context of pre-trial detention? Must the conditions attached to electronic monitoring be continuously monitored (in ‘real time’/semi-passive) or is retrospective monitoring sufficient? Who verifies electronic monitoring (see the debate private vs. public)? Must each violation of electronic monitoring conditions be reported, and when and to whom? Is a preliminary social inquiry report required, and if so, what substantive themes must it address and who must provide the required information? Is a prior agreement with the resident (adult) housemate(s) required? Who is responsible for preparing the schedule and when must this

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<sup>13</sup> This could be based on several arguments. First of all, pre-trial detention is considered as a deprivation of liberty of suspects who are not yet found guilty (cf. the principle of the presumption of innocence). The deduction from the final sentence in a greater amount could therefore serve as an additional guarantee for a more limited use of pre-trial detention. Furthermore pre-trial detention is executed in remand centers in which the detention conditions are usually harsher than those in prisons destined for the execution of prison sentences (cf. infrastructure, activities ...).

Additionally, alternatives to pre-trial detention often have a lot in common with real (community) sanctions (e.g. attending a drug treatment program). Therefore, such types of measures could also be counted, in a certain way, as ‘sentence time served’.

<sup>14</sup> A concrete example will help to illustrate. Suppose: a suspect who has undergone electronic monitoring in the context of pre-trial detention for six months is finally sentenced to an actual prison term of 24 months. If electronic monitoring is considered as already served sentence time, 18 months of the prison sentence must still be served (with, according to current Belgian prison regulation, provisional release after two months, i.e.  $(24 \text{ months}/3) - 6 \text{ months pre-trial detention} = 2 \text{ months}$ ). If, however, the electronic monitoring is *not* taken into account (in other words is not considered equal to prison time served), the pronounced sentence of 24 months remains fully enforceable (with provisional release after eight months, i.e.  $24 \text{ months}/3 = 8 \text{ months}$ ). Thus, this concretely means that the initial ‘saving’ of six months (via electronic monitoring) will simply have to be served at a later time.

be drawn up? What to do about the social security situation of the person being monitored (e.g. unemployment benefit)? And especially concerning the possible application of GPS, what about the privacy of the suspect and the performance and reliability of the technology?

#### 4. CONCLUSION

Returning to the objectives – formulated earlier in this contribution – that could be attached to electronic monitoring, and taking into account the results of our research, it can be stated that the possible decision to implement electronic monitoring in the context of pre-trial detention must be described as: a policy measure that will require an additional (and probably large) budgetary effort, with probably a rather modest – certainly not substantial – impact on the number of prisoners in remand custody, which moreover is surrounded by numerous legal and practical-organisational issues.

The most relevant legal-technical and practical-organisational questions that electronic monitoring raises in the context of pre-trial detention have already been listed above; and, several of these have been further studied in depth in this contribution. Concerning the thorny question of whether electronic monitoring can contribute to relieving the burden on our prisons (in terms of reducing the prison population), it has already been explained elsewhere in this contribution that assessing the extent to which electronic monitoring might be able to result in a (drastic) reduction of the prison population is not self-evident. The possible reducing effects of electronic monitoring will probably be ‘offset’ by a number of (undesirable?) side effects that electronic monitoring could generate in the context of pre-trial detention. The ambitions or expectations concerning electronic monitoring in the investigative phase of criminal cases must also be tempered to some extent in this perspective. Whether the potential introduction of electronic monitoring will also result in cost-savings, is a completely different issue. While electronic monitoring in itself indeed seems to be cheaper than serving a prison sentence<sup>15</sup>, we believe that the introduction of electronic monitoring in the preliminary criminal inquiry phase will require a major additional financial investment: while savings could be realised via a possible reduction of the prison population with respect to a number of variable costs (food, clothing, remuneration for prison labour ...) skimping on the more ‘stable’ – and significant with respect to budget – costs (infrastructure and personnel) can only succeed if the prison population were to drastically decrease and thus the number of prisons shrink, *quod non*. Another obstacle in this regard is that, given the specificity of pre-trial detention, a potential reduction in the prison population would not be felt in only one institution, but would necessarily be spread across remand prisons, distributed across the entire territory (i.e. a reduction in a number of units in each of these institutions).

All of this does not have to mean that considering the introduction of electronic monitoring as an additional alternative to pre-trial detention must be abandoned in advance. Electronic monitoring after all can be considered as a valuable initiative based on a humane, human rights and ethical perspective, in the sense of a (at any rate assumed)

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<sup>15</sup> See *Parl. Vr.*, Kamer (House of Representatives), 2009-2010, QRVA no. 52-88, 4 January 2010 (question no. 103 - 10 December 2009, with answer on 29 December 2009), p. 132-133.

limitation of the harms of detention, more in line with the legal principle of the presumption of innocence. However, hoping for cost-savings and a significant decrease in the prison population is a daring gamble.

If finally electronic monitoring will be introduced as an alternative to pre-trial detention in the Belgian criminal justice system, is currently unclear. There's however little doubt that this question will instigate further parliamentary debate in the near future (see De Clerck, 2010: 10-11<sup>16</sup>). In this debate, one should also pay attention to the developments and experiences abroad. An important lesson from our literature review on electronic monitoring in other jurisdictions – which we didn't discuss in detail in this contribution – is in fact the lack of consensus regarding the introduction or not of electronic monitoring in the phase of the criminal investigation procedure. Several jurisdictions developed very different policies (see e.g. the situation in Scotland and Québec where it was finally decided not to introduce electronic monitoring; Barry *et al.*, 2007; Kaminski *et al.*, 2001; Dallaire and Lalande, 2000), use different models of electronic monitoring (cf. the experimental use of GPS-infrastructure in England and Wales and in The Netherlands), or pursue different objectives via the implementation of electronic monitoring (e.g. reducing prison overcrowding, saving costs for administrating prison services, improving the supervision of released suspects by new technologies, reducing 'pains of imprisonment' ...).

However, as also mentioned earlier in this paper, the debate should also focus on the use of the system of pre-trial detention itself, as we found that pre-trial detention is sometimes applied in an 'improper' manner (as a 'Short Sharp Shock punishment') and that it is very often used as a 'standard' measure towards illegal aliens. From this, the question arises if introducing electronic monitoring could really resolve these practices and reduce the prison population in a significant way...

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<sup>16</sup> See also: *Parl. St.*, Kamer (House of Representatives), 2009-2010, no. 52-2501/001 (Report in the name of the Justice Commission issued by Mrs. Mia De Schampelaere – *Straf- en strafuitvoeringsbeleid*), 24 March 2010, p. 44.

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