



The use of protective measures in Poland as a form of protection of society against certain perpetrators. The role of a probation officer in their enforcement

Stosowanie środków zabezpieczających w Polsce jako forma ochrony społeczeństwa przed niektórymi sprawcami przestępstw. Rola kuratora sądowego w ich wykonywaniu

Krzysztof Stasiak

Assistant Professor at the Department of Material Criminal Law and Criminology at the University of Gdańsk, District Probation Officer of the District Court in Gdańsk, Poland

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Abstract: In 2015, Poland has seen a serious reform in the scope of adjudication and enforcement of protective measures. The result is extension of not only the catalog of possible measures to be used, but also the circle of persons in relation to whom such measures may be adjudicated. On the other hand, reasons for their use – preventing repeated commission of an offense by a perpetrator – have not changed. The effectiveness of precautionary measures is primarily determined by the manner of their enforcement. Due to the above, in the article special attention was paid to their application, focusing first and foremost on the role of the judicial probation officer in this respect. He enforces precautionary measures in the form of electronic supervision of the place of residence as well as prohibitions and order referred to in art. 39 item 2-3 of the Penal Code. Moreover, he may also exercise supervision, adjudicated against certain perpetrators in connection with use of a precautionary measure in the form of therapy and addiction therapy. The article ends with conclusions and *de lege ferenda* postulates.

Keywords: probation measure, penal measure, precautionary measure, executive penal code, conditional discontinuance of proceedings, probation officer, prohibited act

Streszczenie: W Polsce w 2015 r. dokonano poważnej reformy w zakresie orzekania i wykonywania środków zabezpieczających. W jej wyniku poszerzono nie tylko katalog możliwych do zastosowania środków, ale też krąg osób wobec których takie środki można orzec. Natomiast nie zmieniły się przyczyny ich stosowania – zapobieżenie ponownemu popełnieniu przez sprawcę czynu zabronionego. O skuteczności stosowanych środków zabezpieczających decyduje przede wszystkim sposób wykonywania. Z uwagi na powyższe w artykule najwięcej miejsca poświęcono ich stosowaniu, skupiając się przede wszystkim na roli w tym względzie sądowego kuratora zawodowego. Realizuje on środki zabezpieczające w postaci elektronicznej kontroli miejsca pobytu oraz nakaz i zakazy, o których mowa w art. 39 pkt 2-3 k.k. Nadto może on też sprawować dozór, który jest orzekany wobec niektórych sprawców w związku z zastosowaniem środka zabezpieczającego w postaci terapii i terapii uzależnień. Artykuł kończy się wnioskami i postulatami *de lege ferenda*.

Słowa kluczowe: środek probacyjny, środek karny, środek zabezpieczający, kodeks karny wykonawczy, warunkowe umorzenie postępowania, kurator sądowy, czyn zabroniony

Introduction

One of the basic needs of even man is a sense of security. Each of us can perceive them differently, but certainly one of the most important elements is to protect every individual against another person's infringement on legally protected goods. In this case, the role of the state is to create such security. However, this is not an easy task, as the phenomenon of crime is one of the more complicated and the reasons for its occurrence should be found in various areas of human functioning (conditions in which he lives, social conditions of his functioning), but also in himself (his personality, experiences, attitudes, aspirations).¹

The degree of complexity of the phenomenon of crime corresponds to the diversity among people who commit crimes. This includes persons who pose a particularly high threat to others. At the same time, for some of them social rehabilitation interactions are completely ineffective.² This group certainly includes

psychopaths, who, as it was established by Beata Pastwa-Wojciechowska, for example in prison isolation, only simulate improvement in order to achieve benefits, such as conditional release.³

These kinds of person pose a big challenge for every state's criminal policy. As a result, they apply various measures to ensure security for the public, in particular from criminals that do not promise improvement.⁴ The remedies applied go by a different name, e.g., preventive measures (Austria), social protection measures (Belgium),⁵ precautionary measures (Poland). One may also observe the search for various, more or less effective, solutions to increase the level of citizens' security, e.g., centers of social adaptation operating under the Executive Penal Code of 1969,⁶ which have not in fact been called a precautionary measure, but *de facto* played such a role.

³ B. Pastwa-Wojciechowska, *Naruszenie norm prawnych w psychopatii. Analiza kryminologiczno-psychologiczna*, Gdańsk 2006, p. 287.

⁴ Szerzej W. Zalewski, *op. cit.*, p. 49 et seq.

⁵ Pławski, *Recydywa w projekcie kodeksu karnego*, „Nowe Prawo” 1969, no.1, p. 62.

⁶ The Act of April 19, 1969, the Executive Penal Code (OJ of no. 13, item 98 with changes).

¹ H. Kołakowska-Przełomiec, *Zapobieganie przestępczości*, Ossolineum, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1984, p. 28.

² W. Zalewski, *Przestępcy „niepoprawni” – jako problem polityki kryminalnej*, Wydawnictwo Arche, Gdańsk 2010, p. 17.

The amendment of penal law, which entered into force on 1 July 2015,⁷ has made significant changes to the precautionary measures applied in Poland. They covered three areas: the catalog of resources (it was seriously amended, as the system of non-insulative measures was expanded); the circle of indications for which the measure may be adjudicated (it has been substantially extended) and the rules for application of these measures. Particularly interesting is the introduction of several new libertarian precautionary measures, prompting to a careful look at their application and enforcement.

In view of the above, the purpose of this article is to analyze the principles of implementing precautionary measures of libertarian nature, including in particular those carried out by professional judicial probation officers. Motivation to take up this topic is constituted by the fact that until now, it has not been the subject of a broader analysis. The article also has implication objectives, as it will allow not only for a better understanding of the role of a professional probation officer in enforcement of discussed measures, but also to propose solutions to diagnosed problems.

Catalog of precautionary measures

According to art. 93a of the Penal Code, precautionary measures are:

1. electronic supervision of place of residence,
2. therapy,
3. addiction therapy,
4. stay in a psychiatric institution,
5. orders and prohibitions referred to in Article 39 points 2-3 of the Penal Code, if the Penal Code provides for the possibility of their use:
 - prohibition on holding a specific position, performing a specific profession or conducting a specific business activity;
 - prohibition on conducting activities related to

the upbringing, treatment, education of minors or provision of care for them;

- prohibition on staying in certain environments or places, contacting certain people, approaching certain persons or leaving a particular place of residence without the court's consent;
- no admission to mass events;
- no access to game centers and participation in gambling;
- order to periodically leave the premises occupied jointly with the aggrieved party;
- driving ban.

As it appears from the above, the catalog of precautionary measures carried out at large is very extensive, since it does not only cover the measure mentioned in item 4. This is a significant difference compared to the legal status in force prior to the amendment, as the measures listed in items 1-3 have been added, and use of the measure in the form of a stay in a psychiatric institution has been different.

There are several methods for classifying these measures in the literature. Agnieszka Barczak-Oplustil suggested the following division: 1) isolation measures (stay in a psychiatric institution); 2) so-called precautionary libertarian measures of curative nature described in art. 93 § 1 items 2-3 (therapy, addiction therapy); 3) libertarian measure of purely preventive nature, i.e., electronic supervision of the place of residence; 4) so-called administrative precautionary measures, i.e., adjudicated as a precautionary measure or prohibitions referred to in Article 39 points 2-3 of the Penal Code⁸ On the other hand, Igor Zgoliński,⁹ Joanna Długosz¹⁰ and P. Hofmański, L. K. Paprzycki

⁸ A. Barczak-Oplustil, Komentarz do art. 93a Kodeksu karnego, [in:] W. Wróbel, A. Zoll (ed.), Kodeks karny. Część ogólna, volume I, part II, Wydawnictwo Wolters Kluwer, Warszawa 2016.

⁹ I. Zgoliński, Komentarz do art. 93a Kodeksu karnego, [in:] V. Konarska-Wrzosek (ed.), Kodeks karny. Komentarz, Wydawnictwo Wolters Kluwer, Warszawa 2016.

¹⁰ J. Długosz, Komentarz do art. 93a Kodeksu karnego, [in:] M. Królikowski, R. Zawłocki (ed.), Kodeks karny. Część ogólna. Komentarz do art. 1-116, Wydawnictwo C. H. Beck, Warszawa 2017.

⁷ The Act of 20 February 2015 amending the Act - Penal Code and some other acts (OJ of 2015 item 396).

as well as A. Sakowicz¹¹ offered to divide them into measures of libertarian nature (electronic supervision of the place of residence and orders or prohibitions referred to in Article 39 items 2-3 of the Penal Code), therapeutic (curative)¹² and isolation (stay in a psychiatric institution). On the other hand, Filip Cieply divided the precautionary measures into non-curative (electronic supervision of the place of residence and orders or prohibitions referred to in Article 39 items 2-3 of the Penal Code) and curative (other).¹³

In my opinion, the second proposed division is the most accurate, as it clearly and adequately reflects the essence of precautionary measures and the scope of their application. The first of the discussed divisions, precautionary measures in the form of electronic supervision of the place of residence, as well as warrants or prohibitions (Article 39, 2-3 of the Penal Code), falls into separate categories. However, according to art. 41a § 1 and 2 of the Penal Code, a criminal remedy for the prohibition of approaching certain persons (Article 39 item 2b of the Penal Code) may have been controlled in the electronic supervision system. The literature emphasizes that the use of an order or prohibitions can only take place when "this is possible under the provisions determining conditions for adjudication of each of them (Articles 41-42 of the Criminal Code), and its ruling as a criminal measure is impossible due to the commission of an offense in a state of insanity."¹⁴ Pursuant to 43c § 1 of the Penal Code, punitive and precautionary measures in the electronic supervision system are performed as proximity or mobile surveillance. This control may be ordered for a period of 3 to 12 months (Article 43 §

1a of the Penal Code).¹⁵ Therefore, their common element is use of the electronic supervision system. Due to the demonstrated convergence between these institutions in the area of their implementation, it is difficult to treat electronic supervision of the place of residence and the order or prohibitions referred to in art. 39 items 2-3 of the Penal Code as separate categories of precautionary measures.

In the case of division of precautionary measures made by Filip Cieply, the differentiating criterion used in the form of treatment suggests that it constitutes the essence of these measures, which is not consistent with reality. Certain other, equally important, functions of precautionary measures are minimized this way: protective and preventive.¹⁶

Three years have passed since the introduction of legislative changes under discussion (including two full, i.e., 2016 and 2017). Therefore, it is worth looking at the consequences that this has caused. As can be seen from the table below, in comparison to the previous year, in 2017 the number of precautionary measures directed to implementation increased significantly. The largest increase concerned the form of therapy (increase by 138.7%), while the smallest concerned the order or prohibitions referred to in art. 39 points 2-3 of the Penal Code (by 75%). It is worth noting that the electronic supervision of the place of residence, considered the mildest precautionary measure, was the least frequently used one. It seems that the outlined tendency should be associated with the widening circle of persons for whom precautionary measures can be applied, as a result of which more and more of them are adjudicated. At the same time, the measure's low popularity in the form of electronic supervision of the place of residence is associated

¹¹ P. Hofmański, L. K. Paprzycki, A. Sakowicz, Komentarz do art. 93a Kodeksu karnego, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Wydawnictwo Wolters Kluwer, Warszawa 2016.

¹² J. Długosz, P. Hofmański, L. K. Paprzycki and A. Sakowicz referred to them as therapeutic (curative), whereas I. Zgoliński called them healing measures.

¹³ F. Cieply, Komentarz do art. 93a Kodeksu karnego, [in:] A. Grześkowiak, K. Wiak, *Kodeks karny. Komentarz*, Wydawnictwo C. H. Beck, Warszawa 2017.

¹⁴ K. Postulski, M. Siwek, Środki zabezpieczające o charakterze administracyjnym, [in:] L. K. Paprzycki (ed.), *System prawa karnego*, volume VII, Wydawnictwo C. H. Beck, Warszawa 2015, p. 649.

¹⁵ Szerzej K. Stasiak, *Zadania kuratora sądowego w związku z wykonywaniem systemu dozoru elektronicznego*, [in:] K. Stasiak, *Zarys metodyki pracy kuratora sądowego*, Wydawnictwo Wolters Kluwer, ed. IV, Warszawa 2018, p. 513 et seq.

¹⁶ E. Zarębska, *Geneza środków zabezpieczających oraz kilka uwag komparatystycznych na temat systemów kontynentalnego i common law*, „Kwartalnik Sądowy Apelacji Gdańskiej” 2017, no. 1, p. 62.

Tab. I. The number of precautionary measures that have been received (in regional and district courts).

Type of precautionary measure (Article 93a of the Penal Code)	2015	2016	2017
Electronic supervision of the place of residence	4	15	33
Therapy	27	351	838
Addiction therapy	18	211	444
Stay in a psychiatric institution	126	516	833
Order or prohibition specified in art. 39 items 2-3 of the Penal Code	10	44	77
Total	185	1.137	2.225

Source: own study based on statistical prints MS-S10r and MS-S10r for the years 2015-2017. The number of applied protective measures shown in the table is not equal to the number of persons to whom it was adjudicated, as more than one measure was applied for some of them; e.g., in 2017 it contributed to the implementation of 2,225 precautionary measures applied to 2,054 persons.

with its not very high self-sufficiency, as the data collected during its performance can at most constitute evidence in the event of the perpetrator committing a prohibited act. For this reason, its greater usability can be seen when the court combines it with some other precautionary measures.

Source: own study based on statistical prints MS-S10r and MS-S10r for the years 2015-2017. The number of applied protective measures shown in the table is not equal to the number of persons to whom it was adjudicated, as more than one measure was applied for some of them; e.g., in 2017 it contributed to the implementation of 2,225 precautionary measures applied to 2,054 persons.

Use and enforcement of libertarian measures

As it results from the Penal Code, the court, when deciding on precautionary measures, is obliged to follow certain rules. Above all, a precautionary measure can only be adjudicated if other means specified in the Penal Code¹⁷ or in other acts are not sufficient (article 93b § 1 of the Penal Code) to prevent the perpetrator from committing a prohibited act (principle

of necessity).¹⁸ On the other hand, art. 93b § 3 of the Penal Code reads that the principle of proportionality and, according to it, the precautionary measure and principles for its implementation should correspond to the degree of social harmfulness of a prohibited act that the perpetrator can potentially commit and the likelihood of committing it.¹⁹ The literature emphasizes that these rules apply to every step of the proceedings regarding precautionary measures, and therefore both to the judicial stage and to proceedings related to its enforcement.²⁰

The court, pursuant to art. 93b § 4 of the Penal Code, may decide more than one precautionary measure in relation to the same offender.²¹ Naturally, not all precautionary measures will be suitable to be applied at the same time to one perpetrator, e.g., a stay in a psychiatric institution and electronic supervision of the place of residence.

¹⁸ Uzasadnienie do projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw <http://orka.sejm.gov.pl/Druki7ka.nsf/0/39FD209B7AC6C45AC1257CDE0042D631/%24File/2393%20cz%201.pdf>, p. 30 [accessed on: 19/07/2018].

¹⁹ Ibidem; see also I. Zduński, Środki zabezpieczające w projekcie nowelizacji kodeksu karnego, „Prokuratura i Prawo”, 2015, no. 3, p. 53.

²⁰ K. Postulski, Wykonywanie środków zabezpieczających o charakterze terapeutycznym, [in:] L. K. Paprzycki (ed.), System prawa karnego, tom VII, Środki zabezpieczające, Wydawnictwo C. H. Beck, Warszawa 2015, p. 366.

²¹ Barczak-Oplustil A., Charakter środków zabezpieczających w nowelizacji Kodeksu karnego z 20 lutego 2015 r. Wprowadzenie do dyskusji, „Palestra” 2015, no. 7-8, p. 115.

¹⁷ A. Górski, M. Łuksza, Szczególne świadczenia zdrowotne, [in:] L. Bosek, A. Wnukiewicz-Kozłowska (ed.), System prawa medycznego, Wydawnictwo C. H. Beck, Warszawa 2018, p. 876 et seq.

The time of application of a precautionary measure is not determined in advance (Article 93d § 1 of the Penal Code, Article 99 § 2 of the Penal Code). The court may change the measure imposed against the perpetrator or change the manner of its enforcement, if the previously imposed measure has become inappropriate or its enforcement is not possible (Article 93b § 3 of the Penal Code). An exception is a measure in the form of stay in a psychiatric institution, as it can be adjudicated only after meeting the conditions referred to in art. 93g of the Penal Code.

Precautionary measures referred to in art. 93a § 1 items 1-4 of the Penal Code, are subject to waiver when their further use is no longer necessary. However, measures in the form of orders or prohibitions referred to in art. 39 points 2-3 of the Penal Code, are subject to annulment, "when the reasons for their ruling ceased to exist" (Article 99 § 2 of the Penal Code).

The group of entities to which a libertarian precautionary measure may be found contains certain restrictions. They result from the fact that a measure in the form of an order or prohibition may only be applied to a person referred to in art. 31 § 1 of the Penal Code, therefore towards a person of mental incapacity. However, a measure in the form of electronic supervision of the place of residence may be adjudicated against all offenders referred to in art. 93c of the Penal Code

Due to the wide variety of possible libertarian precautionary measures, there are also large variations among entities responsible for their enforcement. The catalog of these entities is included in art. 2 of the Penal Code. In the case of enforcing libertarian precautionary measures, these include: a professional judicial probation officer, a competent governmental administration body or local self-government, commander of the competent Police unit.

The professional judicial probation officer, in accordance with art. 173b of the Executive Penal Code, organizes and controls the execution of a precautionary measure implemented in the electronic supervi-

sion system, therefore the measure referred to in art. 93a § 1 item 1 of the Penal Code (electronic supervision of place of residence). On the other hand, according to art. 181a § 2 of the Executive Penal Code, supervision over the execution of a prohibition on residing in certain environments or places, contacting certain persons, approaching certain people or leaving a particular place of residence without the court's consent, as well as a periodic order to leave the premises occupied jointly with the victims are performed by a professional probation officer.

The literature expressed a view that "the use of electronic supervision of the place of residence can be a strong incentive for the perpetrator to fulfill the probative obligations imposed on him under Art. 72 § 1 item 7 of the Penal Code (...) and art. 72 § 1 item 8 of the Penal Code"²² However, the presented proposal to apply this precautionary measure is questionable; in general in cases where the precautionary measure will be applied, it is not possible to impose probative obligations on the perpetrator.²³

It should also be noted that in accordance with art. 93b § 3 of the Penal Code, the ordered precautionary measure should not only be appropriate "to the degree of social harmfulness of the offense, which the offender may commit, and the probability of its commission", but also the manner of its enforcement should comply with these rules. Thus, the method of implementing the precautionary measure may vary depending on characteristics of the perpetrator against whom it was applied. In addition, the court may also change this

²² P. Zakrzewski, M. Pyrcak, A. Barczak-Oplustil, Środki zabezpieczające o charakterze wolnościowym, [in:] W. Wróbel (ed.), Nowelizacja prawa karnego 2015. Komentarz, Krakowski Instytut Prawa Karnego, Kraków 2015, pt. 14.64.

²³ As stated above, the court may decide on a precautionary measure when it is necessary to prevent the perpetrator from committing an offense and other possible legal remedies are not sufficient. Therefore, if the court did not apply punishment against the perpetrator, it is not possible to impose probationary duties on him. However, if he has applied this penalty, he may also impose penal measures, whose enforcement is more formalized, and the non-enforcement of which has painful consequences (committing offenses specified in Article 244 of the Penal Code); therefore, imposing probative duties referred to in Article 72 of the Penal Code seems pointless (plenty probative duties coincide with many punitive measures as to their scope of application).

method of enforcement. It follows from the quoted provision that it is the court, not the authority that enforces the measure, who is entitled to determine the manner of its enforcement. If the court failed to do so, and the probation officer has doubts as to how the judgment will be enforced, pursuant to art. 13 § 1 of the Executive Penal Code, he may apply to the court which issued the decision to resolve these doubts or to determine the manner of enforcement of the adjudicated precautionary measure.

Electronic supervision of the place of residence

As it follows from art. 43a of the Executive Penal Code, the precautionary measure whose enforcement is combined with use of the electronic supervision system is carried out in accordance with the provisions of Chapter VIIa of the Executive Penal Code (art. 43a-43zac). However, other sections of the Executive Penal Code and Penal Code also include provisions that apply to the enforcement of this measure.

According to art. 43b § 3 item 2, a precautionary measure in the form of electronic supervision of the perpetrator's place of residence is carried out in the electronic supervision system as mobile surveillance. This measure can be performed if it is allowed by the technical conditions. When the supervising entity (entity that supports the system in technical terms) notifies the court enforcing the precautionary measure that it is not possible to immediately start enforcement of the measure, the court decides to postpone its enforcement for a definite period. The total deferral cannot last more than one year (Article 43i § 2 of the Executive Penal Code). If, after this time, it is still not possible to immediately commence enforcement of a precautionary measure, the court shall rule on its amendment or repeal (Article 43j § 2 of the Executive Penal Code). Therefore, this is an exception to the general principle expressed in art. 93b § 2 of the Penal Code and art. 99 § 2 of the Penal Code, that the court repeals the precautionary measure if its application is no longer necessary or if

the reasons for its adjudication have ceased (in the case of an order and prohibitions).

The court competent to enforce a precautionary measure in the form of electronic supervision of the place of residence is one in whose jurisdiction the perpetrator has a permanent residence (Article 43e § 3 in connection with Article 199a § 2 of the Executive Penal Code), which means it is the district court. His role is to supervise enforcement of the measure. On the other hand, the court which issued the judgment is competent to decide on the measure (e.g., in the scope of its repeal - Article 199a § 1 of the Executive Penal Code). Due to the above, these may be two different courts.

Commencement of enforcement of the precautionary measure in the form of electronic supervision of the place of residence takes place in conditions specified in art. 43k of the Executive Penal Code. Thus, its beginning takes place on the day when the technical means necessary to perform electronic supervision of the place of residence were launched against the perpetrator. This is also the moment when the professional judicial probation officer begins his activities. The first action that he should perform is to meet with the perpetrator in order to interview him (Article 173b § 3 of the Executive Penal Code). He informs him about his duties and powers, but also makes arrangements and discusses all the necessary issues that concern the perpetrator's cooperation with the probation officer in order to ensure correct enforcement of the precautionary measure.²⁴ Moreover, the probation officer, during this contact, obtains his telephone number or e-mail address, enabling him to contact the perpetrator while enforcing the precautionary measure. If the perpetrator agrees, calls, notices or information may also be sent by telephone or e-mail.²⁵

The regulations do not indicate the scope which the

²⁴ § 7 of the Regulation of the Minister of Justice of 10 October 2016 on the manner and detailed conditions for execution of penalties, penal measures and precautionary measures in the electronic supervision system (OJ of 2016, item 1698).

²⁵ *Ibidem*, § 4 par. 2.

perpetrator's instructions regarding duties and rights should cover. As a matter of fact, a regulation was issued based on art. 43k § 8 of the Executive Penal Code regarding a template for written caution of the convict in connection with enforcement of electronic supervision,²⁶ however, it cannot apply to enforcement of the precautionary measure discussed, since it refers to a completely different situation. Therefore, a suggestion should be put forward that this instruction include: art. 93e of the Penal Code (obligation to undergo continuous monitoring of the place of residence and carry a transmitter), art. 93d of the Penal Code (the time of applying the measure is not determined in advance), art. 93b § 2 of the Penal Code (the court repeals the precautionary measure when its further use is not necessary), art. 93b § 3 of the Penal Code (the court may change the ordered measure or manner of its enforcement if the previously imposed measure has become inappropriate or its enforcement is not possible), art. 93b § 4 of the Penal Code (more than one precautionary measure may be adjudicated against the same offender), art. 93d § 6 of the Penal Code (possibility of repeated adjudication of a precautionary measure), art. 99 of the Penal Code (the court repeals a precautionary measure in the form of prohibitions referred to in Article 39 items 2-3 of the Penal Code as soon as the reasons for its ruling have ceased), art. 43n § 1 of the Executive Penal Code (obligation to carry a transmitter; take care of entrusted technical means; make available technical means entrusted to control; provide explanations regarding the course of measure enforced to authorized persons and obligation to appear to answer a summon of a judge and probation officer), art. 4 of the Executive Penal Code (enforcing a measure while maintaining the principle of humanitarianism), art. 5 of the Executive Penal Code (compliance with orders issued by relevant authorities to enforce judgment), art. 6 of the Executive Penal Code (the right to submit applications and complaints).

²⁶ Regulation of the Minister of Justice of 10 October 2016 on a written model of instructions regarding the convict's rights and obligations related to electronic supervision as well as consequences of violation of these obligations (OJ of 2016 item 1692).

A professional judicial probation officer enforcing a precautionary measure in the form of electronic supervision of the place of residence documents the actions undertaken by recording data in the communication and monitoring system (a computer program used to operate the electronic surveillance system). This system also includes all information, procedural documents, and decisions that relate to the measure being enforced.²⁷ The probation officer assesses the perpetrator's behavior, in particular taking into account his compliance with the legal order, compliance with obligations related to enforcement of the precautionary measure, the perpetrator's relationship to the authorities enforcing the decision. The probation officer provides this information to the court at his request.²⁸

Signing in to the system that supports the electronic surveillance system, the professional judicial probation officer can check whether the perpetrator has remained within the system's reach at all times. If this was not the case, he should determine the reasons therefor, for example, by calling the perpetrator to his office for an interview. He should periodically determine whether the convict observes the legal order, for example, by contacting the police.

The judicial probation officer, performing electronic supervision of the perpetrator's place of residence, is tasked with assisting in his social re-adaptation. Moreover, he is obliged to control the performance of duties and instructions imposed on him by the perpetrator. This supervision, in accordance with the assumptions of the legislator, aims to influence the perpetrator and prevent his return to crime (Article 173b § 2 of the Executive Penal Code). Naturally, in the case of electronic supervision of the place of residence, it is hypothetically possible to enforce these activities if the perpetrator was obliged to do so or to use another precautionary measure, e.g., in the

²⁷ Regulation of the Minister of Justice of 10 October 2016 on the method and detailed conditions (...), op. cit., § 5.

²⁸ *Ibidem*, § 10.

form of prohibitions referred to in art. 39 items 2-3 of the Penal Code

Regulations do not indicate the frequency with which the probation officer should take actions in a case, including actions documenting the perpetrator's behavior. Because art. 173b § 2 of the Executive Penal Code discusses "strict control of the enforcement of (...) duties and instructions", therefore, it should be acknowledged that the probation officer should perform such activities (control) quite often, e.g., several times a week (access to the electronic supervision system). This is all the more justified by the fact that precautionary measures are imposed only in relation to persons who are likely to repeat a crime.

There are no grounds to consider that the tasks of a probation officer enforcing this precautionary measure should include visiting the offender at his place of residence, as there is no legal norm that would establish such an obligation. As a consequence, the perpetrator is also not obliged to allow the probation officer to enter his place of residence.²⁹

For incomprehensible reasons, a professional judicial probation officer implementing electronic supervision of the perpetrator's place of residence was not granted the right to apply to the court for a decision, change or revocation of the precautionary measure. Such an entitlement, in accordance with art. 199b § 1 of the Executive Penal Code, is held by the prison governor, head of a psychiatric institution or manager of a treatment facility, in which the perpetrator participates in therapy or addiction therapy. It seems obvious that the probation officer, when executing the adjudicated application of a precautionary measure, may observe the need of its repeal or change. Therefore, he should have the right to submit an applica-

tion adequate to the situation to the court. At present, the court may at most inform about the need to initiate appropriate proceedings *ex officio*.

When performing electronic supervision of the place of residence, the question may also arise whether there are situations in which the perpetrator's assembled transmitter can be removed. This situation is provided for in art. 43r § 1 of the Executive Penal Code; in the case of an urgent need, due to a threat to human life or health, the professional judicial probation officer may agree to remove the transmitter.

The probation officer performs activities related to enforcement of the measure at the end of its repeal or as a result of other reasons excluding the enforcement, for example the death of the perpetrator.

At the end of this part, it is also worth considering how a probation officer is supposed to enforce an electronic check of residence in a situation where the perpetrator has been adjudicated another precautionary measure, the enforcement of which does not belong to the probation officer, e.g., therapy. In such a situation, there is no reason to believe that a probation officer has any role to play in enforcing this measure, but it would also be difficult to accept a situation where the probation officer would not show any interest in the course of activities being part of this measure's enforcement. The more so that in accordance with art. 173b § 2 of the Executive Penal Code, the probation officer's task is to help the perpetrator in his social re-adaptation.

Order or prohibitions referred to in art. 39 § 2-3 of the Penal Code

The Penal Code provides for a fairly extensive catalog of prohibitions and one order to be used as a precautionary measure. However, only some of them can be performed by a professional judicial probation officer. This results from the wording of art. 205 of the Executive Penal Code; to enforce an order or prohibition adjudicated in relation to a precautionary measure

²⁹ The Executive Penal Code expressed such an obligation in two places: in art. 43n § 2 (refers only to the convict who is subject to a penalty of deprivation of liberty in the electronic supervision system) and in art. 169 § 3 (refers to probation, the penalty of restriction of freedom – art. 55 § 2 of the Executive Penal Code, and supervision over enforcement of certain criminal measures - art. 181 § 4 of the Executive Penal Code).

referred to in art. 39 items 2-3 of the Penal Code, the aforementioned article recommends to apply art. 180-186 of the Executive Penal Code. However, in accordance with art. 181a § 2 of the Executive Penal Code, the tasks of a professional judicial probation officer include exercising supervision over the execution of a prohibition on residing in certain environments or places, contacting certain persons, approaching certain persons or leaving a particular place of residence without the court's permission and periodical leave of premises occupied jointly with the injured.

The provisions of art. 169 and 172 of the Penal Code are used to enforce this supervision.³⁰ They define the rights and obligations of the perpetrator and probation officer related to supervision over implementation of the order or prohibitions. Thus, the perpetrator is obliged to appear on every request of the court or probation officer; provide clarification on execution of the order or prohibitions; cannot change, without the consent of the court, his permanent place of residence; obliged to allow the probation officer to enter his place of accommodation and inform him about a change of place of employment. On the other hand, a probation officer entrusted with supervision over execution of the precautionary measure in question should immediately contact the perpetrator and instruct him about his duties and entitlements. The judicial probation officer is obliged to periodically report to the court on the performed supervision. The deadline for submission and its substantive scope have not been determined. Because in the case of supervision, reports should be submitted every six months or at every request of the court, it should be considered that this principle should also apply to supervision of the precautionary measure in question.

The main difference between the listed prohibitions

³⁰ More on the enforcement of these measures: Stasiak K., Nadzór, o którym mowa w art. 181a § 2 k.k.w., [in:] K. Stasiak, *Zarys metodyki pracy kuratora sądowego*, Wydawnictwo Wolters Kluwer, ed. IV, Warszawa 2018, pp. 642-650; G. Rybicka, *Praktyczne aspekty sprawowania nadzoru nad wykonywaniem środka karnego orzeczonego na podstawie art. 181a § 2 Kodeksu karnego wykonawczego przez sądowego kuratora zawodowego, „Probacja”, 2017, no. 2, pp. 137-152.*

or order adjudicated as a precautionary measure and those pronounced as a criminal measure is the entity in respect of which they can be applied and their duration. Thus, such precautionary measures can only be applied to a person of mental capacity and they continue until reasons for their ruling have ceased to exist. At the same time, a statement that the perpetrator is exercising a prohibition or order may prove insufficient to make such a decision (to repeal the measure).

Furthermore, in the case of these measures, a probation officer is not entitled to submit applications to the court regarding the ruling, amendment or repeal of the precautionary measure.

Custody of a probation officer applied with a precautionary measure

According to art. 202b § 1 of the Executive Penal Code, the court adjudicating therapy or addiction therapy for the convict specified in art. 93c (5) (convicted of an offense committed in connection with addiction to alcohol, intoxicant or other similar measure) who is released from a psychiatric institution or prison, sets the trial period for a period of 6 months to 2 years and puts him under supervision a probation officer or a trusted person, association, institution or social organization whose activities include caring for upbringing, preventing demoralization or helping convicted persons.

Thus, supervision adjudicated on this basis (which is obligatory) is an additional means of influencing the perpetrator. The legislator did not specify the purpose of this supervision; therefore, it should be considered that it is the same as in other types of surveillance. During its enforcement, the perpetrator should therefore be given help in his social re-adaptation, while “control of strict execution by the convict (perpetrator - note by K.S.) of duties and orders imposed on him is aimed to have an educational impact and prevent from return to crime.” A new, important element is additionally present in these kinds of cases - a precautionary measure in the form of therapy or addic-

Tab. II. Probation performed at the end of the statistical period in 2015-2017.

YEAR	2015	2016	2017
Probation due to conditional release	31,820	26,366	21,576
Probation due to conditional suspension of penalty	156,029	121,904	90,857
Probation due to conditional discontinuance of criminal proceedings	3,094	2,997	3,278
Probation ordered under art. 202b § 1 of the Executive Penal Code	9	20	17
Total	190,952	151,287	115,728

Source: own study based on statistical data contained in the MS-S40r print for the years 2015-2017.

tion therapy. Therefore, the probation officer, enforcing supervisory activities, should also check whether these measures are implemented by the perpetrator.

The manner of enforcing these types of supervision does not differ significantly from performance of supervision imposed on other legal grounds. In literature, this issue has already been discussed, so there is no need to repeat it.³¹ I would just like to point out that supervision adjudicated on the basis of art. 202b § 1 of the Executive Penal Code constitutes a small group among the total number of surveillance (table II).

Source: own study based on statistical data contained in the MS-S40r print for the years 2015-2017.

Conclusion

Precautionary measures, as the name suggests, are primarily intended to prevent repeated commission of an offense by persons who have been subjected to it, but also to protect society. However, effectiveness of these measures is not determined by their adjudication alone, but by the manner of their enforcement. Therefore, the key role is played by entities whose competencies include enforcement of such tasks. Among them an important role is played by the judicial professional probation officer, who, apart from electronic supervision of the perpetrator's place

of residence, also supervises the order or certain prohibitions referred to in art. 39 points 2-3 of the Penal Code and performs supervision ordered in addition to a precautionary measure or addiction therapy.

A shortcoming in the manner of regulating precautionary measures is imprecise determination of the way of their enforcement. This applies to measures of libertarian nature in particular. In their case, a frequently used method of determining the manner of their enforcement is referring to the provisions relating to enforcement of other judgments (Article 205 of the Executive Penal Code), which always causes difficulties in interpretation. However, in the case of measures that are ruled against persons who often pose a serious threat to the legal order, this should not take place. Moreover, for unknown reasons, a judicial professional probation officer is granted certain rights in connection with execution of certain judgments; an example is supervision applied simultaneously with a precautionary measure in the form of therapy or addiction therapy (e.g., submitting specific applications to the court). Other times, he does not have such entitlements, as in the case of submitting applications in connection with implementation of electronic supervision of the perpetrator's place of residence. There is no doubt that these issues should be regulated and harmonized for the sake of transparency and efficiency of proceedings.

³¹ Szerzej np. A. Rzepniewski, W. Liszke, K. Stasiak, *Wychowawczo-zapobiegawcza funkcja dozoru*, [in:] K. Stasiak, *Zarys metodyki pracy kuratora sądowego*, Wydawnictwo Wolters Kluwer, ed. IV, Warszawa 2018, pp. 360-441.

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Corresponding author dr Krzysztof Stasiak; District Court in Gdańsk, Regional Probation Officer; ul. Nowe Ogrody 30/34, 80-803 Gdańsk; Phone no. +48 58-32-13-108; Fax +48 58-32-13-308; e-mail: krzysztof.stasiak@prawo.ug.edu.pl

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