

Ways to improve the procedure of placement under house arrest in Ukraine

Шляхи вдосконалення кримінально-процесуального порядку виконання домашнього арешту в Україні

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Ключові слова:

домашній арешт, запобіжний захід, механізм реалізації, електронні засоби контролю.

Relevance. Currently more and more attention is paid to strengthening of mechanisms of criminal proceeding parties' rights and legitimate interests protection at different stages, in particular during the application of preventive measures. One of the manifestations of the mentioned approach is house arrest inclusion in its list, fixed by relevant provisions of new Criminal Procedure Code of Ukraine.

House arrest as one of preventive measures in Ukrainian criminal process may be applied to persons suspected or accused of commission of a crime subject to punishment in form of imprisonment and basically constitutes a prohibition for suspect or accused to leave the dwelling all day or within the specified period according to the court's ruling. When selecting the house arrest as preventive measure, court must firstly focus on the following issues: is the person an owner or co-owner of this dwelling; is the person officially registered as the dweller; does he/she temporarily or constantly stay at this dwelling without registration etc.

As V. Tertyshnyk notes: «House arrest may be a truly effective preventive measure only upon condition of ensuring its proper implementation».¹ Without its implementation there is no sense to select house arrest as preventive measure.

Still, strong tendency towards certain rules enshrining at the statutory level does not stipulate the unconditioned practical implementation of relevant requirements and standards which, in its turn, leads to problems. That is why the abovementioned problems require comprehensive study to reach the key goal of house arrest – performance of relevant procedural obligations by suspect or accused and prevention of any attempts to escape the prosecution.

Analysis of latest research and publications. House arrest issues were thoroughly studied by many scholars and practitioners including O. Ahakerimov, A. Bezrukava, M. Vilhushynshyi, I. Didiuk, Y. Likholyetova, V. Farynyk etc. Still some issues related to this topic require additional attention due to lack of theoretical background.

The aim of this article is to analyze the statutory acts regulating the procedure of house arrest application in Ukrainian criminal process, practical aspects of its application and formulation of proposals for its improvement.

Basic material. Analysis of legal regulation of house arrest procedure application in Ukraine proves that it is performed in both traditional and innovative forms of person's behavior control. Traditional forms include visits to suspect's or accused place of residence; making phone calls and receipt of relevant clarifications. Innovative control forms present unique methods to ensure control of behavior of persons placed under house arrest, e.g. use of electronic control means (hereinafter referred to as ECM) – special devices.

Naturally, certain questions arise – who will exercise the control and in what way? According to p. 3 of Article 181 of Criminal Procedure Code of Ukraine, registration and control over behavior of persons placed under house arrest

¹ Тертишник В.М. Кримінальний процес України. Загальна частина: підручник. Академічне видання. К.: Алерта, 2014. С. 409

are the responsibility of National Police of Ukraine². The law clearly states that the ruling on house arrest is submitted to police unit responsible for the location (district, region) where the suspect's or accused dwelling is officially registered. And if the legislator defines the territorial body, still there is no list of officials or structural units designated to perform the monitoring of established restriction observance presented in Criminal Procedure Code of Ukraine.

At the same time bodies of National Police of Ukraine act according to the Instruction on procedure of court house arrest application ruling execution by NPU agencies/bodies and replacement of previously selected preventive measure with house arrest (approved by the Order of MIA of Ukraine of 13.07.2016 № 654)³. According to par. 3.1. of this Instruction, the head of NPU agency/body designates the subordinate structural unit taking into account the circumstances of criminal proceeding. But even this by-law does not contain the list of structural units or officials responsible for control over suspect's or accused behavior.

A. Khytra and A. Ratnova provide reasonable comments: «Relative vagueness regarding the subject responsible for execution of house arrest application allows to «toss over» the abovementioned task from one person to another – in this case it is impossible to hold the specific person liable for failure to perform his/her duties»⁴. At the same time looseness of the person's behavior control mechanism is one of the factors which obstructs the proper practical application of such preventive measure as house arrest.

Having analyzed the practice of house arrest application on doctrinal level, O. Ahakerimov offers to establish a special service on the base of MIA of Ukraine (the text implies that this structural unit will be established on the base of NPU agency/body) responsible solely for issues related to house arrest issues⁵.

In our opinion this statement is reasonable, especially if we focus on tendency towards substantial increase of court rulings authorizing the house arrest application regarding suspects and accused. But in current conditions establishment of such service is considered to be more of a perspective project waiting for its implementation in future which requires additional financial resources, appropriate technical and material support and foremost the qualified staff.

We offer to establish the statutory procedure for designation of persons responsible for control of house arrest application without use of ECM (traditional control forms), selected among the NPU structural units current staff. This opinion is supported with a few arguments – firstly, it will ensure strengthened interaction between the NPY body/agency units staff; secondly, during the inspection of established restrictions observance constant communication between the suspect (accused) and staff of structural unit dealing with relevant crimes will be maintained which, in its turn, allows to prevent future crimes. Thirdly, the offered procedure of designation of the unit responsible for established restrictions observance will allow to proportionally involve officials to these inspections without placing extra burden on the unit. According to results of our analysis, this measure (79% of analyzed criminal proceedings materials) was applied by court to suspect or accused with relevant designation of local police inspectors which had negatively affected the effectiveness of their work.

Delegation of tasks related to house arrest application to staff from different structural units of NPU agency/body does not require additional financial resources and saved assets may be used, for example, to purchase additional ECM.

On the basis of the aforesaid we offer the following algorithm of actions for designation of officials (unit), responsible for house arrest application without use of ECM to be considered by the NPU authority:

- 1) registration and control over behavior of suspect or person accused of commission of grievous or extremely grievous crime must be delegated to detectives;
- 2) registration and control over behavior of suspect or person accused of commission of crime related to drug trafficking must be delegated to detectives responsible for handling the drug trafficking cases (if absent, designate independently another unit according to staffing plan);

² Кримінальний процесуальний кодекс України // від 13.04.2012 № 4651 VI. URL: <http://zakon5.rada.gov.ua/laws/show/4651-17/page>.

³ Про затвердження Інструкції про порядок виконання органами Національної поліції ухвал слідчого судді, суду про обрання запобіжного заходу у вигляді домашнього арешту та про зміну раніше обраного запобіжного заходу на запобіжний захід у вигляді домашнього арешту: Наказ МВС України від 13.07.2016 № 654. URL: <http://zakon3.rada.gov.ua/laws/show/z1087-16>.

⁴ Хитра А.Я. Ратнова А.В. Проблеми застосування домашнього арешту в кримінальному провадженні. Науковий вісник Львівського державного університету внутрішніх справ. 2016(2). С. 386.

⁵ Агакерімов О.Н. Домашній арешт в системі запобіжних заходів: дис. канд. юрид. наук: 12.00.09. Одеса, 2016. С. 162.

- 3) registration and control over behavior of suspect or person accused of commission of minor or average gravity crime to be delegated to local police inspectors;
- 4) registration and control over behavior of suspect or person accused of commission of economic crime to be delegated to operative staff from financial security units (if absent, independently designate another unit according to staffing schedule);
- 5) registration and control over behavior of minor suspect or accused to be delegated to juvenile crime prevention units.

In our opinion the proposed procedure will allow to reduce the burden placed on specific unit which, in its turn, will ensure observance of house arrest rulings by NPU staff and effective control over behavior of suspects and accused. Still, some experts offer to delegate this responsibility (control) to the investigator directly responsible for the case. For example, L. Zaitseva justifies this statement with the following: investigator is fully aware of all case details and person subject to house arrest⁶.

A. Bezrukava disagrees with this statement and assumes that any additional responsibility delegated to investigator may prolong the investigation process. Also she stresses that pre-trial investigation, compared to application of house arrest, may be conducted not only by the NPU agency/body, but also by other agencies according to established jurisdiction⁷.

Under these circumstances it is not reasonable to delegate the responsibility of house arrest application control to investigator directly responsible for the case, especially if we take into account that suspect may not reside within the territory controlled by the police unit, responsible for pre-trial investigation.

Issues related to application of innovative means to control the behavior of suspects or accused are regulated in a different way. According to «Procedure of electronic control means application», approved by MIA of Ukraine 08.06.2017 № 480, regional units in the structure of NPU Main Departments (NPU MD) are tasked to perform electronic monitoring of location of suspects or accused persons subject to house arrest with use of ECM⁸. Special role in this process is given to units of organizational and analytical support and operative response (UOASOR) – these are relatively new structural formations which have recently replaced the HQ units.

Before the designation of unit responsible for control over suspects' and accused persons location by MIA of Ukraine M. Vilhushanskyi and Y. Lykholietova expressed their concern: «It is plausible that we will witness the involvement of State Guard Service which is already equipped with the network of centralized control boards and specialized wireless alarm systems»⁹. In our opinion the option for responsible unit designation, proposed by scholars must be supported. Taking into account that units of State Guard Service (currently – the Guard Police Department), operating within the system of NPU agencies/bodies, are directly subordinated to the unit duty officer with initial aim to ensure efficient interaction between the police staff working in the same agency while checking the notifications on ECM alert warnings, the proposed responsible guard police unit is an adequate alternative to existing UOASOR.

In order to ensure the electronic monitoring NPU MD premises are equipped with stationary control boards namely personal computers with required software intended for processing information on observance of house arrest procedure by suspect or accused. In the course of electronic monitoring performance key task of police staff is to ensure 24/7 surveillance over the information on observance of relevant restricting measure procedures by suspect or accused, processed by stationary control boards⁶.

V. Farynnyk notes that: «Use of electronic control means in case of house arrest selection as restricting measure is itself a right but not a requirement according to interpretation of part 5 of Article 181 and part 4 of Article 195 of Criminal Procedure Code of Ukraine. In particular, is it absolutely prohibited to use any electronic control means which lead to certain disturbances in person's everyday life, substantial discomfort or may potentially pose threat to life and health of this person (for example, use of ECM may be prohibited in case if person suffers from cardiovascular diseases)»⁷.

Use of ECM to control suspect's or accused location facilitates the control procedure and ensures effective and timely response in case of any violation related to house arrest requirements fulfillment. In 2017 382 vio-

⁶ Про затвердження Порядку застосування електронних засобів контролю: Наказ МВС України від 08.06.2017 № 480. URL: <http://zakon5.rada.gov.ua/laws/show/z0860-17>.

⁷ Фаринник В.І. Сутність та особливості застосування запобіжного заходу у вигляді домашнього арешту. Юридичний часопис Національної академії внутрішніх справ. 2015. № 1. С. 26.

lations of house arrest regime by suspects or accused were detected with the help of ECM including 266 cases of abandonment of dwelling (residential area) identified in the court ruling; 1 case of visit paid to location prohibited by the court ruling; 5 cases of control evasion by refusal to wear the electronic bracelet of its intentional removal; 3 cases of control evasion by intentional ECM damaging and 107 cases of control evasion by other intervention in ECM operating process⁸.

We would like to stress that applicable Criminal Procedure Code of Ukraine establishes exhaustive list of procedural expenses. Accordingly, any expenses related to electronic control implementation are covered exclusively from the state budget.

That is why it deems necessary to raise the issue of ECM-related expenses inclusion into the list of procedural expenses – it would allow to allocate the electronic control costs with full or partial coverage ensured by suspect or accused. Currently state expenses on technical and financial support of pre-trial investigation agencies are not included in this list.

Analysis of EU states practices proves that the majority of states where electronic control systems are applied it is typical to take such equipment on lease without buying it. This decision is definitely more effective from the economic point of view as all technical aspects and service procedures are under the responsibility of the company – owner of equipment.

At the same time, having conducted the analysis of ECM application, we state that certain states not only take such equipment on lease, but even delegate the surveillance responsibility to private companies. In England and Wales, for example, there are four zones of electronic monitoring – in each region certain company is responsible for performance of electronic monitoring activities⁹. In our opinion this delegation of surveillance functions is definitely a positive practice – firstly, expenses are lower because the equipment is operated under the lease conditions. Secondly, there is no need to spend the money on training (basic, advanced and post-graduate) of police staff. Thirdly, ECM maintenance and repair will be duly performed which will allow to avoid any surveillance delays and obstructions related to its malfunction. If private company fails to provide properly functioning equipment for electronic control performance, the agreement will be respectively terminated and it will be left without profit.

At the same time proper maintenance and due repair of ECM minimizes the amount of false alert signals followed by immediate involvement of police and technical experts. In 3-30 % of such cases false alerts are results of software errors which requires extra assets to be scheduled for experts' additional hours payment¹⁰. In 2017 NPU agencies received more than 2 000 notifications of electronic system hardware errors¹¹.

Conclusions. In fact house arrest is an efficient restricting measure and adequate alternative to detention. Article 181 of the Criminal Procedure Code of Ukraine defines the following forms over house arrest procedure observance by suspect and accused – visits paid to the person's dwelling and/or use of electronic control means. At the same time Ukrainian legislation does not explicitly regulate the procedure of house arrest selection as restricting measure for certain categories (pregnant women, minors, persons with physical disabilities). For example, Criminal Procedure Code of Ukraine does not indicate the opportunity for the court to indicate several places of residence subject to restriction for suspects or accused – this is relevant in cases when suspect or accused takes care of his/her elderly parents or small children at their dwellings and is at the same time the owner of one's own. Lack of suspect's/accused additional responsibilities, which must be fixed in the Code – prohibition to use the Internet, cellphone, use delivery services, meet certain people or groups of people etc – and absence of unified automatized database of persons subject to house arrest selection basically results in discrepancies during the interpretation and implementation of the mentioned provisions in investigative and court practice.

⁸ Звіт про результати застосування органами поліції електронних засобів контролю за 12 місяців 2017 року (форма № 1-ЕЗК).

⁹ Ягунов Д.В. Електронний моніторинг в пенальних практиках зарубіжних країн та перспективи його запровадження до національної системи кримінальної юстиції // Актуальні проблеми політики: зб. наук. пр. / редкол.: С.В. Ківалов (голов. ред.), Л.І. Кормич (заст. голов. ред.), Ю.П. Аленін [та ін.]; МОНмолодьспорт України; НУ ОЮА. Одеса: Фенікс, 2012. Вип. 46. С. 188.

¹⁰ Суходолов А.П., Спасенников Б.А., Швырев Б.А. Цифровая экономика: электронный мониторинг правонарушителей и оценка его экономической эффективности. Всероссийский криминологический журнал. 2017. Т. 11, № 3. С. 499.

¹¹ Звіт про результати застосування органами поліції електронних засобів контролю за 12 місяців 2017 року (форма № 1-ЕЗК).

Summary

Article presents analysis of house arrest application in accordance with the Criminal Procedure Code of Ukraine. Key problems occurring in the course of house arrest application are defined and relevant solutions are proposed.

Анотація

У статті розглянуто процесуальний порядок виконання домашнього арешту як запобіжного заходу в кримінальному процесі України. Визначено основні проблеми, які виникають під час виконання домашнього арешту, та надано пропозиції щодо вдосконалення порядку його застосування.

Literature:

1. Тертишник В.М. Кримінальний процес України. Загальна частина: підручник. Академічне видання. К.: Алерта, 2014. 440 с.
2. Кримінальний процесуальний кодекс України // від 13.04.2012 № 4651 VI. URL: <http://zakon5.rada.gov.ua/laws/show/4651-17/page>.
3. Про затвердження Інструкції про порядок виконання органами Національної поліції ухвал слідчого судді, суду про обрання запобіжного заходу у вигляді домашнього арешту та про зміну раніше обраного запобіжного заходу на запобіжний захід у вигляді домашнього арешту: Наказ МВС України від 13.07.2016 № 654. URL: <http://zakon3.rada.gov.ua/laws/show/z1087-16>.
4. Хитра А.Я. Ратнова А.В. Проблеми застосування домашнього арешту в кримінальному провадженні. Науковий вісник Львівського державного університету внутрішніх справ. 2016(2). С. 380–390.
5. Агакерімов О.Н. Домашній арешт в системі запобіжних заходів: дис. канд. юрид. наук: 12.00.09. Одеса, 2016. 246 с.
6. Савчук Т.А. Домашній арешт: проблеми и пути реформирования // Актуальные вопросы совершенствования правового образования в средних специальных учебных заведениях: материалы Респ. науч.-практ. конф., Минск 25-26 нояб. 2010 г. / редкол.: И.Р. Веренчиков (гл.ред.) [и др.]. Минск, 2011. С. 62–66.
7. Безрукава А.Ф. Домашній арешт в системі запобіжних заходів у кримінальному процесі України: дис. канд. юрид. наук: 12.00.09. Дніпропетровськ, 2013. 225 с.
8. Про затвердження Порядку застосування електронних засобів контролю: Наказ МВС України від 08.06.2017 № 480. URL: <http://zakon5.rada.gov.ua/laws/show/z0860-17>.
9. Вільгушинський М.Й. Ліхолєтова Ю.А. До питання застосування домашнього арешту як запобіжного заходу відповідно до Кримінального процесуального кодексу України. Адвокат. 2012. № 11(146). С. 9–13.
10. Фаринник В.І. Сутність та особливості застосування запобіжного заходу у вигляді домашнього арешту. Юридичний часопис Національної академії внутрішніх справ. 2015. № 1. С. 15–28.
11. Звіт про результати застосування органами поліції електронних засобів контролю за 12 місяців 2017 року (форма № 1-ЕЗК).
12. Rossi P. Evaluation: A systematic approach / P. Rossi, H. Freeman, M. Lipsey. 6th ed. Thousand Oaks, CA: SAGE Publ., Inc, 1998. 480 p.
13. Ягунов Д.В. Електронний моніторинг в пенальних практиках зарубіжних країн та перспективи його запровадження до національної системи кримінальної юстиції // Актуальні проблеми політики: зб. наук. пр. / редкол.: С.В. Ківалов (голов. ред.), Л.І. Кормич (заст. голов. ред.), Ю.П. Аленін [та ін.]; МОНмолодьспорт України; НУ ОЮА. Одеса: Фенікс, 2012. Вип. 46. С. 184–193.
14. Суходолов А.П., Спасенников Б.А., Швырев Б.А. Цифровая экономика: электронный мониторинг правонарушителей и оценка его экономической эффективности. Всероссийский криминологический журнал. 2017. Т. 11. № 3. С. 495–502.

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