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The Scope of Necessary Changes in the Provisions of the Criminal Procedure Code in the Context of Poland's Accession to the European Public Prosecutor's Office

Zakres niezbędnych zmian w przepisach Kodeksu postępowania karnego w kontekście przystąpienia Polski do Prokuratury Europejskiej

ABSTRACT

In December 2023, the Polish Minister of Justice issued a statement on Poland's accession to the European Public Prosecutor's Office (EPPO), seeing this as an opportunity to strengthen cooperation in criminal matters between the countries of the European Union. The European Commission confirmed Poland's participation in the EPPO's on February 2024. As a result, it was necessary to determine whether amendments to the Criminal Procedure Code were necessary in connection with the functioning of the European Public Prosecutor in the Polish legal system. The article presents proposals for the most important changes to be introduced into the Polish Criminal Procedure Code. These mainly concern the determination of material and territorial jurisdiction, jurisdictional disputes between the European Public Prosecutor and national prosecutors, and the validity of evidence taken abroad before a Polish court.

Keywords: criminal procedure; European Public Prosecutor's Office; amendments to the Criminal Procedure Code; jurisdiction of the court

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INDTRODUCTION

When I first prepared this paper, the political situation in Poland was outstandingly different to what it is currently. Poland was governed by a party with extremely Eurosceptic views, which not only aspired to authoritarian power but also undoubtedly violated the rule of law. Considering those factors, introducing the institution of the European Public Prosecutor into the Polish legal system was more than improbable.[1]

The elections won by the democratic opposition on 15 October 2023 and the appointment of a Civic Coalition government on 13 December 2023, oriented towards closer ties with the European Union and radically changed the political landscape. Immediately after taking the office, the Minister of Justice, Adam Bodnar, declared that Poland would join the European Public Prosecutor's Office (EPPO). In January, Poland submitted a formal notification to the European Commission and the Council of the European Union about joining the EPPO. The European Commission decided to confirm Poland's participation in the EPPO on 29 February 2024. The main reason for the Polish government's decision was to tackle the issue of fighting crimes against the financial interests of the European Union, as well as enhancing cooperation in criminal matters between the members of the European Union.[2]

The debate on the introduction of the European Public Prosecutor role has now become a necessity and should be focused on answering the question of how the Polish Criminal Procedure Code (CPC) must be amended in the event that Poland joins the enhanced cooperation in the protection of the financial interests of the European Union. The purpose of the following analysis is to point out possible problems in this respect, without claiming the right to suggest ways of solving them at the same time.

It must be noted that the introduction of the European Public Prosecutor into the Polish legal system will firstly require amendments to the regulations governing the system and principles of the functioning of the Public Prosecutor's Office in Poland. As well as, at a later stage, amendments to the CPC. This relates both to the question of the place of the Polish Deputy European Public Prosecutors in the system of the Public Prosecutor's Office of the Republic of Poland and to the definition of the relationship between them and the Prosecutor General, who is also the Minister of Justice.

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[1] See more about relations between EPPO and Poland: B. Dudzik, *European Public Prosecutor's Office – Relations with Poland as a State Not Participating in Enhanced Cooperation*, [in:] *Current Issues of EU Criminal Law*, eds. A. Ochnio, H. Kuczyńska, Warszawa 2022, pp. 59–69.

[2] See more about the reasons for establishing EPPO and its tasks: M. Tomczyk, *Prokuratura Europejska. Geneza, ewolucja koncepcji oraz kluczowe kontrowersje w perspektywie funkcjonowania organu*, Warszawa 2018; C. Nowak, *Prokuratura Europejska – idea się urzeczywistnia*, "Prokuratura i Prawo" 2013, no. 11.

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According to Recital 16 of the preamble to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO,[3] since the EPPO is to be granted powers of investigation and prosecution, institutional safeguards should be put in place to ensure its independence as well as its accountability towards the institutions of the Union. This raises the question of the extent of the institutional independence of the European Public Prosecutor and the Deputy European Public Prosecutors in the constitutional law governing the status and organization of the European Public Prosecutor. Will they be bound, and to what extent, by the orders of the Public Prosecutor, in particular as regards the preliminary inquiries they conduct?

The law on the European Public Prosecutor should also resolve questions concerning the control of decisions taken by the Deputy European Public Prosecutor in situations where national law provides for the control of such decisions by the national prosecutor in domestic pre-trial proceedings under the CPC, e.g. complaints concerning the discontinuance of proceedings on the grounds of the absence of the elements of a public-private offence and the lack of public interest in prosecuting a private-private offence (Article 465 § 2a CPC), or complaints concerning the prosecutor's decision to refuse to transmit the pre-trial file under Article 330 § 4 CPC. Indeed, the EPPO Regulation stipulates in Recital 30 of its preamble that, where the national law of a Member State provides for internal review of certain acts within the structure of the national prosecution service, review of such decisions taken by the assigned European Public Prosecutor should fall within the supervisory powers of the supervising European Public Prosecutor in accordance with the Internal Rules of Procedure of the EPPO. It is therefore necessary to determine whether the supervising European Public Prosecutor is competent to hear the complaints in question.

As far as the subject of this study is concerned, it should be noted that the Polish CPC contains provisions on international cooperation in criminal matters. They can be found in Section XIII entitled "Procedure in Criminal Cases in International Relations". However, the provisions of Section XIII CPC are not sufficient to ensure that the European Public Prosecutor can act effectively in the course of its investigation. This is because the provisions of this section have a different purpose and relate to a different type of cooperation. It should also be pointed out that, in accordance with the principle of subsidiarity, the provisions of national law will be applied directly and not by analogy in the proceedings conducted by the European Public Prosecutor, as will be explained below. This means that the provisions of Section XIII CPC do not apply in the pre-trial proceedings conducted by the European Public Prosecutor.

[3] OJ EU L 283/1, 31.10.2017, hereinafter: the EPPO Regulation.

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De lege lata, the existing provisions of the CPC relating to the European Public Prosecutor are limited to Article 615a[4] CPC according to which the provisions of Chapters 62, 62c, 62d, 63, 65b, 65d and 67, as well as the provisions of Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders (OJ EU L 303/1, 28.11.2018) shall apply *mutatis mutandis* to cooperation between courts, public prosecutors and other procedural authorities and the European Public Prosecutor, with contact between prosecutors and the European Public Prosecutor, including the transmission of letters or information, being reserved exclusively for the national public prosecutor, as it is carried out only through them. This means that lower level prosecutors have been deprived of the right to conduct international cooperation activities on their own and to decide on the need for such activities, which clearly limits their independence.

An additional obstacle to effective cooperation with the EPPO is Article 615a § 2 CPC, which provides that if the performance of the requested act or provision of information would be contrary to the principles of the legal system of the Republic of Poland or would violate its sovereignty, the court or prosecutor shall refuse to perform the act or provide the information. If, in the opinion of the prosecutor, the performance of the requested act or the provision of information would be contrary to the principles of the legal system of the Republic of Poland or would violate its sovereignty, the court or prosecutor shall be obliged to refuse to perform the act or provide the information.[5] As H. Kuczyńska points out, this has led to a centralization of the control function, since not only the prosecutor conducting (supervising) the proceedings examines the legitimacy of providing assistance to the European Public Prosecutor, but such an assessment is also made by the National Prosecutor's Office.[6] It does not matter if the prosecutor conducting or supervising the proceedings comes to a different conclusion than the National Public Prosecutor and finds no threat to sovereignty or contradiction with the principles of the legal order, the decision of the National Public Prosecutor is binding and the subordinate prosecutor must comply with it.

Supplementing the provisions of the CPC with provisions on the European Public Prosecutor is not motivated by the need to protect the principles of the Polish legal system or Poland's sovereignty, as Article 615a CPC would have it, but by the need to preserve the coherence of the system of criminal procedure. This is necessary because a European Public Prosecutor or a European Public Prose-

[4] Provision introduced by the Act of 27 October 2022 amending the Act – Criminal Procedure Code and the Act – Law on Public Prosecution (Journal of Laws 2022, item 2582).

[5] B. Augustyniak, *Komentarz do art. 615(a)*, [in:] *Kodeks postępowania karnego*, vol. 2: *Komentarz aktualizowany*, ed. D. Świecki, LEX/el. 2024.

[6] H. Kuczyńska, *Komentarz do art. 615(a)*, [in:] *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, ed. D. Szumiło-Kulczycka, LEX/el. 2022.

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cutor's representative conducting pre-trial proceedings on the territory of a given country applies national law in the course of its activities. However, it should be stressed that, according to Article 5 (3) of the EPPO Regulation, if a question is governed by both national law and the EPPO Regulation, the provisions of the latter shall prevail. It is, therefore, necessary to determine the situation of precedence and the priority of application in the light of Article 5 (3) of the EPPO Regulation.

In view of the European Public Prosecutor's powers, which include the conduct of pre-trial proceedings in cases within its jurisdiction and the prosecution of such cases before the courts, the scope of the necessary amendments to the CPC must relate to such provisions as are necessary for the proper conduct of pre-trial proceedings (by which I mean the achievement of the objectives of those proceedings while respecting the rights of the suspect) and for the effective filing of a complaint and its support before the court by the European Public Prosecutor.

In addition, I see a need to determine the procedural consequences of carrying out an action that complies with the provisions of the EPPO Regulation but is regulated differently in national law. In the light of the above, possible amendments to the CPC will address situations where:

- there is a lack of regulation of an issue in the EPPO Regulation and, at the same time, the issue is not regulated in the CPC but is necessary for the effective performance of the European Public Prosecutor's tasks;
- there is a lack of regulation of an issue in the EPPO Regulation and, at the same time, the issue is not regulated with sufficient precision in the CPC;
- the provision of the EPPO Regulation is of a general (framework) nature and therefore needs to be clarified in national law, i.e. in the CPC.

THE SPECIFIC ISSUES OF COOPERATION WITH THE EUROPEAN PUBLIC PROSECUTOR

On specific issues, the deletion of Article 615a CPC, which applies in a situation where Poland has not yet joined the EPPO and it was necessary to define the rules of cooperation with this body, seems obvious.

In my opinion, it is necessary to introduce an additional chapter in Section XIII CPC, which could be entitled "Proceedings in Cases Conducted by the European Public Prosecutor" (in view of the subject matter of the Regulation, this chapter should be placed immediately after Chapter 62 on legal aid and service in criminal matters). This chapter should contain the main provisions relating to the conduct of pre-trial proceedings by the European Public Prosecutor, which have hitherto been dealt with only in the EPPO Regulation.

It is also essential to lay down the principles for the appropriate application of the provisions of the CPC in cases not regulated or insufficiently regulated by the

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EPPO Regulation. Such a need arises from the fact that the proper application of the provisions of a legal act is not uniform in nature, often requires a sophisticated interpretation of the law, and is not a simple transfer of a legal norm from one legal act to a proceeding conducted under another legal act (direct application), although such a form of proper application is also possible. The second form of appropriate application is the application of a particular provision after it has been suitably modified (adaptation of the provision to proceedings conducted under the provisions of another law). Finally, the third form of appropriate application is the refusal to apply a provision because of certain differences that exist between the two laws.[7]

Appropriate application is thus an order to use analogy from the law as a means of applying the law in the cases indicated by the referring provision.[8] It involves respecting the rules expressed in the provisions that constitute the scope of reference, i.e. those that regulate the matter in question. In principle, therefore, there is a change in the disposition of the provision properly applied, due to the different formation of the procedural model in different proceedings. Bearing in mind that in procedural criminal law (as opposed to substantive criminal law) analogy is permitted, provided that it does not apply to acts which are inherently unfavourable to the accused or which infringe human rights, the question of the appropriate application of the provisions of the CPC in the proceedings conducted by the European Public Prosecutor appears to be crucial.

Appropriate application means respecting the rules expressed in the provisions that constitute the scope of reference, i.e. those that regulate the matter in question.[9] In principle, there is a change in the disposition of the provision to be properly applied due to the different formation of the procedural model in different proceedings.[10] Bearing in mind that in procedural criminal law (as opposed to substantive criminal law) analogy is permitted, provided that it does not apply to acts which are inherently unfavourable to the accused or which violate human rights, it seems essential to determine the appropriate application of the provisions of the CPC in proceedings conducted by the European Public Prosecutor.

[7] Judgment of the Supreme Court of 5 November 2003, SNO 67/03, OSNSD 2003, no. 2, item 61.

[8] M. Hauser, *Przepisy odsyłające. Zagadnienia ogólne*, "Przegląd Legislacyjny" 2003, no. 4, pp. 88–89.

[9] Resolution of the Supreme Court of 30 September 2003, I KZP 23/03, OSP 2004, no. 3, item 40.

[10] Cf. R. Kmiecik, *Glosa do uchwały SN z 30 września 2003 r., I KZP 23/03*, "Orzecznictwo Sądów Polskich" 2003, no. 3, item 40, p. 173.

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THE BASIC ISSUES OF THE JURISDICTION

The substantive jurisdiction of the European Public Prosecutor should also be specified in the CP C. As G. Stronikowska points out, the substantive jurisdiction of the European Public Prosecutor is characterised by four features. Firstly, the lack of exclusive jurisdiction, combined with the adoption of the principle of the primacy of the European Public Prosecutor's jurisdiction, known as "shared jurisdiction" between the European Public Prosecutor and the Member States, which is reflected in the right of the European Public Prosecutor to take over a case being conducted by a national authority. Secondly, the fact that jurisdiction depends on the catalogue of offences against the financial interests of the European Union, as defined in Directive 2017/1371,[11] and the way in which it is transposed into the national law of each Member State. Thirdly, the cross-border nature of the offences referred to above. Finally, the possibility for the European Public Prosecutor to withdraw from the investigation in cases where the value of the damage is less than EUR 100,000.[12] It is precisely the lack of exclusive jurisdiction of the European Public Prosecutor and the possibility of withdrawing from pre-trial proceedings that justifies the introduction of provisions in the CPC regulating the material jurisdiction of the Polish Public Prosecutor's Office.

I also see a need to determine the local jurisdiction of the court in the event of an indictment by the European Public Prosecutor in cross-border cases, where the rule set out in Articles 31 and 32 CPC does not apply. Indeed, the question arises whether it is appropriate to create a special division (or divisions) of the courts designated to hear cases brought by the European Public Prosecutor. This question is crucial in the light of Article 6 of the European Convention on Human Rights, which lists among the standards of a fair trial, the right to a court established by law, i.e. a court of competent jurisdiction. This refers not only to subject matter jurisdiction but also to territorial and functional jurisdiction. As stated in the case law, the trial of a case by a court established by law is the basis of the rule of law and a principle of constitutional statute.[13]

The problem is that the Permanent Chamber of the European Public Prosecutor indicates only the country in which the case will be tried after the prosecution by the

[11] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198/20, 28.7.2017).

[12] G. Stronikowska, *Prokuratura Europejska jako instytucja ochrony interesów finansowych Unii Europejskiej*, Warszawa 2020, pp. 184–185. Cf. M. Zreda, *Opinia w sprawie wniosku dotyczącego rozporządzenia Rady w sprawie ustanowienia Prokuratury Europejskiej*, "Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu" 2013, no. 3, pp. 115–116.

[13] Resolution of the Court of Appeal in Krakow of 7 September 2005, II AKo 114/05, KZS 2005, no. 9, item 31. See G. Artymiak, *Realizacja prawa do sądu właściwego w sprawach karnych jako gwarancja rzetelnego procesu – zagadnienia wybrane*, [in:] *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, ed. J. Skorupka, Warszawa 2009.

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European Public Prosecutor, and not a specific court. Meanwhile, under Article 31 § 1 CPC, the court with local jurisdiction is the court in whose district the offence was committed. This rule does not apply to cases conducted by the European Public Prosecutor when they concern cross-border offences. Article 31 § 3 CPC, which provides that where an offence is committed in the territory of more than one court, the competent court is that in which the pre-trial proceedings were first instituted, is not helpful in determining local jurisdiction.[14] Nor do the auxiliary criteria listed in Article 32 §§ 1 and 2 CPC, which include the place where the offence was discovered, the place where the accused was apprehended, the place where the accused resided permanently or temporarily before the offence was committed, provide a solution to the question of local jurisdiction.

The only applicable provision in this regard is Article 32 § 3 CPC, which provides a definitive criterion for determining local jurisdiction. This provision stipulates that if the local jurisdiction of the court cannot be determined in accordance with the above provisions, the case shall be heard by the court with jurisdiction over the Śródmieście district of the capital city of Warsaw. Doubts arise as to the justification for burdening the courts of the Śródmieście District of the City of Warsaw with exclusive jurisdiction to hear cases brought by the European Public Prosecutor. There is a high risk that the number of cases brought before this court (which, in addition, has to recognise "own" cases based on its local jurisdiction determined on the basis of Article 31 CPC) will prolong the proceedings.

A separate problem to be resolved and complemented by the provisions of the CPC concerns the settlement of jurisdictional disputes between the European Public Prosecutor and national authorities.

On the face of it, it would appear that there is no dispute as to jurisdiction since Article 57 (3) of the Internal Rules of Procedure of the EPPO provides that, where the competent national authority decides to take over a case or where a transfer is made in accordance with Article 34 (1) of the Council Regulation 2017/1939, the European Delegated Prosecutor shall transmit the file without delay. Article 57 (4) of the Rules provides that if the competent national authority does not take over the case or does not reply within 30 days of receipt of the decision to transfer, the European Delegated Prosecutor shall continue the investigation or apply Article 56 of the Council Regulation 2017/1939. The problem is that the European Delegated Prosecutor who conducts the investigation acts on the basis of the Council Regulation 2017/1939 and not on the basis of the Rules, so we are dealing here with an unfounded reference, which is perhaps why a provision in the CPC is needed to resolve this problem once and for all.

[14] More on this topic, see M. Błoński, *Praktyczne aspekty dotyczące właściwości miejscowej sądu*, "Przegląd Sądowy" 2013, no. 7–8, pp. 144–158.

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CONCLUSIONS

Finally, it should be pointed out that in the case of cross-border proceedings in which the European Public Prosecutor gathers evidence in different countries and according to different procedures, while the indictment is brought in a Polish court, it is necessary to determine whether evidence gathered in another country, contrary to Polish procedure, can be used as evidence in the court proceedings. It seems that such evidence is admissible as long as it was obtained in accordance with the procedure of that country.

It is necessary to extend the legal obligation to report the offence referred to in Article 304 § 2 CPC to entities obliged to do so under Council Regulation 2017/1939, which will ensure consistency between the two regulations.

It is justifiable to regulate in the CPC the principles of supervision of the pre-trial proceedings conducted by the European Public Prosecutor, which follows from Recital 23 of the preamble to the EPPO Regulation, which states that the term "supervision" is to be understood as referring to closer and continuous control over the pre-trial proceedings and the charges brought and supported, including, where necessary, intervening and issuing orders in matters relating to those proceedings and charges.

On the other hand, it does not seem necessary to change the definition of the accused. According to the Polish CPC, an accused person is a person against whom a charge has been brought before the court, an application has been made for conviction without trial pursuant to Article 335 § 1 CPC or an application has been made for conditional discontinuance of criminal proceedings. Article 71 § 2 CPC speaks of the prosecutor's request, but according to Article 325i CPC other prosecutors are also entitled to request the conditional discontinuance of criminal proceedings. The definition of the accused in the procedural sense formulated in this way also includes the accused against whom the European Public Prosecutor has brought an indictment before the Polish criminal court. The use of the impersonal form of the verb "brought" in the provision of Article 74 § 2 CPC means that the acquisition of the status of a passive party to the criminal proceedings takes place at the moment of the filing of an indictment by any of the authorised accusers (prosecutor, other public prosecutor, private prosecutor and subsidiary auxiliary prosecutor, including the European Public Prosecutor).

The above issues do not exhaust the problems outlined in the title of this study. However, they may provide a starting point for a discussion of how the CPC (as well as the Act on the Public Prosecutor's Office) should be amended in connection with Poland's accession to the EPPO.

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ABSTRAKT

Polski Minister Sprawiedliwości w grudniu 2023 r. złożył deklarację przystąpienia Polski do Prokuratury Europejskiej, upatrując w tym możliwości wzmocnienia współpracy w sprawach karnych pomiędzy krajami Unii Europejskiej. Komisja Europejska potwierdziła udział Polski w Prokuraturze Europejskiej w lutym 2024 r. W efekcie pojawiła się potrzeba ustalenia, czy w związku z funkcjonowaniem Prokuratury Europejskiej w polskim porządku prawnym konieczne są zmiany w Kodeksie postępowania karnego. W artykule zaprezentowano propozycje najważniejszych zmian, jakie powinny zostać wprowadzone do polskiego Kodeksu postępowania karnego. Dotyczą one przede wszystkim: ustalenia właściwości rzeczowej i miejscowej; sporów o właściwość między Prokuratorem Europejskim a Prokuraturą Krajową; skuteczności przed polskim sądem czynności dowodowych dokonanych za granicą.

Słowa kluczowe: postępowanie karne; Prokuratora Europejska; nowelizacja Kodeksu postępowania karnego; właściwość sądu