

The Scope of Necessary Changes in the Provisions of the Code of Criminal Procedure in the Context of Poland's Potential Accession to the European Public Prosecutor's Office (IThenticate Similarity Report)



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

Zakres niezbędnych zmian w przepisach Kodeksu postępowania karnego w kontekście potencjalnego 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, seeing this as an opportunity to strengthen cooperation in criminal matters between the countries of the European Union. As a result, it was necessary to determine whether amendments to the Code of Criminal Procedure 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 Code of Criminal Procedure. 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.

Key words: Criminal procedure; European Public Prosecutor; amendments to the Code of Criminal Procedure; Jurisdiction of the court

INTRODUCTION

When I firstly prepared this paper, 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 Polish legal system was more than improbable.

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. Main reason behind that 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.



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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 Code of Criminal Procedure 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.

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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 Code of Criminal Procedure. This relates both to the question of the place of the Polish Deputy European Public Prosecutors (EPPOs) 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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According to paragraph 16 of the preamble to Regulation No 2017/1939 of the Council of the European Union implementing enhanced cooperation in the establishment of the European Public Prosecutor¹, institutional safeguards must be put in place to ensure the independence of the European Public Prosecutor and his accountability to the institutions of the Union, given his powers to conduct preliminary investigations and to initiate and support prosecutions. 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?

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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 Code of Criminal Procedure (e.g. complaints concerning the

CORRESPONDENCE ADDRESS: xxx

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¹ COUNCIL REGULATION (EU) 2017/1939 of 12.10.2017 implementing enhanced cooperation in the establishment of the European Public Prosecutor's Office Official Journal of the European Union, L 283/1, hereinafter referred to as EPPO Regulation.

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 of the Code of Criminal Procedure), or complaints concerning the prosecutor's decision to refuse to transmit the pre-trial file under Article 330 § 4 of the Code of Criminal Procedure). Indeed, the EPPO Regulation stipulates in point 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 Rules of Procedure of the European Public Prosecutor. It is therefore necessary to determine whether, 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 Code of Criminal Procedure contains provisions on international cooperation in criminal matters. They can be found in Chapter XIII, entitled "Procedure in criminal cases in international relations". However, the provisions of Chapter XIII of the Code of Criminal Procedure are not sufficient to ensure that the European Public Prosecutor can act effectively in the course of his 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 will not apply in the pre-trial proceedings conducted by the European Public Prosecutor.

De lege lata, the existing provisions of the Code relating to the European Public Prosecutor are limited to Article 615a² of the Code of Criminal Procedure, 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 (Official Journal of the EU L 303, 28.11.2018, p. 1) 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

² Provision introduced by the Act of 27.10.2022 amending the Act - Code of Criminal Procedure and the Act - Law on Public Prosecution, (Journal of Laws, item 2582).

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 European Public Prosecutor's Office is Article 615a § 2 of the Code of Criminal Procedure, 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"³. As Ms Kuczynska 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 Office⁴. 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 Code of Criminal Procedure 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 of the Code of Criminal Procedure 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 Prosecutor's representative conducting pre-trial proceedings on the territory of a given country applies national law in the course of his activities. However, it should be stressed that, according to

³ B. Augustyniak [in:] Code of Criminal Procedure. Volume II. Komentarz aktualizowany, ed. D. Świecki, LEX/el. 2024, art. 615(a), accessed 01.01.2024.

⁴ H. Kuczyńska [in:] Code of Criminal Procedure. Commentary to selected provisions, ed. D. Szumiło-Kulczycka, LEX/el. 2022, art. 615(a), accessed 01.01.2024.



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¹² Article 5(3) of the EPPO Regulation, if a question ² 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 ¹⁰ in the light of Article 5(3) of the EPPO Regulation.

⁵ In view of the European Public Prosecutor's powers, which include the conduct of pre-trial proceedings in cases within his jurisdiction and the prosecution of such cases before the courts, ¹ the scope of the necessary amendments to the Code of Criminal Procedure 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 ¹³ 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 ¹² of the European Public Prosecutor Regulation but is regulated differently in national law. ³ In the light of the above, possible amendments to the Code of Criminal Procedure will address situations where

- there is a lack of regulation of an issue ¹⁰ in the EPPO Regulation and, at the same time, the issue is not regulated ³³ in the Code of Criminal Procedure but is necessary for the effective performance ²² of the European Public Prosecutor's tasks;

- there is a lack of regulation ¹⁰ of an issue in the EPPO Regulation and, at the same time, the issue is not regulated with sufficient precision ⁴² in the Code of Criminal Procedure;

- the provision of the EPPO Regulation ¹⁹ is of a general (framework) nature and therefore needs to be clarified in national law, i.e. in the Code of Criminal Procedure.

THE SPECIFIC ISSUES OF COOPERATION WITH THE EUROPEAN PUBLIC PROSECUTOR

On specific issues. The deletion ¹ of Article 615a of the Code of Criminal Procedure, which applies ⁵ in a situation where Poland has not yet joined the European Public Prosecutor's Office 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 Chapter XIII, entitled "Proceedings in international criminal cases". "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.

Firstly, because the European Public Prosecutor's pre-trial investigation is normally conducted in the Member States by delegated European Public Prosecutors on the basis of the provisions of the EPPO Regulation and, in cases not covered by the Regulation, in accordance with national law, in the Code of Criminal Procedure, in the chapter on the European Public Prosecutor (which follows from point 30 of the preamble to the EPPO Regulation), there should be a provision stating the principle of the primacy of the provisions of the EPPO Regulation over the provisions of the Code and, consequently, the subsidiary nature of the Code's provisions.

It is also essential to lay down the principles for the appropriate application of the provisions of the Code of Criminal Procedure in cases not regulated or insufficiently regulated by the 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, 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 laws⁵.

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 provision⁶. Appropriate application involves respecting the rules expressed in the provisions that constitute the scope of reference, i.e. those

⁵ Judgment of the Supreme Court of 5 November 2003, in the case SNO 67/03 Orzecznictwo Sądu Najwyższego - Sądu Dyscyplinarnego, z. II/2003, Warsaw 2004, p. 68.

⁶ M. Hauser: Odpowiednie stosowanie. Zagadnienia ogólne, Legislative Review 2003, no. 4, pp. 88-89.



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 Code of Criminal Procedure 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 question⁷. 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 proceedings⁸. 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 Code of Criminal Procedure in proceedings conducted by the European Public Prosecutor.

THE BASIC ISSUES OF THE JURISDICTION

The substantive jurisdiction of the European Public Prosecutor should also be specified in the Code of Criminal Procedure. As Ms 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, 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; and finally, the possibility for the European Public Prosecutor to withdraw from the

⁷ Supreme Court resolution of 30 September 2003, I KZP 23/03, OSP 2004/3/40.

⁸ Cf. R. Kmiecik: Glosa do Uchwały SN z 30 września 2003, I KZP 23/03, OSP 2003 nr 3, poz. 40, p. 173.



investigation in cases where the value of the damage is less than EUR 100 000⁹. 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 Code of Criminal Procedure 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 of the Code of Criminal Procedure 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 stature¹⁰.

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 European Public Prosecutor, and not a specific court. Meanwhile, under Article 31(1) of the Code of Criminal Procedure, 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) of the Code of Criminal Procedure, 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 jurisdiction¹¹. Nor do the auxiliary criteria listed in Article 32 §§ 1 and 2 of the Code of Criminal Procedure, which include the place where the offence was discovered, the

⁹ ³⁶ Stronikowska, Prokuratura Europejska jako instytucja ochrony interesów finansowych Unii Europejskiej, Warsaw 2020, pp. 184-185. cf. M. Zreda: Opinion on the Proposal for a Council Regulation on the Establishment of a European Public Prosecutor's Office, ZPBAS 2013, no. 3, pp. 115 - 116.

¹⁰ Order of SA in Kraków of 7 September 2005, II AKo 114/05, KZS 2005, no. 9, item 31; see G. Artymiak, Realisation of the right to a competent court in criminal cases as a guarantee of a fair trial - selected issues [in:] Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdry, ed. J. Skorupka, Warsaw 2009, LEX/el, date of access 01.01.2024.

¹¹ More on this topic: M. Błoński, Praktyczne aspekty dotyczące właściwości miejscowej sądu, PS 2013, no. 7-8, pp. 144-158



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 32.3¹ of the Code of Criminal Procedure, which provides a definitive criterion² 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.¹³ There is a high risk³ 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 of the Code of Criminal Procedure) will prolong the proceedings.

A separate problem to be resolved and complemented⁴ by the provisions of the Code of Criminal Procedure concerns the settlement¹¹ 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)¹⁷ of the Rules of Procedure of the European Public Prosecutor 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 Regulation, the European Public Prosecutor shall transmit the file without delay. Paragraph 4⁶ of the Regulation 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 Delegated European Public Prosecutor shall continue the investigation or apply Article 56 of the Regulation. The problem is that the delegated European Public Prosecutor who conducts the investigation acts on the basis of the Regulation and not on the basis of the rules, so we are dealing here with an unfounded reference, which is perhaps why a provision¹¹ in the Code of Criminal Procedure is needed to resolve this problem once and for all.²⁰

CONCLUSIONS

Finally, it should be pointed out that in the case of cross-border proceedings⁴⁴ in which the European Public Prosecutor gathers evidence in different countries and according to different¹³



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 of the Code of Criminal Procedure to entities obliged to do so under Regulation 2017/1939, which will ensure consistency between the two regulations.

It is justifiable to regulate in the Code of Criminal Procedure the principles of supervision of the pre-trial proceedings conducted by the European Public Prosecutor, which follows from paragraph 23 of the preamble to the EPPD Regulation, which states that "supervision" is to be understood as a term 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 Code of Criminal Procedure, 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 of the Code of Criminal Procedure, or an application has been made for conditional discontinuance of criminal proceedings. Article 71 § 2 of the Code of Criminal Procedure speaks of the prosecutor's request, but according to Article 325i of the Code of Criminal Procedure, 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 of the Code of Criminal Procedure 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 Code of Criminal Procedure (as well

as ¹³ the Act on the Public Prosecutor's Office) should be amended ¹⁵ in connection with Poland's accession to the European Public Prosecutor, which will hopefully take place in the relatively near future.

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ABSTRAKT



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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. W związku z tym pojawiła się potrzeba ustalenia, czy w związku z funkcjonowaniem Prokuratury Europejskiej w polskim porządku prawnym konieczne są zmiany w Kodeksie postępowania karnego. Artykuł prezentuje 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 czynności dowodowych dokonanych za granicą przed polskim sądem.

Słowa kluczowe: postępowanie karne; Prokurator Europejski; nowelizacja Kodeksu postępowania karnego; właściwość sądu

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