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POLISH CRIMINAL PROCESS AFTER THE REFORM

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1. Introduction

1.1. Priority: an overhaul of the Polish criminal process

Since its establishment in November 2009, the Criminal Law Codification Commission at the Minister of Justice has been considering a reform of the Polish criminal process as one of its main objectives. This assumption was based on the conclusion that after more than a decade that followed the entry into force of the 1997 Code of Criminal Procedure, a far-reaching change of this Code is needed. After nearly three years of legislative works, on 8 November 2012 the Council of Ministers sent to the *Sejm* a draft of the Act on the amendment to the Code of Criminal Procedure, Criminal Code and certain other acts. Parliamentary works on the draft law resulted in the proposed Act of 27 September 2013 on the amendment to the Code of Criminal Procedure and certain other acts, which is to become effective as of 1 July 2015 (hereinafter: the "September Amendment").

Already after the above Act had been enacted, a large number of significant changes in the Criminal Code were introduced in a draft law that was sent to the *Sejm* on 15 May 2014. Those changes were accompanied by several additional modifications of provisions of the Code of Criminal Procedure that, on the one hand, were designed to ensure coherence between the two Codes and, on the other, transformed some of the provisions introduced by the initial amendment. Having passed the legislative process, the draft law became the Act of 20 February 2015 on the amendment of the Criminal Code and certain other acts (hereinafter, the "February Amendment"). This Act also will become effective on 1 July 2015.

1.2. Major deficiencies in the Polish criminal process before the amendment

At the outset of its work on the reform of the criminal process, the Codification Commission concluded that the existing framework of criminal procedure suffers from a number of key defects. The most striking examples of such defects are the following:

- 1) Excessively inquisitorial nature of criminal procedure: in practice, the court assumes the role of a party that conducts evidentiary proceedings during trial, which results in limiting the activity of the actual parties (above all, of the public prosecutor);
- 2) The unreasonable length of proceedings that results from excessive formalism of the existing laws and defectiveness of appellate procedure, the latter taking the form of second instance courts too frequently ordering retrials of cases heard by first instance courts.
- 3) Insufficient protection of the standards of a fair criminal process, especially in the case of regulations on preventive measures¹.

¹ Sejm Paper No. 870, statement of reasons, p. 1

1.3. Key objectives of the reform of the criminal process

In light of the above, legislative drafters have set the following four principal objectives of the reform:

- 1) Reinforcing the adversarial nature of criminal procedure: this is to be achieved by making the parties to the process more active and substantially limiting the role played by the court in the course of evidentiary proceedings;
- 2) Reducing, to the maximum possible extent, the scope of evidentiary proceedings conducted as part of preparatory proceedings so as to avoid unnecessary duplication of evidentiary acts (such as witness hearings) during the trial, and also to enable the parties to present evidence before the court, in an adversarial and direct manner;
- 3) Accelerating the course of proceedings, by abolishing unnecessary formalism, improving access to measures of consensual resolution of criminal proceedings, and redesigning the rules of appellate procedure;
- 4) Ensuring effective procedural guarantees that may be applied to preventive measures (in particular, pre-trial detention)².

The changes introduced to the Code of Criminal Procedure by the September Amendment and February Amendment are undoubtedly of a fundamental nature as the amendments are not meant to merely adjust the rules of criminal procedure to new needs or changing constitutional and international standards. To the contrary, the key purpose of the reform is to remodel the criminal process by making it more adversarial, which entails a redefinition of the basic tenets of the Polish criminal process.

2. A turn towards a more adversarial criminal process

2.1. Limiting the activity of the court in evidentiary proceedings

As already mentioned, the key objective of the reform that begins on 1 July 2015 is to make the Polish criminal process more adversarial. Adoption of this approach means a departure from the model in which judges play a dominant role in establishing facts of a given case, and consequently, are the key actors in evidentiary proceedings conducted in open court. In the reformed criminal process, the prosecutor will be responsible for proving the defendant's guilt whereas the defendant (and their defence lawyer) will be tasked with opposing the charges made by the prosecution. As a rule, the role of the court is only to consider the evidence presented by the parties and rule on the criminal liability of the defendant. Consequently, judges will no longer be required to take a pro-active stance in investigating and explaining the circumstances of a given case. On the other hand, the court

² Sejm Paper No. 870, statement of reasons, pp. 2-3.

– similarly to a sports umpire – must oversee the parties' compliance with the rules of due process and ensure that they have equal opportunity to prove material circumstances of the case. However, it should be noted that a consequence of the increased "competitiveness" of the judicial dispute is that the outcome of the case will depend, to a significant extent, on actions taken by parties. In the inquisitorial model, the parties could expect that the court's involvement would balance the differences in parties' resources and skills, while in a more adversarial procedure such involvement is much less likely. Hence the parties' greater freedom is coupled with their greater responsibility for the outcome of proceedings.



After the reform, the court is to play the role of an umpire, leaving the job of presenting evidence during the trial to the parties. Only in exceptional cases judges may become involved in fact-finding in a given case.

2.2. The role of courts before the reform of the Polish criminal process

Under the pre-reform law, the court was in practice actively involved in the course of evidentiary proceedings. As a matter of fact, this model is not a unique feature of the Polish legal system; it appears in criminal procedures of many countries of continental Europe. The Code of Criminal Procedure awarded courts an unlimited power to order evidence-taking *ex officio* (art. 167 of the CCP). Judges could also actively participate in the taking of evidence put forward by parties, e.g. ask witnesses questions (art. 370 (3) of the CCP). Moreover, the court was tasked with reading out transcripts of acts performed during preparatory proceedings, such as transcripts of witness statements that were compared with a witness's testimony given at the hearing (arts. 389 and 391 of the CCP). Most importantly, however, article 366 (1) of the CCP obliged the presiding judge to ensure that all circumstances of vital significance to the case are explained, including, whenever possible, also those favouring the commission of the offence. According to the jurisprudence of the Supreme Court, the above obligation, interpreted in connection with the principle of substantive truth expressed in art. 2 (2) of the CCP³, meant that the court needed to explain any material circumstances of the case, even if the parties to the proceedings remained inactive. It was assumed that "the fact that the parties in the trial were inactive and over the course of a long trial did not request taking certain evidence did not waive the court's obligation to take initiative in evidence-taking. Crucially, the absence of sufficient parties' activity in filing evidentiary motions resulted in concrete and present danger that an unjust decision is reached; it is precisely because of that risk

³ Article 2 (2) of the CCP provides that the basis for any kind of determination must be the established true-fact situation.

that authorities involved in the criminal process are obliged to admit evidence *ex officio*⁴. In practice, this often led to a situation in which the court actually took on the whole burden of proving the defendant's guilt while the public prosecutor remained inactive during the proceedings.

Before the reform, courts were actively taking part in the course of evidentiary proceedings. The presiding judge ensured that vital circumstances of the case are explained and established. The court needed to discharge this obligation even if parties remained inactive.



2.3. The role of courts after the reform of the Polish criminal process

The amendment that becomes effective on 1 July 2015 brings about far-reaching changes of the rules governing the court's involvement in evidentiary proceedings conducted as part of the main trial. First, art. 167 (1) of the CCP provides that in judicial proceedings initiated by a party, evidence is presented by parties after it is admitted by the presiding judge or the court. Consequently, a party files an evidentiary motion in which they need to show the circumstances that are to be proven by a given piece of evidence ("evidentiary allegation"), and then independently presents this evidence in court (e.g., by way of questioning a witness). The role of the court is generally limited to assessing the admissibility of evidence named in the motion: this may involve, for instance, reviewing whether evidence is legally admissible and useful for proving a certain set of facts. Article 167 (1) of the CCP establishes only two exceptions to this general rule: The court may take evidence requested by a party if the party fails to appear at a hearing or in exceptional cases that involve extraordinary circumstances.

Second, the assumption that parties are responsible for taking and presenting evidence has a number of significant implications. It means that witnesses are to be questioned by the party rather than by the court. Judges may ask witnesses questions but only after a given witness is examined and cross-examined by, respectively, the party who called them and the opposing party (art. 370 (1) of the CCP). Also, if transcripts of previous testimony of the witness or the defendant must be read during the hearing of the witness, the reading is done by the party who examines or cross-examines the witness (arts. 389 and 391 of the CCP).

Third, the court may admit and take evidence *ex officio*, but only in exceptional cases that involve extraordinary circumstances. The above rule significantly limits the

⁴ Judgment of the Supreme Court of 10 July 2008, case no. II KK 33/08, LEX no. 448967.

court's evidentiary initiative: it obliges judges to give reasons for a decision to consider a piece of evidence that has not been requested by parties and enables them to examine such evidence only in exceptional situations. Obviously, after the launch of the reform courts will develop a detailed meaning of this rule by means of judicial interpretation. Still, the legislator's intention is quite straightforward: criminal judges' ability to take evidence *ex officio* is to be significantly limited. It follows that introducing this change will invalidate the existing jurisprudence of the Supreme Court, according to which the court is obliged to explain all factual circumstances of a case regardless of whether parties actively present any evidence in this respect.



After the reform, it is the parties who, as a rule, will be responsible for taking and presenting evidence during the trial. Judges may engage in evidentiary proceedings only in exceptional circumstances.

2.4. Extended admissibility of privately collected evidence

The decision to impose the burden of evidentiary proceedings on the parties was accompanied by another important change regarding the admissibility of what is known as "privately collected evidence" in the Polish criminal process. Evidence falling into this category, as the name suggests, is obtained by private individuals and not by law enforcement authorities. Before 1 July 2015, article 393 (3) of the CCP provided that any private documents prepared outside the criminal proceedings and not directly for their purposes may be read out during the trial, particularly statements, publications, letters and notes. The above provision effectively prevented admissibility of such privately collected evidence that was developed specifically for the purposes of the criminal proceedings (e.g., an opinion prepared by an expert hired by the defendant). The legislator deleted the expression "not directly for their purposes" from the amended version of art. 393 (3), effective as from 1 July 2015. This means that a party will be entitled to submit private evidence, such as an expert's opinion drafted at the request of the party, for the court's consideration. By introducing this change, the legislator aims to balance the parties' capacity to collect evidence. Wider admissibility of privately collected evidence does not mean, however, that the parties have complete freedom in accessing such evidence. The significant limitation imposed on the private collection of evidence is the prohibition of taking and using evidence obtained for the purposes of the criminal proceedings by means of an act that satisfies the statutory criteria of an offence, which was imposed by the wording of a provision added to the Code of Criminal Procedure, art. 168a.

After 1 July 2015 parties will be able to submit to the court private documents created outside the criminal proceedings, such as an expert's opinion drafted at the request of the party. This is a step towards balancing the rights of parties to criminal proceedings (the defendant and prosecutors) in the process of collection of evidence.

However, it will be inadmissible to use evidence obtained for the purposes of the criminal proceedings by means of an act that satisfies the statutory criteria of an offence (e.g., a recording made with the use of a wire-tapping device secretly installed in another person's home).



2.5. Access to lawyer

In contrast to the pre-reform model of the criminal process, the newly adopted framework requires a much more active and professional approach from the parties. Hence, it became necessary to provide defendants and victims with access to professional legal aid; without it, they might be unable to argue their case during the trial. In order to achieve this goal, the legislator provided, in art. 80a (1) of the CCP, that a free of charge defence lawyer will be appointed at the request of a defendant who does not have a privately-retained lawyer⁵. It must be noted, however, that this right is granted to defendants only at the judicial stage of criminal proceedings. The right to a court-appointed lawyer is thus not guaranteed during preparatory proceedings (at the stage of criminal inquiry or investigation)⁶. Moreover, depending on the outcome of the proceedings, the defendant may be requested to pay the costs related to the appointment of a legal aid lawyer (art. 338 (1) of the CCP). A provision added to the Code of Criminal Procedure by the amendment, art. 87a, provides the legal basis for appointment of counsel at the request of the victim. The article establishes the rules of representation that are identical to those applicable to the defendant.

⁵ This provision obviously does not apply to those situations in which the Code of Criminal Procedure provides for an obligatory appointment of defence lawyer: in felony cases; for defendants under the age of 18; for defendants who are deaf, mute or blind; in cases where there is a reasonable doubt whether the defendant's capacity to understand the meaning of the act or direct their conduct was non-existent or significantly limited at the moment when the act was committed; or in cases where there is a reasonable doubt whether the defendant's mental state allows them to participate in the proceedings or conduct defence in an independent and reasonable manner.

⁶ Provisions of the Polish Code of Criminal Procedure set forth two types of preparatory proceedings. Investigation (*śledztwo*) is more formalised, conducted in serious cases and to a greater extent managed by a prosecutor. On the other hand, inquiry (*dochodzenie*) is conducted by the Police (or other law enforcement agency), in different kinds of cases and is less formalised than the investigation.



After 1 July 2015 all defendants will be able to ask the court for the appointment of a defence lawyer. However, such legal assistance will be available only at the judicial stage of criminal proceedings. Accordingly, there is no guarantee of free legal aid in investigations or inquiries conducted before a case goes to trial. Depending on the outcome of the proceedings, the defendant may be requested to pay the costs related to the appointment of a defence lawyer.

2.6. Evidentiary proceedings: summary

In summary, the amendment to the Code of Criminal Procedure that enters into force on 1 July 2015 materially modifies the rules governing the taking of evidence before the court. After the reform of criminal procedure, the burden of presenting evidence will generally be shifted to parties to the proceedings. The legislator still enables the court to take an active, albeit only subsidiary, role in evidence-taking. Notably, the Polish criminal process after the reform does not materially limit the possibility of reading out transcripts of evidentiary acts conducted during preparatory proceedings at the trial. That limits the parties ability to be involved in an adversarial dispute during the trial as evidence is only reconstructed in the presence of the parties. The legislator also decided against abolishing the requirement according to which those files of the preparatory proceedings that are material for the case must be appended to the indictment document filed with the court⁷. This means that also after the reform the court will still be aware of the facts of the case before the start of the trial.

3. Changes to the preparatory proceedings

3.1. Limitation of preparatory proceedings

Apart from making the criminal trial more adversarial, another key tenet of the reform that is to take effect on 1 July 2015 was limiting the scope and duration of preparatory proceedings. The legislator aimed to avoid situations, which appeared quite frequently before 1 July 2015, where the judicial stage of the proceedings generally involved only the repetition of the evidentiary acts already performed during the investigation or inquiry (such as the re-hearing of a witness). In consequence, the reform changes the objectives of preparatory proceedings laid down in the Code of Criminal Procedure. Article 297 (5) of the CCP, which provided before the reform that an objective of the preparatory proceedings is to collect, secure and, to the extent required, record evidence for the court, has been

⁷ For a discussion about the submission of these materials, see also remarks in para. 3.2.

rephrased and now reads that an objective of preparatory proceedings is to collect, secure and record evidence, to the extent such activities are necessary to determine the reasonableness of the submission of the indictment or other measure of concluding the preparatory proceedings, or to present the motion for admitting the evidence and presenting it before the court. Considering the above, it is evident that the legislator intends to limit the scope of evidentiary acts performed during preparatory proceedings. However, it must be stated loud and clear that the success of the reform largely depends on whether in practice law enforcement authorities decide to restrict their involvement in securing evidence for the purposes of a given case. It is worth noting in this context that the legislator has not modified the provisions that allow for reading out transcripts of evidentiary acts conducted during pre-trial proceedings at the trial, and establish no restrictions whatsoever in this respect.

The reform resulted in the modification of one of the purposes of preparatory proceedings. During an investigation (inquiry), evidence will be secured and recorded not for the court, but above all in order to establish whether the case should go to court or be dropped.



3.2. Selection of the materials gathered during preparatory proceedings for the purpose of submitting them to the court

One of the notable changes to the rules of preparatory proceedings (which are less numerous than those concerning the rules of judicial proceedings), is the modification of the procedure that governs submission of cases to the court. While before 1 July 2015 prosecutors were required to submit to the court the indictment and *all* files of the preparatory proceedings, the post-reform rules provided that an indictment must be accompanied by only those documents of preparatory proceedings that relate to the criminal liability of persons named in the indictment, which need to be selected by the prosecutor (art. 334 (1) of the CCP). This measure is to speed up the proceedings before the court, which receives only those documents that, in the prosecutor's view, are of material significance for a given case. Obviously, it needs to be remembered that the prosecutor who file an indictment to the court has the duty to remain impartial (art. 4 of the CCP). The prosecutor thus may not withhold from the court any evidence that supports the defendant's case. However, since the selection made by the prosecutor is, by its very nature, subjective, the legislator – striving to adhere to the equality of arms principle – provides the defendant (and also the victim) with the legal right to request that the indictment be accompanied by documents of the preparatory proceedings designated by the defendant (the victim) (art. 321 (2) of the CCP). If they request so, the defendant

and victim may read all the files of preparatory proceedings before the start of the trial (art. 321 (1) of the CCP).

After the reform, prosecutors will not send to the court all the documents compiled in the course of preparatory proceedings but only those that relate to the criminal liability of persons named in the indictment for the acts alleged in the indictment.

If they file a proper request, the parties may be allowed to read the files of the case after the conclusion of the preparatory proceedings; the parties may request that further documents be sent to the court. Such a request will be binding on the prosecutor.

4. Improvements to the criminal process

Two modes of accelerating criminal process

An important objective of the reform of the Polish criminal process is to speed up the proceedings. The legislator intends to attain this objective generally in two ways: by broadening the avenues of consensual resolution of criminal proceedings and modifying provisions that regulate the management and course of judicial proceedings, in particular appellate proceedings.

4.1. Consensual resolution of criminal cases

4.1.1. Settlements in the Polish criminal process

The Polish Code of Criminal Procedure provides for two modes of consensual resolution of criminal proceedings. These are: conviction without a trial (art. 335 of the CCP) and voluntary submission to criminal liability (art. 387 CCP). Conviction without a trial is an institution under which a suspect and prosecutor may, still at the stage of preparatory proceedings, enter into a settlement concerning the type and measure of penalty and other criminal sanctions and the payment of costs of proceedings. If an agreement is reached, the prosecutor will refer the case to the court that will deliver a conviction without conducting a trial and evidentiary proceedings, provided that the circumstances of committing an offence do not cause any doubts and the conduct of the defendant shows that objectives of the proceedings will be attained. Voluntary submission to criminal liability is an institution which enables the defendant to file a motion for conviction and imposing a specific penalty or punitive measure without conducting evidentiary proceedings. The Court may consider

this motion if the circumstances in which the offence was committed arise no doubts and the objectives of the proceedings will be accomplished despite the fact that a full trial has not been conducted. Additionally, neither the prosecutor nor the victim may object to the motion provided the latter is duly advised of the defendant's right to submit such a motion. In connection with the consensual nature of both institutions, the defendant, in return for cooperation with judicial bodies, can hope for the mitigation of penalties and other means of criminal sanctions they may face. However, the Polish Code of Criminal Procedure, does not provide for any rigid rules in this regard (e.g. mitigation of penalties to the extent stipulated by statute). The measure of penal sanctions is either determined through negotiations in specific preparatory proceedings (conviction without a trial) or is suggested by the defendant in the motion (voluntary submission to criminal liability). Basically, the statutory threat of punishment laid down in a penal law is binding, but in the case of conviction without a trial the Code of Criminal Procedure also provides for a possibility of mitigation of the measure of penalty⁸. Prior to the entry into force of the Act of 27 September 2013 on the amendment to the Code of Criminal Procedure and certain other acts and the Act of 20 February 2015 on the amendment of the Criminal Code and certain other acts the institution of conviction without a trial could be applied in cases involving a sentence of up to 10 years of deprivation of liberty⁹. A motion for voluntary submission to criminal liability could be filed in any case involving a misdemeanour.

4.1.1.1. Broadening the scope of consensual modes

The amendment to the Code of Criminal Procedure resulted, above all, in the broader application of conviction without a trial and voluntary submission to criminal liability. Pursuant to art. 335 (1) of the CCP conviction without a trial is applicable for all types of misdemeanours¹⁰. On the other hand, from 1 July 2015 onwards, a motion under art. 387 of the CCP may be filed in a case involving any prohibited act, including felony cases (amended art. 387 (1) of the CCP). The above change is part of a trend, visible in the Polish criminal process, to broaden the range of cases that may be resolved by entering into a settlement¹¹.

The legislator stipulated that in both types of settlements an agreement may be reached as to a penalty or other criminal sanction as well as a decision on costs of the trial. Similarly to the situation existing prior to the amendment, Polish criminal law does not

⁸ As shown by empirical studies, this is a very rare situation in practice.

⁹ Making a settlement was not possible only in the case of the most serious misdemeanours (e.g. assault with a deadly weapon, aggravated types of rape) or felonies (e.g. manslaughter, taking hostage).

¹⁰ Unlike the majority of other new regulations, this provision entered into force already on 9 November 2013 and not on 1 July 2015.

¹¹ Previously, the range of cases with the settlement option was broadened in 2003.

contain any binding rules on the extent of mitigating sanctions inflicted under consensual procedures. In addition, despite the fact that the objective of the amendment was to increase the practical application of settlements, it is still inadmissible in the Polish criminal process to agree on the number of counts charged or consensually lessen the charge for a given offence.

4.1.1.2. Increasing the role of the victim under consensual procedures

An important modification of the regulation of consensual modes of criminal proceedings is granting a victim the right to object to conviction without a trial (the added art. 343 (3a) of the CCP which entered into force on 1 July 2015). However, it is worth noting that a settlement may be concluded if the victim makes no objection against it; express consent of the victim is not required. It is thus possible to admit the motion of the defendant in a situation where the victim fails to appear at a hearing or court session, despite having been notified of its date.

4.1.1.3. The reform of voluntary submission to criminal liability

An important change to consensual modes of criminal proceedings is the modification of rules applicable to the motion for voluntary submission to criminal liability filed by the defendant. It must be noted at this point that the amendment of the Code of Criminal Procedure favours these defendants who file motions for voluntary submission to criminal liability at the earliest possible stage of the proceedings. However, this rule applies solely to felony cases. Under art. 387 (4) of the CCP in felony cases the extraordinary mitigation of punishment may be applied only where a motion had been filed prior to the delivery of notice of trial to the defendant. If the defendant files the said motion at a later date, they may still receive a more lenient punishment, but such a penalty may not be lower than the statutory penalty stipulated for a given felony.

The changes in the institution of settlements include:

- 1) *broadening the range of cases which may be resolved by entering into a settlement;*
- 2) *granting the victim the right to object to the conviction of the defendant under consensual procedure,*
- 3) *differentiating the admissible extent of mitigation of a penalty depending on the moment when the defendant files a motion for voluntary submission to criminal liability.*



4.1.2. Case discontinued at the victim's request

In addition to the modifications of provisions governing the existing consensual modes, another very important change was the addition of art. 59a to the Criminal Code¹². The new article allows for an unconditional discontinuation of proceedings in situations where the defendant and the victim reached a settlement and the defendant redressed the loss caused by the offence. Therefore, this provision is a sign of opportunistic approach to the legal process¹³, based on an understanding reached between the defendant and the victim.

Article 59a (1) of the CC reads that if, prior to the commencement of first instance court proceedings, the perpetrator who had not been previously convicted of an intentional and violent offence has reconciled with a victim or victims (especially through mediation) and redressed a loss or compensated the victim or all the victims for a moral loss, the proceedings in a given case are discontinued at the victim's request. However, this provision limits the range of cases that may be discontinued, as it applies exclusively to proceedings that involve the following types of criminal offences: misdemeanours punishable with a prison sentence not exceeding three years; misdemeanours against property punishable with a prison sentence not exceeding five years and misdemeanours under art. 157 (1) of the CC (causing disruption of bodily functions or health disturbance lasting over 7 days but which is not a grievous bodily harm under art. 156 (1) of the CC¹⁴). It is worth noting that the proceedings will be discontinued if the victim files the relevant motion. This is not possible where the victim remains inactive, even if the loss has been cured. Moreover, art. 59 (3) of the CC stipulates that the discontinuation of proceedings is inadmissible where a specific circumstance occurs indicating that this would be contrary to the need to achieve the objectives of the punishment.

12 Originally, the draft law provided that the provision would be added to the Code of Criminal Procedure, but eventually a decision was taken to add it to the Criminal Code. Nevertheless, this does not change the fact that the nature of the new rule is basically procedural.

13 Prior to 1 July 2015 the principle of opportunistic approach to the criminal process had had no application in the Polish law, except for few and narrow exceptions. This principle provides that law enforcement bodies have the right to assess whether it is appropriate to prosecute a given offence (e.g. they may abandon the prosecution due to a trivial nature of the offence or disproportionately high costs of prosecution compared to the harm inflicted).

14 A grievous bodily harm is depriving a human being of sight, hearing, speech or the ability to procreate or inflicting on another a serious crippling injury, an incurable or prolonged illness, an illness actually dangerous to life, a permanent mental illness, a permanent total or substantial incapacity to work in an occupation, or a permanent serious bodily disfigurement or deformation.

The reform creates the possibility of reaching an understanding between the defendant and the victim that will lead to an unconditional discontinuation of proceedings. Nevertheless, the following conditions must be met:

- before the commencement of first instance court proceedings the perpetrator has reconciled with the victim and redressed the loss or compensated the victim for the inflicted moral loss,
- the perpetrator has not been previously convicted of an intentional offence involving violence,
- the victim has requested the discontinuation of proceedings,
- a case applies to a misdemeanour punishable with a prison sentence not exceeding three years or a misdemeanour against property punishable with a prison sentence not exceeding five years or a misdemeanour under art. 157 (1) of the CC,
- no specific circumstance occurs indicating that the discontinuation of proceedings would be contrary to the need to achieve the objectives of the punishment in a given case.

4.1.3. Summary

To sum up, by amending the Polish Code of Criminal Procedure the legislator broadens the field of consensual resolution of criminal proceedings. While in respect of conviction without a trial and voluntary submission to criminal liability, which were applicable since the late 1990s, this extension is not very substantial due to the existing legal framework of these measures, art. 59a of the CC provides new options for the consensual resolution of criminal proceedings (by way of discontinuation of proceedings without the defendant being convicted). It is worth noting that the specific feature of the consensual modes in the Polish criminal process is the role of the victim of the offence, without whom the proceedings may not be so resolved.

4.2. Improvements to judicial proceedings

Another way of improving the criminal procedure that has been chosen by the legislator is amending the provisions that govern the management and conduct of judicial proceedings before first and second instance courts. In this context there are three issues that deserve special attention.

4.2.1. Pre-trial hearing

First of all, the amendment introduces at least several new solutions that aim to improve the management of the judicial stage of criminal proceedings. The new

measure named “pre-trial hearing” is perhaps the most important of them all. Article 349 (1) of the CCP stipulates that if the expected scope of evidentiary proceedings justifies the assumption that the hearing will need to take place on at least 5 different dates, the president of the court must immediately appoint a judge (or judges) and refer the case to a hearing¹⁵. The hearing should be held within 30 days from the scheduled date. Professional participants (public prosecutor, defence lawyer and attorney for the auxiliary prosecutor) may attend the hearing. It is also possible to summon other parties, if it may facilitate the course of the proceedings. Before the hearing, public prosecutor, attorneys and defence lawyers are obliged to submit written proposals of how the main trial should be conducted and managed (e.g. proposals of dates and the content of the hearing, dates of justified absence, etc.), including information on the order of evidence-taking during the trial. During the hearing, the presiding judge considers submissions of the parties, attorneys and defence lawyers regarding the planning and management of the main trial and rules on evidentiary motions, the order of evidence-taking, course and management of the main trial, dates of the main trial, and also makes other necessary resolutions. The legislator has established the pre-trial hearing to enable efficient management of the trial and avoid potential problems in its conduct.

4.2.2. Reduction of the unnecessary formalism of trials

Second, the amendment in question reduces the unnecessary formalism of the main trial. An example of this approach is the abolishment of the requirement of reading out the full text of the indictment, together with its justification (which proved to be extremely time-consuming in some cases). From now on, a prosecutor will only give a short summary of the charges (the amended art. 385 of the CCP). The above change comes hand in hand with another one, which stipulates that the court that passes a sentence is no longer required to read out the indictment in full (it has been introduced by the amendment to art. 418 (1a) of the CCP). Another reflection of the above mentioned trend is the amendment to art. 394 (2) of the CCP, which stipulates that from 1 July 2015 all transcripts and documents required to be read out during the trial may be deemed disclosed in full or in part without the need to read them. They have to be read only upon the request of a party which has had no opportunity to become aware of their content. Until 1 July 2015 it was required by law to read court transcripts and documents each time where a party so requested. Another important change, which aims to reduce the risk of obstructing the disposal of proceedings and, at the same time, is a natural consequence of the shift towards a more adversarial model of proceedings, is

¹⁵ It is also possible to schedule the hearing in other circumstances, if that may contribute to the better management of court proceedings.

the abolishment of a long-standing general rule that the defendant needs to be present during the trial. After the amendment is introduced, defendant's presence during the trial becomes a right rather than an obligation. Only exceptions to this rule are the felony cases, in which the defendant has to participate at the initial stage of the trial, and these cases in which the presence of the defendant is considered necessary by the presiding judge or the court.

The objective of accelerating proceedings before first-instance courts is being achieved through:

- 1) *a better management of trials ensured by a pre-trial hearing,*
- 2) *elimination of the unnecessary formalism of the procedure,*
- 3) *abolishment of the general requirement that the defendant has to be present during the trial.*

4.2.3. The revolution in the appellate procedure

Third, a major change has been introduced to the appellate procedure. Before 1 July 2015, rules of procedure before second instance courts envisaged that the court of appeal considers the case to the extent covered by the appellate measure and, where the appeal is lodged by a professional (public prosecutor, defence lawyer or attorney), to the extent covered by the allegations of the appeal. At the same time, the pre-reform law enabled appellate courts to considerably modify also those parts of first instance rulings that were not covered by the allegations of the appeal¹⁶. What is more, the appellate procedure envisaged a far-reaching restriction as to the possible conduct of evidentiary proceedings by second instance courts. Article 452 (1) of the CCP read that the appellate court could not conduct evidentiary proceedings as to the merits of the case. Hearing evidence was admissible only in exceptional circumstances where it was necessary to supplement the judicial examination of the case. As a result, it became a common practice that appellate courts revoked decisions issued by first instance courts and referred cases for reconsideration. This negatively affected the length of proceedings.

The reform entering into force on 1 July 2015 introduced three major changes. First, all actors in the criminal process, including non-professional actors, were obliged to indicate in the appeal allegations against the decision of the first instance court. Second,

¹⁶ The above practice applied mostly to rulings in favour of the defendant, since delivering unfavourable decisions is rather strictly restricted by the prohibition of the *reformatio in peius*.

the appellate court's ability to interfere with decisions that have not been challenged by the parties was specified and, in effect, narrowed. Third, the provisions restricting the possibility of conducting evidentiary proceedings before an appellate court were revoked and it was stated that referring a case for reconsideration due to the need to hear evidence may only be done where it is necessary to repeat the whole evidentiary proceedings. The purpose of the reform is, on the one hand, to narrow the scope of appellate review almost only to circumstances raised by applicants, and, on the other, to enable second instance courts to amend the substance of lower courts' decisions. Both measures are designed to accelerate appellate proceedings. However, they call for more professionalism on the part of actors making appeals and lead to a situation where an unfavourable decision of the second instance court may turn out to be final, even if the first instance court ruled in favour of the defendant¹⁷.

The reform significantly changes the appellate procedure through:

- imposing more stringent requirements on parties that submit appellate measures (e.g., an appeal against a judgment);*
- limiting the appellate court's ability to review a decision issued in the first instance;*
- enabling the appellate court to conduct evidentiary proceedings as to the merits of the case;*
- limiting the number of decisions in which appellate courts return cases to first instance courts for reconsideration;*
- increasing the number of decisions in which second instance courts amend first instance judgments and conclude the proceedings.*



5. The right to defence and the application of preventive measures

5.1. Objectives of the reform of preventive measures

The reform of the Polish criminal process introduces new important regulations on preventive measures, including specifically pre-trial detention, which is a preventive measure involving deprivation of a person's liberty. They aim to strengthen the guarantees of equality of arms between the parties and the defendant's right to defence.

¹⁷ In the Polish criminal process the extraordinary appellate measure known as the "complaint in cassation" is available only in a limited number of cases.

5.2. The openness of evidence on which pre-trial detention is based

The first important change is the amendment to art. 156 (5a) of the CCP which provides that in the event a motion for the application or extension of pre-trial detention is filed in the course of preparatory proceedings, the suspect and their defence lawyer are immediately provided with case files containing the evidence listed in the motion¹⁸. It is worth noting that before the change, this provision enabled the prosecutor to deny access to case files containing such evidence where there was a justified concern that the grant of access would put a victim or other participant in the proceedings at risk of losing life or health, would pose a risk of destroying or hiding evidence or creating false evidence, could prevent the detection or apprehension of a co-perpetrator of the offence imputed to the suspect or co-perpetrators of other acts revealed in the course of proceedings, could reveal the conducted investigative operations or would pose a risk of obstructing preparatory proceedings in another unlawful manner.

Therefore, the modification of the wording of art. 156 (5a) of the CCP considerably strengthens the right to defence of a person named in a motion for pre-trial detention. This is because it prevents a situation where a defendant and their lawyer do not know evidence on which the motion for pre-trial detention is based and hence may not oppose such a motion by invoking the fact that the motion was based on insufficient evidence. Also art. 249a of the CCP, which enters into force on 1 July 2015, confirms the principle of the complete openness of materials that are used as the basis of the motion for pre-trial detention. Under this article only the findings made on the basis of evidence that is open to the defendant and their defence lawyer may be used as a foundation of a decision on the application or extension of pre-trial detention.

The art. 249a of the CCP guarantees that in examining the motion for the application of pre-trial detention the court may rely exclusively on the evidence presented by the prosecutor; should the court wish to refer to other evidence, this may only be evidence favourable to the defendant and it has to be disclosed during a court hearing. Such a regulation not only excludes the possibility that a prosecutor submitting the motion for the application of pre-trial detention will refuse to disclose to the defendant the evidence incriminating the latter but also removes the possibility that the court will issue a decision on pre-trial detention based on the evidence that is unfavourable and has not been disclosed to the defendant but is known to the court from case files which the prosecutor encloses to the motion for pre-trial detention.

¹⁸ This wording of the provision was introduced by the Act of 27 September 2013 on the amendment to the Code of Criminal Procedure and certain other acts, and entered into force not on 1 July 2015, as the majority of the provisions of this Act, but already on 2 June 2014.

5.3. Better safeguards in the course of extending pre-trial detention

Another very important change in proceedings for the application of pre-trial detention is the amendment to art. 249 (5) of the CCP. This provision governs the issue of extending pre-trial detention. Whereas the Polish Code of Criminal Procedure provides that prior to the application of pre-trial detention it is necessary to hear a defendant (unless it is not possible due to the defendant's going into hiding or staying abroad), during a court hearing on the extension of pre-trial detention the right to be present applies only to a prosecutor and defence lawyer, provided the latter has such a right. The amended wording of the said article provides, on the other hand, that at the request of the defendant who has no defence lawyer, a legal aid lawyer is appointed to take part in the detention hearing. The legislator guarantees then that even if the defendant is not personally present at the hearing, they still have the possibility to have their case defended owing to the appointment of a defence lawyer at their request.

5.4. Fast-tracking the hearing of complaints against decisions on the application of pre-trial detention

Further procedural safeguards introduced in the amendment that enters into force on 1 July 2015 improve the procedure governing appeals against the application of preventive measures. Article 252 (3) of the CCP provides that the complaint against the decision on pre-trial detention is heard by the court not later than within 7 days from the day when it is submitted to the court along with necessary files. Although exceeding this period does not automatically result in the revocation of pre-trial detention, it is definitely disciplining in nature. Its introduction must be assessed positively, for before the amendment it was not rare for complaints against pre-trial detention to be heard weeks or even months after their submission. This practice met with criticism of the European Court of Human Rights¹⁹.

5.5. Limiting the scope of cases where pre-trial detention may be applied

In addition to the reinforcement of procedural rights of the defendant against whom the motion for pre-trial detention was filed, the changes introduced by the amendment move towards rationalising the practical application of pre-trial detention. The legislator specifies in particular the possibility of applying pre-trial detention in situations where the prohibited act the defendant is charged with carries a severe

¹⁹ Cf. e.g. the ECHR judgement in the case *Stettner v. Poland* of 24 March 2015 (application no. 38510/06).

penalty under the statute. To eliminate doubts that appeared in practice prior to the amendment, the modified art. 258 (3) of the CCP stipulates that in the case of a defendant who is charged with committing a felony or a misdemeanour punishable with imprisonment with an upper limit of at least 8 years or whom the first instance court sentenced to imprisonment exceeding three years, doubts that the defendant may obstruct the proper course of proceedings which justify the application of a preventive measure may also result from the severity of a penalty which may be imposed on the defendant. This means that the severity of penalty is a circumstance warranting the presumption that the defendant may obstruct the course of criminal proceedings but only where such severity actually exists given the circumstances of a given case and does not result solely from the statutory penalty. Further, the amendment modifies the scope of cases in which pre-trial detention may be applied by excluding such cases that carry a penalty of imprisonment up to two years. Before 1 July 2015 this limitation applied solely to the cases punishable with a prison sentence of up to one year²⁰.

The amended rules concerning pre-trial detention provide that:

- as a rule, the application of pre-trial detention is excluded in cases carrying the penalty of up to two years of deprivation of liberty;*
- pre-trial detention may be imposed solely on the basis of evidence disclosed to the defendant;*
- the appellate court has seven days to hear the complaint against a pre-trial detention order;*
- proceedings concerning the extension of pre-trial detention are conducted with the participation of a defence lawyer; if the defendant has no defence lawyer they may request one to be appointed by a court.*

6. Summary

The above presented solutions, which aim to reform the Polish criminal process, do not exhaust the topic of changes of criminal procedure introduced by the September Amendment and the February Amendment. It is because both laws amend many other areas of the criminal procedure. The discussed issues are, however, the major elements of

²⁰ An exception to this rule (both before and after the amendment) is the situation where a defendant is in hiding, persistently fails to appear when requested, obstructs the proceedings in other unlawful manner or if the defendant's identity cannot be established.

the introduced reform. Time will show to what degree the intentions of the legislator to thoroughly redefine the main principles of the Polish criminal process will be accomplished in practice and whether the new model of the criminal process will prove more effective and more just.

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