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EXAMINATION OF A COURT'S COMPETENCE AND JURISDICTION IN THE CRIMINAL PROCEEDING

The court competence constitutes the guarantee of the constitutional principle of the right to a fair trial, i.e. "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court" (argument from Article 45 item 1 of the Constitution of the Republic of Poland). The European Convention for the Protection of Human Rights and Fundamental Freedoms[1] also guarantees the right to a hearing of a case before a court established by a statute in Article 6 item 1, which states that the right may only be guaranteed by a competent court[2].

Thus, the examination of the competence of a court is crucial for the criminal proceeding. It makes it possible to establish which court is entitled and obliged to hear a given category of cases and undertake action in the course of a trial.

The Criminal Procedure Code that is currently in force regulates the examination of the competence of courts in Article 35 § 1. According to the provision "a court examines its competence and in case it recognises that is not competent, it transfers a case to a competent court or another organ". Thus, the cited provision obliges every court *ex officio* to examine its competence and it concerns the matter, the territory as well as the function[3]. A court has the right to act in accordance with the norm of Article 35 § 1 of the CPC only in case it determines it is not competent based on the unambiguous and undoubted circumstances of an act and not concluded based on the examination

[1] Convention for the Protection of Human Rights and Fundamental Freedoms drafted on 4 November 1950 in Rome (Journal of Laws of 1993, No. 61, item 284).

[2] P. Hofmański, A. Wróbel, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18* [Convention for the Protection of Human Rights and Fundamental Freedoms – Comments on Articles 1–18], (ed.) L. Garlicki, vol. 1, Warszawa 2010, p. 311 and the following.

[3] J. Bratoszewski, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego, Komentarz* [Criminal Procedure Code – Commentary], vol. 1, Warszawa 2003, p. 387; W. Grzeszczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Warszawa 2012, p. 75; also see ruling of the Court of Appeal in Gdańsk of 13 January 1999, II AKo 216/98 (KZS 1999, no. 7–8, item 84).

and evaluation of evidence, which are immanently part of the evidence hearing stage of a trial[4].

It is worth mentioning that the Criminal Procedure Code also obliges a public prosecutor to examine the competence of a court before filing an indictment. Formulating an indictment and filing it in court, a public prosecutor should indicate the court competent to hear the case and the type of procedure (argument from Article 332 § 1 point 5 of the CPC). Next the president of the court (the head of the chamber or an appointed judge) examines the appropriateness of the indication in the course of checking the indictment (argument from Article 337 § 1 of the CPC). The president of the court refers the case to the sitting also in case there is a need of adjudication that goes beyond the competence of the court, especially if it is necessary to take the decision on non-competence of the court or the change of the type of procedure indicated in the indictment (argument from Article 339 § 3 point 3 of the CPC)[5]. A court is not bound by the public prosecutor's description of the act charged so it can evaluate the appropriateness of the description of the act and its legal classification, and as a result, transfer the case to another court that is competent (Article 35 § 1 of the CPC) also before trial (Article 339 § 3 of the CPC). However, a decision like this should be limited to an unambiguous situation, thus it should not be taken as a result of the examination or evaluation of evidence, which are subject to examination during a trial. Before a trial, a court cannot assess evidence, except for an obvious situation. A court cannot prejudge matters that are subject to adjudication. Thus, a court is obliged to verify its competence and type that a public prosecutor specified in the indictment. The Supreme Court confirmed it in its ruling of 2 October 2006, V KK 211/2006[6], stating that: "regardless of the prosecutor's erroneous classification of an act and inappropriate referral of the indictment, a court is obliged *ex officio* to examine its competence and this must be done at every stage of the proceeding (Article 35 § 1 of the CPC). In accordance with the opinions established in judicial decisions[7], the aim of a criminal proceeding is to establish criminal liability for an unlawful act treated as an actual event. The scope of an indictment does not depend on the description of an act, the time of its commission or legal classification proposed in the indictment, which

[4] See ruling of the Court of Appeal in Warszawa of 21 January 2003, II AKz 5/03 (OSA 2003, no. 12, item 117), sentence of the Supreme Court of 9 January 2013, V KK 382/12, (LEX no. 1289073).

[5] S. Stachowiak, *Rodzaje właściwości sądu w ujęciu nowego Kodeksu postępowania karnego* [Types of court competence in the light of the new Criminal Procedure Code], Prokuratura i Prawo 1999, no. 10, p. 20.

[6] (OSNwSK 2006, no. 1, item 1855); also see sentence of the Supreme Court of 22 April 1986, IV KR 129/86 (OSNPG 1986, no. 12, item 167).

[7] See sentence of the Supreme Court of 23 May 2000, IV KKN 580/99 (LEX no. 51089); sentence of the Supreme Court of 17 April 2013, IV KK 351/12 (KZS 2013, no. 6, item 42); also see sentence of the Supreme Court of 2 February 2009, V KK 427/08 (OSNwSK 2009, no. 1, item 291); ruling of the Court of Appeal in Poznań of 28 April 1992, II AKz 112/92 (OSA 1992, no. 9, item 51).

a court not only can but is obliged to change if the actual findings that must be established based on the results of the court proceeding indicate that". It is obvious that if the evidence provided in the course of the proceeding justifies legal classification of an act, which implicates the change of competence, a court is obliged to consider the above-mentioned issues and take adequate procedural decisions taking into account the fact that the court's competence with respect to the matter in the course of the jurisdictive proceeding is affected by the offence the accused is charged with, what it looks like in the light of the whole evidence collected, and not its inappropriate legal classification that a public prosecutor adopted in an indictment.

It must be emphasised that the provision of Article 35§ 1 of the CPC is applicable in every proceeding conducted before court, thus including a situation in which a court *ex officio* examines its competence to adjudicate on the matter of a trial, i.e. on the legal-penal liability of a perpetrator charged with a criminal act as well as on accidental matters, e.g. on a motion to give consent to telephone tapping or on a complaint.[8]

This means that a court is obliged to examine its competence without delay after a prosecutor files an indictment or a motion for conditional discontinuance of a proceeding or temporary arrest, or a complaint is filed. The obligation to examine its own competence *ex officio* does not exclude the possibility of taking a decision on this matter as a result of a motion filed by the parties or other persons directly interested (Article 9 § 2 of the CPC). In connection with the contents of Article 9 § 2 of the CPC, a question arises whether and what procedural decision a court should take in case of a motion to state or no grounds to state its non-competence filed by the parties in accordance with Article 9 § 2 of the CPC. There are different opinions of the doctrine on this issue. There is an opinion that in case "a motion filed by the parties based on Article 9 § 2 of the CPC, a court is not required to issue a ruling on the matter of the non-allowance for the filed motion under Article 9 § 2 of the CPC"[9]. The dominating opinions are[10], however, that "in case a party, based on Article 9 § 2 of the CPC, applies to a court to examine its competence within the constitutionally guaranteed right to a hearing before a competent court (Article 45 item 1 of the Constitution), it obliges a court to issue a ruling on the matter of competence, which the parties have the right to appeal against". This opinion is worth approving of since it is obvious that the parties' motion

[8] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Komentarz do artykułów 1–296* [Criminal Procedure Code – Comments on Articles 1–296], (ed.) P. Hofmański, vol. 1, Warszawa 2011, p. 299.

[9] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299.

[10] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], Warszawa 2013, p. 206 and opinions and doctrines cited there.

to establish non-competence of a court constitutes a form of typical notification that there is a need to carry out the procedure *ex officio*. The filing of such a motion by the parties is therefore a procedural action because it constitutes the behaviour laid down in the provisions of the criminal procedure law. Thus, in case a motion filed based on Article 9 § 2 of the CPC, a court may state its non-competence and transfer the case to another court or another organ in compliance with their competence. Thus, a court must allow such a motion[11].

It is obvious that a court's competence in the matter in the course of the proceeding also depends on the criminal act committed by the accused as it is seen in the light of circumstances and not its erroneous legal classification made by a prosecutor in an indictment[12]. The obligation to examine the competence and transfer a case if non-competence occurs (except for cases under Article 35 § 2 of the CPC) is binding at every stage of the proceeding. Normative determination of a court's competence by referring to a type of chamber that is to hear a case, even if the chamber were defined as a 'court', does not make it a court in the procedural sense as referred to in Article 35 § 1 of the CPC[13]. As a result, it means that if a given case is wrongly filed to a given chamber of a court, it should be transferred to another chamber of the same court not based on the decision on its non-competence but based on a decision that is organisational in character[14]. Thus, in case of a dispute, the above-mentioned issue – being part of a given court's internal organisational matter – is solved by the president of the court who – based on § 55 item 2 of Ordinance of the Minister of Justice of 23 February 2007 – Rules and regulations of common courts operation[15] – issues an adequate decision that cannot be appealed against[16].

It may happen that the reason for non-competence of a court to adjudicate occurs in the course of the court proceeding. A court is still obliged to *ex officio* take that fact into account and rule on the matter of its non-competence[17]. Thus, if during the first instance hearing a court establishes that it has no territorial

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[11] K. Marszał, *Badanie właściwości sądu w sprawach o przestępstwa* [Examination of court competence in murder cases], [in:] *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi* [Complaint-related model of a trial – Book presented to Professor Stanisław Stachowiak], Warszawa 2008, pp. 246–247.

[12] See sentence of the Supreme Court of 1 December 2010, III KK 224/10 (OSNwSK 2010, no. 1, item 2391).

[13] See ruling of the Supreme Court of 27 January 2011, I KZP 26/10 (KZS 2011, no. 4, item 8).

[14] See resolution of the Supreme Court's bench of 7 judges of 14 March 1989, III PZP 45/88 (OSNCP 1989, no. 11, item 167); see resolution of the Supreme Court of 22 1994, III CZP 87/94 (OSNC 1995, no. 1, item 5).

[15] Uniform text, Journal of Laws of 2014, item 259.

[16] J. Grajewski, S. Steinborn, [in:] J. Grajewski, L.K. Paprzycki, S. Steinborn, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. 2, Warszawa 2013, p. 175.

[17] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299; also see sentence of the Supreme Court of 23 February 2000, IV KKN 596/99 (LEX no. 51132); ruling of the Court of Appeal in Krakow of 3 February 2000, II AKz 2/00 (KZS 2000 no. 2, item 21); ruling of the Court of Appeal in Krakow of 4 June 2002, II AKz 204/02 (KZS 2002, no. 6, item 17).

jurisdiction or that a lower instance court may hear the case, it may transfer it to another court but only if the trial must be adjourned (argument from Article 35 § 2 of the CPC). It is worth mentioning that in case of territorial jurisdiction, the establishment of it before a trial starts, obliges a court to transfer a case to a court that has territorial jurisdiction (argument from Article 35 § 1 of the CPC) and the conditions for transferring a case because of territorial non-competence are applicable in case of a court of a lower instance as well as of a higher instance. In case it is revealed after a trial starts, a court is obliged to transfer a case only if the trial must be adjourned (argument from Article 35 § 2 *in fine* of the CPC). As a result, this means that although territorial non-competence has been established in the course of a trial, a court does not transfer a case to another court if another court of the same or a lower instance is competent to adjudicate and a trial does not have to be adjourned. Thus, the transfer of a case cannot take place because of a court's territorial non-competence if a court continues a trial and issues a verdict or discontinues a trial (argument from Article 402 § 1 of the CPC). The necessity to adjourn is not the same as the fact of adjournment but actual existence of circumstances indicating a lack of rationale for the recognition of a break in the proceeding as a sufficient one[18]. Thus, just the fact of adjournment does not constitute sufficient grounds for transferring a case to another court that has territorial jurisdiction or a court of a lower instance if the arguments for trial economics are against such a decision. Court proceeding economics should be understood in such a case as the speed of proceeding and social costs of the administration of justice. It is obvious that the speed of proceeding lowers social costs of the administration of justice, not to speak about other advantages of such a proceeding, especially with respect to adjudication on a case in a reasonable period of time, which is the implementation of the principle of the right to a fair trial. Before taking a decision in accordance with Article 35 § 2 of the CPC, a court should always follow the principle of adjudicating in a reasonable period of time, which is expressed in the Constitution of the Republic of Poland, the Convention for the Protection of Human Rights and the Fundamental Freedoms as well as the Criminal Procedure Code. This makes the above-mentioned principle a basic one in the light of taking proceeding decisions, including those resulting in transferring a case to another court[19].

Based on Article 35 § 2 of the CPC, the judicature[20] draws attention to the fact that "Even if there is a need to adjourn – a court's decision to transfer

[18] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz. Wydanie 6. Tom I. Artykuły od 1–467* [Criminal Procedure Code – 6th edition – Volume 1 – articles 1–467], Warszawa 2014, p. 167.

[19] See ruling of the Court of Appeal in Gdańsk of 20 November 2013, II AKz 717/13, Prokuratura i Prawo 2014 – pull-out, no. 11–12, item 29.

[20] See ruling of the Court of Appeal in Katowice of 23 June 2010, II AKz 402/10 (OSA 2010, no. 3, item 1); see ruling of the Court of Appeal in Katowice of 14 January 2004, II AKz 16/04 (KZS 2004, no. 6, item 64).

a case is optional. This does not mean arbitrariness – a helpful criterion for evaluating whether transferring a case to a lower instance court is justified is in such a situation the examination of the level of the trial's performance, efficiency of the proceeding – i.e. the analysis of the elements of the broadly understood trial economics, which should prevent undue lengthening of the proceeding. These reasons should be taken into consideration especially if the accused is temporarily arrested […]"[21]. The fact that Article 35 § 2 of the CPC refers to a situation in which a court states during the first instance hearing that "it is not territorially competent", which means that another court of the same instance or "a lower instance court is competent", results in the conclusion that, although it concerns different competence, it is always within the same structure of common or military courts[22].

"Territorial competence of the first instance court that arises with the filing of an indictment – resulting from the Criminal Procedure Code (a statute) and then established during the course of a trial – cannot be changed in the course of a trial based on a provision of a lower rank that is administrative-organisational in character. This means that a change of the territorial jurisdiction of a court established by Ordinance of the Minister of Justice of 16 October 2002 on courts of appeal, district courts and the establishment of their location and territorial jurisdiction (Journal of Laws No. 180, item 1508 as amended) does not authorise a court to examine its territorial competence in the course of a trial and to apply Article 35 § 2 of the CPC"[23]. The Court of Appeal in Katowice presented a different standpoint in this matter and in its ruling of 20 June 2001, II AKo 98/01[24], states that "There are no grounds for the assumption that a given court's competence starts with the filing of an indictment and is established in the course of the further proceeding, and cannot be changed in connection with the establishment of a new court and the change of territorial jurisdiction of the same level courts. The date of filing an indictment does not ultimately decide on the territorial jurisdiction of a given court, which also refers to a situation in which in the later period, based on adequate provisions, the territorial jurisdiction of courts changes".

A different situation takes place when a court during the first instance hearing states that it is not competent to adjudicate the given matter. Then, there are the

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[21] See ruling of the Court of Appeal in Katowice of 14 February 2001, II AKz 122/01 (OSA 2001, no. 7, item 43).

[22] See ruling of the Supreme Court of 13 December 2002, WZ 42/02 (OSNKW 2003, no. 3–4, item 38).

[23] See ruling of the Court of Appeal in Lublin of 4 August 2010, II AKz 350/10 (LEX no. 628244); also see ruling of the Court of Appeal in Warsaw of 17 November 2000, II AKz 602/00 (OSA 2001, no. 4, item 25).

[24] (KZS 2001, no. 11, item 63); also see ruling of the Court of Appeal in of 20 June 2001, II AKo 106/01 (KZS 2001, no. 11, item 64); ruling of the Court of Appeal in Katowice of 27 June 2001, II AKo 113/01 (KZS 2001, no. 11, item 65).

following procedural solutions. Firstly, if a court of a higher instance or a special court is competent to hear a case, regardless of the stage of the course of a trial, a court that is not competent shall transfer a case to a competent one. Otherwise its verdict would be subject to definite quashing (argument from Article 439 § 1 point 3 and 4 of the CPC). If a court competent to hear a case is a court of a lower instance, an adjudicating court may transfer a case to that court but only when a trial must be adjourned[25]. This is because the legislator uses a phrase 'may transfer a case' in Article 35 § 2 of the CPC, and not 'transfers a case' as in Article 35 § 1 of the CPC. Thus, in the discussed procedural situation, transferring a case is not obligatory but adjourning a trial, a court should take into consideration also trial economics before it takes a decision on transferring a case, especially whether the performance of the course of the proceeding is an argument for transferring a case to a competent court of a lower instance.

If, after a trial starts, it occurs that the act the accused committed is an offence, a court does not transfer a case to a competent court but the same bench of the court hears it applying the provisions of the Code of Procedure in Petty Offences (argument from Article 400 § 1 of the CPC).

However, if a regional court, after the hearing of evidence during the first instance hearing decides that the act that the accused is charged with is a misdemeanour that is subject to this court's competence and states in the sentence that the act is a misdemeanour other than referred to in Article 25 § 1 point 2 and 3 of the CPC, then a problem may arise to which court the court of appeal should transfer the case for re-examination in case it approves of the appeal in the adjudicated case filed by whichever party. T. Grzegorczyk[26] rightly notices that "the transfer of a case under examination from a court of appeal to a district court is a judgement concerning the competence of that court, and in case of determining during a trial that an act constitutes a misdemeanour referred to in Article 25 § 1 point 2 or 3 of the CPC, results in the transfer of a case to a regional court, which lengthens the proceeding". Thus, as a result, after the transfer of a case, the indication made in an indictment concerning the legal character of a crime as subject to the competence of a regional court is updated. From this point of view, the transfer of a case from a court of appeal to a regional court is justified. Therefore, re-examining a case, a regional court may establish the character of an act the accused is charged with differently than before, taking into account the appeal approved of that resulted in the quashing of the former verdict and passing a case back to the first instance court for re-examination (Article 443 of the CPC). Thus, it is rightly assumed in the doctrine[27], that if a court re-examining a case, however, reached the same

[25] T. Grzegorczyk, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 166.
[26] *Ibid.*, p. 167.
[27] *Ibid.*

conclusion as formerly, it would not constitute a procedurally faulty act under Article 439 § 1 point 4 of the CPC. However, if the classification of an act adopted by a regional court, excluding the features of the matter, a case should be transferred to a district court and the indication made by a court of the second instance would be binding (argument from Article 442 § 3 of the CPC)[28].

The determination of non-competence of a court requires that a ruling be issued. It is rightly assumed in the doctrine[29] and the judicature[30] that "it is not enough to predict the possibility of stating such a fault, but [sic – Z.K.] this fault must be established. Then, a court transfers a case to a competent court or another organ (argument from Article 35 § 1 of the CPC). As a result, his means that a court must not only establish its non-competence but also establish which court or organ is competent to hear a given case[31]. If a regional court establishes its non-competence and transfers a case to a district court, this court is bound by the decision made by a court of the higher instance unless in the course of a trial new important circumstances occur[32]. The Supreme Court expressed a similar standpoint in its ruling of 18 December 2002, II KO 61/02[33], stating that "Although the scope of the regulation of Article 35 § 1 of the CPC does not cover the situation in which a court of appeal has already issued a binding ruling in the matter of competence, however, in case in the course of further proceeding new important circumstances occur and may be decisive for the establishment of the competence in the matter, a court should state its non-competence and transfer a case to a competent court". This interpretation is followed in other rulings[34]. In this case it does not concern a re-examination of the former prerequisites as if they had been inappropriately considered but

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[28] *Ibid.*

[29] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299 and opinions of the doctrine cited there.

[30] See ruling of the Supreme Court of 29 April 1978, VII KZP 49/77 (OSNKW 1978, no 6, item 61).

[31] W. Grzeszczyk, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 75.

[32] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 299; also see resolution of the Supreme Court of 29 April 1978, VII KZP 49/78 (OSNKW 1978, no. 6, item 61).

[33] (LEX no. 74416); see ruling of the Court of Appeal in Gdańsk of 13 January 1999, II AKo 216/98, [in:] W. Cieślak, T. Kopoczyński, W. Wolański, *Zestawienie orzecznictwa Sądu Najwyższego i sądów apelacyjnych dotyczącego k.k. i k.p.k. z 1997 r. za okres: wrzesień 1998 r. – luty 1999 r.* [Specification of rulings of the Supreme Court and courts of appeal concerning the Criminal Code and the Criminal Procedure Code of 1997 for the period of September 1998 – February 1999], Warszawa 1999, p. 24; also see ruling of the Court of appeal in Krakow of 5 May 1999, II AKa 151/99 (KZS 1999, no. 11, item 41); ruling of the Court of Appeal in Lublin of 29 December 2010, II AKz 585/10 (KZS 2011, no. 5, item 88); resolution of the Supreme Court of 10 October 1991, I KZP 24/91 (OSNKW 1992, no. 1–2, item 9); ruling of the Court of Appeal in Wrocław of 19 January 2005, II AKz 25/05 (KZS 2005, no. 9, item 46).

[34] See sentence of the Supreme Court of 15 November 2013, III KK 320/13 (LEX no. 1393797); sentence of the Supreme Court of 9 January 2013, V KK 382/12 (LEX no. 1289073); also see ruling of the Court of Appeal in Krakow of 17 October 2013, II AKz 375/13 (LEX no. 1386097); ruling of the Court of Appeal in Krakow of 28 February 2013, II AKz 52/13 (LEX no. 1286551); ruling of the Court of Appeal in Lublin of 29 December 2010, II AKz 585/10 (KZS 2011, no. 5, item 88).

the occurrence of new circumstances justifying *rebus sic stantibus* a different ruling. Parties have the right to expect that an opinion of a court (every court) expressed in a valid adjudication will be complied with by all the participants of the proceeding, including other courts, because – not to speak about the indispensable authority of courts – only in this way can procedural order be ensured, especially can a case be examined instead of being transferred from one court to another[35]. The Court of Appeal in Warsaw expressed a different opinion on this matter and in its ruling of 4 January 2008, II AKz 841/07[36], stated that "The adjudication of a court of appeal quashing a verdict and transferring a case to a specified first instance court for re-examination initiates a proceeding from the beginning and confirms that the court to which a case has been transferred has competence in the matter".

The decision on the issue of competence may be passed both at the sitting and during a trial (argument from Article 95 of the CPC). If a sitting on this matter is arranged, the notification of the parties is not necessary. However, they may take part in such a sitting if they appear (argument from Article 96 § 2 of the CPC).

It is rightly raised in the doctrine[37] that "the establishment of non-competence of a court and the resulting transfer of a case cannot concern the subjective elements of a case referring to particular accused persons or the objective elements of a case referring to particular charges". If it were possible, the regulations concerning the subjective conjunction (Article 33 § 1 of the CPC) and the objective conjunction (Article 34 § 1 of the CPC) would be deprived of any sense. It must be assumed, however, that if based on Article 34 § 3 of the CPC, there are grounds for the exclusion of some cases from among the accused persons or matters with respect to some particular acts for separate hearing, then the issue of transferring the cases excluded for separate hearing to a competent court based on Article 35 § 1 of the CPC[38] is updated. There are also alternative opinions on this matter both in the doctrine[39] and in the judicature[40].

The establishment of non-competence of a court, which has already been explained, cannot take place when a case has been transferred in accordance with Article 36 of the CPC and Article 37 of the CPC because in both procedural

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[35] See ruling of the Court of Appeal in Krakow of 2 September 2009, II AKo 97/09 (KZS 2009, no. 12, item 66).

[36] (KZS 2009, no. 1, item 91).

[37] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 301.

[38] See ruling of the Court of Appeal in Katowice of 3 March 2004, II AKz 158/04 (KZS 2004, no. 9, item 73); also see the justification for the sentence of the Supreme Court of 20 February 2008, V KK 306/07 (OSNKW 2008, no. 6, item 47).

[39] D. Kaczorkiewicz, *Właściwość z łączności spraw karnych* [Features resulting from the conjunction of criminal cases], PS 2009, no. 11–12, p. 187.

[40] See ruling of the Court of Appeal in Wrocław of 11 April 2007, II AKz 178/07 (OSA 2007, no. 11, item 57).

situations referred to in the quoted provisions, the issue of competence has already been examined by a court of a higher instance and a decision of a court of a higher instance to transfer a case is binding for a court to which a case has been transferred for hearing[41]. In the literature on criminal proceeding[42] attention is drawn to the fact that "a situation in which a higher instance court transfers a case to a lower instance court should be treated in the same way as a situation in which a higher instance court refuses to hear a case transferred to it from a lower instance court under Article 35 § 1 of the CPC.

The issue of the possibility of appealing against the ruling on the matter of competence must be discussed separately. The issue is regulated in Article 35 § 3 of the CPC, according to which "parties are entitled to appeal against the ruling on competence". The cited provision *expressis verbis* indicates that a court hearing a case issues a decision on its competence concerning the matter, the territory and the function. In Article 35 § 3 of the CPC, the legislator gives the parties the right to appeal against the decision issued based on Article 35 § 3 of the CPC or Article 35 § 2 of the CPC. The decision on 'the issue of competence' as understood in Article 35 § 3 of the CPC is a decision in which a court *ex officio* states its non-competence as well as a decision on not allowing the motion filed by a party based on Article 9 § 2 of the CPC concerning the issue of a court's competence examination in view of the constitutionally guaranteed right to hearing of a case before a competent court (argument of Article 45 item 1 of the Constitution of the Republic of Poland)[43]. The Supreme Court expressed a similar standpoint in its ruling of 20 September 2007, I KZP 25/07[44], deciding that "the ruling on the competence of a court referred to in Article 35 § 3 of the CPC is such a ruling issued in accordance with Article 35 § 1 or 2 of the CPC, in which a court states its non-competence or does not allow a motion to state it". The standpoint is approved of in literature[45]. W. Jasiński[46]

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[41] K. Marszał, *Proces karny. Zagadnienia ogólne* [Criminal trial – general issues], Katowice 2013, p. 201; K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.) – (kilka uwag)* [Features of transferring a case (Article 36 of the CPC) – a few comments], [in:] *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy* [Fair trial – Professor Zofia Świda jubilee book], Warszawa 2009, pp. 340–341.

[42] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 302.

[43] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 206.

[44] (OSNKW 2007, no. 11, item 78).

[45] W. Grzeszczyk, *Przegląd uchwał Izby Karnej Sądu Najwyższego (prawo karne procesowe – 2007 r.)* [Review of resolutions of the Criminal Chamber of the Supreme Court (criminal procedure law – 2007)], Prokuratura i Prawo 2008, no. 4, p. 62; R.A. Stefański, *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie prawa karnego procesowego za 2007 r.* [Review of resolutions of the Criminal Chamber of the Supreme Court with respect to the criminal procedure law for 2007], WPP 2008, no. 2, p. 87; K. Marszał, *Glosa do postanowienia Sądu Najwyższego z dnia 20 września 2007 r., I KZP 25/07* [Gloss to the ruling of the Supreme Court of 20 September 2007, I KZP 25/07], PS 2008, no. 10, p. 149.

[46] W. Jasiński, *Kilka uwag na temat gwarancji prawa do rozpoznania sprawy przez sąd właściwy w polskim procesie karnym* [A few comments on guarantees of the right to the hearing of a case by a compe-

expresses an opinion that "a decision on competence is a decision in which a court states it is not competent to hear a case and transfers it to another court that is competent, or in which it states it is not competent to hear a case transferred from another organ". However, this opinion should be treated as isolated. Its consistent approval would mean that in practice an appeal would be admissible only against the decision in which a court decides both *ex officio* or on a motion that it is not competent and when a case has been transferred to it from another same level court or another organ, and it establishes it is not competent. However, in case a court establishes its competence, although a party believes it is not competent, a decision would not be subject to appeal. Analysing the contents of Article 35 § 3 of the CPC, one must notice that the legislator uses a phrase that there is right to appeal against "the decision on the issue of competence". Such normative wording means that both parties have the right to appeal against the decision, the party that believes a court is not competent (while a court decides that it is) and the party that believes a court is competent and is not right to transfer a case to another court for hearing. Both decisions are "decisions on the issue of competence", which can be appealed against in a higher instance court unless the Supreme Court has adjudicated on the case (Article 426 § 2 of the CPC)[47]. The statement that the possibility of appealing against the decision on the issue of competence referred to in Article 35 § 3 of the CPC is one of the situations in which, in accordance with Article 426 § 2 *in fine* of the CPC, "the statute stipulates alternatively" cannot be approved of. If this assumption were adopted, all the rulings issued by the Supreme Court as the first instance decisions could be appealed against if the legislator laid that possibility down in a statute. It would obviously be in conflict with the principle that the rulings of the Supreme Court cannot be appealed against[48].

The decision on transferring a case to a competent court is one of the decisions that shall be executed once they enter into force. Thus, after the ineffective expiry of a deadline for appeal or keeping the decision appealed against in force, a case should be transferred to a competent court[49].

It is worth mentioning that an opinion is expressed in the doctrine[50] that a decision on the issue of competence should not be subject to appeal at all, and a court would only notify the parties about refusal to establish its non-competence.

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tent court in the Polish criminal proceeding], [in:] *Nowa kodyfikacja prawa karnego* [New codification of criminal law], (ed.) L. Bogunia, vol. 21, Wrocław 2007, p. 202.

[47] See ruling of the Supreme Court of 28 April 2008, I KZP 7/08 (OSNKW 2008, no. 6, item 43).

[48] See ruling of the Supreme Court of 15 July 2010, VI KZ 3/10 (LEX no. 1223736).

[49] D. Świecki, [in:] B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, *Kodeks postępowania karnego* [Criminal Procedure Code], p. 208 and the opinions of the doctrine cited there.

[50] K. Marszał, *Badanie właściwości sądu w sprawach o przestępstwa* [Examination of a court's competence in criminal cases], p. 248.

EXAMINATION OF A COURT'S COMPETENCE AND JURISDICTION IN THE CRIMINAL PROCEEDING

Summary

The article presents the examination of a court's competence in the criminal proceeding. The issue is regulated in the provision of Article 35 § 1 of the CPC, according to which a court examines *ex officio* its competence and in case it establishes its non-competence, it transfers a case to a competent court or another organ. If during the first instance hearing a court establishes that it is not territorially competent or that a lower instance court is competent, it can transfer a case to another court but only in case a trial must be adjourned (argument from Article 35 § 2 of the CPC). This means that despite the establishment of its territorial non-competence, not earlier than during the first instance hearing, a court does not transfer a case to another court or another organ if a competent court is of the same level or a lower instance court and the trial does not have to be adjourned. The necessity for a trial adjournment is not the same as just the fact of its adjournment, but it is the actual existence of circumstances indicating the lack of rationale for establishing that a break in a trial is sufficient. Thus, the fact of a trial adjournment does not constitute a sufficient reason for transferring a case to another court that is territorially competent or a court of a lower instance if there are reasons against such a decision based on trial economics.

The decision on the issue of competence may be taken at the sitting and during the course of a trial (argument from Article 95 of the CPC).

The decision on the issue of competence can be appealed against (argument from Article 35 § 3 of the CPC).

BADANIE WŁAŚCIWOŚCI SĄDU W PROCESIE KARNYM

Streszczenie

W artykule przedstawiono badanie właściwości sądu w procesie karnym. Zagadnienie to reguluje przepis art. 35 § 1 k.p.k., według którego sąd bada z urzędu swą właściwość, a w razie stwierdzenia swej niewłaściwości przekazuje sprawę właściwemu sądowi lub innemu organowi. Jeżeli sąd na rozprawie głównej stwierdza, że nie jest właściwy miejscowo, lub że właściwy jest sąd niższego rzędu, może przekazać sprawę innemu sądowi jedynie wtedy, gdy powstaje konieczność odroczenia sprawy (arg. *ex* art. 35 § 2 k.p.k.). Oznacza to, że mimo stwierdzenia swej niewłaściwości miejscowej dopiero na rozprawie głównej, sąd nie przekazuje sprawy innemu sądowi lub innemu organowi, jeżeli do rozpoznania sprawy właściwy jest sąd równorzędny lub

sąd niższego rzędu, a nie jest konieczne odroczenie rozprawy. Konieczność odroczenia rozprawy to nie sam fakt jej odroczenia, lecz realne istnienie okoliczności wskazujących na brak przesłanek do uznania za wystarczającą przerwę w rozprawie. Sam fakt odroczenia rozprawy nie stanowi zatem wystarczającej przesłanki do przekazania sprawy innemu sądowi miejscowo właściwemu lub sądowi niższego rzędu, jeżeli przeciwko takiej decyzji przemawiają względy ekonomiki procesowej. Postanowienie w przedmiocie właściwości może być wydane zarówno na posiedzeniu, jak i na rozprawie (arg. *ex* art. 95 k.p.k.). Na postanowienie w kwestii właściwości przysługuje zażalenie (arg. *ex* art. 35 § 3 k.p.k.).

L'EXAMEN DES QUALITÉS DU TRIBUNAL DANS DE PROCÈS PÉNAL

Résumé

L'article présente l'examen des qualités du tribunal dans le procès pénal. Cette question est réglée par le contexte de l'art. 35 § 1 du code de la procédure pénale d'après lequel le tribunal examine sa qualité à titre d'office et quand il remarque des éléments inconvenables il transmet l'affaire à un autre tribunal ou à un autre organe. Si le tribunal décide à la séance principale qu'il n'est pas convenable à cause de la place ou le tribunal de moins importance est plus convenable, il peut transmettre cette affaire à un autre tribunal uniquement au cas de nécessite de remettre l'affaire (arg. *ex* art. 35 § 2 du code de la procédure pénale). Ce qui veut dire que malgré la confirmation de la situation inconvenable concernant la place à la séance principale, le tribunal ne transmet pas l'affaire à un autre tribunal parallèle ou celui de moins importance si l'ajournement de l'affaire n'est pas nécessaire. Toutefois la nécessité de remettre l'affaire n'est pas identique au fait de son ajournement mais uniquement des circonstances réelles montrant le manque des prémisses pour prouver la pause suffisante à la séance. Alors le fait de remettre l'affaire ne constitue pas une prémisse suffisante pour transmettre l'affaire à un autre tribunal convenable par sa place ou au tribunal de moins importance si contre cette décision il y a quelques éléments de l'économie du procès. La décision concernant les qualités peut être prise aussi bien au débat qu'à la séance (arg. *ex* art. 95 du code de la procédure pénale). A la décision concernant la qualité il y a la procédure de plainte (arg. *ex* art. 35 § 3 du code de la procédure pénale).

ИССЛЕДОВАНИЕ КОМПЕТЕНЦИИ СУДА В УГОЛОВНОМ ПРОЦЕССЕ

Резюме

В статье представлено исследование компетенции суда в уголовном процессе. Данный вопрос регулируется положением ст. 35 п. 1 УПК, согласно которому суд рассматривает по должности свои компетенции, а в случае определения отсутствия своей компетенции передаёт дело компетентному суду или другому органу. Если суд во время основного разбирательства определит, что не обладает компетенцией по территориальному признаку, либо компетентный суд является нижестоящим судом, может передать дело другому суду только тогда, когда возникнет необходимость отсрочки рассмотрения (арг. *ex* ст. 35 п. 2 УПК). Это означает, что, несмотря на определение отсутствия своей компетенции только в ходе основного разбирательства, суд не передаёт дела в другой суд либо другой орган, если перед ознакомлением с делом компетентный суд является равностоящим либо нижестоящим судом, а отсрочка рассмотрения дела не является необходимой. Необходимость отсрочки судебного разбирательства ещё не является самим фактом его отсрочки, а лишь реальным наличием обстоятельств, свидетельствующих об отсутствии предпосылок для признания достаточным перерыв в разбирательстве. Сам факт отсрочки разбирательства, таким образом, не представляет собой достаточной предпосылки для передачи дела другому суду, компетентному по территориальному признаку, либо нижестоящему суду, если против такого решения свидетельствуют интересы процессуальной экономии. Постановление о компетенции может быть выдано как на заседании, так в ходе разбирательства (арг. *ex* ст. 95 УПК). Постановление по вопросу о компетенции предусматривает возможность опротестования (арг. *ex* ст. 35 п. 3 УПК).