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REOPENING OF COURT PROCEEDINGS BASED ON ARTICLE 540B CRIMINAL PROCEDURE CODE

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The normative grounds for reopening of court proceedings laid down in Article 540b of the Criminal Procedure Code (hereinafter: CPC) was introduced to criminal procedure law by the Act of 29 July 2011,[1] which entered into force on 14 November 2011. As it was indicated in the amending act, the aim of the norm was to implement the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA and 2008/909/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.[2] On the other hand, the justification for the bill suggests that the new grounds for reopening served to strengthen procedural guarantees of the accused in a situation when, regardless of the efficient substitute delivery of a summons or a notification, the accused has not received the information about the scheduled date and place of a trial or a court session. In the legislator's opinion, such a situation can occur, inter alia, when a household member who received a delivered letter does not hand it over to the accused or in case of a substitute delivery by post. It must be assumed that the legislator simply wanted to limit the possibility of recognising a sentence of a Polish court as one issued *in absentia*, in accordance with Article 4a Framework Decision 2002/584/JHA[3] amended

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[1] Act amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act on liability of collective entities for prohibited acts carrying penalties, Journal of Laws [Dz.U.] of 2011, No. 191, item 1135.

[2] OJ L 81 of 27.3.2009, p. 24.

[3] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1 ff; hereinafter: Framework Decision on EAW.

by Framework Decision 2009/299/JHA,[4] and thus decrease the risk of a refusal to surrender persons pursued based on Polish arrest warrants issued in order to execute a sentence in such circumstances.[5] The introduction of Article 540b CPC potentially gave grounds to indicate in Part D of the European Arrest Warrant that even if the convict had not been notified or summoned to appear at a trial in the way determined in Article 4a Framework Decision on EAW and a sentence had not been served to him, and he had not been represented by the counsel for the defence, nevertheless, there is a situation nullifying an optional reason for a refusal to execute the European Arrest Warrant in the form of "the right to re-examine the case" after the convict is surrendered to serve the sentence issued *in absentia*.

However, the legislator rightly assumed that the new grounds for reopening criminal proceedings cannot refer only to the proceedings in which, in order to execute a sentence issued *in absentia*, it is necessary to surrender a convict from another EU member state based on the European Arrest Warrant. The circumstance that someone has escaped from the country and has been transferred to Poland in order to serve a sentence cannot put him in a more advantageous procedural position than that of a person who has also been sentenced in his absence but is staying in Poland.[6]

Thus, there are no doubts that Article 540b CPC in Chapter 56 is applicable to all criminal proceedings matching the conditions laid down therein and not only to the proceedings in which a convict has been recaptured with the use of the surrender instrument based on the European Arrest Warrant.

After a few years of the new grounds for reopening court proceedings being in force, it is worth considering whether its introduction to the Criminal Procedure Code was necessary and whether the instrument fulfils the tasks of mutual recognition of sentences issued *in absentia* with respect to the transfer of persons based on the European Arrest Warrant. The present article aims to answer the above questions.

Since 2011, Article 540b CPC has been amended twice. In the original wording that was in force from 1 July 2015, the provision indicated two independent reasons for reopening proceedings. The first one concerned a situation in which a case is heard in the absence of the accused that has not been served with a notification of the time of a trial or a session, or has been served with it by other means than in person. However, in such a situation, the accused had to prove that he did not know about the scheduled date of a trial and the possibility of issuing a sentence in his absence. Undoubtedly, reopening proceedings based on that might concern

[4] Council Framework Decision of 26 February 2009, OJ L 81 of 27.3.2009, p. 24 ff.

[5] For comparison of the issue, see: D. Dąbrowski, *Wydanie europejskiego nakazu aresztowania w celu wykonania orzeczonej in absentia kary pozbawienia wolności lub środka zabezpieczającego na tle gwarancyjnej funkcji procesu karnego*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (ed.), *Z problematyki funkcji procesu karnego*, Warsaw 2013, pp. 596–597.

[6] Differently and critically on referring the new condition for a retrial to all judgements issued *in absentia*: A. Lach, *Orzeczenia in absentia w europejskiej współpracy w sprawach karnych*, Europejski Przegląd Sądowy No. 6, 2012, p. 22; critically about the introduction of the provision to CPC: S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 2, Warsaw 2013, p. 384; A. Sakowicz, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2015, p. 1127.

all court proceedings concluded with a valid judgement closing the proceedings. The second reason was connected with the failure to serve judgements referred to in Article 100 §2 and §3 CPC and Article 479 §1 CPC (i.e. a sentence issued during a session in the absence of the accused; decisions on discontinuation of proceedings issued at a session in the absence of the accused; decisions on discontinuation of proceedings issued at a session or a trial in the absence of the accused if a court postponed the development of its justification, and a sentence *in absentia*) or their delivery by other means than in person; however, also in this case the accused had to prove that he did not know the content of the judgement and his rights, the time and way of appeal. Undoubtedly, the second reason was applicable to a narrower extent because it did not concern proceedings concluded with a sentence issued at a trial. On the other hand, both reasons for reopening proceedings were not applicable when the accused refused to receive correspondence or there were other circumstances laid down in Article 136 §1 CPC, when he did not receive correspondence sent to the address he had indicated (Article 139 §1 CPC) and also when the counsel for the defence took part in a trial or a session.

From the point of view of fulfilling the obligation to implement Framework Decision 2009/299/JHA, the grounds for reopening court proceedings laid down in Article 540b CPC were too broad. Undoubtedly, the legislator was not obliged to introduce the new normative grounds for challenging valid judgements.[7] For the purpose of fulfilling the above-mentioned aim of the amendment, it was sufficient to stipulate that reopening criminal proceedings concluded with a valid sentence was possible and to leave the proceedings concluded with a decision on discontinuation outside the scope of this regulation. Moreover, as it is rightly emphasized in the doctrine, although the legislator treated the two reasons for reopening proceedings as independent ones, they should not be dealt with independently. The fulfilment of a condition under Article 540b §1(1) CPC should not result in the reopening of proceedings in case a sentence issued *in absentia* was delivered to the accused and/or he appealed against it or approved of it and did not appeal against it.[8]

The provision of Article 540b CPC was changed for the first time in 2015 as a result of the amendment introducing a new adversarial model of a trial.[9] The reason for reopening proceedings laid down in Article 540b §1(2) CPC, resulting from non-delivery of a judgement or its delivery by other means than in person was referred to sentences and decisions that are subject to appeal and it also covered sentences issued at a trial and penal judgements in the form of orders. Article 540b §1(2) CPC indicated judgements referred to in Article 100 §3 and §4 CPC, thus, it referred to all sentences issued in the absence of the accused, regardless of the forum for issuing them. At the same time, under Article 540b §2 CPC, the possibility of efficient motion to reopen proceedings was excluded also when the delivery

[7] Thus, S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks*…, pp. 384–385.

[8] Compare P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz,* Vol. 3, Warsaw 2011, p. 407. The discussed provision also raised other interpretational doubts thoroughly discussed by S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks*…, pp. 387–390.

[9] Act of 27 September 2013, Journal of Laws [Dz.U.] of 2013, item 1247, which entered into force on 1 July 2015.

of a notification of the scheduled date of a trial or a session or the delivery of a sentence took place as a result of two advice notes.

The present wording of Article 540b CPC, developed in the amendment of 11 March 2016, which entered into force on 15 April 2016,[10] in order to reopen proceedings, requires that a notification of the scheduled date of a session or a trial be not delivered to the accused or be delivered by other means than in person. Thus, the possibility of reopening proceedings in case a sentence issued *in absentia* was not delivered to the accused was excluded. The provision still offers a possibility of reopening every court proceedings concluded with a valid judgement closing the proceedings[11] and not only with a sentence. The possibility of requesting a retrial is excluded if it is recognised that the correspondence was delivered in accordance with the terms laid down in Article 133 §2 CPC, thus in case of two advice notes, in case of refusal to receive a letter or the fulfilment of other conditions laid down in Article 136 §1 CPC, as well as in case of the change of the address and failure to provide a new address for delivery of correspondence, which results in the failure to receive correspondence sent to the address available to the proceeding bodies. Moreover, like in the former legal state, the possibility of reopening proceedings is nullified when the accused party's counsel for the defence has taken part in a trial or a session.

The justification for the bill amending the CPC of 2016 does not contain the motives for changing Article 540b CPC. However, it seems that the reason for giving up the second condition for a retrial was the change of the provisions regulating the delivery of sentences. In accordance with the legal state on 15 April 2016, a sentence must be served to the accused only in two cases: when the conditions laid down in Article 422 §2a CPC are met and in case a penal judgement in the form of an order is issued (Article 505 CPC). The legislator did not lay down an obligation to serve the accused with a sentence issued at a session, although there are proposals made in literature to apply Article 422 §2a CPC to a sentence issued in this forum by analogy.[12] Thus, in case of a sentence issued at a session referred to in Article 341 or 343 CPC, the sentence should be served to the accused who was deprived of liberty on the date of the session, did not have the counsel for the defence and, regardless of a motion filed, was not brought to the session.

The present scope of the application of Article 540b CPC is relatively narrow. Firstly, the situation in which a trial is conducted in the absence of the accused if his presence is statutorily obligatory is undoubtedly outside the scope of the grounds for a retrial. It concerns felony-related cases and only this part of a trial when activities laid down in Articles 385 and 386 CPC are performed. Due to the content of Article 439 §1(11) CPC, such proceedings result in an absolute reason for quashing a judgement, thus is also a reason for reopening criminal proceedings

[10] Act of 11 March 2016, Journal of Laws [Dz.U.] of 2016, item 437.

[11] On the issue of understanding of the concept in case law, see J. Kosonoga, *Prawomocne orzeczenie kończące postępowanie sądowe w rozumieniu art. 540 § 1 k.p.k.*, Studia i Analizy Sądu Najwyższego. Przegląd orzecznictwa za rok 2017, Warsaw 2018, pp. 519–529.

[12] Thus, rightly, M. Kurowski, *Komentarz do art. 100 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 6.

ex officio (Article 542 §3 CPC) and not on the accused party's request. The absolute reason for an appeal also occurs when the accused was not properly summoned to the trial, and in case he was properly summoned to the trial, he did not appear, although his presence was obligatory and there were no circumstances allowing the hearing of the case in the absence of the accused as it is laid down in Article 376 or 377 CPC.

It seems that the case in which the accused party's obligatory participation in a trial results from the decisions of a presiding judge of the adjudicating bench or a court should be treated in a different way (Article 374 §1 second sentence CPC). Here, it is crucial to answer the question whether conducting a trial in the absence of the accused, in case the court formerly recognised his presence as obligatory, without a prior decision changing the former one, also results in the absolute reason for an appeal, or whether the hearing of the case in such a situation constitutes an implied change of the former decision on the obligatory presence of the accused. The question should be referred to situations not covered by Articles 376 or 377 CPC.[13] In practice, it mainly concerns the consequences of trials conducted in the absence of the accused when a presiding judge of the adjudicating bench had formerly recognised that presence as obligatory, a presiding judge's or court's decision was not quashed and the condition laid down in Article 377 §3 CPC, i.e. the notification of the accused of the scheduled trial in person, was not met. It must be remembered that the recognition of the notification as efficient as a result of two advice notes constitutes proper fulfilment of the obligation to notify of the first scheduled date of a trial within the meaning of Article 132 §4 CPC, however, it is not at the same time the serving of a notification in person within the meaning of Article 377 §3 CPC. It is unchangeably and rightly assumed in case law that the concept of "serving a notification in person" under Article 377 §3 CPC should be interpreted as a delivery of the notification to the accused personally or informing him in person about the successive scheduled date of the trial, e.g. the trial that was subject to postponement.[14] To sum up, proper notification of the first scheduled date of a trial does not have to constitute "informing the accused in person" within the meaning of Article 377 §3 CPC. In the discussed situation, in order to state whether conducting of a trial in the absence of the accused results in the absolute reason for an appeal, it is necessary to examine if the order of the presiding judge of the adjudicating bench or a court on the recognition of the suspect's presence as obligatory contained an object-related and time limitation. If the order or decision clearly indicated that the presence was obligatory in relation to particular activities, e.g. hearing or interrogating of some

[13] There are no doubts that conducting a trial in the absence of the accused in the conditions determined in Articles 376 or 377 CPC in case of offences without prior decision on conducting proceedings in the absence of the accused does not result in an absolute reason for an appeal. Thus, rightly, J. Matras, [in:] K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2018, pp. 1004–1005.

[14] Compare, inter alia, the Supreme Court judgement of 5 November 2010, III KK 286/10, LEX No. 653513; the Supreme Court judgement of 2 February 2012, V KK 438/11, OSNKW 2012, No. 5, item 51; the Supreme Court ruling of 6 March 2018, V KO 17/18, LEX No. 2488097. Also compare D. Świecki, *Komentarz do art. 377 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 17.

witnesses, after the activities have been performed the presence of the accused is no longer obligatory without the decision quashing its obligatory nature. By the way, it is necessary to approve of the proposal expressed in the doctrine that the order of a presiding judge or the decision of a court should always determine the object-related aspects.[15] As it seems, a different assessment is necessary in a situation in which, in spite of earlier decisions on the accused party's obligatory presence at the whole trial, i.e. an unlimited object- or time-related decision, a court proceeds in his absence, regardless of non-fulfilment of one of the conditions laid down in Article 367 or 377 CPC and the simultaneous lack of a reversal of the earlier decision on the recognition of the accused party's presence as obligatory. There are arguments for the assumption that such proceedings result in an absolute reason for an appeal under Article 439 §1(11) CPC.[16]

In the light of the above-presented considerations, it should be assumed that the condition for reopening court proceedings determined in Article 540b CPC is applicable only to the hearing of the case of the accused whose participation in a trial or a session was not obligatory.[17]

Further narrowing of the admissibility of a retrial results from Article 540b §2 CPC. What is called fictitious delivery, i.e. recognition of correspondence that was not received as delivered because of two advice notes, results in inadmissibility of a retrial. A similar consequence results from a refusal to receive a notification as well as the delivery of a notification to an address provided by the accused in a situation in which he changes the place of residence and does not inform the proceeding bodies about it. Thus, in general, only in case of the so-called serving a notification indirectly (e.g. to an adult household member), it is admissible to reopen the proceedings. However, at present this type of delivery is not applicable to the first scheduled date of a trial.[18] Thus, in practice, the reopening of proceedings is only admissible when a court undertakes to hear a case, despite the fact that the notification of a trial or a session has not been served as well as when a notification of the first scheduled date of a trial is by mistake sent to the address different from that indicated by the accused or is delivered in breach of Article 132 §4 CPC to

[15] D. Świecki, *Komentarz aktualizowany do art. 374 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 6.

[16] For this issue, compare D. Świecki, *Komentarz aktualizowany do art. 439 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, theses 104 and 108. The possibility of the occurrence of an absolute appellate reason in case of recognition of the accused party's presence at a trial as obligatory based on the presiding judge's or court's decision is also approved of in K. Boratyńska and P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2018, p. 1105.

[17] Thus, also rightly J. Matras, [in:] K. Dudka (ed.), *Kodeks…*, Warsaw 2018, p. 1270.

[18] The indirect service of the notification of the first scheduled date of the main proceedings was rightly excluded. In the case C-108/16 PPU (CJEU judgement of 24 May 2016 in the case *Dworzecki*, ECLI:EU:C:2016:346), the CJEU stated that the notification delivered to the address of the accused and handed over to an adult member of the household who undertook to pass the notification to the accused does not meet the requirements laid down in Article 4a(1)(a) point (i) Framework Decision on EAW if it is not possible to establish based on EAW whether and when, in a given case, the household member really handed over the summons/notification to the person concerned.

an adult household member or by other means indicated in Article 132 §2 or §3 or in Article 133 §3 CPC. However, in any of these cases, the accused will have to prove that he did not know about the scheduled date of a trial or a session and the possibility of issuing a judgement in his absence. The term “scheduled date of a trial or a session” used in Article 540b §1 CPC should be interpreted as a trial as such and not any other date of the trial adjournment or postponement. It is not justified to identify the term with the promulgation date, i.e. a date at which a sentence is to be pronounced.[19] In case of a trial conducted on a few dates, it is sufficient to notify the accused of the first date properly. A different interpretation would lead to an absurd conclusion that the reopening of court proceedings is possible, despite the fact that the accused knew about it. Potential failure to notify the accused or indirect notification (e.g. via an adult household member) of the scheduled date of an adjourned trial cannot result in a retrial because in case of the proper notification of the first date of a trial, the accused cannot prove he did not know about the date of a session or hearing.

A motion to reopen proceedings may also turn out to be efficient when the accused is only notified of the date of an adjourned or postponed trial[20] and the notification is served to him indirectly as defined in Article 132 §2 or §3 CPC or Article 133 §3 CPC. In such circumstances, it is sometimes possible to prove the lack of knowledge about the scheduled date of a trial or a session.[21] In a few judgements concerning Article 540b CPC, the Supreme Court or common courts rightly recognised that the accused reveals his knowledge of the scheduled date of a trial when he files a motion to change the date and it excludes the possibility of reopening proceedings later under Article 540b CPC.[22]

It should be remembered that apart from proving the lack of knowledge about the scheduled date of a trial or a session, the condition for reopening proceedings is that the accused makes it plausible that he did not know about the possibility of hearing the case in his absence. Both above-mentioned conditions must be met cumulatively,[23] however, the lack of notification or improper delivery of the notification of the scheduled date of a trial or a session does not result in the lack of information about the possibility of hearing the case *in absentia*. The accused is provided with the information about the content of Articles 374, 376, 377 and 422 CPC not only with the notification of the scheduled date of a trial (Article 353 §4 CPC) but also at the earlier stage of court proceedings when a copy of an indictment is sent to him (Article 338 §1a CPC). In addition, the accused is informed about the admissibility of conducting an adjourned trial without notification of its scheduled date (Article 353 §4a CPC). Successive information about the content of

[19] J. Matras, [in:] K. Dudka (ed.), *Kodeks*…, p. 1270, thesis 3.

[20] Article 402 §1 CPC does not impose an obligation to notify the accused of the scheduled date of an adjourned trial, however, it does not exclude the possibility of delivering such a notification.

[21] Compare, *mutatis mutandis*, the judgement of the Appellate Court in Katowice of 3 July 2013, II AKz 365/13, LEX No. 1378325.

[22] The ruling of the Appellate Court in Katowice of 12 July 2016, II AKz 306/16, LEX No. 2139315; the Supreme Court ruling of 1 March 2017, SDI 95/16, LEX No. 2237425.

[23] Compare J. Matras, [in:] K. Dudka (ed.), *Kodeks*…, p. 1270.

Articles 376, 377, 419 §1 and 422 CPC is provided orally, provided the accused participates in a trial.

In accordance with Article 540b CPC, it is also not possible to reopen court proceedings concluded with the issue of a penal judgement in the form of an order at a session in the parties' absence. Although a penal judgement in the form of an order cannot rule a penalty of deprivation of liberty, it is not irrelevant to the procedure of the European Arrest Warrant. Both the penalty of deprivation of liberty and a fine ruled with the use of a penal judgement in the form of an order may be changed into a substitute penalty of deprivation of liberty for at least four months, thus it is possible to issue the European Arrest Warrant in order to transfer a person to execute this penalty. Since the legislator clearly excluded the obligation to notify the accused of the scheduled date of a session when a penal judgement in the form of an order would be issued, the condition for reopening proceedings cannot be applied to such proceedings in the way unambiguously identified with the statutory obligation to properly notify of the scheduled date of a trial or a session. The essence of the proceeding of a penal judgement in the form of an order consists in the fact that the accused is not notified of the scheduled date of his trial in advance. It should be noticed at the same time that a penal judgement in the form of an order should be served to the accused with the use of delivery methods that guarantee the delivery of the correspondence to the accused. The legislator excluded indirect delivery of this sentence in the way indicated in Article 132 §2 and §3 and Article 133 §3 CPC. Thus, only in case of the delivery of a copy of a penal judgement in the form of an order by mistake to an address different from the one indicated by the accused or in case of failure to receive correspondence containing a copy of a sentence issued *in absentia* for reasons independent of the accused and its recognition as delivered after two advice notes, there is a risk that the person concerned will not receive a copy of a penal judgement in the form of an order and will possibly fail to meet the seven-day time frame for lodging an objection. On the other hand, in case of inability to receive correspondence for reasons independent of the accused and recognition of its delivery as proper in accordance with Article 133 §2 *in fine* CPC, it is possible to renew the deadline for lodging an objection.[24] As a result, in order to be granted the rehearing of the case adjudicated *in absentia* within the proceedings of order imposition, there is no need to use the instrument of reopening court proceedings.

Some doubts may be raised in connection with the issue of admissibility of reopening court proceedings when they are conducted in the first instance in the way excluding admissibility of a retrial but the conditions under Article 540b CPC are met with regard to appellate proceedings. The provision is applicable to a situation in which "a case was heard in the absence of the accused". At the same time, there can be no doubts that hearing an appeal against the first instance court judgement still constitutes adjudication on the accused party's "case". This hypothesis is especially up-to-date at present in the face of considerably limited possibilities of cassation adjudication by an appellate court. Moreover, in Article 540b §1 CPC the

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[24] Compare K. Eichstaedt, *Komentarz do art. 505 Kodeksu postepowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 3.

term "main trial" is not used but just "trial". However, if the legislator wants to refer particular procedural consequences exclusively to the main trial, it should be explicitly expressed with the use of the term "main trial" (as in case of Article 132 §4 CPC or Article 80 CPC). On the other hand, in relation to an appellate trial, the legislator simply uses a term "trial" (thus in Article 450 §1 to §3 CPC). Therefore, *lege non distinguente*, it should be assumed that a failure to notify the accused of the scheduled date of an appellate trial or notifying him by means other than in person, however with the exception of delivery methods indicated in Article 540b §2 CPC, gives grounds for reopening court proceedings, provided the accused proves that he did not know about the scheduled date of the appellate proceedings and a possibility of issuing a judgement in his absence, and also his counsel for the defence did not participate in the appellate trial. It is worth noticing that the accused can be notified about the scheduled date of an appellate trial, unlike in case of the main trial, also with the use of an indirect delivery. Moreover, the accused is not informed about the content of Article 450 §3 CPC so it would be much easier for him to prove that he did not know about the possibility of hearing the case in his absence.

The comprehension of the term "the trial resulting in the decision" used in Article 4a(1) Framework Decision on EAW is indirectly also in favour of such interpretation of Article 540b CPC. As it has been mentioned above, introducing Article 540b to CPC, the legislator aimed to limit the risk of refusal to execute warrants issued in order to surrender a person to execute a penalty ruled *in absentia*.[25] In accordance with Article 4a(1)(d) points (i) and (ii) Framework Decision on EAW, a refusal to execute a warrant is inadmissible in a situation a person was absent from "the trial resulting in the decision", which was not delivered in person, but after the transfer "he or she will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case including fresh evidence, to be re-examined, and which may lead to the original decision being reversed" and "will be informed of the time frame within which he or she has to request such a retrial or appeal". In the judgement in the case of *Tupikas*,[26] the Court of Justice of the European Union[27] stated that "in the case the issuing Member State instituted a two-tier system of jurisdiction, with the result that the procedure in criminal matters involves several instances and may give rise to successive judicial decisions and at least one of them was given in absentia, it is important to understand by 'trial resulting in the decision', within the meaning of

[25] It is necessary to apply the interpretation consistent with the aim of the Framework Decision on EAW. This means the obligation to establish such an effect of the interpretation that will allow the fulfilment of the aim of the Framework Decision so that the envisaged result would be obtained. Compare CJEU judgements: of 8 November 2016 in the case *Ognyanov*, C-554/14, ECLI:EU:C:2016:835, paras. 59 and 66; of 5 September 2012 in the case *Lopes De Silva Jorge*, C-42/11, ECLI:EU:C:2012:517, paras. 55–56; of 28 July 2016 in the case *JZ v. Prokuratura Rejonowa Łódź-Śródmieście*, C-294/16 PPU, ECLI:EU:C:2016:610, paras. 32–33.

[26] CJEU judgement of 10 August 2017 in the case *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 81. Similarly, CJEU judgement of 10 August 2017 in the case *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 82.

[27] Hereinafter: CJEU.

Article 4a(1) Framework Decision [on EAW], the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the fault of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law".

If Article 540b CPC were to fulfil its aim to facilitate mutual recognition of judgements, in case of a two-tier system of jurisdiction, the conditions for a retrial laid down in this provision should refer to the appellate proceedings.

The legislator laid down a monthly final time frame for lodging a motion for a retrial, however, it starts running on the day when the accused gets to know the sentence. Such regulation of the start of the time limit running should be recognised as unfortunate. Firstly, as it was noticed in literature,[28] the accused may learn about the judgement as a result of the delivery of an invalid sentence issued in his absence. Due to the content of Article 422 §2a CPC, the situation mainly applies to the accused deprived of liberty. In such a situation, the monthly final time frame for lodging a motion to be served a sentence with its justification in order to file an appeal starts running on the same date. Thus, the accused may give up a standard appeal measure and let the sentence become final still without losing the time to lodge a motion to reopen court proceedings. Undoubtedly, the legislator's intention was to make the discussed time frame start on the date of learning about the valid judgement. However, the wording of the provision does not exclude the above-presented interpretation.

Secondly, in a situation when the European Arrest Warrant is issued in order to surrender a person to serve the penalty imposed *in absentia* in Poland, the prosecuted person will learn about the issue of a sentence the moment he is acquainted with the order of the state body to execute the European Arrest Warrant. Moreover, the executing Member State judicial authority's obligation is to serve the sentence to the prosecuted person for information purposes (Article 4a(2) Framework Decision on EAW). This means that, in accordance with the content of Article 540 §1 CPC, still before the convict is surrendered to Poland, the time limit for lodging a motion to reopen the proceedings starts running. At the same time, the execution of the warrant alone, in case of no consent to surrender, may last longer than a month; and the stay of the sought person in the territory of the executing Member State considerably hampers the efficient filing of a motion for a retrial, which is subject to the obligatory representation of the accused by the counsel for the defence. Moreover, Article 4a(2) Framework Decision on EAW unambiguously stipulates that the provision of information on the right and date of requesting a retrial "after the surrender" of the sought person to Poland and the above-mentioned informative provision of the judgement by the executing Member State authorities "shall neither be regarded as a formal service of the judgement nor actuate any time limits for requesting a retrial or appeal".[29]

Another obstacle to recognising the instrument regulated in Article 540b CPC as one fulfilling its aim with regard to facilitating cooperation is its optional nature.

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[28] J. Matras, [in:] *Kodeks…*, pp. 1270–1271.

[29] Also compare A. Lach, *Orzeczenia…*, p. 22.

In case law it is assumed that the provision only makes it possible to reopen proceedings when the conditions defined therein occur but it does not oblige one to do that. As a result, "even in case when the circumstances and all conditions laid down in Article 540b §1(1) CPC are met, a court should reopen the proceedings only if it establishes that hearing the case in the absence of the convict might have considerable significance for the course of the court proceedings, the accused party's procedural guarantees and the merits of adjudication".[30] The indication that the proceedings "may be reopened" and not "shall be reopened", i.e. creating a possibility of refusing to reopen the proceedings regardless of the fulfilment of the requirements, causes that it is difficult to recognise Article 540b CPC as expressing "a sought person's right to have his or her case retried" within the meaning of Article 4a(1)(d) point (i) Framework Decision on EAW. Therefore, it is doubtful whether courts should mark point 1e in Part D of the EAW form and refer to the right to a retrial expressed in Article 540b CPC.

Up to now, the concept of "the right to a retrial" laid down in Article 4a(1)(d) point (i) Framework Decision on EAW has not been defined by the CJEU. Neither does the provision indicate conditions that may be applicable in the issuing Member State in order to reopen the case of the surrendered person.[31] In the above-mentioned case of *Dworzecki*, the Government of Poland argued that the issue of a judgement in the absence of the accused resulting from serving the notification and a copy of a sentence to him in an indirect way does not constitute an obstacle to the European Arrest Warrant execution, because the accused has the right to a retrial.[32] The Court only pointed out in the judgement that "(…) the executing judicial authority may also take into account the fact, to which the Polish Government referred at the hearing before the Court, that the national law of the issuing Member State in any event affords the person concerned the right to request a retrial, where, as in this instance, service of the summons is deemed to be effected when the summons is handed over to an adult member of the household of the person concerned".[33] The real and efficient right to a retrial may be spoken about only when, after a court establishes the fulfilment of all the conditions for a retrial, including the fact that the accused proves that he did not know about the scheduled date of a trial or a session and was not informed about a possibility of issuing a judgement in his absence, the court cannot refuse to reopen proceedings and cannot deprive a convict of the guarantee that was a condition for the executing judicial authority to surrender this person to Poland in order to execute the penalty ruled *in absentia*.

Summing up, it is necessary to state that the originally expressed fears that Article 540b CPC may considerably undermine the stability of valid judgements did

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[30] The ruling of the Appellate Court in Katowice of 30 April 2014, II AKz 257/14, LEX No. 1487573; the ruling of the Appellate Court in Katowice of 12 July 2016, II AKz 306/16, LEX No. 2139315.

[31] The content of Article 4a(1)(d) point (ii) Framework Decision on EAW suggests a rather obvious possibility of regulating the deadline for requesting a retrial.

[32] Compare para. 79 of the opinion of Advocate General Michal Bobek of 11 May 2016 in the case *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:333.

[33] CJEU judgement in the case *Dworzecki*, para. 52.

not come true.[34] Even a cursory review of common courts' and the Supreme Court's case law leads to a conclusion that this condition for reopening court proceedings rarely results in challenging the valid judgement closing the proceedings.

Article 4a Framework Decision on EAW in general lays down five circumstances nullifying admissibility of a refusal to execute the European Arrest Warrant issued in order to execute a sentence passed *in absentia*: (1) personal notification of the accused of a trial; (2) notification of him or her in another manner but one that guarantees that it can be unambiguously established that the accused knew about the scheduled date of a trial (in both cases, the accused must also know about the possibility of issuing a judgement in his or her absence); (3) authorisation of the counsel for the defence by the accused in order to defend him or her and participate in a trial; however, the accused should grant this authorisation "knowing about the scheduled trial"; (4) service of the sentence and making it possible to appeal against a judgement issued *in absentia*, which right a person has given up; (5) serving the sentence to the accused after his or her surrender to the issuing Member State, where he will have the right to a retrial in his or her presence.

Due to an unfortunate indication of the beginning of the time limit to request a retrial running as well as the optional nature of the grounds for a retrial laid down in Article 540b §1 CPC, the provision seems not to fulfil the aim for which it was introduced to the Criminal Procedure Code. However, after the amendment to Article 374 CPC and the introduction of the accused party's optional participation in the main proceedings, they can be conducted in the absence of the accused much more frequently than before 1 July 2015. The accused does not have to be notified of the scheduled date of a trial personally. There can be doubts whether the provision of a notification by means of two correspondence advice notes meets the requirements for a delivery in such a manner that makes it possible to unambiguously establish that the accused knows about the scheduled date of a trial (requirements under Article 4a(1)(a) point (i) Framework Decision on EAW). Moreover, as a rule, a sentence is not served to the accused, and as a consequence only exceptionally it is possible to meet the condition under Article 4a(1)(c) Framework Decision on EAW. That is why, the possibility of indicating the right to a retrial under Article 540b CPC in Part D of the European Arrest Warrant form might, at present more often than before 1 July 2015, guarantee the surrender of a person in order to execute the sentence issued *in absentia*. However, making this basis for a retrial an instrument really facilitating cooperation within the European Arrest Warrant requires the legislator's intervention.

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[34] Thus, S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks…*, p. 385.

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REOPENING OF COURT PROCEEDINGS BASED ON ARTICLE 540B CRIMINAL PROCEDURE CODE

Summary

The paper analyses the grounds for reopening criminal proceedings stipulated in Article 540b of the Criminal Procedure Code. The author argues that, although the aim of the introduction of this provision to the CPC in 2011 was to facilitate the surrender under the European Arrest Warrant of persons pursued in order to execute a sentence issued *in absentia* in Poland, that aim has not been achieved due to the flaws in the provision indicated in the paper. The start of the time limit running for lodging a motion for a retrial under Article 540b CPC, as well as the optional nature of such retrial have been critically assessed. It has also been proved that the concerns originally expressed in the doctrine that the discussed grounds for reopening of court proceedings may undermine the stability of valid judgements issued in criminal cases did not come to fruition.

Keywords: reopening of court proceedings, European Arrest Warrant, sentences issued *in absentia*

WZNOWIENIE POSTĘPOWANIA SĄDOWEGO NA PODSTAWIE ART. 540B KODEKSU POSTĘPOWANIA KARNEGO

Streszczenie

Artykuł zawiera analizę podstawy wznowienia postępowania karnego wyrażonej w art. 540b kodeksu postępowania karnego. Jak wykazuje autorka, chociaż wprowadzenie tego przepisu do k.p.k. w 2011 r. miało na celu ułatwienie wykonywania europejskich nakazów aresztowa-

nia zmierzających do przekazania osoby ściganej do wykonania kary orzeczonej w Polsce *in absentia*, to jednak ze względu na wskazane w artykule wady tej regulacji cel ten nie został osiągnięty. Krytycznie oceniono uregulowanie początku biegu terminu do złożenia wniosku o wznowienie postępowania na podstawie art. 540b k.p.k., jak również fakultatywność tego wznowienia. Jednocześnie w artykule wykazano, że nie sprawdziły się formułowane w doktrynie obawy, iż omawiana podstawa wznowienia postępowania sądowego spowoduje zachwianie stabilności prawomocnych wyroków wydawanych w sprawach karnych.

Słowa kluczowe: wznowienie postępowania, europejski nakaz aresztowania, wyroki wydawane *in absentia*

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