PROCEEDING-RELATED INTERCEPTION OF CORRESPONDENCE, POST AND RETENTION DATA IN ACCORDANCE WITH ARTICLE 218 §1 CPC

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Already at the beginning of this article, it is necessary to highlight that most comments made therein, in spite of some common elements, will mainly refer to interception of correspondence and post in their classical form, about which the Skaldowie band used to sing in "Medytacje wiejskiego listonosza" in 1969. Despite the technological revolution that did not omit the means of communication, "people [still] write letters", which may be the subject of interest for proceeding bodies and an important source of information about facts that are critical from the point of view of the aim of a trial.

It is worth noticing that the "interception of correspondence, post and data (…)" mentioned in the title is a phrase that is not used in Article 218 §1 of the Criminal Procedure Code (CPC) of 1997, which is a normative basis for this activity. The provision regulates an activity consisting in "a surrender of correspondence and post as well as data referred to in Articles 180c and 180d of the Act of 16 July 2004 on telecommunications law [to a court or a prosecutor]".[1] However, it is not a phrase without a statutory origin because the word "interception" is used in the title of Chapter 25 CPC[2], including Article 218 although the "interception" applies to a broader legal category of "things".

There is no definition of "things" in the Criminal Procedure Code or the Criminal Code (CC) although one can find reference to a broader category including, inter alia, Polish or foreign currency or other means of payment (Article 115 §9 CC). The lack of the definition of a thing in criminal law makes it necessary to refer to civil law, where the concept of a "thing" refers to "only material items". Although

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1 Journal of Laws [Dz.U.] of 2014, item 243, as amended.

2 It was not used in Chapter 22 CPC of 1969 devoted to "Examination and evidence". The term "interception" was used in Article 22 §3 of this Code, however, it referred to objects "surrendered or found" in the course of search.

Article 45 Civil Code[3] clearly stipulates that a thing understood in this way is a concept created exclusively for the need of "this [i.e. Civil] Code", where a "thing" is mainly understood as an object of ownership rights and other property rights, as it is noticed in the doctrine of the same civil law, such treatment of a thing in the colloquial language and in the entirety of Polish regulations is not questioned.[4] Undoubtedly, correspondence and post referred to in Article 218 §1 CPC take a material form that is being processed, and because of their (artificial) distinction, in social-economic relations, they may be treated as independent interests.[5] As a result, also correspondence and post may be analysed from the point of view of technical-legal[6] definition of a thing developed in Article 45 Civil Code. As A. Kidyba notices based on civil law, since even a sheet of paper is a thing,[7] the same sheet of paper with a text written on it may also be a thing, which can make it a special kind of thing, i.e. a document referred to in Article 115 §14 CC, especially in the scope in which "in connection with its content, [it] constitutes the evidence of a right, a legal relationship or circumstances that are legally significant".

In the context of Article 218 §1 CPC, it may seem strange that the legislator does not specify what "correspondence and post" are. In the interwar period, they were treated in the doctrine as concepts covering all types of "letters, telegrams and post, regardless of the method used to send them (by post, rail, ship or plane) and their content (documents, money and goods)".[8] Looking at this issue from the perspective of Article 23 Civil Code, which classifies secrecy of correspondence,[9] apart from inter alia health, liberty, honour, freedom of religion and reputation, within the so-called personal interests (Article 23 Civil Code), and Article 267 §1 Criminal Code, which penalises its infringement, one may draw a conclusion that the secrecy of its content and the right of the sender and the addressee, with the exclusion of other persons, to dispose of it as well as the fact of its transmission between the two parties are characteristic features of "correspondence". Although Article 267 CC prohibits infringement of secrecy of correspondence in the form of

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[3] Act of 23 April 1963: Civil Code (Journal of Laws [Dz.U.] of 2016, item 380, as amended).

[4] See, W. Katner, [in:] P. Księżak, M. Pyziak-Szafnicka (ed.) et al., *Kodeks cywilny. Komentarz* [Civil Code: Commentary], LEX 2014, Vol. 1, up to Article 45 Civil Code.

[5] J. Wasilkowski, *Zarys prawa rzeczowego* [Overview of property law], Warsaw 1963, p. 8.

[6] E. Gniewek, [in:] B. Burian, A. Cisek, M. Drela, W. Dubis, E. Gniewek (ed.), J. Gołaczyński, K. Gołębiowski, K. Górska, J. Jezioro, J. Kremis, P. Machnikowski (ed.), J. Nadler, R. Strugała, J. Strzebinczyk, W. Szydło, K. Zagrobelny, *Kodeks cywilny. Komentarz* [Civil Code: Commentary], Warsaw 2011, p. 111.

[7] A. Kidyba, [in:] Z. Gawlik, A. Janiak, A. Jedliński, A. Kidyba (ed.), K. Kopaczyńska-Pieczniak, E. Niezbecka, T. Sokołowski, *Kodeks cywilny. Komentarz* [Civil Code: Commentary], LEX 2012, Vol. 1, up to Article 45 Civil Code.

[8] L. Peiper, *Komentarz do kodeksu postępowania karnego* [Commentary on the Criminal Procedure Code], Kraków 1929, p. 100.

[9] It concerns the substantive state (a letter) as well as a non-substantive state (oral communication) or "pure information" (electronic communication), at the same time being additional interests to privacy. See, A. Kidyba (ed.) et al., *Kodeks…* [Civil Code…], LEX 2012, Vol. 14, up to Article 23 Civil Code.

"opening sealed letters"[10], there is a common principle of social life that no one should read somebody else's correspondence, even in the form of postcards.[11]

The Act of 23 November 2012 on postal law (hereinafter PL)[12] also does not contain a legal definition of "correspondence", however, this Act refers to this concept several times. A closer analysis of the solutions in this Act seems to indicate that, from the material point of view, "correspondence" is not a separate being and is treated in PL as an element of post, something that is inside a package (see, inter alia, Article 1(1.2) and (1.3) and Article 29(3) PL), and is protected against third parties and subject to exchange between the parties purchasing a postal service provided by a postal service operator as a business activity in the domestic and foreign turnover and consisting in admitting and exchanging correspondence in special exchange offices organised by this operator (Article 2(1.4) PL). Postal law distinguishes "delivery of correspondence" containing information recorded on any carrier, including one recorded with the use of embossed writing (Article 3(25)), from other deliveries defined as "prints", containing written or graphic information but duplicated with the use of printing or similar methods, recorded on paper or other material used in printing (Article 3(5)). In order to avoid possible misunderstanding, postal law clearly stipulates that a delivery of prints is not treated as a delivery of correspondence. Both types of deliveries may be objects of delivery to blind people (Article 3(18)) and "deliveries of letters" (Article 3(20)), which may take the form of, inter alia, "registered post" (Article 3(22)).

The doctrine points out that Article 218 CPC regulates interception of correspondence *sensu stricto*, while one can find interception used in a general sense, conducted in accordance with Article 217 and Articles 219–236 CPC.[13] Both cases differ not only because of the entity at whose venue interception takes place (a situation laid down in Article 219 and the following, preceded by a search), but mainly due to the fact that in the situation referred to in Article 218 §1 CPC we deal with correspondence and post sent by a relevant postal operator but still not delivered to the addressee. The discussed procedural institution was also known in the former criminal procedure codifications and was laid down in Article 158 §1 CPC of 1928 and in Article 198 CPC of 1969.

The present Criminal Procedure Code describes the discussed activity from the perspective of entities that have correspondence in their possession because Article 218 §1 CPC regulates a "surrender", not a "seizure" or "interception". The entities listed in the Act are authorities, institutions and companies involved in postal or telecommunications services as well as customs offices and transport

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[10] Unlawful obtaining of information may only take place by "opening a sealed letter". In accordance with Article 267 §1 CC, only correspondence sealed against access to it by third parties is protected, not e.g. correspondence in an unsealed envelope. Compare, W. Wróbel, [in:] A. Barczak-Oplustil, M. Bielski, G. Bogdan, Z. Ćwiąkalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, A. Zoll (ed.), *Kodeks karny. Część szczególna* [Criminal Code: Special Part], LEX 2013, Vol. 9, up to Article 267 CC.

[11] Supreme Court judgement of 3 February 2004, II KK 388/02, LEX No. 121287.

[12] Journal of Laws [Dz.U.] of 2016, item 113.

[13] K. Dudka, *Kontrola korespondencji i podsłuch w polskim procesie karnym* [Correspondence control and tapping in the Polish criminal proceedings], Lublin 1998, p. 21.

institutions and companies. The list of entities is so broad that it covers postal and telecommunications operators, i.e. those who are professionals involved in the transfer of correspondence from senders to addressees, as well as entities who provide transport services for them and those who may come into possession of correspondence and other post in accordance with other regulations, e.g. the Act of 19 March 2004 on customs law.[14] The ownership structure of these entities is insignificant; they may be state-owned or private entities.

A court's or a prosecutor's decisions are grounds for a surrender, which is laid down in Article 218 §1 CPC. However, in cases conducted by a fiscal body in preparatory proceedings, that is entitled to conduct it and then to develop an indictment and bring it before a court, also the decisions issued by this body are binding (Article 122 §1(1) FPC in connection with Article 218 §1 first sentence CPC). Only a court or a prosecutor has the right to open correspondence, post or other data or order that they be opened (Article 218 §1 second sentence CPC). Thus, where other proceeding bodies recognise the need for getting to know the content of correspondence, post or data listed in Article 218 §1 CPC, they have to apply to a prosecutor because the Act does not envisage any clause in case of an extraordinary situation.

It is not accidental that the legislator differentiates "opening of correspondence, post or data" from "ordering that [they] be opened" in Article 218 §1 second sentence CPC. While opening is an activity performed by a court or a prosecutor, "ordering" results in the activity of opening correspondence, post or data performed by another body indicated by a court or a prosecutor.[15] "Opening" mainly means breaking the seal protecting the entry to the content. Therefore, it seems that in case of opening correspondence, post and data performed by a court or a prosecutor, there is no need to issue a separate decision because Article 218 §1 second sentence CPC reserves it as a disjunctive alternative only in a situation where the performing body is not a court or a prosecutor. Still, a doubt arises whether a court or a prosecutor really decide about the opening of correspondence, post or data via decisions that do not influence the situation of parties and do not clearly interfere into the sphere of adjudication.[16] The problem is not solved in Article 93 §2 CPC, which allows ordering "in cases not requiring a decision" but grants the competence to issue them to a court's president, a chair of a chamber or an authorised judge and not a court, which may issue such an order but only in accordance with §3 of the provision, in the course of the preparatory proceedings and only "in a case envisaged in statute". The limitation of a court's competence to issue orders to the preparatory proceedings and only to cases laid down in a clear statutory provision,

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[14] Journal of Laws [Dz.U.] of 2004, No. 68, item 623, as amended.

[15] K. Dudka, *Kontrola…* [Correspondence…], p. 31, also drew the same conclusion based on Article 198 CPC of 1969, which is not in force at present.

[16] M. Siewierski, [in:] J. Bafia, J. Bednarzak, M. Flemming, S. Kalinowski, H. Kempisty, M. Mazur (ed.), M. Siewierski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1976, pp. 165–166. However, differently: T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2008, p. 292.

which T. Grzegorczyk[17] approves of, would mean that the situation regulated in Article 218 §2 second sentence CPC is the situation signalled in Article 93 §3 *in fine* CPC. This would raise another question, i.e. what kind of decision, if not an order, should the same court issue in the course of judicial proceedings, or that Article 218 §2 second sentence CPC does not really refer to a separate decision in the form of an order but emphasises that a decision to intercept correspondence is supplied with an additional *passus*, in which the same court, envisaging the necessity of making use of the assistance of another body in opening correspondence or post, assigns the task to it. In such a case, "ordering to open" would be a synonym of giving an instruction or an order, but not a separate decision under Article 93 §4 CPC because, due to Article 93a §2, it would result in further delegation to a judicial officer, who "may also issue orders that a court issues in accordance with statute". The obligation under Article 218 §1 second sentence cannot be treated as an order in the same way as an order under Article 15 §1 to §3 CPC cannot substitute a judgement issued based on the former of these provisions.

However, it is certainly not possible to open correspondence, post or data without their earlier interception because the pronoun "them" used in the second sentence of Article 218 §1 CPC clearly indicates that opening refers to correspondence and post mentioned in the first sentence of the same provision. The legislator's use of the word "open" in Article 218 §1 second sentence may suggest that the adequate court's or prosecutor's decision is necessary only with regard to sealed deliveries because, from the linguistic point of view, we can "open" (*otworzyć*) something that is "closed" (*zamknięte*) or thanks to which the thing becomes "available" (*dostępna*).[18] This interpretation does not seem to be right because in such a case all correspondence that is not sealed in envelopes, i.e. is in the form of postcards, would not be subject to the regulation. The fact that it is sent in this form does not mean that the sender does not mind losing its privacy or reading it by a person other than the addressee. That is why, I would rather interpret the word "opening" used in Article 218 §1 second sentence CPC as a synonym for "reading". As it has already been mentioned at the beginning, Article 218 §1 CPC is applicable only to correspondence and post "on the way" between the sender and the addressee, thus the same items, not sent yet or already delivered, obtained in the course of a search may be subject to examination and, as a result, reading performed in accordance with Article 228 §1 CPC. The provision of Article 228 §1 CPC is applicable to correspondence and post already delivered, even when the delivery was not made to the addressee in person and even if the latter was not able to get to know the content. According to K. Dudka, it does not matter whether the correspondence or post is in places used by the party to the trial or in a letterbox or a *poste restante* office.[19] The application of Article 228 §1 CPC to such correspondence and deliveries is even easier since they belong to, as it has been mentioned at the beginning, a broad category of "objects" that the regulation refers to. The contemporary Criminal Procedure Code, unlike its pre-war counterpart,

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[17] T. Grzegorczyk, *Kodeks…* [Criminal…], p. 292.

[18] Compare, *Słownik języka polskiego PWN* [PWN Dictionary of the Polish language] available at: http://sjp.pwn.pl/sjp/otworzyc;2497122.html [accessed on 14 January 2017].

[19] K. Dudka, *Kontrola…* [Correspondence…], p. 49.

does not envisage a special treatment of correspondence and post obtained during a search, although even the correspondence that has been read does not stop being correspondence. The interwar solution assuming a possibility of checking "correspondence and other papers" only by a court or a prosecutor, and only those found during a search of a person suspected of a crime, due to respect for privacy, seems to have been much better than the present one. The same Article 156 CPC of 1928 also stipulated that checking correspondence, in case of a search of a person not suspected of a crime conducted by a person other than a judge or a prosecutor, and that person's objection, were to result in a ban on checking it and, after sealing, sending it to a court or a prosecutor (§2). The sealing, even by the party interested, was aimed at "protecting it against a searching body's indiscretion".[20]

The ultimate nature of an order under Article 218 §1 CPC is demonstrated not only by the fact that entities listed in Article 218 §1 are "obliged" to surrender correspondence, post and data but also that the legislator gives the order a name of "demand". The body entitled to formulate a demand is a court or a prosecutor, and other law enforcement bodies, e.g. police, are not entitled. As it has already been mentioned, satisfying a court or a prosecutor's demand consists in a physical surrender of correspondence or post to an entitled body and not informing it about the content of correspondence or post demanded. As Article 218 §1 last sentence CPC stipulates, only a court or a prosecutor is entitled to open them or order that they be opened. The Act does not lay down a need for a sender or an addressee to be present in the course of opening correspondence or post, although it was a solution when Article 161 CPC of 1928 was in force. It stipulated "a person who was deprived [here: a person referred to in Article 158 §1 *in fine*] of correspondence [and post] should be present at the moment they are unsealed and checked", which took place in the course of application of Article 157 of the same CPC (Article 161 second sentence CPC of 1928). It is worth mentioning that this presence was not always required but only "if possible", although a judge or a prosecutor should record every exception to the rule and indicate the reason.[21]

The act of opening correspondence and post [and playing the recordings on a carrier] must be recorded in a report which must contain, apart from such obvious data as those concerning persons participating, the time and place of the activity, also data concerning the preliminary examination of the objects intercepted in accordance with Article 218 §1 CPC. The latter should contain information about the state of correspondence and post, i.e. information whether there are signs of earlier interference into its content. This way, the report *de nomine eius* constituting a report on opening correspondence is the report referred to in Article 143 §1(3) CPC. However, there is still an open question whether the report under Article 143 §1(7) CPC should also contain data from the opened correspondence or post. It seems that this should be done because only this way it is possible to protect the data in the opened correspondence that are not connected with the given case, and checking

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[20] L. Peiper, *Komentarz…* [Commentary…], Kraków 1933, p. 257.

[21] A. Mogilnicki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Kraków 1933, p. 336.

them by other persons (e.g. based on Article 156 §1 or §5 CPC) would constitute a too far-reaching interference in the privacy of persons involved in correspondence (Article 143 §1(7) CPC). It seems that interception alone, preceding the opening of correspondence or post, does not require recording in a report, although Article 143 §1(6) *in fine* CPC mentions such an obligation where it refers to "things" *in genere*, but not correspondence and post that are treated following different rules laid down in Chapter 25 CPC, because of a sensitive nature of the latter.

The statement that correspondence or post is subject to "opening" is significant because the sense of the interception of correspondence, post or data referred to in Articles 180c and 180d of the telecommunications law should not be associated only with their surrender to an entitled proceeding body but with the fact that obtaining them, the entitled proceeding body can learn what their content is and make a proper analysis, which is the aim of activities under Article 218 §1 CPC. Thus, interception is just a means leading to the opening of correspondence or post and getting to know their content. However, at least theoretically, it is possible that correspondence or post surrendered to a proceeding body is not opened. It may take place if it proves to lose its significance for criminal proceedings or in case it was not subject to a decision and was surrendered by mistake. In both cases, such correspondence or post should be returned to the authorities, institutions or companies referred to in Article 218 §1 CPC, although this obligation laid down in §3 of the same provision refers only to correspondence and post that has lost their significance for the given case.

"Significance for criminal proceedings" is at the same time a rather imperfect criterion for recognising grounds for activities undertaken in accordance with Article 218 CPC. In this provision, §1 as well as §3 stipulate this "significance", but §1 additionally emphasises the significance for the criminal proceedings that is "pending". This indication suggests that, based on Article 218 §1 CPC, it is not possible to intercept correspondence beyond the scope of the criminal proceedings, which also applies to activities undertaken before it, e.g. in accordance with Article 307 §1 first sentence CPC. There are no obstacles to intercept correspondence and the like in accordance with Article 218 §1 CPC in the course of urgent activities, although e.g. K. Dudka[22] expresses a different opinion, which R.A. Stefański[23] does not approve of. J. Skorupka believes that suspended proceedings do not meet the requirement and identifies "pending" proceedings with "conducting" the proceedings, which is laid down in Article 22 §1 CPC.[24] However, it seems that an activity under Article 218 §1 CPC may be an activity undertaken in the period of suspension of the criminal proceedings based on Article 22 §3 CPC, i.e. in order to

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[22] K. Dudka, *Zatrzymanie korespondencji w projekcie k.p.k. z 1995 r. na tle dotychczasowych uregulowań* [Interception of correspondence in the Bill of CPC of 1995 in the light of present regulations], Prokuratura i Prawo No. 4, 1996, p. 65.

[23] R.A. Stefański, [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński (ed.), S.M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 1998, Vol. I, p. 577.

[24] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], LEGALIS 2016, Vol. 1, up to Article 218.

"protect evidence against its loss or distortion" if only this activity is "appropriate". Article 218 CPC is not applicable, however, in the course of proceedings concerning misdemeanours, it does not apply either directly or by analogy.[25]

The requirement of "significance for the pending criminal proceedings" was formed in such a way that it is possible to intercept correspondence and post in a case concerning every type of crime, regardless of the significance of this act.[26] The Act does not lay down a condition similar to those known from Article 180 §1 ("interest of the institution of justice") or §2 CPC ("interest of the institution of justice" or "inability to establish circumstances based on other evidence"), although it seems that its formulation in case of acts of lesser social harmfulness would be at least desirable. Only because of that, cannot one agree with the opinion expressed by J. Skorupka concerning the necessity of analysing every decision under Article 218 §1 CPC with respect to "the principle of subsidiarity and proportionality of significance of objects and information mentioned for the pending criminal proceedings and the requirement of their protection",[27] because the Criminal Procedure Code does not formulate such a condition. This opinion may be treated only as a proposal rationalising proceeding bodies' activities, which does not go beyond the limits *de lege ferenda*.

In the same way, J. Skorupka rightly notices that in order to establish the existence of the prerequisite of "significance for (…) criminal proceedings", it is necessary to conduct *a priori* and then *a posteriori* assessment of demanded thing or data.[28] The latter assessment may not match the former, which results in a conclusion that the intercepted correspondence or post is useless for the proceedings. One should agree with R.A. Stefański that the return of useless correspondence should not be delayed until the end of the criminal proceedings but it should be done promptly after establishing that it has no significance for the proceedings.[29] It seems that a body could not keep this correspondence or post in the expectation of a change of the assessment in the future, even near future. A different conduct would mean illegal retention of correspondence that, in fact, does not meet the condition of usefulness for the proceedings, which is a basic requirement in the light of norms laid down in Article 218 §1 CPC.

Still in the interwar period, it was possible to intercept only the correspondence and post that were sent by or addressed to the accused (Article 158 CPC of 1928). L. Peiper believed that such a solution was to protect other persons against "strong" interference "into private and personal life", which in case of the accused was admissible only because of "significant necessity".[30] The presently binding Code does not contain any restrictions concerning persons who are subject to a decision

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[25] J. Byrski, D. Karwala, *Tajemnica telekomunikacyjna w postępowaniu w sprawach o wykroczenia* [Telecommunications secrecy in misdemeanour proceedings], Pr.NTech No. 4, 2008, pp. 48–55.

[26] R.A. Stefański, [in:] Z. Gostyński (ed.) et al., *Kodeks…* [Criminal…], p. 577.

[27] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks…* [Criminal…], LEGALIS 2016, Vol. 2, up to Article 218.

[28] J. Skorupka, [in:] J. Skorupka (ed.) et al., *Kodeks…* [Criminal…], LEGALIS 2016, Vol. 1, up to Article 218.

[29] R.A. Stefański, [in:] Z. Gostyński (ed.) et al., *Kodeks…* [Criminal…], p. 577.

[30] L. Peiper, *Komentarz…* [Commentary…], Kraków 1929, p. 102.

issued in accordance with Article 218 §1. Thus, a person whose correspondence and post will be checked is a suspect (the accused), although the doctrine does not exclude those connected with the aggrieved.[31] Article 218 §1 CPC does not lay down that interception is applicable only to correspondence or post sent by the suspect or the accused. Thus, post addressed to them may also be subject to interception. As Article 218 §2 CPC defines these persons with the use of a common name "addressees of correspondence and telephone subscribers or senders whose list of connections and other deliveries of information [shall] be surrendered", the activity may also apply to persons who are not directly connected with a case but only keep some kind of contact with the suspect or the aggrieved and to the extent that has no relation to crime.[32] It seems that Article 218 §2 CPC wrongly omits the sender of correspondence or post as a person who is delivered a decision on interception of correspondence, especially as this exclusion does not apply to "a sender whose list of connections or other deliveries of information was surrendered". Thus, if the sender is indicated on a package, which is obligatory in accordance with Article 3(21) of postal law, she/he should be delivered such a decision, especially as secrecy of correspondence seems to concern mainly the person who the content of it comes from.

The lack of such limitations in Article 218 §1 is undoubtedly a solution favourable for proceeding bodies, but is it in conformity with Articles 47 and 49 of the Constitution of the Republic of Poland giving guarantees of the right to protect private life and privacy of communication, which, thanks to broad interpretation in the doctrine and the fact that it covers "all technical forms of transmitting information, in every form of communicating, regardless of the physical carrier used",[33] should concern written correspondence, fax correspondence, text and multimedia massages and electronic mail? Seemingly, everything is perfect. The same Article 49 of the Constitution signals a possibility of "limitation of freedom and privacy of communication in cases and in a manner specified by statute", which Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms also does.[34] Being a kind of model for national regulations, it bans "interference by a public authority with the exercise of the right to respect for private life (…) and one's correspondence" with the exception of cases "such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Undoubtedly, Article 218 §1 CPC meets all the requirements for a statutory provision. Where is the problem then? It must be noticed that both the Constitution of the Republic of Poland ("only") and the ECHR ("with the exception") treat interference in private life as an extraordinary situation, which additionally emphasises the conventional

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[31] M. Rogalski, *Udostępnianie danych telekomunikacyjnych sądom i prokuraturom* [Surrender of telecommunications data to courts and prosecutors], Prokuratura i Prawo No. 12, 2015, p. 68.

[32] *Ibid*., pp. 68–69.

[33] *Ibid*., p. 60.

[34] Drafted and signed in Rome on 4 November 1950 and amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended).

requirement for its "necessity" ("as is necessary") because of the necessity to protect higher values. Although the Constitution does not repeat the requirement, it seems certain that the objective criterion for such interference must be formulated by the legislator as, otherwise, its efficient control would not be possible, e.g. in accordance with Article 236 §1 CPC, i.e. appeal against the decision concerning, inter alia, interception of things treated as evidence and against other activities. It does not seem probable that "significance for a case" envisaged in Article 218 §2 CPC could become such a criterion for appropriateness and lawfulness of interception and opening of correspondence and post due to its excessive generality.[35]

Relativity of secrecy of communications is not without influence on the solutions laid down in Article 33(1) (opening "undeliverable post") and Article 36(1) (requesting a sender to open "post that may cause damage to other post or an operator's property") of postal law as well as on the way in which the postal secrecy developed. In accordance with Article 41(1) PL, postal secrecy applies to "information transmitted by post, information concerning settlement of postal orders, data concerning entities using postal services and data concerning the fact and circumstances of providing postal services or using those services" and obliges a postal operator and persons who, because of their business activity, have access to postal secrecy to keep it (Article 41(2) PL). The same Act lays down instances of secrecy infringement: revealing or processing information or data that are subject to postal secrecy (Article 41(3.1)), opening sealed post or getting to know its content (3.2) and enabling unauthorised persons to undertake activities referred to in Article 41(1) and (2) (Article 41(3.3)), admitting a possibility of activities referred to in Article 41(3.1) and (3.2) PL, provided they are undertaken in cases envisaged by law or a contract to provide postal services. The situation announced by Article 41(4.1) in connection with (3.1) PL is nothing else but only a case under Article 218 §1 CPC. A postal operator is obliged, from the very first day of their business operations, to ensure, free of charge, within the postal business activity, that the Police, the Boarder Guard, the Internal Security Agency, the Military Intelligence Service, the Military Police, the Central Anticorruption Bureau and fiscal intelligence, hereinafter referred to as "entitled entities", and the prosecution service and courts can have technical and organisational possibilities of fulfilling their tasks. In accordance with Article 82(1) PL, in the scope regulated by other provisions and in the mode laid down therein, it applies to obtaining data concerning a postal operator, postal services provided and information allowing identification of service users (Article 82(1.1)), surrendering post in order to control the content of correspondence or post (1.2), and also giving access to post intercepted by an operator because of suspicion that it constitutes an object of crime in order that entitled bodies examine it (1.3), and admitting further transport of postal deliveries containing objects of crime in an untouched condition or after their removal and partial or complete substitution (1.4).

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[35] See also, K. Eichstaedt, [in:] D. Świecki (ed.), B. Augustyniak, K. Eichstaedt, M. Kurowski, *Kodeks postępowania karnego. Komentarz* [Criminal Procedure Code: Commentary], Warsaw 2013, p. 684.

We can also speak about relativity in case of secrecy of communicating in telecommunications networks, referred to in Article 159 of the Act of 16 July 2004 – Telecommunications law[36] (TL) as telecommunications secrecy, which is limited in accordance with Article 180d in connection with Article 159(1.1) and (1.3–5), in Article 161 and in Article 179 (9) TL, however "in accordance with and following the procedures laid down in other regulations".

Placing Article 218 in Part V ("Evidence") and not Part VII of the Criminal Procedure Code makes us think that interception of correspondence or post may take place in the course of preparatory proceedings as well as in their phase *in rem* and in the course of a judicial proceedings. It seems, however, that due to openness of the last one, the significance of evidence obtained in this phase will be especially high. However, there are no doubts that possibilities of interception are updated in the course of the "pending" proceedings and only for the use of those proceedings.

Although Article 218 §1 CPC uses the nouns "correspondence" and "post" in a plural form in Polish, there are no obstacles to issue a decision to intercept one item or selected items of post sent by or to a given person. The factors allowing differentiation may be, first of all, a sender or an addressee but also a type of post or the time of sending. The content of correspondence or post includes mainly information but also objects enclosed if their size is appropriate for sending from one person to another.

Although, from the linguistic point of view, the word "correspondence" covers "keeping in touch with another person by the exchange of letters" and "a collection of received or sent letters",[37] for the purpose of Article 218 §1 CPC the term should be understood as a material corpus of that contact in the form of all types of letters, postcards, etc. The statutory meaning of the word "post" covers "what is or was sent".[38] In both cases, interception may be applied to private or business correspondence. The legislator does not differentiate between them. It may also be correspondence connected with the job done or a post held, but the doctrine emphasises that formal immunity cannot be disregarded.[39]

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[36] Journal of Laws [Dz.U.] of 2016, item 1489.

[37] Compare, *Słownik języka polskiego PWN* [PWN Dictionary of the Polish Language], http://sjp.pwn.pl/sjp/korespondencja;2564701.html [accessed on 28 December 2016].

[38] *Ibid*., http://sjp.pwn.pl/szukaj/przesy%C5%82ka.html [accessed on 28 December 2016].

[39] K. Dudka, *Kontrola…* [Correspondence…], pp. 24–27.

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PROCEEDING-RELATED INTERCEPTION OF CORRESPONDENCE, POST AND RETENTION DATA IN ACCORDANCE WITH ARTICLE 218 §1 CPC

Summary

This article is devoted to the issue of correspondence and post interception in accordance with Article 218 §1 of the Criminal Procedure Code. The author draws attention to doubts as to whether the regulation is in conformity with the constitutional principle of secrecy and privacy of correspondence, especially in the part referring to the admissibility of this legal tool in each criminal case. The author also highlights the lack of a legal definition of "correspondence" and

the complexity of a court's or a public prosecutor's decision to open it. Apart from that, the issue of recording the interception of correspondence and its opening is discussed.

Keywords: correspondence, post, correspondence interception and control, secrecy of correspondence, communication, correspondence opening, thing

ZATRZYMANIE PROCESOWE KORESPONDENCJI, PRZESYŁEK ORAZ DANYCH RETENCYJNYCH W TRYBIE ART. 218 §1 K.P.K.

Streszczenie

Tekst poświęcony jest zagadnieniom związanym z zatrzymaniem w trybie art. 218 § 1 k.p.k. korespondencji i przesyłek. Zwraca się tu uwagę na wątpliwości co do zgodności tej regulacji z konstytucyjnym prawem do poszanowania prywatności i tajemnicy komunikowania się, zwłaszcza w tej części, w jakiej dopuszcza się stosowanie tej instytucji w każdej sprawie karnej. Wskazuje się na brak definicji ustawowej pojęcia „korespondencja" oraz na złożoność decyzji sądu lub prokuratora odnośnie do otwarcia korespondencji. Osobno omówiono zagadnienia związane z protokołowaniem zatrzymania i otwarcia korespondencji.

Słowa kluczowe: korespondencja, przesyłka, zatrzymanie i kontrola korespondencji, tajemnica korespondencji, komunikowanie się, otwarcie korespondencji, rzecz