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PUBLIC PROSECUTOR'S ACTIONS DURING A RECESS OR AN ADJOURNMENT IN THE MAIN TRIAL

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1. The provision of Article 404a CPC specifying public prosecutor's actions during a recess or an adjournment in the main trial was added based on Article 5 (28) of the Act of 20 February 2015[1] and entered into force on 1 July 2015. In legal literature and professional debates, the provision is interpreted in various ways, which is important not only for the doctrine of criminal procedure law and appropriate understanding of the provision but especially for its appropriate application in practice. Major arguments result from the concept of "evidence" and "actions", which a public prosecutor may perform during a recess or an adjournment of the trial as well as the term "actions reserved for the court's jurisdiction". Doubts about the meaning of the above-mentioned terms probably result from the fact that the statement of reasons for the government Bill of 20 February 2015 lacks the legislator's stand on the objectives of the introduction of Article 404a and its meaning. The present article is an attempt to eliminate interpretational doubts by explaining the concepts in question.

2. At first, it is necessary to quote an earlier statement concerning the discussed provision. Having in mind a big discrepancy between the expressed opinions and the addition of the provision to the Criminal Procedure Code, and, as a result, a lack of earlier comments and court judgements as well as the significance for the practice of its application, big fragments of criminal law doctrine representatives' statements will be quoted.

At the stage of legislative proceeding, in his legal opinion, A. Sakowicz approves of the proposal to add Article 404a CPC, which assumes "a prosecutor will be provided with a possibility of supplementing evidence at the stage of the criminal proceeding". He expresses an opinion that the planned solution provides an opportunity to "supplement

[1] Journal of Laws of 2015, item 396.

evidence collected during the investigation at the stage of judicial proceeding". On the other hand, he criticises the "unlimited objective scope" of evidentiary actions that a public prosecutor can perform during a recess or an adjournment in the trial because "the model of the criminal proceeding (…) from 1 July 2015 will be closer to an adversarial one". Due to that, the author of the opinion proposes "to exclude a public prosecutor's possibility of conducting evidentiary actions after an indictment has been filed because the possibility of conducting them existed during the preparatory proceeding. Only a lack of that possibility would create the possibility of doing that during a judicial proceeding. Otherwise, the borderline between collecting evidence in the preparatory proceeding and a judicial proceeding would be blurred. It is also in conflict with the function the legislator prescribed for the final analysis of the material collected during the preparatory proceeding. This action is strictly connected with the right to defence and means the right of the accused to get acquainted with the material collected in the course of the preparatory proceeding within the limits of justified needs". In conclusion, A Sakowicz expresses an opinion that "the planned Article 404a CPC in an unlimited way provides a prosecutor with an opportunity to supplement evidence collected during the investigation at the stage of a judicial proceeding even in a situation where obtaining specific evidence was possible during the preparatory proceeding".

Thus, A. Sakowicz admits the possibility of performing actions by a prosecutor during a recess or an adjournment in the trial in order to supplement evidence that had been provided in an indictment, with a restriction that these cannot be evidentiary actions that, looking at it objectively, could have been conducted during the preparatory proceeding.

It seems that K. Dąbkiewicz expresses a similar opinion[2]. Namely, that the provision of Article 404a CPC "provides a public prosecutor with legal grounds for undertaking actions *sensu stricte* connected with seeking, at the time of a trial, evidence in order to present it before a court". According to this author, a public prosecutor can conduct procedural activities during a recess or an adjournment in the trial, which "are to lead to obtaining evidence supporting charges formulated in the indictment, especially in a situation when the grounds for them are challenged as a result of active attitude of the accused or his counsel in the course of the evidentiary proceeding". K. Dabkiewicz justifies this opinion with the fact that after 1 July 2015, the accused has an opportunity "to a greater extent than before, to take private steps to collect" evidence and then use it in the course of a trial, which is envisaged in Article 393 § 3 CPC. "If the trial essence is a combat, or a dispute between equal parties, each of them should be equipped with instruments that let it challenge the statements of the opponent. In a situation when the accused presents evidence challenging the theses of the charges against him not earlier than before a court, a public prosecutor cannot be deprived of the right to seek evidence that can confirm his theses and then file a motion to a court to admit that evidence. The only limitation is that the discussed action is reserved to the competence of a court"[3].

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[2] See K. Dąbkiewicz, *Kodeks postępowania karnego. Komentarz do zmian 2015 [Criminal Procedure Code: Commentary on the amendments]*, Warszawa 2015, p. .....

[3] *Ibid*.

Proper interpretation of K. Dąbkiewicz's stand is difficult because, on the one hand, he approves of the possibility of public prosecutor's procedural actions during a recess or an adjournment in the trial in order to obtain evidence in support of charges included in the indictment, and on the other hand, he speaks only about the right to seek evidence and file a motion to a court to admit it. It seems that the author thinks of a situation, in which a public prosecutor has an opportunity to conduct evidentiary activities, e.g. to interview a witness, and then file a motion to examine the witness before a court, and in the event of circumstances laid down in Article 391 § 1CPC, to read the person's interrogation record.

D. Świecki expresses a different opinion[4], namely, that "Article 404a introduces a public prosecutor's entitlement to conduct activities aimed at seeking evidence during the judicial proceeding in order to present it before a court". Discussing the phrase "presenting evidence before a court" used in Article 404a, the author believes that it means evidentiary proceeding before a court, which requires that an evidentiary motion should be filed. The word "evidence" refers not to evidentiary activity but to an evidentiary source that a public prosecutor intends to use before a court[5]. On the other hand, the limitation of the scope of conducted activities in the form of a statement that a public prosecutor's activities are excluded if they are reserved to the competence of a court indicates that the concept of "activities should be referred to such that may be conducted only based on a court's decision and before a court". According to D. Świecki, it refers to evidence provided by witnesses because in the judicial proceeding, direct examination is performed before a court. A court also admits evidence in the form of an expert opinion (Article 194 and 200 CPC), and based on Article 391 § 1 and 1a CPC, witnesses' testimonies provided in writing during the preparatory proceeding or before a court are read during the trial. In the judicial proceeding, a court also performs activities to collect data on the accused laid down in Article 213 and 213 § 1a CPC, as well as orders the conduction of a community inquiry (Article 214 CPC). This means that under Article 404a, a public prosecutor is not entitled to conduct an interrogation and then present its record or a witness's explanation". In D. Świecki's opinion, "there are no barriers to a public prosecutor or the police interviewing a person before proposing them to be examined as witnesses and developing a formal document recording that in order to present it before a court in support of an evidentiary motion". He is also convinced that this is why "the procedural situation of a public prosecutor and other parties, which after the amendment to Article 393 § 3 CPC are entitled to collect the so-called private evidence" has become equal. However, as "obtaining real evidence and private and official documents is not restricted to the competence of a court, a public prosecutor may seek and present this evidence before a court. Based on the discussed provision, a public prosecutor may perform activities aimed at establishing whether it is possible to conduct a certain evidentiary proceeding, e.g. establish a witness's place of residence or whether an expert will be able to develop

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[4] See D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume I, Warszawa 2015, p. 1047.

[5] *Ibid*.

an opinion on a complicated case. Within the scope of these actions, a prosecutor may request that the police conduct them"[6].

As far as the types of the activities that a public prosecutor may perform during a recess or an adjournment in the trial are concerned, R. Ponikowski[7] expresses the furthest reaching opinion, according to which a public prosecutor cannot perform any evidentiary activities during that period. He justifies this opinion stating: „the amended Criminal Procedure Code does not change model principles specifying the stages of the proceeding and establishing *dominus litis* of each of them. Since the start of a trial before a court, a court is the host of the trial (…). An evidentiary statute of repose has not been introduced either, thus the parties to the proceeding, including a public prosecutor, may at any stage of the trial, until its end (even at the stage of final speeches) propose evidentiary motions, the grounds of which have to be assessed by a court". According to R. Ponikowski, in compliance with Article 404a CPC, "a prosecutor will be entitled not only to prepare a motion to a court to examine evidence but also to consider the possibility of examining a particular type of evidence and the possibility of finding and bringing it to the trial and undertaking other such actions (except actions restricted to the competence of a court), with a possibility of requesting that the police perform the activities. The final result of the activities, however, will be a prosecutor's motion to a court to admit evidence and examine it before a court"[8].

3. The quoted statements made by the representatives of the criminal procedure law doctrine indicate that the possibility of performing evidentiary activities by a public prosecutor during a recess or an adjournment in the trial is justified by an adversarial form of a court proceeding and providing the accused with the right to seek evidence and present it before a court in order to challenge the charges in the indictment. It must be noticed, however, that the provision of Article 393 § 3 CPC does not constitute grounds for the accused to perform evidentiary activities aimed at obtaining a private document developed beyond the scope of the criminal proceeding. The accused cannot seize an object (a document) specified in Article 217 § 1 CPC and search a person or premises under Article 219 § 1 CPC in order to find such a document, not to speak about interrogating a witness. The provision of Article 393 § 3 CPC stipulates grounds only to read a private document developed beyond the scope of the proceeding, which means filing an adequate motion to admit evidence and examine it by a party in accordance with Article 167 § 1 CPC. Being in possession of a private document or knowing where it is, the accused may file a motion to examine the evidence resulting from the document, specifying the source and indicating circumstances (the evidentiary thesis) that the evidence is supposed to confirm. Thus, if the provision of Article 404a CPC is to constitute an equal procedural situation of a public prosecutor and the accused in an adversarial judicial proceeding, one of the parties should not be given broader entitlements than the other. If the accused is not entitled to perform evidentiary activities in the course of a trial, a public prosecutor should not have this right either.

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[6] *Ibid*.

[7] See R. Ponikowski, [in:] J. Skorupka (ed.) *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2015, p. 1035.

[8] *Ibid*.

Otherwise, it would result in a violation of the principle of an adversarial process in its basic aspect reflected in parties' equal rights and possession of the same measures of "trial by combat". Because of that, the opinion that the provision of Article 404a CPC constitutes grounds for performing evidentiary activities "undermining evidence that negates charges" during a recess or an adjournment in the trial is erroneous. The directive on an adversarial process obligates to assume that in an adversarial judicial proceeding the provision of Article 404a CPC entitles a public prosecutor to perform only such evidentiary activities to which the accused is also entitled, thus to seek sources of evidence and next to file a motion to a court to admit it.

It must be added that evidentiary activities are steps that can be taken only by procedural organs (a court, the prosecution office, the police and another state organ that the statute provides with the entitlements of the police) [9]. Thus, parties to the proceeding cannot perform evidentiary activities, e.g. an interrogation of the accused, a witness and an expert, a seizure or a search, a scene examination or an experiment during the proceeding, because they are restricted to the competence of the proceeding organs. The lack of parties' competence to perform evidentiary activities should not be confused with the examination of evidence by the parties, which is laid down in Article 167 § 1 CPC. The phrase "evidence shall be taken", which is used in Article 167 § 1 CPC, should be interpreted as "obtaining evidentiary measures from evidentiary sources and protecting them in the form envisaged by procedure law"[10] and "perception of evidentiary measures and their adoption for the proceeding organ's awareness"[11]. Thus, "the taking of evidence" will mean obtaining a testimony (an evidentiary measure) from a witness (an evidentiary source) by a public prosecutor in the course of an examination (hearing) and recording the testimony in the trial minutes so that parties and a court may get acquainted with its contents. It must be added that the taking of evidence by a party (prosecutors and the accused) requires that a competent organ, which in case of a judicial proceeding is a court or the chair of the bench, should formerly admit evidence and this action results from the examination of an evidentiary motion. Thus, there is a sequence of actions that lead to the eventual taking of evidence at a trial: (1) filing an evidentiary motion by a party, (2) examination of the motion and admission of evidence by a court or the chair of the bench, (3) the taking of evidence by a party in the course of evidentiary proceeding conducted by the proceeding organ.

4. It must be also taken into account that the provision of Article 404a CPC does not contain a norm authorising a public prosecutor to perform evidentiary activities during a recess or an adjournment in the trial. The norm has not been directly expressed and it cannot result from the interpretation of the contents of the provision. Due to the reasons discussed earlier, the phrase "a public prosecutor may perform necessary activities in order to present evidence before a court" does not mean that he is authorised to perform

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[9] Compare Z. Kmiecik (ed.), *Prawo dowodowe. Zarys wykładu [Evidence law: lecture outline]*, Warszawa 2008, p. 22.

[10] See P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu [Criminal process: System outline]*, Warszawa 2013, p. 376.

[11] See M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne [Polish criminal procedure: Basic theoretical assumptions]*, Warszawa 1984, p. 413.

evidentiary activities away from the trial, e.g. interview a witness in the prosecutor's office and present this evidence before a court.

In addition to the already presented arguments, it is necessary to state that in the Polish system of criminal procedure law, criminal proceeding is composed of specific stages defined by the statute taking place subsequently, i.e. a preparatory proceeding, a judicial (court) proceeding and a penalty execution proceeding. Possible modifications of the pattern are not important for the present considerations. The borders of each of the criminal process stages are precisely defined. A preparatory proceeding, where the proceeding organ is a prosecutor, has a fixed beginning and end. It ends when the collected evidence is sufficient to file a public complaint or when evidentiary possibilities have been exhausted and facts established by the proceeding organ result in a conclusion that the preparatory proceeding must be unconditionally discontinued[12]. The conclusion of the investigation envisaged in Article 321 § 7 CPC obliges proceeding organs to take the decision on the mode of concluding a preparatory proceeding, which ends with: (1) development of an indictment and filing it to a court (Article 331 § 1 CPC), (2) a prosecutor's motion to convict the accused and impose a penalty in accordance with a plea agreement or other penalties prescribed for a misdemeanour in question (Article 335 § 1 CPC), (3) a prosecutor's motion to a court to discontinue the proceeding due to a perpetrator's insanity and to apply precautionary measures (Article 324 § 1 CPC), (4) a prosecutor's motion to a court to conditionally discontinue the proceeding (Article 336 § 1 CPC), and (5) unconditional discontinuance (Article 322 § 1 CPC). With the conclusion of the preparatory proceeding based on the decision on discontinuance, a prosecutor's supervision of the proceeding ends. From that moment on, all means of supervision specified in Article 326 § 3 CPC are no longer applicable because they refer to supervision over the course of proceedings[13]. Having concluded a preparatory proceeding, a prosecutor is no longer authorised to perform evidentiary activities. At the subsequent proceeding stages, he does not appear as a proceeding organ but a party to a trial.

5. R. Ponikowski draws attention to the fact that "awarding the principle of an adversarial process a priority role in the amended procedure developing the course of an evidentiary proceeding in the course of a trial resulted in the repeal of Article 345 CPC (which authorised a court to refer a case back to a prosecutor in order to eliminate deficiencies in the preparatory proceeding at the stage of preliminary assessment of the indictment) and Article 397 CPC (which authorised a court to discontinue or suspend a trial and suggest a time limit for presenting evidence the taking of which would allow for elimination of the deficiencies noticed) [14]. Thus, in the process of interpreting the provision of Article 404a CPC, referring to the scope of a prosecutor's entitlements laid down in the repealed provision of Article 397 CPC is unjustified and inadmissible. It must be reminded, however, that he repealed provision of Article 397 CPC defined

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[12] See J. Grajewski, *Przebieg procesu karnego [Course of criminal process]*, Warszawa 2012, p. 78.

[13] Compare F. Prusak, *Nadzór prokuratora nad postępowaniem przygotowawczym [Prosecutor's supervision over the preparatory proceeding]*, Warszawa 1984, p. 206.

[14] R. Ponikowski, *op. cit.*, p. 1035.

the course of action of a court in case of recognition that essential deficiencies in preparatory proceeding have become apparent at the trial (§ 1), the mode of a public prosecutor's proceeding in case a court demands additional evidence (§ 2 and § 3) and consequences of a failure to present demanded evidence (§ 4). On the other hand, the conditions for demanding additional evidence by a court were the following: (1) disclosure of essential deficiencies of the preparatory proceeding after a trial has started, (2) lack of possibility of eliminating the deficiencies by a court or causing excessive length of the proceeding beyond a reasonable time limit, (3) lack of possibility of eliminating the deficiencies with the application of Article 396 (a judge designated, another court appointed)[15]. Demand for additional evidence required that a court issued a decision indicating the addressee, evidence a court expected to be provided with and the time when it should be done[16]. When a court issued such a decision, a prosecutor could perform adequate evidentiary activities in person or request that the police do this[17]. Thus, it must be taken into account that the provision of Article 397 § 1 CPC in an abstract way and the above-mentioned decision in a detailed way authorised a prosecutor to perform procedural activities in the form of evidentiary activities during a recess or an adjournment in the trial, thus a judicial stage of the criminal proceeding. Although a trial was conducted, a prosecutor as a criminal proceeding organ was authorised to perform evidentiary activities aimed at obtaining evidence demanded by a court. In other words, a prosecutor had clear legal grounds for performing evidentiary activities at the stage of judicial proceeding but not at a trial. Without the norm laid down in the provision of Article 397 § 1 CPC, a prosecutor would not be able to perform evidentiary activities in the course of a judicial proceeding[18].

However, Article 404a CPC does not directly indicate a possibility of performing evidentiary activities. In this area, it contains a phrase authorising a prosecutor to perform "necessary activities in order to present evidence before a court". The quoted phrase should be interpreted as meaning that a public prosecutor might perform any activities that are not evidentiary ones, which will enable him to file an evidentiary motion, and after it is admitted, the taking of evidence before a court pursuant to Article 167 § 1 CPC. Therefore, based on Article 404a CPC, a public prosecutor can only perform non-proceeding related activities, e.g. seek evidence sources, establish usefulness of information provided by a source of evidence in order to determine a fact or a circumstance and file an adequate motion or evidentiary motions. Thus, a public prosecutor cannot interview a witness, seize objects or perform a search and use the records of these evidentiary activities before a court. Contrary to the earlier quoted statements, a public prosecutor cannot present real evidence before a court unless

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[15] See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Volume II, Warszawa 2007, p. 484.

[16] *Ibid*., p. 487.

[17] Concerning the conditions and mode of referring a case in trial to supplement preparatory proceeding pursuant to Article 344 § 1 CPC of 1969, see S. Kalinowski, *Rozprawa główna w polskim procesie karnym [Main trial in the Polish criminal process]*, Warszawa 1975, p. 283 and subsequent ones.

[18] Concerning a proceeding organ's competence to conduct a procedural activity, see K. Woźniewski, *Prawidłowość czynności procesowych w polskim procesie karnym [Appropriateness of procedural actions in the Polish criminal process]*, Gdańsk 2010, p. 54 and subsequent ones.

it was protected in circumstances requiring immediate action. A public prosecutor can only seize an object or perform a search in cases not amenable to delay, as laid down in Article 217 § 1 CPC and Article 220 § 3 CPC, and then apply to a court for approval pursuant to Article 217 § 4 CPC and Article 220 § 3 CPC respectively. In the performance of non-proceeding related activities, on the other hand, a public prosecutor is limited to such activities that have not been restricted to the competence of a court. Thus, a public prosecutor cannot, e.g. give consent to performance of operational and surveillance activities that require a court's consent or obtain authorization of such operations in cases not amenable to delay.

6. An opinion that a public prosecutor cannot perform evidentiary activities pursuant to Article 404a CPC finds support in the contents of the amended Article 401 § 1 CPC. The amendment to that provision that came into force on 1 July 2015 consists in an addition that a chair can adjourn a trial in order to enable parties to prepare evidentiary motions. A court should provide parties with an opportunity to prepare new evidentiary motions, especially when the need to do that was revealed in the course of a trial. A motion to order a recess can be filed by any party to the judicial proceeding with grounds for the need to prepare evidentiary motions. Parties can collect information and establish its usefulness for proving some facts or circumstances for the needs of developing evidentiary motions. The scope of activities performed by a public prosecutor is limited, however, to their indispensability for developing a motion or evidentiary motions.

Thus, the provision of Article 404a CPC should be interpreted in conjunction with the provision of Article 401 § 1 CPC because it constitutes its supplement or detailed specification. If the provision of Article 401 § 1 CPC constitutes grounds for ordering a recess in a trial in order to prepare evidentiary motions by parties, the provision of Article 404a CPC defines the scope of activities that a public prosecutor can perform in order to present evidentiary motions. The comments show that grammatical interpretation in the process of interpreting the provision of Article 404a CPC is unreliable. The provision should be interpreted also taking into account *ratio* that is the reason for its introduction to the Criminal Procedure Code, which is determination of the scope of a public prosecutor's activities performed to prepare evidentiary motions. The provision of Article 404a CPC should be interpreted also with the use of the system directive interpretation, which is necessary for the explanation of the concept of "evidence" and "actions" as well as the principle of "equality of arms" in order to explain the scope of steps undertaken by a public prosecutor during a recess or an adjournment in the trial.

The phrase "in order to present evidence before a court" in Article 404a CPC should not be understood as stating that after a recess or an adjournment in the trial, a public prosecutor "presents evidence" that he took outside the course of a trial but in the way that he formulates evidentiary motions to take evidence and after their approval, takes evidence before a court and thus "presents it before a court".

7. Summing up, it must be stated that using the methods of grammatical, functional and structural interpretation, one must draw a conclusion that the provision of Article 404a CPC is useless because it does not provide any "new" normative contents. The

discussed provision means that during a recess or an adjournment in the main trial, a public prosecutor may only perform non-proceeding related actions, consisting in seeking evidence sources and assessing their usefulness for establishing facts important in the criminal process in order to file evidentiary motions. Without Article 404a CPC, one should draw the same conclusion.

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PUBLIC PROSECUTOR'S ACTIONS DURING A RECESS OR AN ADJOURNMENT IN THE MAIN TRIAL

Summary

The legal issue that is discussed in the article is what kind of actions a public prosecutor can perform during a recess or an adjournment in the trial. The issue is questionable in the doctrine of Polish criminal procedure law. The author presents an opinion that a public prosecutor cannot perform any evidentiary actions because there is no clear statutory authorisation and, moreover, because he is a party to the judicial proceeding, and evidentiary activities are restricted for proceeding organs. The author supports the opinion using three methods of legal interpretation: the grammatical, functional and structural ones.

Key words: *recess/adjournment in the trial*, *public prosecutor's actions*, *evidentiary activities*, *adversarial judicial proceeding*, *"equality of arms"*

CZYNNOŚCI OSKARŻYCIELA PUBLICZNEGO W CZASIE PRZERWY ALBO ODROCZENIA ROZPRAWY GŁÓWNEJ

Streszczenie

Problemem prawnym, który próbowano rozwiązać, jest to, jakie czynności może wykonać oskarżyciel publiczny w czasie przerwy albo odroczenia rozprawy. Kwestia ta w doktrynie polskiego prawa karnego procesowego jest sporna. Autor wyraził zaś pogląd, że oskarżyciel publiczny nie może wykonać żadnej czynności dowodowej ze względu na brak wyraźnego upoważnienia ustawowego, a nadto, gdyż jest stroną postępowania, a czynności dowodowe są zastrzeżone dla organów procesowych. Pogląd ten autor uzasadnia wykorzystując trzy metody wykładni przepisów prawa, tj. gramatyczną, funkcjonalną i systemową.

Słowa klucze: *przerwa w rozprawie*, *czynności oskarżyciela publicznego*, *czynności dowodowe*, *kontradyktoryjne postępowanie sądowe*, *„równość broni"*