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Proceedings in the matter of a postponement of the execution of a sentence

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Sentence deferment proceedings can be initiated by the court ex officio or following a motion submitted by entities referred to in relevant provisions of the law. In practice, however, in a vast majority of cases proceedings are initiated following the submission of a motion.

Enforcement proceedings are instigated ex officio. This principle is reflected in Article 9 of the Criminal Enforcement Code, under which the court must instigate enforcement proceedings ex officio, and in Article 19 of the Criminal Enforcement Code making it possible to instigate ex officio incidental proceedings, including those concerning deferment of sentence enforcement.

Under Article 19(1) of the Criminal Enforcement Code, the court rules following a motion by the public prosecutor, offender or his or her counsel and ex officio, as well as, if the law provides for such a possibility, following a motion submitted by other individuals.

Rulings concerning deferment of custodial sentences are issued ex officio in a procedure provided for in the ordinance of the Minister of Justice of 25 November 2009 on the procedure to be followed by relevant agencies if the number of individuals kept in prisons or remanded in custody in the country exceeds the total capacity of prisons and deten-

Nowa Kodyfikacja Prawa Karnego 38, 2015

tion centres[1]. Proceedings concerning deferment of restriction of liberty involving electronic supervision as provided for in Chapter VIIa of the Criminal Enforcement Code are also initiated ex officio.

Usually, however, a motion for the deferment of sentence enforcement — irrespective of its legal grounds — is submitted by the sentenced offender or the defence counsel in enforcement proceedings. The motion in question can also be submitted, in accordance with Article 173(3)(6) of the Criminal Enforcement Code, by professional probation officers. The public prosecutor who is a party to enforcement proceedings is also authorised to initiate incidental proceedings.

The Criminal Enforcement Code does not specify directly what formal requirements should be met by a motion for sentence deferment. Nevertheless, given the substance of Article 1(2) of the Criminal Enforcement Code, Article 119(1) of the Code of Criminal Procedure will apply accordingly. According to this regulation, each procedural document should include:

— designation of the authority to which it is addressed and the case which it concerns;

— designation and address of the party submitting the document;

— substance of the motion or statement, with explanatory notes if required;

— date and signature of the party submitting the document.

If the motion for deferment of sentence enforcement does not meet these requirements, and the defect is of a nature which renders further proceedings impossible, or if such a defect consists in a failure to pay the costs required or to submit the authorisation to take the procedural step in question, the competent court summons the person submitting the motion to correct the defect. Under Article 120(1) of the Code of Criminal Procedure the deadline for correcting formal defects is 7 days starting from the day of service of the summons. If the defect is corrected within the deadline, the motion for deferment of sentence enforcement takes effect

[1] Ordinance of the Minister of Justice of 25 November 2009 on the procedure to be followed by relevant agencies if the number of individuals kept in prisons or remanded in custody in the country exceeds the total capacity of prisons and detention centres, Journal of Laws No. 202, item 1564.

from the day of its submission. If the defect is not corrected within the prescribed deadline, the motion is considered to be without effect. The seven-day time limit for correcting formal defects is a prescribed not final time limit, which means that a failure to meet it does not preclude another submission of the motion and bringing about the intended effect[2].

Summons to correct the defect requires the court to issue an order which is then to be served on the party requesting deferment of sentence enforcement. The order should additionally include notes for guidance concerning the consequences of a failure to correct the defect within the time limit, i.e. that the motion will be pronounced null and void. If the motion is deemed to be null and void, this means it has no legal effect associated in the relevant regulation with its submission to the court[3].

The motion to initiate incidental proceedings and its correction following the summons under Article 130 of the Code of Criminal Procedure, may also be submitted orally in the registry of the court. In such a case the head of the registry or authorised staff member writes a report which — in addition to providing information about the time and place of its drafting and persons involved in the drafting — contains information about the person submitting the motion, details concerning the motion, essential facts of the case as well as evidence substantiating each contention. The report is signed by the person submitting the motion and the staff member drafting the document[4].

The motion for deferment of sentence enforcement should be filed with the competent court. Under Article 3(1) of the Criminal Enforcement Code, the court issuing the ruling in the first instance is also the competent court in proceedings concerning the enforcement of the ruling. This provision regulates the functional jurisdiction of the court in sentence enforcement. Thus the Code accepts the general principle whereby in enforcement proceedings the competent court is the court ruling in the

[2] K.T. Boratyńska et al., *Kodeks postępowania karnego. Komentarz*, Warszawa 2012, p. 304.

[3] Decision by the Court of Appeal in Kraków of 16 January 2002, II AKz 495/01, KZS 2002, No. 1, item 20.

[4] Ordinance No. 81/03/DO of the Minister of Justice of 12 December 2003 on the organisation and operation of court registries and other departments of court administration.

first instance with regard to the merits of the case — depending on the material jurisdiction, it is either the district court or regional court[5].

The submission of deferment motion results in the case being entered into the "Ko" register kept in the district and regional courts. The "Ko" register contains motions and other documents associated with enforcement proceedings in criminal cases, cases concerning tax offences and minor offences ending with a court decision and not being subject to registration in other systems. Each action is recorded under a separate number. This means that a motion for further deferment of sentence enforcement is recorded under a new number. Documents concerning initiated sentence deferment proceedings are attached to the relevant records of the criminal case in question, if the records are kept in a given department, while the correspondence associated with them features the "Ko" reference number and "K" case reference number. If the criminal case is not to be found in the department, the documents are kept in separate files[6].

An important change with regard to the obligation to provide evidence concerning the circumstances cited in the course of incidental proceedings was introduced by the Act of 16 September 2011 amending the Criminal Enforcement Code and some other acts[7]. Consequently, the legislator has shifted the burden of proof to the entity initiating enforcement proceedings. Under Article 6(2) of the Criminal Enforcement Code, the sentenced offender, when submitting a motion, complaint or request, is obliged to justify the demands presented in it to an extent making it possible to examine it, in particular he or she is obliged to attach relevant documents. Submitting the motion without proper justification and documentation of the demands indicated in it may result in the motion being left without being examined. A similar result may arise when the motion is based on the same factual grounds or when it contains words or phrases commonly regarded as vulgar or offensive, or as part of criminal jargon.

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[5] S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2012, p. 63.

[6] Paragraph 384 of Ordinance No. 81/03/DO of the Minister of Justice of 12 December 2003 on the organisation and operation of court registries and other departments of court administration.

[7] Act of 16 September 2011 amending the Criminal Enforcement Code and some other acts, Journal of Laws of 2011, No. 240, item 1431.

A decision to leave the motion without further examination cannot be appealed against. Nevertheless, the fact that such a decision has been issued does not prevent the sentenced offender from submitting another motion for deferment of sentence enforcement meeting all the statutory criteria. The essence of the measure was to make the enforcement proceedings much more efficient and, consequently, to reduce the number of motions submitted without proper documentation.

The measure concerning the shift of the burden of proof is complemented by the amendment to Article 19(3) of the Criminal Enforcement Code under which the party submitting a motion is obliged to justify the demands presented in it to an extent making it possible to examine it, in particular, the party is obliged to attach relevant documents. A failure to comply with this obligation may mean, like in the case indicated in Article 6(3) of the Criminal Enforcement Code, that the motion will not be examined.

What is crucial in this respect is the fact that the court is free to decide how to proceed with the motion. Each case requires an individual assessment and consideration whether action should be taken ex officio so that it would become possible to examine the motion or discipline the applicant and force him or her to fulfil his or her obligations by not examining the motion[8].

In order to verify the information given in the motion for deferment of sentence enforcement, the enforcing agency may, under Article 14(1) of the Criminal Enforcement Code, order that information be collected about the sentenced offender in the form of a community interview conducted by a probation officer. Collecting information about the offender may prove necessary to issue an appropriate ruling in incidental proceedings in the course of sentence enforcement[9]. When proceedings concerning deferment of sentence enforcement are initiated by a professional probation officer, the officer may, irrespective of the principle introduced in Article 14 of the Criminal Enforcement Code, conduct a community interview on his or her own.

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[8] K. Szczechowicz, B. Orłowska-Zielińska, 'Wykonalność postanowień, udział stron i inne wybrane aspekty nowelizacji kodeksu karnego wykonawczego', *Prokuratura i Prawo* 2013, No. 3, pp. 115–116.

[9] S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2012, p. 142.

If the motion for deferment meets the formal requirements and is not affected by the defect referred to in Article 6(2) of the Criminal Enforcement Code, the court sets the date for a hearing in order to examine it. Article 22(1) of the Criminal Enforcement Code introduces a general principle of examining cases without the participation of the parties. Nevertheless, the legislator limits the application of this principle to the exceptions indicated in the law. The provisions regulating the enforcement of restriction of liberty do not provide for an obligation to notify the parties and other persons referred to in Article 19(1) of the Criminal Enforcement Code about the court hearing concerning deferment of sentence enforcement. The matter is resolved differently by provisions concerning deferment of the enforcement of a custodial sentence. Under Article 153a(1) of the Criminal Enforcement Code, the persons who have the right to take part in a deferment hearing include the prosecutor, convicted offender and his or her defence counsel as well as professional probation officer or director of the detention facility, if they have requested the court's decision. However, a failure to appear on the part of the persons referred to in Article 153a(1) of the Criminal Enforcement Code and duly notified about the date and purpose of the hearing does not suspend the examination of the case, with the exception of a failure to appear by the defence counsel in cases referred to in Article 8(2) of the Criminal Enforcement Code, unless the court rules in favour of the sentenced offender or in accordance with his or her motion. A case may be heard in the absence of the sentenced offender, only if he or she has been duly notified about the date and purpose of the hearing. A lack of such a notification may be regarded by a higher court as contempt of procedural law that may have an impact on the substance of the decision. Thus, such a failure constitutes a relative ground for appeal (Article 438(2) of the Code of Criminal Procedure). This is because the sentenced offender is deprived not only of the right to substantive defence but also of e.g. possibility of appointing a defence counsel, who would also have the right to take part in the hearing. Such a failure may occur also when the case is heard in the absence of the sentenced offender, who, having been notified about the date and purpose of the hearing, has justified his or her absence, citing one of the circumstances listed in Article 117(2) or (2a)

of the Code of Criminal Procedure and asked for the case not to be heard in his or her absence.

The Criminal Enforcement Code accepts a rule whereby all crucial matters in enforcement proceedings are determined by way of decisions. When this particular form of ruling is not necessary, cases are decided by way of orders of the president of the court or authorised judge.

Usually proceedings concerning deferment of sentence enforcement will end with a decision that the motion in question will or will not be considered. Yet the Code does introduce a possibility of issuing other rulings leading directly to the completion of the proceedings concerning deferment of sentence enforcement. Under Article 35(1) of the Code of Criminal Procedure, in connection with Article 1(2) of the Criminal Enforcement Code, the court examines its jurisdiction ex officio and if it finds that the case does not fall within its jurisdiction, it refers the case to a competent court or other agency. The "reference" may be a consequence of the motion for sentence deferment being filed with the wrong court or of prior commencement of the sentence, which makes it obligatory for the court of first instance to refer the motion in question to the penitentiary court and treat it as a request for a prison leave. Another solution is to "combine" the deferment proceedings with other proceedings in the same department. The court may also close the proceedings in question by issuing a decision terminating the proceedings under Article 15(1) of the Criminal Enforcement Code on account of e.g.

— permission having been granted for a custodial sentence to be served in an electronic supervision system;

— death of the sentenced offender;

— ruling having become part of a joint sentence;

— motion having been considered to be without effect owing to a lack of payment;

— enforcement of a custodial sentence not having been ordered[10].

If a custodial sentence referred for enforcement has been deferred, the president of the court or authorised judge immediately sends a copy

[10] K. Mrozek, 'Odroczenie wykonania kary w świetle badań empirycznych', [in:] *Z problematyki badań empirycznych w prawie karnym wykonawczym*, ed. A. Kwieciński, Wrocław 2015, pp. 127–128.

of the deferment decision to the relevant prison or detention facility and notifies the police unit in charge of conveying the sentenced offender to prison or detention facility[11].

The decision concerning deferment and revocation of sentence deferment can be appealed against (Articles 62(4) and 153a(2) of the Criminal Enforcement Code). The right to appeal against decisions unfavourable to a party is part of essential procedural guarantees intended to protect specific rights and interests in criminal proceedings. An appeal is an ordinary remedy against decisions that are not yet final. Deferment proceedings can thus be initiated only after an appeal has been filed effectively, which testifies to its nature as a complaint.

The course of the appeal procedure is not regulated in a uniform manner at each stage of criminal proceedings. There are separate rules for the judicial and the enforcement stage. In enforcement proceedings the court always sits as a single judge[12]. The provisions of the Criminal Enforcement Code do not provide for any exceptions to the rule. This means that the principle will be fully applicable in the appeal procedure. A higher court that examines appeals against decisions issued in the course of enforcement proceedings is a court superior to — in terms of its organisation and position within the system — the court that has issued the decision. The regional court examines appeals against decisions or orders issued by district courts, while the appellate court — appeals against decisions or orders issued by regional courts.

The right to appeal against rulings issued in the course of enforcement proceedings is the right of the sentenced offender and his or her defence counsel, appointed for the proceedings, as well as the prosecutor, which is a sign of equality of the parties.

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[11] Ordinance of the Minister of Justice of 23 February 2007 on the rules of procedure for courts of law.

[12] There are indications in the case-law that a departure from the principle provided for in Article 20(3) of the Criminal Enforcement Code always has consequences referred to in Article 439(1)(2) of the Code of Criminal Procedure (decision of the Administrative Court in Wroclaw of 26 March 2004, II AKz 119/04, KZS 2004, z. 12, item 54; decision of the Administrative Court in Lublin of 21 March 2001, II AKz 88/01, OSA 2001, z. 11, item 84).

The appeal should be filed within 7 days from the date of the decision being pronounced and if the law demands that the decision must be served — from the date of its service. The time limit for filing an appeal is final, thus if it is exceeded the legal act becomes ineffective. Nevertheless, under Article 126 of the Code of Criminal Procedure, it is possible to reinstate a lapsed time limit[13].

The appeal is filed with the court that has issued the decision appealed against. Without further delay it is referred, with the case files, to a higher court, unless the court ruling in the same composition grants the appeal. The possibility for an appeal to be "taken into account" by the court issuing the decision appealed against makes it possible to distinguish the first characteristic of this measure, namely its devolutive nature, though it should be said that this devolutive nature is relative[14]. The court of first instance has the right to "grant" the appeal, dismissing it or changing it in accordance with the sentenced offender's request; otherwise it refers the appeal to a court of appeal in order for it to be reviewed, though it should be noted that this is an administrative procedure and does not require a substantive decision[15]. What should also be indicated is the relatively suspensive nature of appeal. Under Article 9(3) of the Criminal Enforcement Code, "a decision in enforcement proceedings becomes enforceable upon its pronouncement, unless otherwise provid-

[13] Under Article 126(1) of the Criminal Enforcement Code, if the final time limit has lapsed for reasons beyond the control of the party, the party may, within 7 days from the day on which the obstacle has been removed or expired, submit a request to have the time limit reinstated, at the same time effecting the action which was to have been effected within the previously applicable time limit.

[14] K. Dąbkiewicz, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2015, p. 138.

[15] This issue has been the subject of a lot of controversy, both in the case-law and in the doctrine. As can be seen in the case-law, under the procedure provided for in Article 20(2) of the Criminal Enforcement Code, before referring a remedy to a higher court, the court of first instance should issue a decision stating whether it grants the appeal or not and this is why it refers the appeal with the files to the competent court for a review (decision of 8 January 1999, IV KKN 390/98, *Prok. i Pr.* 1999, No. 7–8, item 12). However, this position does not correspond to that of experts on the doctrine, who rightly indicate that when the appeal is not granted, the court, without having to adopt a substantive position, immediately orders that the case be referred to a higher court (K. Dąbkiewicz, *Kodeks karny wykonawczy…*, p. 139).

ed for in the law, or the court issuing the decision or the court called to examine the appeal suspends its enforcement".

Appeal proceedings in the case of sentence deferment may result in the appealed decision being upheld or changed or annulled in its entirety or in part, which testifies to a reformative nature of appeal.

Thus an appeal against a decision of the court issued in enforcement proceedings has characteristics of a remedy. It is accusatorial, devolutive, suspensive and reformative.

Summary

This article focuses around the issue of sentence deferment proceedings. It concerns not only the court of first instance stage but the appeal procedure as well. It is important as the Criminal Enforcement Code regulates differently the rules of enforcement proceedings. Further actions leading to the release of decree regarding sentence deferment have been described in detail, as well as the rules of the complaint proceedings.

Keywords: deferment of sentence enforcement, defence counsel, pleading, decree, appeal procedure.