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COURT COMPETENCE IN CRIMINAL TRIALS  
IN THE EVENT OF TRANSFERRING A CASE TO A COURT  
OF THE SAME LEVEL DUE TO TRIAL ECONOMICS  
(ARTICLE 36 OF THE CPC)

The constitutional principle of the right to a fair trial means that “everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court” (Article 45 item 1 of the Constitution of the Republic of Poland)<sup>1</sup>. The cited provision is not limited only to the ascertainment that “(...) everyone shall have the right to a fair and public hearing, without undue delay, before (...) court”, but also defines other attributes of the organ authorised to adjudicate. The organ should be “competent”, “impartial” and “independent”<sup>2</sup>. This means competence to examine the case with regard to both the subject matter and the territory. In the light of the constitutional right to a fair trial, it is assumed in the doctrine that “the hearing before a competent court is a guarantee of the rule of law in the administration of justice and the feeling of trust to individual independent courts and their ability to adjudicate objectively”<sup>3</sup>.

It should be emphasised that the Constitution of the Republic of Poland does not enact rules concerning the determination of the competence of a court to adjudicate in a case. In accordance with Article 176 item 2 of the Constitution “the organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute”. The provision unambiguously states that the criteria for determination of the courts competence with regard to the subject

<sup>1</sup> The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483 with amendments that followed).

<sup>2</sup> D. Szumiło-Kulczycka, *Prawo do sądu właściwego w polskim procesie karnym i gwarancje jego realizacji* [Right to a competent court in the Polish criminal proceeding and its guarantees], [in:] *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltośia* [Criminal proceeding rules vs. contemporary challenges – Professor Stanisław Waltoś commemorative book], (ed.) J. Czapska, A. Gaberle, A. Światłowski, A. Zoll, Warszawa 2000, p. 247.

<sup>3</sup> W. Grzeszczyk, *Właściwość miejscowa sądu z delegacji ze względu na dobro wymiaru sprawiedliwości (art. 37 k.p.k.)* [Territorial court jurisdiction with regard to the good of the administration of justice (Article 37 of the Criminal Procedure Code)], *Prokuratura i Prawo* 2000, No. 9, p. 121.

matter and territorial jurisdiction can be regulated only by an Act and not an implementing regulation supplementing an Act, i.e. a legal act that is of lesser importance than an Act of Parliament. This does not mean, however, that an Act can arbitrarily specify the competence of a court and leave e.g. the issues to be decided by another organ of the State, e.g. a court<sup>4</sup>. Thus, the competence of common courts in criminal cases is regulated in the provisions of Part II of Chapter 1 titled *Jurisdiction and composition of a court* (Article 24–39) and Article 7, 11 and 11a of the Act of 6 June 1997 on the Regulations implementing Criminal Procedure Code<sup>5</sup>. In the quoted provisions, the legislator precisely defines the competence of a court, especially with regard to the subject matter and the function determined by the specialist type of supervision and the territory<sup>6</sup>. The legislator specified the competence with regard to the subject matter first of all in accordance with the character of undertaken procedures by authorising a juridical organ of an adequate status to perform them, i.e. deal with a certain case in the first instance within legal liability for an act<sup>7</sup>. Broadly understood economic criteria are also taken into consideration, including the proceeding costs for the persons summonsed to appear in court from remote places<sup>8</sup>. Territorial competence (jurisdiction) means a court is authorised to proceed because of the place where an event took place and gave grounds to carry out these activities<sup>9</sup>. The provisions of the Criminal Procedure Code allow for some specific exceptions resulting in various juridical situations – *forum extraordinatum*. They create circumstances where a case can be transferred to another court of the same level as the one that has jurisdiction to adjudicate. In such a case, there is, by virtue of the special provision, a change of the general regulation of the criteria that result in special competence. The present Criminal Procedure Code (CPC) allows for such regulations in the event when, first of all, most people who must be summonsed live far away from the competent court and close to the court where the case is to be transferred to. In such a situation, the competent court can ask the court of a higher level to transfer the case to another court of the same level (argument from Article 36 of the CPC). Secondly, the good of the administration of justice can justify the transfer of a case to another court of the same level by the Supreme Court (argument from Article 37 of the CPC).

<sup>4</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.) – (kilka uwag)* [Competence from transfer (Article 36 of the CPC) – a few comments] [in:] *Rzetelny proces karny. Księga Jubileuszowa Profesor Zofii Świdy* [Fair criminal trial – Professor Zofia Świda jubilee book], (ed.) J. Skorupka, Warszawa 2009, pp. 332–333.

<sup>5</sup> Act of 6 June 1997 – Regulation implementing the Criminal Procedure Code (Journal of Laws of 1997, No. 89 item 556 with amendments that followed).

<sup>6</sup> M. Cieślak, *Polska procedura karna. Podstawowe założenia teoretyczne* [Polish Criminal Procedure – Basic Theoretical Assumptions], 3<sup>rd</sup> edition, revised and supplemented, Warszawa 1984, p. 238.

<sup>7</sup> *Ibid.*, p. 239.

<sup>8</sup> S. Waltoś, *Proces karny. Zarys systemu* [Criminal Trial – System outline], Warszawa 2009, pp. 161–162.

<sup>9</sup> *Ibid.*, p. 160.

Thirdly, the exclusion of all the judges of a court from adjudication of the case justifies its transfer by the court of a higher level to another court of the same level (argument from Article 43 of the CPC). Fourthly, the limitation of prosecution specified in Article 101 of the CPC makes the appellate court decide to transfer the case for examination to another court of the same level (argument from Article 11a of the Regulations implementing the CPC).

Remaining outside the subject matter scope of the considerations of the situations discussed in Article 37 of the CPC, Article 43 of the CPC and Article 11a of the regulations implementing the CPC, it is necessary to state that further reasoning will concern the change of the territorial competence of a court specified in Article 36 of the CPC. In accordance with that provision: “a court of a higher level than the competent court can transfer a case to another court of the same level if most people who must be summonsed to appear in court live close to that court and far away from the competent court”.

A question is raised about *ratio legis* of Article 36 of the CPC. Considering this issue, it is necessary to notice that in the doctrine<sup>10</sup>, there is an agreement that the provision of Article 36 of the CPC is dictated by the economics of a trial aiming to save time and cut the proceeding costs and, as a result, can influence the maintenance of “a reasonable time limit” for the case resolution<sup>11</sup>, and concern about the speed of proceeding and trial economics should be of great importance<sup>12</sup>. It is also raised that Article 36 of the CPC is a response to the call for an economical trial<sup>13</sup>, which essentially constitutes reference to the principle of trial economics<sup>14</sup>. The judiciary also presents a unanimous standpoint that the competence from delegation specified in Article 36 of the CPC, constituting an exception to the general rules of territorial competence should be applied when it is justified by trial economics and there is a need to reduce social cost of the administration of justice and application of trial economics<sup>15</sup>. Thus, assessing the use of trial eco-

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<sup>10</sup> K. Marszał, *Proces karny. Zagadnienie ogólne* [Criminal trial – general issues], 2<sup>nd</sup> edition, revised, Katowice 2013, p. 202; S. Stachowiak, *Rodzaje właściwości sądu w ujęciu nowego Kodeksu postępowania karnego* [Types of court competence in the light of the new Criminal Procedure Code], Prokuratura i Prawo 1999, vol. 10, p. 21; F. Prusak, *Komentarz do Kodeksu postępowania karnego* [Commentaries on the Criminal Procedure Code], Volume I, Warszawa 1999, p. 179; P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego, Tom I, Komentarz do artykułów 1–296* [Criminal Procedure Code – Volume I – Commentaries on Articles 1 – 296], (ed.) P. Hofmański, Warszawa 2011, p. 304.

<sup>11</sup> Z. Świda, *Właściwość sądu i prawo strony do rozstrzygnięcia sprawy w „rozsądnym terminie”* [Court competence and a party’s right to case adjudication in “reasonable time limits”], Państwo i Prawo 2005, vol. 10, p. 43.

<sup>12</sup> T. Grzegorzczak, *Kodeks postępowania karnego wraz z komentarzem do ustawy o świadku koronnym* [Criminal Procedure Code with commentaries on the Act on the State’s evidence], Warszawa 2008, p. 169.

<sup>13</sup> S. Waltoś, *Proces karny (...)* [Criminal trial (...)], p. 161.

<sup>14</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)* [Competence and delegating the case (Article 36 of the CPC)], p. 335.

<sup>15</sup> Decision of the Supreme Court of 20 September 1976, III Ko 23/75, OSNKW 1975, vol. 12, item 165; also see: decision of the Supreme Court of 11 November 1972, III Ko 63/72, RPEIS 1973, No. 2, item 458.

nomics that can support the aim of transferring a case for examination to another court of the same level based on Article 36 of the CPC, it is not important whether the people who must be summonsed to appear in court live in the territory of the court's jurisdiction but how far away from the competent courts they live and if there are really substantial differences in the level of difficulties in getting to those courts, also because of public transportation available<sup>16</sup>.

This opinion was accepted in literature<sup>17</sup>, where it was rightly raised that the Supreme Court accurately emphasised the importance of the adjudication of a case by the court having territorial competence. The Supreme Court expressed this opinion in its decision of 24 September 1982, I Ko 69/82<sup>18</sup>, stating that the “provisions of Article 26 of the CPC and Article 27 of the CPC – at present Article 36 of the CPC and Article 37 of the CPC [comment by Z.K.] – cannot be subject to broader interpretation because the principle of the rule of law requires that a perpetrator should stand trial before the court having competence over the territory where the crime was committed”. Thus, the decision to transfer a case for examination to another court than the territorially competent one should be made very carefully<sup>19</sup>. The Supreme Court also expressed that standpoint in its decision of 20 March 1972, Cs 26/72<sup>20</sup>, stating that “not in every case, the decisive criterion for transferring a case for examination to another court shall be the consideration of costs cutting and difficulties that summonsed witnesses and the accused must cope with, especially if their number is not big and the distance from the place of their residence to the court is not considerable. In such a situation, what should be taken into consideration first of all is the speed of proceeding and the examination of the case without undue delay (...)”.

Here, another question arises. What are the prerequisites of admissibility of the use of Article 36 of the CPC? Analysing the provision of Article 36 of the CPC, it is necessary to conclude that the transfer of a case for examination to another court of the same level based on this provision can take place only where “most people who must be summonsed to appear in court live close to this court and far away from the competent court” (*verbal egis*). The cited regulation constitutes two prerequisites of the transfer of a case to another court of the same level that must occur together. The first one is connected with the majority of people summonsed to appear in court. The second one concerns the distance between these people's place of residence and the location of the court territorially competent and the court competent by delegation. This means that “The possibility of changing the

<sup>16</sup> Decision of the Supreme Court of 30 May 1981, IV Ko 43/81, OSNKW 1981, vol. 9, item 51.

<sup>17</sup> M. Cieślak, Z. Doda, *Kierunki orzecznictwa Sądu Najwyższego w zakresie postępowania karnego (lata 1980–1983)* [Directions in the Supreme Court rulings with respect to criminal proceeding (1980–1983)], Palestra 1984, vol. 10, p. 26.

<sup>18</sup> OSNPG 1983, vol. 2, item 18, p. 8.

<sup>19</sup> A. Zachuta, *Właściwość sądu z delegacji w sprawach karnych (art. 36 k.p.k.)* [Court competence from delegation in criminal trials (Article 36 of the CPC)], *Prokuratura i Prawo* 2004, vol. 2, p. 152.

<sup>20</sup> OSNKW 1972, vol. 11, item 131.

court's jurisdiction based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – cannot be decided only because of the circumstance that most of the people summonsed to appear in court live close to another court. The provision can be applied only where the majority of them live far away from the competent court based on Article 21 § 1 of the CPC – at present Article 31 § 1 of the CPC [Z.K.]<sup>21</sup>. Thus, the Appellate Court in Cracow was right to state that “in order to transfer a case based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – it does not matter which court is closer to where the people involved live. The change of the territorial competence of a court is admissible where “most of the people involved live far away from the competent court and close to (and not only ‘closer’ to) the designated court<sup>22</sup>”. Where an adjudicating court, based on Article 36 of the CPC, examines the motion to change jurisdiction, it cannot limit itself only to a mechanical use of mathematical calculation, but must take into account real capabilities of the court designated to examine the case<sup>23</sup>. This is so because all the changes in the court competence based on Article 36 of the CPC are extraordinary in character as they are exceptions to the constitutional principle of case examination by a court whose competence is derived from the provisions of an Act. “The transfer of a case away from the court that is in fact territorially competent does not depend on asymmetric domination of the residents of particular court districts but on the difficulty they may face in connection with the necessity to appear in court, i.e. on transportation services, age, state of health etc. In order to change general rules of a court competence, there must be a major dominance of purposefulness of examining a case by another court that the actually competent one<sup>24</sup>”. The opinion of the Appellate Court in Cracow that “not only the place of residence of witnesses (e.g. their administrative subjection to a voivodeship) is important for the transfer of a case for examination to another court than the usually competent one but real difference in the distance between these places and the courts involved and transportation conditions between them<sup>25</sup>” was right. “Thus, assessing the application of trial economics that can be an argument for the transfer of a case to another court based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.], it is not important if the persons that must be summonsed to appear in court live on the territory of the courts' jurisdiction but how far away from the courts they live and if there are real differences between the difficulties they must face in order to get to the courts

<sup>21</sup> Decision of the Appellate Court in Łódź of 1 March 1994, II AKo 14/94, KZS 1994, vol. 5, item 36.

<sup>22</sup> Decision of the Appellate Court in Cracow of 25 March 1998, II AKo 20/98, KZS 1998, vol. 3, item 43.

<sup>23</sup> Decision of the Supreme Court of 20 February 2008, III Ko 5/08, OSNwSK 2008, No. 1, item 396.

<sup>24</sup> Decision of the Appellate Court in Cracow of 25 October 2001, II AKo 141/2001, KZS 2001, vol. 11, item 30; also see: decision of the Appellate Court in Cracow of 16 February 2000, II AKo 6/2000, KZS 2000, vol. 3, item 34.

<sup>25</sup> Decision of the Appellate Court in Cracow of 9 June 2010, II AKo 113/2010, KZS 2010, vol. 5, item 35.

because of poor transportation conditions<sup>26</sup>". This point of view finds grounds in historical interpretation. The Criminal Procedure Code of 1928<sup>27</sup> admitted a possibility of transferring a case because of trial economics and clearly assumed that "If the majority of witnesses that must be summonsed to appear in a court of trial do not live in this court district and their place of residence is far away from that court, it can be transferred to the district where the majority of witnesses live" (Article 37). Although the cited provision *expressis verbis* stated that it concerned witnesses' place of residence, it was assumed in the doctrine<sup>28</sup> that "the change of jurisdiction by delegation to another court of the same level shall take place only in order to save time of the parties, witnesses and the State Treasury".

Another question arises whether the provision of Article 36 of the CPC can be applied where the case is on trial or also where the court is proceeding at a sitting. The judicature does not have the same standpoint on that issue. There is an opinion that "while the possibility of transferring a case to another court of the same level based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – depends on the determination that the majority of persons that must be summonsed to 'trial' live close to this court and far away from the competent court, it is necessary to assume that it is not admissible in proceedings that the Act does not specify to be adjudicated on trial (Article 87 of the CPC)<sup>29</sup> (...)" because Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – refers to summonses on persons to participate in trial. Thus, it should be applied only where it would improve the court proceeding. Thus, it is rightly assumed in the doctrine<sup>30</sup> that "the broadened interpretation of the provision of Article 36 of the CPC by recognizing the admissibility of a case transfer in order to facilitate the participation of parties and other persons at the sitting should not be approved due to its extraordinary character". The standpoint expressed by Z. Świda<sup>31</sup> that "competence by delegation based on Article 36 of the CPC is applicable when the case is adjudicated on trial and it is not admissible in the event of adjudicating in the case at a sitting (Article 341 or Article 343 of the CPC) and many people participate" should be approved. Thus, the opinion of the Appellate Court in Łódź that "the provision of Article 36 of the CPC can be applied also to sittings<sup>32</sup>" is a single one.

<sup>26</sup> Decision of the Supreme Court of 30 May 1981, IV Ko 43/81, OSNKW 1981, vol. 9, item 51.

<sup>27</sup> Regulation of the President of the Republic of Poland of 19 March 1928 on the Criminal Procedure Code (Journal of Laws of the Republic of Poland of 1928, No.33, item 313).

<sup>28</sup> L. Peiper, *Komentarz do Kodeksu postępowania karnego i do przepisów wprowadzających tenże Kodeks* [Commentary on the Criminal Procedure Code and its implementing regulations], Kraków 1932, p. 51.

<sup>29</sup> Decision of the Supreme Court of 14 February 1996, WO 19/96, OSNKW 1996, vol. 5–6, item 29.

<sup>30</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...* [Criminal Proceeding Code...], p. 304; T. Grzegorzczak, *Kodeks postępowania karnego...* [Criminal Proceeding Code...], p. 169, thesis 4.

<sup>31</sup> Z. Świda, *Właściwość sądu (...)* [Court competence (...)], p. 43.

<sup>32</sup> Decision of the Appellate Court in Łódź of 29 December 1998, II AKo 279/98, KZS 1999, vol. 6–7, item 79.



It is worth mentioning that the provision of Article 36 of the CPC does not differentiate whether it can be applied to the main hearing or the appellate hearing. *Lege non distinguente*, it is assumed in the doctrine<sup>33</sup> that the provision of Article 36 of the CPC applies to both the main hearing and the appellate one. A similar standpoint was expressed by the Supreme Court stating that “the transfer of a case for examination to another court of the same level cannot be obstructed by a circumstance that the case is examined by an appellate court because the provision of Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – is applicable to the proceeding before the court of the first instance as well as to the appellate proceeding<sup>34</sup>”. The opinion was approved in literature<sup>35</sup>. Approving of the above-mentioned standpoint of the Supreme Court, W. Daszkiewicz raised that “the application of the rule specified in Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – should be even more careful as the appellate proceeding is freed of the task of examining the evidence”. The Appellate Court in Cracow, in its decision of 2 September 2009, II AKo 99/09<sup>36</sup>, stated “the provision of Article 36 of the CPC on the possibility of transferring a case to another court is not applicable to the appellate proceeding because in that stage nobody is summonsed to appear in court”. It seems that the cited standpoint is not groundless. The appellate proceeding is a separate stage of the juridical proceeding<sup>37</sup> in which the adequate regulations typical of the proceeding before the court of the first instance are used unless the provisions regulating the appellate proceeding state otherwise (argument from Article 458 of the PC). The provision of Article 450 of the CPC regulating the participation of the parties in the appellate proceeding in § 1 stipulates that the participation of a public prosecutor and a counsel in circumstances defined in Article 79 and 80 is compulsory. However, the participation of other parties and their plenipotentiaries and the counsel in circumstances that are not listed in § 1 is obligatory only where the President of the court or the court decides it is indispensable (argument from Article 459 § 2 of the CPC). In the light of the cited provision, the participation of the counsel in circumstances not listed in § 1 and other parties to the proceeding and their plenipotentiaries

<sup>33</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 304; T. Grzegorzczak, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 169.

<sup>34</sup> See: decision of the Supreme Court of 31 January 1976, II Ko 2/76, OSNKW 1976, vol. 3 item 46.

<sup>35</sup> M. Cieślak, Z. Doda, *Przegląd orzecznictwa Sądu Najwyższego w zakresie postępowania karnego. I półrocze 1976 r.* [Review of the Supreme Court rulings with respect to criminal proceeding – First half of 1976], *Państwo i Prawo* 1976, No. 12, p. 48; W. Daszkiewicz, *Przegląd orzecznictwa Sądu Najwyższego (prawo karne procesowe – I półrocze 1976 r.)* [Review of the Supreme Court rulings (criminal procedure law – first half of 1976)], *Państwo i Prawo* 1977, vol. 3, p. 117; A. Kafarski, *Przegląd orzecznictwa Sądu Najwyższego z zakresu postępowania karnego (za rok 1976)* [Review of the Supreme Court rulings with respect to criminal proceeding (first half of 1976)], *Nowe Prawo* 1978, No. 2, p. 274.

<sup>36</sup> KZS 2009, vol. 11, item 46.

<sup>37</sup> M. Cieślak, *Dziela wybrane. Tom II. Polska procedura karna. Podstawowe założenia teoretyczne* [Selected works, Volume II, Polish Criminal Procedure – Basic Theoretical Assumptions], Kraków 2011, p. 50; K. Marszał, R. Koper, R. Netczuk, K. Sychta, J. Zagrodnik, K. Zgryzek, *Proces karny. Przebieg postępowania* [Criminal trial – The course of proceeding], (ed.) K. Marszala, Katowice 2012, p. 261.

is, in general, not obligatory, thus they are not summonsed to appear in appellate court, but they have the right to participate in the appellate proceeding and so they must be notified about it.

Regardless of the above-mentioned issues, it must be noticed that, in accordance with the state *de lege lata*, an appellate court cannot conduct a proceeding to examine the evidence of the case subject matter (argument from Article 452 § 1 of the CPC), i.e. a procedure in which essential evidence is examined in order to adjudicate in the case. This means that, in general, witnesses and experts are not summonsed to the appellate hearing. This results in a conclusion that, in practice, these can be very rare situations in which the provision of Article 36 of the CPC will not be applicable to the appellate proceeding. However, if the appellate court, in extraordinary circumstances, based on Article 452 § 2 of the CPC, decides that there is a necessity to conduct examination of the evidence provided by witnesses, the necessity to use Article 36 of the CPC may become topical.

Another issue that requires consideration is the question: What is the mode of transferring a case to another court of the same level due to trial economics? The provision of Article 36 of the CPC does not regulate this subject matter, as it does not define the organ that can file a motion to transfer a case to another court with respect to the above-mentioned reasons. It is obvious that the competent court is the court that has the best knowledge of the prerequisites justifying the transfer of a case. Thus, it is right to assume in the doctrine<sup>38</sup> and the judiciary<sup>39</sup> that it should be the initiative of the court whose competence was already determined based on Article 31 and Article 32 of the CPC, and the court of a higher level, based on general regulations, issues a decision on the matter. The court that is competent to examine a given case, presenting it to a court of a higher level with a motion to transfer it to another court of the same level should list all the persons who constitute the majority necessary to apply Article 36 of the CPC and point out the reasons why the transfer of the case is purposeful. The court of a higher level has the right and a duty to verify the motion *meriti* and can refuse to agree if it decides that there are no substantial and legal grounds to do so based on all the circumstances revealed during the proceeding.

The transfer of the case based on Article 36 of the CPC can take place not only on the request of the competent court but also can be preceded by motions filed by the parties to the proceeding<sup>40</sup>.

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<sup>38</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 306; K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.) (...)* [Competence and transfer of a case (Article 36 of the CPC) (...)], p. 339; T. Grzegorzczak, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 169.

<sup>39</sup> Decision of the Appellate Court in Łódź of 9 February 1999 II AKo 20/99, KZS 1999, vol. 6–7, item 80.

<sup>40</sup> J. Bratoszewski [in: J. Bratoszewski, L. Gardocki, Z. Gostyński, S. M. Przyjemski, R.A. Stefański, S. Zabłocki, *Kodeks postępowania karnego, Komentarz, Tom 1* [Criminal Procedure Code – Commentary, Volume I], Warszawa 2003, p. 390.



Filing a motion by the court *meriti* based on Article 36 of the CPC to transfer a case to another court of the same level should take place after the competent court gets acquainted with the motions as to evidence filed by the parties and the subject to the proceeding as specified in Article 416 of the CPC (Article 352 of the CPC)<sup>41</sup>. Then, it can happen that the majority of people who should be summonsed to appear in court live close to the competent court and there are no grounds for the application of Article 36 of the CPC. The court *meriti* filing a motion to transfer a case based on Article 36 of the CPC should issue a decision on that matter<sup>42</sup>. In the judiciary<sup>43</sup>, there is an opinion that “in order to present a case requiring consideration based on Article 26 of the CPC – at present Article 36 of the CPC [Z.K.] – to a court of a higher level, there is no need to issue a decision. It is sufficient to sent the case files based on the order made by a judge (head of the department) with a letter listing the prerequisites of adjudication by a court of a higher level”. This standpoint, however, must be treated as a single one.

It is worth mentioning that the court taking the initiative to transfer a case to another court of the same level based on Article 36 of the CPC as well as the court taking the decision on that matter, take the decision at a sitting in which the parties to the proceeding can participate if they appear in court (argument from Article 96 § 2 of the CPC). It is so because the court decides on the matter that, from the juridical point of view, is very important for them. It will depend on that decision whether a case will be examined by the court *meriti* whose territorial competence has been determined based on the provisions of Article 31 and Article 32 of the CPC or another court of the same level. It is also important because of the possibility of participating in the higher level court proceeding on the matter concerning the transfer of a case<sup>44</sup>.

The decision on the matter of transferring a case to another court of the same level is made by a court of a higher level than the court competent to examine a case (argument from Article 36 of the CPC). Thus, a question arises whether “the court of a higher level”, in accordance with Article 36 of the CPC, is a district court acting as a court of the first instance or a district court acting as a court of the second instance. The Criminal Procedure Code does not regulate the issue. In the literature on criminal proceeding, the opinions are varied. K. Zgryzek<sup>45</sup> is right to notice that “if a regional court as a court *meriti* competent to examine a case files a motion based on Article 36 of the CPC, the

<sup>41</sup> T. Grzegorzczak, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 169.

<sup>42</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego (...)* [Criminal Procedure Code (...)], p. 306.

<sup>43</sup> Decision of the Appellate Court in Cracow of 16 December 1992, II AKo 32/92, KZS 1992, vol. 12, item 7.

<sup>44</sup> A. Zachuta, *Właściwość sądu z delegacji (...)* [Court competence by delegation (...)], pp. 154–155.

<sup>45</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)...* [Competence by case transfer (Article 36 of the CPC)...], p. 342.

decision to transfer the case for examination to another court of the same level will be made by a district court but not as a court of appeal because the proceeding in the case is not the proceeding of the second instance but as a court of a higher level in the court organisational system and not the instance system". One can meet a standpoint that "if the initiative to transfer the case is taken in the proceeding before the court of the first instance, the district court acts as a court of appeal, not a court of the first instance, because its role is to verify the arguments presented by the court that has the territorial competence<sup>46</sup>". It is an erroneous opinion. Analysing the provision of Article 36 of the CPC, it is necessary to notice that the legislator uses the wording "a court of a higher level" and "a court of the same level", and not the term "a court of a higher instance". This means that the term "a court of a higher level", used in Article 36 of the CPC refers to the hierarchical system of particular organs of the administration of justice (courts) determined in the provisions of the Act of 27 July 2001 – Law on the System of Common Courts, not to the "court of the second instance". Although the provisions of the Act on the Law on the System of Common Courts (hereinafter referred to as Act on Common Courts or ACC) do not use the terms "a court of a lower level" or "a court of a higher level", taking into account the method of establishing common courts, it should be assumed that as district courts are established for the territorial jurisdiction of at least two regional courts (Article 10 § 2 of the ACC) and appellate courts are established for the territorial jurisdiction of at least two district courts (Article 10 § 3 of the ACC), a district court will always be a "court of higher level" for a regional court and an appellate court for a district court. The above-mentioned terminology unambiguously determines that the decision on the issue of transferring a case based on Article 36 of the CPC is not issued in the course of the instance but constitutes an internal matter of common courts organisation.

It must be emphasised that "the proceeding initiated by a motion filed in connection with Article 36 of the CPC does not constitute a proceeding aimed at examining the remedy at law; and only then a court of a higher level (from the organisational point of view) would also be a court of higher instance<sup>47</sup>". The regional court's motion filed to a district court in order to transfer a case to another court of the same level based on Article 36 of the CPC is not an appellate measure, and the district court's decision is not similar in character to a ruling issued in an appellate proceeding<sup>48</sup>. (...) Decisions made in connection with Article 36 of the CPC are made by agreement of two level courts, the court initiating the decision and the court of a higher level. The parties may

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<sup>46</sup> M. Błoński, *Przekazanie sprawy innemu sądowi równorzędnemu* [Transferring a case to another court of the same level], System Informacji Prawnej LEX No. 176149, thesis 1.4.

<sup>47</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)...* [Competence by case transfer (Article 36 of the CPC)...], p. 342.

<sup>48</sup> Decision of the Supreme Court of 22 August 1974, VI KZP 21/74, OSNKW 1974, vol. 10, item 192.

present their opinions and motions with regard to the future decision or even initiate them. Although it is not adjudicating in the appellate mode, two courts of two levels decide, which prevents precipitous and arbitrary decisions (...) <sup>49</sup>. The standpoint was accepted in the doctrine <sup>50</sup>.

Thus, the analysis done so far determines not only that “a court of a higher level”, in accordance with article 36 of the CPC, is a district court adjudicating as a court of the first instance but also what the composition of this court should be in order to issue a decision on transferring a case to another court of the same level. In the literature on criminal trials <sup>51</sup>, it is highlighted that “the rules of the so-called functional competence of a court will be applied to a decision on this matter”. Thus, K. Zgryzek <sup>52</sup> rightly states “there is no ground for a thesis that a district court as a court of a higher level as specified in Article 36 of the CPC is a court acting as a court of the second instance so the decision on transferring a case to another court should be made by a bench of the appellate department <sup>53</sup>”, i.e. in the composition defined in article 30 § 2 of the CPC.

All the considerations lead to a conclusion that a court of a higher level than a regional court, in accordance with Article 36 of the CPC, is a district court acting as a court of the first instance. Thus, transferring a case to another court of the same level based on Article 36 of the CPC, it should make a decision during a sitting as specified in Article 30 § 1 of the CPC, i.e. as a one-man bench. This does not apply to an appellate court as a court of a higher level than a district court because an appellate court must always decide as a bench defined in Article 30 § 1 *in fine* of the CPC, regardless of the fact if it is to examine measures of appeal against rulings and directives issued by a district court as a court of the first instance or in cases delegated to it by the provisions of the Act <sup>54</sup>.

In the doctrine <sup>55</sup>, it is rightly highlighted that a court of a higher level can transfer a case based on Article 36 of the CPC to a court located in the same district as well as to a court in another district. This point of view is explained by the fact that a case should be transferred to a court that is close to the place of residence of the majority of people who must be summonsed to appear in court and not a court that is in the district of the court of a higher instance. In

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<sup>49</sup> Decision of the Appellate Court in Cracow of 9 February 2005, II AKz 9/05, Prokuratura i Prawo – supplement: Orzecznictwo 2005, vol. 11, poz. 26, p. 16.

<sup>50</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 306 and the opinions presented there.

<sup>51</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)...* [Competence by transferring a case (Article 36 of the CPC)...], p. 342.

<sup>52</sup> *Ibid.*

<sup>53</sup> Erroneously M. Błoński, *Przekazanie sprawy innemu sądowi równorzędnemu...* [Transferring a case to another court of the same level...], thesis 1.4.

<sup>54</sup> K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)...* [Competence by transferring a case (Article 36 of the CPC)...], p. 342.

<sup>55</sup> J. Bratoszewski [in:] J. Bratoszewski, L. Gardocki, Z. Gostyński, S. M. Przyjemski, R. A. Stefański, S. Zabłocki, *Kodeks postępowania karnego...* [Criminal Procedure Code...], p. 390.

the Polish language, the word “majority” means more than a half<sup>56</sup>. Thus, using the word “majority” to the number of people who are subject to summons, in accordance with Article 36 of the CPC, it should be assumed that it means at least one person more.

The decision made by the court of a higher level based on Article 36 of the CPC cannot be appealed against<sup>57</sup>. Although, in accordance with the wording of Article 35 § 3 of the CPC, there is a right to appeal against the decision on competence, and the decision based on Article 36 of the CPC is undoubtedly such a decision, *argumentum a rubrica* is for the assumption that the provision of Article 36 of the CPC is only functionally connected with the decision of the competent court, which examines its competence *ex officio*<sup>58</sup>.

In Article 36 of the CPC, the legislator entrusted a court of a higher level with a task of adjudicating on the issue of special competence that changes the general rules of examining a case by a territorially competent court. The right to file a complaint about competence provided for in Article 35 § 3 of the CPC is applicable in the event of the ruling issued by the adjudicating court. Taking into account the fact that a court of a higher level made a decision on competence, it is rightly assumed in the doctrine<sup>59</sup> that it is not justifiable to verify its ruling with regard to competence in the course of an appellate proceeding.

The decision made by a court of a higher level with respect to transferring a case for examination to another court of the same level based on Article 36 of the CPC is binding for the delegated court, designated to conduct the juridical proceeding<sup>60</sup>. This means that this court is not authorised to determine its non-competence based on Article 35 of the CPC. The decision based on Article 36 of the CPC does not constitute an inviolable legal state with respect to territorial jurisdiction<sup>61</sup>. Thus, if there are circumstances that are more important than trial economics, expressed in Article 36 of the CPC, that require – due to the good of the administration of justice – that a case is transferred to a court competent in accordance with the Act, there are no obstacles to refer a case for examination to the court that is originally competent<sup>62</sup>. In accordance with what

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<sup>56</sup> E. Sobol (ed.), *Nowy Słownik Języka Polskiego* [New Dictionary of the Polish Language], Warszawa 2003, p. 1130.

<sup>57</sup> Decision of the Supreme Court of 21 June 2007, III Ko 42/07, OSNwSK 2007, No. 1, item 1390.

<sup>58</sup> P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego* (...) [Criminal Procedure Code (...)], p. 306 and rulings and opinions of the doctrine cited there.

<sup>59</sup> Ibid; T. Grzegorzczak, *Kodeks postępowania karnego* (...) [Criminal Proceeding Code (...)], p. 170; Z. Doda, *Glosa do postanowienia SN z dnia 12 lipca 1989 r., I Kz 81/89* [Gloss on the decision of the Supreme Court of 12 July 1989, I Kz 81/89], OSP 1990, No. 9, item 336, p. 718.

<sup>60</sup> Decision of the Appellate Court in Katowice of 30 April 2001, II AKZ 330/01, Prokuratura i Prawo – supplement: Orzecznictwo 2002, vol. 3, item 21.

<sup>61</sup> Decision of the Supreme Court of 4 April 1995, III Ko 13/95, OSNKW 1995, vol. 7–8, item 49; decision of the Supreme Court of 21 September 2006, II Ko 51/06, OSNwSK 2006, vol. 1, item 1764.

<sup>62</sup> See: decision of the Supreme Court of 24 June 2010, II Ko 36/10, OSNwSK 2010, No. 1, item 127; also see: K. Zgryzek, *Właściwość z przekazania sprawy (art. 36 k.p.k.)* (...) [Competence by case transfer (Article 36 of the CPC) (...)], p. 341.

has been already said, a conclusion may be drawn that competence by transferring a case based on Article 36 of the CPC is not permanent and definitive in character but in order to change it, the occurrence of new substantive and legal circumstances is indispensable.

Summing up the above considerations, it should be noted that transferring a case by a court of a higher level to another court of the same level because of trial economics should be exceptional. It is a change of the general rule requiring a case examination by a court having territorial jurisdiction as determined in Article 31 and Article 32 of the CPC. The maintenance of the principle of the rule of law requires that a perpetrator stand trial before a court that is competent with regard to the place where the crime was committed<sup>63</sup>.

**COURT COMPETENCE IN CRIMINAL TRIALS IN THE EVENT OF TRANSFERRING A CASE TO A COURT OF THE SAME LEVEL DUE TO TRIAL ECONOMICS (ARTICLE 36 OF THE CPC)**

**Summary**

The article presents the issue of court competence in criminal cases in the event of transferring them for examination to another court of the same level due to trial economics. The matter is regulated in Article 36 of the CPC in accordance with which a court of a higher level than a competent court can refer a case to another court of the same level if the majority of people who must be summonsed to appear in court live close to that court and far away from the court competent. The provision is applicable for both the proceeding before a court of the first instance as well as an appellate proceeding, however it cannot be applied to a sitting. The transfer of a case based on article 36 of the CPC can take place on the initiative of the court competent to examine it as well as it can be preceded by adequate motions filed by the parties to the proceeding. The decision of a court of a higher level to transfer a case for examination to another court of the same level, based on Article 36 of the CPC, is binding for the delegated court. Such a transfer should be treated as exceptional because it is a change of a general rule requiring a case examination by a territorially competent court as defined in Article 31 and Article 32 of the CPC.

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<sup>63</sup> See: decision of the Supreme Court of 24 September 1982, I Ko 69/82, OSNPG 1983, No. 2, item 18.

## **WŁAŚCIWOŚĆ SĄDU W SPRAWACH KARNYCH W RAZIE ICH PRZEKAZANIA INNEMU SĄDOWI RÓWNOZRĘDNEMU ZE WZGLĘDU NA EKONOMIKĘ PROCESU (ART. 36 K.P.K.)**

### **Streszczenie**

W artykule przedstawiono problematykę właściwości sądu w sprawach karnych, w razie ich przekazania innemu sądowi równorzędnemu, ze względu na ekonomikę procesu. Zagadnienie to reguluje przepis art. 36 k.p.k., według którego sąd wyższego rzędu nad sądem właściwym może przekazać sprawę innemu sądowi równorzędnemu, jeżeli większość osób, które należy wezwać na rozprawę, zamieszkuje blisko tego sądu, a z dala od sądu właściwego. Przepis ten może być stosowany zarówno na rozprawie przed sądem pierwszej instancji, jak i na rozprawie odwoławczej, nie ma natomiast zastosowania na posiedzeniu. Przekazanie sprawy, na podstawie art. 36 k.p.k., może nastąpić z inicjatywy sądu właściwego do jej rozpoznania, a także może być poprzedzone stosownymi wnioskami stron w tym zakresie. Postanowienie sądu wyższego rzędu w przedmiocie przekazania sprawy do rozpoznania innemu sądowi równorzędnemu, wydane na podstawie art. 36 k.p.k., jest wiążące dla sądu delegowanego. Przekazanie takie powinno być wyjątkowe, gdyż stanowi ono odstępstwo od ogólnej reguły, iż sprawę powinien rozpoznać sąd miejscowo właściwy, ustalony według zasad określonych w art. 31 i art. 32 k.p.k.

## **LA PARTICULARITÉ DE LA COUR PÉNALE DANS LE CAS DE TRANSFÉRER UNE AFFAIRE À UNE COUR HOMOLOGUE POUR DES RAISONS DE L'ÉCONOMIE DU PROCÈS (ART.36 DE LA PROCÉDURE PÉNALE)**

### **Résumé**

Dans l'article on a présenté la problématique des particularités de la cour dans les affaires pénales dans le cas de les transférer à une cour homologue pour des raisons de l'économie du procès. Cette question est régularisée par le règlement de l'article 36 du code de la procédure pénale selon lequel la cour du rang supérieur que la cour propre peut transmettre une affaire à une autre cour homologue si la plupart des personnes demandées au procès habitent plus près de cette cour et loin de la cour propre. Ce règlement peut être appliqué aussi bien pendant le débat dans la cour de première instance que pendant le débat d'appel mais il n'est pas applicable pendant la session. La transmission de l'affaire basant sur l'art.36 du code de la procédure pénale peut être réalisée à l'initiative de la cour propre à la reconnaître et aussi elle peut être procédée par les demandes préalables des parties dans ce cadre. La décision de la cour du rang supérieur dans le sujet de la transmission de l'affaire à une autre cour homologue éditée à la base de l'art.36 du code de la



procédure pénale est essentielle pour la cour déléguée. Cette transmission devrait être exceptionnelle parce qu'elle constitue une exception de la règle générale qui dit que l'affaire doit être traitée par la cour propre par le lieu fixée d'après les principes définis dans l'art. 31 et l'art. 32 du code de la procédure pénale.

## **ПОДСУДНОСТЬ (ЮРИСДИКЦИЯ) СУДА В УГОЛОВНЫХ ДЕЛАХ В СЛУЧАЕ ИХ ПЕРЕДАЧИ ДРУГОМУ СУДУ, РАВНОЗНАЧНОМУ С ТОЧКИ ЗРЕНИЯ ЭКОНОМИКИ ПРОЦЕССА (СТ. 36 УПК)**

### **Резюме**

В статье представлена проблематика подсудности суда в уголовных делах, в случае их передачи другому равнозначному суду, принимая во внимание экономику процесса. Эта проблематика регулируется положением ст. 36 УПК, согласно которому вышестоящий суд по отношению к подсудному суду, может передать дело другому равнозначному суду, если большинство лиц, которых следует вызвать в суд на рассмотрение дела, проживают близко от этого суда и далеко от подведомственного суда. Это положение может быть применено как на рассмотрении дела в суде первой инстанции, так и на апелляционном рассмотрении дела, в то же время не может применяться в случае заседания суда. Передача дела, на основании 36 УПК, может произойти по инициативе суда, являющегося подсудным для его рассмотрения, а также может быть следствием соответствующих заявлений сторон по этому делу. Постановление вышестоящего суда, касающееся передачи дела для рассмотрения другому равнозначному суду, выданное на основании ст. 36 УПК, является обязательным для делегированного суда. Такая передача должна быть исключительной, поскольку является отступлением от общего правила, заключающегося в том, что дело должно рассматриваться в территориально подсудном суде, установленном согласно принципам, определённым в ст. 31 и ст. 32 УПК.