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TEMPORARY ARREST AFTER AMENDMENTS TO THE CRIMINAL PROCEDURE

1. As from 1 July 2015 Polish criminal procedure will undergo substantial changes resulting from the introduction of Acts of 27 September 2013[1] and of 20 February 2015[2] amending the Criminal Procedure Code (hereinafter referred to as the CPC). The two Acts introduce substantial changes into the existing model of temporary arrest (arrest awaiting trial), especially in determining the prerequisites, directives, bans and terms of using temporary arrest as well as in determining the procedure of using this measure and the parties' right to appeal.

The above-mentioned changes do not refer, however, to the entities using temporary arrest, thus continually, the only entity authorised to take a decision on temporary arrest is a court. In the preparatory proceeding (before trial starts), temporary arrest is ruled on the prosecutor's request by a district court where the proceeding is being carried out, or in urgent cases any other district court in the region.

The purpose of the application of temporary arrest has not been changed either. It is because of the character of the measure, which may be used only in order to meet specified statutory purposes that are safeguarding a proper course of the proceeding and prevention of the commission of another serious crime by the accused (a suspect) (Article 249 § 1 of the CPC)[3]. As far as this is concerned, the quoted provision is compatible with Article 5 § 1 letter c of the ECHR, which stipulates that temporary arrest may take place only in order to implement three purposes: (1) bringing the arrested person before the competent legal authority, (2) to prevent committing an offence and (3) to prevent fleeing after having committed an offence. The use of temporary arrest in order to meet other purposes is inadmissible.

[1] Journal of Laws 2013 item 1247 as amended.
[2] Journal of Laws 2015 item 396.
[3] See S. Waltoś, *Proces karny. Zarys systemu* [Criminal procedure – System outline], Warszawa 2008, p. 422.

Thus, temporary arrest plays a protective role as it protects the criminal proceeding against unlawful impediment to it and, at the same time, a preventive role as it prevents unlawful influence on the proper course of the proceeding, and a safeguarding role as it safeguards the legal order and the public against the commission of a new serious crime. Preventive arrest (in order to implement the safeguarding role) may be used only in extraordinary situations. The threat of the commission of a new serious crime by the accused must be real in the circumstances revealed in the case. The extraordinariness of preventive arrest is emphasised in Article 258 § 3 of the CPC.

2. Important amendments were made to determining prerequisites[4] of temporary arrest (Article 258 of the CPC) and restrictions (bans) on the use of this measure (Article 259 § 3 of the CPC), including fixed-term restrictions (Article 263 § 4b of the CPC).

High probability of the commission of a crime by the accused is still a general prerequisite of temporary arrest. Thus, we may use the measure when the collected evidence indicates high probability that the accused (a suspect in the preparatory proceeding) has committed the crime he is charged with[5]. In the adjudication of Polish courts, it is assumed that establishing 'high probability' of the commission of a crime as referred to in Article 259 § 1 of the CPC, the party conducting the proceeding must be in possession of such evidence that constitute a state close to certainty[6]. High probability that the accused has committed a crime he is charged with justifies his conviction in an invalid sentence[7].

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[4] Prerequisites are actual or legal circumstances that constitute conditions for the application or lengthening of the use of preventive measures, and grounds are statutory provisions that constitute the legal basis for the use or the lengthening of the use of preventive measures.

[5] See K. Dąbkiewicz, *Tymczasowe aresztowanie* [Temporary arrest], Warszawa 2012, p. 90; J. Skorupka, *Stosowanie i przedłużanie tymczasowego aresztowania w postępowaniu przygotowawczym* [Application and lengthening of temporary arrest in the preparatory proceeding], Prokuratura i Prawo 2006, No. 12, p. 111; *ibid.*, Gloss to the judgement of the Court of Appeal in Wroclaw of 19 October 2005, II Akz 453/05, OSP 2007, vol. 2; J. Grajewski, *Przebieg procesu karnego* [Course of criminal proceeding], Warszawa 2012, p. 113; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceeding], Warszawa 2011, p. 587; S. Waltoś, *Proces karny…* [Criminal trial…], pp. 424–425. See judgement of the ECtHR of 27 May 2003 in case 44115/98 *Wedler v. Poland*, in accordance with which the legitimacy of suspicion of a punishable act constitutes the basic condition of the protection against arbitrary arrest, which is referred to in Article 5 item 1 letter c of the ECHR. The existence of "justified suspicion" assumes that there are data that can convince an objective observer that the given person could have committed a punishable act. The standard laid down in in Article 5 item 1 letter c of the ECHR does not require, however, that at the moment of an arrest the law enforcement agencies have evidence necessary to make an indictment.

[6] See judgment of the Court of Appeal in Warszawa of 11 August 2009, II AKz 1006/09, OSA 2012, No. 1, item 2; sentence of the Administrative Court in Warszawa of 1 June 2009, II AKa 98/09, OSA 2012, No. 2, item 9). It is also assumed that the issue of the EAW exempts the detention court from verifying the evidentiary grounds for temporary arrest – see decision of the Court of Appeal in Gdansk of 29 November 2011, II AKz 794/11, KZS 2012, No. 4, item 64; decision of the Court of Appeal in Bialystok of 23 August 2012, II AKz 261/12, KZS 2012, No. 11, item 95.

[7] See judgement of the Court of Appeal in Krakow of 27 July 2005, II AKz 288/05, KZS 2005, No. 7–8, item 87.

Moreover, the real grounds for temporary arrest must result from evidence that have already been collected in the course of the proceeding. The evidence must indicate that the crime has been committed and that the person who is subject to the use of the discussed preventive measure has committed it[8]. If there is no probability of a crime commission, the preventive measure must not be applied (a negative prerequisite)[9].

A court adjudicating in the matter of temporary arrest is obliged to confront evidence with the prosecutor's legal classification with respect to the indication of high probability of the existence of subjective and objective features of the act the accused is *in concreto* charged with[10]. To tell the truth, court judgements express the opinion that in the proceeding with respect to temporary arrest, the grounds for legal classification should not be assessed as this is subject to an adjudicating court's decision after an indictment is filed[11]. However, one is right to express a different opinion that adjudicating at the stage of the preparatory proceeding whether to apply or lengthen the use of temporary arrest, the court is obliged to assess the grounds for the prosecutor's legal classification of the act the accused is charged with. This assessment should be made in accordance with the statutory prerequisites of temporary arrest[12].

The provision of Article 249a of the CPC added by the amendment of 27 September 2013 formulates new evidence-related grounds for temporary arrest. Under the quoted provision, only findings based on evidence revealed to the accused and his barrister should constitute grounds for the application or lengthening of temporary arrest. Routinely, the court also takes into account circumstances that the prosecutor did not reveal earlier after they have been revealed at the court sitting if they are favourable for the accused. The quoted provision is strictly related to the solution laid down in Article 156 § 5a of the CPC, which envisages a requirement of providing the accused and his barrister

[8] Compare decision of the Supreme Court of 15 April 1983, II KZ 31/83, OSNKW 1983, No. 10–11, item 90; decision of the Court of Appeal in Krakow of 23 November 1993, II AKz 327/93, KZS 1993, No. 11, item 23.

[9] Compare decision of the Court of Appeal in Krakow of 10 May 2000, II AKz 97/00, KZS 2000, No. 5, item 43; sentence of the Court of Appeal in Lodz of 25 March 2014, II AKa 6/14, Legalis.

[10] Compare M. Pacyna, *Duże prawdopodobieństwo popełnienia przestępstwa jako przesłanka stosowania środków zapobiegawczych* [High probability of a crime commission as a prerequisite of the application of preventive measures], CzPKiNP 2008, no. 2, p. 133; decision of the Court of Appeal in Krakow of 28 April 2008, II AKz 210/08, KZS 2008, No. 6, item 45.

[11] See decision of the Supreme Court of 1 December 2003, WZ 62/03, OSNwSK 2003, No. 1, item 2597; decision of the Court of Appeal in Katowice of 8 June 2005, II AKz 337/05, KZS 2005, No. 12, item 62; decision of the Court of Appeal in Krakow of 17 December 2008 r., II AKz 632/08, unpublished; decision of the Court of Appeal in Katowice of 5 September 2008, II AKz 661/08, KZS 2009, No. 7–8, item 93; decision of the Court of Appeal in Katowice of 18 February 2009, II AKz 110/09, KZS 2009, No. 3, item 61; decision of the in Katowice Court of Appeal of 10 February 2010, II AKz 76/10, KZS 2010, No. 9, item 67; decision of the Court of Appeal in Krakow of 29 august 2013, II AKz 338/13, KZS 2013, No. 9, item 85.

[12] See resolution of the Supreme Court (7) of 27 January 2011, I KZP 23/10, OSNKW 2011, No. 1, item 1.

with the case files containing the evidence being grounds for the temporary arrest motion. However, the possibility of fulfilling real (effective) defence in the proceeding connected with temporary arrest depends on, inter alia, the possession of information about evidence indicating the commission of a crime the accused is charged with and the circumstances indicating the threat of unlawful obstruction of the proceeding by the accused. The scope of the information limits the defence of the accused at the temporary arrest proceeding stage. Thus, access to the preparatory proceeding files is of crucial importance for the accused and his barrister. That is why the amended Article 156 § 5a of the CPC introduces a solution that in case of filing a motion to apply or lengthen temporary arrest in the course of preparatory proceeding, the accused and his barrister is, without delay, provided with the case files relating to the evidence included in the motion. The prosecutor may provide the files in an electronic form[13].

Since commencing on 1 July 2015, only findings based on evidence revealed to the accused and his barrister may be grounds for the decision to apply or lengthen temporary arrest, the court will not be able to use evidence that has not been revealed to the accused and his barrister as real grounds for temporary arrest, which is possible at present. The evidence that has not been revealed to the defence will not constitute grounds for determining general and specific prerequisites of temporary arrest. However, Article 249a sentence 2 of the CPC obliges the court to routinely take into account also such circumstances that have not been revealed to the other party but are favourable to the accused. In such case, the court will be obliged to reveal them at the sitting, which will enable the accused to defend adequately and the prosecutor to refer to the circumstances. Thus, the quoted regulation obliges the court to carefully analyse not only the prosecutor's motion but also the case files provided together with that motion. The barrister may draw the court's attention to the evidence in the files that has been omitted by the prosecutor but is favourable for the accused.

3. Other conditions for the application of temporary arrest are defined by the prerequisites laid down in Article 258 § 1–3 of the CPC. According to them, temporary arrest may be applied under the condition that: (1) there is a justified concern that the accused could flee or hide, especially when his identity cannot be established or he does not have permanent residence; (2) there is a justified concern that the accused will induce witnesses to give false evidence or explanations or in any other way hinder the criminal proceeding.

In general, the quoted prerequisites have not been amended in comparison with the legal state before 1 July 2015. Thus the criminal procedure law doctrine

[13] See Article 6 point 1 letter b of Act of 20 February 2015 amending Act – Law on the system of common courts and some other acts.

representatives' and Polish courts' statements regarding their interpretation[14], including the one that as from 1 July 2015 it will be necessary to take into account that the accused will no longer be obliged to participate in the court trial. Under Article 374 § 1 of the CPC, the accused has the right to take part in the trial. Only in cases of felony, the presence of the accused at the trial is obligatory but only during the presentation of charges by the prosecutor, the provision of information about his rights and the consequences of not making use of some of them and during his testimonies and explanations. Thus, the above-mentioned regulation should to a great extent limit the application of temporary arrest used to ensure the presence of the accused in the course of the court proceeding.

The next specific prerequisite laid down in Article 258 § 2 of the CPC has been subject to a substantial amendment. The change resulted from a polarisation of opinions about the meaning of the cited provision[15] and "the faulty practice of the automatic application of temporary arrest based on the ruled or imminent penalty without an analysis whether there are any concerns for the proper course of the proceeding when the purpose of preventive measures is to ensure the proper course of the proceeding" by eliminating or limiting the threat (risk) that it will be carried out in an improper way[16]. Under the amended Article 258 § 2 of the CPC, the concerns that the accused who was charged with felony or crime that carries at least eight years' imprisonment or whom the court of the first instance sentenced to more than three years' imprisonment could hinder the proper course of the proceeding, which are referred to in § 1 and justifying the application of temporary arrest, may also result from the severity of the punishment he may be subject to.

First of all, it must be indicated that in Article 258 § 2 of the CPC, the thresholds for imprisonment have been raised because in case of the first instance court's (still invalid) sentence it should be "more than three years", unlike "not less than three years" formerly. However, the possible imprisonment as penalty for a misdemeanour has remained the same. Now, there is also a clear link between the prerequisite of temporary arrest as referred to in § 2 of Article 258 of the CPC and concerns indicated in § 1 of Article 258 of the CPC. Formerly, the application of temporary arrest under Article 258 § 2 of the CPC could be justified by an expected severe penalty. Now the amended § 2 of the provision stipulates that the application of temporary arrest can be justified by concerns referred to in § 1 of Article 258 of the CPC, i.e. that the accused might flee or

[14] See K. Dąbkiewicz, *op. cit.*, pp. 96–194 and literature cited there and judgements of the Polish courts and the ECtHR; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* [Polish criminal proceeding], Warszawa 2011, pp. 590–592.

[15] See K. Dąbkiewicz, *op. cit.*, pp. 116–127.

[16] See, for example, judgement of the Court of Appeal in Krakow of 6 December 2012, II AKz 500/12, Prokuratura i Prawo 2013/7–8/39.

hide, or prevent the course of justice, or act in another way to obstruct the criminal proceeding, which can also result from the severity of possible punishment.

Thus, charging the accused with a crime or a given misdemeanour and the severity of the punishment they carry constitute the only circumstances (facts) justifying the concerns referred to in § 1 of Article 258[17]. The prerequisite of the application of temporary arrest is not the circumstance that the accused may be severely punished, but the concern arising from that fact that he might unlawfully obstruct the proper course of the proceeding as referred to in § 1 of Article 258 of the CPC.

There is no amendment to the contents of the prerequisite of temporary arrest under Article 258 § 3 of the CPC. Therefore, the circumstances providing grounds for the application of the discussed measure under the quoted provision is a concern that the accused who was charged with the commission of a crime or a deliberate misdemeanour will commit a crime against life, health or public security, especially if he had threatened to do that.

4. Apart from the prerequisites of the circumstances that must occur for temporary arrest to be admissible, criminal procedure also envisages norms that are directive-like, requiring that some circumstances must be taken into account when the measure is to be applied. As from 1 July 2015, two directives are in force, i.e. on adaptation – laid down in Article 253 § 1 of the CPC, and on minimisation of temporary arrest laid down in Article 257 § 1 of the CPC. With the amendment of 27 September 2013, in Article 258 § 4 of the CPC another directive is laid down, which can be called a directive on adequacy (proportionality) of preventive measures, including temporary arrest. In accordance with it, taking a decision to apply a given preventive measure, the type and character of concerns referred to in § 1–3 being grounds for the application of a given measure as well as the growing threat for the proper course of the proceeding at a specified stage should be taken into consideration. Thus, the quoted directive requires that, before the application of temporary arrest, it should be taken into consideration what type of concerns are the prerequisite of it, i.e. that the accused could: flee (Article 258 § 1 point 1), hide (Article 258 § 1 point 1), prevent the proper course of justice (Article 258 § 1 point 2), in another unlawful way hinder the criminal proceeding (Article 258 § 2), hinder the proper course of the proceeding as referred to in § 1 (Article 258 § 2), commit a new crime against life, health or public security (Article 258 § 3 of the CPC). The discussed directive also requires that the increase of the threat for the given concerns about the proper course of the proceeding at a given stage be taken into account. The movement of the proceeding within the given stage and passing from one stage to another cause that the increase in threats for the proceeding may differ. Typi-

[17] See K. Dąbkiewicz, *op. cit.*, p. 118 and literature quoted there.

cally, over time the risk of unlawful hindering of the course of the criminal proceeding as a result of these concerns is decreasing. The proceeding organs taking a decision to apply temporary arrest should therefore take into account the type and character of the concerns and refer to the stage of the criminal proceeding in the given case. Temporary arrest must be, however, adequate (proportional) to the level of risk of an improper course of the proceeding. The measure will be adequate (proportional) to the level of existing threats if it is purposeful, i.e. will aim to ensure the proper course of the proceeding by eliminating or limiting the threats; if it is necessary, and thus applied only in case there is a well-grounded risk for the proper course of the proceeding, and proportional in the strict meaning of the term when it ensures the proper course of the proceeding in a way adequate to the level of existing threats. It must be highlighted that in its judgements, the ECtHR demonstrates – it seems – the standpoint that in order to prove that imprisonment is not arbitrary in accordance with Article 5 item 1 of the European Convention, it is not enough to apply the preventive measure in accordance with the national law. Such a measure must be necessary in the circumstances of the given case[18].

The directives on the adequacy (proportionality) under Article 258 § 4 of the CPC, minimisation of temporary arrest under Article 257 § 1 of the CPC and adaptation of preventive measures to the procedural situation of the accused under Article 253 § 1 of the CPC constitute the expression of respect to the normative principles of proportionality of the limitation of an individual's rights and freedoms that are referred to in Article 31 item 3 of the Constitution of the Republic of Poland. With the use of the directive on the minimisation of temporary arrest and the directive on the adaptation of preventive measures to the procedural situation of the accused, expressed in permanent and routinely performed control by the court and the prosecutor whether the sacrificed good of personal freedom is at every stage of the proceeding proportional to the aim referred to in Article 249 § 1 of the CPC, the legislator tries to ensure that the consequences of the limitation of the freedom of the accused are proportional to the burdens imposed on him. This way the requirements of necessity and proportionality *sensu stricte* are met because the provisions of Article 253 § 1 and 2 of the CPC and Article 257 § 1 of the CPC require that temporary arrest and other preventive measures are lifted without delay if they prove to be no longer necessary to protect the proper course of the criminal proceeding. In other words, if it is found that there is no need to protect the proper course of the criminal proceeding because the state of concerns about its unlawful hindering ended or it is found that the protection of the proper course of the criminal proceeding or preventing the commission of a new serious crime by

[18] See, for example, ruling of the ECtHR of 30 June 2013 in case 49872/11 Tymoshenko v. Ukraine, Lex number 1306207.

the accused may be obtained with the application of less strenuous measures (interfering into the sphere of the rights and freedoms of the accused), it is necessary to, without delay, withdraw the application of preventive measures or a more 'lenient' measure should substitute for a more 'severe' one[19].

5. The construction of the so-called conditional temporary arrest under Article 257 § 2 of the CPC remains unchanged. It is applied in order to overcome the difficulties arising in connection with the substitution of bail for temporary arrest[20]. In order to make it effective, it is necessary to deposit some property (Article 266 § 1 of the CPC). Quashing temporary arrest before the property has been deposited results in a risk that the property will not be deposited at all. In such a situation, conditional temporary arrest is a pragmatic solution. Applying conditional temporary arrest, the court rules when the given property must be deposited. Once the property is deposited, the ruling on temporary arrest is invalid *ex lege* and the accused cannot be kept in prison any longer. At the same time the execution of bail starts[21].

The application of temporary arrest with a reservation that the measure will be changed for bail until the prescribed time means that there are still prerequisites of temporary arrest, but bail is a sufficient means of ensuring the proper course of the proceeding if the given property is deposited in due time. Alternatively, temporary arrest will continue[22].

The amendment of 27 September 2013 to the contents of Article 257 § 2 of the CPC consists in the addition of a provision that on the well-grounded request of the accused or his barrister, filed at the latest on the last day of the prescribed period, the court may postpone the deadline for depositing the given property. This amendment is of great importance for the accused. He now has an opportunity to lengthen the period necessary to deposit the given property. Thus, in the event of collecting the means for the deposit after the prescribed deadline, it is necessary to start another bail proceeding and then one more to annul temporary arrest.

6. Amendments also refer to the provisions determining bans on temporary arrest. As from 1 July 2015, there is a ban on temporary arrest in cases of misdemeanour carrying less than one year's imprisonment (Article 259 § 3 of the

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[19] For more see J. Skorupka, *Limitacja tymczasowego aresztowania w polskim procesie karnym* [Limitation of temporary arrest in the Polish criminal trial], Prokuratura i Prawo 2012, z. 3, p. 55.

[20] See A. Szymacha-Zwolinska, *Kompetencje sądu w zakresie stosowania środków zapobiegawczych w toku postępowania przygotowawczego* [Competence of court in the application of preventive measures in the course of the preparatory proceeding], PS 1997, no. 2, p. 37.

[21] See P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2007, p. 1159.

[22] See judgement of the Court of Appeal in Wroclaw of 28 November 2006, II AKz 598/06, OSA 2007, No. 9, item 45.

CPC). The ban is relative in character because it is not applicable to a person who has been caught red-handed or directly after the commission of crime. As from 1 July 2015, temporary arrest shall not be applied in case of a crime carrying less than two years' imprisonment (amended Article 259 § 3 of the CPC). Thus, the threshold of the penalty has been raised from one year to two years and the negative prerequisite of the ban, i.e. the apprehension of the perpetrator red-handed or directly after the commission of crime has been withdrawn. After the amendment, the discussed circumstance shall not be important for the application of the ban on temporary arrest. The regulation aims to limit the possibilities of applying temporary arrest in petty offences. However, in the new legal state, there are still exceptions to the ban under § 3 of Article 259 of the CPC resulting from § 4 of the same provision, which, in case of hiding, persistent failure to appear or other unlawful (but actual, not hypothetical) hindering of the course of the proceeding or the lack of possibility of determining the identity of the accused, result in the application of temporary arrest although the crime the accused is charged with carries less than two years' imprisonment.

Article 269 § 1 of the CPC was also amended. It indicates that temporary arrest may be executed not only in the form of referral to the adequate medical institution, but also a psychiatric facility or drug rehabilitation institution.

7. In general, there are no amendments to the time limits for the application of temporary arrest. Arrest awaiting trial in the preparatory proceeding is applied for no longer than three months. Provided that the preparatory proceeding cannot be finished in three months' time because of some extraordinary circumstances, temporary arrest may be lengthened to a period that totally cannot exceed 12 months, but only in case of necessity. The total period of temporary arrest until the first instance court sentence is issued cannot exceed two years although the limitation is relative in character. The terms of 12 months and two years of temporary arrest may be lengthened by the court of appeal in case there are extraordinary prerequisites as referred to in Article 263 § 4 of the CPC. Under the new Article 263 § 4b of the CPC, temporary arrest should not be applied for a period longer than 12 months if the accused is charged with a crime carrying up to three years' imprisonment, and two years when the accused is charged with a crime carrying up to five years' imprisonment unless the necessity of that lengthening results from the protraction of the proceeding caused by the accused. Lengthening the time limit for temporary arrest in the preparatory proceeding to more than a year (12 months), the legislator introduced a ban on further lengthening when a crime carries a penalty *in concreto* that does not exceed three years' imprisonment, and during the court trial to over two years if the penalty does not exceed five years' imprisonment. The discussed bans would not work, however, if the necessity to lengthen the arrest resulted from intentional protraction of the proceeding by the accused. The solution is to prevent longer

arrest of the accused in cases that are less serious in nature, i.e. situations when after the conviction and deduction of the period of temporary arrest, the convict is to serve only part of the penalty as well as cases when, in spite of a relatively low harmfulness of an act, the ruled penalty is rather severe because of the long temporary arrest and the need to treat it as part of the penalty, otherwise damages for obviously undue arrest would have to be taken into account.

8. Amendments are made to the provisions determining the mode of proceeding in the application of temporary arrest. According to Article 249 § 2 of the CPC, temporary arrest may be applied only towards a person who has a status of a suspect or the accused. That is why the formal condition for the application of the measure is the former decision to press charges[23]. Prior to the application of temporary arrest, a court questions the accused (Article 249 § 3 of the CPC). The use of the measure is not possible without that hearing. The provision of Article 249 § 3 of the CPC allows for the use of temporary arrest without the prior hearing only when the accused hides in the country or has left the country and also when it is necessary to look for him and bring him before court by force (Article 278 of the CPC and Article 247 § 2 of the CPC), and also when law enforcement agencies apply for extradition of the wanted from abroad (Article 594 § 1 of the CPC) or for rendition in accordance with EAW (Article 607a of the CPC). Court rulings[24] rightly indicate that the necessity to hear the arrested person (Article 249 § 3 of the CPC) is not in conflict with the use of arrest and arrest warrant without the hearing but only based on written information. However, when he is apprehended, he should be heard without delay and decision should be taken whether arrest should be continued even if the arrested person did not demand that himself. Every detained or arrested person shall appear before court without delay (Article 5 item 3 of the ECHR)[25].

Filing a motion to apply a temporary arrest in the preparatory proceeding, the prosecutor should provide evidence indicating high probability that the accused committed a crime and circumstances confirming specific threats for the proper course of the proceeding or a possibility that the accused will commit a new serious crime and circumstances indicating that there are grounds for the use of this preventive measure and a necessity to do that.

Thus, the quoted provision determines the requirements that must be met by the justification of the prosecutor's motion to apply temporary arrest, provided

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[23] Compare P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2007, p. 1121; T. Grzegorczyk, *Kodeks Postępowania Karnego. Komentarz* [Criminal Procedure Code – Commentary], vol. I, Warszawa 2014, p. 892.

[24] See decision of the Court of Appeal in Krakow of 6 January 2000 r., II AKz 304/99, KZS 2000, No. 1, item 29.

[25] See J. Matras, *Standard „równości broni" w postępowaniu w przedmiocie tymczasowego aresztowania* [Standard of 'equality of arms' in connection with temporary arrest], Prokuratura i Prawo 2009, no. 3, p. 5.

that the prosecutor should: (1) list the evidence that indicates the existence of the – required by Article 249 § 1 of the CPC – prerequisite of high probability that the accused committed a crime that he is charged with; (2) indicate circumstances that indicate a justified concern that the accused will unlawfully hinder the proceeding or commit a new serious crime (Article 258 § 1–3 of the CPC); (3) prove that there are legal ground for the use of temporary arrest and a necessity to use it, which is connected with taking into account the directive on minimising temporary arrest referred to in § 1 of the Article 257 of the CPC, under which temporary arrest shall not be applied if another preventive measure is sufficient and taking into account the directive on adequacy (proportionality) referred to in the new § 4 of Article 258 of the CPC that requires that the level of the increase in the concern at the given stage of the proceeding should be taken into consideration.

It must be added that the elements of the prosecutor's motion listed in § 2 of Article 250 of the CPC must be based only on the evidence revealed to the accused or his barrister. Moreover, it must be taken into consideration that court rulings and the doctrine unanimously assume that lengthening of temporary arrest is also its application, but only a further one, thus the requirements laid down in Article 250 § 2a of the CPC also refer to the prosecutor's motion to lengthen this preventive measure[26].

The introduction of Article 250 § 2a of the CPC resulted in the amendment to Article 251 § 3 of the CPC, determining formal requirements for the court decision to apply temporary arrest. Under Article 251 § 3 of the CPC, the justification of the decision to apply temporary arrest should contain: (1) the evidence indicating that the accused committed a crime; (2) circumstances indicating that there are certain threats for the proper course of the proceeding; or (3) a possibility that the accused will commit a new serious crime in case the preventive measure is not used; (4) circumstances indicating the existence of specific grounds for its application; and (5) the need to use a given measure; as well as (6) explanation why the application of other measures is not recognised as sufficient.

As from 1 July 2015, a court in its decision concerning temporary arrest, like the prosecutor in his motion to apply temporary arrest, will have to take into account the directives on: minimisation of temporary arrest and adequacy (proportionality) of preventive measures.

9. In the arrest procedure, the principle of 'the equality of arms' between the parties to the proceeding, i.e. the prosecutor and the accused, is applied, which is clearly laid down in the Act of 27 September 2013 amending Article 156

[26] See K. Dąbkiewicz, *op. cit.*, p. 167 and the following, and literature and court judgements cited there.

§ 5a and Article 249 § 5 of the CPC and adding Article 249a of the CPC. In accordance with them, the accused and his barrister should have access to preparatory proceeding files to the extent that is necessary to effectively challenge the grounds for and legality of temporary arrest[27]. It is emphasised in literature that the sense of the guarantee of the equality of arms, which is used in every proceeding before court, regardless of the stage of the proceeding, consists in the fact that none of the parties can be in a situation clearly worse than the other party as far as the possibility of presenting their arguments is concerned[28]. The right to contradictory trial means that both the prosecution and the defence must be guaranteed the possibility of learning and next responding to the allegations and evidence presented by the opponent.

Although there is no statutory regulation, a court is obliged to deliver the prosecutor's motion to apply temporary arrest to the accused and his barrister, because this results from the established judgements of the ECtHR[29]. The accused (a suspect) and his barrister can therefore file a request for the provision of the prosecutor's motion in accordance with Article 156 § 1 of the CPC. The discussed motion constitutes part of the trial files[30]. The copy of the motion should be delivered in time that would enable the accused to prepare the defence and counterarguments.

The obligation under Article 249 § 3 of the CPC to let the barrister take part in the interrogation of the accused (both in the preparatory and court proceeding) is implemented when the barrister has been appointed before the interrogation starts. It should be interpreted broadly as including the appointment of a public defender[31]. The defender's failure to appear does not stop the course of the proceeding in the sense that interrogation is possible without the defender's presence. In accordance with § 3, the obligation to let the defender take part in the interrogation is binding when he appears to do so[32].

The accused (a suspect) under arrest, who has no appointed defender, should be notified about the time of the court's sitting in connection with the motion to lengthen temporary arrest (Article 249 § 5 of the CPC) in the same way as the

[27] Compare M. Wąsek-Wiaderek, *Zasada równości w polskim procesie karnym w perspektywie prawnoporównawczej* [Principle of equality in the Polish criminal proceeding from legal-comparative perspective], Kraków 2003, p. 199.

[28] See P. Hofmański, S. Zabłocki, Gloss to the sentence of the ECtHR of 25 Maech 1998, p. 6; C. Nowak, *Zasada równości w europejskim i polskim postępowaniu karnym* [Principle of equality in the European and Polish criminal proceeding], Prokuratura i Prawo 1999, vol. 3, p. 38.

[29] See sentence of the ECtHR of 5 July 2005 in case 207/23 Osvath v. Hungary, Lex number 154374; sentence of the ECtHR of 6 November 2007 in case 22755/04 Chruściński v. Poland, Lex number 318593; sentence of the ECtHR of 15 January 2008 in case 28481/03 Łaszkiewicz v. Poland, Lex number 336949.

[30] See P. Kardas, *Z problematyki dostępu do akt sprawy w postępowaniu w przedmiocie zastosowania tymczasowego aresztowania* [Issues of access to files of the proceeding in case of the application of temporary arrest], CzPKiNP 2008, No. 2, p. 5; J. Skorupka, Gloss to the decision of the Court of Appeal in Wrocław of 12 September 2011, II Akp 18/11 and II Akp 19/11, WSS 2012, No. 1, p. 64.

[31] See P. Hofmański, *KPK. Komentarz* [CPC – Commentary], vol. I, 2007, p. 1123.

[32] See *ibid.*

prosecutor[33]. On the other hand, according to the amendment of 27 September 2013, on the request made by the accused (a suspect in the preparatory proceeding) without a defender appointed earlier, a public defender is appointed. The court clerk may also take a decision in this matter. The adopted solution is in compliance with Article 80a § 2 of the CPC added to the Act of 27 September 2013, under which the president of the court, the court or the court clerk may appoint a defender for the accused who has no one chosen on his own in order to fulfil some procedural tasks. The accused (a suspect) must appear at each sitting that is referred to in Article 249 § 5 of the CPC. Thus, the quoted provision ensures only formal defence at the stage of lengthening temporary arrest and dealing with the appeal against the decision to apply or lengthen this measure.

10. According to new Article 261 § 2a of the CPC on the application of temporary arrest, the court notifies the organ conducting the proceeding against the accused in another case, provided it knows about the proceeding. The court also informs the accused about the contents of Article 75 § 1 of the CPC (a duty to appear and notify about the change of place of residence or stay longer than seven days). Thus, the amendment to Article 261 § 2 of the CPC consists only in broadening the range of entities notified on the request of the accused about the application of temporary arrest and the addition of organs that conduct the criminal proceeding against him in another case.

11. The amendments to the application of temporary arrest must be approved of. They respond to numerous opinions expressed by the representatives of the doctrine of the criminal procedure law as well as the standpoint of the UCtHR on the necessity to respect the standard of *habeas corpus*, which means the automatic taking of the detained person before court in the course of criminal proceeding, which was expressed in the amendment to Article 279 ensuring the 'equality of arms' during the sitting concerning temporary arrest (Article 156 § 5a, Article 249a, Article 251 § 3, Article 250 § 2a and Article 249 § 5 of the CPC) and the time limit for temporary arrest (Article 263 § 4b, Article 264 § 3 and Article 258 § 4 of the CPC).

[33] Compare J. Matras, *Standard równości…* [Standard of equality…], p. 5.

TEMPORARY ARREST AFTER AMENDMENTS TO THE CRIMINAL PROCEDURE

Summary

The article discusses the model of temporary arrest after the amendments to the criminal procedure. It is still a purpose-related measure used only to ensure the proper course of the proceeding and prevent a commission of a new serious crime. The prerequisites of and bans on temporary arrest have been changed a little. A new directive on adequacy (proportionality) has been introduced and together with the directives on minimisation and adaptation it creates a coherent series of circumstances that must be taken into consideration while taking the decision to apply or lengthen temporary arrest. Although the maximum time limits for temporary arrest have not been laid down, the possibility of lengthening the use of this measure has been substantially limited.

TYMCZASOWE ARESZTOWANIE PO ZMIANACH PROCEDURY KARNEJ

Streszczenie

W artykule omówiono model tymczasowego aresztowania po zmianach procedury karnej. W dalszym ciągu jest to środek celowy, stosowany wyłącznie dla zabezpieczenia prawidłowego toku postępowania oraz zapobieżenia popełnienia nowego ciężkiego przestępstwa. Nieznacznie zmieniły się przesłanki i zakazy tymczasowego aresztowania. Dodano zaś nową dyrektywę w postaci adekwatności (proporcjonalności), która wraz z dyrektywami minimalizacji i adaptacji tworzy spójny zespół okoliczności, które muszą być uwzględnione przy podejmowaniu decyzji o zastosowaniu i przedłużeniu tymczasowego aresztowania. Pomimo, że nie zdecydowano się na wprowadzenie maksymalnych terminów tymczasowego aresztowania, znacznie ograniczono możliwości przedłużania tego środka.

L'ARRESTATION PROVISOIRE APRÈS LES CHANGEMENTS DE LA PROCÉDURE PÉNALE

Résumé

Dans l'article l'auteur parle du modèle de l'arrestation provisoire après le changement de la procédure pénale. Elle reste toujours comme moyen final, appliqué uniquement pour continuer la suite de la procédure et prévenir d'accomplir un nouveau délit

plus grave. Les prémisses et l'interdiction de l'arrestation provisoire ont changé insensiblement seulement. Une nouvelle directive sous la forme de l'adéquation (proportionnelle) a été ajoutée ce qui forme avec la directive de minimalisation et d'adaptation un ensemble cohérent des circonstances qui doivent être respectés si on prend la décision de l'application et du prolongement de l'arrestation provisoire. Malgré le manque de l'introduction des dates maximales de l'arrestation provisoire, on a limité la possibilité de prolonger ce moyen.

ВРЕМЕННОЕ ЗАКЛЮЧЕНИЕ ПОД СТРАЖУ ПОСЛЕ ИЗМЕНЕНИЙ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ

Резюме

В статье рассматривается модель временного заключения под стражу после изменений уголовной процедуры. Это по-прежнему целенаправленная мера, применяемая исключительно в целях обеспечения правильного осуществления судопроизводства, а также предотвращения совершения нового тяжкого преступления. В незначительной степени изменились предпосылки и запреты временного заключения под стражу. Добавлена новая директива в качестве адекватности (пропорциональности), которая наряду с директивами минимизации и адаптации образует новый круг обстоятельств, которые следует учитывать при принятии решений о применении и продлении временного заключения под стражу. Несмотря на то, что не принято решение о введении максимальных сроков временного заключения под стражу, возможности продления данной меры значительно ограничены.