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Request for notification pursuant to Art. 337a of the Code of Criminal Procedure – regression or strengthening of the aggrieved party’s rights?

DOI: 10.5604/01.3001.0013.0362

Summary: The new provision of Article 337a, added to the Code of Criminal Procedure (CCP) through the amendment of 2016, pertains to circumstances of which the injured party is to be informed after the indictment is filed with the Court. Article 337a CCP sets out the obligation for the Court to inform the injured party, but only upon the party’s request, of the date and place of the hearing or the Court session on discontinuation of the proceedings under Article 17 § 1 points 2-11 CCP, discontinuation of the proceedings due to the absence of clear grounds for the accusations, conditional discontinuation of the proceedings and conviction without a hearing. This obligation also applies to notifying the injured party – upon the party’s request – of the criminal charges and their legal qualification. The new regulation raises numerous doubts – first, about the format of the request and, second, relating to the absence of a time limit therein within which the injured party should file his/her request for information. The question is also how the Court should inform the injured party of the charges and their legal qualification. Concerns relate to the procedure where the request referred to in § 1 of the regulation has been filed by too high a number of injured parties. The principal uncertainty about the new regulation is quite essential – whether the new regulation fits with the concept of enhancing the rights of the injured party in criminal litigation.

Key words: the aggrieved , request for notice, adversary principle.

Wniosek o zawiadomienie w trybie art. 337a k.p.k. – regres czy wzmocnienie uprawnień pokrzywdzonego?

Streszczenie: Nowy przepis art. 337a dodany do kodeksu postępowania karnego nowelizacją z 2016 r. dotyczy okoliczności, o których ma być poinformowany pokrzywdzony po wniesieniu do sądu aktu oskarżenia. Z art. 337a k.p.k. płynie obowiązek powiadomienia pokrzywdzonego przez sąd, ale tylko na jego wniosek - o dacie i miejscu rozprawy, posiedzenia - w przedmiocie umorzenia postępowania na podstawie art. 17 § 1 pkt 2-11 k.p.k., umorzenia postępowania z

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powodu braku oczywistych podstaw oskarżenia oraz warunkowego umorzenia postępowania, jak i skazania bez rozprawy. Ten obowiązek dotyczy również powiadomienia pokrzywdzonego na jego wniosek- o zarzutach oskarżenia i ich kwalifikacji prawnej. Nowe uregulowanie rodzi wiele wątpliwości, po pierwsze - jaka ma być forma tego wniosku; po drugie- przepis nie mówi o terminie, w którym pokrzywdzony powinien złożyć wniosek o uzyskanie informacji, o których tu mowa. Następnie jak sąd ma poinformować pokrzywdzonego o zarzutach oskarżenia i ich kwalifikacji prawnej? Niepokój rodzi tryb postępowania, gdy wniosek, o którym mowa w § 1 omawianego przepisu złożyła duża liczba pokrzywdzonych. Główna wątpliwość dotycząca nowego przepisu jest zupełnie zasadnicza – czy nowe uregulowanie wpisuje się w koncepcję wzmocnienia uprawnień pokrzywdzonego w procesie karnym ?

Słowa kluczowe: pokrzywdzony, wniosek o zawiadomienie, kontrydiktoryjność.

1. Introduction

The main idea behind the amendments of the Code of Criminal Procedure introduced over the recent years and covered by the press or the media has always been the acceleration of proceedings, simplification of procedures and the aggrieved party empowerment. This apparent phenomenon also results from the unifying projects undertaken in the legal space of the EU Member States and covered by the Council of Europe system, the growth in importance of the civil rights and liberties movement and the legal awareness of the participants in criminal proceedings².

With respect to the aggrieved party's procedural situation, attention should be paid to the new solution introduced by way of the March amendment³, which refers to the aggrieved party's rights in legal proceedings that are based on the very fact of being wronged by a crime. A courageous move of the legislator in this field was clearing Art. 337a of the Code of Criminal Procedure. This regulation, which was added by way of Art. 1, item 72 of the Act of 11 March 2016⁴ amending the Code of Criminal Procedure and certain other acts, came into force as of 15 April 2016.

The new Art. 337a, which was added to the Code of Criminal Procedure under amendment as of April 2016, refers to the circumstances of which the aggrieved party is to be notified after an indictment is filed with the court. Art. 337a of the Code of Criminal Procedure provides for the court's obligation to inform the aggrieved party, but only upon the aggrieved party's request, of the date and place of the hearing or meeting as to discontinuance of proceedings under Art. 17 § 1, items 2-11 of the Code of Criminal Procedure, discontinuance of proceedings due to the obvious lack of factual basis and conditional discontinuance of proceedings, as well as conviction without a hearing. This obligation also refers to notifying the aggrieved party, upon its request,

² <https://projekty.ncn.gov.pl/opisy/351981-pl.pdf>, [15.04.2018].

³ Pursuant to the amendment of the Code of Criminal Procedure passed on 11 March 2016, they are basically aimed at returning, although not entirely, to the model of proceedings as of before the reform that came into force on 1 July 2015, i.e. to the adversarial and inquisitorial model, which retains the precedence of the material truth, and the adversary procedure is one of the rules making it easier to reach the truth. Explanatory memorandum to the draft act of 8 January 2016 on amending the Code of Criminal Procedure and certain other acts, www.ms.gov.pl, p. 39.

⁴ „Journal of Laws” 2016, item 437.

of the prosecution charges and their legal qualification. Therefore, a conclusion can be drawn that the legislator's intention is to strengthen the aggrieved party's rights, but is it really so? In order to answer this question, the scope of application of Art. 337a of the Code of Criminal Procedure should be defined in the first place.

2. Scope and form of the request under Art. 337a of the Code of Criminal Procedure

The fact of including a new regulation in Chapter 43. *Provisions concerning the main trial* leaves no room for doubt that it applies to court proceedings. Therefore, a request under Art. 337a of the Code of Criminal Procedure can be submitted after an indictment has been filed at the earliest. As no time limit has been specified, it should be assumed that it can be submitted until the moment of closing the trial. The only parties entitled to exercise their rights under Art. 337a of the Code of Criminal Procedure are the aggrieved parties.

The above-mentioned regulation provides for the court's obligation to notify the aggrieved party, but only upon the aggrieved party's request, of the date and place of the hearing or meeting referring to:

1. discontinuance of proceedings under Art. 17 § 1, items 2-11 of the Code of Criminal Procedure,
2. discontinuance of proceedings due to the obvious lack of factual basis,
3. conditional discontinuance of proceedings,
4. conviction without a hearing.

In other words, this refers to adjudicating forums, in which the aggrieved party has the right to participate. Obviously, this obligation also refers to the case of informing the aggrieved party, upon the aggrieved party's request, of the charges pressed against the accused and their legal qualification. Up to this point, everything seems to be clear. However, further in the text of the regulation, there is no information about the form of the aggrieved party's request, i.e. whether it is necessary to prepare it in writing, or if it is sufficient to submit it orally, e.g. in the record of interrogation (Art. 116 of the Code of Criminal Procedure). Similarly, the regulation fails to determine the form of the information to be provided by the court as regards the content of the charges and their legal qualification. It seems to be the most appropriate to use a written form in the second case⁵, and follow Art. 116 of the Code of Criminal Procedure in the first case.

2.1. Time limits for the performance of procedures under Art. 337a of the Code of Criminal Procedure

The obligation to instruct the aggrieved party about its rights indicates that, before the first hearing, the authority conducting preliminary proceedings is obliged

⁵ K. Eichstaedt, *Komentarz do art.337(a) Kodeksu postępowania karnego*, [in:] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. I, WKP 2017.

to inform the aggrieved party in writing about the content of the analysed regulation (Art. 300 § 2 *in fine* of the Code of Criminal Procedure)⁶. What is important, the interpreted regulation fails to provide for a time limit within which the aggrieved party should submit a request for the information, referred to in this regulation. In order to answer this question, a suitable interpretation should be followed, but which to choose? Following functional interpretation of this regulation, a conclusion can be drawn that, in respect of the date and place of the hearing and specified meetings, the said information is to enable the aggrieved party to participate in them. On the other hand, pursuant to systemic interpretation of Art. 337a § 1 of the Code of Criminal Procedure, the aggrieved party's right to participate in the hearing (Art. 384 § 2 of the Code of Criminal Procedure) and in specified meetings (Art. 339 § 5, Art. 341 § 1 and Art. 343 § 5 of the Code of Criminal Procedure), which right is provided for by individual provisions, and, consequently, the obligation to serve a notification of their date and place (Art. 117 § 1 of the Code of Criminal Procedure), materialises only at the moment of submitting a request for such information. As a consequence, a failure to file such a request exempts the judicial body from the duty to send a notification of the date and place of the hearing or meeting, in which the aggrieved party has the right to participate. In this regard, Art. 337a § 1 of the Code of Criminal Procedure seems to be a special provision with respect to Art. 117 § 1 of the Code of Criminal Procedure. Accordingly, in order to exercise the right to participate in the hearing or meeting, the aggrieved party should submit a request for information about the date and place of the hearing or meeting before the date set for this hearing or meeting and at a time allowing this information to be sent. It should be noticed that the information on filing with the court an indictment or a motion for conditional discontinuance of proceedings (Art. 336 of the Code of Criminal Procedure) is provided to the aggrieved party (Art. 334 § 3 of the Code of Criminal Procedure and Art. 336 § 4 *in fine* of the Code of Criminal Procedure). This is the only moment when the aggrieved party, being aware of the fact of filing an action to court, can submit a request for information about the date and place of examining the case in order to participate in the hearing or meeting. Whereas, in the case of obtaining information about the prosecution charges and their legal qualification, the aggrieved party can submit a request during the course of the proceedings.

It should be highlighted here that Art. 350 § 4 of the Code of Criminal Procedure requires the court to inform the aggrieved party of the date and place of the main trial, and that it was added by way of the amending Act of 27 September 2013. Previously, the issues related to the participation of the aggrieved party, not being a party in litigation, in the hearing were regulated by Art. 384 § 2 of the Code of Criminal Procedure only. The original version of this provision required the court to inform the

⁶ Undoubtedly, this quite extensive catalogue of the aggrieved party's rights and the principles of their execution, according to the legislator's will, should be expressed in a clear and transparent way to make it comprehensible also to those who do not use the services of professional representatives. For this purpose, a form specimen has been created, containing the catalogue of the aggrieved party's rights in criminal proceedings, which is adequately shortened and written in colloquial language, and which was published as the Ordinance of the Minister of Justice of 13 April 2016 on establishing the instruction form for the aggrieved party's rights and duties in criminal proceedings ("Journal of Laws" 2016, item 514).

aggrieved party of every date of the hearing, and, after it was amended by way of the Act of 10 January 2003, the duty to notify the aggrieved party was abolished⁷. It should be noticed that the amending Act of 27 September 2013 did not amend Art. 384 § 2. Therefore, it still stipulates that the aggrieved party has the right to participate in the hearing *provided that it appears*. Thus, when comparing this regulation with Art. 350 § 4 of the Code of Criminal Procedure (which refers to setting the date of the hearing before its commencement), it should be concluded that the latter stipulates the obligation to inform the aggrieved party of the first date of the hearing only unless more than one dates are set under the same order issued pursuant to § 2.

Criminal proceedings repeatedly involve a number of aggrieved parties. For example, this may refer to the crime of fraud. Therefore, if the request, referred to in § 1 of the discussed provision, is submitted by a large number of the aggrieved parties (e.g. 200 persons), the information to be provided to them is announced on the court's website. This information shall include the file reference number, but it shall not provide the personal data contained in the indictment.

3. Procedural situation of the aggrieved party vs. notification

Taking into account the strengthening of the aggrieved party's procedural situation in criminal proceedings, the following standpoint of Prof. Zagrodnik seems to be easier to relate to it. This is because the provision included in Art. 337a of the Code of Criminal Procedure conditions obtaining by the aggrieved party of the information on the meetings specified in this provision. Pursuant to Art. 339 § 5, sentence 2, Art. 341 § 1, Art. 343 § 5 of the Code of Criminal Procedure, the aggrieved party has the absolute right to participate in the specified meetings, and, what follows, also under Art. 117 § 1 of the Code of Criminal Procedure, the right to receive information about the date and place of these meetings. This *prima facie* solution for the discrepancies emerging against the background of the regulations referred to should take place by way of applying the conflict-of-law-rule *lex specialis derogat legi generali*, according to which it could be assumed that Art. 337a of the Code of Criminal Procedure, conditioning the notification of the meetings referred to therein on the aggrieved party submitting a relevant request, narrows, in the cases discussed, the scope of application of the general regulation regarding the provision of information about the date and place of trial procedures provided for in Art. 117 § 1 of the Code of Criminal Procedure. However, for guarantee reasons, such reasoning cannot be accepted, especially when the need to provide the aggrieved party with an actual possibility of exercising its rights related to participation in a meeting regarding a motion for conviction without a hearing (Art. 343 § 2 of the Code of Criminal Procedure) is taken into account. Bearing in mind the above-mentioned considerations, a conclusion can be easily drawn that the aggrieved party should be informed about the meetings specified in Art. 337a § 1 of the Code of Criminal

⁷ "Journal of Laws" 2003, No. 17, item 155.

Procedure irrespectively of whether a relevant request has been submitted⁸.

Ad vocem, even the petty offence procedure under Art. 65 § 1 of the Petty Offences Procedure Code⁹ provides for the duty to inform the aggrieved party of the date and place of the hearing. Pursuant to this provision, having referred a case to the meeting, the president of the court should order that information about the date and place of the meeting is provided to the prosecutor, the aggrieved party and the defendant, as well as the defence counsel and attorney if appointed. Additional arguments in this respect are contained in Art. 67 § 4 of the Petty Offences Procedure Code, pursuant to which the notification of the date of the hearing served to the aggrieved party should include information about its right to act as a subsidiary prosecutor, and in Art. 71 § 2 of the Petty Offences Procedure Code, which refers to the aggrieved party's failure to appear and the lack of evidence for serving the aggrieved party with a relevant notification. Interestingly enough, the majority of petty offence cases refer to acts in the case of which the aggrieved party does not need such comprehensive protection of its rights like in a criminal procedure. On this account, the application of a solution modelled after Art. 337a of the Code of Criminal Procedure in the petty offence procedure would be acceptable. Here, the legislator adopted a more guarantee solution requiring the court to inform the aggrieved party of the date of the hearing without a request, i.e. routinely. Moreover, it seems that there are no reasonable arguments for the need to eliminate the aggrieved party from proceedings in petty offence cases; an opposite trend can be rather observed. Furthermore, we cannot disregard the fact that numerous proceedings are initiated as a result of petty offence notifications filed by the aggrieved parties themselves. If a case is referred to the court with a petition for punishment, it is aimed at securing the aggrieved party's legal interests and feeling of justice. Being present at the court hearing not as a subsidiary prosecutor, the aggrieved party may be able to make a statement on obliging the defendant to redress any damage caused to it. Although Art. 28 of the Petty Offences Procedure Code lacks a regulation resembling Art. 47 of the Penal Code, the aggrieved party's position may be of great importance for the contents of the final judgment given by the court on a petty offence case. Therefore, the solution functioning in the petty offence procedure should be deemed correct, calling only for the observance in practice of Art. 65 § 1 of the Petty Offences Procedure Code¹⁰.

4. Assessment of the new regulation. Conclusions

The new regulation entails a number of doubts. Firstly, in what form the request is to be submitted, and, secondly, there is no information on the time limit for the aggrieved party to file a request for the details, referred to therein. There is also the question of the manner in which the court is to notify the aggrieved party of the prosecution charges and their legal qualification. Moreover, concern arises about

⁸ J. Zagrodnik, *Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych*, WK 2016.

⁹ "Journal of Laws" 2018, item 475; consolidated text.

¹⁰ D. Stachurski, *Sens i nonsens odmiennych regulacji zawartych w procedurach: karnej i wykroczeniowej*, „Monitor Prawniczy” 2017, No. 5, p. 252-253.

the procedure to be followed when the request, referred to in § 1 of the discussed provision, is submitted by a large number of the aggrieved parties. The main doubt regarding the new regulation is completely fundamental, i.e. does the new regulation fit in the concept of strengthening the aggrieved party's rights in criminal proceedings?

Another doubt of fundamental nature is whether the introduction of such a procedural instrument in the Code of Criminal Procedure is justified. The new regulation seems to be a far-reaching step and it does not fit in the concept of strengthening of the aggrieved party's position in criminal proceedings. Moreover, the instrument discussed does not seem to be an essential element of criminal procedures. The argument that it is necessary for making equal the position of the aggrieved party and the defendant's position as regards notification duties appears to be wrong. It must be remembered that this may lead to a pathology of criminal proceedings. Finally, it is worth noticing that even civil procedures do not provide for an instrument similar to that stipulated in Art. 337a of the Code of Criminal Procedure.

A person who has been wronged by a crime is one of the most important persons in criminal proceedings, and the rights granted by the legislator and the actual possibility of exercising them are of great importance for this person. Although prosecuting authorities and courts are established to protect the aggrieved party's rights, the aggrieved party itself should have an actual possibility of exercising its rights granted to it by the legislator. With the above in mind, there is no doubt that the procedural situation of the aggrieved party as regards the request under Art. 337a of the Code of Criminal Procedure is a regression of the aggrieved party's rights. It appears that the legislator should once more take into careful consideration the content of Art. 337a of the Code of Criminal Procedure.

In order to avoid ambiguity, it should be highlighted that the introduction of Art. 337a of the Code of Criminal Procedure by way of the March amendment shall not change in any way the benefits related to the fact of the aggrieved party submitting, as early as possible, a statement that it intends to act in court proceedings in the capacity of a subsidiary prosecutor¹¹. Bearing in mind the present legal circumstances, this seems to be the best remedy, as only then the aggrieved party, acting as a subsidiary prosecutor, shall have a proper procedural situation guaranteed.

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