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SYSTEM POSITION OF AN EXPERT IN POLAND

1. Introductory remarks

The aim of this study is to analyze normative acts that regulate the systemic position of the expert, namely: the legal qualification required by law to perform this function, the procedure for entering experts into the court expert lists, expiry of the status of court expert and deprivation of proficiency to perform this function, as well as problems supervision.

2. The concept of «expert court»

The concept of court expert is not defined by law.

According to the views of the legal doctrine, a court expert is an auxiliary body of the court, which plays an important role in the adjudication process. The expert serves the court with his special knowledge in the field of various fields of science, technology, art, craft and other skills, if it is needed to determine the relevant circumstances necessary to issue a ruling. The court expert gives his opinion based on his specialist knowledge and professional experience, acting on behalf of the court. The expert's opinion is always subject to review by the court, but the court is not bound by it. It is the court's duty to analyze in detail the opinion of the expert, in order to review the reasoning contained therein and assess the validity of the final conclusions it should be emphasized that the participation of court experts is provided for in civil and criminal proceedings. The expert receives the remuneration for the performance of the activity in the amount specified in separate regulations¹.

3. Constitutional regulation of forensic experts

The systemic regulation of court experts is contained in the sixth chapter entitled «Experts» of Section IV, pt. «Court referees, probation officers, court employees, permanent mediators, lay judges and auxiliary bodies of the courts» of the Act of 27 July 2001 Law on the System of Common Courts².

According to Article 157 § 1 p.u.s.p. the president of the district court establishes court experts and keeps a list of them. In connection with the performance of activities resulting from the decision on consultation, the expert benefits from the legal protection provided for public officials (Article 157 § 3 p.u.s.p.). Article 157 § 2 p.u.s.p. states that the Minister of Justice shall determine, by way of a regulation, the procedure for appointing court experts, performing their duties and dismissing them from office. In the same mode, the Minister of Justice may also determine detailed rules for the appointment and operation of teams of court experts. In implementing the above-mentioned delegation, the Minister of Justice issued on 24 January 2005 a regulation on court experts³. Forensic experts are appointed by the president of this court at the county court for a period of 5 years (see § 1 r.b.s.). The period of establishment expires at the end of the calendar year (§ 1 paragraph 2 r.b.s.). It is possible to appoint an expert witness at more than one district court, but with the assumption that this appointment is justified by the good of justice. In the case of narrow specialties, such appointment is even a necessity in order to provide proper assistance to the judicial authorities⁴. A court expert is an auxiliary body

¹ G. Ott, *Komentarz do art. 157 Prawa o ustroju sądów powszechnych*, [w:] A. Górski (red.), *Prawo o ustroju sądów powszechnych. Komentarz*, LEX 2013 [access: 25.02.2019].

² Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, t.j. Dz.U. z 2019 r. poz. 52, zwana p.u.s.p.

³ Rozporządzenie Ministra Sprawiedliwości z dnia 24 stycznia 2005 r. w sprawie biegłych sądowych, Dz.U. z 2005r., nr 15, poz. 133, zwane r.b.s.

⁴ Wyrok WSA w Warszawie z dnia 26 czerwca 2007 r., VI SA/Wa 1549/06, LEX nr 352767.

of a court, it can be only a natural person, not an organizational structure, regardless of whether he has legal personality⁵.

Experts are established for particular branches of science, technology, art, craft as well as other skills (§ 2 r.b.s.). According to § 12 paragraph 1 r.b.s. expert may be a person who:

- 1) enjoys full civil and civic rights;
- 2) she is 25 years old;
- 3) has theoretical and practical special messages in a given branch of science, technology, art, craft, as well as other skills for which it is to be established;
- 4) gives a guarantee of proper performance of the duties of an expert⁶;
- 5) he agrees to be an expert witness. The candidate should demonstrate the possession of the message with special documents or other evidence. The president of the regional court assesses whether the possession of special messages has been sufficiently demonstrated. As stated in the Judgment of the WSA in Warsaw of 10 July 2007: «1. The use of an unstamped diploma of the American university meant, under Polish law, that the content found with such a document could not be honored, so the situation of a person with an unstamped diploma was as if the education / title was not certified»⁷.

It should be emphasized that, expressing in the decision of the president of the district court, the assessment of whether a given person meets the criteria for being appointed by a court expert is discretionary⁸.

In the case of an expert – sign language interpreter – the regulation on forensic experts provides for additional requirements in the form of the completion of the twenty-first year of age and possession of the «Second Certificate – >> T2 << – translator-expert in sign language» or the title of an expert of that language, issued by the Polish Association of the Deaf.

Establishing an expert requires an opinion. Pursuant to § 3 paragraph 1 r.b.s. the appointment of an expert staff member requires an opinion of the establishment employing that person. The opinion should be expressed prior to the appointment of an expert. The Regulation on court experts does not specify the date of its expression, nor the manner in which it is adjudicated, in cases where the person obliged to express an opinion fails to fulfill this obligation. It could be proposed to add a provision to the regulation on court experts (§ 3 paragraph 3), according to which the opinion referred to in § 3 paragraph 1 and 2 is expressed within thirty days from the date of presentation by the president of the competent court of the regional intention to appoint an expert. Failure to deliver an opinion within thirty days from the day the Minister of Justice presents his / her intention to submit by the president of the competent court the regional intention to establish expert does not prevent the appointment.

⁵ Por. wyrok WSA w Warszawie z dnia 8 sierpnia 2007 r., sygn. akt VI SA/Wa 863/07, LEX nr 394421.

⁶ 1. Pojęcie >>rękojmi należytego wykonania obowiązków biegłego<< definiuje się jako całość cech, zdarzeń i okoliczności dotyczących osoby biegłego sądowego, składających się na jego wizerunek jako osoby zaufania publicznego. Na wizerunek osoby zaufania publicznego składają się takie cechy charakteru jak: szlachetność, prawość, sumiennność i bezstronność łącznie.

2. Każde podejrzenie nierzetelności w wykonywaniu obowiązków biegłego uprawnia do uznania, że biegły nie spełnia podstawowego warunku rękojmi należytego wykonywania obowiązków biegłego. Osoba biegłego nie może być dotknięta żadną skazą, która podważałaby zaufanie do niej” (Wyrok WSA w Warszawie z dnia 18 października 2006 r., sygn. akt VI SA/Wa 1553/06, LEX nr 264553).

„1. Skazanie biegłego prawomocnym wyrokiem sądu za popełnienie przestępstwa uprawnia do przyjęcia, że nie spełnia on podstawowego warunku do wykonywania tej funkcji - rękojmi należytego wykonywania obowiązków biegłego. Nie może być bowiem obojętne dla oceny rękojmi należytego wykonywania obowiązków popełnienie z jego winy przestępstwa, polegającego na niedopełnieniu obowiązków w zakresie bezpieczeństwa i higieny pracy.

2. Mimo zatarcia skazania popełnienie przez stronę wnioskującą przestępstwa nie może pozostać bez wpływu na ocenę rękojmi należytego wykonywania obowiązków” (Wyrok WSA w Warszawie z dnia 30 marca 2007 r., sygn. akt VI SA/Wa 119/07, LEX nr 335193).

⁷ Wyrok WSA w Warszawie z dnia 10 lipca 2007 r., sygn. akt VI SA/Wa 786/07, LEX nr 394415.

⁸ Wyrok WSA w Warszawie z dnia 9 maja 2017 r., sygn. akt VI SA/Wa 2684/16, LEX nr 2 347187.

It should be emphasized that the opinion is not binding, which means that the expression of a negative opinion about an expert is not an obstacle to its establishment.

The requirement to consult concerns only candidates for experts who remain in employment or do a free profession. It therefore does not include persons who are not employed under an employment relationship and candidates who earn income under civil law agreements.

De lege lata, the regulation on forensic experts will polarize the procedure for the appointment of an expert, introducing an obligation to seek the opinion of a competent entity in relation to candidates who are in an employment relationship or are engaged in a freelance profession. Although the opinion is not binding, it is an assessment of the candidate expressed by the entity specified in the Regulation on statutory auditors (establishment or professional organization). Often, such an opinion may affect the appointment of an expert, because the assessment contained therein is an additional premise on which the candidate's silhouette is examined, including regarding the warranty of proper performance of the duties of an expert.

The appointment by the expert is preceded by his promise to the president of the district court according to the following record: «I am solemnly aware that I will perform the duties of court expert with all my diligence and impartiality» (§ 4 r.b.s.), aware of the importance of my words and responsibilities before the law.). According to § 8 paragraph 1 r.b.s. the president runs lists of court experts – according to particular branches of science, technology, art, craft, and other skills. The President also runs lists of court experts on cards established for each expert; in lists and lists, an expert's address and the date for which it was established as well as other data on specialization are provided.

Lists of court experts are carried out according to established models (§ 10 r.b.s.).

In practice, the list of court experts includes the following branches: – forensic examinations (dactyloscopy); – banking; – safety on the ski slopes; – Health and Safety; – weapons and ammunition; – construction; – dendrology; – energy; – finance, accounting, accounting, taxes, salaries; – human genetics; – geology, – hydrogeology and seismology; – mining; – graphology; – horse breeding; – metallurgy and railways; – Informatics; – other categories; – furniture, wood technology; – medicine; – environmental Protection; – management organization, business economics, marketing; – nursing and midwifery; – fire-fighting; – psychology and pedagogy; – agriculture and gardening; – road traffic, automotive and automotive technology; – estimation real estate; – estimation of movable property, valuation of machines and devices; – toxicology; – road and rail transport; – translators – sign language; – hoisting equipment; – mechanical devices; electric, gas and thermal installations; – valuation and determination of bankruptcy and composition capacity; – business valuation; – textile; – public procurement⁹.

Within the branches mentioned above, their detailed ranges for individual experts were determined. For example, for toxicology: toxicology, forensic chemistry, physicochemical studies of psychotropic substances, narcotic drugs and substances from the group of so-called «Legal highs», a retrospective and prospective account of ethyl alcohol¹⁰. It should be mentioned that the Ministry of Justice announced a list of forensic experts established in the field of sporadically or rarely occurring specialties¹¹. Lists of court experts are available to interested parties in the court secretariats. In particular, these lists shall be made available to the parties, participants in the proceedings and bodies conducting preparatory proceedings in criminal matters and military courts (§ 8 paragraph 3 r.b.s.). It is the duty of the president of the regional court to inform, in January each year, the district courts in the district court and the Ministry of Justice of the list of court experts, as well as notify without delay any change of the list and initiation of criminal proceedings or incapacitation of those persons (§ 9 r.b.s.).

If it is necessary to appoint an expert, the President may, in particular, ask appropriate professional associations or organizations, state-owned enterprises, institutions, universities and state offices to identify persons possessing theoretical and practical special knowledge in a given branch of science, technology, art, craft, and also other skills (§ 14 r.b.s.). The act of establishing an expert, after making a promise, gives rise to the following rights and obligations, which include in particular:

⁹ URL: <https://www.gliwice.so.gov.pl/container/biegli/lista-bieglych-sadowych---stan-na-dzien-18.02.2019r.-1.pdf> [access: 1.03.2019].

¹⁰Tamże.

¹¹ Komunikat z dnia 19 października 1994 r. w sprawie wykazu biegłych sądowych.

a) Authorization:

— to issue opinions at the request of the court or body conducting preparatory proceedings in criminal matters in the field of this branch of science, technology, art, craft, and other skills for which the establishment took place. As emphasized in the Judgment of the Provincial Administrative Court in Warsaw of 20 December 2017:

«1. Timely execution of opinions on behalf of procedural bodies is the basic duty of a court expert.

2. In a situation where proficient – in view of the life situation – is not able to meet the orders of the procedural bodies, he should abstain from accepting them or inform the President in the manner provided for in § 16 subpara. 1 point 2 of the ordinance of 24 January 2005 on court experts about the intended break in the performance of activities¹;

— for remuneration for performing activities, in the amount specified in separate regulations.

b) Duty:

— use of the title of court expert with the designation of the specialty and the district court at which he was established,

— immediately notify the President of: any change of address; intentional break in performing activities for more than 3 months.

If the above-mentioned circumstances arise during the performance of an action commissioned by a court or authority conducting preliminary criminal proceedings, the expert shall notify the authority thereof. With regard to the intended break in the performance of activities for more than 3 months, notifications should also be made if the break does not exceed 3 months. The Regulation on court experts establishes the principle that an expert should perform his duties. According to § 5, the expert can not refuse to carry out his duties in the district court, at which he was appointed, commissioned by a court or authority conducting preparatory proceedings in criminal cases, except for cases specified in the regulations governing the proceedings before these authorities.

In § 8 paragraph 2 r.b.s. the premises in which the president of the court deletes from the list of experts and removes his card from the list:

1) on release from the function;

2) in the event of death;

3) at the end of the period of the expert's establishment, unless there was a re-establishment.

Exemption from the expert function is obligatory or optional.

The president of the regional court exempts from the expert function in the event of the following circumstance: – expert's request, – loss of the conditions for the performance of this function by the expert, or when the statement that he did not respond to the conditions at the time of the appointment and is still not responsible for them. Optional dismissal from the expert function, there may be important reasons, in particular if it performs its activities improperly. In the event that an expert loses the conditions to perform this function or if it is found that he did not respond and does not answer them at the time of the appointment, and that he is dismissed from from the expert function for important reasons, the president of the district court is obliged to hear an expert, unless it is impossible.

As stated in the judgment of the Voivodeship Administrative Court in Białystok of September 12, 2017: «Unlawful performance of activities by a court expert giving grounds for his release from this function on the basis of § 6 paragraph 2 of the ordinance of January 24, 2005 in the case of court experts can not be demonstrated by questioning the substantive content of his opinion in a specific case. It should refer to the activities of an expert as a person of public trust, including not only delays in drafting opinions, but about the entirety of the expert's activity, his behavior, attitude to parties, image, mastery, availability to the authorities and courts, as well as no loss of possessed professional

¹ Wyrok WSA w Warszawie z dnia 20 grudnia 2017 r. sygn. akt VI SA/Wa 1216/17, LEX nr 2471124.

qualifications. Experts are not irremovable, but are also subject to review (supervision) of court presidents, and only this supervision can not cover the merits of their opinions¹.

Both the appointment of an expert as well as the dismissal of an expert is made by way of an administrative decision from which he is entitled appeal.

The chairman shall notify, respectively, the workplace or professional organization referred to in the terms of the appointment of an expert or employed person and dismissal of that function in § 3 paragraph 2. Pursuant to § 17 r.b.s., the president of the district court supervises experts on the terms set out in separate regulations. The regulations to which it refers § 17 r.b.s. they have not been established. The only supervisory activities for the president of the district court are based on the regulation on court experts. It should be added that the specific provisions provide for measures disciplining experts, as exemplified in art. 287 of the Act of November 17, 1964. Code of Civil Procedure, according to which for unjustified failure to appear, for unjustified refusal to make a promise or opinion or for an unjustified delay in submitting an opinion, a court expert witness for a fine². **3. Conclusion**

The analysis of the existing regulations regulating the political position of court expert in Poland allows to formulate the following postulates *de lege ferenda*:

- passing a normative act of a statutory rank that would exhaustively regulate the systemic position of the court expert – the «Law on court experts»;
- introduction of the obligation of the candidate for expert witness preparation to perform this function. Preparation should take place only in specialist units;
- commission examination carried out by judges and experts, after the preparation, (of expert knowledge in the field of expert matters) whose positive result would entitle him to perform the function of an expert;
- periodic, compulsory training of persons acting as an expert;
- establishment of a professional corporation representing persons performing the function of an expert;
- laying down rules regulating the control and supervision of experts and the authorities that will apply them;
- regulating the civil law liability of court experts in the «Law on forensic experts»;
- introduction of compulsory insurance of professional liability of court experts.

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Normative acts:

1. Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, tj. Dz.U. z 2018 r. poz. 2096.
2. Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, t.j. Dz.U. z 2019 r. poz. 52.
3. Rozporządzenie Ministra Sprawiedliwości z dnia 24 stycznia 2005 r. w sprawie biegłych sądowych, Dz.U. z 2005r., nr 15, poz. 133.

Certification:

1. Wyrok WSA w Warszawie z dnia 18 października 2006 r., sygn. akt VI SA/Wa 1553/06, LEX nr 264553.
2. Wyrok WSA w Warszawie z dnia 30 marca 2007 r., sygn. akt VI SA/Wa 119/07, LEX nr 335193.
3. Wyrok WSA w Warszawie z dnia 26 czerwca 2007 r., VI SA/Wa 1549/06, LEX nr 352767.
4. Wyrok WSA w Warszawie z dnia 10 lipca 2007 r., sygn. akt VI SA/Wa 786/07, LEX nr 394415.
5. Wyrok WSA w Warszawie z dnia 8 sierpnia 2007 r., sygn. akt VI SA/Wa 863/07, LEX nr 394421.
6. Wyrok WSA w Warszawie z dnia 9 maja 2017 r., sygn. akt VI SA/Wa 2684/16, LEX nr 2347187.
7. Wyrok WSA w Białymstoku z dnia 12 września 2017 r., sygn. akt II SA/Bk 338/17, LEX nr 2366595.
8. Wyrok WSA w Warszawie z dnia 20 grudnia 2017 r. sygn. akt VI SA/Wa 1216/17, LEX nr 2471124.

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1. Komunikat z dnia 19 października 1994 r. w sprawie wykazu biegłych sądowych.
2. URL: <https://www.gliwice.so.gov.pl/container/biegli/lista-bieglych-sadowych---stan-na-dzien-18.02.2019r.-1.pdf>.

¹ Wyrok WSA w Białymstoku z dnia 12 września 2017 r., sygn. akt II SA/Bk 338/17, LEX nr 2366595.

² Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, tj. Dz.U. z 2018 r. poz. 2096.