

## CONDITIONAL DISCONTINUANCE OF CRIMINAL PROCEEDINGS IN POLISH CRIMINAL LAW

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**Purpose:** analysis of the conditions of the use of one of probation measures present in Polish criminal law, namely conditional discontinuance of criminal proceedings. **Research methods:** legal-dogmatic analysis of the provisions of Criminal Code and the Code of Criminal Procedure, and analysis of available statistics regarding the applicability of conditional discontinuance of criminal proceedings related to total convictions in Poland in the period 1999-2022. **Results:** the author specifies the prerequisites for conditional discontinuance of criminal proceedings (fault and social harmfulness of the offensive act are minor, the circumstances in which the offensive act was committed do not raise any doubts, the offender having not been previously punished for an intentional offence, positive criminological prospects, the offence being punishable by a custodial sentence not exceeding 5 years), and specifies the period of probation, supervision and obligations of the offender, as well as the prerequisites for resuming the proceedings (optional and obligatory). **Discussion:** conditional discontinuance of criminal proceedings is an essential criminal policy tool, and it is the responsibility of judicial authorities to appropriately use this institution as a means for combating relatively minor crime. An analysis of statistical data shows that in recent years, approximately 8 per cent of judgements result in the application of the institution of conditional discontinuance of criminal proceedings (e.g. in 2015 - 8.2 per cent, in 2018 - 9.0 per cent, in 2022 - 8.1 per cent). To sum up, it should be noted that the institution of conditional discontinuance of criminal proceedings is an important tool of criminal policy (as evidenced by the fact that in recent years every 12th adjudication ends with the application of this institution). The current approach to the provision (both in substantive and procedural terms) does not raise any essential doubts.

**Key words:** conditional discontinuance; criminal procedure; period of probation; supervision; resumption of proceedings.

### Statement of the problem and its relevance.

Conditional discontinuance of proceedings, along with conditional suspension of sentence and early release, is a probation measure. Probation measures are an important tool in crime prevention, and their statutory embodiment is a kind of reflection of the penal policy of a given country. These measures significantly make the criminal law system more flexible, allowing both the scale of the criminal law response to be adjusted to the specific factual situation (conditional discontinuance of criminal proceedings, conditional suspension of the execution

of the sentence), and corrections to be made at the stage of the execution of the sentence itself (conditional early release).

The nature of probation measures involves putting the offender to a test, with the possibility of imposing obligations on the offender and placing the offender under the supervision of a probation officer. The essence of these institutions lies also in the waiver of conviction and punishment (in the case of conditional discontinuance of proceedings), the abstention from executing the sentence (in the case of conditional sentence), or serving part of

the penalty imposed (in the case of conditional early release).

**Analysis of research and publications.** Issues related to the analysis of the provisions on conditional discontinuance of criminal proceedings have been considered in domestic science by such authors as A. Marek, B. Kunicka-Michalska, A. Zoll, A. Krukowski, M. Leonieni, W. Michalski and many others. They have made a thorough analysis of the current legislation indicating the doubts that exist. However, in spite of numerous publications, this issue still remains in the circle of interest of the representatives of the doctrine of criminal law, prompting reflections on the construction of the binding provisions.

**Prerequisites of conditional discontinuance.** The prerequisites for the conditional discontinuance of criminal proceedings are specific conditions, the occurrence of which determines the application of this institution [1, p. 83 et seq.; 2, p. 183; 8, p. 706]. In the Polish Criminal Code of 1997, these are set out in Article 66 [3, p. 195]. Pursuant to it, the court may conditionally discontinue criminal proceedings if the fault and social harmfulness of the offensive act are minor, the circumstances of its commission do not raise any doubts, and the attitude of the offender who has not previously been punished for an intentional offence, his/her characteristics, personal traits and previous conduct justify the assumption that, despite the discontinuance of the proceedings, he/she will abide by the legal order and, in particular, will not commit a crime. A prerequisite for conditional discontinuance of proceedings is the prior non-punishment of the offender for an intentional crime, including not only for a felony, but also for an intentional misdemeanor as well as cases where the court refrained from imposing a penalty for such an offence. A conditional discontinuance of proceedings cannot be applied to an offender who has already been convicted of any intentional offence without expungement of criminal record. It is irrelevant for the punishability of the offender what type and amount of the penalty imposed, whether the offender was sentenced to an additional penalty and whether the sentence was executed. A person who has been pardoned under an individual act of grace or amnesty is also considered to be a sentenced person, unless the act was subject to abo-

lition [4, p. 1050]. The possibility of conditional discontinuance of proceedings is limited to offences punishable by a custodial sentence not exceeding 5 years. Criminal proceedings can only be discontinued if the degree of social harmfulness and fault are minor. When assessing the degree of social harmfulness, both the subjective and the objective side of the act should be taken into account, as referred to in Article 115 §2 of the Criminal Code [5, p. 12; 6, p. 50; 7, p. 50; 9, p. 946 et seq.]. The objective elements include, first of all, the type and nature of the infringed or endangered interest that the crime is affecting, the extent of the damage whether actual or potential, the manner and circumstances of the commission of the act (e.g. the circumstances of a natural disaster), as well as the gravity of the obligations breached by the offender. The subjective elements that make up the social harmfulness of the act are the form of intent (intentional or unintentional), the motivation of the offender, the type of precautionary rules violated and the degree of their violation. For example, an extenuating aspect may be the fact of acting under strong excitement caused by an attack, provocation, while aggravating aspects may include e.g. premeditation or thoroughness in preparation of the crime. The Code also requires that the circumstances of the commission of an act do not raise any doubts, which is due to the undisputed determination of the very fact of commission of the offence. In any event, a comprehensive examination of the circumstances of the case, both regarding the act itself and the offender, is necessary. It is not sufficient for the offender to plead guilty of the offence charged. The accused's admission of guilt is thus not a prerequisite for the application of the institution in question. Also, the consent of the accused is not indicated as a prerequisite for the application of the institution of conditional discontinuance of criminal proceedings, but – pursuant to Article 341 §2 of the Code of Criminal Procedure – if the accused objects the conditional discontinuance, the court refers the case to be tried at the hearing [16, p. 562]. Conditional discontinuance of proceedings is inadmissible if the charge against the offender is not substantiated by the collected evidence, and therefore if the pre-trial proceedings need to be supplemented. Conditional discontinuance of proceedings may not be adjudi-

cated also if there are doubts as to the legal classification of the act. Another prerequisite determining the imposition of the measure in question is positive prospects of the offender. This prerequisite becomes valid only after it has been established that the social harmfulness of the act and the offender's fault are of a minor nature [10, p. 455]. If a major degree of social harmfulness of the act or the fault is found, conditional discontinuance is not admissible, even if the offender's attitude and previous way of life deserve a positive assessment. A positive assessment of the accused's attitude and his/her previous life is of a forecast nature, leading the court to believe that despite the conditional discontinuance of the proceedings, the offender will comply with the legal order, and in particular will not commit a crime again. This prerequisite is not met if the offender has already been convicted of any intentional crime and the sentence has not been expunged.

The basis for a positive criminological forecast should be the attitude of the offender, his/her characteristics, personal traits and previous way of life. When assessing the offender's attitude, attention should be paid in particular to their attitude to the act committed and their behaviour after the crime was committed. The offender's remorse shown in the course of the proceedings should be of significant importance, especially if it took the active form of rectification by the offender of the damage caused by the offence. The prerequisites for conditional discontinuance of proceedings must occur jointly and only then may they constitute the basis for the application of this institution. If the offender does not meet the prerequisites for conditional discontinuance and the positive criminological forecast becomes unfounded, the court may resume criminal proceedings. In such a case, the substitution of conviction and penalty with other measures becomes pointless.

Conditional discontinuance takes place for a probation period, which ranges from 1 to 3 years and runs from the moment the judgement becomes final (Article 67 §1 of the Criminal Code). When conditionally discontinuing criminal proceedings, the court may, during the probation period, subject the offender to the supervision of a probation officer or a trustworthy person, association, institution or social organisation, whose activities include

care for upbringing, prevention of demoralisation or assistance to convicted persons (Article 67 §2 of the Criminal Code). When conditionally discontinuing criminal proceedings, the court imposes upon the offender an obligation to rectify the damage in whole or in part, and if possible also an obligation to make reparation for the personal injury suffered, or adjudicate exemplary damages (*nawiqzka*) instead of these obligations. The court may also impose on the offender the obligations listed in Article 72 §1 points 1 to 3, 5 to 6b, 7a or 7b of the Criminal Code (*i.e. the obligation to inform the probation officer, apologise to the injured party, fulfil the offender's obligation to provide maintenance for another person, refrain from alcohol abuse or use of other substances, undergo drug rehabilitation, undergo therapy, in particular psychotherapy or psycho-education, participate in corrective-education interactions, refrain from contacting the injured or other persons in a specific manner or approaching the injured or other people, vacate the premises occupied together with the injured*). Moreover, the court may adjudicate a cash consideration or a driving ban of up to two years.

The resumption of proceedings which have been conditionally discontinued means a return to the question of criminal liability. The issue of whether the accused is liable for the act covered by the conditional discontinuance is then subject to reconsideration. The Criminal Code provides for the possibility of resuming a conditionally discontinued proceeding, *i.e.* from one to two years after the decision on conditional discontinuance has become final, but no later than 6 months after the end of this period. The legislation provides for optional and mandatory resumption of proceedings (Article 68 of the Criminal Code). It is mandatory to resume proceedings when the offender as committed an intentional offence during the probation period and is legally convicted of that offence [11, p. 299; 12, p. 605; 13, p. 488]. The optional resumption takes place where the offender, during the probation period, grossly violates the legal order, in particular when he/she commits an offence other than those specified in Article 68 §1 of the Penal Code, evades supervision, evades the obligation or a criminal measure, compensatory or forfeiture measure imposed on him/her, or fails to execute the settlement

concluded with the injured [15, p. 123]. The law does not specify what kind of "other" offence it must be. This is about an unintentional offence and those intentional offenses for which no final conviction has yet been issued [13, p. 489]. It must not, however, be an infraction (petty offence), because infractions do not fall into the category of criminal offences. On the other hand, the multitude of infractions may be considered a gross violation of the legal order (Article 68 §3 of the Criminal Code). Another prerequisite for the optional resumption of proceedings is evasion of supervision. Evasion of an obligation must be based on other reasons than those beyond the offender's control (such as illness or an accident). Thus, before deciding to resume a conditionally discontinued proceeding, it is necessary to establish not only the objective fact that the obligation has not been performed, but also the fact that the offender was able to comply with that obligation and, by failing to do so, has shown that he/she evades compliance with it. Another premise for optional proceedings is the conduct of the offender after the decision on conditional discontinuance has been issued and before it be-

comes final. The legislation restricts the circumstances resulting in the resumption of proceedings to a gross violation of the legal order, indicating commission of a crime as an example of such conduct.

The resumption of conditionally discontinued proceedings is both substantive and procedural in nature. The provisions of the Criminal Code specify the prerequisites for resumption, while the Code of Criminal Procedure specifies its mode of procedure and consequences. The institution of the resumption of conditionally discontinued proceedings may be the subject of consideration by the court either ex officio or at the request of an authorised entity (pursuant to Article 549 of the Code of Criminal Procedure, it may be a prosecutor, the injured or a probation officer). According to Article 551 of the Code of Criminal Procedure, where conditionally discontinued proceedings are resumed, the case runs anew in accordance with the general rules. Therefore, the consequence of the application of this institution is the annulment of the decision on conditional discontinuance of criminal proceedings.

#### Conditional discontinuance of proceedings in light of statistical data.

Table 1. Conditional discontinuances of criminal proceedings in statistical perspective (1999 – 2022)\*

Year	Adjudications in total	Convictions	Conditional discontinuances (in absolute numbers and as percentage of total adjudications)	Discontinuances	Acquittals or penalty waivers
1999	273346	220562	25494 (9.3%)	16070	11220
2000	300123	250154	23399 (7.8%)	15130	11440
2001	397044	343471	26944 (6.8%)	14194	12288
2002	427046	368240	30124 (7.1%)	15619	13063
2003	497531	434812	31959 (6.4%)	16383	14377
2004	564196	500799	31713 (5.6%)	17227	14457
2005	577798	515822	30364 (5.3%)	17425	14187
2006	533216	477833	26521 (5.0%)	15401	13461
2007	512579	459010	25854 (5.0%)	14959	12756
2008	470815	417184	25227 (5.4%)	15330	13074
2009	468299	417629	24128 (5.2%)	14193	12349
2010	471558	420810	24913 (5.3%)	14252	11583
2011	478484	424996	28179 (5.9%)	13883	11426
2012	461819	405870	30478 (6.6%)	14242	11229
2013	412199	357817	29867 (7.2%)	10024	8321
2014	357131	307407	27418 (7.7%)	12616	9690
2015	330087	280028	26959 (8.2%)	13446	9654
2016	322204	270644	29966 (9.3%)	12591	9003
2017	300370	252915	28617 (9.5%)	10517	8321
2018	315876	268720	28543 (9.0%)	10406	8209
2019	325 369	277893	28623 (8.8%)	10720	8133
2020	282 856	243673	23928 (8.5%)	9389	5866
2021	324724	279444	25239 (7.8%)	11808	8233
2022	320 915	275 705	25876 (8.1%)	11127	8207

\*Source: B. Gruszczyńska, M. Marczewski, A. Siemaszko, P. Ostaszewski, J. Włodarczyk – Madejska, J. Klimczak, *Atlas przestępczości w Polsce 6*, Warszawa 2021, p. 75. Data for the period 2019 to 2022 are sourced from *Mały Rocznik Statystyczny Polski* for 2021, 2022 and 2023.

As can be seen from the data, conditional discontinuance of criminal proceedings was applied relatively frequently in the analysed period (1999-2022). In 1998 it accounted to as high as 9.3% of the total number of adjudications. However, later years brought a decrease and then a stabilisation of the rate of application of this institution at the level of 5 to 6% (2004-2011). The upward trend started from 2010 and continued until 2017 (9.5%), after which a systematic decrease is noticeable (9% in 2018, 8.8% in 2019, 8.5% in 2020, down to 8.1% in 2022). It is worth noting that after the amendment of the Criminal Code (of 1 July 2015) the scope of applicability of conditional discontinuance of criminal proceedings has been significantly extended (by allowing the application of this institution for the case of an offence punishable by imprisonment not exceeding 5 years, and not 3 years as previously), we note an increase in the popularity of this institution (in 2014 – 7.7%, and in 2016 – 9.3%). However, it is not as great as might have been expected. Perhaps before 1 July 2015, the provision of Article 66 §3 of the Criminal Code, providing for the possibility of conditional discontinuance also to the perpetrator of an offence punishable by a sentence not exceeding 5 years of imprisonment, provided that the injured reconciled with the offender or the offender rectified the damage or when the injured and the offender agreed on the manner of rectification of damage, was frequently applied.

**Concluding remarks.** To sum up, it should be noted that the institution of conditional discontinuance of criminal proceedings is an important tool of criminal policy (as evidenced by the fact that in recent years every 12th adjudication ends with the application of this institution). The current approach to the provision (both in substantive and procedural terms) does not raise any essential doubts.

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## УМОВНЕ ЗАКРИТТЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ У ПОЛЬСЬКОМУ КРИМІНАЛЬНОМУ ПРАВІ

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**Мета:** аналіз умов застосування одного із заходів пробації, наявних у польському кримінальному праві, а саме умовного закриття кримінального провадження. **Методи дослідження:** юридико-догматичний аналіз положень Кримінального та Кримінального-процесуального кодексів, а також аналіз наявних статистичних даних щодо застосування умовного закриття кримінальних проваджень, пов'язаних із загальним обвинувальним вироком, у Польщі за період 1999-2022 років. **Результати:** автор визначає передумови для умовного закриття кримінального провадження (вина та суспільна шкідливість правопорушення є незначними, обставини, за яких було вчинено правопорушення, не викликають сумнівів, правопорушник раніше не був покараний за умисне правопорушення, позитивні кримінологічні перспективи, правопорушення, за яке передбачено покарання у вигляді позбавлення волі, що не перевищує 5 років), а також визначає період іспитового строку, нагляду та зобов'язань правопорушника, а також передумови для поновлення провадження (факультативні та обов'язкові). **Обговорення:** умовне закриття кримінального провадження є важливим інструментом кримінальної політики, і відповідальність за належне використання цього інституту лежить на судових органах.

**Ключові слова:** умовне припинення; кримінальний процес; іспитовий строк; нагляд; відновлення провадження.

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