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On the Scope of Competitiveness of Court Proceedings in the Draft Code of Criminal Procedure

Orientation towards competitiveness of court proceedings is among the most attractive elements of the reform of criminal procedure, which is presently being prepared in Estonia. In accordance with that orientation, the draft Estonian Code of Criminal Procedure (hereinafter: the Draft) provides, in section 15, for the competitiveness of judicial proceedings. In that section of the Draft, we can read that in judicial proceedings, the functions of prosecution, defence counsel and adjudication of a criminal matter will be performed by different parties. Other parts of the Draft also contain several substantial “signs” referring to the characteristics of competitive judicial proceedings. At this point, non-exhaustive reference could be made to *e.g.* cross-examination (section 289); the two-file system (section 265); the criminal defence counsel’s mandatory participation in the procedure (subsection 42 (4)); the dispatch of a copy of the criminal file to the defence counsel (section 221); the parties’ independent right to present lists of the persons whose appearance before the court they apply for (subsection 224 (2) and subsection 225 (1)); the option that court hearings can, in many respects, be “shaped” by the parties’ applications; the judge’s right, but not an obligation, to order collection of further evidence on the judge’s own initiative (subsection 298 (1)).

However, it must be admitted that in reality, the above-listed signs by themselves need not make criminal proceedings competitive. For example, a definite division of functions between different participants in proceeding is, naturally, an elementary condition for the competitiveness of court proceedings. Cross-examination is certainly characteristic of competitive judicial proceedings, although in the so-called inquisitional procedure applied in Germany, cross-examination is also permitted by law (section 239).^{*1} The two-file system provided in the Draft may also be of assistance to ensure competitiveness of judicial proceedings. At the same time, it must be noted that the positive effect of the two-file system will not be fully realised unless the stages of the pre-trial and court

¹ It is true, however, that according to specialist literature, cross-examination is not used in German practice (T. Kleinknecht, K. Meyer, L. Meyer-Grossner. *Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*. 43rd revised ed., Munich: Beck, 1997, section 239, paragraph No. 1; C. Rozin. *Strafverfahrensrecht. Ein Studienbuch*. 22nd ed. Munich: Beck, 1991, section 17, C). It has been stated that Anglo-American cross-examination does not fit in the structure of German criminal procedure, because this would leave the president of the court aside from presiding over the discussion of the matter (C. Roxin, section 42, D III).

proceedings are sufficiently separated from each other. The Draft provides for the principle that the judge of preliminary investigation prepares a completely separate file for court proceedings from some materials of the criminal file prepared as a result of the pre-trial investigation (section 265 of the Draft). According to the Draft, the file prepared for the court proceedings does not contain evidential information collected as a result of the pre-trial investigation. Nevertheless, the separation of the stages of the pre-trial and court proceedings will be relatively imaginary if results of the pre-trial procedure can be disclosed very easily during the court hearing.

Since the preparation of the new draft Estonian Code of Criminal Procedure is said to be based on the Italian model of criminal procedure², it must be mentioned, as an aside, that according to specialist literature, a strict separation of the stages of preliminary investigation and the main proceedings was, for the Italian legislator of the reform, the central point of the new law of criminal procedure. Moreover, practical importance is statedly attached to the requirement that the court file of the main proceedings should contain substantially less information than the prosecution's file.³ The preliminary investigation and the main proceedings have been separated with such a strict line in order to prevent the direct use of the prosecution's investigation results in making the judgement.⁴ Apparently, the creation of the new Estonian criminal procedure should also be aimed, to a considerable extent, at the requirement that the results of the pre-trial investigation, and, in particular, testimonies given in the course thereof, should not be disclosed too easily and not be used subsequently in making the judgement.

As regards the competitiveness of criminal proceedings, the text of the Draft should, *inter alia*, be read with a view to such substantial fulcra which could be characterised by the general keywords of "contradictoriness", "right of confrontation" and "equal opportunities of the parties".

Since the Draft provides for only the competitiveness of judicial proceedings, particular attention should be paid to how much and how the court hearings and the judgement can be influenced by the results of the pre-trial investigation, or, in other words, whether and to what extent the stages of the pre-trial and court proceedings are separated from each other. The less those stages are separated, the more difficult it will be to achieve judicial proceedings with an optimally balanced competitiveness based on equal opportunities of the parties.

In the case of the inquisitional model of criminal procedure, which is presently applicable in Estonia, results of the pre-trial investigation have a very strong influence on the court hearing and the judgement. This becomes particularly evident through those provisions of the applicable law that permit the disclosure of evidence collected during the pre-trial investigation to quite a large extent. In that respect, it is, in many cases, permitted to disclose testimonies given by witnesses and victims during the pre-trial proceedings (sections 246 and 247 of the Code of Criminal Procedure) and, hence, to turn such testimonies into evidence without the presence of the defence counsel, *i.e.* without examination by the defence counsel. As, in the case of the procedure presently applicable in Estonia, the accused cannot actively participate until the stage of the court proceedings, the active role of the accused in examining the evidence is, in many cases, limited to participation in the evaluation of pre-trial evidence in the court proceedings, either personally or through the defence counsel. One of the advantages of the future Estonian criminal procedure could be the fact that, in comparison with the present situation, the accused will have a much greater say also in the collection of evidence. This means that at least in the case of testimonies by an adverse witness, which is regarded as collection of evidence, the accused will be provided with the opportunity to be, at least once during the proceedings, confronted with the adverse witness, *i.e.* to examine or have examined the prosecution's witness. Such option would also be a precondition for the realisation of equal opportunities of the parties in criminal proceedings. At the same time, the opportunity of the accused to be confronted with an adverse witness could be regarded as a substantial element in establishing the truth.

The following paragraphs take a closer look at some provisions of the Draft which, besides other provisions, will have a serious influence on the actual competitiveness of judicial proceedings in the future.

² See P. Pikamäe. Itaalia kriminaalmenetluse mudel – võimalik lähtepunkt Eesti kriminaalmenetluse reformiks (Italian Model of Criminal Procedure — a Possible Model for the Reform of Criminal Procedure in Estonia). – *Juridica*, 1999, No. 2, p. 86 (in Estonian).

³ See E. Amodio. Das Modell des Anklageprozesses im neuen italienischen Strafverfahrgesetzbuch – *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1990, 102, Vol. 1, p. 189.

⁴ *Ibid.*, pp. 179–180.

1. Disclosure of pre-trial testimonies of witnesses at cross-examination

Subsection 290 (1) of the Draft provides that in order to verify the reliability of the testimonies of a witness, the court may, at the request of a participant in proceeding, order the disclosure of a testimony given by a witness in the pre-trial investigation if the testimony is in contradiction with a testimony given at a cross-examination.

Here, the principal issue lies in the question of which evidential importance will be borne by testimonies disclosed in such manner. Will those disclosed testimonies have an equal evidential importance in comparison with testimonies given in a court session?

This question arises from the clause “to verify the reliability”, which is present in subsection 290 (1) of the Draft. That clause directs attention to the objectives which may serve as grounds for the disclosure of a testimony given by a witness in the pre-trial investigation. However, there is the problem that witness’ pre-trial testimonies disclosed before the court for the purpose of verification of their reliability, because of such testimonies being in contradiction with subsequent testimonies given in a court session (cross-examination), can principally be provided with a different procedural meaning under the law.

There is an option that such testimonies disclosed in a court session could be statutorily accepted as an evidential basis for, essentially, making the judgement (as in the event of disclosure of testimonies given by witnesses in the pre-trial investigations under subsection 246 (1) 1) of the presently applicable Code of Criminal Procedure).

Another option would be to provide the disclosed testimonies with only such meaning that reference thereto would serve as grounds for contesting the truthfulness of the content of testimonies given by a witness in a court session (cross-examination) while those disclosed testimonies, together with the substantial information contained in those testimonies, could not be used as evidence in making the judgement. That second option could be rather topical particularly in the case of a procedural scheme aimed at maximum observance of the principles of separation of procedural stages and immediacy of court hearings and at preventing substantial use of pre-trial results in making the judgement.

Regrettably, the Draft does not contain any provisions with a more detailed explanation of whether and how those testimonies given in the pre-trial investigation and disclosed before the court can be used as evidence.

By the way, *e.g.* the text of the new Italian Code of Criminal Procedure contained the principle that pre-trial testimonies (explanations) used as a basis of a “reproach” about the contradictoriness of testimonies cannot be used as evidence even if they are read aloud by a party. At the same time, the Italian Code of Criminal Procedure also provided that such explanations may nevertheless be evaluated by the court in order to verify the reliability of the person under examination (article 500 (3) *c.p.p.*⁵).

Principally, in the Italian criminal procedure, those so-called reproachable testimonies were to serve not as evidence but, rather, as an element of evaluation of evidence and, thus, an aid to decide about the reliability of testimonies given by a witness in the court session. The only exception concerned explanations collected by investigation authorities during searches or at the offence scene immediately after the offence. Such explanations could have served as a basis of reproach before the court and, hence, acquired an evidential value (*ratio legis*: an increased believability of testimonies in those circumstances), and the respective investigation material would have become a part of the judge’s file (article 500 (4) *c.p.p.*).⁶

At this point, it is also important to note that by Judgement No. 255/92 of the Italian Court of Constitutional Review, the provision (article 500 III *c.p.p.*) whereunder testimonies (explanations) used as grounds for reproach cannot serve as evidence was declared unconstitutional. Allegedly, that Judgement of the Court of Constitutional Review definitively repealed the separation of procedural stages and the principle of contradiction. At the same time, it must be stressed once more that

⁵ *c.p.p.* = *Codice di procedura penale*. See *Codice di procedura penale, con leggi complementari; Italienische Strafprozessordnung mit Nebengesetzen*. Zweisprachige Ausgabe. Übersetzer und Herausgeber: M. W. Bauer, B. König, J. Kreuzer, R. Riz, H. Zanon. Bozen: Verlagsanstalt Athesia, 1991.

⁶ A. Honert. Der italienische Strafprozess: die Fortentwicklung einer Reform. – *Zeitschrift für die gesamte Strafrechtswissenschaft* 106 (1994), H. 2, S. 435.

separation of procedural stages was, for the Italian legislator of the reform, the central point of the new law^{*7} and article 500 *c.p.p.* was one of the key norms of the procedural reform.^{*8}

Hence, after the amendment that followed the judgement of the Italian Court of Constitutional Review, the following picture prevailed: if a witness' testimonies before the court deviated from the explanations provided during the investigation, the prosecution would be able to use this as a basis for reproach. As a result of the reproach, the investigation results would acquire a full evidential value.^{*9}

Returning to the provisions of the draft Estonian Code of Criminal Procedure, it must be admitted that according to the present wording of the Draft, testimonies given by a witness during the pre-trial investigation and disclosed in a court session can be freely used as a basis of the judgement, equivalently to testimonies given before the court. The clause "verification of reliability" does not specify the evidential importance of disclosed testimonies. Such regulation may be conducive to a situation in which a cross-examination is conducted but, if it does not develop towards a result desired by one of the parties, pre-trial testimonies can be disclosed in the event of a contradiction between testimonies, and those testimonies can be used as an evidential basis in making the judgement. That kind of regulation creates conditions which are very favourable for a substantial use of pre-trial results in judgements. This, however, means that in reality, the separation of procedural stages is, in many respects, imaginary. As the principle of separation of procedural stages is a very important criterion with respect to competitiveness of criminal proceedings, consideration could be given to establishing a regulation whereby disclosed testimonies could be evaluated by the court in order to verify the reliability of the person under examination. The judgement could be based not on the content of the disclosed testimonies but, rather, on the examinee's explanations received as a result of a "reproach about contradiction in testimonies". In addition, a disclosed record containing a witness' testimonies should be regarded not as documentary evidence but only as an aid to examination.

2. Disclosure of pre-trial testimonies of witnesses in court (except cross examinations)

2.1. Disclosure upon witness' refusal to testify

In accordance with subsection 292 (1) of the Draft, disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the witness refuses to testify before the court.

In view of that provision, I should like to ask whether the permissibility of disclosure of a witness' testimony should not be differentiated on the basis of whether such refusal is expressed by a witness who has the right of refusal to give testimony for personal reasons under section 65 of the Draft or by a witness who does not enjoy such right.

The Draft expressly permits to disclose earlier testimonies of a witness who, under section 65, has no right of refusal to testify but who nevertheless refuses to testify before the court. However, if a witness has given testimonies during the pre-trial investigation and exercises the right of refusal to testify in a court session, there will be a question, with regard to disclosure of earlier testimonies, of to what extent such person is provided with the option to use the immunity of witness, which is principally recognised in the Draft. Naturally, it may be argued that a person could have used the immunity of witness and it was that person's mistake not to use the right of refusal to testify during the pre-trial investigation. One must also agree with the reasoning that a witness testimony once given cannot be undone. At the same time, it must still be admitted that apparently, the disclosure of a witness testimony given by a person who had decided to use the right of refusal to testify before the court does not assist to the realisation of the purpose for which the immunity of witness is established. It seems that the provision of the immunity of witness by law has been motivated by the objective to protect witnesses from such forced situations in which they must tell the truth but have the fear of thereby harming persons close to them or causing harm to themselves.

⁷ *Ibid.*, p. 436.

⁸ *Ibid.*, p. 435.

⁹ *Ibid.*, p. 436.

By providing for the immunity of witness in the law, the legislator can essentially express a position whereby the ascertainment of material circumstances in criminal proceedings need not be conducted at any price and by any means. These are situations in which the witness' personal interest in not testifying against their next of kin should be provided with a certain preferential status with regard to the public interest in the ascertainment of material circumstances in criminal proceedings. In light of the above, it would be rather strange if, on the one hand, a witness is protected by means of the immunity of witness provided for in the law but, on the other hand, there are attempts to restrict this right of the witness through disclosure of his or her prior testimonies in a court session, if possible. In such attempts, too little attention is paid to the aspect of protecting the relations between witnesses and persons close to them, and the interest in the ascertainment of material circumstances is pursued in criminal proceedings at the price of possibly damaging the relations between the witness and persons close to him or her.

Here it should be noted that, for example, in Austria or Germany, the ascertainment of material circumstances in criminal proceedings does not have to occur at the price of sacrificing the immunity of a witness. Hence, in Austria, a witness may refuse to testify at any of the successive questionings. Even if the witness uses the right of refusal to testify only in the main proceedings, the minutes of the earlier questionings of that witness may not be disclosed.^{*10} Likewise, in Germany, the testimonies of a witness who was questioned prior to the main proceedings and who used the right of refusal to testify only in the main proceedings may not be disclosed (section 252 *StPO*).

It seems that the development of the future Estonian criminal procedure should follow the principle, applied in the criminal procedures of Germany and Austria, that the minutes of the prior questionings of a witness may not be disclosed if the witness exercises the right of refusal to testify as late as in the court proceedings. The development should be based on the conception that ascertainment of material circumstances in criminal proceedings should not be conducted on the account of the principle of the immunity of witness.

There is another and maybe even more important reason why the future Estonian regulation of criminal procedure should contain a clause whereunder the minutes of the earlier questionings of a witness are not disclosed and not used in making the judgement if the witness exercises the right of refusal to testify as late as in the court proceedings. Namely, in the event of disclosure of the minutes of earlier questionings of a witness, it is not possible to guarantee the accused's right to examine a witness of the prosecution or have such witness examined. It should be kept in mind that according to article 6.3 (d) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to examine, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The judgement of the European Court of Human Rights in *Unterpertinger v. Austria* (1986) should arouse care with regard to disclosure and use of earlier testimonies if the accused or the defence were practically unable to examine the questioned person.

2.2. Disclosure upon non-appearance to court session

In accordance with subsection 292 (2) of the Draft, disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the witness has failed to appear before the court with no substantial reason therefor.

In view of the above-mentioned provision, it should first be observed that, whether the reason for non-appearance is substantial or not, the accused will be deprived of the option of being confronted with a so-called adverse witness in the event of disclosure of the pre-trial testimony of the witness. More specifically, the counsel of the accused will not be able to examine the adverse witness. Therefore it is difficult to speak about ensuring balanced equal opportunities between the prosecutor and the defence counsel in criminal proceedings.

Naturally, the regulation of the question regarding the disclosure of pre-trial testimonies of witnesses must also be considerably based on the objective of achieving efficiency in criminal proceedings, but not too much on the account of the defence opportunities. It is understood that the law should allow disclosure of pre-trial testimonies of witnesses before the court in particularly exceptional cases — for example, if a witness cannot be questioned in a court session because of his or her death or a serious long-term illness. However, there is the question of what should be understood as “a substantial reason” referred to in subsection 292 (2) of the Draft.

¹⁰ W. Platzgummer. Grundzüge des österreichischen Strafverfahrens. 2., Neubearb. Aufl. Vienna, New York: Springer, 1989, S. 80.

While looking for an answer to that question from the Draft, it cannot be left unnoticed that substantial reasons for non-appearance of a summoned person are listed in subsection 170 (2) of the Draft. However, there is a further question of who is “a summoned person” for the purposes of that provision. Does this also include witnesses? A *prima facie* answer would be negative. This section 170 is included in Division III, which is entitled “Summons of Participants in Proceeding”. However, in accordance with subsection 17 (2) of the Draft, participants in proceeding include the suspect and the accused and the defence counsel, and the victim and a defendant. A witness is not, and maybe should not be, a participant in proceeding. Thus, the provisions of Division III should not concern witnesses. A discussion of how a witness is summoned according to the Draft would go beyond the subject matter of this article. Therefore, as regards the above question, it could just be mentioned that, also, in the part concerning judicial preliminary proceedings, only the procedures for summoning the prosecutor and participants in proceeding are provided (section 266). Hence, although section 170 seems, *prima facie*, to extend only to participants in proceeding, it can still be recognised that section 136, which regulates compelled attendance, contains a reference to the substantial reasons specified in section 170. However, as compelled attendance may also be applied to witnesses in accordance with a provision in subsection 136 (1), it can be deduced that substantial reasons provided in subsection 170 (2) also extend to witnesses.

It thus seems that as regards a witness’ non-appearance before the court with a substantial reason, it is important, in a certain sense, to pay attention to the fact that substantial reasons for non-appearance of a summoned person are, according to subsection 170 (2) of the Draft, as follows:

- (1) absence which is not related to absconding of the criminal proceedings;
- (2) belated receipt of the summons;
- (3) illness of the person or serious illness of a person close to him or her;
- (4) other circumstances considered as substantial by a preliminary investigator, the prosecution or the court.

At the same time it must be admitted that the above-listed reasons for non-appearance could be substantial in the sense that in the event of non-appearance for those reasons, compelling means should not be applied to the summoned person, or the summoned person should not be punished for non-appearance. However, this list of substantial reasons should not be a basis for deciding about the permissibility of disclosing pre-trial testimonies.

The first two reasons, *i.e.* “absence not related to absconding of the criminal proceedings” and “belated receipt of the summons”, are particularly questionable. In practice, those reasons can occur very often but they can also be “induced” relatively easily for one purpose or another. Thus, the permissibility of disclosure on those conditions can, in practice, lead to a situation in which the disclosure of pre-trial testimonies is not an exception but, rather, a rule. In that event, little is left of the competitiveness of judicial proceedings in reality. On the basis of the objective that judicial proceedings should provide competition based on balanced equal opportunities of the parties, also “in essence”, the disclosure of witness’ pre-trial testimonies should only be allowed in the event of death or long-term illness of the witness or in the case of another unremovable impediment. Additionally, disclosure of pre-trial testimonies could be permissible if the defence counsel and the accused agree thereto. In other cases, however, the accused should be provided with the option to be confronted to adverse witnesses, allowing the defence counsel to examine the witness.

The law should provide, as one basis for disclosure of witness’ testimonies, for the court’s option to disclose, at a party’s request, testimonies given by a witness in the pre-trial proceedings if the witness fails to appear before the court and if the materiality of the witness’ testimonies in the criminal proceedings does not correspond to the time used to allow the examination of the witness before the court or to the difficulties related to getting the witness before the court.

This would mean that a mere fact of absence would be insufficient to serve as grounds for disclosure of witness’ testimonies, provided that the absence is not related to absconding from the criminal proceedings. Moreover, disclosure should then not be based merely on the fact that the witness’ non-appearance before the court was caused by a belated receipt of the summons or only the fact that the witness fell ill or a person close to the witness was seriously ill. Those reasons for a witness’ non-appearance should be of weight as grounds for disclosing the witness’ testimonies only on the condition that the judge has regarded the importance of those testimonies as not corresponding to the time used to allow the examination of the witness before the court or to the difficulties related to getting the witness before the court.

In that respect, the disclosure of the pre-trial testimonies of the prosecution’s main witness for the reason of the witness’ non-appearance should be avoided to the maximum possible extent. The concept “prosecution’s main witness” means, for that purpose, a witness whose testimonies can be a major basis for a convicting judgement. Hence, if the question of disclosing the testimony of a main

witness arises in connection with the main witness' non-appearance to a court session with a substantial reason, the disclosure of the testimonies could nevertheless be considered only in the event of an unremovable impediment (death of the witness, long-term illness of the witness, *etc.*). In other cases, the defence counsel should have the opportunity of examining the prosecution's main witness even if the court session must be postponed for that purpose.

Naturally, as a counter-argument to the above position, reference may be made to the danger that on those conditions, court hearings may become burdensomely long, and the efficiency of court proceedings can be prejudiced. Indeed, that danger exists and cannot be completely precluded.

2.3. Disclosure if whereabouts of witness could not be determined

Subsection 292 (3) of the Draft provides that disclosure of a testimony given by a witness in the pre-trial investigation may be ordered by the court at a party's request if the whereabouts of the witness could not be determined.

With that regard, it can be noted with satisfaction that this provision is principally different from the formulation in subsection 246 (1) 3) of the presently applicable Code of Criminal Procedure, whereunder testimonies given by a witness in the pre-trial investigation may be disclosed if the whereabouts of the witness is unknown. These are two conditions of disclosure, quite different in their undertones. The condition of the Draft that "if the whereabouts of the witness could not be determined" apparently presumes certain active efforts to determine the whereabouts of the witness. However, the condition "if the whereabouts of the witness is unknown" in the presently applicable Code of Criminal Procedure can be understood so that not knowing the whereabouts of the witness will be sufficient, irrespective of whether anything is done to determine the witness' whereabouts. Thus, the application of the basis of the disclosure provided for in subsection 292 3) of the Draft precludes that the efforts made to determine the whereabouts of the witness be established.

Hence it can be said that this basis for disclosure has been formulated well in the Draft.

3. Participation of defence counsel in court proceedings

We can talk about the actual competitiveness of judicial proceedings only if the defence counsel's participation in the court proceedings is mandatory, among other requirements. The defence counsel's mandatory participation in the court proceedings is a very important precondition for providing the accused with opportunities equal to those of the prosecutor.

3.1. Commencement of defence counsel's mandatory participation

In accordance with subsection 42 (4) of the Draft, the defence counsel's participation in the court proceedings is mandatory.

However, implementation of this provision may involve the question of when the defence counsel's mandatory participation specifically commences. On the one hand, the wording of subsection 42 (4) could give rise to a deduction that the defence counsel's mandatory participation commences with the court proceedings, but on the other hand, according to the purpose of some other provisions of the Draft, the obligation of the defence counsel's participation should begin considerably earlier. Thus, the obligation of the defence counsel's participation could commence from the moment when the prosecution declares the conclusion of the pre-trial proceedings (subsection 220 (1) and (3) of

the Draft)¹ — more specifically, from the moment when a copy of the criminal file must be sent to the defence counsel (subsection 220 (3)). The defence counsel's mandatory participation should, nevertheless, begin no later than at the moment when the prosecution is ready to provide the defence counsel with the statement of charges together with a list of persons whose appearance before the court is requested by the prosecution. The need for the defence counsel's mandatory participation from that moment arises from section 225 of the Draft, whereunder the defence counsel presents, within three days after receiving a copy of charges, the court with a list of those persons whose appearance before the court is requested by the defence counsel. However, the defence counsel can be presented with a copy of charges only after a defence counsel has been appointed, and it is only thereafter when the defence counsel can present the court and the prosecution with a list of persons whose appearance before the court is requested by the defence counsel.

In order to avoid ambiguity, the Draft could be somewhat more specific about when the defence counsel's mandatory participation in criminal proceedings begins in connection with the counsel's mandatory participation in judicial proceedings.

3.2. Continuation of court hearing upon non-appearance of defence counsel

Subsection 271 (2) of the Draft provides that if the defence counsel does not appear to a court session and the accused does not apply for the continuation of the session, the session will be postponed.

In view of that provision, it should be asked what happens if the accused applies for the continuation of the session. In that event, the court session must go on without the defence counsel. That provision is apparently a derogation from the requirement of the defence counsel's mandatory participation, and the possibility of such derogation can also be deduced from that part of subsection 42 (4) which reads: ".../ unless otherwise provided in this Code."

Naturally, at this point it may be further asked how the competitiveness of a court proceeding can be ensured without the participation of the defence counsel. Will a cross-examination be conducted and how will that be done? However, it is more important than those and several other questions to direct attention to the fact that if the defence counsel does not appear before a court session and the accused, nevertheless, applies for the continuation of the session, this may essentially constitute a so-called compelled waiver of criminal defence counsel. In that event, such waiver may, with great probability, be caused only by the reason that the defence counsel has not appeared before the court session while the accused wishes, for some reason, that the proceedings end in a judgement as soon as possible. In reality, this essentially means that the accused is not provided with the opportunity to use the assistance of a defence counsel.

The structure of the inquisitional model of proceedings allows to compensate, to some extent, for the absence of the defence counsel by means of the court's obligation to make active efforts to determine the truth, although even in the inquisitional procedure, the judge's assistance to the accused's defence counsel can prove to be questionable in many cases.² Nonetheless, the judge's assistance in compensation for deficiencies of the accused's defence can be even more questionable in competitive court proceedings, where the judge does not have the obligation to completely, and in all respects, ascertain all material circumstances. This may result in a situation in which the court proceedings are no longer balanced, because, as a rule, an accused is not able to stand against a prosecutor on equal terms. Although, in this respect, the accused's decision that the session be continued without the defence counsel's participation is formally voluntary, we should not forget about the fact that this may essentially mean a compelled waiver of defence counsel while the accused, lacking legal knowledge, may not be able to evaluate the possible actual consequences of his or her decision.

¹ As an aside, it must be admitted that according to the formulation in section 220 of the Draft, the prosecution, after receiving the criminal file, declares the conclusion of the pre-trial proceedings, but the following provisions (sections 222, 223, 224, 225) indicate that the conclusion of the pre-trial proceedings will still continue thereafter. For example, the resolution of parties' applications and the preparation of the statement of charges are conducted within the pre-trial procedure — more specifically, at the conclusion of the pre-trial proceedings. This gives rise to the question of when the pre-trial proceedings are, after all, concluded — either by the declaration of the conclusion thereof or at the actual end of such a conclusion process.

² On this issue, see also M. Sillaots. *Kaitsja võimalikust rollist ja seisundist Eesti tulevases kriminaalmenetluses* (On the Possible Role and Status of Defence Counsel in the future Estonian Criminal Procedure). – *Juridica*, 2000, No. 2, p. 84 (in Estonian).

In that context, decisive importance should be attributed to public interest in the balancedness of court proceedings, and therefore, court sessions should be postponed if the defence counsel fails to appear before the court, regardless of the accused's application for continuation of the court session.

Conclusions

In order to ensure essential competitiveness based on equal opportunities of the parties in court proceedings, the Draft should provide more restrictions with regard to the disclosure of testimonies given by a witness in the pre-trial investigation and to the use of such testimonies in making the judgement. The provisions of the Draft should more extensively cover the accused's right to examine, or have examined, witnesses of the prosecution.

The defence counsel's mandatory participation in court proceedings is a substantial precondition for the competitiveness of the court proceedings.