PROBLEMS OF APPLYING OF THE COURT’S PENAL ORDER’S INSTITUTE IN THE CRIMINAL PROCEDURE LAW OF LITHUANIA

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SUMMARY

The origin as well as the history of the institute of the court’s penal order (hereinafter – penal order) (a form of a simplified criminal process model), the influence of the European criminal procedure laws to the criminal code of procedure of the Republic of Lithuania (hereinafter – the CCP) is briefly presented within this introduction.

In order to test whether there exist any problems to the application of the penal order, a concept of issuing the penal order is presented and three problematic legal regulations identified in the research. Furthermore, proper legal regulations are proposed altering or supplementing some provisions of the CCP of Lithuania. The structure of the article includes two chapters, three paragraphs and conclusions.

In the first chapter (the analysis of the concept of the penal order’s issuing process), the penal order’s issuing process, which is similar in whole jurisdictions is briefly presented highlighting it’s essential features.

The second chapter consists of three paragraphs that provide the identification of the problematic legal regulations and their examinations. It is concluded that some legal regulations cause problems of applying the institute of the penal order. Accordingly, three conclusions were drawn:

Firstly, the implied legal regulation supplementing and extending legal regulation (the Art. 418(3)(4), 420(1(1)) of the CCP) causes the first problem to the application of the penal order. It is assumed that in order to ensure that a judge would not accept the in the CCP’s Art. 420(1(1)) foreseen decision (to issue a penal order) until victim’s complaint’s examination’s outcomes’ disclosing, and to solve the problem this way, a point of view should be supported

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that there shall be explicitly expressed in the Art. 418 of the CCP that a prosecutor is entitled to apply to a court for the issuing of a penal order when the term of the victim’s title to file a complaint about completing the process by a penal order expires and the prosecutor receives both datas about whether the complaint is filed or not and gets a copy of a pre-trial judge’s decision;

Secondly, the application of the implied Art. 234(2) of the CCP is problematic because the ability of application of the Art. 420(1), 234(2), and not the implicit Art. 234(2) of the CCP exists. This misinterpretation causes a second problem. For this reason, it is considered that a standpoint should be supported that the Art. 420(1) shall be supplemented with the 4th decision: “to return the case to the prosecutor in case of substantial violations of the CCP.”. In this way: 1) insufficient clear case’s circumstances that might be removed only in a hearing would be transferred in an order of the Art. 420(1(2)) and removed in the hearing; 2) substantial violations of the CCP would be removed by returning a case to a prosecutor according to the Art. 420(1(4));

Thirdly, an approach should be held that because of the absence of the provision in the Art. 422(1) of the CCP that would engage the accused to take (pick up) a penal order on his / her own motion (in the court’s office, in an e-mail, to accept a penal order at house and so on) and because of the requirement that a accused shall sign that he / she was served by a penal order, the accused has an opportunity to abscond so that he / she would not be served by the penal order. It reveals a third problem of application of the penal order’s institute, i.e. a problem of penal order’s service.

KEYWORDS
Legal regulation, implied, explicit, penal order, criminal order, court’s order

INTRODUCTION

A simplified criminal procedure model as an alternative2 to a common (general) criminal procedure model was introduced in the various European countries so that their legislators and entities that apply legal norms – law appliers3 (for instance, courts)4 – would be able to regulate

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2 The criminal procedure’s law of the Estonia, trans. Robertas Ročys (2003 02 12, Nr. RT I 2003, 27, 166), the Art. 233(1).
evolving social and economic relations which acquire various forms, to solve problems of huge workload for law appliers, public costs’ spending, increasing quantity of crimes, to refuse the general model of criminal procedure “... when an offense is sufficiently revealed, deviations from investigating materials are unexpected, and a judge is able to form his / her belief on the basis of pre-trial investigation materials and a statement [to complete the process by the way of the penal order issuing process]” and, at the same time, to improve a suspect’s position by reducing his / her costs, accelerating process, to ensure an opportunity for him to not participate in a public, psychologically disconcerting court’s hearing. “The simplified criminal procedure model – a procedure in which a preliminary investigation ... is carried out in a very short period of time, separate steps or stages of the process are refused or they are substantially shortened, streamlined procedure for individual process steps are carried out.”. There are several types of the simplified model of criminal procedure. One of them - a summary process called a penal order’s (criminal order’s) institute, formed in 1877, in the law of the German Empire, now in Germany has become the most popular type of the simplified

criminal procedure because of its broad scope; it’s popularity prove both a large amount of cases resolved by the way of this procedural form, and markable quantity of questions about this institute in examinations of the various legal professions (especially prosecutors). The institute of penal order spread into other European countries. In terms of the development of the institute of penal order, it should be noted that some European countries (such as Italy, Spain, Poland, Hungary) adopted not an identical form like a Germany’s one, but consolidated its strains. Comparing different countries in respect of the penal order’s institute’s regulation, there should be noted that making’s process of the penal order in some respects are different. For example, Estonia regulated what should be included into an introduction of a penal order, into it’s main parts and into it’s conclusions while other countries did not, differ entities which may submit a request to hold a court’s hearing, for example, unlike Lithuania, Estonia enables a possibility for a defense counsel to provide it. At the same time, it is worth to say that in the inter-war Lithuania the penal order’s institute was regulated by the Art. 180 (4) – 180-1 (14) of the Criminal Procedure Act, not practiced in the Soviet period, and after the restoration of Lithuanian independence, the penal order’s institute was introduced in the CCP of 14 March of 2002, and, at this time, is governed by the Code of Criminal Procedure, the Art. 29, 41, the I section of the XXXI chapter.

Despite the adoption of valuable experience of foreign European countries, inter-war Lithuania, it is doubtful whether the regulated penal order’s issuing’s process causes any penal order’s institute’s applying problems. This is a problem of the thema. According to the current legal regulation, it is impossible to give definite answers to questions what order of penal order’s service on an accused must be followed when the accused absconds, or why a right to

16 Supra note 6: „Verfolgungsdefizite und polizeiliche Ahndungskompetenzen“, p. 556.
17 Supra note 10: „Das Strafbefehlsverfahren in der mündlichen Prüfung des Assessorexamens“, p. 281-282.
19 BLANKENBURG, ERHARD, “Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany”, vol. 46, American Journal of Comparative Law, 1998, p. 27.
20 Supra note 5: Möglichkeiten der beschleunigung und vereinfachung des verfahrens im deutschen strafprozessrecht, p. 226.
21 Supra note 2: The criminal procedure’s law of the Estonia, Art. 254.
25 Del Lietuvos Respublikos baudžiamajo proceso kodekso 425 straipsnio 2 dalies (2002 m. kovo 14 d. redakcija) atitikties Lietuvos Respublikos Konstitucijai, Decision of the Constitutional Court of the Republic of Lithuania (2008 01 24, Nr. 45/06), 9 p.
26 Supra note 22: The CCP of the Lithuania.
submit a demand of trying a case in a court according to the general rules of the criminal procedure for a prosecutor is denied etc. There is assumed that the application of the penal order’s institute becomes problematic.

The subject is relevant because of reasonable suspicion that the CCP involves problematic legal regulations and these mistakes have not been rectified from the 14 of March of 2002. Besides, although the Supreme Court of Lithuania forms case-law, it plays no role in the penal order’s making process because a penal order is not appealed to that court. For this reason, the Supreme Court of Lithuania does not address the cassation court’s decisions concerned with penal order’s issues, so it is incompetent to unify different penal order’s applying practices of courts’. All those lacks are able to be removed by supplementing / altering the CCP.

The problems of the penal order’s institute in the Lithuanian criminal procedure law were examined in the legal doctrine by dr. R. Jurgaitis, doc. dr. R. Ažubalytė et al., doc. dr. Petras Ancelis, N. Mikalauskiénė, D. Perkumienė, V. Laukaitytė, V. Vabuolas, R. Ročys, however, there were examined either other aspects or some aspects are less detailed in comparance with this paper.

Structure of this article consists of 2 divisions, the 2nd division’s 3 subdivisions which aim to study problematic legal regulations, conclusions.

**A CONCEPT OF THE PENAL ORDER’S ISSUING PROCESS**

A concept of the penal order’s issuing process is revealed in order to find out what legal relations are governed by penal order’s making adjustments. Only then there will be able to identify problematic legal norms/ their groups.

The penal order’s issuing’s process has specific forms of the simplified criminal process model in mostly jurisdictions. In particular, the most important features must be revealed. In most states a prosecutor, on the basis of data collected at investigation stage, decides that there...
is no need for a trial (a suspect confesses, facts of a case are clear). If the statutory basis (for example, the Art. 418(1) of the CCP) let the process complete by the way of the penal order (in comparance with Germany, the StPO provides broader scope of basis, even imprisonment’s punishment), the prosecutor notifies the suspect about an opportunity to apply to the court for the completion the process by a penal order. If the suspect agrees, the prosecutor’s initiative shall be drawn up in a statement to complete the process by a penal order (hereinafter – statement). The statement and the pre-trial materials are forwarded to a court. The court makes one of the decisions (for instance, determined in the Art. 420(1)) in writing. For this reason, the principles of orallity, direct trying of a case, publicity do not play hier a role. The judge has a right to prepare a penal order based solely upon the pre-trial materials and the prosecutor’s statement, so, without typing additional information about the defendant’s guilt, if, according to the evidence gathered in the case, the situation is clear, there are sufficient evidence to prove defendant’s guilt, there are no essential violations of the CCP.

Having determined the legal relationships under the penal order’s issuing process, there is identified that this criminal process’es model involves the features of the simplified criminal process model – confession of a suspect, court’s opportunities to take a quick final act, for the suspect to choose whether to pursue it or to return to the general model of the criminal process, separate divisions of the CCP regulate it.

Further, it is appropriate to identify potentially problematic legal relations and related legal regulations determined in the XXXI division’s I chapter of the CCP.

**PROBLEMATIC LEGAL REGULATIONS OF THE XXXI DIVISION’S I CHAPTER OF THE CCP**

**The prosecutor’s right to apply to a court for issuing of a penal order**

The research of the problematic legal regulations is started with an analysis of a first group of the CCP’s rules associated with the moment’s under which a prosecutor acquires a title to send investigation’s materials and a statement to complete the process by the penal order, study. First of all, actual legal norms are identified, secondly, a question if they cause a problem of penal order’s applying is examined, thirdly, if so, a solution is searched.

Firstly, the problematic provisions of the CCP under which a prosecutor transmits a statement to complete the process by a penal order to a court and a judge issues the penal order are enumerated:
“A title to issue a penal order has a judge upon the prosecutor’s statement on the completion of the process … by the penal order”.33

“A judge who receives the prosecutor’s statement on the completion of the process by the penal order and investigation materials shall accept within seven days … a decision”.34 A decision, _inter alia_, could be the decision on issuing of the penal order.35

Secondly, the provisions of the CCP concerning a victim’s right to complain about the completion of the criminal proceedings by the penal order and an order of the complaint’s proceedings should be mentioned:

“The prosecutor who has taken the decision to complete the process by … the penal order shall notify the victim. The victim might appeal against the prosecutor’s decision to an investigating judge.”36

According to the Art. 418(4), 64(2) of the CCP,37 the investigating (pre-trial) judge must examine the complaint and take a decision (lt. nutarimą or nutartį) within ten days from the receipt of the complaint and the materials.

Careful analysis of these CCP’s provisions shows that if the victim’s complaint is upheld the process does not complete by the penal order because the investigating judge would find it to be illegal, unjust. However, if the prosecutor will send investigating materials and the statement of the completion of the process by the penal order’s issuing process to the court either until receipt of data about the complaint’s submission or until this court examines a victim’s complaint to that (the CCP does not forbid to send the statement), the penal order might be issued earlier than the victim’s complaint would be received. The CCP eliminates the possibility for the judge to abolish (to prevent a coming into effect of the penal order) the his/her issued penal order. No one (neither the investigating judge, a higher court nor the judge) might not abolish it and if the penal order would be served on the accused, it would take effect. Typically, only due to the defendant’s initiative the penal order does not acquire legal force. The penal order does not acquire legal force if the defendant files a demand to hold a trial.38

As a practical illustration of the problem delivered a case as a judge abolished illegally his own issued penal order after there was emerged that the victim’s complaint was satisfied:

“The case materials show that the prosecutor’s statement on the completion of the process by the penal order was received on 28 of June 2013 …

_During the statutory term of 7 days, 5 of July 2013 … was issued the penal order._

_8 of July 2013, after the adoption of the penal order, the court received BUAB (sensitive data) administrator’s complaint to the prosecutor’s decision … This complaint was analysed by the investigating judge on 10 of July 2013 and, despite the fact that 5 of July 2013 the penal_
order has been issued, the investigating judge decided to uphold the complaint and to abolish the prosecutor’s decision.

In light of latter decision of the investigating judge, the court decides to hold the penal order invalid on the 11 of July 2013.

This court’s decision is manifestly contrary to the law because the CCP does not foresee such a possible decision.”

Unfortunately, the court does not specify the manner in which the penal order does not acquire legal force due to the satisfying of the victim’s complaint.

Thus, it is possible to interpret the above-mentioned legal regulations (the CCP’s provisions) so as to permitting the prosecutor to send the investigating materials and the statement to the court without knowledge of the data of victim’s complaint’s receipt in the court or the complaint’s examination’s outcomes. This possibility causes a problem of penal order’s application.

On the other hand, the prohibition for the prosecutor to send the pre-trial materials and the statement before he / she knows if the victim submitted the complaint or the results of complaint’s examination is not expressis verbis expressed in the CCP. It might be said that such an option has been fitted in the CCP as a solution of the problem. Consequently, it is assumed that the implied legal regulation complementing and extending legal regulation has been issued. However, as it is seen from the case-law and the CCP, such regulatory setting enables to misinterpret the legal regulation.

A view that a prosecutor’s title to apply to a court for issuing a penal order exclusively after a deadline of possibility to implement a victim’s right to appeal a prosecutor’s decision of completing process by a penal order and a date of receipt of data about not-receiving the appeal from the court, or, in case of receiving it, upon receipt of a copy of the court’s decision on the

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40 As mentioned in the Decision of Dėl teisės byloje pagal pareiškėjo – Vilniaus miesto 3 apylinkės teismo prašymą ištirti, ar Lietuvos Respublikos Teismų įstatymo 11 straipsnio 3 dalis (2002 m. sausio 24 d. redakciją) neprieštarauja Lietuvos Respublikos Konstitucijos 5 straipsnio 2 daliai, 114 straipsnio 1 dalis, konstituciniam teisinėms valstybės principui, ar Lietuvos Respublikos Valstybės politikų, teisėjų ir valstybės pareigūnų darbo apmokėjimo įstatymas (2000 m. rugpjūčio 29 d. redakcija su velesniais pakeitimais ir papildymais) neprieštarauja Lietuvos Respublikos Konstitucijos 5 straipsniui, 30 straipsnio 1 dalial, 109 straipsnio 2, 3 dalios, 114 straipsnio 1 dalial, konstituciniam teisinėms valstybės principui, taip pat,[...].
victim’s appeal shall *expressis verbis* be supplemented into the Art. 418 (3) of the CCP should be supported.

It should be noted that this issue is discussed in the legal doctrine and there is suggested to follow this view. In contrast, the legal doctrine suggests this following as a recommendation of solving the problem, but it does not acknowledge that the above mentioned implied legal regulation supplementing and extending legal regulation obligates the prosecutor to practice the view now: “The prosecutor, depending on the complaint’s (if the complaint is filed) examination’s results, may either apply to a court or to refuse this plan and continue the process in the normal manner ... the latter option is simpler because it allows to avoid examination of two closely related issues (the complaint’s examination and the statement’s analysis) in the same time in different legal proceedings.” 41 Thus, in case of filing the complaint, the prosecutor could wait (the CCP does not prohibit; the CCP’s implied legal regulation supplementing and extending the explicit legal regulation requires the prosecutor to wait) until the time limits of complaint’s filing and examination come to end, and depending on the results of the examination of the victim’s complaint to choose the form of judicial criminal proceedings.

Such clearly expressed legal framework, in compare with other possible legal frameworks (mentioned below), is considered as the most reasonable because it ensures the proper and timely examination of the victim’s complaint, the prosecutor’s statement, the decision that a judge accepts (i.e. it solves the other’s (first’s) option’s lack) and does not require to wait for the deadline to file the statement if the victim does not complaint about the prosecutor’s decision or files the complaint not at the deadline of complaint’s filing (i.e. solves other’s (second’s option’s) lack). And what could be these other solutions?

Other possible solutions could be sought by shortening or prolonging terms of the Art. 418(4), 64, 420(1).

In the first case, if the terms of victim’s complaint’s filing were shortened from the current 7 days to 3 (by the way, by the latest amendment of the Art. 418(4) of the CCP, the term has been prolonged from 3 to 7 days42) and of the complaint’s examination (for instance, from the current 10 days (Art. 64(2) to 4) in order to accommodate the in the Art. 420(1) enshrined term of 7 days for the penal order’s issuing in line with regulating *expressis verbis* a judge’s duty to examine the statement only after the expire date of the victim’s complaint filing or it’s examination.

It is worth to note that, in this case, the judge must receive information from a pre-trial judge about receipt of the victim’s complaint and examination’s outcomes so that he / she could accept a decision considering the statement (i.e. if there turned out that the victim’s complaint is

42 The law of the supplementing of the CCP by the Art. 3(1) and amendment and supplementing of the Art. 18, 21, 38, 55, 64, 78, 81, 102, 112, 121, 125, 134, 135, 136, 137, 142, 151, 157, 168, 170, 176, 178, 181, 342, 348, 389, 418, 440 (2010 09 21, XI-1014), the Art. 28.
upheld, the judge must return the investigation materials and the statement to the prosecutor, and, on the contrary, to accept any decision referred in the Art. 420(1)). If the judge and the pre-trial judge are not the same person in a case, the pre-trial judge must inform the judge about the outcomes of the victim’s complaint’s analysis: “... between ... the pre-trial judge and the judge ... must be co-ordination of actions. Given the fact that both judges should generally be judges in the same ... courts, the coordination’s questions should not be very difficult. Depending on how the court’s administration resolved the investigating judge’s appointment … it is possible that one person deals with the victim’s complaint and the statement.”

Moreover, the prosecutor could also promote such co-ordination: “the prosecutor who knows that the victim has filed the complaint informs as soon as possible the judge who received the statement …”. An illustration of the solution’s implementation shall be provided: a victim files a complaint the 3rd (the last) day, a investigating judge accepts a decision within 4 days, i.e. the 7th day. Afterwards, a judge deals with a statement (the 7th day, i.e. the same day when the victim’s complaint is examined). Nevertheless, such amendments of the CCP were unduly reduce reasonable terms of the victim’s complaint’s filing and it’s examination and the judge should consider the statement in 1 day, instead of the current 7 (the previous solution entitles the judge to examine the complaint within 7 days).

In case of the second solution, if the term of the accept of the in the CCP’s Art. 420(1) foreseen decision were postponed, regulating, that the judge accepts the decision not earlier than 17 and not later than 24 days from a day of the prosecutor’s decision’s on completion the process by a penal order forwarding to the victim (the 418(4) of the CCP). 17 days would consist of 7 days of the victim’s complaint’s filing (Art. 418(4) of the CCP) and 10 days for the complaint’s examination’s results (Art. 64(2) of the CCP). For example, a prosecutor notifies a victim about his / her decision. The victim files a complaint the 7th day. A pre-trial judge examines it during 10 days (i.e. the 17th day) and dismisses the complaint. After that the judge accepts in the CCP’s Art. 420(1) foreseen decision within 7 days (for instance, issues the penal order), i.e. the 24th day from the day of the notification of the victim about the prosecutor’s decision. In this case, the process would be unreasonable delayed when the victim files does not file a complaint or files it not the latest term’s day, that is why this solution is not flexible. A flexible one - the entitling the prosecutor to apply to a court after the term when the victim’s title to file a complaint expiries and the day of the receipt of the datas’ about whether the complaint is filed, and, if the prosecutor receives these datas, after he / she gets a copy of the pre-trial judge’s decision – would let avoiding undue proceedings’ delay in cases where the victim does not file the complaint or files it not the latest term’s day, i.e. 17 days that would be accommodated to the expiration of the term of the victim’s complaint’s filing and examination are “saved”.

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43 Supra note 41: Lietuvos Respublikos baudžiamojo proceso kodekso komentaras.
44 Id.
Paradoxically, however, the Lithuania’s CCP regulates the special terms of the victim’s complaint’s filing / examination, the prosecutor’s applying to a court and accept of the judge’s decision the most detailed across all the foreign states’ criminal procedure’s laws that the author analysed. Most countries’ criminal procedure’s laws lack this legal regulation (for example, Poland, Croatia). The Latvia’s criminal procedure’s law provides that a prosecutor applies to a court with investigating materials and a statement within 10 days from the accepting of the decision on completion the process by this procedural form,\textsuperscript{45} the Luxembourg’s – within 1 month from q day of notification of decision’s forwarding to a victim,\textsuperscript{46} the Estonia’s – a judge accepts a decision not later than 15 days from forwarding notification of the mentioned decision to a suspect / his defendant counsel,\textsuperscript{47} however, an order of the victim’s complaint's filing / examination and possibility for a judge to take into account the examination’s results remain unclear.

The conclusion shall be made that this implied legal regulation supplementing and extending legal regulation (the Art. 418(3)(4), 420(1) of the CCP) causes a first problem of the penal order’s application. It is assumed that in order to ensure that a judge would not accept the in the CCP’s Art. 420(1(1)) foreseen decision (to issue a penal order) until victim’s complaint’s examination’s outcomes’ disclosing, and to solve this problem by this way, a view should be supported that there shall be explicitly expressed in the Art. 418 of the CCP that a prosecutor is entitled to apply to a court for the issuing of a penal order when the term of the victim’s title to file a complaint about completing the process by a penal order expires and the prosecutor receives both datas about whether the complaint is filed or not and gets a copy of a pre-trial judge’s decision.

A judge’s right to refer investigating materials and a statement to a prosecutor in case of essential violations of the CCP

A problem of application of the Art. 423(1), 420(1), 234(2) of the CCP in the context of the process of issuing of a penal order is raised in this section. Analyzing it, there is assessed how these legal norms are applied and why.

Presentation of legal relations and problematic legal regulation is submitted presenting concepts of the insufficiently clear case’s circumstances and essential violations of the CCP, identifying their differences, elimination’s characteristics, relation between the Art. 420(1) and 234(2) of the CCP.

2 situations where a judge might not accept a penal order are possible: 1) if essential violations of the CCP are made at investigating stage of the penal order’s issuing’s process and

\textsuperscript{45} The criminal procedure law of the Latvia, trans. Robertas Ročys (2005 10 01), the Art. 438(1).
\textsuperscript{46} The criminal procedure law of the Luxembourg (1808 11 17), the Art. 396(d(p)).
\textsuperscript{47} Supra note 2: ‘The criminal procedure’s law of the Estonia, the Art. 253.
or in a prosecutor’s statement which, in nature, might not be eliminated in the judicial process of issuing of a penal order (after a prosecutor transmits investigation materials and a statement to a court) (hereinafter – essential violations of the CCP); 2) if insufficiently clear case’s circumstances exist in a case that might be eliminated only in a way of transferring a case to a hearing.48 These situations are characterized in detail below.

“The essential violations [of the CCP] are considered such [CCP’s] violations that has constrained defendant’s rights that are guaranteed by laws or prevented a court to try a case thorough and impartial and accept fair [decision]”.49 A court’s decision as an illustration of the essential violations of the CCP at investigation stage is presented (in this decision – 4 such violations): “... a case with a request of completion of the process ... by a penal order was transferred to the court after more than seven months, however, the defendant R.D. was not known with the new accusation which entitled defendant’s acts to qualify additionally under ... the Art. 187(3) of the CCP, a new request for a completion the process by a penal order was not served on him and there are no data in a case if the accused agrees that the process were completed by the penal order upon the amended accusation. The injured person E.L. was also not notified of the amended charge and not known with it, thus, the provisions of the Art. 418(4) that foresee an prosecutor’s obligation ... to complete the proceedings by a court penal order on the grounds of a decision made after notifying a victim are violated.”50

While “the principles of reasonableness, justice, fairness, onus probandi require that prosecutor’s mistakes made in a case would be corrected by the prosecutor”,51 a case, in principle, shall be transferred to the prosecutor, although the Art. 420(1) of the CCP does not foresee such possible judge’s decision. Analogically, there are cases when a prosecutor who forms a charge in a statement makes essential violations of the CCP: “The are stated in the charge that there is prescribed that the defendant acquired an unspecified amount of methamphetamine in an unspecified time and unspecified place. It is not a charge that complies with the requirements of the Art. 419(2) of the CCP: a person is charged with that that is not prescribed. Such formulation of the charge violates a person’s right to defense which involves one of it’s implementation aspects that a person has a right to know what he / she is accused for. In this case, V.M. does not know it ...”52 “But ... there is not described a criminal activity, foreseen in the Art. 182(1) of the Criminal Code, with that a defendant I.Š. is charged ... These lacks preclude to examine a

48 „A decision to transmit a case for holding in a hearing a judge accepts in a case when case’s circumstances are insufficiently clear and the doubts might remove only in a trial.” (Supra note 22: The CCP of the Lithuania, the Art. 423(1)).
49 Supra note 22: The CCP of the Lithuania, the Art. 369(3).
50 State v. R. D., Vilnius’ district court, the Division of criminal cases, trans. Robertas Ročys (2013, Nr. 1-207-137/2013); also see. State v. I. K., Kaunas’ district court, the Division of criminal cases (2013, Nr. 1-2501-888/2013) etc.
mentioned statement in a hearing, the court might not eliminate these ...".53 Logically, such violations might not be removed during a trial,54 they interfere to examine a case. “A judge is not entitled to make essential corrections ... The judge is enabled only correct prosecutor’s made grammatical mistakes, other unsubstancial mistakes.”.55 “Removing ... violations is a duty of ... prosecutor, not judge ...”.56 A case should also be forwarded to a prosecutor because of the specifics of the criminal proceedings according to that a statement is similar to an indictment act,57 that is why the prosecutor shall remove both statement’s and indictment act’s violations. Despite the fact that the Art. 420(1) of the CCP does not foresee a judge’s decision to accept a decision on case’s transmission to a prosecutor (i.e. does not foresee a decision alike to the one foreseen in the Art. 234(2) of the CCP), a view will be further analysed in this article why the Art. 234(2) of the CCP shall be applied implicitly.

Need to transmit a case to the prosecutor in case of substantial violations of the CCP should be separated from need of transmit a case to the prosecutor in case of insufficiently clear case’s circumstances when all the doubts might be removed only in a hearing.

“Case’s circumstances are insufficiently clear in a case when doubts raise for a judge if an accused made a criminal activity, when circumstances of a case are not described in the prosecutor’s statement ... (for instance, a place, a manner, consequences or other important circumstances are not described correctly), when doubts raise if a criminal activity is qualified correctly (a ground of thinking exist that a criminal activity should be qualified under an article that foresees a slighter criminal activity .... although factual circumstances do not substantially change (the Art. 256(3) of the CCP); when datas referred in the prosecutor’s statement do not reveal accused’s guilty or are obtained violating law’s requirements and so on.”.58 In addition, “... doubts if ... [the accused were be punished], the requirements of punishments’ applying determined in the Criminal Code would not be violated. Case’s circumstances might be unclear also due other questions, for example, damage’s compensations, confiscation of property etc.”.59 Issuing of the penal order, in case of insufficiently clear case’s circumstances, is not

54 State v. R. A., Kaunas’ town district court, the Division of criminal cases, trans. Robertas Ročys (2012, Nr. 1-3527-651/2012); also Supra note 50: State v. R. D.
55 Supra note 41: Lietuvos Respublikos baudžiamojo proceso kodekso komentaras, p. 493-494.
56 Supra note 51: State v. V. M.
59 Žr. išnašą 27: Specifinės baudžiamojo proceso rūšys, p. 49.
possible, and insufficiently clear case’s circumstances shall be removed in a hearing (for example, “it is obligatory to question again a person who has already been questioned at investigation stage, to invite more witnesses, to make more expertises, to obtain some significant documents and so on.”). Analogically, “a penal order according which a defendant would be acquitted might not be issued. If ... doubts raise for a judge whether to find a defendant guilt, the judge shall accept a decision on transmission of a case to a hearing”.

Comparing mentioned concepts, a conclusion shall be made that “insufficiently clear case’s circumstances” and “substantial violations of the CCP”, in nature, are different legal concepts that should be identified and separated in each concrete case.

As already mentioned, insufficiently clear case’s circumstances are removed in the course of transmission a case to a hearing. In case of substantial violation of the CCP, on the other side, an order of eliminating these is not expressis verbis regulated. Taking into account explicitly legal norms of the CCP’s XXXI division’s I chapter, it is impossible to answer a question what explicitly legal norms entitle a judge to accept a decision on transmission a case to a prosecutor in case of substantial violations of the CCP. For this reason, a problematic legal regulation is the Art. 420(1) of the CCP, in which no legal norm exists that would let to return a case to a prosecutor as in the Art. 234(2) of the CCP.

There should be noticed that because of not foreseeing in the Art. 420(1) of the CCP an opportunity for a judge to return a case to a prosecutor, case-law, although holds a position that a case should be returned to a prosecutor, however, a question what order shall be applied to implement it, is formed differently.

On the one hand, a tendency exists that case-law forms a view that a judge transmits a case to a hearing (the Art. 423(1), 420(1(2)) of the CCP) because it is apparently the most similar decision (i.e. removes substantial violation of the CCP in the same order as insufficiently clear case’s circumstances), and just after that returns a case to the prosecutor according to the Art. 234(2) of the CCP:

“... the Art. 420(1) of the CCP that foresee only court’s opportunities such cases transmit to a hearing or issuing a penal order or terminate criminal proceedings ... shall be transmitted to a hearing. At the same time, this case might not be started to trying in a hearing because it is unprepared because of the abstract indictment. Regarding these circumstances[,] this case ... on the ground of the Art. 234(2) is returned to a prosecutor for indictment’s violations’ removing.

60 Supra note 22: The CCP of the Lithuania, the Art. 420(1).
61 Supra note 22: The CCP of the Lithuania, the Art. 423(1).
62 Supra note 41: Lietuvos Respublikos baudžiamojo proceso kodekso komentaras, p. 173
63 Id, p. 67.
64 Supra note 22: The CCP of the Lithuania, the Art. 423(1).
Based on the mentioned, pursuant to ... the Art. 420(1(2)), 234(2) of the CCP, the court decided this criminal case to return to the prosecutor ...".65

On the other hand, case-law forms another view that, in case of substantial violations of the CCP, a case is returned to a prosecutor applying the Art. 234(2) of the CCP implicitly. A decision should be cited in which applying of the implicit Art. 234(2) of the CCP, though the Art. 420(1) of the CCP does not foresee such possibility, is based on the argument that the substantial violations might be removed not in a court hearing, but only after a case is transferred to the prosecutor:

"The court finds that content of the prosecutor’s statement does not comply with ... the requirements of the Art. 419 of the CCP and it precludes to try a case ... [T]hese lacks might not be eliminated by the way of transmitting a case to a hearing pursuant ... the Art. 423 of the CCP because ... essence of the indictment is read out of the statement instead of indictment act (the Art. 425(2)). Case’s materials are returned to the prosecutor because the statement has been prepared by substantially violating the Art. 419 of the CCP ... The court, pursuant the Art. 234(2), 418, 419 of the CCP ...".66

A point of view that the latter case-law that supports the position that a legal regulation, upon which, in case of substantial CCP’s violations, in the process of the issuing of the penal order, the Art. 234(2) of the CCP is applied implicitly, but not the Art. 423(1(2)), 234(2), has been established shall be followed because of further arguments.

It should be noted that, at first glance, it appears that an exhausted list of judge’s decisions’ is established in the Art. 420(1) of the CCP, and, because of that, application of the implicit Art. 234(2) of the CCP is impossible. This assumption is supported by the fact that there is not established in the Art. 420(1) of the CCP that it might be apply also other legal norms of the CCP (for example, the general ones), otherwise, in the Art. 420(1) of the CCP there would be explicitly determined a provision “other decisions foreseen in this code” (as, for example, in the Art. 173(3) of the CCP). However, this idea can not be accepted and it should be considered that in the Art. 420(1) of the CCP not imperative list of possible judge’s decisions is established, but the most important ones’ (for example, in the 420(1(2)) transmission of a case to a court in case of insufficiently clear case’s circumstances is established. This provision refers penal order’s issuing’s process’es limit – in case of insufficiently clear case’s circumstances, they might not be figured out in the course of the process of the issuing penal

65 Supra note 52: State v. V. M.; also see. State v. K. A., Kaunas’ regional court, the Division of criminal cases (2007, Nr. 1A-133 - 348/2007), State v. V. P., Vilnius’ regional court, the Division of criminal cases (2008, Nr. 1S-444-172-2008), State v. B. M., Kaunas’ district court, the Division of criminal cases (2013, Nr. 1-2283-888/2013), State v. M. M., Kaunas’ district court, the Division of criminal cases (2013, Nr. 1-2443-720/2013), supra note 57: State v. A. Ü., State v. G. J., Kaunas’ regional court, the Division of criminal cases (2012, Nr. 1S-1948-290/2012); State v. I. K., Kaunas’ district court, the Division of criminal cases (2013,Nr. 1-2501-888/2013).

order as well as the penal order might not be issued or a case be terminated). Thus, all others judge’s decisions (not expressed in the Art. 420(1)) might be accepted applying not explicit legal norms, but implicit ones. An opinion that, in general, in absence of a legal regulation in the process of issuing the penal order, implicit legal norms of the general criminal process’es model are applied, supports the authors of Lithuania (“... it might not be stated that the common legal norm established ... in the Art. 218 [of the CCP] ... is not applied in this simplified process. To argue otherwise, a clear exception should be established due ... non-application of the Art. 218 in the Art. 418-425 or determined a specific legal regulation ...”) and other countries, legal acts. A standpoint should be held that, in case of substantial violations of the CCP in the process of issuing a penal order, the implicit Art. 234(2) and not Art. 420(1(2)), 234(2) shall be applied because of following reasons.

First, the legislator intended to establish in the Art. 420(1(2)) of the CCP legal rules under which the insufficiently clear case’s circumstances, and not substantial violations of the CCP would be removed in a court’s hearing. Bearing in mind that the Art. 234(2) is applied in removing violations made at investigation stage, it, and not the Art. 420(1(2)) of the CCP is an appropriate instrument to remove substantial lacks of investigation, statement.

Second, the courts, according to the prevailing case-law, in order to avoid to apply the implied Art. 234(2), apply Art. 420(1(2)), and then, in the absence of any new legal facts, significant for removing of substantial CCP’s violations, immediately apply the Art. 234(2). In this way, adding “Art. 420(1(2))” in a decision, the principle of immediacy is violated: “[the r]equirement that process would be fast means that … proceedings of procedural decision accepting shall not delay ... spacing between procedural acts shall be as short as possible”.

Thirdly, in addition to the reasons stated above, such prevailing case-law poses a conceptual problem: is it necessary to refuse the penal order’s issuing’s process and to go into the general model of criminal procedure, thereby losing access to advantages of the penal order’s issuing’s process so that mentioned violations would be removed? “It may lead to a situation when only the poor quality of the prosecutor’s statement forces a judge to refuse to complete the process by issuing of a penal order, although such completion would be possible and acceptable to everyone involved.”. Such compulsory case’s returning suggests an erroneous view that the Art. 234(2) and 420(1) are not interconnected (i.e. the law appliers are not obligated to eliminate substantial CCP’s violations in order of the Art. 420(1(2)), 234(2) of the CCP), however, such explanation is erroneous because the opportunity to return a case to a

67 Supra note 27: Specifinės baudžiamojo proceso rūšys, p. 52
68 The criminal procedure’s law of the Montenegro (2003, Nr. 79/2003), the Art. 441(1):; The criminal procedure’s law of the Poland, the Art. 468, 500(2), trans. Robertas Ročys; The criminal procedure’s law of the Slovenia (2006 01 28, Nr. 8/2006), the Art. 429.; supra note 7: „Grundzüge des Strafbefehlsverfahrens“.
69 Supra note 28: Baudžiamojo proceso principai, p. 190-191.
70 Supra note 41: Lietuvos Respublikos baudžiamojo proceso kodekso komentaras, p. 491.
prosecutor pursuant to the implied Art. 234(2) of the CCP and complete the process by a penal order remains applying the implied Art. 234(2) of the CCP.

Fourth, since the Art. 234(2) of the CCP, according to reasons enumerated above, is consistently derived from the XVIII chapter, is determined in other (in the V) part, it corresponds the concept of implicit rule of law and might be held as the implicit legal norm (fourth decision) in the Art. 420(1).

Interestingly, compared this legal regulation with the analogical one set out in the XVIII chapter’s I section, the Art. 420(1(3))71, that explicitly expresses a possible judge’s decision to terminate a case, expressis verbis points to another CCP’s legal norms (the Art. 420(3)), allowing to apply the Art. 3 (by the way, also the Art. 232(7)) of the CCP explicitly, although the Art. 420(1(3)) could be applied implicitly in the same way as the Art. 234(2) of the CCP. The Art. 420(1(3)), in sense of clearity of implicit regulation, is not equivalent to other XVIII chapter’s I section’s legal norms that explicitly regulate legal regulations which could not be detected regulating by implicit legal norms, for example, “[a] complaint is examined by an in the [CCP’s] Art. 64 determined order”,72 explicitly providing that the provisions of pre-trail stage are applied in the judicial process’es stage. Thus, although the termination of a case could be consistently derived from the Art. 3 of the CCP, the legislator eliminated an opportunity to apply implicit legal norms in a case of termination of a case, thereby, consolidating a clear legal regulation. Similarly, the same would be behaved by supplementing the Art. 420(1) of the CCP. with a possible decision which would contain a similar content of the Art. 234(2).

Comparing the Art. 420(1) and it’s interpretations with various foreign criminal process’es laws and the legal doctrine, the foreign legal regulations might be divided at this aspect into 3 groups.

The first group includes countries with the criminal process’es laws which obligate a judge explicitly to return a case to a prosecutor. Under the Estonian criminal process’es laws, a case is returned to a prosecutor, when no grounds for the penal order’s institute applying’s process exist.73 In the Switzerland, there is determined, that a judge withdraws the prosecutor’s issued penal order and returns a case to a prosecutor for additional procedural actions.74

The second group includes Germany; it’s StPO does not explicitly foresee the possibility to return a case to a prosecutor in the case of substantial StPO’s violations, however, a legal doctrine points a similar possibility – a judge may refer the case in a case of insufficient clear case’s circumstances. In this case, the judge might dispense with the hearing because before the hearing he / she may agree with the prosecutor about altering the statement: “A judge, in order to depart from the statement, might … agree the prosecutor who, in case of successful

71 „A judge ... must accept one of these decisions ... to terminate criminal proceedings in cases set out in the Art. 424 of this Code” (supra note 22: The CCP of the Lithuania, the Art. 420(1(3)).
72 Supra note 22: The CCP of the Lithuania, the Art. 418(4).
73 Supra note 2: The criminal procedure’s law of the Estonia, the Art. 2351(1(2)).
74 The criminal procedure’s law of the Switzerland (2007 10 05), the Art. 356(5).
agreement, might submit a new statement. Failing to agree, the judge holds a hearing. The agreement may fail, for example, disagreeing with the size of a punishment. So, likewise, it should be allowed to return a case to a prosecutor in case of substantial violations of the CCP. For instance, in absence of copy of the notice a victim about a prosecutor’s decision to complete the process by a penal order, a judge had to return a case to the prosecutor for addition of the copy.

The third group comprises countries with the criminal process’es laws that explicitly do not regulate this legal relationship (e.g. Norway, Slovenia).

From the above reasoning it follows that the legal regulation under which the substantial CCP’s violations are removed by applying the implicit Art. 234(2) of the CCP is baseless determined, because the opportunity to misinterpret this legal regulation in the way that essential CCP’s violations are removed in the order of the Art. 420(1), 234(2) exists. The possibility for this misinterpretation causes a problem of the penal order’s institute’s application.

Summing the above up, it is resumed, that the application of the implied Art. 234(2) of the CCP is problematic because the ability of application of the Art. 420(1), 234(2), and not the implicit Art. 234(2) of the CCP exists. This misinterpretation causes a second problem of application of the penal order’s institute. For this reason, it is considered that a view should be supported that the Art. 420(1) shall be supplemented with the 4th decision: “to return the case to the prosecutor in case of substantial violations of the CCP.”. In this way: 1) insufficient clear case’s circumstances that might be removed only in a hearing would be transferred in an order of the Art. 420(1(2)) and removed in the hearing; 2) substantial violations of the CCP would be removed by returning a case to a prosecutor according to the Art. 420(1(4)).

**An accused’s duty to pick up the penal order**

A problematic legal regulation when it is impossible to serve the penal order on the accused because he / she is unattainable and does not have any in the Art. 422(1) of the CCP mentioned subjects is researched in this section. It should be begun from identification of problematic legal relations and regulation.

Typically, “… the penal order is served on the accused in writing. It is delivered into accused’s house or is served by calling the accused”. After signing, a postmark that certifies the service is stamped.

But what happens when the accused absconds and it is impossible to serve him the penal order? “Absconding – it is a conscious act, carried out the criminal activity, which aims to

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75 Supra note 7: „Grundzüge des Strafbefehlsverfahrens“; also supra note 13: Strafprozeßordnung mit GVG und Nebengesetzen, p. 1260
76 Supra note 8: Strafprozessrecht, p. 355.
77 Supra note 41: Lietuvos Respublikos baudžiamojo proceso kodekso komentaras, p. 496.
78 State v. E. J., Vilnius’ district court, the Division of the criminal cases (2013, Nr. 1-2327-865/2013).
79 Supra note 27: Sapaprasstinta baudžiamojo procesinė forma, p. 90.
avoid prosecution”. The Art. 422(1) of the CCP does not directly regulate how the penal order is served in a case of defendant’s absconding, however, it points a solution from a similar situation when the accused temporarily leaves: “… if the accused is temporarily departed … the penal order is served on an adult person who lives together with the accused or on an accused’s workplace’s administration so that he / she / it would deliver it to the accused”. An analogical solution should prevail in case of defendant’s absconding. A problem raises when the accused does not live together with an adult person, work or did not inform the court about change of his / her residence. 14 days of filing of the accused’s request to hold a hearing (“[a t]itle to file a request … have merely the accused and his / her representative under a law.” do not count, not submitting the penal order to the accused. An equivalent provision is foreseen in the Norwegian criminal procedure’s law. Accordingly, as long as the penal order is not served on the accused, the penal order does not acquire legal force because it acquires legal force, as already mentioned, if the accused does not submit the request within 14 days. Not-acquiring of this legal force causes legal consequences, for example, limitation of the criminal case period goes, the probation’s institution might not request a court to alter a punishment of public works into an arrest or fine, connection of punishments that are appointed by latest sentences is impossible. The process is suspended if the penal order is not served: “The criminal code of procedure does not foresee an opportunity for … a court to annul it’s accepted and legal ineffective … penal order and refer a case to a hearing according to general order …”.

After reviewing other sources of law on this subject, a proposed solution of the Senat of the Lithuanian Supreme Court is cited:

“If the accused is hidden, the term for filing a request to hold a case in a court’s hearing is counted from a day of datas’ that the accused is hidden receipt in a court”. Unfortunately, this proposal does not explain why it is rational, efficient, and the proposal is only indicative: “There are no basis in the laws to [compulsory] follow explanations in the decisions [lt. nutarimais] of the Senat of the Supreme Court of Lithuania ... a sense of a precedent have courts’ decisions in specific cases. Such interpretation is consistent with the constitutional doctrine ... where “… courts’ precedents are source of law ... following the precedents is a condition of implementation of unilateral (consistent, not contradictory) case law, also of the principle of justice”, and case law shall be formed only by handling cases for

80 State v. D. T., the Supreme Court of Lithuania, the Division of the criminal cases, trans. Robertas Ročys (2011, Nr. 2K-7-371/2011).
81 Supra note 22: the CCP of the Lithuania, the Art. 422(1).
83 The criminal procedure’s law of the Norway (1981 05 22, Nr. 25), the Art. 260.
84 State v. I. B., Kaunas’ district court, the Division of the criminal cases (2013, Nr. T-737-926/2013).
85 State v. D. Z., Kaunas’ district court, the Division of the criminal cases (2013, Nr. 1-3076-928/2013).
86 Supra note 27: Specifinės baudžiamojo proceso rūšys, p. 67.
It should be believed that the Senat of the Lithuanian Supreme Court formed such opportunity as a way out of this situation until legal regulation that would solve this problem is established in the CCP.

Recalling the above-mentioned issue of legal relationships, it is considered that the legal norms are not compatible with each other, complicated, are not easily implemented, in general, it causes the problem of application of penal order’s institute. There should be further analysed whether other possible solutions’ alternatives exist, namely, whether: 1) is a law analogy with the CCP’s norms which establish a possibility to equate defense counsel’s procedural actions as defendant’s procedural actions in the event of a defense counsel’s participation in the penal order issuing process, thereby, equating service of the penal order to the defense counsel as service to the accused possible; 2) if a defense counsel is not involved in the process whether legal norms that regulate persons’ search shall be regarded as implicit, what would mean that a possibility to count a term of lodging a request to hold a hearing from a day of penal order’s service on the accused is established in the Art. 422(1) of the CCP, i.e., finding the accused and servicing him the penal order; 3) legal regulation of the CCP under which the accused would be obligated to pick up the penal order or the penal order would be sent to an address which he / she referred, i.e., serviced without signing, rather than the penal order is serviced on the accused on prosecutor’s initiative were reasonable and lawful.

First of all a fact that between the persons who may be served the penal order (the Art. 422(1)), there is not established that the penal order might be served on a defense counsel if he / she took part in the penal order’s issuing process. However, a possibility to serve the penal order on the defense counsel seems to be logical because of below mentioned reasons.

It should be remembered that the current CCP’s rules entitle to equate defense counsel’s procedural actions as defendant’s procedural actions, as well as in the case of defendant’s absconding: “There are lots of situations in the criminal process when lack of foundation of agreement’s theory exists – defense counsel’s and defendant’s agreement’s that does not contradict with the imperative legal norms: for example, a defense counsel is appointed rather than invited[,] and provides state’s guaranteed legal aid (the Art. 50((3, 4), 51), suspect’s true faith is unknown (for instance, a suspect absconds (the Art. 123(2), 181(4)), does not express any wish regarding defense, name his / her objects or has physical or mental defects that do not remove criminal responsibility, however, deprive the opportunity to collaborate effectively with a defense counsel, or rules obligate a defense counsel to act despite of the defendant’s will, whishes or instructions (for example, the Art. 52(2) refers cases when an investigating officer, a prosecutor and a court might ignore [a fact] that a suspect (an accused) has refused a defense counsel; the Art. 312(6) entitles a defense counsel to [appeal] despite defendant’s will; the Ethical code’s Par. 2.3.2 enables a defense counsel to act independently of defendant’s will

88 State v. A. B., the Supreme court of the Republic of Lithuania, the Division of the criminal cases, trans. Robertas Ročys (2010, Nr. 2K-575/2010); State v. I. N., the Supreme court of the Republic of Lithuania, the Division of the criminal cases (2011, Nr. 2K-7-301/2011).
when the defense counsel is convinced that the defendant assumes unrational his / her guilt; Ethical code’s Par. 6.11 obligates a defense counsel to follow self-dependant, independent from defendant’s position when the defendant assumes guilt, but the defense counsel, after [he / she] studies all the evidence, concludes that defendant’s guilt is not proved or is doubtful) and so on.”89 This list may be supplemented by the Art. 437(1)90. “It is apparent that in these situations a defendant’s will is not a determining factor which influences defense counsel’s conduct; a defense counsel acts ... for the benefit of law rather than for the benefit of an individual that him invites or is applied, thus, defends law and legitimacy.”.91 Some theorists point out that “[a d]efense counsel is … not a defendant’s representative, however, an independent legal aid authority. The defense counsel … rescues the defendant ….”92

Considering the opportunity of servicing a penal order on the defense counsel, it is worth to figure out the limits of mandate of a defense counsel in the penal order’s issuing’s process and evaluate whether it may lead to the basis on which the penal order might be served on the defense counsel. A question was analysed whether a state’s appointed defense counsel is authorized to defend a person until penal order’s issuing, till filing of a request to hold a case in a hearing or only filing the request and without defense in the general criminal proceedings. There was concluded that the defense counsel might defend the defendant only then when the defense counsel provides a document that proves the agreement between the defendant and defense counsel to defend the defendant in the general criminal process at the beginning of a hearing or, when the document is not provided, proves the agreement’s fact otherwise (for example, the defendant takes part in the hearing together with his / her defense counsel).93 Thus, it is concluded that the appointed defense counsel defends the accused at until a hearing, so the penal order might be served on the defense counsel. However, a position that the penal order might be served on the defense counsel even if a defense counsel’s duty to defend expired by issuing of the penal order should be held, it would comply with the principle of prudence because the defense counsel remains the only person associated with the likelihood that the accused will contact with the defense counsel and the defense counsel will serve him the penal order.

Taking into account the above and a fact that an accused would not be interested in absconding after service of the penal order on him because, served on the defense counsel, it

90 „Having examined a case in absence of the accused the decision is served on the accused’s defense counsel.“ (supra note 22: The CCP of the Lithuania, the Art. 437(1)).
91 Supra note 89: “Gynėjo paskirtis šiuolaikiniame baudžiamajame procese”, p. 305-306.
93 HANS-JOACHIM LUTZ, „Wie weit reicht die Verteidigerbestellung gem. § STPO § 408b StPO?“, Neue Zeitschrift für Strafrecht (1998, Nr. 18), p. 396.
would be considered that the penal order is served properly, it is presumed that service of a penal order on the defense counsel is available.

Valuable experience in regulating the possibility to serve the penal order on the defense counsel, is established in the criminal process’es laws of other countries. The provisions of the foreign criminal process’es laws govern this legal relationship in different ways. They can be divided into the following groups.

The first group includes countries with criminal process’es laws that regulate alike Lithuania’s CCP. There is established in Estonia, Montenegro that a penal order’s copy is served on an accused and a prosecutor.\(^4\)

The second group includes countries where miscarriage of the penal order on the accused causes penal order’s cancellation. According to the Italian criminal process’es law, in case of the miscarriage, a judge dismisses the penal order and returns a case to a prosecutor.\(^5\) Poland’s criminal process’es law provides that the penal order shall be served on a prosecutor, and it’s copies – on an accused and a defense counsel, however, if the copy is not served on the accused within 3 months, a judge deems the penal order ineffective and a case is transferred to a hearing according to the general rules of criminal procedure.\(^6\)

The third group involves countries whose criminal process’es laws allow or obligate to serve the penal order on the defense counsel. The Art. 409(2) of the German’s StPO is determined that the penal order shall be also sent (“mitteilen”) to the accused’s statutory defense counsel.\(^7\) According to the Croatian criminal process’es law, the penal order is served on an accused, his / her defense counsel, a prosecutor and a victim.\(^8\) Slovenian – on an accused, defense counsel, prosecutor.\(^9\) Irish criminal process’es law’s Art. 314f(2) allows the penal order to serve on a defense counsel, a prosecutor, a victim.\(^10\)

However, an accused may not have a defense counsel in the penal order’s issuing process or the defense counsel may stop being an advocate after issuing of a penal order. In this case, there would be come back to the current legal framework and faced the mentioned problem of penal order’s service. For this reason, it is further analysed whether in a case when a defense counsel does not participate in a penal order’s issuing process an accused’s search shall be announced and the penal order served after finding him?^9

\(^{94}\) Supra note 2: The criminal procedure’s law of the Estonia, the Art. 254(5); supra note 68: The criminal procedure’s law of the Montenegro, the Art. 460(1).

\(^{95}\) The criminal procedure’s law of the Italy (2010 09 21), the Art. 460(4).

\(^{96}\) Supra note 68: The criminal procedure’s law of the Poland, the Art. 505(2).

\(^{97}\) The StPO (2013 10 10), the Art. 409(2); MICHAEL GRESSMAN, „Strafbefehlsverfahren mit Auslandsberührung“, Neue Zeitschrift für Strafrecht (1991, Nr. 11), p. 216; Supra note 13: Strafprozeßordnung mit GVG und Nebengesetzen, p. 1261.

\(^{98}\) The criminal procedure’s law of the Croatia, trans. Robertas Ročys (2009 07 03, Nr. 76/09), the Art. 542(1).

\(^{99}\) Supra note 68: The criminal procedure’s law of the Slovenia, the Art. 445.č(1).

\(^{100}\) The criminal procedure’s law of the Ireland (1961, Nr. 141/1961), the Art. 314f(2).
An advantage of this suggestion would be that beginning to count the 14 days’ term determined in the Art. 422(1) of the CCP from the service’s moment would prevent an accused’s interest to abscond (an absconding’s fact would have no influence on the request to hold a hearing, and the accused would hide if only he / she would seek to case’s limitation period).

It is assumed that such implicit legal regulation is legitimate and justified, however, only in those cases where the accused is found in a state with which Lithuania is signed a bilateral or multilateral police’s cooperation agreement, and, according to this contract, countries are obligated to serve procedural documents, or such opportunity is foreseen in the European Union’s legal acts. In other words, the legislator has left a gap in the law otherwise, i.e. such legal regulation as the Art. 422(1) foresee. Therefore, the implicit legal regulation does not solve this problem. For this reason, it is assumed that the legislator had to explicitly establish a possibility to serve the penal order on the accused after search’es announcing, finding the accused if that allow either the mentioned bilateral or multilateral agreement or European Union’s legal acts. These statements are grounded on the considerations set out below.

Logically, copies of a penal order are not able to be sent to all police offices into states where an international search is executed. In addition, “The court’s penal order issued by the judge is served on the accused …”¹⁰¹, thus, not a copy of a penal order (such as, for example, according to the Art. 423(2) of the CCP¹⁰²), that’s why service of the copy of the penal order is not equivalent to service of the penal order. Once an accused is found, it is questioned how the penal order shall be served on him. This means that the penal order is served on prosecutor’s initiative (comparatively, in Germany, a prosecutor serves on adults, a juvenile judge (Jugendrichter) – on juveniles¹⁰³). It should be remembered that, according to the Art. 140(2) of the CCP¹⁰⁴, assurance of the service of a procedural document is not a condition of a detention as well as an arrest is impossible (the Art. 122(8), 418(1)¹⁰⁵) (similar provisions are found also in foreign CCPs, for example, Azerbaijan’s¹⁰⁶), thus, the police officer is able to serve a penal order only if he / she has it or may get it immediately (as long as he / she contacts with the accused). If he / she does not, the penal order remains unserved. Even more difficult situation arises when the accused absconds in a foreign country where, unlike some countries (for example, Azerbaijan¹⁰⁷), the Republic of Lithuania is either not signed any bilateral or multilateral police’s cooperation’s contracts and any legal acts obligate a country where the

¹⁰¹ Supra note 22: The CCP of the Lithuania, the Art. 422(1).
¹⁰² „... a judge shall send a copy of the … statement … to the accused.“ (supra note 22: the CCP of the Lithuania, the Art. 423(2)).
¹⁰⁴ Supra note 22: the CCP of the Lithuania, the Art. 140(2).
¹⁰⁵ Supra note 22: the CCP of the Lithuania, the Art. 122(8), 418(1).
¹⁰⁶ The criminal procedure’s law of the Azerbaijan (2000 07 14), the Art. 155.3.1. - 155.3.2.
¹⁰⁷ The agreement between the Republic of Lithuania and the Republic of the Azerbaijan concerning legal aid and legal relationships in civil, family’s, penal cases, Žin. (2002, Nr. 75-3217) the Art. 9(1), 11.
accused is found to serve the penal order or a duty to serve documents (including the penal order) in these legal frameworks are not foreseen.\textsuperscript{108}

So, basically, the legal regulation under which a penal order is served on an accused after officials find him depends on existence of the legal basis (international contracts, legal acts), technical feasibility.

2 solutions of this problem were presented above. It is worthwhile to emphasize that, in both of these ways, also according to the current Art. 422(1), a penal order is served on an accused on prosecutor’s motion, i.e. an accused is not obligated to be active and to interest in service of a penal order on him. On the contrary, he has an opportunity to avoid penal order’s service by absconding. However, an approach is promoted that, in principle, the accused shall be interested in penal order’s service because he / she has a right to require to hold a case in a hearing and is enabled to exercise this right, and a legal regulation under which the accused would be required to pick up the penal order on his own, would not hamper accused’s rights because the state would guarantee (the Art. 45 of the CCP\textsuperscript{109}) the exercise of this accused’s right. Provision’s that shall also be established explicitly expressions and, according which the penal order would be served on an accused could be various. The accused or his / her representative could pick up the penal order in the court’s secretary (lt. raštinėje) within a term set out in the CCP, the penal order could be sent to the accused by electronic means (for example, by e-mail) or by mail at accused’s referred address, and, if the accused would not refer any penal order’s service’s way, the penal order could be sent to a declared place of accused’s residence, and so on. The term for submission of the request would be counted accordingly from a day of penal order’s service in the court’s office, issuance of a postmark, sent by electronic means. It is emphasized that the Art. 310(2) of the CCP points out such service’s opportunity.\textsuperscript{110} Actually, in comparance with the above mentioned 2 solutions, this solution shall be regarded as preferable because of it’s advantages.

To sum up, an approach should be promoted that because of the absence of the provision in the Art. 422(1) of the CCP that would engage the accused to take (pick up) a penal order on his / her own motion (in the court’s office, in an e-mail, to accept a penal order at house and so on) and because of the requirement that a accused shall sign that he / she was served by a penal order, the accused has an opportunity to abscond so that he / she would not be served by the penal order. It reveals a third problem of application of the penal order’s institute, i.e. a problem of penal order’s service. The accused’s absconding is problematic because the process is delayed or case’s limitation period might even expire.

\textsuperscript{108} See i.e.: The agreement between the Cabinet of the ministers of the Republic of Lithuania and Belgium concerning polices’ cooperation, Žin. (2004, Nr. 112-4174).

\textsuperscript{109} “A judge, a prosecutor and an investigation’s official must explain process’es participants’ procedural rights and ensure a possibility to use them.” (Supra note 22: the CCP of the Lithuania, the Art. 45).

\textsuperscript{110} “If in the [CCP’s Art. 310][1] referred persons did not participate when the decision was announced or have not accepted it after the announcement, the decision’s copies shall be served or sent them not later than five days from a day of decision’s announcement.” (Supra note 22: the CCP of the Lithuania, the Art. 310(2)).
CONCLUSIONS

This paper revealed some problems of the application of the penal order’s institute in the criminal process of Lithuania. Summarizing the results, following conclusions are drawn:

1) The implied legal regulation supplementing and extending legal regulation (the Art. 418(3)(4), 420(1(1)) of the CCP) causes a first problem of the penal order’s application. It is assumed that in order to ensure that a judge would not accept the in the CCP’s Art. 420(1(1)) foreseen decision (to issue a penal order) until victim’s complaint’s examination’s outcomes’ disclosing, and to solve this problem this way, a point of view should be supported that there shall be explicitly expressed in the Art. 418 of the CCP that a prosecutor is entitled to apply to a court for the issuing of a penal order when the term of the victim’s title to file a complaint about completing the process by a penal order expires and the prosecutor receives both datas about whether the complaint is filed or not and gets a copy of a pre-trial judge’s decision;

2) The application of the implied Art. 234(2) of the CCP is problematic because the ability of application of the Art. 420(1), 234(2), and not the implicit Art. 234(2) of the CCP exists. This misinterpretation causes a second problem of application of the penal order’s institute. For this reason, it is considered that a standpoint should be supported that the Art. 420(1) shall be supplemented with the 4th decision: “to return the case to the prosecutor in case of substantial violations of the CCP.”. In this way: 1) insufficient clear case’s circumstances that might be removed only in a hearing would be transferred in an order of the Art. 420(1(2)) and removed in the hearing; 2) substantial violations of the CCP would be removed by returning a case to a prosecutor according to the Art. 420(1(4));

3) An approach should be held that because of the absence of the provision in the Art. 422(1) of the CCP that would engage the accused to take (pick up) a penal order on his / her own motion (in the court’s office, in an e-mail, to accept a penal order at house and so on) and because of the requirement that a accused shall sign that he / she was served by a penal order, the accused has an opportunity to abscond so that he / she would not be served by the penal order. It reveals a third problem of application of the penal order’s institute, i.e. a problem of penal order’s service. The accused’s absconding is problematic because the process is delayed or case’s limitation period might even expire.
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SANTRAUKA

Straipsnio įvade trumpai pristatoma teismo baudžiamojo įsakymo (toliau – baudžiamasis įsakymas) instituto kilmė, istorija, Europos šalių baudžiamųjų procesinių įstatymų įtaka Lietuvos baudžiamosius procesinius teisės aktus įvertinti baudžiamojo įsakymo institutui. Prisiminta, kad baudžiamajo įsakymo institutas yra supaprastintojo baudžiamajo proceso modelio rūšis, atsiradęs 1877 m. Vokietijos imperijos teisėje, veliau išplėtęs ir į kitas Europos šalis (taip pat ir jo atmainos, pavyzdžiui, Italijoje, Ispanijoje). Taip pat pastebėta, kad, lyginant skirtingų valstybių baudžiamojo įsakymo institutų reglamentavimą, baudžiamojo įsakymo priėmimo procesas yra tikrais aspektais yra skirtinas. Pavyzdžiui, Estijoje
reglamentuojama, kas turi būti įrašyta baudžiamojo įsakymo įvadinėje, pagrindinėje dalyje ir išvadoje, tuo tarpu, kitių šalių BPK ne; skiriastai subjektai, galintys pateikti prašymą bylos nagrinėjimui teisme, pavyzdžiui, skirtingai, nei Lietuvoje, Estijoje numatoma galimybė ir gynėjui pateikti minėtą prašymą. Kartu prisiminta, kad atkūrus Lietuvos Nepriklausomybę, baudžiamojo įsakymo institutas buvo įvestas 2002-03-14 Lietuvos Respublikos baudžiamojo proceso kodekse (toliau - BPK), ir šiuo metu jį reglamentoja BPK 29, 41 straipsniai, XXXI skyriaus I skirsnis.

Tam, kad nustatyti, ar ir kokios baudžiamojo įsakymo priėmimo proceso taikymo problemas kyla, straipsnyje ištirtas BPK XXXI skyriaus I skirsnio teisinis reguliavimas. Tyrimo ribų apimtis buvo BPK XXXI skyriaus I skirsnio 3 galimai probleminės teisės normos / teisės normų grupės. Darbo struktūrą sudaro 2 skyriaus, 3 2-ojo skyriaus poskyrio, išvados.

Pirmajame skyriuje, pateikiant baudžiamojo Įsakymo instituto sampratą, apžvelgiama baudžiamojo įsakymo priėmimo proceso eiga, išskiriant esminius jos bruožus. Baudžiamojo įsakymo priėmimo proceso samparą atskleista tam, kad išsiaiškinti, kokius teisinius santykius reglamentoja baudžiamojo įsakymo priėmimo proceso teisinių reglaviavimai. Tik tuomet bus galima identifikuoti galimai problemines teisės normas / jų grupes.

Išsiaiškinus baudžiamojo įsakymo priėmimo proceso išeivius teisinius santykius, identifikuota, jog ši baudžiamojo proceso rūšis pasižymi supaprastintąja procesinei baudžiamajai formalai būdingais esminiais bruožais – įsitikinimu užimtumui, galimybėmis teismui greitai priimti baigiamąjį aktą, kaltinamajam rinktis, ar jį vykdyti, ar grįžti į bendrąja baudžiamojo proceso modelį, ją reguliuojant teisinius reglaviavimai. Tik tuomet bus galima identifikuoti galimai problemines teisės normas / jų grupes.

Antrajame skyriuje (3 poskyriuose) atliekamas galimai probleminių teisinių baudžiamojo įsakymo priėmimo proceso teisinių reglaviavimų identifikavimo. Atlikus tyrimą, įsitikinta, jog kai kurie probleminiai teisinių reglaviavimai (humanomos, papildančios ar pratęsiančios teisinį reguliavimą, teisinio reguliavimo įtvirtinimas BPK 418 str. 2, 4 d., 420 str. 1 d., reglamentojant teisinius reglaviavimus ir pareivinklo dėl proceso užbaigimo baudžiamojo įsakymu (toliau - pareivinklo) įsitikinimo teismui momentą, numanomos BPK 234 str. 2 d. nustatymas BPK 420 str. 1 d.), baudžiamojo įsakymo įtvirkmo kaltinamajam tvarka kelia baudžiamojo įsakymo instituto taikymo problemas.