

Remarks against selected solutions implemented by the amendment to the Penal Code of 20 February 2015

ANNA MUSZYŃSKA

Department of Substantive Criminal Law
Faculty of Law, Administration and Economics, University of Wrocław

Amendments to the substantive criminal law introduced/implemented in 2015 were certainly recorded as thorough adjustments/modifications of the means of the criminal law on crime. They included the anticipated solutions of 20th February 2015¹ and the amendment of 20th March 2015², referring primarily to the normative shape of sentencing rules of penal measures. Their significance is greater, provided they concern the fundamental structure, regarding which in the doctrine and judicial practice critical remarks are often formulated. We can ascertain that to some extent, the legislator fulfilled expectations with regard to removing the defectiveness of the foregoing solutions. However, it could avoid neither actions nor failures in terms of legislative changes, which still arouse controversy.

Regarding consecutively selected legal solutions, it should be noted that the legislator altered i.a. directories of legal measures, by removing forfeiture, obligation of redress for damage and punitive damages.

¹ Legal Act of 20th February 2015 — change of act — Penal code and other acts (Journal of Law of 2015, item 396).

² Legal Act of 20th March 2015 — change of act — Penal code and other acts (Journal of Laws of 2015, item 541).

Chapter Va has been added, entitled “Forfeiture and compensatory measures” and placed among those which do not fit into the penal measures category. Forfeiture and compensatory measures are not linked by any common element, it seems unnecessary to search for one. The legislative change has a rather technical and ordinal meaning.

Proceeding to amendments to compensatory measures, it should be mentioned that the criminal codification binding until 1st of July 2015 anticipated some legal basis enabling the aggrieved to seek compensation/remedy. The aggrieved had an opportunity to submit a motion in a criminal trial specified in Article 46 § 1 CC (penal code) or adhesive process. The court taking action ex officio could rule obligatory remedy as a (probative?) measure or adjudge compensation based on the grounds of Art. 415 § 4 CPP (code of penal proceedings). The first group of measures had priority and was initiated by the aggrieved, whereas the second group had a more subsidiary character and was considered by the adjudicating agency in case of lack of activity of the aggrieved. The differences between them concern primarily executive grounds, including applying for executive title/name and further consequences resulting in its realization.

The doubts expressed against the background of the existing regulation led to changes in terms of remedy³. Their significance is even greater, since they change in a positive and vital way the image of compensation on the ground of penal law. First as a significant modification we should mention the reduction of plurality of the legal basis related to eliminating adhesive plea and of the ex officio remedy effectuated by the legislator. This way all the statements related to the conditions for applying, as well as the functional side of the legal structures, in particular the possibility too choose the forms of activity in terms of seeking redress (motion Art. 46 § 1 CC or adhesive plea) by the aggrieved became out-of-date, as well as the overlapping regulation. We could say that part of the fate of adhesive claim was decided by practice, including a lack of belief that it is a good of vindicating the legal claims and its effectiveness, actually in criminal proceedings a settlement in a civil case would be

³ Cf. M. Iwański, M. Jakubowski, K. Pałka, “Rozdział 7. Środki kompensacyjne”, [in:] *Nowelizacja Prawa Karnego 2015. Komentarz*, ed. W. Wróbel, Kraków 2015, pp. 179–211.

obtained. An *ex officio* remedy has become insignificant because of the acceptance of the wording of Art. 46 CC. The court had no need to look to the grounds of civil law, holding a competitive criminal law. And in cases where it was obligatory, the court had no other choice.

With the reduction of the legal basis one must pay attention to the shape of criminal law obligatory remedy stipulated in Art. 46 CC. As a positive we must accept the removal of obligatory remedy from the penal measures index and placing it in separate chapter Va entitled “Forfeiture and compensatory measures”. This solution eliminates many foregoing interpretative doubts related to the legal matters of obligatory remedy and its civil nature. Making obligatory remedy a penal measure, a separate legal sanction created controversy, especially on the grounds of combining this measure with other functions of public penalty. In this form it should fulfill goals set for punishment and penal measures, both compensatory functions as well as penal ones. Meanwhile insight into its essence hindered this kind of reference.

Indicating to the legislator that obligatory remedy is followed by penal law regulations, except the possibility of ruling a pension, eliminates judicial issues arising from the overlapping character of the penal measure and its civil law essence. It unequivocally prejudices the civil law character of the mentioned institution and assigns it compensation functions. Moreover, reference to the provisions of civil law directly and not properly, means that it should be applied in full. The only restriction formulated by the legislator concerns prohibition of the use of civil law concerning the possibility of awarding a pension. It can be assumed that the new approach allows for the adjudication of interest, as well as eliminates disputes regarding the solidarity rule obligation to repair the damage.

In the remaining province the legislator retains the current form of evidence to rule obligation to provide compensation upon request, and *ex officio* without changing the scope of the objective and not limiting the scope of the subjective. He only extended the deadline for submission of the application for damages “to the closing of the trial”, thus returning to the original solution and reactivating previously expressed doubts as to the late development of the position of compensation claim of the aggrieved. It is unnecessary to acknowledge the regulation concluded in

Art. 46 § 3 CC. In view of the content of Art. 415 § 2 CPP it is only a repetition of the phrase related to the possibility to claim in civil proceedings unsatisfied portion of claims.

Besides the obligation of remedy ruled as a compensatory measure, the legislator left in the Criminal Code the possibility of redress in the context of the probative condition under conditional discontinuance of criminal proceedings or conditional suspension of execution of a sentence. The legal redress in this approach still has a penal nature and requires consideration of directives sentencing and penal measures. This introduces a clear inconsistency in the amended solutions. It also deepens the possibility of adopting an alternative exemplary judgment of conditional discontinuance of proceedings without the possibility of taking such a decision, the conditional suspension of execution of a sentence. The legislator also clarified the relationship between the compensatory measure and the probative measure in a way that ruled out the adjudication of the latter when the sentence means compensation. Leaving this distinction in the obligation to repair the damage (penal excuse and civil law remedy compensation) raises the question of whether it should confine itself to one based on the judgment of obligation to repair the damage and give the probative measure. There no justification for this current division and it causes some valid criticism of the differentiation of the situation of the aggrieved depending on the legal ground applied.

The position of discretionary damages was changed by the amendment of 2015 locating it, as well as obligation to remedy the damage caused, in section Va entitled “Forfeiture and compensatory measures”. Therefore, it has to be assumed that according to the new systematics, discretionary damages were “removed” from the catalogue of criminal measures and became a compensatory measure. However, there is still a question whether the introduced amendment changed the current views of dualism (double nature) of discretionary damages coming down to the coexistence of a repressive and compensatory element within their framework. In this situation, it is usually essential to give due consideration to the individual regulations of discretionary damages. Looking at the various basis of discretionary damages, it can still be said that discretionary damages in the criminal justice system do not play a uniform role and just as on the basis of earlier codification, they reveal their

mixed penal and compensatory character. There is no “general formula” of discretionary damages, despite their location among the compensatory measures since 1st of July 2015. Depending on the specifically analyzed legal basis, the penal or compensatory element comes to the foreground. The latter primarily characterizes discretionary damages where the aggrieved — individually referenced — is a beneficiary and they remain in close proportion to the loss incurred by the aggrieved. Observing the trends of modern criminal law we can notice that the legal nature of discretionary damages is somehow “bent” toward compensation, which is also apparent in the area of effects caused by the execution of discretionary damages, but they are so far from being uniform that their compensatory character is not to be seen as primary in all cases. Discretionary damages become especially important in cases concerning acts resulting in damage which is difficult to estimate in material terms. It functions as a flat-rate compensation then.

Staying within the circle of former criminal penalties it should be noted that the legislator also made changes concerning forfeiture. In the light of the legislative amendments to the Criminal Code, the rules for the application of forfeiture itself were not changed as much as its location. Forfeiture indicated in Art. 44 CC, as well as forfeiture of material assets under Art. 45 CC were included in separate chapter Va. As indicated in the justification of the amending Act, forfeiture and discretionary damages should be included in a single chapter entitled “Forfeiture and compensatory measures”. Placing forfeiture in one chapter together with compensatory measures means that now the main form of forfeiture, including forfeiture of material assets, has become another kind of reaction of a criminal penalty character to the criminal act. Referring to the *ratio legis* of this legislative measure, the justification for the amending Act should be cited as follows: “it is impossible to clearly determine the nature of forfeiture (if it is not to be confiscation of property) or damages and the obligation to provide compensation, which are of a typically civil law character”⁴. Looking at the introduced modification in terms of the nature of the forfeiture of material assets, it should be noted that it does

⁴ Draft of the Act of 5.11.2013 with justification it has been published on the website of the Ministry of Justice: HYPERLINK „<http://www.ms.gov.pl>” www.ms.gov.pl.

not have the character of a criminal penalty, but it did not lose its penal character. After all, it is not determined by the very change of location of the measure in the criminal code. As a result, the rational legislator should eliminate, while maintaining the consistency of the regulation, the use of the directives in making the decision on it taken into account by the court in the administration of criminal penalties. The change introduced to Art. 39 CC, consisting in removing of forfeiture, and thus also the forfeiture of material assets from the catalogue of criminal penalties and its regulation in new Chapter Va, was not, however, connected with the content of the remaining provisions of the Criminal Code. It should be emphasized that the change in Art. 39 CC was not accompanied by a simultaneous change of the wording of Art. 56 CC, or other provisions, including Art. 53 CC, Art. 54 § 1 CC, and Art. 55 CC, which are applied to other measures provided for in the Criminal Code, respectively. It should be indicated that, admittedly, the obligation to remedy the damage caused or provide compensation for the damage suffered were excluded from Art. 56 CC, however, forfeiture was not part of this exclusion. Such normative regulation seems to be inconsistent. The amendment of 1st of July 2015 in terms of forfeiture of material assets does not introduce any new quality to this measure, apart from different classification of penal measures⁵. Placing forfeiture among other measures provided for in the Criminal Code in Chapter Va by the legislator changed its status only outwardly.

The legislator also planned significant modifications in the field of precautionary measures, which comprise electronic surveillance, therapy, addiction therapy, stay in a psychiatric hospital. The changes consisted mainly in giving the majority of precautionary measures a non-custodial character and strengthening the similarities to probation measures in their content. They can only be adjudicated when it is necessary to prevent the perpetrator from committing a criminal act again and other legal remedies provided for in the Code or the provisions of other laws are not sufficient to achieve this objective (Art. 93b § 1 CC). The legislator, introducing radical changes in this area, once again did not avoid inconsistencies in

⁵ Details on this topic A. Czwojda, *Przepadek korzyści majątkowej w polskim prawie karnym*, Wrocław 2016, unpublished doctoral dissertation.

the monoline regulations. This can be seen in particular on the example of a preventive measure in the form of addiction therapy, applied to the perpetrators in the event of their conviction for crimes committed in connection with alcohol, narcotic drugs or other similarly acting substances. Explaining the essence of this measure, it should be noted that in relation to the previously existing legislation, its subjective prerequisite relating to the psychophysical condition of the perpetrator, i.e. the level of addiction — has not been changed. However, the substances which induce the addiction have been specified in a different way. It is stated in Art. 93e point 5 CC that it concerns addiction to alcohol, narcotic drugs or other similarly acting substances, thereby eliminating the doubts of terminology related to the prior regulation, the interpretation of which led to the erroneous conclusion that, from a legal point of view, alcohol should be treated as an intoxicant. Therefore it shows that the perpetrator, who is adjudicated to undergo addiction therapy is required to appear at the drug treatment facility indicated by the court within the period prescribed by the doctor and undergo treatment for alcohol, narcotic drugs or other similarly acting substances dependence. In the Criminal Code the term “drug treatment facility” was used. Terminology of this kind raises doubts stemming even from the fact that in the legal system in the field of addiction treatment we are dealing with healthcare entities. Thus the question arises, what kind of drug treatment facility is specified in the Code, is this concept equivalent to the healthcare entity, or requires autonomous interpretation. This provision is not clear about the form of addiction treatment to be carried out, either. It would have to be assumed, therefore, that the court — adjudicating such measure, indicates whether the addiction therapy should be of a stationary or outpatient character. One can conclude that before taking a decision the court shall receive an adequate expert opinion. According to Art. 354a § 1 point 1 of the Code of Criminal Procedure, before the application of a preventive measure, referred to in Art. 93a § 1 item 3 CC, the court always has to hear a psychologist, and in cases of addicts it has the possibility (optionally) to listen to an expert in the subject of addiction. The preventive measure in the form of addiction therapy is of a non-custodial character and can be used in the case of adjudication of any sentence. If the offender is sentenced to imprisonment without conditional suspension of a sentence,

25 years imprisonment or life imprisonment, this measure is applied after serving a sentence or after a conditional release. In such a situation, not earlier than 6 months before the end of imprisonment or anticipated conditional release, the court must determine the need for adjudicated preventive measure application. This is due to the fact that the convicts serving a sentence who are addicted to alcohol, narcotic drugs or psychotropic substances are obliged to undergo treatment during their imprisonment in accordance with Art. 117 of the Executive Criminal Code. Therefore, it may happen that the execution of a preventive measure in the form of addiction therapy becomes pointless.

The provision relating to addiction therapy may seem to be accurate — in principle — if it was not juxtaposed with the possibility of imposing an obligation to undergo therapy on people addicted to drugs pursuant to Act of 2005 on counteracting drug addiction⁶, or even with the obligatory treatment of addiction imposed on those addicted to alcohol as probationary condition pursuant to Art. 72 § 1 sec. 6 CC. Then we can see the obvious inconsistency of regulations in the field of therapy for people addicted to alcohol and people addicted to drugs, and it is even more pronounced when considered against the application of a penal seclusion or non-custodial sentence.

It must be noted that according to the Act of 2005 on counteracting drug addiction (Art. 71 sec. 3), in case of conviction to imprisonment without conditional suspension of its execution of an addicted person for an offense committed in connection with the use of narcotic drugs or psychotropic agents, the court may decide to place the offender in an appropriate healthcare entity for a period not exceeding two years before imprisonment. If the sentenced person fails to undergo therapy or rehabilitation, or commits a serious breach of the rules of the healthcare entity, the release may also take place at the request of the entity. After the completion of the therapy and rehabilitation the court shall decide whether the sentence of imprisonment should be enforced. The Act of 2005 on counteracting drug addiction also provides (Art. 7 sec. 1), that in the case of conviction to imprisonment of an addicted person for

⁶ Act of 29.07.2005 on counteracting drug addiction, Journal of Laws 2016, item 224.

an offense in connection with the use of narcotic drugs or psychotropic agents, the execution of which was conditionally suspended, the court shall oblige the convicted person to undergo therapy, rehabilitation in a healthcare entity. Application of that measure ignores the prerequisite of giving consent by the convict to undergo therapy. Moreover, the Act, within the scope regulated in the Criminal Code, eliminates the possibility of adjudication of precautionary measures (electronic surveillance, therapy, addiction therapy; except for a stay in a psychiatric hospital) for the offenders addicted to drugs.

The new precautionary measure in the form of addiction therapy (Art. 93a, sec. 3 CC) is based on other assumptions than those provided for in Art. 71 sec. 3–5 of the Act on counteracting drug addiction. While the first one is a non-custodial measure, which can be adjudicated in the case of any penalty provided by the Criminal Code, provided that the aforementioned conditions are met, the solution set forth in the Act on counteracting drug addiction is still based on the old model, which formed the basis of the Criminal Code of 1969.

It follows that the provisions of the Criminal Code relating to safeguards applied to addicted offenders apply only to offenders addicted to alcohol, and to the same perpetrators addicted to drugs or other similar substances the provisions of the Act on counteracting drug addiction. The result is an unjustified difference in treatment of the two categories of perpetrators. With all different addictions to alcohol and drugs there is no reason to apply non-custodial measures to alcohol addicts and isolation measures to drug addicts and in a narrower extent⁷.

The comparison of the possibility of ruling a preventive measure in the form of addiction treatment next imprisonment with a conditional suspension of its execution to the possibility of imposing on the offender during the probation period obligation to undergo drug treatment in accordance with Article 72 § 1 point 6 CC the conditional suspension of the execution of imprisonment give gross results. The situation is somewhat different for those addicted to alcohol and for people addicted to drugs.

⁷ K. Krajewski, “Rozdział III. Środki zabezpieczające o charakterze leczniczym stosowane wobec sprawców przestępstw uzależnionych od alkoholu, środków odurzających i substancji psychotropowych”, [in:] *System prawa karnego. Środki zabezpieczające*, ed. L.K. Paprzycki, vol. 7, Warszawa 2015, p. 352.

The reasons for imposing the obligation to undergo drug treatment with a conditional suspension of execution of a sentence of imprisonment on the basis of Art. 72 CC refer only to the perpetrators addicted to alcohol. For offenders addicted to drugs the rules of Art. 71 section 1 of the Act on counteracting drug addiction cited above are used. The latter provision is the *lex specialis* in relation to the provision of Art. 72 § 1 point 6 CC. The difference between the solutions of the Criminal Code and the Act on the prevention of drug addiction lies in the fact that, in accordance with Art. 72 § 1 point 6 CC, imposition of an obligation to undergo drug treatment as a condition of use of the product associated with the submission probation in the form of conditional suspension of a sentence of imprisonment is optional in nature and the imposition of such an obligation requires consent of the convicted person. However, according to the provisions of Art. 71 § 1 of the Act on counteracting drug addiction, imposition of compulsory treatment and rehabilitation is mandatory and does not require consent of the convicted person. This provision also introduces handing in the convicted during the probation period under the supervision by the probation officer. Another difference between the obligations imposed in the case of conditional suspension of a sentence and detention in the form of addiction treatment lies in the fact that, in holding protective measure, referred to in Art. 93F CC § 2, the court is required to indicate the drug treatment facility where the convicted person has to undergo therapy. Such a requirement is not included in the provisions of Art. 72 § 1 point 6 CC, Art. 71 § 1 of the Act on counteracting drug addiction. These provisions indicate only an obligation to undergo treatment or addiction treatment and rehabilitation in the appropriate therapeutic entity. The court is not obliged to indicate the institution in which the therapy would take place, which in turn is part of ruling preventive measure. On a final note it is necessary to eliminate this peculiar dualism and adoption of uniform rules governing rule addiction therapy by eliminating the above-mentioned differences.

Concluding this paper on the chosen solutions concerning punitive measures and precautionary measures, it can be observed that some of the solutions in general, deserve recognition. No way can the need to introduce them be challenged, arising from previous negative experiences. This does not mean, however, that the adopted solutions do not

raise criticism. Any observations therefore indicate the need for further comprehensive analysis and structuring of an extensive range of criminal reactions, which are an important instrument for the implementation of the current criminal policy.

Summary

The author presents questions related to the change of legal regulations concerning the selected criminal and security measures. She emphasizes inconsistencies relating to changes in the scope of the obligation to compensate damages, exemplary, forfeiture, protective measures, including addiction treatment. The author welcomes the changes resulting from the amendment of 20th February 2015, but considering the possibility of further changes that lead to more rational normative solutions.

Keywords: crime, obligation of redress for damage, compensation, exemplary damages, forfeiture, protective measure, addiction therapy.