

# Remarks on codex crimes of capital fraud (art. 311 CC) in the background of neighbouring countries

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## I. Introductory remarks

1. Capital fraud is one kind of economic crime<sup>1</sup> and is criminalisation of the behaviour of infringement of stability, safety, and trust of trading securities by acts aimed at creating a false image about the factors implying taking an appropriate investment decision.<sup>2</sup> Typing of capital fraud crime is contained in the regulation of art. 311 of the bill on 6<sup>th</sup> July 1997 — Penal Code<sup>3</sup> which is located in Chapter XXXVII entitled *Crimes against money and security trading*. Sometimes unjustifiably the crime of so-called credit fraud typed in the regulation of art. 297 of the Penal Code in Chapter XXXVI of the Penal code entitled *Crimes against economic turnover*<sup>4</sup> is defined as capital fraud.

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<sup>1</sup> T. Oczkowski, *Oszustwo jako przestępstwo majątkowe i gospodarcze*, Kraków 2004, p. 118.

<sup>2</sup> P. Ochman, *Karnoprawna ochrona rynku kapitałowego. Przepisy karne ustaw polskiego rynku kapitałowego*, London 2014, p. 283.

<sup>3</sup> Journal of Laws from 2016, point. 1137, with later changes, further called *Penal Code*.

<sup>4</sup> See O. Górniok, *Przestępstwa gospodarcze. Rozdziały XXXVI and XXXVII Kodeksu karnego. Komentarz*, Warszawa 2000, p. 26.

2. Although over 20 years has passed since the adoption of the Penal Code, the issue of capital fraud has not seen a huge number of professional publications, apart from commentaries and only in the chapters of a few monographic studies<sup>5</sup> and articles.<sup>6</sup> Moreover, during the discussion on the changes in this particular part of the Penal Code which took place a few years ago, a proposition of deleting the regulation of art. 311 of the Penal Code appeared in the Criminal Law Codification Commission.<sup>7</sup> Not prejudging the legitimacy of the above proposition, it is worth reminding, on such an occasion, the genesis and the range of capital fraud criminalisation in Polish law, possible flaws of the present legal state and also capital fraud criminalisation in neighbouring countries (based on the Penal Codes of Germany, the Czech Republic, Slovakia, Ukraine, Lithuania, and Russia).

## II. Detailed comments

### a) The road to criminalisation of codex capital fraud in Poland

1. The Codex crime of capital fraud was introduced into the Polish legal system on 1<sup>st</sup> September 1998 (art. 311 Penal Code). This does not mean, however, that it was not a subject of criminalisation in non-code criminal commercial law.<sup>8</sup> Capital fraud was also not typed in the bill

<sup>5</sup> See e.g. J. Skorupka, *Obrót papierami wartościowymi i jego prawnokarna ochrona*, Legnica 1998, pp. 156–164; R. Kuciński, *Przestępstwa giełdowe*, Warszawa 2000, pp. 242–250; J. Bojarski, *Przestępstwa gospodarcze związane z działalnością banków*, Toruń 2001, pp. 218–220; T. Oczkowski, op. cit., pp. 192–216; M. Sucharski, *Prawnokarna ochrona giełdowego obrotu papierami wartościowymi*, Toruń 2006, pp. 169–176; P. Ochman, op. cit., pp. 279–296.

<sup>6</sup> See e.g. R. Kuciński, “Oszustwo kapitałowe”, *Gazeta Sądowa* 1998, no. 6, pp. 22–23; J. Skorupka, “Przestępstwa fałszowania papierów wartościowych w nowym kodeksie karnym”, *Prokuratura i Prawo* 1998, no. 10, pp. 71–88; R. Zakrzewski, “Ochrona obrotu pieniądzem i papierami wartościowymi w nowym kodeksie karnym”, *Przegląd Ustawodawstwa Gospodarczego* 1998, no. 5, pp. 15–18; T. Oczkowski, J. Bojarski, “Przestępstwo oszustwa kapitałowego”, *Monitor Prawniczy* 1999, no. 7, pp. 15–19.

<sup>7</sup> <http://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013/download,2556,1.html> (access: 27.10.2017).

<sup>8</sup> See more P. Ochman, op. cit., pp. 23–28.

on 12<sup>th</sup> October 1994 on the protection of economic turnover and the changes of some regulations of criminal law,<sup>9</sup> despite the fact of defining related crimes such as credit fraud (art. 3 OOGU) or insurance fraud (art. 4 OOGU) in this legal act. This state of things wasn't however, an obstacle in running the legislative works on introducing this crime to a new criminal codification.

2. In the works on passing a new Penal Code ongoing since the beginning of the 1990s, there appeared many drafts of capital fraud. In the version of the Penal Code project from December 1991,<sup>10</sup> the crime of capital fraud was typed in the designed Chapter XXXVI entitled *Crimes against economic turnover*, in the regulation of art. 295, stating:

§ 1. The one who, in the documentation related to security trading, disseminates untrue or conceals true information on the estate of the bidder which has significant meaning to the decision of purchasing, selling securities, of increasing or decreasing the input in them is a subject of punishment of imprisonment from 3 months to 5 years. § 2. The one who, in relation to a public tender, disseminates untrue information or conceals significant circumstances being important to taking the decision of purchasing or selling the subject of the tender, is a subject of the same punishment. § 3. The one who freely prevented the damage before the proceedings started, is not punishable.

In justification of this project it was pointed out that

the specific crime of dishonesty in turnover of securities is introduced by art. 295 § 1 making dissemination of untrue information about the estate of the bidder and similar to it dissemination of untrue information in relation to a public tender punishable (art. 295 § 2).<sup>11</sup>

However, there was no explanation of the regulation § 3 art. 295. Moreover, the conviction that “dissemination of untrue information related to a public tender” is similar to “dissemination of untrue information about the estate of the bidder” in the turnover of securities is doubtful.

3. In editing of the Penal Code from February 1995<sup>12</sup> a change of location of the crime of capital fraud was made. It was placed in the

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<sup>9</sup> Journal of Laws No. 126, point 615.

<sup>10</sup> Project of Penal Code. Edition from December 1991, Committee for the case of Penal Law Reform. Team of Material and Military Penal Law.

<sup>11</sup> Project of Penal Code. Edition from December 1991, Committee for the case of Reform of the Penal Code. Team of Material and Military Penal Law, p. 100.

<sup>12</sup> Project of the Penal Code. Edition from February 1995, Committee for the case of Reform of the Penal Code. Team of Material and Military Penal Law.

designed Chapter XXXVII entitled *Crimes against money and securities turnover* in the regulation of art. 309. Its content was as follows:

The one who in the documentation related to the securities turnover disseminates untrue information or conceals information about the estate of the bidder which is significant for purchasing, selling securities or for increasing or decreasing the input is a subject of punishment of imprisonment for up to 3 years.

In the justification of this version of the project of the Penal Code it was pointed out that “The project introduces a penalty of the crime of capital fraud by dissemination of untrue information about the estate of the bidder or its concealment”.<sup>13</sup> The definition of capital fraud proposed in the version of the Penal Code from February 1995 was convergent with the presently binding content of the regulation of art. 311 CC.

**b) The range of criminalisation of the capital fraud in Poland *de lege lata***

1. The dissemination of documentation of untrue information about the estate of the bidder related to securities turnover which is significant for purchasing, selling, increasing, or decreasing the input or concealing this information, is the essence of the constructions of the codex capital fraud (art. 311 CC). Any detailed discussion of statutory features of this crime would exceed the subject in this article but some implications resulting from the analysis of some of them, especially when compared to non-code types of this crime are worth noticing.<sup>14</sup>

2. It is specific for the criminalisation of the crime of capital fraud in Poland that the code regulation (art. 311 CC), *de facto* is *lex generalis* in relation to special types of capital fraud crimes typed in non-code bills.<sup>15</sup> Among non-code capital fraud crimes the regulations of art. 100 of the bill on 29<sup>th</sup> July 2005 about the public offer and conditions of introducing financial instruments to the organised turnover system about public companies,<sup>16</sup> art. 90 of the bill on 15<sup>th</sup> January 2015 about obli-

<sup>13</sup> Ibidem, p. 103.

<sup>14</sup> See T. Oczkowski, J. Bojarski, op. cit., p. 15.

<sup>15</sup> See differently R. Kuciński, op. cit., p. 242.

<sup>16</sup> Journal of Laws from 2016, point. 1639, with subsequent amendments further called *OPU*.

gations,<sup>17</sup> art. 287a, 288a and 288b — of the bill on 27<sup>th</sup> May 2004 about investment funds and management of alternative investment funds<sup>18</sup> should be pointed out. They penalise the behaviour — generally speaking — of giving untrue or concealing true data concerning taking appropriate business decisions. The existence of such a spread non-code typing of capital fraud was one of the arguments supporting the deletion of the regulations of art. 311 of the Penal Code. In the justification of the project of changes of the particular part of the Penal Code prepared under the auspices of the codification commission for criminal law, it was pointed out that:

The Codification Commission stated that the regulation of art. 311 is unnecessary. Currently, legal protection in this aspect is realised in a complex and restrictive way, most of all based on numerous penalty regulations coming from three following bills from 29<sup>th</sup> July 2005: NRKU, OIFU, OPU. Especially in this last bill the regulations of art. 100–104 were foreseen in which the behaviour defined in art. 311 of the Penal Code was penalised in an appropriate and close relation to the proper regulations.<sup>19</sup>

**3. Legal protection of various forms of turnover of financial instruments, also securities, both controlled and non-controlled, against the efforts aimed at creating a false image of the factors influencing taking an appropriate investment decision aims at ensuring stability, safety, and trust to securities turnover.**<sup>20</sup> Despite relevant control requirements in the aspect of turnover of selected financial instruments foreseen in the special bills (OPU, OU, FIU), the regulation of art. 311 of the Penal Code provides wider protection of securities turnover both in the object aspect

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<sup>17</sup> Journal of Laws from 2015, point 238, with subsequent amendments, further called *OU*.

<sup>18</sup> Journal of Laws from 2016, point. 1896, with subsequent amendments, further called *FIU*.

<sup>19</sup> <http://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013/download,2556,1.html> (access: 27.10.2017). On the margin it can be indicated that the bill from 29<sup>th</sup> July 2005 on the supervision of capital market (Journal of Laws 2017, point 1480, with subsequent amendments, called *NRKU*) does not contain and did not contain penal regulations typing non-code capital fraud crime.

<sup>20</sup> P. Ochman, op. cit., p. 283.

(turnover platform) and the subject one as well (professional and unprofessional subjects).<sup>21</sup>

4. Criminal activity of capital fraud lies on the dissemination of untrue and concealment of true information concerning the estate of the bidder. Criminalisation of such efforts comes only when this information has significant meaning for: purchasing securities, their selling, increasing or decreasing the input. With such an approach to the features of capital fraud indicated above, a crucial question may appear, namely, what kind of information concerning the estate of the bidder may have significant meaning for purchasing, selling securities, increasing or decreasing the input? For example, the cases can be indicated in which the securities being the subject of turnover will not come from the bidder, or in the case of endorsing the bill of exchange — untrue information of his estate comes from the endorser. In all cases the estate of the bidder (seller) has no significance from the point of view of taking the decision about the purchase or selling of the selected financial instrument<sup>22</sup> (both in relation to the value of the shares and also from the point of view of possibly satisfying the liability of the endorser!) The problem seems to be in the subject improperly defined by the legislator, from whom the criminalised information comes from. Although the views appearing in professional literature should be approved, according to which in this case giving strategic information for the selected transaction should be penalised,<sup>23</sup> but it should be noted that fulfilling the statutory features of the crime of art. 311 Penal Code will take place only if the bidder at the same time will be the issuer of the securities or the subject in which the increase or decrease of the input is made. Only in such a configuration, however, will the information concerning the “bidder” influence taking the decision in the subject of purchasing or selling securities or increasing or decreasing the input.

5. The Code type of capital fraud is threatened by imprisonment from 1 month to 3 years. What is interesting is that the non-code types are threatened with more severe penalties. So the crime typed in the regulation

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<sup>21</sup> Ibidem.

<sup>22</sup> See. T. Oczkowski, J. Bojarski, op. cit., p. 17.

<sup>23</sup> Z. Ćwiąkałski, [in:] *Kodeks karny. Część szczególna*, vol. 3. *Komentarz do art. 278–363 KK*, ed. A. Zoll, Kraków 2006, p. 913.

of art. 100 OPU is threatened by the alternative sanction of a fine up to 5 000 000 PLN or imprisonment from 6 months to 5 years, or both these penalties together. The crime typed in the regulation of art. 90 OU is threatened by the cumulative sanction of a fine up to 5 000 000 PLN and imprisonment from 6 months to 5 years. But the crimes from art. 287a, 288a and 288b FIU however are threatened by the alternative sanction of a fine up to 5 000 000 PLN or imprisonment for up to 3 years. The lack of tolerance of penalties is visible both in the relation — code type of capital fraud — non-code type of capital fraud, and also between the selected types of non-code capital crimes. The above discrepancy, especially in relation to the regulations contained in additional criminal legislations has no justification.

### **c) Criminalisation of capital fraud in neighbouring countries**

1. The appearing propositions of deleting the code of capital fraud may become a motivation to the diagnosis of criminalisation of such behaviour in the penal codes of Poland's neighbours. For this purpose, as an illustration the regulations of the German, Czech, Slovak, Ukrainian, Lithuanian, and Russian penal codes will be presented.

2. In the German Penal Code (*Strafgesetzbuch*) capital fraud (Germ. *Kapitalanlagebetrug*) was typed in regulation § 264a. It is located in Chapter XXII entitled Fraud and Swindle. Capital fraud is a common offence in the German Penal Code. Presenting untrue, favourable data, or concealing unfavourable data in folders, presentations, a review of the estate related to significant circumstances influencing the decisions of purchasing or increasing the input directed to a larger number of people is its gist. Realisation of the functional feature mentioned above should take place in relation to the distribution of securities, right to purchase, or shares which are supposed to guarantee the shares in profit of the enterprise or to the proposition of increasing these shares. The cases when the act refers to the shares in property which is managed by the enterprise in its own name but for somebody else's account is also penalised. Capital fraud is threatened by imprisonment for up to 3 years or by a fine. A clause of not being a subject of punishment in cases when a perpetrator freely prevents performing the benefit execution of which became possible based on gained or increased benefit, was also foreseen. However, in cases when the benefit is not executed without the perpetrator's action,

free and serious attempts aimed at preventing the benefit's execution are the condition of not being the subject of punishment.

3. In the Slovak Penal Code (*Trestny zakon*) a separate type of capital fraud (*Kapitálový podvod*) is typed in § 224, next to common fraud (§ 221), credit fraud (§ 222) and insurance fraud (§ 223). All of the indicated crimes are located in Chapter four, entitled *Crimes against ownership (right)*. Also in the Slovak penal codification capital fraud is a common crime. Giving untrue data or data which are non-compliant to the actual state related to the capital of a company or a financial situation of the enterprise within which the investment is supposed to take place or concealing the flaws of such an investment is its gist. Realisation of the functional features is supposed to happen in relation to the offer, sale, or distribution of securities or other valuable documents which give grounds to participate in the profit — or in relation to increasing the input in brochures and other promotional materials or reports concerning the structure of property or the capital of the company — related to a significant number of people. In the basic type of this crime it is threatened with imprisonment from a year to five years. The Slovak Penal Code, however, distinguishes as many as three groups of qualified types threatened respectively by the penalty of imprisonment for the period from 3 to 10 years, from 5 to 12 years and from 10 to 15 years. The first group of the qualified types concerns the situations in which damage of significant size was done, committing the act due to special motivation or acting in a serious way. The second group of the qualified types concerns the cases of doing significant damage. In turn the third group of the qualified types concerns doing the damage of huge size or committing the subject crime within an organised crime group or in a crisis situation.

4. In the Czech Penal Code (*Trestny zakonnik*) a separate type of capital fraud hasn't been typed. Such state of affairs may surprise, as next to classic fraud § 209, economic frauds are in the form of security fraud (§ 210), credit fraud (§ 211) and subsidising fraud (§ 212). Additionally, in the sixth chapter of the Czech Penal Code entitled "Economic Crimes" the crimes related to financial instruments turnover were typed. A manipulation of financial instrument (§ 250), *insider trading* (§ 255), unlawful shares emission (§ 249) are pointed out.



5. Also in the Lithuanian Penal Code (*Baudžiamojo Kodekso*) a separate crime of capital fraud hasn't been typed although the code defines the crimes related to financial instruments turnover. A separate chapter 32 entitled "*Crimes and offences against the financial system*" has been devoted to them. In this chapter the crimes such as *insider trading* (art. 217), or the crime of financial instruments (art. 218) manipulation were typed. Bearing in mind the above, the criminalisation of capital fraud is possible if the penal regulations from Chapter XXVII of the Lithuanian Penal Code where the acts against property, against the right to ownership, and property interests were typed.

6. In the Russian Penal Code (*УГОЛОВНЫЙ КОДЕКС*) capital fraud was typed in the regulation of art. 185. It is located in Chapter 22 entitled *Crimes in the area of economic turnover*. Similar to previous cases capital fraud crime is common. It consists in giving untrue information in a prospectus, admitting or approving the prospectus of a selected emission or report (notification) on the results of the emission and also public issue of securities which were not registered. An operation causing large-scale damage for citizens, an organisation or the state is a condition for penalisation. In the basic type the indicated crime is threatened by a fine from 100 thousand to 300 thousand roubles, or at the height of remuneration or other revenue obtained by the convicted in the period from one to two years or a sentence of forced labour for up to 480 hours or corrective work for the period up to two years. The qualified types have been also qualified, the gist of which is committing the prohibited act in the effect of a prior agreement or by an organised group. In the first case the statutory threat is from 100 thousand to 400 thousand roubles or equivalent to the remuneration or the revenue obtained by the convict for the period of one to two years or the penalty of forced labour from one to two years or imprisonment for the same period. In turn in the second case the statutory threat is from 100 thousand to 500 thousand roubles or the equivalent of remuneration or other revenue gained by the convict for the period from one to three years or the penalty of forced labour for up to three years or the penalty of imprisonment for the same period.

7. Criminalisation of capital fraud in the Ukrainian Penal Code (*Кримінальний кодекс*) is foreseen in the regulation of art. 232–2. It is located in Chapter VII entitled *Economic crimes*. In opposition to other

penal codifications, the Ukrainian variety of capital fraud is an individual crime. It can be committed exclusively by a functional person of the issuer. Concealing truthful information or presenting false information about the operation of the issuer is its gist. Causing substantial material damage to the investor (also a shareholder) is a condition of penalisation. In the basic type the crime is threatened by a fine from 500 to 1000 non-taxed minimal salaries of the citizens or imprisonment up to 2 years and prohibition of taking selected functions or running selected operations up to 3 years or without such a limitation. In case of repeatedly committing the crime it is threatened by a fine from 1000 to 3000 non-taxed minimal salaries of the citizens or imprisonment up to 3 years and prohibition of taking selected functions or running selected operations for up to 3 years.

### III. Closing remarks

1. The presented review of penal codifications of selected neighboring countries allows us to draw the conclusion that there is no unified approach in the area of criminalisation of capital fraud, the shape of its features, and a statutory threat.

2. There are cases where there is a separate form of classic fraud — a code type of capital fraud is introduced (Germany, Slovakia, Ukraine, Russia). Sometimes, however, despite the regulation of capital code crimes in penal codes there is no separate typing of capital fraud (The Czech Republic, Lithuania).

3. Basically capital fraud crimes also in Poland,<sup>24</sup> are common crimes. In one case (Ukrainian Penal Code) capital fraud was shaped as an individual crime which can be committed by a functional person of the issuer.

4. Despite similar sanctions for capital fraud crimes the statutory threat for this act in the Slovak Penal Code significantly differs from the “average”. The statutory threat for capital fraud of the basic type is from 1 year to 5 years of imprisonment and the qualified types are threatened

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<sup>24</sup> Despite this, in Polish professional literature an opinion was presented according to which “only the person who, thanks to the played functions, has access to offer documentation and thanks to this has the possibility of dissemination of untrue information can be a perpetrator of this crime” (M. Bojarski, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna*, Warszawa 2012, p. 660).

with imprisonment from 3 years to 10 years, from 5 years to 12 years or from 10 to 15 years.

5. Analysing the Polish regulations on capital fraud its dispersion should be pointed out (the existence of code and non-code regulations of capital fraud), and also non unified repressiveness of penal regulations typing capital fraud (threat by imprisonment together with a fine). Relating to the code type of capital fraud considering change of its location to the category of “Crimes against economic turnover” and introducing the clause of not being subjected to the penalty which exists in the German Penal Code and also in Polish types of economic fraud (in relation to so-called credit fraud in the regulation of 297 § 3 CC and in relation to the insurance crime in the regulation of art. 298 § 2 CC) should be stipulated. A faulty approach to the range of the disseminated false information, despite this fact being signalled about for dozens of years<sup>25</sup> in the professional literature, is a significant defect of the present edition of the capital fraud code.

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<sup>25</sup> See T. Oczkowski, J. Bojarski, op. cit., p. 17.

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## Summary

The subject of the article is the presentation of the genesis of criminalisation of capital fraud in the Polish Criminal Code. Further edits of the projects of this crime in the drafts of the current Criminal Code are also analysed, as well as the scope of criminalisation and the problem of repression of capital fraud in Polish criminal law. In addition, solutions proposed to criminalise capital fraud in neighbouring countries are presented. These analyses provide the basis for reporting significant legislative changes.

**Keywords:** capital fraud, economic fraud, economic crime, penal economic law, comparative penal economic law.