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Editorial Words

Dear Distinguished Readers,

In the realm of academia, where the pursuit of knowledge and the sharing of wisdom take center stage, we are delighted to introduce the second issue of Volume 27 of the ASEJ Scientific Journal. This publication, in partnership with the Bielsko-Biala School of Finance and Law, continues to serve as a repository of intellectual exploration and a testament to the wealth of contemporary research.

Within the pages of this volume, a diverse collection of scholarly articles awaits. Each article represents a facet of our collective commitment to understanding the intricate tapestry of global concerns. From the realm of education to the intricacies of energy security, from the digital landscape to geopolitical intricacies, these articles provide valuable insights and open doors to meaningful discourse.

The essence of this volume lies in its unwavering dedication to furthering our comprehension of complex subjects. These articles, penned by experts and scholars who are leaders in their fields, are a testament to the rigorous examination and exploration of topics that resonate with our ever-evolving world.

As you embark on this intellectual journey through Volume 27, No. 2, we invite you to consider the broader tapestry of knowledge it presents. Each article adds depth and dimension to the ongoing conversations surrounding the most pressing issues of our time. Together, they form a mosaic of thought, offering fresh perspectives, innovative solutions, and a deeper understanding of the complexities that define our contemporary world.

These articles are more than words on paper; they represent the collective pursuit of wisdom and the desire to share it with our readers. In each piece, you will find the dedication of researchers who have invested their time, expertise, and energy to illuminate the issues at hand.

We encourage you to engage with these articles, to discuss and debate their findings, and to contribute to the ongoing dialogue that drives the pursuit of knowledge. We trust that this volume will not only inform but also inspire, and that the insights it offers will be a valuable addition to your intellectual journey.

The imperative role of risk management in ensuring the security of logistics processes within small service enterprises is illuminated, emphasizing the significance of mitigating risks in this sector. Safety management in the context of ISO 9000 quality management systems is dissected, underscoring the pivotal role of these systems in ensuring the safety and quality of organizations.

We invite you to immerse yourselves in this eclectic collection of scholarly works, each a beacon of knowledge and insight into these crucial subjects. The articles contained within this volume aspire to stimulate discussion, foster a deeper understanding, and inspire further exploration. We trust that the journey through these pages will be an intellectually enriching experience for all our readers.

Doc. Dr Kateryna Pilova

Editor of the ASEJ, Issue 2, Volume 27, 2023.

The Crime of Evading the Enforcement of a Compensatory Measure in the Amendment to the Criminal Code

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Abstract— The article refers to the issue of the amendment to the Criminal Code, introducing a new crime of evading the enforcement of a compensatory measure ordered by the court. Pursuant to this provision, a person who evades the enforcement of a compensatory measure in the form of an obligation to repair damage or compensation for harm or indemnity for an offense prosecuted by the public indictment, ordered by the court in favor of the injured party or a person closest to him / her, is subjected to the imprisonment penalty. It is therefore worth considering whether the amendment in question is needed, and what the consequences of its introduction may be.

Keywords— crime, criminal code, imprisonment penalty, law

I. INTRODUCTION

Act of 7.7.2022 amending the Act - Criminal Code and some other acts (Journal of Laws of 2022, item 2600, as amended from Journal of Laws of 2023, item 403), which is included in life 1/10/2023 introduced into the Criminal Code (Act of 23.4.1964, Journal of Laws of 2022, item 1138) art. 244c, concerning the new crime of evading the enforcement of a compensatory measure ordered by the court. Pursuant to § 1 of this provision, a person who evades the enforcement of a compensatory measure in the form of an obligation to repair damage or compensation for harm or indemnity for an offense prosecuted by the public indictment, ordered by the court in favor of the injured party or a person closest to him / her, is subjected to the imprisonment penalty from 3 months to 5 years. § 2 provides, however, that the perpetrator of the offense specified in § 1, who performed the compensatory measure adjudicated against him / her in full no later than within 30 days from the date of the first interrogation as a suspect, is not subjected to punishment. In turn, in accordance with § 3, the prosecution of the offense specified in § 1 takes place at the

request of the injured party. It is therefore worth considering whether the amendment in question is needed, and what the consequences of its introduction may be.

II. THE ESSENCE OF THE INTRODUCED REGULATION

The ratio legis of introducing a new type of crime was explained in the justification to the draft amendment to the Criminal Code, which states that "the legislator criminalizes the convict's failure to comply with other decisions relating to his / her relationship with the victim, such as: periodically leaving the premises occupied jointly with the victim. At the same time, failure to comply with these penal measures may be assessed on the basis of the criminal law consequences of committing the prohibited act in connection with which they were adjudicated (e.g. ordering the execution of a conditionally suspended penalty of imprisonment). Therefore, the law should be very similar towards the compensation obligation, because lack of compensation affects the factual and legal situation of the aggrieved party to even greater extent. There is no reason for weaker legal protection in case of compensation obligation, than in case of other obligations imposed upon the convicted" (Parliamentary Print no 2024, s. 78–80). The justification for the new regulation should therefore be sought in axiological considerations, based on the assumption that there is no reason for non-performance of a compensatory measure to be subjected to weaker protection than in the case of penal measures (Herzog, 2023). Thus, the generic object of protection is the proper functioning of the judiciary, and the direct object of protection is the proper performance of a compensatory measure in the form of the obligation to repair the damage or compensate for the harm or damage suffered (Bogacki, Ołęzałek, 2023).



III. THE MARK OF "EVASIVENESS" AND THE PROBLEMS ASSOCIATED WITH IT

Causative behavior consists in evading the enforcement ordered by the court for the benefit of the injured party or the person closest to him / her, for a crime prosecuted by public indictment (Bogacki, Olęzałek, 2023). It is a formal offense of omission, as the perpetrator evades the enforcement of the compensatory measure ordered by the court (Bogacki, Olęzałek, 2023). It can only be committed intentionally (both with direct and potential intention), because the perpetrator's awareness must include all the factual circumstances corresponding to the subject features of the prohibited act, and thus not only the fact of evading the enforcement of a compensatory measure ordered by the court in favor of the injured party or closest to him / her, for a crime prosecuted by public indictment, but also the fact that such a measure has been validly adjudicated against him (Bogacki, Olęzałek, 2023).

It is worth noting that the phrase "evading the enforcement of a compensatory measure" used in the description of this behavior was present in the provisions of the Criminal Code also before the amendment - the phrase "evading" was used in connection with compensatory measures in the context of adjudicating on undertaking conditionally discontinued proceedings (Art. 68 § 2 of the Penal Code) and ordering the execution of a conditionally suspended penalty (Art. 75 § 2 of the Penal Code) (Brożek, 2021, p. 1187). As it is rightly pointed out in the doctrine, the phrase "evades" means not only that there was an objective fact of non-performance, but that the person could perform this obligation (in other words, the perpetrator is able to perform the obligation, but does not do so) - therefore it is not a situation where the obligation has not been performed for reasons beyond the perpetrator's control (e.g. due to an accident or illness (Kałędek-Gadecka, 2023)). This means that the court is obliged to examine in each case whether the perpetrator could objectively perform the obligation imposed on him / her. However, in the case of compensatory measures, the main goal of the aggrieved party is to enforce claims in the form of, for example, compensation for damage. According to Article 25 § 1 of the Executive Penal Code (Act of 6.6.1997, Journal of Laws of 2022, item 2600), the enforcement of these claims is carried out in accordance with the provisions of the Code of Civil Procedure (Act of 17.11.1964, Jotnal of Laws of 2023, item 289, 326, 403, 535, 556, 614, 739, 803, 852). Pursuant to Article 804 § 1 of the Code of Civil Proceedure, the enforcement authority is not authorized to examine the legitimacy and maturity of the obligation covered by the enforcement title, therefore the reasons for the impossibility of performing the imposed obligations are not relevant in the light of the provisions of the Code of Civil Proceedure and enforcement authorities do not examine these reasons. It seems that the victims of the crime are more interested in receiving adequate compensation than in making the perpetrator criminally responsible for not providing them with this compensation (as the perpetrator has already incurred such responsibility for the crime committed to their detriment). Therefore, the principle of priority of execution over repression should apply in this case.

The mere criminalization of evasion of compensatory measures will certainly not solve the problem of often ineffective enforcement of these measures, but it will contribute to the burden of courts with a significant number of new cases and the obligation to examine the personal and financial situation of the debtor in each such case. This examination must sometimes be very meticulous. For example, in cases concerning the crime of non-paying alimony, which is also characterized by "evasion" from paying alimony, the judicature indicates that "the concept of "evasion" includes a negative mental attitude of the person obliged to perform the obligation imposed on him / her, which makes that despite the objective possibility of its performance, the perpetrator does not fulfill this obligation, because he / she does not want to fulfill it, or he / she has neglected the obligation imposed by the judgment, so it must be intentional behavior. This negative attitude should be demonstrated by relevant evidence. The inability to pay may result e.g. from the fact that the perpetrator in the period covered by the charge had the status of an unemployed person without the right to benefit, or that there were no job offers for him / her at the employment office. In this context, it may be necessary to verify whether the accused received any offer employment and whether there was a real chance of getting a job offer at all" (see the judgment of the Supreme Court of 11 May 2022, III KK 64/22, Legalis). It is also emphasized that "the defendant's existing financial obligations may have a significant impact on the assessment of the exhaustion of the features of the crime of non-paying alimony. Evasion imposes an obligation to prove that the perpetrator had an objective opportunity to provide subsistence, but did not do so. The reason for the impossibility of fulfilling the obligation may be (among others public law obligations, arising especially before the period of non-maintenance) above all bailiff seizures and pending executions regarding these obligations. The description of the crime under Article 209 § 1 of the Criminal Code cannot include periods when the perpetrator was unable to fulfill his / her obligation. Therefore, the amount and nature of the defendant's financial obligations, in particular those that are the subject of enforcement proceedings, are of key importance, as well as the extent to which the defendant has fulfilled these obligations and his / her efforts in this respect" (see the judgment of the Supreme Court of 19.10. 2022, II KK 255/22, Legalis). The courts will therefore have to examine the entirety of the debtor's obligations, as well as assess whether he / she had a real opportunity to take up an employment. The result of this meticulous examination will be, at best, imposing another penalty on the perpetrator, which, however, will not have any effect on bringing about the physical receipt of compensation by the aggrieved party.

It should be noted that if the perpetrator is serving a prison sentence for the crime committed, very often the mark of "evasion" will not be fulfilled, because serving the sentence usually means lack of employment and income (Bogacki, Olęzałek, 2023), as the paid work of convicts in Poland is still the exception rather than the rule. In the judgment of the Supreme Court of April 25, 2022, II KK 158/22 (Legalis), it was stated that, for obvious reasons, the defendant cannot be

held criminally responsible for evading the maintenance obligation at the time when he / she was actually deprived of liberty. In fact, it may turn out that a conviction under Art. 244c will mainly apply to perpetrators of "minor" crimes who have been sentenced to non-custodial penalties and can earn income, while it will not be possible for those convicted of serious crimes (e.g. homicide, grievous bodily harm), serving long-term imprisonment and thus deprived of the possibility of earning - it will not be possible to say about such convicts that they "evade" the implementation of compensatory measures, because they objectively do not have the financial resources to meet their obligations. As a result, perpetrators who evade payment of relatively small amounts will be sentenced, and perpetrators of serious crimes, burdened with the obligation to compensate to a much greater extent, will not be able to be convicted. This result is incompatible with the principles of justice. Moreover, it should be noted that the offense under Art. 244c of the Penal Code is punishable by imprisonment, and in the case of the crime of non-paying alimony, it was pointed in the literature that the application of an absolute penalty of imprisonment against the perpetrators of this crime is irrational, as it prevents them from taking up a job that would allow them to provide benefits for the family and to undertake actions aimed at reducing the debt (Sitarz, 2004).

Finally, it is worth noting that pursuant to Art. 300 § 2 of the Criminal Code, who, in order to prevent the enforcement of a judgment of a court or other state authority, prevents or reduces the satisfaction of his creditor by removing, concealing, selling, donating, destroying, actually or apparently encumbering or damaging his / her assets seized or threatened with seizure or removes the signs of seizure, is punishable by imprisonment from 3 months to 5 years. Therefore, evading the satisfaction of the creditor was also criminalized before the amendment, and it seems that Art. 244c is largely an unnecessary duplication of this regulation. The activities described in the cited provision are classic examples of "evasiveness" characterized by the perpetrator's bad will. The only behavior not listed in Art. 300 § 2, which could potentially apply to Art. 244c, may be a simple failure to settle obligations, without concealing in any way one's property from execution. It is doubtful, however, that this exception alone would justify the introduction of the amendment in question.

The disadvantage of the new regulation is also the lack of specifying how long the state of non-performance by the perpetrator of his obligations should last, as in, for example, Art. 209 § 1 of the Criminal Code, according to which a person who evades paying alimony specified as to the amount by a court decision, a settlement concluded before a court or other authority or another agreement, is punishable if the total amount of the resulting arrears is the equivalent of at least 3 periodic benefits, or if the delay the outstanding non-periodic benefit is at least 3 months. Adding a time criterion would make it possible to specify the meaning of "evasion", since at present the assessment of how long the state of non-enforcement of a compensatory measure should last for the existence of a crime to be considered has in fact been left to judicial decisions. It is worth noting that the legislator, in relation to the crime of non-

paying alimony, resigned from the "persistence" of avoiding the alimony obligation in favor of introducing a "rigid" determination of the amount of maintenance arrears, by indicating that their total amount is to be the equivalent of at least three periodic benefits, or if the delay in the outstanding non-periodic benefit is at least 3 months (Hypś, 2023). Alimony is a benefit payable periodically, while "persistence" is understood as a long-term, repetitive action, characterized by bad will and tenacity - therefore, the doctrine and jurisprudence raised the question of how long the perpetrator should not pay maintenance to be able to talk about long-term behavior, i.e. persistent (Majchrzak, 2016). In the judgment of the Supreme Court of 8 December 2008, V KK 277/08 (Legalis), it was stated that the two-month non-maintenance period does not meet the statutory mark of "persistence" under Art. 209 § 1 of the Criminal Code. However, in the case of an offense under Art. 244c of the Criminal Code, we are dealing with a one-off benefit, therefore it seems that specifying how long the period of non-payment from the date of payment of the benefit would entitle to ascertain the existence of a crime would be even more expedient than in the case of alimony. The lack of the hallmark of persistence, understood as a certain length of time, in fact means that even a slight delay could be considered "evasion", provided that the perpetrator had an objective possibility of performing his duty. Time-specified Art. 244c of the Criminal Code could, for example, read as follows: who for more than 3 months evades the enforcement of a compensatory measure ordered by the court in favor of the aggrieved party or a person closest to him / her, for a crime prosecuted by public indictment, shall be subjected to the penalty of imprisonment from 3 months to 5 years.

The abovementioned problem is particularly visible in the context of intertemporal issues, as it is worth noting that the legislator did not limit the penalization of evasion of compensatory measures to measures adjudicated after the entry into force of the amending act. However, it is difficult to reconcile with the principles of justice a situation where such a measure was adjudicated e.g. 3 years ago and the convicted person evaded its execution for 3 years without any punishment, while after the entry into force of the amendment he / she will be responsible for evading it e.g. for a period of 2 months from the entry into force of Art. 244c.

IV. DIFFERENTIATION OF THE LEGAL SITUATION OF THE VICTIMS

It should also be noted that the legislator did not take into account the fact that the pursuit of claims aimed at repairing the damage caused may take place not only in criminal proceedings, but also in civil proceedings. Many victims decide to take civil action, due to the desire not to prolong the criminal procedure, as well as the content of Art. 11 of the Code of Civil Procedure, according to which the findings of a final judgment issued in criminal proceedings convicting a criminal offense are binding on the court in civil proceedings. In the opinion of the Criminal Law Team of the Association of Polish Judges IUSTITIA of September 27, 2021, regarding the draft act

V. SUMMARY

amending the Criminal Code Act and some other acts of September 16, 2021 (Senate Print no 762, p. 16,) it was rightly emphasized that "one should raise doubts as to whether it is justified to introduce criminalization of evading the obligation to redress the damage, the obligation to compensate for the harm or damages suffered by another person (proposed Art. 244c of the Criminal Code). It should be noted that the above measures are no longer punitive measures, but have become compensatory measures, so the provisions of civil law also apply to them. The application for the imposition of the obligation to redress the damage thus acquired the sui generis nature of a simplified civil action. Therefore, the question arises whether it is justified to differentiate the situation when the aggrieved parties pursue civil law claims arising from a crime in criminal proceedings and when they do so in civil proceedings. This is because, in fact, there would be a penalty for failure to fulfill the obligation, which is largely of a civil law nature (Szeleszczuk, 2021). Criminalization of failure to fulfill civil law obligations was also the subject of allegations in the case of the crime of non-paying alimony (penalty for debts) (Hypś, 2023). Art. 209 KK and in the case of an offense under Art. 244c of the Criminal Code, there is also an unjustified differentiation of the legal situation of the victims depending on the mode in which they pursued property claims arising from the crime. Moreover, it should be noted that in criminal proceedings there is only a possibility of imposing the obligation to repair the damage against the perpetrator himself, and not against persons who, under the law, are responsible for the damage caused by him / her (e.g. the person entrusting the performance of the action - Art. 429 KC (Act of 23.4.1964, Journal of Laws od 2022, item 1360), Art. 430 of the Civil Code, the person obliged to supervise - Article 427 of the Civil Code). Claims against these persons may only be pursued by the aggrieved party in civil proceedings, and then the above-mentioned entities may evade their execution with impunity (the only "sanction" will be bailiff's enforcement), while the perpetrator will be punished for the same behavior.

Unfortunately, the above issue is not the only manifestation of the legislator's unjustified differentiation of the legal situation of the injured parties, as the legislator limited the scope of application of Art. 244c of the Penal Code only to compensatory measures adjudicated for offenses prosecuted by public indictment, not noticing that in the case of offenses prosecuted by private indictment, these measures may also be adjudicated, and the harm suffered by the victims may be severe. An example may be the offense of defamation (Article 212 of the Criminal Code), which often leads - as is clear from the wording of this provision - to humiliating the aggrieved parties in public opinion or exposing them to the loss of trust necessary for a given position, profession or type of activity. It is difficult to indicate rational reasons why evading the payment of compensation awarded for such harm should not be subjected to criminalization.

As it is rightly noted in the literature, the changes introduced by the amendment of July 7, 2022 are primarily aimed at intensifying penal repression and significantly divert domestic criminal law from solutions that are ultimately inevitable and are a basic condition for an efficient criminal justice system, i.e. from introducing a simplified penal procedure of a compensatory and consensual nature, at least in relation to certain types of crime (e.g. of a financial nature, which in Poland account for about half of all crimes committed) (Zawłocki, 2023). In my opinion, the criminalization of non-performance of civil law obligations should rather be abandoned in favor of improving their enforcement in civil proceedings, especially since the introduced provision will not contribute to greater protection of the victims, since some of their groups will remain outside the scope of this protection, for reasons deprived of rational justification (civil law mode of pursuing claims for compensation for damage caused by a crime or the fact of prosecuting a crime by private accusation).

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