

INSTRUMENTS INDUCING THE COOPERATION OF MEMBERS OF ORGANISED CRIMINAL GROUPS WITH LAW ENFORCEMENT AUTHORITIES IN POLISH CRIMINAL LAW – ARTICLE 60(3) AND ARTICLE 259 OF THE POLISH CRIMINAL CODE

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Abstract. The article is devoted to the analysis of instruments used to induce cooperation of members of organised criminal groups with law enforcement authorities. The most important regulations relating to this problem in terms of substantive criminal law are Article 60(3) and Article 259 of the Criminal Code. The article presents selected problems of interpretation of both provisions, the problem of their possible concurrence and also indicates the reasons why particularly Article 259 of the CC, despite the fact that it provides for complete impunity of the perpetrator, is not very often used in practice. This is because the benefits offered by it do not cover, which is fully justified, individual offences committed by an offender who is a member of a criminal group. Attention was also drawn to other criminal law and procedural institutions with similar functions, including in particular the institution of a crown witness.

Key words: organised crime; organised criminal group; crown witness; small crown witness

INTRODUCTION

For many years now, organised crime has been perceived as one of the greatest threats to public security. Undoubtedly, instruments of substantive criminal law play a huge role in combating this type of crime. In Poland, organised crime became a significant problem after the social and economic transformations connected with the change of the state system at the turn of 1980s and 1990s. In the earlier period, the most characteristic manifestations of organised criminal activity had been actions undertaken to the detriment of state-owned work establishments, causing the depletion of the assets of these establishments and de facto transferring part of their production to the black market [Jasiński 1997, 41-60; Majchrzak 1965, 1-192; Pływaczewski 1997, 107-108]. The emergence of organised criminal gangs in the 1990s, often characterised by very brutal methods of operation at the time, made the legislator aware of the need to create special mechanisms to

combat this criminal phenomenon, which would expand the existing system of reaction to organised criminal activity. Since the Criminal Code of 1932, Polish criminal law has traditionally provided for the punishment of participating in, founding and directing a criminal association. The emergence of new forms of criminality, including violent criminal gangs, resulted in the introduction of a new form of criminal association into the criminal law system, which was called an organised criminal group. This was done with the amendment of 1995¹ when the Criminal Code of 1969 was still in force. The distinction of this new form was due to the fact that criminal association was traditionally perceived as a structure with a high level of organisation and, therefore, the introduction of a criminal offence of taking part in an organised criminal group was to allow a proper response to participation in structures with a lower level of organisation.

Since its entry into force, the 1997 Criminal Code² has consistently indicated the fact of committing an offence by an offender acting in an organised group or association whose aim is to commit an offence as a basis for the application to him/her of the severe rules for the application of punishment and application of probation measures provided for repeat offenders (Article 65(2) CC in connection with Article 64(2) CC). From the very beginning, the Code also provided for specific solutions which made it possible to avoid responsibility or to mitigate it in the case of an offender who undertook certain forms of cooperation with law enforcement authorities. The first of these solutions, already known to Polish criminal law,³ was the non-punishment clause contained in Article 259 CC. The second – an extraordinary mitigation of punishment in relation to the so-called “small crown witness” described in Article 60(3) CC.

1. EXCLUSION OF PUNISHMENT UNDER ARTICLE 259 CC

Article 258 CC penalises the participation in, foundation and directing of various types of criminal structures, including those of an armed nature and of a terrorist nature. However, in accordance with Article 259, a person who voluntarily abandoned participation in an organised group or association and disclosed to an authority appointed to prosecute offences all the essential circumstances of the committed act or prevented the commission of

¹ Act of 12 July 1995 on the amendment of the Criminal Code, the Criminal Execution Code and on the increase of the minimum and maximum value of fines and exemplary damages in criminal law, *Journal of Laws* No. 17, item 68.

² Hereinafter: CC.

³ The equivalent of Article 259 in the 1969 Criminal Code was Article 277, which was slightly different, though.

an intended offence, including a fiscal offence, shall not be subject to punishment for the offence specified in Article 258 of the Criminal Code.

Despite the seemingly attractive solution provided for in the provision under analysis, according to which a perpetrator who fulfills the conditions set out in the provision is not subject to punishment⁴ for a crime under Article 258, Article 259 CC is extremely rarely used in practice, which seems to be evidenced by the practical lack of judicial decisions concerning its interpretation. The reason for this is the manner in which the requirements for the application of Article 259 CC are defined. The perpetrator must, firstly, voluntarily renounce participation in the group or association, and secondly, either disclose to an authority appointed to prosecute offences all material circumstances of the committed act or prevent the commission of an intended offence, including a fiscal offence. The condition of voluntary renunciation does not raise major doubts – it is generally accepted in the literature that abandonment of participation in a criminal structure must be an expression of a sovereign decision of the offender to permanently withdraw from the activity of the group or association, while the motivation of the offender is irrelevant. It is also important that the perpetrator manifests his or her will to permanently abandon activity in the group or association outwardly: the will of the perpetrator to give up participation in a criminal group may be evidenced, for example, by a direct announcement to other members of the group or association that the perpetrator is ending his criminal activity. The same will be demonstrated by breaking off contact with members of such structures, undertaking some activity against them, or a definite refusal to carry out orders from the head of the group or association [Wojciechowski 1997, 256; Michalska-Warias 2006, 315].

What raises greater doubts is the requirement of disclosing all material circumstances of the committed act. The wording of the provision seems to indicate unequivocally that the disclosure should relate to the circumstances of committing an act under Article 258 CC, as this is the offence to which impunity is to apply. However, the problem lies in the fact that the literature and the judicature quite unanimously recognise the commission of offences which are the objective of a group or association as an obvious manifestation of membership in such structures [thus: e.g. *Ćwiakalski* 2017, 535; *Wiak* 2021, 1434; *Michalska-Warias* 2017, 385; *Flemming and Kutzmann* 1999, 79-80; *Gadecki* 2008, 69; *Góral* 1998, 442; *Górniok* 1999, 311; *Kalិតowski* 2016, 1447-449; *Skała* 2004, 65; *Wojciechowski* 1997, 445].⁵

⁴ Not being subject to punishment constitutes a negative procedural prerequisite, the occurrence of which results in not instigating criminal proceedings or discontinuing initiated ones (Article 17(1)(4) of the Code of Criminal Procedure). Therefore, there is no conviction of the perpetrator and no determination of his/her guilt.

⁵ As examples of rulings recognising the commission of offences that are the aim of a group

However, there is a dispute in the doctrine as to whether the perpetrator has an obligation to disclose offences committed by him as a member of a group, but even accepting the view that such an obligation does not arise from, and should not be derived from, Article 259 CC [thus: e.g. Michalska-Warias 2006, 316] does not change the fact that in practice it is difficult to disclose information only about membership of organised criminal structures, without mentioning the offences committed within them. Meanwhile, the impunity provided for in Article 259 of the Criminal Code certainly does not apply at all to individual crimes committed by an offender as part of his or her membership of a group or association. As a result, the solution offered by Article 259 CC is not often used in practice. This regulation may be most attractive for a perpetrator who only took part in an organised criminal group or association, but for some reason did not personally commit offences which were the aim of the group or association, and such cases must be extremely rare.

It is worth noting that the benefit of Article 259 CC may be availed of by each of the perpetrators of offences specified in Article 258 CC, including the leader of the group, as well as its founder (provided that he or she is subsequently a member of the group). However, the probability of applying the clause of not being subject to punishment to the leader of the group seems very low, because such a perpetrator, when disclosing what the leadership consisted of, would at the same time have to disclose other offences committed by him, often punishable by much more severe punishments. For the same reason, members of the group who have committed serious crimes

as a manifestation of belonging to the group, the judgment of the Court of Appeal in Cracow of 13 November 2015 may be indicated, in the justification of which this court stated: "The causative act of the offence under Article 258(1) of the Criminal Code consists in «taking part» in an organised group or association. The meaning of «taking part» consists in belonging to a group or association, accepting the rules which govern it and carrying out orders and tasks specified by persons who are respectively higher in the hierarchy of the group or association. It may consist of joint criminal actions, their planning, holding meetings, agreeing on the structure, finding hiding places, using aliases, acquiring supplies necessary for the group or association to achieve its goals, as well as taking actions aimed at preventing the detection of perpetrators or sharing the spoils of crime" (ref. no. II AKa 105/15, Lex no. 2052687) or the judgment of the Court of Appeal in Katowice of 24 November 2005, according to which: "Taking part in an organised criminal group also means taking part in committing crimes for which the group was established. Such an interpretation cannot be regarded as a broadening interpretation. It is obvious that if there is a group with defined criminal goals, led by one person or even a group of persons, with a certain, at least basic level of organisation, conducting systematic criminal activity with the use of the same opportunities and persons, then participation in particular crimes of this group, which constitute the aim of its activity, constitutes informal, through acceptance of these goals, joining of the group and participation in its activity" (ref. no. II AKa 343/05, "Kraakowskie Zeszyty Sądowe" 2007, No. 7-8, item 86).

cannot perceive the solution under Article 259 CC as bringing them real benefits.

2. THE INSTITUTION OF THE “SMALL CROWN WITNESS” UNDER ARTICLE 60(3) CC

When creating the new Criminal Code in 1997, the legislator was aware of the fact that the solutions of Article 259 of the Criminal Code will not, in practice, play an important role in persuading offenders to abandon their previous activities within organized criminal structures. Probably for this reason, a complex of solutions referred to as a “small crown witness” was then introduced into the system of Polish criminal law. These are the regulations of articles 60(3) and (4) of the Criminal Code, whereas special attention should be paid to the first of these provisions, i.e. article 60(3) CC, because – as follows directly from the justification of the Criminal Code – it was created as a tool for breaking criminal solidarity in organised criminal structures.⁶

Pursuant to Article 60(3) CC, the court applies an extraordinary mitigation of punishment and may even conditionally suspend its execution with regard to an offender who cooperates with other persons in the commission of an offence, if he/she discloses to an authority responsible for prosecuting offences information on the persons participating in the offence and essential circumstances of its commission.

From the very beginning, this new solution in the Polish criminal law system appeared to be an attractive option for offenders willing to take advantage of the offer made to them by the legislator. The practical significance

⁶ In the justification it was indicated that it would be insufficient to merely reproduce the regulation of the previously binding Article 57(2) of the 1969 Criminal Code providing for optional extraordinary mitigation of punishment, *inter alia*, with regard to a perpetrator of an offence committed in cooperation with other persons, if his/her role was subordinate and the unlawful benefit gained by him/her was insignificant. The explanatory memorandum of the 1997 Criminal Code emphasises, referring to Article 60(3) of the Criminal Code, on the one hand, that “the fight against organised crime nowadays requires recourse to penal measures adequate to the threat,” while on the other hand it is indicated, referring to the former Article 57(2) of the 1969 Criminal Code, that “the new Code, taking into account the ineffectiveness of such a regulation and very rare use of the possibility of an extraordinary mitigation of punishment, as well as with a view to breaking up the solidarity of a criminal group, provides for an obligatory extraordinary mitigation of punishment without previous limitations for that perpetrator acting in agreement with other persons, who discloses to an authority appointed for the prosecution of offences information concerning persons participating in the commission of an offence and essential circumstances of its commission”, see *Uzasadnienie rządowego projektu Kodeks karnego*, in: *Nowe kodeksy karne – z 1997 roku z uzasadnieniami*, Wydawnictwo Prawnicze, Warszawa 1997, p. 155-56.

of the solution provided for in Article 60(3) CC is confirmed by a large number of court decisions, both of the Supreme Court and common courts, referring to the interpretation of this provision. The usefulness of the analysed solution as an instrument encouraging an offender to start cooperating with law enforcement authorities is undoubtedly connected with the obligatory extraordinary mitigation of punishment resulting from fulfilling the requirements set out in Article 60(3) CC.

Such a construction appeared for the first time in the general part of the 1997 Code, although it is worth remembering that it is also present in several provisions in the special part of the Criminal Code.⁷ Mandatory extraordinary mitigation of punishment means that a perpetrator who meets the formal conditions on which the application of this institution depends must have his punishment inflicted with extraordinary mitigation, and the court is obliged to impose such a punishment, regardless of whether in a given state of facts it assesses the perpetrator as deserving such treatment. Thus, the court's discretion is *de facto* limited in such cases to how much mitigation will be applied in the case of punishment which has anyway to be below the minimum statutory punishment.

Such an approach means that instrumental use of this provision by perpetrators of offences cannot be ruled out. This is related to the fact that Article 60(3) CC does not indicate any exceptions, and thus, absolutely every offender who meets the requirements of this provision must have his/her sentence mitigated. The benefit of this solution may be enjoyed by any perpetrator, who committed an offence in cooperation with other persons. Cooperation is understood broadly, not only as co-perpetration, but also as any other phenomenal forms of committing an offence, including – of course – incitement and aiding and abetting. The above, in turn, means that e.g. a directing perpetrator, who directed the execution of the act by a direct executor and an aider, will have to have the punishment mitigated. Moreover, there are no grounds for not applying Article 60(3) CC to a perpetrator who was assisted in the commission of a prohibited act by two aiders, if he/she discloses the information required by this provision. This problem has already been noticed in criminal law literature [Buchała 1998, 445; Kulesza 1999, 490; Michalska-Warias 2006, 221-22; Konarska-Wrzošek 2000, 42-43].

It is also worth noting at this point that, guided by the desire to combat organised crime, the legislator did not decide to limit the application of the institution of a small crown witness only to perpetrators who committed an

⁷ In the Criminal Code of 1969 there was only one case of obligatory extraordinary mitigation of punishment, which was introduced by the Act of 18 December 1982 on special legal regulation during the suspension of martial law (Journal of Laws No. 41, item 273). Article 243 of the 1969 CC provided for three cases of mandatory extraordinary mitigation of punishment with regard to perpetrators of some corruption offences.

offence while acting in an organised group or association whose aim was to commit an offence. A broader approach was chosen, according to which the benefit of extraordinary mitigation of punishment may be enjoyed by any perpetrator who participated in the commission of an offence with other persons. This solution means, moreover, that the provision cannot be applied, for example, to a member of an organized criminal group, who independently commits an offence on the orders of the group leader, because in such a case there would be no cooperation of at least three persons, which is necessary from the point of view of the analyzed regulation.

In the initial period when Article 60(3) CC was in force, it was a source of great interpretation controversies, however with time – especially in case law – a certain consensus emerged as to the understanding of this provision. First of all, it is currently assumed that the requirement to disclose certain information to law enforcement authorities means the necessity for the offender to subjectively believe that what he discloses is not known to these authorities (the necessity to adopt such an interpretation results from the fact that Article 60(4) CC refers to the disclosure of circumstances which have not yet been known to the law enforcement authorities, and therefore the term “discloses” used in Article 60(3) CC should have – according to common rules of interpretation – a slightly different meaning).⁸ This view seems predominant in literature [see e.g. *Ćwiakalski 2016*, 161-62; *Konarska-Wrzosek 2020*, 500-50; *Łabuda 2012*, 427-29; *Zgoliński 2020*, 422-23], though on the one hand an opposite interpretation, assuming that the information provided should be objectively unknown to law enforcement authorities may also be found [*Zalewski 2021*, 959-61; *Marek 2010*, 203-204; *Wojciechowski 1997*, 130] and on the other hand the necessity to apply the provision in every case of transferring information, even information known to the law enforcement agency, seems also to be advocated by some authors [*Ćwiakalski and Raglewski 2017*, 444; *Kulik 2021*, 257]. There is also a predominant opinion on the necessity for procedural loyalty of an offender who wants to benefit from obligatory extraordinary mitigation of punishment, which means that such an offender should consistently throughout the whole trial uphold his/her statements made initially before law enforcement authorities⁹ [*Ćwiakalski and Raglewski 2017*, 440;

⁸ Such an interpretation has become established since the Supreme Court resolution of 29 October 2004, I KZP 24/04, OSNKW 2004, No. 10, item 92.

⁹ Thus: the Supreme Court in the judgment of 29 May 2003, ref. no. III KK 36/03 (Lex no. 78375). More recent statements maintained in this tone can be found e.g. in the judgment of the SA in Warsaw of 11 June 2019, ref. no. II AKa 38/19 (Lex no. 2701235), judgment of the Court of Appeal in Warsaw of 19 December 2018, ref. no. II AKa 268/18 (Lex no. 2610485), judgment of the Court of Appeal in Szczecin of 27 November 2018, ref. no. II AKa 124/18 (Lex no. 2685602).

Ćwiakalski 2016, 155-56; Gądzik 2021, 580; Konarska-Wrzosek 2020, 502; Zgoliński 2020, 424; Marek 2010, 203-204; Michalska-Warias 2012, 68-82].

3. THE PROBLEM OF CONCURRENCE OF ARTICLE 259 CC AND ARTICLE 60(3) CC

An interesting issue seems to be the mutual relationship between Article 259 CC and Article 60(3) CC, as it seems obvious that these two provisions may coincide in the case in which a person disclosing information to law enforcement authorities is a member of a criminal group. Theoretically, the extraordinary mitigation of punishment provided for in the second of these provisions may also apply to a perpetrator who cooperated with other persons in perpetrating the offence of participation in an organised criminal group, however it should be noted that a perpetrator who meets the conditions set forth in this provision, will probably also meet the requirements indicated in Article 259 CC. In such a situation, Article 259 CC will take precedence as a more far-reaching and definitely more beneficial provision, as it makes it impossible to hold a perpetrator criminally liable for participation in an organised criminal group.

One also cannot exclude a situation in which a member of a criminal group fulfils the conditions for not being subject to criminal prosecution set out in Article 259 CC, and at the same time discloses information specified in Article 60(3) CC relating to an offence or offences which, as a member of the criminal group, he or she committed in cooperation with other persons. It seems that such a situation may constitute a sufficient incentive to cooperate with law enforcement authorities, as it means avoiding criminal liability for participation in an organised criminal group or association in general and a significant mitigation of punishment for offences committed during activity in the group/association. A prerequisite here, however, is that any offence committed by the perpetrator as part of his/her membership of the organised group or association must involve two more perpetrators.¹⁰

¹⁰ It is also worth remembering, that in the situation described above, apart from extraordinary mitigation of punishment and conditional suspension of such mitigated punishment, it is also possible to refrain from imposing a punishment at all on the basis of Article 61(1) of the Criminal Code, according to which the court may refrain from imposing a punishment in a case defined in Article 60(3), especially if the role of the perpetrator in committing an offence was minor and the information provided contributed to preventing the commission of a different offence.

4. OTHER LEGAL INSTRUMENTS AVAILABLE TO ORGANISED CRIME MEMBERS

Committing a certain act in cooperation with only one person (for example, with the leader of an organisation who gave the relevant order) means that the rules of punishment mitigation laid down in Article 60(3) CC cannot be applied to this offence. It is worth remembering, however, that in the case of a perpetrator who loyally cooperates with law enforcement authorities and discloses valuable information, there is always a possibility to apply an extraordinary mitigation of punishment on general principles. However, as this is optional, the perpetrator cannot be sure of the final decision of the court (although a certain solution, which significantly increases the likelihood of obtaining a favourable verdict, may be the submission by the prosecutor of a motion for passing a sentence at the court sitting and imposing penalties agreed with the accused or other measures provided for the misdemeanour¹¹ charged, also taking into account the legally protected interests of the victim according to Article 335(1) of the Code of Criminal Procedure).

It is also worth noting that in certain cases a situation may occur in which the perpetrator may simultaneously benefit, for example, from Article 60(3) and Article 60(4) of the Criminal Code (the latter allows to reward the perpetrator with an optional extraordinary mitigation of punishment for disclosing someone else's serious crime, of which the law enforcement authorities had not been previously aware) – the former provision would necessitate mitigation of punishment for a crime committed in cooperation with other persons, the latter would allow for extraordinary mitigation of punishment for some other crime committed by the perpetrator on his/her own or in cooperation with only one person, if he/she disclosed a serious crime committed e.g. by other members of the group or association without his/her participation.

It follows from the above that for offenders who have participated in an organised criminal group or association over a longer period of time and have committed a greater number of offences as members of those structures, it will only be possible to make use of these solutions in certain circumstances. It may, on the other hand, be much easier to meet the requirements of the provisions in question for offenders who have only participated in the group or association, but for some reason, for example, have not managed to commit any other offence or have only committed one or a few offences in a multi-person configuration. However, from the point of view of the interests of justice, information provided by members of criminal structures who have been active in those structures for a long time and therefore

¹¹ This solution cannot therefore apply to felonies.

have a wealth of knowledge about how such structures operate can be far more valuable. For these offenders, the optimal solution from their point of view may be to obtain the status of a crown witness within the meaning of the Act of 25 June 1997 on Crown Witnesses,¹² which guarantees the offender impunity not only for the offence of participation in an organised criminal group or association, but also for offences committed as part of their membership, regardless of the specific personal arrangement in which they were committed. The status of a crown witness may, however, be granted in specific cases, when the assistance of such an offender appears to be necessary to hold other offenders accountable (pursuant to Article 3(1)(1) of the Act, one of the conditions for admitting evidence from the testimony of a crown witness is that the offender provides the authority conducting the proceedings with information that may contribute to the disclosure of the circumstances of the offence, the detection of other offenders, the disclosure of further offences or the prevention thereof). In addition, certain categories of perpetrators have been excluded *ex lege* from this possibility.¹³ The common feature of the leniency and exoneration measures discussed above is that the motivation of the offender is irrelevant. A decision to withdraw from participation in a criminal group and to disclose various types of information to law enforcement authorities may be taken either as a result of remorse, or out of mere calculation, when the offender believes that such a solution will be the most profitable for him. This does not in any way change the basis for applying the analysed solutions to him, and it may only play a role in the case of extraordinary mitigation of punishment – the motivation of the perpetrator may in such a case be of significance for the final scope of the exceptionally mitigated punishment, although it will not affect the application of this institution itself.

CONCLUSION

To sum up, the Polish criminal law currently contains a whole range of solutions aimed at encouraging members of organised criminal groups and criminal associations to cooperate with law enforcement authorities in exchange for total avoidance of criminal responsibility (Article 259 CC and Article 9(1) of the Act on Crown Witness) or mitigation of punishment

¹² Journal of Laws 2016, item 1197.

¹³ According to Article 4 of the Crown Witness Act, the provisions of the Act shall not apply to a suspect who, in connection with participation in an offence or fiscal offence referred to in Article 1: 1) attempted to commit or committed the offence of murder or participated in the commission of such an offence; 2) incited another person to commit the offence referred to in Article 1 in order to bring criminal proceedings against him or her; 3) directed an organised group or association aimed at committing an offence or a fiscal offence.

on an obligatory (Article 60(3) of the Criminal Code) or optional (Article 60(4) CC) basis. In the case of the same offender, there are no obstacles to applying several of these solutions to different offences, provided that the conditions for applying each of them are met, whereas in the case of a single offence, the solution which is most favourable to the offender should be applied.

As far as the interpretation of the analysed solutions is concerned, there are still some discrepancies, especially in the literature, which could perhaps be most easily removed through a certain modification of the wording of the provisions – it is difficult to indicate e.g. the reason why the obligation to repeat before a court the explanations provided to law enforcement authorities cannot be directly included in Article 60(3) CC. Some doubts may also be raised as to the potentially too broad scope of application of the above mentioned provision and the related possibilities of its instrumental use by perpetrators, who for criminal-political reasons do not deserve an extraordinary mitigation of punishment – here, too, a change would have to result from the introduction of relevant changes to the wording of the provision, as it does not seem possible to limit the scope of its application through interpretation to the detriment of the perpetrator. This does not change the fact that, in general, the discussed regulations seem now to be well established in Polish criminal law, and their practical application – after nearly a quarter of a century of their being in force – does not pose too many difficulties.

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