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The place of commission of the so-called transit forbidden act

Miejsce popełnienia tzw. tranzytowego czynu zabronionego

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Abstract: The subject of the article is the analysis of the place of commission of the so-called transit forbidden act. The author explains the meaning of the concept of transit forbidden act and analyses the legal issue concerning the significance of the place of the course of the causal link in determining the place of commission of the so-called transit forbidden act. The results of this analysis are important for determining the scope of application of the territoriality principle. The publication also presents *de lege ferenda* postulate concerning the analysed issue.

Keywords: criminal law, place of commission of a forbidden act, transit forbidden act

Abstrakt: Przedmiotem publikacji jest analiza miejsca popełnienia tzw. tranzytowego czynu zabronionego. W publikacji wyjaśniono znaczenie pojęcia tranzytowy czyn zabroniony oraz poddano analizie zagadnienie prawne dotyczące znaczenia miejsca przebiegu związku przyczynowego dla ustalenia miejsca popełnienia tzw. tranzytowego czynu zabronionego. Wyniki tej analizy mają istotne znaczenie dla ustalenia zakresu zastosowania zasady terytorialności. W publikacji przedstawiono również postulat *de lege ferenda* w zakresie analizowanego zagadnienia.

Słowa kluczowe: prawo karne, miejsce popełnienia czynu zabronionego, tranzytowy czyn zabroniony.

For many years, the aspect of determining the place of commission of a transit (petty) offence has been a debatable matter in the literature on the subject. The majority of legal scholars associate this concept with issues involving acts of a cross-border nature. According to these scholars, a transit (petty) offence should be understood as an act in the case of which the place of commission of a forbidden act by its perpetrator and the place where the results occur are situated outside the borders of the Republic of Poland. For many years, researchers have been analysing the problem where the course of the causal relationship is the only link with Poland (Wąsek 2005: 93; Wąsek (update Kulik) 2016: 57; Marek 2010: 35; Kozłowska-Kalisz 2019: 40; Piskorski 2003: 112; Namysłowska-Gabrysiak 2017: 244; Gałązka, Grześkowiak 2018: 87). By referring to S. Śliwiński, a simple example of such an act can be presented where a perpetrator, in order to murder somebody, sends poison by post from Sweden, via Poland, to Hungary (Śliwiński 1946: 49). However, other legal scholars understand this term as an act where both the conduct of the perpetrator as well as the result have occurred in places other than those where the course of the causal relationship has been involved (Stefański 2013: 516; Nawrocki 2016: 96-97; Kunicka-Michalska 2006: 392-393).

There are differences when the two definitions are compared. In the case of the latter, neither the perpetrator's conduct nor the result happening abroad are relevant for the assumption that a transit (petty) offence has been committed, but rather the fact that the conduct and the result have not occurred in the same place. On the other hand, the common element linking these two definitions, causing difficulties in determining the place of commission of a transit (petty) offence, is the answer to the question whether or not, in the case of result crimes, the place of the course of the causal relationship is relevant for the determination of its place of commission. Here, it should be emphasised that there are no arguments which would lead to distinguishing the relevance of the course of a causal relationship in the context of the analysed issue, depending on the adoption of one of the above-presented definitions of a transit (petty) offence. Therefore, an identical meaning should be determined for both these definitions. There is a divergence of views in legal sources as to the significance of the course of a causal relationship when determining the place of commission of a forbidden act. Based on the 1932 Criminal Code, S. Śliwiński advocated the recognition of a causal relationship as part of a criminal result. Consequently, this author has argued that: "Since part of the criminal result (the course of the causal relationship) materialises in Poland due to the transit of the parcel, the offence is committed in Poland, even if no damage is caused here" (Śliwiński 1946: 49). Based on the 1969 Criminal Code, K. Buchała and A. Zoll also accepted the above-presented view (Buchała, Zoll 1997: 89). Based

on the Criminal Code currently in force, the aforementioned stance was also taken by M. Gałązka and A. Grześkowiak. According to these authors, the causal relationship is the necessary element for the occurrence of the result and, therefore, it is a certain pathway for accomplishing the result (Gałązka, Grześkowiak 2018: 87). Thus, these authors claim that the causal relationship is included within the scope of the statutory elements which encompass the result. At the same time, the authors emphasise that: “If we exclude it from a set of elements for the purpose of determining the place of commission of a forbidden act, the causal relationship should also be disregarded when deciding on other issues related to criminal liability for result crimes.” (Gałązka, Grześkowiak 2018: 87).

In contrast, other legal scholars reject the possibility of treating the causal relationship as part of the result. (Wąsek 2005: 93; Nawrocki 2016: 96; Stefański 2013: 516). As emphasised by A. Wąsek, the causal relationship is not part of the result, as: “These are in fact two different circumstances, although they are, quite simply, closely related” (Wąsek 2005: 93). According to those legal scholars who reject the concept of the causal relationship being part of the result, the place of the course of the causal relationship must not, therefore, be taken into account when determining the place of commission of a forbidden act (Wąsek 2005: 93; Stefański 2013: 516-517; Nawrocki 2016: 96). According to Wąsek, this is precluded by considerations of legality and the prohibition on applying analogies to the detriment of the perpetrator (Wąsek 2005: 93). Furthermore, by accepting the above-presented view, J. Warylewski additionally emphasises that this would be contrary to the principle of *nullum crimen sine lege* (Warylewski 2017: 192). A similar standpoint was adopted by A. Marek, according to whom, taking into account the causal relationship when determining the place of commission of a forbidden act would be a manifestation of an unacceptable broadening interpretation of Article 6(2) of the Act of 6 June 1997 Criminal Code (Consolidated text S.B. of 2020, pos. 1444 as subsequently amended) (Marek 2010: 35).

The answer to the question regarding the relevance of the place of the course of the causal relationship in the context of the place of commission of a forbidden act must be considered in a two-tier process. Firstly, it is necessary to analyse the issue by accepting the assumption (presented by some legal scholars) that the causal relationship is a component of the result of a forbidden act. Then, in the event of a possible rejection of this concept, it is still necessary to consider the relevance of the causal relationship for the determination of the place of commission of a forbidden act if the course of the causal relationship is not encompassed by the meaning of the concept of “result”. The view that the causal relationship is included in the meaning of the term “result” leads propo-

nents of the former concept to the correct (from their point of view) conclusion, regarding the relevance of the course of the causal relationship in determining the place of commission of a forbidden act. Since, according to this concept, the result also includes a causal relationship, the broadening interpretation is not accepted by these authors in this situation. This interpretation would be applicable if the authors have treated the course of the causal relationship as an element not encompassed by the meaning of the concept of “result”.

However, it is important to note the legal consequence of adopting this viewpoint. In the case of this concept, the place of occurrence of the result would consist of the place where the result occurred and the place where the course of the causal relationship actually took place. Furthermore, the place of commission of a forbidden act would be the place where the result was intended to occur by the perpetrator and the place where the causal relationship was intended to occur by the perpetrator. Therefore, the adoption of this concept would certainly result in determining a much higher number of places of commission of a forbidden act. In the course-of-justice context, the consequence of this assumption would be a higher number of authorities that could potentially carry out criminal or petty offence proceedings concerning such an act (Nawrocki 2016: 97). It can be said that this argument should not be decisive in accepting or rejecting the analysed position of some of the legal scholars. This results from the fact that the high number of judicial bodies authorised to carry out proceedings due to the place of commission of a forbidden act is a situation that would also arise in the case of other types of acts, e.g. permanent (petty) offences or multiple acts. Consequently, the argument of a functional nature does not appear to be justified. Furthermore, in the context of the position analysed above, M. Nawrocki is wrong, claiming that the rejection of this concept is supported by the lack of reference to the causal relationship in provisions of the Code of Criminal Proceedings concerning the determination of the territorial jurisdiction of the body authorised to carry out criminal proceedings (Nawrocki 2016: 97). If we assume, according to the discussed concept, that the causal relationship is included in the meaning of the term “result”, then all the procedural provisions relating, as regards the determination of territorial jurisdiction, to the place where the actual and presumed result occurs, will automatically also apply to the place of the course of the actual and presumed course of the causal relationship. If, however, we accept the latter view to be correct, claiming that the causal relationship is not included within the scope of the referents of the term “result”, in such a case outcomes of the linguistic interpretation of Article 6(2) of the Criminal Code and Article 4(2) of the Code of Petty Offences, where their content does not refer to the causal relationship, lead to the clear conclusion that the place of the

course of the causal relationship does not affect the determination of the place of commission of a forbidden act. In this case, as rightly assumed by proponents of this view, accepting the contrary view would lead to adopting outcomes of the broadening interpretation to the detriment of the perpetrator, which is an interpretation unacceptable in the Polish criminal and petty offences law.

Bearing in mind the above-presented remarks, it should be stressed that, in the current legal situation, the relevance of the place of the course of the causal relationship in determining the place of commission of a forbidden act depends on whether we consider the causal relationship to be part of the result, i.e. as being included in the meaning of the term “result”, or we accept the opposing view. It seems, however, that according to views demonstrated in the doctrine based on the Criminal Code and the Code of Petty Offences currently in force, the vast majority of authors, already cited above, distinguish between the concepts of “result” and “causal relationship”. These views are convincing and, therefore, one can support the doctrinal position that the causal relationship is not included within the scope of the referents of the term “causal relationship”. Consequently, it is believed, the course of the causal relationship, whether actual or presumed, does not affect the determination of the place of commission of a forbidden act. It is hard to accept the argument of M. Gałązka and A. Grześkowiak to be valid, as they advocate a different view, that is: “If we exclude it from a set of elements for the purpose of determining the place of commission of a forbidden act, the causal relationship should also be disregarded when deciding on other issues related to criminal liability for result crimes” (Gałązka, Grześkowiak 2018: 88).

This position is an oversimplification of the discussed issues. It would be correct if the legislature had failed to specify, in the Criminal Code and the Code of Petty Offences, the grounds for determining the place of commission of a forbidden act. Then, results of the linguistic interpretation would exclude the possibility of disregarding the causal relationship in determining the place of commission of a forbidden act. Consequently, the fact that we do not determine the place of commission of a forbidden act based on the place of the course of the causal relationship does not mean, in any way, that the causal relationship should not constitute a relevant factor in other issues related to criminal liability for result crimes or petty offences. At this point, we should emphasise that the Polish legal framework also provides for such types of a forbidden act where the transit (transmission) through the territory of Poland alone will lead to the perpetrator accomplishing the elements of a given type of a forbidden act. (Warylewski 2017: 193). Such acts certainly include those which penalise the very causative act itself. They include, among others, Article 55(1) of the Act of 29 July 2005 on Counteracting Drug Addiction (Consolidated text S.B.

of 2020, pos. 2050 as subsequently amended) or Article 33(1) of the Act of 29 November 2000 on Foreign Trade in Goods, Technologies and Services of Strategic Significance for State Security, and for the Maintenance of International Peace and Security (Consolidated text S.B. of 2020, pos. 509).

At the same time, the perpetrator may also commit a forbidden act, where the transit (transmission) alone is not punishable, unless it leads to the occurrence of a result that involves endangerment (e.g. Article 164(1) of the Criminal Code; Article 165(1) of the Criminal Code; Article 167(1) of the Criminal Code). Consequently, in the two situations referred to above, the place of the perpetrator's conduct (and, in the case of result crimes, also the place where the result occurs, and, in the case of intentional result crimes, also the place of the presumed result) will constitute the place of commission of such types of forbidden acts. However, the above-mentioned divergences present in the doctrine are the reason for some to consider whether or not there are arguments supporting the need to make such legislative changes, so that, *de lege ferenda*, the place of committing a forbidden act is determined by the course of a causal relationship. A. Wąsek validly indicates that, in the case of the former definition of a transit (petty) offence, claiming that part of a forbidden act (in the form of the causal relationship) has not occurred on the territory of the Republic of Poland, would mean denying reality (Wąsek 2005: 93). Such normative changes are advocated by J. Piskorski. According to this author, this issue becomes apparent in the situation where the act of sending poison from the territory of another state in order to murder a person outside the territory of the Republic of Poland is detected and stopped (Piskorski 2003: 112-113). Although the author does not answer the question what state authorities should do in such a situation, he claims that this case shows the weakening of the protection of the Polish territory where criminal occurrences may be permitted. After all, as J. Piskorski argues, such occurrences may take place using the means of public transport associated with Poland (Piskorski 2003: 113). According to this author, the internationalisation of crime and the development of modern media (the Internet) also support the adoption of penalising a transit crime (Piskorski 2003: 113). Obviously, such changes are also supported by the above-presented view of M. Gałązka and A. Grześkowiak, claiming that the same relevance should be attached to the causal relationship in the context of the place of commission of a forbidden act, as this issue affects other principles of bearing liability for forbidden acts as offences or petty offences.

Moving onto the stance on this issue, which is taken by the author of the article, one can begin by answering the question cited above by J. Piskorski. According to the facts presented by this author, based on the legal provisions currently in force, such a forbidden act where only the causal relationship

occurs via the territory of Poland, must be treated as a forbidden act committed abroad. Therefore, in this type of situation, the principles of liability for forbidden acts committed abroad will fully apply. Consequently, Polish law enforcement authorities will be able to carry out criminal proceedings against the perpetrator of this act. Thus, in such a case, there is no weakening of the protection of the territory of the Republic of Poland, since the legal instruments indicated above allow Polish authorities to prosecute perpetrators of such forbidden acts. From the author's point of view, the mere fact that Polish means of public transport may be used in this type of act still does not support the idea that the place of commission of a forbidden act should be determined by the place of the course of the causal relationship. It should be emphasised that in this type of situations, most often the perpetrator will have no knowledge of the course of the causal relationship. This is because most perpetrators that send parcels will not know through which centres of a postal operator the parcel delivery process goes. Furthermore, even with such knowledge on the part of the perpetrator, it cannot be ruled out that, for example, due to an error on the part of a postal worker, the relationship will have a course different from the one expected by the perpetrator. The question then arises as to whether the location of the course of the causal relationship unknown to the perpetrator or the location different from the course planned by the perpetrator should be of relevance in determining where this person has committed the forbidden act. At the same time, it should be emphasised that establishing the exact course of a causal relationship can often be extremely costly and difficult in terms of evidence. There are doubts as regards the claim that the interest in protecting the national territory argues for such legislative changes. It can be said that if we really wanted to apply the principle of territoriality to such acts, a far better form of protection would be to introduce new types of forbidden acts penalising the transit of a specific new type of object or content alone. Similar results could be obtained by the introduction of new types of offences into the legal framework, characterised by the result involving the endangerment of a legally protected good. Furthermore, the introduction of an extension of the criteria determining where a forbidden act has been committed would require the introduction of a legal definition of "causal relationship". This is justified insofar as there is no uniformity of views in the doctrine regarding this concept. On the other hand, it seems extremely difficult to normatively include such criteria in law (Giezek 2013: 419-552). At the same time, the failure to introduce such a definition would lead to further interpretation divergences against the backdrop of such an important issue as the place of commission of a forbidden act.

In view of the above-presented arguments, it can be stated that currently there are no strong arguments that should encourage the legislature to intro-

duce normative changes in order to extend the basis for determining the place of commission of a forbidden act by the place of the course of an actual or postulated causal relationship.

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