BURGLARY IN THE CONTEXT OF CONTACTLESS TRANSACTIONS: COMMENTS ON THE SUPREME COURT JUDGMENT OF 22 MARCH 2017, III KK 349/16

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It is not uncommon for a legal act, clear as it may seem to a layman, to receive a significantly different interpretation due to the specific construal of a given term in legal practice. This is especially true for concepts that have received an autonomous meaning in legal jargon and for fuzzy concepts which, by their very nature, are "fleshed out" in judicial practice and in academic commentaries on the legal doctrine.

The reasons for this are multiple. There are, of course, the inherent attributes of any human language, such as polysemy or homonymy. An important role is also played by the nature of legal jargon as a special language.[1] Nor can one ignore the influence that pragmatics has on semantics and, correspondingly, the dependence of the meaning of a word on the context in which it is used and on other extralinguistic factors.[2] Legal doctrines often operate sets of concepts that are suited to their specific needs but are all but incomprehensible to average language users.

This last fact is of the most relevance to what follows. In this paper, I have taken the judgment of the Supreme Court of 22 March 2017 as the starting point and the basis for the analysis. The Supreme Court states in its judgment that a contactless

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1 J. Pieńkos, *Podstawy juryslingwistyki. Język w prawie – prawo w języku*, Warszawa 1999, pp. 64–77; S. Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego*, Warszawa 2017, p. 129 et seq. On the relation between legal language and natural language, see also T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej*, Warszawa/Kraków 1986, pp. 35–42.

2 Cf. A. Malinowski, *Polski język prawny. Wybrane zagadnienia*, Warszawa 2006, p. 21.

transaction conducted using a stolen payment card contains the constituent elements of the crime under Article 279 §1 of the Criminal Code, i.e. burglary.[3]

The paper is basically divided into two parts. First, I present an outline of the evolution of the term "burglary" as construed in the criminal law. Special consideration is given to an analysis of the constituent elements of burglary as developed in judicial decisions and in the criminal law doctrine. The second part of the paper is directly concerned with the judgment of the Supreme Court referred to in the title. The commentary on the interpretative conclusions reached by the court are based on the observations made in the first part in combination with an expounding on the statement of reasons for the judgment. While approving of the general line towards developing an autonomous construal of the concept of burglary in judicial practice, I express reservations as to the correctness of the Court's assessment of the mechanisms involved in contactless payment transactions.

1. CONSTRUAL OF BURGLARY IN CRIMINAL LAW

Before discussing how the concept of burglary has evolved in legal practice over the years, I will consider the meaning of the word in common language. This will allow me to identify differences between the common usage and legal usage. Besides, one has to agree with the opinion that the dictionary meaning of a word cannot be totally ignored when interpreting the provisions of the criminal law.[4]

As it has been pointed out in literature, the distinguishing feature of the term "burglary" as used in everyday language is the element of applying physical force of varying intensity in order to remove a barrier preventing access to property.[5] Another related element is the requirement that the removal of the barrier should result in gaining access to locked premises. This is reflected in the definitions contained in dictionaries of the Polish language. Thus, *Słownik języka polskiego PWN* offers the following definition of the verb *włamać się* (to break in, to burglarise): "to force access to locked premises by breaking through security devices; also: to open by force a drawer, a strongbox, etc. in order to steal property."[6] This definition

[3] Supreme Court judgment of 22 March 2017, III KK 349/16, OSNKW 2017, No. 9, item 50. The judgment was commented on by the representatives of the legal doctrine, who expressed both approving opinions: D. Krakowiak, *Płatność zbliżeniowa a kradzież z włamaniem. Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, LEX/el. 2017; S. Łagodziński, *Glosa do wyroku SN z 22 marca 2017 r., III KK 349/16*, Palestra No. 9, 2018, pp. 95–103; and critical ones: Z. Kukuła, *Dokonanie płatności skradzioną kartą bankomatową. Glosa do wyroku Sądu Najwyższego z 22.03.2017 r., III KK 349/1*, Przegląd Sądowy No. 7–8, 2018, pp. 174–179; A. Lach, *Glosa do wyroku Sądu Najwyższego z dnia 22 marca 2017 r., sygn. III KK 349/161*, Prokuratura i Prawo No. 5, 2018, pp. 170–175; R. Sosik, *Wykorzystanie skradzionej karty płatniczej do wykonania płatności zbliżeniowych. Glosa do wyroku SN z dnia 22 marca 2017 r., III KK 349/16*, Glosa No. 2, 2018, pp. 121–127.

[4] Z. Bożyczko, *Kradzież z włamaniem w świetle doktryny i orzecznictwa sądów polskich*, Nowe Prawo No. 7–8, 1967, p. 902.

[5] L. Wilk, *Komentarz do art. 279*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część szczególna,* Vol. II: *Komentarz. Art. 222–316*, Warszawa 2017, p. 635.

[6] *Słownik języka polskiego PWN*, online version, www.sjp.pwn.pl/sjp/wlamac-sie;2536858 (accessed 19.10.2019).

is in agreement with the results of surveys conducted by Jerzy Wróblewski in 1966, according to which a burglary, as used in common language, necessarily involves two elements: the use of physical force and the breaking of a security measure.[7] As one can see, the meaning of the word "burglary" in common language has not undergone any significant changes in the decades that have since elapsed.

It is worth noting that, by contrast to the post-war decades, when the term "burglary" first entered the substantive criminal law,[8] the word has acquired a second meaning in common language as a result of the need to describe phenomena related to technological development. Namely, the aforementioned *Słownik języka polskiego PWN* provides the following definition of the verb *włamać się* at the second entry: "to unlawfully read or write data stored on a computer or a computer network after overriding security safeguard."[9] I shall elaborate on this issue further on; at this point, suffice it to say that this novel meaning of the verb is of crucial significance to the court judgment discussed in this paper. At the same time, one has to make it clear that references to the dictionary definitions of a word should by no means determine whether a given legal interpretation is correct or not. One cannot but agree with voices warning against the instrumental treatment of dictionaries in legal interpretation, derogatorily referred to as "dictionary shopping".[10] Nevertheless, the use of dictionaries to determine the meaning of a given expression may be helpful in the searching for possible lines of interpretation. It is precisely with this intention that I have quoted the dictionary definitions above. They provide comparative material for the ensuing examination of the legal usage of the discussed term.

Before proceeding with the analysis, I would like to note that, in literature, the attribution of autonomous meanings to linguistic units in legal practice and the subsequent extension of such meanings is known under the terms "technicalisation" or "terminologisation".[11] This is also apparent in the case under consideration; indeed, it is a common and acceptable practice in the judicial practice the Supreme Court.[12] In the criminal jurisprudence, discussion around the constituent elements of the crime of burglary has always been focused on two elements: breaking by the

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[7] J. Wróblewski, *Kradzież z włamaniem. Z zagadnień rozumienia tekstów prawnych*, Ruch Prawniczy Ekonomiczny i Społeczny No. 2, 1966, p. 235.

[8] The term first appeared in Article 1 §3c of the Decree of 4 March 1953 on strengthening the protection of public property (Dz.U. No. 17, item 68), which reads: "A person who unlawfully appropriates public property (…) by committing burglary shall be punished by imprisonment of 2 up to 10 years."

[9] *Słownik języka polskiego PWN*. Here it should be pointed out that there is a significant similarity between this definition and the constituent elements of the crime envisaged by Article 287 §1 of the Criminal Code (computer fraud). This is one of the factors contributing to the lack of consistency in judicial practice with respect to the qualification of prohibited acts involving payment-card transactions. Cf. P. Opitek, *Kwalifikacja prawna przestępstw związanych z transakcjami kartą płatniczą*, Prokuratura i Prawo No. 2, 2017, pp. 77–105. For a detailed discussion of the offence under Article 287 of the Criminal Code, see P. Kardas, *Oszustwo komputerowe w kodeksie karnym*, Przegląd Sądowy No. 11–12, 2000, pp. 43–75.

[10] M. Matczak, *Why Judicial Formalism is Incompatible with the Rule of Law*, Jurisprudence and Legal Philosophy eJournal, Vol. 8, No. 66, August 2016, p. 24.

[11] S. Żółtek, *supra* n. 1, p. 145.

[12] P. Nasuszny, *Treść i zakres pojęcia włamania jako okoliczności kwalifikującej przestępstwo kradzieży podstawowej w ujęciu doktryny i orzecznictwa sądowego*, [in:] L. Bogunia (ed.), *Nowa kodyfikacja prawa*

perpetrator of a security measure preventing access to the object of theft and the requirement that the object be located in locked premises.[13] Correspondingly, in what follows, I am going to focus on these two constituent elements due to their key role for the analysis.

The first of the above elements raises relatively few controversies. First of all, nowadays it is accepted without doubt that the perpetrator does not necessarily have to apply physical force in order to override the security measure that prevents access to the property in question.[14] As it has been aptly pointed out in literature, the requirement would unjustifiably reward perpetrators acting in a more sophisticated manner.[15] The uniform acceptance of this position is a result of the evolution in judicial practice that started in the late 1950s and continued into the 1960s. It is also a consequence of the academic dispute between the adherents of what is called "physical force theory" and the proponents of the "protection theory", in which the latter prevailed.[16] Within the currently accepted theory, the key element of burglary is that the perpetrator acts contrary to the will of the lawful possessor rather than the fact that physical barriers to accessing the premises are removed.[17] One should be aware, however, that the theory may well prove overly broad. Indeed, it is difficult to conceive of a situation, except where the owner disposes of an object with the intention of abandoning it, in which the owner does not manifest, at least by implication, that the object belongs to them.[18]

With respect to the element of breaking a security measure that prevents unauthorised access to property, it is irrelevant whether the security is physical, electronic or digital.[19] This stands to reason since advanced security devices have come into common use with the development of technology. It would not be appropriate to propose different legal classifications of a prohibited act depending, for example, on whether the perpetrator has broken into a hotel room secured with an electromagnetic card or one secured with a regular key-operated lock. Consequently, an electronic security safeguard requiring an access code is considered equivalent to a physical access lock.[20] Crucially, only a special obstacle designed to prevent unrestricted access to property can be considered a security measure. This excludes closures that do not block access to property.[21]

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karnego, Vol. XIII, Wrocław 2003, p. 137. Cf. the Supreme Court ruling of 6 December 2006, III KK 358/06, OSNKW 2007, No. 2, item 17.

[13] A. Marek, T. Oczkowski, *Kradzież z włamaniem*, [in:] R. Zawłocki (ed.), *System Prawa Karnego*, Vol. 9: *Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa 2015, p. 86.

[14] T. Dukiet-Nagórska, *Kradzież z włamaniem*, Nowe Prawo No. 10–12, 1981, pp. 80–81.

[15] P. Nowak, *Wykładnia znamienia „włamanie" na gruncie art. 279 § 1 Kodeksu karnego*, Palestra No. 7–8, 2013, p. 97.

[16] A. Marek, T. Oczkowski, *supra* n. 13, pp. 88–92.

[17] D. Pleńska, *Glosa do uchwały SN z 3.12.1966 r., VI KZP 42/66*, OSPiKA 1968, No. 2, p. 83.

[18] P. Nowak, *supra* n. 15, p. 97.

[19] T. Oczkowski, *Komentarz do art. 279*, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 3rd edn, Warszawa 2017, p. 1663. Cf. Supreme Court judgment of 9 September 2004, V KK 144/04, OSNK 2004, No. 1, item 1533.

[20] L. Wilk, *supra* n. 5, p. 644.

[21] P. Kardas, J. Satko, *Przestępstwa przeciwko mieniu. Przegląd problematyki. Orzecznictwo (SN 1918–2000). Piśmiennictwo*, Kraków 2002, p. 48.

In view of the above, one would venture a suggestion that the second constituent element of burglary, namely, the location access to which is blocked by a physical, electronic or digital security device, can cause more controversy when determining if burglary has been committed. This is largely due to the overly broad nature of the "protection theory", currently accepted in judicial practice and jurisprudence. As a result of the rejection of the "physical force theory", which emphasises the presence of a real and effective obstacle, in favour of the view defining a security device as any obstacle which gives an unambiguous indication of the owner's will to prevent unauthorised persons from accessing their property,[22] the distinction between burglary and common theft has been blurred. Given this interpretation of a security device, one can easily classify as burglary the stealing of a wallet from a pocket secured with a zip fastener. Indeed, the fact that the pocket is zipped up constitutes an unequivocal manifestation of the owner's will to limit access to their pocket to unauthorised persons. Naturally, this interpretation is intentionally exaggerated, and therefore certainly incorrect. However, the example highlights the need for a precise definition of the space access to which is protected.

In the traditional approach, one of the essential elements of burglary is the requirement that the object of larceny be located in an enclosed room, that is a space enclosed by structural elements.[23] In addition, it is generally agreed that the enclosed room in question must be a product of intentional human activity.[24] The term "enclosed room" arguably excludes open-air space from consideration, even if access to such spaces is restricted by structures like fences, barriers, hedges or other enclosures, although this interpretation has not remained unopposed.[25] This is by far not the only controversial issue with respect to the classification of burglary. For instance, there has been significant disagreement as to "other enclosed space", e.g. containers (packaging), tanks, or transporting facilities (pipelines), the common feature of which is that their main function is to store or transport property.[26]

While controversies around the correct classification of an "enclosed room" are of considerable significance for judicial practice, they are not the matter of my concern here. I will focus on the postulated need for an updated interpretation of the term "burglary" that would cover actions consisting in the "hacking" of security safeguards in a computer, computer network or an automatic teller machine (ATM) that results in the larceny of money, so that prohibited acts of this kind would be qualified under Article 279 §1 of the Criminal Code rather than Article 288 §1

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[22] A. Marek, T. Oczkowski, *supra* n. 13, p. 89.

[23] W. Gutekunst, *O położeniu przedmiotu wykonawczego kradzieży z włamaniem*, Nowe Prawo No. 11–12, 1956, p. 54.

[24] Here human involvement may also consist in the appropriate adaptation of natural structures or structures created by animals. Cf. Z. Bożyczko, *Kradzież z włamaniem i jej sprawca*, Warszawa 1970, pp. 22–23.

[25] M. Dąbrowska-Kardas, P. Kardas, *Komentarz do art. 279*, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. III: *Komentarz do art. 278–363*, 4th edn, Warszawa 2016, p. 84. This controversy has a very long history in the Polish legal literature, cf. T. Dukiet-Nagórska, *supra* n. 14, pp. 75–77.

[26] In literature, this category was first distinguished by Z. Bożyczko. See Z. Bożyczko, *supra* n. 24, pp. 25–26.

(computer fraud).[27] Here one should refer to the position expressed by the Supreme Court in its judgment of 9 September 2004 in the case V KK 144/04, according to which an electronic security safeguard involving the use of an access code constitutes a *sui generis* lock of access for any person (including the authorised person) who intends to take possession of an object and, therefore, constitutes an equivalent of the object being physically locked in a room. Thus, burglary may involve not only breaking through a physical obstacle but also overriding electric, electronic, or computer-based security safeguards.[28]

It seems that this position stems from the confusion of two different elements: the security measures preventing unauthorised access to property and the location of the property access to which is prevented. As I have argued above, the view that a physical security device is equivalent to an electronic or digital security measure is fairly uncontroversial, at least, with respect to property located in a closed room. In this case, however, the location of objects is different. The larceny of funds by gaining access to a computer system or an electronic database cannot be treated in the same way as gaining access to a closed room or another enclosed space.[29] The locations of objects are quite different in nature: the former, being a string of numerical data operated by means of the respective programming languages, exists only in the virtual space, whereas the latter exists physically and occupies a specific position in space. It does not mean that this line of reasoning is wrong as such; however, it does require additional justification. It is not enough to cite the equation of physical security devices to electronic and digital ones, since this argument concerns a separate issue, namely, the means of preventing access to property rather than the nature of the location of the property.

In search for a rationale for extending the semantic scope of the term "burglary" so that it would also cover acts that involve gaining access to computer data stored in bank accounts, etc., one may refer to a more recent meaning of the noun *włamanie* in everyday language. In common usage, the word can refer to the unauthorised reading or writing of data on a computer or computer network, preceded by the breaking (hacking) of security safeguards. From my point of view, an acknowledgment that legal language follows common language in this respect is a sufficient argument in favour of extending the interpretation of this element of burglary and adopting the new meaning of the word *włamanie*. In this way, the admissible location of an object of burglary for the purposes of legal qualification would include, apart from a closed room or so-called enclosed space, data stored on a computer or computer network. The other fundamental element of burglary, i.e. breaking of a security safeguard against access to property, remains unchanged. Obviously, in

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[27] A. Marek, T. Oczkowski, *supra* n. 13, p. 98.

[28] Supreme Court judgment of 9 September 2004, V KK 144/04, OSNK 2004, No. 1, item 1533.

[29] This is also pointed out by M. Wiśniewski and M. Żukowska, who note that in judicial decisions where the execution of an unauthorised contactless transaction using a payment card has been classified as burglary the courts have avoided answering the question whether a bank account can be considered closed premises. M. Wiśniewski, M. Żukowska, *Współczesne problemy rozumienia pojęcia „włamania" na gruncie przepisu art. 279 § 1 k.k.*, Studia Prawnicze i Administracyjne No. 19 (1), 2017, p. 73.

the new context, the security safeguard will always be of an electronic or digital nature.

Approaching the subject matter of the case handled by the Supreme Court, I wish to consider whether larceny of money committed using a payment card can be qualified as burglary.[30] A payment-card transaction usually involves four parties (the issuing bank, the merchant, clearing institutions, and the cardholder) and is a multi-stage process.[31] The problem of the location of the object of larceny is fairly straightforward. As a result of a completed payment-card transaction, the customer can access funds accumulated in the bank account linked to the respective card.[32] A bank account, on the other hand, is nothing else than data stored in the computer system of a given bank. Changes in the account are made according to the rules specified in the agreement concluded between the account holder and the account operator as well as in the general terms and conditions of the respective bank that apply to account operation and maintenance. Everything considered, there is no doubt that the larceny of funds through an unauthorised change in data records meets the location criterion for burglary as discussed above.

One is left with the question whether the second constituent element of burglary, i.e. breaking of a security device that prevents access to property, is present. In terms of ICT processes involved in a payment-card transaction, one can reasonably assume that the role of a security safeguard is performed by the access code. Authentication is carried out by the microprocessor built into the card and requires two pieces of information: one is the PIN code, known to the cardholder, and the other is the unique security key stored in the chip.[33] Being an integral part of the card, the security key is used automatically and can hardly be seen as an independent security device. The same is not true for the personal access code. If a transaction requires the access code,[34] it cannot be completed without the payer entering the respective sequence of digits on the terminal keyboard. Besides, the cardholder has an obligation not to disclose the code to third parties. Gross negligence in this regard may result in the payer's unlimited liability for unauthorised payment transactions.[35]

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[30] On the issue of the legal status of a payment card in the criminal law, see R. Kędziora, *Charakter prawny kart płatniczych w prawie karnym*, Prokuratura i Prawo No. 12, 2011, pp. 59–69.

[31] P. Opitek, *supra* n. 9, pp. 82–83. Due to the complexity of the respective sequence of operations, I make references to the technical aspects of card transactions only to the extent necessary for developing the argument. A detailed analysis of the transaction process and a discussion of the related technical issues can be found in the work by P. Opitek cited above.

[32] The card is linked to the bank account in the case of debit cards. The situation is different for credit or prepaid cards. Still, the difference between those types of cards is insignificant considering the subject matter of this article. Therefore, in the case of the unauthorised use of a credit card or a prepaid card, the information and communications data are changed and the microprocessor is no longer a security safeguard.

[33] P. Opitek, *supra* n. 9, p. 87.

[34] This will take place in most cases of direct payments, excluding contactless transactions of up to 50 zlotys or those that require authorisation by signature, where the signature put by the payer is compared to the specimen signature on the payment card (nowadays, however, the latter method is rarely used).

[35] Cf. Article 46 para. 3 of the Act on payment services of 19 August 2011, Dz.U. 2011, No. 199, item 1175 (and related acts of law in the Journal of Laws of 2016, items 1572, 1997; Journal of Laws of 2017, item 1089).

In view of the above, one has every reason to assert that the larceny of funds perpetrated as a result of an unauthorised use of a payment card contains the constituent elements of the crime under Article 279 §1 of the Criminal Code as long as the action involved breaking of protection in the form of an access code.

2. COMMENTS ON THE SUPREME COURT JUDGMENT III KK 349/16

Now I shall discuss the issue which the Supreme Court had to resolve in the judgment referred to in the title of this paper, namely, the legal qualification of a larcenous contactless transaction conducted directly,[36] by means of a payment card and without entering an access code. In its judgment, the Supreme Court states that transactions of this kind contain the constituent elements of the crime of burglary. One should take a closer look at the arguments presented in the statement of reasons for the judgment.

First, the Supreme Court expresses its approval for the line of reasoning under which, when interpreting the term "burglary", emphasis is placed on the very fact of breaking through the security measures that bar access to property and, at the same time, unequivocally manifest the possessor's will not to allow unauthorised persons to access the said property.[37]

After providing an outline of how the concept of burglary has been treated in judicial practice, the Supreme Court turns to the issue that is of most interest in this case, namely, the legal qualification of a payment transaction effected using another person's payment card. According to the Court, the view under which unlawful banking transactions requiring a PIN code must be qualified as burglary is "well established in judicial practice and undisputed in the literature".[38] Next, the judges consider the nature of the function performed by an access code, concluding that the PIN code "while being, undoubtedly, an important means of protection against unauthorised access to the funds accumulated by the cardholder, is but an additional protection. The primary means of protection is the design of a payment card, which includes a microprocessor; without the microprocessor, no transaction can be effected, including contactless transactions that do not require a PIN code." Therefore, according to the Court, by merely bringing the payment card into the proximity with the terminal, the perpetrator intrudes into the cardholder's bank account, which is tantamount to breaking through the electronic safeguards of the cashless banking payment system. In its turn, this conduct contains the constituent elements of burglary by way of breaking through electronic security safeguards and committing larceny of property in the form of funds recorded in the bank's computer system.

This position calls for a comment. The key element of the above reasoning is the assumption that the primary means of protection of funds accumulated in a bank

[36] That is without the use of online payment systems, etc.

[37] The judges clearly subscribe to the "protection theory" mentioned above.

[38] As mentioned in an earlier passage; I share this view.

account is the very design of a payment card, and more precisely, the microprocessor built into it. In my opinion, this assumption is debatable. In fact, an analysis of the technical aspects of a monetary transaction effected using a payment card gives no indication that the microprocessor functions as a security safeguard. The easiest way to demonstrate this is by comparing the process of a card transaction requiring an access code with a contactless transaction that does not require a PIN code. The microprocessor acts as a kind of "brain" that controls the whole process, since it is responsible for the exchange of data between the payment card and the payment terminal thanks to the software that enables the reading and writing of data in the electronic memory.[39] As to the authorisation process, it is conducted by means of a unique security key stored in the chip and requires entering of the correct PIN code on the terminal keyboard.[40] If authorisation fails, the transaction is aborted. Authorisation failures can be caused by entering a wrong access code or, which is increasingly rare, by placing a signature that does not coincide with the specimen signature on the card.[41] As a rule, contactless transactions of up to 50 zlotys do not require authorisation with an access code or a signature. In effect, it is the authorisation requirement that plays the role of an obstacle to accessing funds accumulated in the cardholder's bank account.[42] The microprocessor itself, although it does control the technical side of the process, cannot be said to be a protection device[43] since, in the case of transactions that do not require authorisation, it – or rather the card it is built into – is but a defenceless tool in the hands of the person currently handling the card.[44] The person can tap the card near a point-of-sale terminal without encountering any real obstacle, provided that the payment amount does not exceed 50 zlotys and that the daily limit for contactless transactions set by the bank has not been exceeded.[45]

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[39] Cf. P. Opitek, *supra* n. 9, pp. 87–88.

[40] *Ibid.*, p. 87.

[41] Another possibility is for the merchant to establish that the payer is not entitled to use a given payment instrument – when the respective transaction involves a human factor. Checking the payer's identity lies within the rights of the merchant as set forth in Section VI of the Act on payment services. However, everyday practice shows that this rarely happens; as a rule, the card never leaves the payer's hand.

[42] The problem of no barrier being broken in contactless transactions is discussed by the commentators in their critical glosses concerning the Supreme Court judgment, listed in footnote 3 *supra*, as well as by the Court of Appeal in Gdańsk in its judgment of 27 November 2018, II AKa 307/18, published in Kwartalnik Sądowy Apelacji Gdańskiej No. 1, 2019, pp. 197–213.

[43] This is a standpoint of the Court of Appeal in Gdańsk, which in the above-quoted judgment II Aka 307/18 stated that "a microprocessor built into the card is only an indifferent, considering the features stipulated in Article 279 § 1 Criminal Code, mechanism which enables one to communicate with the information system of the bank that has issued the card and to make payments using the payment card."

[44] This is true, at any rate, with respect to contactless transactions of up to 50 zlotys carried out at self-service vending machines, etc. In transactions involving a human factor, there is always a possibility of intervention by the merchant.

[45] Cf. J. Blikowska, *Zadłużenie offline kartą płatniczą. Na koncie może powstać debet*, http://www.rp.pl/Jak-zarzadzac-wydatkami/310029982-Zadluzenie-offline-karta-platnicza-Na-koncie-moze-powstac-debet.html (accessed 19.10.2019).

It seems that the lack of security safeguards was one of the reasons why the Payment System Council issued a recommendation to limit payer's liability for unauthorised contactless transactions to the equivalent of 50 euros.[46] This is a noticeable reduction in comparison to the statutory limit initially established for chip-card transactions.[47] A survey of internal regulations that were in force in the Polish banking sector at the beginning of 2015 showed that, by that time, banks had already adjusted their bylaws to the recommendations issued by the Payment System Council.[48]

Opponents of the above view may argue, citing the tenets of the "protection theory", that the essence of burglary does not consist in the actual breaking of a protection preventing unauthorised access to an object but rather in a conduct whose basic characteristic is the perpetrator's disregard for the will of the possessor to protect the object from other persons.[49] Under this interpretation, it is sufficient that there is an external barrier clearly indicating that the purpose of its installation was to prevent access to the object by unauthorised persons.[50] However, the application of this interpretation to contactless transactions that do not require an access code is problematic for at least two reasons. Firstly, as demonstrated above, in the case of contactless transactions, one can hardly discern any actual protection or obstacle. The microchip installed in the card cannot possibly be seen as a protective device, since its function in the course of a transaction is entirely different; in itself, it does not constitute an obstacle to conducting a transaction, unless this requires authorisation by means of a PIN code. What draws attention is the lack of the two-stage behaviour type characteristic of burglary, i.e. breaking of the security and taking the possession in order to keep it.[51] From the judicial practice and commentaries on the legal doctrine, it also follows that there can be no question of burglary when gaining access to an object does not require any actual physical effort.[52] Secondly, again as argued above, treating every manifestation of disregard for the will of the possessor of an object as significant for the qualification of a conduct as burglary would lead to an overly broad construal of the concept of burglary, since, in principle, the only case when the owner of an object does not manifest their will to exclude unauthorised persons from accessing the object is when they abandon the said object.[53] To

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[46] See the press release of 30 September 2013 concerning the recommendations of the Payment System Council on the security of proximity cards, https://www.nbp.pl/systemplatniczy/rada/20130930_rsp_rekomendacje.pdf (accessed 19.10.2019).

[47] See Article 46 para. 2 of the initial version of the Act on payment services.

[48] W. Boczoń, *Złodziej nie wyczyści już konta kartą zbliżeniową*, https://prnews.pl/zlodziej-nie-wyczysci-juz-konta-karta-zblizeniowa-4208 (accessed 19.10.2019).

[49] M. Dąbrowska-Kardas, P. Kardas, *supra* n. 25, p. 80.

[50] Cf. judgment of the Court of Appeal in Białystok of 8 October 2002, VIII AKa 505/02, Prokuratura i Prawo, No. 10, item 21, insert 2004.

[51] A. Lach, *supra* n. 3, p. 172.

[52] For example, burglary is not committed if the perpetrator enters the premises by opening the door with a key left in the lock or if the door is closed using a device that can be opened by anyone. Also, no burglary takes place if the perpetrator enters the premises through an unprotected opening that allows free access to a room. Cf. A. Marek, T. Oczkowski, *supra* n. 13, p. 92 and the literature and judicial decisions referred to therein.

[53] Cf. L. Hochberg, *Rzecz o włamaniu*, Nowe Prawo No. 9, 1956, p. 78.

give an example, the presence of the cardholder's name on a payment card cannot be reasonably considered as a manifestation of their will to set up a protection against the card being interfered with by unauthorised persons. One should agree with the standpoint that deciding on use of the card with the option of contactless payments, the holder is aware of a risk related to lack of protection of contactless transactions up to a defined amount.[54]

When discussing the concept of burglary, one cannot overlook the proposals recently put forward in an article by Tomasz Buchaniec,[55] especially considering that the Supreme Courts makes specific references to this paper in the statement of reasons for its judgment. In the paper, the author points out that, in the doctrine and judicial practice of civil law, the prevailing opinion is that funds held in a bank account are not owned by the account holder but by the bank itself. The account holder only has a claim against the bank for the return of the funds at their first request.[56] As a consequence, from the point of view of civil law, the perpetrator disposes of funds owned by the bank rather than the account holder. The perpetrator's actions result in a change in the amount of claim against the bank to which the account holder is entitled.[57]

The adoption of the civil-law approach to the issue would have some important consequences. Firstly, the object of theft is "a moveable object belonging to another person". The scope of this term is narrower than that of the term "property" and does not include property rights, including claims.[58] Crucially, the damage caused to the cardholder consists precisely in the reduction of the amount of their claim against the bank. Under this approach, one can argue that, in the case at hand, the object of theft is money belonging to the bank, but this means that the identity of the victim must be changed in the description of the prohibited act.[59] In this connection, it has been postulated that two aggrieved parties should be recognised: the respective natural person and the bank.[60] Secondly, when conducting a card transaction, the perpetrator does not take possession of the respective amount. Instead, they cause it to be transferred between bank accounts, which is much closer to the concept of unlawful disposition of property as envisaged in Article 286 § 1 of the Criminal Code than to the larceny of a moveable object.[61]

The central problem raised by Tomasz Buchaniec is how a legal concept should be interpreted in a situation when different branches of law are involved.[62] In such cases, the usual order in which the semantic directives for interpretation are applied

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[54] See the judgment of the Court of Appeal in Gdańsk, II AKa 307/18; R. Sosik, *supra* n. 3, p. 125.

[55] T. Buchaniec, *Nieuprawnione posłużenie się cudzą kartą płatniczą w celu realizacji płatności w technologii zbliżeniowej – problematyka subsumpcji zachowania sprawcy pod właściwy przepis ustawy karnej*, Przegląd Naukowo-Metodyczny No. 2 (31), 2016, pp. 51–62.

[56] A. Kawulski, *Prawo bankowe – komentarz*, Warszawa 2013, pp. 263–268.

[57] T. Buchaniec, *supra* n. 51, p. 54.

[58] *Ibid.*, p. 55.

[59] *Ibid.*

[60] M. Wiśniewski, M. Żukowska, *supra* n. 29, p. 73.

[61] T. Buchaniec, *supra* n. 51, p. 56.

[62] This happens when a concept developed within the doctrine of a different branch of law is used for the purposes of the criminal law. Cf. S. Żółtek, *supra* n. 1, p. 394 et seq.

is modified.[63] As rightly pointed out in literature, from the perspective of criminal law, the key task in this situation is to determine the protected legal interest and to choose the interpretation that would result in its best possible protection.[64]

With reference to the above arguments, the Supreme Court does not consider it appropriate to adopt the civil-law approach to the institution of a bank account, under which an unauthorised contactless transaction conducted with another person's payment card constitutes a cashless settlement that results in a change in the amount of the account holder's claim against their bank.[65] The position taken by the Supreme Court is expressed in the following passage: "for, irrespective of who it is who ultimately suffers a loss as a result of an unauthorised use of a payment card – which matter is resolved by separate regulations and over which the perpetrator has no influence and, presumably, of which he is not aware – it is indisputable that, by making a payment with a stolen card, the perpetrator causes a reduction of assets in the cardholder's account. What essentially happens is that the perpetrator breaks through electronic security safeguards and commits a larceny of property in the form of funds stored in the bank's computer system; even though the perpetrator does not take physical possession of the funds, he receives their equivalent in the form of goods or services."

The standpoint taken by the Supreme Court is quite uncontroversial. The transplantation of the institution of a bank account as developed for the purposes of transactions conducted under civil law would be of little use for the purposes of criminal law. What is relevant to criminal law is that an illicit transaction is conducted with a payment card to which the perpetrator has gained unauthorised access, resulting in the reduction of funds in the cardholder's bank account. Treating this situation as an unauthorised disposition of the cardholder's claim against their bank would only entail unnecessary complications. The relations between an account holder and the respective financial institution are governed by separate regulations, and in particular, by the contract concluded between these parties. As such, these relations lie outside the domain of criminal law. While it is advisable that legal concepts should be treated identically in all the branches of law,[66] in this particular case, the discrepancy between civil and criminal law seems well justified.

3. CONCLUSIONS

When considering how the construal of the offence under Article 279 §1 of the Criminal Code has evolved in judicial practice over the years, one cannot resist the impression that the meaning of the term "burglary" has been expanding in a way

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[63] Cf. P. Wiatrowski, *Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego*, Warszawa 2013, pp. 59–94.

[64] S. Żółtek, *supra* n. 1, p. 395. Compare also comments of the Supreme Court in the judgment of 29 August 2012, V KK 419/11, OSNKW 2012, No. 12, item 133.

[65] Cf. M. Porzycki, *Komentarz do art. 63*, [in:] F. Zoll (ed.), *Prawo bankowe. Komentarz*, Vol. I, Kraków 2005, p. 554.

[66] S. Żółtek, *supra* n. 1, pp. 394–397.

comparable to the snowball effect. With each passing decade, the initially narrow term has been broadened to cover an increasing variety of factual situations. Of course, this does not in itself mean that judicial practice has taken a wrong track. In fact, this strategy can often be seen as desirable and necessary in view of the unceasing effort of the law to keep pace with the changing reality. It would seem that the only rational recommendation that can be made in this respect is for the judicature to avoid unwarranted generalisations and to treat matters on an *ad casum* basis. This was indeed the intended purpose of the discussion presented in this paper.

Beyond doubt, the issue of the legal classification of crimes related to the use of payment cards is very challenging. This is evidenced by the fact that, in the current legal framework, depending on the circumstances of an offence (e.g. the involvement of a merchant, the way in which a transaction is authenticated, the type of electronic security used), it may contain the components of three or, if one includes common theft, even four legally defined crimes.[67] Moreover, reliable assessment of the perpetrator's behaviour requires technical knowledge pertaining to the functioning of payment cards. It is indisputable that there is a need for legislation that would specifically target crimes committed with the use of payments cards. This postulate has been repeatedly voiced in the doctrine[68] and would probably also find support from the Supreme Court, given the arguments presented in the statement of reasons for its judgment. The Supreme Court, faced with the difficult task of adapting the text of the law to the current social practice, decided to continue the gradual broadening of the meaning of the term "burglary" as used in the criminal law by judgment that the constituent elements of the crime under Article 279 §1 of the Criminal Code are present in an unlawful performance of a contactless transaction that does not require a PIN code.

However, as follows from the analysis conducted in the previous sections, the fact that an access code is not required for a contactless transaction means that the offence does not exhibit one of the two constituent elements of the concept of burglary as defined in the criminal law doctrine: namely, the requirement that a security device be breached in order to gain access to property. The Supreme Court, assuming that the function of a security device is performed by the microprocessor, focuses on the identity of the perpetrator's purpose and mode of operation in unlawful card transactions executed with and without the use of a PIN code, and concludes that the difference between the two situations does not affect the legal qualification of the offence.[69] I believe that this reasoning is erroneous. It stems from a misapprehension of the function performed by the microprocessor in the

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[67] Namely, the crimes provided for in Articles 278 §1, 279 §1, 286 §1, and 287 §1 of the Criminal Code. Cf. P. Opitek, *supra* n. 9, pp. 88–105; M. Wiśniewski, M. Żukowska, *supra* n. 29, pp. 72–74. The discrepancies in the legal classification of unauthorised use of payment cards for contactless transactions in the case law are indicated by R. Sosik, *supra* n. 3, p. 124.

[68] Thus also in Z. Kukuła, *supra* n. 3, p. 159. For an opposing opinion, see M. Wiśniewski, M. Żukowska, *supra* n. 29, p. 75. It is worth pointing out, however, that their conclusions concern the provisions of Article 279 §1 of the Criminal Code; the authors suggest that an unauthorised contactless transaction performed using a payment card should be qualified as a crime under Article 278 §1 of the Criminal Code.

[69] Thus in the approving gloss by S. Łagodziński, *supra* n. 3.

process of a card transaction and from the failure to recognise that an access code is the only actual security feature protecting the card holder from theft as a result of an unauthorised use of their payment card. As it can be seen, an apparently insignificant technical point can be of great importance for the legal qualification of prohibited acts involving new technologies. This is particularly relevant in criminal law, which by its very nature requires that similar but not identical situations be carefully differentiated.

In the case handled by the Supreme Court, a particular interpretative conclusion led to the qualification of a prohibited act as a qualified criminal offence. When discussing why the punishment for burglary should be harsher than that for common theft, a number of factors are usually cited, such as: fragrant disrespect for another person's property, intensified manifestation of ill will on the part of the perpetrator, and greater audacity of the crime.[70] If these arguments are considered in the context of a contactless transaction, it becomes clear why, in the course of decades, the legal doctrine and judicial practice have developed an interpretation of the concept of burglary which requires that the perpetrator break at least a minimum security measure that can be considered as a manifestation of the possessor's will to protect their property from being accessed by third parties.[71]

Another issue to be considered in this connection is whether the adopted solution is compatible with the principle *nullum crimen sine lege certa*. It is especially doubtful whether, from the point of view of a potential perpetrator, the statutory set of constituent elements of the prohibited act can be unambiguously inferred. That is to say, it is not clear whether the perpetrator of an unauthorised contactless payment can unambiguously determine whether their conduct bears the constituent elements of burglary. The problem, therefore, lies with the differentiating function of the principle of legal certainty that makes it possible to distinguish between different types of prohibited acts.[72] The existing divergence in how cases of this kind are handled in the judicial practice of lower-instance courts may serve as proof of the existence of uncertainties in this regard.

Finally, it should be pointed out that the rejection of the view that a security safeguard is overridden in the course of an illicit contactless transaction necessarily means that the matter must be governed by the legislation on minor offences. The material value of damage resulting from a contactless transaction cannot possibly run to an amount that would allow the offence to be classified as theft and, therefore, as a crime (Article 278 §1 of the Criminal Code), unless the act is of a continuous nature.[73]

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[70] Cf. P. Nowak, *supra* n. 15, p. 95 and references therein.

[71] As regards the consequences of treating burglary as a qualified crime, see also the apt remarks by T. Dukiet-Nagórska in: T. Dukiet-Nagórska, *supra* n. 14, pp. 83–85.

[72] Cf. T. Sroka, *Komentarz do art. 42 ust. 1*, [in:] M. Safjan, L. Bosek (eds), *Konstytucja RP*, Vol. I: *Komentarz. Art. 1–86*, Warszawa 2016, pp. 1033–1034.

[73] Compare, however, the discussion by Arkadiusz Lach, who argues that after the Act of 23 March 2017 amending the Act: Criminal Code and some other acts, Dz.U. 2017, item 768, was adopted one can assume that the provision applicable to classify the larceny of financial means stored on a bank account is Article 278 § 1 Criminal Code, irrespective of the amount of damage caused; see A. Lach, *supra* n. 3, pp. 172–174.

The uncertainties revealed by the above analysis are so considerable that there is clearly an urgent need for a legislative intervention in this area of law. The existing state of law, especially in the face of the case law discrepancies, creates a highly undesirable situation of legal uncertainty. An additional argument for this need may be the fact that already after the said judgment was issued, the Court of Appeal in Gdańsk in the quoted judgment of 27 November 2018, II AKa 307/18, adopted a different stand that the Supreme Court with respect to the classification of the contactless payment as burglary.

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BURGLARY IN THE CONTEXT OF CONTACTLESS TRANSACTIONS: COMMENTS ON THE SUPREME COURT JUDGMENT OF 22 MARCH 2017, III KK 349/16

Summary

The aim of this paper is to provide an analysis of the concept of burglary in the Polish criminal law, with a particular emphasis on the legal qualification of illicit contactless transactions performed using another person's payment card. The judgment of the Polish Supreme Court of 22 March 2017, III KK 349/16, has been the starting point and the basis for the analysis. According to the judgment, a payment card transaction performed by an unauthorised person using contactless technology, which does not require an access code, constitutes the crime of burglary. In the first part of this paper, the author outlines the evolution of the term "burglary" in the Polish criminal law, with an emphasis on the constituent elements of burglary

as developed in judicial practice and in the criminal law doctrine. The second part is directly concerned with the court case mentioned in the title. It contains commentaries on the Supreme Court judgment based on the conclusions reached in the first part of the paper. In the final remarks, the author makes an assessment of the legal qualification adopted by the Supreme Court in its judgment. The importance of the element of burglary that consists in breaking at least a minimum protection when committing the crime is emphasized. A juxtaposition of the solution adopted by the Court with the requirements of the *nullum crimen sine lege certa* principle leads to postulating a need for legislative intervention in the matter.

Keywords: burglary, contactless payment, another person's payment card, minimum protection

POJĘCIE „WŁAMANIE" W ŚWIETLE TRANSAKCJI ZBLIŻENIOWEJ – UWAGI NA TLE WYROKU SĄDU NAJWYŻSZEGO Z 22 MARCA 2017 R., III KK 349/16

Streszczenie

Artykuł ma na celu analizę pojęcia „włamanie" w polskim prawie karnym, ze szczególnym uwzględnieniem kwalifikacji prawnej nieuprawnionych transakcji zbliżeniowych cudzą kartą płatniczą. Bezpośrednią inspiracją i zarazem osią niniejszego tekstu jest wyrok Sądu Najwyższego z dnia 22 marca 2017 r., sygn. akt. III KK 349/16. Stwierdzono w nim, że zapłata kartą płatniczą przez nieuprawnionego dokonana w sposób zbliżeniowy, niewymagający podania kodu dostępu, wypełnia znamiona przestępstwa kradzieży z włamaniem. Pierwsza część artykułu zarysowuje ewolucję pojęcia „włamanie" w polskim prawie karnym, z naciskiem położonym na wypracowane przez orzecznictwo i doktrynę karnistyczną elementy konstytutywne kradzieży z włamaniem. Druga część pracy odnosi się bezpośrednio do powołanego wyroku, stanowiąc jego komentarz w świetle wniosków wyciągniętych z części pierwszej. Uwagi końcowe poddają ocenie kwalifikację prawną dokonaną przez Sąd Najwyższy w analizowanej sprawie, akcentując wagę elementu przełamania co najmniej minimalnego zabezpieczenia. Zestawienie rozwiązania przyjętego przez Sąd z wymogami zasady *nullum crimen sine lege certa* prowadzi do wyrażenia potrzeby prawnego uregulowania omawianej kwestii.

Słowa kluczowe: kradzież z włamaniem, transakcja zbliżeniowa, cudza karta płatnicza, minimalne zabezpieczenie

EL CONCEPTO DE "FRACTURA" EN LOS PAGOS SIN CONTACTO – COMENTARIO DE LA SENTENCIA DEL TRIBUNAL SUPREMO DE 22 MARZO DE 2017, III KK 349/16

Resumen

El artículo tiene por objetivo el análisis del concepto "fractura" en derecho penal polaco, teniendo en cuenta la calificación legal de pagos sin contacto no autorizados, con tarjeta ajena. La sentencia del Tribunal Supremo de 22.03.2017, III KK 349/16, es inspiración directa y eje del presente artículo. En dicha sentencia se considera que el pago sin contacto con tarjeta por una persona no autorizada, que no requiera el código, cumple con los elementos del tipo de

robo con fractura. La primera parte del artículo presenta la evolución del concepto "fractura" en derecho penal polaco, enfocándose en los elementos constitutivos de robo con fractura considerados por la jurisprudencia y doctrina penal. La segunda parte se refiere directamente a la sentencia citada, siendo un comentario a la luz de conclusiones de la primera parte. Las consideraciones finales valoran la calificación legal efectuada por el Tribunal Supremo en el caso analizado, acentuando la importancia del elemento que consiste en romper al menos protección mínima. La comparación de la solución adoptada con los requisitos resultantes del principio *nullum crimen sine lege* en su aspecto *certa* resalta la necesidad de intervención del legislador.

Palabras claves: robo con fractura, pago sin contacto, tarjeta ajena, protección mínima

ПОНЯТИЕ «КРАЖА СО ВЗЛОМОМ» В КОНТЕКСТЕ БЕСКОНТАКТНОЙ ТРАНЗАКЦИИ: КОММЕНТАРИИ В СВЯЗИ С ПРИГОВОРОМ ВЕРХОВНОГО СУДА ОТ 22 МАРТА 2017 ГОДА, III KK 349/16

Резюме

Целью статьи является анализ понятия «кража со взломом» в польском уголовном праве с учетом юридической квалификации несанкционированных бесконтактных транзакций с использованием чужой платежной карты. Непосредственным поводом для написания статьи и ее отправным пунктом стал приговор Верховного суда от 22 марта 2017 г., номер дела III KK 349/16. В нем утверждается, что оплата платежной картой, осуществленная неправомочным лицом бесконтактным способом, для которого не требуется код доступа, соответствует составу преступления «кража со взломом». В первой части статьи описывается эволюция понятия «кража со взломом» в польском уголовном праве. Особое внимание уделено конститутивным элементам кражи со взломом в соответствии с судебными прецедентами и доктриной уголовного права. Вторая часть работы относится непосредственно к вышеупомянутому приговору. В ней содержатся комментарии к приговору, учитывающие выводы, сделанные в первой части. В заключение автор дает оценку юридической классификации, принятой Верховным судом по рассматриваемому делу, подчеркивая важность присутствия элемента взлома хотя бы минимального уровня защиты. Сопоставление принятого решения с требованиями, вытекающими из принципа *nullum crimen sine lege* в аспекте *certa*, приводит к выводу о необходимости законодательного урегулирования обсуждаемой проблемы.

Ключевые слова: кража со взломом, бесконтактная транзакция, чужая платежная карта, минимальный уровень защиты

DAS KONZEPT DES „EINBRUCHS" IN BEZUG AUF KONTAKTLOSE ZAHLUNGSVORGÄNGE – ANMERKUNGEN VOR DEM HINTERGRUND DES URTEILS DES OBERSTEN GERICHTSHOFS DER REPUBLIK POLEN VOM 22. MÄRZ 2017, AKTENZEICHEN III KK 349/16

Zusammenfassung

Ziel dieses Artikels ist es, das Konzept des „Einbruchs" im polnischen Strafrecht, mit besonderem Augenmerk auf die rechtliche Qualifizierung unbefugter kontaktloser Zahlungsvorgänge mit einer fremden Geldkarte, einer Analyse zu unterziehen. Als direkte Anregung und Achse

des Texts diente das Urteil Sąd Najwyższy (Oberster Gerichtshof), der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen vom 22.03.2017 mit dem Aktenzeichen III KK 349/16. In diesem wird festgestellt, dass die kontaktlose Kartenzahlung durch eine nicht dazu befugte Person, bei der keine Eingabe eines Zugangscodes/PIN erforderlich ist, den Tatbestand eines Diebstahls mit Einbruch erfüllt. Im ersten Teil des Artikels wird ein Überblick über die Evolution des Konzepts des „Einbruchs" im polnischen Strafrecht geliefert, wobei den von der Rechtsprechung und Strafrechtsdoktrin entwickelten konstitutiven Elemente des Diebstahls mit Einbruch besondere Beachtung geschenkt wird. Der zweite Teil der Arbeit nimmt dann direkt auf das angeführte Gerichtsurteil Bezug und kommentiert die gerichtliche Entscheidung vor dem Hintergrund der im ersten Teil gezogenen Schlüsse. In den abschließenden Bemerkungen erfolgt eine Bewertung der rechtlichen Qualifikation durch das Oberster Gerichtshof in der analysierten Strafsache, wobei das Gewicht des Elements der Überwindung von wenigstens minimalen Schutzvorkehrungen betont wird. Die Gegenüberstellung der gewählten Vorgehensweise mit den Erfordernissen des Grundsatzes *Nullum crimen sine lege* in Bezug auf den strafrechtlichen Bestimmtheitsgrundsatz *certa* (Notwendigkeit einer hinreichenden Bestimmtheit des Gesetzes) unterstreicht die Notwendigkeit, dass der Gesetzgeber in dieser Hinsicht tätig wird.

Schlüsselwörter: Diebstahl mit Einbruch, kontaktlose Zahlungsvorgang, fremde Geldkarte, Mindestschutzvorkehrung

LA NOTION DE «L'EFFRACTION» À LA LUMIÈRE D'UNE TRANSACTION SANS CONTACT – COMMENTAIRES DANS LE CONTEXTE DE L'ARRÊT DE LA COUR SUPRÊME DU 22 MARS 2017, III KK 349/16

Résumé

Cet l'article vise à analyser le concept de «l'effraction» en droit pénal polonais, en mettant l'accent sur la qualification juridique des transactions sans contact non autorisées avec des cartes de paiement d'autrui. L'inspiration directe et en même temps l'axe de ce texte a été l'arrêt de la Cour suprême du 22 mars 2017, réf. n° III KK 349/16. Il indique que le paiement au moyen d'une carte de paiement par une personne non autorisée, effectué sans contact et ne nécessitant pas de code d'accès, remplit les signes d'un vol avec effraction. La première partie de l'article décrit l'évolution de la notion de «l'effraction» en droit pénal polonais, en mettant l'accent sur les éléments constitutifs du vol avec effraction développés par la jurisprudence et la doctrine pénale. La deuxième partie de l'article se réfère directement à l'arrêt cité, constituant ainsi son commentaire à la lumière des conclusions tirées de la première partie. Les remarques finales évaluent la classification juridique faite par la Cour suprême dans le cas analysé, soulignant l'importance de l'élément de rupture d'au moins la sécurité minimale. La comparaison de la solution adoptée avec les exigences découlant du principe *de nullum crimen sine lege certa* souligne la nécessité d'une intervention du législateur dans le domaine traité.

Mots-clés: vol avec effraction, transaction sans contact, carte de paiement d'autrui, sécurité minimale

IL CONCETTO DI "EFFRAZIONE" ALLA LUCE DELLE TRANSAZIONI DI PROSSIMITÀ: OSSERVAZIONI SULLO SFONDO DELLA SENTENZA DELLA CORTE SUPREMA DEL 22 MARZO 2017, III KK 349/16

Sintesi

L'articolo ha lo scopo di analizzare il concetto di "effrazione" nel diritto penale polacco, con particolare attenzione alla classificazione giuridica delle transazioni di prossimità non autorizzate con una carta di pagamento altrui. Ispirazione diretta nonché asse portante del presente testo è la sentenza della Corte Suprema del 22 marzo 2017, protocollo del fascicolo III KK 349/16. In essa si è affermato che il pagamento con carta di pagamento da parte di persona non autorizzata, effettuato con modalità a prossimità, che non richiede la fornitura del codice di accesso, configura il reato di furto con effrazione. La prima parte dell'articolo tratteggia l'evoluzione del concetto di "effrazione" nel diritto penale polacco, concentrando l'attenzione sugli elementi costitutivi del furto con effrazione elaborati dalla giurisprudenza e della dottrina penalistica. La seconda parte del lavoro fa riferimento diretto alla sentenza richiamata, e costituisce un suo commento alla luce delle conclusioni derivanti dalla prima parte. Le osservazioni finali sottopongono a valutazione la classificazione giuridica effettuata dalla Corte Suprema nel procedimento analizzato, sottolineando il peso dell'elemento di forzatura di una quantomeno minima protezione. L'accostamento della soluzione assunta con i requisiti derivanti dal principio *nullum crimen sine lege certa* sottolinea la necessità di intervento del legislatore nell'ambito descritto.

Parole chiave: furto con effrazione, transazione di prossimità, carta di pagamento altrui, protezione minima

Cytuj jako:

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