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A few words on the modification of the ruling in the part concerning compensatory damages

Abstract: An important issue that requires in-depth consideration in the context of the issue of enforcement of judgments on the obligation imposed on the perpetrator to compensate for the damage inflicted or to make reparation for the harm suffered by the aggrieved party is the issue of the possibility to modify them (change the manner, scope or even revoke them) in enforcement proceedings. This raises the question: Is the executing authority entitled to make any changes (and if so, what changes) to the part of the judgment that concerns the obligation to compensate for the damage or harm suffered? Whether or not on the grounds of criminal law it is permissible to apply the institutions regulated in Article 453 of the CC, that is, *datio in solutum* (the essence of which consists in the fact that an obligation expires if the debtor, with the creditor's consent, performs another service in order to be released from it), as well as in Article 509 of the Civil Code, the so-called assignment of claims (under which the creditor may, without the debtor's consent, transfer a claim to a third party, unless this would be contrary to the law, a contractual stipulation or the nature of the obligation) and in Article 365 of the CC, that is, alternate obligations, or even in Article 506 of the Civil Code, that is, renewal (novation)? Whether and which amendments, if any, may be made by the court on the basis of Article 13(1) of the EPC? How much influence does the will of the aggrieved party or the will of the offender have on the manner in which such an obligation is to be performed and any modification thereof? The issues outlined are, among others, the subject of a broader analysis within this publication.

Keywords: obligation to repair damages, modification of the decision, compensation, assignment of claims, debt relief, renewal (novation), commutative obligations, criminal law

An important issue that requires in-depth consideration in the context of enforcement of judgments on the obligation imposed on the perpetrator to compensate for the damage inflicted or to make reparation for the

harm suffered by the aggrieved party is the issue of the possibility to modify them (change the manner, scope or even revoke them) in enforcement proceedings. This raises the following question: Is the executing authority entitled to make any changes (and if so, what changes) to the part of the judgment that concerns the obligation to compensate for the damage or harm suffered? Moreover, due to the fact that, as a result of the 2015¹ amendments, the legislator in Article 46 of the Penal Code clearly emphasised that the court, when imposing an obligation to make reparation for damage, applies the provisions of civil law, another problem arises here, namely: Whether or not, on the grounds of criminal law, it is permissible to apply the institutions regulated in Article 453 of the Civil Code, that is, *datio in solutum* (the essence of which consists in the fact that an obligation expires if the debtor, with the creditor's consent, performs another service in order to be released therefrom), as well as in Article 509 of the Civil Code, the so-called assignment of claims (under which the creditor may, without the debtor's consent, transfer a claim to a third party, unless this would be contrary to the law, a contractual stipulation or the nature of the obligation) and in Article 365 of the Civil Code, alternate regarding alternate obligations, or even in Article 506 of the Civil Code, regarding renewal (novation)? Does the current regulation of Article 74(2) of the Penal Code authorise a possible change of entity to another entity than the one in whose favour the criminal law obligation to make reparation for damage or compensation for non-material damage has been awarded? Whether and which amendments, if any, may be made by the court on the basis of Article 13(1) of the Executive Penal Code? How much influence does the will of the aggrieved party or the will of the offender have on the manner in which such an obligation is to be performed and any modification thereof? The issues outlined are, among others, the subject of a broader analysis within this publication.

At the beginning of these considerations, it is worth mentioning that this issue to a certain extent was already the subject of doctrinal investigations on the basis of the codification of 1969, because in the practice of litigation there were motions filed by the obliged to change, inter alia, the manner, scope or time limit of compensation for damage, or even to abolish this obligation. Due to the lack of a clear statutory regulation in this matter and, therefore, of an unambiguous legal basis clearly settling this issue, some courts dismissed such motions, while others granted them.²

¹ Amendment of the Penal Code made by the Act of 20 February 2015 amending the Act – Penal Code and certain other acts, which entered into force on 1 July 2015, Journal of Laws of 2015, Journal of Laws of 2015, item 396.

² Cf. A. Muszyńska: *Naprawienie szkody wyrządzonej przestępstwem*. Warszawa 2010, pp. 378–379.

The current penal codification solves this problem to a certain extent. Incidentally, it should be pointed out that the aggrieved party, upon receiving the enforcement order, should call upon the obliged party to redress the damage in the manner and within the time limit specified in the ruling. This party is entitled to decide on the execution of the judgment in this respect (Article 196(1) of the Executive Penal Code). Therefore, such a ruling must contain certain necessary elements enabling its execution (i.e. determination of the scope, manner, date of execution of the obligation imposed on the offender).³ In a situation where the court has imposed an obligation to redress damage on the basis of Article 46(1) of the Penal Code, the aggrieved may apply for an enforceability clause immediately after such a ruling becomes final. On the other hand, if the obligation to redress a damage is linked to Article 72(2) of the Penal Code, then the clause is enforceable upon the expiry of the time limit that has been set by the court. The substantive prerequisite for granting of an enforceability clause is the advent of the time limit for performance, which results from the judgment.⁴ However, within the framework of enforcement practice, problems sometimes arise in relation to the possibility of potential interference by the court in the matter of correcting the content of such a judgment. It should be pointed out that Article 13(1) of the Executive Penal Code allows the authority enforcing the judgment and anyone directly affected thereby (the aggrieved, the convicted person, the prosecutor) to request the court issuing it to resolve any doubts as to its enforcement. However, it should be made clear that this provision does not authorise to introduce substantive changes to a judgment rendered by a court in a jurisdictional proceeding. On this basis, it is only possible to supplement the judgment (e.g. to define more precisely the subject of the aggrieved party), but it is not permissible to make any changes to its original content.⁵ The Supreme Court, in its judgment of 15 November 2017, stated that “[t]he regulation of Article 13 (1) of the Executive Penal Code offers the possibility of resolving doubts about the execution of a legally defective judgment, rather than remedying the deficiency with which the judgment is affected.”⁶ In turn, in the judgment of 23 August 2017, the Supreme Court emphasised that “[a]lthough the provision of Article 13(1) of the Executive Penal Code makes it possible to clarify doubts that may arise as a result of insufficiently precise or general formulations contained

³ W. Sych: *Zmiana sytuacji pokrzywdzonego w stadium wykonawczym polskiego procesu karnego*. “Prokuratura i Prawo” 2006, 2, pp. 131–132.

⁴ Cf. Supreme Court decision of 24 February 2010, I KZP 31/09, OSNKW 2010, No. 4, item 32.

⁵ A. Muszyńska: *Naprawienie szkody...*, p. 377.

⁶ Supreme Court decision of 15 November 2017, IV KK 397/17, LEX No. 2420341.

in the judgment, the institution described in this regulation does not serve the purpose of making changes or additions to the substantive content of the judgment – including the judgment on punishment.”⁷ On the other hand, in the judgment of 16 December 2015, it/the Supreme Court stated that “[t]he duration of the prohibition and obligation cannot be determined using the disposition of Article 13(1) of the Executive Penal Code.”⁸ It should be pointed out that it may be inferred from Article 74(2) of the Executive Penal Code that, in the case of sentencing the perpetrator to a custodial sentence with conditional suspension of its execution, the possibility of making changes to the content of the ruling imposing the obligation to make reparation of damage, as well as exemption from this obligation during the trial period shall be excluded. However, the content of the indicated provision raises some doubts here.⁹ Since it follows therefrom that if educational considerations speak in favour thereof, the court may in the case of a person sentenced to a custodial sentence with conditional suspension of its execution during the probation period, establish, extend or change the obligations which are listed enumeratively in Article 72(1) (3–8) of the Penal Code (the obligation to repair damage is not expressly included in this catalogue), or exempt from the performance of the obligations imposed, with the exception of the obligation indicated in Article 72(2) of the Penal Code (i.e. the obligation to redress a damage). It would therefore have to be considered that if this measure should not be subject to any modification, the court cannot exempt the convicted person from its execution either. As a result, the final part of the provision of Article 74(2) of the Penal Code, which refers to the obligation to redress a damage, could actually be considered unnecessary.¹⁰ However, this would imply a contradiction with the prohibition of interpreting legal norms in such a way that certain parts of them turn out to be unnecessary. In other words, it cannot be assumed that certain specific expressions (formulations) have been used by the legislator in the Penal Code without a clear need to do so (that they do not mean anything).¹¹ In view of the above, due to the content of Article 74(2) of the Penal Code, it would have to be concluded that under the current state of the law, the court is nei-

⁷ Supreme Court decision of 23 August 2017, V KK 127/17, LEX No. 2389612; Supreme Court decision of 29 October 2013, IV KZ 65/13, LEX No.1388527.

⁸ Supreme Court decision of 16 December 2015, II KK 344/15, LEX No. 1941894.

⁹ Cf. A. Zoll, in: *Kodeks karny. Część ogólna. Komentarz*. T. I, Ed. 4. Eds. G. Bogdan, Z. Ćwiakalski, P. Kardas, J. Majewski, J. Raglewski, M. Szewczyk, W. Wróbel, A. Zoll. Warsaw 2012, p. 972; S. Hypś, in: *Kodeks karny. Komentarz*. Ed. 7. Eds. A. Grześkowiak, K. Wiak. Warsaw 2021 [comment to Art. 74 of the Penal Code], p. 646.

¹⁰ M. Szewczyk: *Glosa do postanowienia Sądu Najwyższego z dnia 16 grudnia 2014 r., sygn. V KK 347/14*. “Probacja” 2015, 4, pp. 135–136.

¹¹ Cf. more L. Morawski: *Zasady wykładni prawa*. Ed. II, Toruń 2010, pp. 122–123.

her entitled to modify the probationary measure imposed in the form of an obligation to redress a damage, nor to exempt from its execution. The arguments raised in the doctrine, which allegedly argue that this institution cannot be modified, are primarily the necessity to protect the interests of the aggrieved. In view of the above, due to the content of Article 74(2) of the Penal Code, it would have to be concluded that under the current state of the law, the court is neither entitled to modify the probationary measure imposed in the form of an obligation to redress a damage, nor to exempt from its execution.¹² The arguments raised in the doctrine, which allegedly argue that this institution cannot be modified, are primarily the necessity to protect the interests of the aggrieved party. As an example, it may change the manner or deadline for fulfilment of such an obligation, but for the aggrieved party the most important is often to simply repair the damage or harm caused.¹³ Accordingly, it should be added that in the situation of imposing an obligation to redress damage as a probationary condition in the case of conditional discontinuance of proceedings and taking into account the content of Article 67(4) of the Penal Code, which refers in such a case to the relevant application of Article 74 of the Penal Code, the legislator excluded here the possibility of amending the ruling in this scope in enforcement proceedings.¹⁴ It would therefore have to be concluded that following the wording of the currently enforceable provisions, it is not permissible to modify an order imposing an obligation to redress damage as a condition of probation, irrespective of which probation institution it is linked to. It is worth mentioning at this point that the Supreme Court in its ruling of 11 January 2022 stated that “[I]t is not possible to convalidate indeterminacy of the duration (validity) of an adjudged penal measure in enforcement proceedings pursuant to Article 13(1) of the Executive Penal Code, if the law directly stipulates the requirement of specifying in the judgment how long the prohibition is to last.”¹⁵ In turn, in its ruling of 16 November 2017, it stated that “[i]n view of the statutory requirement to specify in the judgment how long the prohibition is to last, the possibility of specifying only in the enforcement proceedings the duration of the prohibition is excluded. Therefore the duration of the prohibition cannot be determined using the disposition of Article 13(1) of the Executive Penal Code and the principle of *in dubio pro reo*.”¹⁶

¹² S. Hypś, in: *Kodeks karny. Komentarz...*, pp. 646–647.

¹³ M. Szewczyk: *Glosa do postanowienia...*, pp. 136–137.

¹⁴ A. Muszyńska: *Naprawienie szkody...*, p. 379.

¹⁵ Supreme Court decision of 11 January 2022, III KK 523/21, LEX No. 3352115; Supreme Court decision of 2 February 2021, IV KK 520/20, LEX No. 3150229.

¹⁶ Supreme Court decision of 16 December 2015, II KK 337/17, LEX No. 2401061.

In connection with the above, an important question arises, whether the analysed prohibition is of absolute nature, or whether the court, however, evaluating all circumstances of a given case may *in concreto* make such a modification? In practice, there may be situations in which making such a modification will be justified, and sometimes even necessary, where, for example, during the probation period the financial situation of the obliged person may significantly deteriorate or other obstacles may suddenly appear which make it difficult to fulfil such an obligation. Convicted persons sometimes submit such requests to the courts to change, for example, the date of fulfilment of the obligation to redress damage imposed under Article 72(2) of the Penal Code, arguing their position, for example, that their financial situation has deteriorated after the ruling has been made.¹⁷ At the same time, it should be mentioned that, as a rule, an appropriate motion for modification of obligations during the probation period or for exemption from their execution may be submitted by the convicted person him-/herself or by his/her defence counsel (and also by a probation officer – if supervision has been ordered). This issue may also be considered on the court's own initiative as the competent authority in matters related to the execution of the conditional suspension of the sentence (Article 3 of the Executive Penal Code). If such modifications of the sentence were absolutely forbidden, then after the expiry of the date indicated therein, by which the convicted person was supposed to make good the damage caused or compensate for the harm, it would be necessary, for instance, to initiate proceedings to order the execution of the adjudged sentence of imprisonment. Consequently, it should be considered that if, *in concreto*, the non-fulfilment of the obligation is not due to the bad will of the convicted person, but is caused by objective factors, then there are not always grounds for ordering the execution of the sentence imposed. Undoubtedly, among other things, the educational nature of such a probationary measure argues in favour of the court being able, after hearing the convicted person, to amend the judgment in this respect accordingly.¹⁸ At the same time, it should be pointed out that probation obligations may be imposed by the court after due consideration of the sentenced person's opinion on the matter. Such inclusion of the convicted person in the pro-

¹⁷ Cf. T. Humaniak: *Możliwość nadania klauzuli wykonalności orzeczeniu zobowiązującemu do naprawienia szkody wydanemu w trybie art. 72 k.k. – uwagi na tle rozbieżności w orzecznictwie Sądu Najwyższego*. "Probacja" 2011, 1, pp. 145–151; Wyrok SA we Wrocławiu z 30.12.2014 r., II AKa 387/14, LEX nr 1630908; P. Gensikowski: *Nadanie klauzuli wykonalności orzeczeniom co do roszczeń majątkowych wydanym w procesie karnym – uwagi na tle zmian ustawowych dokonanych w 2015 r.* "Przegląd Sądowy" 2018, 1, pp. 76–84.

¹⁸ M. Szewczyk: *Glosa do postanowienia...*, pp. 137–138.

cess of determining the scope of probation obligations increases somehow the effectiveness of the impact of the probation measure applied in a particular case and ensures to some extent its implementation by the convicted person. It is the duty of the court to hear the convicted person. Despite the lack of an explicit reference in the wording of Article 74 of the Criminal Code to the necessity of hearing the convicted person when modifying previously imposed probation obligations, there is no doubt that this also applies to this situation.¹⁹ It should be indicated that this action is only informative and not binding for the court. As an aside, it is worth mentioning on this occasion that, until the 2015 amendments to the Penal Code came into force, a penal obligation to redress damage could be imposed as a probationary condition for a sentence of restriction of liberty, while under the 2003 Act²⁰ it was possible in such a case to modify (or even revoke) the ruling on such an obligation in enforcement proceedings. However, it was pointed out in the doctrine that this exception was a kind of failure of the legislator. It should be noted that when imposing an obligation to make reparation for damage or compensation for harm suffered on the basis of Article 46 of the Penal Code, the legislator also did not introduce any unambiguous regulation authorising a later possible modification of this measure. However, this does not mean that the modification in a particular case of the conditions that affect the execution of such an obligation will sometimes be deprived of its significance. This is because it may have specific consequences, as when, for instance, the court assesses whether the offender's failure to repair the damage was an "evasion" or not.²¹ It is worth emphasising that any circumstances that may affect this kind of an assessment by the court should always be examined in detail.²² It should be mentioned here that there is no fundamental obstacle to the fact that the obligation to redress the damage imposed both as a compensatory measure and as a condition of probation may be divided by the court into instalments. A request to this effect should be made by the offender when his/her financial situation does not allow him/her

¹⁹ Cf. S. Hypś, in: *Kodeks karny. Komentarz...*, pp. 646–647.

²⁰ Act of 24 July 2003 amending the Act – Executive Penal Code and certain other acts (Journal of Laws No. 142, item 1380), which entered into force on 1 September 2003. Article 61 (1) of the Executive Penal Code was amended to read as follows: "If educational considerations so warrant, the court may, during the period of execution of a sentence of restriction of liberty, establish, extend or modify the obligations referred to in Article 36(2) of the Penal Code, or exempt from the performance of such obligations, as well as place the convicted person under supervision or exempt from supervision."

²¹ A. Muszyńska: *Naprawienie szkody...*, p. 382.

²² Cf. Supreme Court decision of 30 October 1981, V KRN 163/81, OSNKW 1982, No. 1–2, item 6.

to pay the obligation in full.²³ At the same time, it should be noted that actually only a conviction without the application of a probationary measure (in principle) results in the fact that the period set for the offender in which he/she should redress the damage or harm caused by him/her to the aggrieved party is not extended in time. Therefore it seems that, if the court applies this institution as a probationary condition, this obligation should be regarded as the primary one that the offender must perform in order to possibly benefit from the privilege of probation which would be a rational solution in this case. At the same time, it should also be noted that the view expressed in the doctrine on the expiry of the obligation to redress damage after the expiry of the probation period is difficult to accept, as it interferes with the compensatory function of criminal law and harms the interests of the aggrieved party²⁴ – there is no clear legal basis authorising this. The literature rightly stresses that the limitations introduced by the legislator on the issue of admissibility of modifying the obligations listed in points 1 and 2(1) of Article 72 of the Penal Code are unjustified, as probation measures should be characterised by flexibility and only then they can effectively fulfil their functions and objectives related to the rehabilitation of convicted persons. In connection with the above, it has been rightly postulated that the wording of Article 74(2) of the Penal Code should be amended by allowing the court to modify all the obligations imposed on convicted persons and, in the meantime, to amend them appropriately, taking into account the overall circumstances of a given case.²⁵ It is worth mentioning at this point that, for instance, in exceptional situations, a fine may be remitted by the court in whole or in part pursuant to Article 51 of the Executive Penal Code. This remission is optional and does not depend on the amount of the fine imposed. It is a fine of a financial nature and therefore the possibility of at least a certain modification of other criminal response measures of a financial nature should be considered in this respect.²⁶ On the other hand, it should also be pointed out that, for example, the economic situation of the aggrieved party may, in accordance with the content of Article 440 of the Civil Code, lead to a reduction in the scope of the obligation to redress the damage inflicted by the offender already at the stage of sentencing while at

²³ E. Wdzięczna: *Warunkowe umorzenie postępowania karnego w świetle koncepcji sprawiedliwości naprawczej*. Toruń 2010, pp. 358–359; Wyrok SA w Katowicach z 18.02.2014 r., V ACa 708/13, LEX nr 1451653.

²⁴ Cf. M. Łukaszewicz A. Ostapa: *Nawiązka i karnoprawny obowiązek naprawienia szkody a roszczenia cywilnoprawne*. “Prokuratura i Prawo” 2002, 2, pp. 76–77.

²⁵ M. Szewczyk: *Glosa do postanowienia...*, pp. 136–137.

²⁶ Cf. decision of the Administrative Court in Warsaw of 26 June 2020, II AKa 76/20, LEX No. 3046974.

the same time there are additional premises supporting the reduction of the amount of damages to be awarded.²⁷ It should therefore be mentioned that already at the time of sentencing, the court should take into account the various circumstances that may possibly have an impact on the later difficulties in the efficient performance of the obligation imposed on the offender, without the potential need to modify it after sentencing.

In the context of the above considerations, it is important to briefly address an important issue, namely to try to answer the question: Does the current regulation of Article 74(2) of the Penal Code authorise a possible change of entity to another entity than the one in whose favour the criminal law obligation to make reparation for damage or compensation for non-material damage has been awarded? As a general rule, the entity in whose favour the obligation to redress damage may be awarded is, as a rule, the aggrieved party, that is, the natural or legal person whose legal good has been directly violated or threatened by the offence. It should be pointed out, however, that the doctrine states that under criminal law it is permissible for the aggrieved party to cede its claim to another entity so that it can, in consequence, receive the money awarded more quickly. Undoubtedly, this may sometimes make it easier to receive the compensation or redress ordered in favour of the aggrieved party, since in such a situation the benefit will be met by the acquirer of the claim and not the convicted person. The acquirer of such a claim is an entity which, by entering into a relevant civil law contract, has acquired from the aggrieved party a claim resulting from the commission of a criminal offence by the offender.²⁸ In order to resolve certain ambiguities arising against the background of the outlined problem, it is necessary to refer here to the relevant provisions of civil law which regulate the debt acquisition issue (specifically, i.a., to Article 509 of the Civil Code). In general terms, an assignment of a claim (transfer of a claim) is an agreement between a creditor (known as the assignor) and a third party (known as the assignee), whereby the third party acquires a specific claim from the previous creditor. In the case of such an assignment, the existing debtor (in criminal law this would be the offender) still has to fulfil the debt but to another entity (the assignee), so his or her situation does not in principle change significantly anyway. Pursuant to Article 509 of the Civil Code, a creditor may assign such a claim to a third party without the consent of the debtor, unless this would be contrary to the law, a contractual stipulation or

²⁷ Cf. decision of the Administrative Court in Krakow of 22 July 2016, I 699/16, LEX No. 2108540; J. Misztal-Konecka: *Roszczenia majątkowe osób najbliższych dla pokrzywdzonego*. Warszawa 2008, pp. 69–70.

²⁸ A. Muszyńska, A. Jura: *Problematyka przejścia wierzytelności o naprawienie szkody*. “Nowa Kodyfikacja Prawa Karnego” 2018, 48, pp. 140–141.

the nature of the obligation. Along with the assigned claim, all rights attaching thereto, as well as claims for overdue interest, are transferred to the “new” acquirer. The most important effect of concluding such an agreement is that the assignor loses the claim and the assignee gains it. This is an example of singular succession of a translative nature.²⁹ The assignor of a claim is liable to the assignee for the fact that such a claim is owed thereto. However, it should be noted that the assignee in such a manner cannot acquire more rights against the debtor (i.e. in the situation under consideration here against the offender) than the assignor previously had. Thus, such an assignment does not lead to the emergence of a new claim, to an increase in the scope of the claim, or to the debtor being deprived of the claims which he or she was previously entitled to.³⁰ The assignor, as soon as the claim is assigned, loses the ability to require the debtor to fulfil obligation towards him/her. The assignor of the claim is liable for the solvency of the debtor at the time of the assignment only to the extent that it has assumed such liability (Article 516 of the Civil Code).

Among the most important consequences of the assignment of a claim affecting the general situation of the debtor (i.e. under criminal law of the offender), first of all the protection of the debtor acting in good faith should be mentioned, as well as the obligation of the debtor to provide performance to the new creditor (assignee). In this regard, it is worth mentioning the doctrine aptly notes the fact that a sham assignment agreement does not lead to a transfer of the claim. However, if the conditions of Article 83(2) of the Civil Code are met, the assignee will acquire the claim, even though the transferor did not have the right to dispose of it.³¹ However, “[a]s long as the transferor has not notified the debtor of the transfer, performance to the previous owner shall have effect against the transferee, unless the debtor was aware of the transfer at the time of performance. This provision shall apply respectively to other legal acts performed between the debtor and the previous creditor” (Article 512 of the Civil Code).³² The obligation of performance to the assignee arises when the debtor is notified of the assignment (this can be done by both the assignor and the assignee). Therefore, taking into account the above, it should be concluded that if a specific claim is adjudicated in a criminal trial under civil law, any such assignment of a claim under criminal law

²⁹ Cf. K. Zagrobelny, in: *Kodeks cywilny. Komentarz*. Eds. E. Gniewek, P. Machnikowski. Warsaw 2021 [comment to Article 509 of the Civil Code], pp. 1188–1190.

³⁰ A. Brzozowski, J. Jastrzębski: *Zobowiązania – część ogólna*. Warszawa 2016, pp. 389–390.

³¹ Cf. K. Zagrobelny, in: *Kodeks cywilny. Komentarz...* [comment to Art. 516 of the Civil Code], pp. 1205–1206.

³² H. Witczak, A. Kawałko: *Zobowiązania*. Warszawa 2012, pp. 209–210.

may be considered lawful. However, it should be assumed that subsequent disputes between the parties arising from such an assignment should already be resolved by a civil court. The doctrine points out that there is no fundamental contraindication for such a “transfer” of claims by means of a civil law transaction. Thus, it would have to be considered that civil law claims arising from the offence committed by the offender may be transferred to the “new” acquirer through such an assignment.³³ At the same time, however, it should be noted that in the case of the court’s adjudication of a probationary measure on the basis of Article 72(2) of the Penal Code, some specific difficulties may arise here with regard to the possibility of such an assignment of claims, as the possible failure of the offender to comply with the obligation to redress the damage may result in the ordering of the execution of the imprisonment sentence imposed thereon. In this respect it is important that the transfer of a claim by means of a civil law contract indeed does result in a change of creditor, but the offender is still obliged to redress damages. He or she still has to provide this kind of performance, but already to the new acquirer of the claim (assignee). Attention should be drawn here to the decision of the Supreme Court of 19 November 2015,³⁴ in which it stated that if the aggrieved party has sold to another person a claim arising from a criminal offence, the obligation to redress the damage becomes irrelevant in such a situation. On the other hand, the failure to satisfy the person who acquired, by such assignment, the property rights originally vested in the aggrieved party, cannot be regarded as the offender’s failure to fulfil his or her probationary obligation within the meaning of Article 75(2) of the Penal Code. As a consequence of this, it is inadmissible in such a case for the court to order the execution of a conditionally suspended custodial sentence due to the convicted person’s failure to redress the damage. Thus, it would have to be concluded that after the transfer of the receivables resulting from the offence to another person, it becomes pointless for the convicted person to perform the probationary obligation of redressing the damage in favour of the aggrieved party (assignor).³⁵ Consequently, it would have to be assumed that the acquirer of the claim (the assignee) could only enforce such a claim in a civil lawsuit. If this view were to be taken as correct, it would therefore have to be concluded that the assignment of the claim in such a case is advantageous for the offender. However, it should also be noted that the person who has acquired such a claim may apply for an enforcement clause in favour of his or her conviction and then initiate

³³ A. Muszyńska, A. Jura: *Problematyka przejścia...*, p. 140.

³⁴ Cf. Supreme Court decision of 19 November 2015, IV KK 342/15, LEX No. 1358956.

³⁵ Cf. Supreme Court decision of 21 February 2013, IV KK 332/12, LEX No. 1298120 and of 16 December 2014, V KK 347/14, LEX No. 1642886.

and carry out enforcement proceedings in order to enforce the amount awarded under the reparation obligation. There is no fundamental obstacle to an enforceability clause being issued in favour of persons other than the aggrieved party alone, although an important condition for this is that the acquirer of the claim must prove to the court that certain rights have been transferred thereon. Thus, the acquirer should enclose the assignment agreement or a copy thereof with the application for a clause. Failure to fulfil this necessary condition in this situation may result in the court not granting such a request.³⁶ It should also always be borne in mind that, in the case of a probationary condition, the legislator has provided the offender with a “probationary” privilege, which can be revoked if the offender fails to fulfil the obligations imposed thereon. Consequently, the possible threat of its loss may sometimes mobilise this person to redress the damage caused independently of the entity to which is obliged to. It could therefore be concluded that, in principle, the assignment affects the change of entity on the part of the creditor, whereas it does not affect the existence of the obligation itself. If, therefore, the aggrieved party is anxious to be compensated quickly for the damage or harm caused by the offender, such a disposal of the claim is a positive solution therefor. It should be noted, however, that an assignee, acquiring a claim resulting from a prohibited act in this manner, cannot obtain the status of an aggrieved party in a criminal trial due to the lack of immediacy of the infringement or threat to its legal good³⁷ (in connection with this, it might be worth considering possibility of allowing such an entity to join a criminal trial in certain situations³⁸). It is aptly emphasised in the doctrine that, in the case of an assignment of claims, the obligation to make reparation still fulfils a compensatory and preventive function, as the offender has to perform it anyway.³⁹ Taking into account the above findings, it would therefore have to be concluded that there are no fundamental obstacles to the institution of assignment of claims finding appropriate application in criminal law in connection with the courts’ imposition of an obligation to redress damage in the course of criminal proceedings. Thus, it would have to be considered that it is possible in practice that the offender will sometimes have to redress the damage caused to a “new” entity, the so-called assignee. This type of solution may be of particular relevance where

³⁶ A. Muszyńska, A. Jura: *Problematyka przejścia...*, p. 144.

³⁷ *Ibidem*, p. 142.

³⁸ *Ibidem*, pp. 145–146.

³⁹ A. Jaworska-Wieloch: *Przymusowa egzekucja karnoprawnego orzeczenia o naprawieniu szkody*. In: *Konsensualizm i kompensacja a podstawy odpowiedzialności karnej*. Warszawa 2016, pp. 94–95.

the aggrieved party is anxious to obtain quick compensation for the damage or harm.

In the context of these considerations, it is worth noting the institutions provided for in Article 453 of the Civil Code, that is, *datio in solutum* (the so-called provision in lieu of performance) and in Article 365 of the Civil Code, that is, alternating obligation, as well as in Article 506 of the Civil Code, that is, renewal. The essence of the so-called *datio in solutum* (Article 453 of the Civil Code) is that the obligation expires if the debtor, in order to be released therefrom, fulfils another performance with the consent of the creditor. The consent of such a creditor is important here, as its absence results in the existence of an obligation with its original content. The existing obligation expires at the moment of fulfilment of the substitute (replacement) performance. On the other hand, in the event of non-performance, the original relationship remains in force. Such an agreement is subject to an appropriate assessment taking into account all criteria of its validity, in particular the legal capacity of both parties is required here.⁴⁰ The question to be addressed, therefore, is whether it is possible to apply this institution in criminal law? On the basis of the legal status prior to the 2015 amendment, at the time when the obligation to redress damage acted as a criminal measure in addition to a probationary condition, it was a common position in the doctrine that the application of these civil law regulations on the basis of criminal law was not possible. This was argued, inter alia, on the basis of the different functions and features of the criminal law obligation to redress the damage compared to a civil-law obligation. At the same time, attention was drawn to the fact that redressing the damage in a manner other than that specified by the court in its judgment may give rise to various doubts and difficulties manifested in this context, for example, in relation to the proper assessment of the offender's behaviour in the context of "evading" the fulfilment of the obligation imposed thereon.⁴¹ However, as a result of the aforementioned amendment, the obligation to redress damage has been transformed from a punitive measure into a compensatory one, and its main function is now primarily to facilitate the aggrieved party's obtaining, redress of the damage or harm caused by the offence in the course of a criminal

⁴⁰ Cf. more K. Zagrobelny, in: *Kodeks cywilny. Komentarz...* [comment to Art. 453 of the Civil Code], pp. 1079–1080.

⁴¹ Z. Gostyński: *Obowiązek naprawienia szkody w nowym ustawodawstwie karnym*. Kraków 1999, pp. 236–237; T. Kozioł: *Warunkowe umorzenie postępowania karnego*. Warszawa 2009, pp. 195–196; K. Postulski: *Glosa do wyroku s. apel. z dnia 18 lutego 2014 r., V ACa 708/13*, LEX/el. 2015.

trial.⁴² It should be mentioned here that it is now acceptable to oblige the offender to redress the damage in the forms provided for in Article 363(1) of the Civil Code, that is, by restoring the previous state of affairs or by paying an appropriate sum of money. Thus, generally it may be concluded that since the legislator in the content of Article 46 of the Penal Code expressly emphasised that the court, when imposing an obligation to redress the damage, applies the provisions of civil law, the application of the institution of *datio in solutum* should not be completely excluded in this case either. It should be noted that only the actual performance of the offender can possibly lead to the termination of a pre-existing obligation. It is worth noting at this point that the agreement in question is sometimes concluded as a result of an alternate mandate. It can therefore be assumed that in criminal law there are currently no fundamental obstacles to the aggrieved party (the creditor) proposing to the offender (the debtor) another way of performing the obligation, at the same time indicating what performance he or she is willing to accept. On the other hand, it is up to the offender (debtor) in such a situation to decide independently whether he/she wants to make use of this possibility, if any. It would have to be supposed that if the offender behaves in a certain way proposed by the creditor, by fulfilling another obligation, a *datio in solutum*⁴³ will be established as a result of consensual declarations of intent. Such a solution can sometimes be very beneficial for both the aggrieved party and the offender. The doctrine clearly indicates that the obligation to redress the damage may be adjudged in the form of an alternative performance (so-called alternate obligation). This means that the court may specify several different ways of reparation in the judgment.⁴⁴ Thus, it would have to be concluded that there is here, so to speak, a situation specified in the content of Article 365 of the Civil Code resulting in the conclusion that, if the debtor (in this case, the offender of the damage or harm) is obliged in such a way that the performance of the obligation may take place through the fulfilment of one of several issues, the choice of the issue belongs to the debtor, unless it results from the legal transaction, from the act or from the circumstances that the entitled person to make the choice is the creditor him-/herself (the aggrieved party) or a third person (another entitled person).⁴⁵ It follows from the wording of Article 365(2) of the Civil Code that such a choice is made by making an appropriate declara-

⁴² Cf. Explanatory Memorandum to the Act on Amendments to the Act – Penal Code and Certain Other Acts, 7th Sejm of the Republic of Poland, Print no: 2393, pp. 28 ff.

⁴³ K. Zagrobelny, in: *Kodeks cywilny. Komentarz...*, p. 1080.

⁴⁴ W. Daszkiewicz: *Naprawienie szkody w prawie karnym*. Warszawa 1972, pp. 37–39.

⁴⁵ Cf. more P. Machnikowski, in: *Kodeks cywilny. Komentarz*. Eds. E. Gniewek, P. Machnikowski. Warsaw 2021 [comment to Art. 365 of the Civil Code], pp. 774–776.

tion to the other party, but if the offender him- or herself is the entitled party, then the offender may simply fulfil the specified performance and thus redress the damage or harm by one of the permitted means. It would therefore have to be concluded that, in the current state of the law, there are no contraindications to the application of Article 453 of the Civil Code and Article 365 of the Civil Code in the context of criminal law.⁴⁶ It would be necessary even sometimes consider the possible application also of the institution of renewal (novation) regulated in Article 506 of the Civil Code. According to which, if in order to cancel an obligation, the debtor undertakes, with the creditor's consent, to provide a different performance or even the same performance, but on a different legal basis, the previous obligation expires (renewal). It is assumed that, in case of doubt, a change in the content of the existing obligation does not constitute a renewal. Therefore, considerable caution should always be taken here, as various doubts and difficulties may arise in practice in connection with this institution. At the same time, it should be borne in mind that, as a general rule, pursuant to the wording of Article 363 of the Civil Code, it should be up to the aggrieved party to choose how to compensate for the damage. His or her will in this regard should be duly taken into account by the court, as this is consistent with the purpose of the institution in question, which is to fully redress the damage and harm caused by the offence. However, the will of the offender should also be taken into account by the court here. It should be noted that, in procedural practice, sometimes there may be situations in which certain circumstances arise just after the obligation to redress the damage becomes effective, making it difficult for the offender to fulfill it. In such cases, it would be prudent for the offender to notify the court that, for example, he or she can comply with the payment but in a different manner than that specified in the judgment. Consequently, the offender would not suffer the negative consequences of having repaired the damage in a manner different from that indicated by the court. As a result, the court would not be able, for example, to take up proceedings previously discontinued against such an offender.⁴⁷ Therefore, the possibility of applying the aforementioned civil law institutions in criminal law would in many situations be a favourable solution for the offender and the aggrieved party.

To conclude deliberations within the framework of this publication, it should be noted that the issue of possible modification of a judgement in enforcement proceedings in the part of the judgement which concerns the

⁴⁶ R. Giętkowski: *Hierarchia funkcji karnoprawnego obowiązku naprawienia szkody i jej znaczenie w praktyce*. "Palestra" 2003, 11–12, pp. 137–138.

⁴⁷ Cf. Z. Gostyński: *Karnoprawny obowiązek naprawienia szkody*. Katowice 1984, pp. 205–206.

obligation to redress damage or compensate for the harm suffered must be considered taking into account the fact that this institution in penal law has a dual character, that is, as a compensatory measure and as a probationary condition. However, it must be stated that due to the unambiguous content of Article 74(2) of the Penal Code, on the basis of the current state of law, the court (as a rule) is not entitled to make changes in the scope of the probationary measure imposed on the offender in the form of an obligation to redress damage, nor to release from its execution. However, in practice, there are sometimes exceptional situations where making such a modification in the light of the circumstances of a particular case appears to be justified, because during the period of the probation ordered by the court, obstacles of various kinds may arise which make it difficult for the offender to fulfil the obligation imposed thereon. Thus, if its non-fulfilment in the manner specified in the judgment is impossible due to objective factors, it would then have to be considered that the court does not always have clear grounds for revoking the application of the probation measure (e.g. ordering the offender to execute the sentence imposed). The situation is similar in the case of imposing an obligation to redress damage or compensation for harm suffered as a compensatory measure (Article 46 of the Penal Code), where the legislator has also not introduced an explicit legal basis authorising the modification of the ruling in this respect. Also in this case, a significant change in the conditions already after it has been awarded, which may affect the execution of such an obligation, might have its own specific meaning *in concreto* and should be duly taken into account by the court. In view of the above, it would be advisable, *inter alia*, to consider amending the content of Article 74(2) of the Penal Code by allowing, in exceptional and reasonably justified cases, the court to appropriately modify the probation obligations imposed on convicted persons. Moreover, it can be considered that in the current state of law, it is permissible in criminal law for the aggrieved party to assign a claim (Article 509 of the Civil Code) to a third party and, as a result, the obligation to redress the damage will be incumbent on the offender against the new entity (assignee). If the aggrieved party is keen to quickly obtain compensation for the damage or harm caused by the crime, such a sale of the claim may be a useful and positive solution for him/her. However, it should be emphasised that an assignee acquiring a claim resulting from a criminal act in this manner does not automatically obtain the status of an aggrieved party in criminal proceedings, due to the fact that there is no directness of the violation or threat to his/her legal good. Thus, the application of this institution is not entirely free of various disadvantages. In addition, it should also be pointed out that in criminal law, the use of the institutions regulated by Article 365 of the Civil Code,

that is, alternate obligations, as well as *datio in solutum* (Article 453 of the Civil Code), so-called provision in lieu of performance is not excluded, which can also in many cases be very beneficial for both the offender and the aggrieved party. Sometimes in exceptional situations the possibility of applying the institution of renewal (novation) regulated under Article 506 of the Civil Code should even be considered, however, a great dose of caution should always be exercised here, as various difficulties and ambiguities may arise in connection with it in practice. It is understood that, in case of doubt, a change in the content of an existing obligation does not constitute a renewal. Currently, under criminal law there is no fundamental obstacle to the aggrieved party (the creditor), for example, proposing to the offender (the debtor) a method of fulfilment of an obligation, while at the same time indicating what performance he/she is willing to accept. On the other hand, it is the offender (debtor) in such a situation who can decide whether he or she wants to make use of this possibility. It would have to be assumed that if the offender behaves in a certain way proposed by the creditor, by fulfilling another obligation, a *datio in solutum* will be established as a result of consensual declarations of intent. At present, the obligation to redress the damage may be awarded in the form of alternative performance (so-called alternate obligation), and therefore the court may specify several different compensations for the damage caused in the judgment. However, it should be borne in mind that generally pursuant to the wording of Article 363 of the Civil Code, it should be up to the aggrieved party to choose the manner of compensation for the damage. On the other hand, however, it should be pointed out that probationary obligations (including the obligation to redress the damage and that also adjudged as a compensatory measure) may be imposed by the court after due consideration of the convicted person's opinion on the matter, which to a certain extent ensures their effective implementation by him/her.

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