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‘THE CAPACITY FOR AGGREGATION’ OF A CONDITIONALLY SUSPENDED CUSTODIAL SENTENCE WHOSE EXECUTION IS INADMISSIBLE

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Abstract

The research purpose of this study was to determine whether it is possible to include, within the framework of an aggregate sentence, a conditionally suspended custodial sentence in respect of which no order for execution was issued within the permissible time limit. In the considerations carried out, in which mainly the formal-dogmatic method of legal research was used, and reference was also made to selected judicial positions, an attempt was made to bring out the fundamental arguments supporting the view that negates such a possibility. This is also the view currently presented in the case law of the Supreme Court. In confronting the selected group of arguments, it was found that they are not sufficiently convincing to justify the uncritical adoption of such a position. As a result of the analyses carried out, the conclusion was drawn that there are no contraindications, in light of the currently applicable rules for imposing an aggregate sentence, to including the sentence referred to in the title within its framework, provided that the conditions determined by a real concurrence of offences are met. At the same time, this article seeks to signal and justify the need for further regulation of the issue under consideration by clarifying the normative message in this regard by the legislator.

Keywords: aggregate judgment, aggregate sentence, conditionally suspended custodial sentence, probationary period

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INTRODUCTION

The capacity for aggregation of sentences is associated with various issues, both of a more general[1] and of a more specific nature.[2] The present study seeks to present and resolve a matter which undoubtedly belongs to the latter category and which – perhaps because of such an initial classification – has, quite unjustifiably, received little attention in legal doctrine thus far. Before embarking on the substantive considerations, however, it is necessary to make a few remarks clarifying the title. These remarks will serve not only to justify its formulation, in the sense of defining its semantic scope, but also to bring the research problem addressed in this text closer.

The term 'capacity for aggregation' is equivalent to the possibility of joining one object with another. In the discourse on the aggregate sentence, this expression therefore denotes the possibility, or capacity, to encompass criminal penalties within the framework of such an aggregate sentence, that is, to aggregate them. Procedurally, this possibility is expressed by the admissibility of imposing an aggregate sentence by virtue of a procedural decision. In essence, it amounts to the court's competence to issue a ruling on the aggregation of penalties on the basis of substantive grounds. In the subsequent analysis, 'capacity for aggregation' is thus understood as corresponding to the existence of substantive legal grounds for aggregating specific individual penalties and, as a consequence, for imposing an aggregate sentence.[3]

As follows from the title under consideration, the analysis concerns a conditionally suspended custodial sentence. This refers to a situation in which the court, in delivering its judgment, imposed a custodial sentence on the offender, but also found grounds for applying the institution of conditional suspension and determined a probationary period.[4]

For the purposes of the present analysis, neither the legal basis for granting the benefit of suspension nor the length of the custodial sentence is of significance. Nor is the duration of the period for which the offender was placed on probation relevant. What is material is that no order for execution of the sentence has been issued and that such an order is inadmissible. The first characteristic is manifested in the absence, within the legal order, of a ruling ordering the execution of the conditionally suspended custodial sentence. The second results from the expiry of

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[1] Such as, e.g. its legal nature; see K. Leżak, *'Korzystność' wyroku łącznego. Analiza orzecznictwa sądowego i poglądów doktryny na tle polskich rozwiązań normatywnych*, Warszawa, 2022, p. 36.

[2] For example, the problem of interpreting intertemporal provisions, in relation to which two opposing positions have been developed – doctrinal and case law positions (see A. Dziergawka, 'Reguły intertemporalne związane z orzekaniem kary łącznej w warunkach art. 81 Tarczy 4.0', *Przegląd Sądowy*, 2020, No. 11–12, pp. 121–134; for a different view, see Supreme Court decision of 13 October 2021, I KZP 2/21, *Orzecznictwo Sądu Najwyższego. Izba Karna*, 2021, No. 11–12, item 44).

[3] The term 'capacity for aggregation' is not unfamiliar to scholarly discourse – see J. Majewski, 'Czy kara ograniczenia wolności podlega łączeniu z karą pozbawienia wolności orzeczoną z warunkowym zawieszeniem jej wykonania?', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 2, pp. 93–102.

[4] The conditional suspension of execution of a custodial sentence is obligatorily applied for a probationary period, as provided in Article 70 § 1 of the Act of 6 June 1997 – Penal Code, consolidated text: Journal of Laws of 2025, item 383 (hereinafter referred to as the 'PC').

both the probationary period and the one-year period calculated from the end of the probationary period, as provided for in Article 75 § 4 PC, within which an order for execution of the sentence may still be issued. Upon the expiry of these time limits, ordering execution of the sentence, in the sense used in the title, becomes inadmissible. At the same time, however, the sentence in question continues to exist, remaining within the purview of the court deciding whether to issue an aggregate judgment. The factual basis for this is that the conviction has not yet been expunged.[5]

The issue under consideration thus illustrates an abstract factual situation in which the court considers the possibility of issuing an aggregate judgment.[6] Among the penalties delineating the scope of this consideration is a custodial sentence with conditional suspension of its execution, an order for the execution of which is no longer admissible. An additional assumption is that this penalty was imposed for an offence, or possibly a series of offences, which, together with another offence attributed to the convicted person, remains in a state of real concurrence determining the imposition of an aggregate sentence. What is to be determined, however, is whether this penalty may represent a component of the aggregate sentence.

A CUSTODIAL SENTENCE WITH CONDITIONAL SUSPENSION OF ITS EXECUTION AS A CONSTITUENT ELEMENT OF THE AGGREGATE SENTENCE

The characterisation of a custodial sentence with conditional suspension of its execution, considered as a component of the aggregate sentence, should begin with situating it within the catalogue of penalties provided for by the legislature. In this elementary step lies an obvious yet significant dependency that determines the direction of further analysis. It must be recognised that custodial sentences, whether conditionally suspended or not, are sanctions of the same kind. This is indicated by the legislature, which, in cataloguing such penalties, does not distinguish between them, but confines itself, in the field of sanctions semantically associated with full isolation, solely to the custodial sentence.[7] Attention should also be drawn to the closed nature of the set enumerated in Article 32 PC and to the resulting

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[5] Expungement could not occur under Article 76 § 1 PC due to statutory obstacles, namely the operation of Article 108 in conjunction with Article 76 § 1 and Article 76 § 2 PC.

[6] The analysis has been confined to the aggregate sentence imposed by way of an aggregate judgment, since what is under consideration is the aggregation of a custodial sentence that has already been suspended. Where the conviction for concurrent offences is rendered in a single judgment (a convicting judgment, not an aggregate one), the decision on suspension concerns the aggregate sentence already encompassing the individual penalties (P. Hofmański, L.K. Paprzycki, in: Filar M. (ed.), *Kodeks karny. Komentarz*, 3rd edn, Warszawa, 2012, p. 488). This arrangement is referred to as the two-stage nature of adjudication, based on a specific sequence of offences that is not interrupted by the convicting judgment (T. Bojarski, in: Bojarski T. (ed.), *Kodeks karny. Komentarz*, 7th edn, Warszawa, 2016, p. 260).

[7] For more, see J. Majewski, 'Czy warunkowe zawieszenie wykonania kary zmienia jej rodzaj?', in: Majewski J. (ed.), *Środki związane z poddaniem sprawcy próbie. Pokłosie IX Bielańskiego Kolokwium Karnistycznego*, Toruń, 2013, pp. 35 et seq.

prohibition on distinguishing penal sanctions other than those exhaustively listed in that provision.[8]

The prohibition on distinguishing penalties other than those enumerated by the legislature within a closed set is, by its nature, absolute. It is therefore striking that the Constitutional Tribunal, in its judgment of 17 July 2013 in case SK 9/10,[9] presented a different view on the question of the whether custodial sentence with conditional suspension and one without such suspension are identical in terms of type, drawing a fairly clear distinction between these sanctions.[10] For the sake of accuracy, however, it is necessary to present the broader context of this statement. The issue under consideration was more complex, and the nature of the penalty was only one of the many matters discussed. In the relevant part, the deliberations were linked to determining whether the feature of conditional suspension is merely a decision concerning the execution of a custodial sentence and therefore does not represent an integral element of its determination, or whether such integration does occur. Particularly noteworthy in this respect is the passage of the reasons referring to the position expressed in the opinion of Andrzej Zoll, appointed in the case as an expert, according to whom, although an unconditional custodial sentence and a custodial sentence with conditional suspension of its execution are identical penalties, in case law the latter is framed as a special form of sentencing, namely as a probationary penal measure.[11] Furthermore, during the hearing preceding the delivery of the aforementioned judgment, discussion took place on the classification of a conditionally suspended custodial sentence. One member of the adjudicating panel classified it among the so-called probationary penalties.[12]

Recognising the incorrectness of such a classification of the penalty referred to in the title is not difficult when it is viewed through the prism of the statutory catalogue of penalties. For this reason, concepts defining it in this way remain useful, at most, terminologically, but are inappropriate for the purpose of characterisation. Distinguishing this type of sanction facilitates the transmission of views by emphasising the qualitative difference in actual burdensomeness between custodial sentences with conditional suspension and those without conditional suspension. From a broader perspective, taking into account the dogmatic status of the penalty, however, the use of such a classification risks conflating legal terms with legal concepts.[13] As a result, one might arrive at the conclusion that a statutory 'probationary penalty' exists. Yet it scarcely requires broader justification that using

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[8] The situation is different when the penalty of military arrest is taken into account (see V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th edn, Warszawa, 2023, pp. 225–226). From a broader perspective, it may be said that Article 32 PC contains the core of the catalogue of penalties (thus J. Majewski, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1–52*, 5th edn, Warszawa, 2016, pp. 657–658).

[9] *Orzecznictwo Trybunału Konstytucyjnego*, Series A, 2013, No. 6, item 79.

[10] Justification of the Constitutional Tribunal judgment of 17 July 2013, SK 9/10, p. 19.

[11] Ibidem, p. 8.

[12] Transcript of the hearing of 17 July 2013 in case SK 9/10, p. 15.

[13] Corresponding, respectively, to origins in legal language and the language of the law. For a concise discussion of the differences, see S. Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego*, Warszawa, 2017, pp. 132–133.

such a construct in the context of classifying a given sanction, in terms of type, among the penalties listed in Article 32 PC amounts to an outright negation of the closed nature of the catalogue contained in that provision.

The principal justification for the view that a custodial sentence and a conditionally suspended custodial sentence are identical lies in the argument derived from the sequence in which the penalty in question is adjudicated. It is based on the chronology of the court's decisions preceding the final ruling to suspend the custodial sentence. In regulating the process by which the court arrives at the suspension of a custodial sentence, the legislature first requires the court, guided by the directives set forth in Article 53 PC, to determine the quantum of the custodial sentence. Only subsequently does the court decide whether such a penalty, once imposed, may be considered for suspension at all. The primary requirement in this regard is a positive determination that the quantum of the penalty falls within the limit specified in Article 69 § 1 PC. At that point, the possibility of considering the conditional suspension of the custodial sentence arise.[14] In short, in the process of imposing a custodial sentence with conditional suspension of its execution, the penalty is imposed as a custodial sentence, since it is encompassed by a decision made at an earlier stage of the adjudicative sequence than the ruling on the suspension of its execution. Accordingly, the penalty in question, in its initial form as a custodial sentence, must remain classified among the sanctions enumerated in Article 32(3) PC.[15]

The identification of a custodial sentence with conditional suspension in terms of type leads to a further thesis, highly significant for the issue at hand. Namely, it is not Article 89 § 1 PC, which, in linguistic terms, refers to the concurrence of convictions resulting in custodial sentences with and without conditional suspension of their execution, and custodial sentences with conditional suspension of their execution, that provides the substantive basis for their aggregation, but Article 85 § 1 PC, which lays down the fundamental conditions for imposing an aggregate sentence.[16] At the same time, the norm derived from Article 89 § 1 PC merely constitutes the prerequisites for conditionally suspending the execution of an aggregate sentence already imposed. The consideration of granting the benefit of suspension is therefore

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[14] T. Kalisz, 'Obligatoryjne zarządzenie wykonania kary warunkowo zawieszonej. Uwagi na tle wyroku Trybunału Konstytucyjnego z 17 lipca 2013 r. oraz uchwały Sądu Najwyższego z 27 marca 2014 r.', *Nowa Kodyfikacja Prawa Karnego*, 2014, No. 33, pp. 81–82; G. Goniewicz, *Środki probacyjne. Przesłanki stosowania w ujęciu prawnoporównawczym*, Kraków, 2019, p. 97.

[15] The position that custodial sentences with conditional suspension and without conditional suspension are of the same type is not unfamiliar in the literature (thus P. Kardas, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53–116*, 5th edn, Warszawa, 2016, p. 1382). Until recently, this view was supported by the argument that the institution of suspension was not limited to custodial sentences, but also extended to community sentences and fines as standalone penalties (the legal framework prior to 1 July 2015). At that time, therefore, penalties of a given type were capable of being suspended. The consequence was that a custodial sentence with conditional suspension could not be treated as an alternative to a custodial sentence without conditional suspension (cf. J. Skupiński, 'Środki probacyjne w prawie polskim – *de lege ferenda*', in: Kardas P., Sroka T., Wróbel W. (eds), *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa, 2012, p. 970).

[16] As rightly noted by J. Majewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 569.

of a secondary nature, which corresponds to the earlier observations regarding the sequence of adjudication in relation to an individual custodial sentence. This is further confirmed by the wording of Article 89 § 1 PC.[17] It follows, in turn, that the subsequent analysis must primarily be guided by the principles contained in Article 85 § 1 PC.

The view presented, in its general message, stands in opposition, if not to the actual positions formulated in the case law of the Supreme Court, then at least to the linguistic convention observable in its judgments.[18] However, it is difficult to dispute that, in applying Article 89 § 1 PC, the court includes it as part of the legal basis, thereby making it a foundation for the aggregate sentence imposed. This can undoubtedly be regarded as an argument in favour of accepting the convention adopted by the Supreme Court. Nevertheless, as indicated, the provision of Article 89 PC defines the conditions for the admissibility of suspending an aggregate sentence already imposed. In essence, the normative content of this provision, in the present perspective, is not the same as the substantive basis for the aggregation of individual penalties, which, once aggregated and framed within a sanction uniform in terms of type, are subsequently suspended. Suspension therefore takes place on the basis of different criteria, namely those set out in Article 89 § 1 PC, which, from the perspective of the entire process, are independent of the decision on the imposition of the aggregate sentence.

A CUSTODIAL SENTENCE WITH CONDITIONAL SUSPENSION OF EXECUTION AND THE PRINCIPLES GOVERNING THE IMPOSITION OF AN AGGREGATE SENTENCE

It was indicated at the outset that 'capacity for aggregation', as understood in the present text, coincides with the admissibility of encompassing within the framework of an aggregate sentence those penalties whose characteristics render them capable of aggregation on the basis of substantive conditions. In turn, in view of the findings made immediately above, in order to determine the existence of such capacity in the case of a conditionally suspended custodial sentence, it is necessary to examine this sanction through the prism of the conditions set forth in Article 85 PC. In undertaking this analysis, one must not overlook the significant modifications to the principles governing the imposition of an aggregate sentence that have taken place over the past decade.

Reference to the historical legal framework is justified by two closely interrelated factors. First, under the former wording of Article 85 PC, the issue under discussion was clear and thus did not give rise to major difficulties. This naturally translated into the development of a uniform line of interpretation. Second, although the position expressed in that line was formed on the basis of previous regulations,

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[17] That is: 'In the event of a conviction for concurrent offences to penalties'.

[18] For example, Supreme Court decision of 3 October 2005, V KK 128/05, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2005, No. 12, item 119.

different from those currently in force, views adopting that earlier interpretation may be discerned in the case law rendered under the provisions currently in force. The correctness of such an approach invites reflection, not least because the aforementioned changes in the rules governing the imposition of an aggregate sentence concern matters of a fundamental nature. Far-reaching modifications, moreover, entail an obvious need to adapt decisions to the new regulations, which typically results in a transformation of judicial practice. Hence, the question arises as to the reason for this different state of affairs. It is therefore necessary here to provide a concise account of the said changes, in order to clarify the subsequent analysis and to highlight a rather marked inconsistency, which also highlights the issue addressed in this text.

THE LEGAL FRAMEWORK FROM 1 JULY 2015 TO 23 JUNE 2020

Under the legal framework in force prior to the current one, specifically from 1 July 2015[19] until, and including, 23 June 2020,[20] the constitutive conditions for imposing an aggregate sentence were the uniformity in terms of the type of criminal sanctions (Article 85 § 1 PC) and their enforceability (Article 85 § 2 PC). The requirement of uniformity as to type has been discussed above. It should only be added that, both then and now, the legislature allowed for the aggregation of penalties of different types (Article 87 § 1 PC).[21] The requirement of enforceability, in turn, was linked to the status of the sanction execution. It was not satisfied by penalties that had been fully executed, deemed executed, or were not subject to execution because of legal impediments, for example where execution of a given penalty had become time-barred. In other words, even if the aggregation of penalties of the same type was under consideration, where a penalty was not subject to effective execution to any extent, it could not form a part of the aggregate sentence and, consequently, could not be included within its framework.

In view of the legal framework under discussion and the resulting impossibility of aggregating penalties not subject to execution, the issue of the capacity for aggregation of a conditionally suspended custodial sentence appears rather problematic. Its distinctive feature lies in the fact that it is not subject to effective execution. Its status changes only when it is ordered to be executed at the enforcement stage. At the same time, the penalty is not subject to execution, although the possibility of its execution is not excluded. Obviously, such an order may never be issued. The question of the

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[19] Introduced by the Act of 20 February 2015 amending the PC and Certain Other Acts (Journal of Laws, item 396, as amended).

[20] Abolished by the Act of 19 June 2020 on Subsidies to Interest on Bank Loans Granted to Entrepreneurs Affected by the Effects of COVID-19 and on Simplified Restructuring Proceedings in Connection with the Occurrence of COVID-19 (Journal of Laws, item 1086).

[21] As of 1 July 2015, the text of Article 87 § 1 PC did not change. What was transformed was its normative content, in view of the finding of unconstitutionality of the obligation to aggregate custodial sentences and community sentences, as well as the imposition of an aggregate custodial sentence following the conversion of a community sentence into a custodial sentence – cf. Constitutional Tribunal judgment of 11 June 2019, P 20/17, *Orzecznictwo Trybunału Konstytucyjnego*, Series A, 2019, No. 29.

relationship between fulfilment of the enforceability requirement and the status of a conditionally suspended custodial sentence was resolved at the linguistic level. Indeed, the wording of Article 85 § 2 PC, in the version in force from 1 July 2015, explicitly provides, through the phrase 'subject to Article 89', for the exclusion of the enforceability requirement with respect to the sanction indicated.[22] By this measure, the legislature thus introduced an exception allowing for the aggregation of conditionally suspended custodial sentences in the situational framework described in Article 89 PC and supplemented by Article 89a PC.[23]

The exclusion of the enforceability requirement in the legal framework under discussion is, however, not absolute. There are circumstances in which this condition does not lose its relevance and remains, also in factual settings falling within the scope of Article 89 PC or Article 89a PC, pertinent in determining the status of a conditionally suspended custodial sentence in the context of establishing its capacity for aggregation. This does not concern the situation in which execution of the sentence is ordered, as a result of which the category of conviction changes into that of an unconditional custodial sentence.[24] Rather, the relevant circumstance is the expiry of the period provided for in Article 75 § 4 PC, which results in the permanent lapse of the possibility of ordering execution of the sentence. In such a case, the requirement of enforceability operates as a criterion of inadmissibility for treating a conditionally suspended custodial sentence as a component of an aggregate sentence. This view, which explicitly links the legal effect associated with the expiry of the said period to the conditions set out in Article 85 § 2 PC, in its wording in force from 1 July 2015 to 23 June 2020, became firmly established in case law. This applies both to the judgments of ordinary courts[25] and to those of the Supreme Court.[26] The view in question, which must be strongly emphasised, is based on an analysis of the status of a custodial sentence whose execution has been conditionally suspended after the expiry of the time limit under Article 75 § 4 PC, conducted with regard to whether that sentence satisfies the enforceability requirement. This analysis leads to the entirely sound conclusion that the requirement is not satisfied, since ordering execution of the sentence is permanently inadmissible.[27]

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[22] As rightly noted in J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warszawa, 2015, pp. 298–299; see also P. Kardas, 'Nowy system wymiaru kary łącznej a problematyka warunkowego zawieszenia wykonania kary', in: Wróbel W. (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Kraków, 2015, pp. 576–577.

[23] A. Szwedowski, 'Wyroki łączne – porównanie stanów prawnych obowiązujących przed i po 30 czerwca 2015 r. oraz od 24 czerwca 2020 r. na tle wybranych zagadnień', *Prokuratura i Prawo*, 2024, No. 4, p. 130; also S. Żółtek, 'Kara łączna w znowelizowanym Kodeksie Karnym', *Temidium*, 2015, No. 2, p. 42.

[24] Supreme Court decision of 3 October 2005, V KK 128/05, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2005, No. 12, item 119; J. Majewski, *Kodeks karny…*, op. cit., pp. 332 and 334.

[25] *Inter alia*, judgment of the Court of Appeal in Gdańsk of 18 October 2017, II AKa 310/17, LEX No. 2425609.

[26] *Inter alia*, Supreme Court judgment of 21 March 2017, III KK 72/17, LEX No. 2271448.

[27] See Supreme Court judgment of 21 January 2021, IV KK 550/20, LEX No. 3358821; also M. Bielski, 'Zakres zastosowania negatywnej przesłanki wymiaru kary łącznej z art. 85 § 3 i 3a k.k.', *Prokuratura i Prawo*, 2018, No. 11, p. 47, footnote 27.

For the purpose of further analysis, it is therefore important that, in view of the solutions concerning the imposition of an aggregate sentence which remained in force until 23 June 2020, though ultimately rejected by the legislature, the problem essentially did not exist. Categorically, a conditionally suspended custodial sentence, an order for execution of which is inadmissible, does not possess the capacity for aggregation. The justification for this lies in the status of such a sentence, which, in view of the operation of Article 75 § 4 PC, cannot be ordered to be executed and, consequently, cannot be regarded as subject to effective execution.

THE LEGAL FRAMEWORK FROM 24 JUNE 2020

It is now necessary to determine the capacity for aggregation of the penalty in question under the arrangements currently in force, since 24 June 2020, concerning the imposition of an aggregate sentence, as set forth in Article 85 § 1 PC. There are two general conditions for aggregating individual penalties. First, it must be established that the offender committed two or more offences before the first judgment, at first instance, was rendered in respect of any of those offences. In addition, the aggregation of penalties requires that separate penalties of the same type, or other penalties capable of aggregation, were imposed for offences standing in such concurrence. At the same time, the rules on the conditional suspension of the execution of an aggregate sentence, contained in Articles 89 and 89a PC, have remained unchanged. The direction of further analysis is thus determined by the penalty at issue, namely a penalty that was imposed and subsequently suspended and that stands in real concurrence with another offence, or offences, under the principles set out above, where both the probationary period and the period specified in Article 75 § 4 PC have expired, yet the conviction has not been expunged.

Importantly, the concept of real concurrence of offences arising from the current wording of Article 85 § 1 PC reflects that which was in force prior to 1 July 2015.[28] The jurisprudential views expressed at that time therefore, as a rule, remain applicable today. Hence, in the following remarks, reference is also made to those judgments. However views concerning a conditionally suspended custodial sentence, the execution of which is inadmissible, where the conviction, having met the statutory requirements, has been expunged, are omitted.[29] Transposing such views to a factual situation in which no such expungement has occurred, and which therefore represents a different arrangement *de facto*, would not be justified. Nevertheless, situations in which a conviction has been expunged give rise to other, rather specific problems.[30]

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[28] As expressly indicated by the drafter – justification of the government bill on subsidies to interest on bank loans granted to ensure the financial liquidity of entrepreneurs affected by the effects of COVID-19 and on the amendment of certain other acts, Sejm Paper No. 382, p. 24.

[29] No major difficulties arise in relation to the capacity for aggregation of this penalty, given the legal effect of expungement of the conviction and its being deemed non-existent – cf. Supreme Court judgment of 9 December 2009, V KK 303/09, LEX No. 553740.

[30] Registration-related and practical in nature. The issue concerns the tendency to maintain in the criminal register penalties already expunged. This problem is noted by B.J. Stefańska, *Zatarcie skazania*, Warszawa, 2014, p. 205.

At the outset of the substantive analysis, it is necessary to formulate a thesis which, at first glance, appears obvious and is also repeated in the case law cited below. Namely, the issuing of an aggregate judgment under the current legal framework is precluded where the penalty imposed for an offence standing in real concurrence, at the moment of adjudicating on such a judgment, could no longer be executed and can never be put into execution in the future.

In the thesis cited above, it is easy to discern the similarity between the reason for recognising that a penalty does not possess the capacity for aggregation and the basis for finding that such capacity is absent under the legal framework in force from 1 July 2015 to 23 June 2020. Both ultimately amount to the irrevocable loss of the feature of enforceability. While, under the previously applicable rules governing the imposition of an aggregate sentence, such a view is justified, its transposition to the current legal framework appears highly problematic. Previously, the requirement of enforceability formed an autonomous condition co-shaping the substantive basis for aggregation. The obvious consequence of the penalty under consideration failing to satisfy this requirement was the absence of capacity for aggregation. At present, however, this condition no longer applies. Hence, reliance on it lacks sufficient justification.

Nevertheless, the Supreme Court presented the opposite view. The underlying reasoning may be summarised in the categorical statement that the penalty in question cannot be aggregated due to the lapse of the period within which its execution could have been ordered. In its judgment of 5 March 2024, issued in case V KK 42/24, the Supreme Court stated that:

> 'The lack of an order directing the execution of the custodial sentence […] and the lapse of the […] period within which this sentence could have been put into execution results in the fact that including the above penalty in an aggregate judgment was not possible, since that penalty could never again be put into execution.'[31]

Significantly, in support of this view, two other positions of the Supreme Court were invoked, both formulated under the regulations previously in force, that is, from 1 July 2015 to 23 June 2020, and containing considerations relating to different rules governing the imposition of an aggregate sentence, determined by the requirement of enforceability.[32] In view of this position, therefore, the requirement of enforceability of the penalty is to remain binding under the current legal framework, despite no longer being applicable. This dogmatic dissonance, in turn, prompts reflection on the correctness of such an approach.

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[31] Supreme Court judgment of 5 March 2024, V KK 42/24, LEX No. 3692798.

[32] Supreme Court judgment of 14 March 2017, IV KK 363/16, LEX No. 2261744; Supreme Court judgment of 21 March 2017, III KK 72/17, LEX No. 2271448.

THE (IN)CORRECTNESS OF RELYING ON THE REQUIREMENT OF ENFORCEABILITY UNDER THE LEGAL FRAMEWORK SINCE 24 JUNE 2020

In assessing the soundness of the view presented, it must first be recalled that whether a penalty can be aggregated depends on its conformity with the model of the penalty reconstructed from Article 85 § 1 PC. This naturally shifts the discussion onto the normative plane. In view of this, the question inevitably arises whether the position under analysis does not contradict the prohibition on synonymous interpretation.[33] For if a provision has been reformulated so that it differs from its previous wording, while at the same time establishing new conditions for the application of a given institution that depart from those previously applicable, it is unclear why the normative content derived from both provisions should coincide. This is all the more striking given that the textual amendment is intended to be of fundamental significance, insofar as it eliminates one of the requirements, namely enforceability.

What complicates reliance on the prohibition of synonymous interpretation, however, is that this directive applies to different provisions within a single legislative act.[34] In the case under consideration, by contrast, the issue concerns different linguistic formulations of Article 85 PC, that is, *de facto*, the same provision. This is therefore closer to comparing two iterations of the same provision, namely its former and current versions. One may nevertheless consider that the said prohibition has been breached by including in the analysis the previous legal framework on the basis of the general intertemporal rule contained in Article 4 § 1 PC.[35] From this perspective, the analysis of a potential breach of the said prohibition also covers the period prior to 1 July 2015.[36] Accordingly, it would have to be assumed that, across three legal frameworks, the regulation in question, that is, the substantive conditions for the aggregation of penalties, successively took the form of A, B and C,[37] with the regulations corresponding to meanings A and C being textually identical, while only the different wording of text B requires for compliance with the requirement of enforceability. In this view, deriving that requirement under legal frameworks A and C may lead to the conclusion that the prohibition on synonymous interpretation has been breached.

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[33] Prohibiting 'the assumption that the lawmaker attributes the same meaning to different expressions' – L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń, 2002, p. 144; L. Morawski, *Zasady wykładni prawa*, Toruń, 2006, p. 103.

[34] L. Morawski, *Wykładnia w orzecznictwie…*, op. cit., pp. 103–104. It may occasionally be applied within a single branch of law (thus M. Bielski, 'Wykładnia art. 280 § 1 k.k. oraz art. 130 § 3 k.w. Glosa do uchwały SN z dnia 17 grudnia 2008 r., I KZP 27/08', *Państwo i Prawo*, 2010, No. 3, pp. 138–139).

[35] This is the rule in aggregate judgments – for example, Supreme Court judgment of 9 January 2015, IV KK 224/14, LEX No. 1622330; Supreme Court judgment of 28 March 2023, I KK 18/23, LEX No. 3562797.

[36] This applies only to those cases in which the conditions of Article 4 PC are met. Further remarks on synonymous interpretation are therefore confined to offenders who committed offences prior to 1 July 2015 and were sentenced to penalties of the same type.

[37] Thus, the legal frameworks in force: until 30 June 2015 (framework A), from 1 July 2015 to 23 June 2020 (framework B), and the current one, from 24 June 2020 (framework C).

Even assuming that the interpretative variant under consideration entails a breach of the said prohibition, one may hesitate to conclude categorically that this amounts to an error. In criminal law, it is accepted that the linguistic meaning,[38] including the prohibition in question, may be overridden by recourse to extra-linguistic directives, provided that, speaking in the broadest terms, sufficient arguments exist to justify such an approach.[39] Such an interpretative outcome, overriding the linguistic meaning, is also supported by the historical context, which is more pertinent to the present observations.[40] Its use indeed justifies recourse to past regulations. The mere occurrence of interpretative doubt, however, appears insufficient as a stand-alone justification for resorting to the historical context. This prompts the search for further arguments in favour of adapting previously binding provisions.

In seeking further arguments to justify the view that reliance on the previously binding condition for imposing an aggregate sentence is warranted, it is natural to turn to the assumption of legislative rationality, which is inseparable from legal analysis.[41] This requires accepting that, if putting a given penalty into execution is no longer admissible, as in the case of the penalty at issue, then encompassing it within the aggregate sentence represents an irrational solution, in the sense that this is not the purpose of the regulation.[42] It is therefore necessary to determine whether, in introducing Article 85 § 1 PC, the will of the legislature's intention was to endow a penalty whose execution is inadmissible with the capacity for aggregation.[43] In

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[38] As a side note, the prohibition of synonymous interpretation, when approached as an interpretative directive, is not uniform. It is sometimes classified among linguistic directives (M. Suska, *Korespondencja dyrektyw redagowania i interpretowania tekstu prawnego*, Katowice, 2023, pp. 239–240; P. Wiatrowski, *Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego*, Warszawa, 2013, pp. 109–110), and at other times among extra-linguistic, systemic directives (A. Bielska-Brodziak, *Interpretacja tekstu prawnego na podstawie orzecznictwa podatkowego*, Warszawa, 2009, pp. 115–117).

[39] Thus, for example, S. Żółtek, *Znaczenie normatywne…*, op. cit., pp. 400 et seq.

[40] From the perspective of the functional, extra-linguistic directive. Within this group of directives it is placed by R. Jastrzębski, 'Wykładnia historyczna we współczesnej judykaturze', *Przegląd Sądowy*, 2010, No. 1, p. 92. In the literature, one can find studies in which historical interpretation is characterised by various forms, which allows its classification under different directives – see, interestingly, O. Bogucki, *Wykładnia funkcjonalna w działalności najwyższych organów władzy sądowniczej*, Szczecin, 2011, pp. 29–33.

[41] The assumption of the rationality of the legislator represents a main pillar of legal dogmatics and is intended to bring one closer to resolving interpretative problems by idealising the legislator as the subject of interpretation – Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań, 1973, p. 101.

[42] Legislative activity, including amendment of a given regulation or provision, is always guided by a purpose (Z. Ziembiński, *Teoria…*, op. cit., p. 101).

[43] The view that the amendment introduced by the Act of 19 June 2020, insofar as it concerned the rules on imposing an aggregate sentence, produced no normative effects must be rejected. It is indisputable that these rules underwent a complete transformation, and there is therefore no need to consider such a position. As a rule, moreover, changes to legal texts result in normative transformations (cf. W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków, 2003, pp. 194–195). This does not, however, preclude the existence of non-normative amendments (T. Grzybowski, 'Zmiana tekstu prawnego a zmiana normatywna (w świetle sądowej wykładni prawa)', *Państwo i Prawo*, 2010, No. 4, pp. 42–51), or, conversely, the transformation of meanings not through changes in the text, but through judicial practice (S. Żółtek, 'Przeobrażenia semantyczne jako wynik orzecznictwa Sądu Najwyższego – na

this context, of particular importance is the position expressed in the judgment of the Supreme Court of 12 April 2013, issued in case III KK 401/12, against the background of a factual situation illustrating the problem addressed in this text. In that ruling, the Court firmly held that the penalty at issue lacks the capacity for aggregation, on the ground that it would be inadmissible to create a possibility of executing a penalty that cannot be executed.[44] From this thesis, two arguments may be derived that are intended to lend rationality to this position.

The first argument arises naturally and concerns the expressly stated potential for executing an aggregate sentence encompassing a conditionally suspended custodial sentence, a possibility rejected in view of the fact that execution of that sentence could not be ordered. In other words, if a sentence is no longer subject to execution, because the required order in this respect can no longer be issued, then including it in an enforceable aggregate sentence represents an unacceptable inconsistency. An argument based on such 'potential' may also be derived from the Supreme Court judgment of 22 November 2023, issued in case V KK 156/23, in which it was stated that:

> 'A sentence which is not subject to execution at the moment when the question of determining an aggregate sentence is being considered cannot form the basis for determining that sentence; that is, a sentence which is not subject to execution because it has already been fully executed, or has not been fully executed but the conditions excluding its execution have materialised.'[45]

Of particular importance in this position is the qualitative equation of a penalty already executed with penalties whose execution is no longer possible.

However, the uncritical acceptance of such a view is hindered by the regulation contained in Article 91a PC, which has no counterpart in the regulations in force from 1 July 2015 to 23 June 2020 and permits the aggregation of penalties that have already been executed, whether in part or in full. In such a case, the potential for execution of a fully executed penalty, considered as an individual penalty, likewise does not exist. From the perspective of potential enforceability, it is therefore difficult to discern a qualitative difference between a fully executed penalty and the penalty at issue. With respect to both sanctions, it must be asserted that they will never be put into execution, since the conditions for their execution have lapsed. In such an arrangement, in the case of two penalties with the same potential, the statute would allow aggregation in one instance but not in the other. In view of such an inconsistency, it is futile to seek a rational judgment of the legislature. This therefore creates the need to search for another justification for equating the statuses of a fully executed penalty and the penalty at issue by reference to the criterion of their enforceability, when, in substantive terms, that criterion became operative only in relation to the former.

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przykładzie spraw karnych', in: Giaro T. (ed.), *Rola orzecznictwa w systemie prawa*, Warszawa, 2016, pp. 268 et seq.).

[44] Supreme Court judgment of 12 April 2013, III KK 401/12, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2013, No. 8, item 68.

[45] Supreme Court judgment of 22 November 2023, V KK 156/23, LEX No. 3632440.

A second argument that may lend rationality to the view under analysis arises from the legal effects produced by an aggregate judgment. The aggregation of penalties in the arrangement under consideration is said to represent a solution imposing a greater burden than would result from the sum of the penalties imposed separately.[46] In general, it is difficult to disagree with this view.[47] Yet treating the absence of an improvement in the convicted person's situation as a negative prerequisite for imposing an aggregate judgment is inconsistent with the obligatory nature of imposing an aggregate sentence. Indeed, the determinants of its issuance are reduced to the fulfilment of the conditions set out in Article 85 PC.[48] Among them, however, there is no requirement that the convicted person be placed in a more favourable position. Moreover, Article 91a PC indisputably permits the aggregation of penalties executed in full.[49] From the perspective of actual legal effects, the aggregation of sanctions already carried out brings no benefit to the convicted person. In cases involving the aggregation of sentences already executed in full, one may even discern a certain provisional character. Since the components of the aggregate sentence have already been executed, the aggregate sentence itself is likewise not subject to execution.[50] Clearly, it is difficult in such a case to speak of rationalising the quantum of the penalty, which is, after all, the main function of an aggregate judgment.[51] Nonetheless, the categorical attribution of the capacity for aggregation to penalties already executed in full suggests that, even where their aggregation is provisional in character, the issuance of such a procedural decision is still expected.

The imposition of an aggregate sentence is therefore not dependent on the convicted person deriving a benefit from its imposition.[52] This remains so even if such an improvement in his situation does in fact occur relatively often.[53] In light of

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[46] Thus K. Leżak, *'Korzystność'…*, op. cit., pp. 87–88.

[47] Including the penalty at issue in the determination of the aggregate sentence will not improve the offender's situation in terms of the period of the custodial sentence remaining to be served; only in the case of full absorption will the length of the aggregate sentence preserve the *status quo* with respect to the enforcement status of the individual sentences prior to their aggregation.

[48] Thus D. Kala, *Postępowanie w przedmiocie…*, op. cit., p. 111; M. Kulik, 'Wyrok łączny w praktyce sądowej w latach 2012–2013', *Prawo w Działaniu. Sprawy Karne*, 2015, No. 23, p. 177. In the same vein, see Supreme Court resolution (7) of 9 June 2006, I KZP 11/06, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2006, No. 7–8, item 64; Supreme Court resolution of 29 October 2012, I KZP 15/12, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2012, No. 11, item 111; Supreme Court judgment of 30 March 2017, V KK 50/17, LEX No. 2261021; Supreme Court judgment of 2 October 2024, I KK 301/24, LEX No. 3763648.

[49] J. Giezek, in: Giezek J. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, p. 734.

[50] It was once disputed whether an aggregate sentence could encompass a penalty from which the offender had been conditionally released; see W. Zalewski, 'Warunkowe przedterminowe zwolnienie a wyrok łączny. Glosa do uchwały SN z dnia 20 stycznia 2005 r., I KZP 30/04', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2005, No. 3, pp. 97–102. The controversy subsided only with the entry into force of Article 82 § 2 PC.

[51] Cf. Supreme Court decision of 22 September 2016, III KK 140/16, LEX No. 2142559.

[52] In the literature, however, such postulates are formulated (e.g. R. Sądej, 'Realny zbieg przestępstw a wyrok łączny', in: Majewski J. (ed.), *Zbieg przepisów oraz zbieg przestępstw w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego*, Toruń, 2006, p. 36).

[53] Thus M. Gałązka, 'Kara łączna po nowelizacji Kodeksu karnego z 20 lutego 2015 r.', *Studia Prawnicze KUL*, 2015, Vol. 64, No. 4, pp. 34–36.

this, the argument based on the relevance of predicting the legal effects of issuing an aggregate judgment, as a justification for attributing the capacity for aggregation to the penalty at issue, must accordingly be rejected.

Consideration must also be given to the relationship between the consequences of the expiry of the period set out in Article 75 § 4 PC and the capacity for aggregation of the penalty at issue. From this relationship a general rule is derived, broader than the rules governing the institution of an aggregate judgment itself, in the form of a prohibition on creating negative consequences for the convicted person in the future. Importantly, however, this rule is grounded in the operation of Article 76 § 1 PC and the removal of the legal assessment of the offence by way of expungement.[54] The resulting state of legal fiction causes the conviction to be treated as forgotten,[55] albeit with limitation to the criminal-law sphere.[56] The more specific scope of being bound by the legal effects of expungement of a conviction is the subject of separate disputes. For the present analysis, however, what matters is that the fiction thus created restores to the convicted person the status of a person without a criminal record. Such relief implies the absence of any penalty arising from the expunged conviction, which then, as non-existent, irrevocably loses its capacity for aggregation.

The status of the penalty must be assessed differently in the case of the penalty at issue, namely where – despite the expiry of the periods referred to in Articles 75 § 4 and 76 § 1 PC – expungement does not occur.[57] In this context, it is significant that there are no solutions providing for partial expungement of a conviction. The act of expungement thus has, borrowing terminology from the science of logic, a categorical character. This means that it either occurs or it does not. Where the fiction of a non-existent conviction does not arise, it is difficult to find a rational justification for giving effect to its consequence in the form of the criminal-law irrelevance of the sanction, even if the specified periods have already expired. What changes is only the penalty status, which becomes inadmissible for execution, and this, as indicated, does not qualify as an obstacle to encompassing it within an aggregate sentence under the currently applicable conditions for imposing such a sentence.[58]

Naturally, the sense of a penalty remaining within the legal order despite the permanent impossibility of ordering its execution is open to question. Certainly,

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[54] For more, see Supreme Court decision of 10 April 2019, IV KK 606/18, LEX No. 2647196.

[55] B.J. Stefańska, 'Skutki zatarcia skazania', *Prokuratura i Prawo*, 2007, No. 10, p. 54.

[56] On the persistence of extra-legal assessments, including ethical and moral ones, see Supreme Court resolution of 27 November 1984, III AZP 6/84, *Orzecznictwo Sądu Najwyższego. Izba Cywilna*, 1985, No. 8, item 105.

[57] As a result of the application of Article 108 PC in conjunction with Article 76 § 1 PC and Article 76 § 2 PC.

[58] This view does not run counter to that of W. Wolter, who maintained that the requirement of simultaneity of convictions, by reason of its procedural nature, is not a determinant of the imposition of an aggregate sentence. Such determinants are the material conditions describing the real concurrence of offences (see W. Wolter, 'O warunkach orzeczenia kary łącznej', *Nowe Prawo*, 1962, No. 1, pp. 14–26; W. Wolter, 'O wyborze w łączeniu kar', *Nowe Prawo*, 1962, No. 9, pp. 1190–1193). If, therefore, the unenforceability of a penalty is not an obstacle to imposing an aggregate sentence under the rules currently in force, then Wolter's position fits within the line of reasoning advanced here.

it reflects the offender's prior criminality.[59] Yet restricting its significance solely to a communicative function does not appear appropriate. In such a view, a conditionally suspended custodial sentence, an order for execution of which is inadmissible, would have to be treated as an annex to the conditions sustaining the conviction within the legal order. Such an assessment may, of course, be derived from the benefit inherent in probation itself, the very nature of which implies that an offender benefitting from probation in fact obtains the privilege of not serving an actual penalty.[60] Still, the evident argumentative deficiencies make it difficult to accept such a justification. It appeals to the axiological foundation of the institution of suspension of execution of a sentence. This, in turn, requires accepting an axio-normative consensus and acknowledging a specifically understood form of relief for the offender. Set against this, however, is the axiological justification for retaining the penalty despite the impossibility of ordering its execution. One must not lose sight of the fact that the persistence of a conviction within the legal order, including the penalty arising from it, results from the offender's invariably negative conduct.[61] In such a framework, therefore, a collision arises between assessments of the offender's conduct and the prioritisation of one of them over the other, which would nullify the sense of treating the latter as relevant. Hence, every position will necessarily meet with objections, thereby precluding acceptance of the existence of a consensus.

CONCLUSIONS

In view of the solutions currently governing the institution of real concurrence of offences, there are no categorical obstacles to encompassing, within the aggregate sentence, a conditionally suspended custodial sentence an order for execution of which is inadmissible. Accordingly, the answer to the question of whether the penalty at issue possesses the capacity for aggregation must be affirmative. The reasoning underlying the opposing view, by contrast, appears unconvincing. This conclusion resonates all the more strongly given that it stands in opposition to the uniform position of the Supreme Court.

Nevertheless, the sentence at issue possessing the capacity for does not appear to correspond with the essence of an aggregate sentence, which is grounded in the rationalisation of criminal liability. Such rationalisation can hardly be said to occur where the sentence imposed, which is, by assumption, subject to execution, includes one that is categorically unenforceable. Such a solution is strikingly incompatible with the axiological foundations not only of the aggregate sentence, but also of the legal fact constituted by the expiry of the period after which ordering execution of a suspended custodial sentence is no longer admissible. Conversely, in seeking to support the thesis that the penalty at issue cannot be aggregated, the problem

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[59] See also Supreme Court decision of 15 September 2005, II KK 4/05, LEX No. 157545.

[60] Cf. K. Politowicz, 'Stosowanie instytucji z art. 75 KK w kontekście wydania wyroku łącznego', *Probacja*, 2011, No. 4, p. 141.

[61] See B.J. Stefańska, 'Zatarcie warunkowego skazania', *Prokuratura i Prawo*, 2009, No. 7–8, p. 120.

extends beyond the sphere of the capacity for aggregation itself. In view of the applicable regulations, such interpretative results may be criticised for relying on criteria external to the legal text. This remains so even under an activist approach to legal interpretation which allows for correction of the normative content derived from linguistic interpretation, provided that the requirement of argumentative soundness is maintained.[62] The arguments identified and analysed in this text cannot be said to meet that standard. Moreover, in the absence of clearer textual support for the thesis discussed here, further difficulties may arise, such as the need to accept the view that the legislature has not achieved full transparency in defining real concurrence of offences.

In conclusion, the capacity referred to in the title finds its basis in the regulations currently in force. Nonetheless, the status of the penalty under analysis appears under-regulated. The natural postulate is therefore to clarify the legal status of such a penalty. For the purpose adopted in this study, which is oriented towards determining the existence of a specific decision-making possibility, the direction of such clarification is immaterial; nevertheless, in a desiderative sense, this should stimulate a broader discussion on the matter.

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[62] Cf. M. Babiaczyk, K. Pawłowska, 'Między formalistycznym a aktywistycznym stosowaniem prawa', in: Pohl Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, pp. 42–43.

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