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LEGISLATIVE CHANGES REGARDING DIRECTIVES ON SENTENCING

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The amendment to the Criminal code of 20 February 2015 (Journal of Laws of 2015, item 396), which entered into force on 1 July 2015, introduced important changes in the field of directives on sentencing for commission of misdemeanours. It introduced new directives as well as thoroughly changed those articulated in the Criminal Code of 1997. All these directives concern the issue of choice of penalty for misdemeanour perpetrators and they aim to stop imprisonment being the most common response to forbidden acts that are not of the highest harmfulness level in the Polish justice system and become a reaction *ultima ratio* ruled only if it is indispensable in order to achieve targets of a repressive measure. Since 1 July 2015, there have been special directives in common criminal law on the choice and judgement of imprisonment with regard to all basic types of misdemeanours distinguished in the Polish criminal law based on their impact, i.e. (1) petty misdemeanours, (2) medium impact misdemeanours and (3) profound impact misdemeanours.

A special directive on the choice of penalty for petty misdemeanours that include forbidden acts carrying only a non-custodial sentence as well as ones carrying alternative sanctions that, apart from non-custodial sentences, envisage also short-term imprisonment (not exceeding one year, two years, three years and in exceptional cases five years) – was formulated in Article 58 § 1 CC. The directive, which in its first version limited the possibility of rendering unconditional imprisonment sentence (i.e. one that cannot be suspended) for petty misdemeanours, now limits the choice and rendering of imprisonment sentences in any form, i.e. both unconditional imprisonment and conditionally suspended imprisonment sentences. The directive on the choice laid down in Article 58 § 1 CC constitutes preference of rendering, in case of petty misdemeanours, non-custodial sentences, i.e. a fine or community service. Imprisonment envisaged as an alternative sanction may be rendered only when another penalty or penal measure cannot meet the objectives specified in Article 53 § 1 CC. Having in mind that directive on the choice of the penalty type, a court shall always consider non-custodial penalties first and then, 'as a last resort', a suspended imprisonment sentence (provided

the perpetrator meets the conditions of Article 69 CC) or unconditional imprisonment in accordance with the *ultima ratio* principle of rendering an imprisonment sentence in case of petty misdemeanours.

A special directive on imposing penalties for misdemeanours of medium impact was originally formulated in Article 58 § 3 CC. It referred only to some misdemeanours of that group (i.e. lesser medium ones) carrying a simple sanction as a single penalty: imprisonment not exceeding five years (or this penalty and a fine). In case of misdemeanours of this impact level, instead of the imprisonment sanction a court could render one of non-custodial penalties, i.e. a fine or a community service. The imposition of the so-called alternative penalty instead of the imprisonment sanction was to the discretion of a court. The provision of Article 58 § 3 CC did not contain any premises of the use of that possibility; neither did it formulate any restrictions or exclusions. It contained, however, a suggestion that an alternative non-custodial penalty may be imposed and indicated that it should take place when a court imposes a penal measure at the same time[1]. A lack of any restrictions on the application of non-custodial penalties in Article 58 § 3 did not mean that a court could make use of that possibility in every case. There were special directives on the imposition of penalties for hooliganism (see Article 57a § 1 CC stipulating imposition of a penalty prescribed in the sanction and even with its extraordinary enhancement of at least its lowest statutory threshold) and for multi-recidivists, professional criminals (i.e. those for whom the commission of crime is the source of income), criminals operating in an organised group or criminal organisation with an aim to commit crime as well as perpetrators of crimes of a terrorist nature (see the provision of Article 64 § 2 and Article 65 § CC ordering the imposition of imprisonment with its extraordinary enhancement of at least its lowest statutory threshold). A special directive allowing for the imposition of alternative penalties for imprisonment laid down in Article 58 § 3 CC was repealed in the amendment of 20 February 2015.

The discussed amendment introduced a new provision of Article 37a to the Criminal Code. Its content is similar to the content of the repealed Article 58 § 3 CC. It allows for the imposition of an alternative non-custodial penalty in the form of a fine or community service (except for the variant limited to the obligations of Article 72 § 1 (4)–(7a) CC, which is planned in the government bill to amend the Criminal Procedure Code and some other acts of 8 January 2016 to be repealed from Article 34 § 1a (3) CC[2]) in case of every misdemeanour carrying an imprisonment penalty not exceeding eight years. This means that – as it did before – there is a broad possibility of rendering one of the non-custodial sentences instead of imprisonment that is prescribed for this kind of forbidden acts, but not only for those lesser misdemeanours of the group of medium impact ones but for all medium impact misdemeanours, including those more profound. The provision of Article 37a CC, apart from the broadening of the scope of application

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[1] For more see V. Konarska-Wrzosek, Szczególne dyrektywy sądowego wymiaru kary [Special directives on judicial penalty imposition], [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015, pp. 295–298.

[2] See Article 3 (1) (a) of the Bill to amend the Act – Criminal Procedure Code and some other acts, the Sejm Paper no. 207.

of alternative penalties for all kinds of misdemeanours carrying a simple sanction of imprisonment not exceeding eight years (i.e. eight years inclusive), gave up indicating that the possibility should be applied, especially when a court also imposes a penal measure. This significant extension of the possibility of applying one of non-custodial penalties instead of imprisonment not exceeding eight years was possible mainly because of the addition of new content to non-custodial penalties, which caused that the penalties are more severe and painful, of stronger preventive impact, and substitute for imprisonment in a broader range of cases than ever before. It must be noticed, however, that a court's decision on imposing an alternative non-custodial penalty must result in unavoidable inability to impose a cumulative fine penalty when it is optional as well as obligatory. It is strictly connected with the characteristic feature of our criminal law, which envisages imposition of a fine as a statutory penalty prescribed for a given act or together with imprisonment (see Article 33 § 2 CC) and does not allow for the imposition of a fine together with a non-custodial penalty (unlike when it is pursuant to penal fiscal law – Article 26 § 1 of the Penal Fiscal Code and Article 110 PFC).

Although the wording of Article 37a CC is quite clear and its similarity to the norm of the repealed provision of Article 58 § 3 CC is big, its legal and penal status and function is highlighted in jurisprudence. Some researchers into criminal law believe that the provision of Article 37a CC formulates a special directive on judicial sentencing enabling courts to impose alternative non-custodial penalties for misdemeanours carrying imprisonment not exceeding eight years[3]. Some other researchers express a different opinion (inter alia A. Zoll and J. Majewski)[4] because they believe that the provision of Article 37a CC modifies simple sanctions that are prescribed for such misdemeanours, introducing a non-custodial alternative, and as a result a single sanction is changed into a complex alternative one, which offers an opportunity to choose a fine, a non-custodial penalty or imprisonment. Such an opinion was expressed in the statement of reasons for the amendment of 20 February 2015[5]. In accordance with this point of view, the provision of Article 37a CC does not formulate a directive on judicial sentencing but expresses a certain general principle of statutory penalties imposition. What confirms the thesis is the fact that Article 37a CC is in Chapter IV CC entitled PENALTIES, which provides regulations on imprisonment, and not in Chapter VI CC entitled PRINCIPLES OF THE IMPOSITION OF PENALTY AND PENAL MEASURES, where the repealed Article 58 § 3 CC was[6].

However, it is difficult to approve of the opinion, but not because it is questioned whether statutory norms can be contained in the general part of the Criminal Code

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[3] See e.g. A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2015, p. 323; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, Warszawa 2016, p. 165; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz Komentarz [Criminal Code: Commentary]*, Warszawa 2016 (gone to press).

[4] A. Zoll and J. Majewski discussed that several times, inter alia at XII Kolokkwium Bielańskie on 20 May 2015.

[5] See Statement of reasons for the Bill to amend the Act – Criminal Code and some other acts of 20 February 2015 (Journal of Laws of 2015, item 396), p. 13.

[6] See a broad discussion of this issue by M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Amendments to criminal law of 2015: Commentary]*, Kraków 2015, pp. 284–294.

and not only in special provisions of the Act. In fact, hardly anyone questions this nowadays[7]. For the need of further considerations, however, it will be purposeful to indicate that, in the author's and some other researchers' opinion, the domain of the statutory penalty imposition also includes, apart from indications regarding a penalty or penalties prescribed in sanctions of special provisions, those regulations of the general part of the CC that lay down minimum and maximum limits of particular penalty types and regulate issues connected with imposition of penalties prescribed for obligatory application[8]. Any regulations regarding penalty imposition, including those modifying it in some way in relation to penalty threat, if they are to be applied optionally, they belong to the domain of judicial penalty imposition[9]. We deal with such a situation based on the provision of Article 37a CC. It indicates that in case of misdemeanours carrying a penalty of imprisonment not exceeding eight years, a fine or a non-custodial penalty **may be imposed instead of** imprisonment penalty prescribed in the sanction. Nobody can do it but a court. A court has discretion to impose imprisonment, a fine or a non-custodial penalty restricting liberty. The provision of Article 37a CC allows courts – within the limits of standard, not extraordinary, imposition of penalties – to give up imposing a penalty of imprisonment prescribed in the sanction and impose one of non-custodial alternative penalties instead, and leaves the decision whether to make use of this possibility to courts. Thus, the norm included in Article 37a CC constitutes a special directive on penalties imposition addressed to courts, which are not bound to implement it but can choose to do this. **The provision of Article 37a CC does not change the type of sanction[10]. It remains a simple sanction** limited to a threat of imprisonment penalty imposition for misdemeanours. It is only indicated to courts that, being authorised by statute, they may decide not to render sentences in compliance with the sanction but the directive laid down in Article 37a CC.

The provision of Article 37a CC might perform a function of transforming simple (homogeneous) sanctions into alternative sanctions if it were formulated differently, e.g. *Whenever a special provision envisages imprisonment penalty not exceeding eight years, it shall not be interpreted as a simple sanction but as an alternative one that also includes non-custodial penalties in the form of a fine or restriction of liberty that*

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[7] See M. Melezini, *Ustawowy a sądowy wymiar kary [Statutory and judicial penalty imposition]*, [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary [Study of penalties: Judicial penalty imposition]*, System Prawa Karnego [Criminal Law System], Vol. 5, Warszawa 2015, pp. 149–157.

[8] V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym [Directives on the choice of a penalty in the Polish criminal legislation]*, Toruń 2002, p. 42 and 44; A. Marek, *Prawo karne [Criminal law]*, Warszawa 2009, pp. 337–338; J. Raglewski, *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (Analiza dogmatyczna w ujęciu materialnoprawnym) [Exceptional penalty moderation in the Polish system of criminal law (Dogmatic analysis from substantive law perspective)]*, Kraków 2008, pp. 42–47; Z. Sienkiewicz, [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne [Criminal law]*, Warszawa 2010, pp. 365–366.

[9] See V. Konarska-Wrzosek, Modyfikacje w zakresie zagrożeń karnych przewidziane w ramach zwykłego sądowego wymiaru kary [Modifications to penal threat envisaged within simple judicial penalty imposition], [in:] J. Majewski (ed.), *Nadzwyczajny wymiar kary [Extraordinary penalty imposition]*, Toruń 2009, p. 63.

[10] See a contradictory opinion by e.g. M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Amendments to criminal law of 2015: Commentary]*, Kraków 2015, p. 286 and 289; E. Hryniewicz-Lach [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna [Criminal Code. General issues]*, Vol. II, Warszawa 2015, p. 43, seems to express a similar opinion.

is laid down in Article 34 § 1a (1), (2) or (4)[11]. Such wording would not make it be a directive on a judicial imposition of a penalty but a regulation within the area of statutory penalty imposition.

Here a question arises whether the issue of the legal character of the provision of Article 37a CC is important from a practical point of view or is purely theoretical. It has an important practical dimension. If the opinion that the provision of Article 37a CC in its present or possibly amended form transforms simple (homogeneous) sanctions envisaging imprisonment not exceeding eight years into alternative ones were common, this would result in a change of the envisaged sanctions in the whole criminal law and blur the differences in the legislator's legal and penal assessment of various types of disorderly conduct between petty misdemeanours carrying an alternative sanction laid down in a special regulation and misdemeanours of medium impact, which – as the legislator believed to be appropriate – as a rule carries imprisonment and not more lenient sentences. Moreover, there would be no need for the exceptional solution of mitigation of a penalty for crimes that are classified as misdemeanours, which results in the same effects as far as a penalty imposition is concerned, and for the application of which some special conditions must be met (see Article 60 § 1–4 and § 6 (3) and (4) CC). The assumption that Article 37a CC constitutes a special directive of a judicial penalty imposition does not undermine the legislator's abstract assessment of particular types of disorderly conduct nor finely developed intra-statutory justice between different types of disorderly conduct, but just allows courts broad individualisation of assessment of each medium impact misdemeanour and the imposition of non-custodial penalties instead of imprisonment if a court considers that it is sufficient to achieve the objectives of punishment. The formulation of such a directive on judicial imposition of penalties, as laid down in Article 37a CC, allows for rationalisation and individualisation of the standard penalty imposition without the need to use an institution of exceptional mitigation of a penalty, which requires meeting special premises in order to be applied, and cannot and should not be commonly applied because it is of exceptional character.

Moreover, it is necessary to raise here that sharing an opinion that the provision of Article 37a CC *ex lege* modifies simple sanctions of imprisonment not exceeding eight years transforming them into alternative sanctions would inevitably have to lead to the necessity of applying to some of the crimes carrying imprisonment not exceeding five years a special directive on the choice of a penalty envisaged in Article 58 § 1 CC. This would cause that in all cases when the statute envisages only an imprisonment penalty not exceeding five years in a sanction for a given type of crime, because of Article 37a CC and next Article 58 § 1 CC, a court, as a rule, would not be able to impose imprisonment unless it decided that none of non-custodial sentences would be able to fulfil the objectives of punishment. Here, another question must be asked, i.e. whether the differentiation of sanctions between various types of misdemeanours, which is envisaged in the present act, is rational and whether the present expression of legal and penal assessment reflected in the type and amount of a penalty envisaged in the

[11] Noticing numerous drawbacks to the norm laid down in Article 37a CC, M. Małecki proposes quite similar interpretation of its normative content; see *Ibid*., [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015 [Amendments to criminal law of 2015]*, p. 288. The problem, however, consists in the fact that the discussed provision in its current form does not express such meaning.

sanction is not out-dated. If that were a diagnosis with regard to penal threats, a review and possible change of sanctions for crimes classified as misdemeanours, or perhaps all crimes classified in our legal order, would be an absolutely better solution. It seems to be a definitely better and more efficient way of influencing judicial judgements than formulation of various directives on penalties imposition, which can but do not have to be respected in the judicial process of penalties imposition, especially if they are not formulated in a quite categorical and extremely optional way as in the case of Article 37a CC.

Drawing conclusions from the discussion of the normative regulation laid down in Article 37a CC, which causes serious interpretational differences and, in case of an opinion different from the above-presented one, destroys the logic and coherence of the system of sanctions prescribed for particular types of disorderly conduct in the field of the whole criminal law and falsifies the picture of real sanctions, it seems to be justified to return to the regulation that existed before the amendment of 2015. In my opinion, it would be purposeful to repeal the provision of Article 37a CC and reintroduce the competence to impose non-custodial alternative penalties in Chapter VI in Article 58 § 3 CC with the limitation of that possibility to misdemeanours carrying imprisonment not exceeding five years. It is quite commonly believed that a possibility of imposing non-custodial penalties envisaged in Article 37a CC with regard to misdemeanours carrying imprisonment not exceeding eight years is too far reaching[12]. *De lege ferenda* – taking into account the bill to amend the Criminal Code that is under development in order to eliminate from the main part of a penalty of imprisonment obligations specified in Article 72 § 1 (4)–(7a) CC aimed to be applied on their own or with other measures, the reintroduced provision of Article 58 § 3 CC might read: *If a crime carries imprisonment not exceeding five years, a court may impose a fine or a non-custodial penalty instead of imprisonment*.

Because of their placement in Chapter IV on PENALTIES, the legal and penal character of the provisions of Article 37b CC may raise some doubts as they allow courts to impose the so-called mixed (joined) penalty that consists in combining short imprisonment, i.e. not exceeding three months (if a misdemeanour carries imprisonment not exceeding ten years) or up to six months (if a misdemeanour carries at least ten years' imprisonment) and a non-custodial sentence not exceeding two years. In case of imposition of such a mixed penalty, first imprisonment must be served unless the statute stipulates otherwise (Article 37b CC *in fine*). In comments on this provision, questions are asked whether a mixed penalty is a new type of penalty or just a certain combination of already existing penalties. Asking that question, A Grześkowiak answers it rightly stating that if it were a new type of penalty, it should have been placed in the catalogue of penalties. However, the catalogue of penalties remains unchanged[13]. The analysis of the provision of Article 37b CC, which allows courts, at their own discretion, to impose mixed penalties instead of imprisonment, leads to a conclusion that this is

[12] See e.g. T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 165; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 321.

[13] Compare A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 326–327.

a case of a new, successive directive on judicial imposition of penalties with regard to all misdemeanours carrying only imprisonment (as well as imprisonment and a fine), including misdemeanours of the highest impact (carrying sanctions envisaging ten years' imprisonment or twelve years' imprisonment). Making use of the possibility created by the new provision of Article 37b CC, courts may (taking into account general and special directives on penalties imposition), in case of perpetrators of a misdemeanour carrying imprisonment not exceeding ten years, impose short imprisonment (between one and three months), and in case of misdemeanours of the highest impact carrying imprisonment of at least ten years, impose imprisonment for a period from one to six months and a non-custodial penalty for a period from one month to two years. As a result of making use of the possibility provided by Article 37b CC, courts will be able to impose (in case of perpetrators of some misdemeanours that can or must carry a cumulative fine) three different penalties at the same time, i.e. imprisonment, a non-custodial penalty and a fine. They will of course have to remember that the total harshness resulting from penalties and penal measures cannot exceed the degree of guilt (Article 51 § 1 CC) and that when a statute lays down an obligation to impose a penalty prescribed in the sanction, an alternative mixed penalty cannot be imposed (see Article 57a § 1, Article 64, Article 65 § 1 and Article 178 § 1 CC).

The introduction of the directive on penalties imposition to Article 37b CC is, according to the statement of reasons, to prevent, on the one hand, devaluation of assessment of higher impact misdemeanours because of broad imposition of suspended imprisonment penalties and, on the other hand, imposition of unconditional imprisonment in the situation when the possibility of imposing suspended imprisonment sentences was limited in the amended Article 69 CC. The statement of reasons also indicates that a short-term imprisonment being a part of a mixed penalty may be imposed as an unconditional one or with conditional suspension of its execution. Then, there are arguments for the introduction of a possibility of imposing a mixed penalty instead of imprisonment because in many situations the imposition of a short-term isolation penalty is sufficient to achieve adequate results in the field of special prevention, and the role of imprisonment is to establish a convict's conduct that is socially desired[14]. It seems that the introduction of a mixed penalty solution to the system of criminal law, which in general deserves positive assessment, is accompanied by a lack of necessary gradation of penal response and some serious inconsistency. It is connected with admission of a possibility of conditional suspension of imprisonment imposed within a mixed penalty. The adopted solution is acceptable in case of medium impact misdemeanours, i.e. those carrying imprisonment not exceeding eight years. However, in case of perpetrators of most serious misdemeanours (carrying imprisonment not exceeding ten years or twelve years), it raises serious doubts. In such cases a penalty should be significantly different from a penalty for medium impact or petty misdemeanours. If courts commonly impose mixed penalties (and this was the intention of its introduction to the system), the difference in penal liability for acts of different impact will be blurred. It is not good from the perspective of justice as well as prevention. The necessity of maintaining

[14] See Statement of reasons for the Bill to amend the Act – Criminal Code and some other acts of 20 February 2015 (Journal of Laws of 2015, item 396), pp. 11–12.

differentiation of penal sanction's harshness based on the impact of an act committed by a perpetrator requires that imprisonment imposed for high impact misdemeanours within a mixed penalty should be unconditional and efficiently executed in order to play the role of a short and just shock penalty. In case of high impact misdemeanour perpetrators who do not deserve unconditional imprisonment, when it does not exceed one year, there are no obstacles in the way of courts applying conditional suspension of the execution of an imprisonment penalty pursuant to Article 69 CC and not apply a mixed penalty.

Seeing the need to differentiate penal sanctions for perpetrators of medium impact misdemeanours in comparison to those convicted for high impact misdemeanours, in my paper presented at a scientific conference on the directions of change in the contemporary criminal law organised in connection with Professor Zofia Sienkewicz's jubilee (on 29 September 2015 in Wrocław), I formulated a proposal *de lege ferenda* to amend Article 37b CC by adding after the words *not exceeding six months* ***without conditional suspension*** *and a non-custodial penalty not exceeding two years*. That is why I fully support the proposal to introduce changes within Article 37b CC included in Article 3 (2) of the Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016, where there is an addition stating that "Article 69 § 1 is not applicable". The decision contained in a separate sentence refers to all cases of imposition of the so-called mixed (cumulative) penalty. This means that imprisonment imposed within a mixed penalty together with a non-custodial sentence cannot be suspended, i.e. it will have to be imposed in the form of unconditional imprisonment resulting in a convict's real isolation in prison. A non-custodial penalty execution will start, as a rule, on a convict's release from prison unless some kind of *lex specialis* stipulates otherwise allowing for the change of sequence (see Article 37b, last sentence *in fine* CC and Article 17a PEC).

It is rightly raised in the statement of reasons for an amendment to the content of Article 37b CC that "the essence of penal response in the form of a mixed penalty consists in a short-term imprisonment and then a longer non-custodial penalty. This way, imprisonment is to function as a deterrent and be some sort of real warning to the convict. (…)"[15].

As far as the regulations contained in Article 37b CC are concerned, it also seems purposeful to formulate a proposal *de lege ferenda* to move its contents that are especially directive in character from Chapter VI CC to Article 58 § 4 CC.

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[15] See Statement of reasons for the Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016 (the Sejm Paper no. 207), p. 17.

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LEGISLATIVE CHANGES REGARDING DIRECTIVES ON SENTENCING

Summary

The article is a dogmatic and legal analysis of new regulations introduced by the amendment of 20 February 2015 to Articles 58 § 1, 37a and 37b CC. The author presents the opinion that the regulations articulate special directives on judicial imposition of penalties for petty, medium and high impact misdemeanours stipulating statutory preferences with respect to the choice of a penalty provided that such choice is envisaged in the sanction or it is possible to apply a non-custodial alternative penalty when a crime carries a simple sanction of just imprisonment or a possibility of imposing a mixed penalty composed of short imprisonment and a non-custodial penalty. The author is especially against the interpretation of the provision of Article 37a CC according to which it transforms all simple sanctions for misdemeanours carrying imprisonment

not exceeding eight years into alternative sanctions composed of imprisonment and a fine or a non-custodial penalty. The author points out a series of negative results of such interpretation and presents proposals *de lege ferenda* with regard to modification of the analysed norms as well as a change of their placement in the General Issues chapter of the Criminal Code.

Key words: *amendment to the Criminal Code of 20 February 2015*, *penalty imposition*, *misdemeanours*, *special directives on penalty imposition*, *interpretational doubts regarding Article 37a and 37b CC*, *proposals* de lege ferenda

ZMIANY LEGISLACYJNE DOTYCZĄCE DYREKTYW WYMIARU KARY

Streszczenie

Artykuł zawiera analizę dogmatycznoprawną nowych uregulowań, wprowadzonych przez nowelę z dnia 20 lutego 2015 r., zawartych w art. 58 § 1, 37a i 37b k.k. Autorka stoi na stanowisku, że przepisy te artykułują dyrektywy szczególne na użytek sądowego wymiaru kary za występki o lekkim, średnim lub poważnym ciężarze gatunkowym, określające ustawowe preferencje w zakresie wyboru rodzaju kary, gdy taki wybór jest przewidziany w sankcji albo możliwości zastosowania wolnościowej kary zamiennej, gdy przestępstwo jest zagrożone sankcją prostą przewidującą tylko karę pozbawienia wolności lub też możliwości orzeczenia kary mieszanej składającej się z krótkiej kary pozbawienia wolności i kary ograniczenia wolności. Autorka w szczególności neguje trafność wykładni przepisu art. 37a k.k., w myśl której przekształca on wszystkie sankcje proste grożące za występki przewidujące karę pozbawienia wolności nieprzekraczającą 8 lat w sankcje alternatywne zawierające oprócz tej kary także karę grzywny lub karę ograniczenia wolności. Autorka wskazuje na szereg negatywnych skutków takiej wykładni i przedstawia określone propozycje *de lege ferenda* zarówno co do modyfikacji treści analizowanych unormowań, jak i zmiany ich usytuowania w Części ogólnej k.k..

Słowa kluczowe: *nowelizacja k.k. z 20 lutego 2015 r.*, *wymiar kary*, *występki*, *dyrektywy szczególne wymiaru kary*, *wątpliwości wykładnicze przepisów art. 37a i 37b k.k.*, *postulaty* de lege ferenda