Ius Novum
2025, vol. 19, no. 3, pp. 62–76

PETTY OFFENCE RECIDIVISM IN THE LIGHT OF ARTICLE 38 OF THE MISDEMEANOUR CODE

JULIA KOSONOGA-ZYGMUNT*

DOI 10.2478/in-2025-0025

Abstract
The article addresses the issue of petty offence recidivism in the light of Article 38 of the Misdemeanour Code (MC), with particular emphasis on the legal conditions for its occurrence and legal consequences. The author characterises the concept of special multiple recidivism (Article 38 § 1 MC), as well as a specific form of the so-called road traffic offence recidivism (Article 38 § 2 MC), introduced by the Act of 2 December 2021 amending the Road Traffic Law and Certain Other Acts. The analysis carried out aims to better understand the role of recidivism in the petty offence law system and to indicate possible directions for legislative changes in the context of existing interpretative and practical difficulties.

Key words: petty offence recidivism, road traffic offence recidivism, similarity of offences, final and binding punishment, extraordinary aggravation, detention, fine

INTRODUCTION

Petty offence recidivism poses a significant problem both from the perspective of criminal policy and the effectiveness of repressive measures provided for by the legislator. In the Polish misdemeanour law system, the issue of recidivism is regulated in Article 38 of the Misdemeanour Code (MC). Despite proposals put forward in the doctrine to repeal the provision, as it constitutes an unnecessary

* LLD, Criminal Law Department, Faculty of Law and Administration of Cardinal Stefan Wyszyński University in Warsaw (Poland), e-mail: j.zygmunt@uksw.edu.pl, ORCID: 0000-0002-3368-300X

imitation of the solution in the Criminal Code,[1] the legislator has not decided to do so. On the contrary, a mechanism of extraordinary aggravation of penalty for road traffic offence recidivism has been introduced recently.

The current wording of Article 38 MC was introduced with the entry into force of the Act of 2 December 2021 amending the Road Traffic Law and Certain Other Acts.[2] In addition to the already existing content, designated as § 1, a new form of extraordinary aggravation of penalty for road traffic offences was added in § 2.

A repeated petty offence under Article 38 § 1 MC constitutes special recidivism, as it requires the repeated commission of an intentional misdemeanour similar to the previously committed one. It also qualifies as multiple recidivism due to the fact that similar intentional petty offences have already been penalised twice. The solution is aimed at tightening repression against perpetrators who persistently commit similar offences and do not show signs of effective rehabilitation. The ineffectiveness of the penalties applied thus far is intended to justify the imposition of the harshest measure, i.e. detention.[3]

In turn, Article 38 § 2 MC provides for special recidivism, although not multiple recidivism, even though it also results in the aggravation of the penalty. It applies only to a driver of a mechanical vehicle who commits the same enumerated misdemeanour against road safety and order within two years of the last final and binding punishment. Meeting the requirements of the directive laid down in Article 38 § 2 MC results in the mandatory imposition of a fine of no less than double the minimum statutory penalty.

Further consideration is given to the characteristic features of petty offence recidivism in the light of Article 38 MC, with particular emphasis on the conditions for its occurrence and its legal consequences. The analysis is aimed at a better understanding of the role of recidivism in the misdemeanour law system and at indicating possible directions for legislative changes.

RECIDIVISM CIRCUMSTANCES

PREVIOUS PUNISHMENT FOR A PETTY OFFENCE

The basic legal basis for the application of Article 38 MC is the requirement of previous punishment for a petty offence. In accordance with Article 38 § 1 MC, at least two previous penalties for similar intentional offences are required. In turn, Article 38 § 2 MC applies to a driver of a mechanical vehicle punished for an offence specified in Article 86 §§ 1a and 2, Article 86b § 1, Article 87 § 1, Article 92 § 2, Article 92a § 2, Article 92b, Article 94 § 1 or Article 97a MC. The legislator used

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1 Thus, A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2004, p. 114; with approval by M. Melezini, in: Melezini M. (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, Warszawa, 2016, p. 438.

2 Journal of Laws of 2021, item 2328.

3 A. Marek, *Prawo wykroczeń*…, op. cit., p. 112.

the term 'punishment' in the provision without stipulating that it refers to double punishment. The basis for extraordinary aggravation of the penalty provided for in Article 38 § 1 MC is therefore validated even if the perpetrator has been punished for a similar petty offence only once. The condition for prior punishment should be understood identically in both regulations under analysis.

The essential part of the issue related to the circumstance discussed has already been explained in detail in the doctrine. In particular, it should be considered undisputed that: a single previous punishment for a petty offence is not a sufficient basis for imposing a detention sentence;[4] a conviction for a petty offence combined with a waiver of the imposition of a penalty does not constitute punishment for an offence;[5] for the purpose of Article 38, it is inadmissible to take into account a penalty that has been expunged in accordance with the rules laid down in Article 46 § 1 MC;[6] the conditions for extraordinary aggravation of punishment are not met if at least one of the acts committed by the perpetrator in the past constituted a crime;[7] Article 38 MC is not applicable in the case of partial decriminalisation specified in Article 50 of the Act of 27 September 2013 amending the Act: Code of Criminal Procedure and Certain Other Acts,[8] and in Article 2a MC;[9] the transformation of a penalty does not change the fact that we are still dealing with a final and binding conviction for a crime.

However, there is no uniform assessment of whether the scope of application of the extraordinary aggravation of punishment also applies to perpetrators fined in penalty notice proceedings. Case law consistently holds that a fine cannot constitute a basis for determining recidivism. Only a final and binding court judgment, not a fine imposed in a penalty notice proceeding, can constitute grounds for determining special multiple recidivism laid down in Article 38 MC allowing for extraordinary aggravation of punishment.[10] This stance also prevails in the doctrine.[11]

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[4] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa, 2016, p. 227; see the Supreme Court judgment of 8 November 2007, II KK 247/07, LEX No. 340549.

[5] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2016, p. 227; thus also I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2021, Article 38, thesis 3.

[6] Cf. T. Grzegorczyk, in: Jankowski W., Zbrojewska M., Grzegorczyk T., *Kodeks wykroczeń. Komentarz*, LEX, 2013, Article 38, thesis 3.

[7] What draws attention is the fact that Article 38 MC omits recidivism of similar crimes or petty offences, which must be taken into account in determining a penalty to the perpetrator's disadvantage as an incriminating circumstance (Article 33 § 4 (5)). This approach to recidivism is disapproved of by T. Bojarski, in: Bojarski T. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2020, Article 38, thesis 1.

[8] Journal of Laws of 2013, item 1247, as amended.

[9] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2016, p. 228; also see the Supreme Court judgment of 14 February 2018, IV KK 519/17, LEX No. 2450269.

[10] The Supreme Court judgment of 13 September 2017, IV KK 55/17, *KZS*, 2018, No. 3, item 7; similarly in the Supreme Court judgment of 23 October 2024, V KK 323/24, Legalis No. 3136090.

[11] T. Bojarski, J. Piórkowska-Flieger, in: Michalska-Warias A., Bojarski T., Piórkowska-Flieger J., *Kodeks wykroczeń. Komentarz aktualizowany*, LEX, 2024, Article 38, thesis 1; I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38, thesis 3.

The issue, however, seems to be more complex. Undoubtedly, a fine is not a judgment (Article 32 § 1 of the Misdemeanour Procedure Code (MPC)) and, moreover, it does not constitute a determination of guilt and punishment, as such determination can only be contained in a sentence. It should be noted, however, that unlike the provisions of the Penal Code (PC) laying down the consequences of recidivism (Articles 64–64a PC), Article 38 MC does not contain a requirement for the perpetrator to have been previously convicted of a petty offence, but merely requires that he/she be punished for a petty offence, which may result from either a prior conviction for a petty offence or the conclusion of the misdemeanour proceeding by imposing a fine. The requirement that the perpetrator be previously found guilty of a misdemeanour in a final and binding court judgment cannot be inferred from the condition for a former penalty for a petty offence imposed on the perpetrator twice.[12]

Moreover, the provisions of substantive and procedural misdemeanour law indicate that the legislator distinguishes between punishing the offender and convicting them. The legislator uses the term 'convicted' only in one provision of the Misdemeanour Code (Article 57 § 1(2)), which clearly distinguishes conviction for a crime from punishment for a petty offence.[13] In turn, in accordance with the provisions of the Misdemeanour Procedure Code, the legislator repeatedly uses the concept of 'conviction' in relation to punishment for a petty offence within the meaning of the Misdemeanour Code.[14] On the other hand, a number of provisions of Part IX, Chapter 17 MPC use the term 'punished' to describe a person who has been fined.[15] In the Penalty Execution Code (PEC), although the legislator distinguishes punishment in relation to the imposition of a penalty for a petty offence (Article 86 § 1, Article 99 § 2 PEC), persons convicted of crimes and punished for petty offences are uniformly referred to as 'convicted' (Article 242 § 1a PEC).[16] In turn, the Act of 24 May 2000 on the National Criminal Register[17] uses the term 'persons sentenced for petty offences to detention' (Article 1(2)(7)), due to the fact that detention can only be adjudicated in a court judgment of conviction. Finally, Article 46 § 1 MC uses the concept of punishment (and not conviction), which is related to the statutorily defined status of a person who has been imputed the commission of a petty offence and a penalty has been imposed on them for this offence.[18]

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[12] Thus, rightly, A. Jezusek, 'Glosa do wyroku Sądu Najwyższego z dnia 13 września 2017 r., sygn. IV KK 55/17', *Prokuratura i Prawo*, 2018, No. 6, p. 160.

[13] S. Kowalski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Legalis, 2023, Article 46 MC, thesis 4.

[14] See e.g. Article 57 § 3, Article 60 § 1 (1) and (2), Article 82 § 5 (2) and (3), Article 114 § 2a or Article 119 § 1 MPC.

[15] See e.g. Article 96 § 1b–1bc or Article 98 MPC; cf. W. Jankowski, 'Kilka uwag na temat nadzwyczajnego zaostrzenia kary, w związku z uprzednio popełnionymi czynami karalnymi w sprawcach o wykroczenia', *Policja. Kwartalnik Kadry Kierowniczej Policji*, 2011, No. 4, pp. 22 et seq.

[16] S. Kowalski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 46 MC, thesis 4.

[17] Consolidated text, Journal of Laws of 2024, item 276.

[18] On the basis of this regulation, divergent stances are presented as to whether this regulation should apply only to acts that are subject to court proceedings and penalties imposed by the court in such proceedings, or also to fines imposed in penalty notice proceedings.

The linguistic interpretation of Article 38 MC supports the recognition that the phrase referring to punishment for petty offences encompasses punishment for petty offences in court proceedings, as well as for petty offences in extrajudicial penalty notice proceedings. If the legislator had intended to limit the scope of application of the regulation provided for in Article 38 MC to punishment in a court proceeding, a different expression should have been used in the provision, e.g. 'convicted of a petty offence'.[19]

INTENTIONAL OR UNINTENTIONAL PETTY OFFENCES

The condition for multiple recidivism recognition, as referred to in Article 38 § 1 MC, is that it also be determined that the two previous petty offences, as well as the third one, were committed intentionally. The commission of even one of these offences unintentionally eliminates the possibility of applying this provision. It is rightly pointed out in the literature that the requirement of committing an intentional offence applies to a perpetrator's specific act. Therefore, it does not only concern petty offences that can be committed only intentionally. A perpetrator of a misdemeanour classified as both intentional and unintentional may also be held liable under Article 38 § 1 MC, provided that he committed the act intentionally.[20]

In turn, the legislator did not use the term 'intentional' in Article 38 § 2 MC; thus, it can be concluded that the petty offences specified in this provision can also be committed unintentionally. This form of recidivism is generally based on two intentional offences, two unintentional offences, or one intentional offence and one unintentional offence. However, it should be pointed out that in one of the types of offences referred to in the provision, the legislator departs from the principle of equivalence of intentionality and unintentionality adopted under the misdemeanour law (see Article 5 MC), requiring intentionality. This is the case with the petty offence under Article 92 § 2 MC, the perpetrator of which fails to comply with a signal from a person authorised to control road traffic ordering the vehicle to stop 'in order to avoid a check'. This means that this offence can only be committed intentionally, and only direct intention tinged with the purpose of the action is taken into account.[21]

The application of recidivism to unintentional acts raises doubts about the very nature of this concept. Recidivism is intended to serve a preventive and educational purpose, acting as a deterrent to individuals who, despite their previous punishment, knowingly commit a successive offence. Imposing a double fine for an unintentional offence simply because the former one was also a road traffic misdemeanour leads to disproportionate punishment in relation to the degree of culpability. The automatic

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[19] Thus also P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, thesis 2; cf. A. Jezusek, 'Glosa do wyroku…', op. cit., p. 160.

[20] M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks wykroczeń. Komentarz,* LEX, 2009, Article 38 PC, thesis 4.

[21] K. Wala, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 92 MC, thesis V.2.

nature of more severe punishment also raises doubts. The current structure of Article 38 § 2 MC requires that a fine of no less than double the minimum amount be imposed, regardless of whether the perpetrator committed the misdemeanour intentionally or unintentionally.

SIMILARITY OF PETTY OFFENCES

The condition for the application of Article 38 § 1 MC is the commission of at least three offences that are similar within the meaning of Article 47 § 2 MC. The third one committed by the perpetrator must be similar to the previously committed ones.[22] It must be agreed that the lack of similarity between the two acts for which the perpetrator was previously punished, as well as the lack of similarity between the third prohibited act and those for which he was punished, prevents the application of Article 38 § 1 MC.[23]

The criteria used for the purpose of misdemeanour law to determine whether a given petty offence is similar to another one or a crime are laid down in Article 47 § 2 MC. The similarity criteria were modelled on the criteria for similarity of crimes laid down in Article 115 § 3 PC.[24] Article 47 § 2 MC lists: the classification of petty offences, or of a petty offence and a crime, as belonging to the same type; the use of violence or the threat of its use; and the aim of obtaining financial gain.

In turn, in the content of Article 38 § 2 MC, the legislator did not use the term 'similar'. Instead, two significant restrictions were introduced: one subjective and one objective in nature. The subjective one stems from the stipulation that the provision applies only to 'drivers of mechanical vehicles', while the objective one is limited to strictly specified types of prohibited acts. This specific form of the so-called road traffic recidivism will only occur if the person punished for an enumerated offence against traffic safety and order commits 'the same petty offence' within two years of the last legally binding punishment.[25]

Article 38 § 2 MC refers to the driver of a mechanical vehicle. The concept of a mechanical vehicle is not defined by statute, and the provisions of the Road Traffic Law[26] do not use this term. However, the statute defines the term 'motor vehicle', which is a vehicle equipped with an engine, with the exception of mopeds, rail vehicles, bicycles, bicycle strollers, electric scooters, personal transport devices, and wheelchairs (Article 2(32) RTL). Every motor vehicle is a mechanical vehicle, which does not mean that the two concepts are identical. The concept of a mechanical

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[22] The Supreme Court judgment of 18 May 2005, II KK 118/05, *OSNwSK*, 2005, No. 1, item 978.

[23] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń. Komentarz*, Warszawa, 2023, Article 38 MC.

[24] For more on the issue see P. Daniluk, *Przestępstwa podobne w polskim prawie karnym*, Warszawa, 2013, and the literature referred to therein.

[25] T. Bojarski, J. Piórkowska-Flieger, in: Michalska-Warias A., Bojarski T., Piórkowska-Flieger J., *Kodeks wykroczeń*…, op. cit., Article 38, thesis 1.

[26] Act: Road Traffic Law of 20 June 1997, consolidated text, Journal of Laws of 2024, item 1251, as amended.

vehicle under the provisions of the Criminal Code and the Misdemeanour Code should be interpreted independently. A mechanical vehicle is any vehicle that, by its design, is propelled by mechanical force derived from an engine.[27] It is rightly pointed out that such an engine does not have to be an internal combustion one, as electric motors can also be used.[28]

The term 'mechanical vehicle' covers a wide range of vehicles. In case law, mechanical vehicles include vehicles equipped with an engine propelling them (automobiles, agricultural machinery, motorcycles, railway locomotives, aircraft, helicopters, watercraft, and others), as well as rail vehicles powered by electric traction (trams and trolleybuses). Other, non-mechanical, vehicles include horse drawn carriages, bicycles, sailing vessels, and gliders.[29] A moped designed for road travel solely with the use of an engine is a mechanical vehicle within the meaning of the Criminal Code and the Misdemeanour Code regardless of its technical parameters.[30] A problematic issue is raised, *inter alia*, in the case of the status of an electric scooter, defined as an electrically powered, two-axle vehicle with a handlebar, without a seat or pedals, designed to be ridden by a rider (Article 2(47b) RTL). Thus, an electric scooter is not a motor vehicle. However, there is no legal definition based on criminal law statutes indicating whether an electric scooter is a mechanical vehicle. It is rightly pointed out in the literature that an electric scooter becomes a mechanical vehicle when it is not propelled by the muscular power of the person riding the vehicle, but solely by the power of the electric drive. The determination will be based on the speed of the vehicle, including the exclusion of the possibility that the speed resulted from the muscular power of the driver or movement on a slope.[31]

As has been rightly noted in the doctrine, the manner in which the subjective scope of the directive in Article 38 § 2 MC is defined does not entirely align with the subjective scope of the offences listed therein. The enumerated classifications of prohibited acts make use of the concepts of 'driver', 'traffic participant or another person on a public road, in a residential area or a traffic zone', and even the impersonal term 'who'. Article 38 § 2 MC, however, refers exclusively to a 'driver

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[27] See the Supreme Court judgment of 11 February 2021, II KK 227/19, LEX No. 3187491; E. Kunze, 'Pojęcie pojazdu mechanicznego w polskim prawie karnym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1978, No. 2, pp. 38 et seq.

[28] M. Leciak, in: Daniluk P. (ed.), *Kodeks wykroczeń…*, op. cit., Warszawa, 2016, pp. 600–601.

[29] Thus, the Supreme Court judgment of 25 October 2007, III KK 270/07, *OSNwSK*, 2007, No. 1, item 2320.

[30] The Supreme Court (7) resolution of 12 May 1993, I KZP 9/93, *OSNKW*, 1993, No. 5–6, item 27.

[31] This view was expressed on the basis of the typifying provisions of Chapter XXI of the Criminal Code; thus P. Zakrzewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 920. A different view was expressed by the Supreme Court, which assumed that 'an electric scooter equipped with a motor with parameters similar to the power of a motor of an electrically assisted bicycle, which retains all the normal construction characteristics enabling its normal operation as a scooter, i.e. movement by pushing with the leg, is not a mechanical vehicle within the meaning of the provisions of the Criminal Code'; see the Supreme Court judgment of 22 February 2023, III KK 13/22, *OSNKW*, 2023, No. 11–12, item 49, p. 25.

of a mechanical vehicle',[32] which limits the scope of application of the increased amount of a fine.

The term 'driver' is legally defined in Article 2(20) RTL, according to which a driver means a person who drives a vehicle or a combination of vehicles, as well as a person who leads a column of pedestrians, rides on horseback, or drives animals individually or in droves. As indicated in the literature, this definition emphasises actual activities, and not meeting the requirements for their performance. A driver is a natural person who influences the movement and manoeuvres of the persons, animals or devices specified in the provision.[33] Pursuant to the provisions of the Misdemeanour Code, the functional feature of 'driving a vehicle' occurs rarely, as in Article 86a MC ('Who, driving a bicycle, electric scooter or personal transport device') and in Article 97a MC ('and also a driver of a vehicle who violated the prohibition'). In other cases, in which the legislator refers to activities related to setting the direction and speed of vehicles, the Misdemeanour Code uses the verb 'to drive'.

The feature has been extensively explained in criminal law doctrine.[34] The verb 'to drive' [in Polish: *kierować*], in a dictionary definition means 'to lead or send someone or something somewhere' or 'to regulate the action or movement of something with the use of some device' or 'to give a vehicle a specific direction'.[35] In spite of this, it is assumed in criminal law literature and case law that driving a vehicle should not be equated with operating it. It is pointed out that the semantic scope of the term 'operates' is broader, because it does not only encompass the driver's conduct, the primary activity within the vehicle's driving team, but also activities of some other participants of the driving team.[36] Operating a vehicle means setting it in motion, steering it, setting its speed and braking in a manner consistent with the vehicle's design.[37] Driving should be understood as the act of setting the direction and pace of travel with the use of the appropriate power source for the vehicle.

In addition, for the application of the analysed extraordinary aggravation of a fine, there must be individual identity of the act committed by a driver of a mechanical vehicle with the petty offence for which he was previously punished.[38] The use of the phrase 'commits the same petty offence' should be considered inadequate. In the case of recurrence, it is not the same, but a similar or identical petty offence.[39]

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[32] K. Łucarz, 'Remarks on the Tightening of Liability for Certain Traffic Offences', *Ius Novum*, 2024, No. 2, p. 63.

[33] R.A. Stefański, *Prawo o ruchu drogowym. Komentarz*, Warszawa, 2024, p. 76.

[34] See R.A. Stefański, *Wykroczenia drogowe. Komentarz*, Kraków, 2005, pp. 237 et seq.

[35] E. Sobol (ed.), *Nowy słownik języka polskiego PWN*, Warszawa, 2002, p. 319.

[36] K. Buchała, 'Glosa do wyroku SN z 13 lutego 1969 r., V KRN 9/69', *Państwo i Prawo*, 1970, No. 5, pp. 832–833.

[37] The judgment of the District Court in Kielce of 10 December 2013, IX Ka 1523/13, LEX No. 1717640.

[38] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń…*, op. cit., Article 38 MC, thesis 4.

[39] Rightly, K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 64.

TIME REQUIREMENT FOR A SUBSEQUENT OFFENCE

The regulation provided for in Article 38 § 1 MC may only apply to a perpetrator who, having been punished twice for similar intentional offences, commits a third similar offence within two years of the last punishment. However, it is not clear at what point in time this punishment should be measured, i.e. whether the term 'punishment' should be understood as the moment of issuance of a conviction sentence or a fine, the date on which these became final and binding, or perhaps the execution of the imposed penalty. The doubts are even more justified if one takes into account the wording of the added Article 38 § 2 MC. The regulation may be applicable to a perpetrator driving a mechanical vehicle who commits a second petty offence within two years of the last final and binding punishment. Therefore, within the scope of the basis provided for in Article 38 § 2 MC, there is no doubt that the time of committing the second offence is linked to the time of the previous penalty for the first offence measured from the date the conviction or penalty notice became final and binding.

In turn, divergent views are expressed regarding Article 38 § 1 MC. According to the first of them, which relies on teleological interpretation, since Article 38 MC applies to a perpetrator who repeatedly breaks the law and has already been subjected to the actual impact of a penalty, punishment should be understood as the execution of all or part of the previously imposed penalty. This refers to the last penalty, i.e. the one closest to the perpetrator's repeated breach of the law.[40] A different view links the time of the third petty offence commission to the time of the last former penalty for the petty offence measured from the date the conviction became final and binding.[41] Also according to the Supreme Court:

> 'Article 38 MC, which allows for the imposition of a custodial penalty for a petty offence that does not carry such a penalty under the provision penalising the given conduct, requires that the accused be punished at least twice for similar offences and commit the current offence within two years of the last punishment. The penalties must be final and binding, because only then can they be considered legally punishing the given person, and, as final convictions, they should be issued before the person commits another similar petty offence'.[42]

Before the introduction of § 2 to Article 38 MC, the lack of the indication of the final and binding status of the punishment as a condition for the imposition of a custodial penalty was not so flagrant. *De lege lata*, the question arises about the validity and purpose of such differentiation of the grounds for recidivism. Although

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[40] M. Budyn-Kulik, in: Mozgawa M. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 6.

[41] T. Grzegorczyk, in: Grzegorczyk T. (ed.), *Kodeks wykroczeń. Komentarz*, LEX, 2013, Article 38 MC, thesis 2; similarly P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, thesis 5; I. Kosierb, in: Lachowski J. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 5.

[42] The Supreme Court judgment of 8 November 2007, II KK 247/07, LEX No. 340549; the Supreme Court judgment of 22 February 2023, I KK 399/22, LEX No. 3555279.

the literal interpretation of Article 38 § 1 MC may suggest that it concerns any punishment, the functional, constitutional and systemic arguments support the two-year period being measured from the final and binding status of the penalty in the same way as in the case of § 2. To maintain the consistency of the entire Article 38 MC, the same moment should also be adopted in § 1 as the starting point for the limitation period for recidivism. Differentiating this requirement and adopting the requirement for finality only for the so-called road traffic recidivism, but not for the aggravated penalty provided for in § 1, would be systematically inconsistent and grossly unfair.

ISSUE OF STATUTORY PENALTY

The extraordinary aggravation of punishment provided for in Article 38 § 1 MC applies to prohibited acts punishable by a less severe penalty than detention, i.e. the limitation of liberty, a fine or a caution. The use of the phrase 'even if', as is rightly pointed out in the doctrine, means that the measure regulated therein also applies to prohibited acts carrying the penalty of detention for up to 14 days.[43] In such cases, however, one can speak of an extraordinary aggravation of punishment only when the detention penalty is adjudicated for a longer period than that provided for in the violated provision, i.e. when the provision does not allow for such a penalty of up to 30 days, but for a shorter period (e.g. Article 52, Article 96a § 2 MC).[44]

The regulation provided for in Article 38 § 2 MC applies to acts carrying a simple penalty of a fine, as well as acts carrying an alternative sanction.

LEGAL CONSEQUENCES OF MEETING THE CONDITIONS UNDER ARTICLE 38 MC

Meeting the conditions laid down in Article 38 § 1 MC creates the possibility of extraordinary aggravation of punishment by adjudicating a detention penalty, even if the misdemeanour carried a less severe punishment.[45] The court may impose a detention penalty in accordance with the rules laid down in Article 19 MC (up to 30 days), both when the given misdemeanour does not carry a detention penalty at all, as well as when this penalty is provided for, but for a shorter period, e.g. 14 days. The provision of Article 38 § 1 MC, if the reasons indicated therein actually exist, does not oblige the court to impose the detention penalty on the accused.

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[43] P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38, thesis 6; W. Radecki, in: Bojarski M., Radecki W., *Kodeks wykroczeń. Komentarz*, Legalis, 2019, Article 38, thesis 2.

[44] T. Grzegorczyk, in: Grzegorczyk T. (ed.), *Kodeks wykroczeń*…, op. cit., Article 38 MC, thesis 3.

[45] The Supreme Court judgment of 18 May 2005, II KK 118/05, *OSNwSK*, 2005, No. 1, item 978.

The use of the word 'may' makes the directive of the provision optional. The court must each time decide, taking into account the evidence collected, the purposes of the penalty, and the sentencing guidelines, whether to punish the accused with a detention penalty pursuant to Article 38 § 1 MC or to impose a penalty based on the sanction for the breached provision if it is deemed a sufficient response to the misdemeanour committed.[46]

Meeting the criteria for the so-called road traffic recidivism regulated in Article 38 § 2 MC obliges the court to adjudicate a fine of no less than twice the minimum statutory penalty. It is rightly pointed out that in the case of acts carrying only a fine, the analysed basis for extraordinary aggravation of the penalty results in the imposition of a fine higher than the minimum statutory penalty limit. In turn, in the case of acts carrying an alternative penalty in which a fine is provided for, the analysed basis for the extraordinary aggravation of the penalty results in the imposition of a fine higher than the minimum statutory penalty limit only if the adjudicating body deems it purposeful to impose such a penalty.[47]

It is rightly noted in the literature that there is an automatic mechanism of doubling the minimum limit of statutory punishment that is similar to the solutions for recidivism laid down in the Criminal Code of 1969, which have been widely criticised in the literature. It is also argued that the adopted solution violates the principle of equal treatment of repeated perpetrators of petty offences. Unlike under Article 38 § 2 MC, pursuant to Article 38 § 1 MC, the imposition of a detention penalty on the perpetrator, despite meeting the criteria laid down in the provision, is left to the court's discretion. Consideration of the symmetry of legal solutions would also require, in this case, abandoning the mandatory application of the extraordinary aggravation of the fine.[48]

PROCEDURAL ISSUES

The circumstance of committing a petty offence meeting the criteria of recidivism referred to in Article 38 MC should each time be reflected in the grounds for conviction for a petty offence. However, in the grounds for a given penalty, Article 38 § 1 MC or Article 38 § 2 MC should be referred to if the court actually applies the extraordinary aggravation of punishment provided for in the aforementioned provisions.[49] If the criteria for recidivism under Article 38 § 1 MC are met, when adjudicating a detention penalty, the court must cite this provision also in the grounds for the

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[46] Thus, rightly, the Supreme Court in judgment of 13 September 2017, IV KK 55/17, *OSNKW*, 2018, No. 2, item 12.

[47] See P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Warszawa, 2023, Article 38.

[48] Thus, rightly, K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 63.

[49] Much the same as pursuant to Article 64 PC; see e.g. the Supreme Court judgment of 24 August 2000, IV KKN 325/00, LEX No. 51397; the Supreme Court judgment of 11 October 2011, V KK 234/11, LEX No. 1044075; the Supreme Court judgment of 16 December 2014, V KK 305/14, LEX No. 1583245.

penalty, because a detention penalty is not provided for in the statutory punishment under the special part of the Misdemeanour Code or a provision of the non-statutory misdemeanour law, or a detention penalty is provided for but for a shorter period than the one adjudicated. Similarly, in the case the criteria laid down in Article 38 § 2 MC are met, when imposing a fine, the court must cite this provision in the grounds for adjudicating this penalty.[50]

The order issuance procedure is essentially the basic mode of adjudicating in misdemeanour cases. Therefore, it is important to determine whether Article 38 MC is applicable in such proceedings. In accordance with Article 93 § 1 MPC, the court may issue an order-judgment at a sitting without the parties' participation in cases concerning a misdemeanour in which a reprimand, a fine, or limitation of liberty is a sufficient penalty. In order issuance proceedings, it is absolutely inadmissible to adjudicate a detention penalty, even for a minimal period. Adjudicating such a penalty in the order issuance proceeding would constitute a flagrant breach of Article 93 § 1 MPC, which would clearly have a significant impact on the content of the issued judgment. If the court is convinced that it is purposeful to impose such a penalty for the misdemeanour committed, it should refrain from adjudicating in the order issuance mode and refer the case for hearing under the ordinary procedure.[51] The contempt of Article 93 § 1 MPC will also occur in a situation where the court, in the case of a correctly described recidivism in the motion for punishment, applies the aggravated penalty under Article 38 § 1 MC and imposes a detention penalty on the accused.

A negative condition for the application of an order issuance proceeding also occurs when the court assumes that the perpetrator's act meets the criteria of recidivism under Article 38 MC in a situation where such a finding was not included in the motion for punishment, regardless of whether this is reflected solely in the adopted legal classification of the penalty or also in the description of the act, which should always include such a finding. Failure to refer such a case for hearing in the ordinary mode will always result in the violation of the provision of Article 93 § 1 MPC.[52]

However, the application of the directive under Article 38 § 2 MC in the order issuance proceeding should be deemed admissible, but only if the findings regarding the criteria have been taken into account in the motion for punishment and do not raise any doubts.

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[50] Thus, rightly, P. Gensikowski, in: Daniluk P. (ed.), *Kodeks wykroczeń*…, op. cit., Legalis, 2023, Article 38 MC, margin number 16.

[51] See the Supreme Court judgments of: 8 May 2013, II KK 338/12, Legalis; 1 October 2014, II KK 39/14, Legalis; 24 August 2016, IV KK 263/16, Legalis; 28 November 2013, IV KK 367/13, Legalis; 24 August 2016, IV KK 263/16, Legalis; 23 November 2016, V KK 328/16, Legalis; 12 February 2019, II KK 191/18, Legalis; 14 February 2019, IV KK 364/18, Legalis; of 16 June 2020, III KK 9/20, Legalis; 31 August 2021, V KK 286/21, Legalis; 13 December 2021, II KK 567/21, Legalis; 25 January 2023, II KK 558/22, Legalis; 19 October 2023; V KK 420/23, Legalis; 8 November 2023, V KK 427/23, Legalis.

[52] Thus, the Supreme Court in its judgment of 13 September 2017, IV KK 55/17, Legalis No. 1704903.

PRACTICAL ASPECTS

Some practical difficulties in the application of the regulation provided for in Article 38 MC are recognised in the doctrine due to the lack of central registration of persons punished for petty offences. Under current law, the National Criminal Register retains data on persons sentenced to detention for the commission of petty offences.[53] A proposal has even been made to repeal the regulation provided for in Article 38 MC, as it constitutes an unnecessary imitation of a measure of the Criminal Code, which fails to recognise that petty offences are less harmful acts and are not classified as crimes. Moreover, due to the lack of central registration of persons punished for petty offences, the application of Article 38 MC may be haphazard, which in turn violates the principle of equality before the law.[54]

To improve the application of the regulation provided for in Article 38 MC, it is important to establish a register of misdemeanours as a collection of data within the National Police Information System (*Krajowy System Informacyjny Policji* – KSIP). It contains information about perpetrators of petty offences against property referred to in Article 119 § 1, Article 120 § 1, Article 122 §§ 1 and 2 and Article 124 § 1 MC, persons suspected of committing them, and those charged and punished for these misdemeanours. The information is collected and processed in an electronic database of perpetrators of misdemeanours, called the 'misdemeanour register', maintained in the telecommunications system by the Chief Commander of the Police.[55] In addition, for road traffic petty offences, there is a special register of drivers breaching traffic regulations, maintained in electronic form in the Police telecommunications systems. The data contained in the register may include important information on the violation of traffic regulations and the total number of penalty points assigned to the drivers, as well as the violations that were not assigned penalty points. It is intended to prevent situations where the perpetrators of petty offences are subject to inappropriate punishment, resulting from the court's biased judgment regarding their previous conduct constituting a violation of road safety regulations. The justification for the Bill of 23 March 2017 amending the Act: the Criminal Code and some other acts, which introduced this requirement, states that:

> 'Offences against road traffic safety constitute specific prohibited acts that are not usually committed by perpetrators of typical criminal acts, e.g. theft, robbery, assault etc. Therefore, it is very common for these acts to be committed by persons who are not listed in the National Criminal Register and have a good reputation in their place of residence, but who have already committed numerous serious road traffic misdemeanours, e.g. driving under the influence of alcohol, failing to stop for a roadside check or speeding, which resulted in confiscation of a driving licence and the withdrawal of the right to drive vehicles. Adjudicating in a criminal case, the court is usually unaware of these circumstances because,

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[53] See Article 1(2)(7) of the Act on the National Criminal Register, consolidated text, Journal of Laws of 2024, item 276.

[54] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa, 2002, p. 114.

[55] See Article 20f of the Act of 6 April 1990 on the Police, consolidated text, Journal of Laws of 2024, item 145, as amended.

in accordance with the data obtained from the National Criminal Register, the perpetrator has no criminal record'.[56]

In spite of the above, the registration of penalties for misdemeanours is incomplete. It is rightly pointed out in the literature that for the proper application of Article 38 MC, it is desirable to expand the catalogue of data related to petty offences retained in the National Criminal Register to include information on all perpetrators legally punished, regardless of the type of penalty imposed or the procedure applied. It is all the more important because the regulations under Article 38 MC are general in nature.[57] While fully approving of this stance, one may also propose the introduction of an equivalent provision to Article 213 § 1b of the Code of Criminal Procedure into the Misdemeanour Code.[58] The above-mentioned provision establishes an obligation to collect information from the central register of drivers violating road traffic regulations maintained by the Police, concerning the accused in cases of crimes against safety (Chapter XXI of the Penal Code) committed in land traffic.

CONCLUSION

The concept of petty offence recidivism, regulated in Article 38 MC, constitutes an important tool to punish perpetrators more severely if they commit misdemeanours repeatedly, despite having been previously punished. The measure serves a preventive function and, to some extent, allows for individualisation of a penal response in situations where standard measures prove to be ineffective. The so-called road traffic recidivism, covering situations of repeated traffic offences, e.g. driving a vehicle under the influence of alcohol (Article 87 § 1 MC), constitutes a particularly important area of practical application of Article 38 MC.

However, the current wording of Article 38 causes certain interpretative and practical difficulties. It seems reasonable to consider *de lege ferenda* changes – in particular, the introduction of organisational solutions (e.g. an appropriate register of petty offences), as well as clarification of the criteria for applying the classification of petty offence recidivism. To maintain the consistency of the discussed regulation, Article 38 § 1 MC should explicitly state that the two-year statute of limitation for recidivism runs from the date of 'final and binding punishment', and not, as currently, from 'punishment'. The current differentiation in this requirement is incomprehensible and unjustified. The application of the so-called road traffic recidivism to unintended acts also raises doubts. These are all the more justified because its adoption results in a mandatory increase in the fine, regardless of whether the perpetrator committed the misdemeanour intentionally or unintentionally. Considering the symmetry of legal solutions would also require that the mandatory application of extraordinary aggravation be abandoned in this case.

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[56] Justification for the governmental Bill amending Act: the Criminal Code and Certain Other Acts, 7th term of the Sejm (print no. 1231).

[57] P. Gensikowski, in: Daniluk P. (ed.), *Reforma prawa wykroczeń. Tom 1*, Warszawa, 2019.

[58] K. Łucarz, 'Remarks on the Tightening…', op. cit., p. 64.

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Cite as:

Kosonoga-Zygmunt J. (2025), *Petty Offence Recidivism in the Light of Article 38 of the Misdemeanour Code*, Ius Novum (Vol. 19) 3, 62–76. DOI 10.2478/in-2025-0025