

INVOICE-RELATED CRIMES: THEIR SIGNIFICANCE, LEGAL CLASSIFICATION AND PLACE IN THE SYSTEM OF POLISH CRIMINAL LAW

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The need for counteracting a large scale and highly detrimental phenomenon of obtaining undue VAT return and other types of tax fraud in relation to VAT was the reason for criminalising some kinds of blameworthy behaviour and classifying them as separate crimes in the Criminal Code of 1997, i.e. in the field of common criminal law. Placing these new invoice- and VAT-related crimes in the Criminal Code (CC) instead of the Fiscal Penal Code of 1999 (FPC) might puzzle and raise doubts. The justification for the bill of 10 February 2017 that entered into force on 1 March 2017,¹ which introduced new crimes and felonies, the so-called invoice (VAT)-related ones, explains that the phenomenon of VAT fraud in Poland has become a serious economic and social problem resulting in losses to the state budget accounting for dozens of billions of zlotys annually. The scale of this fraud is growing every year and in 2013 fiscal control authorities revealed PLN 19.7 billion worth of false invoices, in 2014 – PLN 33.7 billion, and in 2015 – as much as PLN 81.9 billion². The justification for the Bill introducing those blameworthy offences connected with the issue of fictitious or unreliable VAT invoices to the Criminal Code suggests that the large-scale of the phenomenon posing a threat to the state budget and the involvement of organised criminal groups in that activity require the use of legal penal instruments of common criminal law. According to the legislator, fiscal penal law applies too lenient penalties, including deprivation of liberty from five days to

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¹ Amendment to the Act: Criminal Code and some other acts of 10 February 2017, Journal of Laws [Dz.U.] of 2017, item 244.

² See, Justification for the Bill amending the Act: Criminal Code and some other acts of 10 February 2017, Sejm paper VIII. 888, p. 3.

five years, and in case of extraordinarily strict penalty – up to 10 years, which is insufficient because of the substantial loss to the budget revenues. Moreover, courts' adjudication practice in fiscal penal cases is too liberal because a penalty of absolute deprivation of liberty is imposed too rarely. The introduction of new types of crimes, referred to as invoice ones, to CC and stipulating adequately severe penalties are to "make this type of behaviour aimed at obtaining financial benefits at the State budget's expense unprofitable, and adequately severe punishment act as a deterrent against potential perpetrators. For it is obvious that people committing fiscal crimes to a greater extent than other criminals plan their activities and make a specific profit and loss analysis with regard to their commission."³

The above-mentioned *ratio legis* concerning the including of the new types of invoice (VAT)-related crimes in the Criminal Code instead of the Fiscal Penal Code does not eliminate doubts about some of the reasons. Firstly, as it is indicated in the justification for the Act of 10 February 2017, which introduced invoice-related crimes to CC, it maintains the possibility of "classifying behaviour of lesser social harmfulness of an act (especially where it results in smaller loss to the budgetary revenues) under the provisions of the Fiscal Penal Code, especially its Article 62 §1 and §2". It may also concern a possibility of legal classification of concurrence under CC and FPC in connection with the same prohibited act, i.e. the application of the so-called perfect concurrence of a common crime and a fiscal crime in accordance with Article 8 §1 FPC.⁴ This means a conscious and fully intended division of socially harmful acts posing threats to the State finance into common crimes and fiscal crimes, and making the perpetrators of those prohibited acts subject to liability in accordance with two different criminal liability regimes with a possibility (and more often necessity) of using both of them together.

It is purposeful here to present blameworthy behaviour connected with VAT invoices and VAT, which were included in FPC and recently also in CC, and to indicate the object of protection, which these types of crime harm.

The types of blameworthy behaviour in relation to VAT invoices are penalised under Article 62 FPC and those connected with obtaining undue VAT return under Article 76 FPC. The objects of protection against these fiscal crimes are tax liabilities and their proper execution.

Tax reliability of invoices or bills documenting economic operations is an individual object of protection based on Article 62 FPC, including Article 62 §2 and §2a (as well as Article 62 §5 FPC laying down fiscal misdemeanours), which are especially interesting for us because they are important from the point of view of tax liabilities, including VAT.⁵ An act penalised under Article 62 §2 FPC consists in the unreliable (i.e. not in conformity with the actual state; compare Article 53 §22 FPC) issue of an invoice or a bill, or using such a false document, which carries,

³ *Ibid.*

⁴ *Ibid.*, p. 4.

⁵ Compare, I. Zgoliński, *Wystawienie lub posługiwanie się nierzetelnym dokumentem podatkowym* [Issue or use of a false fiscal document], *Prokuratura i Prawo* No. 3, Warsaw 2012, pp. 163 and 167; and L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], C.H. Beck, Warsaw 2016, pp. 314–315.

after the amendment of 1 December 2016,⁶ a penalty of a fine of 720 daily rates or a penalty of deprivation of liberty for at least one year (up to five years), or both penalties together. In case of a similar act, where an amount on an invoice is of small value, the sanction is more lenient: 720 daily rates or a penalty of deprivation of liberty (from five days to five years), or both penalties together (added Article 62 §2a FPC). Issuing a false invoice or a bill is an intellectual forgery consisting in the development of a document that is not in conformity with the truth concerning important data included in it, i.e. first of all the issuer, the type and volume of an economic operation and its value and due tax. A small value of tax indicated on an invoice or invoices typical of a privileged type of a crime under Article 62 §2a FPC accounts for 200-fold value of a minimum salary at the time of commission of the prohibited act (see Article 53 §14 FPC, which means that in case of acts committed in 2017, it will be up to PLN 400,000). An act will be classified as a basic type of this crime under Article 62 §2 FPC when the tax amount indicated on an invoice or a sum of amounts indicated on invoices exceeds that small value (i.e. PLN 400,000), however, the maximum limit is not laid down, which means that it may be substantial (i.e. exceed 500-fold value of a minimum salary, which in 2017 is an amount exceeding PLN 1,000,000) or even great (i.e. exceed 1,000-fold value of a minimum salary, which means PLN 2,000,000 in 2017).

On the other hand, individual objects of protection under Article 76 FPC against their unauthorised exposure to reduction or actual reduction include financial resources of the given public entities resulting from the due taxes settled. An act prohibited under Article 76 FPC consists in deceiving a given body by providing data that are inconsistent with the real state of facts (i.e. unreliable, untrue, false) or concealing a real state and constituting an exposure to a risk of undue return of tax, especially VAT, or counting it as an appropriation for a tax debt or current or future tax liabilities. A basic type of this crime carries a penalty of a fine of up to 720 daily rates or deprivation of liberty (from five days to five years) or both penalties together. Article 76 §2 FPC envisages a privileged form of this crime carrying a fine of 720 daily rates because of a small value (i.e. not exceeding a 200-fold minimum salary – see Article 53 §14 FPC, i.e. PLN 400,000) exposed to undue return. If the amount of tax subject to undue return does not exceed the statutory threshold (i.e. a fivefold minimum salary – see Article 53 §6 in connection with §3 FPC), an act is classified as a fiscal misdemeanour carrying a penalty of a fine of 1/10 to 20-fold minimum salary (see Article 76 §3 and Article 47 §1 and Article 48 §1 FPC). Fiscal crimes under Article 76 §1 and §2 FPC (like misdemeanours under Article 76 §3 FPC) are intentional acts of material nature, which result in posing a risk of an undue return of tax or counting it as an appropriation for tax debt or current or future tax liabilities, i.e. in causing actual risk of such a return or appropriation, which means that the occurrence of a financial loss was highly probable although it did not have to take place (compare Article 53 §28 in connection with §29 FPC). Anybody, not only a person having a status of a tax payer, can be a perpetrator of acts under Article 76 FPC if she/he behaves in the blameworthy way described. This means

⁶ Journal of Laws [Dz.U.] of 2016, item 2024.

that, based on this provision, a person involved in business operations and obliged to pay taxes, including e.g. VAT, as well as someone who is not involved in business but issues false VAT invoices and based on them applies for an undue return of tax may be liable.⁷ Acts under Article 76 FPC are committed, as T. Oczkowski rightly notices, “at the moment of submission of an application for a return based on false data to a competent tax authority, which poses a real risk of undue return of VAT.”⁸

The invoice crimes recently introduced to CC were incorporated in Chapter XXXIV listing crimes against reliability of documents. This means that reliability of documents that can be found or are in public use is the object of protection against all the crimes listed therein. In accordance with the statutory definition laid down in Article 115 §1a CC, an invoice is a document defined in Article 2(31) of the Value Added Tax Act of 11 March 2004,⁹ i.e. a document in a paper or electronic form containing data required by the Act and provisions that were passed based on it. In case of invoice-related crimes, a document in the form of an invoice is an object of a prohibited activity. In case of a crime under Article 270a CC, the activity is a form of material forgery jeopardising the authenticity of the document that a given entity is not entitled to issue or it consists in the use of such a document. Thus, in case of this crime, authenticity and reliability of the content of an issued invoice are individual objects of protection. In case of the type of crime under Article 271a CC, an invoice or invoices are objects of prohibited activities, and intellectual forgeries consisting in issuing an invoice containing false content or using such an invoice or invoices are penalised acts. It is an individual crime (in the first of the listed forms) the perpetrator of which is a person entitled to issue invoices but an issued invoice contains false data. In case of a criminal act under Article 271a CC, reliability and trust in the content of the issued invoice is an individual object of protection. As far as both types of the above-mentioned crimes are concerned, the financial interest of the State related to the fact that in order to obtain due revenue in VAT and avoid losses to the State Treasury resulting from claiming undue return of VAT or other tax obligations is another object of protection, which was the main reason for establishing this new category of invoice-related crimes. Closer and further individual objects of protection against the crime under Article 271a CC and the fiscal crime under Article 62 §2 and §2a FPC are the same. Thus, a question arises why the type of crime under Article 271a CC was included in CC instead of FPC, while the latter code was created especially to protect interests and financial resources of the State (and units of territorial self-government and the European Union). What is the mutual relation between those two types of crimes: common and fiscal ones? What are the difference and the relation between the type of crime under Article 271a CC and the type of fiscal crime under Article 76 §1 and §2 FPC?

The new Article 270a added to CC lays down a common crime consisting in forging or altering an invoice in order to use it as an authentic one in the scope of

⁷ See, e.g. L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy...* [Fiscal Penal Code...], pp. 368–369.

⁸ T. Oczkowski, [in:] V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Prawo i postępowanie karne skarbowe* [Fiscal penal law and procedure], Wolters Kluwer, Warsaw 2013, p. 239.

⁹ Uniform text, Journal of Laws [Dz.U.] of 2016, item 710, as amended.

actual circumstances that may be important for the establishment of the amount of tax liability or its return or the return of another obligation of tax nature, or in using such an invoice as an authentic one. The act has the attributed status of a rather serious crime. It carries a penalty of imprisonment from six months to eight years (see §1 CC). If a perpetrator commits this act in connection with an invoice or invoices containing a total due amount the value of which is great (i.e. exceeds PLN 1,000,000 – Article 115 §6 CC), or makes this crime a permanent source of income, the act has a status of a felony carrying a penalty of deprivation of liberty for at least three years up to 15 years (see §2 CC). Article 270a §3 CC envisages also a privileged type of the crime of forging invoices laid down in §1 where it is an instance of lesser significance. It is a crime carrying a penalty of a fine (from 10 to 540 daily rates), limitation of liberty (from one month to two years) or deprivation of liberty (from one month to up to two years).

The added provision of Article 271a CC penalises the issue of an invoice or invoices where untruth is included with regard to actual circumstances that may be important for establishing the amount of tax liability or its return or a return of another obligation of tax nature if they contain a total amount of liability the value of which or total value is substantial (i.e. exceeding PLN 200,000 – see Article 115 §7 CC). Alternatively, the use of such an invoice or invoices is also penalised. The crime carries a penalty of deprivation of liberty for six months to eight years (§1 CC). If a perpetrator commits that act in connection with an invoice or invoices the value of which or total value is great or makes this crime a permanent source of income, the act is a felony that carries a penalty of deprivation of liberty for at least three years up to 15 years (§2 CC). In case of lesser significance, the perpetrator of the act under §1 CC commits a crime that carries a penalty of imprisonment from one month up to three years (§3 CC).

Article 277a CC defines a common classification of the most serious kind of both types of blameworthy behaviour that are defined in Article 270a §1 CC and Article 271a §1 CC where the object of crime is an invoice or invoices containing a tax amount the value of which or total value exceeds fivefold the amount specified as property of great value, i.e. exceeds PLN 5,000,000 (see Article 115 §6 CC). Acts of issuing such invoices have a status of an aggravated felony that carries a penalty of deprivation of liberty for at least five years up to 15 years or an alternative penalty of 25 years' imprisonment.

In all the recently classified types of invoice-related crimes and their different forms, the objects of crime are invoices and especially their content concerning actual circumstances that may be important for establishing the amount of tax liability or its return or a return of another obligation of tax nature. The significant actual circumstances laid down in Articles 270a, 271a and 277a CC are almost all data that every VAT invoice should contain. They are listed in Article 106e of the Value Added Tax Act, and especially include: the invoicing date, a successive invoice identification number, names of a taxpayer and a buyer of goods or services and their addresses, a taxpayer's and a buyer's tax identification numbers (NIP), the date of goods or services delivery or delivery conclusion and sometimes a payment receipt date, the name (type) of product or service, measurement and amount (number) of goods or

services or the scope of services provided, a product or service unit price without tax (unit net price), amounts of any discounts if applied to a unit net price, value of goods delivered or services provided before adding tax (transaction net value), a tax rate, the net sum of transaction value subdivided into each tax rate and tax exemption, tax amount subdivided into different tax rates, and the total amount of tax liability. In some cases laid down in the Act, an invoice should contain additional information that may be or is important for the establishment of tax liability or its return.

All invoice-related crimes introduced to CC are formal in nature. No effect is their statutory feature. The amounts of tax liability to be settled or returned are nominal values that have been indicated on forged or false invoices and which constitute criteria for classifying particular blameworthy acts as a basic type of crimes when the value is not great (Article 270a §1 and Article 271a §1 CC), as a qualified type of crimes when the value is great or a perpetrator makes this crime a permanent source of income (Article 270a §2 and Article 271 §2 CC) and an aggravated type of crimes when the value is fivefold higher than the one defined as property of great value (Article 277a in connection with Article 270a §1 or in connection with Article 271a §1 CC). Thus, all invoice-related crimes classified in CC belong to a type of crimes posing abstract threats to revenues and financial resources of the State. Their essence and social harmfulness consist in the fact that they are specific preparatory activities and, in case of using a forged or false invoice or invoices, they form a specific fraud attempt on the State revenues. Confronting them, especially with the type of the material crime under Article 76 §1 FPC, which penalises deception of an authority and posing a threat of, *inter alia*, an undue return of VAT, i.e. causing a particular risk of such a return when the return amount exceeds PLN 400,000 (compare Article 53 §28, §29 and §14 FPC), carrying an alternative-cumulative penalty of a fine of up to 720 daily rates, a penalty of deprivation of liberty (from five days to five years) and a possible adjudication of both penalties together, raises a question why, if such a real and highly probable threat does not exist and it concerns a nominal amount of PLN 200,000 expressed on an invoice, an envisaged sanction is much more severe, as it is a penalty of deprivation of liberty for six months to eight years (see Article 271a §1 CC). Confronting statutory descriptions of crimes under CC and under FPC with envisaged sanctions leads to a conclusion that in the process of criminalisation of invoice-related crimes a few rules are violated. Firstly, they were inadequately included in CC instead of FPC where Article 62 penalises blameworthy acts connected with invoices and bills, so qualified types of crimes could have been added there. Dividing crimes according to political and criminal criteria instead of factual ones makes the system of law inconsistent and unclear. Secondly, assessing criminal and legal aspects of invoice-related crimes, which is reflected in sanctions, the legislator failed to keep proportions between material (effective) crimes under Article 76 §1 and §2 FPC, posing a threat of the calculated tax undue return and formal (ineffective) crimes under CC carrying disproportionately severe penalties. Thirdly, making ineffective invoice-related crimes felonies and, in case of acts under Article 277a CC, aggravated felonies carrying a penalty of even 25-years' imprisonment, violated the axiology and coherence of

the criminal law system with respect to protection of particular legal interests. The level of protection of reliability of documents should not be the same as the level of protection against extermination of such most important interests as human life (Article 118 §1 and §2 CC) or other felonies against humanity (Article 118a CC), or even a single manslaughter (Article 148 §§1-3 CC) or such interests as peace (Article 117 §1 CC), independent State or the State territorial integrity (Article 127 CC). Presenting the necessity of deterring potential perpetrators in justification of purposefulness of classifying forging invoices or using them, or issuing or using false invoices as felonies and imposing very severe penalties for their commission¹⁰ does not take into consideration criminological findings, according to which it is not the severity of punishment but its inevitability that has a real preventive power. And this means that, first of all, the revenue system should be sealed and law enforcement agencies made more active in detecting crimes committed directly against the State finance. Apart from that, it is necessary to remember that the best way of fighting against crime is to use sanctions of the same nature so that crime commission of some kind is financially unprofitable. Thus, the adequate kinds of response to this crime are the penalty of a fine, limitation of liberty, forfeiture of objects, forfeiture of property even if it is obtained indirectly from crime, and penal measures banning a given activity such as: business prohibition, prohibition to exercise a profession or to occupy specified posts. It is also necessary to take into consideration that obligatory execution of financial liabilities is not very efficient. That is why, it is purposeful to use such measures which guarantee that perpetrators of crimes against the financial interests of the State will be subject to more lenient criminal liability and the State tax authorities will recover the lost revenues via their voluntary return. The Fiscal Penal Code envisages such measures and mechanisms. A possibility of adjudicating more severe penalties of deprivation of liberty will not deter criminals, especially members of organised criminal groups, from committing profitable crimes. Adjudication of absolute imprisonment penalties may only worsen the State finance because of very high costs of prison maintenance: PLN 3,150 per convict monthly.¹¹ Imprisonment sentences for criminals who do not pose any threat to the most precious and non-renewable interests such as human life and health or personal freedom or sexual rights do not pay from the point of view of the society or the State.

For an invoice-related crime, Article 277b CC envisages a possibility of adjudicating, apart from a penalty of deprivation of liberty, also a penalty of an extraordinarily high fine, i.e. higher than the basic one laid down in Article 33 §1 CC, namely accounting for up to 3,000 daily rates. This is a possibility of instituting a maximum fine of PLN 6,000,000 for a common crime (3,000 daily rates x PLN 2,000 – see Article 33 §3 CC). In comparison, a maximum fine imposed for most fiscal crimes, including invoice-related ones under Article 62 §2 FPC and for a crime of obtaining a return of VAT on false pretences under Article 76 §1 or §2

¹⁰ Justification for the Bill of 10 February 2017 amending the Act: Criminal Code and some other acts, Sejm paper VIII. 888, p. 3.

¹¹ See, data for January 2017 at: finanse.wp.pl/gid,18665993,kat,1033699,title,Ile-tak-naprawde-kosztuje-utrzymanie; accessed on 27 March 2017.

FPC, may reach PLN 19,200,000 (720 daily rates x 400 x PLN 66,666 – compare Article 23 §3 FPC). This means that fines envisaged in fiscal penal law are more likely to show that crimes against the interests and financial resources of the State are not profitable. Moreover, fines constitute revenue of the State Treasury. Failure to settle them does not pay either because then they are exchanged for deprivation of liberty (compare Article 46 of the Criminal Procedure Code in connection with Article 178 §1 FPC). This way and this mechanism of punishing perpetrators are much better and should not be substituted by penalties laid down in the Criminal Code for common crimes perpetrators.

Penalisation of invoice-related crimes in accordance with FPC instead of CC would not have required the development of further casuistic solutions with doubtful results laid down in Article 277c and Article 277d CC, concerning the penalty for perpetrators who decided to self-denounce or cooperate with law enforcement agencies in connection with the detection of an act committed and its perpetrator, because FPC has much better regulations to deal with such cases that constitute real, not illusory, encouragement to act in such a desirable way (see Articles 16 and 36 FPC). Also Article 66 CC regulating extraordinary mitigation of punishment envisages a special solution for the remorseful criminals. Therefore, it seems that there is no need to develop special regulations of extraordinary mitigation of punishment for perpetrators of invoice-related crimes if they deserve it. The introduction of only slightly different solutions and directives concerning extraordinary mitigation of punishment for perpetrators of particular types of crimes to the Special Part of the Criminal Code disturbs the established division of matters regulated in the Criminal Code into provisions and institutions of the General Part and the Special Part of the Criminal Code. Apart from useless casuistry, it introduces a certain normative chaos, which may mislead not only the addressees of legal norms but also professionals involved in their application. The originators and legislators' belief that locating special solutions allowing extraordinary mitigation of punishment directly next to the types of crimes they concern to a greater extent influences perpetrators' behaviour after their commission is based on an unconfirmed assumption that perpetrators of specific types of crimes, specifically those intended to obtain financial benefits at the State budget's expense, on their own, without the assistance of lawyers, analyse their legal situation in case of their crime detection, especially as they do this after the commission of a crime and before its detection.

The new Article 277c §1 CC regulates the specific active repentance after the commission of an invoice-related crime laid down in Article 270a §1 or §2 or in Article 271a §1 or §2 CC. As far as the required prerequisites for its expression are concerned, it is similar to fiscal active repentance under Article 16 FPC (see especially Article 16 §1 and §5(1) FPC). However, the legal consequences differ totally. Active repentance in fiscal law results in no penalty for a committed crime, and active repentance under Article 277c §1 CC results in obligatory extraordinary mitigation of punishment, provided a prosecutor files such a motion (i.e. extraordinary mitigation of punishment is relatively obligatory depending on a prosecutor's discrete decision). The condition for more lenient treatment of a perpetrator of the discussed type of crime is self-denunciation after its commission, i.e. reporting it by

the perpetrator before an entitled fiscal law enforcement body detects it. Moreover, the perpetrator is obliged to reveal all significant circumstances of this crime and indicate all acts in connection with the invoice-related crime and their perpetrators. It is naive to assume that the perpetrator of an invoice-related crime is going to self-denounce if she/he has no guarantee of impunity (as in the case of active repentance in fiscal penal law – see Article 16 §1 FPC) and just the opposite, has a guarantee she/he will be convicted for a highly penalised crime with a potential possibility of extraordinary mitigation of punishment, which she/he might avoid not revealing that crime.

Another illusory incentive to self-denouncement in the form of a further reaching possibility of mitigation of punishment for a perpetrator of an invoice-related crime is laid down in Article 277c §2 CC. It stipulates a facultative possibility that a court renounces inflicting a penalty if a prosecutor files such a motion. This possibility concerns prosecuting in any invoice-related crime and is laid down in Article 270a or Article 271a CC. However, it is not applicable in case of the most aggravated invoice-related felony under Article 277a CC (i.e. where the amount of tax liability resulting from false invoices exceeds fivefold the value specified as property of great value). The condition for a prosecutor's motion and a court's decision to renounce inflicting a penalty is, firstly, self-denunciation and revealing all significant circumstances of the crime before a law enforcement body detects it, as well as the indication of acts connected with that crime and their perpetrators, and secondly, a return of all or a significant part of financial benefits obtained from that crime.

Meeting the above-mentioned conditions laid down in Article 277c §2 CC by a perpetrator of the most aggravated invoice-related felony under Article 277a CC constitutes grounds for possible application of extraordinary mitigation of punishment by a court (see Article 277c §3 CC).

Article 277d CC extends the possibility of inflicting a penalty with the application of its extraordinary mitigation to perpetrators of invoice-related crimes who did not self-denounce after their commission, but when criminal proceedings were initiated they decided to cooperate with law enforcement bodies and revealed all circumstances of their crimes that were not known to the law enforcement bodies and indicated other acts in connection with crimes committed and their perpetrators. In case of the most serious invoice-related felonies laid down in Article 277a CC, the application of extraordinary mitigation of punishment also requires an additional return of all or at least a substantial part of financial benefits obtained from the committed crime. It must be emphasised that this is the only one of the four recently introduced criminal law regulations laid down in Article 277c §1, §2 and §3 and Article 277 CC which may meet the expected criminal policy function of assisting in detection of invoice-related crimes, mechanisms and their perpetrators.

It must be noticed, however, that the regulation of Article 277d CC is quite similar to the norm of a general nature laid down in Article 60 §4 CC, which is universally applicable, regardless of the type of a crime for which a perpetrator is prosecuted, and it should be used or other similar solutions with possible modifications should be placed next to it where purposeful. Dispensing institutions with similar aims and functions is not a good solution.

What still needs closer consideration is the issue of proportionality and coherence of the legal assessment of acts of issuing an invoice or invoices in a fraudulent way or using such a document, which matches the statutory features of a fiscal crime (and sometimes a fiscal misdemeanour) laid down in Article 62 §2 or §2a FPC, and at the same time of a common crime under Article 271a CC or Article 277a CC. Where the amount of tax on an invoice or the sum of tax amounts on invoices:

- 1) is of small value, i.e. in 2017 does not exceed PLN 400,000 (compare Article 53 §14 FPC), the prohibited act matches the features of a fiscal crime laid down in Article 62 §2a FPC and carries a penalty of a fine of up to 720 daily rates or a penalty of deprivation of liberty (from five days to five years) or both penalties together;
- 2) exceeds the defined small value, i.e. in 2017 exceeds the amount of PLN 400,000 (compare Article 53 §14 FPC), the prohibited act matches the features of a fiscal crime laid down in Article 62 §2 FPC and carries a penalty of a fine of up to 720 daily rates, a penalty of deprivation of liberty for at least one year up to five years, or both penalties together;
- 3) is substantial, i.e. exceeds PLN 200,000 (see Article 115 §7 in connection with §5 CC), the act matches the features of a common crime laid down in Article 271a §1 CC and carries a penalty of deprivation of liberty from six months to eight years;
- 4) is great, i.e. exceeds PLN 1,000,000 (see Article 115 §6 CC) or a perpetrator makes it a source of permanent income, the act matches the features of a common crime laid down in Article 271a §2 CC and carries a penalty of deprivation of liberty for at least three years up to 15 years;
- 5) is bigger than fivefold amount of property of great value, i.e. exceeds the value of PLN 5,000,000, the act matches the features of a common crime laid down in Article 277a CC and carries a penalty of deprivation of liberty for at least five years or deprivation of liberty for 25 years.

The provision of Article 271a §3 CC also envisages the instance of lesser significance in relation to an invoice-related crime under Article 271a §1 CC, which carries a penalty of deprivation of liberty from one month up to three years. Under this provision, invoice-related crimes can be aggravated, as a rule but not only, when they consist in issuing fraudulent invoices or their use when the total tax liability resulting from them does not constitute a substantial value, i.e. does not exceed PLN 200,000.

The above presentation clearly shows that the legal assessment demonstrated in the sanctions is really differentiated and not always coherent, and sometimes even disproportionately severe.

The above closer presentation of characteristics of invoice-related fiscal misdemeanours and invoice-related common crimes evoke consideration of the issue of legal classification of particular blameworthy acts consisting in issuing false invoices or using them. Having in mind the institution of a perfect concurrence of crimes (or misdemeanours) that are subject to two different areas of law, fiscal penal law and common criminal law, in accordance with Article 8 FPC, a conclusion must be drawn that there may be a perfect concurrence between the following fiscal misdemeanours or fiscal crimes and common crimes:

- a misdemeanour under Article 62 §5 FPC constituting an instance of lesser significance where, inter alia, the amount of tax resulting from an invoice or invoices or the sum of amounts does not exceed PLN 10,000 in 2017 (see Article 53 §8, §6 and §4 FPC) and a crime under Article 271a §3 CC constituting an instance of lesser significance, which can be (with some simplification) such one where the amount of tax resulting from an invoice or the sum of amounts does not exceed PLN 200,000); or
- a crime under Article 62 §2a FPC, where the amount of tax resulting from an invoice or invoices or the sum of amounts is of small value (i.e. in 2017 exceeds PLN 10,000 but does not exceed PLN 400,000) and is a crime under Article 271a §1 CC where this amount or the sum of amounts exceeds PLN 200,000 but does not exceed PLN 400,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of the amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and a crime under Article 271a §1 CC where it does not exceed PLN 1,000,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and under Article 271a §2 CC where the amount of tax resulting from an invoice or the sum of amounts exceeds PLN 1,000,000 but does not exceed PLN 5,000,000; or
- a crime under Article 62 §2 FPC where the amount of tax resulting from an invoice or the sum of amounts exceeds the defined small value (i.e. PLN 400,000 in 2017) and a crime under Article 277a CC where the amount of tax resulting from an invoice or the sum of amounts exceeds PLN 5,000,000.

The above analysis of regulations of invoice-related crimes in the Criminal Code and similar fiscal crimes and misdemeanours in the Fiscal Penal Code indicates a few possible perfect concurrences, which will always result in the necessity of convicting a perpetrator in accordance with every of the concurring provisions and imposing adequate penalties in accordance with each of them (see Article 8 §1 FPC). For it must be noticed that elimination of multiplicity of assessments based on particular principles, including the principle of *lex specialis derogat legi generali*, takes place only within the same areas of criminal law and not between the different areas.¹² The essence of the perfect concurrence of prohibited acts consists in the fact that concurring provisions are not eliminated but they are all applied and a perpetrator is

¹² See, V. Konarska-Wrzošek's explanatory notes to Article 8 FPC, [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2017 (in press), and G. Łabuda, *Nierzetelne wystawianie faktur – oszustwo pospolite czy oszustwo podatkowe? Glosa do uchwały Sądu Najwyższego z 30 września 2003 r., I KZP 22/03* [Issue of false invoices: common fraud or fiscal fraud? Gloss on the Supreme Court resolution of 30 September 2003, I KZP 22/03], *Monitor Podatkowy* No. 6, Warsaw 2004, pp. 50–52. Differently: L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy...* [Fiscal Penal Code...], pp. 53–55. Also on this issue, compare I. Zgoliński, *Wystawienie lub postępowanie się...* [Issue or use of a false...], p. 167; P. Kardas, [in:] P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], LEX, Warsaw 2012, and A. Wielgolewska, [in:] A. Piaseczny, A. Wielgolewska, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], LEX, Warsaw 2012.

convicted and penalties are imposed based on particular sanctions.¹³ In accordance with Article 8 §2 FPC, only the most severe of the adjudicated penalties will be executed, which in case of the concurrence with an invoice-related common crime under Article 271a CC or Article 277a CC and adjudication of penalties by a court based on the sanctions envisaged therein, containing only penalties of deprivation of liberty, will always be a penalty of deprivation of liberty and must be the one that is adjudicated in the most severe degree. Apart from those adjudicated penalties, in case a fine is also adjudicated, the highest of them will be subject to execution. Also penal measures and preventive measures will be subject to execution even where they are adjudicated only for one of the concurring crimes (see Article 8 §2 and §3 FPC).

Due to perfect concurrence of crimes in every case of issuing a false invoice or invoices or using them, thus also due to the necessity of adjudicating based on all the concurring provisions and finally the execution of only the most severe penalties, a question arises about the sense of introducing such always overlapping normative solutions. The purpose of developing the idea of perfect concurrence of crimes was different. It seems that establishing adequate aggravated types in the Fiscal Penal Code or repealing the provisions of Article 62 §2 and §2a FPC concerning invoice-related crimes that were penalised in the Criminal Code would be a simpler, and thus a better, solution to invoice-related crimes. The introduction of the above-discussed new solutions to the criminal law does not deserve positive assessment.

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¹³ The Supreme Court drew attention to that many times, see the resolution of seven judges of the Supreme Court of 24 January 2013, KZP 19/12, OSNKW 2013, Vol. 2, item 13; the Supreme Court ruling of 24 January 2013, I KZP 21/12, OSNKW 2013, Vol. 2, item 14; the Supreme Court ruling of 8 April 2009, IV KK 407/08, LEX No. 503265; see also the Supreme Court judgement of 10 October 2016, IV KK 152/16, LEX No. 2148637.

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INVOICE-RELATED CRIMES: THEIR SIGNIFICANCE, LEGAL CLASSIFICATION AND PLACE IN THE SYSTEM OF POLISH CRIMINAL LAW

Summary

The article is devoted to the invoice-related crimes that the Act of 10 February 2017 (Journal of Laws [Dz.U.], item 244) recently introduced to the Criminal Code, incorporating them in the new Articles 270a, 271a and 277a CC in Chapter XXXIV, which lists crimes against reliability of documents. The author analyses *ratio legis* of those new amendments to the Criminal Code, taking into consideration a closer and further object of protection of invoice-related crimes that are also penalised in the Fiscal Penal Code. She also indicates legal consequences of penalisation of issuing false invoices or using them in both CC and FPC, which in every case inevitably leads to what is called the perfect concurrence of invoice-related fiscal crimes (under Articles 62 §1 and 62a §1 FPC) and fiscal-related common crimes (under Articles 271a and 277a CC). The author is critical of the adopted solutions and assigning the new ineffective crimes added to CC in order to protect reliability of issued invoices (and, in fact, the financial interests and resources of the State), a status of common crimes, and in some cases even a status of a felony, including aggravated felony alternatively carrying a penalty of deprivation of liberty for 25 years (see Article 277a CC). What the author also criticises in the added Articles 277c and 277d CC is the introduction of special regulations stipulating a possibility of extraordinary mitigation of punishment for perpetrators of invoice-related crimes who self-denounce and/or decide to cooperate with law enforcement bodies, because she believes that a bonus of extraordinary mitigation of punishment for self-denunciation is an illusory incentive, and the decision that extraordinary mitigation of punishment for perpetrators who decide to cooperate with the law enforcement bodies after the detection of their illegal activities should be within the competence of a court is useless casuistry because it might be adequately amended in Article 60 CC.

Key words: VAT invoices, material forgery, intellectual forgery, invoice-related crimes, common crimes, fiscal crimes, legal classification, perfect concurrence of common and fiscal crimes

PRZESTĘPSTWA FAKTUROWE: ICH ZNACZENIE, KLASYFIKACJA PRAWNA ORAZ MIEJSCE W SYSTEMIE POLSKIEGO PRAWA KARNEGO

Streszczenie

Treść artykułu została poświęcona nowo wprowadzonym do Kodeksu karnego, ustawą z dnia 10 lutego 2017 r. (Dz.U. poz. 244), typom przestępstw tzw. fakturowych, które usytuowano w dodanych art. 270a, 271a i 277a k.k. w rozdziale XXXIV k.k. grupującym przestępstwa przeciwko wiarygodności dokumentów. Autorka analizuje ratio legis wprowadzenia tych nowych uregulowań do k.k., mając na uwadze bliższy i dalszy przedmiot ochrony tzw. przestępstw fakturowych, które są spenalizowane także w k.k.s. Wskazuje również na prawnokarne konsekwencje penalizacji wystawiania nierzetelnych faktur lub ich używania, zarówno w k.k., jak i w k.k.s., co nieuchronnie prowadzi w każdym wypadku do tzw. idealnego zbiegu przestępstw fakturowych skarbowych (z art. 62 § 1 i 62a §1 k.k.s.) i przestępstw fakturowych powszechnych (z art. 271a i 277a k.k.). Autorka krytycznie ocenia przyjęte rozwiązanie oraz nadanie tym nowym, bezskutkowym przestępstwom dodanym do k.k., mającym chronić wiarygodność wystawianych faktur (a de facto interesy i zasoby finansowe państwa), statusu przestępstw powszechnych i to w niektórych wypadkach o randze zbrodni, w tym zbrodni najcięższej, zagrożonej alternatywnie karą 25 lat pozbawienia wolności (zob. art. 277a k.k.). Autorka krytycznie ocenia także wprowadzenie w dodanych art. 277c i 277d k.k. specjalnych uregulowań przewidujących możliwość nadzwyczajnego złagodzenia kary sprawcom przestępstw fakturowych, którzy dokonali samodenuncjacji i/lub zdecydowali się na podjęcie współpracy z organami ścigania, gdyż premię w postaci nadzwyczajnego złagodzenia kary za akt samodenuncjacji uważa za iluzoryczną zachętę, a ustanowienie kompetencji dla sądu do nadzwyczajnego złagodzenia kary sprawcom, którzy po ujawnieniu ich działań sprzecznych z prawem zdecydowali się na współpracę z organami ścigania – za zbędną kazuistykę, ponieważ mogłoby to zostać odpowiednio doregulowane w art. 60 k.k.

Słowa kluczowe: faktury VAT, fałszerstwo materialne, fałszerstwo intelektualne, przestępstwa fakturowe, przestępstwa powszechne, przestępstwa skarbowe, kwalifikacja prawna, idealny zbieg przestępstwa powszechnego i skarbowego