Ius Novum
3/2017

FORFEITURE VERSUS DISCONTINUANCE OF PROCEEDINGS IN ACCORDANCE WITH ARTICLE 62 OF THE ACT ON PREVENTING DRUG ADDICTION

KATARZYNA ŁUCARZ*

The limitation of the statutory approach to the issue of the "small" possession of intoxicants or psychotropic substances in a way forced the national legislator to develop a new formula that would make it possible to soften the extremely strict position on that matter. Only as a necessary digression, let me remind that the presently binding Act of 29 July 2005 on preventing drug addiction[1] (APDA) does not lay any exclusions of penalisation of the possession of intoxicants or psychotropic substances and classifies it, similarly to the former legal state, as a basic type, an aggravated type due to a bigger amount in possession, and a type treated less severely because of lesser significance. As a result, absolutely every case of possession of the above-mentioned substances, against statutory provisions, is subject to penalty today. Any attempts to assign a different meaning to the provision of Article 62 APDA may constitute an example of at the most creative interpretation.[2] The conclusion is drawn not only from the construction of the provision of Article 62 APDA but mainly from the intention of the legislator, who until recently was still strongly convinced that this route is the most efficient tool in the fight against the phenomenon of so socially harmful drug addiction. It will, inter alia, allow coping with the problem of dealers who, without a great risk of legal liability, used to traffic in psychoactive substances, while being

* PhD, Assistant Professor, Department of Misdemeanour Law and Fiscal Penal Law, Faculty of Law, Administration and Economics of the University of Wrocław

1 Journal of Laws [Dz.U.] of 2016, items 224, 437.

2 For more on the issue of possible controversies over the interpretation of conduct consisting in the possession of narcotic drugs in order to consume, see J. Raglewski, *Kilka uwag de lege lata i de lege ferenda w kwestii karania za posiadanie narkotyku w związku z przeznaczeniem go na własne potrzeby* [Some comments *de lege lata* and *de lege ferenda* on the issue of drugs possession in connection with their use for one's own needs], [in:] A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [Problems with the institution of criminal justice. Professor Jan Skupiński jubilee book], Warsaw 2013, pp. 1092–1105 and literature cited therein.

in possession of small amounts of them. Nevertheless, criminalisation of all forms of possessing psychoactive substances, also the small amount for personal use, means *de facto* the creation of broad possibilities of using penal repression, especially against addicts. Still, because of their addiction, they require a completely diverse approach that goes far beyond the traditional instruments typical of criminal law. Thus, it soon turned out that the stricter legal response, instead of efficient prevention of the phenomenon of drug addiction, produced a totally different effect. However, contrary to the legislative assumptions, it did not lead to the reduction of psychoactive substances consumption in Poland. What is worse, it created a new category of criminals: addicts and illegal users of psychoactive substances.[3] Since 2000, the number of people sentenced for the possession of intoxicants or psychoactive substances has risen substantially. Thus, the penalisation of this activity has become a means of criminalising the use of psychoactive substances and not of preventing drug addiction. This is why, it might have been expected that the legislator, wanting to change this unfavourable trend, would recommend the change of the approach to consumers of intoxicants and psychotropic substances.

In fact, the new Act of 1 April 2011 amending the Act on preventing drug addiction and some other acts[4] introduced the provision of Article 62a to the legal order, which creates a possibility of absolute discontinuance of the proceedings against perpetrators possessing small amounts of intoxicants for their own use. In accordance with the provision, a prosecutor, and at the juridical stage a court, provided some premises are met, assesses purposelessness of ruling a penalty because of the circumstances of the act commission and the level of its social harmfulness.

Even a cursory review of the above-mentioned regulation allows stating that the solution adopted does not resemble in any way the one that was in force pursuant to Article 48(4) of the Act of 1997 on preventing drug addiction.[5] It does not lead to de-penalisation of psychoactive substances possession. In accordance with the Act on preventing drug addiction, the possession of even a small amount of them is still a prohibited act carrying a penalty. The real sense of the discussed measure is exhausted, however, in the far-reaching simplification of the criminal proceedings in this kind of cases. It envisages a mechanism of abandoning prosecution and penalising perpetrators of petty crimes connected with the consumption of intoxicants and psychotropic substances, against whom the use of penal repression has not produced positive results so far.[6] And, in the legislator's opinion, it would be totally negated if,

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[3] *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r. o zmianie ustawy o przeciwdziałaniu narkomanii oraz niektórych innych ustaw (druk nr 3420)* [Justification for the Bill of 1 April amending the Act on preventing drug addiction and some other acts (the Sejm paper no. 3420)], www.orka.sejm.gov.pl, p. 1, www.orka.sejm.gov.pl. Also compare, E. Kuźmicz, Z. Mielecka-Kubień, D. Wiszejko-Wierzbicka (ed.), *Karanie za posiadanie. Art. 62 ustawy o przeciwdziałaniu narkomanii – koszt, czas, opinie* [Punishment for possession: Article 62 of the Act on preventing drug addiction: cost, time, opinions], Instytut Spraw Publicznych, Warsaw 2009.

[4] Journal of Laws [Dz.U.] of 2011, No. 117, item 678.

[5] Journal of Laws [Dz.U.] of 2003, No. 24, item 198, as amended.

[6] For more, see *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r.…* [Justification for the Bill of 1 April 2011…, p. 14.

as a rule, it were necessary to conduct the preparatory proceedings, in a situation of purposelessness of penalising a perpetrator, and to finally discontinue it. That is why, the legislator made it possible to discontinue the proceedings before the decision to initiate criminal proceedings is made. As a consequence of the adopted assumption, a prosecutor may refuse to initiate the proceedings and undertake a series of activities, which usually follow a decision on proceedings initiation.

It is not necessary to add that the above formula of "discontinuance of proceedings not yet initiated" from the very beginning raised many more doubts and much less certainty as to whether it would be really possible to achieve the expected effects of the amendment in the field of trial economics. More pragmatic authors, questioning not just the value of the solution worked out but basing their assessment on the possibility of discontinuing actually non-existent proceedings, indicate that it needlessly complicates the scheme sufficiently established in the criminal procedure, in accordance with which, depending on the moment when the given procedural obstacle takes place, the criminal proceedings are not initiated, discontinued or, possibly, the accused is acquitted of a charge.[7] As a matter of fact, it resembles enchanting reality, which takes a form of calling the same institution (refusal to initiate proceedings) with the use of a name reserved for another one (discontinuance). It is really difficult to imagine discontinuance of something that has not been formerly initiated.[8]

If the value of the results of the analysis conducted in this area is left aside, it seems that still one more issue deserves attention. Despite the valuable work by P. Gensikowski,[9] it is in a way almost unnoticed in literature although it has, as it should be recognised, fundamental significance for determination whether and to what extent the acceptance of the construction "discontinuance before the initiation of proceedings" is admissible. It concerns the relations of content that take place between the latter and the institution of forfeiture, which is actually implemented in every, without exception, case of committing a crime of possessing a small amount of psychoactive substances for one's own use (Article 62(1) or (3) APDA). The issue is becoming even more complicated, mainly because the proceeding body confronts, in a way just "at the very beginning", its two different types. Usually, it faces a necessity of ruling the forfeiture of intoxicants or psychotropic substances seized in the course of the criminal proceedings, as well as objects used to commit a crime of possessing them violating the provisions of the Act. By the way, in practice, it quite frequently turns out that the possibility of forfeiture is implemented in relation to the latter. It happens especially when the vestigial amount of white powder is found in the seized plastic bags, metal boxes or glass tubes used for smoking. It is unquestionable then that, e.g. a plastic bag and not amphetamine is subject to forfeiture because it is hard to imagine a ruling of forfeiture of a vestigial amount of

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[7] A. Bojańczyk, T. Razowski, *W sprawie nieprzekraczalnych granic semantyki* [On the issue of impassable borders of semantics], Prokuratura i Prawo No. 11, 2011, p. 142 ff.

[8] *Ibid*.

[9] P. Gensikowski, *Instytucja przewidziana w art. 62a ustawy o przeciwdziałaniu narkomanii a orzeczenie przepadku* [Institution envisaged in Article 62a of the Act of preventing drug addiction versus a ruling of forfeiture], Prokuratura i Prawo No. 2, 2013, pp. 37–48.

white powder. However, regardless of the interpretation of the concept of "an object used to commit crime", in a broad or narrow sense, such a plastic bag undoubtedly is such an object as it made the commission of the crime possible.[10]

As a result of such a strict limitation of the two types of forfeiture, the normative basis for decisions in this area also looks different. However, it must be stated here that only in case of the forfeiture of intoxicants or psychotropic substances (objects of the act performed) it is relatively simple. It is sufficient to refer to the content of the regulation in Article 70(2) APDA, which unambiguously indicates that in the event, inter alia, of discontinuance of the proceedings in the case of crime under Article 62 APDA, the forfeiture of intoxicants or psychotropic substances is to be ruled, even if they were not the perpetrator's possessions.[11] Not discussing the issue of its legal nature more thoroughly as we are going to come back to it later, to be precise, we should add that, based on Article 70(2) APDA, it is used as a protective means. Anyway, it is right to say that the provision only makes a general reference to discontinuance of the criminal proceedings, thus, there is no obstacle to rule the forfeiture of psychoactive substances as a protective means in the event of every decision to discontinue the proceedings, including the one laid down in Article 62a APDA.[12] By the way, if the legislator wanted to limit the ruling of forfeiture under Article 62a APDA to some circumstances determining the discontinuance of criminal proceedings and exclude some others, it would have to be explicitly indicated in the content of the provision. However, it is not. Yet, such a conclusion is not obvious for everyone. It is raised in literature that such a broad affirmation of the discontinuance of criminal proceedings as a basis for ruling the forfeiture of an intoxicant or a psychotropic substance is simply an oversight on the legislator's part, which should be rectified in the course of interpretation narrowing the premises of the procedural decision to only those that are commonly identified with the general clause of "circumstances excluding punishment" of the perpetrator of a prohibited act laid down in Article 44a Criminal Code (ex Article 100 CC).[13] Fully approving

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[10] Judgement of the Appellate Court in Katowice of 29 December 2011, II AKa 498/11, KZS 2012, No. 4, item 70.

[11] In accordance with Article 70(3) APDA, forfeiture shall not be ruled if an intoxicant or psychotropic substance belong to a third party, and a perpetrator obtained them in the course of a crime or misdemeanour or was in possession of them in a way flagrantly violating employees' duties or the conditions of an agreement he/she has with the owner of those intoxicants or psychotropic substances.

[12] P. Góralski, *Środki zabezpieczające w polskim prawie karnym* [Protective measures in Polish criminal law], Warsaw 2015, p. 511.

[13] In M. Siwek's opinion, it is not possible to accept an option of ruling forfeiture as a protective measure if the discontinuance of proceedings took place, e.g. because the act had not been committed, the act did not have the statutory features of a prohibited act or there was another circumstance excluding prosecution, different from the circumstances excluding the punishment of the perpetrator of a prohibited act. The first two circumstances, in this author's opinion, exclude whatever penal reaction, also in the form of protective measures, as there is no possibility of establishing the subject of an act, and the statutory features of a prohibited act are not matched.

As a result, ruling a protective measure in this situation would be in conflict with its essence. It is true that the author admits there is a danger for the society, which results from the fact that some intoxicants or psychotropic substances remain available, however, he states that it does

of the opinion that any reason for the discontinuance of criminal proceedings may generate a ruling of the forfeiture of an intoxicant or a psychotropic substance, it is necessary to notice that the approval of such a stand may unavoidably lead to misinterpretation of the actual essence of Article 70(2) APDA. It completely omits the legislator's will expressed in it to formulate legal grounds for forfeiture in the broadest way possible. The chronology of the solutions discussed here indicates that. The legislator confined that to regulating the grounds for forfeiture under Article 70(2) APDA, despite the awareness of the existence of different solutions to those issues laid down in Article 45a CC or Article 42 §3 Fiscal Penal Code.[14] It seems that just this fact may constitute an argument sufficient for a broad approach to the discontinuance of criminal proceedings as a premise of the application of the forfeiture of an intoxicant or a psychotropic substance as a protective means in accordance with Article 70(2) APDA, all in all, in a broader way than in case of Article 45a CC or Article 42 §3 FPC.

The rightfulness of this conclusion may be verified in another way, namely, by referring to the function of forfeiture ruled in accordance with Article 70(2) APDA. In such a case, the need to apply it results, in general, from a fear that a perpetrator will reuse the objects somehow "contaminated", due to the source of it, for the purpose that is illegal. In order to deprive him or her of that opportunity, it is necessary to prevent a perpetrator from possessing them and to rule forfeiture. This way, the society as well as the perpetrator are protected against the commission of successive prohibited acts resulting from the disposal of the objects in spite of the ban.[15] Undoubtedly, this functional aspect of forfeiture is demonstrated equally well when the discontinuance of criminal proceedings takes place because of the reasons partially indicated in Article 17 §1 Criminal Procedure Code (CPC) and those laid down in Article 62a APDA.[16]

What has been already said suggests that Article 70(2) APDA directly lays down only the forfeiture of intoxicants and psychotropic substances. However, it does not mention the forfeiture of tools used to commit a crime under Article 62(1) or (3) APDA. In the light of reticence about the issue in the Act on preventing drug addiction, it seems justified to apply regulations of the Criminal Code. Especially, as the general clause expressed in Article 116 CC encourages this. In accordance with the clause, issues not covered in APDA and connected with the prevention of drug addiction may and should be supplemented with the provisions laid down

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not constitute *se ipse* a sufficient argument for the application of a protective measure, which is in fact one of the tools of criminal law in a situation when an act was not committed or when it does not have the statutory features of a prohibited act.

(M. Siwek, *Materialnoprawne podstawy orzekania środków zabezpieczających o charakterze administracyjnym* [Substantive legal grounds for ruling administrative protective measures], [in:] L.K. Paprzycki (ed.), *System Prawa Karnego, t. 7, Środki zabezpieczające* [Criminal law system, vol. 7, Protective measures], 2nd edition, Warsaw 2015, pp. 578–579).

[14] P. Góralski, *Środki zabezpieczające…* [Protective measures…], p. 511.

[15] It is worth highlighting that forfeiture ruled as a protective measure differs from forfeiture ruled as a penal measure and it can only apply to a perpetrator who is not sentenced by a court (for more on the issue, see K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym* [Forfeiture in Polish criminal law], Zakamycze 2004, p. 206).

[16] P. Gensikowski, *Instytucja przewidziana w art. 62a…* [Institution envisaged in Article 62a…], p. 40.

in the General Part of the Criminal Code.[17] Assuming that, the judicature started to apply the provision of Article 44 §2 CC regardless of the fact that this type of practice is, to tell the truth, admissible but only when we deal with a perpetrator's conviction.[18] In the event of the discontinuance of criminal proceedings, inter alia because of the reasons laid down in Article 62a APDA, the proposed ruling turns out to be simply inappropriate because it has no basis in the content of the above-cited provision. Certainly, this does not mean that the problem cannot be solved in a different way. Looking for an appropriate point of reference in the formerly binding legal state, P. Gensikowski rightly notices that if the forfeiture of tools used to commit a prohibited act is laid down in the Criminal Code in order to somehow play a double role, on the one hand as a penal measure and on the other hand as a protective one, it is possible and would be even highly desired to link it with Article 100 CC (at present Article 45a CC),[19] putting this more literally, in one of the premises laid down in its content, namely the one that the legislator specified as the circumstance excluding the punishment of the perpetrator of a prohibited act. Distancing ourselves from disputes over the characteristics of this phrase, we can assume, with a certain simplification, that it applies not only to such circumstances the consequences of which consist in the exclusion of the perpetrator's punishment. At the same time, it is unimportant for their assessment whether they originate from procedural obstacles, thus, whether they are formal-legal in nature, or whether they have been determined in the provisions of substantive law.[20] All those circumstances

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[17] The Act on preventing drug addiction contains a clear exclusion only in relation to the provisions of Article 93a §1(1) to (3) CC (see Article 74 APDA, in accordance with which "Within the scope regulated in the present Chapter, protective measures laid down in Article 93a §1(1) to (3) CC do not apply to perpetrators referred to in Article 93c(5) Criminal Code").

[18] In the judgement of 20 January 2004, the Appellate Court in Lublin erroneously ruled in connection with evidence in the form of: a metal box, a glass tray and a spatula. Article 55(2) APDA of 24 April 1997 (Journal of Laws [Dz.U.] No. 75, item 468) cannot constitute grounds for the forfeiture of those objects because it applies only to intoxicants and psychotropic substances. On the other hand, it should have been Article 44 §2 CC as the objects served the commission of crime (II AKa 390/03, KZS 2005, No. 1, item 30). Similarly, the Appellate Court in Wrocław in its judgement of 12 March 2014, II AKa 41/14, Lex, No. 1451870.

[19] Forfeiture as a protective measure was provided for in Article 100 and Article 99 §1 CC. With the amendment to Article 99 §1 CC and repealing of Article 100 CC, a completely new Article 45a CC was introduced, which at first glance turns out to be a synthesis of the two former provisions. Despite that, the legislator decisively emphasises in the justification for the amendment project developed by the Committee of Criminal Law, that Article 45a contains forfeiture as an administrative measure (see, *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, w redakcji z dnia 5 listopada 2013 r*. [Justification for the Bill amending the Act: Criminal Code and some other acts, in edition of 5 November 2013], p. 14; https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego-2009-2013/, [accessed on 16 June 2016].

[20] The non-uniform approach of jurisprudence to the essence of circumstances excluding the punishment of the perpetrator of a prohibited act is confirmed in the opinions contained in the works of, inter alia, P. Góralski, *O wątpliwościach dotyczących „okoliczności wyłączającej ukaranie sprawcy czynu zabronionego" jako przesłance zastosowania przepadku tytułem środka zabezpieczającego* [On doubts concerning "circumstances excluding the punishment of the perpetrator of a prohibited act" as premises of forfeiture as a protective measure], Przegląd Sądowy No. 1–2, 2009, p. 166 ff; by the same author, *Reforma unormowań poświęconych środkom zabezpieczającym z dn. 20 lutego 2015 r.* [Reform of regulations concerning protective measures of 20 February

the consequences of which are a little more far-reaching and consist either in acquitting or in annulling the unlawfulness of an act are outside this conceptual category.[21] At the same time, it is necessary to emphasise that the circumstances excluding the perpetrator's punishment apply to cases in which we deal with a prohibited act, i.e. the conduct having the features laid down in the Criminal Code (Article 115 §1 CC), matching the features of a prohibited act carrying a penalty when, however, that penalty cannot be imposed. Therefore, we can include in this group situations in which a criminal provision uses a phrase "is not subject to a penalty" as well as those in which punishment of a perpetrator is excluded due to the statute of limitations or the legislator's evident abandonment of punishment.[22]

We can state without hesitation that the issue is exactly the same as the institution laid down in Article 62a APDA. First of all, the provision, using terms referring directly to a prohibited act ("subject of an act", "circumstances of an act commission") or to a perpetrator ("for a perpetrator's own use", "sentencing a perpetrator"), unquestionably proves that the discontinuance of proceedings may take place only when a suspect's conduct implements the whole catalogue of statutory features of a prohibited act under Article 62(1) or (3) APDA in the conditions in which his/her criminal liability is not annulled, due to the circumstances excluding unlawfulness of a prohibited act or the perpetrator's guilt. A situation when the perpetrator's act does not constitute a crime because of a low level of social harmfulness should be assessed similarly. Upon the legislator's initiative, Article 62a APDA is to apply to prohibited acts specified in Article 62(1) or (3) APDA, which are characterised by the level of social harmfulness higher than scarce but not so high that it excludes the recognition that imposing a penalty on the perpetrator would be purposeless.[23]

The conclusion that can be drawn next is that the discontinuance of proceedings under Article 62a APDA is implemented only when the imposition of a penalty

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2015] (in press); *Środki zabezpieczające…* [Protective measures…], pp. 497–515; J. Raglewski, *Podstawy orzekania środków zabezpieczających o charakterze administracyjnym w kodeksie karnym z roku 1997* [Grounds for ruling administrative protective measures in the Criminal Code of 1997], Prokuratura i Prawo No. 4, 2002, pp. 44–51; M. Siwek, K. Postulski, *Przepadek w polskim prawie…* [Forfeiture in Polish criminal…], pp. 218; M. Siwek, *Materialnoprawne podstawy orzekania środków zabezpieczających…* [Substantive legal grounds for ruling administrative…], pp. 596–618; by the same author, *Okoliczność wyłączająca ukaranie sprawcy czynu zabronionego jako przesłanka orzeczenia przepadku tytułem środka zabezpieczającego* [Circumstance excluding punishment of the perpetrator of a prohibited act as a premise of ruling forfeiture as a protective measure], Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury No. 2, 2011, p. 6 ff.

[21] K. Postulski, *Glosa do uchwały SN z dnia 13 marca 1984 r., VI KZP 47/83* [Goss on the Supreme Court resolution of 13 March 1984, VI KZP 47/83], Nowe Prawo No. 3, 1985, p. 102 and J. Warylewski, *Orzekanie przepadku tytułem środka zabezpieczającego wobec sprawcy czynu zabronionego* [Ruling of forfeiture as a protective measure in case of the perpetrator of a prohibited act], Prokuratura i Prawo No. 6, 2000, pp. 125–127.

[22] M. Siwek, *Okoliczność wyłączająca ukaranie sprawcy…* [Circumstance excluding punishment…], p. 232. Not without a reason, it is stated that the application of treatment-related or administrative protective measures at the procedural stage should always match the ruling discontinuing the proceedings (M. Siwek, *Glosa do postanowienia Sądu Najwyższego z dnia 8 kwietnia 2010 r., IV KK 52/10* [Gloss on the Supreme Court ruling of 8 April 2010, IV KK 52/10], Lex/el. 2011, thesis 13).

[23] *Uzasadnienie do projektu ustawy z dnia 1 kwietnia 2011 r. …* [Justification for the Bill of 1 April 2011…], p. 13.

is fully admissible. Regardless of that, a proceeding body, having recognised that the subject of an act referred to above is an intoxicant or a psychotropic substance in a small amount to be used by the perpetrator alone and that it is aimless to impose a penalty on him/her because of the circumstances of the act commission as well as the level of its social harmfulness, takes a procedural decision to discontinue criminal proceedings, which directly results in the abandonment of punishment of the perpetrator. This way and because of that, P. Gensikowski's belief that the institution laid down in Article 62a APDA matches the essence of "circumstances excluding the punishment of a perpetrator" allowing, in accordance with Article 45a APDA, ruling the forfeiture of tools used to commit a prohibited act as a protective measure deserves full approval. At the same time, the assessment cannot be challenged by the fact that the discontinuance of proceedings under Article 62a APDA is facultative in nature and the premises *se ipse* listed in the provision do not constitute an obstacle to initiate and continue the proceedings, i.e. they do not constitute negative procedural premises meaning that non-initiation or the discontinuance of proceedings is obligatory as it happens in case of other circumstances recognised as excluding the punishment of the perpetrator of a prohibited act in the meaning of Article 45a CC. However, it is necessary to notice that, in spite of the facultative form of the discussed institution, because of purpose-related reasons, its obligatory nature should be presumed. What substantive-legal or procedural purpose, in case of the implementation of all the circumstances laid down in the provision, would accompany further criminal proceedings[24]? Even if this explanation were insufficient, paying too much attention to obligatory or facultative nature of the given institution as a circumstance excluding the punishment of the perpetrator pursuant to Article 45a CC does not seem to be right either because of the consequences of imposed penalty. In case of the discontinuance of proceedings pursuant to Article 62a APDA as well as the application of other circumstances excluding the punishment of the perpetrator of a prohibited act, the punishment, i.e. the imposition of a penalty on the perpetrator, does not in fact take place.[25] And this, it seems, constitutes a characteristic feature of all, without exception, circumstances excluding the punishment of the perpetrator in accordance with Article 45a CC. Let me add that the prevalence of individual approach in the legal construction of Article 62a APDA is to prevent its automatic application. Indeed, obligatoriness usually excludes whatever decision based on actual facts and places the whole burden of taking it on statute and not the body concerned. As the latter has to adjudicate, the purposefulness of the ruling escapes its control. This way, the adjudication loses its significance. The only reasonable solution to this situation, making it possible to fulfil other aims of criminal law (general prevention, therapeutic purposes) in case

[24] B. Wilamowska, *Komentarz do art. 62a* [Commentary on Art. 62a], [in:] P. Kładoczny (ed.), B. Wilamowska, P. Kubaszewski, *Ustawa o przeciwdziałaniu narkomanii. Komentarz do wybranych przepisów karnych* [Act on preventing drug addiction: Commentary on selected penal provisions], Warsaw 2013, pp. 92–93.

[25] P. Gensikowski, *Instytucja przewidziana w art. 62a…* [Institution envisaged in Article 62a…], p. 44.

of the petty possession, is to lift the feature of obligatoriness from the formula in Article 62a APDA and use a facultative mode of its application instead.

P. Gensikowski's reasoning, in which Article 62a APDA constitutes an example of circumstances excluding the punishment of the perpetrator in the meaning of Article 45a CC, finally finds support in the functional aspect of forfeiture as a protective measure. As forfeiture is ruled as such, it plays almost all functions traditionally attributed to penalties or penal measures with the exception of the repressive function, which it does not actually contain, and one can look in it for a factor considerably strengthening the opinion about the purposelessness of punishing the perpetrator pursuant to Article 62(1) or (3) APDA.[26] Complete abandonment of the application of forfeiture to a perpetrator, who in the circumstance of a lack of penalty actually implemented the features of the prohibited act, might meet with justified criticism. Apart from a rather obvious protective function, especially within individual prevention or positive general prevention, the aim is also to meet the social sense of justice. Especially, as we deal with objects, leaving of which for reuse, just due to the public interest, would be highly inadvisable.[27] In any event, in this kind of situations, the prospect of ruling forfeiture as a protective means should only be conducive to a decision to discontinue proceedings pursuant Article 62a APDA. To tell the truth, due to the content of Article 45a CC, forfeiture is facultative in nature, however, whenever a decision is made to rule it, a court should consider ruling it in this form provided there are premises that are laid down in Article 44 §2 CC.

Here, the above-presented findings should be supplemented and it should be added that an opinion admitting the application of forfeiture as a protective measure in a situation when the punishment of the perpetrator is abandoned, despite the latest amendment to its legal classification, did not lose much of its up-to-date nature. The forfeiture can still be a measure of penal reaction included in the sentence or a protective measure when the perpetrator of a punishable act cannot be sentenced due to various reasons. *Tertium non datur*. It is absolutely certain, however, that the lack of classification of forfeiture in one of the known categories of penal reaction, i.e. penalties, penal measures, protective measures, compensation or probation, instead of leading to a common opinion on its legal characteristics, intensifies doubts concerning this matter.[28]. First of all, it is not possible to state that

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[26] Due to the fact that ruling of forfeiture as a protective measure is not an institution of a penalty to the perpetrator of a prohibited act, its major aim cannot be a burden for him. Such burden that is possible as a result of its application is not a form of revenge but an unavoidable "side effect" connected with the implementation of that protective measure (S. Śliwiński, *Polskie prawo karne materialne. Część ogólna* [Polish substantive criminal law. General Part], Warsaw 1946, p. 439). Due to that, M. Cieślak is right to comment that we deal with the burden that is not intended but unavoidable. (M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia* [Polish criminal law: Outline of systemic approach], Warsaw 1990, p. 479).

[27] Supreme Court judgement of 12 February 1946, K 375/45, Państwo i Prawo issue 4, 1946, p. 99.

[28] According to J. Raglewski, the only reasonable solution to the situation is to place forfeiture in a separate chapter entitled "Forfeiture" and containing the present Articles 44 to 45a CC and to treat it as an institution similar to an administrative measure as far as its juridical characteristic is concerned (J. Raglewski, *Rozdział III: Przepadek i środki kompensacyjne* [Chapter III: Forfeiture and compensation means], [in:] M. Melezini (ed.), *Kary i inne środki reakcji prawnokarnej*

it lacks a penal nature. While in case of the forfeiture of objects (property-related gains) originating from crime (*producta sceleris*) the above stand may be supported, it completely loses its significance in a situation when the forfeiture concerns objects used or intended for the commission of crime (*instrumenta sceleris*). It is necessary to hinder or directly make it impossible to continue criminal activities by depriving the perpetrator of tools necessary to do this. If so, this form of the forfeiture of an object cannot be denied a feature of a penal measure. The more so, as Article 56 CC directly indicates that directives on judicial sentencing defined in Article 53, Article 54 §1 and Article 55 CC apply to forfeiture as "another means provided for in this code". The only exclusion refers to compensation under Article 46 CC. Similarly, the elimination of forfeiture from the chapter containing protective means and its replacement in a new Chapter Va entitled "Forfeiture and compensation measures", contrary to the legislator's declarations, does not introduce anything new to the issue. It is due to the fact that the legal characteristics of the measure determine its normative features, especially including the aims, the implementation of which it serves, and not the fact of placing it in this or the other chapter of the Criminal Code.[29] And taking them into consideration in the right way allows assuming that the forfeiture laid down in Article 45a CC still remains a protective measure and, as a result of such a reshuffle, we cannot only refer to its general rules concerning protective measures specified in Chapter X CC. If we added to this that in case of fiscal crimes and misdemeanours forfeiture still functions as a protective measure that is administrative in nature (Article 22 §3(6) and Article 47 §4 FPC), the scope of use of which corresponds to the features specified in Article 45a CC, the approval of the above-expressed stand should no longer be the subject matter of any dispute. On the contrary, it may lead to a sad reflection that there is a lack of the legislator's proper care for internal coherence of the Polish criminal law. The legislator might

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[Penalties and other penal reaction measures], 2nd edition, Warsaw 2016, pp. 788–791; by the same author, *Przepadek i środki kompensacyjne w projektowanej nowelizacji Kodeksu karnego* [Forfeiture and compensation means in the planned amendment to the Criminal Code], Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury issue 3, 2014, pp. 126–127; also compare, B.J. Stefańska, *Przepadek przedmiotów* [Forfeiture of objects], [in:] R.A. Stefański, *Środki karne po nowelizacji w 2015 roku* [Penal measures after the amendment of 2015], Warsaw 2016, pp. 333–334). There is only a question whether the introduction of completely new divisions instead of the well-known penal instruments is a move that will really make it possible to solve all the problems that occur in the light of the application of forfeiture.

[29] Rightly so, P. Góralski, who in addition indicates that the history of domestic regulations of criminal law covers cases of placing protective measures outside the chapter dedicated to them. Not quoting all of them after the author, one can refer to the solutions concerning, inter alia, police supervision laid down in the Regulation of the President of the Republic of Poland of 1934 and 1938, supervision of protection and placing habitual criminals in OPS in CC of 1969, actual protective measures applied to tramps and beggars in accordance with non-statutory legal acts of 1927 and 1950, measures really protective described as "a penalty" – forfeiture ruled in case of no conviction, and treatment-related preventive measures of the Bill of the Criminal Code of 1963 (P. Góralski, *Środki zabezpieczające…* [Protective measures…], respectively: pp. 74–78 and 209, 135–137, 139–142, 168, 173, 179–180). All acts related to drug addiction also envisaged, and still do it, some measures that do resemble protective measures, although they are not called as such (compare Article 34 Act on preventing drug addiction of 1985, Article 56 APDA of 1997 and Article 71 APDA of 2005).

have as well included penal measures and administrative protective measures in the same chapter of the Criminal Code because their content is the same.[30]

Now it is time to return to the question of the possibility of reconciling forfeiture with the formula of the discontinuance of proceedings before the decision to initiate an investigation or inquiry, which the legislator adopted. First of all, it is necessary to notice that a prosecutor's decision to discontinue proceedings in accordance with Article 62a APDA cannot contain adjudication on the issue of forfeiture. As it constitutes an element of the institution of justice, its adjudication is entirely reserved for a court.[31] On the other hand, this means that after the above-mentioned adjudication becomes valid, applying the solution laid down in Article 323 §3 first sentence CPC, a prosecutor must submit to a court a separate motion to rule the forfeiture in its both forms, although the content of this provision may suggest that the mode of proceedings applies only to the motion to rule forfeiture as a protective measure. Indeed, it concerns lodging a motion to a court to rule forfeiture "(…) provided there are grounds provided for in Article 45a CC (…)". Therefore, there is evidently no mention of the forfeiture of intoxicants or psychotropic substances under Article 70(2) APDA. It does not seem, however, taking into consideration the aim of ruling such a forfeiture, that it is impossible to eliminate the legislator's oversight by analogy to the provision of Article 323 §3, first sentence, CPC and apply it also to forfeiture as the most appropriate one. The lack of a formal-legal basis for ruling a protective measure in the form of forfeiture in the situation when substantive regulations envisage its adjudication should not constitute *se ipse* obstacle to ruling it if we do not want to lead to a contradiction in the same branch of law.[32] Anyway, filing a motion to rule the forfeiture of the objects of crime (Article 70(2) APDA) and the forfeiture of tools used to commit a crime (Article 45a CC) by a prosecutor binds a court of first instance to hear a case in the meaning that it should refer the motion to be examined at a sitting designated based on Article 339 §1 CPC.

In order to accept the motion to rule forfeiture, the adjudicating body must obviously be in possession of reliable information about the type and real amount of psychoactive substances seized in the course of criminal proceedings. However, only an expert toxicologist can provide it. By the way, the verification of the data must be preceded by a prosecutor's decision to discontinue the proceedings pursuant to Article 62a APDA. The necessity to appoint an expert eliminates the possibility of conducting the proceedings within the necessary limits laid down in Article 308 CPC, of which the legislator thought when developing Article 62a APDA. There are no doubts that the legislator referred the discontinuance before the initiation of proceedings, which is laid down in it, to a situation when there is a need to undertake particular procedural activities within an investigation or inquiry but only in the necessary scope. To tell the

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[30] P. Góralski, *Środki zabezpieczające…* [Protective measures…], p. 557.

[31] Provision of Article 46 of the Constitution of the Republic of Poland admits forfeiture of objects only if so laid down in statute and only based on a valid court's judgement. The provision does not envisage any exceptions to the cognition of a court in the case or a possibility of stipulating such an exception by the legislator in the course of a standard act.

[32] K. Postulski, M. Siwek, *Przepadek w polskim prawie …* [Forfeiture in Polish criminal…], p. 263.

truth, the catalogue of possible activities in this mode is open, however, this does not mean that based on that all procedural activities, without exception, are permitted. It is inadmissible to issue a decision on conducting physical-chemical examination by an appropriate expert. Moreover, the legislator also ignored the fact that activities in the necessary scope are, in fact, an element of the preparatory proceedings, which anyhow start with the first chronologically undertaken activity.[33] Only this means that the idea of "discontinuance of proceedings not yet initiated", being in a loose relation with the basic principles of a trial, in fact, does not achieve the aim for which it was developed. One can even risk the statement that exposing itself to criticism containing this charge, it actually constitutes the weakest link in the chain of the regulation laid down in Article 62a APDA, which, according to the assumptions, was to introduce a solution to the problem of perpetrators of petty crimes connected with the consumption of drugs that would be free of criticism. That is why, it is quite probable that the provision of Article 62a APDA, in the part admitting the possibility of discontinuing criminal proceedings before their initiation, may fail to meet the expectations that were the basis for its enactment.

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[33] W. Grzeszczyk, *Przebieg postępowania przygotowawczego* [Course of preparatory proceedings], [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego* [New criminal codification: Criminal Procedure Code], Warsaw 1997, p. 7.

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FORFEITURE VERSUS DISCONTINUANCE OF PROCEEDINGS IN ACCORDANCE WITH ARTICLE 62 OF THE ACT ON PREVENTING DRUG ADDICTION

Summary

The topic of this study is the question of legal admissibility of the ruling of forfeiture of objects of crime and forfeiture of instruments of crime in case of applying a new institution laid down in Article 62a of the Act on preventing drug addiction (APDA), which envisages discontinuance of criminal proceedings in case of offences specified in Article 62(1) and (3) APDA. Apart from this issue, the author considers whether and to what extent it is possible to reconcile the ruling of forfeiture in the two forms with the part of the provision of Article 62a APDA, which assumes "discontinuance of proceedings not yet initiated".

Keywords: discontinuance of criminal proceedings, intoxicant, psychoactive substance, forfeiture

PRZEPADEK A INSTYTUCJA UMORZENIA POSTĘPOWANIA Z ART. 62A USTAWY O PRZECIWDZIAŁANIU NARKOMANII

Streszczenie

Przedmiotem niniejszego opracowania jest zagadnienie prawnej dopuszczalności orzeczenia przepadku przedmiotów przestępstwa oraz przepadku narzędzi przestępstwa w razie zastosowania nowej instytucji przewidzianej w art. 62 a u.p.n., która zakłada umorzenie postępowania karnego w sprawach o czyny zabronione określone w art. 62 ust. 1 i 3 u.p.n. Poza tą kwestią autorka rozważa, czy i na ile możliwe jest pogodzenie orzeczenia przepadku w obu jego postaciach z tą częścią przepisu art. 62 a u.p.n., która zakłada „umorzenie postępowania karnego przed wszczęciem".

Słowa kluczowe: umorzenie postepowania karnego, środek odurzający, substancja psychotropowa, przepadek