IMPLEMENTATION OF FRAMEWORK DECISIONS REGARDING SUBSTANTIVE CRIMINAL LAW INTO THE POLISH LEGAL ORDER – SELECTED ISSUES

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Abstract: The paper is composed of three basic parts. In the introduction are discussed the successive stages of cooperation of the states of the European Union within the III pillar of the EU – from its inception (the European Union Treaty, signed in Maastricht on the 7th of February 1992) to the Treaty of Lisbon (signed on the 13th of December 2007). In the second part is described the most significant legal instrument of the III pillar, implementing the harmonisation of the criminal law of the member states, that is the framework decisions. In the third part are presented examples of the implementation of chosen framework decisions in Polish law – the Framework Decision of the Council of 2002/475/JHA of 13th of June 2002 on combating terrorism and the Framework Decision of the Council 2002/629/JHA of the 19th of July 2002 on combating trafficking in human beings. Certainly the choice is not casual. The author endeavours to present two extreme models of implementing of framework decisions: a method of implementation consisting in transfer of legal rules, with the aim of inserting created norms into the Polish legal order and the contrary one of rewriting the content of the implemented framework decision without any reflection.

IMPLEMENTACJA DECYZJI RAMOWYCH DOTYCZĄCYCH PRAWA KARNEGO MATERIALNEGO DO POLSKIEGO PORZĄDKU PRAWNEGO – ZAGADNIENIA WYBRANE

Abstrakt: Referat składa się z trzech zasadniczych części. We wstępie omówione zostały kolejne etapy współpracy państw Unii Europejskiej w ramach III filara UE – od jego powstania (Traktat o Unii Europejskiej, podpisany w Maastricht 7 lutego 1992 r.) do traktatu z Lizbony (podpisany 13 grudnia 2007 r.). W części drugiej dokonano charakterystyki najistotniejszego instrumentu prawnego III filara, słu˙ącego zbli˙aniu prawa karnego państw członkowskich, czyli decyzji ramowej. W części trzeciej zaprezentowane zostały przykłady implementacji wybranych decyzji ramowych do polskiego porządku prawnego – decyzji ramowej Rady 2002/475/WSiSW z dnia 13 czerwca 2002 r. w sprawie zwalczania terroryzmu oraz decyzji ramowej Rady 2002/629/WSiSW z dnia 19 lipca 2002 r. w sprawie zwalczania handlu ludźmi. Ich wybór jest nieprzypadkowy. Autor na ich przykładzie starał się zaprezentować dwie przeciwstawne metody implementacji: metodę polegającą na transpozycji norm prawnych i nadaniu przepisom form pasujących do polskiego porządku prawnego oraz jej przeciwieństwo – „przepisanie" treści postanowień implementowanej decyzji.

Introduction

The Member States of the European Community have for a long time avoided taking any action to harmonise criminal law as the state monopoly in punishing criminals is undoubtedly one of the most important aspects of state sovereignty. The arguments for maintaining the status quo were provided by founding treaties, in which there were no grounds to undertake any action in this matter. A turning point came on the 7th of February 1992 when the European Union Treaty, hereinafter referred to as the Treaty of Maastricht, was signed. Its so-called third pillar included cooperation in criminal justice and home affairs.

Cooperation of states within the framework of the third pillar was on an intergovernmental and not a community basis. That means that the Member States settled the areas of common interests in which their actions were coordinated. As a result, the Member States themselves made decisions in this matter and transferred them to their legislation. (Zielińska 2004, 186). As a consequence there was a lack of homogeneity with the community model of decision making (independently by the Council of the EU) and greatly limited competences of the community institutions, for instance legislative initiative regarding cooperation in criminal issues rested only on the Member States, no powers were provided for the European Court of Justice. In the third pillar other forms and instruments of cooperation were also applied: unanimously adopted by the Council of the EU common standpoints (defining precisely the procedure in specific issues), joint actions and international conventions, which the Member States concluded within the EU (Grzelak 2008, 41). The first two "were only a set of good intentions and rules" (Karsznicki 2009, 71-72). Within the framework of the third pillar the only binding legal acts were conventions prepared by the Council of the EU and "recommended to be implemented" by the Member States.

The solutions adopted in the third pillar were subject to criticism because of their ineffectiveness. Because of that work on reform started, the effect of which was the Treaty of Amsterdam (signed on the 2nd of October 1997, hereinafter referred to as the Treaty of Amsterdam). Primarily the scope of cooperation within the third pillar was extended (see art. 29-31of the Treaty of Maastricht). Recognition of the Area of Freedom, Security and Justice (AFSJ) as a one of EU objectives was important (art. 2 of the Treaty of Maastricht). It was evidence of no longer considering this sphere only as an object of "common interests" of the Member States and starting to consider it as the policy of the whole EU (Grzelak 2008, 45). Simultaneously so-called policies related to free movement of persons became policies of the entire Community. In connection with that within the framework of the first pillar were included: visas, asylum, immigration policies, judicial cooperation in civil matters and mutual administrative assistance in customs matters. Judicial cooperation in criminal matters and police cooperation remained in the third pillar. As a result, AFSJ became unbalanced since it was composed of policies of the first pillar to which the community system was applied and policies of the intergovernmental third pillar. Furthermore with the *aquis communitare* were included the Schengen Agreement of the14th of June 1985 on the gradual abolition of checks at their common borders and the Convention of the 19th of June 1985

implementing the Schengen Agreement. For the issues thus regulated, some of their provisions became a part of the first pillar, while others were included in the third pillar.

As a consequence of the changes introduced by the Treaty of Amsterdam, institutions of the Community obtained certain competences in the third pillar. The commission was given parity of legislative initiative with the Member States. Limited powers were submitted to the European Court of Justice: controlling framework decisions and other decisions (art. 35 par. 6 of the Treaty of Maastricht), and also responding to prejudicial questions (but the Member States were at liberty to decide whether to recognise the jurisdiction of the European Court of Justice in this field). Furthermore, the Council of the UE was obliged to consult the European Parliament before approving statutes (with the exception of common standpoints). The most important change was the introduction of the new legal instrument – the framework decision – intended according to art. 34 par. 2 point B of the Treaty of Maastricht for the approximation of the laws and regulations of the Member States. Other legal instruments of the former third pillar were common standpoints and decisions, general statutes adopted by the Council "for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect" (art. 34 par. 2 point c). By virtue of these decisions several specialised institutions were created, such as Eurojust (Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime). In accord with the Treaty of Amsterdam joint actions were renounced. Obviously some, previously promulgated, are still valid, but most were replaced by framework decisions or decisions, for instance: the Joint action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union was replaced by the Council Framework Decision 2008/841/JHA on the fight against organised crime.

The Treaty of Nice (signed on the 26th of February 2001, hereinafter the Treaty of Nice) introduced no important modifications related to the subject discussed in this article. Whereas far-reaching modifications were proposed in the Treaty establishing a Constitution for Europe, signed on the 29th of October 2004, which aimed at total abolition of the EU pillar structure. The main legal instruments were intended to be European statutes and European framework decisions, which were equivalents of today's regulations and directives. Since it was not approved, the treaty of Lisbon was signed on 13th December 2007, hereinafter the Treaty of Lisbon, apparently as a compromise solution. It was formulated as amendments to the Treaty of Maastricht (hereinafter the treaty with amendments is referred to as the EU Treaty) and to the Treaty Establishing the European Community. Simultaneously, the name of the latter was changed to the Treaty on the Functioning of the European Union (hereinafter the Treaty on the Functioning of the EU).

Currently, we are in the transitional period of five years until the Treaty of Lisbon becomes effective. It is regulated in Protocol Title 7 (No 36) to the Treaty on the Functioning of the UE on Transitional Provisions. According to its art. 9 the legal consequences of acts adopted within the third pillar on the basis of the Treaty of Maastricht prior to the validity of the Treaty of Lisbon remain valid until they are repealed, annulled, or amended, for the period not exceeding five years (art. 10 of the

Protocol). The first abrogated framework decision was the Framework Decision 2002/629/JHA on combating trafficking in human beings replaced by the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims). The same refers to the conventions concluded between the Member States on the basis of the Treaty of Maastricht. During this period the Commission was not entitled to the powers resulting from the provision of art. 258 of the Treaty on the Functioning of the EU (former art. 226 of the Treaty Establishing the European Community) concerning statutes on police cooperation and judicial cooperation in criminal matters and jurisdiction of the European Court of Justice is executed according to art. 35 of the Treaty of Maastricht (providing facultative jurisdiction, presently abrogated). If the statute is amended though, the above reservations shall not be valid.

Characteristics of framework decisions

Framework decisions are binding for the Member States in regard to the result, which must be reached but national institutions are unrestricted in choosing forms and measures for that purpose. Thus they are similar to directives – they oblige the Member States to implement their provisions in national legislation within a fixed period. What differentiates them from directives is that they have no direct executive effect (cannot be a separate source of rights and duties of individual persons). Furthermore, it was not decided how to exact their implementation from the Member States. That was primarily caused by the fact that the European Court of Justice had no competence in the third pillar and as a consequence of the lack of procedure analogous to that provided in the first pillar according to art. 226 and 227 of the Treaty Establishing the European Community (currently art. 258 and 259 of the Treaty on the Functioning of the EU). On the basis of the procedure the Commission (art. 226 of the Treaty Establishing the European Community, currently art. 259 of the Treaty on the Functioning of the EU) or a Member State (art. 227 of the Treaty Establishing the European Community, currently art. 259 of the Treaty on the Functioning of the EU) may initiate proceedings before the Court of Justice against state which in the fixed time has not implemented (or implemented incompletely or incorrectly) a directive to its legal order. Still, judicial decisions of the European Court of Justice obliged the Member States to ensure the effectiveness of framework decisions; results included the principle of loyalty to the EU and obligation of interpretation of domestic legal acts in favour of the law of the European Community, which was highlighted by the Court in the case C 105/03 Pupino (Biernat 2005, 201-204, 216-217; Jasiński 2005, 105).

By framework decisions the Member States were bound to penalise such acts as for instance: euro counterfeiting (the Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro), terrorism (the Council Framework Decision 2002/475/JHA on combating terrorism), trafficking in human beings (the Council Framework Decision 2002/629/JHA on combating trafficking in human beings), drug trafficking (the Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit

drug trafficking) and attacks against information systems (the Council Framework Decision 2005/222/JHA on attacks against information systems).

Similarly as in the case of directives, two extreme models of implementing of framework decisions and their variants may be identified. The first consists of literal rewriting of a framework decision. Sometimes it is the only possible mean of transfer – this is the case of framework decisions regarding procedural issues, for instance the Council Framework Decision 2002/584/JHA on the European arrest warrant (hereinafter Framework Decision 2002/584/JHA). Generally, this method has one advantage because of which is promoted by institutions of the EU – verification of implementation correctness presents no difficulty. Nevertheless it should be remembered that framework decisions intend to harmonise of legal orders of the Member States not unify them. Therefore their transfer should take into account the specific character of a legal system in a particular state. Thus it should be assumed that necessarily it consists of implementation of legal rules not provisions. It is essential especially for framework decisions regarding substantive criminal law, which compels penalisation of defined behaviour. Their provisions are very general, their contents indicate the facts of a case whereas it is the responsibility of national legislatures to create legal rules to criminalise undesirable conduct (see more in: Grzelak 2008, 120-123).

Implementation of provisions of framework decisions should be achieved in the greater part with a statute, especially when provisions of a framework decision refer to so-called statutory matter. In the case of discordance between a framework decision and a constitution it may be necessitate amending the constitution (in many countries, including Poland that was the effect of Framework Decision 2002/584/JHA). In some cases it is sufficient to change the legal interpretation of rules of a national law (such a situation occurred for instance in Italy with regard to the Pupino case).

Certainly it is possible that legal rules of a Member State are consistent with provisions of a framework decision. In such case there is no need of implementation of the provisions.

In conformity to the subject of the present article, the next part focuses on the problem of implementation within the Polish legal order of framework decisions obliging the Member States to introduce defined types of prohibited acts to their legal systems.

Because of the limited volume of the present study only the question of implementation of two framework decisions will be discussed: the Council Framework Decision 2002/475/JHA on combating terrorism and the Council Framework Decision 2002/629/JHA on combating trafficking in human beings. Certainly the choice is not casual. In the case of the first one deals with a method of implementation consisting in transfer of legal rules, with the aim of inserting created norms into the Polish legal order. The second case, to the contrary, shows the model of rewriting the content of the implemented framework decision without any reflection.

Framework Decision 2002/475/JHA of the 13th of June 2002 on combating terrorism

The Council Framework Decision 2002/475/JHA of the 13th of June 2002 on combating terrorism (hereinafter referred to as the Framework Decision 2002/475) obliges the

Member States primarily to introduce a unified definition of a "terrorist offence". All the more since in international law "terrorism" has no universally agreed, legally binding, criminal law definition. In some UN documents the following descriptive definition is used: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes" which are "in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" (United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60 Measures to Eliminate International Terrorism of December 9, 1994, UN Doc. A/Res/60/49).

The definition of a terrorist offence is included in art. 1 par. 1 of the Framework Decision 2002/475 and consists of two elements: the subjective and the objective. The offence shall be deemed a terrorist offence first of all when corresponding to at least one of subjective prerequisites included in the first part of the definition regarding the intention of offender, that is it has to be committed with the intention of:

(i) seriously intimidating a population, or
(ii) unduly compelling a Government or international organisation to perform or refrain from performing any act, or
(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Secondly, it must comply with the objective criterion, that is inclusion in the finite catalogue included in the second part of the definition (among others: attacks upon a person's life, attacks upon the physical integrity of a person, kidnapping, hostage taking, causing extensive destruction to a Government or public facility, seizure of aircraft, manufacture, possession, acquisition, transport, supply or use of weapons, explosives or nuclear, biological or chemical weapons etc.) or to threat to commit any of the acts listed.

Whereas in art. 3 of the Framework Decision 2002/475 the Member States are obliged to penalise "offences linked to terrorist activities", consisting of activities, which are not terrorist activities themselves but may be undertaken with a view to their commission (for instance: inciting terrorist offences, recruitment and terrorist training, forgery of administrative document etc.)

According to art. 2 of the Framework Decision 2002/475directing a terrorist group and participating in the activities of a terrorist group shall be punishable. According to the provision of art. 2 par. 1 of the Framework Decision 2002/475, a terrorist group is a structured group of more than two persons established over a period of time and acting in concert to commit terrorist offences. The "structured group" is a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

The provisions of the Framework Decisions 2002/475 were implemented in the Polish legal order with the Act of the 16th of April 2004 on amendment of the Penal Code Act and some other acts.

The Polish legislator did not decide on literal transfer of the definition of a terrorist offence. A new, more concise definition was created. The highlighted issue was the criterion of the intention in the act of an offender, which was indicated in the provision as in the Framework Decision 2002/475 art. 1 par. 1. Alternatively, as the aim of a criminal act are regarded:

(i) seriously intimidating a large number of people,
(ii) compelling the Government of the Republic of Poland or the Government of another country or international organisation to perform or refrain from performing defined acts,
(iii) seriously destabilising the political system or economy of the Republic of Poland, of another country or an international organisation.

The second element of the definition, which is included in art. 115 § 20 of the Penal Code is constructed differently from the original in the Framework Decision 2002/475. The catalogued offences, which when committed with any of the intentions listed in the first part of the definition are regarded as offences of a terrorist character are replaced by the formal criterion. An offence to be regarded as an offence of a terrorist character must be subject to the penalty of deprivation of liberty with at least a statutory maximum of 5 years. Therefore the provision does not create *delictum sui generis* but regards as an offence of a terrorist character every offence (every crime and serious misdemeanour punished under penalty of deprivation of liberty with at least 5 years of statutory maximum) committed with any of the intentions listed in the first part of definition (Giezek 2007, 772). In accord with provisions of the Framework Decision 2002/475, as a terrorist offence is also regarded threatening to commit any such act (art. 115 § 20 *in fine*) (Wąsek 2005, 874).

It is worth mentioning that the result described in the definition is not crucial for committing an offence considered as an offence of a terrorist character. It is important that an offender acts with the aim described and the offence itself is punished under penalty of deprivation of liberty with at least 5 years of statutory maximum (Compare with Giezek 2007, 775; Górniok 2004, 8; Michalska-Warias 2009, 221; Sońta 2005, 17-18).

The number of offences, which are subject to penalty of deprivation of liberty with at least a statutory maximum of 5 years, is high. Many of them may not be considered as offences of a terrorist character since it is even difficult to imagine how with their commission an offender may achieve the result described in the definition, such as seriously intimidating a large number of people, compelling the public authorities or international organisation to perform defined acts or seriously destabilising the economy of the Republic of Poland, another country or an international organisation. The most striking examples of such offences are the offences against the family and custody (for instance bigamy, the offence of ignoring the obligation to pay alimony or inducing minors to drink) (Giezek 2007, 773. Compare with Jasiński, Zielińska 2005, 528).

The solution applied, to refrain from enumerating the list of offences, which when committed with any of the aims indicated become offences of a terrorist character – as in the Framework Decision 2002/475 – is advantageous because it does not create an expanded and casuistic definition (Compare with Majewski 2004, 1244). Furthermore, as

is stressed by Agnieszka Grzelak, literally "rewriting" the content of art. 1 of the Framework Decision 2002/475 would be ineffective since every prohibited act indicated there in the Polish penal system may be qualified on the basis of different legal rules of the Penal Code, cumulatively coinciding in predictable facts of a case (Grzelak 2008, 158).

The statutory maximum of 5 years of deprivation of liberty arouses justified doubts. It may have the effect that not all types of the offences described in the framework decision shall be considered as terrorist offences on the grounds of the penal code. As an example may be cited the culpable preparation to commit an offence of hostage taking, punished under penalty of deprivation of liberty for a term of 3 years (art. 252 § 3 of the Polish Penal Code, hereinafter PPC) or punishable threat (art. 190 PPC see Budyn-Kulik, Kozłowska-Kalisz 2010, 258. More in Jasiński, Zielińska 2005, 527).

Taking into consideration the above, some scholars believe that if the criterion of the intention of the offender's act is the most important issue and determines the terrorist character of the offence, the condition of statutory maximum should be annulled. This is especially relevant when considering that the idea of distinguishing a terrorist offence consists among others in more severe of punishment for acts of a terrorist character, even those seemingly less serious (Compare with Giezek 2007, 775).

In accord with provisions of the Framework Decision 2002/475 the regulation providing aggravation of penal responsibility for an offence of a terrorist character was introduced into the General Part of the Penal Code (art. 5 par. 2). According to the content of amended art. 65 § 1 PPC for offenders committing such acts, the provision of art. 64 § 2 PPC is applied. In compliance with that the rules regarding sentencing, penalty measures and means connected with an offender being on probation, provided for offenders described in art. 64 § 2 PPC (that is "multi-recidivists") are applied also to offenders of acts of a terrorist character. That means, among others, that the court (obligatorily) imposes a penalty of deprivation of liberty provided for the offence committed harsher than the statutory minimum and may impose it up to the statutory maximum increased by a half. Such an offender may apply for conditional release not before having served ¾ of a sentence.

In connection with implementation of the Framework Decision 2002/475 the amendment to the provision of art. 110 § 1 PPC regarding jurisdiction was needed. It needed modification to enable application of Polish penal rules to a foreign national, who committed an offence of a terrorist character in Poland. It was necessary to amend art. 258 PPC as well, which penalises participation in a group or organization intending to commit terrorist offences or fiscal offences. The provision of § 2 was modified creating the qualified type of this crime, providing harsher punishment (deprivation of liberty from 6 months to 8 years) when the group is armed – presently it refers to organisation or group with the intention of committing offences of a terrorist character. At the same time art. 258 PPC was supplemented with § 4 penalising founding or directing a group or organisation of a terrorist character and that was considered to be a crime. Whereas, according to art. 65 § 2 PPC to the offender of the offences described in art. 258 PPC provisions regarding multi-recidivists are applied, that is referring to an offender described in art. 64 § 2 PPC, except for severer punishment provided in the provision.

I think it may be generally assumed that the framework decision was implemented in the proper manner to the Polish legal order. Rightly it was decided not to mechanically rewrite its provisions but it was properly adapted to the Polish Penal Code. Due to that excessive casuistry and possible incoherence of the penal system were avoided (Compare with Grzelak 2008, 161. Differently Jasiński, Zielińska 2005, 527). It is worth considering though departing from fixing the lowest level of a statutory maximum of a penalty as a condition for regarding a prohibited act as an offence of a terrorist character.

Framework Decision 2002/629/JHA on combating trafficking in human beings

The second framework decision, which I wish to focus on is the Council Framework Decision 2002/629/JHA of the 19th of July 2002 on combating trafficking in human beings (hereinafter Framework Decision 2002/629/JHA), which obliges the Member States to take appropriate action for the purpose of preventing human trafficking. Likewise the term "terrorism", trafficking in human being has no universally agreed, international definition. The authors of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No 197) in its explanatory report stated that "Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all" (Explanatory Report to Council of Europe Convention No 197 on Action against Trafficking in Human Beings). Similarly, in the Explanatory Memorandum in Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, "Trafficking in human beings" is described as "considered one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable business for organised crime. It consists of the recruitment, transfer or receipt of persons, carried out with coercive, deceptive or abusive means, for the purpose of exploitation including sexual or labour exploitation, forced labour, domestic servitude or other forms of exploitation including the removal of organs".

In the Framework Decision 2002/629/JHA, which is the subject of present study, this prohibited act is defined as "the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:

(i) use is made of coercion, force or threat, including abduction, or
(ii) use is made of deceit or fraud, or
(iii) there is an abuse of authority or of a position of vulnerability, which is such, that the person has no real and acceptable alternative but to submit to the abuse involved, or
(iv) payments or benefits are given or received to achieve the consent of a person having control over another person".

The purpose of the offender's activity is exploitation of the victim's labour or services, including "at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of exploitation of the prostitution of others or other forms of sexual exploitation including in pornography" (art. 1 par. 1 *in fine*).

In paragraph 2 of the article is made the reservation that the consent of a victim to the exploitation is irrelevant, where any of the means set forth in article 1 paragraph 1 have been used. Regarding children (that is any person below 18 years of age – art. 1 par. 4 of the framework decision) the same solution as in the acts of international law was applied, when the conduct described in par. 1 involves a child it shall be an offence, even if none of the means set forth in the provision have been used.

The provisions of the framework decision were implemented in the Polish legal order with the Penal Code Amendment Act of the 20th of May 2010, to the Police Act, to the act on provisions introducing the Penal Code and the Code of Penal Proceedings. With the amendment, the previous provision penalising human trafficking (that is art. 253 § 1 PPC) was replaced by the provision of art. 189a (placed in Chapter XXIII "Offences against freedom"), which has a similar content. One, important modification was introduced: the verb "to practise" (in the provision of art. 253 § PPC practising human trafficking was mentioned) was replaced by the verb "to commit", which in my opinion allows the conclusion that even a single act of an offender may be regarded as human trafficking. Other important *novum* is the punishability of preparation for the offence.

The most relevant modification is the definition of human trafficking adopted in art 115 § 22 PPC. According to that human trafficking is the act consisting of actual actions of recruitment, transfer, harbouring and reception of an even one person executed with use of the defined means. The legislator enumerated them: violence or unlawful threat, abduction, deceit, misleading or taking advantage of a mistake or incapability of correct comprehension of action undertaken, an abuse of a relation of dependency, taking advantage of critical position or a state of helplessness, giving or receiving payments or personal benefits or their promise given to a person exercising tutelage or controlling another person. It is without doubt a confined catalogue since the legislator did not use an open clause enabling considering mentioned conduct only as examples (Kozłowska-Kalisz 2010, 263). What is more, the definition specifies that an offender must act for the purpose of exploitation of a person, who is a "victim of human trafficking". The meaning of exploitation was specified also by giving examples (the expression "particularly" tells us that): exploitation of prostitution, pornography or other forms of sexual exploitation, forced labour or services, begging, slavery or other forms of exploitation humiliating human dignity or for the purpose of obtaining cells, tissues or organs against legal rules. Furthermore, the clause was added that the above-mentioned conduct, when referring to a minor, is human trafficking even when the methods or measures listed in the act were not used. The consent of an injured person certainly is irrelevant for occurrence of human trafficking.

According to the above mentioned act, there is no doubt that the concept of human trafficking shall be understood as actual actions, and it is clear that to indicate the

offence only one action of the offender is needed ("one transaction"), referring to one person. Whereas, the requirement of acting for the "purpose of exploitation" is the requirement of result oriented intent (*dolus directus coloratus*).

The amendment to the Penal Code conveyed is not sufficiently considered. Without doubt few correct solutions were introduced. As such should be regarded transferring the provision, which previously penalised human trafficking (art. 253 § 1 PPC) to the Chapter XXIII, its modification by replacing the word "to practise" by the word "to commit", introducing the offence of preparation for the offence and abrogation of art. 204 § 4 PPC, since the facts of a case, which are penalised by this provision are covered in full by the provision of art. 189a § 1 (that is the previous art. 253 § 1 PPC) that determines the definition of "human trafficking" applied. The definition itself arouses reservations. There is no doubt that it consists in the framework decision rewriting. Therefore it is expanded and extremely casuistic, which may cause limitation of the scope of culpability. That is why it is essential to support the view of Włodzimierz Wróbel (Wróbel, 2010) and Andrzej Sakowicz (Sakowicz, 2010), who in the opinions to the draft of amendment prepared by them suggest introducing the expression "in particular", before the forms of human trafficking described and making it a list of examples. At the same time it would enable removing the clause regarding minors (the last phrase of the definition). Włodzimierz Wróbel shows that it might reduce possible problems in the future, since the clause existing in the present form may cause penalisation of conduct, which does not threaten personal dignity (for instance adoption procedures) (Wróbel, 2010). I think that the definition should exclude means used for committing the offence of human trafficking as well, since when the offender uses none of them it might prevent prosecution (Hudzik, Paprzycki, 2009). Due to that change it would become synthetic and "concordant with the Polish tradition of creating synthetic provisions of penal law" (Bojarski, Górniok 2010, 615).

In similar respects it is not advisable to introduce subjective attributes by including the requirement of the purposive intent – each time indicating the direction of the offender's action may prevent application of the provision of art 189a in reference to some facts of a case (Hudzik, Paprzycki, 2009; Sakowicz, 2010). Whereas it will certainly hamper fast and effective prevention of the dangerous and increasingly frequent phenomenon of human trafficking (Radoniewicz 2011, 153-154).

It seems that the above-discussed defects of the new regulations, created as a result of implementation of the new Framework Decision 2002/629, prove convincingly that transposition of its provisions was not appropriately conducted. Copying the definition included there, as presented above, was a mistaken solution, the consequences of which are regulations, which certainly will be not be effective for prevention of human trafficking.

Conclusions

As mentioned in the introduction of this study, the Treaty of Lisbon formally abolished the three-pillar structure of the European Union. But it may not be forgotten that during the current 5-year transition period, the provisions of framework decisions are valid until

repeal, annulment or amendment. Furthermore, it seems that remarks made in the present study regarding implementation of the framework decisions regulating the issues of substantive criminal law may be referred to the directives, which will intercept their role. Since with regard for the differences between particular national legal orders and the unwillingness of the Member States to devolve on the EU institutions too strong an interference in this matter of law, the provisions of the directive regarding this issue will be, at least in the immediate future, formulated in the same way as the provisions of framework decisions, that is as generally as possible. As a result, the optimal implementation should be analogous to that applied to the Framework Decision 2002/475 on combating terrorism, consisting in implementation of the legal rules rather than unconsidered rewriting their contents, as was the case of the Framework Decision 2002/629 on combating trafficking in human beings. The thesis is confirmed by the way in which the provisions regarding substantial criminal law were formulated in the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

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