

FIGHTING TERRORISM IN POLISH CRIMINAL LAW – THE INFLUENCE OF EU LEGISLATION

Poland, fortunately, does not belong to those countries in Europe which have been forced to fight terrorism for many decades, sometimes throughout most of the 20th century. And even now, in the era of enhanced global awareness of the danger of international terrorism, Poland has not become an arena for any of those dramatic events that have taken place in other countries and there is no reason to believe that this situation is going to change¹. The fact that for many years terrorism has not been an urgent problem (not even an urgent threat) has had many consequences, the lack of any references to terrorism in Polish criminal law being one of the most notable of them.

The term “terrorism” appeared for the first time in Polish criminal legislation in 2004², though many scholars had been writing much earlier about the need to incorporate this particular type of criminal behaviour in criminal law³. Before the legislative change of 2004, a terrorist attack could only be treated as an ordinary offence and qualified as one of the common felonies or misdemeanours recognised

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- 1 Of course, there have been many undertakings on different levels to prepare Poland to react to a possible terrorist attack. Initiatives of this kind are often connected with the more sophisticated system of organised crime fighting. About these problems, see: E.W. Pływaczewski, *Przestępczość zorganizowana z punktu widzenia polityki, teorii i praktyki*, [in:] E.W. Pływaczewski (ed.), *Przestępczość zorganizowana, świadek koronny, terroryzm w ujęciu praktycznym*, Kraków 2005, pp. 91-124 and E.W. Pływaczewski, *The Polish Platform for Homeland Security – a Pioneer Initiative for up-to-date Security in the European Union*, [in:] E.W. Pływaczewski (ed.), *Current Problems of the Penal Law and Criminology*, Białystok 2009, pp. 445-474. The problem of terrorism, especially after September 11, 2001 has revived the interest in terrorism in Poland, which resulted in a number of publications about this phenomenon, see e.g. B. Hołyst, *Terroryzm*, vol I, vol. II, Warszawa 2009; K. Wiak, *Prawnokarne środki przeciwdziałania terroryzmowi*, Lublin 2009; K. Liedel, P. Piasecka, *Współpraca międzynarodowa w zwalczaniu terroryzmu*, Warszawa 2004, C. Dycz, *Terroryzm początku XXI wieku jako zagrożenie bezpieczeństwa międzynarodowego i narodowego*, Gdynia 2005; T. Aleksandrowicz, *Terroryzm międzynarodowy*, Warszawa 2008; K. Karolczak, *Terroryzm. Nowy paradygmat wojny w XXI wieku*, Warszawa 2010.
 - 2 The change was introduced by an act entitled: *Ustawa z 16 kwietnia 2004 o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw* (Dz.U. Nr 93, poz. 889).
 - 3 See: R. Aleksandrowicz, *Pojęcie czynu o charakterze terrorystycznym „de lege lata” i „de lege ferenda” (wybrane zagadnienia)*, *Problemy Praworządności* 10/1988, p. 24, K. Indecki, *Prawo karne wobec terroryzmu i aktu terrorystycznego*, Łódź 1998, p. 335, M. Filar, *Terroryzm – problemy definicyjne oraz regulacje prawne w polskim prawie karnym w świetle prawa międzynarodowego i porównawczego*, [in:] V. Kwiatkowska-Darul (ed.), *Terroryzm. Materiały z sesji naukowej*. Toruń 11 kwietnia 2002 r, Toruń 2002, pp. 27-36.

in the criminal statutes with, however, no possibility of applying aggravated punishment to the perpetrator of a terrorist act. More severe punishment could be imposed on terrorist offenders only when they were acting within a criminal organised group or a criminal association as the law considered such a fact to be an aggravating circumstance (but it did not matter what kind of offences – whether terrorist or common – were the aim of the criminal structure).

The situation changed because of the accession of the Republic of Poland to the European Union in 2004. Poland had to meet many legal requirements of the EU, including those considering criminal law. And the European law knew the concept of terrorist offences and required the member–states to recognise it in their internal systems as well. The problem of terrorism has been dealt with in the framework decision of 13 June 2002 on combating terrorism (2002/475/JHA)⁴. According to this legal act all member states were obliged to introduce changes in their internal legal systems so that the notion of terrorist offences would be instituted. According to art. 1 of the framework decision, by terrorist offences the criminal law of each member state should understand a number of intentional acts which, given their nature or context, may seriously damage a country or an international organisation, if they are committed with the aim of: seriously intimidating a population or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. In art. 1 the following acts are listed as offences which are to become terrorist, if committed with one of the above mentioned aims: a) attacks upon a person's life which may cause death, b) attacks upon the physical integrity of a person, c) kidnapping or hostage taking, d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss, e) seizure of aircraft, ships or other means of public or goods transport, f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons, g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life, h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life, and i) threatening to commit any of the acts listed in (a) to (h).

The Polish legislator decided to implement the obligations stemming from art. 1 of the framework decision not by creating a new group of terrorist offences in the

4 Official Journal L 164, 22.06.2002.

special part of the criminal code, but by introducing a broad concept of a terrorist offence in the general part of the code, so that a larger group of offences than in the framework decision could be considered “terrorist”. The definition of a terrorist offence can be found in art. 115 § 20 of the Polish criminal code (PCC). According to it, an offence becomes terrorist when it is punishable by a maximum imprisonment of at least five years, if it is committed with the aim of: seriously intimidating many persons, compelling a public authority organ of the Republic of Poland or of another state or an organ of an international organisation to perform or abstain from performing certain acts, causing serious destabilisation in the political system or economy of the Republic of Poland, another state or international organisation. A threat to commit such an act should also be considered a terrorist offence⁵.

If one compares the two definitions, the second one seems to be broader. While the framework decision imposes the obligation to treat as terrorist a specified group of offences listed in points (a) – (i), the Polish legislator decided to use a general clause, which means that theoretically any offence can become terrorist, provided it is “serious” enough (there is a minimum penalty of imprisonment of not less than 5 years.). This, of course, means that many more offences can be considered terrorist by the Polish criminal law, though a number of those offences that are punishable by the required term of imprisonment are not, by their very nature, suitable to become the means of terrorist activity (e.g. in the group of offences punishable by at least five years of imprisonment one finds offences such as domestic violence, infanticide, child pornography and other child sex offences)⁶. Other offences, though they may be actually committed by terrorists, will not always be executed directly for those aims mentioned in the definition, e.g. terrorists may commit a number of offences against property in order to obtain funds for their future actions, or they may give bribes to obtain some information that might be useful for them in the future – in such cases the offences cannot be considered terrorist, as the aims described by the law are yet too distant from the committed acts⁷.

5 There have been expressed, however, some doubts about the way the threat is described. E.g. K. Indecki claimed that the requirement that the penalty for an act should be at least 5 years of imprisonment refers also to the penalty provided for the threat to commit a given offence, which would mean that no threat could be considered a terrorist offence under the binding criminal law, as the maximum penalty for the misdemeanour of threatening somebody with committing an offence against him is two years of imprisonment (see: K. Indecki, *W sprawie definicji normatywnej terroryzmu*, [in:] W. Pływaczewski (ed.), *Przestępczość zorganizowana, świadek koronny, terroryzm w ujęciu praktycznym*, Kraków 2005, pp. 289-291. Most authors, however, interpret the discussed article in such a way that they do not refer the requirement of 5 years imprisonment punishment to the offence of threat as such but claim that the offence that the offender threatens to commit should be punishable by such punishment (see, e.g. J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2007, p. 1244 and K. Wiak, *Prawnokarne środki przeciwdziałania terroryzmowi*, Lublin 2010, p. 240).

6 See: K. Wiak, *Prawnokarne środki...*, s. 231, J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2007, p. 773.

7 Such offences would, however, fall under the category of offences linked to terrorist activities in the meaning of art. 3 of the framework decision. This concept will be discussed later.

Looking at the aims which are intended by the terrorists, one can see that the Polish legislator, to a great extent, used the framework approach to that problem.

The descriptions of terrorist aims are very similar in the framework decision and in the Polish criminal code, though there are some minute differences. While the framework decision requires the intention to seriously intimidate a population, the Polish criminal code makes use of the phrase “seriously intimidating many persons”. This again might lead to the conclusion that the Polish definition is broader, as “many persons” would generally require a lower number than a “population”, which means that actions smaller in scope can also be considered terrorist under the binding Polish criminal code provisions. Commentators disagree, however, about the interpretation of “many persons”. Some authors establish the minimum number of persons which the offender intended to intimidate as at least ten⁸, others claim the number could be even as small as six⁹ or even two¹⁰, and others assume that the minimum number of persons required to be “many” should be established depending on the actual circumstances of a given case¹¹.

The second possible aim of a terrorist offender is practically identical in the Polish criminal code and in the framework decision, there are, however, some differences in the wording of the third aim – while the framework decision speaks of “seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation”, art. 115 § 20 PCC speaks of “causing serious destabilisation in the political system or economy of the Republic of Poland, another state or international organisation”. The omission of destruction as the aim of a terrorist offence can be explained in such a way that it is, in fact, encompassed by the term “destabilisation”. Some doubts could arise whether the current Polish law allows for treating as terrorist a serious offence committed with the aim of destabilising the social structures of a country, which is not expressly mentioned in art. 115 § 20 PCC. It seems, however, that any attack with such an aim could be considered to constitute an attack on the political system of the Republic of Poland, so as far as the description of terrorist aims is concerned, the Polish criminal law seems to meet the framework requirements in full.

There is, as yet, an area in which the solutions adopted by the Polish legislator seem to fall short of the framework decision demands. The decision in art. 1 obliges

8 See: e.g. O. Górniok, *Prawo karne gospodarcze*, Bydgoszcz 2003, p. 108, M. Bojarski, [in:] O. Górniok, *Kodeks karny. Komentarz*, Warszawa 2006, p. 889, A. Michalska-Warias, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, 4th edition, Warszawa 2011, p. 758.

9 See: K. Buchała, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz do kk.*, vol. II, Kraków 1999, p. 331.

10 See: R. Zawłocki, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna. Komentarz*, vol. II, Warszawa 2005, pp. 1280-1284.

11 See: A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 552, J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*, vol. III, Kraków 2008, pp.709-710, K. Wiak, *Prawnokarne środki...*, p. 246.

the member states to penalise the act of threatening to commit any of the acts listed in points (a) to (h). At the first glance, the Polish law seems to do so, as a threat to commit any of the serious offences described in art. 115 § 20 PCC is mentioned as a possible manifestation of a terrorist offence. The problem which appears here is, however, connected with the fact that the discussed definition constitutes a general clause and not a specific type of offence. All forbidden acts (which are punishable by five years of imprisonment or the threat to commit them) can become terrorist, but they first have to constitute offences in all. If an act falls under the definition of art. 115 § 20 PCC but does not fulfil the statutory features of an offence defined in the special part of the criminal code (or in some other statute) it does not constitute an offence at all. A punishable threat is defined in art. 190 § 1 of the criminal code as a threat to commit an offence against the threatened person or against his or her close relatives. The limitation of punishable threats to threats directed at the victim himself or his or her close relatives means that, under the binding criminal code, to threaten a person with the commission of an offence against a third party and their close relatives is not unlawful and does not constitute a punishable threat. In this regard the threats typical of terrorists may often refer to public property or e.g. the safety of people who are not in any way related to the threatened person or institution¹². As stated by the Supreme Court in a sentence issued on 13 February 2008¹³, threats directed by a prisoner to the police about blowing up a block of flats together with its inhabitants do not constitute the offence of punishable threat for the very fact that they were not directed to the intended victim or his or her close relatives.

The amendment to the criminal code of 16 April 2004 introduced some more changes connected with the requirements of the framework decision. As per art. 5 (2) of the decision, the terrorist offences specified in art. 1 (1) should be punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 1(1), save where the sentences imposable are already the maximum. This requirement was met by introducing changes to art. 65 of the Polish criminal code. Before the amendment of 2004 that article entitled the courts to treat as multi–recidivists (which meant the possibility of imposing aggravated punishment on them and longer terms in prison to be served before conditional release could be granted to them) two more categories of offenders: the so-called professional offenders, who commit offences to source their regular income and offenders who commit an offence as members of a criminal organised group or a criminal association. In 2004 a new category of offenders was

12 About this problem, see: J. Majewski, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2007, p. 1244 oraz K. Wiak, *Prawnokarne środki...*, p. 240. See also: A. Michalska-Warias, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Wyd. IV, Warszawa 2011, p. 423.

13 See: Supreme Court sentence of 13 February 2008, IV KK 407/07, *Biul.P.K.* 2008, nr 4, poz. 10.

added to art. 65 PCC – the perpetrators of a terrorist offence. This change meant in fact that the scope of the article was broadened only as far as to include a terrorist act carried out by a lone-terrorist – in the case of typical terrorist activity connected with working within some kind of organised structure, the offender being a member of a criminal structure could be punished more severely before the legislative change became effective¹⁴ (of course, this could only happen where participation in the criminal organisation could be proven, so the change introduced in 2004 means that in the case of terrorist offenders proving one of the two categories – participation in an illegal structure or the terrorist character of the offence committed – will suffice to apply the more severe rules of punishment according to art. 65 PCC).

The framework decision of 13 June 2002 on combating terrorism also introduces the concept of offences relating to a terrorist group. According to art. 2 (1) “terrorist group”, for the purposes of the framework decision means “ a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences”, and by “structured group” one should understand “ 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”. Moreover, all member states, were obliged to take the necessary measures to ensure that the following intentional acts are punishable: (a) directing a terrorist group; (b) participating in the activities of a terrorist group including supplying information or material resources, or by funding its activities in any way with the knowledge that such participation will contribute to the criminal activities of the terrorist group.

As far as the requirements of art. 2 of the framework decision are concerned, some changes were introduced into art. 258 PCC, which penalised the offences of establishing, directing and participation in a criminal organised group or a criminal association. First of all, a modification that cannot be directly connected with fulfilling the EU obligations was effected. The Polish criminal code of 6 June 1997 in its first version penalised in art. 258 § 1 PCC only the participation in an organised group or an association which intended to commit offences. The plural form used in the provision meant that criminal associations whose members intended to commit only one offence could not be prosecuted under that article. Such a decision of the legislator was criticised by some authors¹⁵, and there were even attempts

14 The aggravation of punishment for multi-recidivists, according to art. 64 § 2 of the Polish criminal code means that the court is obliged to impose the punishment of imprisonment higher than the minimum term of imprisonment for a given offence and the punishment imposed can be as high as the maximum term of imprisonment enlarged by 50%. Yet, in the case of felonies, the upper limit of punishment cannot be changed at all. Multi-recidivists cannot be generally granted the suspension of the execution of the imposed punishment and they can be conditionally released from prison after serving the 3/4 of their term, while no-recidivist offender can be released after serving half of the imposed term of imprisonment.

15 See: O. Górniok, [in:] O. Górniok, S. Hoc M. Przyjemski, Kodeks karny. Komentarz, Tom III, p. 304, A. Marek, Komentarz do kodeksu karnego. Część szczegółowa, Warszawa 2000, p. 256, A. Michalska-Warias, Przestępczość

at interpreting the article in such a way that it would refer also to those criminal groups or associations which intended to commit only one offence¹⁶. Though one could argue that the framework decision did not oblige the states to penalise the participation in a terrorist group which intended to commit only one offence – in the definition of such a group a plural form was used¹⁷ – the Polish legislator decided to change the wording of the offence in art. 258 § 1 PCC, by defining criminal structures as those organised groups and associations which intend to commit an offence. As far as the understanding of “criminal organised group” and “criminal association” is concerned, the interpretation of those terms by Polish scholars was fully accordant with the definition proposed in the framework decision¹⁸.

The changes effected in 2004 brought into the Polish legal system a new type of criminal organised groups and criminal associations. Before the introduction of the above mentioned amendment, criminal law recognised two types of unlawful structure: the common type (groups and associations which intended to commit offences including fiscal offences) and the aggravated type i.e. organised armed criminal groups and armed criminal associations, which were more severely punished. The implementation of the framework decision brought about not only the introduction of a new type of aggravated participation in a criminal structure in the form of an organised terrorist group and terrorist association but also the heightening of punishment for participation in the already known criminal structures. This was connected with the obligations imposed by art. 5 (3) of the framework decision, which obliged member states to take the necessary measures to ensure that offences listed in Article 2 are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for the offence of directing a terrorist group, and for the offences listed in Article 2(2)(b) – i.e. the different forms of participating in the activities of a terrorist group – a maximum sentence of not less than eight years. In so far as the offence of directing a terrorist group referred only to the threatening to commit any of the acts listed in art. 1 (1) (a) to (h), the maximum sentence should not be less than eight years.

After the amendment of 2004 to the criminal code became effective, the participation in a “standard” criminal structure has become punishable by

zorganizowana i prawnokarne formy jej przeciwdziałania, Lublin 2006, pp. 257-258, C. Sořta, *Przestęstwo o charakterze terrorystycznym w prawie polskim*, *Wojskowy Przegląd Prawniczy* 4/2005, pp. 18-19.

16 See: Z. Ćwiąkalski, [in:] A. Zoll (red), *Kodeks karny. Część szczególna. Komentarz*, vol. II, Kraków 1999, p. 929, R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 1998, p. 111.

17 Yet, a singular form is used in the definition of a structured group, so the interpretations of the required range of penalisation could differ and both, a minimalistic and a wider approach could be defended.

18 The Polish law recognised two types of criminal structures: an organised group and a criminal association. The second term is the traditional one, used by all Polish 20th century criminal codes and is used to describe better organised criminal structures. The second term appeared for the first time in the criminal code of 1969 as late as in 1995 as a response to changing economic and political situation, which in turn was connected with the appearance of more powerful criminal group in the Polish criminal underground. About the interpretation of these two terms, see: A. Michalska-Warias, *Przestępczość zorganizowana...*, p. 256-277.

imprisonment from 3 months to 5 years, while participation in an armed or terrorist criminal structure has become punishable by imprisonment from 6 months to 8 years. Establishing or directing one of the "standard" or armed structures has been punishable by imprisonment from 1 to 10 years, and establishing or directing a terrorist structure has become a felony (the only one described in art. 258 PCC) punishable by imprisonment from 3 to 15 years. The Polish legislator did not make use of the option granted by art. 5 (3) of the framework decision to differentiate penalties for directing a terrorist group by providing lower penalty in the case of directing a group whose aim was to threaten with the commission of terrorist offences. The maximum penalty of 15 years of imprisonment refers to every type and form of terrorist group direction.

According to the framework decision participating in the activities of a terrorist group includes, in any way, the supply of information, material resources or funding, with the knowledge that such participation will contribute to the criminal activities of the terrorist group. The acts referred to as supplying of information or material resources fall in the Polish criminal law system under the definition of aiding and abetting, which is – as a rule – punishable in the same way as the offence whose commission was facilitated by the aider and abettor¹⁹. As to the financial support given to a terrorist group – it can also be generally considered as a form of aiding and abetting, and depending upon the intention and consciousness of the offender, his financial help could be seen as both aiding the terrorist group to exist (so the charges would be based on art. 258 § 2 PCC in connection with art. 18 § 3 PCC, which defines aiding and abetting) and aiding in the commission of a specified offence where the offender knew how his financial help was going to be used – if one of these charges were difficult to prove the other would suffice to bring the offender to Justice²⁰. As a result and insofar that the framework decision demands referring to the criminalisation of funding the activities of a terrorist group, there was at this time no need to introduce further changes into the criminal code. However, some concerns were expressed in the literature about the need to establish a new offence of financing terrorist activity as a response to other international obligations of the Republic of Poland²¹. It was even claimed that solidarity with those European

19 See: T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2011, pp. 73-74.

20 About the aiding in the commission of the offence defined in art. 258 § 2, see: A. Michalska-Warias, *Przestępczość zorganizowana...*, pp. 291-293.

21 Many of the UN Conventions and other international law documents require the criminalisation of some forms of terrorist financing. The UN International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 in art. 2 (1) states that "any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex, or b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. Similar obligations can be found e.g. in art. 1 (b) of the Security Council resolution

countries that were actually fighting with terrorism on their own territory made it necessary to have a separate offence of financing terrorist activity²² – thus Poland's determination in the global war on terrorism would be visible at first sight.

In 2009, as a result of international obligations, another amendment²³ to the criminal code introduced for the first time into the Polish criminal law system the offence of giving financial support to the perpetrator of a terrorist offence. According to art. 165a of the criminal code, this offence takes place when somebody collects, transfers or offers legal tender, financial instruments, securities, foreign currency, proprietary interest or other movable or immovable property in order to finance a terrorist offence. The misdemeanour in question is punishable by imprisonment from two to twelve years.

As has already been underlined in criminal law literature, there can be some doubts raised about the wording of the new offence and, as a result, its actual scope. The most serious problem is connected with meeting the requirement to prove specific intent on the part of the offender. To convict somebody of the aforementioned offence the prosecution must prove not only the full knowledge of the possible use of the property by the person or organisation to whom it was given, but also the intention on the part of the offender that the property should be employed in committing a specific terrorist offence, and proving the existence of such an intention at the moment of the commission of the offence may often be quite difficult²⁴. This also leads to some doubts about the fulfilment of the International and EU law demands²⁵, as in those acts no such specific intention is required (according to the 1999 UN Convention for the Suppression of the Financing of Terrorism the offender must act "with the intention" or "in the knowledge" that the funds are to

no 1373/2001, which obliges the states to criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts". Within the European Union the obligation to criminalise the financing of terrorism can be found in the directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Official Journal L 309/15, 25.11.2005) according to which by "terrorist financing" one should understand "the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism" (art. 1 (4)).

- 22 See: W. Filipkowski, R. Lonca, Kryminologiczne i prawne aspekty finansowania terroryzmu, *Wojskowy Przegląd Prawniczy* 4/2005, p. 43. The proposition to introduce a new crime was also advocated by Filipkowski and Guzik-Makaruk, see: W. Filipkowski, *Polskie regulacje w zakresie zwalczania finansowania terroryzmu*, [in:] T. Dukiet-Nagórska (ed.), *Zagadnienia współczesnej polityki kryminalnej*, Katowice 2006, p. 198; E. Guzik-Makaruk, W. Filipkowski, *Kryminalizacja finansowania terroryzmu na tle prawnoporównawczym*, *Studia prawnoustrojowe* 10/2009, pp. 64-65;
- 23 See: Ustawa z 25 czerwca 2009 r. o zmianie ustawy o przeciwdziałaniu wprowadzaniu do obrotu finansowego wartości majątkowych pochodzących z nielegalnych lub nieujawnionych źródeł oraz o przeciwdziałaniu finansowaniu terroryzmu oraz o zmianie niektórych innych ustaw (Dz.U. Nr 166, poz. 131).
- 24 This problem has been stressed by: K. Wiak, *Kryminalizacja finansowania terroryzmu w polskim prawie karnym*, *Palestra* 7-8/2010, pp. 64-65 and E. Guzik-Makaruk, W. Filipkowski, *Kryminalizacja finansowania...*, p. 62.
- 25 See: K. Wiak, *Kryminalizacja finansowania...*, p. 65, E. Guzik-Makaruk, W. Filipkowski, *Kryminalizacja finansowania...*, p. 62.

be used, in full or in part, in order to carry out the terrorist offences mentioned in the Convention. Also the directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, uses exactly the same expressions to describe the subjective side (*mens rea*) of the offence of terrorist financing).

It should be, however, noted that the above mentioned doubts about the fulfilment of international demands in the sphere of terrorist financing are not fully justified. In those cases where it is not possible to prove the specific intent required by art. 165a of the criminal code (e.g. because the offender knew that he was providing financial support for committing an offence, but it would be impossible to prove that he was aware of the terrorist character of such an offence), it will remain to be seen whether the offender can be held responsible for aiding and abetting in the commission of a specific offence and in such cases where the help was given to some kind of organisation, the offender could be charged with aiding and abetting under the offence of participation in a criminal structure. This means that the types of behaviour which are to be criminalised in accordance with the above-mentioned legal acts constitute offences under Polish criminal law, even though they may not always be labelled as “terrorist offences”.

The framework decision of 2002, art. 3 applies the expression “offences linked to terrorist activities. By such offences three categories of unlawful act are meant: a) aggravated theft with a view to committing one of the acts listed in Article 1(1), b) extortion with a view to the perpetration of one of the acts listed in Article 1(1) and c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b). It should be stressed here that in art. 5, which refers to the penalties for offences described in the framework decision, no special aggravated penalties are connected with this category of terrorism-linked offences, since the unlawful acts described in art. 3 are mentioned in the most general terms in art.5(1) according to which the member states should take the necessary measures to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.

As a result the Polish legislator did not decide to formally recognise the category of offences linked to terrorist activity, which means that the offences listed in art. 3 of the framework decision cannot be labelled as terrorism-linked by the courts when sentencing, though, at the stage of imposing punishment, the courts should take into account all circumstances of the commission of an offence²⁶, and where there can be no doubt that e.g. an aggravated theft or extortion was committed with a view to

26 About the rules of imposing punishment, see e.g. T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks...*, pp. 139-145.

preparing or committing a terrorist offence, this will constitute a factor inducing the court to impose a more severe punishment than it would otherwise have imposed on the offender in absence of this type of motivation.

Another obligation referring to the scope of national criminalisation is contained in art. 4 of the framework decision. According to that provision, each member state shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable. Moreover, each member state should take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

These demands of the framework decision required no changes in the internal Polish criminal law system, as it is a general rule of the criminal code that inciting, as well as aiding and abetting any offence are always punishable with the same penalties as the “main” offence, committed by the person who was incited by the instigator or assisted by the aider and abettor²⁷. The same rule applies to attempting to commit an offence – such attempts are also always punishable in the same way as the successful commission of an offence²⁸.

This way of regulating the aforementioned forms of committing an offence, means that the rules of applying punishment as referred to in art. 65 PCC, also refer to the commission of the offence by an instigator, an aider and abettor, as well as to cases where the offender only attempted to commit a terrorist offence – so also the demands of art. 5 (2) are met by the Polish criminal legislation²⁹.

Another problem regulated by the framework decision is the reduction of penalties for terrorist offenders in cases where by their behaviour they help the legal justice system and show substantial change in their attitude to justice and order. According to art. 6 of the framework decision each member state may take the necessary measures to ensure that the penalties referred to in Article 5 may be reduced if the offender: a) renounces terrorist activity, and b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: prevent or mitigate the effects of the offence, identify or

27 About instigation, aiding and abetting in Polish criminal law, see e.g.: P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Kraków 2004, pp. 340-384.

28 About criminal attempts in Polish criminal law, see e.g.: A. Zoll, [in:] A. Zoll (ed), *Kodeks karny. Część ogólna. Komentarz*, Kraków 2004, pp. 236-261.

29 Art. 5 (2) of the framework decision imposes on the member states the obligation to take the necessary measures to ensure that the offences referred to in Article 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 1(1), save where the sentences imposable are already the maximum possible sentences under national law.

bring to justice other offenders, find evidence, or prevent further offences referred to in Articles 1 to 4.

This provision is again in accordance with existing regulations contained in Polish criminal law which refer to the reduction (sometimes elimination) of punishment in cases where offenders who change their attitude and either renounce their criminal activity or actively assist the criminal law enforcement agencies or criminal courts. The binding legal regulations provide a whole system of solutions which can be applied to such offenders (there are no special regulations, however, referring to terrorist offenders as such). Since 1997 Polish criminal law has recognised the institution of the crown witness³⁰, which at first was to be only a contemporary tool used in fighting the most dangerous types of crimes³¹, but which now seems well installed in the system and is bound to remain so for many years to come. An offender granted leave by the prosecution to become a crown witness, is afforded total immunity from prosecution in exchange for evidence provided to the law enforcement agencies. As far as substantial criminal law is concerned, one of the most important clauses in affording an offender total immunity from prosecution is to be found in art. 259 PCC. This clause is connected with the offence of participating in a criminal structure of any kind and accordance therewith, no prosecution is possible in the case of an offender who committed the offence of participating in a criminal organised group or association (or the offence of establishing or directing such a structure), if that person has renounced his participation in that unlawful group or association and either revealed before a law enforcement agency all important circumstances of the act committed or prevented the commission of an intended offence, including a fiscal offence. Furthermore, the Polish criminal law system recognises the institution of the so-called “small crown witness” which is defined in art. 60 § 3 and 4 PCC. These provisions allow the extraordinary mitigation of punishment in the case of two categories of offender: those who committed an offence together with at least two other persons and reveal to the prosecution organ the identity of those persons and the circumstances of the commission of the offence (the mitigation of punishment is then mandatory – art. 60 § 3 PCC) and those who during criminal proceeding concerning an offence they have committed, beside testimony in that proceeding, reveal to the prosecution unknown important facts about the commission of another serious offence (in this case mitigation of punishment is, however, only optional).³² As for these “small crown witness” regulations, there are no exemptions of any offenders so even a person who committed murder or who directed a terrorist group

30 See: Ustawa z dnia 25 czerwca 1997 r. o świadku koronnym (Dz.U. Nr 114, poz. 738).

31 When the new institution was introduced, it was to function only until the end of 2001, but the time was once prolonged and then the provisions establishing the expiry date of the law were abolished (see: A. Michalska-Warias, *Przestępczość zorganizowana...*, p. 371).

32 About those two institutions and their application in the fight against organised criminal structures, see: A. Michalska-Warias, *Przestępczość zorganizowana...*, pp. 219-236 and the literature quoted there.

or other criminal group could benefit from these solutions – this can be the source of some doubts on the one hand, yet, on the other hand, art. 60 § 3 and 4 PCC might constitute an offer capable of convincing serious criminals to assist law enforcement for the benefits it offers particularly in cases where other forms of benefits are not accessible (e.g. persons who were involved in a murder cannot be granted the status of the “crown witness” and cannot be afforded total immunity from prosecution, no matter how much they are willing to cooperate).

The regulations referring to terrorism in Polish substantial criminal law, discussed above, constitute a comprehensive system of instruments which could be useful in reacting to various manifestations of terrorism. This means that Polish substantial criminal law generally meets the EU standards and requirements in the field of fighting terrorism³³, which also ensures that if international cooperation were required, the internal Polish systems would make proper reaction to various challenges in that field possible.

33 The legal solutions adopted in the Polish criminal code can, of course, be modified in order to improve their possible application and usefulness. About such propositions to change the definition of a terrorist offence, see: R. Zgorzaly, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, Prokuratura i Prawo 7-8/2007, pp. 68-77.

ZWALCZANIE TERRORYZMU W POLSKIM PRAWIE KARNYM – WPŁYW PRAWA UNIJNEGO

Artykuł omawia aktualny stan polskich regulacji odnoszących się do terroryzmu. Samo pojęcie przestępstwa o charakterze terrorystycznym zostało wprowadzone do polskiego systemu prawnego dopiero w 2004 r. w związku z koniecznością dostosowania prawa polskiego do wymogów prawa wspólnotowego. W artykule wskazano, jakie sposoby reakcji na zachowania terrorystyczne istniały w prawie polskim przed tymi zmianami oraz jakie możliwości reakcji istnieją obecnie. Omówiono także problem zgodności polskiego prawa karnego z wymogami decyzji ramowej Rady z 12 czerwca 2002 r. w sprawie zwalczania terroryzmu (2002/475/JHA) – autorka analizuje rozwiązania decyzji ramowej oraz przepisy kodeksu karnego, które miały ją implementować. W konkluzji wskazano, że antyterrorystyczne rozwiązania polskiego prawa karnego stanowią dość kompleksowy system instrumentów, które mogą być wykorzystane do zwalczania różnych przejawów tego zjawiska. Polskie prawo karne generalnie spełnia standardy unijne w zakresie zwalczania terroryzmu, co oznacza również, że w razie konieczności współpracy na arenie międzynarodowej, polski system wewnętrzny pozwoli na prawidłową reakcję w tej dziedzinie.

Key words:

Terrorism, anti-terrorism legislation, organized crime