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Insurance Fraud in a Legal Comparative Perspective. Part One

Oszustwo asekuracyjne w ujęciu prawnoporównawczym. Część pierwsza

ABSTRACT

This article presents a critical analysis of insurance fraud with a legal comparative perspective. In the author's opinion, it is beyond doubt that the Polish solution needs change. Nonetheless, the scope of this change may vary. A look at this type of prohibited act regulated in foreign legal systems may be helpful in formulating conclusions for the Polish law as it stands and proposals for the law as it should stand. Considering the above, part one of this article focuses on the legal-dogmatic analysis of the crime under Article 298 § 1 of the Polish Penal Code, and its counterparts in the subsidiary model (i.e., in Germany, Austria and Finland). A detailed study precedes the process of modelling the liability for the commission of an insurance fraud, taking into account the specificity of economic crime and the various approaches taken by European legislatures, while preliminary conclusions resulting from the analyses carried out have been formulated in the summary. However, it should be pointed out at this point that the presentation of the final conclusions will take place after the discussion regarding the independent model, which will be presented in part two of the article.

Keywords: insurance fraud; modelling the liability; legal comparative perspective; economic crime; European legislatures

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INTRODUCTION

It should be no wonder that the vulnerability of business mechanisms to criminal abuse varies and stems from a number of factors. One must also point to the nature of the activity, the complexity of the legal relationships involved, the degree of economic development and the place of action by the perpetrator. This applies in particular to the insurance industry in the broad sense, where the rights and obligations of the contracting parties are included in a number of normative acts.[1]

It must be stated that a system of remedies to protect the insurance market is necessary. In view of the subsidiary nature of penal law, this system should be first and foremost based on civil law or administrative law. This conclusion is drawn based on problems in the classification of criminal acts under penal economic law[2] resulting from the blurred boundary between the lawful activity in legal transactions and the conduct whose degree of criminality justifies a criminal response.[3] However, the application of penal law norms cannot be completely ruled out. It is important to notice the close link between the classification and interpretation of the prohibition and the establishing of the content of norms in other branches of law.

In part one of the article, the study covers the dogmatic analysis of the crime under Article 298 § 1 of the Polish Penal Code[4] and its equivalents in penal codes of the countries which use the subsidiary model. The type interpretation is preceded by an indication of the general models of liability for the so-called insurance fraud.[5] This will allow, in part two of the paper, the review of the legal systems of the standalone model countries and to evaluate the Polish solution in the form of conclusions regarding the law as it stands (*de lege lata*), and to put forward the suggestions for its modification, which constitute the proposals for the law as it should stand (*de lege ferenda*).

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[1] J. Skorupka, *Uwagi porównawcze na temat cywilnej i karnej ochrony praw majątkowych ubezpieczycieli*, "Prokuratura i Prawo" 2000, no. 2, p. 41.

[2] L. Gardocki points out that the way out of the problem of meeting the rule of sufficient type specificity is to use the so-called simplified criminalisation. The author rightly argues that this often leads to the extension of the scope of penalisation to the foreground of the offence and the creation of crime types based on exposure to abstract hazards which are not reasonably justified. See L. Gardocki, *Zagadnienia kryminalizacji*, Warszawa 1980, p. 65 ff.; idem, *Typizacja uproszczona*, "Studia Iuridica" 1982, vol. 10, p. 73. The difficulties in proving acts committed under economic penal law cannot constitute an argument for deviating from the principles and functions of penal law at the legislative stage. See W. Zalewski, *Contrology and Criminal Law: Genesis, Current State, Perspectives*, "Studia Iuridica Lublinensia" 2021, vol. 30(2), pp. 382–383.

[3] G. Wiciński, *Oszustwa ubezpieczeniowe*, "Prokuratura i Prawo" 1997, no. 7–8, p. 34.

[4] Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2020, item 1444, as amended).

[5] As regards the problems with the correct naming of a type under examination, see Ł. Pohl, *Przestępstwo tzw. oszustwa ubezpieczeniowego (art. 298 Kodeksu Karnego) – uwagi zasadnicze*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2001, no. 63, pp. 79–81; R. Zawłocki, *Oszustwo gospodarcze. Analiza przepisów art. 297 i 298 KK*, "Monitor Prawniczy" 2006, no. 3, pp. 1–2.

RESEARCH PART

1. Models of penal liability for the so-called insurance fraud

The approach of European legislatures to the penalisation of acts that put at risk the interests of insurance market participants is worth reflecting upon.[6] The diversification of approaches is justified by the lack of equivalence of participants to civil law relationships, despite the unprecedented level of mutual trust between the parties.[7] It is not surprising, though, that there is no uniformity with regard to the reasons and means to criminalise behaviour leading to the payment of undue compensation under an insurance contract. Two model approaches to criminal liability can be distinguished. They concentrate around the views on penalising behaviours interfering with the functioning of the insurance market. Two additional factors should be mentioned to characterise the crime at issue. The first one relates to the description of the type of a prohibited act; the second one concerns the specificity of a legal good subject to protection. Their analysis will allow us to present particular types considered as the so-called insurance fraud.

First, the model must be mentioned, in which relations under the insurance contract are a component of the object of protection. According to this perspective, the insurance relationship is not distinguished from other contractual relationships at the classification stage. Therefore, an act protecting only the mentioned value is not distinguished. The model only boils down to the general concept of fraud, considering it to be the best available solution. It is impossible not to see its advantages, including its normative clarity, as well as the prevention of discrepancies in interpretation resulting from the collision of norms. This model has proved working well in: Bosnia and Herzegovina, France, Spain, Iceland, Lithuania, Moldova, Russia, Switzerland, Turkey, Hungary or Montenegro.[8] The second model concerns the situation when the legislature, motivated by the civil law contract specificity,

[6] At this point, a certain reservation must be made. Speaking of European legislatures, a kind of simplification was used. The use of it regards the countries of continental Europe with the culture of positive law. This means that the analysis does not cover those of legal systems of the Old Continent where common law is applied. This is justified by considerations of purposefulness and a certain pragmatics. In the author's opinion, legal comparative considerations make the utmost sense when at least culturally similar legal systems are being compared. The analysis of legal systems of European countries allowed us to start the modelling process, the effects of which will be discussed further herein.

[7] J. Skorupka, *Uwagi porównawcze…*, p. 46.

[8] For the sake of sufficient precision, it is also worth noting that Article 230 of the Montenegrin Penal Code has also regulated a type of offence involving causing or faking an illness or incapacity for work that entitles to social security. The offence is punishable with a fine or imprisonment of up to a year. However, this is not a "classic" insurance fraud, which can be compared both with the Polish solution described in Article 298 § 1 of the Polish Penal Code and its counterparts in individual countries of the mentioned models.

concludes that the correctness of the insurance relationship requires special protection. This is done by distinguishing a type of prohibited act oriented solely at securing this legal good.

There are different approaches to the nature of the crime in question as compared to classic fraud. Two different approaches can be distinguished in this model. The first one, where the criminalisation of behaviour of participants in the insurance market leads to the creation of an independent type of crime. It should be assumed that insurance fraud is an autonomous type of crime, while the provision governing it has a general supplementary character in relation to classic fraud.[9] There is no relationship of subsidiarity here. This approach is applied in Bulgaria, Croatia, the Czech Republic, Estonia, the Netherlands, Kosovo, Latvia, North Macedonia, Malta, Norway, Poland, Romania, Slovakia, Slovenia and Sweden. The second sub-model is that the type of insurance fraud is ancillary to classic fraud. It can be used when the original provision cannot be applied. This leads to the conclusion that statutory subsidiarity applies here. This variant is a construction that is typical of Austria, Finland and Germany.

Two different views on the models of how to describe a prohibited act can be distinguished. The first – a synthetic one – consists in looking for the general formula of the act of perpetration and its circumstances, the occurrence of which is to lead to the exposure of legal goods to danger. This assumption allows for the wide use of the provision due to the broad content of the verb-defined criterion of the offence. This approach occurs in Austria, Bulgaria, Croatia, Estonia, Finland, Kosovo, Latvia, North Macedonia, Germany and Poland. Its opposite is the casuistic approach, where one tries to provide a complete enumeration of the ways of committing a criminal offence. This results in an unnecessary extensive description of statutory criteria of offence and the multiplication of modified types of fraud. The above approach can be found in Albania, the Czech Republic, the Netherlands, Malta, Norway, Romania, Serbia, Slovakia and Slovenia.

There are differences in the scope of the legal relationships to be protected across the models presented. This is relevant both from the point of view of the legislature's views on repressive law as the *ultima ratio* and on the set of values whose safeguarding requires criminal sanction. Legal systems can be distinguished where only property interests of the parties to the insurance contract are protected (Bulgaria, the Czech Republic, Estonia, Finland, Latvia, Malta, the Netherlands, Germany, Norway, Poland, Serbia and Slovakia) and where both property and personal interests of the insured persons are subject to individual protection (Albania, Austria, Croatia, Kosovo, North Macedonia, Romania, Slovenia and Sweden).

Despite divergent concepts, there is a surprising fundamental consensus about the location of the type in the structure of individual criminal laws. Insurance fraud

[9] W. Wolter, *Nauka o przestępstwie*, Warszawa 1973, pp. 323–333.

is directly (Albania, Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Kosovo, Latvia, North Macedonia, Malta, Romania, Serbia, Slovakia and Slovenia) or indirectly (Finland, the Netherlands, Germany, Norway and Sweden) classified as a crime against property. The indirect link is most often the result of distinguishing a separate part within the criminal law, which only governs the issue of fraud. It is worth noting that the Polish legislature did not succumb to this trend, as it consistently links the issue of insurance fraud with the proper functioning of economic transactions. Insurance fraud was originally regulated by Article 4 of the Act of 12 October 1994 on the protection of economic transactions and the amendment of certain provisions of penal law.[10] In the Penal Code currently in force in Poland,[11] this type is included in Chapter XXXVI "Offences against business transactions and property interests in civil law transactions".[12]

2. Insurance fraud – dogmatic and normative analysis

Having presented the general assumptions of modelling penal liability for committing an insurance fraud, we can proceed to the analysis of prohibited acts from individual legal systems. First, a model will be discussed, in which the analysed crime is used on a supplementary basis, i.e. when fraud in the basic type will not be applicable as part of the criminal-law assessment. Then, an arrangement will be analysed, in which insurance fraud is characterised by autonomy. For the sake of clarity, the argument will be preceded by an analysis of the crime under Article 298 § 1 of the Polish Penal Code. This will allow verification of the functioning of the Polish regulation as compared to other legal systems.

[10] Journal of Laws 1994, no. 126, item 615.

[11] The classification of insurance fraud is not a normative novelty in Polish science of criminal law. During the work of the Codification Commission of the Republic of Poland after Poland regained independence and during the preparation of the criminal codification of 1969, it used to be proposed to separate this type alongside the basic type of fraud. This proposal was abandoned, in both cases on the grounds of the desire to avoid too much caustic law. It has been found that the type of classical fraud was so broadly defined that it could be used to criminalize conduct that undermined the trust of insurance market participants. See P. Kardas, [in:] K. Buchała, P. Kardas, J. Majewski, W. Wróbel, *Komentarz do ustawy o ochronie obrotu gospodarczego*, Warszawa 1995, pp. 70–71.

[12] As a result of the entry into force of Article 2 (1) of the Act of 15 March 2019 amending the Act – Road Traffic Law and the Act – Penal Code (Journal of Laws 2019, item 870) changed the intitulation of Chapter XXXVI of the Penal Code. Until 25 May 2019 this chapter concerned only economic transactions. As a result of the amendment, the protection of property interests in civil law transactions has also been covered. The amendment should be assessed negatively. It may lead to the blurring of the boundary between the generic and individual object of the protection from the offences under Chapter XXXVI and, consequently, to a distortion of the results of an interpretation aimed at the protected good.

2.1. Special type of fraud under Article 298 § 1 Polish Penal Code

When discussing the Polish regulation in the comparative legal context, one should point out its generic and individual objects of protection. Article 298 § 1 of the Penal Code considers as a generic legal good the public interests related to maintaining functional and social efficiency of insurance institutions.[13] It is derived from the need to secure the principles of honesty and fairness in economic transactions[14] in the context of insurance institutions[15] and insurance activities.[16] The individual object of protection are the property interests of both insurance companies[17] and the insured, endangered with the payment of undue compensation.[18] This leads to the conclusion that the analysed type is an act of exposure to an abstract danger. To commit it, it is not necessary that the perpetrator receives compensation.[19]

The commission of an insurance fraud is only possible after effective conclusion of a contract under Article 805 § 1 of the Civil Code[20] or Article 292 § 1 of the Maritime Code[21]. This takes place after the offer is submitted by the policyholder and accepted by the insurance company. In this analysis, it would not be sufficient to simply stop at this circumstance alone. It is important to establish that the act of perpetration was carried out at the time when both the insurance cover and the insurance company's obligation to pay were activated. Unless the parties to the contract have agreed otherwise, it takes place on the day following the day of concluding the contract, not earlier than from the day following the payment of the premium or its instalment (Article 814 § 1 of the Civil Code). This means that a person who committed the act prior to the above-stated date may only be held criminally liable for an inept attempt of the type under Article 298 § 1 of the Penal Code, as there is no object suitable for committing a prohibited act on it. A conduct undertaken in relation to an item not covered by the insurance may not lead to the effect of causing the insurance company's obligation to pay compensation.

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[13] O. Górniok, *Przestępstwa przeciwko obrotowi gospodarczemu w projekcie kodeksu karnego i noweli do obowiązującego kodeksu karnego*, "Przegląd Sądowy" 1994, no. 10, p. 76; *Prawo karne gospodarcze*, ed. O. Górniok, Warszawa 2003, p. 34 ff.

[14] R. Zawłocki, [in:] *Kodeks karny. Część szczególna*, eds. M. Królikowski, R. Zawłocki, vol. 2, Warszawa 2013, p. 764; judgement of the Supreme Court of 2 April 2008, III KK 473/07, "Prokuratura i Prawo" 2008 (insert), no. 10, p. 13.

[15] A. Marek, *Kodeks karny. Komentarz*, Warszawa 2010, p. 340 ff.

[16] J. Skorupka, *Prawo karne gospodarcze. Zarys wykładu*, Warszawa 2007, p. 114.

[17] J. Potulski, [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, Warszawa 2018, p. 1778.

[18] J. Giezek, [in:] *Kodeks karny. Część szczególna. Komentarz*, ed. J. Giezek, Warszawa 2014, p. 1205.

[19] Z. Niezgoda, *Niektóre aspekty prawnokarnej ochrony ubezpieczycieli (instytucji ubezpieczeniowych) na gruncie unormowań art. 286 i 298 k.k.*, "Prokuratura i Prawo" 2006, no. 4, p. 134.

[20] Act of 23 April 1964 – Civil Code (Journal of Laws 1964, no. 16, item 93).

[21] Act of 18 September 2001 – Maritime Code (Journal of Laws 2001, no. 138, item 1545).

The above analysis also leads to the conclusion that the type in question does not criminalize activities consisting in entering into a backdated insurance contract.[22]

The offence in question has one form of functional characteristic, i.e. the causing of an event which gives rise to the payment of compensation. It is correctly interpreted when the interpretation relates to a change in the external world in the form of an "event" required by law. *Prima facie*, one could say that causing is the induction of any causal chain, the result of which is an effect in the form of an event specified in the insurance contract.[23] However, this would be too broad an interpretation. J. Giezek is right, claiming that in order to narrow down the purely causal approach, it is necessary to use the rules of objective attribution and normative connection.[24] Then, the perpetration of the crime can be established beyond any doubt. Some doubts arise as to the question of defining the objective aspects of an insurance fraud consisting in arranging a fictitious event, and not its actual occurrence. This is usually justified by the allegedly extensive scope of the act of perpetration. The prevailing assumption is that the behaviour consisting of faking an event cannot be equated with causing it.[25] The position proposed by O. Górniok, who claimed that penalizing solely actually caused events constituting a basis for compensation payment would lead to an incoherence in the legal system, is not convincing. In her opinion, it is difficult to see the rationality of the legislature's action in leaving the staging of such events without a legal response. The author also justified her position by the fact that both situations aim at the same goal.[26]

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[22] M. Filipowska, *Znamiona przestępstwa oszustwa ubezpieczeniowego w polskim prawie karnym*, "Rozprawy Ubezpieczeniowe" 2013, vol. 1(14), p. 45.

[23] As argued, among others, by I. Sepioło-Jankowska, *Prawnokarna odpowiedzialność za bezprawne uzyskanie nienależnego odszkodowania od zakładu ubezpieczeń na podstawie art. 298 KK*, „Monitor Prawniczy" 2017, nr 7, p. 370; A. Pyka, *Oszustwo asekuracyjne*, "Monitor Prawniczy" 1999, no. 9, p. 2.

[24] J. Giezek, *op. cit.*, p. 1206. P. Kardas argues in a similar way. See P. Kardas, [in:] *Kodeks karny. Część szczególna*, ed. A. Zoll, vol. 3, Warszawa 2016, p. 663.

[25] As argued, among others, by M. Gałązka, [in:] *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Warszawa 2018, p. 1395; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998, p. 522; M. Bojarski, [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2016, p. 1593; R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa 1998, p. 521; P. Kardas, [in:] *Kodeks karny*..., pp. 663–664; G. Wiciński, *op. cit.*, pp. 36–38. Differently R. Zawłocki, [in:] *Kodeks karny. Część szczególna*, eds. A. Wąsek, R. Zawłocki, vol. 2, Warszawa 2010, p. 1402; idem, [in:] *Kodeks karny. Część szczególna*, eds. M. Królikowski, R. Zawłocki, p. 766; J. Skorupka, *Wybrane zagadnienia konstrukcji typów szczególnych oszustwa*, "Monitor Prawniczy" 2004, no. 14, p. 7; idem, *Uwagi porównawcze*..., p. 54; Ł. Pohl, *Przestępstwo tzw. oszustwa ubezpieczeniowego*..., p. 85.

[26] O. Górniok, *Przestępstwa gospodarcze. Rozdział XXXVI i XXXVII Kodeksu karnego. Komentarz*, Warszawa 2000, p. 40. This proposal is supported by J. Giezek (*op. cit.*, pp. 1207–1208), who claims that "indeed, therefore, it does not matter whether the event referred to in Article 298 is a situation deliberately initiated or just staged […]. To illustrate this point with an example, one could ask whether it would be possible to point out a qualitative difference from the insurer's point

While assessing the above view negatively, it should be noted that it is a result of putting emphasis on the objective-and-functional method of interpretation of the verb-defined criterion of the offence, as well as on the interpretation oriented towards the object of protection. However, it may not lead to overcoming unequivocal results of semantic interpretation of the objective aspects of the crime. There are no justified reasons for such a departure from the rule. This is so because causing a certain state of affairs differs from staging it. It is also rightly argued that a different interpretation leads in consequence to an interpretation *contra legem*.[27]

In the Polish literature on the subject, controversy is raised by the question of effect of offence. It is a repercussion of the systemic separation between the content of the provisions of criminal law and the rules of private law, in particular Article 805 § 1 of the Civil Code. The latter uses the term "accident". It would therefore be unreasonable to equate the term "event" with the term "accident" as they are not equivalent. The legislature, being aware of this, deliberately made a distinction in the penal law. This was justified by the wish to avoid the civil-law connotation of the term "accident", which would have an impact on the interpretative result of insurance fraud.[28] To clear the foreground of the discussion, it should be noted that insurance accident is a situation described in the contract, which entails the obligation to pay the compensation due. In addition, accident is a future, uncertain, and random event.[29] On the other hand, the event referred to in Article 298 § 1 of the Civil Code is ontically the same situation as provided for by the insurance contract, except that it is devoid of any element of randomness.[30] In view of the above, a situation where, following an insurance accident, the offender

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of view between a situation in which two drivers agree that, in pre-planned circumstances, they will cause a collision of their vehicles, and a situation consisting in the 'use' of a previous damage to simulate such a collision. In both cases, we are dealing with created events that are to be the basis for the payment of compensation (although none of them is an accident)".

[27] P. Kardas, [in:] *Kodeks karny*..., p. 664.

[28] J. Skorupka, *Uwagi porównawcze*..., p. 52.

[29] R. Zawłocki, *Oszustwo gospodarcze*..., p. 8. Certain authors, such as Ł. Pohl (*Przestępstwo tzw. oszustwa ubezpieczeniowego*..., pp. 84–85) and G. Wiciński (*op. cit.*, p. 27), also point out that insurance accident is an event which has taken place independently or against the will of the policyholder. However, it is difficult to find elements in the above list that have not been addressed so far. It should be noted, however, that these features coincide with the legal definition of random event as specified in Article 3 (1) (57) of the Act of 11 September 2015 on insurance and reinsurance activity (Journal of Laws 2015, item 1844).

[30] A more far-reaching conclusion is formulated by M. Filipowska and J. Skorupka, according to whom the content of the term "an event constituting the basis for the payment of compensation" consists not only of the event provided for by the insurance contract, but also of any other event that is the basis for the payment of compensation. See M. Filipowska, *W sprawie przestępstwa oszustwa gospodarczego z art. 298 k.k.*, "Nowa Kodyfikacja Prawa Karnego" 2008, no. 22, p. 33; J. Skorupka, *Uwagi porównawcze*..., p. 53.

deliberately overstates the amount of the damage, is not an insurance fraud.[31] In the context of penal-law assessment, this conduct constitutes attempted classical fraud, since there is a misrepresentation towards the insurance company as to the amount of the claim due to the policyholder and a direct attempt to bring the policyholder into disadvantageous use of its assets.

It should be noted that causing an event activating the obligation to pay compensation does not *per se* entail criminal liability under Article 298 § 1 of the Penal Code. The content of the criterion of "insurance contract" should be made more specific. Not all contract types constitute the basis for the payment of compensation. When interpreting insurance fraud in the context of Article 805 § 2 (1) of the Civil Code, it should be stated that only property insurance is relevant for the attribution of criminal liability.[32] Only these provide for compensation.[33] The situation is different for personal insurance, where the performance of the obligation is the payment of the agreed sum, disability benefit or another benefit.[34] This analysis allows a conclusion that causing an event activating the obligation to pay under personal insurance contracts does not entail liability.[35] This conclusion also applies to situations giving rise to liability of the Insurance Guarantee Fund or a reinsurance company.

Insurance fraud is of a type characterised by the generally-defined perpetrator. The provision does not provide for features to individualise the offender, in particular whether he/she should be a party to the insurance contract. The offender may therefore be both the policyholder, the insured or the beneficiary, as well as an entity not related to the insurance company through the relevant contract. This argument is strengthened by the connection between the content of Article 298 § 1 of the Penal Code and the legal definition of financial or personal gain from Article 115 § 4 of the Penal Code. The application of the systemic interpretation allows us to claim that the perpetrator may be not only one who seeks to pay undue compensation to himself/

[31] Approached differently by J. Skorupka, *Uwagi porównawcze…*, pp. 53–54; M. Filipowska, *W sprawie przestępstwa oszustwa…*, p. 33; eadem, *Znamiona przestępstwa oszustwa ubezpieczeniowego…*, p. 49.

[32] Judgement of the Court of Appeal in Gdańsk of 21 March 2002, II AKa 523/01, "Krakowskie Zeszyty Sądowe 2002, no. 10, item 114.

[33] B. Sałata, *Przestępczość ubezpieczeniowa w praktyce prokuratorskiej*, "Prokuratura i Prawo" 2003, no. 9, p. 132; Z. Niezgoda, *op. cit.*, p. 134.

[34] It should be noted that the payment under a contract of personal insurance may in some cases be of a partly compensatory nature. See P. Kardas, [in:] *Kodeks karny…*, p. 669.

[35] This does not mean that there are no postulates for the elimination of the above-mentioned systemic inconsistency in terms of failure to provide a sufficient protection to the whole of relationships based of an insurance contract. See A. Madej, *Oszustwo ubezpieczeniowe w kontekście oszustwa klasycznego*, "Prokuratura i Prawo" 2017, no. 6, pp. 109–110; R. Zakrzewski, *Ochrona obrotu gospodarczego w nowym kodeksie karnym*, "Przegląd Ustawodawstwa Gospodarczego" 1997, no. 11, p. 4; Ł. Pohl, *Przestępstwo tzw. oszustwa ubezpieczeniowego…*, p. 83.

herself. The offender will also be the one who acts in order to make someone else the beneficiary of the insurance payment.[36] In the context of the criterion of the offender, it should be stated that Article 308 of the Penal Code does not apply here, as there are no conditions enabling the admissibility of the substitute liability clause.[37]

From the point of view of subjective aspects of crime, insurance fraud is characterised by a direct intent with a specific objective (*dolus directus coloratus*). This is justified by the fact that the offender causes the event specified in the insurance contract in order to obtain compensation. The criminal goal of the perpetrator consists not only of the striving to be granted an insurance payment, but also of the awareness of the possibility of obtaining it unlawfully.[38] Importantly, the subjective aspects of crime must be formed before the implementation of the act of perpetration. The act under Article 298 § 1 of the Penal Code does not take place when, although an event constituting the basis for the payment of compensation is caused, the perpetrator intends to obtain it after the end of the prohibited act.

The analysis of the concurrence of provisions and offences will be limited to the case where the statutory criteria of the offences under Article 298 § 1 of the Penal Code and Article 286 § 1 of the Penal Code are met at the same time. This raises questions among scholars in the field. In view of the multiplicity of acts involved, the prevailing view is that this is a concurrence of offences and not a concurrence of provisions.[39] From the point of view of practice, the most important thing is to determine whether the concurrence of offences is actual[40] or just negligible.[41] It is quite convincing to assume that insurance fraud may constitute

[36] W. Jaroch, *Przestępczość na rynku ubezpieczeń*, Warszawa 2002, pp. 40–41.

[37] J. Skorupka (*Glosa do postanowienia SN z dnia 27 kwietnia 2001 r.*, "Orzecznictwo Sądów Polskich" 2002, no. 1, p. 6) has indirectly drawn a different conclusion. However, this author did not rule out the admissibility of the application of Article 308 of the Penal Code to the assessment of the identity of the offender in Article 297 § 1, Article 298 § 1, Article 304 or Article 305 § 1 of the Penal Code. It seems that allowing such a possibility would constitute an extensive interpretation to the detriment of the perpetrator. The clause contained in Article 308 of the Penal Code is an exception which only extends the scope of criminalisation in respect of individually-defined perpetrator offences committed by debtors or creditors.

[38] R. Zawłocki, [in:] *Kodeks karny. Część szczególna*, eds. M. Królikowski, R. Zawłocki, pp. 767–768.

[39] As in *ibidem*, p. 769; M. Gałązka, [in:] *Kodeks karny*..., p. 1395; M. Filipowska, *W sprawie przestępstwa oszustwa*..., p. 37.

[40] Ł. Pohl, *Przestępstwo upozorowania wypadku ubezpieczeniowego a przestępstwo oszustwa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, no. 3, p. 128; O. Górniok, *Znamiona przestępstwa oszustwa ubezpieczeniowego*..., p. 41; R. Zawłocki, *Oszustwo gospodarcze*..., p. 12; M. Bojarski, *op. cit.*, p. 1593.

[41] J. Giezek, *op. cit.*, p. 1212; P. Kardas, [in:] *Kodeks karny*..., p. 674. P. Kardas sees the possibility of adopting a legal qualification covering the concurrence of provisions of Article 298 § 1 of the Polish Penal Code and Article 286 § 1 of the Polish Penal Code with the use of the legal construction of the unity of action in Article 12 of the Polish Penal Code.

a jointly-punished crime prior to the fraud regulated in Article 286 § 1 of the Penal Code. This is supported by the essential criteria of joint punishment[42], although the degree of criminality of both types may speak against it.[43] It seems appropriate to reject the view that omitting the act in question in the legal classification would result in the failure to reflect the real threat to the protected values.

It should be noted that the offence is punishable by imprisonment of between 3 months and 5 years. The severity of the penalty range enables the use of the institutions described in Articles 37a and 37b of the Penal Code. As a rule, it is possible to impose a fine in addition to a custodial sentence under Article 33 § 2 of the Penal Code.

2.2. Legal comparative analysis[44]

A comparative analysis should begin with a type, which by the construction of its elements escapes the theoretical framework of the models presented above. We are talking about the crime described by the Penal Code of Albania, which can be defined as an unlawful failure to fulfil the obligations by the policyholder in the period preceding the entering into of the insurance relationship.[45]

Article 145 of the Penal Code of Albania regulates it as a generally-defined perpetrator offence. The circle of actors capable of implementing the statutory criteria of this offence was not narrowed down. The subjective aspects of the crime are characterised by direct intent aimed at a specific objective. The perpetrator acts in order to conclude an insurance contract or to extend it for a further period. The perpetrator acts either by stating untrue circumstances or information related to the object of insurance, or by arranging false circumstances or information and stating them in the insurance documentation. The offence may only take place at the stage preceding conclusion of the insurance contract or before extending it for a further period. On the other hand, the causing of an effect in the form of an unfavourable

[42] The issue of jointly punished crime deserves a separate study. At this point, only the basic criteria enabling the application of this institution should be noted. These include: interrelation of the crimes under assessment, identity of the generic object of protection, interrelation of subjective aspects of the crime or difference in the degree of their social harmfulness. See L. Tyszkiewicz, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, vol. 1, Gdańsk 2005, p. 689.

[43] O. Górniok, *Przestępstwa przeciwko obrotowi*..., p. 41. A similar approach is taken by Ł. Pohl (*Przestępstwo upozorowania wypadku ubezpieczeniowego*..., p. 128), who justifies the concept of actual concurrence of crimes in the following way: "[…] the special nature of the offence of faking an insurance accident requires that it be taken into account in the legal assessment, as the very offence of fraud alone does not reflect […] the specificity of the insurance relations".

[44] It should be noted that access to the normative acts under analysis is dated as of 22 March 2020.

[45] J. Skorupka, *Uwagi porównawcze*..., p. 44.

disposal of assets by the insurance company is irrelevant. Causing such a change may be associated with the adoption of the legal qualification under Article 143 of the Penal Code of Albania, which describes a regular fraud. An alternative penalty range is provided for this offence. The sanction for committing this type of offence is a fine[46] or imprisonment for up to 5 years.[47]

The first of the regulations under the subsidiary model is § 151 of the Penal Code of Austria (hereinafter: aStGB). This provision covers a general-perpetrator type of insurance fraud through an enumerative indication of the act of perpetration. Criminal conduct may consist in destroying, damaging, removing or stealing the insured item or causing damage to health or endangering the perpetrator himself/herself or another person. From the point of view of the subjective aspects of the crime, the offence in question is of a type aimed at a specific goal because the perpetrator must seek to obtain a payment under the insurance contract. The Austrian *Strafgesetzbuch* provides comprehensive protection of the interests of the parties to the insurance contract, irrespective of its nature. This leads to the conclusion that both personal and property types of insurance are secured by criminal law norms. An extremely broad approach to the act of perpetration in relation to non-property insurance is noticeable. This is because even putting the insured good at risk has been criminalized. The auxiliary nature of insurance fraud results from opting for punishment, unless a provision of the *lex primaria* nature is applied. In this case, priority is given to the commission of fraud (§ 146 aStGB), serious fraud (§ 147 aStGB) or the situation where the perpetrator has made a permanent source of income from committing fraud (§ 148 aStGB). Insurance fraud was punishable by imprisonment of up to 6 months[48] or a fine of up to 360 day-fine units.[49] The discussion of the Austrian regulation would be incomplete without noticing § 151 (2) aStGB. This provision regulates the institution related to the refraining from punishing the perpetrator in the form of the voluntary disclosure clause. According to it, the person who, prior to obtaining insurance and disclosing the extortion, voluntarily abandoned to continue the prohibited act, is not subject to a penalty.

[46] Under Article 34 of the Penal Code of Albania, the fine of between 100 thousand and 10 million lek is to be imposed. If the offender acts with the aim to earn a financial gain, the forfeiture of such a sum or a fine of up to 5 million lek may be imposed.

[47] The Albanian legislature has introduced differentiations in the range of the penalty of imprisonment depending on the type of offence. The appropriate distinction is made in Article 32 of the Penal Code of Albania. According to it, if a crime is committed, a custodial sentence of between 5 days and 25 years can be imposed. In the case of an infraction, it ranges from 5 days to 2 years.

[48] Pursuant to § 18 (2) aStGB, a penalty of imprisonment is imposed from 1 day to 20 years.

[49] Pursuant to § 19 (1) aStGB, the fine is imposed in day-fine units. The minimum amount is two units. According to § 19 (2) aStGB, the amount of one day-fine unit depends on the personal and financial capabilities of the offender. However, it cannot exceed EUR 5,000 or be lower than EUR 4.

The representative of the subsidiary model is also the type described in § 265 (1) of the Penal Code of Germany (hereinafter: StGB). The act of perpetration involves destroying, damaging, rendering unusable, concealing or transferring to another person an object covered by insurance against this risk. It is characteristic that the offender acts to obtain insurance for himself/herself or for someone else.[50] It also follows that § 265 (1) StGB protects only a property insurance contract. From the point of view of the range of penalty, the commission of the offence was punishable with imprisonment of up to 3 years[51] or a fine.[52] Insurance fraud is ancillary to the type described in § 263 StGB, namely the regular fraud.[53] It is also worth noting that an attempt to commit this offence is also punishable (§ 265 (2) StGB).[54]

In the Finnish legal system, insurance fraud is regulated in Chapter 36 § 4 of the Penal Code of Finland. It is at the same time the most synthetic construction of the fraud in question of all the countries analysed. Criminal conduct involves setting a fire in order to obtain undue compensation for oneself or someone else. The said type is of a general-perpetrator nature. This means that the legislature did not provide for any specific features of the offender, the occurrence of which would condition the charging of the prohibited act. This type does not narrow down the features of the perpetrator to the parties to the insurance contract or the property owner. Moreover, it is an offence aimed at a specific goal. It may be committed only with the *dolus directus coloratus*. In the context of subsidiarity, it should be pointed out that Chapter 36 § 4 is subsidiary to fraud or attempted fraud covered by Chapter 36 § 1 of the Penal Code of Finland. The penalty for committing the offence in question is a fine[55] or imprisonment of up to one year.[56]

[50] T. Fisher, *Strafgesetzbuch und Nebengesetzen, Kommentar*, München 2009, pp. 1957–1958; K. Kühl, [in:] *Strafgesetzbuch. Kommentar*, eds. K. Lackner, K. Kühl, München 2004, pp. 1133–1134.

[51] Pursuant to § 38 (2) StGB, the penalty of imprisonment is imposed within the range from 1 month to 15 years.

[52] According to § 40 (1) StGB, the fine is imposed in day-fine units, ranging from 5 to 360. Pursuant to § 40 (2) of the Penal Code of the FRG, the amount of one unit may not be lower than EUR 1 and higher than EUR 30 thousand.

[53] T. Fischer, *op. cit.*, p. 1959.

[54] According to § 23 (1) StGB, the rule is to punish an attempted offence classified as felony, i.e. punishable with one-year imprisonment at least (§ 12 (1) StGB), while misdemeanours are punishable where the law provides so.

[55] Within the meaning of Chapter 2a § 1 of the Penal Code of Finland, a fine is imposed based on the day-fine units system, ranging from 1 to 120 units. In accordance with Chapter 2a § 2 (1) of the Penal Code of Finland, the amount of the unit is determined taking into account the offender's monthly income and assets held.

[56] Pursuant to Chapter 2 § 3 (2) of the Penal Code of Finland, a custodial sentence may be imposed – unless a special provision provides otherwise – for a period of between 6 months and 12 years.

CONCLUSIONS

For the sake of systematisation, it should be noted that the final conclusions resulting from the analyses conducted will be presented in part two of the study. This is based on several grounds. Firstly, conclusions or proposals can only be presented in full once the entire picture of insurance fraud is shown in a comparative legal perspective. Otherwise, the findings may be burdened with the risk of mistake, resulting from the presentation of only fragmentary analyses. Secondly, a fragmentary approach to the subject may lead to argumentative shortcomings that weaken the significance of the proposed normative changes. It should be noted, however, that leaving the readers without any conclusions would, at this stage, generate a certain informative gap. We should therefore formulate at least an outline of the summary, while avoiding anticipating the reflection on the whole of the problems to be addressed. This is what the summary in part two of the text will be about.

It is necessary to take a comprehensive view on economic crime, particularly insurance crime. This is so because there are links between economic and administrative law and criminal law, which make it necessary to interpret the norm from the provision of Article 298 § 1 of the Polish Penal Code.[57] Their skilful and prudent analysis, accompanied with the use of all directives of the assessment of a legal text, determines whether or not the result of legal interpretation will be correct.

The review of the legal systems of European countries allowed us to model two basic schemes of liability for insurance fraud. The first one, assuming that this prohibited act is nothing else than a classic fraud, the general description of which allows the interests of the parties to the insurance contract to be secured. The second, which considers it necessary to provide criminal-law protection for the insurance relationship by distinguishing an additional prohibited act. Of course, it may remain in different relationships with the type of fraud. Specific systems provide that this bond may be based on the principle of statutory subsidiarity, as has already been mentioned herein. However, there are relatively few examples of this model. Under the prevailing approach, insurance fraud is a standalone type of a prohibited act, but this perspective will be thoroughly analysed in part two.

In the context of the description of prohibited conduct, the crime under Article 298 § 1 of the Penal Code should be classified as a synthetic submodel. However, this does not imply full approval of its subjective aspects. It should only be stressed that a number of legislatures have dealt much worse with this issue, without trying to search for the general characteristics of the act of perpetration.[58] It should also

[57] M. Zirk-Sadowski, *Enactment of Legal Rules as a Link to Philosophy and Politics*, "Krytyka Prawa" 2020, vol. 12(3), pp. 168–174.

[58] Especially concerning offences described in the German and Austrian criminal laws and a significant number of offences included in the standalone model.

be said that, as far as the Polish realities are concerned, only the property interests of the parties to an insurance contract are protected. Although such a solution is not uncommon in Europe, it is fair to say that it is not the only one possible either.

While still being cautious in formulating final conclusions, it must be stated that the Polish approach is not perfect and flawless. The foregoing discussion illustrates a number of shortcomings relating to this type of offence. However, a reasonable criticism of the concept of insurance fraud will be fully possible only after considering the paradigm that prevails in Europe, i.e. the standalone model.[59]

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[59] It is worth stressing at this point again, that the type described in Article 298 § 1 of the Polish Penal Code is just the model which prevails in the Old Continent. This will be discussed in more detail in part two of the study.

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ABSTRAKT

Niniejszy artykuł zawiera krytyczną analizę oszustwa ubezpieczeniowego przy wykorzystaniu ujęcia komparatystycznego. W ocenie autora nie ulega wątpliwości, że polskie rozwiązanie wymaga zmian. Różny może być jednak ich zakres. Pomocna w formułowaniu wniosków *de lege lata* oraz postulatów *de lege ferenda* może być optyka na ten typ czynu zabronionego w obcych porządkach prawnych. W związku z powyższym w części pierwszej skupiono się na analizie dogmatycznej przestępstwa z art. 298 § 1 Kodeksu karnego oraz na jego odpowiednikach w subsydiarnym modelu w Niemczech, Austrii i Finlandii. Szczegółowy wywód poprzedza proces modelowania odpowiedzialności za realizację oszustwa asekuracyjnego, uwzględniający specyfikę przestępczości gospodarczej oraz różnorodne podejścia ustawodawców europejskich. W podsumowaniu pokuszono się o sformułowanie wstępnych wniosków, wynikających z przeprowadzonych analiz. W tym miejscu należy podkreślić, że finalne konkluzje zostaną zamieszczone w drugiej części opracowania, po uwzględnieniu rozważań dotyczących modelu samoistnego.

Słowa kluczowe: oszustwo asekuracyjne; modelowanie odpowiedzialności; ujęcie prawnoporównawcze; przestępczość gospodarcza; ustawodawcy europejscy