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THE OFFENCE OF IDENTITY THEFT IN THE POLISH CRIMINAL LAW (ARTICLE 190A § 2 OF THE PENAL CODE). *(PART TWO)**

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Purpose: *the main purpose of the paper is to analyse the problem of provision concurrence of Art. 190a § 2 with other articles of the Penal Code, as well as to present the issues of imposing punishment for this offence and the statistical picture of the phenomenon of identity theft.* ***Methods:*** *to obtain these aims the dogmatic method was used as well as analysis of statistical data.* ***Results:*** *the offence under Art. 190a § 2 may be in real concurrence with the provisions describing offences against the protection of information (art. 265-268a, 269a of the Penal Code), against the credibility of documents (art. 270, art. 272, art. 273, art. 275 of the Penal Code) as well as with provisions describing offences against property (e.g.: art. 284 § 1, 285, 287, 288 § 1 or 2 of the Penal Code). Analysis of data referring to final convictions for the offence of identity theft shows that the punishment most often imposed is deprivation of liberty, almost always applied with the conditional suspension of its execution.* ***Discussion:*** *the number of discovered offences of theft identity is growing dynamically, unfortunately, however, there is no such dynamics in the case of detection of the offence. Therefore the question arises about the causes of the detection results becoming poorer every year.*

Keywords: impersonating; identity theft; personal data; damage; concurrence of provisions.

Introduction. The paper is the second part of an article devoted to the offence of identity theft in Polish penal law (art. 190a § 2 k.k.). The first part referred to the reasons behind the introduction of this offence into the system of Polish penal law (which took place on 6th June, 2011) and to the analysis of the statutory features of the misdemeanour of identity theft (protected value, actus reus, the actor, mens rea). This (second) part discusses the problem of provision concurrence, problems of punishment imposition and the statistical picture of the offence of identity theft.

The concurrence of provisions. Article 190a § 2 of the Penal Code may be in real concurrence with provisions describing the offences against the protection of information (Articles 265 – 268a [1], 269a of the Penal Code [2]), against the credibility of documents (Article 270 of the Penal Code – forgery of the substance of documents, Article 272 of the Penal Code – obtaining certification of untruth by false pretences, Article 273 of the Penal Code – using a document certifying an untruth, Article 275 of the Penal Code – using someone else's document). In some cases, there may be a cumulative qualification with some of the provisions defining offences against property (e.g. Article 284 § 1 of the Penal Code – misappropriation of someone else's property or property right); Article 285 of the Penal Code – theft of telephone impulses, Article 287 of the Penal Code – computer scam, Article 288 § 1 or 2 of the Penal Code – destroying or damaging someone else's property [3]) [4, p. 476]. Noteworthy is the view of A. Lach, according to whom «there is no concurrence with Art. 286 § 1 of the Penal Code (fraud) because of the other purpose of the action (to achieve property gains)» [5, p. 38]. Apparently, the author was referring to the concurrence of the provision of Article 190a § 2 with Ar-

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ticle 286 § 1 of the Penal Code. However, this view cannot be considered correct. The fact that Article 190a § 2 describes the purpose of the perpetrator's action as undertaken in order «to inflict a property damage or personal injury» to the victim, does not preclude the possibility that at the same time the offender wants to achieve a property benefit, and this in consequence leads to the cumulative qualification of the provisions being analysed. As previously noted (when discussing the mens rea of the offence under Article 190a § 3 of the Penal Code), the cumulative qualification of Article 190a (§ 1 or 2) with Article 148 (§ 1 or 2) of the Penal Code is also possible [6].

Undoubtedly, the cumulative qualification of Article 190a § 2 of the Penal Code with Article 107 of the Act of 10 May 2018 on the protection of personal data [7], as well as with Article 115 of the Act of 4 February 1994 on copyright and related rights [8] (first of all in terms of misleading as to the authorship) may take place [9].

Punishment imposition. The offence under Article 190a § 2 of the Penal Code is punishable by imprisonment from one month to three years; the aggravated type under Article 190a § 3 contains a sanction of one year to 10 years. If the imprisonment sentence does not exceed one year, its execution may be conditionally suspended (for a probation period of 1 to 3 years, and in the case of an adolescent or perpetrator who committed a violent offence to the detriment of a person who lives together with the perpetrator – from 2 to 5 years). Both in the case of the basic type (Article 190a § 2) and the aggravated one (Article 190a § 3), the so-called alternative punishment (article 37a of the Penal Code [10]) or mixed punishment (Article 37b of the Penal Code [11]) may be imposed. It is also possible to apply to the perpetrator of the offence under Article 190a § 1 or 2 the conditional discontinuance of criminal proceedings (Articles 66-67 of the Penal Code). In the case of conviction for offences specified in 190a of the Penal Code, the court may order such punitive measures as: interdiction to stay in certain environments or places, interdiction to contact certain persons, to approach certain persons or to leave a particular place of residence without the court's consent, as well as a periodic order to leave the premises occupied jointly with the victim (art. 41a of the Penal Code), deprivation of public rights – Article 40 of the Penal Code (when sentenced to imprisonment for a period not shorter than 3 years for an offence committed as a result of motivations deserving special reprobation) [12], interdiction to occupy a specific post or to perform a specific profession, or publication of the judgement (Article 43b of the Penal Code). Sometimes the sentence may involve the forfeiture of items (Article 44 of the Penal Code), or the imposition of the obligation to remedy the damage (Article 46 of the Penal Code).

As suggested by the above data, in 2011-2016 a total of 238 adults were sentenced with a final judgement under Art. 190a § 2 of the Penal Code. The number of convictions under the aggravated type of the offence (Article 190a § 3 of the Penal Code) is small – several a year (in total 17 cases in 2011-2017), however, the aggravated type refers both to the offence of harassment (Article 190a § 1 of the Penal Code) and to identity theft (Article 190a § 2 of the Penal Code), and there is no information in how many cases Article 190a § 3 was linked with Article 190a § 2 of the Penal Code. As regards the convictions under Article 190a § 2 of the Penal Code, it should be stressed that the most frequent sentence imposed on the perpetrators was the deprivation of liberty (108 persons - 45.4%), and almost always it was accompanied by the conditional suspension of its execution (105 persons - 97.2%). Only in three cases during the whole period under analysis, courts imposed on the perpetrators of the offence of identity theft (basic type) the punishment of absolute deprivation of liberty (twice in 2015 and once in 2016). Fine occupied the second place (85 convicted persons – 35.7%). The less frequent convictions related to the punishment of restriction of liberty (45 convicted persons - 18.9%). It is worth noting that in one case the court conditionally suspended the execution of the imposed punishment of restriction of liberty (which was still possible in 2013 under the then applicable legislation [14]).

Adults convicted with final judgements for crimes under Article 190a § 2 and 3 in 2011- 2016 [13]

TYPE OF CRIME AND YEAR	TOTAL	FINE AS THE MAIN PUNISHMENT		RESTRICTION OF LIBERTY		DEPRIVATION OF LIBERTY		
		TOTAL	WITH SUSPENSION	TOTAL	WITH SUSPENSION	TOTAL	WITHOUT SUSPENSION	WITH SUSPENSION
Year 2011								
Article 190a §2 PC	4	1	–	2	–	1	–	1
Article 190a §3 PC	1	–	–	–	–	1	–	1
Year 2012								
Article 190a §2 PC	35	13	–	5	–	17	–	17
Article 190a §3 PC	1	–	–	–	–	1	–	1
Year 2013								
Article 190a §2 PC	37	10	–	3	1	24	–	24
Article 190a §3 PC	1	–	–	–	–	1	–	1
Year 2014								
Article 190a §2 PC	38	11	–	4	–	23	2	21
Article 190a §3 PC	4	1	1	1	–	2	1	1
Year 2015								
Article 190a §2 PC	47	12	–	8	–	27	–	27
Article 190a §3 PC	4	–	–	–	–	4	–	4
Year 2016								
Article 190a §2 PC	77	38	–	23	–	16	1	15
Article 190a §3 PC	5	–	–	–	–	5	2	3

It should be stressed that the sanction specified in Article 190a § 2 of the Penal Code mentions expressly only the punishment of imprisonment (up to 3 years), while - according to statistical data - for as many as 54.6% of all convictions, the courts imposed on the perpetrators the punishment of restriction of liberty or a fine. It may be inferred that the extraordinary mitigation of punishment was involved in some of these cases, which in the case of the offence in question may lead to imposing the punishment of restriction of liberty or a fine (Article 60 § 6 point 3 of the Penal Code [15]) instead of imprisonment. As can be seen from the attached conviction statistics, the courts are not too severe for the perpetrators of offences under Article 190a § 2 of the Penal Code. Suspended punishments are overwhelming, and absolute deprivation of liberty was imposed only on 1.3% of the total number of perpetrators. Even if the courts applied the punishment of deprivation of liberty, it was almost always applied with the conditional suspension of its execution, as has earlier been mentioned. When we look at the structure of convictions in particular years, it can be clearly seen that it was different in 2016 than in 2012. Most often, as it amounted to almost half of the convictions, a fine was imposed, while five years earlier the punishment of imprisonment with conditional suspension of its execution amounted to 49.4%. In 2016 the courts imposed relatively often (almost 30% of convictions) the punishment of restriction of liberty, and in 2012 this type of punishment was twice as rare (14.3%) [16, p. 317]. In general, though the number of convictions for the crime of identity theft is low throughout the analysed period, there is a steady upward trend (in 2016, more than twice as many perpetrators were sentenced as in 2012).

Identity theft in statistical data. In 2012, the number of offences revealed (for Article 190a § 2 of the Penal Code) in entire Poland amounted to 279 (and detected – 120); in 2013 – 404 (and 138 respectively); in 2014 – 653 (197); in 2015 981 (295); in 2016 – 1291 (328). As can be seen, the number of crimes revealed increased dynamically during the period of analysis (in the year 2012 it was less than 300 crimes, and four years later 4.5 times more). Unfortunately, a similar dynamics was not recorded for the figures of detection of this crime; in 2012 the perpetrator was detected in 43% of the crimes, and in the year 2016 it was only 25%, so the investigative results are worse each year [17, p. 315]. Poor detection results in poor figures as regards the number of suspects. Therefore, in the years 2012 and 2013 the police recorded around 100 suspects [18], in the year 2014 – 148, in 2015 – 145, in 2016 – 160 (thus, in the years 2014-2016, their number increased by about 50%, but it was still very small in relation to a relatively large number of offences committed) [19, p. 315]. It is worth noting that the percentage of juvenile perpetrators (aged 13-16 years) of criminal offences among the total number of suspects in 2102 was 7%, while from 2013 to 2015 it was already 20% and in 2016 it decreased to 14% [20, p. 316].

Concluding remarks. There are no critical reflections referring to the punishment for the basic type of the offence of identity theft (i.e. deprivation of liberty up to 3 years), yet there are serious doubts about the sanction range in the case of the aggravated type (deprivation of liberty from 1 to 10 years), which should be synchronised with analogous cases described in the Penal Code, in which the consequence of the forbidden act is the suicide attempt by the victim (e.g. Art. 207 § 3 of the Penal Code) and range from 2 to 12 years. The desirability of criminalising the impersonation of another person is demonstrated by the dynamic increase of the discovered offences under Art. 190a § 2 (over fourfold increase in the years 2012-2014), while the poor detectability is worrying as it leads to a low number of convictions. This requires a decisive correction in order to improve the efficiency of the detection and justice bodies.

References

1. Article 265 – disclosure or use of classified information; Article 266 – disclosure of information in connection with one's position; Article 267 – unlawful acquisition of information; Article 268 – hindering access to information; Article 268a – destroying IT data. https://doi.org/10.5771/9783845279893-711

2. Corrupting IT data.

3. And of course, respectively (with the value of the property below ¼ of the minimum remuneration) – a single-deed concurrence of crimes under

Article 190a of the Penal Code with the petty offence under Article 124 of the Code of Infractions.

4. Mozgawa M. Przestępstwa przeciwko wolności, in: System prawa karnego, vol. 10, Przestępstwa przeciwko dobrom indywidualnym, ed. J. Warylewski, Warszawa, 2016. P. 476.

5. Lach A. Kradzież tożsamości. Prokuratura i Prawo. 2012. No. 3. P. 38.

6. Art. 148 § 1. Whoever kills a human being shall be subject to the punishment of deprivation of liberty for a minimum term of 8 years, the punishment of deprivation of liberty for 25 years or the punishment of deprivation of liberty for life. § 2. Whoever kills a human being: 1) with particular cruelty, 2) in connection with hostage taking, rape or robbery, 3) for motives deserving particular reprobation, 4) with the use of explosives, shall be subject to the punishment of the deprivation of liberty for a minimum term of 12 years, the punishment of deprivation of liberty for 25 years or the punishment of deprivation of liberty for life. https://doi.org/10.1163/2210-7975_hrd-9945-003

7. Journal of Laws 2018.1000. Article 107: 1. A person, who processes personal data where such processing is forbidden or where he/she is not authorised to carry out such processing, shall be liable to a fine, restriction of liberty or deprivation of liberty for up to two years. 2. Where the offence mentioned in point 1 of this article relates to information on racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, genetic code, biometric data processed in order to unequivocally identify an individual, data on health condition, sexuality or sexual orientation, the person who processes the data shall be liable to a fine, restriction of liberty or deprivation of liberty for up to three years. https://doi.org/10.1093/he/9780198785163.003.0008

8. Budyn-Kulik M. Komentarz, teza 101 and 102. Lex el. 2016 (accessed: 7 September 2018).

9. Journal of Laws of 2018.1191 Article 115 paragraph 1: «Whoever usurps the authorship or misleads others as to the authorship of a whole or a part of another person's work or another person's artistic performance shall be liable to a fine, restriction of liberty or imprisonment for up to 3 years».

10. Article 37a: If the statute provides for a sentence of deprivation of liberty not exceeding 8 years, then a fine or restriction of liberty referred to in Article 34 § 1a paragraph 1 or 4 may be imposed instead.

11. Article 37b: In a case regarding a misdemeanour punishable by imprisonment, irrespective of the minimum of the statutory punishment limits provided for in the statute for the act in question, the court may impose at the same time a custodial sentence not exceeding three months, and if the maximum limit of punishment is at least 10 years - 6 months, and the restriction of liberty up to 2 years. Provisions of Articles 69-75 shall not apply. Then, the sentence of imprisonment is executed first, unless the statute provides for otherwise.

12. The condition in the form of sentencing the offender for at least 3 years of imprisonment leads to the conclusion that in practice, deprivation of public rights could be applied to the offence under Article 190a § 3 of the Penal Code.

13. https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (accessed: 7 September 2018).

14. The possibility of conditional suspension of the restriction of liberty (as well as fine imposed as the main punishment) was present in the Polish criminal law system between 1 September 1998 and 1 July 2015. In the original wording of the Penal Code, it was possible to conditionally suspend the execution of a sentence of imprisonment not exceeding 2 years, the punishment of restriction of liberty or the fine imposed as the main punishment (Article 69, paragraph 1). The Act of 20 February 2015 amending the Act - the Penal Code and certain other Acts (Journal of Laws of 2015.396), which entered into force on 1 July 2015, amended the provision by excluding the possibility of conditional suspension of the restriction of liberty and fine, while it kept the possibility of a conditional suspension of the execution of deprivation of liberty, provided that it does not exceed one year (and not 2 years as it had been previously). https://doi.org/10.21795/kcla.2015.27. 4.3

15. Article 60 § 6. The extraordinary mitigation of a punishment means the imposition of a punishment below the minimum statutory level, or the imposition of a punishment of lesser severity, in ac-

cordance with the following principles: - item 3) if the act in question constitutes a misdemeanour, and the minimum statutory level of punishment is less than one year's deprivation of liberty, the court shall impose either a fine or restriction of liberty.

16. Marczewski M. Przestępstwo uporczywego nękania (stalkingu) w świetle danych statystycznych, in: Stalking, ed. M. Mozgawa, Warszawa, 2018. P. 317.

17. Marczewski M. Przestępstwo. P. 315.

18. In 2012 - 105, while in 2013 - 100.

19. Marczewski M. Przestępstwo. P. 315.

20. Marczewski M. Przestępstwo. P. 316.

М. Мозгава, К. Назар

ВІДПОВІДАЛЬНІСТЬ ЗА КРАДІЖКУ ПЕРСОНАЛЬНИХ ДАНИХ В ПОЛЬСЬКОМУ КРИМІНАЛЬНОМУ ПРАВІ (СТ. 190А § 2 КРИМІНАЛЬНОГО КОДЕКСУ РЕСПУБЛІКИ ПОЛЬЩА)

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Мета: *основна мета статті – проаналізувати проблему узгодження положень ст. 190а § 2 з іншими статтями Кримінального кодексу, а також представити питання про накладення покарання за це правопорушення та статистичну картину феномена крадіжки особистих даних.* ***Методи:*** *для досягнення цих цілей використовувався догматичний метод, а також аналіз статистичних даних.* ***Результати:*** *злочин, відповідальність за який передбачена у ст. 190а § 2, узгоджується з положеннями, що описують правопорушення проти захисту інформації (ст. 265-268а, 269а Кримінального кодексу), проти достовірності документів (п. 270, ст. 272, ст. 275 Кримінального кодексу), а також положеннями, що описують правопорушення проти власності (наприклад: ст. 284 § 1, 285, 287, 288 § 1 або 2 Кримінального кодексу). Аналіз даних, що стосуються остаточних засуджень за злочин крадіжки особистих даних, показує, що найчастіше застосовується покарання у виді позбавлення волі, при цьому майже завжди застосовується умовне його виконання.* ***Обговорення:*** *кількість виявлених злочинів такого виду крадіжок динамічно зростає, але, на жаль, такої динаміки немає щодо виявлення та розкриття цього злочину. Тому виникає питання про причини латентності даного виду кримінального правопорушення.*

Слід дійти висновку, що одним із видів шахрайства можна вважати злочин, який виражається у крадіжці персональних даних. Це особливий різновид шахрайства, який полягає у використанні іміджу іншої особи або особистих даних із тим, щоб заподіяти шкоду або травму жертві. Цей склад правопорушення сформульований як формальний і вважається закінченим з моменту вчинення діяння. Щодо суб'єктивної сторони, то ми вважаємо, що він здійснюється лише з прямим умислом.

Криміналізація цього діяння в польському кримінальному законодавстві оцінюється позитивно, хоча виникають певні сумніви щодо визначення місця цього складу злочину в системі польського кримінального права.

Ключові слова: *уособлення; крадіжка особистих даних; особисті дані; пошкодження; узгодження положень.*