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## THE USURY CRIME UNDER ART. 304 OF THE PENAL CODE IN THE CONTEXT OF BREACHES OF SAFE TRADE RULES OF ECONOMIC TURNOVER

This paper presents the issues that determine the security of business transactions, whose proper functioning is endangered by so-called usurers. It discusses crimes under Art. 304 § 1–3 of the Penal Code. The offense of usury, regulated in Art. 304 § 1 of the P.C., provides for the criminal liability of persons who, by taking advantage of the compulsory position of another natural person, legal entity, or organizational unit without legal personality, conclude a contract with it, imposing an obligation on it to perform disproportionate to the consideration. Article 304 § 2 and 3 of the P.C. regulate new types of usury, introduced into the legal system by the amendment of May 14, 2020, which penalizes behavior directed against consumers, consisting in demanding excessive interest or non-interest costs for providing a benefit with the obligation to return.

**Keywords:** usury, economic turnover, security, penal code.

### 1. INTRODUCTION

The concept of usury is commonly understood as concluding an unfavorable contract for one of the parties, in a situation where the other party, using the compulsory position of the former, obtains excessive and unjustified profit. On the other hand, in colloquial language, it primarily means “borrowing money at a very high percentage and achieving great benefits from it” (Sobol, 1985). Usury is directly regulated by both civil and criminal law. The civil law aspect is provided for in Art. 388 of the Civil Code (The Civil Code Act, 1964), while the offense of usury, also referred to in the literature on the subject as the exploitation of a contractor, is regulated in Art. 304 of the Penal Code (Penal Code Act, 1997b).

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The purpose of the paper is to present and analyze the current legal state of affairs in combating the threats posed to the security of economic turnover by the behavior of its participants, which exhausts the elements of the crime of Article 304 of the Penal Code.

The offense of usury was already regulated by the Penal Code of 1932 (The Penal Code Regulation, 1932). Pursuant to Art. 268, the behavior of the perpetrator who, exploiting the coercive position of another person, concluded a contract with them, imposing on them an obligation to provide material benefits, obviously disproportionate to the consideration, was subject to penalisation. The perpetrator was subject to imprisonment of up to 5 years or arrest. A very similar regulation was also contained in the Penal Code of 1969 (The Penal Code Act, 1969) in Art. 207, under which the criminal liability was borne by a person who, taking advantage of the compulsory position of another person, concluded with them an agreement imposing an obligation on them to provide obviously disproportionate to the consideration. The perpetrator was punishable by imprisonment from 6 months to 5 years 5. Both of the above-mentioned legal acts placed the offense of usury in the chapter regulating crimes against property, and the difference between these regulations was practically only in the type of service constituting the subject of the perpetrator's executive act. The Penal Code of 1932 limited the commission of this offense to a situation where the contract concerned pecuniary benefits, in a situation where such a limitation was no longer provided for by the provisions of the 1969 Penal Code.

In the original wording of the currently binding Penal Code of 1997 (The Penal Code Act, 1997a), the crime of usury was regulated in Art. 304. This regulation, in relation to the provisions of the above-mentioned codes, on the one hand, extended the penalisation due to the fact that the benefit of the injured party no longer had to be "obviously" disproportionate, on the other one it lightened the criminal sanction for committing this offense, providing for imprisonment up to years 3.

Article 304 of the Penal Code was amended by the Act of May 14, 2020 amending certain acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus (The Act on the amendment..., 2020), which left the previous wording of the article unchanged, marking it as § 1 and introduced two additional types of usury, marking them as § 2 and § 3, which, as the legislator himself provides in the justification of the bill, apply to acts against natural persons outside the scope of their economic activity, i.e. in the area of their private life ([www.sejm.gov.pl](http://www.sejm.gov.pl), 01.09.2022.). This change is aimed at protecting the weaker side of economic transactions, which is the consumer, due to the lower level of awareness of threats among this group of participants in legal transactions. The existing provision of this article, left in § 1 Art. 304 of the Penal Code, relying on the autonomy of the will of the parties on the competitive market, without differentiating the legal situation of the injured party, regardless of whether he is an entrepreneur or a consumer, did not provide such protection. Therefore, in the opinion of the legislator, while "in relation to an entrepreneur, it is justified to make criminalization dependent on subjective elements related to the assessment of its current position, in the case of consumers, the features of the act should be determined while maintaining the objective factor" ([www.sejm.gov.pl](http://www.sejm.gov.pl), 01.09.2022.).

## 2. THE STRUCTURE OF THE USURY CRIME FROM ART. 304 P.C.

### 2.1. The subject of protection

The subject of protection under Art. 304 of the Penal Code § 1–3 of the P.C. is to secure the rules of fair and safe business transactions. According to R. Zawłocki, the subject of protection is “undisturbed economic turnover free from exploitation, maintaining honesty and a relative balance of mutual benefits by the parties” (Zawłocki, 2017). Art. 304 § 1 of the P.C. primarily protects the individual property interests of professional and non-professional trading participants, in particular those who are in a forced position. On the other hand, Art. 304 § 2 and 3 of the P.C. they only protect the property interests of consumers. In the light of the current regulations, this protection *de facto* applies to persons concluding a consumer loan agreement with the entrepreneur.

### 2.2. The subject of the crime

The subject of the crime under Art. 304 § 1 of the P.C. can be any natural person capable of being criminally responsible (a common crime) (Majewski, 2022). As for the crimes specified in Art. 304 § 2 and 3 of the P.C. in terms of defining the subject of these crimes, opinions are divided in the literature on the subject. The prevailing view is that they are also common crimes. This position is supported by the structure of these provisions, which indicates that the perpetrator who demands from a natural person the payment of exorbitant amounts in exchange for the provided cash benefit is subject to criminal liability. Due to the fact that such receivables may be sold, there is no limitation that only an entrepreneur may be the claimant, and thus a natural person who does not conduct business activity may also be the claimant. Therefore, these circumstances indicate that also crimes under Art. 304 § 2 and 3 of the P.C. are common crimes.

### 2.3. The subject side

It is undisputed that the subject of the crime under Art. 304 § 1 of the P.C. is deliberate. The perpetrator should be aware of the disproportionate benefit imposed on the other party of the legal relationship with the mutual benefit offered (Buczowski, 1999). On the other hand, the doctrine has different opinions as to whether only a direct intention is possible, i.e. the perpetrator must not only be aware of, but also want to take advantage of the forced situation of the victim, or whether it is possible to commit this crime also with a possible intention. Some representatives of the criminal law science take the position that due to the trait of “exploitation”, the possibility of committing this crime with possible intention is excluded, while others assume that the perpetrator may also anticipate the possibility of the victim being in a forced position and he agrees to it, which, in their opinion, also makes it possible to assume the form of a possible intention.

It seems, as J. Majewski rightly emphasizes, that accepting the possibility of committing a crime under Art. 304 § 1 of the P.C. with the possible intention, in the context of the application of interpretation rules based on the linguistic directives of the verb of a crime, by interpreting the word “exploit”, it would lead to an interpretation prohibited by criminal law, extending the features of a crime (Majewski, 2022).

In turn, the crimes under Art. 304 § 2 and 3 of the P.C. they belong to the category of intentional crimes which can undoubtedly only be committed with a direct intention. Any intention in this case is excluded due to the necessary purposefulness in the perpetrator's action.

#### 2.4. The subject matter side

The subject matter of the offense under Art. 304 § 1 of the P.C. consists in taking advantage of the compulsory position of the entity indicated in the provision by concluding an agreement with it, imposing on it an obligation to perform disproportionate to the consideration.

The enforcement activities of the perpetrator of the usury offense consist in concluding the so-called a usury contract, i.e. one that imposes on the other party to the contract the obligation to perform disproportionate to the consideration, and it is necessary that the perpetrator, by concluding such a contract, exploits the forced position of the victim (Kozłowska-Kalisz, Szczekala, 2014).

The forced position of the victim means a factual situation in which the conclusion of an unfavorable contract is, in principle, the only way for them to avoid the danger that threatens them, their relatives or, for example, their business activity. For compulsory position within the meaning of Art. 304 § 1 of the P.C. a situation in which the aggrieved party is forced to conclude an agreement unfavorable for itself is assumed. It carries out such a transaction in order to avoid the threat of severe harm or other physical or moral unpleasantness (Wyrok, 2018). The essence of the compulsory position is the necessity to obtain a benefit, which is to improve or prevent the threat of damage (Wyrok, 2016). The prevailing view in the doctrine is that the compulsory position of a party to a usury agreement is an objective category (Majewski, 2022; Michalska-Warias, 2016). On the other hand, the reasons for its occurrence are irrelevant for the fulfillment of the criteria of a prohibited act under Art. 304 § 1 of the CC This does not exclude a situation where the aggrieved party finds himself in a forced situation through his own fault (Oczkowski, 2020).

Exploitation, i.e. the use of compulsory positioning, means that the perpetrator is fully aware of the victim's situation and uses it, leading the subject in a compulsory position to conclude an unfavorable contract for them. If there is no such awareness on the part of the perpetrator, the criteria of a prohibited act under Art. 304 § 1 of the P.C. (Kulik, 2022; Michalska-Warias, 2016).

A disproportionate benefit is one that is significantly disproportionate to the benefit offered in return by the perpetrator. At the same time, the legislator does not require that it should be obvious disproportionate (Majewski, 2022). This means that, in principle, disproportionate will be any benefit where the difference between its value and the value of the consideration exceeds the disproportion between mutual benefits permitted and justified in a given market situation. Nevertheless, it should exhibit features that are so unfavorable to the aggrieved party that it can be concluded that it will directly threaten him with a great ailment, and it will not be any situation that worsens the condition of the aggrieved party (Wyrok, 2014).

This makes it necessary to compare the benefits specified in the contract on both sides of the agreement. Not every disproportion between the performances of the parties to the contract will result in considering the service disproportionate. Although the legislator in the regulation of 1997 abandoned the term "obvious disproportionate", which appeared in earlier codes, it should nevertheless be significant. Undoubtedly, a certain determinant of the limits of the permitted disproportion between the parties' services are the civil law provisions, which often indicate the framework in which the parties to the contract can operate in the regulation of mutual benefits (Zalewski, 2015).

For the legal existence of this crime, it is necessary to conclude a contract, therefore the perpetrator and the aggrieved party must submit unanimous declarations of will, leading to the creation of a legal relationship. The contract must provide mutual services by both parties. Any type of benefit may be the subject of the contract. They can be cash and non-cash benefits, but also property and non-property benefits. It is also not required that the benefits included in a given contract are of the same type (Górniok, 2000). In addition, the very conclusion of an unfavorable contract is important, but it will not matter whether it was performed or not (Bafia, Mioduski, Siewierski, 1987; Bojarski, 2006), as well as whether there was a real violation of the property interests of the aggrieved party (Byczyk, 2016).

The subject matter of the offense under Art. 302 § 2 of the P.C. consists in the perpetrator demanding from a natural person not conducting business activity (consumer) non-interest costs, the amount of which is at least twice the maximum statutory costs, in exchange for a cash benefit granted to him with the obligation to reimburse.

Non-interest costs referred to in article 1. 304 § 2 of the P.C. as “costs other than interest” means any costs, other than interest, that may be related to the provision of a cash benefit with the obligation of reimbursement, which include, in particular, fees, commissions, margins, etc. Important in determining the fulfillment of this offense is the fact that these must be the types of costs for which the legislator has provided for a formula allowing the determination of their maximum amount in a legal act of the statutory order or has made it unequivocally by indicating the maximum amount. In the current legal system, such a situation takes place only in the case of granting a consumer loan on the terms specified in the Act of 12 May 2011 on consumer credit (The Act on credit..., 2011).

The subject matter of the offense under Art. 304 § 3 of the P.C. consists in the perpetrator demanding from a natural person not conducting business activity (consumer) interest, whose amount is at least twice the maximum statutory interest or the maximum statutory interest for delay, in connection with the granting of a cash benefit with the obligation to return it.

The maximum interest is specified in Art. 359 § 21 of the Civil Code<sup>1</sup>, according to which this is interest, the annual rate of which is twice the amount of statutory interest. In turn, Art. 359 § 2 of the Civil Code points out that statutory interest amounts to twice the sum of the reference rate of the National Bank of Poland and 3.5 percentage points.

The maximum interest for the delay is set out in Art. 481 § 21 of the Civil Code, under which this is interest, the annual rate of which is twice the amount of statutory interest for delay, and these in turn are specified in Art. 481 § 2 of the Civil Code, according to which they are twice the NBP reference rate and 5.5 percentage points.

For the legal existence of crimes under Art. 304 § 2 and 3 of the P.C. it is necessary to jointly occur two events: prior establishment of an appropriate legal relationship with the consumer, the subject of which is the provision of a cash benefit with the obligation to return, and then the demand for payment of non-interest costs or interest in an unlawful amount. The very conclusion of the contract, which results in the consumer's obligation to pay the above-mentioned benefits indicated in art. 304 § 2 and 3 of the P.C. amount does not constitute a crime, although it is necessary as a prior act. However, it will be realized only when the demand for payment is formulated against the consumer.

### 2.5. Penal threat and prosecution

The misdemeanor under Art. 304 § 1 of the P.C is punishable by imprisonment from one month to three years, which allows the legislator to assume that it is a crime of average social harmfulness and does not pose a significant threat to society (Jarska, 2001). Misdemeanors under Art. 304 § 2 and 3 of the P.C. are subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. 304 § 1–3 of the P.C. are prosecuted in a public prosecution procedure, *ex officio*.

### 3. SECURITY OF ECONOMIC TRADE AND THE OFFENSE UNDER ART. 304 P.C.

There is no legal definition of the term “economic turnover” in Polish law, nor is there any distinction between economic turnover and trade. Economic turnover is most often defined as the exchange of goods and services between market participants and the legal effects of this exchange. The security of economic transactions consists, among others, in ensuring equal opportunities and operating conditions. It is a desirable state in which conditions cannot be changed, when time cannot adapt to them, and economic entities cannot be treated unequally.

The principle of certainty and security of trading is considered to be one of the fundamental principles of private law. The principle of safe trade plays a particularly important role in professional trade, due to the strengthening of consumer protection at the expense of certainty of trade in the sphere of consumer relations. It is derived from a number of institutions of the legal system. Examples of the implementation of this principle are: land and mortgage registers, public registers, the requirement of a specific form of legal transaction, liability for *culpa in contrahendo*, the concept of contractual penalty. This principle is strengthened by the interference of criminal law, including the regulations contained in Art. 304 of the Penal Code. Behind the criminalization of crimes against economic turnover is the broadly understood social interest, understood both as the interest of the state budget and the private sector. Hence, an unambiguous and decisive reaction of the legislator aimed at the protection of properly functioning economic transactions.

Table 1. Own study based on police statistical data

Art. 304 P.C. – statistics										
Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>Number of initiated proceedings</b>	21	29	43	46	30	32	49	41	44	38
<b>Number of identified crimes</b>	13	15	21	170	158	40	3	39	77	25

Source: ([www.policja.gov.pl](http://www.policja.gov.pl), 20.09.2022).

The statistical data provided on the official website of the Police do not fully present the legal situation related to the crime related to the commission of the crime of usury on a national scale under Art. 304 of the Penal Code. First of all, it should be noted that they

do not provide data after the amendment introduced by the Act of May 14, 2020 on the amendment of certain acts in the field of protective measures in connection with the spread of SARS-CoV-2 virus, as they end in 2020, while pointing to the original wording of Art. 304 of the Penal Code. Therefore, it is not possible to assess how the change in the provision influenced the number of committed offenses of usury, in all its varieties. As for the evaluation of data collected in previous years, i.e. from 2011 to 2020, it can be assumed that this is not a crime characterized by a large number of conducted and completed criminal proceedings.

#### 4. CONCLUSIONS

Extending the field of criminalization of usury in Art. 304 § 1 of the P.C. by the possibility of recognizing a benefit as a disproportionate one, did not increase the number of reports by the aggrieved party and did not contribute to the enhancement of criminal law protection. This may give rise to the assumption that the reason for the unchanged number of proceedings lies in the too generally defined features of the prohibited act. This applies in particular to the feature of disproportionate consideration, which is one of the assessment criteria considered in judicial decisions on the basis of specific factual states, which necessitates linking it with the type of turnover, the type of basic benefit and the related mutual benefit (Pastora, 2019). The lack of gradation of disproportionate by the legislator means that it is not possible to limit this characteristic by adopting gross disproportion or obvious disproportion. A similar situation occurs when the victim must be in a forced position and the perpetrator exploits this position, which results in limiting the application of this provision to the minimum necessary in terms of criminal law protection. The problem is primarily the fact that, although forced positioning is an objectified category of economic nature, it is not universal in nature and, moreover, does not take into account the subjective side, namely the mental state of the aggrieved party. Therefore, it seems that it would be advisable to extend the features of the forbidden act of usury to the intellectual capacity of the aggrieved party, apart from the compulsory position treated objectively.

On the other hand, the amendment of May 14, 2020, introducing two new types of usury crime, whose task was to protect consumers, i.e. natural persons who do not conduct business activity, who have concluded contracts with entrepreneurs, against the so-called users. While the very genesis of introducing this type of additional liability has been recognized by the legal doctrine, the solutions contained therein, and in particular the manner of introducing the new provisions of the Penal Code into legal circulation, raises doubts, primarily related to intertemporal issues. The provisions of Art. 304 § 2 and 3 of the P.C. have been introduced, which has already been provided for in the regulations included in the so-called anti-crisis shield (so-called shield 3.0.), related to protective measures in connection with the COVID-19 pandemic, and it seems that the criminal anti-usury provisions have a broader scope of action and the justification for their introduction is not directly related to the pandemic, which is indicated in particular by the fact that they are not of a temporary nature limited to the period of combating the negative effects of this pandemic, but have been introduced into the legal system on a permanent basis (Giezek, Lipiński, 2020). Doubts regarding the application of criminal liability under Art. 304 § 2 and 3 of the P.C. However, it raises the question of whether these provisions apply to cases in which the unlawful demand for payment of interest or non-interest costs took place after

the entry into force of the above-mentioned of the amendment, but in relation to receivables resulting from contracts concluded before its entry into force. The prevailing position is that the indicated proceedings are subject to the criminal law regime under these provisions, but there are also opposite opinions (Giezek et al., 2020).

However, the following are not criminalized, in particular: 1) behaviors that will be related to the use of the special condition of the person receiving the benefit, 2) all factual states in which, through concealment, there will be an erroneous perception of the amount of consideration, 3) actions that will lead to mutual benefit many times in excess of the original benefit and behavior that will lead to a significant deterioration in the economic situation of the party, if the original beneficiary was not in a compulsory position, 4) intermediation.

In conclusion, in this connection, it would be worth considering the introduction of the following crimes: 1) professional usury activities, (in connection with the state of knowledge, the possibility of assessing the situation by the primary beneficiary, at the time the service is provided by the service provider), 2) an intermediary. What follows is the conclusion that, despite the expansion in 2020 of the criminalization of behavior that constitutes the crime of usury under Article 304 of the Penal Code, the criminal law still does not guarantee full protection of economic turnover from the dangers arising from the reprehensible behavior of its participants engaged in usury activities.

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